

OCTOBER 1, 2007 ALERT:
Deadline for non-qualified deferred compensation plan updates extended to Dec. 31, 2008 – but designation of compliant time/form of payment deadline and operational compliance still required by year-end 2007

The IRS has once again extended the deadline for firms with non-qualified deferred compensation plans to have a formal written plan document in compliance with IRC Section 409A. The new deadline is Dec. 31, 2008.

However, although the deadline to have written plan documents updated and in compliance with 409A has been extended another year – **one specific document requirement (designation of compliant time/form of payment) must be finalized by Dec. 31, 2007**, and the **plan sponsors must operate their plans in compliance with the final 409A regulations as of Jan. 1, 2008**.

IRC Section 409A, tightening restrictions on how non-qualified deferred compensation plans are managed, went into effect Jan. 1, 2005, with organizations required to follow its dictates from that point on, but not required to amend their **written plan** yet. The IRS provided several deadline extensions to allow companies more time to comply while final regulations were being written, but now, **all plans must be operating by the final regulations by Jan 1, 2008 and have a final plan document in compliance by Dec. 31, 2008**. Those plans NOT in compliance face serious penalties, with the deferred compensation becoming immediately taxable and participants incurring a 20% penalty, tax and interest. Penalties are paid by the employee, not the employer.

Exceptions and exclusions to 409A

- Non-qualified deferred compensation plans in place in 2004 before Section 409A went into effect are grandfathered (provisions may continue to govern pre-2005 vested benefits), as long as there are no “material modifications” to the plans after Dec. 31, 2004. Deferrals made and/or benefits vesting after Dec. 31, 2004 must conform to the new law and regulations.
- Other exclusions include qualified plans, SEPs and SIMPLEs.
- Section 409A was written to be broadly inclusive; if an exclusion is not specifically provided, the plan must be in compliance.

Designation of compliant time and form of payment due

By Dec. 31, 2007, all non-qualified deferred compensation plans must designate in writing a compliant time and form of payment in accordance with 409A. A separate written document (not the entire plan) may be adopted to comply with this requirement. For example, an unwritten plan must adopt in writing a compliant time and form of payment by Dec. 31, 2007. A plan presently utilizing a permitted time and form of payment may only add additional permitted distribution events if done before Dec. 31, 2007.

What plans must amend to be in compliance

Section 409A reduces the amount of control that individuals have over their non-qualified deferred compensation plan, putting many more restrictions on how and when funds may be handled. Changes include new restrictions on elections to defer compensation, funding deferred compensation, and distributions of deferred compensation. Essentially, 409A requires that **decisions about deferred compensation must be made in advance and written into the plan.**

What are the next steps

If you have a deferred compensation plan, you will receive the most benefit by consulting with both a tax professional and an attorney. A tax professional can advise you on the specifics of which plans are included, what the new restrictions are, and how to bring your plan into compliance, and work with your counsel to draft a new plan.

If you would like to discuss your plan, please contact your Allen, Gibbs & Houlik, L.C. tax or employee benefits professional at (316) 267-7231 as soon as possible, so that we may coordinate with your counsel and help make sure you are in compliance by year end.

NOTE: Pursuant to federal regulations imposed on practitioners who render tax advice ("Circular 230"), we are required to advise you that any tax advice contained herein (including any attachments unless expressly stated otherwise) is not intended or written to be used for the purposes of: (i) avoiding tax penalties that may be imposed by the IRS, or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.