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Katten Muchin Rosenman LLP

Compensation & Benefits IN FOCUS

Developments in executive compensation and employee benefits

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Compensation Arrangements to Check Before Year-End—Quick Action May Be Required

There are several tax-driven items related to incentive and deferred compensation that employers should include on their year-end checklist. There are three types of arrangements that should be reviewed to determine whether any action is required before December 31, or possibly soon thereafter.

Public Company Performance-Based Compensation Arrangements:

For public companies intending to comply with Section 162(m), performance-based compensation that becomes payable, regardless of whether applicable performance goals are attained, in the event of the covered employee's involuntary termination (including without "cause" or for "good reason") or retirement, may be running out of the "grace period" and may require modification. Click here to read more.

Deferred Compensation Arrangements:

Section 409A provides for same-year corrections of certain types of errors made with respect to deferred compensation arrangements. Therefore, if any unintentional operational failures occurred this year, time is running out to make the permitted correction. Click here to read more.

Employee Stock Purchase Plans:

Final regulations governing tax-qualified employee stock purchase plans (ESPPs) were recently issued and apply to any options to purchase shares of company stock at a potentially tax-free discount on and after January 1, 2010. Amendments to ESPPs to comply with the final regulations likely will require prompt action to ensure that timely and appropriate board and/or compensation committee approvals can be obtained. Click here to read more.

The Pulse

SEC Considering Adopting New Executive Compensation and Corporate Governance Rules

The SEC will hold an open meeting on December 16 to review and consider adoption of its executive compensation and corporate governance proposals. It is unclear whether these rules will be binding on companies for the upcoming 2010 proxy season.

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COBRA Violation Not Covered by Fiduciary Insurance

An employer sponsor and administrator of a group health benefits plan was sued for alleged violations of its fiduciary duties under the Employee Retirement Income Security Act of 1974 (ERISA) and the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA). The employer in turn sought coverage from the insurance carrier from which it had purchased a fiduciary insurance policy. The carrier refused to defend the employer, basing its denial of coverage on the ground (among other grounds) that the claims against the employer did not constitute "wrongful acts" under the terms of the fiduciary policy. The employer brought suit against the carrier claiming that it was entitled to be defended.

The Fifth Circuit Court of Appeals affirmed the decision of the District Court in denying coverage under the fiduciary insurance policy. The Court reasoned that the liability which was claimed was based upon the employer's duty as a plan sponsor, not as a fiduciary of the benefit plan.

In asserting its entitlement to coverage, the employer pointed to the language from the suit which had been brought against it, alleging that it had "failed to provide continuation coverage to the terminated… employees and to otherwise satisfy any of the other obligations imposed upon [it] by COBRA." The relevant COBRA obligations, at least as alleged, concerned the provision of access to benefits under the medical plans.

The relevant provisions of the fiduciary insurance policy, which was expressly described as providing "fiduciary liability coverage," insured only against claims of "wrongful acts." The policy defined "wrongful acts" as "any breach of the responsibilities, obligations or duties imposed upon fiduciaries of the Sponsored Plan by [ERISA]… or any negligent act, error or omission in the Administration of any Sponsored Plan."

One is a "fiduciary" under ERISA only "to the extent… he exercises any discretionary authority or discretionary control respecting management… or disposition of [plan] assets…." (29 U.S.C. Section 1002(21)(A)).

The Court of Appeals agreed with the lower court and found that any alleged failure to offer continuing benefits under its benefit plans rests upon the employer as a plan sponsor, and sponsorship acts or omissions are not fiduciary in nature. The Court of Appeals noted that some circuits (such as the Third Circuit Court of Appeals) have allowed fiduciary-based relief for failure to advise participants of COBRA rights. However, the Fifth Circuit has taken care to distinguish between fiduciary and statutory ERISA duties. The court reasoned that the offer of health benefits—the core of the relevant claim in the suit—would require inclusion of new participants in the employer's benefit plan. This, it concluded, would be a settlor, not a fiduciary, function. (Mary Kay Holding Corp. v. Federal Insurance Co., 2009 U.S. App. LEXIS 2381 (5th Cir. 2009))

Federal Reserve Proposes Guidance on Incentive Compensation Practices Applicable to All Banks

On October 22, the Federal Reserve Board (the Board) issued proposed guidance that would allow the Board to review the incentive compensation practices of all banks under its supervision.

