Compensation and Proxy Litigation and the Latest Delaware Cases

ALI-CLE Executive Compensation: Strategy, Design and Implementation
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Delaware Compensation Cases
Origin and Trends

- Why a role for a state court?
- Historical Underpinnings
  - Options backdating cases
- Two current theories
  - “Self dealing” by Directors and Ineffective Stockholder Approval
  - Failure to Comply with Plan
- Additional Emerging Trends
  - Scrutiny of Board’s Decision–making Process
  - Failure to Comply with Delaware Approval Requirements
Director Compensation
Seinfeld v. Slager

- Decision issued June 29, 2012 on defendants’ motion to dismiss the complaint for failure to state a claim
- Plaintiff sued Republic Services, Inc. over compensation paid to directors in 2009 and 2010 under a stockholder approved stock incentive plan
- 2009 restricted stock awards valued at $743,000 - 2010 restricted stock awards valued at $320,000
- Plaintiff alleged total director compensation far exceeded the compensation of Republic’s peers
- Plaintiff argued awards should be reviewed under the entire fairness standard
Director Compensation
Seinfeld v. Slager

- Defendants countered that awards under the plan should be reviewed under the business judgment rule because the stockholders had approved the plan.
- Defendant’s position was based on *In re 3 Com Corp. Shareholders Litigation*, C.A. No. 16721 (Del. Ch. Oct. 25, 1999) (decided by then Vice Chancellor, later Chief Justice, Steele)
- Central to the Court’s decision on the motion to dismiss was the Court’s calculation of the value of the annual awards that the directors could make to themselves within the limits of the plan – 875,000/director with a value of $21M and total value for all directors of $260M.
The Court cited to the very case the defendants relied on (3 Com) and noted that an important element of the decision was that the 3 Com plan had “sufficiently defined terms” that it could give business judgment rule treatment as a result of stockholder approval.

In contrast, the Seinfeld Court found that the plan before it “lack[ed] sufficient definition” to warrant BJR review.

The Court went on to state: “sufficiency of definition that anoints a stockholder-approved option or bonus plan with business judgment rule protection exists on a continuum” and then noted:

- The more definitive a plan, the more likely that a board’s compensation decision will be labeled disinterested and qualify for protection under the business judgment rule. If a board is free to use its absolute discretion under even a stockholder-approved plan, with little guidance as to the total pay that can be awarded, a board will ultimately have to show that the transaction is entirely fair.
Director Compensation
Seinfeld v. Slager

- The Court concluded:
  - In reading the Complaint and the [Plan], I find no effective limits on the total amount of pay that can be awarded through time-vesting restricted stock units. The plan before me confers on the Defendant Directors the theoretical ability to award themselves as much as tens of millions of dollars per year, with few limitations; therefore, I find that the Defendant Directors are interested in the decision to award themselves a substantial bonus. While the Defendant Directors may be able to show that the amounts they awarded themselves are entirely fair, their motion to dismiss must be denied with respect to this claim.

- Case ultimately settled.
Director Compensation
Calma v. Templeton (the “Citrix” Case)

- Decision issued by Delaware Chancellor Bouchard on April 30, 2015 on defendants’ motion to dismiss the complaint for failure to state a claim
- Plaintiff sued Citrix over compensation paid to directors in 2011 - 2013 under a stockholder approved stock incentive plan
- 2010: 3,333 RSUs valued at $143,852, 10,000 stock options valued at $101,116 with total director comp between $288,718 and $312,040
- 2011: 4,000 RSUs valued at $339,320 with no stock options - total director comp between $386,716 and $425,570
- Compensation increased by over $100,000 on average for each non-employee director
- Stock price dropped shortly after 2011 RSUs were granted
Director Compensation
Calma v. Templeton

- Plaintiff alleged that the RSUs, when added to the directors’ cash compensation, far exceeded the compensation of Citrix’s peers
- Similar to *Seinfeld v. Slager*, plaintiff argued that the directors’ compensation should be reviewed under the entire fairness standard – no “meaningful limits” plan limits
- Defendants countered that awards under the plan were reviewable under a corporate waste standard because stockholders had approved the plan. Defendants were essentially arguing that *Seinfeld* should be overruled.
  - *Seinfeld v Slager* was “incompatible with the deference owed under settled Delaware law to the fully-informed collective decision of disinterested shareholders to grant directors discretion within broad parameters to exercise business judgment”
Director Compensation
Calma v. Templeton

