

**Abstract:** On September 10, 2007, the IRS extended the required deadline for taxpayers to formally amend their nonqualified deferred compensation plans and arrangements to comply with Section 409A until December 31, 2008.

Companies should be aware that this extension is limited and plan design decisions need to be made by the end of 2007.

*The following is based on a summary of legal principles. It is not to be construed as legal advice. Individuals should consult with legal counsel before taking any action based on these principles to ensure their applicability in a given situation.*

### Only Limited Relief Provided in the Recent Extension of the Section 409A Documentary Compliance Deadline

By Debra Sadow Koenig & Lecia D. Johnson

#### Introduction

The IRS released Notice 2007-78 on September 10, 2007, extending the required deadline for taxpayers to formally amend their nonqualified deferred compensation plans and arrangements to comply with Section 409A until **December 31, 2008**.

Prior to this extension, companies had until December 31, 2007 to formally amend their plans in accordance with the final regulations issued in April 2007. See our update from May 2007 entitled, “*What Your Company Should Do Now in Response to the Final Deferred Compensation Regulations Under Section 409A*,” for further information on the changes that need to be made to nonqualified deferred compensation plan at <http://www.gklaw.com/docs/409Ainfo.cfm>. Failure to comply with the provisions of Section 409A results in a 20% penalty tax on the employee entitled to the compensation.

The relief in Notice 2007-78 is limited. The effective date of the final regulations will still be January 1, 2008 and there are a number of requirements under Section 409A that will need to be addressed in your company’s deferred compensation arrangements by the end of 2007.

#### Section 409A Deadlines

Your company should be aware of the following Section 409A deadlines:

(1) On or before **December 31, 2007**, companies must:

- Confirm that all nonqualified deferred compensation plans or arrangements specify in writing a compliant time and form that payments will be made under the plan or arrangement; and
- Take advantage of transitional guidance, which allows both the employer and employees to make new distribution elections with respect to plans or arrangements subject to Section 409A in most cases.

**PLANNING POINT:** This means that major plan design decisions involving the time and form of payments under nonqualified deferred compensation plans and arrangements must be finalized in 2007 due to the limited ability to make changes to payment events after the end of 2007.

(2) Starting on **January 1, 2008**, all nonqualified deferred compensation plans and arrangements must:

- Fully comply with the final regulations of Section 409A in their operation – the “good faith compliance” standard currently in place has **not** been extended beyond the end of 2007.

## Section 409A Documentary Compliance Deadline (continued)

(3) Due to the extension granted in the Notice, companies have until **December 31, 2008** to:

- Retroactively amend, as of January 1, 2008, all nonqualified deferred compensation plans or arrangements in writing so that they comply in all respects with the final regulations under Section 409A (consistent with the manner in which the plan or arrangement was operated during 2008).

### Additional guidance under Section 409A provided by the IRS in Notice 2007-78

Notice 2007-78 provides additional guidance and clarification on some technical issues. The IRS also announced its intention to establish a limited voluntary compliance program for certain unintentional operational failures that occur under Section 409A. The program will provide methods by which certain unintentional operational failures may be corrected in the same taxable year in which the operational failure occurred to avoid application of Section 409A. The program will also provide other methods by which certain unintentional operational failures may result in only limited amounts becoming includible and subject to additional taxes under Section 409A. Further guidance on this program will be issued in the near future.

### What should my company do now?

You, along with counsel, should determine if you have any plans or arrangements that may be subject to Section 409A. If you do, you should discuss with counsel what modifications, if any, are required. Even though you may have previously reviewed and/or modified an arrangement in reliance on earlier guidance, we recommend that all arrangements be reviewed in light of the final regulations.

**IMPORTANT:** All plans and arrangements should be reviewed and necessary payment modifications must be made prior to January 1, 2008. Only certain modifications will be able to be made in 2008.

### Where can I obtain additional information about Section 409A?

Detailed information regarding Section 409A and the regulations that have been issued since its enactment (both proposed and final) can be found on our website at <http://www.gklaw.com/docs/409Ainfo.cfm>.

If you have any questions about Section 409A or require assistance, please contact Debra Koenig ([dkoenig@gklaw.com](mailto:dkoenig@gklaw.com) or 414-287-9476), Lecia Johnson ([ljohnson@gklaw.com](mailto:ljohnson@gklaw.com) or 414-287-9319), or another Godfrey & Kahn attorney. ♦

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