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SECTION 409A–TREASURY "NEWSPEAK"[1] LOST IN THE "BRIAR PATCH"[2]

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I. INTRODUCTION

New Internal Revenue Code § 409A adds a layer of requirements to nonqualified deferred compensation ("NQDC"). Although the statute is straightforward on its face, the Department of Treasury ("Treasury") is seeking to expand the restrictions well beyond § 409A's scope and purpose.[3] As a result, the cloud of uncertainty over NQDC will continue until Treasury completes its rule-making.

Treasury's activism notwithstanding, there is good news. Treasury has already issued detailed guidance on scope, effective dates and transition relief (Notices 2005-01 and -02), and promises to continue issuing guidance throughout the year to provide a clear road map to compliance.[4] The most surprising revelation, however, is that the new rules liberalize the law in one important respect, which could cause NQDC usage to grow.[5]

II. SYNOPSIS

A. Purpose and Scope

On October 22, 2004 President Bush signed into law The American Jobs Creation Act of 2004 (the "AJCA").[6] The 600-page bill includes section 885, a six-page statute that adds § 409A to the

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1. GEORGE ORWELL, 1984: A NOVEL (1949) (depicting the language used to stifle thought as a means to gain complete control over society and the individual in the world of Oceania).

2. JOEL CHANDLER HARRIS, UNCLE REMUS: HIS SONGS AND HIS SAYINGS (Applewood Books 1999) (1907).

3. *See* I.R.S. Notice 2005-1, 2005-2 I.R.B. 274, *available at* 2004 WL 2930998.

4. *See id.*

5. *See infra* Section II.C (describing the ability to use § 409A to achieve greater liquidity and security in their deferred cash arrangement and retain the continuing income tax deferral).

6. Pub. L. No. 108-357, 118 Stat. 1418.

Internal Revenue Code (the "Code").[7] Section 409A layers on a new set of rules to existing rules that govern the federal income taxation of NQDC.[8] The law explicitly supplements, rather than supplants, existing law. If a services provider is owed NQDC that fails to satisfy § 409A, the services provider is subject not only to back taxes with interest, but a twenty percent penalty calculated on the sum of the NQDC plus interest.[9] Moreover, the employer is required to withhold the tax.[10] A violation can arise from a failure of either the NQDC arrangement's provisions or the actual operation of the NQDC arrangement.[11]

Section 409A does not re-write or repeal existing law. Instead, Congress simply added new, supplemental requirements to the "constructive receipt" doctrine. It is clear from the plain meaning of § 409A that Congress intended to tighten the rules that govern the unfunded and unsecured promises by employers to their employees to pay cash or property in the future, commonly referred to as "nonqualified deferred compensation."[12] It is equally clear from the plain meaning of the statute that Congress did not intend to apply these new rules to supplant either the law of "valuable right substantial limitation" or the law of compensatory options.

The statute applies to unfunded and unsecured promises to pay cash or property in the future that are governed by Code § 451's doctrine of constructive receipt.[13] It is also clear that the statute prohibits the NQDC recipient (the "Participant") from demanding payment at any time subject to a penalty or "haircut."[14] Such a deferred compensation arrangement can be designed, however, to give the Participant the right to demand payment subject to a substantial limitation. For example, the arrangement can provide a capital appreciation opportunity that the Participant cannot replicate outside the arrangement without an investment of substantial additional capital. Under current law, there is no taxation until actual receipt because the right to demand payment is subject to a substantial limitation in the form of an opportunity cost.[15] For example, stock appreciation rights ("SARs") and fund appreciation rights ("FARs") are tax-deferred under the doctrine of

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7. *Id.*
8. I.R.C. § 409A(a)(2)-(4) (Supp. 2005).
9. *Id.* §§ 409A(a)(1)(B), (b)(4)(A)–(B).
10. I.R.S. Notice 2005-1, 2005-2 I.R.B. 274, pt. IV.F (noting the change to withholding requirements which now require employers to withhold income that is deferred under § 409A).
11. I.R.C. § 409A(a)(1)(A)(i).
12. *Id.* § 409A(b).
13. *Id.* § 409A.
14. *Id.*
15. Rev. Rul. 80-2300, 1980-2 C.B. 165.

"valuable right substantial limitation."[16]

B. Treasury "Newspeak"

In enacting § 409A, Congress did not empower Treasury to re-write the laws of tax-deferred compensation.[17] Congress considered, but rejected, a proposal to revoke the 1978 moratorium on Treasury's power to issue rulings that change the state of the "constructive receipt" doctrine.[18] Instead, Congress merely authorized Treasury to carry out the purpose of § 409A.

Treasury's response has many experts "scratching their heads" in puzzlement. Treasury has interpreted § 409A as a mandate not only to re-write the constructive receipt doctrine, but to re-write the Code § 83 option rules.[19] Treasury has made this known through public verbal comments and the two Notices that confirm Treasury's belief that § 409A is broad and gives Treasury *carte blanche* to write the rules governing tax-deferred compensation.

Treasury has taken the position that § 409A applies not only to deferrals under an account balance plan, but to compensatory options issued at a discount. Treasury has taken the further position that a NQDC plan will comply only if it restricts the deferral's date of payment, or the option's exercisability, to one or more dates certain following the occurrence of one of six events: retirement, separation of service, disability, death, change in control or a date specified. Treasury has further announced that fair market value options and fair market value appreciation rights are exempt from § 409A.

Treasury's interpretation of § 409A as covering options and restricting payments to one or more dates certain is unsupportable. The statute plainly supplements the constructive receipt doctrine only. Moreover, with respect to constructive receipt, it plainly specifies that a plan must provide that distributions may not be made before the earlier of one of the six events.[20] It does not say, as Treasury contends, that the plan must restrict payment to a date or dates certain. It clearly permits flexibility in distributions after the occurrence of one of the events.[21]

Treasury's interpretation kills the doctrine of "valuable right substantial limitation" and, therefore, kills SARs and FARs. It reaches this conclusion through a grotesque reading of the phrase "compensation . . . may not be distributed earlier than [one of six

16. *Id.*
17. I.R.S. Notice 2005-1, 2005-2 I.R.B. 274, pt. IV.A.
18. Prop. Treas. Reg. § 1.61-16(a), 43 Fed. Reg. 4639 (Feb. 3, 1978).
19. *Id.*
20. I.R.C. § 409A.
21. *Id.* § 409A(a)(2)(A).

events]."[22] Treasury holds that the term really means: "distributions may be made (or commence) only upon [one of six events]," and must be made at a time or times that are fixed in advance under the § 409A rules.[23]

Currently, Code § 83, and not § 451's constructive receipt regime, governs the taxation of options.[24] It provides that option spread is not taxable until the optionholder exercises the option[25] (except in the very rare case when an option is actively traded on an established market or has a readily ascertainable fair market value as defined by the § 83 regulations).[26] Even though an exercise and consequent purchase or sale occurs not "earlier than" a time specified at the time the option is granted (one of the six events),[27] Treasury holds that options violate § 409A because it allows exercises later than the specified event.[28]

Treasury has exempted certain compensatory options, namely call options to purchase common stock of the employer provided the strike price equals the fair market value of the underlying securities at grant.[29] Treasury has also exempted similar appreciation rights.[30] Treasury has indicated it will apply the statute to other types of options.[31] The statute gives Treasury no authority or basis for exempting one type of covered deferred compensation and not other types.[32] The ostensible statutory purpose of limiting executive control over the timing of deferred compensation does not, for example, support Treasury's selective and arbitrary approach to enforcement.[33]

In sum, neither the plain meaning of the statutory language nor the purported policy behind the statute supports Treasury's interpretation. Although Congress authorized Treasury to issue interpretative regulations, there are limits to Treasury's rule-making powers.[34] Such regulations, if promulgated, would be in direct conflict with the meaning and purpose of the statute and are

22. *Id.*

23. I.R.S. Notice 2005-1, 2005-2 I.R.B. 274, pt. IV.B.

24. I.R.C. § 83. *See* Treas. Reg. § 1.83-7(a) (1978) (exploring the taxability of stock options as it pertains to § 83 of the Internal Revenue Code).

