New U.S. Reporting Requirements for Issuers of Securities

Related Attorneys

John D. Hollinrake Jr.
Lindsay Hopkins

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Background

New requirements under Section 6045B of the Internal Revenue Code of 1986, as amended (the "Code") change the reporting requirements applicable to issuers of securities.[1] Congress amended the Code to add new basis reporting requirements with the Energy Improvement and Extension Act of 2008 because it believes that there may be significant underreporting of capital gain resulting from the misreporting of basis. By mandating information reporting in the circumstances described below, Congress believes that it can reduce capital gain underreporting by ensuring that both taxpayers and the Internal Revenue Service (the "IRS") have the information needed to accurately compute gain or loss from the sale of securities.

We previously notified our clients of these reporting requirements in February, at which point it appeared that the new rules were broad enough to cover initial issuances of securities. However, additional guidance issued by the IRS now specifies that no reporting will be required following an initial public offering. We also understand that no reporting will be required under Code Section 6045B regarding private placements by the issuer. This memorandum updates and clarifies the information provided earlier in accordance with the issuance of the final treasury regulations.

Issuer Reporting in Connection with Actions Affecting Basis

The new reporting obligations under Code Section 6045B are specifically imposed on issuers of securities, including foreign issuers if its securities are held by U.S. taxpayers. Under these rules, if a corporation takes an organizational action on or after January 1, 2011 that affects the basis of its stock, then the corporation generally must file a return with the IRS and furnish an information statement to its security holders (or a holder's nominee) explaining the action and its quantitative effect upon the basis of its securities.[2] The rules are written broadly, and thus will apply to any action that affects the basis of stock, such as mergers, acquisitions, recapitalizations, spin-outs, stock splits, distributions of stock, or non-dividend distributions. However, the instructions to Form 8937, R*eport of Organizational Actions Affecting Basis of Securities*, expressly state that issuers should not file the return for an initial public offering.

An issuer can satisfy its reporting requirements in one of two ways:

1. it may file Form 8937 with the IRS and mail a copy of such return to each

security holder, or
2. it may post a completed Form 8937 in a readily accessible format on its website and keep it accessible for ten years.

If the issuer selects the first option, the information return submitted to the IRS is due within 45 days after the organizational action (unless the action occurs in December, in which case the return must be filed by January 15 of the following year), except for actions occurring in 2011, for which the deadline is extended to January 17, 2012. The issuer will need to furnish the return to each security holder of record by January 15 of the year following the action. An issuer may use an agent, including a depositary, to satisfy its reporting requirements, though it remains liable for any penalties for failure to comply unless the failure is due to reasonable cause. The IRS issued the final information reporting form, Form 8937, and the accompanying instructions on January 5, 2012. The form, which shows the information required, can be viewed here.

If the issuer alternatively chooses to post Form 8937 on its website, the information must be made available by the same due date for reporting the action to the IRS (i.e., normally within 45 days or by January 15th, but extended for actions occurring in 2011).

1 Note that Code Sections 6045 and 6045A impose additional reporting requirements on brokers and on transfers of certain securities to brokers which are beyond the scope of this memorandum.

2 Mutual funds must report organizational actions taken on or after January 1, 2012 that affect the basis of the fund's stock.

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