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**From:** Weir Financial Resources, LLC  
**To:** Clients and Friends  
**Date:** November 20, 2007  
**Subject:** §409A Compliance Extended Again...only Partially in October (Notice 2007-78)...  
but Now Fully under Notice 2007-86!

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The IRS issued Notice 2007-78 on September 10, 2007. This notice extended the deadline for satisfying the written plan requirement under the §409A final regulations until December 31, 2008. Additionally there are many plans that are still required to designate a compliant time and form of payment in writing. Notice 2007-78 extended the deadline for compliance until the end of 2008, but it does not extend the effective date of the final regulations or the transition rules that were scheduled to apply on December 31, 2007. All arrangements subject to the new rules will need to be compliant with the final regulations no later than January 1, 2008.

## **Final Regulations Compliance Date Extension**

The rules imposed by section 409A generally apply to deferral amounts on or after January 1, 2005. Originally the final regulations were to be applicable for taxable years beginning on or after January 1, 2008. **Notice 2007-86, issued October 22nd extended the final regulations' effective date for one year to January 1, 2009.** However amounts deferred from January 1, 2005 and prior to the effective date of the final regulations, must be compliant with the new rules under a *reasonable, good faith compliance standard*, again using interim guidance that was issued by the IRS along with the transition rules.

An exception to the extension of the transition rules, Notice 2007-86 states that, deferrals for periods after December 31, 2007 and before January 1, 2009 must be compliant with the final regulations.

## **Transition Rules Extension**

Prior to the issuance of Notice 2007-86, a number of transition rules that were scheduled to expire on December 31, 2007. What Notice 2007-86 does is to generally extend these transition rules for a full year to the end of 2008. The rules that were extended are summarized below:

(1) **Amendment of Plans:** Arrangements that are subject to section 409A must meet a number of new requirements, including a written plan requirement. Notice 2007-86 extends the compliance deadline for this written plan requirement for one full year until December 31, 2008. Until then, as stated previously a plan must be operated in *reasonable, good faith compliance* with the new rules and all plans subject to section 409A will have to be amended by the end of 2008 to be fully compliant with the new rules.

(2) **Changes in Time and Form of Payment:** An existing transition rule which allows new payment elections to be made during the transition period provided that a change made in a particular tax year does not cause a payment to be accelerated into or deferred out of the tax year in which the change is made. This rule was extended by Notice 2007-86 to the end of 2008. Therefore, arrangements subject to section 409A may provide for a new time and form of payment through the end of 2008 providing that the in and out rule is satisfied. This extension may require action to be taken by the end of 2007.

It should be noted that the transition rule **does not** provide relief from other tax rules that may apply. While Section 409A imposes additional new rules on nonqualified deferred compensation arrangements; all of the prior tax principles continue to apply. Any new time and form of payment changes that are made under the

transition rule should be examined so they do not trigger adverse tax consequences under any of the other tax rules that may apply.

(3) Payments Based on Elections Under Qualified Plans: Nonqualified deferred compensation arrangement payment elections that mirror or depend on payment elections in a qualified retirement plan in general will not satisfy the election rules under 409A since the elections may or may not be made at the time the deferral election is made.

There is an existing transition rule that allows such payment elections to continue in effect through the end of 2007, as long as the determination of the time and form of payment is made under the terms of a previous nonqualified deferred compensation arrangement that was in effect on October 3, 2004. This transition rule is extended through the end of 2008.

(4) Substituting Non-Discounted Stock Rights for Discounted Stock Rights: Notice 2007-86 also extends through the end of 2008, a transition rule that allows discounted stock rights that do not comply with section 409A to be replaced with non-discounted stock rights that are excepted from the new rules providing certain requirements are satisfied. This extended transition rule does not apply to insiders of publicly-traded companies that were expected to restate their financial statements to reflect the discounted options.

Notice 2007-86 revokes and supersedes the limited transition relief provided by Notice 2007-78. Notice 2007-78 includes additional guidance regarding the application of the final regulations to employment agreements, which guidance was not revoked and was clarified in certain respects by Notice 2007-86.

You can see that Treasury has not made this any easier to understand. **The important thing to take away is that whether this year or next, plans must continue to operate under this good faith standard and it is critical for companies to understand whether they have done so since the inception of the proposed regulations in 2004.** If you are not sure, visit the What's New link on our website ([www.WeirResources.com/WhatsNew](http://www.WeirResources.com/WhatsNew)) and click on the "*11 Critical Nonqualified Plan Questions*" document.

If you have any additional questions, we can be reached at 716.854.3343 or [jweir@weirresources.com](mailto:jweir@weirresources.com).

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