

Firms Make Urgent Request for Deadline Extension Under Final Nonqualified Deferred Compensation Plan Regs

Regina Olshan of Skadden, Arps, Slate, Meagher & Flom LLP and more than ninety other law firms have asked the IRS to extend until December 31, 2008, the deadline to amend deferred compensation plans to comply with section 409A.

Date: Aug. 21, 2007

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August 21, 2007

Mr. Kevin Brown
Acting Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Dear Acting Commissioner Brown:

The 92 law firms listed as signatory firms hereto urgently request an extension of the deadline for amendment of deferred compensation plans to comply with Section 409A of the Internal Revenue Code of 1986, as amended ("Section 409A") until December 31, 2008. Based on our collective extensive experience in advising businesses and individuals with respect to Section 409A compliance and related matters, it is our collective view that the period until the current deadline (December 31, 2007) is not sufficient to ensure both thorough compliance with Section 409A and appropriate analysis by the taxpayers of the high level policy issues raised by the required amendments, particularly in light of the corporate governance processes many of our clients have adopted with respect to decision making related to executive compensation matters. Further, attempted compliance with the deadline is imposing an undue strain on resources and administrative burdens on our clients and their service providers (including attorneys, actuaries, compensation consultants, accountants and record keepers).

The final Section 409A regulations, issued in April 2007, are necessarily lengthy and complex, since the statute left a great deal to be explained in regulations. We greatly appreciate the IRS providing this extensive guidance in a timely manner. However, with the final regulations published less than nine months before the documentary compliance deadline, many of the issues raised are still being debated by the most sophisticated practitioners and, we understand, in a number of cases continue to be the subject of evolving consideration and analysis by Department of Treasury and IRS personnel. As a result, even expert practitioners differ or are uncertain of how to apply the rules to many common business practices. Moreover, failure to comply will result in significant tax liabilities to individuals many of whom will have had no significant involvement in the compliance process.

Many of our corporate clients have literally hundreds of interrelated deferred compensation arrangements which must be collected, reviewed and analyzed. These include employment agreements, the severance provisions of each of which must be individually analyzed for

Section 409A compliance. Following review and analysis, many decisions, each with varying cost, tax, accounting, human relations, public relations and securities laws implications, need to be made. These decisions require involvement by the highest levels of the company's management and, thereafter, by the company's board of directors (or the compensation committee). These decision makers must all be extensively briefed on the issues raised, will then pose questions and review responses to those questions, evaluate various alternatives, and ultimately approve proposed changes.

Upon completion of this lengthy process, Section 409A amendments reflecting the decisions reached must then be drafted, reviewed, approved, communicated and implemented (many will also require negotiations with affected individuals, who may themselves be represented by counsel).

We are very concerned that the attempts to accomplish the required analysis, decision making and amendments in the current compressed time frame are likely to cause mistakes, oversights and errors, even by the most sophisticated advisors and clients who are doing their absolute best to comply. The consequences of any errors will fall on the individual employees, not the employers, and most of those employees have little or no ability to address or correct those errors. These issues are exacerbated for the small business community (including tax exempts) and for foreign companies, many of which are still largely unaware of the complexities and burdens of Section 409A compliance and have limited access to sophisticated advisors.

Accordingly we respectfully request that the period to bring plan documents into compliance with Section 409A be extended until December 31, 2008. We further request that all transition relief currently scheduled to expire on December 31, 2007 (including the "reasonable good faith compliance" standard for plan operation) be extended until December 31, 2008 and that the date of the applicability of the final regulations be changed to January 1, 2009. During the period prior to December 31, 2008, we urge you to solicit practitioner input on ways for employers to comply on a simplified and bulk basis and, as the Section of Taxation of the American Bar Association has also suggested, to develop a voluntary correction program for inadvertent Section 409A violations.

