

the donee's basis, as of the time of the gift, for determining gain or loss.

Example 6. Assume the same facts as in *Example 2*, except that instead of selling the share on January 1, 2014, P makes a gift of the share on that date. Because the fair market value of the share on that day (\$75) is less than the option price (\$85), no amount in respect of the disposition by way of gift is includible as compensation in P's gross income for 2014. P's basis for the share is \$85, which becomes the donee's basis, as of the time of the gift, for the purpose of determining gain. The donee's basis for the purpose of determining loss, determined under section 1015(a), is \$75 (fair market value of the share at the date of gift).

Example 7. Assume the same facts as in *Example 1*, except that after acquiring the share of stock on June 1, 2011, P dies on August 1, 2012, at which time the share has a fair market value of \$150. Compensation in the amount of \$15 is includible in P's gross income for the taxable year closing with P's death, \$15 being the difference between the option price (\$85) and the fair market value of the share when the option was granted (\$100), because such value is less than the fair market value at date of death (\$150). The basis of the share in the hands of P's estate is determined under section 1014 without regard to the \$15 includible in the decedent's gross income.

Example 8. Assume the same facts as in *Example 7*, except that P dies on August 1, 2011, at which time the share has a fair market value of \$150. Although P's death occurred within one year after the transfer of the share to P, the income tax consequences are the same as in *Example 7*.

Example 9. Assume the same facts as in *Example 1*, except that the share of stock was issued in the names of P and P's spouse jointly with right of survivorship, and that P and P's spouse sold the share on June 15, 2012, for \$150, its fair market value on that date. Compensation in the amount of \$15 is includible in P's gross income for the year 2012, the year of the disposition of the share. The basis of the share in the hands of P and P's spouse for the purpose of determining gain or loss on the sale is \$100, that is, the cost of \$85 increased by the amount of \$15 includible as compensation in P's gross income. The gain of \$50 on the sale is treated as long-term capital gain, and is divided equally between P and P's spouse.

Example 10. Assume the same facts as in *Example 1*, except that the share of stock was issued in the names of P and P's spouse jointly with right of survivorship, and that P predeceased P's spouse on August 1, 2012, at which time the share had a fair market value of \$150. Compensation in the amount of \$15 is includible in P's gross income for the taxable year closing with his death. See *Example 7*. The basis of the share in the hands of P's spouse as survivor is determined under section 1014 without regard to the \$15 includible in the decedent's gross income.

Example 11. Assume the same facts as in *Example 10*, except that P's spouse predeceased P on July 1, 2012. Section 423(c) does not apply in respect of the death of P's spouse. Upon the subsequent death of P on August 1, 2012, the income tax consequences

in respect of P's taxable year closing with the date of P's death, and in respect of the basis of the share in the hands of P's estate, are the same as in *Example 7*. If P had sold the share on July 15, 2012 (after the death of P's spouse), for \$150, its fair market value at that time, the income tax consequences would be the same as in *Example 1*.

(l) *Effective/applicability date.* The regulations under this section are effective on November 17, 2009. The regulations under this section apply to options granted under an employee stock purchase plan on or after January 1, 2010.

■ **Par. 6.** Section 1.424-1, paragraphs (a)(10) *Example 9* (iii) and (g)(1) are revised to read as follows:

§ 1.424-1 Definition and special rules applicable to statutory options.

- (a) * * *
- (10) * * *

Example 9. * * * (iii) Assume the same facts as in paragraphs (i) and (ii) of this *Example 9*. Assume further that as part of the acquisition, X amends its plan to allow future grants under the plan to be grants to acquire Y stock. Because the amendment of the plan to allow options on a different stock is considered the adoption of a new plan under § 1.422-2(b)(2)(iii), the stockholders of X (in this case, Y) must approve the plan within 12 months before or after the date of the amendment of the plan. If the stockholders of X (in this case, Y) timely approve the plan, the future grants to acquire Y stock will be incentive stock options (assuming the other requirements of § 1.422-2 have been met).

