

Deadline for Compliance with Section 409A Approaching

September 16, 2008

The deadline for ensuring that all deferred compensation plans, agreements, and other arrangements subject to section 409A of the Internal Revenue Code (IRC) comply with the 409A requirements is December 31, 2008. It is highly unlikely that this rapidly approaching deadline will be extended.

We would like to bring to your attention the following key section 409A deadlines, which may affect a broad variety of nonqualified deferred compensation plans and arrangements. Failure to meet the applicable section 409A requirements may result in the imposition of an immediate 20% additional federal income tax, and potentially additional interest charges, on the individual (i.e., executive or director) benefiting from the nonconforming arrangement.

1. **Good-Faith Compliance Period Ends January 1, 2009:** During 2008, plans subject to section 409A are required to be operated in “good faith” compliance with the final IRS regulations issued under section 409A. On January 1, 2009, the final regulations become effective and plans must comply fully with the final regulations; mere “good faith” compliance is no longer acceptable. As a result, it is important that all arrangements be reviewed and, if necessary, amended to comply with the requirements of section 409A by December 31, 2008. Amendments to deferred compensation arrangements may require consideration and approval by a board committee or by the full board of directors. Consequently, it may be necessary to have all revisions drafted in time to be reviewed at the last board meeting of the calendar year (which will likely occur well before December 31).
2. **Nonqualified Deferred Compensation Arrangements:** Section 409A generally applies to any arrangement in which an individual has a legally binding right in one year to receive compensation that will be paid in a future year. The following types of arrangements could be nonqualified deferred compensation arrangements subject to section 409A:
 - Traditional nonqualified deferred compensation plans, SERPs, excess benefit plans, section 457(f) plans
 - Employment agreements, change-of-control agreements
 - Severance agreements, severance plans, severance provisions in offer letters, and retention agreements
 - Equity grants, including restricted stock units, phantom shares, options, SARs, and deferred equity awards
 - Annual bonus plans, long-term incentive plans
 - Fringe benefits, prerequisite arrangements

- Corporate transaction “earnout” arrangements
 - Expatriate agreements, foreign retirement arrangements covering U.S. employees
3. **Elections Permitted on or Before December 31, 2008:** Prior to January 1, 2009, taxpayers are permitted to make elections as to the form and time of payment under plans or arrangements subject to section 409A, and employers may amend their plans to provide for such elections. These elections must be made no later than December 31, 2008 and may not (a) accelerate payments into 2008 or (b) defer into a later tax year amounts otherwise payable in 2008.

Summary

The deadline for compliance with section 409A and the final regulations is quickly approaching. In order to ensure that your compensatory plans, arrangements, and agreements are in compliance with section 409A and the final regulations by January 1, 2009, all such arrangements should be reviewed to determine whether:

- The arrangement provides deferred compensation under section 409A
- The arrangement needs to be amended to comply with the requirements of section 409A and the final regulations
- Elections as to form and time of payment need to be made on or prior to December 31, 2008

If you have any questions or if you would like to obtain more information, please contact your Morgan Lewis attorney or any of the following Employee Benefits attorneys:

Chicago

Brian D. Hector	312.324.1160	bhector@morganlewis.com
Louis L. Joseph	312.324.1726	louis.joseph@morganlewis.com

Dallas

Riva T. Johnson	214.466.4107	riva.johnson@morganlewis.com
Heath Miller	214.466.4118	hmiller@morganlewis.com
Erin Turley	214.466.4108	eturley@morganlewis.com

New York

Craig A. Bitman	212.309.7190	cbitman@morganlewis.com
Gary S. Rothstein	212.309.6360	grothstein@morganlewis.com

Palo Alto

S. James DiBernardo	650.843.7560	jdibernardo@morganlewis.com
Zaitun Poonja	650.843.7540	zpoonja@morganlewis.com

Philadelphia

Robert L. Abramowitz	215.963.4811	rabramowitz@morganlewis.com
I. Lee Falk	215.963.5616	ifalk@morganlewis.com
Amy Pocino Kelly	215.963.5042	akelly@morganlewis.com
Robert J. Lichtenstein	215.963.5726	rlichtenstein@morganlewis.com
Vivian S. McCardell	215.963.5810	vmccardell@morganlewis.com
Joseph E. Ronan	215.963.5793	jronan@morganlewis.com

Steven D. Spencer	215.963.5714	sspencer@morganlewis.com
Mims Maynard Zabriskie	215.963.5036	mzabriskie@morganlewis.com
David B. Zelikoff	215.963.5360	dzelikoff@morganlewis.com

Pittsburgh

John G. Ferreira	412.560.3350	jferreira@morganlewis.com
R. Randall Tracht	412.560.3352	rtracht@morganlewis.com

Washington, D.C.

Althea R. Day	202.739.5366	aday@morganlewis.com
Daniel L. Hogans	202.739.5510	dhogans@morganlewis.com
Gregory L. Needles	202.739.5448	gneedles@morganlewis.com

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