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Section 409A Update: Internal Revenue Service Extends Deadline for “Operational” Compliance for Nonqualified Plans Until December 31, 2008



by [Andrew Elbon](#)

On October 22, the Internal Revenue Service issued Notice 2007-86, which effectively postpones for another year the deadline for nonqualified deferred compensation plans to comply in operation with the final Treasury Regulations under Section 409A of the Internal Revenue Code (the “409A Regulations” and “Section 409A,” respectively). Earlier, in Notice 2007-78, the IRS had extended the deadline for all of the *plan documents* governing arrangements subject to Section 409A to be in compliance with the new rules, but had left intact the December 31, 2007 deadline for *operational* compliance with the new Section 409A rules that was established under prior guidance. Under this new relief, nonqualified plans—including contributory savings plans, noncontributory supplemental executive retirement plans (SERPs), and certain severance arrangements—need only be administered in good faith compliance with Section 409A until December 31, 2008, at which time full compliance with the 409A Regulations will be required.

During 2008, plan sponsors may continue to operate nonqualified deferred compensation plans in accordance with the terms of such plans, to the extent such terms are consistent with Code Section 409A and all applicable guidance. In the interim, taxpayers may rely on the earlier guidance in Notice 2005-1, when Notice 2005-1 is inconsistent with the 409A Regulations. If an issue is not addressed in Notice 2005-1 or other applicable guidance, taxpayers may rely on a good faith interpretation of the statute itself. Notice 2007-86 provides that reliance on the 409A Regulations is always a good faith interpretation of the new rules.

Payment election relief has also been extended for another year in Notice 2007-86. Consistent with previous guidance, with respect to amounts subject to Section 409A, a plan may provide for new payment elections on or before December 31, 2008, with respect to both the time and form of payment of such amounts, and the election will not be treated as an impermissible change in the time or form of payment under Section 409A. However, with respect to an election or amendment to change a time and form of payment made on or after January 1, 2008 and on or before December 31, 2008, the election or amendment may apply only to amounts that would not otherwise be payable in 2008 and may not cause an amount to be paid in 2008 that would not otherwise be payable in 2008. For example, with respect to an amount payable upon separation from service, an election may not be made in 2008 to change the amount payable upon a separation from service in 2008.

Notwithstanding the new transition relief provided under Notice 2007-86, plan sponsors should consider implementing as soon as possible administrative schemes that are consistent with the final regulations under Code Section 409A. This is especially the case since, according to Notice 2007-86, reliance on the final regulations always constitutes good faith compliance with Code Section 409A.

If you have any questions about Notice 2007-86 or general compliance with Code Section 409A, please

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