New York State Bar Association Tax Section

Employee Benefits Committee Report On

A Program To Remedy Documentary Noncompliance By Section 409A Plans In Response To Notice 2008-113

March 25, 2009

Report No. 1180

New York State Bar Association Tax Section

Employee Benefits Committee Report On
A Program To Remedy Documentary Noncompliance By
Section 409A Plans In Response To Notice 2008-113

I. Background

Notice 2008-113, 2008-51 I.R.B. 1305 (Dec. 22, 2008), 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 of the Internal Revenue Code of 1986, as amended (the "Code") (referred to as "documentary noncompliance") to bring the plan into compliance.[1] This report responds to Notice 2008-113's request for comments.

In 2004, Congress comprehensively codified the federal income tax treatment of nonqualified deferred compensation by enacting Section 409A. In general, Section 409A provides that a service provider who is entitled to deferred compensation under a nonqualified deferred compensation plan that fails to comply with the requirements of Section 409A is potentially subject to accelerated inclusion in income of all amounts deferred under the plan, plus an additional 20% tax on the accelerated income amounts, plus interest. The taxation and penalty applies on an individual basis to any participant whose deferred compensation plan has compliant terms but fails in operation to satisfy the requirements of Section 409A (referred to as "operational failure").[2] In addition, if the plan fails in documentary form to satisfy the requirements of Section 409A (i.e., the plan contains terms that do not meet the requirements of Section 409A or fails to contain a term necessary to meet such requirements) then all affected participants may become subject to the Section 409A sanctions. Documentary noncompliance results in the sanctions described above even if the plan is actually operated in a manner that would comply with Section 409A.

The final Section 409A regulations (the "Final Regulations")[3] were issued in 2007. Section 409A has raised difficult compliance-related issues, leading the U.S. Department of the Treasury ("Treasury") and the Internal Revenue Service (the "IRS") to issue extended and expanded transitional relief in 2007.[4] In our view, this relief and the other relief described below recognize appropriately that Section 409A is an unusual provision of the Code. Its unusual status is not so

---

[1] All section references herein are to sections of the Code, unless the context requires otherwise.
[2] Section 409A(a)(1)(A)(ii).
[3] 72 Fed. Reg. 19,234, technically corrected, 72 Fed. Reg. 38,477, 72 Fed. Reg. 41,620, modified in part, Notice 2007-86, 2007-2 C.B. 990 (Oct. 22, 2007).
[4] Notice 2007-86, 2007-2 C.B. 990 (Oct. 22, 2007). The dislocation caused by Section 409A is evidenced by, among other things, the fact that the Treasury and the IRS, reacting efficiently to the expressed needs of the market, issued extended and expanded relief a mere one month after earlier relief, Notice 2007-78 (Sept. 10, 2007) (which was revoked and superseded in part and modified in part by Notice 2007-86), was issued.

much that it is new, or complex, or that there are many remaining uncertainties about how it should be applied, although all of those points are true and many practitioners in the area believe that the number and significance of those uncertainties is considerably greater than in other areas of the Code. Rather, it is one of the very few provisions of the Code that imposes harsh penalties for noncompliance as part of the essence of the rule itself, and that imposes those penalties on a party (the service provider) who generally is not the party principally responsible for devising the transaction or document that gives rise to the penalty.

Accordingly, as we see it, Treasury and the IRS are faced with a difficult balancing act: they must on the one hand implement the Congressional mandate, and on the other hand they properly are concerned with developing a set of rules that are administrable and that do not unduly penalize taxpayers for inadvertent errors or other footfaults. We believe that it is appropriate for Treasury and the IRS to interpret the grant of regulatory authority provided by Section 409A broadly, as long as the exercise of that authority remains faithful to Congressional intent that participants in nonqualified deferred compensation plans be entitled to the benefits of deferral only under strictly defined conditions. It is against this backdrop that that Treasury and the IRS issued Notice 2007-100, 2007-52 I.R.B. 1243, which set forth limited guidance permitting the correction of certain operational failures and provided specified transition relief. Notice 2008-113 was issued in light of comments which were requested to Notice 2007-100, and is the successor to, and obsoletes, the prior notice.

