

Executive Compensation, Benefits and Employment Law Focus

In This Issue...

Section 409A Deadline: Act Now to Comply in Time	1
IRS Makes Welcome Changes to Its Correction Program for Tax-Qualified Retirement Plans	3
The Intricate Web of Plan Amendments Explained	5
Reviewing the Status of Section 409A Transition Relief.....	6
Proposed IRS Regulations Require Employers to File Information Returns in 2009 on Incentive Stock Options.....	6
DOL Confirms a US Bank's Non-US Branches May Hold ERISA Plan's Non-US Assets Outside US.....	9

Section 409A Deadline: Act Now to Comply in Time

By **December 31, 2008**, all nonqualified deferred compensation arrangements subject to Section 409A of the Internal Revenue Code must be formalized in a written document that complies with Section 409A and the authority thereunder. If such an arrangement fails to satisfy the documentary compliance requirements of Section 409A, the vested benefits of employees and other service providers participating in the arrangement may become subject to adverse tax consequences, including:

- Accelerated taxation
- An additional 20 percent federal income tax
- Interest at the underpayment rate plus an additional one percent.

Background on Section 409A

Section 409A generally provides that vested amounts deferred under a nonqualified deferred compensation arrangement are currently includible in taxable income, unless the arrangement meets specified **documentation** and **operational** requirements.

To satisfy the documentation requirements, all material terms of the deferred compensation arrangement must be in writing, including:

- The identity of the covered participants
- The deadline for elections to defer compensation
- The amount of compensation to be deferred
- The time and form of payment of the deferred compensation
- The restrictions on the ability to change the designated time and form of payment
- The list and definition of the permitted distribution events
- The six-month delay of any payment of deferred compensation to "specified employees" of public companies on account of their separation from service.

To satisfy operational requirements, companies must administer nonqualified deferred compensation arrangements in accordance with Section 409A and the written terms of the arrangement.



The White & Case LLP EXECUTIVE COMPENSATION, BENEFITS AND EMPLOYMENT LAW FOCUS is prepared for the general information of our clients and other interested persons. This memorandum is not, and does not attempt to be, comprehensive in nature.

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Executive Compensation, Benefits and Employment Law Focus

Accordingly, for example, the arrangement must be administered to:

- Effectuate applicable restrictions on deferral elections
- Limit the time and form of payments to one or more of the six permissible payment events
- If funding is utilized, prohibit impermissible offshore funding arrangements and funding during the period the company's pension plan is in "at-risk" status
- Prohibit an impermissible acceleration or delay in payments of deferred compensation
- Fulfill tax reporting and withholding obligations.

Immediate Actions

All companies, who have not already done so, should immediately **identify** and, if necessary, **amend** plans and arrangements (written and unwritten) that are potentially subject to Section 409A. Common types of arrangements which potentially provide nonqualified deferred compensation subject to Section 409A include:

- Deferred salary and compensation plans
- Certain bonus and incentive pay plans
- Supplemental executive retirement plans (SERPs)
- Certain stock rights
- Employment or consulting agreements and offer letters
- Reimbursement policies
- Severance agreements
- Split-dollar life insurance policies
- Change-in-control agreements
- Tax gross-up arrangements

Upon identifying nonqualified deferred compensation arrangements, companies should contact legal counsel to perform a comprehensive review to ensure that the identified arrangements are either exempt from, or brought into compliance with, the technical requirements of Section 409A.

Amendments to nonqualified deferred compensation arrangements may require consent from affected service providers, review and approval of the board

of directors or compensation committees, revision of employee communications and election forms to comply with the law and the corresponding plan document, and disclosures in SEC filings for public companies. **Accordingly, companies should act immediately to stay on track to meet the documentary compliance deadline.**

Other Section 409A Year-End Deadlines to Watch For

Section 409A has been in effect since January 1, 2005, and all arrangements have generally been subject to good faith operational compliance since that time. While identifying and amending nonqualified deferred compensation arrangements, companies should audit their operations for compliance with Section 409A. This review of operational procedures will help companies determine whether the IRS correction program for certain unintentional operational failures is available. In particular, certain operational failures that occurred in 2008 may be cured under the correction program by December 31, 2008, in order to avoid accelerated income inclusion and tax penalties.

