ABA Section of Business Law Fall Meeting

November 21-- 22, 2008
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Washington, DC

409A: The Final Countdown

Presented by: The Committee on Employee Benefits and Executive Compensation

Chair - Martha N. Steinman

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AMERICAN BAR ASSOCIATION
SECTION OF BUSINESS LAW

409A: The Final Countdown and Late Breaking Legislative Developments

Section of Business Law Fall Meeting
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409A: The Final Countdown and Late Breaking Legislative Developments

ABA Business Law Section
Fall Fly-In
November 21, 2008

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Agenda

- Executive Compensation Provisions in the Emergency Economic Stabilization Act of 2008
  - Section 457A
  - Section 162(m)
  - Section 280G
- Section 409A Update
  - Last points for end of transition
  - Additional guidance – income inclusion, corrections, and reporting
- Questions

Emergency Economic Stabilization Act

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Emergency Economic Stabilization Act

- Changes focused on corporate governance with respect to executive compensation with significant equity or debt investment
- Two executive compensation tax provisions apply with certain assets purchases:
  - Restrictions on nonqualified deferred compensation paid by offshore entities
  - Elimination of tax benefits for executive compensation for employers who participate in the troubled assets relief program

TARP Direct Investment

- A company in which the US acquires a substantial equity/debt interest is required to:
  - ensure that incentive compensation to senior executive officers does not reward "unnecessary and excessive risks that threaten the value of the institution"
  - prohibit the payment of any golden parachute amount to those individuals
  - provide for the recovery of bonus or incentive compensation paid based on earnings or gains that are later proven to be materially inaccurate
  - limit compensation deductions to $500,000 for senior executives in these entities

TARP Asset Acquisitions

- If more than $300 million of the company's assets are acquired,
  - New employment contracts with senior executive officers cannot provide for any payment on account of involuntary termination, bankruptcy or insolvency
  - Compensation deductions are limited to $500,000 for senior executives in these entities
  - Section 280G restrictions are extended
- These restrictions expire December 31, 2009, unless the authorities of this legislation are extended by the Secretary of the Treasury

TARP Capital Purchase Program

- Direct purchase of senior preferred shares in certain qualified financial institutions
- As a condition, the QFI must meet certain compensation standards
  - ensure that incentive compensation does not reward "unnecessary and excessive risks that threaten the value of the institution"
  - prohibit golden parachute payments (as defined in 280G)
  - provide for the recovery of bonus or incentive compensation paid based on earnings or gains later proven to be materially inaccurate
  - limit compensation deductions to $500,000 for senior executives in these entities

Section 162(m) amendments

- Tax deduction for compensation paid to anyone serving as the CEO, the CFO, or one of the other three highest-paid executives is limited to $500,000
  - Multiple CEOs/CFOs?
- No exception for stock options or performance based compensation
- Rules apply to nonpublic and noncorporate entities
- Limit applies to compensation earned during the period(s) in which the assets are acquired, irrespective of when the compensation is paid or otherwise deductible

Section 280G amendments

- Severance payments as a result of involuntary termination or in connection with any bankruptcy or liquidation to covered employees are subject to the golden parachute rules
  - No exception for small businesses
  - No provisions for the payment of reasonable compensation
  - Rules are applied on a noncontrolled group basis
- Applies to severances occurring currently through period of authorization

Deferred Compensation Paid by Offshore Entities

- Service providers working for certain offshore entities will no longer be able to defer US income tax on their compensation for more than 12 months after the end of the payor's year in which the services required to vest in the compensation are complete
  - Without regard to whether there are additional performance conditions still in effect
- Nonqualified deferred compensation is defined in the same manner as under section 409A EXCEPT expanded to include stock options and other equity appreciation rights

Deferred Compensation Paid by Offshore Entities

- If the amount of compensation is not determinable at the time that such compensation is otherwise includible in gross income, then:
  - –Include when determinable
  - –additional interest rate tax
  - –20% penalty tax

A Nonqualified Entity

- Foreign corporation, unless substantially all of its income is
  - effectively connected with a U.S. trade or business or
  - subject to a comprehensive foreign income tax;
- A foreign or domestic partnership, unless substantially all of its income is allocated to people other than
  - foreign persons not eligible for a comprehensive income tax treaty or who are not subject to a comprehensive foreign income tax; or
  - organizations which are exempt from tax

Effective Dates:

- Amounts deferred attributable to services performed after December 31, 2008
- Amounts attributable to services performed before December 31, 2008, are includible in the later of
  - the last taxable year beginning before 2018 or
  - the taxable year in which there is no longer a service-based risk of forfeiture.
- Treasury will provide a limited time period during which arrangements may be amended to allow payment to conform to the income inclusion under these provisions without violating section 409A

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- Treasury will provide a limited time period during which arrangements may be amended to allow payment to conform to the income inclusion under these provisions without violating section 409A

Update on Section 409A

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Update on Section 409A

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What is 409A?

- 409A applies to nonqualified deferred compensation plan
- General definition is broad: Agreements entered into one year for compensation that could be paid in a later year
- Failure to comply results in income at vesting and a 20% additional tax, with possibility of additional interest at the underpayment rate plus 1%

Effective dates

- Amounts deferred in taxable years beginning after December 31, 2004
- Amounts deferred in taxable years before January 1, 2005, if the plan under which the deferral is made is materially modified after October 3, 2004
- An amount is “deferred” only if it is earned and vested

Where Are We Now?

- Final regulations effective January 1, 2009
- Until December 31, 2008
  - Good faith compliance with statute and Notice 2005-1
  - Compliance with proposed (prior to 2008) or final regulations is good faith compliance
- Documents must be in compliance beginning January 1, 2009
- Changes in distributions under transition relief must be made by December 31, 2008

What is Deferred Compensation?

- A plan is any arrangement that provides for a deferral of compensation
  - Elective or nonelective plans
  - Employment agreements
    - Payments associated with international assignments (discussed in more detail below)
  - Severance plans
  - Some RSU or long term bonus plans

What Does 409A Require?

