

Client Alert.

January 16, 2013

Reminder: Information Statements Due by January 31, 2013, for 2012 Incentive Stock Options and Employee Stock Purchase Plan Transactions; IRS Filings Also Required

By Michael Frank and Wells Miller

This is a reminder to public and private companies that grant incentive stock options (“ISOs”) or maintain a tax-advantaged employee stock purchase plan (“ESPP”). Under IRS regulations, these companies must provide information statements on Forms 3921 and 3922 no later than January 31, 2013, to any employee or former employee who exercised an ISO during 2012 or transferred shares of stock during 2012 that were previously acquired pursuant to an ESPP. Companies that fail to provide such statements on a timely basis may be liable for penalties of \$50 per statement, up to a maximum of \$100,000 per year.

In addition, companies must file returns with the Internal Revenue Service on Forms 3921 and 3922 no later than February 28, 2013 (if filed on paper) or April 1, 2013 (if filed electronically). Companies that are required to file 250 or more of either type of form must file the forms electronically. Companies that fail to timely file these information returns may be liable for penalties of up to \$100 per information return, up to a maximum of \$1,500,000 per year.

Content of Information Statements and Returns. The statements provided to employees and the returns provided to the IRS need to be made on a specified form. Form 3921 is used for ISO exercises and Form 3922 for ESPP share transfers. Sample Forms [3921](#) and [3922](#) are available on the IRS website for informational purposes but cannot be used for filing. The official forms to be used for filing may be ordered by calling 1-800-TAX-FORM (1-800-829-3676).

ISO Exercises. Form 3921 provides the following information regarding the exercise of an ISO:

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 or shares 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 option was exercised;
6. The exercise price per share;
7. The fair market value of a share on the date the option was exercised; and
8. The number of shares of stock transferred pursuant to the exercise of the option.

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ESPP Share Transfers. Form 3922 provides the following information regarding the first transfer of shares of stock acquired by an individual pursuant to an option granted under an ESPP, where the exercise price was less than 100 percent of the fair market value of the shares on the date of grant or was not fixed and determinable on the date of grant:

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 were exercised on the grant date (provided only in certain circumstances);
7. The option exercise date;
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.

The “first transfer of legal title” that triggers the ESPP share transfer reporting requirements includes an immediate deposit of the shares acquired under the plan into a brokerage account established on behalf of the employee, which may occur on the ESPP purchase date. If shares acquired under the ESPP are issued in certificate or book-entry form, the “first transfer of legal title” will occur when the employee subsequently sells the shares or transfers them to a brokerage account.

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