

Rosen Seymour Shapss Martin & Company LLP  
*Certified Public Accountants & Profitability Consultants*

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## **BENEFITS BLAST**

**Greetings!**

*Welcome to the Employee Benefits & Executive Compensation Service Group's Benefits Blast!* (a publication of Rosen Seymour Shapss Martin & Company LLP). Here is where you will receive periodic updates on all your employee benefits and executive compensation needs.

Employee benefits programs and executive compensation issues are more complex than ever - tax laws and the applicable statutory schemes are continually changing, and increasingly employers must consider international implications. These issues also are critical to maintaining continuity in your workplace and retaining key employees.

We welcome your questions or comments about the topics discussed or related ones. Please feel free to contact us at 212-303-1806 or e-mail us at [aneumark@rssmcpa.com](mailto:aneumark@rssmcpa.com) and let us know how we can be of assistance.

Sincerely,

Avery E. Neumark, CPA, JD  
Partner-in-Charge of Employee Benefits & Executive Compensation

### **Form 5500 Isn't Just For Retirement Plans**

Most entities that sponsor a tax qualified retirement plan realize they must file Form 5500 (Annual Return/Report of Employee Benefit Plan) with the Department of Labor

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("DOL"). The Form 5500 is due seven months after the end of the plan year. For calendar year plans the due date is July 31. The plan sponsor may apply for an additional 2½ months' extension of time to file its return using Form 5558. Employer contributions for the plan year being filed are due, with limited exceptions, by the due date of the company's business tax return, including extensions.

What some employers fail to realize is that Form 5500 is required to be filed for all qualified employee **benefit** plans and that includes welfare benefit plans. With limited exceptions, all welfare benefit plans that cover 100 or more **employee** participants at the beginning of the plan year must file Form 5500 annually. Plans with less than 100 employee participants may be required to file if they do not meet certain funding requirements. The most common welfare benefit plans required to file are those that provide medical, dental and non-statutory disability benefits.

There are significant penalties for each day the return is late. There is a delinquent filer voluntary compliance program that caps the penalty on both a "per filing" and "per plan" basis. The current maximum penalties range from \$750 for a single delinquent filing of Form 5500 for a small plan to \$4,000 for multiple delinquent filings of Form 5500 for a large plan.

You may be sponsoring a plan that requires Form 5500 and not even know it. It is important for you to check with your tax advisor to determine your filing requirements. Now is the time to review your plans to make sure that you meet the current deadline, and to voluntarily file any delinquent returns to avoid stiffer penalties that may be imposed at a later date.

## Designated Roth 401(k) and 403(b) Accounts

Effective for plan years beginning on or after January 1, 2006, employees participating in either a 401(k) or 403(b) retirement plan may be able to designate some or all of their elective deferrals as Roth contributions. In order to be eligible to make such a designation, existing or new 401(k) and 403(b) plans must adopt this feature by the end of the plan year in which this designation feature becomes effective.

Plan sponsors wishing to offer their employees more options could adopt such a feature. Like Roth IRAs, distributions

from 401(k) and 403(b) Roth accounts are tax free if all of the requirements are met, including the requirements to be 59 1/2 years of age and to have held the Roth accounts for at least 5 years at the time of the distribution. And like Roth IRAs, employee contributions to 401(k) and 403(b) Roth accounts do not reduce the employee's current taxable income.

If the Roth feature is adopted, employees can designate contributions to either a Roth account or a traditional pre-tax account or both in any proportion they choose, as long as the combined contribution does not exceed Internal Revenue Code 402(g) limits, currently \$15,500 a year plus an additional \$5,000 in catch-up contributions for employees age 50 and older. Once the designation has been made it is irrevocable. Contributions cannot be re-characterized. The Roth and traditional pre-tax accounts must be segregated.

Employer matching contributions are permitted based on employee deferrals designated as Roth contributions, but must be allocated to the traditional pre-tax account. Only employee deferrals, so designated, may be contributed to a Roth account. Rollovers must be between similar accounts; no rollover between traditional and designated Roth accounts is permitted.

401(k) and 403(b) plans cannot offer designated Roth accounts only. When adopting provisions for Roth accounts, the plan sponsor must continue to offer traditional pre-tax accounts.

## New Rules For Non Qualified Deferred Compensation Plans

In April of 2007 the Internal Revenue Service released final regulations regarding the proper treatment of deferred compensation arrangements to be in compliance with Internal Revenue Code section 409A ("IRC 409A"). These final regulations require that all deferred compensation plans, not otherwise exempted, be amended to comply with the Code by December 31, 2007. Failure to do so can result in an excise tax of up to 20% of the disallowed deferred amount plus interest.

Deferred compensation is broadly defined by the regulations

to include most legally binding rights to receive compensation that will or **may** be paid in a later year. IRC 409A imposes certain constraints on both the timing and form of Non Qualified Deferred Compensation ("NQDC"). Examples of NQDC include:

- Severance packages
- Bonus arrangements
- Restricted stock and discounted stock options, including stock appreciation rights
- Agreements not to compete
- Reimbursement payments
- Tax gross up arrangements
- Indemnification programs

Independent contractors and those companies using their services are included under the regulations.

The regulations exclude most compensation paid no later than two and one-half months after the end of the tax year in which the right to the compensation vests, death benefits, sick leave and disability pay, incentive and non qualified stock options **not** issued at a discount and benefits provided under a **qualified** retirement plan, e.g. 401(k), 403(b) and 457(b) plans.

Since IRC 409A was adopted in 2004, taxpayers have been permitted to comply with its provision in good faith with available guidance. With the issuance of final regulations, that now changes. Taxpayers should review **all** deferred compensation arrangements for possible classification as NQDC. It is important to identify which plans need to be amended, and to consider alternatives and options regarding the restructuring of such as soon as possible. **All amendments must be in place by the end of this year** and all deferral elections made within prescribed time limits.

That leaves little time to review, analyze, prepare, execute and adopt. Now is the time to contact us if you have any concerns.

**EMPLOYEE BENEFITS & EXECUTIVE COMPENSATION  
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