

Client Alert.

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Reminder: Final IRS Reporting Rules on Incentive Stock Options and Employee Stock Purchase Plan Transactions in Effect for 2010; Information Statements Due January 31, 2011

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This is a reminder to companies that grant incentive stock options (“ISOs”), or that maintain a tax advantaged employee stock purchase plan (“ESPP”). **No later than January 31, 2011**, companies must furnish information statements to employees (and former employees) who exercised an ISO during 2010 or transferred stock during 2010 that was previously acquired pursuant to an ESPP. **This is also the first year for which reports to the IRS are required. No later than March 31, 2011**, for electronic filers and **no later than February 28, 2011**, for paper filers, companies must also provide such information to the IRS.

Failure to provide such statements to employees on a timely basis may cause the company to incur a penalty of \$50 per statement, up to a maximum of \$100,000 per year. Late filings to the IRS will incur additional penalties of \$50 per statement, up to a maximum of \$250,000 per year.

We encourage companies to make sure their information collection processes are in place, or that their third-party vendors have processes in place to comply with the new reporting requirements.

BACKGROUND

In December 2009, the IRS issued final regulations (TD 9470) outlining the new reporting requirements for stock transfers made in 2010 associated with the exercise of ISOs or the transfer of shares acquired under an ESPP when legal title of stock is transferred to an employee or former employee. A principal objective of these final regulations is to require companies to furnish employees with sufficient information to calculate their tax obligations.

Companies are now required to use IRS Form 3921 (for employees exercising ISOs) or Form 3922 (for employees transferring stock under an ESPP) to provide information statements to the IRS in addition to providing such statements to participating employees.

FILING PROCEDURES

For companies filing more than 250 information statements on either Form 3921 or 3922 for the year, the IRS requires that companies file that form electronically using the procedures in Publication 1220 provided [here](#). Companies may voluntarily file electronically in order to take advantage of the later filing date.

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For paper filers, Forms 3921 and 3922 are provided online for informational purposes only. An official printed version is the only allowable form for paper filers. Filing either form downloaded from the IRS website may result in a penalty of \$50 per information return. Official printed versions of forms 3921 and 3922 may be ordered by calling 1-800-TAX-FORM or ordered online [here](#).

A request for an automatic 30-day extension from the original due date is available to both paper and electronic filers by submitting Form 8809 provided [here](#).

ISO Information Statements (2010 Transactions). Form 3921 is required when an employee or former employee exercises an ISO. If a statement relates to the exercise of an ISO, the following information must now be provided:

1. The name, address, and employer identification number of the corporation transferring the stock;
2. The name, address, and identifying number of the person to whom the share(s) of stock were transferred;
3. The name and address of the corporation whose stock is the subject of the option (if other than the corporation transferring the stock);
4. The date the option was granted;
5. The date the shares were transferred to the person exercising the option;
6. The fair market value of the stock at the time the option was exercised;
7. The number of shares of stock transferred pursuant to the option; and
8. The total exercise price per share.

ESPP Information Statements (2010 Transactions). Form 3922 is required when an employee transfers stock acquired under an ESPP to another party. This includes transferring stock to a recognized broker or financial institution maintaining an account for the employee. In contrast, no reporting is required if the ESPP stock is issued directly to the employee. An additional reporting requirement for ESPP stock occurs where the exercise price is not fixed or determinable on the date of grant. For such grants, the exercise price is determined as if the option were exercised on the date of the grant. If a statement pertains to the transfer of ESPP stock after the employee or former employee has acquired it, the statement must now include the following:

1. The name, address, and employer identification number of the corporation whose stock was transferred;
2. The name, address, and identifying number of the transferor (i.e., the employee or former employee who transferred the previously acquired ESPP stock);
3. The date the option was granted;
4. The fair market value of the stock on the date the option was granted;
5. The actual exercise price paid per share;
6. The exercise price per share determined as if the option was exercised on the grant date (provided only in certain circumstances as described above);
7. The option exercise date;

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8. The fair market value of the stock on the date the option was exercised;
9. The date the person transferred legal title of the shares; and
10. The number of shares to which the person transferred legal title.

If you have any questions, contact your Morrison & Foerster attorney or any member of the Employee Benefits and Executive Compensation Group.

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