VOLUME 77 ◆ NUMBER 7

Employee Benefit Plan Review

Ask the Experts

By Katrina L. Berishaj and Zunara Ishtiaq

Delegating Grantmaking Authority

Q Can a growing startup company delegate to management the authority to grant equity awards?

A Equity-based awards can be a significant part of a company's compensation program and a powerful incentive for attracting and retaining talent. Whether the company is a startup or public, it must grant equity awards properly, meaning that, absent a valid delegation, only a company's board of directors may grant equity awards. To be valid, a delegation must comply with relevant law and the equity plan's governing documents.

Q What state law implications should we be concerned with in connection with delegating grantmaking authority?

A State laws applicable to corporate governance provisions typically pertain to certain aspects of executive compensation arrangements, including who has the authority to grant equity awards. Thus, the ability to delegate grantmaking authority generally depends on applicable state law.

Delaware General Corporation Law (DGCL) §§ 152 and 157[1] allow the boards of Delaware corporations to delegate to any person or body (whether officers or board members) the authority to approve issuances of stock, stock rights and stock options. The delegates may determine grant recipients; the timing of grants; the exercise price; the number of stock options or rights to be granted; and other terms of the awards, including vesting and expiration.

Board resolutions must be adopted that delegate the power to implement the grantmaking authority. For proper delegation to a non-board member or body, the board resolutions must specify the following:

- The maximum number of stocks, stock rights or stock options that may be granted and the maximum number of shares issuable upon exercise thereof.
- A period during which such stock, stock rights or stock options (and during which the shares issuable upon exercise thereof) may be issued.
- A minimum amount of consideration (if any) for which such stock, stock rights or stock options may be issued, and a minimum amount of consideration for the shares issuable upon exercise thereof. (The consideration paid for stock rights or options may be set by referring to a formula provided in the board resolutions, such as the one used for the company stock's trading price.)

Notwithstanding the limitations of DGCL §§ 152 and 157 with respect to delegations to non-board members and bodies, board committees remain empowered to exercise the full power and authority of the board to make grants of stock, stock rights and stock options.

Q Are there any plan-level considerations concerning the delegation of grantmaking authority?

A Another issue regarding the delegation of grantmaking authority under an equity plan is whether the plan itself allows for such delegation. The plan and related governing documents should be reviewed to confirm the authority of the board (or of a board committee) to delegate grantmaking authority to company officers. If an equity plan does not allow the delegation of grantmaking authority, the board might consider amending the plan to permit it.

Q How much grantmaking authority delegated to management should be considered?

A As a practical matter, when deciding how much grantmaking authority to delegate to management, the board must balance between allowing the flexibility provided by the amended plan and ensuring the board retains sufficient control and oversight over the issuance of securities and awards to avoid diluting the company stockholders' ownership interests.

If state law and the equity plan permit, delegating grantmaking authority to one or more officers might reduce the administrative challenges of granting off-cycle equity awards. Delegating grantmaking authority could be especially helpful when companies want to streamline the hiring process or hold on to valued employees without going through the time-consuming process of calling a board or committee meeting.

As a matter of prudence, boards might consider approving forms of grant agreements to establish the terms and conditions of awards and, in such instances, establish ranges of equity award amounts or other vesting conditions to offer employees based on job categories. For example, vice president-level employees might be eligible for 25-50 stock options with standard vesting conditions, and senior vice president-level employees might be eligible for 50-100 stock options with more favorable vesting conditions. Boards should also require delegates to regularly report grants made under their delegated authority to ensure compliance with the delegate's authority, the equity plan's governing documents, and state law.

Note

1. The Delaware legislature passed clarifying amendments in 2023 that, if signed by the governor, would have become effective on Aug. 1, 2023.

Katrina L. Berishaj, a counsel in the Washington, D.C., office of Stradley Ronon Stevens & Young, LLP, and co-chair of the firm's Fiduciary Governance practice, advises financial services clients, including banks, trust companies, broker-dealers, investment advisers, insurance companies and institutional investors, on issues arising under the fiduciary and prohibited transaction rules of the Employee Retirement Income Security Act and the Internal Revenue Code with respect to financial products, services and transactions. Ms. Berishaj, who is the Ask the Experts columnist for *Employee Benefit Plan Review*, may be contacted at kberishaj@stradley.com. Zunara Ishtiaq is an associate and member of the firm's financial services practice group. She may be contacted at zishtiaq@stradley.com.