

## Client Alert

# Treasury and IRS Extend Deadline for Amending Plans to Comply with 409A and Provide Additional 409A Relief

Yesterday, in response to a letter submitted by 92 prominent law firms, including Chadbourne & Parke LLP, the Treasury Department and Internal Revenue Service issued additional transitional relief under Internal Revenue Code Section 409A. The transitional relief provides an extra year (until the end of 2008) for companies to bring their nonqualified deferred compensation arrangements into documentary compliance with 409A. The relief is not as extensive as many companies had hoped, and companies will need to comply with a number of important deadlines before the end of 2007. The transitional relief is set forth in Notice 2007-28, which can be found at <http://www.chadbourne.com/files/upload/2007-78.pdf>. Additional information on 409A can be found on our website at <http://www.chadbourne.com/409A>.

### Additional Transitional Relief

Under the transitional relief, companies now have until the end of 2008 to amend nonqualified deferred compensation arrangements to comply with or be exempt from 409A. Although the deadline for amending documents has been extended until the end of 2008, the amendments must reflect how the arrangements were operated in 2008. There is no requirement that a written arrangement reflect the good faith compliance with 409A for years 2005 through 2007. However, many companies may wish to include such amendments to document such good faith compliance with 409A for prior years.

### No Relief for Documenting Times and Forms of Payment

The transitional relief does not provide additional time to establish times and forms of payments under 409A. Those provisions of an arrangement, including any participant elections, must be made in writing by the end of 2007. Any changes in the time or form of payment made under a 409A arrangement after 2007 must comply with 409A's restrictive rules regarding changes to payment elections.

The transitional relief also does not extend beyond 2007 the ability to add to or remove from an arrangement permissible payment triggers. For example, if an arrangement currently pays out upon the earlier of separation from service or disability, and a company wishes to add a payout trigger for change of control, it must do so in writing before the end of 2007. After 2007, such changes generally cannot be made without pushing the payment date out at least five years.

### Other Important Points

- **Final Regulations Are Still Effective on January 1, 2008.** The transitional relief does not change the January 1, 2008 effective date of the final 409A regulations. This means that, starting January 1, 2008, companies must operate arrangements in compliance with the final 409A regulations. After 2007, taxpayers may no longer rely on Notice 2005-1 or the proposed 409A regulations.

- **Limited Ability to Revise Existing “Good Reason” Provisions.** The new guidance provides very limited relief for companies that had hoped to amend their existing “good reason” resignation provisions to bring them within 409A’s safe harbor definition for “involuntary” separations from service. The new guidance does not clearly address the circumstances under which good reason triggers may be modified to comply with 409A.
- **Documenting Six-Month Wait for Key Employees.** Under 409A, nonqualified deferred compensation that is payable to a key employee of a public company due to a separation from service cannot be paid during the six-month period immediately following the separation from service. Compliance with the six-month wait rule does not need to be documented until the end of 2008, although it will then need to be documented retroactively to January 1, 2008.
- **Installments Treated As a Single Payment Unless Otherwise Designated.** 409A’s rules regarding changes to payment elections apply to each “payment” under the arrangement. The default rule under 409A is that a series of installments is treated as a single payment that is made on the date of the first installment. Companies may elect not to follow the default rule and instead to treat each installment as a separate “payment” for purposes of 409A. However, in order to do so, companies must make this election by the end of 2007.
- **Treasury and IRS to Establish Limited Corrections Program.** For the first time, Treasury and IRS have indicated that they will establish a limited voluntary compliance program through which certain inadvertent 409A violations may be corrected or minimized. Notice 2007-78 states that guidance regarding this program will be issued “in the near future.”
- **Continued Application of 409A’s Prohibitions Against Offshore Trusts and Certain Funding Arrangements.** 409A generally prohibits (a) nonqualified deferred compensation from being funded with offshore trusts, (b) restricting assets in connection with the downturn of a company’s financial health to pay out nonqualified deferred compensation, and (c) transferring assets to a trust or otherwise restricting assets to pay out nonqualified deferred compensation for a “covered employee” during certain time periods in which the company’s defined benefit plan is “at risk” or otherwise underfunded. Companies must continue to operate in good-faith compliance with these rules, and continue to have only until the end of 2007 to bring any non-compliant arrangements into conformity with these rules.

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**For Additional Information**

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