



eActionAlert

IRS Extends 409A Operational Relief Through 2008

November 8, 2007

In our eAlert dated October 18th, we notified you that the deadline for sponsors of nonqualified deferred compensation plans (NQDCPs) to comply with the documentation requirements under Internal Revenue Service (“IRS”) guidance for Section 409A of the Internal Revenue Code of 1986 (the “Code”) had been extended through December 31, 2008. We also noted, however, that beginning January 1, 2008 NQDCPs were still required to comply with the operational rules under IRS final Regulations, issued on April 17, 2007.

We are pleased to inform you that the IRS has just published Notice 2007-86 (the “Notice”), which indicates that NQDCPs now have until December 31, 2008 to comply with the operational requirements of the final 409A Regulations. This is welcome news as it gives employers additional time to analyze their plans and make informed decisions regarding any changes that may be needed to bring the operation of their plans into compliance with the final Regulations

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Code Section 409A was enacted as part of the American Jobs Creation Act of 2004. However, the IRS has issued sporadic guidance regarding 409A. IRS Notice 2005-1, issued in December 2004, required all deferred compensation arrangements subject to the new law to operate immediately in “good-faith compliance” with the statute. Then, in October 2005, the IRS issued proposed Regulations. Those Regulations were modified and made final in April 2007.

The final Regulations provide that good-faith compliance regarding NQDCPs would end on December 31, 2007, thus mandating full documentary and operational compliance as of that date. In September of this year, the IRS relented to pressure from the nation’s largest law firms and, in Notice 2007-78, allowed NQDCPs until December 31, 2008 to comply with the documentation requirements of 409A. However, these plans were still to comply with the operational requirements of 409A as of January 1, 2008.

Responding to comments made by the American Bar Association, large law firms and several employee benefits consulting organizations, the IRS issued Notice 2007-86 on October 22nd. This Notice extends the operational good-faith compliance period by one year to December 31, 2008.

Some Specifics of the Notice

The good-faith operational compliance period is extended through December 31, 2008. After that date, compliance with the final Regulations (but not the proposed Regulations) will be considered to be proper operational compliance.

Employers still have until the end of 2008 to amend their plans in order to bring them into documentary compliance with Section 409A, including the requirement that the plan specify the time and form of payment.

Payment elections may be changed through December 31, 2008. However, any changes made in 2008 cannot accelerate or delay payments that would have been payable during that year, or cause any amount that would have been paid in another year to be paid in 2008. (Under prior guidance, identical rules apply for 2007.)

NQDCP payments linked to the time of payments under a qualified plan may continue through December 31, 2008.

Prior guidance allowed for the substitution of discounted stock options or stock appreciation rights ("SARs") with nondiscounted options or SARs in order to exempt the option or right from the many requirements of 409A. Subject to other detailed rules, this relief is extended through the end of 2008, provided the transaction does not result in the cancellation of a deferral of income in exchange for cash or other vested property.

Consistent with prior guidance, the Notice confirms that the IRS intends to develop a new program whereby plan sponsors can correct certain 409A compliance errors. Presumably, this would be somewhat akin to the correction program for qualified plans.

What this means to you and M&A's Recommendations

Many employers have already started to identify and analyze all of their deferred compensation arrangements. The extensions granted in the Notice should not deter you, your attorneys and other advisors from continuing this time-consuming process, especially if the board of directors or other governing body must approve any changes to your company's deferred compensation arrangements.

M&A is an employee benefit consulting and management firm and, as such, we do not practice law. However, if you have any questions about the information presented in this eAlert, the Notice or deferred compensation plans, please contact your Senior Consultant or Health & Welfare Specialist at (877) 564-4300.