

Executive Compensation Alert:

IRS Filing and Reporting Requirements for ISO Exercises and ESPP Stock Transfers

JANUARY 10, 2013

Fenwick
FENWICK & WEST LLP

This Client Alert is intended to remind you of certain year-end reporting requirements under Section 6039 of the Internal Revenue Code of 1986, as amended (the "Code"), with respect to stock issued to employees (or former employees) upon the exercise of an incentive stock option (an "ISO") or transferred under a tax-qualified employee stock purchase plan (an "ESPP") and inform you of Internal Revenue Service ("IRS") filing requirements for transactions that occurred in 2012.

Forms

The IRS has issued two forms (along with accompanying instructions) that corporations must use to satisfy the return and information statement requirements under Section 6039. Form 3921 is required when an employee (or former employee) exercises an ISO, and Form 3922 is required when a corporation records a transfer of legal title of shares acquired under an ESPP (including to a broker or other financial institution) when either (a) the purchase price of the shares was less than the fair market value of

the shares of stock on the date of grant or (b) the purchase price of the shares was not fixed or determinable on the date of grant.

Upcoming Deadlines

For ISO exercises and applicable ESPP stock transfers that occurred in the calendar year 2012 corporations must file completed Forms 3921 and Forms 3922 with the IRS no later than February 28, 2013 for paper filers, and no later than April 1, 2013 for electronic filers. If a corporation will file 250 or more forms, electronic filing is required.

For ISO exercises and ESPP stock transfers that occurred in calendar year 2012, corporations must provide the employee (or former employee) the information statement (Copy B to the applicable Form) no later than January 31, 2013.

Corporations must use the official Form 3921 and 3922 provided by the IRS. **Only one transaction may be reported on each Form 3921 or Form 3922.**

Information requirements of form 3921 and Form 3922:

Exercise of an Incentive Stock Option Form 3921

- The name, address, and employer identification number of the corporation transferring the stock;
- The name, address, and social security number of the employee to whom the share or shares of stock were transferred pursuant to the exercise of the ISO;
- The date the ISO was granted to the employee;
- The exercise price per share;
- The date in 2012 the ISO was exercised by the employee;
- The fair market value of a share of stock on the date the ISO was exercised;
- The number of shares of stock transferred pursuant to exercise of the ISO; and
- An Account Number (only required if the corporation has multiple accounts for an employee, requiring multiple Forms 3921 to be filed).

Transfer of Shares Acquired Under an ESPP Form 3922

- The name, address, and employer identification number of the corporation whose stock is being transferred;
- The name, address, and social security number of the employee;
- The date of grant of the purchase right (typically the offering date for the offering period of the ESPP) under which the shares were issued to the employee;
- The fair market value of the stock on the date of grant;
- The price per share at which the shares were purchased under the ESPP;
- The price per share determined as if the shares were purchased on the date of grant (to be provided only if the purchase price per share is not fixed or determinable on the date of grant);
- The date the shares were purchased by the employee;
- The fair market value of the stock on the date of purchase by the employee;
- The date the legal title of the shares was transferred by the employee;
- The number of shares to which legal title was transferred by the employee; and
- An Account Number (only required if the corporation has multiple accounts for a person, requiring multiple Forms 3922 to be filed).

Action Required

Corporations should order the official Forms 3921 and 3922 from the IRS as soon as possible. Forms may be obtained by calling 1-800-TAX-FORM or ordering the forms online on the IRS website. For informational purposes, Form 3921 is available at <http://www.irs.gov/pub/irs-pdf/f3921.pdf> and Form 3922 is available at <http://www.irs.gov/pub/irs-pdf/f3922.pdf>, and the joint instructions for both forms are available at <http://www.irs.gov/instructions/i3921/aro2.html>. **Forms may not be copied.**