25. Treas. Reg. § 1.83-7(a).

26. I.R.C. § 83(e)(3)–(4); Treas. Reg. § 1.83-7(b)(1)–(2). *See also* I.R.C. § 421 (regarding certain "qualified options" not applicable under § 83).

27. I.R.C. § 409A(a)(2)(A).

28. I.R.S. Notice 2005-1, 2005-2 I.R.B. 274, pt. I.B.

29. *Id.*

30. *Id.*

31. *Id.*

32. I.R.C. § 409A(e)

33. *See* American Jobs Creation Act of 2004, 118 Stat. at 1418 (stating the purpose of the Act as an attempt to "remove impediments in such Code" to increase satisfaction and productivity among workers).

34. *See* I.R.C. § 409A(e) (listing the restrictions on Treasury's rule-making power).

likely to be overturned if challenged.

C. The "Briar Patch"

Despite Treasury's overreaching, § 409A may actually cause an increase in the use of NQDC. Section 409A liberalizes the law of NQDC in one important respect concerning the ability to "re-defer" or "roll forward" payment dates.[35] By taking full advantage of this opportunity, a Participant can, at all times, limit the average duration of benefits to less than three years, while achieving many years of tax deferral.[36] By limiting duration, Participants make benefits more liquid and more secure. As a result, NQDC under § 409A can be much more attractive than under the old law.

Although the statutory language on the rollforward right is plain and clear, Treasury has not yet published its interpretation. As we have already seen, Treasury is not constrained by commonly accepted norms of statutory construction. Thus, until Treasury reveals its meaning, no one can be assured that following the plain meaning is safe. Hopefully, Treasury will soon confirm the plain meaning.

III. BACKDROP TO § 409A ENACTMENT

A. Three Types of Deferred Compensation

In its broadest sense, the term "deferred compensation" means compensation that is payable, and taxable, more than a brief period of time after the taxable year in which the services are performed.[37] Outside of a qualified retirement plan, there are only three types of nonqualified deferred compensation:

> 1. an unfunded and unsecured promise to pay cash or property at a specified time or times in the future, or earlier upon demand by the services provider, subject to a substantial penalty or financial hardship;[38]
>
> 2. an unfunded and unsecured promise to pay cash or property upon demand by the services provider at any time during a specified period, where, upon such demand prior to the expiration of the period, the services provider would forgo an accumulation opportunity that cannot be replicated without a substantial additional outlay of capital;[39] and

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35. I.R.C. § 409A(a)(4)(B).
36. *Id.* § 409A.
37. *See* I.R.S. Notice 2005-1, 2005-2 I.R.B. 274, pt. IV.A.
38. I.R.C. § 451.
39. *Id.*

3. an option to buy or sell property.[40]

A restricted stock award plan consists of a transfer of property that is taxable upon the performance (or refraining from the performance) of specified services. Because the taxation is not deferred beyond the completion of the service requirement, such a transfer is not deferred compensation.

There are two unique and independent tax regimes for nonqualified deferred compensation (as the term is used in its broadest sense)—Code § 451 and Code § 83. Code § 451 governs unfunded, unsecured promises to pay cash or property in the future. This regime is commonly called the "constructive receipt" doctrine.[41] Thus, deferred compensation Types 1 and 2 above are governed by the § 451 constructive receipt doctrine. Section 83 governs Type 3, compensatory options. The Section 83 rule is commonly called the "exercise" rule.

1. NQDC

It is common for employers to enter into agreements with employees to defer the payment of compensation. An unfunded and unsecured promise to pay cash or property in the future is subject to income taxation when it is actually or constructively received.[42] Such a promise can take many forms. It can arise out of an agreement between an employer and an employee whereby the employee agrees to forgo his or her current salary or bonus and receive instead a promise to pay a specified or determinable amount of cash at a specified time or times in the future.[43] This type has traditionally been called "nonqualified deferred compensation" or "NQDC."

2. SARs and FARs

Such a promise can also take the form of a promise to pay an amount equal to the excess of the value of the employer's stock over a specified amount.[44] This is commonly referred to as a "stock appreciation right" or "SAR." Typically, the SAR holder has the right to demand payment at any time during the SAR's exercisability period.[45] Constructive receipt is avoided by ensuring that there is a substantial limitation on the right to demand

40. *Id.* § 83.

41. *See* Treas. Reg. § 1.451-2(a) (as amended in 1979) (defining constructive receipt). *See also* Martin v. Comm'r, 96 T.C. 814, 822–23, 825 (1991).

42. *See generally* Veit v. Comm'r, 8 T.C. 809 (1947) (discussing the constructive receipt of an employee's bonus payments and income tax ramifications).

43. *Id.* at 809.

44. I.R.C. § 409A(d)(2).

45. *Martin*, 96 T.C. at 828.

payment.[46] The substantial limitation consists of the opportunity to realize returns that cannot be replicated outside the SAR without a substantial outlay of additional capital.[47]

Section 451 provides that a promise to pay compensation in the future is taxable when the services provider is in actual or constructive receipt of such compensation. It further provides that one is in constructive receipt when the compensation is made available without a substantial limitation.[48] Treasury regulations and rulings explain that a "substantial limitation" can be a "stick" or a "carrot."[49] For example, the forfeiture of substantial accrued benefits is a common substantial limitation. Treasury has also ruled that the forfeiture of the opportunity to earn future benefits that cannot be replicated outside the NQDC plan without substantial additional capital is a substantial limitation that precludes constructive receipt.[50]

3. Options

An option, on the other hand, consists of the right, but not the obligation, to purchase property from the employer, or to sell property to the employer, at a specified price.[51] Such an option granted in connection with performance of services is taxable when exercised.[52] The only exceptions are options that are actively traded on an established market and options with a readily ascertainable fair market value.[53]

Section 83 sets forth the regime for the taxation of "property transferred in connection with the performance of services." Section 83(a) provides that a transfer of property is taxable when it is substantially vested.[54] The Treasury regulations promulgated under § 83 provide that "[t]he grant of an option to purchase certain property does not constitute a transfer of such property. . . . See § 1.83-7 for the extent to which the grant of the

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46. *Id.*

47. *Id.* at 821-22. In this case, the petitioners argue that the "substantial limitation" was:

> (1) [f]orfeiture of the right to participate in future dividends declared by Koch; (2) forfeiture of the right to benefit from Koch's future equity growth without investing or losing their capital; (3) forfeiture of the right to change the form of payment in subsequent years; and (4) forfeiture of all cumulative profits previously allocated to the portion of his unvested shares.

