

Section 409A Requirements for Amending Nonqualified Deferred Compensation Plans

Section 409A of the Code imposes strict requirements on nonqualified deferred compensation plans and arrangements. Effective January 1, 2009, all plans must be amended to comply with the requirements of Code Section 409A and the final regulations. Until then, deferred compensation plans and arrangements must be operated in reasonable, good faith compliance with Code Section 409A. Failure to comply with Code Section 409A will result in immediate taxation to the executive of the amounts deferred. In addition, the executive will be required to pay a twenty percent (20%) excise tax and may be required to pay interest for failure to include the deferred amounts in his taxable income in the year such amounts were earned.

Code Section 409A defines "nonqualified deferred compensation plan" broadly to include "traditional" deferred compensation plans, as well as certain long-term incentive and bonus plans, equity compensation plans (e.g., discounted stock options and stock appreciation rights, restricted stock units and phantom stock), severance and employment agreements, and reimbursement arrangements (including, but not limited to, indemnification arrangements). Therefore, it is imperative to prepare an inventory of the arrangements you currently sponsor so that we can determine whether they satisfy the requirements for an exemption from Code Section 409A or you can timely amend them to reflect their compliance with Code Section 409A.

Note, if any amendments are necessary, they will need to be prepared in time to take any necessary corporate action on or before December 31, 2008.

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