

Executive Benefits BULLETIN

July 6, 2005

ADDITIONAL §409A GUIDANCE EXPECTED IN AUGUST OR SEPTEMBER

Second Round of Guidance May Include Extension of Key Deadlines

Last December, the Treasury Department issued Notice 2005-1, which provided initial transition guidance for the nonqualified deferred compensation rules contained in new Internal Revenue Code §409A. (For a more detailed discussion of the contents of Notice 2005-1, please refer to Clark Consulting's *Executive Benefits Bulletins* of December 22, 2004, and January 7, 2005). Informal comments from Treasury Department officials indicate that a draft of a second round of guidance is now being reviewed at the highest levels of the Treasury Department and the Internal Revenue Service, and depending upon the time necessary for this internal review, may be released in August or September. This extensive guidance is expected to be in the form of proposed or temporary Treasury regulations exceeding 100 pages in length.

The guidance will generally cover plan drafting, design and operation. Topics likely to be addressed include:

- ◆ Possible Extension of the December 31, 2005 Deadline for Documentary Compliance. Some sources say a three-month extension of the deadline for bringing plan documents into compliance is likely, while others predict an extension of up to twelve months. In addition, other portions of the initial transition relief may be extended, including extension of the deadline for making distribution elections for amounts subject to Internal Revenue Code §409A.
- ◆ Clarification Regarding the Scope of the Five-Year "Pushout" Requirement. Informal discussions indicate that the second round of guidance will clarify how broadly the five-year "pushout" requirement (i.e., minimum period of delay) must be applied when a participant elects to change the time or form of a payment.
- ◆ Exclusion of SARs Granted by Privately Held Companies. In Notice 2005-1, stock appreciation rights (SARs) granted by publicly traded companies were excluded from Internal Revenue Code §409A if certain requirements were met, including the requirements that the exercise price of the SAR may not be less than fair market value of the stock on the date of grant and that the SAR must be settled in stock. It appears that in the second round of guidance this exception may be broadened to include SARs granted by privately held companies.

The second round of guidance will not address all of the outstanding issues involved in interpreting and applying Internal Revenue Code §409A to nonqualified deferred compensation arrangements. A third round of guidance is expected, and may be targeted for release in December. The third round of guidance will likely address penalties, among other topics.

www.clarkconsulting.com

For additional information, please contact your Clark Consulting representative.

Executive Benefits Bulletin is not intended to present an opinion on legal, tax, accounting or investment matters.

Please consult professional advisors for legal, tax, accounting or investment advice, as applicable, before taking any action based upon this information.

Securities products and services are offered through Clark Securities, Inc., DBA CCFS, Inc. in Texas, member NASD & SIPC, Los Angeles, CA 90071, (213) 438-6300. Clark Securities, Inc., DBA CCFS, Inc. in Texas, is a wholly owned subsidiary of Clark, Inc.