



## IRS Issues New Forms Regarding Stock Transfers

The Internal Revenue Service ("IRS") has recently issued Form 3921, "Exercise of an Incentive Stock Option Under Section 422(b)," and Form 3922, "Transfer of Stock Acquired Through An Employee Stock Purchase Plan Under Section 423(c)." These forms provide for the disclosure of information required by the 2006 Tax Relief and Health Care Act ("Act") regarding transfers of stock pursuant to the exercise of an incentive stock option ("ISO") or an employee stock purchase plan ("ESPP"). The forms are effective and required for stock transfers occurring after 2009.

### Background

The Act amended the information reporting requirements in Internal Revenue Code ("Code") Section 6039. Prior to the amendment, Code 6039 generally required corporations to provide a written statement to each employee regarding the corporation's transfer of stock pursuant to the exercise of an ISO and under an ESPP on or before January 31 of the year following the year for which the statement is required. Under the Act, corporations are required to file an information return with the IRS *in addition to* providing employees with the information statement.

In Notice 2008-8, the IRS waived the obligation to file an information return for stock transfers in 2007, although corporations were still required to furnish the information to employees. In July of 2008, the IRS issued proposed regulations and waived the requirement to file with the IRS for transfers during the 2007 and 2008. In November of 2009, the IRS issued final regulations that further postponed the required reporting to the IRS until 2010.

### New Forms

For ISOs, Form 3921 must be filed with the IRS by every corporation which in any calendar year transfers to an employee a share of stock pursuant to that employee's exercise of an ISO for that calendar year and for each transfer made during that year. However, Form 3921 is not required for the exercise of an ISO for the first transfer of legal title of a share of stock by an employee who is a nonresident alien and to whom the corporation is not required to provide a Form W-2, Wage and Tax Statement, for any calendar year within the time period beginning with the first day of the calendar year in which the option was granted to the employee and ending on the last day of the calendar year in which the employee exercised the ISO.

For ESPPs, Form 3922 must be filed with the IRS by every corporation which in any calendar year records, or has by its agent recorded, a transfer of the legal title of a share of stock acquired by the employee pursuant to the employee's exercise of an option granted under an ESPP (where the exercise price is less than 100% of the value of the stock on the date of grant, or is not fixed or determinable on the date of grant) for that calendar year and for each transfer made during that year. For ESPPs, a return is required only for the first transfer of legal title of the shares by the employee, including the first transfer of legal title to a recognized broker or financial institution. If a contractual agreement exists or is entered into with a recognized broker or financial institution under which shares acquired upon exercise of

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### AUTHOR



**B. David Joffe**  
615.252.2368  
[djoffe@babco.com](mailto:djoffe@babco.com)

### RELATED ATTORNEYS

**Martha L. Boyd**  
615.252.2357  
[mboyd@babco.com](mailto:mboyd@babco.com)

**J. S. Christie, Jr.**  
205.521.8387  
[jchristie@babco.com](mailto:jchristie@babco.com)

**Andrew Elbon**  
615.252.2378  
[aelbon@babco.com](mailto:aelbon@babco.com)

**B. David Joffe**  
615.252.2368  
[djoffe@babco.com](mailto:djoffe@babco.com)

**Gordon Earle Nichols**  
615.252.2387  
[gnichols@babco.com](mailto:gnichols@babco.com)

**John M. Scannapieco**  
615.252.2352  
[jscannapieco@babco.com](mailto:jscannapieco@babco.com)

**Jay P. Turner**  
205.521.8412  
[jturner@babco.com](mailto:jturner@babco.com)

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the option will be immediately deposited into a brokerage account established on behalf of the employee, then the deposit of shares by the employee into the brokerage account following the exercise of the option is the first transfer of legal title of the shares acquired by the employee, and the corporation is only required to file a return relating to that transfer of legal title. Shares of stock transferred as a result of the exercise of an option described above must be identified by a special serial number or color for accurate reporting of the transfer of legal title. Form 3922 is also not required for the first transfer of legal title of a share of stock by an employee who is a nonresident alien and to whom the

corporation is not required to provide a Form W-2, Wage and Tax Statement, for any calendar year within the time period beginning with the first day of the calendar year in which the option was granted to the employee and ending on the last day of the calendar year in which the employee first transferred legal title to shares acquired under the option.

If you have any questions about the new requirements, please contact David Joffe or one of the other attorneys in the Employee Benefits & Executive Compensation Group at Bradley Arant Boulton Cummings LLP.

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### Bradley Arant Boulton Cummings LLP Office Locations:

#### ALABAMA

One Federal Place  
1819 Fifth Avenue North  
Birmingham, AL 35203  
205.521.8000

200 Clinton Avenue West, Suite 900  
Huntsville, AL 35801  
256.517.5100

The Alabama Center for Commerce  
401 Adams Avenue, Suite 780  
Montgomery, AL 36104  
334.956.7700

#### MISSISSIPPI

188 E. Capitol Street, Suite 400  
Jackson, MS 39201  
601.948.8000

#### NORTH CAROLINA

100 North Tryon Street, Suite 2690  
Charlotte, NC 28202  
704.332.8842

#### TENNESSEE

1600 Division Street, Suite 700  
Nashville, TN 37203  
615.244.2582

#### WASHINGTON, DC

1133 Connecticut Avenue NW,  
12th Floor  
Washington, DC 20036  
202.393.7150

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