Employee Benefits and Executive Compensation Podcast Series:
Current Executive Compensation Trends in Private Equity Transactions
Hosts: Josh Gelfand and Mike Crumbock
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Joshua Gelfand:
Hi, everyone. Welcome to another edition of the *Troutman Pepper Employee Benefits and Executive Compensation Podcast*, your compass for navigating the complex world of benefits and compensation. I'm Josh Gelfand, a partner in Troutman Pepper's New York office. Today, I'm joined by Mike Crumbock, a partner in our Philadelphia office. Mike and I are both partners in the private equity subgroup of Troutman Pepper's Employee Benefits and Executive Compensation Department. Today, we're going to be discussing current executive compensation trends and issues in the private equity M&A space.

Executive compensation aspects of private equity M&A cover employment contracts, severance, equity compensation, all in the context of M&A transactions and beyond. I think we could use that as a jumping point. Mike, what are some of the aspects and things of note that you've been seeing in your practice lately?

Michael Crumbock:

Sure. And thanks, Josh. First of all, my disappointment. I thought I was being invited on the New Heights Podcast with the Kelce brothers. Talking about Taylor Swift and Travis, I think we're going to lose two audience members with my daughter.

Joshua Gelfand:

There you go.

Michael Crumbock:

To dive into this, I think one of the things that are at the forefront of what we always address at the outset of any transaction is equity incentives, and in particular, I'm curious what you're seeing recently, but how we're negotiating equity incentives for management teams. I think everyone has their own insight on what an appropriate pool looks like as a percentage of fully diluted equity.

I have my personal opinions. I'm sure you do, too, as well, and I think all our clients have their perspective and for the audience, so you understand, Josh and I also represent management teams and executives. We're often on the other side of the table, so to speak. We see from both angles. I think the first thing, again, going back to the pool is negotiating that percentage. I guess, my personal perspective, 8% to 12% of fully diluted equity is a starting range.

Joshua Gelfand:

I think it might be helpful. Maybe this is overly basic, but even to just explain, or say, when we talk about an equity pool, what it is we're referring to for folks in the – I think a lot probably do, but some might not. When we say equity pool, I think what Mike and I are discussing is the portion of the stock, or partnership interest, whatever it might be, that would go to members of the management team and other employees typically. And so, you reserve that amount to issue to them for when a future sale transaction comes up, right? The pool being whatever the value, the percentage of value of the company that would go to the management team.

Michael Crumbock:

Right. Thanks for that clarification, Josh. That's right. I think that obviously, management is going to want to negotiate for the largest pool possible. Those pools can be influenced by industry as well. You may have a different market perspective, depending on whether you're representing a manufacturing company, or you're in the health sciences space. The idea is to, at the outset of a transaction, determine what the intended percentage of overall ownership should be allocated towards management.

Again, that 8% to 12% generally applies, I think, for most of our private equity sponsors. I'm curious what you've seen, Josh. I was on a transaction recently, where a management council was very hot, not just on negotiating the size of the pool, but negotiating how much of the pool would be allocated to existing management, immediately following the transaction. For instance, I think in this case, it was a 12% equity pool, and they wanted no less than 11% of the pool allocated immediately, leaving very little room for new hires, or promotions and things like that. That was the first time I've seen where a management team was negotiating that specific point. I'm just curious if you've ever seen that before.

Joshua Gelfand:

That's interesting. No, I can't say I've seen that before. I've definitely seen where there's been a discussion where the management team wants clarity on what portion of the pool will be allocated upfront, and oftentimes, they'll want some larger portion. They'll also, usually, because they're putting on two different hats, right? They have to put on the management hat for themselves, but also, the company hat and say, “Well, we need to reserve enough that we can bring in new people and backfill positions that need to be filled.” I haven't seen them push on that point, but I've certainly seen discussions around, oftentimes, with the CEO, how much of the pool will be issued upfront and how much might be held back for dry powder.

Michael Crumbock:

Right. It's a weird dynamic, because, again, wearing those two hats, I think that it does put pressure on management, potentially hand-cuffing them going forward. Maybe a good time to talk about when we talk about the pool, what does that pool mean in terms of what the actual instrument of incentive equity is? When we're dealing with corporations, of course, it's typically stock options, or restricted stock. Unusually, it would be RSUs. Those are more public company-oriented types of grants. I think, Josh, will agree that we're oftentimes helping set up structures that are partnerships, or pass-through entities. More often than not, these days, we're drafting and implementing profits interests.