* * * * *

(g) *Effective/applicability date*—(1) *In general.* Except for § 1.424-1(a)(10) *Example 9* (iii), the regulations under this section are effective on August 3, 2004. Section 1.424-1(a)(10) *Example 9* (iii) is effective on November 17, 2009. Section 1.424-1(a)(10) *Example 9* (iii) applies to statutory options granted on or after January 1, 2010.

* * * * *

Linda E. Stiff,
Deputy Commissioner for Services and Enforcement.

Approved: November 9, 2009.

Michael F. Mundaca,
Acting Assistant Secretary of the Treasury
(Tax Policy).

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9470]

RIN 1545-BH69

Information Reporting Requirements Under Internal Revenue Code Section 6039

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains the final regulations relating to the return and information statement requirements under section 6039 of the Internal Revenue Code (Code). These regulations reflect changes to section 6039 made by section 403 of the Tax Relief and Health Care Act of 2006. These regulations affect corporations that issue statutory stock options and provide guidance to assist corporations in complying with the return and information statement requirements under section 6039.

DATES: *Effective Date:* These regulations are effective on November 17, 2009.

Applicability Date: For dates of applicability, see §§ 1.6039-1(g) and 1.6039-2(e).

FOR FURTHER INFORMATION CONTACT: Thomas Scholz or Ilya Enkishev at (202) 622-6030 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in these regulations has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545-2129. Responses to this collection of information are required to assist taxpayers with the completion of their income tax returns for the taxable year in which a disposition of stock acquired under a statutory option occurs.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

Section 403 of the Tax Relief and Health Care Act of 2006 (Act) amended the information reporting requirements of section 6039. Prior to its amendment, section 6039 required corporations to furnish a written statement to each employee, in a manner prescribed by the Secretary in the regulations, regarding: (i) The corporation's transfer of stock pursuant to the employee's exercise of an incentive stock option described in section 422(b); and (ii) the transfer of stock by the employee where the stock was acquired pursuant to the exercise of an option described in section 423(c). Corporations must furnish employees with the information statements required by section 6039 on or before January 31 of the year following the year for which the statement is required. Prior to the amendment of section 6039 made by the Act, the regulations under section 6039 were last updated in 2004. See TD 9144 (69 FR 46401).

As amended by the Act, section 6039 requires corporations to file an information return with the IRS, in addition to providing employees with an information statement, following a stock transfer. Section 6039, as amended by the Act, applies to stock transfers occurring on or after January 1, 2007. However, in Notice 2008-8, 2008-3 IRB 276 (December 19, 2007) (see § 601.601(d)(2)(ii)(b)), the IRS waived the obligation to file an information return for 2007 stock transfers governed by section 6039.

On July 17, 2008, the Department of Treasury published a notice of proposed rulemaking (REG-103146-08) in the **Federal Register** (73 FR 40999) under section 6039. In addition to describing the return and information reporting requirements pursuant to section 6039, the notice of proposed rulemaking waived the obligation to file an information return for 2008 stock transfers governed by section 6039. A public hearing on the proposed regulations was held on October 30, 2008. Written and electronic comments responding to the notice of proposed rulemaking were received. After consideration of these comments, the Department of Treasury adopts the proposed regulations as final regulations, with the modifications set forth in this Treasury decision. The significant revisions are discussed in this preamble.

Explanation of Provisions

1. Overview

These final regulations describe the information that is required in the

return filed with the IRS and the information statement furnished to employees pursuant to section 6039. There are two sections under these final regulations: § 1.6039-1, Returns required in connection with certain options; and § 1.6039-2, Statements to persons with respect to whom information is reported. A principal objective of these final regulations is to require corporations to furnish employees with sufficient information to enable them to calculate their tax obligations upon disposition of the shares acquired by the exercise of a statutory option. As discussed further in this preamble, the IRS will issue two forms (with accompanying instructions) that corporations must use to satisfy the return and information statement requirements under section 6039.