Id.

48. I.R.C. § 451.

49. *See, e.g.*, Treas. Reg. § 1.83-7.

50. *See, e.g.*, I.R.C. § 1.451-1(a).

51. Graney v. United States, 258 F. Supp. 383, 386-87 (S.D. W. Va. 1966).

52. I.R.C. § 83(b); Treas. Reg. § 1.83-7(a).

53. I.R.C. § 83(a); Treas. Reg. § 1.83-7(b)(1).

54. It also provides that property will be included in gross income in the year in which the property is transferable or not subject for failure.

option itself is subject to section 83."[55] Treasury Regulation § 1.83-7(a) provides that an option grant is a taxable transfer of property if the option has a readily ascertainable fair market value ("FMV"). It further provides that if an option does not have a readily ascertainable fair market value at grant, then "sections 83(a) and 83(b) shall apply at the time the option is exercised. . . ."[56]

Treasury Regulation § 1.83-7(b)(1) provides that "options have a value at the time they are granted, but that value is ordinarily not readily ascertainable unless the option is actively traded on an established market." Section 1.83-7(b)(2) provides that "if an option is not actively traded on an established market, the option does not have a readily ascertainable fair market value when granted unless the taxpayer can show that all of the following conditions exist:"

- The option is transferable
- At grant the option is immediately exercisable in full
- There exists no restriction on the option or the underlying property that significantly affects the option value
- The "option privilege" value is readily ascertainable at grant

In short, the tax regime for options does not use constructive receipt principles.[57] Instead, § 83 and the Treasury regulations thereunder reflect a strong bias for compensatory options to be taxed at exercise and not upon grant. Section 83 was enacted in 1969, and codified a forty-year history of Treasury rulings that preferred to treat compensatory options as open and nontaxable transactions until the option is exercised and the benefit is actually realized.[58]

The reason for this bias is that Treasury wishes to tax spread growth as ordinary income and not as capital gains. In fact, the litigated disputes involving options have involved the taxpayer arguing for taxation upon grant, and Treasury arguing for taxation upon exercise. Treasury prevailed in every one.[59]

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55. Treas. Reg. § 1.83-3 (as amended in 2003).

56. *Id.* § 1.83-7(a).

57. *See, e.g.,* Treas. Reg. § 1.451-2(a) (noting that income is constructively received when it is credited to one's account, set apart or otherwise made available).

58. *See Graney*, 258 F. Supp. at 387 (agreeing with the government's position that the options are taxable when exercised).

59. *See generally* Comm'r v. Lo Bue, 351 U.S. 243 (1956) (agreeing with the government that taxable gain should be measured as of the time the options were exercised and not at the time they were granted); Victorson v. Comm'r, 326 F.2d 264 (2d Cir. 1964) (rejecting tax payers' agreement that the income was realized upon grant and not exercise of the right to purchase the stock);

B. Courts' Rejection of the Doctrine of Subsequent Election

Treasury's general ruling position, as outlined in Revenue Procedure 71-19, has traditionally been that the taxpayer must make an irrevocable election with respect to the timing and method of deferred benefit payments, and must make such election before the beginning of the period of service that earns the deferred compensation (the doctrine of "subsequent election").[60] To avoid Treasury's attempt to apply the doctrine of subsequent election, NQDC plans have required the Participant, at the time the Participant elects to forgo or defer compensation, to specify the timing and method of payment.[61]

The courts, however, have generally not subscribed to the doctrine of subsequent election.[62] Instead, the case law allows an election regarding the timing and method of payment to be made after services have been performed, so long as at the time of the election there is not a right to current payment.[63]

In *Veit v. Commissioner*, the taxpayer and his employer entered into an agreement to defer the taxpayer's bonus for the year 1940.[64] The agreement was made mid-year, after much of the service for which the bonus was payable had been performed.[65] In rejecting Treasury's claim that the taxpayer was in constructive receipt because the agreement was made after the period of service had begun, the court held that because the agreement was bona fide and entered into prior to the time the bonus amount was ascertainable, the taxpayer was not in constructive receipt of the deferred amounts.[66]

In *Oates v. Commissioner*, the taxpayer, a retiring insurance agent, agreed to have his renewal commissions paid in level monthly installments over fifteen years instead of having them paid in the normal fashion of a high up-front payment and decreasing payments over time.[67] The agreement was made after the services had been performed, but prior to the time the renewal commissions were determinable.[68] The court held that the deferral

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Simmons v. Comm'r, 23 T.C.M. (CCH) 1423 (1964) (agreeing with the government that the income in question was realized on the date the option was exercised, not upon the granting of the option); *Graney*, 258 F. Supp. at 383 (discussing that taxpayers want their options to be taxed upon grant to reduce the amount of taxable income).

60. Treas. Reg. § 601.201 (as amended in 2002).

61. I.R.C. § 409A.

62. Palmer v. Comm'r, 80 T.C.M. (CCH) 101, 131 (2000).

63. *Id.*

64. 8 T.C. at 811.

65. *Id.* at 811-12.

66. *Id.* at 816.

67. 18 T.C. 570, 577-79 (1952), *aff'd*, 207 F.2d 111 (7th Cir. 1953).

68. *See id.* at 576 (estimating how many insurance contracts would exist as time went on).

agreement was entered into at arm's length, was bona fide and constituted a "novation" of the original agreement.[69] Consequently, the taxpayer could not be held in constructive receipt of amounts to which he was no longer entitled.[70]

In the second *Veit* case, the parties agreed to further defer the 1940 bonus payment.[71] The agreement was made after the services were performed and after the 1940 bonus amount had been determined, but prior to the time the bonus payments were due.[72] The court upheld the deferral on the theory that the agreement was bona fide and entered into at a time when the taxpayer had no present entitlement to the bonus payment.[73] Treasury has not acquiesced in the second *Veit* case.[74]

Technical Advice Memorandum ("TAM") 86-32-003 involved a phantom stock plan that provided for the payment of benefits in a lump sum within sixty days after the phantom shares were surrendered, subject, however, to the employee's right to elect, prior to the surrender of the shares, for the benefit to be paid in installments with interest.[75] Treasury ruled that participants who elected installments would be in constructive receipt of the lump sum amount.[76]

Martin v. Commissioner[77] presented facts similar to those of TAM 86-32-003. The taxpayers elected an installment payout.[78] The court rejected Treasury's argument that the taxpayers were in constructive receipt of the lump sum amount.[79] The court held that because the taxpayers made their election to receive installments at a time when they were not in actual or constructive receipt of the lump sum, they should be taxed on the installment payments upon actual receipt.[80]

Based on the case law, many NQDC plans permit Participants to make elections regarding timing and method of

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69. *Id.* at 584-85.

70. *Id.* at 585.

