

## Year-End Reporting for ISO Exercises and ESPP Stock Transfers

December 23, 2020

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 (i) exercises of incentive stock options (ISOs) by employees and former employees and (ii) transfers of stock acquired by employees and former employees under a tax-qualified employee stock purchase plan (ESPP).

For each ISO exercise and ESPP stock transfer that occurred in 2020, the corporation must furnish an information statement to the employee (or former employee) regarding such transaction no later than February 1, 2021, and it must file an information return with the IRS regarding such transaction no later than March 1, 2021 (or March 31, 2021, if filing electronically). These reporting requirements are intended to provide employees and former employees with sufficient information to enable them to calculate their tax obligations.

### Employee information statement

Every corporation that in 2020 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 February 1, 2021, furnish to the employee (or former employee) who exercised the option a written statement containing the information contained on Form 3921. Copy A of Form 3921 is filed with the IRS, copy B is furnished to the employee (or former employee) and copy C is retained by the corporation for its records.

[Form 3921 is available on the Internal Revenue Service's website](#), but note that 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](#). A penalty of \$280 per information return may be imposed for failing to file a correct form by the due date (lowered to \$50 if corrected within 30 days and to \$110 if corrected prior to August 1, 2021), up to an aggregate annual limit of \$3,392,000 (or \$1,130,500 for small businesses). Penalties will not apply to any failure that the corporation can show was due to reasonable cause and not to willful neglect.

Similarly, every corporation that in 2020 records (or has recorded by its transfer agent) an initial transfer by an employee (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) when the purchase price is either (i) less than 100% of the value of the stock on the grant date or (ii) not fixed or determinable on the grant date must, on or before February 1, 2021, furnish to the employee (or former employee) transferring the stock a written statement containing the information contained on Form 3922. Copy A of Form 3922 is filed with the IRS, copy B is furnished to the employee (or former employee) and copy C is retained by the corporation for its records.

[Form 3922 is available on the IRS' website](#). As discussed above, copy A that is filed with the IRS needs to be scannable.

### Form of employee information statement

The employee information statement must either be (i) contained on the appropriate form (i.e., Form 3921 with respect to ISO

exercises or Form 3922 with respect to ESPP stock transfers) or (ii) contained on a substitute form that meets the format and content requirements contained in Publication 1179.

A separate form must be filed for each transaction, even if one employee has more than one transaction during the year and, if an employee has more than one transaction, then each such 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 either mailed or delivered to the employee's (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 2020, the information returns must be filed no later than March 1, 2021 (or March 31, 2021, if filing electronically).

The information returns must contain the same information required by the Section 6039 regulations with respect to employee information statements. Information returns with respect to ISO exercises must be made on Form 3921 and information returns with respect to 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](#). The extension will only extend the due date for filing the returns with the IRS and will not extend the due date for furnishing statements to recipients.

## **Information requirements**

As described above, the information that corporations must provide to an employee (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 use the applicable form for both the information statement and the information return. As described above, copy A of the applicable form is filed with the IRS, copy B is provided to the employee (or former employee) and copy C is retained for the corporation's records.

### **[Form 3921](#): ISO exercises**

- The name, address and employer identification number of the corporation transferring the shares
- The name, address and taxpayer identification number of the employee (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](#): ESPP stock transfers**

- The name, address and employer identification number of the corporation whose shares were transferred

- The name, address and taxpayer identification number of the employee (or former employee) who transferred the shares
- The date the purchase right was granted to the employee (or former employee), the fair market value per share on the grant date, the purchase date, the fair market value per share on the purchase date, the purchase price paid per share on the purchase date, the number of shares to which legal title was transferred by the employee (or former employee), the date the legal title of the shares was first transferred by the employee (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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