Comments received in response to the proposed regulations were generally favorable. Commenters observed that the proposed regulations improved the existing regulations by requiring corporations to provide additional information useful to employees for purposes of computing tax liability with respect to the disposition of shares acquired pursuant to the exercise of a statutory option. These final regulations are generally similar to the proposed regulations with the modifications described below in response to the comments submitted by taxpayers.

2. Return and Information Statement Requirements for Stock Acquired Pursuant to Incentive Stock Options

With respect to the transfer of stock pursuant to the exercise of an incentive stock option, the information required in the return and the information statement pursuant to § 1.6039-1(a) and § 1.6039-2(a) of these final regulations is the same information that is required pursuant to the proposed regulations.

3. Return and Information Statement Requirements for Stock Acquired Under Employee Stock Purchase Plans

a. Transfers of Legal Title for Stock Acquired Under an Employee Stock Purchase Plan

Section 6039(a)(2) requires every corporation which records (or has by its agent recorded) a transfer of the legal title of a share of stock acquired by the employee where the stock was acquired pursuant to the exercise of an option described in section 423(c) to file a return with respect to each transfer made during a particular year. Section 6039(c)(2) provides that the return under section 6039(a)(2) is required only with respect to the first transfer of such stock by the person who exercised

the option. Section 6039(b) requires every corporation filing a return under section 6039(a)(2) to furnish to each employee named in such return a written statement with respect to the transfer or transfers made by the employee during a particular year.

Several commenters noted that it has become common practice for employers to maintain a system in which shares acquired by employees under an employee stock purchase plan are deposited directly into a brokerage account established on behalf of the employee. In the typical arrangement, a contractual agreement exists with a recognized broker or financial institution, and employees who elect to participate in the employee stock purchase plan direct that all shares acquired upon the exercise of the option be immediately deposited into a brokerage account established on behalf of the employee. The legal title of the shares deposited into the brokerage account is typically held by another entity acting as a securities depository, which holds the shares in the street name of the broker. The employee has a beneficial interest in the shares, but the securities depository holds legal title of the shares.

The final regulations modify § 1.6039-1(b)(3) of the proposed regulations to provide that a transfer of legal title to a recognized broker or financial institution immediately following the exercise of an option is treated as the first transfer of legal title for purposes of the section 6039(a)(2) filing requirement. Accordingly, if an employer operates an employee stock purchase plan pursuant to which shares acquired upon exercise of 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 such transfer of legal title.

For employees whose shares are immediately deposited into a brokerage account following the exercise of an option, the exercise of the option and the first transfer of legal title occur on the same date. In such a case, the dates to be provided under §§ 1.6039-1(b)(1)(vii) (the date the option was exercised) and (ix) (the date legal title was first transferred) will be the same.

If, instead of establishing a brokerage arrangement, an employer either issues a stock certificate directly to an employee who purchases stock pursuant to an employee stock purchase plan, or

registers the shares in the employee's name on the employer's record books and the employer or its transfer agent holds the shares for the employee in book-entry form, then, for purposes of section 6039(a)(2) and (c)(2), the issuance of the stock certificate or the registration of the stock ownership on the record books is not considered the first transfer of legal title of the stock acquired by the employee. Accordingly, the employer is not required to file a return and furnish an information statement to the employee (pursuant to section 6039(a)(2) and (b)) with respect to such transfer of the stock to the employee. Instead, the employer is required to file a return and furnish an information statement to the employee with respect to the first transfer of the legal title of the stock acquired by the employee (for example, when the employee sells the stock or transfers the stock to a brokerage account established on behalf of the employee). Consequently, if a stock certificate is issued or the ownership of the shares is registered on the employer's record books following the exercise of an option, the exercise of the option and the first transfer of legal title occur on different dates, unless the shares are immediately sold or otherwise transferred. Accordingly, in such a case, the dates to be provided under §§ 1.6039-1(b)(1)(vii) (the date the option was exercised) and (ix) (the date legal title was first transferred) will be different.