- Compliance with
  - Election requirements
  - Distribution timing
    - Separation from service
    - Fixed time/specified schedule
    - Death
    - Disability
    - Change in control
    - Unforeseeable hardship
  - Limitations on acceleration/redeferral
- Funding restrictions

Exceptions to Deferred Compensation

- Short-term deferrals
- Certain equity compensation
- Restricted property
- Certain arrangements between partners and partnership
- Certain foreign arrangements
- Separation pay arrangements
- Certain indemnification and liability insurance plans
- Certain legal settlements
- Certain educational benefits

Equity-based Compensation

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Stock Options and SARs

- Exclusion for non-discounted options and SARs on "service recipient stock"
- Service recipient stock defined generally as common stock with no preferential distribution rights (other than on liquidation)
  - Service recipient stock may include stock of the corporation for which the employee provides service and stock of other corporations that have a controlling interest in the employer.
  - Controlling interest generally requires 50% interest, but this can be reduced to 20% with a legitimate business reason
- Additional deferrals of stock right gains generally are prohibited, with limited exception for:
  - extension of exercise period up to lesser of original outside term or 10 years
  - extension of exercise period when option is underwater

Stock Options and SARs

- Stock valuation is key to the exception for stock options and SARs
- Public companies generally must use trading price or average over a short period of time
- Private companies must use reasonable application of reasonable valuation method - an appraisal is not required
  - Safe harbors are provided for appraisals using ESOP rules under the Code, repurchase formula treated as FMV under Section 83, and certain valuations of illiquid stock of start-up companies
  - One valuation method may be used to determine exercise price and another for buy back
- Questions
  - Is it permissible for holder to receive dividend equivalents that terminate when option is exercised?
  - If a private company experiences a significant corporate event must it obtain a new stock valuation prior to issuing stock options, or may it materially use the annual appraisal?

Issues for Expatriate Programs

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Types of payments that may be impacted on International Assignments

- Repatriation bonus: paid on return to home country
- Repatriation allowance: specified amount paid on return to home country (or reassignment); intended to cover expenses
  - Temporary living expenses
  - Moving expenses
- Repatriation reimbursement: related to expenses incurred in course of return to home country
  - Return airfare
  - Shipment of household furnishings
  - Resettlement allowance
- Tax Equalization

Tax Equalization

- To offset differences between US and foreign effective tax rates where income is subject to tax in more than one jurisdiction
- Excluded from 409A if paid by the end of the second taxable year following the later of
  - year in which the service provider's U.S. tax return is required to be filed for the year to which the compensation subject to the equalization payment relates, or
  - The payment can be made as late as the end of the second taxable year after the foreign tax return or payment is due.

Potential Pitfalls and Administrative Tips

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Operational Considerations

- Deferral elections
- Timing of distributions
- Plan funding
- FICA payments
- Reporting of deferrals on W2's and 1099's
- SEC Reporting – 8K, 10K/Q, Proxy, S-8
- Document processes and controls
- Communications
  - Employees, independent contractors, service providers (including review of service provider agreements)
  - Board of directors, compensation committees
  - Shareholder approvals required?

Elections

- Identify plans that allow elections with respect to AMOUNT
- Identify plans that allow elections with respect to TIMING
- Identify plans or payments that are NONELECTIVE with both AMOUNT and TIMING set by the employer

Elections

- Key procedures
  - Communicating about the election process
  - Receiving timely elections
  - Allowing for changes
  - Tracking elections
- What is permissible? What does the plan provide?

New Hires

- Employment agreements and negotiations
  - Eligibility for plans
  - Date of hire grants and equity pricing
  - Starting and retention bonuses
- Who is involved?
- What process exists to confirm compliance for new agreements?

Promotions and Transfers

- Changes in benefits can affect deferred compensation plans
- Is someone eligible for a plan mid-year?
- Protecting against inadvertent revocations

Departures and Severance

- Identify benefits
  - Retirement plans
  - Severance plans
  - Post-employment benefits
  - Outplacement benefits

- When is there a “separation from service”

- Provisions of employment agreements
  - What can be renegotiated?
  - Who is involved?

Specified Employees

- Who is a specified employee?
- What payments are subject to delay?
- Establishing "Specified Employee"
  - Consistent definition required across plans and agreements
  - Reference to single definition
  - Confirm what definition is used

Specified Employees

- Key procedures
  - Collect data
  - Identify specified employees
  - Flag distributions for delay if applicable
  - Notify affected employees

Reporting and Withholding

- Code Z
  - Applies only if there is a failure to comply with section 409A
  - When an amount is included in gross income of an employee the amount is reported on Form W-2 in boxes 1 and 12 using code Z
  - Non-employee amounts reported in box 7 and 15a of Form 1099-Misc
  - Employers report the amount on Form 941
  - Withholding is at the rate of 25% applicable to supplemental wages

- Code Y
  - Requires disclosure of deferred compensation
  - For years 2008 and later
  - Amount deferred for employees is reported on Form W-2 in box 12 using code Y
  - Non-employee amounts reported in box 15a of Form 1099-Misc

Key Points For Transition to January 1, 2009

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Key Points for Transition

- The form of the plan is required to be in compliance for periods on and after January 1, 2009
- Amendments are NOT required to retroactively bring the plan into compliance or document all operational compliance
- HOWEVER, taxpayers must be able to substantiate compliance with 409A during transition

Key Points for Transition

- Transition from good faith compliance to final regulations
- Stock rights:
  - Granted prior to publication of final regs, and comply with notice or proposed regs, but not final regs, can continue to operate in due course
  - Applies to wrong class of stock, not discounted options
  - Good faith attempt standard continues in effect for setting exercise price (Notice 2006-4)
  - Extensions generally in compliance

Key Points for Transition

- Initial deferral elections
  - Continue to be effective and in compliance if in compliance with statute or guidance
- Elections with respect to performance-based compensation
  - Performance-based compensation established by April 10, 2007
  - Deferral is permissible if made by deadline or December 31, 2008, if earlier
- Timing and form of payment DOES need to come into compliance, even if agreed upon during the transition period

Key Points for Transition

- Separation from Service
  - If in pay status, can continue or revise
  - If separated but not in pay status, commence by the end of 2007
- Good faith position with respect to application of 6-month delay will be respected

Key Points for Transition

- Material modification: Clarification that a change to a stock right that wouldn’t be a modification under 409A isn’t a material modification
- Open issue – what happens if a plan is materially modified outside of transition?
- Tweaks to grandfathering – deferral of vested bonus credited in ‘05 is grandfathered

Key Points for Transition

- Establish documented processes and controls for operational compliance

What Can We Expect Next?

