

IRS Form 8937 Reporting – An Often-Overlooked U.S. Tax Reporting Requirement

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As discussed in our [prior blog posting](#), Canadian companies should be aware that, if they engage in certain “organizational actions” (as discussed below) that affect the tax basis of their securities held by one or more U.S. persons, they may be required to evaluate the effect of such action on the U.S. holder’s tax basis and promptly disclose this information on a properly completed IRS Form 8937, *Report of Organizational Actions Affecting Basis of Securities*.

Generally, Internal Revenue Code Section 6045B (including the Treasury Regulations promulgated thereunder) requires an issuer classified as a corporation for U.S. federal income tax purposes of certain securities to report on an IRS Form 8937 any “organizational action” that affects the tax basis of such securities held by one or more U.S. holders. For these purposes, Canadian residents who are U.S. citizens or green card holders are also treated as U.S. holders.

“Organizational actions” include, without limitation:

- tax-deferred mergers, amalgamations and other acquisitions under Code Section 368(a),
- contributions of property to controlled corporations under Code Section 351(a),
- contributions to capital without the issuance of additional securities,
- tax-deferred stock distributions,
- share consolidations (i.e., reverse-stock splits),
- tax-deferred spin-offs,
- distributions that are treated as a return of capital (i.e., a distribution in excess of a company's earnings and profits),
- taxable liquidations under Code Section 331 which involve more than one distribution in liquidation,
- recapitalizations, redomiciliations and conversions under Code Section 368(a), and
- modifications of specified debt instruments.

Issuers required to report an “organizational action” on an IRS Form 8937 may generally

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satisfy the applicable reporting requirements in one of two ways. Firstly, a corporate issuer may satisfy the reporting requirement by (a) providing the IRS Form 8937 to the IRS within 45 days of the “organizational action” (or by January 15th of the following year, if earlier), and (b) providing the IRS Form 8937 to the affected securityholders by January 15th of the following year. Alternatively, such an issuer may satisfy the applicable reporting requirement by timely posting the IRS Form 8937 on its public website within 45 days of the “organizational action” (or by January 15th of the following year, if earlier) and maintaining it on such public website (or any successor website) for ten years. For purposes of administrative convenience, most companies that maintain a corporate website generally choose this latter option of posting the IRS Form 8937 on their public website.

The instructions to IRS Form 8937 provide that issuers required to report an “organizational action” on an IRS Form 8937 may make reasonable assumptions about the quantitative effect on tax basis that cannot be precisely determined by the due date. If such an issuer later determines facts that would result in a different quantitative effect on tax basis from what was previously reported, then such issuer would generally be required to file a corrected return with the IRS within 45 days of making such determination and to provide such corrected return to the affected securityholders by the later of the January 15th due date (discussed above) or within 45 days of making such determination.

A non-U.S. issuer classified for U.S. federal income tax purposes as a corporation is subject to the same reporting rules described above as a U.S. issuer classified for U.S. federal income tax purposes as a corporation, provided it has at least one securityholder who is not an exempt recipient (such as a U.S. individual or partnership). For example, a Canadian unlimited liability company which elects to be treated as a corporation for U.S. federal income tax purposes is treated as a corporation for IRS Form 8937 reporting purposes.

Penalties may apply for the failure to properly report an organizational action. An acquiring or successor entity of an issuer must also satisfy the above reporting obligations if the original issuer has not done so.

Dorsey & Whitney regularly assists taxpayers with their reporting requirements under IRS Form 8937. If you have any questions or would like to learn more, please contact us.