Cooley

Year-End Reporting for ISO Exercises and ESPP Stock Transfers

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This alert serves as a reminder of certain year-end reporting requirements imposed under Section 6039 of the Internal Revenue Code of 1986, as amended, with respect to:

- Incentive stock option (ISO) exercises by current and former employees.
- Transfers of stock acquired by current and former employees under a tax-qualified employee stock purchase plan (ESPP).

For each ISO exercise and ESPP stock transfer that occurred in 2022, the corporation must furnish an information statement to the current or former employee regarding such transaction no later than January 31, 2023, and it must file an information return with the Internal Revenue Service regarding such transaction no later than February 28, 2023, if filing by paper, and no later than March 31, 2023, if filing electronically. These reporting requirements are intended to provide current and former employees with sufficient information to enable them to calculate their tax obligations.

Employee information statement

Every corporation that in 2022 issued stock upon the exercise of an ISO – meaning a stock option described in Section 422 of the Internal Revenue Code – must, on or before January 31, 2023, furnish to the current or former employee who exercised the option a written statement containing the information on Form 3921. Copy A of Form 3921 is filed with the IRS, copy B is furnished to the current or former employee, and copy C is retained by the corporation for its records.

The reporting deadlines noted above and below may be extended for taxpayers in select counties for which the IRS has announced disaster relief, including people affected by California winter storms, flooding and mudslides, Hurricane Nicole in Florida and severe winter storms in northern New York State. A full list of disaster deadline extensions can be found on the IRS website.

Form 3921 is available on the IRS website, but a copy A downloaded from the IRS website should not be filed. The official printed version of this IRS form is scannable, but the online version of it, printed from the IRS website, is not. The official form may be ordered from the IRS website. Corporations also should note:

- A penalty of $290 per information return may be imposed for failing to file a correct form by the due date.
- The penalty is lowered to $50 if corrected within 30 days (by March 30 if the due date is February 28), and is lowered to $110 if corrected by August 1, 2023, up to an aggregate annual limit of $3,532,500, or $1,177,500 for small businesses.
- Penalties will not apply to any failure that the corporation can show was due to reasonable cause and not willful neglect.

Similarly, every corporation that in 2022 records or has recorded by its transfer agent an initial transfer by a current or former employee of stock acquired by such employee under an ESPP – meaning a plan that is established under Section 423 of the Internal Revenue Code – must, on or before January 31, 2023, furnish to the current or former employee who's transferring the stock a written statement containing the information on Form 3922 when the purchase price is either:

- Less than 100% of the value of the stock on the grant date.
- Not fixed or determinable on the grant date.

Form 3922 is available on the IRS website. Copy A of Form 3922 is filed with the IRS, copy B is furnished to the current or former employee, and copy C is retained by the corporation for its records. As explained above, the copy A that is filed with the IRS needs to be scannable.

Form of employee information statement

The employee information statement must either be:

- Contained on the appropriate form (i.e., Form 3921 for ISO exercises or Form 3922 for ESPP stock transfers).
- Contained on a substitute form that meets the format and content requirements in Publication 1179.

A separate form must be filed for each transaction and, if an employee has more than one transaction during the year, each form must contain a unique account number, such as a number provided by equity tracking software. However, if a substitute form is used, the company may aggregate transactions, providing a single form to each employee.

Delivery of employee information statement

Employee information statements, either copy B of the applicable form or an acceptable substitute, may be mailed or delivered to the current or former employee's last known address or may be sent electronically, provided that the person has given their consent to receive the statement electronically and the corporation meets certain other specified requirements.

IRS information return

A corporation is required to file an information return with the IRS in addition to providing information statements to employees. For exercises and transfers in 2022, the information returns must be filed no later than February 28, 2023, if filing by paper, and no later than March 31, 2023, if filing electronically (subject to extensions in certain declared disaster zones as noted above).

Companies filing 250 or more copies of Form 3921 or Form 3922 in a year (determined separately and not aggregated between them for purposes of this 250-form threshold) must file their information returns electronically. The Taxpayer First Act of 2019, enacted July 1, 2019, authorized the US Treasury Department and the IRS to reduce the 250-return requirement, and regulations proposed in July 2021 reduced the 250-return threshold to 100 in 2022 and to 10 in 2023. However, the proposed regulations have yet to be finalized, and the threshold remains at 250 until issuance of final regulations.

The information returns must contain the same information required by the Section 6039 regulations with respect to employee information statements. Information returns for ISO exercises must be made on Form 3921, and information returns for ESPP stock transfers must be made on Form 3922.

It is possible to file Form 8809 to get an automatic 30-day extension to the due date for filing information returns. Form 8809 is available on the IRS website, and the extension will only extend the due date for filing the returns with the IRS, not the due date for furnishing statements to recipients.

Information requirements

As explained above, the information that corporations must provide to a current or former employee in an information statement is the same information that corporations must report to the IRS in an information return. When reporting this information, corporations should use the applicable form for both the information statement and the information return. Also as described above, copy A of the applicable form is filed with the IRS, copy B is provided to the current or former employee, and copy C is retained for the corporation's records.

Form 3921 for ISO exercises must contain:

- The name, address and employer identification number of the corporation transferring the shares.
- The name, address, and taxpayer identification number of the current or former employee to whom the shares were transferred pursuant to the exercise of the ISO.
- The grant date, the exercise price per share, the date of exercise, the fair market value per share on the date of exercise and

the number of shares transferred pursuant to the exercise of the ISO.

Form 3922 for ESPP stock transfers must contain:

- The name, address and employer identification number of the corporation whose shares were transferred.
- The name, address, and taxpayer identification number of the current or former employee who transferred the shares.
- The date the purchase right was granted to the current or former employee, and the fair market value per share on the grant date.
- The purchase date, the fair market value per share on the purchase date and the purchase price paid per share on the purchase date.
- The number of shares to which legal title was transferred by the current or former employee, the date the legal title of the shares was first transferred by the current or former employee and, if the purchase price was not fixed or determinable on the grant date, the purchase price per share determined as if the shares were purchased on the grant date.

If you have any questions about this alert, please contact a member of the Cooley compensation & benefits group.

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