b. Reporting of Information With Respect to the Special Tax Rule Under Section 423(c)

Acknowledging that one of the primary purposes of these regulations is to provide information to employees for purposes of computing their tax liability with respect to the disposition of shares acquired pursuant to statutory options, commenters suggested that the return and information statement provided with respect to options granted under an employee stock purchase plan contain additional information necessary to calculate the tax liability in the case of a qualifying disposition of the stock. Under section 423(a), a qualifying disposition occurs if the stock acquired under an employee stock purchase plan is disposed of no earlier than two years after the date of grant of the option and one year after the date of exercise of the option.

Section 423(c) provides a special rule for calculating the timing and amount of compensation income that must be recognized in the event of a qualifying disposition when the exercise price is less than 100 percent of the value of a

share on the date of grant. Generally, the compensation income recognized is the lesser of: (a) The excess of the fair market value of the share on the date of grant over the exercise price, and (b) the excess of the fair market value of a share at the time of disposition (or death) over the price paid per share. The flush language of section 423(c) provides that if the exercise price is not known on the date of grant, the exercise price shall be determined as if the option were exercised on the date of grant.

There are various circumstances under which the exercise price will not be known on the date of grant. For example, the exercise price will not be known on the date of grant if the exercise price is equal to the lesser of 85 percent of the fair market value of the stock on the date of grant or 85 percent of the fair market value of the stock on the date of exercise. In addition, the exercise price will not be known on the date of grant if the exercise price is calculated based on a certain percentage (not less than 85 percent) of the fair market value of the stock on the date of exercise. In order to compute the tax liability resulting from a qualifying disposition of the stock acquired using either of the foregoing pricing formulas, the employee needs to know the exercise price determined as if the option were exercised on the date of grant of the option.

In response to the comments, these final regulations modify the proposed regulations by adding § 1.6039-1(b)(vi) to these final regulations. If the exercise price per share of an option is not fixed or determinable on the date the option was granted to the employee, § 1.6039-1(b)(vi) of these final regulations requires corporations to include in the return and information statement the exercise price per share determined as if the option were exercised on the date of grant.

c. Requirement of Return and Information Statement Under Section 6039(a)(2) and (b)

Commenters asked for clarification regarding whether the return and information statement requirements of section 6039(a)(2) and (b) apply only to the transfer of shares pursuant to a qualifying disposition. Section 6039(a)(2) requires that an information return be filed 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 transferor pursuant to his or her exercise of an option described in section 423(c). The IRS and the Treasury Department have concluded that the reference in section

6039(a)(2) to an option described in 423(c) relates to the exercise price of the option (as evidenced by the parenthetical phrase in 6039(a)(2) following the reference to section 423(c)) rather than whether or not the shares are disposed of in a qualifying disposition as also described in 423(c). Furthermore, section 6039(c)(2) provides that the return and information statement requirements of section 6039(a)(2) and (b) are triggered by the first transfer of the legal title of the shares. This provision would be unnecessary if section 6039(a)(2) only applied to qualifying dispositions. Therefore, these final regulations provide that the return and information statement requirements are not dependent upon whether such transfer of legal title is a qualifying or disqualifying disposition.

Commenters also asked for clarification regarding whether the return and information statement requirements of section 6039(a)(2) and (b) only apply to the transfer of shares acquired pursuant to an option described in section 423(c) where the exercise price is less than 100 percent of the value of a share on the date of grant. These final regulations provide that the return and information statement requirements of section 6039(a)(2) and (b) also apply to the transfer of shares acquired pursuant to an option where the exercise price is not fixed or determinable on the date of grant, as well as to the transfer of shares acquired pursuant to an option described in section 423(c) where the exercise price is less than 100 percent of the value of a share on the date of grant.

