Contents

Preface xi

Introduction 1

Part I: Overview of Stock Options and Related Plans

Chapter 1: The Basics of Stock Options 5
1.1 What Is a Stock Option? 5
1.2 Legal and Regulatory Framework 6
   1.2.1 Tax Law 7
   1.2.2 Securities Law 8
   1.2.3 Accounting Rules 9
   1.2.4 Miscellaneous Laws 11

Chapter 2: Tax Treatment of Nonstatutory Stock Options 13
2.1 Grant and Exercise Price 13
2.2 General Tax Rule 14
2.3 Application of Section 83 of the Code 15
2.4 Section 83(b) Election 17
2.5 Application of Section 409A of the Code 20
2.6 Employer Deduction 21
2.7 Accounting Treatment 22

Chapter 3: Tax Treatment of Incentive Stock Options 23
3.1 Statutory Requirements for ISOs 24
3.2 Analysis of Statutory Requirements 26
   3.2.1 ISO Plan Must Be Properly Adopted 27
   3.2.2 Amendment of ISO Plan Must Be Properly Approved 28
   3.2.3 Options Must Be Granted Properly 28
   3.2.4 ISOs Are Only for Employees 29
3.2.5 Option Exercise Price for ISOs 31
3.2.6 Limitation on Size of Option 33
3.2.7 Limitation on Term of Option 34
3.2.8 Payment for Option Shares 35

3.3 Taxation of ISO Stock 35

3.4 Alternative Minimum Tax Issues 38
3.4.1 Effect of AMT on ISOs 39
3.4.2 Effect of Disqualifying Dispositions on AMT 40
3.4.3 When to File a Section 83(b) Election for ISO AMT 40
3.4.4 Background on the AMT 41

3.5 Modifying Statutory Options 43

Chapter 4: Plan Design and Administration 49
4.1 General Considerations for the Company 50
4.1.1 Plan Perspective 51
4.1.2 Grant Perspective 52
4.1.3 Grant Acceptance 53

4.2 ISOs or NSOs? 56

4.3 Plan-Level Shareholder Approval Considerations 57
4.3.1 When Is Shareholder Approval Required? 58
4.3.2 Stock Exchange Rules 59
4.3.2.1 Shareholder Approval of Plans 59
4.3.2.2 Independence of Compensation Committee and Advisors 62
4.3.3 Proxy Advisor Influence 63

4.4 Say-on-Pay Votes 64

4.5 A Note on Plan Amendments 65

4.6 International Planning Considerations 66

4.7 Grant Timing 68
4.7.1 What Is Option Backdating? 70
4.7.2 Grant Timing: Spring-Loading, Forward-Dating, and Bullet-Dodging 72
4.7.3 Consequences of Backdating 73
4.7.3.1 Tax Consequences 74
4.7.3.2 Accounting Consequences 75
4.7.3.3 Securities Law Consequences 76
4.7.4 Suggestions for Avoiding Backdating in the Future 77
Chapter 5: Employee Stock Purchase Plans 79
5.1 Statutory Requirements for Section 423 Plans 80
5.2 ESPP Design 84
  5.2.1 ESPP Design Vocabulary 84
  5.2.2 Statutory Design Limits for Section 423 Plans 85
  5.2.3 Typical Structure of an ESPP: Payroll Deduction Plans 88
    5.2.3.1 Enrollment Procedures/Participation Level 89
    5.2.3.2 Offering Period Structure 92
  5.2.4 Participating in a Section 423 Plan After Termination 96
5.3 Tax Consequences 96
  5.3.1 Employee Income Taxes 97
  5.3.2 Employer Taxes 100
  5.3.3 Quirky Tax Outcomes for Section 423 Plans in Down Markets 101
5.4 International Planning Considerations 102

Chapter 6: Trends in Equity Compensation: An Overview 105
6.1 Aligning Equity Compensation with Shareholder Interests: Some Trends 106
  6.1.1 Stock Transaction Policies 107
  6.1.2 Clawbacks 108
  6.1.3 Performance-Contingent Long-Term Incentives 109
6.2 Restricted Stock Awards (RSAs) 110
6.3 Restricted Stock Units (RSUs) 112
6.4 Stock Appreciation Rights (SARs) 115
  6.4.1 Tax Issues: Employees 115
  6.4.2 Tax Issues: Employers 116
  6.4.3 Tandem SARs 116
6.5 Phantom Stock 117

