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Client Alert

A report for clients and friends of the firm

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Update On New Deferred Compensation Rules: Proposed Regulations Issued Under Code Section 409A

On September 29, 2005, the Treasury Department ("Treasury") and the Internal Revenue Service (the "IRS") issued further guidance on the new deferred compensation rules under Section 409A of the Internal Revenue Code of 1986, as amended (the "Code"). The new guidance, in the form of proposed regulations, generally incorporates and expands upon the interim guidance previously issued by the IRS in Notice 2005-1, with certain key modifications. The proposed regulations (238 pages in length, including the preamble) and Notice 2005-1 are available on the Treasury Department's website at www.treas.gov.

Code Section 409A ("Section 409A") was added by the American Jobs Creation Act of 2004 in response to perceived abuses with respect to nonqualified deferred compensation arrangements by, or on behalf of, executives. Section 409A significantly altered the rules applicable to nonqualified deferred compensation and impacts traditional nonqualified deferred compensation arrangements, as well as many other arrangements not previously considered "deferred compensation" (including equity incentive, employment and severance arrangements).

Part I of this client alert describes the effective dates and transition rules under the proposed regulations. Part II describes key substantive developments under the proposed regulations, including areas where the proposed regulations offer new guidance on Section 409A compliance, as well as areas where the proposed regulations modify prior guidance from the IRS and Treasury. Part II also identifies key topics that are still to be addressed by the IRS and Treasury in future guidance.

For a summary of the provisions of Section 409A and Notice 2005-1, please refer to our previous client alerts entitled, "Recent Legislation Impacts Deferred Compensation and More" and "Treasury and IRS Issue Guidance on Nonqualified Deferred Compensation." These client alerts are available on our website at www.proskauer.com.

Part I - Effective Dates and Transition Period Rules

Effective Dates

Section 409A generally is effective for amounts deferred after December 31, 2004 (and amounts deferred prior to January 1, 2005 which do not fall within special grandfathering rules).[1] Notice 2005-1 provided interim guidance under Section 409A, including a transition period ending on December 31, 2005 during which plan sponsors were required to operate their plans in accordance with the new rules and amend their plans by December 31, 2005 to comply in form.

The proposed regulations are scheduled to become effective for taxable years beginning on or after January 1, 2007. However, taxpayers may rely on the proposed regulations in the interim until the effective date of the final regulations. Until the effective date

[1] For these purposes, an amount (and any earnings thereon) is considered "deferred" prior to January 1, 2005 if the employee (or other "service provider") had a legally binding right to be paid the amount, and the amount was earned and vested on December 31, 2004, provided that no material modification was made to the arrangement after October 3, 2004. Thus, amounts that were not earned, or that were not vested, prior to January 1, 2005, are not considered grandfathered deferrals for purposes of Section 409A.

of the regulations, Notice 2005-1 generally remains in effect, with certain of the transition provisions extended through December 31, 2006. Plans subject to Section 409A need not comply with the proposed regulations before the regulations become effective. However, to the extent that a provision of the proposed regulations is inconsistent with Notice 2005-1, a plan may comply with the provisions of the proposed regulations in lieu of complying with Notice 2005-1.

Transition Period Rules

The proposed regulations extend some, but not all, of the transition relief provisions in Notice 2005-1.

Transition Relief Provisions Extended to December 31, 2006

- *Amendments to Plan Documents.* Plans adopted before December 31, 2006 must be amended on or before December 31, 2006, either to conform to the requirements of Section 409A or to provide for compensation that is exempt from Section 409A.

  In all cases, plans subject to Section 409A must have been operated in accordance with the provisions of Section 409A since the date of the statute's enactment, October 3, 2004. A plan will be treated as operating in accordance with Section 409A only if it is operated in good faith compliance with Section 409A and Notice 2005-1. Compliance with the proposed regulations will also be considered good faith compliance with the statute.

- *Changes in Payment Elections.* The transition period during which a plan may be amended to provide for new payment elections without violating the "subsequent deferral" and "anti-acceleration" rules of Section 409A is extended through December 31, 2006, as was the transition period for the corresponding deferral elections by employees.[2] However, an employee cannot in 2006 change payment elections with respect to payments the employee would otherwise receive in 2006, nor can the employee change payment elections to cause payments to be made in 2006.

