WOULD YOU LIKE TO TERMINATE A DEFERRED COMPENSATION PLAN THAT IS SUBJECT TO I.R.C. § 409A WITHOUT TRIGGERING ITS ONEROUS PENALTIES?

There May Be A Way To Do So Under IRS Notice 2006-79, But You Must Start The Process In 2007.

In Notice 2007-69, the IRS has provided a transition rule whereby a plan or arrangement that is subject to I.R.C. § 409A may be amended to provide for change of payment elections with respect to both the time or form of payment of previously deferred compensation and the election will not be treated as a change for the purpose of either the 409A anti-acceleration or subsequent deferral rules.

Any such amendment and the change of payment elections must both be made on or before December 31, 2007.

The I.R.C. § 409A anti-acceleration rule, generally, prohibits any election of an earlier time of payment, except as specifically permitted by Treasury Department Regulations, such as:

- payments pursuant to a qualified domestic relations order;
- cash outs of de minimus amounts of not more than the I.R.C. § 402(g) limit ($15,500 in 2007); or
- under limited circumstances, payments in connection with a plan termination.[1]

The I.R.C. § 409A subsequent deferral rule provides that any change in the time or form of a payment from a plan must:

- be made not less than 12 months before a scheduled payment;

[1] Early distributions pursuant to a plan termination are only permitted as an exception to the I.R.C. § 409A anti-acceleration rule if the plan termination is due to corporate dissolution of the plan sponsor, bankruptcy (with the approval of the bankruptcy court) or a change of control (as defined in Treas. Reg. § 1.409A-3(i)(5)).

- be effective not earlier than 12 months after it is made; and
- postpone the time of a plan payment by at least an additional five years.

The five year postponement rule does not apply to distributions made due to disability, death or an unforeseeable emergency.

How Could This Transition Rule Be Used to Terminate A 409A Plan?

Plan participants could be given the option of electing in 2007 to either remain in a 409A plan or to cash out in 2008.

Alternatively, if the employer has reserved the right to do so in the plan document, the plan could be amended in 2007 to cash out all plan accounts in 2008.

Please note that in order for either of these examples to work, the plan must be amended in 2007, elections by participants need to be made in 2007 and the time of the permitted accelerated payments cannot be earlier than 2008.

Furthermore, this special 2007 election cannot defer payment of a deferred compensation otherwise payable in 2007 or accelerate a payment of deferred compensation scheduled to be paid in any later year to 2007.

This transition rule does not apply to discounted stock rights.

This is a reminder that the plan or other document for any deferred compensation arrangement which is subject to I.R.C. § 409A must be amended to comply with 409A and the Treasury Department Regulations thereunder by not later than December 31, 2007.

For more information please contact Haynes Benefits at 816-875-1919 or visit www.haynesbenefits.com.