

Section 6045B Update: IRS Publishes Form 8937 and Notice 2012-11



January 2012

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Section 6045B of the Internal Revenue Code ("IRC") provides that an issuer of a specified security must report certain information to the Internal Revenue Service ("IRS") following an organizational action that affects the basis of the specified security. For purposes of Section 6045B, a specified security can include, but is not limited to, any share of stock in a corporation, any note, bond, debenture, or other evidence of indebtedness. The issuer must set forth a description of the organizational action which affects the basis of such specified security of the issuer and the quantitative effect on the basis of the specified security resulting from the action. This reporting is required for transactions occurring on or after January 1, 2011. It also provides that an issuer must also furnish a separate written statement to each holder of record of the security or its nominee. These rules apply to both public and private corporations, whether foreign or domestic.

Under Section 6045B, taxpayers must comply with the reporting requirement to the IRS within 45 days after the action, but in any case no later than January 15 of the following calendar year. This can be accomplished by filing the required information with the IRS and furnishing a separate written statement to each holder of record or the holder's nominee. Statements to the holders of record are due by January 15 of the calendar year following the year of the action. In the alternative, the taxpayer can post the required information in a readily accessible format on the taxpayer's website, providing accessibility to the public for a period of ten years after the date of posting. A taxpayer is deemed to satisfy both of the reporting requirements (i.e., to the IRS and to the holders of record) if a taxpayer posts the required information on its website by the due date described above.

Organizational Actions. The Regulations issued pursuant to section 6045B do not provide a specific definition of "organizational action." However, the legislative history and the Regulations provide examples of actions that affect the basis of a security in the hands of a shareholder that must be reported in accordance with Section 6045B. These actions would presumably include mergers, spin-offs, stock splits, stock redemptions, and distributions in excess of corporate earnings and profits, if these actions affect the basis of a specified security. It is this last category--return of capital distributions--which will most frequently result in required reporting by a REIT. Instructions to the form provide that reporting is required only if the corporate action affects the basis of all holders of the security.

Information to be Reported. The Regulations also list the information required to be reported. This includes (1) the name and taxpayer identification number of the reporting issuer; (2) identifiers of each security involved in the organizational action including the security's CUSIP number or other security identifier number; (3) the name, address, e-mail address, and telephone number of a contact person at the issuer; (4) the type or nature of the organizational action including, as applicable, the date of the action or the date against which shareholders' ownership is measured for the action; and (5) the quantitative effect of the organizational action on the basis of the security in the hands of a U.S. taxpayer as an adjustment per share or as a percentage of old basis, including a description of the calculation, the applicable section of the IRC and subsection upon which the tax treatment is based, the data supporting the calculation such as the market values of securities and valuation dates, any other information necessary to implement the adjustment including the reportable taxable year, and whether any resulting loss may be recognized.

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Exemptions. The Regulations provide that reporting to the IRS and shareholders of record or its nominee is not required if the recipient is deemed to be an "exempt recipient." Exempt recipients include (1) corporations, whether domestic or foreign; (2) an organization exempt from taxation under Section 501(a) of the IRC or an individual retirement plan; (3) the United States or a State, the District of Columbia, a possession of the United States, or a political subdivision thereof, or an international organization; (4) a foreign government, a political subdivision thereof, or an international organization; (5) a foreign central bank of issue; (6) a dealer in securities or commodities registered as such under the laws of the United States or a State; (7) a futures commission merchant registered as such with the Commodity Futures Trading Commission; (8) a REIT, as defined in Section 856 of the IRC; (9) an entity registered at all times during the taxable year under the Investment Company Act of 1940; and (10) a common trust fund. A partnership composed exclusively of corporations is also an exempt recipient. The regulations provide guidance regarding the documentation that can be relied upon or is required in determining exempt status. In addition, the Regulations provide that reporting to the IRS is not required if the issuer reasonably determines that all of the holders of the security are exempt recipients as indicated above.

A RIC or REIT that reports undistributed capital gains to shareholders is deemed to have met the reporting requirements of Section 6045B for purposes of the undistributed capital gain distribution by filing Forms 2438 and 2439.

Assumptions and Revisions. The Regulations permit issuers to make reasonable assumptions about facts that have a quantitative affect on basis that cannot be determined prior to the reporting due date. This can have a potential impact on REITs which make distributions in excess of corporate E&P on a regular basis. Generally, an issuer must treat a distribution as a dividend until

obtaining facts that produce a different result. An issuer then has 45 days from the date of obtaining this information (or until January 15th of the following year, if earlier) to report.

Penalties. Failure to comply with the reporting requirements of Section 6045B may subject an issuer to penalties of \$100 per failure. These penalties are assessed on each failure to file with the IRS and each failure to report the required information to each holder of record.

Additional Guidance. Although the reporting requirement was effective for transactions occurring on or after January 1, 2011, the IRS did not release a form during 2011. Notice 2011-18, released in February 2011 provided transitional relief. The IRS indicated in the Notice that issuers were expected to make a good-faith effort to comply with the requirements of Section 6045B, but until a form for reporting was made available, the IRS would not impose penalties for a failure to file an issuer return with the IRS within 45 days of an organizational action taken in 2011, provided that the issuer files the issuer return with the IRS, or posts the return on its website as provided in the Regulations, by January 17, 2012.

Form 8937, Report of Organizational Actions Affecting Basis of Securities, was released on January 5, 2012.

On January 13, 2012, the IRS released Notice 2012-11. In this notice, the IRS acknowledges that questions have arisen following the release of the final Form 8937 and instructions and recognizes that the release date provides a very limited timeframe remaining before the due date of the form. Accordingly, the notice provides that the IRS will not impose penalties for reporting incorrect information for 2011 organizational actions provided that issuers make good-faith efforts in timely posting the Form 8937 or the required information on the issuers' primary public websites or filing accurate Forms 8937 and

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furnishing the corresponding issuer statements. Unlike Notice 2011-18, which addressed only the penalties imposed on a failure to timely file Form 8937, Notice 2012-11 provides relief for both the penalty for failure to timely file Form 8937 and the penalty for failure to timely provide the issuer statements to stockholders.

Example:

During 2011, a REIT declares quarterly distributions with respect to shares of stock held by recipients that are not "exempt recipients" for purposes of Section 6045B. Total distributions for 2011 are \$100x. Prior to January 17, 2012, the REIT does not determine its earnings and profits and treats the entire \$100x as being made out of E&P pending determination of its E&P. The REIT is not required to file Form 8937 with the IRS or report to its shareholders before January 17, 2012.

If the REIT later revises its E&P determination and amends its Form 1099s, it is required to then revise its filings under Section 6045B. The REIT is required to file under Section 6045B consistent with its Form 1099 filings.

In contrast, if, prior to January 17, 2012, the REIT had determined that its E&P for the taxable year ended December 31, 2011 was only \$95x, then the REIT apparently would be required to file Form 8937 (and provide a statement to shareholders of record) on or before January 17, 2012, with respect to such shareholders, subject to any relief under the notices. Neither notice explicitly addresses this fact pattern, leaving the taxpayer to rely upon the exception for a good-faith effort to timely file accurate Forms 8937 and issuer statements.

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