



## 2014 YEAR-END EXECUTIVE COMPENSATION MATTERS: U.S. Annual Reporting Requirements Applicable to Equity Awards

December 2014

### Reminder of Annual Reporting of ISO Exercises and ESPP Purchases

Employers must file information returns with the IRS and provide employees with information statements related to incentive stock option exercises that occurred during the 2014 calendar year. Similarly, employers (typically relevant only for public companies) must file information returns with the IRS and provide employees with information statements related to initial transfers of stock acquired during the 2014 calendar year under an employee stock purchase plan that complies with Internal Revenue Code Section 423.

The information returns to be filed with the IRS are Form 3921 (for incentive stock option exercises) and Form 3922 (for transfers of shares acquired under an employee stock purchase plan). Employers may satisfy the requirement to provide employees with an information statement (formerly referred to as a Section 6039 statement) by delivering to the employee "Copy B" of the applicable Form 3921 or 3922 or they may use substitute forms for the employee information statements, so long as the substitute forms meet published IRS guidance as to form and content.

The delivery and filing deadlines are as follows:

- February 2, 2014 (January 31<sup>st</sup> is a Saturday) – Deadline to furnish an information statement to employees.
- March 2, 2014 (February 28<sup>th</sup> is a Saturday) – Deadline to file return, if filing a paper copy.
- March 31, 2014 – Deadline to file return, if filing electronically with IRS.

Companies reporting 250 or more transactions (applied separately to transactions under each of Form 3921 and Form 3922) in a year are required to file electronically. Note that each option exercise or stock transfer is a separate transaction, and therefore multiple transactions by a single individual trigger multiple filings.

The penalty for late and incorrect filings ranges from \$30 to \$100 per form, with a maximum penalty of \$1.5 million. The penalty for intentional disregard of these requirements is \$250 per form, with no maximum. The IRS will grant an automatic 30-day extension upon filing a Form 8809, which must be filed electronically or by paper by the applicable deadline. Companies may request an additional 30-day extension due to a claimed hardship, but such extension will not be automatically granted by the IRS.

Third-party vendors are available to assist companies with preparing and filing Forms 3921 and 3922. For a list of vendors, please contact the attorney with whom you regularly work at Gunderson Dettmer or check Publication 1582, which gets updated periodically on the IRS website at [www.irs.gov](http://www.irs.gov). A list of software providers may be found by going to the IRS website and typing “Business e-file Providers” in the Search box.

### Reporting Requirements of U.S. Taxpayers Holding Equity Awards From Non-U.S. Employers

Taxpayers receiving equity awards or certain other compensation from non-U.S. companies may be required to file Form 8938 with the IRS as part of their 2014 tax returns.

The Foreign Account Tax Compliance Act (FATCA), which is intended to combat tax evasion by U.S. taxpayers holding non-U.S. assets, has a very broad reach. One component of FATCA may require U.S. taxpayers receiving equity awards from foreign companies to file this form with the IRS as part of their 2014 tax returns.

FATCA requires that U.S. taxpayers (*i.e.*, U.S. citizens, U.S. tax residents, and non-resident aliens who have elected to be taxed as U.S. residents) report to the IRS information annually on Form 8938 about their non-U.S. financial assets, if those assets exceed certain thresholds. For this purpose, non-U.S. financial assets include equity compensation awards, incentive compensation, pension, deferred compensation and other compensation plans sponsored or granted by a non-U.S. employer or a non-U.S. parent or holding company. (Assets not subject to FATCA reporting include assets held in a U.S. financial account or an account of a non-U.S. subsidiary of a U.S. financial institution.)