71. Veit v. Comm'r, 8 T.C.M. (CCH) 919 (1949).

72. *Id.*

73. *Id.* at 922.

74. *See* Gen. Couns. Mem. 35,196 (Jan. 16, 1973) ("The position of the Service has generally been that income cannot be deferred once it has been earned. . . ."). "It is questionable whether the Service could defend such a position in litigation. . . . Based on these cases and the longstanding acquiescence, it cannot be stated that a deferral of compensation is only valid if entered into before the performance of services." *Id.*

75. Tech. Adv. Mem. 86-32-003 (Apr. 18, 1986).

76. *Id.*

77. 96 T.C. 814 (1991).

78. *Id.* at 814.

79. *Id.* at 825, 829-30.

80. *Id.* at 830. *See also* Priv. Ltr. Rul. 89-28-051 (Apr. 18, 1989) (declining to characterize substitution of nonqualified stock options in a merger as a taxable event).

payment up to the time of termination of employment, or up to a specified number of months preceding termination.

C. *The 1978 Moratorium on Constructive Receipt Rulings*

On February 3, 1978 Treasury proposed a regulation that reversed the established interpretation of the constructive receipt doctrine.[81] In § 1.61-16, Treasury disallowed deferred compensation by claiming that a taxpayer would be taxed on deferred income.[82] It stated that deferred income shall "be treated as received by the taxpayer in such earlier taxable year."[83] This meant that any income that an employee deferred would be taxed as income in the year it was deferred. Basically, Treasury outlawed deferred compensation by forcing taxpayers to recognize deferred income in the year that the agreement is made.

No case law or legislative history supported Treasury's proposed regulation. The decision seemed completely arbitrary and unfounded. Congress immediately responded to the move by enacting section 132 of the Revenue Act of 1978.[84] Section 132 reversed Treasury's proposed regulation by mandating that deferred compensation plans would operate under the rules and regulations as of February 1, 1978.[85] This reversal placed a moratorium on Treasury's ability to issue any rules or regulations concerning deferred compensation.[86]

D. *Corporate Deferred Compensation Practices*

During the 1980s and 90s, many corporations increased the flexibility of their NQDC plans. Some allowed for subsequent elections as to the method for paying benefits.[87] For example, it has become common for a plan to allow a participant to elect a payment method (i.e., lump sum or installments) up to one year prior to the commencement of payment of benefits.[88] Many plans also added hardship withdrawal rights and "haircut" withdrawal

81. Prop. Treas. Reg. § 1.61-16(a), 43 Fed. Reg. 4639.

82. *Id.*

83. *Id.*

84. Pub. L. No. 95-600, § 132(a), 92 Stat. 2763.

85. *Id.*

86. *See id.* (limiting the effect of regulations to those passed before February 1, 1978).

87. *See, e.g.*, Tech. Adv. Mem. 86-32-003 (concerning a plan adopted by a corporation whereby employees were issued "shadow stock" as compensation that could be surrendered the employees' election).

88. *See, e.g.*, *Martin*, 96 T.C. at 818 (concerning a deferred compensation plan whereby participants could elect a lump sum or installment payments); Priv. Ltr. Rul. 82-15-054 (Jan. 18, 1982) (discussing the tax consequences arising from a plan whereby participants must elect lump sum or installment payments at the time of execution of the deferred compensation agreement).

rights.[89] It was also common for a plan to allow participants to specify a time for payment, such as the fifth anniversary of the deferral, and also allow participants to later defer payment.

Because Treasury was prevented from making new law in the area of deferred compensation, it could not update its ruling position to conform to case law developments. As a result, employers looked less and less to Treasury for guidance, and tended to rely on tax and benefits counsel instead.

E. Enron

In late 2001 as Enron Corporation approached bankruptcy, key executives elected to withdraw benefits from nonqualified deferred compensation plans. The plans were traditional NQDC plans consisting of promises to pay cash benefits at specified or determinable times in the future.[90] The plans were governed by § 451's constructive receipt doctrine. The plans allowed such withdrawals subject to a ten percent "haircut" penalty. Enron's management had designed the plans, and persuaded the Enron Board to approve it.

F. "Hue and Cry" over Executive Pay

During the past ten years, the media have reported many cases of annual executive pay in the tens of millions of dollars.[91] Pundits and analysts have become increasingly critical of executive pay. Congress and the Securities Exchange Commission have initiated certain reforms aimed at curbing excessive executive pay.[92]

IV. SECTION 409A

A. Convergence of Forces Produces § 409A

The events and trends described above converged in 2002 to cause the Chairmen of the House Ways and Means Committee and the Senate Finance Committee to introduce § 409A (or their

89. *E.g.*, Richard J. Bronstein & Michael D. Levin, *A Reasonable Approach to Deferred Compensation in the Post-Enron Climate*, 624 PLI/TAX 1251, 1281 (Oct. 2004) (discussing Enron's deferred compensation plan which provided early withdrawal payments subject to haircut penalties). *See also* Priv. Ltr. Rul. 82-15-054 (concerning a deferred compensation plan in which the employer retained the sole discretion to distribute compensation in the event of an employee's financial hardship).

90. Bronstein & Levin, *supra* note 89, at 1280-81.

91. *E.g.*, David Leonhardt, *Reining in the Imperial C.E.O.*, N.Y. TIMES, Sept. 15, 2002, at C1.

92. *E.g.*, Qwest Communications Int'l Inc., SEC No-Action letter, 2005 WL 562500, at *14 (Jan. 13, 2005) (proposing to limit excessive executive pay).

version of the same).[93] The anger over Enron and the media drumbeat about excessive executive pay focused Congress' attention on NQDC.[94] In February 2002 the Joint Committee on Taxation probed Enron.[95] Its findings served as the impetus for reform of deferred compensation legislation.[96] A consensus emerged in Congress that corporate executives should not be allowed to control payment of their deferred compensation.[97] Treasury actively participated in crafting reform bills.[98] For many years Treasury has been asking Congress to lift the moratorium and enable it to again make regulations for NQDC.[99] Treasury wished either to have its doctrine of subsequent election codified, or to update its ruling position to conform to case law and current practices.[100]

As Senator Charles Grassley, the Chairman of the Senate Finance Committee, stated in a floor speech on October 11, 2004: "This legislation [AJCA] includes the so-called Enron reforms that members have been pushing for over the last three years."[101] The bill allows Congress to limit corporate executives' control over the timing of time deferred compensation payments, enables Treasury to codify the doctrine of subsequent election and ostensibly provides a source of tax revenue.[102]

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93. I.R.C. § 409A (noting that the regulation became effective on October 22, 2004).

94. *Efforts to Toughen Deferred Comp Plan Laws Creating Compliance Concerns with Employers*, http://www.benefitnews.com/retire/detail.cfm?id=6307 (Aug. 2004) ("The Enron debacle prompted a stealth effort in Congress to revamp the rules of non-qualified deferred compensation (NQDC) plans.").

95. JOINT COMM. STAFF REP. NO. 108-3 (stating that Senator Max Baucus and Senator Charles E. Grassley requested the investigation).

