

IRS Extends Section 409A Remedial Amendment Period to December 31, 2008

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Overview of Latest Developments

On October 22, 2007 the Internal Revenue Service (the "IRS") issued much anticipated guidance in the form of Notice 2007-86 that extends the remedial amendment period with the final regulations under Internal Revenue Code Section 409A ("Section 409A") from December 31, 2007 to December 31, 2008. Prior to issuance of this notice, all nonqualified deferred compensation plans would have been required to be administered in strict compliance with the final Section 409A regulations beginning January 1, 2008. Now, both documentary compliance and administrative compliance (in most cases) with the final Section 409A regulations is not required until January 1, 2009.

Final 409A Regulations Now Take Exclusive Effect 1/1/2009—The date at which the final Section 409A regulations take exclusive effect is now January 1, 2009, not January 1, 2008. Until then, good faith reliance can be placed on prior IRS notices under Section 409A (including Notice 2005-1) in addition to the final regulations (good faith reliance on the proposed regulations remains possible only through December 31, 2007).

Permissible Amendment of Discounted Stock Options/Stock Appreciation Rights Extended to 12/31/2008—The time in which to make amendments to discounted stock options and stock appreciation rights (other than those held by persons subject to Section 16 of the federal securities laws) to raise the exercise price, or provide for a fixed exercise schedule, is extended to December 31, 2008. However, any exercise of such a stock award before amendment still is subject to the taxes imposed by Section 409A (and California taxpayers would also face a similar penalty tax from California). Therefore, we continue to recommend that such amendments be made as soon as possible.

Amendment of Deferral Elections—The time during which a deferral election can be made in a manner consistent with the requirements of Section 409A is extended to December 31, 2008, provided the amendment neither (i) applies to an amount that would otherwise have been received in the year in which the election is made, nor (ii) accelerates to the year in which the election is made with respect to the receipt of compensation that was to have been received in a different taxable year. Thus, for example, it remains possible in 2007 or 2008 for an amended deferral election to be made to receive a payment in 2010, so long as the payment was not due to be made in 2007 or 2008.

Notice 2007-86 can be viewed at <http://www.irs.gov/pub/irs-drop/n-07-86.pdf>.

For more information on this, or related matters, please contact any attorney in the Equity Compensation and Employee Benefits Group:

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