If you have any questions or would like to discuss these issues further, please contact Regina Olshan, phone 212-735-3963, rolshan@skadden.com, Neil Leff, phone 212-735-3269, nleff@skadden.com, William Sweetnam, phone 202-861-5427, wfs@groom.com or Mark Wincek, phone 202-508-5801, MWincek@KilpatrickStockton.com. We would also be happy to arrange a meeting with representatives of some or all of the signatory law firms.

Sincerely,

Regina Olshan

Cc:

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Allen & Overy LLP
Alston & Bird LLP
Arnall Golden Gregory LLP
Baker & McKenzie LLP
Baker Botts L.L.P.
Ballard Spahr Andrews & Ingersoll, LLP
Bingham McCutchen LLP
Bond, Schoeneck & King, PLLC
Bracewell & Giuliani LLP

Buchanan Ingersoll & Rooney PC
Cadwalader, Wickersham & Taft LLP
Cahill Gordon & Reindel LLP
Caplin & Drysdale, Chartered
Chadbourne & Parke LLP
Cleary Gottlieb Steen & Hamilton LLP
Clifford Chance US LLP
Covington & Burling LLP
Cravath, Swaine & Moore LLP
Davis & Gilbert LLP
Davis & Harman LLP
Davis Polk & Wardwell
Debevoise & Plimpton LLP
Dechert LLP
Dewey Ballantine LLP
DLA Piper
Drinker Biddle & Reath
Epstein Becker & Green, P.C.
Fried, Frank, Harris, Shriver & Jacobson LLP
Fulbright & Jaworski L.L.P.
Gibson, Dunn & Crutcher LLP
Goodwin Procter LLP
Groom Law Group, Chartered
Haynes and Boone, LLP
Hogan & Hartson LLP
Hunton & Williams LLP
Ivins, Phillips & Barker
Jones Day
Katten Muchin Rosenman LLP
Kelley Drye & Warren LLP
Kilpatrick Stockton LLP
King & Spalding LLP
Kirkland & Ellis LLP
Kirkpatrick & Lockhart Preston Gates Ellis LLP
Kramer Levin Naftalis & Frankel LLP
Latham & Watkins LLP
LeBoeuf, Lamb, Greene & MacRae LLP
Linklaters LLP
Lowenstein Sandler PC
Mayer, Brown, Rowe & Maw LLP
McCarter & English, LLP
McDermott Will & Emery LLP
McGuireWoods LLP
Milbank, Tweed, Hadley & McCloy LLP
Morgan, Lewis & Bockius LLP
Morrison & Foerster LLP
Morrison Cohen LLP
O'Melveny & Myers LLP
Orrick, Herrington & Sutcliffe LLP
Osier, Hoskin & Harcourt LLP
Paul, Hastings, Janofsky & Walker LLP

Paul, Weiss, Rifkind, Wharton & Garrison LLP
Pepper Hamilton LLP
Perkins Coie LLP
Pillsbury Winthrop Shaw Pittman LLP
Proskauer Rose LLP
Reed Smith, LLP
Ropes & Gray LLP
Sands, Anderson, Marks & Miller, PC
Schulte Roth & Zabel LLP
Shearman & Sterling LLP
Sidley Austin LLP
Simpson Thacher & Bartlett LLP
Skadden, Arps, Slate, Meagher & Flom LLP
Sonnenschein Nath & Rosenthal LLP
Steptoe & Johnson LLP
Steptoe & Johnson PLLC (West Virginia)
Stroock & Stroock & Lavan LLP
Sullivan & Cromwell LLP
Sutherland Asbill & Brennan LLP
Thelen Reid Brown Raysman & Steiner LLP
Thompson Hine LLP
Troutman Sanders LLP
Vedder, Price, Kaufman & Kammholz, P.C.
Vinson & Elkins LLP
Wachtell, Lipton, Rosen & Katz
Waller Lansden Dortch & Davis, PLLC
Weil, Gotshal & Manges LLP
White & Case LLP
Willkie Farr & Gallagher LLP
Wilmer Cutler Pickering Hale and Dorr LLP
Wilson Sonsini Goodrich & Rosati

Tax Analysts Information

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