Notice 2008-113 does not contain relief for documentary noncompliance, and through the date hereof, Treasury and the IRS have not adopted any programs permitting correction of documentary failures under Section 409A. Section XI of Notice 2008-113 does, however, suggest the possibility of such a program and the second paragraph of Section XI focuses on two general problems with the design and adoption of a voluntary compliance program covering documentary noncompliance.

In particular, Treasury and the IRS would intend that any voluntary corrections program covering documentary noncompliance "not allow taxpayers who sponsor or participate in a noncompliant plan an advantage in comparison to taxpayers who sponsor or participate in a compliant plan, by providing the sponsor of, or the participants in, the noncompliant plan greater flexibility to change the time and form of payment of deferred amounts than would have been available if no such plan document failure had occurred. In addition, . . . Treasury . . . and the IRS intend that such a program maintain strong incentives for taxpayers to comply in full with the requirements of [Section] 409A." Section XI then proceeds to identify seven issues regarding which comment is specifically requested: (i) the types of failures that would or would not be eligible for the program, (ii) whether relief should be limited to nonmaterial errors and if so how materiality would be determined, (iii) questions relating to whether a noncompliant plan provision has had an actual effect, (iv) the rules governing corrections, and how such rules would avoid effectively granting impermissible electivity, (v) distinctions between amounts deferred before and during the year of correction, (vi) the information that taxpayers would be required to file with the IRS, and (vii) the procedures employers would be required to use to prevent recurrence.

This Report[5] addresses only the possible adoption and implementation of a program to remedy documentary non-compliance under Section 409A, and does not address any other aspect of Notice 2008-113. We believe, in light of the extensiveness and complexity of Section 409A and the other considerations discussed above, that a documentary compliance program is appropriate and important, and, moreover, can be designed and implemented so as to be consistent with the two fundamental guiding principles noted above which are identified in Section XI of Notice 2008-113. We acknowledge that such a program would need to be crafted and targeted carefully in order to be consistent with such principles and otherwise in order to advance the purposes of Section 409A.

Thus, we propose below a three-pronged program. The first 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. The second would relate to those circumstances in which errors are quickly discovered and corrected. The third involves the establishment of a policy of prospective enforcement and liberal transitional relief 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 program consistent with Treasury's and the IRS's two identified general principles, while also addressing over the course of our discussion below the seven issues specifically identified by Treasury and the IRS for comment.

II. Approved List of Documentary Compliance Failures Subject to Correction.

We recommend a program that would provide relief in the case of a plan document failure that is brought into compliance with Section 409A in certain limited circumstances. The program would be only available if the failure is inadvertent and the service recipient has undertaken diligent efforts and commercially reasonable steps to comply with Section 409A. Such a program would both encourage compliance and avoid penalizing non-abusive and unintentional errors. Section 409A's sweeping and intricate rules pose many stumbling blocks to even the most seasoned practitioner and a heavy burden to many businesses. The many obstacles of Section 409A risk accelerated recognition of income, imposition of an additional 20% tax and interest on deemed underpayments at a high rate. Combined with Section 409A's aggregation rules, the penalties can result in a freefall of tax liabilities that can exceed the present value of the total amount deferred.

In light of the substantial complexity and diversity of nonqualified deferred compensation plans we suggest that in limited circumstances a service provider should be afforded relief and service recipients should be provided the opportunity to cure minor missteps that result in plan document failure. We are confident that a program can both provide relief for common and non-offensive errors while at the same time increasing self compliance and furthering congressional intent. Simply put, we request that Section 409A make a distinction between failures which are abusive in nature and those which do not present a material likelihood of abuse.

[5] The principal drafters of this report were Andrew L. Gaines and Andrew L. Oringer. Significant contributions were made by Jeanie Cogill, Michelle Goldstein, Erika W. Nijenhuis, Scott D. Price, Kenneth A. Raskin, Carol S. Silverman, Paul J. Wessel and Lawrence I. Witdorchic. Helpful comments were received from Peter H. Blessing, Adam Mendelowitz, David S. Miller, Michael S. Schler, Eric. B. Sloan, Eric Solomon, Karen Gilbreath Sowell, Carlisle F. Toppin and Richard R. Upton.

