

2022 Year-End Executive Compensation Matters: Reminder of Annual Reporting of ISO Exercises and ESPP Purchases

Insights

January 17, 2023

This alert briefly highlights certain reporting requirements applicable to equity-based compensation and reminds employers to proactively review option ledgers for upcoming expiration dates as we begin 2023.

Employers must file information returns with the Internal Revenue Service and provide employees with information statements related to incentive stock option exercises that occurred during calendar year 2022. 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 2022 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 by delivering to each 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:

- January 31, 2023 – Deadline to furnish an information statement (“Copy B”) to employees;
- February 28, 2023 – Deadline to file return on appropriate form with IRS, if filing a paper copy; and
- March 31, 2023 – Deadline to file return on appropriate form with IRS, if filing electronically.

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.

[1] 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 range from \$50 to \$290 per form, with a maximum penalty of \$3,532,500 (\$1,177,500 for “small businesses”). The increased penalty for intentional disregard of these requirements is \$580 per form, with no maximum. The IRS will grant an automatic 30-day extension for the return filing deadline 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 and does not extend the due date for delivering “Copy B” of the applicable form to the employee.

Forms 3921 and 3922 are available through the IRS website. Instructions for completing and filing Form 3921 can be obtained through this link:

<https://www.irs.gov/forms-pubs/about-form-3921>, and instructions for completing and filing Form 3922 can be obtained through this link: <https://www.irs.gov/forms-pubs/about-form-3922>. 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.

Relatedly, employers are advised to review option ledgers to confirm if any outstanding options will expire during the year 2023. As background, if a service provider has not terminated service with the employer, their options will typically expire ten years or, in some cases, five years, after the initial grant date and cannot be revived once expired. As such, it is good practice to review option ledgers for expiring options at least once per year. For questions, please contact the attorney with whom you regularly work at Gunderson Dettmer.

[1] On July 23, 2021, the Department of the Treasury released proposed regulations that would amend the rules for those required to file certain information returns,

including Forms 3921 and 3922, electronically. Under the proposed regulations, taxpayers who file more than 10 information returns of a single type in 2023 and beyond would be required to file electronically.

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