- *Elections Under Tandem Tax-Qualified Plans.* Elections made under tax-qualified deferred compensation plans that govern the time or form of payment under nonqualified deferred compensation plans can continue to apply during an extended transition period through December 31, 2006, provided that the election was made in accordance with the terms of the nonqualified plan as in effect on October 3, 2004. The IRS and Treasury have indicated that they do not intend to make this transition relief permanent. Accordingly, elections under a supplemental executive retirement plan (SERP) that are effective after December 31, 2006 and that mirror (or depend on) elections under a 401(k) plan, would not comply with Section 409A and would need to be discontinued after the transition period.

- *Substitute Options and Stock Appreciation Rights.* Under extended transition rules, a discounted stock option or stock appreciation right ("SAR") can be cancelled or replaced prior to January 1, 2007 without constituting a material modification under Section 409A, subject to a number of additional requirements set forth in the proposed regulations.

Transition Relief Not Extended (Ends 2005)

- *Initial Deferral Elections.* Notice 2005-1 provided limited transition relief for initial deferral elections, generally permitting initial deferral elections for compensation for services performed on or before December 31, 2005 to be made on or before March 15, 2005 (rather than December 31, 2004). This transition relief has not been extended through 2006. Thus, initial deferral elections in respect of 2006 compensation generally must be made no later than December 31, 2005, unless a later date is permitted under an alternate provision of the proposed regulations.

- *Cancellation of Deferrals and Termination of Plan.* The transition period during which an employee or employer may cancel an existing deferral election or terminate participation in a deferred compensation plan (thereby electing to cease participation in a plan subject to Section 409A), has not been extended beyond December 31, 2005. Similarly, the transition period during which a grandfathered plan may be terminated without the termination being treated as a material modification under Section 409A has not been extended beyond December 31, 2005. Please refer to the discussion in Part II of this client alert for a summary of the plan termination rules that apply after December 31, 2005. Please also refer to the discussion above regarding the applicability of the proposed regulations prior to December 31, 2005.

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[2] For simplicity, this client alert refers to "employers" and "employees" in lieu of the regulatory defined term "service recipient" and "service provider," which terms are much broader. For example, Section 409A applies beyond employees, and also covers independent contractors, including directors.

Part II - Key Substantive Developments

Short-Term Deferrals

The proposed regulations incorporate from Notice 2005-1 an important and useful exception to the Section 409A definition of "deferred compensation" for amounts that are received by the employee within a short period following vesting (referred to as a "short-term deferral").[3]

- *Written Plan Provision.* The preamble to the proposed regulations clarifies that the plan document is not required to expressly provide for payment by the short-term deferral deadline, so long as the payments are in fact made by the deadline. However, if payment is not actually made by the deadline, and the plan does not expressly provide that payment must be made by the deadline, the late payment will result in an automatic violation of Section 409A due to the plan's failure to specify a payment date or a permissible payment event. In addition, rules otherwise permitting the employer to delay payment (for example, where the payment would violate loan covenants or similar contractual provisions), would be unavailable because the arrangement failed to specify a payment date subject to the delay. By contrast, if the plan expressly incorporates provisions requiring payment by the relevant deadline, and that deadline is missed, the payment generally will be eligible for administrative relief permitting the payment to be delayed. Accordingly, it may be advisable to include a date or year for payment in the plan documents, even when it is intended that the payment be made within the short-term deferral period under Section 409A.

Severance Arrangements

The proposed regulations confirm that the broad definition of "deferred compensation" under Section 409A covers many common types of severance arrangements, including broad-based severance policies and individually negotiated severance or golden parachute agreements.

The proposed regulations contain a few key exceptions.

- *Limited Safe Harbor; Window Programs.* An exception applies for arrangements where severance is paid upon involuntary separation from service or pursuant to a window program and where (i) the entire amount of payments to any employee does not exceed two times the employee's annual compensation (or, if less, two times the limit on annual compensation that may be taken into account for contributions under tax-qualified plans (*i.e.*, $210,000 for calendar year 2005)), for the year prior to separation, and (ii) all payments are made no later than December 31 of the second calendar year following the year in which the separation from service occurs.

- *Short-Term Deferrals.* An exception applies for involuntary separation pay arrangements that meet the short-term deferral exception (*i.e.*, severance payments are made within the short-term deferral period discussed above). The preamble to the proposed regulations clarifies that the right to severance that is only payable on an involuntary separation generally will be viewed as a non-vested right, and so can be structured to satisfy the short-term deferral rule.

