

## The New 83(b) Election Requirements

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IRS has removed one requirement for making 83(b) elections, but other conditions, with a tight 30 day deadline, remain. The new rule applies to grants of non-vested property (usually stock) in 2016 and later and may be used for 2015.

### ***Background: an 83(b) election may save taxes in the long term***

Typically, 83(b) elections are made by service providers who receive low value property, such as employer stock in a start-up, that is subject to temporary vesting restrictions. Without an §83(b) election, there is no tax when non-vested property is granted. However, when the vesting conditions are met, there is ordinary income at the time based on the value at the time. That can be a lot of high-rate taxable income. Section 83(b) elections are a way around that. With an 83(b) election, the service provider agrees to pay ordinary tax early, determined as if the property had no temporary vesting restrictions. The advantage, especially in start-ups, is that the value at time of grant is usually slight, so reporting salary income does not cost much. The 83(b) election then allows the service provider, for tax purposes, to treat the property as a capital asset purchased at the time of grant. The advantages:

1. Hopefully, the property appreciates. When it is sold, the gain will be capital in nature.
2. The service provider will not be taxed at ordinary rates at the time the property becomes vested, an especially important advantage when the property is illiquid at the time of vesting and is not being sold.

There is only one disadvantage to making an 83(b) election. If the service provider loses the property due to a vesting requirement – quitting before a required period of years, for example - , the taxes that were paid early were unnecessary. However, a tax loss can be claimed for the year when the property is forfeited, based on the value at the time of grant.

### ***The only change in the new regulations.***

Some commentary we have read creates the impression that IRS has removed its filing requirements for 83(b) elections and that the elections only need to be produced if audited. That's wrong. The IRS has only changed a requirement that the election be attached to the service provider's annual tax return. All other requirements, including a special filing with IRS within 30 days of the grant, remain intact. Only one sentence was removed from the regulation:

*“(c) Manner of making election. The election referred to in paragraph (a) of this section is made by filing one copy of a written statement with the internal revenue office with whom the person who performed the services files his return. ~~In addition, one copy of such statement shall be submitted with this income tax return for the taxable year in which such property was transferred.~~”*

The IRS reasoning is that many annual tax forms are now filed electronically. The 83(b) form of election (see below) is not an IRS form, and filers were running into technical problems in attaching manually prepared elections to the Form 1040.

### ***These 30 day requirements haven't changed***

IRS had no desire to turn the 83(b) election process into an honor system without ascertainable deadlines. The following regulatory requirements remain:

1. A written copy of the 83(b) election must still be filed within 30 days of the grant with the IRS office where the service provider files his or her return.
2. A written copy of the election must still be filed within 30 days of the grant with the recipient of the services (usually an employer).
3. If the non-vested property right was transferred to a third party, the transferee must also get a copy of the form.

In other words, removing the requirement to file the election with IRS with the annual tax return is not an invitation to miss the 30 day deadline for other election requirements, including a first filing with the IRS office.

### ***The content requirement for the election hasn't changed.***

As noted, there is no official form for the election. The regulations require that the election be signed by the service provider and contain the following information:

- (1) The name, address and taxpayer identification number of the taxpayer;
- (2) A description of each property with respect to which the election is being made;
- (3) The date or dates on which the property is transferred and the taxable year for which such election was made;
- (4) The nature of the restriction or restrictions to which the property is subject;
- (5) The fair market value at the time of transfer (determined without regard to any vesting restriction that will lapse at some point, such as a years of employment requirement).
- (6) The amount (if any) paid for such property; and
- (7) A statement to the effect that copies have been furnished to the service recipient and, if applicable, a transferee.

### ***Summation***

When people are busy, it's easy to miss tight deadlines. The 83(b) election may be the most important tax filing an executive makes. The IRS has simply removed one minor condition. Executives who receive non-vested stock should pay careful attention to what is still required in that critical first 30 days.

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