**COMMENTS REGARDING SPECIFIED EMPLOYEES
UNDER SECTION 409A OF THE INTERNAL REVENUE CODE**

The following comments are the individual views of the undersigned attorney.

Although I have clients who would be affected by the federal tax principles addressed by these comments or have advised clients on the application of such principles, I have not been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these comments.

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I. EXECUTIVE SUMMARY

The following comments are submitted in response to the request for comments made by the Internal Revenue Service in the Notice of Proposed Rulemaking (70 Fed. Reg. 57930, October 4, 2005) for Proposed Treasury Regulations Section 1.409A-1 et seq. (the “:Proposed Regulations”) issued under Section 409A of the Internal Revenue Code of 1986, as amended (the “Code”). These comments address certain aspects of the Proposed Regulations concerning the mandatory six-month delay in commencing payments of deferred compensation to “specified employees,” and specifically, the definition of “specified employee.”

My recommendations are as follows:

1. I recommend that regulations under Section 409A, as finalized (the “Regulations”) provide that a “specified employee” is only a key employee who, at the time of termination of his or her employment, is an employee of a corporation, any stock in which is publicly traded on an established securities market or otherwise.

2. I further recommend that Regulations not provide that, following a merger or other transaction in which the corporation’s stock ceases to be publicly traded, a key employee continues to be considered as a “specified employee” for any period of time.

II. BACKGROUND

On December 20, 2004, the U.S. Treasury Department (the "Treasury") and the Service issued Notice 2005-1, 2005-2 I.R.B. 274 (January 10, 2005) (the "Notice"). The Notice did not address the definition of a "specified employee." The Proposed Regulations include a definition that substantially broadens the definition of a "specified employee" beyond the terms of the statute and the legislative history, in a manner that was not suggested in the Notice.

III. COMMENTS

A. Summary

Section 409A(a)(2)(B)(i) requires that distributions not be made before the date which is six months after the date of separation from service with regard to any "specified employee." Section 409A(a)(2)(B)(i) defines a "specified employee" as a key employee (as defined in Code section 416(i)) of a corporation any stock in which is publicly traded on an established securities market or otherwise (herein, a "Public Company"). The Committee Report for Section 409A provides that "Specified employees are key employees of publicly-traded corporations." There is no further or expanded definition, nor any discussion of a need for an expanded definition, in the legislative history.

The Proposed Regulations provide that "[W]hether any stock of a service recipient is publicly traded on an established securities market or otherwise must be determined as of the date of the employee's separation from service." Prop. Regs. Section 1.409A-1(i)(1). However, the Proposed Regulations include a special rule applicable to corporations that are parties to spin-offs and mergers. Prop. Regs. Section 1.409A-1(i)(2). These rules require that, where a Public Company becomes privately held, any key employee of the pre-spin-off "old" corporation immediately prior to the spin-off continues to be a "specified employee" for a transition period. That period extends until the end of the 12-month period beginning on the first day of the fourth month following the "old" corporation's last identification date preceding the spin-off transaction. In the case of a merger, any key employee of the pre-merger "old" corporation immediately prior to the merger continues to be a "specified employee" until the first day of the fourth month after the identification date of the survivor corporation in the merger, next following the merger. (Collectively, these are referred to as the "Transition Periods.")

B. Recommendations

I recommend that the Regulations provide that a "specified employee" is a key employee who, at the time of termination of his or her employment, is an employee of a corporation, any stock in which is publicly traded on an established securities market or otherwise.

I further recommend that Regulations not provide that, following a spin-off, merger or other transaction in which the corporation's stock ceases to be publicly traded, a key employee continues to be considered a "specified employee" during the applicable Transition Period.

C. Explanation

The intent of the statute is clear and is based on actions by Public Companies. By enacting Section 409A(a)(2)(B)(i), Congress intended to prohibit highly publicized and abusive situations with public corporations (notably, Enron Corporation) in which highly paid executives were "cashed out" of their deferred compensation benefits immediately prior to the bankruptcy of the employer. The statute requires a mandatory "six month delay" in distributions in order to place these executives at risk of loss of their deferred compensation benefits. Congress considered that the executives had a clear conflict of interest and were engaged in furthering their interests rather the interests of the shareholders in the public company. However, the statute is clear that these restrictions apply only to executives of Public Companies (in which the publicized abuses occurred).

After a Public Company becomes a private company, there are adequate safeguards in the governance of the private company to avoid these abuses, and the shareholders are in a position to protect their interests. After a Public Company engages in a spin-off transaction or a merger and, as a result, is no longer a Public Company, then the shareholders of the private company, who are limited in number, have the ability to closely monitor the actions of their officers, and determine whether key employees should be able to receive immediate distribution of their deferred compensation benefits following termination of employment. There is no longer a policy reason for the six-month delay to be mandated. The shareholders of a private company are in a position in which they can control and oversee the actions by the executives. This is significantly different from the situation in a public company in which the shareholders have no influence over executive compensation decisions (other than their ability to vote for directors annually), and in which the key employees of the corporation typically also serve as directors.

Alternatively, to avoid abuses, a simpler and shorter transition period could apply. If the Treasury is concerned about abuse – for example, a situation where the timing of an executive's termination of employment is "gamed," so that it occurs one day following the closing of a merger or spin-off (indicating that the pre-spin-off or pre-merger board of directors negotiated the ability of the executives to "cash out" their deferred compensation), then I recommend that Regulations provide that the Transition Period extends ONLY until the date that is six months following the closing of the spin-off or merger. If the executive continues his or her employment for the six-month period, then he or she would no longer be considered a "specified employee" after that date and would not be subject to the rule, because the private company board of directors is overseeing distributions made to executives at that time.

The simpler transition period I propose will assist taxpayers in complying with the law, and will simplify Treasury guidance significantly. This proposal eliminates a significant amount of unnecessary complexity in the Proposed Regulations in determining the time period covered by the Transition Period. As an example, in the case of a merger, the post-merger private company must establish an "identification date" following the merger in order to measure the applicable Transition Period following the merger. It is very unlikely that the advisors to a private company would recognize the need to establish an identification date, because they would have no reason apparent from the statute to consider the six-month delay rule applicable. In addition, under the Proposed Regulations, the Transition Period may be as short as four months and one day following the merger (if the survivor corporation immediately designates the day following the merger as its identification date), or as lengthy as 16 months (if the survivor corporation designates the date that is 364 days after the merger as its identification date). There is no policy reason to apply such a variable period as the transition period. The intent of Congress would be better carried out by applying a simple six month transition period, if there is a concern regarding abuse.

IV. CONCLUSION

The foregoing recommendations are intended to facilitate the intent of Congress in enacting the rules mandating a six-month delay in distributions made to key employees of public companies. The recommendations are soundly based on the rationale of avoiding abuse in public companies which was a significant reason for Congress' enactment of Section 409A. The recommendations will assure increased compliance with the law and will eliminate the risk (which we submit is very high) of non-compliance because of the complexity of the Proposed Regulations.