

Executive Compensation and Equity Compensation Plans Year-End Checklist; 409A Documentary Compliance Period Ends December 31, 2008

December 18, 2008

The following checklist describes 2008 year-end action items with respect to executive compensation and equity compensation plans. Though not exhaustive, this list is intended to provide a reminder of the general set of issues facing us at year end.

Year-end action items:

- ***The documentary compliance deadline under section 409A of the Code is December 31, 2008.*** There has been no indication from the IRS that there will be any extension. Failure to act may result in imposition of a 20% additional tax on participants in nonconforming deferred compensation arrangements, which includes not only “plain vanilla” deferred compensation plans but also other arrangements, such as for example employment agreements, change-in-control agreements, and severance agreements. (For further details, see our LawFlash issued September 16, 2008, at http://www.morganlewis.com/pubs/EB_Section409ADecline_LF_16sept08.pdf.)
- Elections to defer compensation to be earned in 2009 generally must be made by December 31, 2008 under section 409A.
- Under the section 409A transitional election rules, elections to change the time or form of payment for deferred compensation that is otherwise payable in 2009 or thereafter can be made until December 31, 2008. The section 409A transition rules end on December 31, 2008. (For more details, see our LawFlash issued October 24, 2007, at http://www.morganlewis.com/pubs/EB_Section409ADecline_LF_24oct07.pdf.)

Note that a transitional payment election in 2008 cannot accelerate a payment into 2008 that is not otherwise due in that year and cannot postpone to a later year a payment otherwise scheduled for 2008.

- Note that the section 409A six-month delay required for payment of deferred compensation to a key employee of a public company upon separation from service is currently in effect. The

section 409A transition rules did not postpone the effective date of this requirement, and applicable documents must include a provision addressing the six-month delay.

- Any violations of section 409A in 2008 must be reported on Form W-2 or Form 1099 for 2008. (For more details, see our LawFlash issued October 26, 2007, at http://www.morganlewis.com/pubs/EB_IRSExtendsReporting_LF_26oct07.pdf.)
- Many inadvertent violations of section 409A occurring in 2008 and minor errors made in 2006 or 2007 may be corrected to eliminate or minimize section 409A exposure if required actions are taken by December 31, 2008. (For more information, see our LawFlash issued December 5, 2007, at http://www.morganlewis.com/pubs/EB_CorrectionProgram_LF_05dec07.pdf. For further details, see our LawFlash issued December 11, 2008, at http://www.morganlewis.com/pubs/EB_409AViolations_LF_11dec08.pdf.)
- Employers that maintain a nonqualified defined benefit plan (SERP) may want to consider accelerating FICA tax on the SERP benefits into 2008, to minimize the effect of future FICA tax increases. (For more details, see our Hot Topics issued November 20, 2008, at http://www.morganlewis.com/pubs/EB_HotTopics_ThroughTheDonutHole_20nov08.pdf.)
- Employers with offshore deferral arrangements involving U.S. taxpayers may need to take actions to ensure compliance with new section 457A of the Code, which requires employers having a “nonqualified entity” that sponsors a noncompliant deferred compensation arrangement to report taxable income to U.S. taxpayer participants generally when the amount is no longer subject to a substantial risk of forfeiture. Amounts not properly dealt with will be subject to a 20% penalty as well as an interest charge-back to the date of deferral. For more information, see our LawFlash issued October 16, 2008, at http://www.morganlewis.com/pubs/FCIA_LF_ExecutiveCompensation_16oct08.pdf.)

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