



Letter of Comment No: 2
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August 23, 2005

Mr. Robert Herz - Chairman
Financial Accounting Standards Board
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P.O. Box 5116
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Mr. Christopher Cox - Chairman
Securities and Exchange Commission
100 F Street, NE
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By email to: director@fasb.org

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Mr. Donald T. Nicolaisen - Chief Accountant
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Re: Determination of Grant Date for Share-Based Compensation Awards

Sirs:

The purpose of this letter is to request re-consideration of guidance issued to the Big 4 public accounting firms by the Financial Accounting Standards Board ("FASB") Staff regarding the determination of the grant date for equity compensation awards. This guidance is intended to be part of the adoption of Statement of Financial Accounting Standards No. 123 - Revised, *Share-Based Compensation* ("SFAS 123-R"), but was not clearly communicated in the text of SFAS 123-R. It is our current understanding that the FASB Staff has indicated that the grant date for an equity compensation award occurs when the terms of the award are communicated to the applicable employees. This is different from current practice which considers the grant date to be the date that the Compensation Committee and/or management approves the award for issuance, including the number of shares, the exercise price, life of the award, etc., provided that communication occurs shortly thereafter. Approval of an award effectively commits a company to the issuance of the award under such terms regardless of when communication to employees occurs.

We are writing to express our concerns that requiring communication to occur in meeting the definition of grant date will erode the Compensation Committee's authority, trigger increases to equity compensation administrative costs, will conflict with the current guidance of the Internal Revenue Code ("IRC"), and conflicts with other guidance in SFAS 123-R. We also believe that such a change has no economic significance for either employers or employees. Therefore, we request that the FASB Staff's guidance on this issue be immediately rescinded by either the FASB or the Securities and Exchange Commission.

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Erosion of Compensation Committee Authority

In fulfilling their duties as independent directors, Compensation Committee members need to know the approximate value of compensation being delivered to employees at the time they approve an equity compensation award. Under SFAS 123-R, determination of the grant date is critical in calculating the fair value of the award that has been granted. Note that the grant date fair value of the award is ultimately recognized in the financial statements as expense over the award's requisite service period. If communication date equals grant date, then Compensation Committees will be asked to approve awards for which they may not have a reasonable basis for knowing an award's fair value (value would be determined by the communicator of the award), reducing their ability to fulfill their duties as fiduciaries of stockholders through insuring appropriate levels of compensation for employees.

Increased Operating Costs

Most companies use an average of the high and low market value on approval date to establish an award's issuance price (exercise price for options). Since this requires waiting until the end of the trading day, it is simply not administratively feasible to send the communication out around 4:30 EST and expect that all employees will have been notified. Some will have already gone home, others will be on vacation or traveling. Knowing that these circumstances will occur, must the grantor receive an acknowledgement from each employee regarding receipt of the terms of their award(s)? This would obviously lead to multiple grant dates based on the timing of individual employee acknowledgements.

In addition to the administrative difficulties in communicating with employees, there will be incremental increases in operational costs for tracking awards under the FASB Staff's guidance. These incremental costs would include modifications to our equity compensation software, tracking thousands of individual awards based on communication date (resulting in a significantly greater number of grant dates and expensing schedules), and development of new communication mechanisms to inform as many employees as possible shortly after approval. These costs would represent a waste of capital because no economic benefit would result from their expenditure. The employees and the employer are in the same economic situation whether the grant date is approval date or communication date except for the fact that the employer has now incurred additional costs solely to meet the form of the new rules without any consideration given to economic substance.

Conflict with Internal Revenue Code

Through preliminary conversations with legal counsel, we believe that the IRC will continue to mandate that the grant date of an equity award to employees is the approval date. As we mentioned previously (and as indicated in the IRC), upon approval, management is effectively committed to delivering the award to employees. If the IRC finds this to be such a fundamental truth in equity compensation, why does the FASB feel compelled to require communication in order to achieve grant date status for book purposes? More broadly, we must ask why should accounting principles be changed to create a conflict with the IRC when one does not exist today?

Conceptual Inconsistencies

We also have objections to the FASB Staff's interpretation of the requirements for achieving grant date status on conceptual grounds. The definition of grant date within Appendix E of SFAS 123-R indicates the following:

The date at which an employer and an employee reach a mutual understanding of the key terms and conditions of a share-based payment award. The employer becomes contingently obligated on the grant date to issue equity instruments or transfer assets to an employee who renders the requisite service. Awards made under an arrangement that is subject to shareholder approval are not deemed to be granted until that approval is obtained unless approval is essentially a formality (or perfunctory), for example, if management and the members of the board of directors control enough votes to approve the arrangement. Similarly, individual awards that are subject to approval by the board of directors, management, or both are not deemed to be granted until all such approvals are obtained. The grant date for an award of equity instruments is the date that an employee begins to benefit from, or be adversely affected by, subsequent changes in the price of the employer's equity shares.

Apparently, the FASB Staff has focused on the first sentence of the definition in indicating that a mutual understanding of key terms and conditions cannot occur prior to the communication of such terms to an employee by the employer. However, the next sentence indicates that the grant date is the date that the employer is obligated to issue the awards, which is described previously as the approval date. Further, the last sentence of the definition unequivocally indicates that the grant date for an equity award is the date that the employee recipient begins to benefit from changes in share price, which is also the approval date. Further, the definition of grant date emphasizes that more-than-perfunctory approvals must be obtained prior to a grant occurring. We interpreted this to indicate that obtaining more-than-perfunctory approvals is the critical element in meeting the standards for granting an award, because such approvals are made with knowledge of the terms of the agreement and the total value being delivered to employees. Therefore, it seems that the definition of grant date within SFAS 123-R contains inconsistencies within itself that must be corrected.

Conclusion

In conclusion, we believe that the FASB Staff's guidance to use communication date for determination of an equity compensation award's grant date constrains Compensation Committees and penalizes employers and shareholders without delivering any change in economic status for any of the affected parties in comparison to the current use of the approval date as the grant date. The inconsistency of such guidance with the IRC and the internal conflicts within SFAS 123-R's definition of grant date speak to the lack of conceptual preference for a communication requirement in determining grant date. Therefore, we respectfully request retention of the current practice of approval date qualifying as grant date if communication is made shortly thereafter.

If you have any questions or comments regarding this letter, please contact me at (901) 537-1937. We appreciate your time in reviewing our concerns.

Sincerely,

/s/ Shawn P. Luke

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