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Re: IRS Extends 409A Deadlines

Dear Clients and Other Friends:

Our September 11, 2007 client letter reported that the IRS had extended the deadline for amending the deferred compensation plans to comply with Code §409A to December 31, 2008, but that certain interim compliance steps still had to be completed by December 31, 2007. Yesterday, the IRS issued Notice 2007-86, which generally extends all of the 409A related compliance deadlines to the end of 2008. As a result of this extension:

- The December 31, 2007 deadline for designating the time and form of payment for existing deferrals is deferred to December 31, 2008. This means that the final opportunity for a participant to choose the payment date for existing deferrals is the end of 2008 rather than the end of 2007. Also, in cases where the payment date and form of payment are prescribed by the Plan and not subject to participant elections, the employer is free to modify these terms through the end of 2008. However, any new payment terms for amounts currently scheduled to be paid in 2008 must be adopted by the end of 2007.
- The ability to link payment under a non-qualified SERP to the time and form of payment elected under the employer's qualified plan is extended through 2008.
- The deadline for complying with the final 409A regulations issued April 17, 2007 is extended to January 1, 2009. In the meantime, deferred compensation plans must be operated in accordance with a "good faith" compliance standard, which may involve complying with the final regulations or could be based on other prior IRS guidance such as IRS Notice 2005-1. However, during 2008, a Plan may not rely on the proposed 409A regulations issued in 2005.

While the 409A compliance deadlines have now been extended to December 31, 2008, employers still are free to complete the 409A compliance process earlier. In cases where an employer is almost at the point of finalizing its 409A amendments and elections, it may be advisable to complete the process now rather than delaying it for another year. We sense that many companies are far along with this process and would welcome an opportunity to move on to other issues.

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Let us know if you have any questions about how this extension will apply to your company.

Sincerely,

A. David Kelly

ADK/jks

P.S. This afternoon, in Notice 2007-89, the IRS announced that employers are not required to report non-taxable accruals of deferred compensation on 2007 Forms W-2 (for employees) or 1099 (for directors and other non-employee services providers). This is good news because it has been unclear exactly what amounts were supposed to be reported on the 2006 W-2 and 1099 forms which must be distributed in January.

This guidance does require employers to report any deferred compensation which became taxable during 2007 due to a violation of Code §409A. The Notice gives detailed guidance about how employers are supposed to handle reporting and withholding requirements in such cases. Please call us if you want more information about that subject.