



MEMO

Date: June 2, 2014
From: Jonathan D. Weir, JD*
To: WFR Clients & Friends
Subject: New 409A Deferred Compensation Limited Scope Audits Announced – Will It Impact You?

Recently the IRS has announced the launch of a limited audit initiative that will examine how well a select group of current nonqualified deferred compensation plans are complying with Code Section 409A.

Nonqualified deferred compensation plans are governed through Section 409A of the IRC Code. The IRS performed Section 409A audits in 2009 and they were conducted at a very general level. These recently announced audits will look more closely at the plans of 50 public companies which were already selected for employment tax audits.

This type of audit is known as a Compliance Initiative Project (CIP) audit. CIP's are often done as a way to gauge compliance and the need for more widespread audits. The IRS has specifically noted that the focus on 409A compliance will be on the top 10 highest compensated executives. It has been noted that the auditors will be concentrating on the following components of Section 409A:

- 1) Initial Deferral Elections
- 2) Subsequent elections to further defer receipt of deferred compensation
- 3) Plan distributions, including the six-month delay for select employees

Despite this limited scope, WFR recommends all Companies with a 409(A) plan should review both their legal and operational compliance. In particular we recommend a close look at the following plan aspects:

- 1) Bad "good reason" definitions for plan deferrals, withdrawals, etc.
- 2) Lack of 409A savings clause within written agreements
- 3) Eligibility and the composition of the participant group, notably whether the plan is limited to a "top hat" group
- 4) Proper administrative procedures are in place to ensure timely deferral elections of new entrants
- 5) Company procedures for completing Forms W-2 and treatment of FICA/FUTA, notably deferred amounts are taxable for FICA (social security and Medicare) when earned and vested
- 6) Current year distributions are reported as wages
- 7) Review any deferrals and distributions outside of the specific deferred compensation arrangement to clarify if they are covered under 409A and in order if so

This action by the IRS announcing another round of 409(A) audits provides an initiative to all plan sponsors to review their plans and other arrangements that may be subject to 409A for both documentary and operational compliance prior to an IRS visit and while any errors can still be rectified.

Please contact us for more information on improving the NQDC plan you already have or finding one that is suitable for your company. **Weir Financial Resources: 716.845.3343 - jweir@weirresources.com**

The information provided is of a general nature and intended to be accurate and authoritative in regard to the subject covered. It is provided with the understanding that it does not constitute tax, legal or accounting advice. *Licensed, not practicing.