



Peter T. Beach
Direct dial: 603.627.8185
Fax: 603.641.2396
pbeach@sheehan.com

Practice Areas

Taxation

Good Company

Reminder: December 31, 2008 Deadline for Section 409A Documentary Compliance

Wednesday, October 08, 2008

December 31, 2008 is the documentary compliance deadline for deferred compensation arrangements subject to Section 409A of the Internal Revenue Code. The rapidly approaching deadline gives employers a relatively brief period in which to bring into compliance with Section 409A their documents setting forth plans, arrangements, awards and individual agreements that provide deferred compensation (collectively, "Arrangements"). While not intended to be an exhaustive list or a statement that any Arrangements not mentioned below are not subject to Section 409A, the broad categories of Arrangements that may be subject to Section 409A include:

Arrangements that pre-date the enactment of Section 409A in October of 2004, since the statute provides for limited "grandfathering."

- Arrangements created since enactment of Section 409A (to ensure proper compliance with rules that may have changed or been clarified since the Arrangements were created).
- Certain stock rights (e.g., deferred compensation settled in shares, restricted stock units, phantom stock, discounted stock options and discounted stock appreciation rights).
- Separation pay arrangements (plans and individual agreements, including employment agreements and change in control agreements providing severance benefits).
- Bonus plans.

Some companies may still not be aware of the broad application of Section 409A or that the IRS has taken the position that Section 409A compliance "savings clauses" that purport to nullify other non-compliant provisions in an Arrangement generally will be disregarded and deemed ineffective. Therefore, many Arrangements must be amended no later than December 31, 2008 to avoid adverse Section 409A tax consequences, which may include taxation prior to receipt of deferred amounts, an additional 20% federal income tax and an interest-charge tax. The IRS is expected to issue guidance later this year on calculation of the adverse Section 409A tax consequences for non-compliant Arrangements.

Operational compliance with Section 409A has been required since January 1, 2005, and companies should consider whether there have been any operational failures since January 1, 2005 that may need to be



**SHEEHAN
PHINNEY
BASS +
GREEN PA**
the business law firm

corrected before January 1, 2009 pursuant to the transition relief guidance in IRS Notice 2007-100.

The Tax Group at Sheehan Phinney Bass + Green is prepared to work with you to identify and, where necessary, amend Arrangements in all of the above categories. However, given the breadth of application of Section 409A and the large number of clients we serve, we would like to schedule such work over the remaining months of the year. Therefore, if you would like us to assist you with amendments to Arrangements required by Section 409A, please contact either the attorney with whom who normally do business at the firm or Peter T. Beach, Chairman of the Tax Group, so that we may begin this process.

CIRCULAR 230 DISCLOSURE

The following disclosure is provided in accordance with the Internal Revenue Service's Circular 230 (21 CFR Part 10). Any tax advice contained in this Alert is intended to be preliminary, for discussion purposes only, and not final. Any such advice is not intended to be used for marketing, promoting or recommending any transaction or for the use of any person in connection with the preparation of any tax return. Accordingly, this advice is not intended or written to be used, and it cannot be used, by any person for the purpose of avoiding tax penalties that may be imposed on such person.

This article is intended to serve as a summary of the issues outlined herein. While it may include some general guidance, it is not intended as, nor is it a substitute for, legal advice. Your receipt of Good Company or any of its individual articles does not create an attorney-client relationship between you and Sheehan Phinney Bass + Green or the Sheehan Phinney Capitol Group. The opinions expressed in Good Company are those of the authors of the specific articles.