

September 12, 2007

## IRS ANNOUNCES LIMITED EXTENSION OF SECTION 409A COMPLIANCE DEADLINE

The Internal Revenue Service has issued Notice 2007-78 (the "Notice") providing an extension for some but not all of the written plan document requirements contained in the final regulations under Section 409A of the Internal Revenue Code ("Section 409A"). Under the Section 409A final regulations, all nonqualified deferred compensation documents, agreements, plans and other arrangements covered by Section 409A ("Plans") were required to be amended or otherwise documented to be in compliance with the final regulations by December 31, 2007, to be effective January 1, 2008. The Notice extends the December 31, 2007 deadline to December 31, 2008.

However, as noted, a blanket extension of all of the plan document requirements has not been granted. Therefore, all arrangements potentially providing nonqualified deferred compensation still must be reviewed now to determine which of the more limited amendments or document requirements still must be met by December 31, 2007.

***Full Operational Compliance Not Delayed*** - The extension did not delay operational compliance with Section 409A; all Plans must be operated fully in compliance with the final regulations during all of 2008. Even if a Plan is not amended fully until December 31, 2008, the amendment must be effective retroactively to January 1, 2008. Furthermore, the transition rules that currently exist are not extended so there are fewer ways to terminate Plans or change elections after 2007.

***Written Compliance Required Before 2008 for Time and Form of Payment Provisions*** - The Notice does not extend beyond December 31, 2007 the deadline for documenting or amending a Plan to specify the time and form of payments. As of December 31, 2007, all Plans must meet the written document requirements regarding times and forms of payment in accordance with the requirements of the Notice. While the Notice provides simplified methods and relaxes other rules in the final regulations regarding the obligation to specify the time and form of payment (such as the six-month delay requirement for certain officers of public companies, which does not have to be reflected in an amendment by December 31, 2007), it will still be necessary, prior to December 31, 2007, to review all Plans and coordinate the various types of Plans to assure that the documentation or amendments required by the Notice are prepared properly.

***Good Reason Terminations*** - Employment agreements that provide for payment upon a good reason termination that employers want to conform to meet the safe harbor good reason in the final regulations, and thus be considered an involuntary termination that is potentially excepted from Section 409A, must be amended before December 31, 2007, in order to avoid having the amendment treated as an extension of the substantial risk of forfeiture. However, if there is no substantial risk of forfeiture in the existing "good reason" provision, any modification of the good reason definition cannot result in an amount of already-vested deferred compensation becoming non-vested and subject to a substantial risk of forfeiture, so as to exempt such amount from Section 409A.

**Correction Program Coming** - The Notice also promises future guidance on a limited voluntary correction program by which unintentional operational failures can be corrected. As with all correction programs, it is likely to involve payment of some sanction amount.

**Cashout Provisions** – The Notice provides that, until further guidance, a nonqualified deferred compensation plan may provide for an objectively determinable cashout threshold below which payment to the employee will be made in a lump sum, even though the plan otherwise provides for an installment or annuity form of payment. Any subsequent change in the threshold amount, however, is subject to the rules governing subsequent deferrals and prohibited acceleration of the payment.

**Offshore Trusts and Certain Other Funded Trusts** - Section 409A's application to certain offshore trusts, trusts based on the financial status of the employer, and prohibited funding of trusts for deferred compensation where an employer has substantially underfunded defined benefit pension plans, was *not* delayed by this Notice. Instead the reasonable good faith interpretation of those provisions will continue until additional guidance is issued on these trust arrangements. Plans covered by these types of trusts must comply with the 409A requirements applicable to these trusts no later than by December 31, 2007, and the limited extensions discussed in this Alert are not available for such trusts.

If you have any questions regarding the foregoing, or for assistance in complying with Section 409A, please feel free to contact one of the attorneys listed below.

Charles F. Plenge  
(214) 651-5573

[charles.plenge@haynesboone.com](mailto:charles.plenge@haynesboone.com)

John M. Collins  
(214) 651-5564

[john.collins@haynesboone.com](mailto:john.collins@haynesboone.com)

Greta E. Cowart  
(214) 651-5592

[greta.cowart@haynesboone.com](mailto:greta.cowart@haynesboone.com)

Jesse J. Gelsomini  
(713) 547-2233

[jesse.gelsomini@haynesboone.com](mailto:jesse.gelsomini@haynesboone.com)

Susan A. Wetzel  
(214) 651-5389

[susan.wetzel@haynesboone.com](mailto:susan.wetzel@haynesboone.com)

Marilyn C. Doolittle  
(713) 547-2901

[marilyn.doolittle@haynesboone.com](mailto:marilyn.doolittle@haynesboone.com)

Tiffany Walker  
(214) 651-5266

[tiffany.walker@haynesboone.com](mailto:tiffany.walker@haynesboone.com)

Michael Danforth  
(214) 651-5421

[mike.danforth@haynesboone.com](mailto:mike.danforth@haynesboone.com)

Kirsten Jensen  
(214) 651-5171

[kirsten.jensen@haynesboone.com](mailto:kirsten.jensen@haynesboone.com)

Jamison Klang  
(713) 547-2025

[jamison.klang@haynesboone.com](mailto:jamison.klang@haynesboone.com)

**In order to comply with certain U.S. Treasury regulations, we are informing you that any U.S. federal tax advice that may be contained in this document is not intended or written to be used, and cannot be used, by any person for the purpose of (i) avoiding any tax penalties that may be imposed by the Internal Revenue Service or any other U.S. federal taxing authority or agency or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.**