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COVID-19 AND COMPENSATION: CONSIDERATIONS FOR PUBLIC AND PRIVATE U.S. COMPANIES

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The COVID-19 pandemic has created significant disruption in the financial performance of businesses across the globe, creating real challenges for compensation programs maintained by both public and private U.S. companies. While the health and safety of company employees does and should remain the primary concern, boards of directors and compensation committees may also want to consider how the economic impact of COVID-19 may affect their short- and long-term incentive compensation programs and the potential effects of related performance declines on employee morale and commitment.

1. Establishing and Adjusting Performance Goals for Incentive Compensation Programs.

The destabilizing forces of the COVID-19 pandemic have significantly impacted business operations around the globe. As a result, company performance may lag for reasons unrelated to employee performance. In that context, boards of directors and compensation committees should evaluate the performance goals that have been (or are scheduled to be) established for their current cash and equity incentive compensation programs and determine whether it would be in the company's interest to adjust those performance goals . For public and private companies that have not yet established performance goals for 2020 performance periods, to the extent permitted under applicable plan documents it may be best to hold off on establishing performance goals until the impact of COVID-19 on business operations is more fully understood. Fortunately for U.S. public companies, the repeal of Section 162(m)'s performance-based compensation exception in 2017 created significant flexibility as to when during a performance period performance goals may be established. For public and private companies who have already established performance goals for the 2020 performance period, the terms of the applicable incentive compensation programs should be reviewed to determine the amount of discretion that the company has to adjust those goals during or at the end of the performance period to account for unexpected events, so that such programs continue to motivate and incentivize employees for the remainder of the performance period.

2. Public Company Stockholder Outreach.

> The COVID-19 pandemic has also resulted in significant disruption to global financial and equity markets, with all major U.S. stock indices reporting substantial year-to-date negative stockholder returns as of March 13, 2020. This negative downturn comes on the heels of a prosperous 2019 calendar year for many U.S. public companies, which likely resulted in significant short-term and long-term cash and equity compensation payouts to company executives. With the majority of U.S. public companies holding their annual meetings in the next few months, many public company stockholders will have the opportunity to cast an advisory vote on the executive compensation paid during 2019 (the "say-on-pay" vote), and those payouts may look disproportionate when viewed in the context of recent stock declines. It may be advisable for U.S. public companies to start reaching out to key stockholders now to educate them on the merits of the 2019 cash and equity compensation payouts in order to avoid negative feedback on their say-on-pay vote. As part of those conversations, U.S. public companies could also preview any adjustments that may need to be made to 2020 performance goals in light of COVID-19.

Incentive compensation-related action items stemming from the COVID-19 pandemic will vary significantly by company. However, boards of directors and compensation committees should keep incentive compensation in mind as they meet and take action over the coming months.

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