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Acredula is the Latin word for "owl," connoting wisdom. This newsletter is intended as wise counsel for boards and executives. Acredula is available to clients and friends of the firm. It is not to be construed as legal advice or opinion.

Leadership Requires Integrity

Addressing the 2007 Class of the U. S. Air Force Academy, Lt. Gen (Ret.) J. W. Kelley said, "Values and standards are critical and go hand in hand with character and leadership . . . Integrity is the single most important element of your character [to be a leader]. The last time I checked, integrity had no elastic properties whatsoever. Don't try to stretch it. You either have it, or you don't. And as my friend, General Ron Yates says, 'I don't know anyone who has some of it!'"

I think this is good advice to both boards of directors who oversee their organization's leaders, as well as to lawyers and consultants who advise them. The duty of both is to provide such oversight and advice for what they believe is in the organization's best interests. Perhaps it is time for boards to oversee, and lawyers and other independent advisers to advise, our organizations' leaders with respect to issues of integrity in "black or white" terms.

Jay Kelley is a good friend. He is more responsible for where my daughters are in their careers than I am. So I listen when Jay speaks. I can tell from his past discussions on issues of governance that he believes a failure in corporate America is not having black or white standards.

Being trained and having lived as a lawyer for over 35 years, I think in shades of gray rather than black or white. But I now think that a board that judges, and a lawyer or other independent adviser that advises, executives with respect to their practices and standards in terms of shades of gray does a disservice to the organization. As Jay Kelley also told the cadets, "So, what's it gonna be

for you? High standards or double standards? You know the answer."

Government is partly to blame for these double standards. The tax laws, such as the alternative minimum for example, defy not only comprehension, but also fairness. So lawyers and accountants began advising how to reduce taxes. Boards began judging executives by how much they brought to the bottom line, including how much they could increase that line by



EDITOR'S NOTE

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reducing taxes. We then applied the same gamesmanship to accounting principles which, unfortunately, still focus on "accepted" rather than "best" practices.

The basic principal of the American corporate system remains sound: Independent oversight

of management by independent directors with the assistance of independent advisers, with accountability of executives for the practices and standards employed. The failure over the last decade was not holding those executives to the best practices and the highest standards. It is now time that we do because who wants to invest or otherwise rely upon an organization that chooses "generally accepted" practices rather the best, or "acceptable" standards rather than the highest?

Although there is no "I" in team, there is an "I" in leadership, and it stands for integrity. You either have it and you can lead, or you don't and should step aside.

Committee Charters: Your Most Important Governing Documents

By

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The most important, and often most ignored, governing documents for any organization with a governing board are the committee charters.

The most important, and often most ignored, governing documents for any organization with a governing board are the committee charters. The charter of any committee should be discussed, if not negotiated, between the directors who are on the committee and the remaining directors who will rely on the committee.

A charter not only protects non-committee members from liability, but also imposes that liability on the committee members. For directors, one of the most important protections from liability is the state-law right of reliance of directors upon committees of directors of which they are not members. However, a director may rely upon a committee

only for matters within the committee's designated authority for which the director reasonably believes merits confidence. But, the committee to which such authority is delegated has a legal duty of care to carry out that authority as an ordinarily prudent person in a like position would do under similar circumstances and a legal duty of loyalty to do so only in, or not opposed to, the best interest of the organization.

Accordingly, committee charters should be in writing. More importantly, these charters should be periodically reviewed and discussed by directors. Therefore, care should be taken in reviewing, discussing and drafting any committee charter to balance both (1) the interest of non-committee members to be protected from liability for the matters delegated and (2) the competing interest of committee members not to be imposed with unreasonable liability.

Someone familiar with the legal rights and obligations of directors should lead the review and discussion of charters. This is often a regular function of a governance committee (a governance committee is often part of another committee such as the nominating committee or corporate compliance committee).

Legal Nature

Each committee charter should establish the committee's legal nature or type, which is often in a purpose clause. Committees may be executive, oversight, recommendation, or advisory.