- The Court reviewed sixty years of decisions by the DE Supreme Court and Chancery Court
- *Sample v. Morgan*
  - The Delaware doctrine of ratification does not embrace a “blank check” theory. . . *[T]he mere approval by stockholder of a request by directors for the authority to take action with broad parameters does not insulate all future action by the directors within those parameters from attack.” (emphasis in original text)
- Court held that stockholder ratification is generally available as a defense to avoid the entire fairness standard when:
  - the plan sets forth the specific compensation to be received by directors or
  - the plan sets forth meaningful “director-specific ceilings” or
  - the specific awards in question have been approved by stockholders
Director Compensation

Calma v. Templeton

- The Court emphasized that the plan only imposed a general limit that no person could receive more than 1 million RSUs per calendar year – this number of RSUs was worth $55 million at time of filing.

- The Court found that a stockholder ratification defense was not available:
  - “the Citrix stockholders were never asked to approve – and thus did not approve – any action bearing specifically on the magnitude for compensation for the Company’s non-employee directors... the Plan does not set forth any director-specific “ceilings” on the compensation that could be granted to the Company’s directors” (emphasis in original)

- The Court found no “meaningful differences” between the allegations in Calma and those in Seinfeld, and that these decisions are consistent with longstanding Delaware precedent.

- Breach of fiduciary duty and unjust enrichment claims allowed to proceed against defendant directors who received RSUs; corporate waste claim was dismissed.

- Settlement has been reached, Court approval pending. Terms include several “corporate governance” changes and the fee award of $450,000.
Director Compensation – Implications of Seinfeld and Calma Decisions

- Consider having separate equity award limits for director compensation to avoid the entire fairness standard of review
- Consider alternatives for designing director compensation limits
  - Separate sublimits for both director stock options/SARs and full value share awards?
  - Share limit vs. dollar limit?
- Obtain independent advice when developing peer group for director equity compensation, evaluating peer group practices and establishing limits
- When possible, avoid having directors approve their own individual director compensation (e.g., compensation or a special committee)
  - “Daisy chain” approval won’t fly
  - *Dolan* case shows that independent director approval can be a powerful tool
- Advantages of not using a new stand alone director stock plan
  - one vs. two plans to document and administer
  - shares under executive stock plan unavailable to make grants under director stock plan
  - multiple S-8 filings / prospectuses
Additional Trends and Observations

- Complaints Continue to be Filed
  - Chipotle
  - Investors Bancorp
- Plaintiffs are doing their homework
  - Peer comparison
  - Books and records demands under Delaware corporate law
Failure to Comply with Plan Terms

- In a July 17, 2014 opinion, Chancellor Bouchard noted that “claims challenging payment of compensation to an officer or director… based on an alleged violation of the terms of a compensation plan” are a “seemingly increasing area of litigation” in the Chancery Court. *Friedman v. Diller*, C.A. No. 9161-CB (Del. Ch. July 16, 2014)

- These cases have two inter-related elements –
  - Have the clear terms of the plan been violated?
  - Is a pre-suit demand excused?

- Generally, these cases are derivative cases, which require as a pre-condition to a plaintiff maintaining the suit either:
  - A recognized basis for excusing the pre-suit demand; or
  - Pre-suit demand is made and the board decides to have the suit maintained by plaintiff
Failure to Comply

- Pre-suit demand is excused if the plaintiff alleges particularized facts that create a “reasonable doubt” either that:
  - The directors are disinterested and independent; or
  - The challenged transaction was otherwise the product of a valid exercise of business judgment.

- Several cases have held that the second prong above will be met if the plaintiff allege facts that show that there was a “clear or intentional” violation of a compensation plan.

- If the plaintiff can establish a “clear or intentional” violation, the case can go forward.

