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September 16, 2008

Re: Year End 409A Deadlines

Dear Clients and Other Friends:

In recent years, we have written to you at about this time with news that the deadline for adopting Code §409A amendments to deferred compensation plans had been extended for another year. That is not our current message, as it appears that this year the 409A deadline will not be extended again and the final 409A amendments will actually have to be finalized and signed by December 31, 2008. We have been working closely with many of you to get these amendments completed. For others with whom we have not been working as closely, please let us know if you have any questions or concerns about the 409A amendment process.

Also, it should be noted that under the IRS 409A transition rules, plan participants can be offered one more opportunity to change the form of payment of deferred amounts subject to 409A that are scheduled to be paid after 2008¹. Such elections must be made in writing by December 31, 2008. For example, an individual who is scheduled to be paid a lump sum in 2010 could choose instead to have the deferred amount paid in installments beginning in, say, 2015.² Similarly, an individual whose deferred compensation is scheduled to be paid following termination of employment could choose instead to receive it on a fixed payment date, so long as the original scheduled payment date and the new payment date are both after 2008. Again, we have worked with a number of clients in connection with such elections. Please let us know if you need our help in that regard.

Sincerely,

A. David Kelly

ADK/bz

¹ If you have deferred compensation arrangements that are "grandfathered" under the pre-409A rules, offering this type of election has the effect of waiving grandfathering and making the pre-2005 deferrals subject to 409A. This is not necessarily a problem, but it is an issue you need to think about before offering such elections with regard to pre-2005 grandfathered deferrals.

² One possible reason to consider such a change is the new Minnesota law taxing deferred compensation earned by an individual while a Minnesota resident and paid after he or she has moved to another state. Deferred compensation paid in installments over a recipient's lifetime or over a period of at least 10 years is not subject to Minnesota taxes under this new law. See our May 2, 2008 letter for more about this new Minnesota tax.