NYCIRB
New York Compensation
Insurance Rating Board
733 Third Avenue
New York, NY 10017
Tel: (212) 697-3535

July 1, 2020

R.C. 2519

Re: Basis of Premium Clarifications / Equity and Deferred Compensation
Effective Date: July 1, 2020

Members of the Rating Board:

I write to inform you that the New York State Department of Financial Services ("DFS") approved amendments to the Rating Board's New York Workers' Compensation and Employers' Liability Manual ("Manual") which are detailed herein, attached hereto, and are effective on July 1, 2020.

Specifically, DFS approved revisions to Rule V (Basis of Premium) of the Manual that serve to memorialize current industry practice regarding different types of equity compensation and deferred compensation and their respective inclusion or exclusion as payroll for premium determination purposes.

The following modified and final pages from the Manual, reflecting the approved amendments, are attached for your convenience: Rules Section – Pages R-52, R-52a, R-52b, R-53 and R-53a.

If you have any questions, please contact Mr. Mark Battistelli, Vice President of Underwriting Services at (212) 697-3535, ext. 113 or at underwritingservices@nycirb.org.

Very truly yours,

Jeremy Attie
President and CEO

Enclosures

(y) Payment for filming of commercials excluding subsequent residuals which are earned by the commercial's participant(s) each time the commercial appears in print or is broadcast.

★ **(z)** Payout of deferred compensation to current employees from an employer's contributions to previously deferred payroll.

Example: The payout of an employer's contribution from a non-qualified deferred compensation plan to the extent these payments are available in payroll records.

Rationale: Payouts are considered additional income.

★ **(aa)** Payment by an employer in connection with an employee's cashless exercise of stock options.

Note: A cashless exercise is the purchase of shares of stock from a company by using the proceeds of a pending sale.

Example: An employee uses his or her options to buy shares of stock, which they simultaneously sell in order to pay the exercise cost, transaction fees and any withholding taxes due at exercise. They may sell all the shares and retain any remaining cash or sell just enough shares to pay all costs and then keep the remaining shares. For example, an employee exercises his or her option to purchase 1,000 shares of XYZ Corp. at $2.00 per share and then immediately sells these shares in the market for $5.00 per share. The employee uses the proceeds of the sale to pay the purchase costs of the shares of stock.

Rationale: Cashless exercises of employee stock options are completed without making a cash payment. The company essentially lends the employee the money needed for the option exercise for the fraction of a second that the employee owns the shares.

★ **(bb)** The amount by which an employee's salary is reduced to fund a pension, deferred compensation plan, equity-based compensation plan, Qualified or Non-Qualified Employee Stock Purchase Plan (ESPP), stock options or other employee-elected deferral plan, when earned, even though such plan is a portion of a cafeteria plan.

Rationale: Since employees' salary dollars fund these plans, those dollars should count in the payroll base to determine premium.

★	**(cc)** The amount by which an employee's salary is reduced to contribute to the purchase of stock options or Qualified or Non-Qualified Employee Stock Purchase Plans (ESPP), when earned. **Rationale:** Since employees' salary dollars contribute to these plans, those dollars should count in the payroll base to determine premium.
★	**(dd)** The value of equity-based compensation plans (other than Stock Options and Stock Purchase Plans), including but not limited to Stock Transfers, Stock Warrants, Restricted Stock, Restricted Stock Units, Phantom Stock Plans and Stock Appreciation Rights, shall be included at the time of vesting when vesting is on a scheduled or annual basis, such as graded vesting or scheduled cliff vesting, or when vesting is based on the achievement of performance goals or milestone anniversaries. **Note:** Amounts contributed by employees are not to be double counted. **Rationale:** Easily verifiable by audit.
★	**(ee)** The amount by which an employee's salary is reduced to contribute to an equity-based compensation plan. **Rationale:** Since employees' salary dollars contribute to these plans, those dollars should count in the payroll base to determine premium.
★	**3. Exclusions**
★	**(a)** Tips and other gratuities received by employees;

