



ROBERT B. STEVENSON
NANCY KEPPELMAN
NANCY J. SPEZIA
TIMOTHY J. MCGRAW

O F C O U N S E L

NANCY H. WELBER
ANTHONY S. HART III
RICHARD L. SANDERSON, JR.

M E M O R A N D U M

To: Clients and Friends of Stevenson Keppelman Associates
From: Timothy J. McGraw
Date: October 26, 2007
Subject: Déjà vu all over again: IRS Notices 2007-86 and 2007-89 extend compliance dates for Code Section 409A

IRS Notice 2007-86

Just as it did in the two previous years, the IRS has generally extended the documentary compliance date for Code § 409A for another year with the issuance of Notice 2007-86 on October 22, 2007. This notice supersedes much of the limited relief provided in Notice 2007-78, which the IRS issued just last month on September 10, 2007. Notice 2007-86 provides in pertinent part that --

- (1) Amendments to deferred compensation plans to comply with Code § 409A are not required to be made until December 31, 2008. However, as discussed in (4) below, good faith compliance is still required until December 31, 2008. Barring any additional extensions, all deferred compensation plans and arrangements must comply with the final regulations beginning January 1, 2009.
- (2) Nonqualified deferred compensation plans which are linked to qualified plans to determine the time and form of distributions can continue this linkage until December 31, 2008.
- (3) Nonqualified deferred compensation plans may be amended to provide changes in the time and form of payment or to allow service providers to make new elections until December 31, 2008, subject to the same restraints imposed in prior years that the amendment or election cannot accelerate the payment of nonqualified deferred compensation into 2008 or defer an amount otherwise payable in 2008. If the amendment or election changes the time or form of benefit payments that would otherwise be payable in 2008, the amendment or election would have to be made by December 31, 2007.

- (4) The period during which plans can rely on a good faith interpretation of Code § 409A is generally extended until December 31, 2008. Following the Proposed Regulations, the Final Regulations, and/or Notice 2005-1 demonstrates good faith compliance for periods on or before December 31, 2007. For periods commencing on January 1, 2008, nonqualified deferred compensation plans can no longer rely on the Proposed Regulations for good faith compliance purposes, only on the Final Regulations and Notice 2005-1 (except that plans may continue to rely on the partnership provisions of sections II.E and VI.E of the preamble to the Proposed Regulations and the provisions relating to changes in payment elections or conditions in section XI.C of the Proposed Regulations).
- (5) Employers may continue to substitute non-discounted stock options and stock appreciation rights for discounted stock options and SARS until December 31, 2008, but only to the extent that such cancellation and reissuance in 2008 does not result in the cancellation of a deferral in exchange for cash or vested property in 2008.

IRS Notice 2007-89

As it has also done in prior years, on the next day, October 23, 2007, the IRS issued Notice 2007-89 which provides that amounts deferred (Code Y reporting) will not be required on forms W-2 or 1099 for 2007 . If there has been a taxable event under Code § 409A in 2007, tax withholding and Code Z reporting on the 2007 Form W-2 or Form 1099 are required.

This relief provided by the IRS in these two Notices is welcome indeed. However, this also gives the IRS another year to think new thoughts under Code § 409A and inevitably issue more “guidance”. With that in mind, it is still probably a good idea to continue with your amendments for nonqualified deferred compensation plans and arrangements and have the amendments executed earlier rather than later since much of this work may have already been done. This will avoid last minute rushes next year, and will also provide another year to digest the existing and any newly issued guidance, and then make appropriate changes.

Please let us know if you would like assistance in your Code § 409A compliance efforts.