

October 23, 2007

ONCE AGAIN! IRS and Treasury Department Extend Section 409A Deadlines One More Year!

The IRS and Treasury Department yesterday extended the deadline for complying with the Final Regulations and most of the existing transition relief under Internal Revenue Code Section 409A from December 31, 2007 to December 31, 2008. Code Section 409A, which governs the taxation of nonqualified deferred compensation arrangements, was enacted in 2004 and is generally effective for amounts deferred after December 31, 2004. Previously, the deadline for fully complying with Section 409A had been extended through December 31, 2007. IRS Notice 2007-86 (the "Notice") further extends to December 31, 2008 most of the transition deadlines otherwise slated to expire December 31, 2007, as well as compliance with the Final Regulations. While the Notice extends the deadline for full compliance with Section 409A, good faith compliance with the statute and other authoritative guidance is still required, and has been required since January 1, 2005. Consequently, employers still must determine which arrangements are subject to Section 409A and make decisions regarding the operation of such programs now, rather than waiting until the end of next year.

The more significant deadlines extended to December 31, 2008 by the Notice include the following:

- Amending arrangements to comply with the requirements of Section 409A;
- Complying in good faith with the statute, Notice 2005-1, the Final Regulations and/or limited parts of the Proposed Regulations;
- Changing payment elections with respect to the form and timing of payments, provided that elections made in 2007 do not accelerate payments into, or delay payments from, 2007, and elections made in 2008 do not accelerate payments into, or delay payments from, 2008;
- Amending certain discounted stock options to provide for fixed payment dates, or substituting non-discounted stock options for discounted stock options (except as discussed below); and
- Linking the form and timing of payments under an arrangement subject to Section 409A to the employee's election under a qualified plan.

Transition relief is *not extended* to the amendment or substitution of discounted stock options for top executives or directors of public companies that have restated, or reasonably expect to restate, their financials due to failure to timely report the expense associated with such options, for example, where option backdating has been uncovered. Those options were required to be fixed by December 31, 2006. In addition, no extension was provided for the required "domestication" of certain offshore trusts by December 31, 2007 (so-called "grace period assets").

If you have any questions regarding the foregoing, please contact one of the attorneys listed below.

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