★	(b) Payments by an employer to group insurance or group pension plans for employees, other than payments covered by Section (B)(2)(n) and (u) of this Rule;
★	(c) The value of special rewards for individual invention or discovery;
★	(d) Dismissal or severance payments except for time worked or accrued vacation;
★	(e) Reimbursed expenses and allowances paid to employees shall be excluded, provided all three of the following conditions are met:
★	(i) The expenses or allowances were incurred in the course of the employer's business;
★	(ii) The amounts are shown separately for each employee in the employer's records; and
★	(iii) The amount of each expense reimbursement or allowance payment approximates the actual expenses incurred.
★	(f) Payments for active military duty, including subsistence allowance paid by the federal government to veterans in training;
★	(g) Employee discounts on goods purchased from the employee's employer;
★	(h) Meal allowance when working late;
★	(i) Work uniform allowances;

	(j) Sick pay paid to an employee by a third party such as an insured's group insurance carrier which is paying disability income benefits to a disabled employee;
	(k) Employer provided perquisites ("perks") such as:
	(i) An automobile;
	(ii) An airplane flight;
	(iii) An incentive vacation (e.g. contest winner);
	(iv) A discount on property or services;
	(v) Club memberships;
	(vi) Tickets to entertainment events;
	(vii) Educational assistance; and
	(viii) Relocation and moving expenses.
	(l) Employer contributions to salary reduction, employee savings plans, retirement, or cafeteria plans (IRC 125); contributions made by the employer, at the employer's expense, that are determined by the amount contributed by the employee; and
★	~~**(m)** Stock Option Plans – When stock options are exercised, the income is not included for remuneration purposes.~~
★	**(m)** Payout of deferred compensation to retired or terminated employees who are not employed during the current policy period, provided the employer maintains records that segregate such payments. **Example:** The payout from a non-qualified deferred compensation plan to a retiree. **Rationale:** Retired / terminated employees are not reflective of the employer's current policy exposure.

★	**(n)** Employer contributions in connection with: • Qualified or Non-Qualified Employee Stock Purchase Plans (ESPP) • The exercise of stock options, other than the cashless exercise of stock options • Deferred compensation plans **Rationale:** This is in line with industry practice of not counting these employer contributions in the payroll base to determine premium.
★	**(o)** The difference between the market price of stock and any discounted price paid by the employee. **Rationale:** This is in line with industry practice of not counting these amounts in the payroll base to determine premium.
★	**(p)** The market value of equity-based compensation plans shall not be included as remuneration when accelerated cliff vesting is triggered by (1) an Initial Public Offering (IPO) of stock, or (2) a change in majority ownership where the owners(s) prior to the change own less than one-half interest after the change. **Example**: A change in majority ownership could include a merger or acquisition if the owner(s) prior to the change own less than a one-half interest after the change. **Rationale:** This recognizes that these types of payouts are infrequent, possibly once in lifetime events. As such, they should not trigger a significant increase in premium for a given policy year that is not commensurate with the exposure.

	(y) Payment for filming of commercials excluding subsequent residuals which are earned by the commercial's participant(s) each time the commercial appears in print or is broadcast.
★	**(z)** Payout of deferred compensation to current employees from an employer's contributions to previously deferred payroll. **Example:** The payout of an employer's contribution from a non-qualified deferred compensation plan to the extent these payments are available in payroll records. **Rationale:** Payouts are considered additional income.
★	**(aa)** Payment by an employer in connection with an employee's cashless exercise of stock options. **Note:** A cashless exercise is the purchase of shares of stock from a company by using the proceeds of a pending sale. **Example:** An employee uses his or her options to buy shares of stock, which they simultaneously sell in order to pay the exercise cost, transaction fees and any withholding taxes due at exercise. They may sell all the shares and retain any remaining cash or sell just enough shares to pay all costs and then keep the remaining shares. For example, an employee exercises his or her option to purchase 1,000 shares of XYZ Corp. at $2.00 per share and then immediately sells these shares in the market for $5.00 per share. The employee uses the proceeds of the sale to pay the purchase costs of the shares of stock. **Rationale:** Cashless exercises of employee stock options are completed without making a cash payment. The company essentially lends the employee the money needed for the option exercise for the fraction of a second that the employee owns the shares.
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