Part II: Technical Issues

Chapter 7: Financing the Purchase of Stock Options 121
7.1 Broker-Assisted Cashless Transactions 122
  7.1.1 Tax Issues 123
  7.1.2 Insider Issues 124
7.2 Net Exercise 125
7.3 Stock Swaps 126
  7.3.1 Using Nonqualified Shares to Exercise an NSO 128
7.3.2 Using Tax-Qualified Shares to Exercise an NSO 128
7.3.3 Using Nonqualified Shares to Exercise an ISO 129
7.3.4 Using Tax-Qualified Shares to Exercise an ISO 131
  7.3.4.1 Using Tax-Qualified Shares for Which the Holding Period Has Been Met 131
  7.3.4.2 Using Tax-Qualified Shares for Which the Holding Period Has Not Been Met 133
7.3.5 Procedure for Stock Swaps 134
7.4 Employer Loans 134
  7.4.1 Recourse Notes 135
  7.4.2 Collateral 136
  7.4.3 Authorization in ISO Plans 136
  7.4.4 Providing Adequate Interest 136
  7.4.5 Loan Forgiveness 138
  7.4.6 Recommendations 138

Chapter 8: Overview of Securities Law Issues 141
8.1 State Blue Sky Laws 142
8.2 Classification of Companies 143
8.3 Federal Securities Rules: Rules 144 and 701 144
  8.3.1 Rule 144 Generally 145
  8.3.2 Rule 144 Decision Tree 147
  8.3.3 Rule 701 149
8.4 Federal Securities Rules: Section 16 151
8.5 Securities Law Information and Reporting Requirements 153
  8.5.1 1933 Act: S-8 Prospectus 153
  8.5.2 Exchange Act: Section 16(a) Filings 155
8.6 Exchange Act: Equity Compensation Disclosure Rules 156
  8.6.1 Executives Covered by Reporting Requirements 157
  8.6.2 Compensation Discussion and Analysis 157
  8.6.3 NEO Executive Compensation Disclosure Tables and Related Narrative Disclosures 158
  8.6.4 Special Disclosure Regarding Stock Options 160
  8.6.5 Form 8-K Reporting Requirements 160
8.7 ESPP Securities Law Considerations 161
  8.7.1 Securities Act of 1933 161
  8.7.2 Securities Exchange Act of 1934 162
8.8 International Securities Law Issues 162
# Chapter 9: Tax Law Compliance Issues  165

9.1 Tax Withholding for Stock Options  166

9.2 Tax Reporting for Stock Options  169
  9.2.1 Nonstatutory Options: Form W-2 or Form 1099  169
  9.2.2 Statutory Options, Code Sections 422 and 423: Form W-2  169
  9.2.3 Form 1099-B  170
  9.2.4 FATCA Reporting  171

9.3 Section 6039 Information Reporting for Statutory Options  171
  9.3.1 Information Required to Be Reported to Optionee  171
  9.3.2 Tracking ESPP Qualifying Dispositions  173
  9.3.3 Penalties for Noncompliance  175

9.4 Procedure for Withholding with Stock  175

9.5 Internal Revenue Code Section 409A  177
  9.5.1 General Application  178
  9.5.2 Specific Application of the Rules to Equity Awards  179
  9.5.3 NSOs and SARs  179
  9.5.4 Restricted Stock and RSUs  181

9.6 Limit on Deductions: $1 Million Cap
  (Code Section 162(m))  181

9.7 Limit on Deductions: Golden Parachute Rules  185
  9.7.1 When Are Options Treated as Parachute Payments?  186
  9.7.2 How Are Options Valued for Purposes of Section 280G?  186

9.8 Domestic Mobile Employees  187

# Chapter 10: Basic Accounting Issues  189

*Pam Chernoff and Elizabeth Dodge*

10.1 Fair Value and Measurement Date  192

10.2 Option-Pricing Models  194

10.3 Definition of Employee  197

10.4 Recognition of Expense and Application of Estimated Forfeiture Rate  198

10.5 Equity Compensation Vehicles  200
  10.5.1 Stock Options and Stock-Settled SARs with Time-Based Vesting  200
  10.5.2 Stock Options with Performance Vesting  200
  10.5.3 Section 423 ESPPs  201
  10.5.4 Restricted Stock Awards and Restricted Stock Units  204
  10.5.5 Cash-Settled SARs  204
10.5.6 Phantom Stock 205
10.6 Tax Accounting 205
10.7 Earnings Per Share: Diluted and Basic 207