96. MICHAEL DORAN, EXECUTIVE COMPENSATION REFORM AND THE LIMITS OF TAX POLICY 3 (2004), *available at* http://www.urban.org/uploadedPDF/311113_TPC_dp18.pdf ("The [new] legislation regulates three aspects of nonqualified deferred compensation: deferral elections, holding of assets, and distribution of benefits.").

97. *See id.* (stating that Congress will have more control over taxation of NQDC with the new legislation).

98. *See id.* (noting that the Treasury Department was given a "broad grant of interpretive authority").

99. *See id.* (stating that the Treasury Department was finally able to lift this moratorium with their new authority).

100. Press Release, Office of Public Affairs, Testimony of Pamela F. Olson, Assistant Secretary of the Treasury (Tax Policy) for the Committee on Finance United States Senate, http://www.treas.gov/press/releases/js168.htm (Apr. 8, 2003) (recommending new regulations that would address some of the problems that allowed Enron's "questionable" tax practices).

101. Press Release, United States Senate Committee on Finance, Floor Speech of Chairman Grassley on Tax Loophole Closers in JOBS Act, http://finance.senate.gov/press/ Gpress/2004/prg101104.pdf (Oct. 11, 2004).

102. *See id. See also* I.R.C. § 409A.

B. *Overview of Provisions*

Section 409A imposes four new sets of constructive receipt rules.[103] These rules are in addition to all existing rules. As a result, all existing rules concerning constructive receipt, economic benefit and assignment of income continue to apply.[104] To achieve tax deferral, the compensation must not only satisfy the existing rules, but these new rules as well.[105]

1. *Initial Election Rules*

Amounts deferred at the Participant's election can avoid adverse tax consequences only if the election to defer is made before the beginning of the calendar year in which services are performed.[106] There are two exceptions.[107] First, a Participant may make an election to defer compensation during the calendar year in which the Participant first becomes eligible to participate, provided the election is made during the first thirty days of eligibility.[108] Second, a Participant can make a deferral election with respect to "performance-based" compensation up to six months before the end of the twelve-month performance measurement period.[109]

2. *Distribution Rules*

The initial deferral election must specify the time or times for payment of benefits. The statute says only that the amounts deferred can avoid adverse tax consequences only if the Plan provides that benefit payments (distributions) may not be made any earlier than the occurrence of one of six specified events:

(i) the Participant's separation from service;

(ii) the Participant's disability;

(iii) the Participant's death;

(iv) a change in control of the Plan Sponsor;

(v) the Participant's unforeseeable emergency; and

(vi) a time or times specified at the time of the initial deferral

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103. Department of the Treasury, *Nonqualified Deferred Compensation Audit Techniques Guide*, http://www.irs.gov/businesses/corporations/article/0,,id=134878,00.html (last visited Mar. 23, 2005) (stating that NQDC plans fall into four categories).
104. *See id.*
105. *See* I.R.C. § 409A.
106. *Id.* § 409A(a)(4)(B)(i).
107. *Id.* § 409A(a)(4)(B)(ii-iii).
108. *Id.* § 409A(a)(4)(B)(ii).
109. *Id.* § 409A(a)(4)(B)(iii).

election.[110]

Treasury has said, however, that it will write the regulations to say that amounts deferred can avoid adverse tax consequences only if the Plan provides that payments may be made only upon the occurrence of one of these events.[111]

3. Anti-Acceleration Rules

Amounts deferred can avoid adverse tax consequences only if the Plan does not permit the acceleration of the time or schedule of any payment under the Plan.[112]

4. Permissible Postponement of Payment Rules

Amounts deferred can avoid adverse tax consequences only if the Plan permits a subsequent election to postpone a payment or change the form of payment under the following conditions. First, any such subsequent election may not take effect until at least twelve months after the election is made.[113] Second, if the election relates to a distribution to be made on separation from service, a specified time or a change in control, then the payment subject to the election must be postponed by at least five years.[114] Third, if the election relates to a payment to be made at a specified time, then it must be made at least twelve months before the date the payment would have otherwise been made.[115]

In addition to the four criteria above, § 409A includes provisions regarding:

A. The definition of a "nonqualified deferred compensation plan," and therefore the scope of § 409A;

B. The effective dates and grandfather rules; and

C. Penalties for noncompliance.[116]

V. TREASURY RULE-MAKING

A. AJCA Authorization

The AJCA provides that

> The Secretary [of the Treasury] shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this section, including regulations

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110. *Id.* § 409A(d).
111. *See infra* Appendix.
112. I.R.C. § 409A(a)(3). *See also infra* Appendix.
113. I.R.C. § 409A(a)(4)(c)(i).
114. *Id.* § 409A(a)(4)(c)(ii).
115. *Id.* § 409A(a)(4)(c)(iii).
116. *See infra* Appendix.

providing for the determination of amounts of deferral in the case of a nonqualified deferred compensation plan which is a defined benefit plan,

relating to changes in the ownership and control of a corporation or assets of a corporation for purposes of subsection (a)(2)(A)(v),

exempting arrangements from the application of subsection (b) if such arrangements will not result in an improper deferral of United States tax and will not result in assets being effectively beyond the reach of creditors,

defining financial health for purposes of subsection (b)(2), and

disregarding a substantial risk of forfeiture in cases where necessary to carry out purposes of this section."[117]

Congress purposely rejected an approach that would have given Treasury *carte blanche* to regulate deferred compensation. The Senate Finance Committee (perhaps at the urging of Treasury) had proposed to lift the 1978 Revenue Act moratorium and empower Treasury to "make the rules." Congress specifically rejected this approach. Instead, Congress authorizes Treasury to make rules "necessary or appropriate to carry out the purposes of this section," and gives the five examples listed above.[118]

B. Regulations that Are Contrary to Plain Meaning

Notice 2005-01's definition of covered nonqualified deferred compensation is broader than the congressional intent indicated by the statutory language and the legislative history. It appears that the regulations forthcoming with respect to the definition of the Minimum Distribution Rules and the Anti-Acceleration Rules will be overbroad as well.

In divining the purpose and meaning of the statute, the courts will look first to the language of the statute and then to legislative history for context and to resolve ambiguities.[119]

Section 409A arose out of the Enron bankruptcy, and ostensibly was intended to prevent corporate executives from withdrawing nonqualified deferred compensation while in service in anticipation of an employer bankruptcy. Historically, the term "nonqualified deferred compensation" referred to the type of plans that Enron maintained. These plans consisted of unfunded, unsecured promises to pay cash benefits at termination of employment, subject to the executives' right to withdraw benefits prior to termination less a ten percent "haircut" penalty. Such

117. American Jobs Creation Act of 2004 § 885(e)(1)(2)(3)(4)(5).
118. *Id.* § 885(e)
119. Linquist v. Bowen, 813 F.2d 884, 888 (8th Cir. 1987).

plans are governed by Code § 451's rules regarding constructive receipt.

