

## CLIENT ADVISORY

## IRS Extends Transition Relief for Compliance with Section 409A Until December 31, 2008

On October 22, 2007, the IRS issued Notice 2007-86, which generally extends the transition period for complying with Section 409A through December 31, 2008. The new relief supersedes the very limited extension of transition relief provided last month by the IRS in Notice 2007-78, which was widely regarded as insufficient.

### FOLLOWING ARE KEY HIGHLIGHTS OF NOTICE 2007-86:

- **Compliance with Final Regulations Delayed Until 2009:** A plan is not required to comply with the Final Regulations under Section 409A, which were scheduled to become effective on January 1, 2008, until January 1, 2009.
- **Deadline for Plan Amendments Delayed Until 2009:** As a result of the compliance extension, the deadline for amending plans and agreements to comply with Section 409A is now December 31, 2008.
- **Interim Compliance Standard:** Until January 1, 2009, when the Final Regulations become effective, a plan generally will be treated as complying with Section 409A if it is operated in accordance with its terms (to the extent consistent with Section 409A) and previously issued Section 409A guidance that has an effective date before January 1, 2008. Where an issue is not addressed by such guidance, a reasonable, good faith standard applies. During 2007, compliance with either the Final Regulations, the Proposed Regulations, or Notice 2005-1 constitutes reasonable, good faith compliance. During 2008, compliance with the Final Regulations or Notice 2005-1, but not the Proposed Regulations, will constitute reasonable, good faith compliance.
- **Changes to Payment Elections:** New payment elections relating to time and form of payment may be made during 2008, provided that the new election does not defer a payment that would otherwise be made during 2008 or accelerate into 2008 a payment that would otherwise be made during a later year. This corresponds with the transition relief in effect for 2006 and 2007 with respect to new payment elections.
- **Payment Elections Linked to Qualified Plans:** The ability to continue to link a payment election under a nonqualified deferred compensation plan to an election under a qualified plan, a 403(b) plan, a 457(b) plan and certain broad-based foreign plans is extended through December 31, 2008.

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*This summary is intended to be a general summary of the law and does not constitute legal advice. You should consult with competent counsel to determine applicable legal requirements in a specific fact situation.*

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- **Transition Relief For Replacement of Discounted Options and SARs:** Transition relief for replacing discounted stock options (stock options granted with exercise prices below the fair market value of the covered stock on the date of grant) and discounted stock appreciation rights with nondiscounted stock options or stock appreciation rights is extended through December 31, 2008. Similar to the transition relief in effect for 2007, this relief does not apply to certain back-dated discounted stock options and stock appreciation rights granted by publicly traded companies to persons subject to the disclosure requirements of Section 16(a) of the Securities Exchange Act of 1934.
- **Forthcoming Section 409A Correction Program:** The IRS announced that it expects to issue guidance on its new Section 409A correction program “as soon as possible.”

*We hope that you find this brief summary helpful. If you would like more information, or assistance in addressing or commenting on the issues raised in this advisory, please feel free to contact:*

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