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Corrections

- Notice 2007-100
  - Notice provides guidance on correction of plan failures to comply with 409A
  - Unintentional operational errors
  - Operational failures up to 402(g) limit
  - Other failures
  - Reporting
- Further program potentially under development

Additional Guidance

- Proposed regulations on includible income
  - How to calculate?
  - Potential for deductions for service providers?
- Code Y reporting
- 409A Guidance: Rev Proc 2008-61
  - Modifies Rev Proc 2008-3 to allow rulings in very specific areas (such as FICA and estate and gift taxes)
  - The Rev Proc also indicates specific, broad areas in which there is still a no-rule policy

Questions?

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MEMORANDUM TO CLIENTS

October 10, 2008

RE: **Financial Bailout Legislation – Summary of Benefits-Related Provisions**

Last week, the Senate and then the House of Represented passed, and on October 3rd the President signed into law, the controversial financial bailout legislation (H.R. 1424; Pub. L. No. 110-343) (the "Act"). The Act is divided into three divisions:

- the "Emergency Economic Stabilization Act of 2008" ("EESA") which contains the bailout provisions;
- the "Energy Improvement and Extension Act of 2008" (the "Energy package") which contains energy-related tax incentives, and
- the "Tax Extenders and Alternative Minimum Tax Relief Act of 2008" (the "Extenders package") which contains a one-year "patch" of the Alternative Minimum Tax ("AMT") and a two-year extension of various temporary tax provisions.

The voluminous legislation totals nearly 450 pages with over 140 different provisions. It contains significant restrictions on executive compensation at entities that participate in the bailout program, potentially onerous rules governing certain compensation paid to U.S. taxpayers working overseas for foreign affiliates, the extension of popular provisions related to charitable contributions from IRAs, additional disaster relief for individuals who live in areas declared as federal disaster areas, and additional restrictions related to offering mental health benefits in group health plans.

Part one of this memorandum describes the EESA, including the asset purchase program and the executive compensation restrictions that apply to participating entities. Part two describes the potentially burdensome new restrictions on offshore nonqualified deferred compensation. Part three contains the disaster relief and other benefits-related tax provisions in the Extenders package. Part four summarizes the mental health parity provisions.

I. Emergency Economic Stabilization Act

The EESA authorizes authorize the Secretary of Treasury to establish a new "troubled asset relief program" (or "TARP") to buy "troubled assets" from any "financial institution," subject to various conditions, limits and requirements. EESA would impose executive compensation limits and corporate governance requirements on any financial institution from which assets are purchased. In addition, it would generally require the Secretary to obtain from financial institutions, as part of the purchase transaction, warrants or a long-term note to help provide potential "upside" for taxpayers. EESA also contains a temporary increase in the FDIC insurance amount to $250,000 through the end of 2009.

As discussed more fully below, some pension plans may be able to take advantage of the TARP to sell troubled assets to the Treasury, although this point is far from clear at this time.

A. Troubled Asset Purchase Program and Pension Plans

Whether a pension plan can take advantage of the TARP depends on how Treasury interprets the definitions of "troubled assets" and "financial institution[s." Subject to certain limitations, EESA defines the term "troubled assets" generally to mean "residential or commercial mortgages and any securities, obligations or other instruments that are based upon such mortgages." The quoted language – especially "any securities . . . based upon such mortgages" – seems broad enough to cover most types of mortgage-based investments traditionally held by or on behalf of pension plans.

Similarly, EESA broadly defines the term "financial institution" to mean "any institution, including but not limited to, any bank, savings association, credit union, security broker or dealer, or insurance company" that is "established and regulated" under the laws of the United States or any State, territory, or possession of the United States, . . ., but excluding any central bank of, or institution owned by, a foreign government." Nothing in this language specifically excludes pension plans.

Other provisions of EESA more specifically reflect an intent to extend the TARP program to pension plans. Section 103 of EESA, for example, lists nine specific factors that the Secretary "shall take into consideration" in exercising the authorities granted under the Act. Two of those factors specifically mention pensions or retirement. In particular, the Secretary "shall" take into consideration:

> (2) providing stability and preventing disruption to financial markets in order to limit the impact on the economy and *protect* American jobs, savings and *retirement security*; [and]
>
> * * *
>
> (8) protecting the retirement security of Americans by purchasing troubled assets held *by or on behalf of an eligible retirement plan* described in clause (iii), (iv), (v), or (vi) of section 402(c)(8)(B) of the Internal Revenue Code of 1986 [defined to include section 401(a) and 403(a), 403(b) and governmental 457(b) plans, but excluding IRAs], except that such authority shall not extend to compensation arrangements subject to section 409A of such Code. . .

EESA § 103 (emphasis added). Consistent with these factors, the general statement of the statute's purposes, set forth in EESA section 2, includes a specific reference to protecting "retirement accounts." Additionally, another of the listed factors specifically requires that "all financial institutions are eligible to participate in the program, *without discrimination based on* size, geography, *form of organization*, or the size, type and number of assets eligible for purchase under this Act." EESA § 103(5)(emphasis added). Another provision requires the Secretary to use his authority under the Act in a manner that will "minimize any potential long-term negative impact on the taxpayer, taking into account . . . *the impact on the savings and pensions of individuals*, . . ." EESA § 113(a)(1) (emphasis added). Taken together with the

broad definitions of "troubled assets" and "financial institution," these excerpts strongly suggest that the Secretary may buy assets held by or on behalf of pension plans.

That said, the extent to which the Secretary, in fact, buys assets held "by or on behalf of" pension plan investors could depend greatly on how some key provisions of EESA are interpreted. To put these interpretive issues in context, it is useful to begin by considering the structures through which pension plans typically hold mortgage-based investments.

Pension plans can hold interests in mortgage-related investments directly or indirectly through investments in collective or pooled investment vehicles. Some common types of indirect ownership arrangements include interests held by pension plans in bank collective investment funds, insurance company pooled separate accounts, mutual funds, and private equity funds and hedge funds which often take the form of limited partnerships or limited liability companies. For purposes of ERISA, the underlying investments of some of these types of vehicles are considered to be owned by the pension plans that invest in them, but that treatment does not necessarily conform to official legal ownership (e.g., insurance company separate accounts are the insurance company's assets, but generally are ERISA plan assets). Pension plans also own mortgage related securities directly, in accounts managed by professional investment managers and held by trustees or custodians.

