

SMITH ANDERSON

Client Alert

Expect Excellence

January 2013

Reminder: January 31, 2013 Deadline for Employers to Report Incentive Stock Option (ISO) Exercises and Employee Stock Purchase Plan (ESPP) Transfers During 2012

With rebounding stock prices and significant tax uncertainty in 2012, many employers saw optionees elect to exercise in-the-money stock options last year. For some, especially smaller employers and/or private companies, these exercises were among the first since the IRS began requiring employers to report annual ISO exercises under Section 6039 of the Internal Revenue Code of 1986 (the "Code") in 2010. This alert is provided as a reminder of the year-end reporting requirements for ISO exercises as well as certain ESPP purchases in 2012.

Code Section 6039 imposes two reporting obligations on employers with employees (or former employees) exercising ISOs. First, the employer must provide individuals with an "employee information statement" for each ISO exercise by **January 31** of the following year (i.e., January 31, 2013 for ISOs exercised any time in 2012). Second, the employer must report each ISO exercise to the IRS on Form 3921. The deadline for filing Form 3921 with the IRS for ISO exercises in 2012 is **February 28, 2013** for those employers filing paper copies. For employers required to file Form 3921 electronically – generally required of all employers reporting 250 or more transactions a year – the filing deadline is **April 1, 2013**. (Because the usual March 31st deadline for electronic filings falls on a Sunday this year, the deadline is extended until April 1st.) Under the applicable IRS rules, each ISO exercise is regarded as a separate transaction and must be reported to the IRS on a separate Form 3921. (Note: exercises of nonqualified stock options ("NSOs") are not required to be reported on Form 3921.)

Employers who sponsor tax-qualified ESPPs permitting employees to purchase employee stock at a discount (or at a purchase price not fixed and determinable on the grant date) are subject to similar employee information statement and IRS reporting requirements under Code Section 6039. In particular, employers sponsoring ESPPs are required to report the first transfer of legal title to an ESPP share on IRS Form 3922. The Form 3922 filing deadlines for ESPP shares first transferred in 2012 are the same as for ISO exercises on Form 3921. Employers are also required to provide participants with employee information statements for ESPP purchases by **January 31, 2013**.

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The employee information statement requirement may be satisfied by providing individuals with “Copy B” of each Form 3921 (ISO exercises) or Form 3922 (ESPP purchases). Alternatively, employers may satisfy the employee information statement requirement by use of a substitute form that complies with the general format and content requirements detailed in IRS Publication 1179. Links to copies of [Form 3921](#), [Form 3922](#), [Instructions to Form 3921 & 3922](#), and [Publication 1179](#) (included in Rev. Proc. 2012-38) are available on the IRS website. (Note: the copies of the sample forms on the website are for informational purposes only. Official forms for filing may be ordered from the website or by calling 1-800-TAX-FORM.)

Employers who fail to timely file Form 3921 or Form 3922 may be subject to penalties ranging from \$30 to \$100 per return (up to maximum aggregate penalties of \$75,000 to \$1,500,000) depending on the lateness of the filing. Failure to timely provide employee information statements may also result in a \$50 penalty for each failure (up to a maximum aggregate penalty of \$100,000 per calendar year).