



Executive Compensation Law

ALERT

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Limited Extension of Deadline for Internal Revenue Code Section 409A Compliance

On September 10, 2007, the Internal Revenue Service (the "IRS") extended the deadline for bringing written provisions of nonqualified deferred compensation plans, agreements and arrangements (collectively "arrangements") into compliance with Internal Revenue Code section 409A until December 31, 2008. However, section 409A is currently effective, and operational compliance with the final regulations issued this spring is still required by January 1, 2008. **Moreover, provisions regarding the time and form of all payments in every nonqualified deferred compensation arrangement must still be reviewed and, if necessary, revised and adopted by December 31, 2007.**

As described in previous Alerts (which can be found here), section 409A applies to virtually any arrangement that provides for the payment of compensation in a year after it is earned, potentially including not only nonqualified deferred compensation and retirement plans but also other arrangements, including employment and consulting agreements, bonus plans, stock option plans, reimbursement arrangements, split dollar arrangements and royalty arrangements. If an arrangement does not conform to section 409A, participants in the arrangement are required to immediately include in income any amounts vested under the plan and to pay additional interest, penalties and a 20% excise tax. The IRS issued final regulations under section 409A this past April, with a general deadline for compliance of December 31, 2007.

The IRS extended the deadline for compliance with section 409A on account of the extremely large number of arrangements that must be amended to conform to the rules under section 409A, the decisions that must be made as to what

changes are required, and the consents needed to approve them. The relief provided by the one-year deadline extension, however, is limited solely to the deadline to bring arrangements into written compliance with the requirements of section 409A. Moreover, the extension is available only if the arrangement in question (1) is being operated in accordance with the requirements of the final regulations issued under section 409A as of January 1, 2008, and (2) is amended on or before December 31, 2008, to comply with section 409A retroactively to January 1, 2008. However, the time and form of payment of deferred amounts must comply with section 409A and be specified in writing before the end of this year. Also, the transition rules which allow restructuring of arrangements, changes in vesting provisions and changes in the time and form of amounts payable after January 1, 2008 without being subject to section 409A change limitations and five-year payout delays all end on December 31, 2007.

The IRS also announced that it will issue guidance in the near future establishing a limited voluntary compliance program that will apply to certain unintended operational failures to comply with section 409A, in cases where the operational failure is corrected in the same taxable year in which the failure occurred.

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