409A highlights and ftwilliam.com's 409A document

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Agenda

- Review of 409A
  - What is a 409A plan
  - Penalties
  - Plan requirements
  - Elections
  - Changes to time/form payment
  - Distributions
- ftwilliam.com 409A checklist / software
- Questions

409A has broad reach

Nonqualified deferred compensation plan:

"any plan… that provides for the deferral of compensation."

409A has broad reach

Plans that are not 409A plans:

- Qualified plans,
- Welfare plans,
- No deferral of compensation:
  - Compensation received w/in 2.5 months after close of tax yr in which the services were performed, “short-term deferral”
  - Certain stock options, SARs, equity-based comp (stock of the company)
  - Certain separation pay plans: involuntary separation from service / good reason (last day of 2nd taxable year, < 2X annual pay/401(a)(17))
  - window programs
  - Certain reimbursements, legal settlements, educational benefits

409A covered plans - examples

- Bonuses paid later than March 15th of following year
- Employment contract – on termination pays out portion of accts receivable over three-year period
- Exceptions
  - Subject to substantial risk of forfeiture
  - Payment delayed b/c admin impracticable due to unforeseen events
  - Jeopardize er's ability to continue as going concern

409A penalties

If the plan fails to meet the 409A requirements (in form or operation):

- All comp deferred under the plan is immediately taxable, plus
- 20% of the comp included in income as penalty tax, plus
- Interest

Plan aggregation

- All similar plans are aggregated (elective deferral account balance plans, separation pay plans, etc)
- If one fails, all aggregated plans fail
- Ftwilliam.com 409A plan requires it to be only 409A plan for employer

Plan requirements

- Written plan (12/31/07)
- May be more than one document (ftwilliam.com plan does not allow)
- Amount of deferred compensation
- Triggering events, payment schedule, form of payment
- Election conditions must be in writing on or before the date the election is required to be irrevocable
- 6 month delay for specified employees

Timing of Elections

- Election:
  - Amt of comp to be deferred
  - Time of payment
  - Form of payment
- Elections must be made prior to the end of Plan Year next preceding the year in which service is rendered
- First year of eligibility:
  - Within 30 days of becoming eligible to participate in the plan (for comp earned after election)
  - Exceptions for comp based on performance period and nonelective excess benefit plans
- Default: lump sum upon Separation from Service

Changes to time/form of payment

- Change does not take effect for 12 months
- Payment must be delayed at least 5 years (except if adding Disability, death, unforeseeable emergency as earlier payment event)
- Change must be made at least 12 months before scheduled payment

Distributions I

- Separation from Service
  - A Separation from Service will occur once an Employee's services decrease to 20% [or as in the AA] or less of the average level of bona fide services compared to services performed over the preceding 12 month period
  - leaves of absence up to 6 months
- Specified time/schedule
  - Must be objectively determinable and nondiscretionary

Distributions II – accelerating events

- Change in Control
  - Person(s) acquires ownership of stock possessing ≥ 30% of the total voting power;
  - majority of board of directors is replaced by directors whose appointment is not endorsed by a majority of the members of the corporation's board of directors; or
  - Person(s) acquires assets from the corporation that have a total gross fmv equal to 40 percent of the total gross fmv of all of the assets of the corporation
- Disability
  - unable to engage in any substantial gainful activity by reason of physical or mental impairment which can be expected to result in death or can be expected to last for a continuous period of not less than 12 months, or
  - receiving income replacement benefits for a period of not less than 3 months under an accident and health plan covering employees of the Participant's employer
- Unforeseeable emergency
  - extraordinary and unforeseeable circumstances arising as a result of events beyond the control of the Participant
- Death

Distributions III - Cash out

- At discretion of plan administrator
- Up to the 402(g) limit or other amount as in AA
- Terminate/liquidate the Account(s) under the plan

Recent 409A guidance

- 2007-78:
  - Extends 12/31/07 written plan deadline to 12/31/08
  - Operational compliance still required
  - “Relief without relief”
- 2007-86
  - Revokes and supercedes 2007-78: “real relief”
  - Can change time/date of payments as long as not scheduled to be paid in 2008
- 2007-100
  - Transition relief on correcting 409A failures

Ftwilliam.com 409A plan features

- Defined Contribution plan
- Unfunded for select group of management or HCE or excess benefit plan
- Includes:
  - Adoption Agreement / BPD
  - Plan Description
  - Rabbi Trust
  - Election forms (wage deferral and time/form of payment)
  - In-service distribution form (Unforeseeable emergency)
  - … among other forms and documents