- Importantly, an ambiguity concerning the plan will not be enough to excuse demand.
Failure to Comply

- Examples of cases in which clear plan violations were found include:
  - Issuing 9.5 million shares more than are authorized under the plan. (*Sanders v. Wang*, C.A. No. 16640 (Del. Ch. Nov. 8, 1999))
  - Repricing of stock options after a precipitous price decline required stockholder approval under the plan and could not be implemented unilaterally by the board (*CALPERS v. Coulter*, C.A. No. 19191 (Del. Ch. Dec. 18, 2002))
  - Grant of “spring-loaded” or “bullet-dodged” stock options based upon material non-public information (yet to be announced earnings announcement) violated the plan terms (*Weiss v. Swanson*, 948 A.2 433 (Del. Ch. 2008))
  - Award to single award recipient of stock options that exceeded annual plan limits. (*Pfeiffer v. Leedle*, C.A. No. 7831-VCP (Del. Ch. Nov. 8, 2013))
Failure to Comply

- Complaints continue to be filed as the plaintiff’s bar continue to focus on this area
- Plaintiffs are increasingly willing to bring these complaints on a “stand alone” basis rather than as part of a larger attack on the board
- The cases serve as reminder of the importance of good record keeping and documentation, the observance of corporate formalities (e.g., stock options vs. restricted stock) and plan terms permitting the board to interpret ambiguous provisions
Failure to Comply

- Possible emerging trend-direct suits by option holders for failure to comply?
CDX Holdings, Inc. v. Fox
Del. Supreme Court (June 6, 2016)

- Addresses adjustments made to stock options in a merger-spinoff
  - CDX spun off two of its lines of business (SpinCo) and then merged with its remaining line of business with a subsidiary of the buyer
- Buyer paid $4.46 for each share of CDX common stock
- SpinCo was valued at $65 million or $0.61 per share
- Each option was converted into a cash payment equal to $5.07 per share less the exercise price
  - $4.46 for CDX plus $0.61 for SpinCo
- 8% of the option proceeds were held back under an escrow agreement to satisfy indemnification claims
- Court was reviewing a Chancery Court decision issued after trial
Plan Provisions
Permitted Action for Merger

- “Change of Control – Asset Sale, Merger, Consolidation or Reverse Merger. In the event of a dissolution or liquidation of the Company, or any corporate separation or division, including, but not limited to . . . a reverse merger in which the Company is the surviving entity, but the shares of Common Stock outstanding immediately preceding the merger are converted by virtue of the merger into other property . . ., then, the Company, to the extent permitted by applicable law, but otherwise in the sole discretion of the Administrator may provide for . . . (iv) the cancellation of such outstanding Awards in consideration for a payment equal in value to the Fair Market Value of vested Awards, or in the case of an Option, the difference between the Fair Market Value and the exercise price for all shares of Common Stock subject to exercise (i.e., to the extent vested) under any outstanding Option.” (emphasis added)

- The Plan defined the “Administrator” as “the Board or the Committee appointed by the Board”

- The Plan defined “Fair Market Value” to mean “as of any date, the value of the Common Stock as determined in good faith by the Administrator . . .” (emphasis added)
Plan Provisions – Permitted Actions for Spinoff/Standard of Review

- “Capitalization Adjustments. If any change is made in the Common Stock subject to the Plan, or subject to any Award, without the receipt of consideration by the Company (through . . . stock dividend . . . or other transaction not involving the receipt of consideration by the Company), then . . . (v) the exercise price of any Option in effect prior to such change shall be proportionately adjusted by the Administrator to reflect any increase or decrease in the number of issued shares of Common Stock or change in the Fair Market Value of such Common Stock resulting from such transaction. . . . The Administrator shall make such adjustments, and its determination shall be final, binding and conclusive.”

- The plan required the Board account for the spinoff by adjusting the exercise price of the options to reflect the change in CSX’s stock value resulting from the spinoff.

- The plan also provided for “[a]ll decisions made by the Administrator pursuant to the provisions of the Plan shall be final and binding on the Company and the Participants, unless such decisions are determined to be arbitrary and capricious.” (emphasis added)
Option Holders’ Position

- Option holders claimed that actions by CDX management in allocating the merger consideration breached plan terms.
- The Board did not determine the option cash out amount.
  - The Board Chair, who owned 70.4% of the stock, and the CFO adjusted the option values.
- The value attributed to the spun off lines of business were made in bad faith and were arbitrary and capricious.
  - SpinCo’s value was manipulated so that there would be no corporate level tax to CDX due to the spinoff; buyer did not want to pay for business and then pay income tax for a deemed sale of Spinco to CDX’s shareholders.
- The options could not be subject to an escrow requirement.
  - No plan provision authorized the escrow holdback.
Key Holdings

- Board failed to determine FMV or adjust the options for the spinoff
  - The Board never acted
  - A Board resolution approving the merger-spinoff transaction is not the same as a Board determination under the plan
  - Board action “was not one or two directors acting informally. . . [n]or was it an officer getting approval from the controlling stockholder”