For individuals living in the U.S. (*i.e.*, those who do not qualify for the foreign earned income exclusion under Section 911 of the Code), the reporting thresholds are as follows:

| Filing Status                       | Value of Specified Non-U.S. Assets Exceeds |                         |
|-------------------------------------|--|-------------------------|
|                                     | On Last Day of Year                        | At Any Time During Year |
| Single or Married Filing Separately | \$50,000                                   | \$75,000                |
| Married Filing Jointly              | \$100,000                                  | \$150,000               |

Higher thresholds apply to those living outside the U.S. (*i.e.*, those who qualify for the foreign earned income exclusion under Section 911 of the Code).

Note that this reporting obligation falls entirely on U.S. employees and consultants, rather than their employers. However, employees will need guidance from their employers about the value of plan awards in order to comply with the reporting requirements. As a result, employers may want to consider communicating the requirement and the value of plan awards to individuals who are subject to FATCA reporting.

FATCA reporting for the 2014 tax year is due on April 15, 2015 unless an individual obtains an extension to file his or her 2014 federal income tax return. The penalty for failure to file a timely Form 8938 is \$10,000, which can be increased up to \$50,000 for each failure.

### Form 1099-B Reporting Changes

Companies may want to take note of a change for 2014 in the way brokers are required to report certain acquisitions of company stock by service providers.

In recent years, many brokers voluntarily and quite helpfully reported on Form 1099-B the correct cost basis (purchase price paid, if any, plus compensation income recognized in connection with the acquisition of the shares) of employer-company shares acquired under a stock option or ESPP. For shares acquired on or after January 1, 2014, brokers are no longer allowed to include the compensation income recognized in connection with such acquisitions in the Form 1099-B cost basis. Rather, they are now required to report only the purchase price as the basis and employees will have to report an adjustment on Form 8949 to correct the gain or loss they report on their tax return.

As we are coming up on the first tax reporting period where employees are likely to see inaccurate cost-basis reporting for their stock purchases on Form 1099-B, companies may want to anticipate how to manage employee questions and reach out to any broker administering the company's stock plan awards to see what if any communications the broker intends to provide on this topic.

### Reporting Obligations by Companies Taking Actions Affecting the Basis of Securities

If a domestic or foreign company engages in an organizational action (such as a stock split, recapitalization, redemption, or merger transaction) that affects the basis of a specified security<sup>1</sup> owned by a U.S. taxpayer, the company must:

- File a return with the IRS on Form 8937, and
- Furnish an information statement to each certificate holder or nominee reporting the effect on basis.

Among other things, Form 8937 requires information about the security, the date and nature of the organizational action, the quantitative effect on basis (e.g., an adjustment per share or percentage of old basis), and supporting data and authorities specifying how the change in basis was determined.

Form 8937 must be filed with the IRS by the earlier of (a) 45 days after the organizational action, or (b) January 15th following the year in which the action occurred. The information statement to each certificate holder or nominee must be delivered by January 15th following the year in which the action occurred, and must include all subsequent holders of record up to the date the return is provided to the security holders.

It is important to note that the foregoing requirements to file a return and furnish information statements are waived if, by the applicable due date, the company posts the appropriate information about the organizational action on its primary public website (or that of any successor organization) for a period of 10 years.

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<sup>1</sup> In general, a specified security is any share of stock in a company that is treated as a corporation for U.S. tax purposes. Special rules apply to S corporations, regulated investment companies (RICs), real estate investment trusts (REITs), and situations in which the holders of all securities are "exempt recipients," such as corporations, nonprofit organizations, and foreign holders.

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The penalty for late and incorrect filings ranges from \$30 to \$100 per information return, with a maximum penalty of \$1.5 million. The penalty for intentional disregard of these requirements is \$250 per information return, with no maximum. Acquiring and successor entities are jointly and severally liable for applicable penalties for failure to satisfy these reporting obligations.

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Gunderson Dettmer's lawyers are available to assist in addressing questions you may have regarding the issues discussed in this Alert. Please contact the Gunderson Dettmer attorney with whom you regularly work. Contact information for our attorneys can be found at [www.gunder.com](http://www.gunder.com).

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