- An **executive committee** has all authority to act on behalf of the board during intervals between meetings of the board. For the charter of an executive committee, typical language in a purpose or similar clause would read "the executive committee will have and exercise the authority of the board in the management of the organization during the interim between meetings of the board, subject to any restrictions established by the board." Typically, any action or authorization by an executive committee is to be effective for all purposes as the act or authorization of the board, unless the board otherwise determines or directs.
- An **oversight committee**, such as the audit or compensation committee, generally "carries out" all authority of the board with respect to their matters of responsibility. The carry-out oversight committee is the result of the Sarbanes-Oxley Act and subsequently SEC, NYSE and Nasdaq rules requiring that oversight of the financial statement preparation and audit process and of executive compensation be by a committee composed of, or otherwise by, independent directors. For the charter of a carry-out oversight committee, typical language in a purpose or similar clause would read "the audit committee will carry out the board's oversight responsibilities for the integrity of the organization's financial statements and reports." As a result, the actions of these two committees are effective for all purposes as the act or authorization of the board, unless the board otherwise determines or directs by not less than majority vote of those directors having no financial or personal interest in such matter.
- A **recommendation committee** assists the board in reviewing certain matters, but only makes recommendations to the board as to appropriate action. For the charter of a recommendation committee, typical language in a purpose or similar clause would read "the committee will assist

the board by reviewing . . . and recommending some action for the board's consideration." Accordingly, any act of the committee is not the act or authorization of the board unless the board affirmatively approves or authorizes such action.

- An **advisory committee** is not a statutory committee of the board, but only advisory to it.

If the committee is properly composed, the right of reliance entitles non-committee directors to rely upon an executive, oversight or recommendation committee, but not an advisory committee because advisory committees are not statutory.

Composition

Under most states' laws, directors are entitled to rely upon committees only if the committee is composed of directors. This does not mean that there cannot be non-voting members of committees, such as non-director officers, but only those members who are directors may have the right to vote. Voting members, accordingly, must have all rights to receive notice, attend, present and consider matters, vote and otherwise participate in any proceedings of the committee. Non-voting members can be entitled to be present in person, to present matters for consideration and to take part in consideration of any business by the committee at any meeting of the committee, but non-voting members cannot be counted for purposes of a quorum nor for purposes of voting or otherwise in any way for purposes of authorizing any act or other transaction of business by such committee.

Proceedings

Although not legally required, it is recommended that each committee's charter contain provisions as to how it conducts its proceedings, such as who can call meetings, the notice requirements for meeting, and how meetings can be held (including written consents in lieu of meetings), etc.

Responsibilities

The most important provisions of a committee's charter are the committee's responsibilities. These should be written in terms of what is expected of the committee keeping in mind the balance of both (1) the interest of non-committee members to be protected from liability for the matters delegated and (2) the competing interest of committee members not to be imposed with unreasonable liability.

Example responsibilities of an executive committee include transacting all of the business of the organization and exercising the authority of the board in the management of the organization during the interim between meetings of the board, subject to any restrictions established by the board.

Example responsibilities of a "carry-out" oversight committee, such as an audit committee, include carrying out the board's oversight responsibilities for the integrity of the organization's financial statements and reports, including (1) retaining and terminating the organization's public accounting firm responsible for auditing and providing an audit report on the organization's financial statements; and (2) approving the scope of all auditing services and the compensation and other terms of engagement of the external auditor.

Example responsibilities of a recommendation committee, such as a finance committee, include periodically before each fiscal year or other appropriate period review making changes in proposed operating and capital budgets of the organization and recommending to the board adoption of those budgets for such period.

Independent Advisers

As a result of the Sarbanes-Oxley Act, one of the most important authorities of any oversight committee is the right to retain, at the organization's expense, such independent counsel or other advisors as it deems appropriate. This is particularly important for "carry-out" oversight committees. Typically, this may not be an express authority of an executive or recommendation committee and is infrequently an express authority of an advisory committee.

