



BDO Seidman, LLP
409A Executive Deferred Compensation
Compliance deadline is HERE!

The December 31, 2008 deadline for compliance with Internal Revenue Code Section 409A is almost here. Companies must make all necessary revisions to any “deferred compensation plan” to comply with Code Section 409A. The penalties for failure to timely comply are significant and include immediate taxation to the employee of vested deferred amounts, a 20% additional tax and an interest penalty.

With respect to equity compensation, stock options that are issued with an exercise price that is less than the fair market value of the shares on the grant date are subject to Section 409A and must be brought into compliance prior to the deadline. For example, private companies may need an independent valuation to confirm their fair market value for pricing their option awards. Additionally, restricted stock and units are generally exempt from Section 409A, but units may be subject to Section 409A if the shares are paid after vesting.

Currently, some of the most common issues that can subject equity compensation to Section 409A taxation include:

- Discounting Stock Options
- Restricted Stock Unit plans with deferral features
- Company valuation compliance errors
- Grant date administrative errors
- Acquisition related modifications
- Stock Options where the underlying stock is not service recipient stock

Also, be aware of certain elections to deferral stock awards (RSUs) beyond the vesting date. Elections must be made in the fiscal year before the fiscal year in which the award is granted, which may not be practicable in many cases, unless certain conditions are met.

In addition to Employee Equity Plans, it is important to remember that Section 409A and its severe penalties can also cover all of the following arrangements.

- Supplemental Executive Retirement Plans
- Severance Arrangements
- Split-Dollar Life Insurance
- 457(f) Plans
- Commission Arrangements
- Medical or Other Reimbursement Arrangements including Tax Gross-Ups
- Nonqualified Defined Contribution and Defined Benefit Plans
- Phantom Stock Plans
- 401(k) “Wrap” Plans
- Excess Benefit Plans
- Bonus & Incentive Plans
- Employment Agreements
- Change in Control Agreements

There a number of exceptions to Section 409A that can apply to these plans and for the most part, amendments to bring plans into compliance are minimal but must be done prior to the deadline.

BDO recommends companies review their equity compensation plans and the other arrangements listed above to make sure necessary plan changes are made by the end of this year!

For further information from BDO please visit the following publications on our website:

<http://www.bdo.com/publications/tax/wash/WTR7-07-2.pdf>

<http://www.bdo.com/publications/tax/seminar/409AUpdate0507.pdf>

Please feel free to call Peter Klinger (415) 490-3214 or Andy Gibson (404) 979-7106 if you feel you have questions about any of your programs.