One important caveat to the application of EESA to this wide variety of direct and beneficial pension ownership arrangements may be a proviso that limits the bill's definition of "troubled assets" to those assets "the purchase of which the Secretary determines promotes financial market stability." This proviso implies that certain assets that might otherwise fit within the general definitional language quoted above might nonetheless *not* constitute "troubled assets" if the Secretary does not conclude that they are fueling market instability. For example, the Secretary arguably could determine that a mortgage-backed security or pool of securities owned by a long-term investor like a pension plan is not a "troubled asset," but that the same asset held directly by a bank for its own account is a troubled asset. This is because the bank, in contrast to the pension plan, is engaged in the business of lending money, and the Secretary might decide that focusing relief efforts on entities directly engaged in the lending business is the most efficient way to stabilize the financial markets.

In addition, the Secretary could conclude that he is "protect[ing] … retirement security" (as required by the EESA section 103 factors) by stabilizing the securities markets in which pension plans are major investors, and by shoring up the banks and other traditional financial intermediaries that manage and hold huge amounts of pension fund assets. In other words, the Secretary could conclude that direct purchases of troubled securities from pension plans are permitted but not required.

Additional factors complicating the application of EESA to pension plans are two sets of EESA provisions that impose additional conditions on TARP purchases. The first set of provisions imposes executive compensation limits (summarized below) and corporate governance requirements on any financial institution from which assets are purchased. See EESA §§ 111, 302. The second set of provisions generally requires the Secretary to obtain from financial institutions, as part of the purchase transaction, warrants or a long-term note to help provide potential "upside" for taxpayers. See EESA § 113.

Applying these provisions to pension plans creates still more interpretive problems. As noted, a pension plan may invest in mortgage-based assets either directly (e.g., through an account managed by an investment manager) or indirectly (e.g., through ownership of units in a collective investment trust, limited partnership or insurance company pooled separate account). If one considers the pension plan itself to be the "financial institution" from which a TARP purchase is made, EESA's restrictions on executive compensation and requirements for upside warrants or notes seem out of place. For example, most types of plans typically do not have "executives." Indeed, in the single employer plan context, plans are often "administered" by the "company" sponsoring the plan.

One also might view a plan's trustee or investment manager, or the entity that manages a collective investment vehicle, as the "financial institution" subject to the EESA restrictions. But applying EESA's executive compensation limits and warrant requirements to these entities would seem inconsistent with ERISA and with trust law generally. For example, it would make no sense for Congress to burden an institutional trustee (who might be a non-discretionary directed trustee) with executive compensation restrictions simply because that institution happened to hold troubled assets at the direction of the investing plans' fiduciaries.

Certain de minimis purchases would be exempt from some of the general executive compensation restrictions and warrant/long-term note requirements. Although this could moot some of the troublesome issues regarding EESA's application to pension plan investors, it does not answer the fundamental question of how such investors are intended to fit within the TARP purchasing scheme.

Importantly, EESA section 101(d) contemplates the prompt publication by Treasury of program guidelines for TARP purchases. It is possible that such guidelines would establish mechanisms, methods, procedures or criteria that tend to favor, or to disfavor, the purchase of certain kinds of assets or the purchase from certain types of financial institutions, such as pension plans.

B. Restrictions on Executive Compensation

EESA would impose new restrictions on the executive compensation that may be paid by financial institutions that participate in TARP. The nature and extent of the restrictions depend on whether troubled assets are acquired from the financial institution through a "direct purchase" or, instead, through an "auction sale."

1. Direct Purchases

When Treasury buys assets directly from the financial institution without going through a bidding process and receives a meaningful equity or debt position in the financial institution as a result of the transaction, the Secretary must require the financial institution to meet "appropriate standards for executive compensation and corporate governance," including:

- **Compensation Limits** – limits on compensation that exclude incentives for senior executive officers of the financial institution to take unnecessary and excessive risks that threaten the value of the institution;

- **Clawback of Previously Paid Bonus/Incentive Compensation** – recovery by the financial institution of any bonus or incentive compensation paid to a senior executive officer based on financial statements that are later proven to be materially inaccurate (i.e., a "clawback" provision); and

- **Golden Parachute Prohibition** – prohibitions on the financial institution making any golden parachute payment to its senior executive officers.

The term "senior executive officer" is defined as an individual who is one of the top 5 executives of a public company whose compensation is required to be disclosed pursuant to the Securities Exchange Act of 1934 and counterparts in non-public companies. These restrictions would apply for the duration of the period during which Treasury holds the equity or debt position in the financial institution.

2. <u>Auction Sales</u>

A financial institution participating in the TARP auction program that sells $300 million or more in assets (including any sales through direct purchases) would be subject to the following restrictions while the TARP is in effect. (In general, the TARP is to terminate on December 31, 2009, but may be extended until October 3, 2010.)

- **$500,000 Deduction Limit–** Code section 162(m) is amended to impose a new $500,000 per year limit (instead of $1 million) on the deduction permitted for the compensation of the CEO, CFO and top 3 highly compensated officers at the company (as determined on the basis of the shareholder disclosure rules under the Securities Exchange Act of 1934, whether or not such rules apply to the company). This provision is not limited to public companies – or even to companies – and does not contain any exception for binding contracts or "performance-based compensation." Thus, stock option gains and other types of incentive payments would be subject to the limit.

  Furthermore, companies could not get around this lower 162(m) limit by deferring non-deductible compensation into future years and attempting to take a deduction at that time. Once an employee becomes a covered executive for a year for which the restrictions apply, he will (1) remain a covered executive for all subsequent years for which the restrictions apply, and (2) continue to be treated as a covered executive even after the TARP expires with respect to compensation for an applicable year that is deferred into a future year. An example in a Technical Explanation prepared by the staff of the Joint Committee on Taxation ("JCT") clarifies that any earnings on compensation deferred with respect to an applicable year also would be subject to the limit for such year. This limitation will likely result in difficult to administer annual deferral and earnings calculations with respect to certain deferred compensation arrangements (e.g., DB SERPs).

- **Golden Parachute Limit –** The Code section 280G golden parachute rules would be amended to subject to the golden parachute rules any payments made upon the severance from employment of a top 5 officer (as defined in section 162(m)) by

reason of an involuntary termination or in connection with a bankruptcy, liquidation or receivership. The golden parachute rules generally provide that if an executive receives payments in excess of three times the executive's annual pay, the amount in excess of one times annual pay is not deductible and is subject to a 20% excise tax payable by the executive (Code sec. 4999). As noted in the JCT Technical Explanation, payments on account of severance from employment include amounts that vest or are accelerated on account of severance from employment. The exception in section 280G for "reasonable compensation" does not apply.