Self Evaluations

Self evaluations by the committee of its proceedings as well as the skills and experience of its members are important to the governance of not only the committee, but also the board and the organization itself. Typically, committees are now required to conduct a periodic evaluation of the provisions of its charter, its performance under those provisions and each committee member's contribution to that committee's performance.

As a result of the Sarbanes-Oxley Act, one of the most important authorities of any oversight committee is the right to retain independent counsel or other advisors as it deems appropriate.

Amendment

Finally, each committee charter is a governing document of the board as a whole, and it may not be amended except by the board. Accordingly, any considerations of the board in its self evaluation become recommendations to the board. The board may defer to such recommendations for consideration of a governance committee.

Conclusion

Individual directors should review the charters of committees of which they are members as well as those of which they are not with the following questions in mind:

1. Is everything you want to know about the authority and responsibilities of the committee in writing?
2. Is the legal nature (i.e., executive, oversight, recommendation or advisory) of the committee clear from the writing or charter?
3. Is it clear who the committee's voting members are, and, if so, are they directors?
4. Is it clear who can call meetings, what notice is required, how meetings can be held, and what constitutes actions of the committee?
5. Are specific responsibilities of the committee stated, and, if so, do the stated responsibilities reflect the balance of both (1) the interest of non-committee members to be protected from liability for the matters delegated and (2) the competing interest of committee members not to be imposed with unreasonable liability?
6. At least for an oversight committee with "carry-out" responsibilities, is it clear whether the committee has authority to have, at the organization's expense, independent advisers?
7. Is the committee required to evaluate itself, its composition, the performance of its members, and the provisions of its charter?



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New Deferred Compensation Rules May Require Year-End Compliance

Congress added section 409A to the Internal Revenue Code as part of the American Jobs Creation Act of 2004. Section 409A intends to curb a variety of perceived abuses in the use of "nonqualified deferred compensation" plans by imposing strict requirements on when deferral elections can be made, limiting distributions to certain specified events, prohibiting the "acceleration" of benefits, and restricting the types of vehicles used to fund such plans. Section 409A became effective beginning on January 1, 2005.

Due to the breadth of section 409A—some consider it to be as significant a piece of legislation in the compensation arena as was the enactment of ERISA in 1974—the tax community has awaited guidance on exactly how to implement the many new mandates of this provision. This guidance initially came in the form of Notice 2005-1, in which the Internal Revenue Service generally allowed employers until December 31, 2005 to amend their plans to comply with the new law, provided that they were operated in "good faith compliance" with these rules in the interim. As a result of some significant delay in issuing proposed regulations, released only recently, the IRS has extended the general period to comply with section 409A until December 31, 2006.

Despite the extension of time in which employers may amend their plans, the proposed regulations do not extend other forms of transition relief offered in Notice 2005-1. As a result, we strongly recommend that employers freeze or terminate certain plans and permit employees to cancel certain late deferral elections no later than December 31 of **this year** (2005).

This article provides a brief overview of section 409A, highlights some significant developments in the proposed regulations and concludes with several recommendations on how to take advantage of the transition relief in Notice 2005-1 and the proposed regulations.

Scope of Section 409A

What Arrangements are Subject to Section 409A?

Section 409A applies to any "nonqualified deferred compensation plan." In general, a nonqualified deferred compensation plan is any "plan" providing for the deferral of compensation.

A "plan" includes any arrangement covering employees, directors, board members, trustees and certain independent contractors (referred to as "service providers"). A plan provides for the "defer-

ral of compensation” to the extent that it creates a legally binding right to have compensation earned by a service provider in one taxable year (but not actually or constructively received or included in income) paid in a future taxable year.

If the employer (referred to as the “service recipient”) has unilateral discretion to reduce or eliminate payments, the plan does not provide for the deferral of compensation unless the facts and circumstances indicate that it is unlikely that the service recipient will exercise this discretion.

The broad scope of section 409A makes it applicable to a variety of arrangements that have not traditionally been considered deferred compensation, such as bonus plans, certain shadow equity arrangements (restricted stock units and phantom stock plans), and certain severance pay arrangements.

