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## PLAN AMENDMENT DEADLINE EXTENDED FOR NONQUALIFIED DEFERRED COMPENSATION ARRANGEMENTS

The IRS has extended the deadline for employers maintaining nonqualified deferred compensation arrangements to bring their plan documents and agreements into written compliance with final Treasury Regulations implementing new Section 409A of the Internal Revenue Code.<sup>1</sup> That deadline had been set to expire on December 31, 2007, but has now been extended for most purposes until the end of 2008. With this extension, employers will now have more time to digest the 390 plus pages of regulations issued in mid-April of this year, determine how they impact the compensation arrangements maintained, and take appropriate action.<sup>2</sup> The extension of time to bring documents into written compliance with Section 409A does not, however, affect an employer's duty to administer a deferred compensation arrangement in reasonable, good faith compliance with the guidance issued by the IRS. That duty has been required since January 1, 2005 and will continue through the end of 2008.

### Background and Scope of the Regulations

The final Treasury Regulations were mandated by the addition of new Section 409A of the Internal Revenue Code by the American Jobs Creation Act of 2004. Although designed to address perceived abuses with nonqualified deferred compensation

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arrangements (principally illustrated by the Enron collapse), the changes go far beyond the intended purpose, with the statute imposing substantial new restrictions on the timing of deferral elections and when distributions can be made, among other changes. The final Treasury Regulations, like previous IRS guidance interpreting the statute, broadly interpret the phrase "nonqualified deferred compensation arrangement," therefore Section 409A will impact a whole host of arrangements that have not been traditionally thought of as deferred compensation, including (*potentially*) employment agreements, director fee deferrals, bonus arrangements, severance agreements, and change of control agreements. The practical effect of Section 409A and the final Treasury Regulations is that virtually every contract or agreement that provides for compensation to be paid after the year in which the services were performed should be reviewed for compliance. Failure to comply will result in substantial adverse tax consequences suffered by affected participants in the arrangement.

### **2008 Transition Relief**

In addition to the amendment deadline extension, the IRS has also provided transition relief to allow employees to make changes in 2008 to the form or time of payment in arrangements subject to Section 409A without running afoul of the general prohibition on the acceleration of benefits in the new law or having to comply with the limits on subsequent deferrals of the timing of the benefit payments. This transition relief does, however, retain the same limitations as found in prior transition relief--such that changes in elections in 2008 cannot delay until 2009 or later an amount that was otherwise payable in 2008 nor may it accelerate payments into 2008 that would not otherwise be payable in 2008. Similar transition relief to make changes in the form or time of payment also applies in 2007 so long as the changes do not accelerate a payment into 2007 that was to be paid in a later year and does not defer an amount otherwise payable in 2007 into a later year.

### **2007 Reporting and Disclosure Guidance**

Shortly following the extension of the amendment deadline, the IRS also issued guidance on the reporting and disclosure requirements for nonqualified deferred compensation arrangements for 2007.<sup>3</sup> For 2007, the reporting of deferrals under Section 409A arrangements is not required, but amounts includible in income under Section 409A are treated as supplemental wages for withholding purposes and must be reported on Forms W-2 or 1099, as applicable, with a special code to indicate that Section 409A applies. The IRS also provides guidance on determining the amount includible in income under Section 409A.

### **Employer Action May Be Desirable By 12/31/07**

The extended amendment deadline is no doubt good news to the employers who have not been able to bring their documents into compliance before now or who have simply failed to appreciate the applicability of these new rules. Despite the extension, many employers may find it prudent to review and update their arrangements before the end of this calendar year, for example, to take advantage of the transition relief permitting changes in

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elections in the form or time of payment currently in existence-- before this latest deadline extension. Such changes may prove especially beneficial in arrangements with participants nearing eligibility for a distribution in 2008 or 2009.

<sup>1</sup> IRS Notice 2007-86, 2007-46 I.R.B. 990.

<sup>2</sup> For a summary of the final Treasury Regulations, see the August 2007 edition of Planning Notes, which can be found at [www.butlersnow.com/news/documents/PN-August2007\\_001.pdf](http://www.butlersnow.com/news/documents/PN-August2007_001.pdf)).

<sup>3</sup> IRS Notice 2007-89, 2007-46 I.R.B. 998.

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