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March 25, 2009

Mr. Michael Mundaca  
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Department of the Treasury  
1500 Pennsylvania Avenue, N.W.  
Washington, DC 20220

The Honorable Douglas H. Shulman  
Commissioner  
Internal Revenue Service  
1111 Constitution Avenue, NW  
Washington, DC 20224

**Re: Report on a Program to Remedy Documentary  
Noncompliance by Section 409A Plans in Response to  
Notice 2008-113**

Dear Sirs:

We write to comment on the establishment of a voluntary corrections program for documentary noncompliance in connection with Section 409A of the Internal Revenue Code. The Report follows our earlier reports dated June 28, 2005 (report no. 1091) and February 27, 2006 (report no. 1104), relating to Section 409A.

In 2004, Congress comprehensively codified the federal income tax treatment of nonqualified deferred compensation by enacting Section 409A. The Treasury Department and Internal Revenue Service have subsequently

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issued regulations and other guidance on the implementation of Section 409A. Notice 2008-113 permits taxpayers that have established a nonqualified deferred plan that complies by its terms with Section 409A to correct certain operational errors. Notice 2008-113 also requests comments on the possibility of establishing a voluntary compliance program that would provide relief to taxpayers that have established a nonqualified deferred compensation plan that fails by its terms to comply fully with Section 409A (referred to as “documentary noncompliance”) to bring the plan into compliance. The Report responds to Notice 2008-113’s request for comments.

We believe that a documentary noncompliance program is appropriate and important, and can be designed and implemented so as to be consistent with the guiding principles identified in Notice 2008-113. The Report proposes a three-pronged program.

The first part of the program would set out specific, narrowly targeted types of violations which may be viewed as presenting a low probability of abuse and which we therefore view as appropriate for inclusion in a list of correctable violations. Examples of such violations are errors in defining terms such as “disability”, the failure to include a properly drafted provision that would grandfather awards vested and earned prior to specified effective dates, and certain other very technical errors. The program would be available only if the failure is inadvertent and the service recipient has undertaken diligent efforts and commercially reasonable steps to comply with Section 409A.

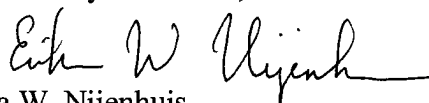
The second part of the program would relate to circumstances in which errors are quickly discovered and corrected. The remedial amendment period generally would be (i) through the end of the taxable year of the service provider in which the legally binding right arises, or (ii) with respect to an amount first payable after the year immediately following the taxable year of the service provider in which the legally binding right arises, the 15th day of the third month of such subsequent year. The remedial amendment period would be available only to those deferred compensation arrangements in which there is no operational noncompliance with respect to the amended provision.

The third part of the program involves the establishment of a policy under which the IRS will give due consideration to enforcing new Revenue Rulings and judicial determinations on a prospective basis and to liberal transitional relief in such cases, to allow taxpayers to adapt to new authorities interpreting Section 409A or changes in enforcement approach.

Our proposals are intended to facilitate the establishment of a multi-faceted program in a manner that is faithful to Congressional intent that participants in nonqualified deferred compensation plans be entitled to the benefits of deferral only under strictly defined conditions, and that also is administrable and does not unduly penalize taxpayers for inadvertent errors or other footfaults. We hope that these suggestions are helpful to you as you endeavor to pursue the critical task of crafting a relief program for documentary noncompliance.

We appreciate your consideration of our comments. Please let us know if you would like to discuss these matters further or if we can assist you in any other way.

Respectfully submitted,



Erika W. Nijenhuis  
Chair

Enclosure

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