What about Bonus Plans and Other Short-Term Deferrals?

A plan does not provide for the deferral of compensation to the extent that it is paid by the later of 2-1/2 months from: (a) the end of the service provider’s taxable year or; (b) the date on which it is no longer subject to a “substantial risk of forfeiture.” Practically, this applies to most bonus plans, including multi-year bonus plans and fiscal year bonus plans where the amount of the bonus is unknown, so long as bonuses are paid within this 2-1/2 month period.

Note: Section 409A provides for a special definition of “substantial risk of forfeiture.” Under this special definition, a non-competition agreement is not considered to create a substantial risk of forfeiture. As a result, many plans, including “457(f)” plans, which rely on non-competition agreements must be amended. This definition, however, also provides a planning opportunity to combine a “substantial risk of forfeiture” with a short-term deferral and avoid application of section 409A.

What Plans are Exempt from Section 409A?

As a general rule, the following are exempt from section 409A:

- Qualified plans;
- “457(b)” plans;
- SEP plans and SIMPLE-IRAs;
- *Bona fide* vacation, sick leave, disability pay or death benefit plans;
- Certain stock rights, including fair-market value stock options and fair market value stock appreciation rights;

- Grants of incentive stock awards (“ISOs”) and under employee stock purchase plans (“ESPPs”);
- Certain separation payment plans;
- Transfers of restricted property;
- Grants of partnership profits interests;
- Routine business payments between accrual taxpayers;
- Grants of restricted property;
- Split-dollar insurance arrangements; and
- Medical reimbursement arrangements.

What about Stock Plans?

The proposed regulations clarify that fair market value stock rights are not subject to section 409A. For these purposes, “stock rights” include both stock options and stock appreciation rights.

However, if a stock right contains a feature for the deferral of compensation, it may nevertheless be subject to section 409A. A stock right includes a feature for the deferral of compensation if the:

- Option may be settled in stock other than of the service recipient, or the appreciation is measured by appreciation in stock other than of the service recipient;
- Amount required to purchase the stock is or could become less than the fair market value of the stock on the date of the grant, or compensation payable under the appreciation right is or could be greater than the difference between the stock value on the date of grant and the value on the date of exercise;
- Stock right permits the recipient to receive compensation other than cash or stock of the service recipient on the date of exercise and such additional rights allow for the deferral of compensation; or
- Stock right permits the recipient to receive an amount equal to all or part of the dividend declared and paid on the underlying stock upon exercise, unless set forth in a separate agreement conforming to the rules of Section 409A.

The proposed regulations adopt a generous definition of “stock of the service recipient” by applying the affiliated company and common control definitions by substituting a 50% (or, for legitimate business reasons, 20%) ownership test.

The proposed regulations clarify that fair market value stock rights are not subject to section 409A. For these purposes, “stock rights” include both stock options and stock appreciation rights.

Section 409A prohibits employers from using certain “offshore” trusts to hold plan assets or trust documents containing “financial health” triggers.

Due to some differences in the transition relief granted in Notice 2005-1 and the proposed regulations, employers maintaining stock plans that do not comply with section 409A are advised to amend these plans to cancel deferrals or terminate awards no later than December 31, 2005.

What about Severance Pay Plans?

The proposed regulations indicate that “separation pay” plans are generally subject to section 409A unless the plan provides for separation pay only upon an actual involuntary separation from service or pursuant to a window program and is either:

- Collectively bargained; or
- Paid no later than two years from the separation from service and does not exceed the lesser of twice the service provider’s compensation or twice the section 401(a)(17) limit for the year (\$210,000 in 2005).

We recommend that severance pay plans and similar arrangements be reviewed prior to December 31, 2005 to determine whether such plans should be amended to comply with section 409A or be terminated and replaced by a new or different arrangement.

What about Independent Contractors and Directors?

Section 409A does not apply to arrangements between service recipients and independent contractors if, during the taxable year, the independent contractor provides significant services to two or more unrelated service recipients.

