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Another Twist in the Challenges to Director Compensation

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In a series of cases challenging the magnitude of equity award compensation that boards have provided for their non-employee directors, the Delaware Chancery Court suggested that if the awards were made within a “meaningful limit” approved by shareholders the court would review these challenges under the standard business judgement rule rather than requiring an entire fairness review.

Many companies took heed, seeking shareholder approval for amendments adding a director award limit to their stock incentive plans. However, the Delaware Supreme Court recently put into question whether a meaningful limit would actually help to avoid an entire fairness review.

While it is hard to believe that a reasonable limit approved by shareholders would be of no value in rebutting a challenge to an otherwise defensible equity grant, boards should focus on the entirety of their approach to determining non-employee director compensation. An informed and deliberative process leading to a demonstrably reasonable compensation decision is the best way to deny a plaintiff the essential ingredients for a complaint that can survive dismissal, with or without business judgement deference. The attached piece offers some background and suggestions in this regard.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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