In its oversight of regional, community and banks other than the top 28 large banks identified by the Board, the Board will review such banks' incentive compensation arrangements as part of risk management reviews during the regular risk-focused examination process. Such reviews will be tailored to reflect the scope and complexity of each bank's activities, as well as the prevalence and scope of each bank's incentive compensation arrangements. Interestingly, the scope of the proposed guidance includes non-executive employees who are responsible for material aspects of the business or whose activities may expose the bank to significant risk, or groups of employees (e.g., loan officers) who may be aggregated into one or more similar incentive compensation arrangements that as a whole pose a material risk to the bank.

For larger and more complex banks (i.e., the largest 28 banks), the internal policies must be accompanied by a plan (including timetables) for improving incentive compensation practices. The Board will then conduct a horizontal review of such plans and policies in order to ensure that they are likely to result in the establishment and maintenance of incentive compensation arrangements that do not encourage excessive risk-taking.

In either case, if a bank is found to be in violation of the Board's guidance, such a finding will be communicated to the bank and incorporated into the bank's supervisory ratings. In certain circumstances, the Board may take enforcement action to correct incentive compensation arrangements which pose a risk to the bank's safety or soundness.

More information on the Board's proposal can be found **here**.

Department of Labor Criminalizes Late Contributions to Retirement and Health Plans

The new Assistant Secretary of Labor of the Employee Benefits Security Administration, Phyllis Borzi, recently announced a new Department of Labor (DOL) ERISA enforcement initiative to criminalize failures to forward participant contributions to retirement and health plans.

DOL regulations require employers to transfer employee salary deferrals to the plan as soon as administratively feasible. The regulations also contain a "latest possible transfer date" of the fifteenth business day of the month following the month in which such compensation was withheld from the employee's paycheck. If salary deferrals are transferred after the latest possible transfer date, they are presumed to be late contributions. However, in most cases the DOL would not consider transfers on, or just prior to, the latest possible transfer date as timely made. Instead, the DOL requires salary deferrals to be transferred to the plan as soon as reasonably possible, which in many cases is within one or two days after issuance of the paycheck.

If an employer transfers salary deferrals later than when it otherwise reasonably could have, the contributions are usually considered late by the DOL. This late contribution is a breach of fiduciary duties that could subject the employer to civil penalties. If a late contribution occurs, the employer should report the late contributions on the plan's Form 5500. In addition, the employer should make an additional plan contribution for any lost earnings on the late contributions and may, but is not required to, submit the correction to the DOL under the DOL's voluntary fiduciary correction program. If the employer does not use the DOL's correction program, the DOL may contact the employer and invite the employer to use such program.

Under the DOL's new criminal enforcement initiative, fiduciaries who make late contributions could be subject to criminal prosecution. At this time, it appears that only the most egregious and persistent violators will be prosecuted, and that enforcement will be sought against those who embezzle plan assets, do not transfer the contributions to the plan or knowingly file false Forms 5500.

We have noticed an increase in DOL benefit plan audit activity, and, in our experience, the DOL has questioned contribution delays that are as short as just a few days from the applicable payroll date. Based on this DOL announcement and the increased DOL audit activity, we recommend that employers review their procedures for withholding plan contributions from employees' pay and transferring such amounts to benefit plans. All employers should be able to (i) justify the timing of their salary deferral transfers and (ii) respond to a DOL agent's request for support of any delay in transferring employee salary deferrals.

For more information about the DOL's ERISA enforcement effort and results, click **here**.

Deferred Compensation Funding Can Cause Tax Consequences

Internal Revenue Service officials recently reminded taxpayers that Section 409A of the Internal Revenue Code of 1986 limits when a company can fund its non-qualified deferred compensation benefits. In addition to restricting offshore funding and funding based on a change in the company's financial health, Section 409A provides that amounts transferred to a trust that funds the non-qualified deferred compensation benefits of covered executives (typically referred to as a "rabbi trust") are subject to immediate taxation, and a 20% additional tax, if those amounts are transferred when the company's qualified defined benefit pension plan is "at-risk."

