

2020 Incentive Stock Option & Employee Stock Purchase Plan Reporting

Update

January 12, 2021 | 5 minute read

Now that 2021 is here, corporations should be aware of IRS reporting requirements regarding certain 2020 stock transactions with their employees.

Section 6039 of the Internal Revenue Code of 1986, as amended (the “Code”), requires a corporation to report (i) the transfer by the corporation of its stock with respect to the exercise of an incentive stock option (“ISO”) and (ii) the initial transfer of legal title to the corporation’s stock acquired at a discount pursuant to an employee stock purchase plan (“ESPP”) if such transfer under the ESPP is with respect to an exercise price that is either (I) less than the value of the stock on the date of grant or (II) not fixed or determinable on the date of grant. Specifically, Section 6039(a) of the Code requires corporations to file information returns relating to such exercises and transfers with the Internal Revenue Service (the “IRS”), while Section 6039(b) of the Code requires corporations to furnish that information to each employee exercising an ISO or receiving, in the circumstances described herein, legal title upon the initial transfer of the corporation’s stock acquired under an ESPP.

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Reporting Exercises of ISOs

IRS Form 3921 is used to report exercises of ISOs. Copy A of Form 3921 is filed with the IRS, Copy B is furnished to the exercising employee and Copy C is retained by the corporation for its records. [Click here to view Form 3921.](#)

Official versions of Copy A of Form 3921 for direct filing by the corporation (assuming electronic filing is not mandated) can be obtained only from the IRS. Corporations may use the fillable Copies B and C of Form 3921, which can be found [online here](#). Alternatively, a corporation may utilize the services of a vendor (generally for a fee) that creates, files and furnishes all copies of Form 3921 on behalf of the corporation.

Corporations required to file 250 or more Copies A of Form 3921 in any calendar year must do so electronically through the IRS's Filing Information Returns Electronically ("FIRE") system. The deadline for electronic filing with the IRS is March 31, 2021. Corporations that elect to file Copies A of Form 3921 manually with the IRS must do so by March 1, 2021. An automatic 30-day extension for filing Copies A of Form 3921 with the IRS is available by filing Form 8809 (either on paper or through the FIRE system) with the IRS no later than the due date for filing such Copy A. Also, an additional 30-day extension beyond the automatic extension may be requested by filing a second Form 8809 no later than the expiration of the automatic 30-day extension, though the IRS retains discretion to reject such additional request. Note, however, that filing for an extension (whether the initial automatic extension or the second discretionary extension) with respect to Copies A of Form 3921 does not provide an extension for providing Copies B of Form 3921 to employees (or former employees).

The deadline for furnishing Copies B of Form 3921 to employees (or former employees) who exercised ISOs in 2020 is February 1, 2021. A maximum 30-day extension may be requested by the corporation via letter to the IRS postmarked no later than the due date for furnishing Copy B of Form 3921, though the IRS is under no obligation to grant such extension.

Reporting Transfers of Stock Acquired Under ESPPs

IRS Form 3922 is used to report initial transfers of stock acquired by an employee (or former employee) pursuant to the terms of an ESPP if such transfer under the ESPP is with respect to an exercise price that is either (i) less than the value of the stock on the date of grant or (ii) not fixed or determinable on the date of grant. Copy A of Form 3922 is filed with the IRS, Copy B is furnished to the employee and Copy C is retained by the corporation for its records. [Click here to view Form 3922](#). Corporations may use the fillable Form 3922, which can be found [online here](#) or utilize the services of a vendor (generally for a fee) that creates, files and furnishes Form 3922.

Corporations required to file 250 or more copies of Form 3922 in any calendar year must do so electronically through the IRS's FIRE system. (Note that the number of Forms 3921 and of Forms 3922 to be filed are considered separately for the purposes of the 250 threshold for electronic filing.) The deadline for electronic filing with the IRS is March 31, 2021. Corporations that elect to file the Form 3922 manually with the IRS must do so by March 1, 2021. The same extension rules as apply to Form 3921 as discussed above also apply to Form 3922.

The deadline for furnishing Copies B of Form 3922 to employees (or former employees) for legal title associated with initial transfers of stock in 2020 that were acquired pursuant to an ESPP is February 1, 2021. A maximum 30-day

extension may be requested by the corporation via letter to the IRS postmarked no later than the due date for furnishing Copy B of Form 3922, though the IRS is under no obligation to grant such extension.

General Reporting Requirements

Copies B of Forms 3921 and 3922 furnished to employees (or former employees) must be delivered in person or mailed to the recipient's last known address, or may be furnished electronically if the recipient affirmatively consents to such a means of delivery. Any consent by the recipient to electronic receipt must itself be made electronically and must demonstrate that the recipient can access the form in the electronic format in which it will be provided. Certain other requirements must be met before electronic distribution to recipients may be made, which requirements are available for review [here](#).

In order to satisfy the reporting requirements relating to ESPPs, the Code also requires that a corporation issuing stock under an ESPP identify the stock in a manner sufficient to enable the corporation to carry out its reporting obligation (e.g., by use of special serial numbers or codes, which, in practice, are typically determined by the transfer agent).

These reporting obligations are in addition to any reporting obligations that arise upon the disqualifying disposition of stock acquired under either an ISO or an ESPP. In particular, the IRS generally requires that the income from a disqualifying disposition be reported as "other compensation" on an employee's Form W-2 in order for the corporation to be eligible to take a federal income tax deduction equal to the amount of income recognized as well as to satisfy the corporation's reporting obligations.

[Click here for more detailed instructions](#) on filing requirements for Form 3921 and Form 3922.

Certain Penalties

In general, a corporation that unintentionally fails to timely make correct and complete filings (e.g., Copies A of Forms 3921 or 3922) with the IRS (or file correct and complete paper copies when electronic filing is required) may be subject to penalties from \$50 to \$280 per form (up to a maximum of \$565,000 to \$3,392,000 (\$197,500 to \$1,130,500 for small businesses)), based on the date of filing. For these purposes, a corporation constitutes a "small business" if its annual gross receipts for the three most recent tax years (or for the period the corporation has been in existence, if shorter than three years) do not exceed \$5 million.

If a corporation unintentionally fails to timely furnish correct and complete payee statements (e.g., Copies B of Forms 3921 or 3922) to employees (or

former employees), a separate penalty may apply and is calculated in similar manner for similar amounts as the penalty for failure to timely file correct and complete information returns with the IRS as described immediately above.

Penalties are subject to increase (in some cases with no maximum) for a corporation's intentional disregard of compliance with these reporting requirements.