



LEGAL ALERT

www.swlaw.com

April 2009

SNELL & WILMER

Founded in 1938, Snell & Wilmer is a full-service business law firm with more than 425 attorneys practicing in eight offices throughout the western United States and in Mexico, including Phoenix and Tucson, Arizona; Los Angeles and Orange County, California; Denver, Colorado; Los Cabos, Mexico; Las Vegas, Nevada; and Salt Lake City, Utah. Representing corporations, small businesses, and individuals, our mission is to take a genuine interest in our clients, understand their objectives, and meet or exceed their expectations.

Snell & Wilmer
L.L.P.
LAW OFFICES

IRS Announces Section 409A Correction Program

The Internal Revenue Service (the "IRS") recently issued Notice 2008-113 (the "Notice") detailing a correction program for inadvertent and unintentional Section 409A operational errors in administering nonqualified deferred compensation plans. The Notice modifies and incorporates a prior notice released by the IRS and is effective for taxable years beginning on or after January 1, 2009. This article highlights key aspects of the new correction program.

Operational Failures Only

It is critical to note that the Section 409A correction program only applies to operational failures. The program does not apply to Section 409A document failures. Plan documents were required to be amended to comply with Section 409A by December 31, 2008.

General Eligibility

The following criteria must be met to be eligible for the Section 409A correction program:

- The employer must take "commercially reasonable steps to avoid a recurrence of the operational failure."
- An employee's federal tax return cannot be under examination for the year in which relief is sought.
- The operational failure must be "inadvertent and unintentional."
- An employer must not be experiencing a "substantial financial downturn" such that they are unlikely to make a corrective repayment when due.



Types of Relief Available

Depending on when the operational failure occurs and the amount of compensation involved, the following types of operational failures may be corrected:

- Failures to defer compensation
- Incorrect payments of compensation
- Excess deferrals of compensation
- Grants of below-market stock rights

Treatment of Insiders

Operational failures involving “insiders” are limited under the correction program. For the purposes of the Notice, an “insider” is a director or officer or is directly or indirectly the beneficial owner of more than 10% of any class of any equity security of the employer, determined in accordance with Section 16 of the Securities Exchange Act of 1934.

Additional Relief for Non-Insiders

A special transition rule for “non-insiders” allows for the correction of operational failures that oc-

curred on or before December 31, 2007, without incurring the additional Section 409A taxes if corrected *on or before December 31, 2009*.

Special Information and Reporting Rules

An employer availing itself of the Section 409A correction program must attach a memorandum to its tax return for the year in which the failure occurred explaining its reliance on the correction program. An employer must provide a similar memorandum to employees affected by the failure.

Action Item

Employers should identify and review existing deferred compensation arrangements for Section 409A operational failures and consider whether there are any operational failures they wish to correct in compliance with the Notice.

If you have questions about this article, please contact Marvin Swift at 602.382.6211 or Greg Gautam at 602.382.6356.

* * *