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Giving Nonqualified Deferred Compensation Plans Their Due Diligence in M&As: Part I—409A Fitness

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With merger and acquisition (M&A) momentum showing no signs of slowing down, companies should review their current nonqualified deferred compensation plans (NDCPs) to assess whether such plans can withstand the rigors of an M&A due diligence test, particularly with respect to compliance with Internal Revenue Code Section 409A.¹ For those companies in the midst of an M&A process, a careful examination and comparison of each of the respective companies' NDCPs is recommended prior to closing the deal so that each side knows exactly what they will be getting into (as well as what they will be getting out of the NDCPs) when the change in control occurs. This article reviews the potential pitfalls NDCP

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sponsors may face as they attempt to successfully navigate an M&A to a conclusion that is satisfactory to both the organization and those executives chosen to lead the surviving entity. Furthermore, the article explores the various compliance alternatives available to such entities.

409A COMPLIANCE CAMPAIGN DEMANDS ATTENTION ON MANY FRONTS

Before focusing on exactly how Code Section 409A can come into play in the M&A arena, a brief overview of its far-reaching grasp and the adverse consequences of noncompliance is useful. Employers must recognize that Code Section 409A's potential coverage goes far beyond what many organizations would typically consider an NDCP (e.g., supplemental executive retirement plans, straight deferred compensation plans, "401(k) Mirror" plans, or excess plans). Broadly drafted to cover "service providers"² and "service recipients,"³ Code Section 409A can apply to a wide group, including executives, directors, partners, independent contractors, and consultants. It applies to any arrangement that provides for a "deferral" of compensation whether such is elective or nonelective; for one individual or a group; formal, informal, or oral. As a result, the lengthy list of arrangements that may be subject to Code Section 409A includes, but is not limited to, employment agreements, certain bonus payments, severance agreements, stock options, offer letters, restricted stock units, consulting agreements, phantom stock, change-in-control agreements, reimbursement agreements, and director fee deferrals. Accordingly, the first step for any organization is to conduct a comprehensive inventory and analysis of any such arrangements to see whether or not they qualify for an exemption from Code Section 409A. For those agreements that are determined to be covered by Code Section 409A, a Code Section 409A compliance analysis must then be undertaken as noncompliance carries significant costs:

- **For participants,** a failure could result in the immediate recognition of income to the participant, a 20-percent excise tax penalty, and interest.
- **For plan sponsors,** noncompliant employers have enhanced reporting and withholding responsibilities and may face legal battles with disgruntled employees who blame them for the Code Section 409A failure. Additionally, plan sponsors may need to restate prior years' Form W-2s for participants and

incur other administrative costs associated with correcting any compliance issue.

Note that the above summary is intended solely to provide a general overview of the vast scope of Code Section 409A and the importance of maintaining compliance for those arrangements that are subject to its requirements. Employers should seek the assistance of their employee benefit advisors and legal counsel in ascertaining the specific applicability of Code Section 409A to any particular agreement. This article will focus solely on those nonequity NDCPs that are subject to Code Section 409A and the compliance issues that may arise when their plan sponsors become involved in M&A activities.

HOW DOES 409A FACTOR IN M&A SCENARIOS?

Under any given M&A scenario, there will naturally be two independent companies with two separate sets of top management executives. Therefore, there will also most likely be at least one and perhaps several NDCPs covering the executives of each company. The questions that must be addressed pre-deal are as follows:

- Will there be payments triggered by the deal?
- Will such payments be subject to Code Section 409A?
- Are any exceptions available?
- As currently drafted, do the target company's compensation arrangements contain noncompliant provisions?
- Does the acquiring company or surviving entity want to keep the executives of the target company (whether for the long-term or for a specific period of time after the deal is closed)?

These questions are crucial because while Code Section 409A does not prohibit plan sponsors from making payments from their NDCPs, it does invoke penalties if such distributions do not follow Code Section 409A's rule that distributions may only be made upon certain specified events.⁴ The remainder of this article explores the three permissible Code Section 409A distribution events that will most often come into play under a typical M&A: (1) change of control; (2) separation from service; and (3) plan termination/liquidation.