The IRS and Treasury have provided transitional relief regarding documentary compliance, which ends on December 31, 2008. Companies should take advantage of this final opportunity, which allows for payment election changes without regard to the "anti-acceleration" and "five-year" rules. After 2008, any change to the time or form of a payment of deferred compensation must be scheduled for a date that is at least five years from the originally scheduled payment date.

Conclusion

The process of amending nonqualified deferred compensation arrangements may be extremely involved and time-consuming. Without delay, companies should inventory all compensation arrangements potentially subject to Section 409A and determine whether the identified arrangements are either exempt from, or brought into compliance with, the technical requirements of Section 409A. White & Case would be happy to assist in your Section 409A compliance review.

IRS Makes Welcome Changes to Its Correction Program for Tax-Qualified Retirement Plans

On September 2, 2008, the Internal Revenue Service (IRS) issued Revenue Procedure 2008-50 which updated and expanded its comprehensive system of correction programs, the Employee Plans Compliance Resolution System (EPCRS), for retirement plans. The new EPCRS retains the basic structure of Revenue Procedure 2006-27, the predecessor to Revenue Procedure 2008-50, but makes a number of enhancements and expansions to the prior version of EPCRS.

Background

By way of background, EPCRS is designed to assist sponsors of retirement plans to voluntarily correct certain errors that, if uncovered by the Internal Revenue Service (IRS) on audit, could lead to plan disqualification. Notably, the IRS generally takes the position that any plan error, no matter the size, is sufficient basis for plan disqualification. In this regard, the consequences of the disqualification of a retirement plan are as follows: (1) for open tax years, the employer loses its tax deduction for nonvested contributions made to the plan for such years; (2) for open tax years, participants recognize income with respect to their vested accrued benefits; (3) for open tax years, the plan's underlying trust recognizes income on its earnings; (4) distributions from the disqualified plan are not eligible for rollover into another tax-qualified vehicle (i.e., all participant monies are subject to immediate taxation) and (5) the plan sponsor and/or the plan fiduciaries responsible for failing to maintain the plan's tax-qualified status face the risk of lawsuits by participants who are forced to prematurely recognize income under (2) and (4) above.

The three components of EPCRS are: (1) the Self-Correction Program (SCP), which allows plan sponsors to correct certain "insignificant" operational failures without notifying the IRS or paying the IRS any compliance fee; (2) the Voluntary Correction Program (VCP), which allows plan sponsors to request IRS approval of a proposed correction and

to pay a fixed compliance fee that is based upon the number of plan participants, provided the IRS has not yet identified the applicable failure on its own through the audit process or otherwise; and (3) the Audit based Closing Agreement Program (Audit CAP), which allows plan sponsors to correct failures during an IRS audit by means of a negotiation with the IRS of a correction methodology and compliance fee.

Updates and Expansions to EPCRS

The following items are the most significant ways in which the IRS updated and expanded EPCRS in Revenue Procedure 2008-50:

1. *Failure to Include an Eligible Employee*—The correction method for a failure to include an eligible employee in a Section 401(k) plan has been expanded to include a situation in which elective deferral contribution elections are not implemented by the plan sponsor or are implemented in a manner that is inconsistent with the plan's terms. Specifically, a plan sponsor may correct such failure by making a corrective contribution for the employee's missed opportunity to make elective deferrals and any missing employer matching contributions, including earnings. With respect to missed employee elective deferrals due to the plan sponsor's failure to implement a participant election on a timely basis, the employer must make a contribution, adjusted for earnings, equal to 50 percent of the employee's "missed deferral." The missed deferral is calculated by multiplying the employee's elected deferral percentage by the employee's compensation for that year (reduced as necessary so that the missed deferral does not exceed plan limits, including the IRS' annual limit on employee elective deferrals). With respect to any missing employer matching contributions, the employer makes a contribution, adjusted for earnings, equal to the matching contribution the employee would have received had the employee made a deferral equal to 100 percent of the missed deferral amount.

Executive Compensation, Benefits and Employment Law Focus

Prior to this expansion, because EPCRS applied this correction methodology only to situations involving a “failure to include” an otherwise eligible employee in the plan, many plan sponsors were uncomfortable applying it to situations in which elective deferral contribution elections were implemented in a manner that was inconsistent with the plan’s terms. Therefore, the typical correction for such an error was for the plan sponsor to make a contribution based upon the employee’s actual election that was erroneously processed. The revised EPCRS methodology eliminates the windfall such correction provided to such employee.