Joshua Gelfand:

Yeah, I agree. Actually, one of the things tying in with the pool that I find comes up more often with, let's say, profits interests than stock options, which I think is probably the most common type of equity instrument for a corporation that's set up. Is the question of when we talk about the pool, what happens to the unallocated portion of the pool? Oftentimes, with a corporation structure, you've got some authorized percentage, or authorized number of shares, you issue out of that pool, and whatever is unissued is just not shares in the company. It's unallocated, which effectively means that it goes back to the other owners and it doesn't dilute everyone.

Whereas, sometimes, when you've got a profits infrastructure with partnership interests, it's not always so defined. It can be, but it's not always so defined what a specific equity pool is. There's maybe not necessarily a cap always, on how much can be issued, and it's just a continued dilution, and there's more flexibility there. At least that's what I've seen.

Michael Crumbock:

Going back to that deal I mentioned, not only did they negotiate for how much of the pool would be used up at the outset, they also negotiated what would happen at an exit event, to the extent that any part of that pool was unallocated. They wanted to ensure that it was, in this case, they negotiated for the CEO to have discretion to allocate the remainder of that pool. I found that to be an interesting take when we're dealing with profits interests. Profits interests economically have, at least by definition, have no value at the grantee. If you're at an exit event, you have to peg a threshold amount in order to keep it as a profits interest and attribute no value to it. You would have to take into account the implications of the transaction and value at that time. If you're going to allocate the balance of this unused pool, and you're using profits interests, those profits interests would have either no value, or very little value.

Joshua Gelfand:

Yeah. Or effectively, you'd just be giving them cash, or compensation at ordinary income rates, because you say, I'm going to give you the value of the pool in some other form. But yeah, it's interesting that you said – I think it's a difference in philosophy between, let's say, the management perspective, versus the company perspective, which is to say, oh, I've seen situations where the management team will argue, "Well, hold up a second. The pool is the economics that you want to share with the team."

If it turns out that the team that we have can get the done job that you need to get done without bringing additional people and giving them another share of the pie, well, we, the team, should get the benefit of that value in which you keep whatever the full value is, as opposed to the company perspective being, well, no, we're incentivizing management individuals on a person-by-person basis, and what we think is fair and appropriate for that person. Anything else, it's not like that, there's some magic pool that's guaranteed to go to everyone, and it's just what we pay people on an individual basis, what we think is appropriate and fair. I think that there's that, that's the differentiation between the two sides. Who wins is, that's a deal-by-deal basis, and it depends on the facts on the ground, I think.

But I think that's the fundamental difference going on what you were saying about, well, if there's unallocated interest, how do we deal with that? Are we saying we're going to pay that to other people, or find something, or is that just additional saved expenses on the company's part?

Michael Crumbock:

Exactly. To your point about, it really is supposed to be a person-by-person evaluation, and it's not just this fixed pool that should be allocated, but this idea that if you are going to go that route and make up for this unused pool, that at least theoretically doesn't have any value, you start trending into the full-value cash award, or phantom equity type of arrangement. I think what I'm seeing quite a bit of, especially to your point about management turnover, are the complementary profits interest, or stock option coupled with a phantom interest. Are you seeing a lot of phantom type of arrangements in your practice?

Joshua Gelfand:

Well, that's interesting. Are you seeing, meaning that the – with a profits interest like you were talking about, just for the sake of the audience, by a profits interest, one of the requirements to satisfy the tax requirements of it is that it has to be granted with a threshold value, like a value that's a liquidation value of zero on the date of grants. Meaning that if the company were sold, you'd get no value on the date of grant. Think of it like the exercise price of a stock option. I think sometimes, and let me know if this is what you're seeing, sometimes people will say, “Well, hold up a second. There's value today. I don't want to give up on that value. Grant me some sort of a compensatory bonus arrangement tying in with that profits interest, so that I don't lose out on the accretion to date of grants, and then I'll get both of those things on a transaction.” Is that what you're seeing? Or am I misconstruing it?

Michael Crumbock:

Yes. Not just in that circumstance. I think there's a number of different circumstances where a phantom equity comes into play. It could be something simple as a mistake. We promised Josh when he joined the company a year ago that we were going to give him a profits interest or stock options, and guess what? We forgot. Now, we're on the cusp of exiting, and we want to make it up to Josh. If we're going to grant a stock option, or a profits interest, as Josh noted, those have exercise prices that render them valueless when you take into account the value of the transaction.