CHANGE IN CONTROL

Does the NDCP Contain Change in Control (CIC) Provisions?

If the answer is yes, the immediate follow-up question is “what does the CIC provision do?” Some NDCPs have CIC provisions that only trigger immediate vesting upon a CIC. If the effect of the NDCP’s CIC provision is limited to this function, then the actual CIC definition does not have to comply with Code Section 409A (i.e., the plan sponsor is free to define the change in any way it sees fit). However, if a plan sponsor’s intent is to have a CIC trigger a plan distribution, the CIC definition in the plan document must satisfy at least one of the following Code Section 409A definitions of a CIC:

Change in ownership occurs on the date that any person obtains an ownership interest in the company’s stock that, together with previously held stock, constitutes (1) more than 50 percent of the total fair market value (FMV) or 50 percent of the total voting power.

Under Code Section 409A, this type of a CIC will be deemed to have not occurred in cases where such person already owns more than 50 percent of a company’s stock at the time of acquisition. The percentage utilized may be higher (but not lower) than 50 percent.⁵

Change in effective control may occur in two separate and distinct ways:

1. On the date that any person acquires, or has acquired during the preceding year, ownership of 30 percent or more of the total voting power of the company; or
2. On the date that a majority of the company’s directors is replaced during any 12-month period by new directors whose appointment is not endorsed by a majority of the board before appointment.

As with the “change in ownership” rule, a plan may choose an amount higher (but not lower) than 30 percent. Additionally, where a person effectively controls a company, the acquisition of additional control does not cause a CIC.⁶

Change in the ownership of substantial assets occurs on the date that any person acquires, or has acquired during the preceding year, assets from the company that amount to 40 percent or more of the total gross FMV of all of the assets of the company immediately prior to the acquisition. As with the previous two definitions, a plan sponsor may choose an amount higher (but not lower) than 40 percent.

A CIC under this definition does not occur when the transfer of assets flows to an entity controlled by the shareholders of the transferring company immediately after the transfer or to an entity controlled by the company or its shareholders as described under Section 409A.⁷

What Does the Plan Document Say?

During the initial plan design and drafting process, Code Section 409A offers plan sponsors some discretion with respect to determining how and when the distribution of benefits will occur. The NDCP document may provide that benefits will commence to the participants upon the occurrence of any or all of the three types of the above-described CIC events. Alternatively, the plan may be designed so as to not include any of these provisions, in which case a subsequent CIC event would not trigger distributions (i.e., benefits would remain in the plan until one of the plan's Code Section 409A permissible payment events occurs).

This design discretion disappears, however, when the plan sponsor adopts the plan. Once this adoption occurs, any future changes to the distribution provisions would then be subject to Code Section 409A's rules governing subsequent changes in time and form of payment (i.e., cannot take effect until 12 months after the change is made and must have the effect of deferring the distribution for at least five years from the date that the distribution would have originally been made).⁸ Accordingly, it is essential that the plan is drafted to (1) unambiguously indicate if and when a CIC trigger will apply; and (2) include clear, objective, Code Section 409A-compliant CIC definitions and distribution provisions so that the determination of whether a CIC distribution is due will not be open to interpretation. Failure to draft the document and/or administer the plan in a manner that adheres to these guidelines could expose the plan sponsor to Code Section 409A penalties if or when it actually undergoes a CIC.

Therefore, it is prudent for all employers, even those that may not presently consider themselves on the M&A radar, to check their NDCPs for these provisions and make corrective amendments as soon as possible if such provisions are not compliant. Speed is of the essence here, because if the NDCP sponsor corrects the noncompliant definition in accordance with the parameters set forth by the IRS under its documentary correction guidance, and such correction does not affect the operation of the plan for one year following the correction, then participants may avoid all penalties under Code Section 409A.⁹ Conversely, if the noncompliant CIC provision is corrected and such correction *does* affect the operation of the plan within one year (i.e., a CIC occurs within one year after the amendment is adopted), the

correction will still be permitted but participants will face a reduced penalty (i.e., the Code Section 409A penalties will be assessed on 25 percent of the amount under the plan to which the provision applies).¹⁰

SEPARATION FROM SERVICE: WHEN DOES IT OCCUR?

