

PUBLICATION

409A Deadlines Extended to December 31, 2008

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Earlier this week, the IRS announced an additional extension for Internal Revenue Code Section 409A compliance. However, December 31, 2007, remains the deadline for substitution of certain equity rights for SEC insiders.

Internal Revenue Code Section 409A adds important new rules on the treatment of certain forms of non-qualified deferred compensation. Operational "good faith" compliance has generally been required since January 1, 2005. Under new Notice 2007-86, dated October 22, 2007, the previously-announced December 31, 2007 deadline for written compliance with certain rules, and January 1, 2008 deadline for full operational compliance with the Final Treasury Regulations, have been extended to the end of 2008. The end of 2008 remains the deadline for full compliance in form. Good faith operational compliance in the interim remains the rule, using most existing guidance. However, after 2007 the ability to rely on the Proposed Regulations will be very limited. Compliance with the Final Regulations during 2008 is permitted but not required.

Election changes regarding the time and form of payment are now permitted until the end of 2008 without violating Section 409A rules which will later limit or forbid such changes. In general, a change may not accelerate distributions scheduled for any future year into the current year, or vice versa (the "transition rule"). Amounts which would have been exempt from Section 409A under the "short deferral" rule may be revised before 2009, with Section 409A compliance where necessary, including the transition rule. Multiple changes are allowed, provided each complies with the transition rule. These changes may also be made to equity-based grants.

Discounted stock options or stock appreciation rights may generally still be replaced before 2009 by new grants, at fair market value as of the original date of grant (to exempt the grant from Section 409A). However, nondiscounted grants to certain executives who are subject to SEC disclosure rules still must be substituted by the end of 2007. No supplemental cash payment can be made in the year of repricing.

The ability to link nonqualified deferred compensation payments to distribution elections under tax qualified plans will still be restricted after 2008. Until the end of 2008, the time and form of qualified and non-qualified payments may still be linked.

Treasury has again stated an intent to develop a program for the correction of inadvertent failures to comply with Section 409A.