The following proposed approved list of covered defects is presented in light of these considerations:

A. Definition of Disability

Section 409A restricts the ability of a service provider to control the timing of income from nonqualified deferred compensation by limiting payment to certain permissible events such as "disability." The Final Regulations precisely define each of the permissible payment events, and even a slight variation from the specified terms will trigger a plan failure. In the case of disability the risk that a plan will use incorrect verbiage is significant. The Final Regulations provide multiple definitions of the term disability. There are even two distinct definitions of disability within Section 409A itself: one definition allows an employee to cancel a deferral election and a second stricter definition constitutes one of the permissible payment events.

An employee may cancel a deferral election upon becoming disabled if the employee suffers from a medical condition resulting in an inability to perform the duties of his or her position or any substantially similar position. In contrast, for purposes of triggering the payment of nonqualified deferred compensation the definition of disability is much narrower and use of the above stated definition will result in a plan failure. In order to trigger payment the service provider must suffer from a medical condition resulting in an inability to engage in any substantially gainful activity. Thus, if disability is described in a plan as an inability to perform a particular job for purposes of triggering payment, the service provider will be subject to the penalties of Section 409A.

Accordingly, we recommend that a service recipient should be able to amend a noncompliant definition of disability within a plan so that it complies with Section 409A and constitutes a permissible payment event. Income that was previously distributed under the noncompliant triggering event would still be subject to the penalties of Section 409A, but relief would be provided for all subsequent compensation so long as the plan is brought into compliance.

B. Definition of Change of Control

Similarly, "certain change in control events" constitute permissible payment events under Section 409A. The change in control trigger presents the same sort of challenges as the disability trigger. Nonqualified deferred compensation plans often include terms providing for distributions upon a change in control and the use of many customary definitions of that phrase will result in a plan failure. The Final Regulations provide numerous requirements for analyzing whether a change in control event has occurred in various circumstances and are further complicated by the fact that some events that result in golden parachute payments under Section 280G of the Code will not trigger permissible payments under Section 409A. Conventional change in control definitions frequently include events such as liquidation or requiring that a board or board committee determine that a change of control has occurred, which are especially problematic.

In light of these equitable concerns we recommend that a service recipient should be able to amend a noncompliant definition of change of control within a plan so that it complies with Section 409A. Income that was previously distributed under the noncompliant triggering event would still be subject to the penalties of Section 409A, but relief would be provided for all subsequent compensation so long as the plan is brought into compliance.

C. Six-Month Delay Provision for Specified Employees

One of the requirements of Section 409A is a rule delaying payments of nonqualified deferred compensation to "specified employees" who separate from service for six months after the separation, as a condition to the making of payments on account of a separation of service. For this purpose, a "specified employee" generally is a highly-paid key employee of, or a shareholder owning a specified ownership interest in, a public company. The six month rule needs to be incorporated into any and all pertinent plan documents. Plans, employment contacts, award agreements, separation agreements, company policies, company handbooks and the like must all be scrutinized for compliance. The preamble to the Final Regulations provides that a plan must contain the required six-month delay provision by the time the employee becomes a specified employee.

We request that public companies be afforded the opportunity to amend plan documents by adding six-month delay provisions, regardless of whether the service providers covered by the documents are currently listed as specified employees, by the earlier of (i) the end of the year prior to the year in which the separation of service of the service provider occurs or (ii) the 90th day before the separation of service of the service provider. Such relief would further the purpose of Section 409A by preventing Enron-like payouts to additional highly ranking employees whenever proper, accurate identification of specified employees is in doubt, while still requiring that the plan be in documentary compliance with the six-month rule before the separation giving rise to the required six-month delay. We emphasize that this relief would apply only if the general requirements of our proposed program set forth above (i.e., that the failure was inadvertent and that diligent compliance efforts had been made) are satisfied.

D. Installment Payments

The Final Regulations provide that a series of installment payments is treated as a single payment unless the plan provides that the right to receive the installment payments is to be treated as a right to a series of separate payments. For plans in existence prior to 2009 this designation was required to be made in writing before January 1, 2009. The failure to include a provision or amend a plan to provide that installment payments are treated as separate payments can greatly restrict the flexibility of service providers and service recipients regarding payment of deferred compensation and utilizing subsequent deferral opportunities. Critically, a failure to make the election could cause certain earlier installments to be ineligible for treatment as short-term deferrals, unnecessarily subjecting them to Section 409A. The rule is a dangerous trap for the unwary and the harshness of the default installment payments rule is only amplified by the stringent timing rules for making subsequent elections.