Under Code Section 409A, NDCPs may permit distributions to occur upon a participant's separation from service.¹¹ Simply stated, a separation from service occurs upon the participant's death, retirement, or other termination of employment. Although the first two events have generally been definitely determinable over the years, the issue of ascertaining exactly when a termination of employment occurred has presented some problems pre-Code Section 409A. The IRS concern was that too much room existed for scenarios whereby a temporary termination of employment could be initiated as a means to trigger a distribution, followed by the participant in question then being rehired or remaining with the employer in a nonemployee status (e.g., as a consultant). In order to address this concern, Code Section 409A created a facts and circumstances test under which a termination occurs (i.e., for purposes of permitting an NDCP distribution) if both the employer and employee anticipate that no further services (or a very limited level of services) would be performed after a certain date. The test includes a set of presumptions that employers may use when making a separation from service determination for a participant. The basis of these presumptions is a comparison of the amount of services currently performed by the participant versus the amount of services performed in the past.

A separation from service will be presumed to have occurred where the employer and employee reasonably anticipate either that:

- No future services (whether as an employee or a consultant) will be performed by the employee; or
- The level of services to be performed will decrease to no more than 20 percent of the average level of services performed over the preceding three-year period.

If the level of services to be performed is expected to be 50 percent or more of the average level of services previously performed, it will be presumed that a separation from service has not occurred. No presumption is made with respect to situations where services are expected to continue at a level between 20 and 50 percent, but an employment agreement can designate a level within these amounts as constituting a separation from service.¹²

With respect to M&A activity, the question of whether a separation from service has occurred typically arises in the following circumstances: (1) asset sales and (2) spin-offs.

Asset Sales

This issue of triggering an unwanted separation from service (and thus an accompanying unwanted NDCP distribution) typically is not a concern in stock deals, because in those cases the target company (including its employees) is absorbed by the acquiring company with no interruption of employment for such employees. In contrast, when the deal takes the form of an asset purchase, the default is that there is a separation from service for the employees of the target company. Those employees who “transfer to” and continue working for the new company are considered as new hires by such company.

Code Section 409A, however, permits the buyer and seller to choose whether an employee of the seller will experience a separation from service when the employee is providing services to the seller immediately before the asset sale and is providing services to the buyer after, and in connection with, the sale. This rule, known in the qualified plan world as the “same desk” rule, gives discretion to the seller and buyer to determine whether a separation occurs. In order to satisfy this rule, the following requirements must be met:¹³

- The asset sale must be the result of a bona fide, arm’s length negotiation; and
- All employees providing services to the seller immediately prior to the asset sale must be treated consistently.

Issues often arise with respect to the second requirement above where certain employees want to be treated as being at the same desk while others would prefer the asset sale be treated as a separation of service—and so result in payout of the NDCP. Thus, this can be a contentious element in M&A negotiations.

Spin-offs

Where a plan defines separation from service to include any action that results in an employee no longer being employed at the company, a spin-off of a subsidiary may seem problematic. Accordingly, prior to the release of the final Code Section 409A regulations, commentators requested clarification as to whether a spin-off of a subsidiary could result

in a separation from service of an employee of the subsidiary, where the NDCP defines a separation from service as including any action resulting in the employee no longer being an employee of the controlled group of corporations, including the parent corporation. Fortunately, the response to such request indicated that “generally such a transaction would not result in a termination of employment for an employee of the subsidiary, because the employee is continuing employment with the same employer both before and after the transaction.”¹⁴

SEPARATION FROM SERVICE: M&A AND THE SIX-MONTH DELAY

If an NDCP participant who qualifies as a “specified employee”¹⁵ incurs a separation from service from an employer that is a publicly traded entity, the plan sponsor must delay payment of benefits triggered by the separation from service until six months after such separation. Such employers are required to select a “specified employee identification date”¹⁶ and “specified employee effective date.”¹⁷ The specified employee identification date will be December 31 unless the plan sponsor selects a different date (which date must be used for all of its NDCPs).¹⁸ In general, the specified employee effective date is the first day of the fourth month following the specified employee identification date (e.g., if the specified employee identification date is December 31, the specified employee effective date is the following April 1), although the plan sponsor may elect to have the specified employee effective date that is prior to the default date (which date must be used for all of its NDCPs).¹⁹