- **Prohibition of Golden Parachutes in New Employment Agreements –** Under guidance to be issued by Treasury by December 3, any new employment contract with a senior executive officer would be prohibited from providing a "golden parachute" in the event of involuntary termination, bankruptcy, insolvency, or receivership.

Whether assets a financial institution holds for pension plan clients would count toward the $300 million threshold that triggers these limits is unclear – along with many other issues.

It is important to note that certain concepts included in these new restrictions (e.g., once covered, always covered under section 162(m); applying restrictions to non-public companies) have been considered by Congress as part of more general changes to the executive compensation rules. As a result of the growing concerns about executive compensation, fallout from the financial markets crisis, and massive projected budget deficits, it is likely that Congress will consider applying these and other executive compensation restrictions more generally in coming years.

C. Increase in FDIC Insurance Coverage

Generally, the Federal Deposit Insurance Corporation insures the first $100,000 of basic savings deposits. Under EESA, this insurance amount is increased to $250,000 for the period from October 3, 2008 to December 31, 2009. This temporary $250,000 limit provides individuals with the same financial security that has applied to certain pension plans and IRA accounts on a "pass-through" basis since April 2006.

II. Offshore Deferred Compensation Restrictions

The provision to greatly restrict the use of certain offshore deferred compensation arrangements that has been included in several House and Senate-passed bills during the 110th Congress has been adopted in the Act as a revenue raiser to the Extenders package. Although this provision has been described in press releases and news articles as being targeted at hedge fund managers, it could potentially apply more broadly to U.S. employees of multinational employers.

A. Income Taxation upon Vesting

The provision would add a new Code section 457A to tax compensation deferred under a nonqualified plan of certain foreign entities at the time of vesting -- i.e., the deferred amounts

would be includable in an employee's income when such amounts are no longer subject to a "substantial risk of forfeiture." The restrictive tax treatment would apply to deferrals under nonqualified plans maintained by (1) any foreign corporation unless substantially all of its income is effectively connected with a U.S. trade or business, or subject to a "comprehensive foreign income tax," and (2) any partnership, unless substantially all of its income is allocated to persons other than foreign persons with respect to whom the income is not subject to a comprehensive foreign income tax, or to organizations which are tax-exempt. The term "comprehensive foreign income tax" is defined generally as an income tax of a foreign country if an applicable person is eligible for the benefits of a comprehensive income tax treaty, or Treasury otherwise determines that the foreign country has a comprehensive income tax.

Aggregation rules similar to the rules under Code section 409A apply for purposes of determining whether the plan sponsor is an entity subject to the provision. Thus, it appears that the provision could potentially apply in the case of U.S. taxpayers working for a foreign subsidiary of a U.S. multinational or a U.S. subsidiary of a foreign parent. A version of the provision in legislation recently passed by the House (H.R. 7060) and a JCT Technical Explanation of still another earlier version of the provision had indicated that the provision was not intended to apply to employees of a U.S. subsidiary of a foreign parent, but this language was not included in the final provision.

B. Expanded Definition of Nonqualified Deferred Compensation

The term "nonqualified deferred compensation plan" is generally defined to have the same meaning as under Code section 409A, with several major expansions that could apply these new restrictions to forms of compensation that are generally excluded from the application of Code section 409A.

1. Certain Equity Compensation

Under the provision, the definition of "nonqualified deferred compensation plan" specifically includes amounts that are "based on the appreciation in value of a specified number of equity units." The JCT Technical Explanation of an earlier version of the provision states that this definition is intended to apply to stock appreciation rights, but not to fair market value stock options and restricted stock subject to Code section 83. Although the JCT description does not specifically address the treatment of restricted stock units ("RSUs"), it appears that RSUs could potentially be covered by the expanded definition in all cases – regardless of whether the more restrictive short-term deferral provision (described below) applies – because the amount ultimately distributed under an RSU typically is based, at least in part, "on the appreciation" of the underlying stock.

2. Restrictive Short-Term Deferral Exception

One of the most useful exceptions from the application of Code section 409A is for amounts that are considered "short-term deferrals" distributed within the first 2 ½ months of the year after the year in which the amounts are no longer subject to a substantial risk of forfeiture. The JCT Technical Explanation of the earlier version provides that compensation is subject to a substantial risk of forfeiture only if the right to the compensation is conditioned on the future

performance of substantial services. Thus, the provision would not recognize a vesting condition that is "related to the purpose of the compensation" (e.g., performance-based conditions based on the satisfaction of objective performance criteria), as permitted under the Code section 409A and 83 regulations. Although the short-term deferral exception would be narrowed for purposes of the application of the offshore restrictions, the bill would extend the 2 ½-month short-term deferral payment period to 12 months after the year of vesting.

C. Penalties and Interest on "Not Determinable" Compensation

If the amount of deferred compensation is "not determinable" at the time the compensation is otherwise includible in income, it is includible in income in the year it becomes determinable, and the tax imposed that year is increased by interest and a 20 percent penalty. This could cause compensation that is contingent upon the satisfaction of predetermined performance goals to be subject to these penalties.

D. Effective Date; Regulatory Guidance

The amendment would generally be effective for amounts deferred that are attributable to services performed after December 31, 2008. However, amounts attributable to services before January 1, 2009 generally would be includible in income no later than 2017.

Treasury is directed to issue regulations as necessary to carry out the purposes of the provision, including regulations disregarding a substantial risk of forfeiture where necessary. Treasury also is directed to issue guidance within 120 days of enactment regarding the ability to amend nonqualified deferred compensation plans to conform the date of distribution to the date of income inclusion under Code section 457A. This provision also states that an amendment to provide for payment of a previously deferred amount upon inclusion in income under Code section 457A will not be considered a material modification for the purposes of Code section 409A.

III. Other Benefits-Related Tax Provisions

A. Disaster Relief

Throughout the summer, individuals throughout the Midwest suffered severe weather damage from storms, tornados, and flooding. The Act provides certain disaster relief to affected individuals living in areas of Alabama, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, and Wisconsin that were declared to be a major disaster area by the President on or after May 20, 2008 and before August 1, 2008. In general, the relief tracks the relief granted in connection with Hurricanes Katrina and Wilma.