In order to provide for greater fairness in the application of this default rule, we recommend that the service recipient be afforded the opportunity to amend a plan to provide that installment payments are to be treated as a series of separate payments at any time before the earlier of (i) the end of the year prior to the year the first installment payment is scheduled to be made, or (ii) 90 days prior to the scheduled date of the first installment; provided, however, that the 90-day period would not apply if the commencement date is an objectively determinable date (because, in that case, the distribution date would not be subject to manipulation into a subsequent year in order to obtain the benefit of the relief). We recognize that, in this case, rather than allowing the parties to bring compensation into compliance with Section 409A, the proposed relief could allow certain compensation not to be covered by Section 409A at all (i.e., under the short-term deferral rule), but believe that this result is appropriate in this particular case given the highly technical nature of the rule, and given that it would seem that in almost every case in which the default rule is relevant the parties would prefer that the default rule not apply.

E. Payment Periods

A plan may designate an objectively determinable and nondiscretionary period during which payment will be made upon the occurrence of any permissible payment event. The designated period must either begin and end within one taxable year or be limited to not more than 90 days provided the service provider does not have the right to designate the taxable year of payment. The limited time frame helps to minimize the control a service provider has over the timing of payment of nonqualified deferred compensation, but is also likely to result in plan failures. In many instances these failures are likely to be non-abusive, such as a plan designating payment within 180 days after separation of service. Accordingly, we suggest that, when a payment period is both noncompliant and non-abusive, a service recipient should be given the opportunity to amend the payment period so that it becomes compliant and the new payment period falls within the original noncompliant period. Such an amendment could be made at any time prior to the year which includes any portion of the noncompliant payment period. Relief would not be provided to any amounts that have already been distributed.

F. Contractual "Setoff" Provisions

Setoff provisions are exceedingly common in employment and termination agreements and pose a substantial obstacle to Section 409A compliance. When a service provider has a right to nonqualified deferred compensation benefits that are designed generally to comply with Section 409A the plan might still be noncompliant if contractual provisions permit the service recipient to setoff amounts which the service recipient is owed by amounts payable under the nonqualified deferred compensation arrangement. The setoff right may be interpreted as equivalent to an accelerated payout provision or its exercise could be seen as an unscheduled withdrawal even if the plan is otherwise Section 409A compliant. For example, if an employer makes a loan to the employee which becomes due and payable on separation of service and the employee has a legally binding right to deferred compensation (e.g. severance payable over 2 years), any offset of the severance amount may constitute an accelerated payout provision, even if no setoff actually occurs. The Final Regulations provide an exception for amounts up to $5,000 per year under Reg. § 1.409A-3(j)(4)(xiii). We recommend that service recipients be provided with an opportunity to nullify setoff provisions at any time prior to when the provision is utilized. Such an allowance would recognize the sea change that Section 409A has brought about in

employment contracts, allow for increased self-compliance, and help limit the penalties of Section 409A to instances of abuse, without creating a loophole that might be created were set-offs simply permitted.

G. Releases

One issue that still generates a surprising amount of complexity and confusion arises when a service recipient conditions severance (or other) payments on a service provider's proffering of an executed and irrevocable release of claims. The use of such a condition is common in both employment and severance agreements. Difficult issues arise in the case of releases because the requirement to give a release does not generally give rise to a substantial risk of forfeiture. Depending on the circumstances a release could be viewed as resulting in a plan failure by creating uncertain and therefore noncompliant time of payment, conferring a late distribution election, or contravening the prohibition against using different methods of payment within one triggering event. Releases could also be viewed as a condition to payment, possibly pushing a payment outside of the short-term deferral period.

A plan can likely be made compliant by carefully structuring a release. For instance a plan can expressly condition payment upon the release so as to make execution a vesting event. If the plan also provides an end-stop date for giving the release then the release will likely be Section 409A compliant. Alternatively a plan could be restructured so that a service provider would forfeit future compensation in the event that a release is not provided by a specific date.

We propose that due to the seemingly unanticipated difficulties that releases create and the equitable concerns associated with solving those conundrums, service recipients should be able to modify noncompliant release provisions prior to a service provider's separation of service so long as payment is neither accelerated nor deferred.