- **All Dispositions** The information statement and return requirements under Section 6039 are not dependent on whether the exercise or stock transfer is a qualifying or disqualifying disposition.
- **Non-Resident Aliens** A corporation is not required to file a return with respect to, or provide an information statement to, an employee who is a non-resident alien and to whom the corporation is not required to provide a Form W-2 for any calendar year beginning with the first day of the calendar year that the ISO or purchase right (typically the offering date for the offering period of the ESPP) was granted and the last day of the calendar year that the ISO was exercised or stock transfer occurred.
- **Non-Compliance** A penalty will be imposed for each statement that has not been timely filed with the IRS. For example, with respect to electronic filings, and subject to certain maximum penalties, the penalty will be \$30 per form (for filings late by 30 days or less), \$60 per form (for filings late by over 30 days, but filed by August 1, 2013), and \$100 per form (for filings after August 1, 2013, or a complete failure to file). There is an additional penalty for failure to provide timely statements to employees. An intentional failure to report will be subject to a greater penalty.

Important Note for Private Corporations

Corporations are advised to discuss with employees the fair market value of common stock throughout the year to facilitate tax planning by the employees. Please note that even though the corporation is not required to file Form 3921 when an employee exercises a non-qualified stock option, it must collect and report withholding taxes upon such exercise and will need to value common stock delivered to the employee.

For more information, you may contact any attorney in the Executive Compensation and Employee Benefits Group at Fenwick & West LLP.

| | | |
|-----------------------|--------------|--|
| Scott P. Spector | 650.335.7251 | sspector@fenwick.com |
| Shawn E. Lampron | 650.335.7642 | slampron@fenwick.com |
| Blake W. Martell | 650.335.7606 | bmartell@fenwick.com |
| Gerald Audant | 415.875.2362 | gaudant@fenwick.com |
| Elizabeth A. Gartland | 415.875.2361 | egartland@fenwick.com |
| Marshall Mort | 650.335.7131 | mmort@fenwick.com |
| Adriana Sherwood | 415.875.2364 | asherwood@fenwick.com |
| Grace Chen | 650.335.7676 | gchen@fenwick.com |
| Sofia Chesnokova | 650.335.7637 | schesnokova@fenwick.com |

©2013 FENWICK & WEST LLP. ALL RIGHTS RESERVED.

THE VIEWS EXPRESSED IN THIS PUBLICATION ARE SOLELY THOSE OF THE AUTHOR, AND DO NOT NECESSARILY REFLECT THE VIEWS OF FENWICK & WEST LLP OR ITS CLIENTS. THE CONTENT OF THE PUBLICATION ("CONTENT") SHOULD NOT BE REGARDED AS ADVERTISING, SOLICITATION, LEGAL ADVICE OR ANY OTHER ADVICE ON ANY PARTICULAR MATTER. THE PUBLICATION OF ANY CONTENT IS NOT INTENDED TO CREATE AND DOES NOT CONSTITUTE AN ATTORNEY-CLIENT RELATIONSHIP BETWEEN YOU AND FENWICK & WEST LLP. YOU SHOULD NOT ACT OR REFRAIN FROM ACTING ON THE BASIS OF ANY CONTENT INCLUDED IN THE PUBLICATION WITHOUT SEEKING THE APPROPRIATE LEGAL OR PROFESSIONAL ADVICE ON THE PARTICULAR FACTS AND CIRCUMSTANCES AT ISSUE. IRS CIRCULAR 230 DISCLOSURE: TO ENSURE COMPLIANCE WITH REQUIREMENTS IMPOSED BY THE IRS, WE INFORM YOU THAT ANY U.S. FEDERAL TAX ADVICE IN THIS COMMUNICATION (INCLUDING ATTACHMENTS) IS NOT INTENDED OR WRITTEN BY FENWICK & WEST LLP TO BE USED, AND CANNOT BE USED, FOR THE PURPOSE OF (I) AVOIDING PENALTIES UNDER THE INTERNAL REVENUE CODE OR (II) PROMOTING, MARKETING, OR RECOMMENDING TO ANOTHER PARTY ANY TRANSACTION OR MATTER ADDRESSED HEREIN.