



FENWICK & WEST LLP

Executive Compensation and Benefits

Now We Are Making Sense – Revised Grant Date Rules for Options

September 19, 2005

At a meeting earlier this year, the Financial Accounting Standards Board (“FASB”) announced that, pursuant to FAS Statement 123(R), the grant date of an option would not occur until the employee had been notified of the material terms of the option grant.

Under pressure to change its interpretation, in September of 2005, FASB modified its position by announcing that the date of the board of director’s approval of an option grant may be used as the grant date of the option for financial accounting purposes if (i) the employee does not have the ability to negotiate the terms of the option and (ii) the terms of the option are communicated to the employee within a reasonable time period.

Accordingly, the grant date of options granted to the majority of employees will be the date the board approves the grants. However, the grant date of options granted to senior executives who have the power to negotiate their option grants will not occur until all of the material terms are agreed upon by the optionee and the company. This will most likely only be an issue when one-off grants are awarded in the course of employment negotiations.

While care should be taken to ensure that the above requirements are satisfied, we are hopeful that the most recent option crisis has ended. However, lest anyone get too overconfident, the new IRC Section 409A regulations will be published shortly by the IRS. We are certain that many issues will be raised by these 409A regulations that will heighten our collective anxiety. Stay tuned!

If you have any questions regarding this notice, feel free to contact Scott Spector at (650) 335-7251 or sspector@fenwick.com.

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