- CFO “actually made the value determination” and the Board Chair/majority stockholder “signed off”
  - Court noted that the Board could have delegated authority for Board Chair to determine adjustments, but didn’t do so

- “[D]irector primacy remains the centerpiece of Delaware law, even when a controlling stockholder is present.”
Key Holdings

- Plan provisions interpreted to result in a two-part test:
  - Did the Administrator subjectively believe in the FMV it selected?
  - Decision must result from “a process and fall within a range of outcomes that is not arbitrary and capricious”

- Lower court assumed that a good faith standard applied to acts by the Board Chair/majority stockholder and CFO

- Valuation determination was not made in good faith as evidenced by:
  - Prior CFO statements, expressions of interest by potential buyers, investment banker advice, prior 409A valuation, growth in revenue versus valuation increase (5,000% versus 17%), reinvestment of sales proceeds into SpinCo
  - Manipulation of valuation process to obtain tax result required by the buyer as a closing condition
Key Holdings

- Court cited to case law under federal Administrative Procedures Act as plan did not define “arbitrary and capricious”
- Standard requires a “satisfactory explanation for its action including a rational connection between the facts found and the choice made”
- Valuation determination was “arbitrary and capricious” as evidenced by:
  - CFO set out to achieve no taxable gain to CDX on spinoff
  - Using a transfer pricing valuation for IP assets - preparer had warned that IP valuation may not equal to FMV for business
  - Obtaining a 2\textsuperscript{nd} valuation that was not credible (“just copying [original] report and calling it their own”)
Key Holdings

- CDX breached the plan by retaining some of the consideration in escrow
  - The plan document did not include an escrow holdback provision (but could have been drafted to do)
- Merger agreement, to which the option holders were not a party, did not override the plan document
- Section 251(b)(5) of the DGCL permits conversion of shares into consideration subject to an indemnification provision
- DE Supreme Court finds options are not subject to Section 251(b)(5)
  - “Options are not shares, and option holders are not stockholders”
  - Options are contracts and “the rights and obligations of the parties to the option are governed by the terms of their contract.”
- $16.26 million in awarded damages based on $6.57 stock price
Additional Emerging Trends

- Scrutiny of Board’s Decision-Making
- Increasing use of “Section 220” demands – “tools at hand”
- Section 220 Delaware General Corporate Law (DGCL)
  - Allows stockholder inspection rights for a “proper purpose”
  - Requires showing of a “credible basis” to infer possible mismanagement that warrants further investigation
    - this standard is the “lowest possible burden of proof” – it does not require a demonstration of wrongdoing
  - Scope of inspection is limited – only documents that are “essential” to a proper purpose—not the same as discovery
- Possible uses of requested information include:
  - instituting a shareholder derivative action, preparing stockholder proposal for next annual meeting, mounting a proxy fight for director election
Amalgamated Bank v. Yahoo!.com  
(Del. Ch. Feb. 2, 2016) 
Background for Request

- Amalgamated sought to investigate the compensation paid to COO
- CEO recruited former colleague from a prior employer
- COO’s employment was terminated without cause after less than 15 months
- Reported value of payments to COO was just less than $60 million
- Formal board level materials were provided to Amalgamated regarding COO’s hiring, compensation and employment termination
- Litigation ensued after further request for additional documents under Section 220 was rejected
Key Holdings

- Desire to investigate wrongdoing or mismanagement is a “proper purpose”
- Disclosed documents were sufficient to demonstrate a “credible basis” to infer possible breach of fiduciary duty and waste
  - Court of Chancery did not find that the record, by itself, establishes wrongdoing, or that it supports a claim for wrongdoing
- Exculpation did not cut off the proper purpose
  - Possible uses of requested information broader than just obtaining damages in a shareholder derivative suit
  - Possibility that directors might not be exculpated – breach due to failure to act in good faith cannot be indemnified under Delaware law
Key Holdings

- Court orders a “tailored production” of a significant amount of the additional requested documents:
  - the files and documents from the CEO and 4 committee members who were involved the COO’s hiring and termination

- “Books and records” includes electronically stored information from the corporation and its directors and officers – it’s not just paper records
  - Includes e-mails, both at work and on a personal account

- Court did not order disclosure of all requested documents, including legal advice and certain documents prepared or received by officers and employees, pending a further showing of necessity
Hiring Process