Treasury maintains that the term "nonqualified deferred compensation" means all tax-deferred compensation outside of a qualified plan.[120] Treasury also holds that the statute applies not only to deferred compensation subject to the § 451 constructive receipt regime, but to options subject to the § 83 exercise rule regime.[121]

The issue of scope involves whether § 409A is intended to apply to compensatory options, or simply codifies certain additional constructive receipt rules. The definition of "nonqualified deferred compensation" is broadly written and not of much help. Consequently, a court would look to the statute as a whole.[122] The statute as a whole strongly indicates that Congress intended only to codify, through a supplemental law, most of Treasury's version of the doctrine of constructive receipt. The opening subsection of § 409A begins as follows:

> SEC. 409A. Inclusion in gross income of deferred compensation under nonqualified deferred compensation plans.
>
> (a)Rules relating to constructive receipt.

Section 409A(a) sets forth the new rules pertaining to constructive receipt. Congress chose not to include a similar provision for "Rules Relating to Options." The remainder of the statute reinforces and affirms that Congress intended to alter only the constructive receipt rules and not the option rules.[123] The language of the constructive receipt type of deferred compensation includes terms such as "deferral elections," "distributions" and "acceleration."[124] These terms are not used in the context of option law. With options, one refers to "grants," "awards," "exercises," "purchases" and "sales."[125] At no time does the statute refer to options or use any terms that would be essential to the application of a tax law to options.

Perhaps the most egregious and grotesque interpretation, however, is Treasury's insistence that "earlier than" means "later than."[126] Section 409A(a)(2) provides as follows:

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120. I.R.S. Notice 2005-1, 2005-2 I.R.B. 274, pt. IV.A. "[T]he term nonqualified deferred compensation plan does not include a qualified retirement plan, tax-deferred annuity, simplified employee pension, SIMPLE or § 501(c)(18) trust." *Id.*

121. *Id.* pt. I.B.

122. United States v. Talley, 16 F.3d 972, 975 (8th Cir. 1994).

123. Congress chose not to include a section pertaining to options; thus, it may be inferred that § 409A is intended to only alter the rules of constructive receipt.

124. *See* I.R.C. § 409A.

125. *See* Treas. Reg. § 1.83-7.

126. I.R.S. Notice 2005-1, 2005-2 I.R.B. 274, pt. IV.B.

(2) Distributions—

(A) In General—The requirements of this paragraph are met if the plan provides that compensation deferred under the plan may not be distributed earlier than—

(i) separation from service as determined by the Secretary (except as provided in subparagraph (B)(i)),

(ii) the date the participant becomes disabled (within the meaning of subparagraph (C)),

(iii) death,

(iv) a specified time (or pursuant to a fixed schedule) specified under the plan at the date of the deferral of such compensation,

(v) to the extent provided by the Secretary, a change in the ownership or effective control of the corporation, or in the ownership of a substantial portion of the assets of the corporation, or

(vi) the occurrence of an unforeseeable emergency.

Treasury points to the Joint Explanatory Statement of the Committee of Conference for support. The Statement explains that "distributions from a nonqualified deferred compensation plan may be allowed only upon. . . ."[127] Such reliance is misplaced when, as now, the statutory language is clear and unambiguous. There is no doubt about the meaning of "earlier than." Consequently, the Committee explanation is simply wrong.[128]

With respect to SARs and FARs, it is uncertain as to whether they are covered by § 409A. On the one hand, they are governed by the § 451 constructive receipt rules. Conversely, they do not involve deferral elections,[129] and do not have payment schedules or acceleration of payment concepts,[130] as § 409A contemplates. As a result, it is difficult to apply the statute's requirements to SARs and FARs.

If "earlier than" means "earlier than," then the answer to whether SARs and FARs are covered is not so important. Inasmuch as § 409A supplements rather than supplants existing law, and the SAR or FAR provides for exercises after a time specified at the time of the grant, the SAR or FAR complies with

127. STAFF OF THE JOINT COMM. ON TAXATION, 108TH CONG., TECHNICAL EXPLANATION OF H.R. 2896, THE "AMERICAN JOBS CREATION ACT OF 2003" (Joint Comm. Print 2003).
128. *See infra* Appendix.
129. *See supra* Section III.A.2.
130. *Id.*

§ 409A.[131]

The "earlier than" phrasing is further indication that Congress intended to change only the rules that apply to Type 1 deferred compensation. The use of such language presumes that if the compensation were available at that time, then it would be deemed constructively received and therefore taxable.[132] If Congress had intended to affect the operation of Type 2 (SARs and FARs), then it would have, and easily could have, used the term "upon" or added "and not later than."[133]

C. *Standard of Review*

Congress has authorized Treasury to issue regulations carrying out the purposes of the statute.[134] Although the courts will generally defer to the regulations, the courts draw their own inferences as to what Congress intended. If the regulations conflict with the courts' interpretation, then the court is likely to ignore the regulations and apply its own interpretation. Because of the punitive nature of the statute, the regulations will be afforded even less deference than otherwise.

VI. THE RECURRING ROLLFORWARD

Section 409A liberalizes a Participant's ability to defer and re-defer—to "roll forward" benefits. By taking full advantage of this opportunity, a Participant can, at all times, limit the average duration of benefits to less than three years, while achieving many years of tax deferral. By limiting duration, Participants make benefits more liquid and more secure. As a result, NQDC under § 409A can be much more attractive than under the old law.

Section 409A establishes four simple rules for rollforwards:

> 1. The initial deferral election must be timely (§ 409A(a)(4)(B)) and specify the time or times for payment of benefits (§ 409A(a)(2)(A)(iv));
>
> 2. The rollforward election must be made at least twelve months in advance of the payment date (§ 409A(a)(4)(C)(iii) ("The requirements of this subparagraph are met if, in the case of a plan which permits under a subsequent election a delay in payment . . . (iii) the plan requires that any election related to a payment described in paragraph (2)(A)(iv) may not be made less than 12 months prior to the date of the first scheduled payment under such paragraph."));
>
> 3. The new payment date must be at least five years later than the

131. *See infra* Appendix.
132. *See LoBue*, 351 U.S. at 247.
133. *See infra* Appendix.
134. I.R.C. § 409A.

old payment date (§ 409A(a)(4)(C)(ii) ("The requirements of this subparagraph are met if, in the case of a plan which permits under a subsequent election a delay in payment . . . (ii) . . . the plan requires that the first payment with respect to which such election is made be deferred for a period of not less than 5 years from the date such payment would otherwise have been made.")); and

4. There is no limit on the number of times a Participant may roll forward a benefit.

To take full advantage of § 409A, a Participant would "ladder" deferrals and then "roll forward" each benefit. The Participant simply makes a deferral election, and either (i) defers payment to the second year following the deferral year[135] or (ii) allocates the benefits to payment dates in five consecutive years beginning with the second year following the deferral year.[136] One year from each scheduled payment date, the Participant would roll forward the payment date five years, unless the Participant has elected to cancel the rollforward in whole or in part (and therefore to receive all or part of such benefit on the scheduled payment date).[137] The Participant can make such election any time before the rollforward occurs (one year before the scheduled payment date).[138]

VII. CONCLUSION

Section 409A imposes a new layer of requirements that NQDC must meet to avoid current taxation and a twenty percent penalty.[139] Section 409A is, however, a limited and narrow statute that supplements a large body of law developed over the past fifty years.[140] Its purpose is to create rules as to how and when corporate executives receive deferred compensation that is subject to constructive receipt rules.[141] It is not comprehensive, sweeping legislation intended to re-write all existing laws of deferred compensation.

