
WHAT EVERY ESTATE PLANNER NEEDS TO KNOW ABOUT 409A FINAL REGULATIONS

Donald O. Jansen, J.D., LL.M.

WHY SHOULD ESTATE PLANNERS CARE ABOUT 409A?

- Closely Held Family Business Clients
 - Non-Family Executives
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409A IN A NUTSHELL

- Pre-409A Rules – Still Apply
 - Constructive Receipt Doctrine
 - Economic Benefit Doctrine (§ 83)
 - New 409A
 - Statute Effective 1-1-2005
 - Final Regs Effective 1-1-2008
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409A IN A NUTSHELL

- What is a Deferred Compensation Plan?
Very Broad.
 - Who is Covered? Employee, Director,
Independent Contractor
 - Plans Excluded by Statute –
Qualified Plans and Welfare Plans
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409A IN A NUTSHELL

- Expansion of Constructive Receipt Rules
 - Restrictions on Distributions
 - No Acceleration of Benefit Payments
 - Restrictions on Deferral and Rodeferral Elections
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409A IN A NUTSHELL

- Expansion of Funding Rules of Section 83
 - Offshore Rabbi Trusts
 - Employer Financial Health Triggers
 - Domestic Rabbi Trust with Underfunded DB Plan
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409A IN A NUTSHELL

- Deferred Compensation – Legally Binding Right to Compensation which May be Paid in a Later Taxable Year
 - Regulation Exclusions
 1. Payroll Period
 2. Short Term Deferrals
 3. Statutory Stock Options
 4. Certain Non-Statutory Stock Options and SARs
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409A IN A NUTSHELL

- Regulation Exclusions (continued)
 5. Restricted Property
 6. Certain Separation Pay Plans
 7. Certain Indemnification Plans
 8. Legal Settlements
 9. Certain Taxable Educational Benefits
 10. Benefits Otherwise Nontaxable
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409A IN A NUTSHELL

- Ignore 409A at Your Peril
 - “Deferrals” Taxed Immediately or at Lapse of Substantial Risk of Forfeiture
 - Penalty Interest
 - 20% Additional Tax (No Waiver)
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409A IN A NUTSHELL

- Effective for Deferrals On Or After 1-1-2005
 - Grandfathering – Vested Deferrals Before 2005
 - Material Modification Exception to Grandfathering
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409A IN A NUTSHELL

- Transition Rules – End 12-31-2007
 - Three-Year Grace Period – Operate Good Faith Compliance; Amend by 12-31-2007
 - Amendments to Provide New Payment Elections or Conditions
 - Substitute Nondiscounted Stock Options and SARs
 - Payment Elections of Nonqualified Plans Linked to Qualified Plans
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PLAN AGGREGATION RULES

- 409A Applies on a Participant by Participant Basis
 - How Aggregation Rules Work for Violation of 409A
 - Nine Different Aggregation Groups
 - Aggregation Rules Not Restricted to 409A Violations
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SHORT-TERM DEFERRAL EXCLUSION

- Paid Within 1-1/2 Months After Appropriate Taxable Year in Which Vested
 - “Deferred Payments” Not Covered
 - How Apply to Installment or Life Annuity Payments?
 - Three Exceptions to 2-1/2 Month Rule
 - Should Short-Term Deferral be in Plan?
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SEPARATION PAY EXCLUSION

- Collective-Bargained Plans
 - Non-Collective-Bargained Plans
 - Reimbursements, Medical Benefits and In-Kind Benefits
 - Involuntary Separation; Window Program; Separation for Good Reason
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DISTRIBUTION UPON SEPARATION FROM SERVICE

- When Does It Occur? Leave of Absence
- Presumptions of Separation from Service – 20% and 50% Rules
- Independent Contractor
- Specified Employee of Public Company – 6 Month Delay

INITIAL DEFERRAL ELECTIONS

- Specify Time and Form of Payment
- Time of Election
 - Previous Taxable Year
 - 30 Days After Eligibility
 - 6 Month Rule for Performance Based
 - Time of Non-Elective (Employer) Deferrals

REDEFERRAL ELECTIONS

- Conditions for Redeferral
 - Effective 12 or More Months Before Payment
 - Minimum Deferral of 5 Years
 - Elected at Least 12 Months Before Payment
 - How Applies to Installments and Life Annuities
 - Two Exceptions to Redeferral Conditions
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GRANDFATHERING RULES

- Legally Binding Right Earned and Vested 12-31-2004
 - Post-2004 Earnings are also Grandfathered
 - Material Modifications
 - Materially Enhances Benefit or Right
 - Adds New Material Benefit or Right
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WHAT SHOULD BE DONE BEFORE 2008?

- Identify Deferred Compensation Plans
- Identify Grandfathered Deferred Compensation
- Good Faith Operational Compliance until Amended
- What Transition Rules Should Be Adopted?

WHAT TO DO BY 2008 (CONTINUED)

- Determine Amendment to Take Advantage of Short-Term Deferral or Other Exclusions
- Unlink Payments for 401(k) Wraparound and Excess Benefit Plans
- Amend Plan by 12-31-2007
- Employee Consent