4. Nonresident Aliens

Several commenters suggested that the return and information statement requirements of section 6039 should not apply to nonresident aliens (as defined in section 7701(b)) who perform services outside the United States. These commenters point out that the reported information may not be useful to nonresident aliens because they likely will not have any U.S. tax liability.

In response to comments, these final regulations modify the proposed regulations by adding § 1.6039-1(e) which provides an exception to the return requirements of section 6039(a) for certain nonresident aliens. With respect to incentive stock options, the return requirement of section 6039(a)(1) is not applicable to the exercise of an incentive stock option 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 (or its designated successor) 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 incentive stock option. With respect to employee stock purchase plans, the return requirement of section 6039(a)(2) is not applicable to 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 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. For purposes of § 1.6039-1(e) of these final regulations, the term *corporation* is defined in section 7701(a) and includes, but is not limited to, the corporation issuing the stock, a related corporation of the corporation, any agent of the corporation, any party distributing shares of stock or other payments in connection with the plan (for example, a brokerage firm), and any party in control of the payment of remuneration for employment to the employee.

5. Forms To Satisfy the Return and Information Statement Requirements

Returns required by § 1.6039-1(a) of these final regulations and information statements required by § 1.6039-2(a) of these final regulations must be made using Form 3921, Exercise of an Incentive Stock Option Under Section 422(b) (or its designated successor) and filed in the manner provided in the instructions thereto. Returns required by § 1.6039-1(b) of these final regulations and information statements required by § 1.6039-2(b) of these final regulations must be made using Form 3922, Transfer of Stock Acquired Through an Employee Stock Purchase Plan under Section 423(c) (or its designated successor) and filed in the manner provided in the instructions thereto. Section 1.6039-1(c) of the proposed regulations provided that Forms 3921 and 3922 must be filed on or before January 31 of the year following the year for which the return and statement are required. Section 1.6039-1(c) of these final regulations has been revised to provide that Forms 3921 and 3922 must be filed in accordance with the guidelines and procedures set forth in the instructions to Forms 3921 and

3922. The IRS expects to release Forms 3921 and 3922 in the near future.

Several commenters suggested that taxpayers be allowed to satisfy the information statement requirements of § 1.6039-2(a) and (b) of these final regulations by delivering a substitute form that includes all of the information required to be included on the Forms 3921 or 3922, as applicable. Taxpayers may satisfy the return requirements of § 1.6039-1(a) and (b) as well as the information statement requirements of § 1.6039-2(a) and (b) by submitting substitute Forms 3921 and 3922 in accordance with the guidelines set forth in Publication 1179 (or its designated successor). For example, it would be permissible for a taxpayer to satisfy the return requirements of § 1.6039-1(a) and (b) by submitting Forms 3921 and 3922 to the IRS, and satisfy the information statement requirements of § 1.6039-2(a) and (b) by delivering substitute Forms 3921 and 3922 to the appropriate recipients in accordance with the guidelines set forth in Publication 1179 (or its designated successor).

Effective/Applicability Date

These final regulations will apply as of January 1, 2007. However, taxpayers are not required to comply with the return requirements of § 1.6039-1(a) and (b) of these final regulations for stock transfers that occur during the 2007, 2008 and 2009 calendar years. Notwithstanding the waiver of the return requirements for 2007, 2008 and 2009 stock transfers, taxpayers must furnish information statements to employees for such stock transfers. For purposes of furnishing information statements for stock transfers that occur during the 2007 or 2008 calendar years, taxpayers may rely on § 1.6039-1 of the 2004 final regulations (69 FR 46401) or § 1.6039-2 of the 2008 proposed regulations (REG-103146-08) (73 FR 40999). For purposes of furnishing information statements for stock transfers that occur during the 2009 calendar year, taxpayers may rely on § 1.6039-1 of the 2004 final regulations (69 FR 46401), § 1.6039-2 of the 2008 proposed regulations (REG-103146-08) (73 FR 40999), or these final regulations.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It is hereby certified that the regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that the filing of a return with

the IRS and the provision of employee statements required under this Treasury decision will impose a minimal administrative burden on small entities. It is estimated that it will take approximately 30 minutes to prepare and provide the information required by these regulations. Further, the information to be provided is readily available. Therefore, an analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking that preceded these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal authors of these regulations are Thomas Scholz and Ilya Enkichev, Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

■ Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805.

