



# Alert

Employee Benefits & Executive Compensation  
Client Service Group

To: Our Clients and Friends

December 7, 2010

## Executive Compensation Update: IRS Issues Guidance Expanding and Modifying 409A Correction Program and New Reporting Requirements for Stock Transfers under ISOs and ESPPs

### **409A Correction Program Modifications**

Last week, the IRS issued Notice 2010-80 (the "Notice"), which made favorable changes to the procedures for voluntary correction of failures to comply with Internal Revenue Code Section 409A ("Section 409A") originally issued in Notice 2010-6. These changes should make the correction procedures more accessible and less burdensome and are summarized below.

Linked Plans - The Notice clarifies that a nonqualified plan linked to a qualified plan or another nonqualified plan may be corrected under the documentary correction program, provided that the linkage does not affect the time and form of payments under the plans.

Stock Rights Intended to Comply with 409A - The types of plans eligible for relief under the documentary correction program now include certain stock rights, such as options and stock appreciation rights, that were intended to comply with the requirements of Section 409A(a) (rather than be exempt from the requirements). This means that relief is generally available for stock options and stock appreciation rights to the extent that the recipient of the award may exercise the right only on a fixed date, within a period beginning and ending within a single taxable year or on a permissible payment event under Section 409A. Stock options and stock appreciation rights granted with an exercise or base price that was intended to be at least equal to fair market value and were intended to be exempt from Section 409A are not eligible for relief.

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Releases and Non-compete Agreements - Documentary failures involving payments at separation from service, or other permissible payment event, subject to the employee's delivery of a release of claims, non-compete agreement, non-solicitation agreement or similar employment-related document now can be corrected under the IRS procedures by providing for payment during a specified period of time not longer than 90 days following a permissible payment event. If the payment period spans two of the employee's taxable years, then the payment must be made during the subsequent taxable year.

Transitional relief is also available to correct failures involving arrangements that were in effect on or before December 31, 2010 under which payments dependent upon the employee delivering a release of claims, non-compete agreement, non-solicitation agreement or similar employment-related documents. These failures may be corrected through December 31, 2012, provided that any payments made after March 31, 2011 that could be paid during a period that begins in one taxable year and ends in the subsequent taxable year must be made in the subsequent taxable year and to the extent any amounts remain deferred under the plan, the plan must be amended to be compliant by no later than December 31, 2012. Any payment made before March 31, 2011 pursuant to such an arrangement that was in effect on or before December 31, 2010 does not need to be corrected under the Notice.

Information and Reporting Relief - Employee information reporting will not be required for documentary corrections made pursuant to IRS procedures not later than December 31, 2010. In addition, employee information reporting will not be required for any operational corrections made pursuant to IRS procedures in the same taxable year as the occurrence of the failure.

### **New Reporting Requirements for Stock Transfers under Incentive Stock Option Plans and Employee Stock Purchase Plans for 2010**

Section 6039 of the Internal Revenue Code (the "Code") was amended by The Tax Relief and Health Care Act of 2006 (the "Act") to require employers sponsoring incentive stock option ("ISO") plans and employee stock purchase plans ("ESPPs") to file returns with the IRS after the company has either transferred stock to any employee as a result of the employee's exercise of an ISO, or recorded the transfer of stock acquired under an ESPP on the employee's behalf. The Act and new treasury regulations also revise and clarify what information must be provided to employees in information statements provided following such transfers. These new rules apply to transfers occurring in 2010 and subsequent calendar years.

The new rules require filing [Form 3921](#), Exercise of an Incentive Stock Option Under Section 422(b), or [Form 3922](#), Transfer of Stock Acquired Through an Employee Stock Purchase Plan Under Section 423(c). The appropriate form must be filed with the IRS and provided to the employee no later than January 31 of the year following the year in which the transfer occurs in order to avoid penalties. In other words, for any such transfers taking place in 2010, the deadline is January 31, 2011.

These reporting requirements generally do not apply to nonresident aliens who perform services outside the United States for whom the company is not required to provide a Form W-2. They also do not apply to any stock options that are not ISOs subject to Code Section 422 or to any transfers of stock under a stock purchase plan that is not intended to qualify under Code Section 423.

If you have any questions regarding anything discussed in this Alert, the attorneys and other professionals of the Employee Benefits and Executive Compensation group of Bryan Cave LLP are available to answer your questions.