Whether a defined benefit pension plan is "at-risk" should be determined by the plan's actuaries, but "at-risk" status can apply if the plan is significantly underfunded (usually less than 65%–80% funded, depending on the year). Such determination is made based on the preceding plan year. Given the significant downturn in the markets last year, it is possible that a large number of plans might currently be "at-risk."

If applicable, the Section 409A funding limitations for non-qualified deferred compensation would apply to amounts transferred to fund the benefits of the company's CEO (or the individual acting in a similar capacity). If the company is public, the limitation also would apply to amounts transferred to fund the benefits of the named executive officers and the remaining Section 16 officers. The limitation also applies to amounts transferred to fund the benefits of former employees if they were the CEO or, if the company is public, a named executive officer or Section 16 officer at the time of employment termination.

Improper funding of non-qualified deferred compensation causes the employee to be subject to immediate income taxation on the amounts transferred, as well as an additional tax equal to 20% of such amounts. Interest earned on such amounts in subsequent years also is subject to accelerated taxation and the additional tax. If a funding error is discovered after the fact (on audit, for example), interest and penalties on past due amounts may also be assessed. These consequences are applied despite the fact that amounts in the non-qualified plan trust remain subject to the claims of the company's creditors.

Companies that sponsor defined benefit plans and are concerned about triggering adverse tax treatment for their executives under non-qualified deferred compensation arrangements should review their pension plan and non-qualified plan funding policies to ensure that inadvertent violations do not occur.

Click **here** to read the full text of Section 409A.

IRS Can Levy Against Non-Transferable Stock Options

The Internal Revenue Service recently concluded in Chief Counsel Advice 200926001 (CCA) that it could enforce a tax levy served on an individual taxpayer by seizing and selling incentive and non-qualified stock options he had received during his employment as an executive for the company issuing the options. The IRS reached this conclusion despite option award provisions that permitted the options to be transferred only by will, the laws of descent or distribution, or under a qualified domestic relations order.

Under federal tax law, when a taxpayer fails to pay a tax liability after notice and demand, a lien attaches to all of the taxpayer's property and property rights held by the taxpayer or a third party on behalf of the taxpayer. For this purpose, "property and property rights" includes, among other items, securities, salaries, wages, commissions or compensation. Such a lien generally applies only to property and property rights held by or on behalf of the taxpayer at the time of the levy, but a lien on wages and salary remains in effect until the tax liability is satisfied or becomes unenforceable. The tax law permits the IRS to seize and sell the taxpayer's property and property rights covered by the lien to pay the unpaid taxes.

The CCA describes the facts of the taxpayer's situation, including details regarding the evolution and vesting of his rights under the stock options and a settlement agreement entered into by the executive and the company. Among other things, the settlement agreement provided that the company would comply with any liens applicable to the executive or his property rights. The CCA found that, based on the facts, the taxpayer had a vested right to the options at the time the tax lien attached. Although the options were subject to specific restrictions on transferability, both statutory (in the case of the incentive stock options) and contractual, the CCA concluded that the options were not exempt from levy, seizure or sale by the IRS.

This issue is relevant for companies that award stock options as well as individual taxpayers who hold stock options and may have outstanding federal tax liability. Even if a stock option limits or restricts transfer of the option, if the option is vested the IRS may be able to seize the option and sell it to satisfy the individual taxpayer's unpaid federal taxes.

Section 162(m) Deadline May Be Approaching

In Revenue Ruling 2008-13, the Internal Revenue Service clarified that compensation which would otherwise be deductible under Section 162(m) of the Internal Revenue Code using the "performance-based compensation" exception would not qualify for such exception if the compensation would became payable, regardless of whether the applicable performance goals were satisfied, in the event of the covered employee's involuntary termination (either without "cause" or for "good reason") or retirement.

Prior to this ruling, such involuntary termination and retirement payment provisions were generally thought to satisfy the requirements of the "performance-based compensation" exception. Accordingly, the ruling provides transitional relief (i.e., a grace period) so that it does not apply to plans and arrangements that otherwise satisfy the requirements of the "performance-based compensation" exception and either (i) contain a performance period which begins on or before January 1, 2009, or (ii) were in effect on February 21, 2008.