There's really no value to gain there, or appreciate between the grant and the exit when the exit is on your doorstep. For a phantom equity comes in to be relatively useful in that it doesn't have the attributes of the actual equity, so it's not going to have any preferable tax advantage. It's not going to be subject to a long-term capital gain. It's going to be treated like a bonus subject to ordinary income tax recognition and withholding, but it gives you the flexibility of making up for that lost grant and providing whatever economics you think are appropriate in the context of the individual and the transaction.

I think I'm seeing quite a bit of that. Not just because of the mistake, and mistakes come up quite a bit where our clients are still forgetting to do things. Maybe to the audience and to the extent that you're sitting in a sea worry responsible for equity grants, maybe this is the point where we say, be careful what you put in offer letters. If you'd say you're going to make a grant to somebody in an offer letter in an employment contract, make sure you do it and do it timely.

Joshua Gelfand:

Yeah. No, I agree. I think to answer your question, yes, I'm seeing it. I think that sometimes, it's also – it obviously comes with a lot of baggage around structuring to be either compliant, or exempt from section 49A of the tax code, which governs deferred compensation arrangements. It can probably be its own podcast in and of itself. I don't think we can delve entirely into that here. But I think oftentimes, I do see phantom arrangements either going hand-in-hand, like you said, with profit interests, or just being granted.

I actually have one matter I'm working on right now, where it wasn't profit interest, it's actually stock, but stock was issued, and it's restricted stock, and they realized that they forgot to make an 83B election. At this point, it's too late. An 83B election, for those who don't know, is an election to allow you to pay the tax on the value of the restricted stock on the date of grant, as opposed to the date when it vests, which absent an 83B election, would be the date on which the taxable event occurs.

You get the benefit of taking, hopefully, a lesser amount into income, although you bear the risk that down the road, if it doesn't come to have a good value, you've paid tax on cash, or value you've never actually received. Today, they've missed the 83B election deadline, and now vesting is quickly approaching, or will soon be approaching, and they're trying to figure out a way to mitigate the downside and avoid that tax hit. One possible solution, without getting too much into the nitty-gritty of it, but one possible solution is to switch this in a 409A compliant way, with to switch it into a deferred compensation phantom award, to allow you to push out the taxable event until a sale transaction.

Now, like you said, the cost of that, one of the costs, is you get ordinary income taxation on the sale, as opposed to potentially capital gains tax, which is typically lower, but it might be worth it to narrow situation to avoid the tax hit. I think, I do see that coming up more and more.

Michael Crumbock:

That's interesting. What the 83B election is particularly relevant is where the incentive equity has vesting conditions. Maybe this is a good time to segue into maybe what we're seeing in terms of vesting conditions that our clients want, vesting conditions that management counsel are negotiating for. I think one of the things that I'm noticing quite a bit is the trend over the last several years to a split between both time and performance vesting, time being just, if you stay for a certain period of time with the company, you will vest.

Whereas, performance vesting is oftentimes, especially when we're representing a private equity backed entity, that it's based on the exit value at the time of a transaction, and there are multiple of return on the sponsor's equity. I think before this trend towards more performance vesting, it was, at least in my experience, it was almost always just pure time-based vesting. Now with the introduction of performance, you get into oftentimes, the negotiation between, well, what's the split, should it be 50/50 timed performance? Is it 60/40, 40/60? Josh, what are you seeing in your practice?

Joshua Gelfand:

Yeah, I agree with all that. I think that, like you said, the trend that I've seen now for obvious reasons is a split of both time and performance vesting conditions. It's interesting. One thing to note is when we talked about time versus performance, time vesting conditions means if you're in your seat, or whatever it might be, you get it, performance is both not just performance, but also service vesting. You still have to be in your seat, but you also have to hit the metric for that.

I agree. I've seen negotiations around what that mix is going to be, of which I think 50/50, or 60/40, 70/30, anything like that. Then I think, there's also variance on what the performance metrics are. I think you hit on the main ones, right? There's oftentimes, it's the multiple of invested capital, like a return on investment. Then also, oftentimes, that's paired with an internal rate of return hurdle, which essentially the way people can think about it is the multiple of invested capital says, how much money did I make? The IRR return essentially says, how quickly did I achieve that goal? Because it's an internal rate of return.

The faster you go to a transaction, if you've reached the same multiple, the higher the rate of the internal rate of return will be, because to get to that level, you've had to hit a higher percentage. I've seen a negotiation around whether you've got both an IRR and a multiple of invested capital, maybe on some piece, it's one and not the other. I think there's a variance there.

