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**SUBMISSION OF
THE ERISA INDUSTRY COMMITTEE
TO THE DEPARTMENT OF THE TREASURY**

**PRESSING ISSUES UNDER IRC § 409A
November 3, 2004**

(a) How long do employers need, after the Treasury issues comprehensive guidance under § 409A, to adopt required amendments to their deferred compensation plans?

(1) If the amendments require shareholder approval, until the next shareholder meeting that is held at least 180 days after the issuance of guidance on which employers can rely.

(2) If the amendments pertain to a collectively-bargained plan, until the expiration of the last-to-expire of all applicable bargaining agreements in effect when the guidance on which employers can rely is issued.

(3) For all other plans, until the later of (A) December 31, 2005, or (B) nine months after the issuance of guidance on which employers can rely.

(b) How should the Treasury define the benefits that are earned and vested before January 1, 2005, under a defined benefit restoration plan?

An employer should be allowed to apply either of the following two approaches to an employee who had a vested interest in his accrued benefit under the plan on December 31, 2004, provided that the employer must treat all participants in the plan consistently:

(1) *Accrued benefit approach*: Under this approach, the benefit that is earned and vested before January 1, 2005, is the vested benefit to which the employee would have been entitled if he had terminated employment on December 31, 2004, plus any early retirement subsidy on such benefit to which the employee subsequently becomes entitled – based on the terms of the plan in effect on December 31, 2004.

(2) *Fractional approach*: Under this approach, the benefit that is earned and vested before January 1, 2005, is the vested benefit to which the employee ultimately becomes entitled under the plan – based on the terms of the plan in effect on December 31, 2004 – multiplied by a fraction. The numerator of the fraction is the employee's years of service before January 1, 2005, that are taken into account by the plan for benefit accrual purposes. The denominator of the fraction

is the employee's total years of service taken into account by the plan for benefit accrual purposes.

(c) How should the Treasury design a transition rule for severance plans covering rank-and-file employees?

The following types of severance plans should be excluded from the definition of a "nonqualified deferred compensation plan":

(1) Collectively-bargained severance plans;

(2) Severance plans that fall within the safe harbor in 29 C.F.R. § 2510.3-2(b); and

(3) The portion of any severance plan that covers nonhighly compensated employees (within the meaning of IRC § 414(q)).

If the Treasury does not issue guidance that permanently exempts these plans from the definition of "nonqualified deferred compensation plan," the Treasury's guidance should, at the very least, provide that such plans are excluded until the later of (A) the expiration of any applicable collective bargaining agreement in effect on the date the Treasury issues guidance or (B) January 1, 2007.

(d) What standards must be met in order for compensation to be treated as "performance-based"?

Compensation should be deemed to be performance-based if:

(1) The compensation is at risk (*i.e.*, not guaranteed, contractually or otherwise);

(2) The compensation is not determined by the employee (or independent contractor) himself or by any member of his family; and

(3) The compensation is earned over a measuring period specified by the plan.

(e) How can a plan provide for distributions to employees who terminate employment with the plan sponsor as a result of a business disposition?

A plan should be permitted to make distributions in these circumstances on either of two grounds:

(1) *Separation from service* – based on an approach analogous to GCM 39824 (Aug. 15, 1990); or

(2) *Change of control* – where a control group sells or otherwise disposes of a member of the group (*e.g.*, the sale or spin-off of a subsidiary).