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Complexity of Final 409A Regulations

The changes made by the final 409A regulations were extensive and complex.

We are currently working with a number of our clients in regard to 409A education, collecting 409A documents, discussing 409A plan redesigns, amending 409A documents, and revising election forms.

The current process demonstrates the complexity of the 409A requirements and the need to begin the amendment process as soon as possible.



A Benefits Consulting Firm affiliated
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Limited Extension to the 409A Amendment Deadline Provides Little Relief

Last week, an IRS representative informally commented that (i) the IRS would issue a limited extension to the compliance deadline for Section 409A of the Internal Revenue Code ("409A"), and (ii) no one would be happy with this extension. This representative was correct on both accounts.

In Notice 2007-78, the IRS issued a limited extension for the deadline to amend nonqualified deferred compensation plans to comply with 409A. Previously, all nonqualified deferred compensation plans had to be *fully amended* to comply with the final 409A regulations by December 31, 2007. Now, all documents only need to be *partially amended* to comply with 409A by December 31, 2007 - they do not need to be *fully amended* until December 31, 2008.

This extension is significantly limited and flawed because all nonqualified deferred compensation plans must contain 409A-compliant distribution rules (specifying the time and form of payment) no later than December 31, 2007. This means that most, if not all, nonqualified deferred compensation plans will still need some amendments by December 31, 2007.

As you may recall, 409A is a very broad statute, and many types of arrangements that are not traditionally considered "nonqualified deferred compensation plans" fall within its scope. These include employment agreements, severance plans, long-term bonus plans and certain stock-based compensation. Each of these arrangements will need to be analyzed, and likely amended, by December 31, 2007, to ensure that they include proper distribution rules.

In particular, it may be possible to make only brief amendments to at least some broad-based deferral plans or supplemental retirement plans. However, for executive contracts, in which the payment provisions go to the heart of the arrangement, the limited extension probably has little application.

The IRS's pseudo extension provides little relief but has generated many false hopes and much confusion. It certainly does not allow any of us to slow down our diligent efforts to comply with 409A.

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