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earliest of (Code Sec. 83(i)(1)(B)):

Craig Smalley • Jan. 21, 2019



Under TCJA, if a Code Sec. 83(i) election (also called an inclusion deferral election) is made, then the tax year of inclusion is the employee's tax year that includes the earliest of (Code Sec. 83(i)(1)(B)):

1. the first date the qualified stock becomes transferable (including, solely for this purpose, becoming transferable to the employer) (Code Sec. 83(i)(1)(B)(i));
2. the date the employee first becomes an excluded employee (defined below) (Code Sec. 83(i)(1)(B)(ii));

3. the first date on which any stock of the corporation that issued the qualified stock

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above. However, the term can't include any market that isn't recognized as an established securities market for purposes of a Code provision other than Code Sec. 83(i). (Code Sec. 83(i)(1)(B)(iii))

It's intended that the limited circumstances outlined in Code Sec. 83(c)(3) and applicable regs apply in determining when stock first becomes transferable or is no longer subject to a substantial risk of forfeiture (For example, income inclusion can't be delayed due to a lock-up period as a result of an initial public offering (IPO).

If an employee makes a Code Sec. 83(i) election, then the employer's deduction of the amount of income attributable to the qualified stock is deferred until the employer's tax year in which or with which ends the tax year of the employee for which the amount is included in the employee's income as described in (1)–(5), above.

An excluded employee is, for any corporation, any individual (Code Sec. 83(i)(3)(B)):

(1) who is a 1% owner within the meaning of the Code Sec. 416(i)(1)(B)(ii) top-heavy plan rules at any time during the calendar year, or who was such a 1% owner at any time during the 10 preceding calendar years (Code Sec. 83(i)(3)(B)(i));

(2) who is or has been at any earlier time (Code Sec. 83(i)(3)(B)(ii)) the corporation's chief executive officer (CEO) or an individual acting in that capacity (Code Sec. 83(i)(3)(B)(ii)(I)), or the corporation's chief financial officer (CFO) or an individual acting in that capacity (Code Sec. 83(i)(3)(B)(ii)(II));

(3) who bears a relationship described in the Code Sec. 318(a)(1) family attribution rules to an individual described in (2), above (Code Sec. 83(i)(3)(B)(iii)); or

(4) who is one of the four highest compensated officers of the corporation for the tax year, or was one of the four highest compensated officers of the corporation for any

of the 10 preceding tax years, determined for each tax year on the basis of the

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any qualified employee, any stock in a corporation that's the employer of that employee, if (Code Sec. 83(i)(2)(A)):

- the stock is received (Code Sec. 83(i)(2)(A)(i)):
 - ... in connection with the exercise of an option (Code Sec. 83(i)(2)(A)(i)(I)); or
 - ... in settlement of an RSU (Code Sec. 83(i)(2)(A)(i)(II)); and
- the corporation granted the option or RSU (Code Sec. 83(i)(2)(A)(ii)):
 - ... in connection with the performance of services as an employee (Code Sec. 83(i)(2)(A)(ii)(I)); and
 - ... during a calendar year in which the corporation was an eligible corporation (defined below). (Code Sec. 83(i)(2)(A)(ii)(II))
- But qualified stock doesn't include any stock if the employee may sell the stock to, or otherwise receive cash in lieu of stock from, the corporation at the time that the employee's rights in the stock first become transferable or not subject to a substantial risk of forfeiture. (Code Sec. 83(i)(2)(B))
- For purposes of determining whether stock is qualified stock (Code Sec. 83(i)(2)(C)), a corporation is an eligible corporation for a calendar year if (Code Sec. 83(i)(2)(C)(i)):
 -
 - (a) no stock of the corporation (or any predecessor of the corporation) is readily tradable on an established securities market (as determined under Code Sec. 83(i)(1)(B)(iii), discussed above) during any preceding calendar year (Code Sec. 83(i)(2)(C)(i)(I)); and

- (b) the corporation has a written plan under which, in that calendar year, not less

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- if any stock of the corporation is readily tradable on an established securities market at any time before the election is made. (Code Sec. 83(i)(4)(B)(ii))
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- For purposes of (b), above, the determination of rights and privileges with respect to stock is made in a similar manner as under the Code Sec. 423(b)(5) rule for employee stock purchase plans (ESPPs) (FTC ¶H-2973 ; USTR ¶4234). (Code Sec. 83(i)(2)(C)(ii)(I)) However:
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- . . . employees won't fail to be treated as having the same rights and privileges to receive qualified stock solely because the number of shares available to all employees isn't equal in amount, so long as more than a de minimis number of shares is available to each employee. (Code Sec. 83(i)(2)(C)(ii)(II))
- . . . rights and privileges with respect to the exercise of an option aren't treated as the same as rights and privileges with respect to the settlement of a RSU. (Code Sec. 83(i)(2)(C)(ii)(III))
- The requirement that 80% of all applicable employees be granted stock options or RSUs with the same rights and privileges can't be satisfied in a tax year by granting a combination of stock options and RSUs. Rather, all such employees must either be granted stock options or be granted RSUs for that year. (Com Rept, see ¶5086)
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- For purposes of (b), above, the term "employee" doesn't include any part-time employee, as described in Code Sec. 4980E(d)(4) (i.e., an employee who's customarily employed for fewer than 30 hours per week, FTC 2d/Fin ¶H-1350.25), or any excluded employee (defined above). (Code Sec. 83(i)(2)(C)(iii))

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