Executive Compensation Alert:

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

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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 new Internal Revenue Service ("IRS") filing requirements for transactions that occurred in 2011.

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**, which is required when an employee (or former employee) exercises an ISO, requires the following information:
    - The name, address, and employer identification number of the corporation transferring the stock;
        - If other than the corporation identified above, the name, address and employer identification number of the corporation whose stock is being transferred;
    - The name, address, and social security number of the person 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 person;
    - The exercise price per share;
    - The date in 2011 the ISO was exercised by the person;
    - 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 for which multiple Forms 3921 are being filed).
- **FORM 3922,** which 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 was not fixed or determinable on the date of grant, requires the following information:
    - The name, address, and social security number of the transferor;
    - The name, address and employer identification number of the corporation whose stock is being transferred;
    - 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 transferor;
    - 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 transferor;
    - The fair market value of the stock on the date of purchase by the transferor;
    - The date the legal title of the shares was transferred by the transferor;
    - The number of shares to which legal title was transferred by the transferor;
    - An Account Number (only required if the corporation has multiple accounts for a person for which multiple Forms 3922 are being filed).

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

UPCOMING DEADLINES

For ISO exercises and ESPP stock transfers which occurred in calendar year 2011, corporations must file with the IRS the completed Forms 3921 and Forms 3922 no later than February 28, 2012 for paper filers, and no later than April 2, 2012 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 2011, corporations must provide the employee (or former employee) the information statement (Copy B to the applicable Form) no later than January 31, 2012.

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 http://www.irs.gov/pub/irs-pdf/f3921.pdf and Form 3922 is available http://www.irs.gov/pub/irs-pdf/f3922.pdf , and the joint instructions for both forms is available http://www.irs.gov/instructions/i3921/ar02.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, 2012), and $100 per form (for filings after August 1, 2012, 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 (i) discuss with employees the fair market value of common stock throughout the year to assist with estimated tax determinations upon exercise of an ISO, and (ii) value common stock delivered upon exercise of a non-qualified stock option for withholding tax purposes.*

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

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