Treasury has taken an overreaching and unsupportable view of the reach of § 409A. Specifically, § 409A does not apply to compensatory options. In addition, when Congress wrote "earlier than,"[142] neither Treasury nor the courts can change the wording to "upon." Only Congress can do that.[143] For Treasury to promulgate

135. I.R.C. § 409A(a)(4)(c)(iii).
136. *Id.* § 409A(a)(4)(c)(ii).
137. *Id.*
138. *Id.* § 409A(a)(4)(C).
139. *Id.* § 409A(a)(1)(B)(i)(II).
140. H.R. REP. NO. 108-548(I) (2004).
141. *Id.*
142. I.R.C. § 409A(a)(2)(A).
143. *Id.* § 409A(e) (providing that the Secretary is only authorized to "prescribe such regulations as may be necessary or appropriate to carry out the purposes of this section").

regulations to such effect is arbitrary, and creates confusion and uncertainty in the administration of the tax laws.

Despite the new restrictions and Treasury's unwarranted expansion of their scope, NQDC should continue to be attractive and a powerful and popular compensation tool. It is doubtful that Treasury can take away a Participant's rights under § 409A to make short-term deferrals and to roll forward benefits as many times as the Participant wishes. This feature of § 409A is a major liberalization and makes NQDC more attractive than under the old law.

APPENDIX

Q1. ***What are the § 409A requirements with respect to distributions (benefit payments)?***

A1. Section 409A(a) provides as follows:

> SEC. 409A. INCLUSION IN GROSS INCOME OF DEFERRED COMPENSATION UNDER NONQUALIFIED DEFERRED COMPENSATION PLANS.
>
> (a) RULES RELATING TO CONSTRUCTIVE RECEIPT—
>
> (1) PLAN FAILURES—
>
> (A) GROSS INCOME INCLUSION—
>
> (i) IN GENERAL—If at any time during a taxable year a nonqualified deferred compensation plan—
>
> (I) fails to meet the requirements of paragraphs (2), (3), and (4), or
>
> (II) is not operated in accordance with such requirements,
>
> all compensation deferred under the plan for the taxable year and all preceding taxable years shall be includible in gross income for the taxable year to the extent not subject to a substantial risk of forfeiture and not previously included in gross income.
>
> (ii) APPLICATION ONLY TO AFFECTED PARTICIPANTS—Clause (i) shall only apply with respect to all compensation deferred under the plan for participants with respect to whom the failure relates.

The § 409A rules are in addition to all existing constructive receipt rules. As a result, all existing rules concerning constructive receipt, economic benefit and assignment of income continue to apply. To achieve tax deferral, the compensation must not only satisfy the existing rules, but the new § 409A rules as well.

Paragraph 409A(a)(2), (3) and (4) sets forth requirements regarding "Distributions" (benefit payments), "Acceleration of Benefits" and "Elections" (initial deferral elections and subsequent elections to change time and form of benefits), respectively.

Section 409A(a)(2) provides as follows:

> (2) DISTRIBUTIONS—
>
> (A) IN GENERAL—The requirements of this paragraph are met

if the plan provides that compensation deferred under the plan may not be distributed earlier than—

(i) separation from service as determined by the Secretary (except as provided in subparagraph (B)(i) [containing the six-month rule for "key employees"]),

(ii) the date the participant becomes disabled (within the meaning of subparagraph (C)),

(iii) death,

(iv) a specified time (or pursuant to a fixed schedule) specified under the plan at the date of the deferral of such compensation,

(v) to the extent provided by the Secretary, a change in the ownership or effective control of the corporation, or in the ownership of a substantial portion of the assets of the corporation, or

(vi) the occurrence of an unforeseeable emergency.

Section 409A(a)(3) provides as follows:

(3) ACCELERATION OF BENEFITS—The requirements of this paragraph are met if the plan does not permit the acceleration of the time or schedule of any payment under the plan, except as provided in regulations by the Secretary.

Section 409A(a)(4) provides as follows:

(4) ELECTIONS—

(A) IN GENERAL—The requirements of this paragraph are met if the requirements of subparagraphs (B) and (C) are met.

(B) INITIAL DEFERRAL DECISION—

(i) IN GENERAL—The requirements of this subparagraph are met if the plan provides that compensation for services performed during a taxable year may be deferred at the participant's election only if the election to defer such compensation is made not later than the close of the preceding taxable year or at such other time as provided in regulations.

(ii) FIRST YEAR OF ELIGIBILITY- In the case of the first year in which a participant becomes eligible to participate in the plan, such election may be made with respect to services to be performed subsequent to the election within 30 days after the date the participant becomes eligible to participate in such plan.

(iii) PERFORMANCE-BASED COMPENSATION—In the case of any performance-based compensation based on services performed over a period of at least 12 months, such election may be made no later than 6 months before the end of the period.

(C) CHANGES IN TIME AND FORM OF DISTRIBUTION—The requirements of this subparagraph are met if, in the case of a plan which permits under a subsequent election a delay in a payment or a change in the form of payment—

(i) the plan requires that such election may not take effect until at least 12 months after the date on which the election is made,

(ii) in the case of an election related to a payment not described in clause (ii), (iii), or (vi) of paragraph (2)(A), the plan requires that the first payment with respect to which such election is made be deferred for a period of not less than 5 years from the date such payment would otherwise have been made, and

(iii) the plan requires that any election related to a payment described in paragraph (2)(A)(iv) may not be made less than 12 months prior to the date of the first scheduled payment under such paragraph.

HYPOTHETICAL

Suppose a Plan provides as follows:

Benefit payments may not be made earlier than

(i) separation from service as determined by the Secretary (except as provided in subparagraph 409A(a)(2)(B)(i));

(ii) the date the participant becomes disabled (within the meaning of subparagraph 409A(a)(2)(C));

(iii) death;

(iv) 2 years after the date of the deferral of the compensation to which the benefit payment relates;

(v) to the extent provided by the Secretary, a change in the ownership or effective control of the corporation, or in the ownership of a substantial portion of the assets of the corporation; or

(vi) the occurrence of an unforeseeable emergency.

Suppose further that the Plan does not require that benefit payments be made upon the occurrence of the event, but gives the Participant the right to elect to withdraw benefits after the occurrence of any of the listed events. Q&A 2 refer to this hypothetical.

Q2. ***In what way does the Plan violate the § 409A distribution rules?***

A2. Such a Plan would not violate the § 409A distribution rules. The § 409A distribution rules require merely that the Plan bar distributions before one of the listed events. They do not require that distributions be made upon the event, or no later than the event. Enron spawned § 409A. Enron executives withdrew NQDC benefits in anticipation of Enron bankruptcy. In § 409A, Congress sought to limit the times at which executives can receive NQDC benefits. Consequently, it conditioned tax deferral on a Plan's preventing Participants from receiving benefits *before* a certain, enumerated event occurs. Those events are termination, death, disability, change in control, unforeseeable emergency and a time or times specified at the time the NQDC agreement is made.