■ **Par. 2.** Section 1.6039-1 is revised to read as follows:

§ 1.6039-1 Returns required in connection with certain options.

(a) *Requirement of return with respect to incentive stock options under section 6039(a)(1).* (1) Every corporation which in any calendar year transfers to any person a share of stock pursuant to such person's exercise of an incentive stock option shall, for such calendar year, file a return with respect to each transfer made during such year. This return must include the following information—

(i) The name, address, and employer identification number of the corporation transferring the stock;

(ii) If other than the corporation identified in paragraph (a)(1)(i) of this section, the name, address and employer identification number of the

corporation whose stock is being transferred;

(iii) The name, address, and identifying number of the person to whom the share or shares of stock were transferred pursuant to the exercise of the option;

(iv) The date the option was granted to the person;

(v) The exercise price per share;

(vi) The date the option was exercised by the person;

(vii) The fair market value of a share of stock on the date the option was exercised by the person; and

(viii) The number of shares of stock transferred to the person pursuant to the exercise of the option.

(2) Each return required by this paragraph (a) shall be made on Form 3921, Exercise of an Incentive Stock Option Under Section 422(b) (or its designated successor) and shall be filed in such manner as provided in the instructions thereto.

(b) *Requirement of return with respect to stock purchased under an employee stock purchase plan under section 6039(a)(2).* (1) 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 transferor (person who acquires the shares pursuant to the exercise of the option) pursuant to the transferor's exercise of an option granted under an employee stock purchase plan as described in section 423(c) and where the exercise price is less than 100 percent of the value of the stock on date of grant or is not fixed or determinable on the date of the grant, shall, for such calendar year, file a return with respect to each transfer made during such year. This return must include the following information—

(i) The name, address, and identifying number of the transferor;

(ii) The name, address and employer identification number of the corporation whose stock is being transferred;

(iii) The date the option was granted to the transferor;

(iv) The fair market value of the stock on the date the option was granted;

(v) The actual exercise price paid per share;

(vi) The exercise price per share determined as if the option were exercised on the date the option was granted to the transferor (to be provided only if the exercise price per share is not fixed or determinable on the date the option was granted);

(vii) The date the option was exercised by the transferor;

(viii) The fair market value of the stock on the date the option was exercised by the transferor;

(ix) The date the legal title of the shares was transferred by the transferor (see paragraph (b)(3) of this section); and

(x) The number of shares to which legal title was transferred by the transferor.

(2) Each return required by this paragraph (b) shall be made on Form 3922, Transfer of Stock Acquired Through an Employee Stock Purchase Plan Under Section 423(c) (or its designated successor) and shall be filed in such manner as provided in the instructions thereto.

(3) A return is required by reason of a transfer described in section 6039(a)(2) only with respect to the first transfer of legal title of the shares by the transferor, 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 pursuant to which shares acquired upon exercise of the option will be immediately deposited into a brokerage account established on behalf of the transferor, then the deposit of shares by the transferor into the brokerage account following the exercise of the option is the first transfer of legal title of the shares acquired by the transferor, and the corporation is only required to file a return relating to such transfer of legal title.

(4) Every corporation that transfers any share of stock pursuant to the exercise of an option described in this paragraph shall identify such stock in a manner sufficient to enable the accurate reporting of the transfer of legal title to such shares. Such identification may be accomplished by assigning to the certificates of stock issued pursuant to the exercise of such options a special serial number or color.

(c) *Time for filing returns.* Each return required by this section for a calendar year must be filed in accordance with the guidelines and procedures set forth in the instructions to Form 3921 and Form 3922.

