



EMPLOYEE BENEFITS PRACTICE

# ALERT

## LAST CHANCE FOR 409A DOCUMENT CORRECTIONS

By Adam B. Cantor

Do you have a “non-qualified deferred compensation plan” that has not been amended to comply with Section 409A of the Internal Revenue Code? If so, and the plan was in existence prior to January 1, 2009, **you need to act by December 31, 2010**, to take advantage of a limited time, penalty-free offer from the Internal Revenue Service (IRS). Amend the plan by this date, have the amendments take effect as of January 1, 2009, satisfy certain IRS tax return reporting requirements and correct any operational failures attributable to this retroactive correction, and you are on your way to 409A compliance. Sound easy? It’s not. Sound necessary? Absolutely. When to start? Right now!

409A applies to non-qualified deferred compensation plans, which are any plans or arrangements, other than qualified retirement plans (e.g., 401(k) plans), under which a service provider (typically an employee, but sometimes an independent contractor) to an employer receives a legally binding right to receive compensation in one or more future years. Typical examples include:

- Employment, severance, bonus, change in control, management retention and similar agreements or arrangements;
- Independent contractor agreements;
- Traditional deferred compensation plans under which employees defer all or a portion of their base salary or bonus to a subsequent year;

- In-the-money stock option (including LLC unit) or stock appreciation rights plans or arrangements;
- Restricted stock unit and phantom stock plans or arrangements;
- Shareholder and similar agreements that provide a selling shareholder who provides services to the company with a right to sell his or her shares back to the company at a discount;
- Buy-sell and similar agreements in which the buyer is entitled to future payments in exchange for future services; and
- Physician practice group agreements in which a doctor “buys in” and becomes entitled to a stream of receivables payable over multiple years.

What happens if you have a faulty provision or lack a required provision in one of your plans and do **not** correct this problem by December 31, 2010? Under 409A, the service provider is taxed as soon as the deferred amount vests (even if it is not paid out) and the IRS imposes a 20 percent excise tax and interest (from the time of initial deferral or vesting, whichever is later) on the deferred amount.

And if you **do** correct this problem by December 31, 2010? No 20 percent penalty tax, no IRS interest and income taxation at the time of payment, not at the time of vesting. Clearly, this is a better outcome.

Please contact your Fox Rothschild attorney to get started on the corrections. Even if you do not think you have any problems with your plans, having your Fox Rothschild attorney review your plans, agreements and arrangements to spot material issues is advisable.

For more information on this alert, please contact Adam B. Cantor at 212.878.7978 or [acantor@foxrothschild.com](mailto:acantor@foxrothschild.com) or any member of our Employee Benefits & Compensation Planning Practice Group.

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