



2015 YEAR-END EXECUTIVE COMPENSATION MATTERS: U.S. Annual Reporting Requirements Applicable to Equity Awards

This Alert highlights certain annual reporting requirements applicable to equity-based compensation that clients should consider as we begin 2016.

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 2015 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 2015 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, provided that the substitute forms meet published IRS guidance as to form and content.

The delivery and filing deadlines are as follows:

- February 1, 2016 (January 31 is a Sunday) – Deadline to furnish an information statement to employees.
- February 29, 2016 – Deadline to file return, if filing a paper copy.
- March 31, 2016 – 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 penalties for late and incorrect filings, which have been increased this year, range from \$50 to \$250 per form, with a maximum penalty of \$3 million. The increased penalty for intentional disregard of these requirements is \$500 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. Additionally, a list of software providers may be found by going to the IRS website at www.irs.gov and typing "Software Vendors" 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 a form with the IRS as part of their 2015 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 a form with the IRS as part of their 2015 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 2015 tax year is due on April 15, 2016 unless an individual obtains an extension to file his or her 2015 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.

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 security¹ 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 15 following the year in which the action occurred. The information statement to each certificate holder or nominee must be delivered by January 15 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.

The penalty for late and incorrect filings ranges from \$50 to \$250 per information return, with a maximum penalty of \$3 million. The penalty for intentional disregard of these requirements is \$500 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.

Section 83(b) Elections No Longer Must be Filed with Tax Returns

Section 83 of the Internal Revenue Code sets forth rules regarding the taxation of property, including employer stock, transferred in connection with the performance of services. In general, the fair market value of the property transferred, less the amount paid, is included in gross income in the year in which the property first becomes vested. Section 83(b) allows an individual performing service to elect to recognize taxable income immediately upon receipt of the unvested property. Such an election must be made within 30 days after the date of transfer, and can serve as a valuable tax planning tool to begin a capital gain holding period.

The regulations under Section 83 require that a written copy of the Section 83(b) election be filed with the Internal Revenue office with which the taxpayer files his or her return. In addition, the existing regulations

¹ 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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require the individual performing services to submit a copy of the Section 83(b) election with his or her federal income tax return for the year of transfer.

In recent years, many taxpayers wishing to file their tax returns electronically have been unable to do so due to the requirement that the Section 83(b) election be submitted with the return and inconsistent commercial tax preparation software. As a result, many taxpayers have been forced to file paper tax returns to comply with the regulations.

In order to facilitate e-filing of federal income tax returns, the IRS has proposed regulations to eliminate the requirement that a copy of the Section 83(b) election be submitted with an individual's federal income tax return. The proposed regulations apply to property transferred on or after January 1, 2016. In addition, taxpayers are permitted to rely on the proposed regulations for property transferred on or after January 1, 2015, making this relief available to taxpayers when filing their 2015 federal income tax returns.

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.

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