  - *Good Reason.* The preamble to the proposed regulations cautions that a right to payment in connection with a "good reason" termination may not categorically qualify as a "right subject to a substantial risk of forfeiture." Therefore, until future guidance is issued on this point (which the IRS and Treasury have indicated is forthcoming), a good faith determination needs to be made as to whether the inclusion and specific wording of a "good reason" termination provision in a severance or employment agreement will make the short-term deferral exception unavailable for the entire arrangement.

Reimbursement of Business Expenses

Limited exceptions for post-termination reimbursements also apply.

- Expense reimbursements that are not contingent on the provision of services (such as reimbursements following termination of employment) generally are not treated as subject to a "substantial risk of forfeiture." Accordingly, if the reimbursements are made after the year in which the legally binding right to the payment arises, they may be viewed as deferred compensation under Section 409A.

  - A limited exception applies to the extent that the reimbursement arrangement covers only expenses incurred and reimbursed before the end of the second calendar year following the calendar year in which termination occurs. The types of reimbursement arrangements covered include reimbursements otherwise excludable from income, reimbursement that are deductible by the employer under Code Sections 162 or 167, business expenses

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[3] Under this short-term deferral exception, a "deferral of compensation" does not occur for purposes of Section 409A if the payment is received no later than 2 1/2 months after the end of the year in which the amount no longer is subject to substantial risk of forfeiture. The 2 1/2 month period is measured from the end of the employee's tax year or the end of the employer's tax year, whichever is later. For example, under this rule, multi-year bonus arrangements that require payments promptly after the bonus amount vests would be exempt from the requirements of Section 409A.

incurred in connection with the performance of services, outplacement services, moving expenses and medical expenses.

- A limited exception also applies for certain other "de minimis" reimbursements or benefits that do not exceed $5,000 in the aggregate.

- For this purpose, the reimbursement arrangement may provide in-kind benefits or direct payments by the employer to the third party providing the relevant goods or services to the employee.

Key Employees

Section 409A requires that payments of deferred compensation, including severance, upon separation from service to certain key employees must be delayed by at least 6 months following such separation, unless it satisfies an exception. This special rule is discussed below.

Anti-Manipulation

The exclusions for severance pay are not intended to allow employers and employees to avoid Section 409A by re-characterizing amounts that would otherwise be deferred compensation. The limited exemptions for severance pay do not apply to the extent the severance pay acts as a substitute for, or replacement of, amounts that would otherwise be subject to Section 409A. For example, a right to severance pay obtained in exchange for the relinquishment of a right to deferred compensation subject to Section 409A will not be excluded from coverage, but rather will be treated as payment of the original amount of deferred compensation.

Equity Incentive Arrangements

In general, stock options, SARs and other equity-based compensation arrangements can constitute nonqualified deferred compensation arrangements under Section 409A. Key exceptions for equity incentive awards set forth in Notice 2005-1 are incorporated in the proposed regulations, and new exceptions have been added.

Treasury and the IRS remain concerned that manipulation of stock valuations, and manipulation of the characteristics of the underlying stock, may lead to abuses in this area. Accordingly, the proposed regulations contain new, detailed provisions with respect to (i) the type of stock that may be made subject to stock awards that will be exempt from Section 409A, and (ii) the permissible valuation methods for such stock.

New Developments for SARs

Section 409A exempts from the definition of deferred compensation "plain vanilla" stock options (*i.e.*, non-discounted stock options with no additional deferral features), whether or not the underlying stock is traded on an established securities market. Notice 2005-1 generally limited the exemption for SARs to stock-settled awards where the underlying stock was traded on an established securities market. The proposed regulations expand the relief available for SARs, and provide an exclusion from coverage under Section 409A for "plain vanilla" SARs (*i.e.*, non-discounted SARs with no additional deferral features), regardless of whether the SAR is settled in cash or stock, and regardless of whether the underlying stock is readily tradable on an established securities market.

Eligible Stock

The proposed regulations provide that only common stock may be made subject to options or SARs that are exempt from Section 409A, and also that only the class of common stock with the highest aggregate value of any class of outstanding common stock (or class of common stock substantially similar to such class, ignoring voting rights) on the date of grant will qualify. Thus, the use of a separate class of common stock for employee awards, or the use of preferred stock for employee awards, will not satisfy these important and useful exemptions.

