

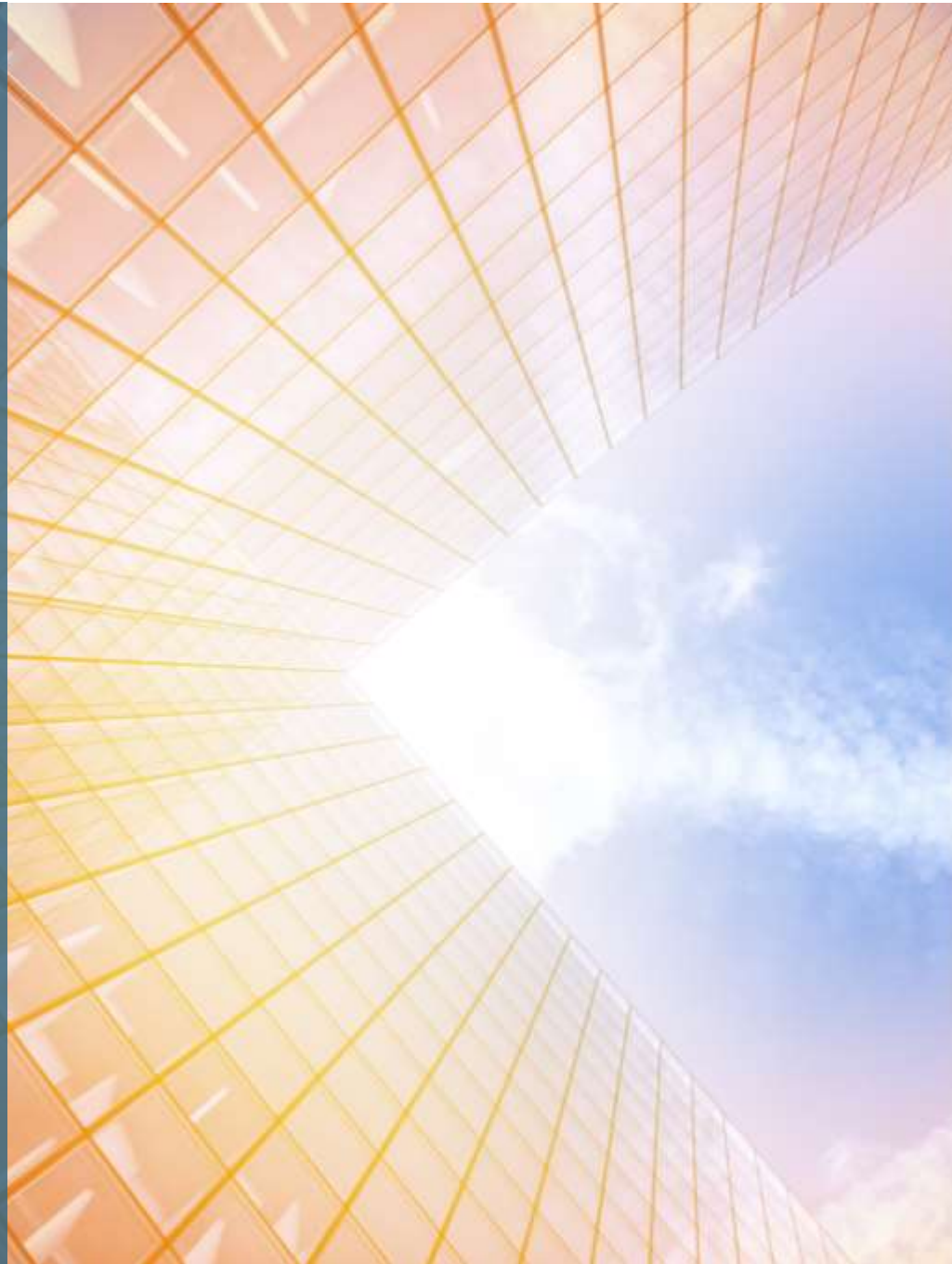


Vinson & Elkins

THE
COMPENSATION
UPDATE: MERGERS
AND ACQUISITIONS,
INCENTIVES,
EXECUTIVE
COMPENSATION
AND MORE

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MERGERS AND ACQUISITIONS

READINESS AND OVERSIGHT IN CHANGE IN CONTROL TRANSACTIONS

- **M&A has slowed in 2019, as compared to 2017 and 2018**
- **Increase in industry consolidation**
 - Be prepared for potential transactions – as a buyer or seller
- **Shareholder activism**
 - M&A is a core theme
- **Growing influence of proxy advisory firms**
 - Focus on change in control payment
- **Section 280G**
 - For private companies: exemptive shareholder vote
 - For public companies: advisory shareholder vote (“say on golden parachutes”)
 - Accounting implications

- **TSR remains the most prevalent metric**
 - But companies are supplementing TSR with other metrics (e.g., return on capital employed, debt reduction, cash flow, etc.)
- **Investors want returns-based**
 - Issue: three-year performance period often too short
- **ESG-related metrics**
 - Environmental, social and corporate governance
 - Exercise caution: potential public and investor relations issues if metric is not achieved
- **Modification of performance metrics**
 - Economic uncertainty has led to a desire to adjust performance metrics during the performance period
 - Accounting implications

COMPENSATION COMMITTEE

EXPANDING RESPONSIBILITIES

- **Repeal of Section 162(m)**
 - Companies have more flexibility to adjust performance-based compensation
 - The compensation committee has been charged with exercising this flexibility through the use of discretion
- **Discretion**
 - Multiple approaches – standalone metric or broad overall authority
- **Public disclosure**
 - Exercise good judgment and sell your decisions in the proxy statement or Form 10-K

DIRECTOR COMPENSATION

TRENDS AND CHALLENGES

- **New ISS Rule – Excessive Director Compensation**
 - Two-year lookback
 - Can result in a recommendation against certain directors if director compensation is excessive
- **Legal Cases**
 - No clear consensus on best practices
 - Safest approach remains meaningful limits and reasonable compensation with effective justification in public disclosures
- **Extra board meetings and fees**
 - Robust disclosure needed for extra meetings beyond the regular board meeting schedule

2019 PROXY SEASON LESSONS LEARNED

- **Increase in companies receiving less than 70% approval for “say on pay”**
 - Influence of proxy advisory firms and heightened shareholder involvement and education
- **CEO Pay Ratio**
 - Hasn't drawn as much investor attention or scrutiny as originally expected
 - But if the ratio grows too much, could see uptick in attention

CLAWBACKS AND RESTRICTIVE COVENANTS

- **Clawback policies**
 - Policies adopted today far surpass the guidelines issued under Dodd-Frank
 - Reputational and behavioral triggers
 - Don't expect SEC final rules or stock exchange standards in the near future
- **Enforcement of clawbacks**
 - Remains difficult if payment was already made
 - Pay in installments instead of lump sum to avoid issue
- **Restrictive Covenants**
 - Being negotiated before and after employment

QUESTIONS?