Once these dates are selected, all employees identified as specified employees on the applicable date will be considered as such for purposes of applying the six-month delay rule for any separation of service that occur during the 12-month period until the next specified employee effective date. This rule is not only an operational requirement but one that must be evidenced in writing in the NDCP document. Since the rule does not apply to nonpublicly traded companies, NDCPs sponsored by such entities are not required to follow this rule. Accordingly, the most obvious potential noncompliance trap for this rule under an M&A would be the scenario where a public company acquires a private company and assumes plan sponsorship of its NDCP(s).

Acquisition Involving a Public Company and a Private Company

During the period between the closing of the transaction and the next specified employee effective date (the transition period), the

specified employees will continue to be only the individuals who were the specified employees of the public company prior to the closing of the transaction (i.e., no private company employees will be specified employees during the transition period).²⁰

Acquisition Involving Two Public Companies

During the transition period (using the next specified employee effective date of the resulting public company), the specified employee lists of the two companies are combined. The specified employees during the transition period will be the top 50 officers, determined by ranking the officers of the combined list by compensation, as well as any applicable 1- and 5-percent owners who are not also one of the top 50 officers. Alternatively, the resulting public company may elect any other reasonable method to determine the specified employees, provided that the election is made no later than 90 days following the transaction and is applied prospectively.²¹

Spin-Off

If a public company spins off another company that is publicly traded immediately following the transaction, the specified employees of the initial public company continue to have that status until the next specified employee effective date. The specified employee identification date and specified employee effective date of the initial public company (as in effect prior to the spin-off) will continue for both companies until they are subsequently changed following the spin-off.²²

TERMINATION AND LIQUIDATION OF THE NDCP

Under Code Section 409A, NDCPs generally may not accelerate the time, schedule, or amount that is scheduled to be paid under the terms of the plan. In the event that a plan is terminated and paid out, it would be treated as an impermissible acceleration of payments and result in the Code Section 409A penalties described above. Code Section 409A, however, does provide limited circumstances upon which a plan may be terminated and payments made without triggering any penalties.²³ The following describes two of these permitted circumstances along with the requirements mandated under each alternative.

CIC Plan Termination and Liquidation

A company may terminate and liquidate a plan (i.e., accelerate any payments) without violating the anti-acceleration rule, provided:

1. The termination occurs within the 30 days prior to a CIC event or the 12 months following the CIC event;
2. In addition to the NDCP under consideration, the plan sponsor also terminates and liquidates all similar arrangements subject to aggregation²⁴ with such NDCP,²⁵ and
3. The CIC event must meet one of the previously described permissible Code Section 409A CIC definitions.

Even though the requirement cited above in item (2) cites the Code Section 409A aggregation rule, this particular termination and liquidation option contains a very useful limitation of the application of this rule. For purposes of this required aggregation:

- Code Section 409A permits the entities comprising the service recipient to be determined immediately following the CIC event; and
- The rule applies only with respect to service providers for whom a CIC has occurred.

For example, assume there is a CIC event that consists of a sale of a subsidiary corporation that results in the subsidiary corporation no longer treated as a single service recipient with the (former) parent corporation. In such a case, the requirement to terminate and liquidate substantially similar arrangements will apply only to the purchaser service recipient group of corporations that now owns the subsidiary corporation. In addition, and more important, the rule would apply only to the service providers that had experienced a CIC (i.e., generally consisting only of the service providers of the subsidiary corporation). Where the CIC event consists of an asset purchase, the applicable service recipient with discretion to terminate and liquidate the plan is deemed to be the entity retaining the deferred compensation liability after the transaction.

Employer Discretion Plan Termination and Liquidation

Outside of the CIC context, a company may also terminate and liquidate an NDCP if the following requirements are met:²⁶

1. The termination and liquidation do not occur proximate to a downturn in the company's financial health;
2. Each similar plan that is subject to aggregation²⁷ with the terminated plan is also terminated and liquidated;
3. No liquidation payments are made within 12 months of the date the employer takes the actions necessary to irrevocably terminate and liquidate the plan;
4. All payments are made within 24 months of the date the employer takes all necessary actions to irrevocably terminate and liquidate the plan; and
5. The employer does not adopt any new plan that would be aggregated with the terminated plan within three years of the date the employer takes all necessary actions to irrevocably terminate and liquidate the plan.

