Wilson Sonsini Goodrich & Rosati
PROFESSIONAL CORPORATION

WSGR ALERT

DECEMBER 2010

IRS PROVIDES ADDITIONAL 409A CORRECTION RELIEF

As previously summarized in our WSGR Alert dated October 8, 2010, the Internal Revenue Service (IRS) established a correction program in Notice 2010-6, providing the ability to correct certain documentary errors in deferred compensation plans and arrangements subject to Section 409A on favorable terms if such corrections are completed by December 31, 2010. If not corrected, such arrangements could result in early income inclusion, a 20 percent federal penalty tax, and a 20 percent state penalty for California taxpayers.

The IRS recently announced, in Notice 2010-80, additional relief for documentary errors in deferred compensation plans. An important advantage of the new guidance is that for corrections made before December 31, 2010, the only information reporting requirement is a filing by the employer stating that corrections were made. If corrections are made after December 31, 2010, affected employees must also attach a filing to their federal income tax return.

In addition to this helpful reporting relief, the IRS extended the deadline for correction of certain documentary errors and expanded the pre-approved methods of corrections.

Information Reporting Relief

The new guidance provides relief from certain of the tax information reporting requirements previously outlined in Notice 2010-6. An employer participating in the correction program is required to attach a disclosure of participation to its federal income tax return for the year the correction occurred and provide this statement to the affected employees. Prior to the new guidance, Notice 2010-6 required employees to attach a copy of the statement to their personal income tax return. Under the new guidance, although the employer reporting requirements still apply, the requirement for the employee to attach an information statement to his or her tax return is waived for (i) all corrections under the program completed by December 31, 2010, and (ii) any corrections made with respect to release-timing violations during the transition period ending December 31, 2012, as described below.

Relief for Payments Conditioned on a Release of Claims

As summarized in our prior WSGR Alert, the IRS takes the position that if payment of an amount is conditioned upon an employee signing a release of claims, such a condition could create a compliance issue for any deferred compensation arrangement by providing an employee with the ability to delay the signing of his or her release until a future tax year. For this reason, many separation agreements and severance provisions of employment agreements contain specific release-timing and payment language.

For agreements that don't contain specific release-timing and payment language, the new guidance permits the correction of this problem by restructuring the arrangements to (a) require that payments be made on a fixed date 60 or 90 days after the separation from service that triggered the payment or (b) provide that the payment will commence automatically in the second tax year if the designated period for executing the release spans two tax years (e.g., a 30-day window for returning a release that begins on December 10).

The new guidance permits the correction of release-timing errors during a new and extended transition period that will now end on December 31, 2012. During this new extended transition period (i) such release-timing language, if operated in compliance with the guidance, will be deemed to satisfy Section 409A, and (ii) the release-timing language may be corrected under the correction program without adverse tax consequences under Section 409A.

Action Steps

The new relief makes action to correct Section 409A errors by December 31, 2010, more attractive by eliminating the employee information reporting requirement. Employers also should consider reviewing plans and taking advantage of the new guidance to correct payment arrangements that are contingent upon the execution of a release. The new relief gives employers an additional transition period to identify and address this issue without adverse tax consequences under Section 409A.

Continued on page 2...

IRS Provides Additional 409A Correction Relief

Continued from page 1...

If you have any questions regarding this WSGR Alert, or would like assistance reviewing your documents for compliance with Section 409A, please contact any member of Wilson Sonsini Goodrich & Rosati's employee benefits and compensation practice:

John Aguirre	(650) 565-3603	Scott McCall	(650) 320-4547
Melody Barker	(415) 947-2029	Michael Montfort	(202) 973-8815
Ralph Barry	(858) 350-2344	Cisco Palao-Ricketts	(650) 565-3617
Jessica Bliss	(650) 849-3470	Roger Stern	(650) 320-4818
Madeleine Boshart	(415) 947-2057	David Thomas	(650) 849-3261
Brandon Gantus	(650) 849-3405	Jackie Tokuda	(650) 565-3904
Michael Klippert	(650) 849-3276	Michelle Wallin	(650) 565-3620
Sriram Krishnamurthy	(202) 973-8876		

<u>Circular 230 Compliance:</u> To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this memorandum is not intended or written to be used, and cannot be used, for the purpose of (a) avoiding penalties under the Internal Revenue Code, or (b) promoting, marketing, or recommending to another party any transaction or matter addressed herein.

WSGR

Wilson Sonsini Goodrich & Rosati

PROFESSIONAL CORPORATION

This WSGR Alert was sent to our clients and interested parties via email on December 14, 2010. To receive future WSGR Alerts and newsletters via email, please contact Marketing at wsgr_resource@wsgr.com and ask to be added to our mailing list.

650 Page Mill Road
Palo Alto, CA 94304-1050
Tel: (650) 493-9300   Fax: (650) 493-6811
email: wsgr_resource@wsgr.com

www.wsgr.com