

40<sup>th</sup> Annual TEI -SJSU High  
Tech Tax Institute  
November 4, 2024

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*RdMp*

- Option Repricings & Exchanges
  - Benefits and Drawbacks
  - Frequency
  - “Gossamer Style” Repricings
- Equity Award Matters
  - RSUs versus Options
  - Private Company RSUs with Double Trigger Vesting
  - Special Equity Awards
  -

## ~~Thoughtful~~ ~~BEAD Options~~

### ~~BE~~

- Non-cash solution to re-incentivize existing option holders
- Helps prevent negative sentiment between new hires and existing/longer-term option holders
- Can be done in a manner that has a low net cost to the company
- Can be structured to minimize financial statement impact

### ~~Draw~~

- Administrative costs
- Tax and accounting complexities
- Potential ISO disqualification
- Optics
- Getting stakeholder alignment

## ~~Thoughtful~~ ~~Types~~

### ~~Options~~

Cancel underwater options and issue new options with strike prices at, or greater than, the current (lower) FMV.

- No change in number of shares
- Reduced number of shares (value for value)
- Additional vesting conditions

### ~~Options~~

Exchange underwater options for other equity-based awards (e.g., RSUs).

- Eliminates possibility of needing successive repricings

**MI** **§** **409A** **¶**

Preamble to proposed regs: ... depending upon the facts and circumstances, a series of repricings of the exercise price may indicate that the original right had a floating or adjustable exercise price and did not meet the requirements of the exclusion at the time of the original grant.

Potential severe penalties, etc.

**PMISO** **§**

Treated as the grant of a new award

ISO 100,000 limit is retested in year of repricing

**ASC 718** – **§**

Fair value of the modified award is the same as the modified award immediately before the modification

Same vesting conditions

Same classification (equity or liability)

**MI**

~~The Golden~~  
~~W~~ **Options** **vs** **RSUs**

	Options	RSUs
<b>What is it?</b>	Right to purchase shares in the future at a price specified on the date of the grant (usually FMV on grant date)	Right to receive a share of stock when vested
<b>Value</b>	FMV on date of exercise less purchase price	FMV of shares on date of settlement
<b>Payment for Shares</b>	Payment of exercise/purchase price	No cash payment to receive shares
<b>Tax</b>	Tax upon <b><u>Exercise and at Sale</u></b>	Tax at <b><u>Vest and at Sale</u></b> - Shares are delivered upon vesting; and there is ordinary income equal to the FMV of the shares on the date of issuance
<b>Mostly Seen In...</b>	All stages of companies (i.e., early stage, high-growth startups, mature public companies)	Public companies; some private companies with substantial valuations (generally at least greater than one billion or more)

7

~~The Golden~~  
~~W~~ **Why** **RSUs**

- 1 Discount between the most recent preferred and the common is shrinking.
- 2 Board and investors are signaling the burn rate / dilution from existing options and continued granting is too high.
- 3 Talent acquisition team signals that they are unable to close candidates with options

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Thoughtful  
To - Pursue

-- To

Decision Point

"Stay in Seat"

or

or

~~TEBEP~~  
~~LJA SIBES~~  
~~(FIS)~~

No specific guidance from IRS on applying the substantial risk of forfeiture test, therefore



~~TEBEP~~  
~~SIBES~~



## Thoughtful Elections

### Constructive Receipt Takeaways:

- The safest approach is to comply with IRS guidance by requiring employees to elect between cash and options before the start of the services necessary to generate the compensation.
  - Usually, this means the election should be made in the calendar year prior to the year when the compensation is earned.
- Another approach is to permit the election after the services necessary to earn the cash or options have commenced, but to require the employees to remain employed for several months following the election in order to receive the cash bonuses or option grants.
  - Although the specific amount of time necessary to remove constructive receipt issues is unclear (and the IRS may still challenge the arrangement), a company could decrease the likelihood of courts finding that the constructive receipt doctrine applies if the employees' rights to receive the compensation at the time of the deferral elections are subject to greater limitations.

*Dd* ~~*Fk*~~ ~~*Clv*~~

*Pb*

~~*Th*~~ ~~*G*~~ ~~*E*~~ ~~*C*~~ ~~*P*~~ ~~*n*~~  
*DF Clv*

*Pb* - ~~*B*~~ ~~*g*~~



~~THE COMPAN~~  
~~DF CTR~~

~~- PPT~~

If, during or after the last completed fiscal year the company was required to prepare a restatement that required recovery of erroneously awarded incentive-based compensation under the company’s clawback policy, or there was an outstanding balance as of fiscal year end of erroneously awarded incentive-based compensation to be recovered from a previous application of the policy, the listed company is required to disclose:

- (a) the date it was required to prepare the restatement;
- (b) the aggregate dollar amount of erroneously awarded incentive-based compensation, including an analysis of how the amount was calculated (with enhanced disclosure if the financial reporting measure related to stock price or TSR(s)3.dockaoi43.8( )30bl <</MCID 29 >>BDC 1 0.427 0.416 scn /TT2 1 Tf 0 Tc 0

~~The Company~~  
~~DF CIB~~

- ~~PTG~~

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For each current and former named executive officer from whom, as of the end of the last completed fiscal year, erroneously awarded incentive-based compensation had

~~Eip table 02(x)~~

~~Table 6.5~~  
~~Open~~  
~~Options~~

Companies will also be required to disclose in a new table any options granted in the last completed fiscal year to NEOs that were granted within four business days before or one business day a.7(s)0.6em4l2(s)0 itsiu9( )83y a.7(s7(iu9( li.)-4.6o)2.9 )s74(da)1.( a

# SAB 120

## Thoughts

### SAB 120

SAB 120 is the accounting partner to the renewed focus on “springloaded” equity awards under Item 402(x).

- A company that grants an equity award while in possession of positive material nonpublic information should consider whether adjustments to the following are appropriate when determining the fair-value-