THE WAGNER LAW GROUP

A PROFESSIONAL CORPORATION

Legal Updates in the ERISA & Employee Benefits World

ERISA, Employee Benefits and Executive Compensation Law

September 2010

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Marcia Wagner

Published Article

Here is a recent articles that Marica wrote:

"***Avoiding Conflicts of Interest As Your Business Grows***," *401(k) Advisor*, July

Recent Television Appearance

Marcia appeared on *The Street* discussing pension plans on June 30th.

Click here to watch Pension Plans: Not Dead Yet

This Newsletter is intended to provide you with legal updates regarding executive compensation, the recently implemented Dodd-Frank Wall Street Reform and Consumer Protection Act and the Voluntary Correction Program for non-qualified deferred compensation document failures.

If you have any questions or seek our counsel, please contact any of The Wagner Law Group attorneys, specialists in ERISA, employee benefits and executive compensation law.

To learn more about our team and practice, please visit our website at www.erisa-lawyers.com.

Best regards,

Marcia Wagner

Executive Compensation

Dodd-Frank Wall Street Reform and Consumer Protection Act

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Act") is one of the most sweeping financial reform initiatives since the Great Depression. Since many of the Act's provisions are expected to be effective for the 2011 proxy season, public company directors should begin to formulate a strategy to implement the new requirements on executive compensation and corporate governance. The principal areas of reform are:

1. Mandatory say-on-pay for executive compensation - The Act requires companies to provide shareholders with a nonbinding advisory vote on executive compensation at least once every three years.

2. Mandatory say-on-pay for golden parachute payments in connection with a merger, acquisition, consolidation, sale or other disposition of all or substantially all the assets of an insurer - Companies must now provide a nonbinding advisory vote regarding any compensation payments (whether present, deferred or contingent) that may be paid or become payable to named executive officers in connection with such business combination.

3. Enhanced executive compensation disclosure (including disclosure of CEO total compensation versus median total compensation of employees) - The Act requires the following disclosure on executive compensation matters:

o Ratio of CEO pay to median employee pay.

o Correlation between actual performance and compensation. Enhanced disclosure on the relationship between executive compensation actually paid and the financial performance of the company, taking into account any change in the value of the shares of stock and dividends of the company and any distribution; such disclosure may include a graphic

Recently Presented Seminars & Papers

Here is a list with links to seminars, webinars and papers that Marcia has recently presented.

"**Health Care Reform Overview**," HighRoads, Inc., July 21st in New York -**Click to view PowerPoint presentation**

"**Advisory Committee on Tax Exempt and Government Entities (ACT),**" IRS/ASPPA Northeast Area Benefits Conference, July 13th in New York

Click here for the **ACT Report**

Quoted Articles

Marcia has been quoted in a number of publications.

"Lawsuits Over 401(k) Fees Driving Costs Down," *Associated Press*, July 20th

"Class Notes 1987,"***Harvard Law Bulletin***", Summer 2010

Services We Provide for Our Clients

1. Retirement Plans
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The Wagner Law Group Description

The Wagner Law Group, A Professional Corporation, is a nationally recognized ERISA, employee benefits, executive compensation and employment firm.

Established in 1996, The Wagner Law Group has 15 attorneys engaged exclusively in employee benefits law. The firm is among the largest ERISA boutiques in the country. The practice is national in scope, with clients in

representation of the required information to be disclosed; and
o CEO/Chairman structure. Enhanced disclosure in the proxy statement on the reasons why a company has chosen the same or different persons as Chairman and CEO.

4. Implementation and disclosure of clawback policies, disclosure of hedging policies -

o Clawback of executive compensation. Companies are required to implement a policy that would permit the company to recover, in the event of an accounting restatement as a result of the company's "material noncompliance" with any financial reporting requirement under the securities law, any incentive-based compensation (including stock option awards) from any current or former executive officer in excess of what would have been paid under the accounting restatement, with a three-year look-back period.
o Hedging. Disclosure in the annual proxy statement regarding whether any employee or director is permitted to purchase financial instruments designed to hedge or offset against a decrease in the market value of the equity securities granted to such employee or director.

