

Letter of Comment No: /3
File Reference: FSP123R-D

Director, TA&I – FSP
Financial Accounting Standards Board
401 Merritt 7
P.O. Box 5116
Norwalk, CT 06856-5116

Re: Proposed FASB Staff Position No. 123(R)-d, Classification of Options and Similar Instruments Issued as Employee Compensation That Allow for Cash Settlement upon the Occurrence of a Contingent Event

Dear Director,

We appreciate the opportunity to comment on Proposed FASB Staff Position No. 123(R)-d, Classification of Options and Similar Instruments Issued as Employee Compensation That Allow for Cash Settlement upon the Occurrence of a Contingent Event. We support the issuance of the final FSP based on the Proposed FSP as a "practical accommodation" of existing practices.

Prior to discussing our comments we wanted to share with you our perspective as a compensation consultant that works with both public and private companies on the issue of how common it is to see cash out provisions for awards. Anecdotally, we can share with you that most current equity awards and equity compensation plans provide for the possible cash out of equity awards upon a change in control if the replacement awards being offered do not have an equivalent value, as determined by the Board or a Committee. Frequently other situations exist where such cash out provisions are used by companies, including in grants made by private companies anticipating going public (fairly common in our experience), and in grants made to employees so that the company can cash out the award upon the employee's death or disability (infrequently specifically set out in award agreements, but generally permitted under the language used in many current equity compensation plans).

We also wanted to specifically address the questions that were raised in the Notice for Recipients.

Restricting the FSP to Specific Contingent Events

The Notice asked, "Do you think the Board should restrict the guidance in this FSP only to specific types of contingent events (for example, a change in control)?" We do not believe the guidance should be restricted.



First, the specific contingencies mentioned are not an exhaustive list of possible contingencies in which a company may desire to have the ability to cash out equity awards if certain events do or do not occur. For example, a company that is planning on having a public offering of its securities may wish to provide for the cash out of equity awards it grants prior to its initial public offering (IPO) if the IPO does not occur by a certain date or within a certain period of time.

Second, it appears that certain Board members thought that by not limiting the FSP to specific contingent events that a possibility for abuse might then exist. In our experience, companies are not trying to add cash out provisions to their equity awards. In fact, they generally try to avoid including such cash outs except in cases where they serve the interests of the company, such as in the context of changes in control so the outstanding awards would not act as a deterrent to possible acquirers, and in the pre-IPO context so the company doesn't have to deal with all the securities issues associated with equity awards if its IPO does not occur. Companies placing cash out provisions into their equity awards are forced to deal with the volatility associated with liability accounting, something that most companies seek to avoid at almost any cost.

Consequently, we do not believe companies or the Board would be well served if the guidance in the FSP were limited to only specified contingent events. We note that by allowing the FSP to apply to all types of contingent events that could permit cash outs of equity awards, the Board is also saving itself from having to reconsider this issue again if other specific contingent events are found to routinely exist amongst constituents.

Appropriateness of Alternative Grandfathering Approach

The Notice asked, "Do you believe the grandfathering approach more appropriately addresses this issue?" We do not believe the alternative grandfathering approach that the Board considered, but rejected, more appropriately addresses the issue.

We believe the probability approach as currently embodied in the Proposed FSP is superior to the grandfathering approach, as it is consistent with current accounting practices under APB Opinion No. 25 and FAS 123 and therefore would mitigate changes when companies begin applying FAS 123(R). Since the probability approach currently is utilized under APB Opinion No. 25 and FAS 123 (which is silent on the classification of such instruments, and so the practice has been to apply the probability approach of APB Opinion No. 25), its use should not cause undue confusion. Additionally, there has been sufficient time for the development of a body of knowledge concerning when a contingent event would be probable of occurring, which will be useful as companies go about classifying employee instruments for purposes of FAS 123(R). Finally, because the Board is currently still working on its Liabilities and Equities project,



requiring the grandfathering alternative would introduce additional complexity that may not be in harmony with the conclusions reached as part of the Liabilities and Equities project.

Conclusion

Thank you again for the opportunity to provide comments on the proposed FSP. We would be happy to discuss our comments with the Board members or FASB staff at your convenience.

Best regards,

Buck Consultants, an ACS Company

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