

MANDATORY RETIREMENT PLAN AMENDMENTS

By Marc S. Schechter

Economic Growth and Tax Relief Reconciliation Act of 2001

Congress enacted the Economic Growth and Tax Relief Reconciliation Act of 2001 (“EGTRRA”), on June 7, 2001, which included numerous mandatory and optional modifications to tax-qualified retirement plan rules. The Internal Revenue Service issued notices regarding necessary language to be added to pension plans in compliance with EGTRRA. Revenue Procedure 2005-66 finalized the EGTRRA remedial amendment and restatement period for individually designed plans. The deadline to bring qualified plans into compliance is based upon the last digit of the plan sponsor’s federal employer identification number (EIN). **All qualified retirement plans must be amended to comply with the new regulations to maintain the plans’ tax-qualified status.** The compliance periods are as follows:

| Last Digit of Plan Sponsor’s EIN | Cycle | EGTRRA Remedial Amendment Period Ends |
|----------------------------------|-------|---------------------------------------|
| 1 or 6 | A | January 31, 2007 |
| 2 or 7 | B | January 31, 2008 |
| 3 or 8 | C | January 31, 2009 |
| 4 or 9 | D | January 31, 2010 |
| 5 or 0 | E | January 31, 2011 |

You may also like other changes relating to Plan eligibility, desired levels of contribution, or other aspects of the Plan. This would be a good time for us to discuss those changes and incorporate any changes into the restated Plan.

It is very important that the amendment and restatement to your Plan be adopted. Contributions to the Plan will not be income tax deductible and the Plan will be disqualified if the amendment and restatement is not timely adopted. Disqualification has a host of adverse results including the loss of the Plan's tax-exempt status and potential immediate taxation of the accumulated benefits. A rollover to an IRA also is invalid if the Plan loses its tax-qualified status.

American Jobs Creation Act

On October 22, 2004, the American Jobs Creation Act (the “Act”) was enacted. The Act put into place new Internal Revenue Code Section 409A. This section changes the tax rules applicable to unfunded, nonqualified deferred compensation plans. On September 29, 2005, the IRS released proposed regulations which taxpayers must, in good faith, comply with by amending any non-qualified deferred compensation plan, stock option plan, stock appreciation rights plan, or phantom stock plan **before December 31, 2006.**

Under the new Code Section 409A, any amounts deferred by an employee under a nonqualified deferred compensation plan are included in income when deferred, or, if later, when they are no longer subject to a substantial risk of forfeiture (i.e., at the time it vests), unless the plan complies with the requirements of timing of elections, distributions, and funding provided by such Code section. Tax treatment under Section 409A is the same as under prior law; however, if the plan fails to comply with the requirements of 409A, deferrals are includible in income at vesting and subject to an additional 20 percent tax.

Section 409A is effective for compensation deferrals after December 31, 2004. Deferrals earned and vested before 2005 remain subject only to prior law unless the plan under which they are deferred is materially modified after October 3, 2004. In that case, they are treated as post-effective date deferrals and are subject to Section 409A.

Any plan adopted prior to October 4, 2005, should not be materially modified (the regs provide guidance) unless you want to comply with the new rules. Plans adopted on or after October 4, 2005, have, under transitional relief in the regs, until December 31, 2006, to amend to conform to Section 409A. The time period to change or modify certain payment elections also was extended to December 31, 2006 (but no payment due in 2006 can be postponed to later). Meanwhile, the plan has to be operated through December 31, 2006, in good faith reliance on the provisions of Section 409A and Notice 2005-1. Thus, provisions in the plan document that violate Section 409A must be ignored and operated in compliance with the new requirements. Any plan provision allowing "exercise of discretion" must not be exercised in contravention of Section 409A.

Please do not hesitate to call our office if you have any questions concerning these plan amendments, possibilities for improved plan design, or if we could be of assistance in this regard.