

ADVISORY

SULLIVAN & WORCESTER EMPLOYMENT & BENEFITS ADVISORY

IRS Announces Limited Relief for Section 409A Operational Mistakes

In Notice 2007-100, the IRS reveals a program for full or partial relief from Section 409A penalties in the case of certain innocent operational slip-ups. The first part of the Notice provides relief from all adverse tax consequences where certain mistakes are corrected within the same tax year in the manner prescribed by the Notice. These include deferring more or less than the applicable documentation had called for, paying out of a deferred compensation plan more than should have been paid, and violation of the prohibition on paying deferred compensation upon termination of a key employee of a public company within six months after separation from service. Adjustment of the stock option exercise price of an unexercised option where an administrative mistake had set the price too low is also possible within the same year.

The second part of the Notice applies to tax years beginning before 2010 in circumstances similar to those mentioned above (other than option repricing) but where correction is not made within the same tax year. If the amount directly involved in the operational mistake does not exceed the Section 402(g) limit (currently \$15,500), self-correction under the prescribed regime will cause Section 409A income taxes plus the 20% additional tax to be imposed solely on the amount directly involved and not on other amounts deferred under the plan.

Except for option repricing, all of the corrections mentioned above must be accompanied by tax return reporting by both the payor and payee of the self-correction involved. Finally, the Notice announces IRS consideration of a possible broader program for Section 409A self-correction, generally along the lines of the second part of the Notice but without being limited to slip-ups that are less than the Section 402(g) limit.

IF YOU WOULD LIKE ADDITIONAL INFORMATION, PLEASE CONTACT:

Jonathan B. Dubitzky
617 338 2936
jdubitzky@sandw.com

David A. Guadagnoli
617 338 2938
dguadagnoli@sandw.com

Amy E. Sheridan
617 338 2897
asheridan@sandw.com

BOSTON

Sullivan & Worcester
One Post Office Square
Boston, MA 02109

NEW YORK

Sullivan & Worcester
1290 Avenue of the Americas
New York, NY 10104

WASHINGTON, DC

Sullivan & Worcester
1666 K Street, NW
Washington, DC 20006

SULLIVAN &
WORCESTER