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November 18, 2008

Honorable Eric Solomon
Assistant Secretary (Tax Policy)
Department of the Treasury
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Washington, D.C. 20220

Honorable Douglas H. Shulman
Commissioner
Internal Revenue Service
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Re: Good Faith Compliance with Section 409A

We write to request that, for 2009, good-faith compliance with Section 409A and the existing regulations and other guidance be considered compliance with Section 409A.

**Background.**

In 2004, Congress comprehensively codified the federal income tax treatment of nonqualified deferred compensation by enacting Section 409A of the Internal Revenue Code of 1986. In general, Section 409A provides that a service provider who is entitled to deferred compensation under a nonqualified deferred compensation plan that fails to comply with the requirements of Section 409A is potentially subject to accelerated inclusion in income, an additional 20% tax, and interest.

In Notice 2007-86,[1] the Internal Revenue Service provided that, during 2008, taxpayers are not required to comply with the final regulations issued under Section 409A. Instead, taxpayers are required only to operate a nonqualified deferred compensation plan in accordance with the plan's terms to the extent consistent with Section 409A and the applicable guidance (including Notice 2005-1).[2] In addition, under Notice 2007-86, if a provision of Notice 2005-1 is inconsistent with the final regulations, during 2008 taxpayers may rely on either Notice 2005-1 or the final regulations. To the extent that an issue is not addressed in Notice 2005-1 or other applicable guidance, under Notice 2007-78,[3] taxpayers must apply a reasonable, good faith interpretation of the statute (and reliance on the final regulations, although not required, is treated as applying a reasonable, good faith interpretation of the statute). In Notice 2007-100, the Internal Revenue Service permitted taxpayers to correct unintentional Section 409A operational failures without penalty as long as the taxpayer takes commercially reasonable steps to avoid a recurrence.

**Discussion.**

We believe the relief we request is appropriate in light of several factors. First, the January 1, 2009 deadline established under Notice 2007-86 is a little more than a month away and a significant number of unresolved issues remain under Section 409A.[4]

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[1] 2007-46 I.R.B. 990.

[2] Notice 2005-1, 2005-1 C.B. 274, provided certain guidance regarding Section 409A.

[3] 2007-42 I.R.B. 809. Notice 2007-78 was modified by Notice 2007-86.

[4] For example, among the many open issues under Section 409A, it is unclear (i) whether a distribution that is scheduled to be paid at a fixed time may be paid earlier under a plan in the event of an involuntary termination without violating Section 409A, (ii) how the rules governing offsets for tax-qualified benefits under excess-type plans are applied, (iii) the extent to which severance payments under fixed-term employment contracts benefit from the exclusion from Section 409A for payments in respect of "involuntary separation from service," (iv) how Section 409A applies to partnerships, (v) how the Section 409A rules apply to a variety of disability-related situations, including when a disability condition occurs but the disability is deemed under the plan to arise at a later time, (vi) how to determine whether a service provider is subject to the six-month delay rules, particularly in transactional settings, (vii) when payment formulas based on underlying transactions or other performance measures (A) should be deemed to involve a substantial risk of forfeiture or (B) qualify as performance-based compensation, (viii) whether and when a promise to pay compensation in the future may be substituted for transferred property scheduled to vest in the future, (ix) the extent to which installments of severance payments are exempt from Section 409A, (x) whether and when plans that make distributions upon specified liquidity events are subject to Section 409A (i.e., because the compensation should be considered prematurely vested), (xi) how Section 409A applies to a dividend equivalent right that is attached to an option, (xii) how a customary release-of-claims requirement may be incorporated into a settlement agreement consistent with Section 409A, (xiii) the extent to which employment and similar agreements containing deferred-compensation provisions may be changed, (xiv) whether, if plan language sets forth a 90-day (or shorter) period for payment, the payment may be made later in the year, and (xv) whether a plan may provide that payments may be made promptly (or as soon as practicable) after a permissible payment event.

Second, interpretive issues cannot even be resolved for those willing to seek a ruling, as the Internal Revenue Service will not issue private letter rulings with respect to Section 409A matters.[5]

Third, although Notice 2007-100 provides a helpful voluntary compliance program for unintentional operational failures, Notice 2007-100 is not available for an unintentional failure of a plan term to comply with the requirements of Section 409A and in any event is not available with respect to documentary compliance.

Finally, Section 409A is unusual because the failure of an employer or other service recipient to properly comply does not affect the service recipient, but instead affects the employees and other service providers and may result in accelerated taxation, interest and additional tax in the nature of penalties to them.

For these reasons, we request that, for 2009, good-faith compliance with Section 409A and the existing regulations and other guidance be considered compliance with Section 409A. We do not suggest that the effective date of the regulations and other guidance be suspended and we do not suggest that taxpayers be permitted to disregard the final regulations (as Notice 2007-86 presently provides); instead, we request only that good-faith compliance with the final regulations and other guidance be sufficient to avoid the adverse consequences of noncompliance.

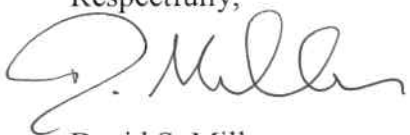
* * * *

Our request is not intended as a criticism of the regulatory process. Instead, we firmly believe that the regulations and other guidance that has been issued are the product of careful thought and analysis, and the Internal Revenue Service and the Treasury Department have attempted to address uncertainty. We request relief simply because the nature and complexity of Section 409A itself has not permitted resolution of the significant number of open issues.

Finally, while we request only limited relief in this letter, we continue to welcome additional guidance on Section 409A and do not intend to preclude other relief.

Please let us know if you would like to discuss this matter further or if we can assist you in any other way.

Respectfully,



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[5] Revenue Procedure 2008-61, 2008-42 I.R.B 934.

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