Note: Directors – even directors who are independent contractors with respect to multiple unrelated corporations – are not eligible to take advantage of the independent contractor exception.

Operation of Section 409A

What Changes Does Section 409A Require to My Plans?

Section 409A requires employers to make several significant changes to their deferred compensation plans. These changes require that:

- Employers maintain their nonqualified deferred compensation plans in writing.
- Participants elect to defer: (a) non-performance based compensation no later than December 31 of the prior calendar year; and (b) performance

based compensation no later than six months before the end of the performance period;

- Distributions from plans be made only upon the occurrence of one of the six specified events of distribution described in the statute;
- Distributions to certain key employees of public companies be delayed by six months; and
- Plans be amended to restrict the ability of participants to: (a) accelerate the receipt of benefits; or (b) make later elections to further defer distributions.

In addition, section 409A prohibits employers from using certain “offshore” trusts to hold plan assets or trust documents containing “financial health” triggers.

What Are the Penalties for Not Complying with the New Rules?

If a plan violates the rules discussed above, section 409A imposes substantial penalties against the **participant**. As a result, service providers have a significant vested interest in ensuring that their employers comply with section 409A.

The failure of a plan to comply with section 409A requires that the participant include all previously deferred amounts under the plan in gross income and pay on this amount: (1) income taxes, (2) employment (Social Security and Medicare) taxes; **and** (3) a 20% penalty tax. In addition, the participant will also be responsible for interest on this amount at the underpayment rate plus 1% and any underpayment penalties that may be imposed.

Neither Notice 2005-1 nor the proposed regulations provides an exception from these penalties for good faith plan drafting errors or operational failures that are fully and promptly corrected upon discovery.

How Are Multiple Plans Treated?

Significantly, the proposed regulations aggregate **all** nonqualified deferred compensation plans of a service recipient in which a service provider participates. Practically, this means that an operational failure with respect to any single plan is deemed to trigger an operational failure in all other plans of that service recipient in which the service provider participates.

Transition Relief

When Does Section 409A Take Effect?

Section 409A applies to any “amount deferred” on or after January 1, 2005 or any plan that was “materially modified” after October 3, 2004. An

amount will be treated as deferred before 2005 (and, as a result, exempt from these new rules) so long as the service provider has a legally binding right to receive the amount, and the amount is both earned and vested. For this purpose, an amount is earned and vested only if not subject to either a substantial risk of forfeiture; or a requirement to perform further services.

Technically, this means that participants should have made elections to defer compensation earned or vesting in 2005 by December 31, 2004 and plans should have been amended to conform to these rules by the same date. However, the Internal Revenue Service has provided transition relief for employers to bring their deferred compensation plans into compliance with section 409A.

This transition relief provides that:

- Any deferral elections required to have been made by December 31, 2004 were deemed timely only if made by March 15, 2005;
- Participants may cancel deferral elections made in 2005 or terminate participation in a plan only until December 31, 2005;
- Participants may change their distribution elections to comply with section 409A until December 31, 2006; and
- Plans may be amended to comply section 409A until December 31, 2006, so long as operated in good faith compliance with the new law until such time.

What Is “Good Faith Compliance” with Section 409A?

Plans will be operated in good faith compliance with section 409A so long as they operated in accordance with the principles in either Notice 2005-1 or the proposed regulations.

Note: The exercise of discretion by the service recipient or provider in a manner that causes a plan to violate section 409A will not be considered good faith compliance. However, such actions will not cause the plan to fail to be operated in good faith compliance with respect to the other participants.

What Should I Do about My Existing Plans?

The actions that employers should take in response to section 409A depend on the type of deferred compensation plans maintained.

(a) Fully Vested Plans

Generally, section 409A is not applicable to deferred amounts that were fully earned and vested

by December 31, 2004. This means that all services for accrual and vesting of all benefits under the plan have been performed. Thus, fully earned and vested plans are grandfathered under the old law. As a result, an employer should take no action with respect to an existing deferred compensation plan that no longer accepts deferrals and all previously deferred amounts under which are fully vested.

