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TO MASLON CLIENTS AND OTHER FRIENDS

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DEFERRED COMPENSATION PLANS MUST COMPLY WITH SECTION 409A - FINAL REGULATIONS CLARIFY HOW AND REQUIRE ACTION BEFORE 2008

Section 409A and Action Items. Beginning in 2005, Section 409A of the Internal Revenue Code ("Section 409A") governs each "non-qualified deferred compensation plan" (or "NDCP") described in Section 409A, unless it is exempt. NDCPs described in Section 409A are summarized on the next page. As explained later in this letter, Section 409A restricts (or even prohibits) many common NDCP provisions, and imposes severe penalties on participants entitled to benefits under any NDCP that does not comply. Thus, employers should seek counsel before amending or adopting any NDCP, or making further payments under an NDCP. This letter also includes action items for NDCP sponsors, most of which must be completed before the end of 2007.

Section 409A has been Clarified. On April 10, 2007, final Treasury Regulations (the "Final Regulations") were issued to clarify Section 409A. The Final Regulations have also exempted some compensation arrangements, and extended some favorable transition rules until the end of 2007. Early in 2005, IRS issued Notice 2005-1 (the "Notice"), which defined some terms and included the initial transition rules; and Proposed Regulations were issued on October 4, 2005 (the "Proposed Regulations"), to define more terms and extend some transition rules into 2006. During 2005, 2006 and 2007, the parties to an NDCP may comply with Section 409A by relying on the Notice, the Proposed Regulations or the Final Regulations. After 2007, all NDCPs that are not exempt from Section 409A must comply (in form and operation) with the Final Regulations.

2007 Amendment Deadline and Interim Good Faith Compliance. The Final Regulations require each NDCP to be amended (or documented, if not written) to comply with Section 409A, by the end of 2007. However, until an NDCP is amended to comply, it must be operated in good faith compliance with Section 409A, the Notice, the Proposed Regulations or the Final Regulations, regardless of the NDCP's terms.

Transition Rules in 2007. These NDCP changes may still be made in 2007:

- amendments allowing new payment elections (time and/or method) for previously deferred amounts, if those elections do not (a) affect payments already due in 2007, (b) trigger payments in 2007 that were not due, or (c) violate tax rules on constructive receipt (after 2007, changes in payment elections will be much more restricted);

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- canceling discounted stock options or stock appreciation rights, and reissuing non-discounted options or rights in their place (but after 2005, any compensation to a participant for the lost discount must be in the form of either restricted stock or deferred compensation that complies with Section 409A); and
- amendment (or creation) of non-exempt NDCP documents to comply with Section 409A and the Final Regulations.

Updated Definition of NDCP. The definition of an NDCP remains extremely broad, although the Final Regulations include a few more exemptions. An NDCP includes every economic benefit that will be delivered to employees, directors, partners, LLC members and some independent contractors after the year in which it was earned, unless an exemption applies. Some examples are voluntary deferral of pay, short-term and long-term incentives, supplemental executive retirement plans (or SERPs), so-called "rabbi" trusts, deferred directors' fees, severance pay commitments, stock options, stock appreciation rights (SARs), "phantom" stock, any restricted stock or stock option that is convertible into deferred pay, deferred payments made for not competing, "split-dollar" insurance agreements not treated as loans, and taxable "executive perks" such as personal expense reimbursements payable in future years. Essentially, an NDCP is any plan or arrangement that provides for any deferral of earned compensation, either for a group or by individual contract, except for:

- compensation paid within 2½ months after the year in which it was earned and vested;
- compensation that is fully discretionary until paid;
- tax-qualified retirement plans listed in Section 409A;
- plans that provide only disability benefits, death benefits, or paid vacation or sick leave;
- a limited amount of separation pay (currently \$450,000 or, if less, two times annual pay) paid by the end of the second tax year after the employee is discharged or leaves for "good reason;"
- employee stock purchase plans under Code Section 423;
- incentive stock options under Code Section 422;
- grants of restricted stock or other property taxable under Code Section 83; or
- other stock options or stock appreciation rights with respect to common stock of the participant's corporate employer (or its corporate parent), if the exercise price is never less than market value on the grant date, and the option term is not extended after it was granted beyond its maximum original exercise period (the Final Regulations include detailed rules for this exemption, such as stock valuation standards for both private and publicly held companies, and restrictions on using stock of subsidiaries). Until future guidance is issued, options to purchase equity interests in limited liability companies (or other entities taxed as partnerships) may be treated in the same way as corporate stock options.

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For Section 409A, a deferred benefit is "earned" only when the participant is legally entitled to it. However, this entitlement is determined by assuming that all later vesting conditions will be satisfied and no benefits will be forfeited.

For Section 409A, "vesting" means the end of any substantial risk of forfeiture. However, a risk of forfeiture for competition with the employer does not delay vesting of covered benefits, except for the following exemption of benefits that were vested in 2004.

