

Legal Updates & News

Legal Updates

Reminder: Information Statements Due by February 1, 2010, for 2009 Incentive Stock Options and Employee Stock Purchase Plan Transactions; New Disclosure Rules will Apply to 2010 Transactions

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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 no later than February 1, 2010, to any employee or former employee who exercised an ISO during 2009 or transferred stock during 2009 that was 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.

Content of Information Statements. The IRS has prescribed the required content of the information statements. The required content of each statement differs depending on whether it relates to an ISO or an ESPP.

ISO Statements. If a statement relates to the exercise of an ISO, the following information must be provided:

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 shares were transferred to the person exercising the option;
6. The fair market value of the stock at the time the option was exercised;
7. The number of shares of stock transferred pursuant to the option;
8. The type of option under which the transferred shares were acquired; and
9. The total cost of all the shares.

ESPP Statements. If a statement pertains to the transfer of ESPP stock after the employee or former employee has acquired it, the statement must include the following:

1. The name and address 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 such stock was originally acquired by the transferor;
4. The number of shares to which title was transferred; and
5. A statement that the transferor acquired the transferred shares under an ESPP.

New Information Return Requirement for 2010 Transactions. Recently finalized IRS regulations will require companies that must provide information statements to employees or former

employees to provide generally the same information to the IRS with respect to ISO exercises and transfers of ESPP stock that occur beginning in 2010.

The new IRS regulations slightly alter the required content of the information statements to be provided in 2011 and beyond. Going forward, the statements provided to employees and returns provided to the IRS will generally need to be made on a specified form, Form 3921 for ISOs and Form 3922 for ESPPs. The IRS has not yet published either form. We expect the IRS to issue new forms to facilitate these obligations. We suggest that companies establish systems to collect the required information during 2010 so that it may be accurately reported beginning in 2011.

ISO Statements (2010 Transactions). If a statement relates to the exercise of an ISO, the following information must be provided:

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 shares were transferred to the person exercising the option;
6. The fair market value of the stock at the time the option was exercised;
7. The number of shares of stock transferred pursuant to the option;
8. The type of option under which the transferred shares were acquired; and
9. The total exercise price per share.

ESPP Statements (2010 Transactions). If a statement pertains to the transfer of ESPP stock after the employee or former employee has acquired it, the statement must include the following:

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 was 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 new regulations clarify that the information and return requirements will apply only to the first transfer of ESPP shares. They also permit that an immediate transfer of legal title to a recognized broker or financial institution maintaining an account for the ESPP participant can be treated as the first transfer for purpose of these rules.