Treasury contends, however, that § 409A(a)(2) provides *minimum* distribution rules. It maintains that distributions must be made *upon* or *no later than* the first to occur of such events. Neither the legislative history, statutory purpose nor the statutory language support such a construction. Congress did not express any interest in controlling the form or timing of benefits during the period following the occurrence of an enumerated event.

If Congress had intended to require that distributions be made (or commence) upon the event it would have so specified. For example, Congress imposed such minimum distribution rules on qualified plans by providing as follows in 401(a)(9):

(9) REQUIRED DISTRIBUTIONS.—

(A)IN GENERAL.—A trust shall not constitute a qualified trust under this subsection [401(a)] unless the plan provides that the entire interest of each employee—

(i)will be distributed to such employee not later than the required beginning date, or

(ii)will be distributed, beginning not later than the required beginning date, in accordance with regulations, over the life of such employee or over the lives of such employee and a designated beneficiary (or over a period not extending beyond the life expectancy of such employee or the life expectancy of such employee and a designated beneficiary). . . .

(C)REQUIRED BEGINNING DATE.—For purposes of this paragraph—

(i)IN GENERAL.—The term "required beginning date" means April 1 of the calendar year following the later of—

(I)the calendar year in which the employee attains age

70 ½, or

(II)the calendar year in which the employee retires. . . .

As illustrated by § 409(a)(9), when Congress wishes to require that distributions be made earlier rather than later, it does not prohibit distributions earlier than certain specified events. Instead, it provides that distributions will be made "no later than" the specified event.

The Acceleration Rules and Election Rules bolster the construction that Congress' purpose was to prevent early withdrawals. Section 409A(a)(3) requires the Plan to prohibit accelerations. Section 409A(a)(4) expressly permits unlimited re-deferrals provided the re-deferral postpones payment by five years. Again, there is no evidence of an intent to require that NQDC benefits be made earlier rather than later, or to restrict payment dates to the enumerated events.

This interpretation is further supported by the supplemental nature of § 409A. Section 409A does not re-write or repeal existing law. Instead, Congress simply added new, supplemental requirements to the "constructive receipt" doctrine. For example, Congress was aware that a Participant could be given the right to demand payment at any time without causing constructive receipt provided the right was subject to a "substantial limitation." It was also aware that a "substantial limitation" could be a "stick" or a "carrot." A common stick is a penalty or "haircut." A common carrot is a capital appreciation opportunity that the Participant cannot replicate outside the arrangement without an investment of substantial additional capital (the doctrine of "valuable right substantial limitation").

Congress did not repeal the doctrine of substantial limitation. It simply eliminated the ability to accelerate benefits before the occurrence of one of the enumerated events.

It is also important to note that § 409A does not empower Treasury to re-write the laws of tax-deferred compensation. Congress considered, but rejected, a proposal to revoke the 1978 moratorium on Treasury's power to issue rulings that change the state of the "constructive receipt" doctrine. Instead, Congress merely authorized Treasury to carry out the purpose of § 409A.

HYPOTHETICAL

Suppose the Participant makes a timely election to defer $120,000 otherwise payable during calendar year 2006. Suppose further that the election specifies that the benefits from such deferral are payable in five installments in five consecutive years beginning 2016. Q&A 3 refer to this hypothetical.

Q3. ***Does the Plan comply with the § 409A distribution***

rules?
A3. Yes. Benefits can be paid at a time or times specified, provided the time or times are specified at the time the deferral election is made.

HYPOTHETICAL

Suppose the Participant makes a timely election to defer $120,000 otherwise payable during calendar year 2006. Suppose further that the election specifies that the benefits from such deferral are payable in five installments in five consecutive years beginning the *earlier of* January 1, 2016 or retirement. Q&A 4 refer to this hypothetical.

Q4. ***Does the Plan comply with the § 409A distribution rules?***
A4. Yes. Benefits can be paid after separation of service or a time or times specified, provided the time or times are specified at the time the deferral election is made.

HYPOTHETICAL

Suppose the Participant makes a timely election to defer $120,000 otherwise payable during calendar year 2006. Suppose further that the election specifies that the benefits from such deferral are payable in five installments in five consecutive years beginning the *later of* January 1, 2016 or retirement. Q&A 5 refer to this hypothetical.

Q5. ***Does the Plan comply with the § 409A distribution rules?***
A5. Yes. Benefits can be paid after separation of service or a time or times specified, provided the time or times are specified at the time the deferral election is made. Section 409A does not require that benefits be paid upon the occurrence of an event, or upon the first to occur of two or more events.

HYPOTHETICAL

Suppose the Participant makes a timely election to defer $120,000 otherwise payable during calendar year 2006. Suppose further that the election specifies that the benefits from such deferral are payable in five installments in five consecutive years beginning the later of January 1, 2016 or retirement.

Suppose the Participant then makes a timely election to defer $120,000 otherwise payable during calendar year 2007. Suppose further that the election specifies that the benefits from such deferral are payable in five installments in five consecutive years beginning the later of January 1, 2010. Q&A 6 refer to this hypothetical.

Q6. ***Does the Plan comply with the § 409A distribution, anti-acceleration and election rules?***

A6. Yes. The 2007 deferral election constitutes neither a change in the time or schedule of any benefits under the Plan, nor an acceleration in the time or schedule of any benefits under the Plan.

HYPOTHETICAL

Suppose the Participant makes a timely election to defer $120,000 otherwise payable during calendar year 2006. Suppose further that the election specifies that the benefits from such deferral are payable in five installments in five consecutive years beginning the later of January 1, 2016 or retirement.

Suppose that twenty-five months before January 1, 2017 the Participant elects to postpone the January 1, 2017 benefit to January 1, 2022. Q&A 7 refer to this hypothetical.

Q7. ***Does the Plan comply with the § 409A distribution and election rules?***

A7. Yes. The 2007 election is timely and permissible. Section 409A establishes four simple rules for benefit re-deferrals or postponements:

> 1. The initial deferral election must be timely (§ 409A(a)(4)(B)) and specify the time or times for payment of benefits (§ 409A(a)(2)(A)(iv));
>
> 2. The postponement election must be made at least twelve months in advance of the payment date (§ 409A(a)(4)(C)(iii) ("The requirements of this subparagraph are met if, in the case of a plan which permits under a subsequent election a delay in payment . . . (iii) the plan requires that any election related to a payment described in paragraph (2)(A)(iv) may not be made less than 12 months prior to the date of the first scheduled payment under such paragraph."));
>
> 3. The new payment date must be at least five years later than the old payment date (§ 409A(a)(4)(C)(ii) ("The requirements of this subparagraph are met if, in the case of a plan which permits under a subsequent election a delay in payment . . . (ii) . . . the plan requires that the first payment with respect to which such election is made be deferred for a period of not less than five years from the date such payment would otherwise have been made.")); and
>
> 4. There is no limit on the number of times a Participant may postpone a benefit.

Section 409A explicitly allows postponements with respect to any benefit, in whole or in part. For example, the Participant elected to re-defer only one of the five payments that were due. The Participant could have elected to re-defer part of such payment as well.