With respect to the references to the Code Section 409A aggregation rules²⁸ that appear in the requirements cited above in items (2) and (5), the actual language in the final 409A regulations respectively provides as follows:

(2) The service recipient terminates and liquidates all agreements, methods, programs, and other arrangements sponsored by the service recipient that would be aggregated with any terminated and liquidated agreements, methods, programs, and other arrangements under [Treasury Regulation §] 1.409A-1(c) if the same service provider had deferrals of compensation under all of the agreements, methods, programs, and other arrangements that are terminated and liquidated;²⁹

(5) The service recipient does not adopt a new plan that would be aggregated with any terminated and liquidated plan under [Treasury Regulation §] 1.409A-1(c) if the same service provider participated in both plans, at any time within three years following the date the service recipient takes all necessary action to irrevocably terminate and liquidate the plan.³⁰

For flexibility purposes, NDCP sponsors and participants alike would have preferred to interpret this language to mean that *only* the plans of a particular category in which a particular service provider *actually participated* had to be terminated if a plan in which that service provider participates is terminated. This “wishful thinking”, however, was officially dashed in the IRS’s last guidance³¹ on this topic, in which it stated that

[T]he rule set forth under [Treasury Regulation §] 1.409A-3(j)(4)(ix)(C) that requires the termination and liquidation of all plans sponsored by the service recipient that would be aggregated with the terminated plan “if the same service provider had deferrals of compensation” under all of those plans is intended to require the termination of all plans in the same plan category sponsored by the service recipient. The reference to the “same service provider” having deferrals of compensation under all of those plans refers to participation of a hypothetical service provider in all such plans, which would be required to aggregate all of the plans under the [Code Section] 409A plan aggregation rules.” The Treasury Department and the IRS have concluded that the meaning of the plan termination rule under [Treasury Regulation §] 1.409A-3(j)(4)(ix)(C) is not ambiguous. However, to address the questions raised by commenters, these proposed regulations further clarify that the acceleration of a payment pursuant to this rule is permitted only if the service recipient terminates and liquidates all plans of the same category that the service recipient sponsors, and not merely all plans of the same category in which a particular service provider actually participates. These proposed regulations also clarify that under this rule, for a period of three years following the termination and liquidation of a plan, the service recipient cannot adopt a new plan of the same category as the terminated and liquidated plan, regardless of which service providers participate in the plan.³²

These rules can be problematic in cases where there may be duplication of NDCP benefits or less favored arrangements after a merger/acquisition and the surviving entity wishes to eliminate such redundancy or unwanted plans and cover the remaining executive group under one or more preferred plans. Accordingly, if the acquiring company already has its own NDCP(s) and there is any intent to terminate and liquidate the NDCP(s) of the acquired company:

- Every effort should be made to either terminate and liquidate such plans prior to the closing; or

- If that is not possible, meet the timeframe requirements described under the previously described “CIC Plan Termination and Liquidation” with its built-in aggregation limitations so that the termination and liquidation of the targeted NDCP does not require an undesirable chain reaction of terminations.

MANAGING MERGERS WITHOUT THE ACQUISITION OF 409A PENALTIES

In this current era of M&A “mania,” where at least the possibility of this type of transaction is in play for the majority of companies, NDCP sponsors should proactively review their plans for provisions that will either be triggered or otherwise be affected by a CIC. Firms on both sides of any deal need to be mindful of Code Section 409A’s extensive requirements when diving into the due diligence process in the initial planning stages and throughout the negotiations, right up until closing. The enforcement and levying of the costly consequences of Code Section 409A noncompliance are always only an audit away, whether it be on the corporate side or of a participant’s personal tax return. Although the tight timing in some deals does not always afford this luxury, there are many NDCP-related issues that ideally should be addressed before signing and definitely before closing of the transaction. Which executives will be targeted to survive the deal? Will any of them have CIC triggers in their NDCPs that may incentivize them to leave? If both organizations have one or more NDCPs in place premerger, what is the desired optimal postmerger arrangement for these benefits? Answering these and other questions will require comprehensive compensation and benefits comparative analysis, a thorough review of the NDCP documents, and exploration of what alternatives exist to provide solutions that balance business needs with the required Code Section 409A compliance. Consequently, whenever M&A is even on the verge of being in play, the sooner the respective firms can enlist the services of their employee benefit advisors and legal counsel to “shape up” the state of their NDCPs, the sooner they can all work together to contour an effective strategy for emerging from the transaction, having fit in the primary goals of the NDCP sponsors while staying okay with respect to Code Section 409A.

