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409A Compliance Deadline Expected to Be Extended Final Regulations Targeted for Late October

In the near future Treasury and IRS are expected to announce the extension of the deadline for documentary compliance until December 31, 2007 (the current deadline is December 31, 2006). They are also expected to extend until this date the good faith compliance period provided under Q&A-19 of Notice 2005-1. In addition, it appears that IRS and Treasury accept that much or all of the Notice 2005-1 transition relief that was extended by the proposed regulations should also be extended until December 31, 2007. Thus, for example, we understand that they are favorably disposed to extending the ability to make new payment elections. Q&A 19(c) of Notice 2005-1 authorized such payment elections during 2005, and the proposed regulations extended this transition rule through 2006, but subject to slightly more restrictive provisions. Presumably, the additional extension will follow the provisions in the proposed regulations.

The announcement extending the compliance deadline and transition relief is expected to be made in the near future. This announcement (or one issued about the same time) is also expected to extend the delay of W-2 and 1099 reporting of 409A deferred compensation. The final regulations appear currently targeted for release in the second half of October. I will be participating in a panel discussion with IRS and Treasury representatives on October 21, 2006, as part of an American Bar Association meeting. We understand that Treasury and IRS are hopeful they will have the final regulations out by that date.

This information is based upon informal comments by Treasury and IRS representatives. Although subject to change, we believe it reflects Treasury's and IRS' current plans.

In part, our discussions with Treasury and IRS occurred in the context of discussing an expected clarification in the final regulations that will affect a common practice in elective deferral plans. Specifically, many deferral plans have been drafted to provide that a deferral to a particular date is swept into the basket of deferrals that are distributable on employment termination, if the participant terminates employment before reaching the date selected for payment of the date-based deferral.

Often, this practice applies the form of payment selected for the termination distributions to the date-based deferral. The final regulations will clarify that this is permissible if the date-based deferral is paid, as a result of applying the form selected for termination distributions, either without change or more quickly than would have applied originally. However, it cannot result in the date-based deferral being paid over a longer period, because that would be an additional deferral without satisfying the conditions for making an election one year in advance and delaying the payout at least five years. Because the proposed regulations did not clearly address this point, Treasury and IRS appear to accept that this is the kind of situation that justifies a general extension of the payment election transition relief. As a result, it is expected that new elections could be made under plans with this design to take into account the clarification in the final regulations.

If things play out as expected, IRS and Treasury are to be complimented for providing an additional extension of the transition process that should make it possible to evaluate the final regulations and then to have a reasonable period of time to react to them. After new 409A guidance is released, we will distribute our analysis of the guidance.