H. Grandfathering

Grandfathered awards are those that were vested and earned by December 31, 2004 and have not been "materially modified" on or after October 3, 2004. A "material modification" occurs if a benefit or right existing as of October 3, 2004, is materially enhanced or a new material benefit or right is added, and such material enhancement or addition affects amounts earned and vested before January 1, 2005. The grandfathered status permits awards to be exempt from Section 409A and to operate in accordance with the terms of the plan prior to January 1, 2005. If a plan inadvertently omits a grandfather clause (i.e., a clause that specifically carves out the vested pre-January 1, 2005 deferred compensation from being subject to the terms of the plan adopted after December 31, 2004) from a nonqualified deferred compensation plan in existence prior to 2005 and amended for compliance with the new deferral rules, the amendments may cause Section 409A to apply to the otherwise grandfathered deferrals. For example, the addition of a right to a payment upon an unforeseeable emergency of an amount earned and vested before January 1, 2005 would be a material modification, thereby subjecting such deferral to Section 409A. We propose that plans be permitted to be amended to add a grandfather clause for pre-2005 deferred compensation (i.e., to clarify or carve out vested, pre-2005 deferred compensation from the

application of Section 409A) to reflect the original intention to preserve the grandfathered status of certain deferrals.

I. Other Defects

Treasury and the IRS should be able to provide for such other correctable defects as may from time to time be added pursuant to notices, regulations and other appropriate authority.

III. Remedial Amendment Period.

Proposal:

Create a "Remedial Amendment Period" during which service providers and service recipients without penalty may amend a plan provision providing for a newly created legally binding right, or a plan provision changing an existing legally binding right, to deferred compensation. The Remedial Amendment Period would be (i) through the end of the taxable year of the service provider in which the legally binding right arises or, in the case of an amendment, the time at which the amendment is effective as to the service provider, 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 or, in the case of an amendment, the time at which the amended provision is effective as to the service provider, the 15th day of the third month of such subsequent year.

In addition, the Remedial Amendment Period would include an additional correction period for a limited period of time (e.g., six months) after the establishment of the IRS documentary compliance program whereby documents can be conformed to the law provided there has been no operational noncompliance as to the provision in question.

The Remedial Amendment Period would be available only to those deferred compensation arrangements in which there is no operational noncompliance as to the provision which would be the subject of the amendment during the Remedial Amendment Period.

Discussion:

Service providers and service recipients should be provided a short period following the creation of a legally binding right to review and revise such arrangement to correct any technical documentary compliance failures without penalty. This rule is consistent with the requirements relating to the establishment of a plan under Reg. § 1.409A-1(c)(3)(i). It also finds some support in the general annual-period approach to taxation in the Code.[6] (The rules under Section 409A consistently equate the 2-1/2 month period following the end of a particular calendar year with

[6] See PLR 9104039 (Oct. 31, 1990) (holding that a rescission of a stock grant within the taxable year of grant was permitted and respected for Section 83 purposes). See generally Rev. Rul. 80-58, 1980-1 C.B. 181 (holding that no gain is recognized on a sale of land by a taxpayer where the transaction is rescinded in the same tax year as the sale); Penn v. Robertson, 115 F.2d 167 (4th Cir. 1940) (cited with approval in Rev. Rul. 80-58, supra, and holding that a 1931 rescission of a plan relating to a stock benefit fund for employees extinguished what otherwise would have been taxable income for that year).

the year itself, and thus we are suggesting that the Remedial Amendment Period be extended into that 2-1/2 month period as well.)

Under the Final Regulations, a legally binding right to deferred compensation is generally established on the latest date on which the material terms of the plan are set forth in writing. The material terms of the plan may be set forth in writing in one or more documents. The Final Regulations provide that a plan will be deemed to be set forth in writing if it is set forth in a form that is approved by the Commissioner. Further, the Final Regulations provide that a plan will be deemed to be established as of the date the participant obtains a legally binding right to a deferral of compensation, provided that the plan is otherwise established under the Final Regulations by the end of the taxable year of the service provider in which the legally binding right arises, or with respect to an amount not payable in the year immediately following the taxable year of the service provider which the legally binding right arises (the subsequent year), the 15th day of the third month of the subsequent year. Under this rule, the service provider and service recipient could in theory enter into an arrangement creating a legally binding right and have an extended period of time to document that arrangement. Under the proposal, service providers and service recipients would be able to utilize this same period already established in the Regulation to conduct continued technical compliance review of any contractual arrangement and correct any documentary compliance issues that may become evident on subsequent review. Under our proposal they would also be permitted to modify a provision that is technically compliant when made but that is rapidly discovered to be drafted in a manner that does not correspond to desired compensation terms. The short-term deferral rule under Reg § 1.409A-1(b)(4) utilizes a similar period of time for a number of compliance issues.