NOTES

1. IRC § 409A and Treas. Reg. § 1.409A-1 through 6.
2. Treas. Reg. § 1.409A-1(f).

3. Treas. Reg. § 1.409A-1(g) provides that this term generally means the person for whom the services are performed and with respect to whom the legally binding right to compensation arises, and all persons with whom such person would be considered a single employer under IRC § 414(b) (employees of controlled group of corporations), and all persons with whom such person would be considered a single employer under IRC § 414(c) (employees of partnerships, proprietorships, etc., under common control). For example, if the service provider is an employee, the service recipient generally is the employer (including all persons treated as a single employer under IRC § 414(b) or (c)).
4. Treas. Reg. § 1.409A-3.
5. Treas. Reg. § 1.409A-3(i)(5)(v).
6. Treas. Reg. § 1.409A-3(i)(5)(vi).
7. Treas. Reg. § 1.409A-3(i)(5)(vii).
8. Treas. Reg. § 1.409A-2(b).
9. IRS Notice 2010-6.
10. IRS Notice 2010-6, V.B.2.
11. Treas. Reg. § 1.409A-1(h).
12. Treas. Reg. § 1.409A-1(h)(1)(ii).
13. Treas. Reg. § 1.409A-1(h)(4).
14. Section VII(C)(2)(f) of the Preamble to Treas. Reg. § 1.409A.
15. Treas. Reg. § 1.409A-1(i)(1). An employee will generally be considered a “specified employee” if he or she (1) is a 5% stockholder, (2) is a 1% stockholder with annual compensation in excess of \$150,000, or (3) is an officer with annual compensation in excess of \$175,000 (this is the threshold for 2018; the amount is subject to annual adjustment); the number of officers is limited to the lesser of (a) 50 employees or, (b) the greater of (i) three employees or (ii) 10% percent of the employees).
16. Treas. Reg. § 1.409A-1(i)(3).
17. Treas. Reg. § 1.409A-1(i)(4).
18. Treas. Reg. § 1.409A-1(i)(3).
19. Treas. Reg. § 1.409A-1(i)(4).
20. Treas. Reg. § 1.409A-1(i)(6)(ii).
21. Treas. Reg. § 1.409A-1(i)(6)(i).
22. Treas. Reg. § 1.409A-1(i)(6)(iii).
23. Treas. Reg. § 1.409A-3(j)(4)(ix).
24. Treas. Reg. § 1.409A-1(c)(2).
25. Treas. Reg. § 1.409A-3(j)(4)(ix)(B).
26. Treas. Reg. § 1.409A-3(j)(4)(ix)(C).
27. Treas. Reg. § 1.409A-1(c)(2).
28. The plan aggregation rules under Treas. Reg. § 1.409A-1(c)(2) of the final regulations identify nine different types of nonqualified deferred compensation

plans—account balance plans providing for elective deferrals, account balance plans that do not provide for elective deferrals, nonaccount balance plans, separation pay plans, plans providing for in-kind benefits or reimbursements, split-dollar plans, foreign earned income plans, stock right plans, and plans that are not any of the foregoing. All plans of the same type in which the same service provider participates are treated as a single plan.

29. Treas. Reg. § 1.409A-3(j)(4)(ix)(C)(2).

30. Treas. Reg. § 1.409A-3(j)(4)(ix)(C)(5).

31. Internal Revenue Bulletin: 2016; REG-123854-12; Proposed Treas. Reg. under § 1.409A.

32. Treas. Reg. § 1.409A-3(j)(4)(ix)(C).

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