Valuation

The proposed regulations provide additional guidance on the permissible valuation methods for purposes of Section 409A, including:

- For publicly traded companies, the permissible range of dates that may be used to establish the stock's fair market value;

- For privately-held companies, a description of factors and presumptions that will be applied in evaluating whether a valuation is reasonable (rules which are intended to provide greater certainty and to encourage consistency and discourage manipulation); and

- For start-up corporations, an explanation of the conditions under which the valuation of the illiquid stock of the start-up will be presumed reasonable.

Put and Call Rights

The IRS and Treasury also remain concerned about "put" and "call" rights on stock awards to employees because the ability to set a purchase price that differs from the fair market value of the stock could be used to circumvent the Section 409A rules. Accordingly, the proposed regulations generally require that the purchase price for "put" and "call" rights on vested stock be set at the fair market value of the shares at the time of purchase, determined in accordance with a consistently applied valuation method described above.

Application to Subsidiaries
Under Notice 2005-1, the exceptions for plain vanilla options and SARs do not apply to awards granted with respect to an entity that is not a "service recipient." In an important expansion, the proposed regulations extend the definition of "service recipient" to include 50 percent-owned subsidiaries. In addition, where a legitimate business reason exists (*e.g.*, a joint venture), this relief is extended to 20 percent-owned subsidiaries.

Modifications
The proposed regulations include new guidance on the treatment of modifications, extensions and renewals of previously granted equity incentive awards. Under this guidance, subject to certain additional conditions, the addition of provisions permitting (i) the transfer of the stock right, (ii) the exchange of the stock right for cash rights, (iii) acceleration of the stock right's exercisability, and (iv) the payment of exercise prices or withholding taxes with mature shares, may be achieved without violating Section 409A. In addition, although an extension granting an employee an additional period within which to exercise a stock right generally will be treated as an impermissible addition of a deferral feature (and make the grant subject to Section 409A retroactively to the date of grant),[4] the proposed regulations provide a limited exception to this rule for certain short extensions until the later of (i) the fifteenth day of the third month following the date, and (ii) the December 31st of the calendar year in which, the right otherwise would have expired. There is also an exception for extensions necessary to avoid expiration of the stock right where exercise would violate applicable securities laws. The proposed regulations also provide a limited ability to rescind changes to stock awards that inadvertently result in a modification to the award. Rescission must occur during the same calendar year as the change, and before the stock right is exercised.

Corporate and Business Entity Transactions

Change in Control of Corporations
The proposed regulations generally incorporate the provisions under Notice 2005-1 respecting changes in ownership and control of corporations.

Change in Control of Partnerships; Interim Rules
Future guidance will address in more detail how these rules will apply to partnerships. Until that guidance is issued, the rules regarding permissible distributions upon a change in the ownership of a corporation or a change in the ownership of a substantial portion of the assets of a corporation may be applied by analogy to changes in the ownership of a partnership and changes in the ownership of a substantial portion of the assets of a partnership.

Conversion of Equity Awards in Corporate Transactions
Consistent with Notice 2005-1, the proposed regulations provide that the conversion of options and SARs in the corporate merger and acquisition context will not result in an impermissible modification if the awards are converted using the methodology set forth in the proposed regulations. If followed, the conversion will not be treated as a cancellation and re-grant of the option in violation of Section 409A.

The conversion methodology is similar to the one currently applied under Treas. Reg. § 1.424-1, which generally provides a conversion methodology for incentive stock options ("ISOs") designed to ensure that the conversion preserves the holder's basic economic position in the option. The ISO methodology requires that the conversion satisfy "spread" and "ratio" tests. The "spread" test in the ISO rules requires that the aggregate "spread" (excess of the aggregate fair market value of the shares over the aggregate exercise price) of the new option not exceed the aggregate spread of the old option at the time of conversion. The "ratio" test in the ISO rules requires that, on a share by share basis, the ratio of the exercise price to the fair market value of the shares must not be more favorable for the new award at the time of conversion.

Consistent with Notice 2005-1, the proposed regulations include an important modification, permitting, for purposes of Section 409A, the "ratio" test to be satisfied if the ratio of the exercise price to the fair market value of the shares immediately after the substitution or assumption is not greater than the ratio of the exercise price to the fair market value of the shares subject to the stock right immediately before the substitution or assumption. This change is intended to offer flexibility in circumstances where, to reduce dilution, an acquiring corporation wishes to issue a smaller number of shares than the number of shares underlying the old option, but also wishes to retain the entire aggregate difference between the fair market value of the shares and the exercise price that had been available to the employee before the conversion.