Effective Date and "Grandfathered" 2004 Benefits. Generally, Section 409A applies to amounts that are first deferred (or first become vested) under an NDCP after 2004. However, deferred amounts that were earned under an NDCP and fully vested before 2005, are exempt from Section 409A unless the NDCP is improperly amended as described in the next paragraph. Section 409A does apply to amounts deferred before 2005 (and related investment earnings) if they were not vested (in other words, were subject to a substantial risk of forfeiture) at the end of 2004. Section 409A applies to investment earnings after 2004 only if Section 409A applies to the deferred amounts that are credited with those earnings. Any amounts that could be forfeited for competition with the employer are not treated as vested for this 2004 exemption, so they are not exempt from Section 409A.

Avoid Material Modification of "Grandfathered" Plans. The Section 409A exemption described in the preceding paragraph does not apply to NDCP benefits otherwise "grandfathered" under Code Section 409A, if the NDCP is materially modified after October 3, 2004. A material modification includes an improvement or addition of any benefit, right or feature, but does not include any exercise or reduction of an existing benefit, right or feature. A material modification includes any acceleration of vesting under the NDCP between October 3, 2004, and the end of 2004. Terminating a "grandfathered" NDCP in 2005 was not considered a material modification, if all deferred benefits were distributed as taxable income in 2005.

Penalties for Non-compliance. If a non-exempt NDCP (or a participant) does not satisfy the requirements of Section 409A for a tax year after 2004:

- All compensation deferred for that year (and all prior tax years) must be included in the participant's taxable income for that year (or, if later, when it first becomes vested).
- The participant must pay interest to the Internal Revenue Service (at the rate for tax underpayments, plus one percentage point) on the income tax that would have been due if the deferred amounts had been taxable when first earned or, if later, when they first became vested. This interest accrues from then until the year when the income is taxed under Code Section 409A.

- The participant must pay an extra 20% penalty tax on all deferred amounts included in his or her taxable income under Section 409A.

Action Items for Employers. Because Section 409A is now in effect, employers should promptly:

- Identify each plan, agreement and other arrangement that could be treated as an NDCP.
- Determine whether any benefits under an NDCP were earned and vested as of the end of 2004. Those benefits would not be affected by Section 409A, unless their vesting was accelerated between October 3, 2004, and December 31, 2004, or the benefits (or related rights or features) have been materially enhanced after October 3, 2004.
- Obtain competent advice before amending any compensation arrangement that could be an NDCP, because some amendments might cause a Section 409A exemption to be lost. For example, NDCP benefits earned and vested in 2004 could become restricted rather than "grandfathered" under Section 409A, if they are enhanced.
- Maintain procedures to ensure that, even before required amendments are made, each non-exempt NDCP is operated after 2004 (and before 2008) to comply with the Notice, the Proposed Regulations or the Final Regulations. After 2007, the operation and documents of a non-exempt NDCP must comply with the Final Regulations.
- Before deferral elections are made for 2007 compensation, explain the new restrictions to participants in each NDCP, along with the likely effects on their current benefits and future deferred compensation. This explanation should emphasize how the new rules will restrict future changes of any time and method they initially choose for benefit distributions. Those rules are summarized at the end of this letter.
- Evaluate alternatives and develop a strategic plan for taking advantage of the remaining transition rules in 2007, complying with Section 409A and re-designing each NDCP to maximize alternatives that are still open. This strategic plan may include allowing participants to change payment elections before the end of 2007, segregating any vested benefits "grandfathered" as exempt from Section 409A, amending NDCPs (or adopting new ones) in 2007 to take advantage of the flexibility remaining under Section 409A, and preparing to report to the IRS, on Form W-2 (or Form 1099 for non-employees) any tax-deferred compensation earned after 2004 by NDCP participants. However, the reporting deadline for

compensation deferred in 2005 and 2006 has been extended until future IRS guidance is published.

- Make all required NDCP amendments (or initially document the NDCP) no later than December 31, 2007.
- We urge you to consult with us very soon, to discuss the effects of Section 409A on any NDCPs your business may have. You may contact any member of our tax and executive compensation team for help with Section 409A. This team includes, among others, Mark Baumann (612-672-8339), Larry Koch (612-672-8322), Barry Gersick (612-672-8384) and, for stock-based compensation, Marty Rosenbaum (612-672-8326) and Alan Gilbert (612-672-8381).

Summary of Key Restrictions of Section 409A

Restrictions on Compensation Deferrals. A participant may elect to defer (or an NDCP may require deferral of) compensation for services performed during a taxable year, only if the election (or requirement) is made before that year (except as allowed by the Final Regulations). The election (or requirement) can be made before the employer's fiscal year, but a fiscal year election (or requirement) may apply only to bonuses for the fiscal year. A new participant can make a deferral election within 30 days after becoming eligible, but the election can affect only compensation for services performed after the election is made. As a result, only a pro-rated portion of an annual bonus can be deferred by the new participant. If performance-based compensation will be based on services performed during a period of 12-months or longer, a deferral election can be made up to six months before the end of the period (unless the compensation amount is then substantially certain). Commissions that are not earned until the customer pays can be deferred by an election made before the year in which the customer pays. However, if compensation will not be vested for 12 months (or more) in the future, an NDCP participant may elect to defer the compensation at any time at least 12 months before vesting could occur.