1. Waiver of 10 Percent Early Withdrawal Penalty

Generally, a 10 percent additional tax is imposed on participants who receive a distribution from an individual retirement account ("IRA") or certain other tax-favored retirement plans (e.g., qualified plans and 403(b) plans) before attaining age 59 ½. Distributions from a governmental 457(b) plan are also subject to the 10 percent tax if such distributions are attributable to rollovers from a qualified plan or 403(b) plan, or an IRA. Amounts distributed are

taxable to the participant (and subject to the 10 percent additional tax) in the year in which they are received.

The legislation waives the 10 percent penalty tax for the receipt of an early distribution by IRA owners and participants in a qualified plan or 403(b) plan whose principal residence is located in the disaster area described above and who sustained economic loss by reason of the weather damage. The waiver is also applicable to affected governmental 457(b) participants who receive amounts attributable to rollovers from these plans. Principal features of this relief include the following –

- The waiver is (i) limited to amounts up to $100,000 and (ii) only available for early distributions made on or after the applicable disaster date and before January 1, 2010.

- The mandatory withholding rules applicable to eligible rollover distributions would not apply. Thus, the early distributions would be subject to the elective withholding rules, which require 10 percent of the distribution to be withheld unless the participant elects for withholding not to apply.

- Participants receiving an early distribution would be permitted to spread the income tax resulting from receipt of the distribution ratably over three years.

Amounts distributed may be re-contributed to the plan over a three-year period following the distribution and such re-contributions would be treated as tax-free rollovers. In other words, amounts that are re-contributed (within the three-year period) would not be includible in income in the tax year in which the distribution was made (e.g., if a participant received an "early" distribution in 2008 and subsequently re-contributed the distribution amount in 2010, the participant may file an amended return requesting a refund for the amount taxable in 2008).

2. Plan Loans

Generally, if a tax-favored retirement plan allows loans to plan participants, the loan cannot exceed $50,000 or 50 percent of the participant's total vested accrued benefit. The plan loan must be amortized in substantially level payments over the term of the loan, generally limited to 5 years.

The legislation effectively doubles the limitation on plan loans by allowing participants located in the disaster area described above and who sustained economic loss by reason of the disaster to receive loans up to the lesser of $100,000, or 100 percent of the vested accrued benefit for loans made beginning from October 3, 2008 to December 31, 2009. In addition, outstanding loan payments due on or after the applicable disaster date and before January 1, 2010 may be deferred an additional 12 months, with appropriate adjustments for interest and the term of the loan.

3. Re-Contribution of Withdrawals for Home Purchases

Generally, a participant may receive a hardship distribution under a Code section 401(k) or 403(b) plan (if the plan permits hardship distributions) for costs directly relating to the purchase of a principal residence. If such amounts are distributed before the participant attains age 59 ½, such amounts are includible in income and subject to a 10 percent penalty tax. In addition, distributions from IRAs for first-time homebuyers are generally subject to the 10 percent penalty to the extent the distributions exceed $10,000.

The legislation allows distributions for home purchases that were made after the date which is six months before the applicable disaster date and before the date that is the day before the applicable disaster date and that were not finalized because of the severe storms, tornados or flooding in the Midwest disaster area to be re-contributed to the plan tax-free (i.e., the re-contributions would be treated as rollovers). These amounts must be re-contributed by March 3, 2009 in order to receive favorable tax treatment. In other words, a participant who received a hardship distribution (or IRA distribution) to purchase or construct a principal residence, but was unable to purchase or construct the principal residence on account of the Midwest storms, would not be required to include the amounts in income (nor would the 10 percent penalty apply), so long as amounts are re-contributed to the plan by March 3, 2009.

4. Plan Amendments

The legislation allows certain retroactive plan amendments to effectuate the pension-related provisions included in the tax relief package. For example, plans that do not currently provide for loans may be amended retroactive to the effective date of the legislation to allow such loans to be made, up to the maximum loan amount and limited to the time period set forth under the legislation (see the discussion on Plan Loans, above). In other words, plans that do not otherwise allow loans to be made may make such loans to affected participants, and subsequently be amended retroactive to the effective date of the legislation. In addition, plans that do not currently accept rollovers may be amended retroactively to accept such rollovers. More specifically, because re-contributions of an early distribution or distributions to purchase or construct a principal residence are treated a "rollovers" under the legislation, plans that do not otherwise accept rollovers must be amended to accommodate any re-contributions to the plan. Generally, plans must be amended by December 31, 2010 (for calendar year plans). Governmental plans must be amended by December 31, 2012.

B. Extension of Charitable IRA Distributions

Deductions for charitable contributions are generally subject to specific income limits and depend on the form of the contributions. The Pension Protection Act of 2006 permitted, for a limited time period, individuals who have attained age 70 ½ to exclude from gross income amounts distributed from their traditional or Roth IRA to a charitable organization. This exclusion from income is limited to $100,000 per taxpayer per taxable year.

While this provision had expired at the end of 2007, the Extenders package extends it retroactively and through the end of 2009.

C. New Qualified Bicycle Commuting Reimbursement

A provision included in the Energy package would permit employers to reimburse employees for expenses associated with commuting by bicycle. "Qualified bicycle commuting reimbursement" (Code sec. 132(f)(1)(D)) means any reimbursement during the 15-month period beginning on the first day of the calendar year for bicycle expenses incurred during the calendar year. The reimbursable expenses are defined as reasonable expenses for the purchase of a bicycle and bicycle improvement, repair, or storage if the bicycle is regularly used to commute to work. The annual limit on the amount of the bicycle expenses that can be reimbursed is determined by multiplying $20 by the number of months during the year an employee regularly uses a bicycle for a substantial portion of their commute. Any month that an employee receives any other qualified transportation fringe benefit cannot be counted in determining the annual amount of qualified bicycle commuting months. Unlike parking and transit passes, this benefit may not be funded by the employee on a pre-tax basis. The provision applies beginning in 2009.

IV. Mental Health Parity and Addiction Equity Act

A. Background

Under the Mental Health Parity and Addiction Equity Act of 1996, group health plans were prohibited from placing lifetime or annual limits on mental health benefits that did not apply to substantially all medical and surgical benefits. Prior law had well understood limits. In particular, health plans were permitted to place limits on the number of annual visits and/or by adding additional cost sharing requirements for mental health treatment. For example, it was permitted under the prior law to include an 80% coinsurance for medical surgical benefits and a 50% coinsurance for mental health benefits. Different limits on the number of days of treatment were also permitted. The new 2008 Mental Health Parity Act prohibits such arrangements with certain exceptions described below, and expands the parity requirements to include the treatment of substance use disorders.