- Opinion cites facts proven by a preponderance of the evidence at trial based on the “paper record”

- September 14th – Special Meeting of Compensation Committee
  - Candidate not identified by name or title
  - CEO disclosed expected compensation range - $40 to $56 million
  - Consultant reported range was “generally more” than supported by peer group data but he “could justify the compensation”
  - CEO authorized to negotiate subject to Committee review of contract

- September 23th - Compensation Committee Meeting
  - Term sheet provided to committee members – candidate still not identified
# Equity Compensation Package – Initial Offer

<table>
<thead>
<tr>
<th>Incentive RSUs</th>
<th>Performance Stock Options</th>
<th>Make Whole RSUs</th>
</tr>
</thead>
</table>
| • $20 million target value  
  • 25% vesting on 11/23/2013; 1/36 monthly vesting over next 3 years | • $20 million target value  
  • four equal tranches with vesting dates:  
    - 7/26/2013  
    - 1/26/2014  
    - 1/26/2015  
    - 1/26/2015  
    subject to meeting performance goals | • $16 million target value  
  • 1/48th monthly vesting over 4 years |
Severance Terms – Initial Offer

- Initial offer provided for partial accelerated vesting of equity awards
- 6 months additional vesting for Incentive RSUs and Options subject to cutback for early termination
  - 25% of vesting benefit if termination before 11/23/2013; 50% of vesting benefit if termination on or after 11/23/2013 but before 11/23/2014; 75% of vesting benefit if termination before 11/23/2015
- Accelerated vesting for Make Whole RSUs with no cutback feature
  - 50% vesting for termination before 11/23/2013; 75% vesting for termination after 11/23/2013 but before 11/23/2014; 100% vesting thereafter
- 1 times salary plus target bonus (90% of salary)
Opinion included the following chart to illustrate for each type of award how vesting provisions operated upon a termination without cause, and the total effective vesting percentage upon different termination dates.

<table>
<thead>
<tr>
<th>Table 1</th>
<th>Make-Whole RSUs</th>
<th>Incentive RSUs and Options</th>
</tr>
</thead>
<tbody>
<tr>
<td>Termination Date</td>
<td>% Of Remaining Awards to Accelerate</td>
<td>Effective % Of Total Received</td>
</tr>
<tr>
<td>November 24, 2012</td>
<td>50%</td>
<td>50%</td>
</tr>
<tr>
<td>November 24, 2013</td>
<td>75%</td>
<td>81.25%</td>
</tr>
<tr>
<td>November 24, 2014</td>
<td>100%</td>
<td>100%</td>
</tr>
<tr>
<td>November 24, 2015</td>
<td>100%</td>
<td>100%</td>
</tr>
</tbody>
</table>
Hiring Process

- September 24th - Compensation Committee and Board Meetings
  - Committee first learned identity of candidate and received offer letter
  - Committee approved offer letter and authorized continued negotiation by COO after 30 minutes
  - Any material changes to offer letter to be approved by the full compensation committee
  - No materials quantifying compensation components under different scenarios part of official board record prior to authorization
  - Board met to “review and discuss the appointment” – record indicates that Board only received term sheet
Hiring Process – Changes to Initial Offer

- October 13th - Compensation Committee
  - Reporting by CEO on negotiations– candidate not happy with initial offer
  - CEO suggests removing vesting cutback for Incentive RSUs and Options
  - Record indicates that CEO incorrectly described prior Committee action
    - approval of only 6 months additional vesting, not 12 months
  - No Committee materials “quantif[ied] the effect of the changes or how they altered the compensation payouts under different scenarios”
  - CEO: less concern in the termination without cause context “since that will be under her and the Board’s control”
Hiring Process – CEO Changes in Final Offer Letter

- CEO made the following changes as part of a final offer letter:
  - Increase post-termination vesting under Incentive RSUs and Options from 6 months to 12 months
  - Eliminate vesting cutback for Incentive RSUs and Options
  - Additional changes as part of the final offer letter that the court found were not discussed with the Committee based on the record:
    - 100% accelerated vesting for Make Whole RSUs on employment termination without cause at any time
    - Increase to target value of Make Whole RSUs by $4 million; $2 million decrease each to Incentive RSUs and Options
Total Equity Vesting Value
Expressed as a Percentage of Target Value

Opinion included the following chart to illustrate the total equity vesting (for actual service plus severance) of equity awards – as a percentage of grant date target value - under the initial offer and the final offer upon a termination of employment without cause.