The proposed Remedial Amendment Period would be self-executing and would not require any filing with the IRS for taxpayers. The materiality of the documentary failure would not be a condition to utilization of the Remedial Amendment Period. Any documentary failure which is not the subject of a current operational failure would be eligible for correction during the Remedial Amendment Period. In addition, the Remedial Amendment Period should be available for making changes and corrections to payment dates provided the payment date under the terms of the existing arrangement is not occurring during the Remedial Amendment Period or the calendar year of the change. Any new deferral or election would have to be compliant determined at the time of the later deferral or election.

We considered recommending that the Remedial Amendment Period apply only with respect to noncompliant plans, or that any change to a compliant plan be limited to one that does not allow additional deferral, but ultimately decided to recommend a broader relief rule. Our decision in this regard was influenced by (i) difficulties in determining whether there is compliance and the consequent likelihood of difficult judgment calls if different rules apply to compliant and noncompliant plans, (ii) a low potential for abuse under the relief we propose,[7] and (iii) a belief that, in light of the complexity of Section 409A and the extent to which the approach taken in a plan could have extremely long-term and unchangeable (without penalty) ramifications that may not be fully understood at inception, a short period of time should be available to service providers and service recipients who quickly realize that the plan's design is not desirable. As noted earlier, we believe that Treasury and the IRS have broad scope to exercise their regulatory

[7] See also footnote 6 above.

authority in this area, consistent with the purposes of Section 409A. If Treasury and the IRS wish to take our Remedial Amendment Period recommendation generally but limit the use of the Remedial Amendment Period to noncompliant plans, an additional feature of the program could be to require that any changes be limited so as to be reasonably designed to address the noncompliance narrowly.

We do not believe that our proposal will dilute the incentives for taxpayers to comply with the requirements of Section 409A; to the contrary, we believe that a program encouraging the correction of recent error and permitting the rescission of decisions quickly discovered to be inconsistent with the business arrangement between service recipients and service providers will foster increased and enhanced quality of compliance.

IV. Transitional Relief Regarding Future Guidance and Other Authority

Proposal:

As the third prong of our suggested program, Treasury and the IRS should establish a policy under which the IRS will give due consideration to enforcing new Revenue Rulings and judicial determinations on a prospective basis, as each new ruling and determination is issued, and under which liberal transitional relief is considered with the intent that a higher quality of fairness and orderly compliance with the new rule or rules may be achieved. This policy should also expressly provide for consideration of the foregoing relief where an approach to enforcement on a material point, for example one manifested by a series of private rulings or by other known indicia, is palpably changed.

Discussion:

We acknowledge and agree with Treasury and IRS views, that as a general matter, any future compliance programs or relief should provide strong incentives for taxpayers to comply in full with the requirements of Section 409A. However, we also recognize that Section 409A, for the first time codifies an entirely new comprehensive regime for the taxation of nonqualified deferred compensation. It is widely recognized that many interpretive issues remain unanswered or uncertain, with practitioners in the market, and maybe even within Treasury and the IRS, disagreeing on the application of Section 409A to particular types of factual situations. We note in addition that, as previously noted, the burden of noncompliance will often fall on those without the authority to design and implement them (that is, service providers, as opposed to service recipients). Given the relative newness of the enactment and implementation of Section 409A and the regulations thereunder, and the broad and evolving scope of the rules, we believe that this kind of administrative consideration of the difficulties in the market with analysis and

compliance is appropriate and critical and not in conflict with the general goal of fostering compliance with the requirements of Section 409A.[8]

[8] In a November 2008 letter , the Tax Section has previously pointed out the many interpretive difficulties with Section 409A. See Letter to the Honorable Eric Solomon and the Honorable Douglas H. Shulman from David S. Miller dated November 18, 2008. We note that, following our November 2008 letter, a proposal similar to that made above in Section IV hereof was made by Max Schwartz of Sullivan & Cromwell, LLP. See 35 Pens. & Bens. Rep. (BNA) 2646, 2647 (Nov. 25, 2008).