GUNDERSON DETTMER CLIENT ALERT

2013 YEAR-END EXECUTIVE COMPENSATION MATTERS:

Year-End Stock Plan Transaction Reporting and Other Recent Developments

November 2013

This Alert highlights certain compensation tax, benefits and related matters that clients should consider as we approach the end of 2013.

Year-End Reporting of ISO Exercises and ESPP Purchases

This is a reminder that employers must file information returns with the IRS and provide employees with information statements related to incentive stock option exercises that occurred during the 2013 calendar year. Similarly, employers (typically relevant only for public companies) must file information returns with the IRS and provide employees with information statements related to initial transfers of stock acquired during the 2013 calendar year under an employee stock purchase plan that complies with Internal Revenue Code Section 423.

The information returns to be filed with the IRS are Form 3921 (for incentive stock option exercises) and Form 3922 (for transfers of shares acquired under an employee stock purchase plan). Employers may satisfy the requirement to provide employees with an information statement (formerly referred to as a Section 6039 statement) by delivering to the employee "Copy B" of the applicable Form 3921 or 3922 or they may use substitute forms for the employee information statements, so long as the substitute forms meet published IRS guidance as to form and content.

The delivery and filing deadlines are as follows:

- January 31 – Deadline to furnish an information statement to employees.
- February 28 – Deadline to file return, if filing a paper copy.
- March 31 – Deadline to file return, if filing electronically with IRS.

Companies reporting 250 or more transactions (applied separately to transactions under each of Form 3921 and Form 3922) in a year are required to file electronically. Note that each option exercise or stock transfer is a separate transaction, and therefore multiple transactions by a single individual trigger multiple filings.

The penalty for late and incorrect filings ranges from $30 to $100 per form, with a maximum penalty of $1.5 million. The penalty for intentional disregard of these requirements is $250 per form, with no maximum. The IRS will grant an automatic 30-day extension upon filing a Form 8809, which must be filed electronically or by paper by the applicable deadline. Companies may request an additional 30-day extension due to a claimed hardship, but such extension will not be automatically granted by the IRS.

Third-party vendors are available to assist companies with preparing and filing Forms 3921 and 3922. For a list of vendors, please contact the attorney with whom you regularly work at Gunderson Dettmer or see the IRS website at www.irs.ustreas.gov/pub/irs-pdf/p1582.pdf.

Reporting Requirements of U.S. Taxpayers Holding Equity Awards From Non-U.S. Employers

This is a reminder that taxpayers receiving equity awards or certain other compensation from foreign companies must file a form with the IRS as part of their 2013 tax returns.

The Foreign Account Tax Compliance Act (FATCA), which is intended to combat tax evasion by U.S. taxpayers holding non-U.S. assets, has a very broad reach. One component of FATCA may require U.S. taxpayers receiving equity awards from foreign companies to file a form with the IRS as part of their 2013 tax returns.

FATCA requires that U.S. taxpayers (*i.e.*, U.S. citizens, U.S. tax residents, and non-resident aliens who have elected to be taxed as U.S. residents) report to the IRS information annually on Form 8938 about their non-U.S. financial assets, if those assets exceed certain thresholds. For this purpose, non-U.S. financial assets include equity compensation awards, incentive compensation, pension, deferred compensation and other compensation plans sponsored or granted by a non-U.S. employer or a non-U.S. parent or holding company. (Assets not subject to FATCA reporting include assets held in a U.S. financial account or an account of a non-U.S. subsidiary of a U.S. financial institution.)

For individuals living in the U.S. (*i.e.*, those who do not qualify for the foreign earned income exclusion under Section 911 of the Code), the reporting thresholds are as follows:

Filing Status	Value of Specified Non-U.S. Assets Exceeds	
	On Last Day of Year	At Any Time During Year
Single or Married Filing Separately	$50,000	$75,000
Married Filing Jointly	$100,000	$150,000

Higher thresholds apply to those living outside the U.S. (*i.e.*, those who qualify for the foreign earned income exclusion under Section 911 of the Code).

Note that this reporting obligation falls entirely on U.S. employees and consultants, rather than their employers. However, employees will need guidance from their employers about the value of plan awards in order to comply with the reporting requirements. As a result, employers may want to consider communicating the requirement and the value of plan awards to individuals who are subject to FATCA reporting.

FATCA reporting for the 2013 tax year is due on April 15, 2014, unless an individual obtains an extension to file his or her 2013 federal income tax return. The penalty for failure to file a timely Form 8938 is $10,000, which can be increased up to $50,000 for each failure.

Tax Code Section 409A Development: At last, Some Good News From California!

Section 409A applies a 20% federal penalty tax, plus interest, to nonqualified deferred compensation arrangements that do not comply with its strict payment timing rules and other requirements. Due to the way that California

incorporates federal income tax law, California has also imposed its own 20% penalty tax and interest on arrangements that fail to comply with Section 409A.

On October 4, 2013, Governor Jerry Brown signed into law AB 1173, which reduces from 20% to 5% the additional California state tax imposed on non-compliant Section 409A arrangements. This rate reduction relief is effective for taxable years beginning on or after January 1, 2013.

Supreme Court to Decide Whether Supplemental Unemployment Compensation Benefits Subject to FICA Taxes

As we discussed in our 2012 Year-End Alert, the Sixth Circuit Court of Appeals held in *U.S. v. Quality Stores* that supplemental unemployment compensation benefits, or SUB payments, are not wages subject to Federal Insurance Contributions Act (FICA) taxes. The government filed an appeal, and on October 1, 2013, the Supreme Court granted a petition for certiorari.

Not all severance payments will qualify as SUB payments. In general, SUB payments are paid to employees pursuant to a plan in connection with an involuntary separation from employment resulting from a reduction in force or discontinuance of a plant or operation.

Employers who have paid and withheld FICA on past severance payments that qualify as SUB payments may want to consider filing protective refund claims to preserve their rights. The deadline for filing a refund claim for SUB payments paid in 2010 or later is April 15, 2014. It is possible that the Supreme Court will not issue a decision until June 2014. Therefore, it is possible that employers may need to file protective claims to prevent the statute of limitations from expiring before the law has been settled by the Supreme Court.

Gunderson Dettmer's lawyers are available to assist in addressing questions you may have regarding the issues discussed in this Alert. Please contact the Gunderson Dettmer attorney with whom you regularly work. Contact information for our attorneys can be found at www.gunder.com.