2. *Earnings*—Earnings adjustments for corrective contributions or distributions derived from the Department of Labor’s Voluntary Fiduciary Correction Program’s (i.e., a program designed to encourage employers to voluntarily comply with the Employee Retirement Income Security Act by self-correcting certain violations of such law) online calculator (which is located at <http://askebsa.dol.gov/VFCPCalculator/WebCalculator.aspx>) may now be applied to corrective contributions, distributions, allocations and/or reallocations if it is not otherwise feasible to make a reasonable estimate of what the actual investment results have been. Previously, plan sponsors that were unable to calculate actual investment results were generally required to apply earnings based upon the plan’s “best performing fund.”

3. *Streamlined Application Procedures*—The current VCP rules provide a streamlined application procedure to correct a failure to adopt interim amendments and certain other legally required plan changes. The revised EPCRS provides new and expanded streamlined application procedures for (a) loans in excess of maximum amounts permitted by the Internal Revenue Code, (b) a failure to distribute elective deferrals in excess of Internal Revenue Code maximum annual limitations, (c) a failure to pay required minimum distributions, (d) certain corrections permitted to be made by plan amendment, (e) plan sponsor eligibility failures and (f) certain failures relating to simplified employee plans and individual retirement accounts.

4. *Excise Taxes*—Amounts improperly distributed to participants, which a participant has then rolled over to an IRA, are currently subject to a six percent excise tax under Section 4973 of the Code and may be subject to a ten percent excise tax on early distributions (if the participant was less than 59½ at the time of the distribution). However, the revised EPCRS states that, in appropriate cases, the IRS will not pursue such excise taxes relating to excess contributions made to IRAs if the recipient removes the overpayment and earnings from the IRA and returns them to the applicable plan.

5. *Deminimus Corrections*—Under the revised EPCRS, if the total corrective distribution due to a participant is US\$75 or less (up from US\$50 or less under the prior version of EPCRS), the plan sponsor is not required to make the corrective contribution if the reasonable direct costs of pursuing and delivering the distribution to the participant would exceed the amount of the distribution.

6. *Expansion of the Availability of SCP for Substantially Complete Corrections*—In order to qualify for correction under SCP, correction of a significant operational failure must be at least “substantially complete” prior to the IRS placing such plan under examination. In this regard, the revised EPCRS indicates that correction is substantially complete if it is at least 65 percent complete, down from 85 percent in the prior guidance.

7. *Plan Loans*—In addition to the extension of the use of a standardized VCP for some plan loan failures, Revenue Procedure 2008-50 make two other significant changes to facilitate plan loan corrections. First the definition of plan loan failures that can be corrected through EPCRS is expanded to include violations of the Internal Revenue Code Section 72(p) (i.e., the section of the Internal Revenue Code that provides exceptions from the tax that would otherwise be triggered by plan loans). In addition, the compliance fee for a plan is reduced by 50 percent, where (a) the only failure is the failure of plan loans to meet the requirements of such section 72(p) and (b) the plan loan failure affected no more than 25 percent of the plan participants.

8. *Sample Application Form*—A new sample application form is provided in Appendix D to EPCRS.

9. *Contribution Failures*—The definition of excess amounts within EPCRS has been updated and specified corrections have been provided for failures relating to excess amounts, including those that exceed the limitations in Sections 415 and/or 401(a) (17) of the Internal Revenue Code or that exceed plan-imposed contribution limitations.

10. *Determination Letter Applications*—The requirements for submitting a determination letter application when correcting certain qualification failures by plan amendment have been revised.

Effective Date

The updated EPCRS is generally effective January 1, 2009, but plan sponsors are free to

apply its provisions beginning September 2, 2008. Because the changes to EPCRS are generally beneficial expansions, plan sponsors will want to utilize the revised EPCRS immediately.

Conclusion

The updates to and expansion of EPCRS are welcome changes available to plan sponsors and their advisors in maintaining tax-qualified status with respect to retirement plans. Because of the severe penalties associated with the disqualification of a tax-qualified retirement plan, to the extent a plan sponsor discovers any instance of noncompliance, legal counsel should be consulted to help ensure that such noncompliance is adequately fixed through EPCRS. Should such a discovery be made, White & Case would be pleased to assist you in this regard.

