
IRS Extends Transition Relief under Section 409A to December 31, 2008

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Overview

On October 22, 2007, the IRS released Notice 2007-86 (the Notice), which generally extends until the end of 2008 the transition relief for compliance with Section 409A of the Internal Revenue Code (Section 409A). The Notice provides the meaningful transition relief that taxpayers and practitioners had hoped for and goes well beyond the minimal transition relief recently provided under Notice 2007-78.

Highlights of the Notice

- The transition period for documentary compliance for nonqualified deferred compensation plans under Section 409A's broad definition is extended to December 31, 2008, providing service providers and recipients with additional time to revise employment agreements, change in control plans and the broad range of other arrangements covered by Section 409A.
- During the transition period, taxpayers must continue to operate plans in reasonable, good faith compliance with Section 409A. During the remainder of 2007, reasonable, good faith compliance includes reliance on the provisions of Section 409A, Notice 2005-1, the proposed regulations, the final regulations and other applicable guidance. During 2008, reliance on any of the foregoing, **except** the proposed regulations, constitutes reasonable, good faith compliance.
- During the transition period, nonqualified deferred compensation plans may provide--or be amended to provide--for new payment elections on or before December 31, 2008, with respect to the time and form of payment, as long as the plan is so amended and elections are made on or before December 31, 2008. However, (i) as has been the case, an election or amendment made during 2007 to change a time or form of payment may only apply to amounts not otherwise payable in 2007, and may not cause an amount to be paid in 2007 that would not otherwise be payable in 2007; and (ii) an election or amendment made

during 2008 to change a time or form of payment may only apply to amounts not otherwise payable in 2008, and may not cause an amount to be paid in 2008 that would not otherwise be payable in 2008.

- Discounted stock options and stock appreciation rights may be substituted with nondiscounted stock options or stock appreciation rights (or be amended to comply with Section 409A) until December 31, 2008 (except that the relief for substituting or amending certain discounted stock options and stock appreciation rights held by insiders of publicly held companies expired at the end of 2006).
- A nonqualified plan linked to a qualified plan can continue allowing distributions at a time and in a manner that is parallel with the qualified plan for payments made through 2008.
- The extension through 2008 does not apply to certain funding arrangements using trusts, which must still be corrected no later than the end of 2007.

The IRS intends to issue guidance relating to a Section 409A compliance program soon.

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