(d) *Penalty.* For provisions relating to the penalty applicable to the failure to file a return under this section, see section 6721.

(e) *Exception to return requirements of section 6039(a) for certain nonresident aliens—(1) Return requirement under section 6039(a)(1).* The return requirement of section 6039(a)(1) is not applicable to the exercise of an incentive stock option by an employee who is a nonresident alien (as defined in section 7701(b)) and to whom the corporation is not required to provide a Form W-2, Wage and Tax Statement (or its designated successor)

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 option.

(2) *Return requirement under section 6039(a)(2).* The return requirement of section 6039(a)(2) is not applicable to the first transfer of legal title of a share of stock by an employee who is a nonresident alien (as defined in section 7701(b)) and to whom the corporation is not required to provide a Form W-2 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 as described in paragraph (b)(3) of this section.

(3) For purposes of this paragraph (e), the term *corporation* is defined in section 7701(a) and includes, but is not limited to, the corporation issuing the stock, a related corporation of the corporation, any agent of the corporation, any party distributing shares of stock or other payments in connection with the plan (for example, a brokerage firm), and any party in control of the payment of remuneration for employment to the employee.

(f) *Effective/applicability date—(1) In general.* This section is effective on November 17, 2009. This section will apply as of January 1, 2007.

(2) *Transition period.* Taxpayers are not required to comply with the return requirements of paragraphs (a) and (b) of this section for stock transfers that occur during the 2007, 2008 and 2009 calendar years.

■ **Par. 3.** A new § 1.6039-2 is added to read as follows:

§ 1.6039-2 Statements to persons with respect to whom information is reported.

(a) *Requirement of statement with respect to incentive stock options under section 6039(b).* (1) Every corporation filing a return under § 1.6039-1(a) shall furnish to each person whose name is set forth in such return a written statement with respect to the transfer or transfers made to such person during such year. This statement must include the information described in § 1.6039-1(a)(1).

(2) Each statement required by this paragraph (a) to be furnished to any person must be furnished to such person on Form 3921, Exercise of an Incentive Stock Option Under Section 422(b) (or its designated successor) and be delivered at such time and in such

manner as provided in the instructions thereto.

(b) *Requirement of statement with respect to stock purchased under an employee stock purchase plan under section 6039(a)(2).* (1) Every corporation filing a return under § 1.6039-1(b) shall furnish to each person whose name is set forth in such return a written statement with respect to the transfer or transfers made by such person during such year. This statement must include the information described in § 1.6039-1(b)(1).

(2) Each statement required by this paragraph (b) to be furnished to any person must be furnished to such person on Form 3922, Transfer of Stock Acquired Through an Employee Stock Purchase Plan Under Section 423(c) (or its designated successor) and be delivered at such time and in such manner as provided in the instructions thereto.

(3) If the statement required by this paragraph is made by the authorized transfer agent of the corporation, it is deemed to have been made by the corporation. The term *transfer agent*, as used in this section, means any designee authorized to keep the stock ownership records of a corporation and to record a transfer of title of the stock of such corporation on behalf of such corporation.

(c) *Time for furnishing statements—*(1) *In general.* Each statement required by this section to be furnished to any person for a calendar year must be furnished to such person on or before January 31 of the year following the year for which the statement is required.

(2) *Extension of time.* An extension of time to furnish statements required by this section may be granted in accordance with the guidelines and procedures set forth in the instructions to Form 3921 and Form 3922.

(d) *Penalty.* For provisions relating to the penalty applicable to the failure to furnish a statement under this section, see section 6722.

(e) *Effective/applicability date—*(1) *In general.* This section is effective on November 17, 2009. This section will apply as of January 1, 2007.