The Intricate Web of Plan Amendments Explained

Sponsors of tax-qualified retirement plans must keep their plans up-to-date by periodically amending them to comply with changes in applicable law and official government-issued guidance. Unfortunately, the amendment process is not a simple process; in fact, there are several types of required plan amendments, each potentially having a different deadline.

Generally, the three categories of plan amendments that plan sponsors currently must be aware of are (i) amendments required by the Pension Protection Act of 2006 (for calendar year plans, the amendment deadline is December 31, 2009); (ii) amendments required by the IRS determination letter submission process, as detailed on the IRS “annual cumulative list” (this amendment deadline depends upon which filing cycle an employer is assigned to, as determined by its

EIN; for example, for “Cycle C” filers (i.e., EINs ending in 3 or 8) the amendment deadline is January 31, 2009) and (iii) interim and discretionary amendments (generally, the amendment deadline with respect to an interim amendment is on or before the applicable “remedial amendment period” and the amendment deadline with respect to a discretionary amendment is on or before the end of the plan year in which such amendment is effective). In addition, there are certain other special amendment deadlines and exceptions.

White & Case has published a more detailed article to help explain the three main categories of plan amendments, along with the deadlines for making such amendments. The article, from the August 4, 2008 issue of RIA Pension and Benefits Week, is attached.

Reviewing the Status of Section 409A Transition Relief

Section 409A of the Internal Revenue Code for the first time comprehensively codifies the federal income tax treatment of nonqualified deferred compensation. In general, Section 409A provides that non-complying deferrals can be subject to accelerated inclusion in income, an additional 20 percent tax and interest. Extensive and complex final regulations were issued in 2007.

Full compliance with Section 409A is scheduled to be required in less than four months, by January 1, 2009. This deadline is the result of the considered and responsive review by personnel from Treasury, the IRS and the legislative branch, as 2007 ran its course. At that time, an extension sought by the market from an impending December 31, 2007 deadline was, gratefully, granted, ostensibly on the basis that compliance by year-end 2007 would be difficult to achieve, would result in inordinate corporate distraction and would produce a less-than-optimal quality of compliance.

There are suggestions in the market that it may be time to review the present state of Section 409A transition relief. See the blog on this topic of earlier today—Oringer, “Reviewing the Scope of Section 409A Transition,” BNA Pension and Benefits Blog, <http://pblog.bna.com/penben/2008/09/reviewing-the-s.html> (September 24, 2008). Also see our comments on the latest developments, quoted in the September 25, 2008 edition of BNA’s Pension and Benefits Daily. In this regard, circumstances have changed, and the financial crisis has thrown a wide range of institutions into disarray. In addition, there continues to be considerable substantive interpretive uncertainty, arguably making complete and total compliance by December 31, 2008 difficult at best to attain, even under the best of market conditions.

We will continue to follow whether there is any regulatory movement regarding additional transition relief.

Proposed IRS Regulations Require Employers to File Information Returns in 2009 on Incentive Stock Options

Employers are currently required to provide annual information statements to employees concerning incentive stock options and stock purchased under employee stock purchase plans. Proposed Treasury Regulations that were recently issued by the Internal Revenue Service (Prop. Treas. Reg. Section 1.6039-1, 73 Fed. Reg. 40999 (July 17, 2008)) would require employers to file similar annual information returns with the IRS.

Background

Employers are currently required to furnish information statements to employees who receive stock upon the exercise of incentive stock options.

Employers are also required to furnish information statements to employees who transfer stock that was purchased under an employee stock purchase plan. These information statements must be provided by January 31st of the year following the year for which the statement is required.¹ Section 1.6039-1 of the Treasury Regulations prescribes the content of these statements.

The Tax Relief and Health Care Act of 2006 amended the Internal Revenue Code to require employers to file an information return with the Internal Revenue Service, in addition to providing employees with an information statement, concerning incentive

¹ Final regulations under Section 6039 were issued in 2004. The written statement requirements generally became applicable as of January 2006 or January 2007 with respect to certain grants. Previously, the Internal Revenue Service indicated that these written statement requirements would not apply until final regulations under Section 6039 were issued. See Information Letter from James G. Gibbons, Internal Revenue Service, Office of Chief Counsel, to Ernst & Young LLP (July 18, 2001).

stock options and employee stock purchase plans. The IRS waived the obligation to file these information returns for stock transfers occurring in 2007. IRS Notice 2008-8. As noted below, the new proposed regulations again waive information return obligations for transfers occurring in 2008.