5. Heightened independence requirements for compensation committee members and disclosure requirements regarding their relationship with compensation consultants and any conflicts of interest - Whether a member of the compensation committee would be considered independent depends on such factors as the source of compensation paid to a compensation committee member, including any consulting, advisory, or other compensatory fee paid by the company to such member, and whether the member is affiliated with the company directly or through an affiliate or subsidiary of the company.

6. New independence standards for compensation consultants, law firms and other advisers to compensation committees - The Act requires that compensation consultants, legal counsel and other advisers engaged by the compensation committee be selected only after considering factors that may affect the advisers' independence.

Such factors include: (i) the services by the employer of the adviser to the company; (ii) the amount of fees received by the employer of the adviser to the company as a percentage of total revenue of such employer; (iii) the policies and procedures of the employer of the adviser that are designed to prevent conflicts of interest; (iv) any business or personal relationship the adviser has with a member of the compensation committee; and (v) any stock of the company owned by the adviser.

Note:The requirements of the Act are sufficiently detailed so that directors of public companies should take steps now to implement a strategy to comply with the new requirements. The Wagner Law Group is happy to assist in these matters.

Voluntary Correction Program for Non-Qualified Deferred Compensation Document Failures

Highly compensated employees often seek to defer tax by entering into non-qualified deferred compensation agreements with their employers. Deferred compensation agreements, supplemental executive retirement programs and certain severance arrangements are regulated by Section 409A of the Internal Revenue Code. Section 409A, and the regulations promulgated thereunder, form an extraordinarily complex set of rules regulating elections to defer compensation and subsequent election changes. They also limit the events upon which deferred compensation may commence to be paid.

Because of the complexity of the rules, many deferred compensation plans and agreements inadvertently fail to comply with Section 409A. Failure to satisfy the more than 30 states and several foreign countries.

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409A requirements has significant adverse tax consequences; amounts that are improperly deferred are currently taxable to the employee and are subject to a 20% excise tax plus interest and penalties.

A violation of Section 409A can arise due either to a failure in the operation of the plan or to a violation in the plan terms. The IRS published its long-awaited program for correcting documents that fail to satisfy Section 409A. This guidance, set forth in Notice 2010-6, provides employers and employees with a program under which they may bring their non-qualified deferred compensation agreements into compliance. IRS Notice 2010-6 establishes a voluntary correction program for plan document errors under Section 409A. This correction program follows earlier correction programs established by the IRS for operational errors under Section 409A. Notice 2010-6 allows sponsors to correct plan language defects and limits or eliminates the application of the Section 409A penalties to participants in such plans.

Under the Notice, certain document failures may be corrected without having to pay any taxes, provided that the corrected plan provision does not affect the operation of the plan within one year following the date of the document correction. If the corrected plan provision does affect plan operation within one year, the Notice provides limited relief, reducing but not totally eliminating the taxes otherwise applicable to a Section 409A document failure.

The types of plan document failures that may be corrected under this program include impermissible payment events, incorrect definitions of events that are acceptable payment events, impermissible discretion to modify a payment schedule, impermissible discretion to accelerate payment events, and impermissible initial deferral elections.

In order to qualify for relief under the Notice, neither the employer nor the employee may already be under audit for the item, the employee must pay any reduced taxes that are due under the program and the parties must satisfy certain disclosure requirements. Relief under the Notice is not available for a document failure unless, in addition to properly correcting the failure, the employer takes commercially reasonable steps to identify and correct all other non-qualified deferred compensation plans that have a substantially similar failure.

The Notice includes a transition rule whereby corrections which otherwise would have resulted in reduced taxes may be corrected by December 31, 2010 without the payment of *any* tax or penalty.

Note: Employers and employees who maintain deferred compensation arrangements should review them to determine if there are any deficiencies which should be corrected under the Notice. This would include reviewing separate deferred compensation plans and agreements, as well as employment agreements that incorporate compensation deferral features.

Note: The IRS commenced audits of Section 409A plans in 2009. The IRS has recently announced that it will review executive compensation arrangements, including non-qualified deferred compensation arrangements, for 6,000 taxpayers. Employers should take the opportunity now to review plan documents and make any needed corrections.