While most public companies' arrangements would likely have satisfied one of the transitional relief requirements for 2009, it is time to take a look at such arrangements to determine if changes need to made before next year's performance programs are put in place. If amendments are necessary, they should be addressed in a timely fashion to ensure that they are appropriately negotiated with the relevant executives and approved by the compensation committee and/or the board of directors before any deadline passes.

Click **here** for further information on Revenue Ruling 2008-13.

December 31 is Same-Year Correction Deadline for 409A Failures in 2009

Pursuant to Notice 2008-113, the Internal Revenue Service is permitting corrections without penalty for certain unintentional operational failures under Section 409A of the Internal Revenue Code (Section 409A) that are corrected in the same year in which the failure occurs. Thus, the deadline for correcting such failures that occur during 2009 is December 31, 2009.

The following operational failures may be corrected without penalty if correction is completed in the same year that they occur:

- Payments made in 2009 that should have been deferred to a later year
- Payments that violate the six-month delay rule for "specified employees"
- Payments deferred to a later year that should have been made in 2009 (i.e., excess deferrals)
- Correction of a less than fair market value exercise price for stock options that would otherwise be exempt from Section 409A

To obtain relief for a same-year correction, the Notice sets forth certain steps that must be followed, including a requirement that the employer report certain information to the IRS and take steps to avoid recurrence of the failure.

Please note that while the Notice also permits correction of certain failures during later years, the Notice does not provide relief for the following Section 409A failures: (i) plan documentation failures; (ii) intentional operational failures; (iii) erroneous payments made during a year in which the employer experiences a substantial financial downturn if circumstances indicate that the employer will not be able to make the payment when it becomes due; and (iv) failures that are related to a "listed transaction" under Section 1.6011-4(b)(2) Treasury Regulation (generally relating to abusive tax avoidance transactions).

Although relief is not currently available for Section 409A documentation failures (i.e., documented plan terms that violate Section 409A), IRS employees have indicated that a correction program for such failures may become available in the near future.

The Notice can be found **here**.

Recent Regulations May Require Hasty Amendment of Employee Stock Purchase Plan

Final regulations governing employee stock purchase plans (ESPPs) were issued by the U.S. Department of the Treasury in mid-November. ESPPs grant participating employees of a corporation an option to purchase shares of company stock with a potentially tax-free discount. The final regulations apply to any option issued under an ESPP that is intended to qualify with Section 423 of the Internal Revenue Code on or after January 1, 2010, so swift action is necessary to avoid unintentional violations. If an ESPP is not timely updated to comply with the final regulations, the employees' special tax treatment could be lost and adverse tax consequences could result.

The final regulations contain numerous requirements that must be met for an ESPP to be compliant. Some of the more notable requirements include:

- To ensure that the maximum purchase discount is available, each offering under the ESPP should include a maximum number of shares that can be purchased by each employee (established either by formula or a specific number).
- While ESPPs may exclude from participation certain categories of employees (e.g., employees with two or fewer years of service and employees who are regularly scheduled to work 20 or fewer hours per week), virtually all other U.S. employees must be allowed to participate.
- The purchase discount cannot be greater than 15% of market value (determined based on the share price at the time the option is granted or at the time the option is exercised, whichever is lower).
- An ESPP participant cannot be offered an option to purchase more than $25,000 worth of company stock during any calendar year.
- Options granted under an ESPP must provide equal rights and privileges to all participants.

While the foregoing requirements have previously been part of the statutory provisions governing ESPPs, the final regulations provide increased detail regarding how ESPP sponsors must comply with the relevant requirements.

ESPP sponsors should immediately undertake a review of their plans to ensure compliance with the final regulations. In addition, given the procedural steps that may be required to amend an ESPP, sponsors should ensure that necessary board and committee members are available to provide consent during the upcoming holiday travel season so that an updated plan can be in place by January 1, 2010, or, if later, the beginning of the next offering period under the ESPP. If shareholder approval of the updated plan is required, such approval may be obtained during 2010 (up to 12 months after the board approves the updated ESPP).