Information returns and statements for incentive stock options

For incentive stock options, the proposed regulations would require a corporation that transfers stock pursuant to an employee's exercise of an incentive stock option to file a return with respect to each transfer made during a particular year. The return would include the following information:

- The name, address, and employer identification number of the corporation transferring the stock issued to the employee (and the name and address of the corporation whose stock is being transferred, if different from the corporation transferring the stock—for example, if the employer transferring the stock is a subsidiary of the issuer)
- The name, address and social security number of the employee
- The date the option was granted
- The exercise price per share
- The date the option was exercised
- The fair market value of a share of stock on the exercise date of the option
- The number of shares transferred upon exercise of the option.

The content of the information return is substantially the same as that of the information statement currently required to be provided to employees, except that instead of reporting the total cost of all shares purchased, the exercise price per share is reported. The information return will be made on a new form, Form 3921, which the IRS expects to release later this year. Facilitating compliance, Form 3921 will also serve as the information

statement that the corporation is required to provide to employees. These returns and information statements must be filed and provided to employees no later than January 31 following the calendar year to which they relate.

Information returns and statements for stock purchased under employee stock purchase plan

The proposed regulations would require a corporation to file a return concerning each recorded transfer made during a particular year by an employee of legal title of a share of stock that the employee purchased under an employee stock purchase plan. This return is only required if the purchase price of the stock is less than the fair market value of the stock on the date the option or purchase right was granted (i.e., the beginning of the offering period). The return would include the following information:

- (1) The name, address and social security number of the employee
- (2) The name, address and employer identification number of the corporation whose stock is being transferred
- (3) The grant date of the option (purchase right)
- (4) The fair market value of the stock on the grant date of the option (purchase right)
- (5) The exercise price (purchase price) per share
- (6) The exercise date of the option (purchase date of the shares)
- (7) The fair market value of the stock on the exercise date (purchase date)
- (8) The date when legal title of the shares was transferred by the employee
- (9) The number of shares to which legal title was transferred by the employee.

This return adds items (3) through (7) to the information contained in the information statement currently required to be provided to employees

Executive Compensation, Benefits and Employment Law Focus

concerning stock purchased under an employee stock purchase plan. The information return will be made on a new form, Form 3922, which the IRS expects to release later this year. Facilitating compliance, Form 3922 will also serve as the information statement that the corporation is required to provide to employees who transfer stock purchased under an employee stock purchase plan. The information contained in this form is intended to enable employees to determine their tax obligations when they dispose of shares purchased under an employee stock purchase plan. These returns and information statements must be filed and provided to employees no later than January 31 following the calendar year to which they relate.

A return or statement is required only with respect to the first transfer of a share by the employee who purchased the share under an employee stock purchase plan. For example, if the employee transfers record title to shares to a recognized broker or financial institution, and the shares are subsequently sold by the broker or institution on behalf of the employee, the corporation is only required to file a return and furnish a written statement to the employee relating to the transfer of record title to the broker or financial institution. Similarly, a return and a written statement are required when a share of stock is transferred by the employee to himself and another person (or persons) as joint tenants, tenants by the entirety or tenants in common. However, when stock is originally issued to the employee and another person (or persons) as joint tenants, or as tenants by the entirety, the return and written statement are only required to be filed and furnished with respect to this first transfer of the title to such stock by the employee.

Every corporation which transfers a share of stock under an employee stock purchase plan to which the information return and statement requirements described above apply is required to identify such stock in a manner sufficient to enable the accurate

reporting of the transfer of record title to such shares. Such identification may be accomplished by assigning to the certificates representing these shares of stock a special serial number or color.

Mailing or electronic transmission of information statements

Rules on furnishing information statements electronically and by mail, which are currently addressed in existing Treasury Regulations, will be addressed in instructions to Forms 3921 and 3922.