I think another place that I'm curious to hear your thoughts that I've seen a lot of negotiation and discussion is also, really, how you calculate that return amount, right? Because oftentimes, it's a debate of like, is it a cash-on-cash return? Meaning, is it just cash in and cash out? Or do you factor in other types of property and consideration, like deferred consideration, or marketable, or non-marketable securities and how that all plays in? Because often, from the PE sponsor side in my experience, there's very much a focus on cash and cash equivalents, because they've got at the end of the day, respond to it and provide a return to their investors.

For their perspective, what matters is what they receive back and can actually distribute out. There's oftentimes a focus on ensuring cash on cash return. Whereas, if you are on the management side, they'll say, well, that's not – if there's an exit, there's an exit and we have to figure out some way to determine performance-based on other things you might get. Like, if it was a – maybe part of the consideration is in the form of shares of the acquirer, or the buyer, or something into that effect. I'm not sure if you've seen a lot of negotiation on that point, or what you've been seeing in the market.

Michael Crumbock:

A ton.

Joshua Gelfand:

Mike is laughing, for those who can't see on the video. This is an audio podcast.

Michael Crumbock:

The multiple, as a multiple return on the investment, that's so wide-ranging in my experience. I feel like, our private equity clients and other private equity firms that I've been on the other side of the table from, they're very much stuck to what they think the rate multiple is. It usually ranges between 2- 4 times. Recently, I had a management engagement where it was 5%. It was staggered between three and five, but still I thought a 5X return was extraordinary.

I feel like, if you're looking in market, it's around three. Maybe between two and a half and four. Something like that is something that I would ordinarily consider market and reasonable. Get to five. I'm going to probably start out a little bit of Harper, and if I'm representing management. It's really an interesting discussion when we're talking about the calculation of the return. To your point, Josh, is more often than not, it is cash in, cash out. Sometimes, sponsors and management teams get comfortable that, okay, we'll include marketable securities. I rarely see non-marketable securities being included in the calculation of return.

The other thing that often comes into play is management fees. Many of our private equity entities that we represent are getting a management fee. Should that, or should that not be included as part of their return? I would argue that shouldn't. It's just a fee. It's not a return on investment. A transaction I was involved in several months ago, management was really barking at this point, and really thought that that maybe because the fee was potentially higher than a typical management thing. But nonetheless, they did not win that point, for one.

I did have another circumstance where management did get the private equity firm to agree that management fees would be included up to a point. In that case, it was some number of hundreds of thousands would be taken into account, but nothing over that. It's really interesting in all the different law firms have their views and different counselors have their views as to how returns could be determined, could be complicated. I think, oftentimes, us lawyers are buried in the negotiation and drafting.

We oftentimes get to the end of a transaction and we're looking at the English on the page and we go to model it out on the next all spreadsheet, where the heck was – What were you thinking? How exactly is this supposed to work? I think to that point, one of the things is that you sometimes see proceeds definition that takes into account the proceeds that are deliverable in respect of incentive equity. That creates a circular calculation to determine exactly what the investing should be in that circumstance. I don't know if you want to talk about that when I think of the termination aspects that are part of that determination, that's another area where we spend a lot of energy negotiating.

Joshua Gelfand:

To tack on to what you were saying before, because I think it's very accurate, I think there's a range of what we might, or other practitioners might view as what's market. At the end of the day, it really is offered. It's just a case by case. Everything is bespoke to whatever the particular transaction is. There might be a range of the equity pool, or how the investing works, but everything really comes down to what the particular situation is for that particular arrangement. Because you might have a fund that presented to its investors that this is how – this is the return it's going to make, and that's what drives whatever the return might be.

It's all really, at the end of the day, well, every situation is unique, I think. That's going to be taken into account, whether you're on the management side, or the company side, I think, on that piece of it, which I think is very helpful.

Michael Crumbock:

That's a great point. A lot of these things are negotiable. I do think that we have, rightly so, clients that have certain models, that they know work for them. They're not going to be particularly interested in negotiating certain items, like the return multiple, or investing conditions. I think your experience is probably like mine. We spend a ton of energy negotiating what the consequences of a separation are. When it's time investing equity, pretty simple, it can simply be, you got what you earned through your termination date as the recipient, it can be, maybe we'll fully accelerate your time-based equity incentives. I think that's pretty rare. Sometimes it's somewhere in between. We'll give you one year's worth of credit towards your time investing criteria.

