

April 10, 2007

## **Treasury Publishes Final Section 409A Regulations**

Today, April 10, 2007, the U.S. Department of the Treasury (“Treasury”) published its long-awaited final regulations with respect to Internal Revenue Code Section 409A (“Section 409A”). These final regulations should provide employers the information they need to structure and amend their nonqualified deferred compensation plan documents, participant agreements, election forms, employment agreements and all other related documents to comply with Section 409A. Employers have until December 31, 2007 to make required document and operational changes and to take advantage of transition guidance that provides some relief and exceptions to the Section 409A rules. Failure to amend plan documents and comply fully in operation by this deadline will result in immediate income taxation of the arrangement, a 20% excise tax, and potential interest penalties.

Section 409A provides rules for the deferral, payment, and administration of “nonqualified deferred compensation plans,” which can include traditional deferred compensation plans, nonqualified stock options, phantom stock plans, stock appreciation rights (“SARs”), restricted stock units (“RSUs”), bonus and incentive payment plans, and other types of compensation plans, regardless of the form of business entity providing such compensation (corporations, LLCs, or partnerships) and regardless of the person to whom such compensation is provided (directors, employees, or independent contractors). Section 409A also applies to executive employment agreements that provide severance pay, certain non-competition arrangements, change in control payments, or post-termination benefits (such as medical coverage).

The final regulations cover 397 pages. These regulations generally appear to supplement and expand upon Notice 2005-1, Treasury’s initial guidance on Section 409A (published in December, 2004) and previously issued proposed regulations (issued in September, 2005).

The regulations do not, however, address all issues related to Code Section 409A. For example, the regulations do not address the application of Code Section 409A to partnership agreements or the reporting requirements under Code Section 409A. Treasury officials have stated that these and other outstanding issues will be addressed in further guidance or regulations.

As most employers and employee benefits practitioners have been awaiting publication of these final regulations for a substantial amount of time, we wanted to provide you with immediate notice of their publication.

If you have questions, or if we can be of assistance, please contact any of the following attorneys in Womble Carlyle’s Employee Benefits Group or the Womble Carlyle attorney with whom you regularly work.

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