Earnouts
Amounts received by employees under "earn-out" provisions in corporate transactions (*i.e.*, provisions under which a purchaser pays a portion of the transaction consideration

[4] This rule would seem to apply to "underwater" grants which previously had been assumed to be not impacted by Section 409A on an extension of time to exercise. Unlike an extension, on a repricing a new grant is considered to be issued and Section 409A compliance is measured at that time. The guidance also clarifies that only changes which impact the exercise price, create an additional deferral feature, or constitute an extension or renewal of the stock right are Section 409A modifications.

some period of time after closing, subject to specified conditions) will need to be structured to comply with Section 409A. The proposed regulations provide that compensation payable pursuant to the purchase by the employer of the employee's stock (or a stock right), or the payment of amounts of deferred compensation calculated by reference to the value of the stock, may satisfy Section 409A requirements for deferred compensation if the following conditions are satisfied:

- If they are paid on the same schedule and under the same terms and conditions as payments to shareholders generally pursuant to a change in control event (as defined); and

- If they are paid within 5 years after the change in control event.

Plan Terminations
As described below, limited rules permit employers to terminate deferred compensation plans in connection with a change in control. In general, the proposed regulations permit employers to elect to terminate a plan and make payments to participants during the twelve-month period following a change in control.

Performance-Based Compensation

Section 409A provides that in the case of any performance-based compensation based on services performed over a period of at least twelve months, a participant's initial deferral election may be made no later than 6 months before the end of the period. The proposed regulations define performance-based compensation as compensation contingent on the satisfaction of pre-established organizational or individual performance criteria. Performance-based compensation generally may include payments based upon subjective performance criteria, provided that the subjective performance criteria relate to the performance of the employee, a group of employees that includes the employee, or a business unit for which the employee provides services (which may include the entire organization). In addition, the determination that the subjective performance criteria have been met may not be made by the employee or a member of the employee's family, or a person the employee supervises or over whose compensation the employee has any control.

Similar to the rules under Code Section 162(m), employers are permitted to establish criteria within ninety days after the commencement of a performance period of twelve months or more, rather than having to establish the criteria before the commencement of the service period, provided that the outcome is not substantially certain at the time the criteria are established.

In a departure from Notice 2005-1, the proposed regulations provide that performance-based compensation may include amounts that are based solely on the value of, or appreciation in value of, the employer or the stock of the employer after the date of award. However, if an amount of compensation that an employee will receive pursuant to an award is not based solely on an increase in the value of the stock after the grant (for example, in the case of a stock right granted with an exercise price that is less than the fair market value of the stock as of the date of the award), and that other amount would not otherwise qualify as performance-based compensation, none of the compensation attributable to the award qualifies as performance-based compensation.

Six-Month Delay for Key Employees

Section 409A provides that payments of deferred compensation upon a separation from service to a "key employee" of a corporation whose stock is publicly traded on an established securities market must be delayed by at least 6 months following the separation from service. For these purposes, a "key employee" is defined by reference to special rules applicable to tax-qualified retirement plans (*i.e.*, a key employee for purposes of the "top-heavy" rules). The proposed regulations provide a special simplifying rule whereby the identification of key employees is based upon the twelve-month period ending on an identification date chosen by the employer. Persons who are key employees during such period are then considered key employees for the twelve-month period commencing on the first day of the fourth month following the identification date. For example, if an employer chooses December 31 as an identification date, any key employees during the calendar year ending December 31 would be treated as specified employees for the twelve-month period commencing the following April 1.

To meet the 6-month delay requirement, a plan may provide that any payment pursuant to a separation from service due within the 6-month period is delayed until the end of the 6-month period, or that each scheduled payment that becomes payable pursuant to a separation from service is delayed 6 months, or a combination thereof.

Elections; Time and Form of Payment

The proposed regulations contain additional guidance on employee elections, including the timing requirements for initial elections, as well as guidance on the timing and form of payments, most notably:

- *Administrative Delays in Payments.* The proposed regulations provide limited relief for administrative delays when it is not administratively feasible for the employer to make payments on the scheduled dates or when a delay does not meaningfully affect the timing of the income inclusion. This relief is not intended to provide a substantive rule that allows the employee to further delay payment beyond the elected payment date, and this relief is not available when the delayed payment is caused by action or inaction of the employee.