Penalty for failure to file; extensions

The Internal Revenue Code currently imposes penalties for failure to provide information statements required by Section 6039. The Internal Revenue Code generally imposes a US\$50 penalty for each such statement that is either not furnished or is furnished but contains incorrect or incomplete information, up to a cap of US\$250,000 for all such failures during any calendar year. If an employer intentionally disregards any requirement to furnish an accurate and complete information statement, the penalty imposed under the Internal Revenue Code increases to US\$100 per statement or 10 percent of the aggregate amount of the items reported to be reported correctly, whichever is greater, and the US\$250,000 cap does not apply. The Internal Revenue Code also provides that these penalties will not be imposed if it is shown that the failure was due to reasonable cause and not to willful neglect.

The proposed regulations would impose these same penalties with regard to failures to file or furnish information returns and statements.

Currently, an extension of 30 days to furnish the information statements may be granted by the IRS if good cause is shown. The application for an extension must be filed before the date the employer is required to provide such statement to employees without an extension.

The instructions to Forms 3921 and 3922 will provide guidelines and procedures for the granting of extensions of time to file or furnish the required returns and information statements.

Effective date; transition period

Once final regulations are published, they will apply as of January 1, 2007. However, for stock transfers occurring in 2007 and 2008:

- Employers are not required to file the information returns described above

- Employers may comply with existing information statement requirements by relying on either existing Treasury Regulations (Section 1.6039-1) or the new proposed regulations.

We would be pleased to discuss any questions or concerns you may have concerning a corporation's information return and information statement obligations for stock transfers under incentive stock option and employee stock purchase plans.

DOL Confirms a US Bank's Non-US Branches May Hold ERISA Plan's Non-US Assets Outside US

In an advisory opinion, dated April 8, 2008 (Adv. Op. 2008-04A), the Department of Labor (DOL) considered the application of the indicia of ownership requirements of the Employee Retirement Income Security Act of 1974, as amended (ERISA), to off-shore pooled investment products of a United States bank in which ERISA plans invest. Non-US managers or custodians of ERISA plan money are among those who should be familiar with these detailed requirements.

Generally speaking, an ERISA plan fiduciary may not maintain the indicia of ownership of ERISA plan assets outside the jurisdiction of the US district courts. However, DOL regulations provide rules which allow the indicia of ownership of certain types of plan assets to be maintained outside the US. To be eligible for these rules, the asset must be:

- (a) A security issued by a person which is not organized under the laws of the US or a state and does not have its principal place of business in the US
- (b) A security issued by a government other than the government of the US or a state, or of any political subdivision, agency or instrumentality of such a government

- (c) A security whose principal trading market is outside the US, or
- (d) The currency of a government other than the US government if the currency is maintained outside the jurisdiction of the US district courts solely incident to the purchase, sale or maintenance of a security described in (a), (b) or (c) above.

These eligible assets generally may be held outside the US under any one of three alternatives:

- (1) **Asset manager alternative**—the fiduciary with management and control over the assets is a (A) US bank (including a bank organized under US law, a member bank of the Federal Reserve System and certain other banking institutions or trust companies) having, as of the last day of its most recent fiscal year, equity capital in excess of US\$1,000,000; (B) state-regulated insurance company having, as of the last day of its most recent fiscal year, net worth in excess of US\$1,000,000 or (C) US-registered investment advisor having, as of the last day of its most recent fiscal year, total client assets under its management and control in excess

Executive Compensation, Benefits and Employment Law Focus

of US\$50 million and either (i) shareholders' or partners' equity in excess of US\$750,000 or (ii) all of its obligations and liabilities are assumed or guaranteed by such a US bank, insurance company or other investment advisor or a US-registered broker-dealer having, as of the last day of its most recent fiscal year, net worth in excess of US\$750,000. In each case, the fiduciary must be organized under US or state law and have its principal place of business in the US.¹

(2) **Direct custodian alternative**—the actual custodian of the assets is a (A) US bank described in (1)(A) above or (B) US-registered broker-dealer having (i) as of the last day of its most recent fiscal year, net worth in excess of US\$750,000 or (ii) all of its obligations and liabilities are assumed or guaranteed by a US bank, insurance company or US-registered investment advisor (described in (1)(A), (B) or (C) (i) above) or another US-registered broker-dealer described in (2)(B)(i) above. In each case, the custodian must be organized under US or state law and have its principal place of business in the US.

or

(3) **Indirect custodian alternatives**—a US bank described in (1)(A) above or a US-registered broker-dealer described in (2)(B) above is responsible for the custody of the assets maintained with certain other custodians (subject to certain conditions).

