

## **New Proposed Regulations Issued Under IRC Section 409A**

Article By:

Randall C. McGeorge

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The Internal Revenue Service (the IRS) has issued proposed regulations on deferred compensation arrangements that would “clarify” and/or “modify” certain specific provisions of the previously issued final regulations under Section 409A of the Internal Revenue Code (Section 409A). In addition, the IRS withdrew a specific provision of proposed rules that were issued in 2008 regarding the calculation of amounts includible in income under Section 409A and replaced it with revised proposed regulations.

The newly proposed regulations make the following modifications to the existing rules under Section 409A:

- Expand the “short-term deferral” exception to permit a payment delay to avoid federal securities or other applicable laws
- Include the stock of an entity that a person is reasonably expected to work for soon after the grant within the applicable exclusion for certain stock rights
- Provide that the payments for bona fide legal claims extend to expenses to enforce any claim by the service provider with respect to the service relationship
- Permit the annualization of recurring part-year compensation where such compensation does not exceed an applicable dollar limit
- Add a rule to determine when a payment has been made for all provisions of Section 409A (i.e., when any taxable benefit is actually or constructively received)
- Relax the timing rules for payment following death so that payment is considered timely if made by December 31 of the year following the year of death
- Extend the rules that permit payment acceleration on death, disability, or unforeseeable emergency to apply to a beneficiary who has become entitled to benefits because of the service provider’s death
- Permit the payment of all types of deferred compensation if necessary to comply with a bona fide foreign ethics or conflicts of interest law

- Expand the rules that permit payment acceleration for certain offsets to include those necessary to comply with federal laws regarding debt collection
- Replace income inclusion rules to limit the ability to change payment timing for nonvested benefits or create errors for nonvested benefits as a pretext for changing payment timing

In addition, the newly proposed regulations include several “clarifications” to the existing rules under Section 409A. Although most of these clarifications likely merely confirm the existing interpretations and understandings of companies and practitioners, such clarifications should be analyzed to determine whether any changes to existing deferred compensation documentation and/or administration is necessary or advisable.

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