<b>Richard (Rick) L. Arenburg</b>	(404) 572-6765	<a href="mailto:richard.arenburg@bryancave.com">richard.arenburg@bryancave.com</a>
<b>Brian W. Berglund</b>	(314) 259-2445	<a href="mailto:bwberglund@bryancave.com">bwberglund@bryancave.com</a>
<b>Harold G. Blatt</b>	(314) 259-2216	<a href="mailto:hgblatt@bryancave.com">hgblatt@bryancave.com</a>
<b>Armin G. Brecher</b>	(404) 572-6634	<a href="mailto:armin.brecher@bryancave.com">armin.brecher@bryancave.com</a>
<b>Bard Brockman</b>	(404) 572-4507	<a href="mailto:bard.brockman@bryancave.com">bard.brockman@bryancave.com</a>
<b>Carrie E. Byrnes</b>	(312) 602-5063	<a href="mailto:carrie.byrnes@bryancave.com">carrie.byrnes@bryancave.com</a>
<b>Paul F. Concannon</b>	(404) 572-6856	<a href="mailto:paul.concannon@bryancave.com">paul.concannon@bryancave.com</a>
<b>Chad R. DeGroot</b>	(314) 259-2803	<a href="mailto:chad.degroot@bryancave.com">chad.degroot@bryancave.com</a>
<b>Edmund (Ed) Emerson</b>	(404) 572-6739	<a href="mailto:edmund.emerson@bryancave.com">edmund.emerson@bryancave.com</a>
<b>Jennifer Faucett</b>	(404) 572-4516	<a href="mailto:jennifer.faucett@bryancave.com">jennifer.faucett@bryancave.com</a>
<b>Kyle P. Flaherty</b>	(212) 541-2134	<a href="mailto:kpflaherty@bryancave.com">kpflaherty@bryancave.com</a>
<b>Mark H. Goran</b>	(314) 259-2686	<a href="mailto:mhgoran@bryancave.com">mhgoran@bryancave.com</a>
<b>Carrie E. Herrick</b>	(314) 259-2212	<a href="mailto:carrie.herrick@bryancave.com">carrie.herrick@bryancave.com</a>
<b>Jonathan Hull</b>	(314) 259-2359	<a href="mailto:jthull@bryancave.com">jthull@bryancave.com</a>
<b>Charles B. Jellinek</b>	(314) 259-2138	<a href="mailto:cbjellinek@bryancave.com">cbjellinek@bryancave.com</a>
<b>Michele L. Lux</b>	(314) 259-2519	<a href="mailto:mllux@bryancave.com">mllux@bryancave.com</a>
<b>Hal B. Morgan</b>	(314) 259-2511	<a href="mailto:hbmorgan@bryancave.com">hbmorgan@bryancave.com</a>
<b>Dan O'Keefe</b>	(314) 259-2179	<a href="mailto:dmokeefe@bryancave.com">dmokeefe@bryancave.com</a>
<b>Christian Poland</b>	(312) 602-5085	<a href="mailto:christian.poland@bryancave.com">christian.poland@bryancave.com</a>
<b>Kathy Reardon</b>	(314) 259-2269	<a href="mailto:kcreardon@bryancave.com">kcreardon@bryancave.com</a>
<b>Jeffrey S. Russell</b>	(314) 259-2725	<a href="mailto:jsrussell@bryancave.com">jsrussell@bryancave.com</a>
<b>Christopher (Chris) Rylands</b>	(404) 572-6657	<a href="mailto:chris.rylands@bryancave.com">chris.rylands@bryancave.com</a>
<b>Steven G. (Steve) Schaffer</b>	(404) 572-6830	<a href="mailto:steven.schaffer@bryancave.com">steven.schaffer@bryancave.com</a>
<b>Kathleen R. Sherby</b>	(314) 259-2224	<a href="mailto:krsherby@bryancave.com">krsherby@bryancave.com</a>
<b>Sarah Roe Sise</b>	(314) 259-2741	<a href="mailto:srsise@bryancave.com">srsise@bryancave.com</a>
<b>Michael Corey Slagle</b>	(214) 721-8031	<a href="mailto:corey.slagle@bryancave.com">corey.slagle@bryancave.com</a>
<b>Alan H. Solarz</b>	(212) 541-2075	<a href="mailto:ahsolarz@bryancave.com">ahsolarz@bryancave.com</a>
<b>Jennifer W. Stokes</b>	(314) 259-2671	<a href="mailto:jennifer.stokes@bryancave.com">jennifer.stokes@bryancave.com</a>
<b>Lisa A. Van Fleet</b>	(314) 259-2326	<a href="mailto:lavanfleet@bryancave.com">lavanfleet@bryancave.com</a>
<b>Tom Wack</b>	(314) 259-2182	<a href="mailto:tewack@bryancave.com">tewack@bryancave.com</a>
<b>Julie A. Wagner</b>	(314) 259-2637	<a href="mailto:jawagner@bryancave.com">jawagner@bryancave.com</a>
<b>Jay P. Warren</b>	(212) 541-2110	<a href="mailto:jpwarren@bryancave.com">jpwarren@bryancave.com</a>
<b>Carolyn Wolff</b>	(314) 259-2206	<a href="mailto:carolyn.wolff@bryancave.com">carolyn.wolff@bryancave.com</a>
<b>Serena F. Yee</b>	(314) 259-2372	<a href="mailto:sfyee@bryancave.com">sfyee@bryancave.com</a>

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