The final regulations can be found **here**.

RiskMetrics Releases 2010 Compensation and Corporate Governance Policy Guidelines

RiskMetrics Group (RMG, f/k/a ISS) recently published its policy guidelines on executive compensation and corporate governance for the 2010 proxy season. In the 2010 policy guidelines, RMG has integrated three of its individual policies into one single Executive Compensation Evaluation policy, which includes three sections: Pay for Performance, Problematic Pay Practices, and Board Communication and Responsiveness. Depending upon the pay issue, RMG's recommendations may have an impact on any (or all) of the following three areas: director elections (particularly compensation committee members), advisory votes on compensation (also referred to as Management Say on Pay Proposal or "MSOP") and equity plan proposals.

Generally, the MSOP is designed to be the initial means for RMG to make recommendations upon a proposal. However, if a company does not offer an advisory vote on compensation or if there is an instance of egregious or continuing practices (including failure to respond to a negative vote on a pay practice), RMG may also recommend withhold/against votes on compensation committee members.

Among the pay practices considered the most contrary to a performance-based pay philosophy and that may result in negative recommendations from RMG are:

- Employment contracts with multi-year guarantees for salary increases, non-performance based bonuses and equity compensation
- New CEO contracts providing excessive "make whole" awards without sufficient rationale, as well as other pay practices viewed as overly generous or problematic by RMG
- Large bonus payments without quantifiable link to performance, including altering performance metrics and other changes to performance-based awards
- Egregious SERP payouts and excessive perquisites, particularly for former or retired executives, or large relocation benefits
- Change in control payments greater than three times annual compensation
- So-called single trigger and modified single trigger (a/k/a "walk-away rights") change in control benefits in new or materially amended agreements, whereby the executive either (i) does not need to terminate or have a substantial diminution in duties or (ii) may voluntarily leave the company for any reason and collect change in control severance benefits
- New or materially amended agreements providing for either a full or modified excise tax gross-up
- Tax reimbursements on certain perquisites
- Payment of dividends or dividend equivalents on unvested performance shares or units
- Executives using company stock in hedging activities, such as "cashless" collars, forward sales, equity swaps and similar arrangements (which, separately, has been the topic of proposed executive compensation legislation)
- Repricing or replacing underwater stock options or stock appreciation rights (including cash buyouts)

Additionally, other problematic pay practices that may receive an adverse recommendation or negative commentary include:

- Excessive severance and or change in control provision, including payments in connection with an executive's performance failure and liberal change in control definitions that may not actually require a change in control to occur for payments to be made
- Overly generous perquisites, including personal use of aircraft, personal security systems maintenance and/or installation, car allowances and executive life insurance
- Internal pay disparity, such that there is an excessive pay differential between the CEO and that of the next highest-paid named executive officer
- Executives voluntarily surrendering underwater options

For more information on RMG's 2010 Executive Compensation and Corporate Governance Policy Updates, click **here**.
For RMG's 2010 Compensation FAQ, click **here**.

COBRA Subsidy Extension Seems Likely

Senators Robert Casey and Sherrod Brown have introduced a bill in the Senate that would extend and enhance the COBRA subsidy enacted by the American Reinvestment and Recovery Act of 2009 (ARRA) last February. ARRA provides a 65% subsidy of COBRA healthcare continuation coverage costs for individuals who have been involuntarily terminated and have lost their employer-sponsored health coverage between September 1, 2008, and December 31, 2009.

Because the unemployment rate remains high, the bill's sponsors (the number of whom continues to grow) seek to extend the COBRA subsidy beyond the original expiration date of the qualifying period (December 31, 2009) until June 30, 2010. In addition to extending the qualification, the bill also would enhance the subsidy by (1) allowing individuals to receive the subsidy for up to 15 months instead of 9; (2) increasing the subsidy to 75% of COBRA costs; and (3) expanding eligibility for the subsidy to include employees who lost their coverage due to a reduction in hours and former employees who are eligible for retiree health coverage.

