

One Minute Memo[®]



New IRS Guidance Provides Only Limited Relief From Looming Section 409A Deadline

Yesterday, the IRS released Notice 2007-78, providing limited transition relief from the looming December 31, 2007 deadline for compliance with Internal Revenue Code Section 409A, which imposes significant operational and documentation requirements on deferred compensation arrangements. The Notice extends the deadline for full document compliance until December 31, 2008. However, what the Notice does **not** do is even more important:

- Full operational compliance with the Section 409A Final Regulations is still required beginning January 1, 2008. The “good faith” compliance period was not extended.
- The rules allowing a “transition election” period through December 31, 2007 were not extended. Accordingly, any change in the time or method of distribution of deferred compensation after December 31, 2007 must meet the “redeferral” rules in Section 409A, including the requirement that the distribution be delayed for a further minimum five year period.
- The rule permitting distribution from a supplemental deferred compensation plan “linked” to a qualified plan to follow the qualified plan distribution election has not been extended. Accordingly, supplemental retirement plans will need to be “de-linked” by December 31, 2007.

- No extension of the transition relief for the substitution of non-discounted stock options and stock appreciation rights for discounted equity awards is provided after December 31, 2007.

Even where Notice 2007-78 provides relief—from plan documentation requirements—that relief is limited. Although a plan document will not be required to specify many of the details mandated by the Final Regulations until December 31, 2008, plans must still designate in writing, by December 31, 2007, a Section 409A compliant time and form of payment for deferred compensation. Plan terms that are inconsistent with Section 409A will be disregarded through December 31, 2008, provided that the plan complies in operation.

Finally, Notice 2007-78 provides additional guidance regarding the application of Section 409A to employment agreements and features that require participants to “cash out” their benefits upon termination if their benefits are below a certain amount. The IRS also announced that it will establish a voluntary compliance program to correct unintentional violations of Section 409A and limit the amount of taxation that would result from such violations, although the scope of the correction program and when it will be up and running remain undefined.

Because of the limited nature of the relief provided by Notice 2007-78, employers must continue to identify compensation arrangements that may provide for deferred compensation, assess each arrangement's compliance with Section 409A, and amend the arrangement (or associated deferral elections) as necessary to assure operational compliance by December 31, 2007.

If you have any questions about this One Minute Memo, please contact your Seyfarth Shaw attorney, or any of the attorneys in the Employee Benefits & Executive Compensation Department at www.seyfarth.com.

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