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**What Still Needs To  
Be Done By  
December 31, 2007**

Many companies are already geared up to come into full compliance with the final regulations by December 31, 2007. And, since compliance with the final regulations is deemed to be good faith compliance with the statute, it makes sense in many cases to continue along this path.

In addition, any changes to distributions that will be effective during 2008 must be made before the end of 2007. For example, a participant who is scheduled to receive installments payments beginning in 2008 could elect to receive a single lump sum in 2008 instead. However, to be effective, this election would need to be made before the end of 2007.

If you have any questions about the scope of this extension, the continuing transition rules or the requirements of Section 409A in general, please contact Don Mazursky at 404-888-8840 or Toby Walls at 404-888-8870.

**IRS RELUCTANTLY RELENTS TO PRESSURE  
FULL SECTION 409A EXTENSION UNTIL JANUARY 1, 2009**

**The Bottom Line.** *The great news giving rise to a collective sigh of relief is that the deadline to comply with the written and operational requirements of Section 409A has been fully extended for 1 year, until December 31, 2008. Now, the rest of the story . . .*

Yesterday, the IRS issued a full 1-year extension for the deadline to comply with the final regulations under Section 409A of the Internal Revenue Code. Section 409A is the broad deferred compensation plan legislation that was enacted in 2004. It imposes numerous new requirements on deferred compensation plans, and it covers a wide range of plans and arrangements that are not traditionally considered deferred compensation (such as severance plans, incentive programs and employment agreements).

The IRS issued final regulations under Section 409A in April, and these final regulations were originally scheduled to become effective on January 1, 2008. This meant that all Section 409A arrangements had to be in operational and documentary compliance with the final regulations by that date. ***The IRS has now extended both deadlines until January 1, 2009.***

**What Lead to the Extension.** With the original, unreasonable December 31, 2007, deadline bearing down quickly, the IRS steadfastly held to that deadline. Trying to stem the groundswell of criticism, in early September, the IRS issued a limited extension that even the IRS eventually admitted had almost no value.

Undeterred by the IRS's smokescreen, pressure from the legal community, business and Congress continued to mount. As late as Thursday of last week during a conference, the IRS refused to acknowledge the need for, or any propensity to provide, an extension. However, the IRS finally cracked under extreme pressure and now has provided relief.

**Good Faith Compliance.** Through 2008, all Section 409A arrangements can continue to operate in good faith compliance with the statute and other guidance issued by the IRS, but they are not required to comply with the final regulations. Early compliance with the final regulations will be deemed to be good faith compliance with the statute, but it is not required. *(Note that, beginning in 2008, it is no longer good faith to rely on the proposed Section 409A regulations that were issued in 2005.)*

**Transition Rules.** In addition to extending the operational and documentary compliance deadlines, the IRS also extended several of the existing "transition rules" until the end of 2008. These include each of the following:

- **Change in Payment Form and Timing.** The form and time in which deferred compensation benefits will be paid can continue to be changed through the end of 2008 without complying with the Section 409A limitations on these changes (e.g., no acceleration, changes made 12 months in advance of payment, and payments delayed by 5 years). The only requirement for these transition rule changes is that they not accelerate a future payment into the year in which the change is made or delay a payment scheduled to be made in the year of change into a later year.

- ***Links to Qualified Plans.*** Many nonqualified plans are linked to qualified plans and provide that benefits will be paid in the same form and at the same time as the participant elects to be paid under the qualified plan. Under Section 409A, this type of linking is prohibited. However, through the end of 2008, plans that were linked on October 3, 2004, can continue to be operated in this manner.
- ***Replacement of Discounted Stock Options.*** Among the broad range of Section 409A arrangements that are not traditionally considered “deferred compensation” are discounted stock options. Section 409A ordinarily does not apply to stock options that are granted at fair market value, but it does apply to discounted options. Through the end of 2008, outstanding discounted options may be cancelled and replaced with options having an exercise price equal to fair market value on the grant date of the original option. However, as in the past, this transition rule does ***not*** apply to certain discounted options issued to a public company’s Section 16 officers.

**Conclusion.** Regardless of the reluctance with which it was granted, the deadline extension provides necessary relief for many employers. However, efforts to bring all covered arrangements into compliance with Section 409A should continue to avoid a year-end crunch at the end of 2008.

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