



## ANOTHER 409A EXTENSION. THE IRS BLINKS, AND EVERYONE "WINS."

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### IS ANYONE SURPRISED?

The IRS conceded to reality today. For all practical purposes, it has granted a full extension until January 1, 2009 of the major requirements of IRC Section 409A. Plan documents do not have to be executed until December 31, 2008. Plan operations can be based on good faith compliance and need not follow the April 10 final regulations until January 1, 2009. Executives have more time to consider their choices. The deadline to commit to a definite time and method of paying 409A deferrals --- the transition procedure --- has been moved to December 31, 2008.

Until 2009, employers may use good faith efforts to comply; they may rely on the "final" regulations and Notice 2005-1, and common sense for matters not addressed by those two sources. After 2007, the proposed 2005 regulations may not be used except in limited instances.

### IS ANYONE HAPPY?

As a lawyer representing clients who want to comply with the law, of course I'm "happy." My purported joy is shared by the ABA Tax Section, and a potpourri of white shoe law firms and big industry groups. The system we compensation lawyers work under does not encourage us to be philosophers. We are supposed to help clients comply with whatever Congress and the Agencies dream up in their collective wisdom.

However, as an American citizen, I want to vent just a bit about 409A and the millions it has cost our businesses. This money could have been better spent in improving the competitive position of US industry. The 409A debacle is a microcosm of a tax system gone rotten.

### I'M NOT HAPPY.

It would be foolish not to want extra time to comply. After all, we are dealing with a law that, since its 2004 infancy, has been analyzed and parsed as if it were Talmud, including Notice 2005-1, September 2005 proposed regulations, and a 397 page "final" regulations effort, that was clarified twice after the April, 2007 promulgation, and then extended in a miscalculated half effort, just two months before the current full extension.

My clients took the deadlines seriously, invested the time, have documents in place, and would like to go on to other matters. A one year extension, frankly, will just encourage more wheel spinning in Washington. Young lawyers who hop between private firms and Treasury are making

a career out of a single section of the Internal Revenue Code, meant to cure a minor abuse. I doubt that any elected member of Congress is actually reading the fine print or appreciates the waste of brains and money which their staffs have spawned, and which the Administration's bureaucrats are nurturing. Section 409A, like much of the tax-oriented regulation of our benefits system, is not a sexy enough issue for any powerful elected person to call for a halt to it all. So the wheels spin on. No one dares challenge new tax laws labeled as "reforms." No one is looking at the big picture.

## WAS 409A REALLY NECESSARY?

In the shell game that passes for a National budget process, 409A was falsely represented in 2004 as a future revenue raiser to offset current cuts in corporate tax rates. It was also trumpeted as a great reform of Enron-type abuses, and as a means to prevent executives in troubled companies from accelerating their deferred compensation payments while investors and employees were left as bag-holders.

The tax math is flawed, of course. An executive who defers taxable compensation pays no current taxes, but his employer also gets no current deduction. Deferred compensation does not really "cost" the Treasury anything. As for Enron, it got so much publicity because it was a rare instance. Those portions of 409A which deal with Enron abuses could have been easily implemented anyway: (1) no offshore trusts or springing rabbi trusts, (2) mandatory 6 month delay on payments to key employees, and (3) elimination of haircut provisions.

All of the rest of 409A has been made unnecessarily complex. For example, was it really necessary for regulations to require advance (at the time of deferral) elections as to when and how to pay money for the separate events of death, disability, and change in control? The statute simply said that those were events when payments could be permitted. Why 75 days to pay short term deferrals and 90 days for separation from service payments? Can the complexities of the installment payment rules be mentioned in polite company? And where are the rules to tell employers how to quantify all of this on W-2's, or how to administer 409A in a partnership?

How do companies comply when the government can't finish rules in more than three years? Too much intellect, and not enough wisdom, has made this whole process as silly as that which surrounded the [ill-fated Section 89](#). Old hands recall that Congress finally repealed Section 89, but not before industry had invested millions in a multi-year regulatory and compliance effort which is chillingly similar to the 409A process today.

Oh well. I guess I should be of good cheer that we have an extension. Still, why do I have a sinking feeling that next year promises even more complexity and expense to my clients? And why do I feel, when politicians pander and coo about tax simplification, that they don't really mean it?

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