

September 22, 2005

### FASB Clarifies Grant Date for Stock and Option Awards

When FASB adopted the revisions to Financial Accounting Statement 123 regarding Accounting for Share-Based Payments in 2004 (referred to as FAS 123R), a definition of “grant date” was included. That definition specified that the “grant date” was 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. Awards subject to shareholder or board of directors approval are not to be considered granted until such approval was obtained, *unless* approval is essentially perfunctory. The relevance of the term “grant date” is that the value of the award is to be estimated as of the grant date.

In practice, the date that an award is approved by the company’s board of directors, compensation committee, or otherwise under the company’s corporate governance provisions has often been treated as the grant date, even though the award or its key terms and conditions may not be communicated to the recipient until some time after the approval date, *e.g.*, a stock award document or option document is not immediately provided. This raises the question whether there is a “mutual understanding” until such time as the communication takes place.

At its meeting at September 14, 2005, FASB decided to treat the date that the board of directors, compensation committee or other applicable person approves the award as the grant date, without regard to actual “mutual understanding”, *provided* that the following two conditions are satisfied:

- The award recipient does not have the ability to negotiate key terms and conditions of the award.
- The key terms are expected to be communicated to all recipients within a “relatively short term period” following the date of approval.

In a footnote, the term “relatively short term period” was defined as “that period an entity could plausibly complete all actions necessary to communicate the awards ... in accordance with the entity’s customary human resource practices”. Unfortunately, this definition does not provide any objective safe harbor. Arguably, it includes the amount of time that the

entity would need to produce whatever documentation is regularly produced and to provide it to recipients in whatever form it is normally provided in. For example, in the case of an option grant, it would arguably include the time necessary to produce the grant document and any covering letter or memo, as well as any attachments, such as a copy of the option plan, and to deliver, mail, or email the package, as is the company's normal practice, to the recipients – a week or two, but clearly not several months.

The Staff of the FASB has issued a proposed Staff Position setting forth the above recommendation. The comment deadline is October 1, 2005. It is expected that the Staff Position will be adopted. We will keep you informed of any changes.

*If you have questions or need additional information, please contact the Seyfarth Shaw attorney with whom you normally work or any Corporate or Employee Benefits attorney on our website at [www.seyfarth.com](http://www.seyfarth.com).*



This One Minute Memo is a periodical publication of Seyfarth Shaw LLP and should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. For further information about these contents, please contact any Seyfarth Shaw LLP office. Copyright © 2005 Seyfarth Shaw LLP. All Rights Reserved.