Chapter 11: Tax Treatment of Options on Death and Divorce 209
11.1 Death 209
11.2 Divorce 211
11.2.1 Option Transfers 212
11.2.2 Tax Treatment on Option Exercise 213
11.2.3 Transfers of Optioned Stock 215
11.2.4 Securities Law Issues 215
11.2.5 Practical Issues 215

Chapter 12: Post-Termination Option Issues 217
12.1 Using Equity as Severance 218
12.1.1 Acceleration 218
12.1.2 Consulting Agreements 219
12.1.3 Extension of Exercise Period 220
12.1.4 Limitations in the Document 220
12.1.5 Tax Deductions 221
12.1.6 Inadvertent ERISA Severance Plans 221
12.1.7 Related Change-in-Status Issues 221
12.2 Forfeiture Clauses: A Note of Caution to Companies That Do Business in California 223

Part III: Current Issues

Chapter 13: Legislative and Regulatory Initiatives Related to Stock Options: History and Status 229
13.1 Legislative History: Stock Option Initiatives 230
13.2 Recent Legislation Affecting Stock Options 231
13.2.1 Sarbanes-Oxley Act of 2002 232
13.2.1.1 Loans to Executive Officers and Directors Are Prohibited 232
13.2.1.2 Forfeiture of Compensation 233
13.2.2 American Jobs Creation Act of 2004 233
13.2.3 Emergency Economic Stabilization Act of 2008 233
13.2.4 Dodd-Frank Act of 2010 235
13.2.4.1 Pay Ratio Disclosure 236
13.2.4.2 Clawback Policies 237
13.2.4.3 Pay vs. Performance 238
13.2.4.4 Requirements Specific to Financial Institutions 239
13.2.4.5 Disclosure of Hedging by Employees, Officers, and Directors 239
13.2.5 Jumpstart Our Business Startups Act of 2012 239

Chapter 14: Cases Affecting Equity Compensation 241
14.1 Tax Cases and Rulings 242
   14.1.1 Tax Decisions in the Courts 242
   14.1.2 IRS Rulings and Announcements 244
      14.1.2.1 Corporate Matters 245
      14.1.2.2 Individual Matters 246
      14.1.2.3 Stock Plan Administration 248
14.2 Securities-Related Matters 249
14.3 Contract Cases Related to Stock Options 252
   14.3.1 Waiver, Oral Modification, and Related Claims 253
   14.3.2 Inconsistent Documents and Ambiguous Language 255
14.4 Equity Issues Related to Employment Disputes 259
   14.4.1 Effects of Termination 260
   14.4.2 Equity as Wages 261
   14.4.3 Noncompete Agreements, Recaptures, and Stock Option Forfeitures 267
   14.4.4 Treatment of Equity in Corporate Transactions 268

Chapter 15: Transferable Options 271
15.1 Why the Interest in TSOs? 271
15.2 Limits on TSOs 272
   15.2.1 Regulations on Option Transfers to Related Parties 275
15.3 Recommendations 276

Chapter 16: Reloads, Evergreens, Repricings, and Exchanges 277
16.1 Reloads 278
16.2 Evergreen Provisions 279
   16.2.1 Tax Limitations 279
   16.2.2 Nonapproved v. Approved Plans 280
16.3 Repricing Programs 281
   16.3.1 Corporate Considerations 281
   16.3.2 Tax Considerations 283
Appendixes

Appendix 1: Designing a Broad-Based Stock Option Plan  291  
Corey Rosen

Appendix 2: Primary Sources  311  
Section 83 of the Internal Revenue Code  312  
Section 162 of the Internal Revenue Code  314  
Section 280G of the Internal Revenue Code  321  
Section 421 of the Internal Revenue Code  325  
Section 422 of the Internal Revenue Code  327  
Section 423 of the Internal Revenue Code  329  
Section 424 of the Internal Revenue Code  332  
Section 1041 of the Internal Revenue Code  335  
Section 4999 of the Internal Revenue Code  336  
Section 6039 of the Internal Revenue Code  336  
Section 16 of the Securities Exchange Act of 1934  337  
SEC Rule 144  340  
SEC Rule 701  354

Glossary  359

Bibliography  369

Index  371

About the Authors  389

About the NCEO  392