



JONES DAY  
**COMMENTARY**

# TAX REPORTING DEADLINE RAPIDLY APPROACHING FOR INCENTIVE STOCK OPTIONS AND EMPLOYEE STOCK PURCHASE RIGHTS

By **January 31, 2012**, employers must deliver information statements to their employees (and shortly thereafter, to the IRS) that report exercises of incentive stock options (“ISOs”) and transfers of stock under employee stock purchase plans (“ESPPs”) that occurred during 2011.

These obligations to distribute statements to employees and subsequently file reports with the IRS are imposed under Section 6039 of the Internal Revenue Code, which first required the information statements to be delivered in 2011 for exercise/transfer activity that occurred during 2010. However, there was a substantial amount of uncertainty regarding how employers needed to comply with these requirements prior to and during the first year of their application. Much of that confusion has been resolved over the last 12 months.

## FORMS 3921 AND 3922

For ISOs, employers must deliver an information statement on IRS Form 3921 to all employees (excluding nonresident aliens) who have exercised their options in the prior taxable year by January 31 of the following year. The form must also be filed with the IRS by either the last day of February (for paper filings) or March 31 (for electronic filings).

For ESPPs, the information statement should be made on Form 3922 and is required when the shares of stock transferred are acquired at an exercise price that is less than 100 percent of the value of the stock on the date of grant or that is not fixed or determinable on the date of grant. Otherwise, the distribution and filing deadlines are the same as those for Form 3921. Special rules apply to determine when a transfer has occurred for this purpose.

## INFORMATION REQUIRED

In addition to general identifying information about the issuing company and employee, the information statement for an ISO must provide the following information:

- Date of grant;
- Date of exercise;
- Exercise price per share;
- Fair market value per share on the date of exercise; and
- Number of shares transferred to the employee as the result of the exercise.

The information statement for transfers of stock under an ESPP requires the following information:

- Date of grant;
- Date of purchase;
- Fair market value per share on the grant date;
- Fair market value per share on the date of purchase;
- Purchase price;
- Number of shares purchased; and
- Date the legal title was transferred.

Please note that even though copies of both Form 3921 and Form 3922 can be obtained from the IRS web site, forms printed from the web site are not scannable. Therefore, employers should order official forms from the IRS (which are scannable) or create their own forms, being sure to include all of the categories of information that appear on the official forms.

## PENALTIES

Failure to distribute copies of the forms to employees can result in the assessment of penalties against the employer (\$100 per statement, up to a maximum of \$1.5 million per year). Likewise, failure to submit either a Form 3921 or 3922 to the IRS may result in a penalty of \$100 for each return

that has not been timely filed, with the aggregate assessment not to exceed \$1.5 million in one calendar year. Penalty amounts may be reduced if corrections are made within 30 days of the filing deadline or before August 1 of the calendar year in which the required filing date occurs. Failures to deliver and file factually correct and complete reports, even if they are delivered and filed on time, can also result in the imposition of fines on the employer.

## PRACTICAL CONSIDERATIONS

While these filings are required only once per year, please note that each Form 3921/3922 may report only one transaction. As a result, employers may need to prepare multiple forms for a single employee. This may occur, for example, when an employee has multiple ISO exercises during a single calendar year. Although preparation of the information statements is relatively straightforward, the preparation of these forms can be daunting and difficult to coordinate, especially if large numbers of documents must be prepared by the applicable deadlines.

## LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our “Contact Us” form, which can be found at [www.jonesday.com](http://www.jonesday.com).

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