B. Mental Health Parity & Addiction Equity Requirements

The Mental Health Parity Act of 2008 amends the Employee Retirement Income Security Act of 1974 ("ERISA"), the Public Health Service Act ("PHSA") and the Internal Revenue Code ("Code") to prohibit group health plans that offer mental health or substance use disorder benefits from applying financial requirements or treatment limits that are more restrictive from those applied to substantially all medical surgical benefits. The new mental health and substance use disorder parity provisions go into effect for plan years beginning in or after 2010.

The Act requires that the financial requirements for mental health or substance use disorder benefits be "no more restrictive than the predominant financial requirements applied to substantially all medical and surgical benefits covered by the plan, and that there are no separate cost sharing requirements." The Act defines financial requirements to include deductibles, copayments, coinsurance, and out-of-pocket expenses.

The Act also requires that the treatment limits "applicable to mental health or substance use disorder benefits are no more restrictive than the predominant treatment limitations applied to substantially all medical and surgical benefits covered by the plan and there are no separate

treatment limitations." The Act defines treatment limitations to include limits on the frequency of visits, number of visits, days of coverage, or other similar limits on the scope or duration of treatment. The Act defines the term "predominant" to mean the most common or frequent of such type of limit or requirement (i.e. financial requirement or treatment limit).

The Act allows health plans to define the terms "mental health" or "substance use disorder" in accordance with applicable state and federal law. This important provision preserves the ability of health plans to better control the cost and scope of mental health and substance use disorder coverage.

C. Application

The new parity requirements apply only to group health plans that offer both medical surgical benefits and mental health or substance use disorder benefits. Plans that do not offer mental health or substance use disorder benefits are not required to make any changes. However, the Act does require a plan to offer out-of-network mental health or substance use disorder benefits if it offers out-of-network medical surgical benefits. The parity requirements generally apply to out-of-network mental health and substance use disorder benefits. The Act also exempts small employers with 50 or fewer employees and collective bargaining agreements in place before the Act's enactment until the later of January 1, 2009 or the collective bargaining agreement's termination (without regard to amendments or extensions).

Under the Act, group health plans may continue to use medical management techniques to the extent that such techniques do not conflict with the Act's parity requirements. Medical management techniques are protected by a rule of construction that states that nothing shall be construed as affecting the terms and conditions of the plan or coverage to the extent that the plan terms and conditions do not conflict with the new parity requirements. The rule of construction, together with the fact that the Act's basic requirements do not expressly preclude medical management practices that vary between medical and surgical benefits and mental health and substance use disorder benefits, appear to protect these cost saving techniques. However, the Act does require plans to disclose, upon request or as otherwise required by law, criteria used to make medical necessity determinations and the reasons for any denial of reimbursement for services.

D. Cost Exemption

The Act contains a cost exemption if the parity requirements cause a health plan's total costs to increase by 2% in the first plan year and 1% in subsequent years. The cost exemption requires plans to comply with the parity requirement for at least six months before claiming the cost exemption, which permits plans to avoid the parity requirements for the remainder of the year and the following plan year. To claim the cost exemption, a plan must notify the secretary of HHS, DOL, or the IRS, as well as appropriate state agencies and plan participants and beneficiaries that the plan intends to utilize the cost exemption. The plan must notify participants before taking advantage of the cost exemption. The notice to the secretary must describe the number of covered lives, the total cost of medical surgical, mental health, and substance use disorder benefits, and the total cost for mental health and substance use disorder benefits for the prior year and the year for which the exemption is sought.

The cost increase must be certified in writing by a qualified actuary who is a member of the American Academy of Actuaries and all underlying documentation must be retained by the plan for a period of six years, during which time such documentation is subject to audit.

E. Enforcement & State Law

The Act retains the current enforcement scheme, which provides that the DOL will enforce the parity requirements as applied to self-funded plans, and HHS will be the fall back regulator for insurers in states that do not adopt laws that meet the new federal requirements. In regulating insurers, states may adopt the federal parity requirements or their own parity laws, provided that such laws do not prevent the application of the new federal requirements. This allows states to go further and ensures that state mental health coverage mandates are preserved.

F. Reporting Provisions, Regulations & Effective Date

The Act requires federal government agencies to comply with new reporting and disclosure requirements. The DOL is required to submit a report to Congress by January 1, 2012, and every two years thereafter to report on group health plan compliance with new parity requirements. The DOL is also required, in connection with HHS and Treasury, to publish and widely disseminate guidance and information on the application of the Act, for health plans, participants, beneficiaries, states, and other regulatory bodies.

The Comptroller General is required to undertake a study analyzing the rates, patterns, trends, coverage, and exclusions of specific mental health and substance use disorder diagnosis by health plans. Within three years of the Act's enactment and every two years thereafter, the Comptroller General shall submit a report to Congress summarizing the research.

Finally, the Act requires the appropriate agencies issue regulations no later than October 3, 2009. The Mental Health Parity Act of 2008 goes into effect for plan years beginning after October 3, 2009, regardless of whether regulations are issued.

* * *

Please call one of the following, or the Groom attorney you regularly contact, if you have any questions about these matters.

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MEMORANDUM TO CLIENTS

July 23, 2008

RE: <u>409A YEAR-END SURVIVAL GUIDE</u>

As widely reported, the IRS is highly unlikely to postpone the December 31, 2008 deadline for revising executive compensation arrangements to comply with Code section 409A. This date also marks the end of the 409A transition period, which has already lasted nearly four years and provided employers and executives with great flexibility. We offer below (1) drafting tips for amending these arrangements, (2) aids in identifying arrangements subject to 409A, and (3) action items in light of the transition period ending.

Drafting Tips

For arrangements that are subject to 409A, everyone should be aware of the need to limit distribution events to those permitted under 409A and the six-month delay on certain payments. Below are some slightly more advanced suggestions for plan documents and executive agreements.

Offsetting Nonqualified Plans – The IRS has made clear that if benefits under one plan subject to 409A (such as a pension or severance plan) reduce the amount of benefits provided under another plan subject to 409A, both plans normally need to have the same distribution rules.

Debts Owed Employer – 409A arrangements should not provide that benefits will be reduced to the extent an employee owes the employer money (although there is a $5,000 de minimis exception that might apply).

As Soon as Practicable – Payment timing under 409A arrangements needs to be more precise than "as soon as practicable" after a payment event (e.g., within 90 days).

