

Executive Compensation Alert: ESPP Final Regulations Issued

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The IRS and Treasury Department recently issued final employee stock purchase plan (commonly referred to as an “ESPP”) regulations. The final regulations largely adopt the proposed regulations with a notable clarification, described below.

Background

An ESPP is a type of employer stock purchase plan that permits employees to purchase shares of their employer’s stock (or that of a qualifying parent or subsidiary) at a discount relative to the fair market value on the date of purchase. If shares purchased under an ESPP are held for a qualifying period of time (two years from the grant of the option and one year from the date of purchase of the shares upon exercise of the option), then preferential tax treatment will apply upon the subsequent sale or disposition of the ESPP shares.

Determining the Grant Date of an Option under an ESPP

One of the more important clarifications of the final regulations is the requirement that an ESPP contain the maximum number of shares that may be purchased by any one ESPP participant during an offering period in order for the grant date of the option to be deemed to occur on the first day of the offering period for accounting and tax purposes. The number need not be a fixed number, a formula is sufficient, so long as the maximum number can be ascertained. We believe that most ESPPs either have a specified number of shares that may be purchased during an offering period or that the \$25,000 annual limitation on shares that may be purchased is a sufficiently specific formula to establish a share limit.

We recommend companies review their ESPP and confirm that it contains a specified maximum limit on the number of shares that may be purchased in each offering period and, if it varies year to year, that the company set a limit annually. If it does not, we suggest that the ESPP be amended (and if the limit varies year to year, that a corporate resolution be adopted) to include an annual specified maximum limit on the number of shares that may be purchased in each offering period.

Effective Date

The final regulations are effective January 1, 2010 and will apply to any 423 plan grants on or after January 1, 2010. However, most plans have offering periods that commence on or after January 31, 2010. The new final regulations will generally apply to ESPP offering periods (or purchase periods of existing offering periods) beginning on or after January 31, 2010.

For more information, you may contact any attorney in the Executive Compensation and Employee Benefits Group.

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