



JONES DAY
COMMENTARY

SECTION 409A: INTERNATIONAL IMPLICATIONS

U.S. deferred compensation plans must be in compliance with Internal Revenue Code Section 409A no later than December 31, 2008.¹ With this date rapidly approaching, many companies are currently reviewing their deferred compensation plans for Section 409A compliance. During this review, those companies with an international presence should not overlook the international implications of Section 409A.

Section 409A does not contain a general exemption for foreign plans. Failure to bring these plans into compliance by December 31, 2008, means that participants who are subject to tax in the U.S. (*i.e.*, U.S. citizens and residents working abroad and certain nonresidents working in the U.S.) may be subject to substantial Section 409A penalties.²

Under Section 409A, there are limited, specific exceptions that allow individuals to accrue benefits under foreign plans that do not meet the Section 409A requirements. Where no exception applies, however, companies need to amend their foreign plans to avoid the penalties under 409A for those subject to tax in the U.S.

Companies with international operations should pay particular attention to the following types of arrangements:

- **Tax Equalization Policies.** Companies should confirm that all tax equalization policies are in written form, and they should review the timing and calculation of any equalization payments.

1. Unless the Treasury Department and Internal Revenue Service issue a last-minute extension.

2. Section 409A penalties are imposed on the employee and include inclusion of deferred amounts in income when they are no longer subject to a substantial risk of forfeiture (rather than when the payment is received), an additional 20 percent penalty, and interest.

- **International Stock Plans.** Companies should focus on plans that feature a discounted exercise price for awards (e.g., SAYE plans and “nil-cost options” in the U.K.) and plans that use an average share price to set the exercise price.
- **Bonus Choice Plans.** Bonus plans that allow employees to choose a cash bonus or restricted stock units (“RSUs”) in lieu of the bonus should be reviewed in particular for the timing of the election, the payout terms of the RSUs, and any “sweetener” awards given in lieu of a cash bonus.
- **Employment and Severance Agreements.** “Garden leaves” should be reviewed closely for separation from service and severance payment date issues.
- **Retirement/Pension Plans.** Companies should focus on retirement/pension plans that provide senior executives with enhanced benefits that are not available for rank-and-file participants.

With the compliance deadline rapidly approaching, we urge companies to identify their foreign plans with participants who are subject to tax in the U.S. Once the plans have been identified, these plans should be reviewed and revised for Section 409A compliance by December 31, 2008.

LAWYER CONTACT

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