<table>
<thead>
<tr>
<th>Table 2</th>
<th>Make-Whole RSUs</th>
<th>Incentive RSUs</th>
<th>Options</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Original</td>
<td>Final</td>
<td>Original</td>
</tr>
<tr>
<td>November 24, 2012</td>
<td>50%</td>
<td>100%</td>
<td>0%</td>
</tr>
<tr>
<td>November 24, 2013</td>
<td>81.25%</td>
<td>100%</td>
<td>31.25%</td>
</tr>
<tr>
<td>November 24, 2014</td>
<td>100%</td>
<td>100%</td>
<td>59.375%</td>
</tr>
<tr>
<td>November 24, 2015</td>
<td>100%</td>
<td>100%</td>
<td>87.5%</td>
</tr>
</tbody>
</table>
Total Equity Vesting Value
Expressed in Dollars Based on Target

Opinion included the following chart to illustrate the total equity vesting value (for actual service plus severance) – assuming awards remained at target value - under the initial offer and the final offer upon a termination of employment without cause.

<table>
<thead>
<tr>
<th>Table 3</th>
<th>Make-Whole RSUs</th>
<th>Incentive RSUs</th>
<th>Options</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Original ($16)</td>
<td>Final ($20)</td>
<td>Original ($20)</td>
<td>Final ($18)</td>
</tr>
<tr>
<td>November 24, 2012</td>
<td>$8</td>
<td>$20</td>
<td>$0</td>
<td>$4.5</td>
</tr>
<tr>
<td>November 24, 2013</td>
<td>$13</td>
<td>$20</td>
<td>$6.25</td>
<td>$9</td>
</tr>
<tr>
<td>November 24, 2014</td>
<td>$16</td>
<td>$20</td>
<td>$11.875</td>
<td>$18</td>
</tr>
<tr>
<td>November 24, 2015</td>
<td>$16</td>
<td>$20</td>
<td>$17.50</td>
<td>$18</td>
</tr>
</tbody>
</table>
Termination Process

- COO’s employment terminated without cause in January 2015, about 15 months after hiring
- Committee approves CEO’s recommendation to fire COO
  - Action taken by written consent
- No evidence of meeting or record of what was considered by Committee prior to firing
  - Possibility of “for cause” termination?
  - Payouts upon termination of employment without cause?
- Minutes first reflect discussion of basis for employment termination in late February 2015 as part of bonus determinations
Practice Pointers

- Develop formal board level documents demonstrating that the committee was adequately engaged and informed before making decisions
  - defining the board committee and committee chair roles in hiring process
  - obtaining financial analysis of overall compensation offer
  - identifying up front potential conflicts (e.g., should CEO have led the negotiation in light of prior relationship with candidate?)

- Include in the record estimates of severance payments, how different elements of compensation are interrelated and provide update for changes
  - Consider presenting information in tables or charts similar to those prepared by the Court of Chancery

- Address potential differences between cash vs. equity severance benefits
Practice Pointers

- Have documented, in person or telephonic meetings for important decisions
- Provide documents sufficiently in advance of meeting
  - 30 minutes not enough to understand complicated deal structure
- Document the level of director involvement, including key questions
  - "A board cannot mindlessly swallow information, particularly in the area of executive compensation”
  - “While there may be instances in which a board may act with deference to corporate officer’s judgments, executive compensation is not one of those instances”
- Have an outside professional (e.g., consultant or lawyer) in the meeting
  - when the offer is being described to the committee, when votes are taken
Practice Pointers

- Review committee briefing package to check that all material information has been provided to the committee.
- Require approval by at least one independent director of any changes to documentation presented to the compensation committee.
- Provide a report to the committee regarding the executive’s performance before making a termination position.
- Consider and memorialize possible grounds for “cause” termination prior to an involuntary terminations.
Additional Emerging Trends

- Failure to Comply with Delaware Approval Requirements
  - October 28, 2015 Facebook decision
    - Challenge to outside director compensation
    - Defense: Mark Zuckerberg (who did not participate in awards) approves of the compensation
    - No written consent signed; deposition, testimony and affidavit only
    - Court decides informal approval not good enough – “precision” and “transparency” are key concepts and informal approval falls short on both counts
    - Why not one person (MZ) board committee?
  - Case Settled