

Recent Regulations May Require Hasty Amendment of Employee Stock Purchase Plans

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Final regulations governing employee stock purchase plans (ESPPs) were issued by the U.S. Department of the Treasury in mid-November. ESPPs grant participating employees of a corporation an option to purchase shares of company stock with a potentially tax-free discount. The final regulations apply to any option issued under an ESPP that is intended to qualify with Section 423 of the Internal Revenue Code on or after January 1, 2010, so swift action is necessary to avoid unintentional violations. If an ESPP is not timely updated to comply with the final regulations, the employees' special tax treatment could be lost and adverse tax consequences could result.

The final regulations contain numerous requirements that must be met for an ESPP to be compliant. Some of the more notable requirements include:

- To ensure that the maximum purchase discount is available, each offering under the ESPP should include a maximum number of shares that can be purchased by each employee (established either by formula or a specific number).
- While ESPPs may exclude from participation certain categories of employees (e.g., employees with two or fewer years of service and employees who are regularly scheduled to work 20 or fewer hours per week), virtually all other U.S. employees must be allowed to participate.
- The purchase discount cannot be greater than 15% of market value (determined based on the share price at the time the option is granted or at the time the option is exercised, whichever is lower).
- An ESPP participant cannot be offered an option to purchase more than \$25,000 worth of company stock during any calendar year.
- Options granted under an ESPP must provide equal rights and privileges to all participants.

While the foregoing requirements have previously been part of the statutory provisions governing ESPPs, the final regulations provide increased detail regarding how ESPP sponsors must comply with the relevant requirements.

ESPP sponsors should immediately undertake a review of their plans to ensure compliance with the final regulations. In addition, given the procedural steps that may be required to amend an ESPP, sponsors should ensure that necessary board and committee members are available to provide consent during the upcoming holiday travel season so that an updated plan can be in place by January 1, 2010, or, if later, the beginning of the next offering period under the ESPP. If shareholder approval of the updated plan is required, such approval may be obtained during 2010 (up to 12 months after the board approves the updated ESPP).

The final regulations can be found [here](#).