

INTRODUCTION

When we published the first edition of this book back in early 2011 covering the basics of Section 409A, we expressed our understanding that our publication could only be a start to dealing with the many questions that would be encountered in creating, operating and amending plans subject to or designed to avoid the far-reaching scope of Section 409A. At that time, we asked you to contact us with questions that you routinely encountered. You responded so well, in fact, that we found ourselves with many more questions and answers. This fourth edition now covers 300 of your most frequently asked questions about Sections 409A and 457.

As we anticipated, new and important developments have continued to emerge in the form of IRS guidance and case law since the first edition was published. As a consequence, a prior edition included significantly more guidance on questions regarding procedures for correcting errors in documentation that resulted from the release of IRS Notices 2010–6 and 2010–80 as well as questions regarding administrative error corrections arising from the operation of nonqualified deferred compensation plans under the complex and often confusing guidance under Section 409A. Then, in June 2016, the IRS released additional proposed Section 409A Regulations, including the long-overdue proposed regulations for Section 457 relating to nonqualified plans of tax-exempt organizations.

In addition to providing correction procedures, the 2010 IRS Notices provide guidance on drafting documents subject to Section 409A by highlighting language that gives rise to documentary errors under Section 409A. Of course, with that guidance came a host of additional questions.

Even though more than 15 years have passed since the enactment of Section 409A, little or no official guidance has yet been issued with respect to some parts of the law. For example, the IRS and the

Department of the Treasury (Treasury) have not issued proposed regulations with respect to the funding rules under Section 409A(b). Important Section 409A regulations governing the calculation of the tax in case of a violation have not been finalized, even though the proposed regulations were released in 2008 (note that amendments to the proposed regulations regarding Section 409A income inclusion principles were issued in 2016). In addition, new law has been passed since the prior edition, such as the changes to Section 162(m) compensation deductions, and the addition of Section 4960 imposing a 21 percent excise tax on executive compensation of certain tax-exempt organizations, which has resulted in the need to “adjust,” or even amend 409A-covered plans.

Finally, in 2020, the Covid-19 pandemic caused tremendous focus on the ability under 409A of both plan sponsors and participants to deal with their plans, stop contributions and access benefits to address the financial problems of both groups generated by the negative financial impact and chaos created by the pandemic. However, Congress provided no special relief for either group as to their 409A-covered plans, especially employee account balance plans. And, in IRS Notice 2020-50, Section 6, the IRS provided only minimal relief regarding a participant’s ability to suspend deferrals (not access account balances) when the participant has first accessed their qualified 401(k) accounts under special pandemic financial hardship provisions. Therefore, parties were left to carefully nuance the existing law and regulations for 409A-permissible solutions for deferral cancellations and acceleration of account balance distributions.

So, much guidance is still yet to come on Section 409A from the government, new laws may require changes, and case law, like *Wilson v Safe-lite*, will undoubtedly proliferate as disputes relating to Section 409A arise. Each release of new law, new guidance and each new case opinion will inevitably lead to additional questions. We also note that the answers to the additional 50 question in this edition evidence a growing subtlety and sophistication that try solid analysis. All practitioners may not agree with an interpretation in an answer in some cases as we note in the copy where appropriate.

In this process, we recognize that this fourth edition will only be another step—hopefully a very helpful step—toward addressing the

important questions routinely raised by this complicated and broadly applicable law. We trust that you will find this book useful to your practice when dealing with plans subject to and exempt from Sections 409A and 457. But if you find that this guide does not answer a Section 409A- or 457-related question, please contact us at bwberglund@bclplaw.com (Brian Berglund) and Lou_Richey@AOL.com (Lou Richey).

Finally, thanks for buying all our prior editions, and now this fourth edition. We are truly honored by your trust in our work product and seek to make each edition more helpful to you.