IRS Conducting Section 409A Audits

There have been reports that the IRS has already begun auditing companies' compliance with the complex tax provisions of Code Section 409A. Section 409A imposes a 20% additional income tax, as well as potential interest and penalties, on individuals who have a right to payment of deferred compensation that does not comport with the applicable provisions. Because the rules under Section 409A are very complex and the "transition period" to operate under the rules expired January 1, 2009, many practitioners had hoped that the IRS would delay its enforcement action. However, it appears that the IRS is beginning to take a close look at these arrangements, while at the same time contemplating a Section 409A correction program (see "Treasury Developing Code Section 409A Document Correction Program").

DOL and SEC Take Aim at Target Date Funds

Due to the increasing popularity of offering target date retirement funds in 401(k) plans, federal agencies and Congress have been subjecting such funds to increased scrutiny, including in hearings held earlier this year. The Department of Labor indicated that it is determining what information with respect to target date retirement funds should be provided to plan participants. Meanwhile, the Securities and Exchange Commission's Division of Investment Management is preparing recommendations relating to target date retirement fund names and sales materials. The DOL and SEC also plan to collaborate on developing investor education initiatives regarding target date retirement funds.

DOL: Pledge and Lien Agreement Is Prohibited Transaction

In **Advisory Opinion 2009A-03**, the Department of Labor determined that it would be a prohibited transaction under Code Section 4975 for an individual retirement account (IRA) to enter into a pledge and lien agreement involving a customer's regular brokerage account and the customer's IRA.

Code Section 4975 and ERISA Section 406 contain similar (but not identical) provisions on "prohibited transactions" between retirement plans and related parties. IRAs are not subject to ERISA, but they are subject to the Code's prohibited transaction provisions. The DOL has authority to issue regulations applicable to the prohibited transaction provisions of both the Code and ERISA. Thus, while the Advisory Opinion concerns an IRA, one would expect the DOL to apply the same reasoning to a pledge and lien agreement involving the accounts of a plan subject to ERISA and the plan's sponsoring employer.

Treasury Developing Code Section 409A Document Correction Program

At recent practitioner conferences, Treasury officials have mentioned that the Treasury Department is working to create a document correction program under Code Section 409A. As of January 1, 2009, all arrangements providing for "nonqualified deferred compensation" are required to be in written compliance with Code Section 409A to avoid adverse tax consequences for participants, and corresponding reporting and withholding obligations for employers. Although details about this correction program have been scant, it is expected to allow employers the ability to fix documents that were not in written compliance as of January 1, 2009, while incurring lesser penalties. Also unknown is when the Treasury Department will issue this correction program.

Please direct any questions, comments or suggestions regarding the newsletter to your Katten attorney or any of the following members of the firm's **Employee Benefits and Executive Compensation Practice**:

Shannon Skinner Anglin, Partner
312.902.5409 / shannon.anglin@kattenlaw.com

Gregory K. Brown, Partner
312.902.5404 / gregory.brown@kattenlaw.com

William B. Duff, Partner
212.940.8532 / william.duff@kattenlaw.com

Steven G. Eckhaus, Partner
212.940.8860 / steven.eckhaus@kattenlaw.com

Russell E. Greenblatt, Partner
312.902.5222 / russell.greenblatt@kattenlaw.com

Gary W. Howell, Partner
312.902.5610 / gary.howell@kattenlaw.com

Ann M. Kim, Partner
312.902.5589 / ann.kim@kattenlaw.com

Daniel B. Lange, Partner
312.902.5624 / daniel.lange@kattenlaw.com

William E. Mattingly, Partner
312.902.5266 / william.mattingly@kattenlaw.com

Edward J. Rayner, Partner
212.940.8515 / ed.rayner@kattenlaw.com

Kathleen Sheil Scheidt, Partner
312.902.5335 / kathleen.scheidt@kattenlaw.com

A. Victor Wray, Partner
704.444.2020 / victor.wray@kattenlaw.com

Andrew E. Bridgman, Associate
312.902.5509 / andrew.bridgman@kattenlaw.com

Michael R. Durnwald, Associate
312.902.5697 / michael.durnwald@kattenlaw.com

Katten
KattenMuchinRosenman LLP

www.kattenlaw.com

CHARLOTTE CHICAGO IRVING LONDON LOS ANGELES NEW YORK PALO ALTO WASHINGTON, DC