

# Client Alert

A report  
for clients  
and friends  
of the Firm     **January 2009**

## January 31 Deadline Approaching for Furnishing Employees with Information Statements Regarding Incentive Stock Options and Employee Stock Purchase Plans

Section 6039 of the Internal Revenue Code of 1986, as amended (the “Code”) requires corporations to furnish their employees (including former employees) with information statements by **January 31, 2009** with regard to: (i) the exercise of an incentive stock option (“ISO”) described in Code Section 422(b); and (ii) the transfer of shares granted under certain employee stock purchase plans meeting the requirements of Code Section 423 (“ESPP”) during calendar year 2008. The corporation may furnish the information statement by delivering it in person, mailing it to the individual’s last known address, or if the individual has previously consented, sending it in electronic form in accordance with Internal Revenue Service (“IRS”) guidance.

### Incentive Stock Options

A corporation that transfers stock pursuant to an employee’s exercise of an ISO in calendar year 2008 must include the following information in the statement it furnishes to the employee:

- (1) the name, address, and employer identification number of the corporation transferring the stock;

- (2) the name, address, and identifying number of the person to whom the shares were transferred;
- (3) the name and address of the corporation whose stock is the subject of the option (if other than the corporation transferring the stock);
- (4) the date the option was granted;
- (5) the date the shares were transferred to the person exercising the option;
- (6) the fair market value of the stock at the time the option was exercised;
- (7) the number of shares transferred under the option;
- (8) the type of option under which the transferred shares were acquired; and
- (9) the total cost of all of the shares.

### Employee Stock Purchase Plans

If a corporation records (or has recorded by its transfer agent) a transfer of stock during calendar year 2008 pursuant to an employee’s exercise of an option granted under a corporation’s ESPP, and if such stock was issued for an exercise price between 85 percent and 100 percent of the stock’s fair market value in accordance with Code Section 423(c), the corporation must include the following in the information statement it furnishes to the transferor (*i.e.*, the employee who transfers the stock):

- (1) the name and address of the corporation whose stock is being transferred;
- (2) the name, address, and identifying number of the transferor;
- (3) the date such stock was transferred to the transferor;

- (4) the number of shares to which title is being transferred;  
and
- (5) the type of option under which the transferred shares  
were acquired.

### **Penalties for Failure to Timely File**

A corporation may be subject to penalties if it fails to furnish the information statement in a timely manner, fails to include all the required information, or includes incorrect information in the filing. The penalty is \$50 for each statement the corporation fails to furnish or furnish correctly, up to a maximum of \$100,000 for the calendar year. No more than one penalty is imposed for a single information statement even if there is more than one failure relating to the statement. Where the failure to furnish accurate information statements was due to an intentional disregard of the requirement, higher penalties may be imposed.

### **Future Reporting Obligations**

The Tax Relief and Health Care Act of 2006 expanded the reporting obligations with respect to the exercise of ISOs and the transfer of stock pursuant to an ESPP to include the filing of an information return with the IRS. It is expected that this information will be required to be reported on Form 3921 for ISOs and Form 3922 for ESPPs, which have not yet been released by the IRS.

Proposed regulations issued by the IRS on July 17, 2008 provide for enhanced reporting requirements with respect to information statements and for the filing of an information return with the IRS for stock transferred pursuant to an ISO or ESPP after 2008. The proposed regulations specifically waive the requirement for filing information returns with the IRS and provide that corporations may choose to furnish information statements to employees pursuant to the existing final regulations or the proposed regulations for stock transferred in 2008.

The enhanced reporting requirements are intended to provide employees with more readily usable information to assist them in calculating their tax obligations. Although the information that needs to be reported with respect to ISO transfers under the proposed regulations is basically the same as the information required under the existing final regulations, the proposed regulations add the requirement to report the exercise price per share of ISOs instead of the total cost of all of the shares. The proposed regulations enhance existing reporting obligations with respect to ESPPs by requiring the reporting of: (i) the dates the options were granted and exercised; (ii) the fair market value of a share of stock on both the grant date and exercise date of the option; and (iii) the exercise price per share.

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**For more information, please contact:**

#### **Andrea S. Rattner**

212.969.3812 – [arattner@proskauer.com](mailto:arattner@proskauer.com)

#### **Ira G. Bogner**

212.969.3947 – [ibogner@proskauer.com](mailto:ibogner@proskauer.com)

#### **Stacey P. Klein**

212.969.3639 – [sklein@proskauer.com](mailto:sklein@proskauer.com)

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