
Final Regulations Released For Employee Stock Purchase Plans Under IRC §423 – Action May Be Required By January 1, 2010

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Overview:

The Internal Revenue Service released on November 16 final regulations relating to employee stock purchase plans (ESPPs) qualifying under Section 423 of the Internal Revenue Code. Click [here](#) for the final regulations.

In general, the final regulations provide helpful clarifications of long-standing ESPP rules and add certain new rules that offer greater flexibility for ESPPs. However, the final regulations require that in order for the commencement date of an ESPP offering period to be considered the "grant date" – the relevant date for satisfaction of participation requirements, for calculation of holding periods and for application of the \$25,000 limitation – the plan must state a maximum number of shares that can be purchased by each employee during the period (stated either as a number of shares or by a formula). The regulations make clear that simply referring to the \$25,000 limitation will not suffice to establish a maximum number of shares available for purchase by each employee in the offering period.

The final regulations are effective for offering periods that commence (or

that have a grant date) on or after January 1, 2010, but can be relied upon for options granted prior to January 1, 2010.

Our Recommendations:

We encourage employers with existing ESPPs and those considering establishing an ESPP in the future to have their plans reviewed prior to commencing an offering period in 2010 in order to ensure compliance with the final regulations and to discuss relevant opportunities arising under the new rules. In particular, any employer maintaining an ESPP that does not have a limit on the shares that can be purchased in an offering period must add such a limit before the first offering period to begin after 2009. We expect that in most cases, changes to ESPPs that are necessary to comply with the final regulations can be made without stockholder approval; however, such changes likely will require Board of Directors or Compensation Committee action, so employers should plan accordingly.

For more information on this or other executive compensation matters, contact [R. Scott Kilgore](#), [Amy A. Null](#), [Linda K. Sherman](#), or [Kimberly B. Wethly](#).

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