

## New U.S. Tax Basis Reporting Rules Imposed on Certain Securities Issuers

U.S. and non-U.S. issuers of specified securities are subject to new U.S. tax basis reporting obligations under Section 6045B of the U.S. Internal Revenue Code of 1986, as amended (*Code*), which was enacted as part of the Energy Improvement and Extension Act of 2008. In general, effective January 1, 2011, if an issuer of a "specified security" takes an organizational action that affects the U.S. tax basis of that security, then the issuer, subject to certain exceptions, must file Form 8937 with the U.S. Internal Revenue Service (*IRS*) and furnish a copy of the form (or corresponding information statement) to its security holders or their nominees. As discussed below, an issuer is not required to file Form 8937 with the IRS or furnish a copy of the form to holders if the issuer posts the required information on its website. An issuer's failure to comply with such reporting obligations could give rise to significant penalties. If an issuer has not already done so, it should file Forms 8937 or post the required information on its website for 2011 organizational actions promptly.

### Scope of Section 6045B Basis Reporting

The scope of the Section 6045B information reporting obligations is very broad. As noted, the new obligations apply both to U.S. and non-U.S. issuers of "specified securities." A "specified security" means any share of stock or any interest treated as stock (including American Depositary Receipts, or *ADR*) in a U.S. or non-U.S. corporation. For example, a non-U.S. issuer could be required to report information under Section 6045B not only with respect to its shares but also with respect to its ADRs.

There are multiple triggers for Section 6045B reporting. In general, an issuer must comply with Section 6045B with respect to any organizational action that affects the U.S. tax basis of its securities. Such actions are not specifically enumerated in the Code or the implementing U.S. Treasury regulations, but include nontaxable stock distributions to shareholders, such as stock splits. In addition, depending on the U.S. income tax treatment of the organizational action, a merger, spin-off or certain cash distributions also could affect the tax basis of an issuer's securities and, accordingly, could require information reporting under Section 6045B.

Section 6045B reporting is not required if the issuer properly determines that all the security holders are "exempt recipients." Exempt recipients include corporations, charitable organizations, non-U.S. holders, individual retirement plans, the United States government, a non-U.S. government, a state and political subdivisions. For example, a wholly-owned subsidiary that makes a distribution to its corporate parent would not be required to report any information under Section 6045B because the corporate parent would be an exempt recipient. In addition, Section 6045B reporting is not required if the issuer is a regulated investment company that can hold itself out as a money market fund under Rule 2a-7 under the U.S. Investment Company Act of 1940. Special reporting rules apply to S corporations, real estate investment trusts and regulated investment companies that must file information under Section 6045B.

Reporting under Section 6045B can be particularly burdensome for non-U.S. issuers. Consider, for example, a cash distribution by a non-U.S. issuer to its shareholders. If the cash distribution exceeds the issuer's "earnings and profits" for the year (as determined under the U.S. tax rules), then the excess would generally reduce the shareholder's U.S.

tax basis in its stock and, accordingly, would require the non-U.S. issuer to report (among other things) the change in basis to the IRS and to the shareholders. A non-U.S. issuer that does not calculate its "earnings and profits" each year under the U.S. tax rules might find it burdensome to comply with this obligation. In addition, as noted above, ADRs are treated as "specified securities" for purposes of Section 6045B. Accordingly, an action by a non-U.S. issuer that affects the basis of its shares and the basis of its ADRs (such as a nontaxable stock split or certain cash distributions) would be required to report the basis information to its shareholders, its ADR holders and the IRS.

## **Form 8937 (Report of Organizational Actions Affecting Basis of Securities)**

Unless an exception applies, such as the public reporting exception (described below), an issuer must satisfy its Section 6045B reporting obligation by filing Form 8937 with the IRS and distributing the form to its security holders. On January 5, 2012, the IRS released the final version of Form 8937 and the instructions to the form.

### *Required Information*

In general, an issuer must report the following information on Form 8937:

- the name and taxpayer identification number of the reporting issuer;
- certain identifiers of each security involved in the organizational action (including, the CUSIP number), the classification of the security, the serial number and ticker number, as well as descriptions about the class of security;
- the name, address, e-mail address and telephone number of a contact person at the issuer;
- the type or nature of the organizational action and the date of the action (or date against which the shareholders' ownership is measured for the action);
- 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 the old basis; and
- a description of the change in basis and the data that supports the calculation, such as market values of the securities and the valuation dates.