Lump Sums Upon Plan Termination – While 409A plans may be terminated in limited circumstances, it is not acceptable to state that an employer may terminate such a plan at any time and pay immediate lump sums to all participants.

Releases – If payment of a 409A amount is contingent on execution of a release by an executive, the payment date should not be based on when the release is signed (e.g., severance will be paid 60 days after separation from service).

Taxable Reimbursements – The 409A regulations provide fairly simple payment rules that can make taxable post-termination reimbursements (e.g., gross-ups, medical, relocation, financial planning) either exempt from 409A or compliant with the 409A distribution rules.

Inadvertent Material Modifications – If there are grandfathered amounts under a plan, it is advisable to provide that amendments to the 409A portion of the plan will not impact the grandfathered amounts unless the amendment states otherwise.

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Savings Clauses – While it will not remedy non-compliant plan provisions, a clause stating that a plan is intended, and will be operated, to comply with 409A is still desirable.

Keep It Simple – The more complicated the deferral election and/or distribution scheme under a plan, the harder it is to ensure 409A compliance, and the more likely it is the scheme will not be followed resulting in a 409A violation.

You Might Have a 409A Arrangement If

For several reasons, it is preferable to have an arrangement fit within an exemption from coverage and avoid 409A altogether. Unfortunately, otherwise exempt arrangements (e.g., restricted stock units, long-term bonus plans, severance) will be covered because of provisions addressing:

- ***Retirement, or***
- ***Good Reason Termination***

These types of provisions often cause an arrangement to lack a "substantial risk of forfeiture," and thus, fail to qualify for the short-term deferral exemption. These arrangements need to be carefully reviewed and either revised to fit within an exemption or made 409A compliant.

Year-End Action Items

Last Chance for Maximum Payment Flexibility – Through December, employers and employees may continue to change (with limited restrictions) the payment time and/or form for 409A amounts without regard to the "no acceleration" and "12-month/5-year" rules that will apply to such changes after 2008.

Bonus Deferral Elections – If bonuses based on 2009 performance will not qualify as "performance-based compensation" under 409A, bonus deferral elections need to be made by December 31, 2008 rather than by June 30, 2009.

Explanatory Memo – An employer with a complicated deferral election and/or distribution scheme under a 409A arrangement may want to document in a memorandum how the scheme complies with 409A. This type of documentation could be very helpful if the IRS audits an arrangement in the future.

* * *

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Ms. Drigotas received an A.B. in History from Bowdoin College in Maine, and a J.D. from the University of North Carolina at Chapel Hill. She is a member of the Employee Benefits Committee, Section of Taxation, American Bar Association, the State Bar of Texas and the Maryland State Bar Association.

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Ms. Morrison's practice focuses on executive compensation, qualified retirement plans, employee stock ownership plans (ESOPs) and business succession planning. She is a frequent speaker and author on these topics.

Ms. Morrison received her bachelor's degree in 1979 from Trinity College, Hartford, CT. In 1985, she received her juris doctor degree, *cum laude*, from Illinois Institute of Technology/Chicago-Kent College of Law. She was admitted to the Illinois bar in 1985, and served as a law clerk to the Honorable Hector M. Laffitte of the U.S. District Court in San Juan, Puerto Rico, from 1985 to 1987.

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Before joining Groom in May 2005, Bill was the Benefits Tax Counsel in the Office of the Tax Policy at the U.S. Department of the Treasury. The Benefits Tax Counsel is the principal legal advisor to the Secretary of the Treasury and the Assistant Secretary for Tax Policy with regard to all aspects of employee benefits taxation and related matters, including pensions, health care and executive compensation. Bill was the Treasury's primary contact with Congress with regard to the IRA and pension provisions in the Economic Growth and Tax Relief Reconciliation Act of 2001. Bill also led the team at the Treasury in its guidance efforts with regard to consumer-directed health care (such as Health Savings Accounts and Health Reimbursement Arrangements) and the new executive deferred compensation rules.

Prior to the Treasury Department, Bill was Tax Counsel on the Majority Staff of the U.S. Senate Committee on Finance, under the chairmanship of Senator William V. Roth of Delaware. At the Committee, he was responsible for tax matters in the areas of employee benefits (pensions, medical plans, and executive compensation), retirement savings vehicles (such as IRAs), insurance and tax-exempt organizations (including charitable giving). During his tenure, Bill was involved with the Retirement Savings and Security Act (which unanimously passed through the Finance Committee), the Patients' Bill of Rights and the IRS personnel flexibility provisions in the IRS Reform and Restructuring Act.

Bill's government work has taught him that, as he observes, "The law is a living thing that changes all the time. From a legislative perspective, I tried to help direct some of that change, especially during my time in government." He believes that the nature of employee benefits law makes it all the more important to try to influence change in the most positive way possible. "One of the reasons I chose employee benefits," he says, "was that, in the end, you were trying to help workers and their families—either helping them to prepare for the future through retirement plan benefits or to help keep them healthy and safe through medical and insurance benefits."

Bill is admitted to practice in New York and Washington, D.C.

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Paul Wessel is the head of Milbank's Compensation and Benefits Group of the Tax Department, based in the New York office. His practice includes all aspects of employee compensation and benefits law, with a particular focus on corporate transactions and executive compensation matters.

Mr. Wessel has represented numerous public and privately held companies, boards of directors and compensation committees, individual corporate executives and management groups. He provides advice on the compensation and benefits aspects of mergers and acquisitions, leveraged buyouts, public offerings and other corporate transactions. He regularly advises clients in connection with the design and implementation of equity compensation and incentive plans, qualified and nonqualified pension plans, employment, severance and change in control agreements, and other executive compensation arrangements. Mr. Wessel also represents clients in connection with ERISA fiduciary matters and employee benefits litigation.

Mr. Wessel currently serves as the Chairman of the Executive Compensation Subcommittee for the ABA Business Law Section, and is a Member of the New York State Bar Association Tax Section. He is a frequent speaker on executive compensation matters and has been published and quoted in the media on current issues in this area.

Mr. Wessel is admitted to practice in New York State and in the U.S. District Courts for the First and Second Departments of New York. He is listed in The Best Lawyers in America and The Best Lawyers in New York for Employee Benefits Law. Prior to joining Milbank, Mr. Wessel was the head of the Compensation and Benefits practice group at Dewey Ballantine LLP.

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