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Final Reminder - Avoid Adverse Tax Consequences on Vested Benefits of Non-Qualified Deferred Compensation Plans Compliance Deadline is 12/31/08

Much has been written about Section 409A and the impact it would have on the taxation of a variety of non-qualified deferred compensation (NDC) plans and arrangements.

In general, Section 409A provides that any vested amounts deferred under an NDC arrangement must satisfy certain requirements. If these requirements are not satisfied, the vested benefits of employees and service providers who are NDC participants will be subject to adverse tax consequences, including accelerated taxation, an additional twenty percent (20%) income tax and interest charges.

Under transitional rules that have been in effect since 2005, being in "good faith" compliance with Section 409A has been sufficient. That transitional period ends as of December 31, 2008; and no further extensions of this deadline are expected. Accordingly, on January 1, 2009, all deferral arrangements must be in full compliance with Section 409A or be subject to the adverse tax consequences.

Types of Plans Affected

The definition of deferred compensation plans under Section 409A is extremely broad and may include many types of compensatory arrangements that may not otherwise be considered deferred compensation. The arrangements may include supplemental executive retirement plans (SERPs), salary continuation plans, certain stock rights, severance plans, certain bonus and incentive pay plans, change in control agreements, tax gross-up arrangements and split dollar insurance arrangements.

Immediate action is necessary to bring plans and arrangements into compliance before the deadline.

By December 31, 2008 plans and arrangements must be amended to comply with, or to qualify for an exemption from, Section 409A. In addition, participants must make certain transition relief elections as to the time and form of payment. Accordingly, all companies that have not already done so should immediately identify those plans and arrangements (whether written or unwritten) that are potentially subject to Section 409A. Companies should then contact legal counsel to perform a comprehensive review to ensure that the identified arrangements are either exempt from, or are brought into compliance with, the required rules from both a documentary and operational perspective.

Farrell Fritz attorneys are working closely with clients to assist with all 409A compliance issues. If you have questions regarding this advisory, please contact Bob Goldberg.

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