- *Other Limiting Factors.* The proposed regulations generally provide that a plan may delay payment in the case of payments the deduction for which would be limited by the application of Code Section 162(m), payments that would violate securities laws, or payments that would violate loan covenants or other contractual terms to which the employer is a party where such a violation would result in material harm to the employer. If a plan contains such a provision, any failure to apply that provision or any modification of the plan to remove such a provision with respect to amounts previously deferred will constitute an impermissible acceleration under Section 409A.

Plan Terminations

The proposed regulations provide three circumstances under which a deferred compensation plan may be terminated after 2005 without violating the prohibition under Section 409A against impermissible accelerations of benefits. The first applies in cases where an employee ceases to provide a certain category of nonqualified deferred compensation entirely (such as account balance plans or separation pay plans), all plans of the same type are also terminated for all participants and no such new plans are subsequently established for a period of five years. The second and third relate to events that are objectively determinable and are of independent significance so that they are unlikely to be abused by employers, namely a change in control, a corporate dissolution and a Chapter 11 bankruptcy proceeding (with approval of the bankruptcy court).

A separate rule applies permitting plan terminations that comply with special transition rules for 2005 under Notice 2005-1 (and not extended by the proposed regulations), as described above.

Back-to-Back Deferral Arrangements

The proposed regulations contain guidance on "back-to-back" deferral arrangements between a "service recipient" and a "service provider" that is also a "service recipient." This guidance will be of particular interest to hedge funds and their investment managers which have fee deferral arrangements that parallel deferred compensation arrangements with the manager's employees. Often, under these arrangements deferred fees are payable to the investment manager at the time the deferred compensation becomes payable to the investment manager's employee, such as upon the employee's separation from service. Under prior guidance, it was not clear whether this was permissible under Section 409A, as it was not clear whether the deferred amounts paid to the investment manager were paid on one of the Section 409A permitted distribution events.

The proposed regulations permit back-to-back deferral arrangements in this context if (i) the deferred compensation arrangement between the investment manager and the employee complies with Section 409A, and (ii) the deferred compensation arrangement between the hedge fund and the investment manager expressly provides for payment to the investment manager at the time and in the form payment is made to the employee, and the arrangement otherwise satisfies Section 409A. However, future guidance will clarify the scope of this rule. Future guidance is expected to clarify the application of Section 409A to deferred compensation arrangements between partnerships and their partners, which may implicate the arrangements between investment managers and their "service providers." In addition, future guidance also is expected to clarify the application of Section 409A to deferred compensation amounts provided through off-shore entities, which may implicate off-shore hedge funds.

Not-For-Profit and Governmental Plans

Section 409A applies to nonqualified deferred compensation plans sponsored by not-for-profit entities, and state and local governments. Income inclusion will be required on the earlier date required under Section 457(f) or Section 409A.

Other Key Developments

In addition to the key substantive developments summarized above, the proposed regulations include detailed technical guidance on a number of points beyond the scope of this client alert, including:

- The application of Section 409A to non-U.S. deferred compensation arrangements, U.S. citizens working abroad and compensation earned by non-resident aliens;

- The extent to which similar regulatory provisions should (or should not) influence Section 409A practices (*e.g.*, FICA taxes, 401(k) "same desk" rules, Code Sections 162(m) and 280G), either technically or as a policy matter;

- The extent to which Section 409A applies to compensation paid to independent contractors;

- The application of Section 409A to split-dollar arrangements;

- Rules requiring aggregation of similar types of compensation arrangements (*e.g.*, account balance plans or separation pay plans) when evaluating violations and assessing penalties (the so-called plan aggregation rules) under Section 409A; and

- The circumstances under which a "separation from service" occurs if future services are being provided.

Matters for Future Guidance

Future guidance from the IRS and Treasury will provide more detailed rules on:

- The calculation of penalties under Section 409A (*i.e.*, the calculation of the amount of the impermissible deferral, the amount of income inclusion upon a violation of Section 409A, and the timing of the inclusion of income and related withholding obligations);
- The application of Section 409A to partnerships and other non-corporate business entities;
- The value of extending the exercise period of options and SARs; and
- Off-shore funding arrangements for nonqualified deferred compensation, such as rabbi trusts.

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