

SEPTEMBER 14, 2007

**TREASURY, IRS PROVIDE LIMITED EXTENSION TO §409A  
DOCUMENTARY COMPLIANCE DEADLINE***TIME AND FORM OF PAYMENT FOR AMOUNTS SUBJECT TO §409A MUST STILL  
BE DOCUMENTED BY DECEMBER 31, 2007*

On September 10, 2007, the Treasury Department and the IRS issued Notice 2007-78 (the “Notice”), which provides a limited extension to the deadline for plan sponsors to bring their plans into documentary compliance with the requirements of Internal Revenue Code section 409A (“§409A”) and the related final Treasury Regulations (the “Final Regulations”). However, as summarized below, this relief is subject to certain requirements that may limit its practical benefit for sponsors of voluntary deferred compensation plans and supplemental executive retirement plans (“SERPs”).

**Highlights of Notice 2007-78**

- ◆ Limited One-Year Extension of Documentary Compliance Deadline; Does NOT Apply to Payment Terms. Subject to an important limitation described below, the Notice extends the deadline for sponsors to fully bring plans into documentary compliance with the requirements of §409A and the Final Regulations to December 31, 2008. Significantly, the Notice does not extend the deadline for sponsors to establish written documentation that evidences the payment terms that will apply to amounts subject to §409A — i.e., sponsors must still document in writing the permissible events or time upon which benefits will become eligible for distribution under the plan, as well as the form in which such benefits will be paid, by December 31, 2007.

By way of example, if the final plan design selected by the sponsor will permit benefits to become eligible for distribution upon the earlier to occur of a scheduled date or any of the permissible distribution events provided under §409A (e.g., separation from service, disability, death, change in control, unforeseeable emergency), such payment structure must be set forth in writing by December 31, 2007. Further, the Notice requires that such written documentation reflect the form in which benefits will be distributed (i.e., in a lump sum or in installment payments).

- ◆ Transition Relief for Distribution Elections NOT Extended. The Notice does not extend the December 31, 2007 deadline for plan sponsors to either designate the time and/or form of payment or to allow participants to make new distribution elections for amounts subject to §409A, in accordance with the transition relief contained in prior Treasury guidance. As a result, any change to the time or form of payment made after December 31, 2007, including but not limited to the addition or deletion of a permissible distribution event under the plan, must comply with the so-called “subsequent change” rules and the other requirements of the Final Regulations (e.g., distribution of amounts subject to the change generally must be delayed for a period of at least 5 years). For a summary of the requirements in the Final Regulations that apply to a change in time or form of payment made after December 31, 2007, please see Clark Consulting’s *Executive Benefits Bulletin* dated May 1, 2007.

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- ◆ Plans Must Be Operated in Compliance with Final Regulations Beginning January 1, 2008. The Notice does not impact the effective date of the Final Regulations. As a result, beginning on January 1, 2008, plan sponsors must operate their plans in compliance with the Final Regulations and cannot rely on prior guidance (e.g., Notice 2005-1, the proposed regulations, or a reasonable “good faith” interpretation of the statute).
- ◆ IRS and Treasury Anticipate Developing a Limited Voluntary Compliance Program. The Notice indicates that the Treasury Department and the IRS will be developing a corrections program to allow plan sponsors to correct certain unintentional operational failures.

*Clark Consulting Notes:*

- ◆ Due to the limited nature of the relief provided by the Notice, all nonqualified deferred compensation arrangements must still be identified, reviewed, and, in many cases, revised to ensure that compliant payment terms (i.e., time and form of payment) for amounts subject to §409A are set forth in writing by December 31, 2007. Further, if available transition relief will be used to provide a limited opportunity for participants to make new distribution elections for amounts subject to §409A, such elections must be made and documented by December 31, 2007. Accordingly, plan sponsors may find that the Notice has little practical benefit because many of the more difficult steps required to bring a plan into compliance with §409A and the Final Regulations (i.e., determination of the final plan design and completion of required documentation related to the time and form of benefit payments) remain subject to the December 31, 2007 deadline.
- ◆ Plan sponsors must operate their plans in compliance with the Final Regulations beginning January 1, 2008. In light of this requirement and the actions that still must be completed by year-end, many plan sponsors will likely choose to complete their documentation for voluntary deferred compensation plans and SERPs in 2007. While not technically required by the Notice, documenting all of the material terms of the arrangement by year-end could mitigate the risk of committing an operational violation.

Please visit <http://www.ustreas.gov/press/releases/reports/n200778.pdf> if you would like to obtain a complete copy of the Notice.