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New York • Chicago • Los Angeles • San Francisco • Atlanta

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**AUTOMATIC EXTENSION OF STOCK OPTION
TERM BECAUSE OF INABILITY TO EXERCISE
DUE TO DELINQUENT COMPANY SEC FILINGS**

There have been a number of instances in the last few years in which companies have been delinquent with their SEC filings (typically the annual report on Form 10-K) due to ongoing investigations of certain accounting and reporting matters or other reasons. Companies have to suspend stock option exercises when their Form S-8 registration statements cease to be effective as a result of the filing delinquency. During the suspension period both the term of outstanding options held by current (and former) employees and the post-termination exercise period of options of former employees may expire. In one recent situation, Dell Inc. addressed this issue by making cash payments to current and former employees who held in-the-money options that expired during the period in which they were not exercisable because of the company's filing delinquency. The amount paid, which has totaled more than \$60 million, was based upon the average closing price during the week prior to the option's expiration and the option's exercise price (see the Form 8-K Current Report filed by Dell Inc. on July 18, 2007).

As companies begin their fiscal 2008 compensation planning cycle and make their 2008 stock option grants, they should consider adding a provision to their standard form stock option award agreement that automatically extends both the option term and the post-termination exercise period to 90 days after the suspension period ends; they should also consider including extensions for other violations of the federal securities laws (or any related company policy). Companies that are considering a similar amendment to outstanding stock option award agreements may need to limit the extension to 30 days (but not later than the end of the option's original term) to avoid adverse income tax treatment to the optionees under the deferred compensation rules of Section 409A of the Internal Revenue Code. If an outstanding option's original term lapses during the suspension period there may not be any alternatives available to eliminate the issue. In those situations a cash payment may need to be considered based upon the applicable facts and circumstances.

The extension language should have no additional accounting implications if contained in the original stock option award agreement. However, adding the possibility of an extension to outstanding award agreements may result in an incremental compensation expense under FAS 123R, depending on the probability that the extension will occur.

The inclusion of an automatic extension provision would give appropriate protection to an optionee who is not responsible for the inability to exercise a stock option before it expires and would avoid the necessity of the company considering cash or other payments to the optionee as compensation for the expired stock option.

This letter is intended to alert compensation professionals about developments that may affect their companies, and should not be considered or relied upon as legal or accounting advice. Specific questions about the securities laws registration requirements for stock options and the impact of Section 409A should be discussed with appropriate legal counsel, and specific questions about accounting consequences should be discussed with the company's professional accountants. General questions about this letter may be directed to Richard Alpern in our New York offices at 212-299-3599 or by e-mail at ralpern@fwcook.com. Copies of this letter and other published materials are available on our website, www.fwcook.com.