

## Considerations for a Section 83(b) Election

by Joseph Doerrer, CPA – March 30, 2020


Generally, when restricted stock awards (RSAs) vest, ordinary income will be included for the current fair market value of the underlying stock, less any consideration paid by the taxpayer. This treatment has the potential to erode a large portion of the monetary gain connected with this event. But this can potentially be mitigated by electing treatment under §83(b), which allows for this ordinary income inclusion to occur at the transfer date (typically the grant date) of the RSAs, rather than the vesting date.



This accelerated point of taxation creates a potential opportunity to minimize the ordinary income generated in this situation, as the fair market value used to calculate this income inclusion could conceivably be much lower at the transfer date than the future vesting date. Once the restriction terms lapse, there is no additional tax event beyond the initial income inclusion triggered by the election. Any appreciation above the fair value of the stock after the transfer date will be taxed as a capital gain upon sale of the stock. The issuing company's stock plan must allow for such an election to be made.

The election is most beneficial when the value of the underlying stock is relatively low at grant and is expected to greatly increase in the future, while the restriction terms are expected to ultimately lapse. However, not all situations will be such clear-cut wins or losses. The risks associated with making the election should always be carefully evaluated beforehand.

### Risks When Electing §83(b)

Just because the election is made does not mean that actual vesting has occurred in the ownership of the underlying stock. If, subject to the issuing company's stock plan, the electing individual must forfeit ownership of the stock prior to vesting, no deduction is allowed in relation to the forfeiture. The only relief offered is found in situ  Chat with us amounts were actually paid by the taxpayer to acquire the elected stock.

2(a), this forfeiture is treated as a sale where there is a loss equal to the excess of any amount paid for such property above any amount realized on the forfeiture. If the asset was capital in the taxpayer's hands, the exchange will retain that character and be treated as a capital loss. Once the election is made, it may not be revoked except with consent from the IRS Commissioner.

Other considerations, beyond possible forfeiture of unvested stock, are the risk for a potential post-election decline in the value of the stock, as well as whether committing any cash up front with the election makes sense in the purview of the client's overall financial plan.

## Making a §83(b) Election

Once deciding to make the election, the election must be filed with the IRS no later than 30 days after the transfer date. The individual who performed the services that is making the election must file a signed statement with the IRS. The statement must include general information about the taxpayer, a description of the property to which the election applies, and the restrictions to which that property is subject, among other information. Additionally, the electing individual must submit a copy of the election to the person for whom the services were performed.

Rev. Proc. 2012-29 provides an example election letter, along with other general information on §83(b) elections. It should be noted that recently issued final regulations may supersede Rev. Proc. 2012-29 on some points. This includes the elimination of the requirement to attach a copy of the election to the tax return for the year in which the property is transferred.

Choosing to elect §83(b) can be a prime tax planning opportunity that may easily be overlooked. This time-sensitive election allows for a potentially minimized ordinary income inclusion connected with the vesting of RSAs, as well as capital gain treatment on a larger portion of the realization of any post-transfer appreciation upon sale of the stock. As this article discusses §83(b) as it relates to restricted stock awards, it is important to note that restricted stock units are not eligible for the election, as their grant does not qualify as a property transfer under §83.



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