(b) Existing Plans Still Accepting Deferrals

An employer maintaining an existing deferred compensation plan still accepting deferrals that were not vested by December 31, 2004 should consider freezing this plan with respect to previously deferred amounts that were fully vested as of December 31, 2004 to preserve the prior, more favorable, tax treatment of the plan. Employers must be careful not to “materially modify” the plan, otherwise they risk jeopardizing the plan’s grandfathered status.

The employer may permit participants to continue making deferrals into the existing plan, as employers have until December 31, 2007 to amend their plans. Under this transition rule, the existing plan will be deemed to comply with section 409A so long as: (a) deferral elections for 2005 were made by March 15, 2005; (b) deferral elections for 2006 are made by December 31, 2005; (c) the plan is amended to conform to section 409A by December 31, 2007; and (d) the plan is operated in good-faith compliance with section 409A and Notice 2005-1 or the proposed regulations until such time.

(c) New Plans

The release of proposed regulations address many concerns about the operation of new nonqualified deferred compensation plans under section 409A. As such, employers are free to establish such new plans and operate them in good faith compliance with section 409A and applicable IRS guidance.

Note: The plan termination rules in the proposed regulations require that employers terminating any single plan to terminate all like plans, distribute the plan assets within two years and refrain from establishing replacement plans for a period of at least five years. In addition, the adoption of a new plan to circumvent the rules of section 409A with respect to existing plans indicates a lack of good faith compliance with respect to that plan.

An employer maintaining an existing deferred compensation plan still accepting deferrals that were not vested by December 31, 2004 should consider freezing this plan with respect to previously deferred amounts that were fully vested as of December 31, 2004 to preserve the prior, more favorable, tax treatment of the plan.

Section 409A provides special termination rules requiring that, if an employer terminates a plan, all other plans must be terminated with respect to all other participants and the employer cannot establish a new plan for five years.

To this extent, we caution employers to think carefully and consult with counsel before establishing any new arrangements until the operation of section 409A is fully understood.

What Actions Must I Take in 2005?

Certain complexities in the transition relief require that the following actions be taken no later than **December 31, 2005:**

- **Terminate Certain 2005 Deferrals.** Section 409A requires that participants elect to defer non-performance based compensation no later than December 31 of the year **preceding** the year in which compensation is to be paid. Practically, this means that an election to defer a calendar year 2005 bonus must have been made by December 31, 2004 (extended to March 15, 2005 for compensation payable in 2005 only). As a result, any participant who made an election to defer compensation under a deferred compensation plan after March 15, 2005 must cancel this deferral by December 31, 2005. Similarly, participants must defer certain performance-based compensation no later than six months before the end of the performance period.

Practically, this means that an election to defer a performance payment payable on December 31, 2005 must have been made no later than May 31, 2005, and must be canceled by

December 31, 2005 to avoid application of section 409A.

- **Terminate Plans.** Employers who do not wish to maintain plans subject to section 409A may terminate these plans and distribute plan assets to participants, who include the amounts distributed in gross income when they become vested. Any employer who wishes to cancel a deferred compensation plan (or any participant who wishes to cease participating in such a plan) must do so by December 31, 2005.
- **Amend Discount Stock Plans.** Section 409A applies to any “discount” stock plans (stock option or stock appreciation plan). Employers who wish to amend these plans by substituting fair market value stock or stock rights must do so by December 31, 2005.
- **Certain Other Stock Plans.** Section 409A applies to any stock plan (stock option or stock appreciation plan) that that is payable in **other than** cash or employer common stock (e.g., non-employer stock, preferred stock etc.) Employers who wish to amend these plans to provide for payments in cash or employer common stock must do so by December 31, 2005.

Note: Section 409A provides special termination rules requiring that, if an employer terminates a plan, **all** other plans must be terminated with respect to all other participants and the employer cannot establish a new plan for five years. As a result, December 31, 2005 is the last best opportunity for employers to terminate non-conforming plans.

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