

EMPLOYEE BENEFITS ALERT

TRANSITION RELIEF FOR NONQUALIFIED DEFERRED COMPENSATION EXTENDED TO DECEMBER 31, 2008



Notice 2007-86, issued by the Treasury Department and the Internal Revenue Service on October 22, 2007, extends through 2008 the transitional relief under Section 409A of the Internal Revenue Code (“Section 409A”) that would otherwise have expired on December 31, 2007 (including transitional relief requiring only good faith operational compliance with Section 409A). This extension provides employers with another full year (until **December 31, 2008**) to amend their nonqualified deferred compensation arrangements to bring them into full operational and documentary compliance with the final regulations issued under Section 409A. This notice was issued in response to concerns raised by employers that requiring full operational compliance with the final regulations by year end would not provide sufficient time to fully review and amend all such nonqualified deferred compensation arrangements, some of which are very complex and/or require negotiation with the affected employees. As discussed in further detail below, good faith operational compliance with Section 409A has been required since **January 1, 2005** and will continue to be required in 2008.

Section 409A defines nonqualified deferred compensation very broadly, including, but not limited to, the following arrangements:

- traditional salary and bonus deferral arrangements and supplemental executive retirement plans (“SERPs”)
- severance and separation pay plans or agreements (including employment and change in control agreements)
- certain split-dollar life insurance arrangements
- phantom stock (including restricted stock units)
- stock options and stock appreciation rights that have an exercise price below grant date fair market value (“discount stock rights”).

Although they no longer need to meet a December 31, 2007, deadline, employers should endeavor to complete their analysis of their nonqualified deferred compensation arrangements as quickly as possible and should adopt any amendments required by the final regulations (including formally implementing specified employee identification procedures) as early as possible. Completing a Section 409A review early in 2008 will avoid the pressures on compensation committees and other key decision makers that resulted in the one-year extension granted by the notice and give employers and their employees time to adjust to the final regulations before the new full operational compliance deadline (January 1, 2009). It is not

clear whether any further extensions of the full compliance deadline will be granted and the Treasury and the Service have informally indicated that they will likely not issue any additional formal guidance with respect to issues already addressed by the final regulations.

Good Faith Compliance Standard Continues to Apply in 2008. Documentary, and therefore full operational, compliance with the final regulations is not required until January 1, 2009. In 2008 nonqualified deferred compensation arrangements must be operated based on a reasonable, good faith interpretation of Section 409A and Notice 2005-1 and/or the final regulations. In 2007 compliance with any of Notice 2005-1, the proposed regulations or the final regulations will constitute reasonable, good faith compliance.

Payment Elections. Transitional relief permitting changes in the time and form of payment of nonqualified deferred compensation amounts has been extended through December 31, 2008. However, a nonqualified deferred compensation arrangement may not be amended in 2008 to cause an amount to be paid in 2008 that would not otherwise be payable in that year or to push the payment of an amount otherwise due in 2008 to a later year. A parallel rule applies for 2007. Accordingly, any amendments to nonqualified deferred compensation arrangements that are designed to delay the payment date beyond a scheduled 2008 payment date must be made by no later than December 31, 2007. It is too late to delay the payment date of an amount that is scheduled to be paid in 2007.

Discount Stock Rights. Until December 31, 2008, a discount stock right may be replaced with a stock right having an exercise price equal to the original grant date fair market value. This relief does not extend to stock rights granted to employees subject to the reporting requirements under Section 16(a) of the Securities Exchange Act of 1934 under circumstances where the issuing company has reported or reasonably expects to report a charge to earnings attributable to the discount that was not timely reported previously.

Linked Plans. Elections as to the time and form of payment under an excess benefit plan or SERP (for example, an excess 401(k) plan) may continue to be linked to the payment elections under the tax-qualified plan to which such plan relates until December 31, 2008. Accordingly, participants in such nonqualified plans must make a separate election as to the time and form of payment of their nonqualified plan benefits by no later than the end of 2008.

Correction Program. The Treasury and the Service stated that they intend to establish a voluntary compliance program that will permit employers to correct certain unintentional failures to operate in compliance with Section 409A. It is unclear when this program might be implemented.

Employer Reporting/Withholding Obligations. On October 23, 2007, the Treasury and the Service issued Notice 2007-89 regarding reporting and wage withholding for 2007 under Section 409A. Employers are not required to report to the Service nonqualified deferred compensation amounts deferred in 2007, but must report (and withhold on) amounts includable in an employee's 2007 income due to noncompliance with Section 409A (this withholding obligation does not extend to the 20% penalty tax or any interest penalties imposed under Section 409A).

CONTACT INFORMATION

If you have questions regarding this Alert or Section 409A generally, please contact:

Bruce E. Simonetti.....	212.872.8023.....	bsimonetti@akingump.com.....	New York
Tristan M. Brown.....	212.872.1083.....	tbrown@akingump.com.....	New York
Robin M. Schachter.....	310.728.3363.....	rschachter@akingump.com.....	Los Angeles

Austin	Beijing	Dallas	Dubai	Houston	London	Los Angeles	Moscow
New York	Philadelphia	San Antonio	San Francisco	Silicon Valley	Taipei	Washington, D.C.	