Where it gets very complicated, I think, is where we're talking about what the consequence of a separation is to a manager's performance-based equity. I'm interested to see what you negotiate for, and what your clients are more or less willing to agree to. Ordinary case, and to your point earlier, performance-based vesting almost always is tied to the recipient's continued service through the exit event, or equity event.

If you leave beforehand, you're out of luck. That equity goes away. That performance-based equity goes away. You can keep your vested. But performance, nothing's going to be payable in respect to those units, or shares.

Joshua Gelfand:

I do sometimes see that one, depending on the circumstances and the situation, sponsors might be willing to consider doing what I would call a post-termination tail eligibility on the performance hurdle, which is essentially to say that if there's a good lever termination situation, then they would allow the performance vesting award to hang out there for some period of time, so that if a transaction occurs during that tail period, it remains eligible to the vest.

Often, the theory behind that being that if the person is a good lever and a deal happens relatively soon after they leave, they were probably involved with it, or they should get the benefit to some extent of that transaction. I've seen, again, depending on the situation, I've seen that negotiated where sponsors are comfortable with that. I've seen situations where sponsors are not comfortable with that. That's on the performance side, which I have seen.

Michael Crumbock:

Yeah. That's the out period, is anywhere from usually three to 12 months. I think six months is probably one of those areas where most people can be comfortable that it's managers leaving within six months of a transaction. They probably were involved to some extent, and certainly, were hopefully, instrumental in driving the success of the business as being sold. I think we can get comfortable with some tail period.

One of the things I saw recently was a no tail period, but the company would run a performa evaluation and had they exited on the separation date, what would have been vested in terms of performance. Which I thought was unique. Probably not easy to do. Again, it's one of those situations where you're dressing it and putting it in English. But when you have to actually run that calculation, it's just probably not the cleanest calculation that you have to make.

Joshua Gelfand:

Yeah. That's the tricky one, I'd say. I think another place that ties into actually is on repurchase rates, or call rates. Oftentimes, when a service provider terminates employment, the company will have a repurchase right on the vested equity, on vested profits interest. Let's say, we're talking about that, or shares of stock. The unvested award will be forfeited and the vested award will be subject to buyback, typically at fair market value, or some lesser amount of it's a bad lever situation, things like that.

What I have seen on occasion is management teams try to negotiate for some sort of a tail almost on the buyback, where if a transaction occurs at a higher valuation within some period of time after the termination buyback date, that they'll get an adjustment upward on the repurchase price. I don't think that's as common, but I have seen that requested on occasions accepted by the sponsors. Again, I think it all depends on the circumstances of the particular deal.

Michael Crumbock:

That's pretty interesting. I can't say I've seen that strategy employed. I think more often than not, where clients are dealing with a good lever, somebody that's being terminated without cause, or they're residing with good reason, they're agreeable to waiving the call rate. They agree not to repurchase the equity. That could be for a number of reasons, not just a good lever circumstance, but somebody that might be going to a customer, or is otherwise going to be engaged with the management team, or the business in some respect and want to do them a solid and let them keep their equity.

Where it gets really interesting is that the outset and the drafting of the governing documents where it's partnership agreement, or stockholders agreement and drafting those call rates. I've seen some management teams get really, really aggressive about what the buyback price is going to be. What is the fair market value determination? At least in my experience, more often than not, with a non-public company in the units share market, you leave it to the sponsor, as we're usually dealing with. Let them determine in their good faith discretion what that market value is for purposes of the call rate, and for other purposes as well.

That gives, sometimes, without good reason, somebody to question that approach and say, “I would appreciate a little bit more certainty.” In the case of a call rate, we're going to ask you to go and solicit a third-party appraisal of the equity that's subject to the call rate. Have you seen that frequently at all?

Joshua Gelfand:

I've seen it. I've certainly seen it requested by management teams. I think there's oftentimes, I think to your point, there's oftentimes pushback on that from the sponsors, because one is they don't want to have the headache of having to have that done whenever there's a buyback, or the risk of it having been done. Then if they do, sometimes there is a debate, or negotiation around what the cost is and who bears the cost of that determination. I think, I've seen it down in some places where if there's a dispute on the valuation, they go out and each of them gets their own evaluator and they say whoever – and then they have a third party and they pick a third person.

Then depending on how off that value was, determines who pays for the valuation. I mean, there's lots of different ways, I think, to deal with. But I think, more often than not, it's really just determined by the board and good faith, and that's what I've seen used.