Restrictions on Distributions and Changes. Generally, the time and form of future distributions must be stated at the time of initial compensation deferral, either in the NDCP or a participant's election. Later on, a participant (or the employer) may elect to delay (but not accelerate) the scheduled time for a benefit payment, or change the method for payment, only if:

- the change is made at least one year before it can affect any payment; and
- each affected payment is also delayed at least five years from its scheduled date. However, this five-year rule does not apply if the revised payment time or method applies only upon the participant's death, disability or unforeseeable emergency. For applying the five-year delay rule, a series of installments is treated like a single

payment unless the NDCP is amended to treat each scheduled installment as a separate payment.

No distribution scheduled under an NDCP can be accelerated by the employer and/or the employee, except as permitted by the Final Regulations. Under this rule, a participant cannot change from a periodic payment method to any shorter payment period, or a lump sum, unless the installments were treated as a single payment under the Final Regulations and the starting date is delayed at least five years. However, the Final Regulations allow changes between different forms of life annuity, if they are actuarially equivalent. The Final Regulations also allow early distributions from an NDCP to cover FICA taxes and income taxes (but not penalties) imposed under Section 409A, or to satisfy court orders assigning benefits to a participant's former spouse.

Restrictions on Events Allowing Distributions. Distributions from an NDCP to a participant are allowed only at the following events or times, unless delayed under the following paragraph:

- upon (or at a stated time after) the participant's separation from service, disability or unforeseeable emergency; or the employer's change in control (as those terms are defined in the Final Regulations);
- upon (or at a stated time after) the participant's death; or
- at another time (or according to a fixed schedule) stated in the NDCP or elected at the time of initial deferral.
- However, the NDCP may provide for distribution upon (or at a stated time after) the earliest (or latest) of two or more of the permitted events or times (as listed above).

However, if the employer's stock is publicly traded, any scheduled distribution to a "key employee" (generally as defined for tax-qualified plan purposes) cannot be made before the end of a six-month period after his or her termination of employment (unless the participant has died). This rule applies regardless of the terms of the NDCP, and must be stated in the documents if the employer's stock is publicly traded. An affected employer may choose an annual date (such as December 31st) for identifying its "key employees," who will then become bound by this rule for a 12-month period beginning three months later. This identification date may be different from the "key employee" identification date used for the employer's tax-qualified retirement plans.

New Rules Will Require Reporting Deferred Compensation When Earned. For any compensation deferred in 2005 and later years, a new reporting rule (not yet issued) will require an employer to report to the IRS any amount deferred for a participant under an

NDCP, at the end of the first taxable year in which the amount is earned. This report must include all new amounts accrued under the NDCP, whether or not vested in that year. Any such amount must be reported in Box 12 on an individual's Form W-2 (or on a Form 1099) for that year, even if the amount is not yet includible in taxable income. This reporting rule will apply to all amounts newly earned (or becoming vested) after 2004, whether or not any of the NDCP's benefits were "grandfathered" at the end of 2004.

New Trust Restrictions. If assets are set aside in a trust (such as a "rabbi trust) to make payments under an NDCP, and the NDCP or the trust violates any of the following three restrictions, the value of the trust's assets will be taxed to the participants (in proportion to their benefits) when all substantial risks of forfeiture have expired, even if the assets remain available to satisfy the employers' general creditors:

- Neither the NDCP nor the trust can provide that, upon an adverse change in the employer's financial health, assets will be transferred to the trust or otherwise become restricted for payment of nonqualified deferred compensation.
- Neither the assets nor the trust can be located outside of the United States or later transferred outside of the United States.
- No assets can be transferred to the trust during (a) any period in which the finding status of a qualified defined benefit plan sponsored by the employer is "at risk" under the Pension Protection Act of 2006 or that plan sponsor is a Chapter 11 debtor under the federal bankruptcy law; or (b) any 12-month period beginning 6 months before, and ending 6 months after a qualified defined benefit plan sponsored by the employer is terminated.

Any later investment earnings on, or increases in the value of, those taxable trust assets will be treated as additional taxable amounts. Interest will be due on any tax underpayments, and the taxable amount will also be subject to the 20% excise tax.

Limited Use of Tax Advice. Treasury Circular 230 requires our firm to add the following statement to this letter, because this letter is not intended to be a formal tax opinion that would satisfy the Circular's rules for such opinions. Any tax advice included in this letter is not intended to be used, and cannot be used, by any taxpayer for the purpose of avoiding tax penalties that may be imposed under the Internal Revenue Code.