



Executive Compensation Law

ALERT

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Use of Short-Term Deferral Exception to Avoid Section 409A

To the extent payments under a nonqualified deferred compensation plan satisfy the short-term deferral exception under Internal Revenue Code Section 409A, they are excluded from its purview. To qualify for the exception, the payment must be required to be made, and must actually be made, on or before the 15th day of the third month following the end of the employee's tax year or the employer's tax year, whichever is later, in which the right to the payment vests (i.e., is no longer subject to a substantial risk of forfeiture). If no payment date is specified, the payment will qualify for the short-term deferral exception if it is actually paid within the short-term deferral period.

A payment that was designated to be paid within the short-term deferral period, but which is not made until after the end of the short-term deferral period, may continue to qualify for the short-term deferral exception if the taxpayer establishes that it was administratively impracticable to make the payment by the end of the short-term deferral period and that such impracticality was unforeseeable at the time the legally binding right to the compensation arose, or that making such payment by the end of the short-term deferral period would have jeopardized the ability of the employer to continue as a going concern, and the payment is made as soon as administratively practicable or as soon as the payment would no longer have such effect. In addition, a delay may be permitted to avoid the loss of a deduction to the employer under the \$1,000,000 cap applicable to com-

penetration paid to certain executive employees of publicly traded companies under Code Section 162(m), where such limitation was not reasonably foreseeable when the legally binding right arose.

Failing to qualify for the short-term deferral exception does not mean the payment is subject to the 20% excise tax, which can still be avoided by meeting the requirements of Section 409A.

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