Michael Crumbock:

Yeah. It's one of those things that gets incredibly complicated, when you're trying to figure out all these different avenues you can take in determining market value. To your point, sometimes I get my appraiser, you get yours. If my appraiser comes up with a value that's 10% greater than yours, then I win. The alternative being, I lose, if it's equal to, or less than 10% of your appraisal. It's really interesting.

Then you get into the terms of the call itself, how long after a manager, or a set of equity holder leaves, should the company or the sponsor have the right to trigger the repurchase? Should that be six months, should it be a year, should it be more than that? I think more often than not, it's out of around a year. I haven't seen it be indefinite, except from one time, I did see an indefinite call rate. They could pull the trigger at any time to repurchase management's equity. I think it's pretty unusual.

The other thing is, how do we pay you? Are we going to pay you with cash? Are we going to pay you with a note? What are the terms of the note? What's the duration of the promissory note? What is the interest rate? Just all these different items that go into the terms of the call rate, we could probably do another podcast on that.

Joshua Gelfand:

You’re right. I mean, it can suddenly play in. I think, I've even seen on some situations, I mean, I think the key often is, and I think the typical purpose behind not paying cash upfront is oftentimes, the concern that there might be either a cash flow issue with the company, or more often, I think, it's triggered by the concern that whatever the cash outlet would be, might run afoul of the company's credit agreement.

Oftentimes, and the language that's in that provision says, to the extent that buying back at fair market value, or buying back in cash would run afoul of whatever the limitations are under the credit facility, then we can pay you back in a note. I think that's what I've seen happen. I think one of the other things just to highlight, I think, for people to be aware that, I think, how this all plays out also depends on the type of instrument you're using, and there's different things to be aware of, right?

If you're using a phantom equity, then unless you structure it as a, what I would say, a taxable note, you really can't defer the payout arrangement, right? It's got them. You also can't have a call rate on a phantom equity. A lot of what we're talking about does depend on the type of instrument you're using, each of which can have its own separate implications.

Michael Crumbock:

Sure. It's probably a good point for our audience to be reminded, to the extent you're responsible, or involved with one of these repurchase arrangements, always check your credit agreement. Because to Josh's point, they often have pretty tight limits on what can be spent in terms of repurchasing equity from the recording management. Sometimes we get the call and it's too late. “Oh, we already did the repurchase. That's good with our credit agreement, right?” Let's cross our fingers and let's check. It's one of those things that often is overlooked and has some actual tangible implications.

Joshua Gelfand:

Another public service announcement, as it were, which might feel a little bit off-topic, but it's tied in this, is that there's, for purposes of thinking about forfeiture and whether or not you have to make an 83B election, or even going into the golden parachute calculations when you have a deal that you have to do with what they call a determination of whether or not the payments are contingent on the transaction. Oftentimes, you'll see people say, “Well, I've got shares, or profits and just.” “Oh, no. It's vested. It's fine. This is not subject to risk of forfeiture. I don't need to make an 83B, or 280G is not applicable, or whatever.”

Oftentimes, there might be something buried in the agreement, like a repurchase right in less than fair market value in certain circumstances, which can actually be construed as itself a risk of forfeiture making, necessitating, or maybe making appropriate in 83B election, or figuring those amounts into 280G. Even though you might think, well, it says it's a vested award, or it's not subject to forfeiture. Again, all that can be interplayed within the repurchase rights within the documents and it's important to keep those arrangements in mind.

Michael Crumbock:

Yeah, that's a great point. I personally had that situation come up several times. It's never great when the posing counsel is saying, “Are you sure these are vested? Because we just saw this stockholders agreement that nobody knew about me. It has a call rate for less than market value.” Okay. Got to redo the 280G calculation.

Joshua Gelfand:

Yeah. Frankly, and to that point, even under 280G, and again, 280G can be its own separate podcast edition, when you run your analysis for 280G, you disregard whether or not an 83B election has been made. People might mix that up and have an executive say, “Well, no. I made an 83B election four years ago. It's vested for tax purposes.” But no, for 280G calculation purposes, you treat it as if you didn't, as if there was no 83B election made. Meaning that you still have to factor that amount in if it's vesting in the deal effectively without the absence of 280G absenteeity for the election.

So I think that's probably a great place for us to end the discussion. I hope you found today's podcast episode helpful, and it's a complex landscape, but understanding these aspects can make a significant difference in a lot of ways with the negotiations and the discussions around equity and other compensation in the context of a transaction. If you have any questions, or need further clarification on any of the topics we talked about today, please don't hesitate to reach out to either of us directly. Thank you for listening.

Michael Crumbock:

Thanks so much.