Some of the noteworthy points of the advisory opinion are summarized below.

Non-US branches of US bank. The US bank described in the advisory opinion would itself be an eligible custodian under the direct custodian alternative referred to above. Under the facts of the advisory opinion, indicia of ownership of eligible assets of ERISA plans, if not held by the US bank in the US, may be held outside the US in branch offices of the US bank that are located outside the US. These non-US branch offices are not separate entities and are subject to regulation and supervision by US state and federal authorities that have examination and supervisory authority over banks. The DOL concluded that these non-US branch offices would constitute a US bank eligible to hold the indicia of ownership of eligible assets outside the US under the direct custodian alternative described above.

US securities. US securities would be held by the US bank, as subcustodian, within the jurisdiction of the US district courts or held in the US by appropriate domestic clearing agencies, the Federal Reserve Bank or other appropriate entities that act as agent for the US bank. The DOL concluded that these arrangements would meet the indicia of ownership requirements.

"Eligible asset" status of US currency invested in non-US fund. US currency that has not otherwise been invested by an ERISA sub-fund's investment manager would be swept daily into a non-US investment fund established by the US bank. The applicant took the position that interests of such an ERISA sub-fund in such a non-US investment

1 Note that these asset manager requirements are generally similar to the definition of a "qualified professional asset manager," or "QPAM," in prohibited transaction class exemption 84-14 issued by the Department of Labor, as amended August 23, 2005. One principal difference is that the portion of the QPAM exemption that corresponds to (1)(C) above substitutes US\$85 million for US\$50 million and US\$1,000,000 for US\$750,000.

2 Note the applicant also represented that the underlying assets of this non-US investment fund would not be considered ERISA "plan assets" under applicable ERISA rules.

fund would be “foreign securities” that are eligible to be held outside the US under the indicia of ownership rules.² The DOL did not give an opinion on this position.

Indirect bank custodian. The US bank may allow affiliated or unaffiliated subcustodians to hold eligible assets of ERISA plans outside the US. In this case, those assets must be maintained in the custody of an entity that is a foreign securities depository, foreign clearing agency which acts as a securities depository (e.g., Euro-clear, Cedel or Indeval), or foreign bank, that is supervised or regulated by a government agency or regulatory authority in the foreign jurisdiction having authority over such depositories, clearing agencies or banks and the following five conditions must be met:

- (1) The foreign entity must hold the indicia of ownership as agent for the US bank
- (2) The US bank must be liable to relevant ERISA plans to the same extent it would be if it retained the physical possession of the indicia of ownership within the US

- (3) The indicia of ownership must not be subject to any right, charge, security interest, lien or claim of any kind in favor of the foreign entity except for their safe custody or administration
- (4) Beneficial ownership of the assets represented by the indicia of ownership must be freely transferable without the payment of money or value other than for safe custody or administration
- (5) Upon request by the plan fiduciary who is responsible for the selection and retention of the US bank, the US bank must identify the name, address and, if applicable, principal place of business of the foreign custodial entity and of the governmental agency or other authority that supervises or regulates that entity.

Investment managers, trustees or custodians responsible for ERISA plan assets invested outside the US should ensure compliance with the detailed requirements of ERISA's indicia of ownership rules. We would be pleased to assist you in reviewing and complying with these rules.

White & Case

White & Case is a leading global law firm with more than 2,300 lawyers in 37 offices in 25 countries. Among the first US-based law firms to establish a truly global presence, we provide counsel and representation in virtually every area of law that affects cross-border business. Our clients value both the breadth of our network and depth of our US, English and local law capabilities in each of our offices and rely on us for their complex cross-border transactions, arbitration and litigation. Whether in established or emerging markets, the hallmark of White & Case is our complete dedication to the business priorities and legal needs of our clients.

Our approach is based on listening to our clients' needs, taking the time to understand their business and responding with effective strategies and solutions, no matter how big the opportunity or formidable the challenge. With new technologies, globalization, consolidation and other forces continuously changing how business gets done, we help our clients evaluate the risks and rewards of ventures designed to advance their interests.

We work with the world's most established and respected companies, including two-thirds of the *Global Fortune 100* and half of the *Fortune 500*, as well as with start-up visionaries, governments and state-owned entities.

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