Issuers must also report the applicable section and subsection of the Code upon which the tax treatment of the organizational action is based and whether any resulting loss from the organizational action can be recognized.

### *Report to Security Holders*

The issuer must provide a copy of Form 8937 (or a written statement including the same information) to each security holder of record as of the date of the organizational action and all subsequent security holders of record up to the date that the copy is provided. If the security is recorded on the issuer's books in the name of a nominee, then the issuer must furnish a copy of Form 8937 to the nominee in lieu of the holder, unless the nominee is an agent of the issuer, or a plan operated by the issuer, in which case the issuer must instead furnish the form or information statement to the holder.

### *Public Reporting (Website) Exception*

Issuers are not required to file Form 8937 with the IRS or provide a copy of the form to the security holders if the issuer timely posts a properly completed Form 8937 in a readily accessible format in an area of the issuer's primary public website dedicated to such purpose. To fall within this public reporting exception, the issuer must keep the form accessible to the public on its website (or on the primary website of any successor organization) for ten years.

### **Form 8937 Due Date and Penalties**

Form 8937 must be filed with the IRS on or before the 45th day following the organizational action or, if earlier, January 15th of the year following the calendar year of the organizational action. A copy of Form 8937 (or written statement with the same information) must be provided to security holders or nominees by January 15th of the year following the calendar year of the organizational action. As noted, Form 8937 is not required to be filed with the IRS (or provided to holders) if the issuer complies with the public reporting (website) exception described above.

An issuer may use an agent, including a depository, to satisfy its reporting obligations under Section 6045B. For example, a non-U.S. issuer that has sponsored an ADR program could use its depository bank to file Form 8937. Similarly, a non-U.S. issuer whose shares trade and settle directly in the U.S. (i.e., by means of NY registry program) could use the U.S. registrant and transfer agent to file Form 8937. However, if an issuer uses an agent, the issuer remains liable for the penalties for any failure to comply with the rules. It is not clear at this time that website posting can be satisfied through an agent.

The penalty for failing to file a properly completed Form 8937 with the IRS and the penalty for failing to provide a copy of the form (or written statement with the same information) to security holders is applied separately. In general, the penalty for failing to file correct information returns (including Form 8937 and various other information returns) with the IRS is U.S. \$100 per return, with a U.S. \$1,500,000 cap on the total amount of penalties for such failures for any calendar year. The penalty for failing to provide a copy of a properly completed Form 8937 (or written statement) to security holders is equal to U.S. \$100 per copy (or statement) not so provided (with a maximum of U.S. \$1,500,000 for any calendar year). Thus, the combined penalties for failing to comply with Section 6045B could equal up to U.S. \$3,000,000 dollars in any calendar year. In general, the issuer may avoid penalties if it shows that the failure is due to reasonable cause and not willful neglect.

In Notice 2011-18 the IRS stated that it would not impose penalties on issuers that failed to comply with Section 6045B with respect to organizational actions occurring in 2011, as long as the issuer either filed Form 8937 (and provided a copy of it to security holders) or posted the required information on its website by January 17, 2012. Furthermore, the IRS subsequently issued Notice 2012-11 stating that, with respect to organizational actions taken in 2011, it will not impose penalties on issuers for reporting incorrect information, provided that the issuer makes a good-faith effort to report the information timely and accurately. Accordingly, with respect to 2011 organizational actions, we encourage issuers that have not yet filed Form 8937 or posted the required information on their website to do so promptly.

### **Enforcement of Section 6045B Against Non-U.S. Issuers**

As noted, the reporting obligations imposed by Section 6045B apply equally to U.S. and non-U.S. issuers. If a non-U.S. issuer holds any assets located within the United States (such as U.S. business operations

or a U.S. bank account) or owns any U.S. subsidiaries, the IRS could seek to collect penalties from those U.S. assets. In addition, we note that certain treaties with the U.S. could allow the IRS to enforce a default judgment for penalties outside the U.S. ♦

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**If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.**

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