(2) *Reliance and transition period.* Notwithstanding § 1.6039-1(g), corporations must furnish information statements to employees in accordance with this section for stock transfers that are subject to § 1.6039-1(a) and (b), and occur during the 2007, 2008 and 2009 calendar years. For purposes of furnishing information statements for stock transfers that occur during the 2007 or 2008 calendar years, taxpayers may rely on § 1.6039-1 of the 2004 final regulations (69 FR 46401) or § 1.6039-

2 of the 2008 proposed regulations REG-103146-08 (73 FR 40999). For purposes of furnishing information statements for stock transfers that occur during the 2009 calendar year, taxpayers may rely on § 1.6039-1 of the 2004 final regulations (69 FR 46401), § 1.6039-2 of the 2008 proposed regulations (REG-103146-08) (73 FR 40999), or this section.

Linda E. Stiff,
Deputy Commissioner for Services and Enforcement.

Approved: November 9, 2009.

Michael Mandaca,
Acting Assistant Secretary of the Treasury (Tax Policy).
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DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR 2550

RIN 1210-AB13

Investment Advice—Participants and Beneficiaries

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Final rule; delay of effective and applicability date.

SUMMARY: This document delays the effective and applicability dates of final rules under the Employee Retirement Income Security Act, and parallel provisions of the Internal Revenue Code of 1986, relating to the provision of investment advice to participants and beneficiaries in individual account plans, such as 401(k) plans, and beneficiaries of individual retirement accounts (and certain similar plans). These rules were published in the **Federal Register** on January 21, 2009. The effective and applicability dates of the final rules were deferred until November 18, 2009, in order to permit a review of policy and legal issues raised with respect to the rules. This document further delays the effective and applicability dates of these final rules from November 18, 2009, until May 17, 2010, to allow additional time for the Department to complete its analysis of questions of law and policy concerning the rules.

DATES: The effective and applicability date of the rule amending 29 CFR Part 2550, published January 21, 2009, at 74 FR 3822, delayed March 20, 2009, at 74 FR 11847, and May 22, 2009, at 74 FR

23951, is further delayed until May 17, 2010.

FOR FURTHER INFORMATION CONTACT: Fred Wong, Office of Regulations and Interpretations, Employee Benefits Security Administration (EBSA), (202) 693-8500. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

On January 21, 2009, the Department of Labor published final rules on the provision of investment advice to participants and beneficiaries of participant-directed individual account plans and to beneficiaries of individual retirement accounts and certain similar plans (IRAs) (74 FR 3822). The rules implement a statutory prohibited transaction exemption under ERISA Sec. 408(b)(14) and Sec. 408(g), and under section 4975 of the Internal Revenue Code of 1986 (Code),¹ and also contain an administrative class exemption granting additional relief. As published, these rules were to be effective on March 23, 2009. Paragraph (g) of Sec. 2550.408g-1 provided that the rule would apply to covered transactions occurring on or after March 23, 2009.

By memorandum dated January 20, 2009, Rahm Emanuel, Assistant to the President and Chief of Staff, directed Agency Heads to consider extending for 60 days the effective date of regulations that have been published in the **Federal Register** but not yet taken effect. The memorandum further advised that, where such regulations are extended, agencies should allow 30 days for interested persons to comment on issues of law and policy raised by the rules. In accordance with that memorandum, and taking into account the considerations listed in the Memorandum of January 21, 2009, from Peter R. Orszag, Director of the Office of Management and Budget, the Department published in the **Federal Register** on February 4, 2009, a document seeking comment on a proposed 60-day extension of the effective dates for these rules until May 22, 2009, and a proposed conforming amendment to the applicability date of Sec. 2550.408g-1 (74 FR 6007). The document also requested comment on issues of law and policy raised by the final rules. The Department indicated that upon completion of its review, it might decide to allow the rules to take effect, issue a further extension, withdraw the rules, or propose amendments, and solicited comment on each of these possible outcomes. In response to this invitation, the Department received 28 comment

¹ These provisions were added to ERISA and the Code by the Pension Protection Act of 2006 (PPA), Public Law 109-280, 120 Stat. 780 (Aug. 17, 2006).