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## Compliance with Section 409A – Another Year to Go!

By: [Edward F. Martin](#) and [Anita B. Curran](#)

Internal Revenue Code Section 409A (“409A”) established an enormous and complex new set of rules governing nonqualified deferred compensation arrangements and onerous penalties for violations. The lengthy final regulations were not issued until earlier this year. The deadline for full compliance was set at December 31, 2007. On October 22, 2007, the Treasury Department, through Notice 2007-86, extended that deadline to December 31, 2008.

While the one-year delay is welcome and needed, we strongly urge employers to act soon to decide how their nonqualified deferred compensation arrangements will be adapted to Section 409A. Even though the effective date of the regulations is largely postponed, the law is already in place, and delays may result in inadvertent violations.

Here’s how the Notice works:

**Documentary Compliance Deadline:** The deadline for amending deferred compensation arrangements to comply with 409A is now December 31, 2008. Thus, employers now must amend documents (or reduce nonwritten arrangements to writing) to conform to the provisions of 409A and the final regulations on or before December 31, 2008.

**Good Faith Compliance:** Despite the delay in actually documenting plans correctly, it is necessary that plans be operated in a way that evidences a good-faith effort to comply with the law. What is the most certain way of evidencing good-faith compliance? By operating in compliance with the regulations! Thus, it is important to know what the law provides and what the regulations provide and to make decisions soon to assure that there is no inadvertent failure to comply.

**Change in Payment Elections:** Perhaps the most important extension of time relates to the ability to make a change in the form or time of payment of a benefit under a 409A plan without causing a violation of 409A. In fact, plans can be amended to *add* the ability to make changes in the time and form of payment through the end of 2008. However, there is an important caveat: a participant can neither be given the opportunity to accelerate a payment into the current year, nor the option to delay into a future year payment that is due in the current year.

**“Linked” Payment Options:** If the time or form of payment of a benefit under a 409A plan is determined by an election under a qualified plan, that “linkage” can continue through 2008 but must be separated effective January 1, 2009.

**Discounted Stock Options:** The period during which discounted stock options and stock appreciation rights (SARs) may be corrected is extended until December 31, 2008. Thus, during 2008, discounted stock options and SARs may be amended to comply with Section 409A or cancelled and replaced with options or SARs that would not have pro-

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vided for a deferral of compensation. This relief is not available for stock options and SARs granted to Section 16 officers of public companies required to restate financial statements to address option backdating, or for discounted stock options or SARs that have been exercised.

**Information Reporting:** In Notice 2007-89, the IRS also delayed by one year the requirement to report current year amounts deferred under a nonqualified plan in Box 12 of Form W-2 (Code Y). However, if any compensation is paid in violation of 409A, this must be reported on Form W-2 (or Form 1099-MISC in the case of a non-employee).

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*Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues you may contact any of the attorneys contacted below.*

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