

Nonqualified Deferred Compensation - Update

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October 2007

Effective Date of Final Regulations Postponed one Year

The changes in the tax treatment of nonqualified deferred compensation made by Section 409A of the Internal Revenue Code of 1986, as amended, were enacted near the end of 2004 and are generally effective for deferrals that occur or vest after 2004. (An outline of Section 409A can be found in [Tax Treatment of Deferred Compensation](#).)

After a series of postponements, the IRS earlier this year, in response to concerns that it would be difficult to amend plans, announced in [Notice 2007-78](#) an extension of the time for amending a deferred compensation plan until December 31, 2008, but the amendment would have to be retroactive to January 1, 2008, the effective date of the final regulations.

In Notice [2007-86](#), just released, the IRS announced that the amendment of plans in compliance with the final regulations that is to be made by December 31, 2008 need not be retroactive to the beginning of that year and that the final regulations will not go into effect until January 1, 2009.

During this period, plans must be operated in compliance with those of their terms that are consistent with Section 409A and the guidance provided by [Notice 2005-1](#) (the original guidance provided by the IRS). Insofar as that Notice and the final regulations are inconsistent, taxpayers may rely on either until the final regulations are in effect. To the extent that an issue is not addressed in that Notice or other guidance, taxpayers may apply a "reasonable, good faith interpretation" of Section 409A. Reliance upon either the proposed regulations or the final regulations will be considered as meeting that standard for this year; in 2008, however, compliance solely with the final regulations will automatically meet that standard.

[Notice 2007-86](#) also discusses extended transition relief for particular types of nonqualified deferred compensation.