Summer 2014

VIEWpoint

MANAGEMENT COMPENSATION RESOURCES

15 YEARS

Fifteen Years and Counting...

How can it have been 15 years ago that we started this business?!? It seems like just yesterday that Lisa and I were assembling participant packages for our first large deferred compensation plan enrollment — literally around our kitchen table!

A lot has changed since then, including the kitchen table. When we started this journey, we didn't know what the future had in store. During the last 15 years, we've seen:

- The bursting of the ".com" market bubble;
- The attacks on our country on September 11, 2001;
- Two major economic downturns ('01-'02 and '08-'09);
- A new tax law that took effect in 2005, freezing activity in our market for 2 years;

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Foreshadowing Future IRS Scrutiny of 409A Compliance

While there is very little risk today for small and mid-size companies, the recent IRS announcement regarding a program to audit Section 409A compliance of the country's 50 largest companies foreshadows a much broader initiative on enforcement of Section 409A. Section 409A governs the tax treatment of non-qualified deferred compensation plans. It is also broadly interpreted to impact any compensation arrangement that pays out more than two and a half months after the end of the period in which the compensation was earned.

Regardless of company size, most plans today are in documentary compliance with 409A; as legal documents have been thoroughly reviewed and amended over the past five years. However, the IRS will also be looking for ongoing administrative compliance — which is where some plan sponsors may have inadvertently tripped over the rules and have some compliance problems.

MCR clients will have little real risk — even if they are audited.

Since large public companies are likely to be in compliance (for the most part), the IRS is unlikely to find much in the initial audit process. Given that, the IRS could 1) conclude that compliance isn't currently an issue or 2) decide that they also need to audit smaller company compliance.

Given my experience with the government on related topics, it is a good bet that they'll expand the scrutiny to small and mid-size companies. If audited, companies will need to provide detailed information regarding deferred compensation plans, payments made and deferral elections.

Having said all that, if the IRS does decide to expand the audits, it will likely be 2015 before any small and mid-size companies are impacted.

For Management Compensation Resources (MCR) clients there is little real risk — even if they are audited — since Section 409A compliance is a major part of our ongoing focus and service to clients.

As you review your regular quarterly reporting from MCR, please let us know if you have questions or concerns regarding your Plans Section 409A compliance. We'd be happy to conduct an informal self-audit of your Plan.

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- Regulations for the tax law that became effective 1/1/2009;
- An early decrease in U.S. income tax rates, with relative stability in tax rates since; and
- Historically low fixed interest rates for the last 4-5 years.

While we can't know what the next 15 years will look like, I can make some guesses.

Here is what I think we will see:

- Higher marginal tax rates (both State and Federal) and fewer deductions / exemptions for highly-paid people over time;
- Interest rates will stay low (but slowly rise) for the foreseeable future;
- Baby-boomer executives will continue to retire in ever-greater numbers;
- Companies will need to pay extra attention to developing "bench strength" and succession planning in all areas of their business; and
- Business owners (who are also predominantly baby-boomers) will struggle with the questions of how they want to retire — and what will become of the company they have built?

Right now, these issues are on the front-burner for many companies and we are busy helping several companies and owners address these issues. Please let us know if we can be of service to you and your company in any way.

Finally, many thanks to all of you who were able to join us at our anniversary event at Wildfire for the wine-tasting celebration. The weather was bad, but the food and wine were great! And more thanks to the others who weren't able to attend that night — but still sent along their well wishes. We wouldn't be in business without our clients, associates, and friends and it meant a lot to see and hear from so many of you.

Enjoy the rest of summer!

Benefits of a Corporate Trustee

Offering a retirement plan can be one of the most challenging, yet rewarding, decisions an employer makes. Everyone benefits when a retirement plan is in place — the employees who participate, their beneficiaries, and the employer. Some companies wonder whether it is necessary to employ a corporate trustee or, instead, to "self-trustee" the plan.

Administering a plan and managing its assets both carry a significant amount of responsibility. The administration and asset-management roles also expose you to some degree of personal liability under the Employee Retirement Income Security Act of 1974 (ERISA).

ERISA protects a plan from the mismanagement and misuse of its assets by establishing a fiduciary relationship between the plan and anyone who:

- Exercises discretionary authority or responsibility for management of the plan.
- Provides investment advice to the plan and its participants for compensation.

There are several ways for the Plan Sponsor of a qualified retirement plan to fill the role of trustee. Each option carries its own degree of fiduciary liability. The graph nearby illustrates different trustee roles and the degree of fiduciary risk and responsibility associated with each.

Given the different levels of fiduciary duty and the increased degree of liability that accompanies each, your business must define the exact role to be assumed by your retirement plan trustee.

Non-qualified (NQ) retirement plans also often utilize trusts and corporate trustees. However, because the trusts that support NQ plans are not of the same legal structure as those used in qualified plans — the fiduciary risk and responsibility is not as big of an issue. Most NQ trusts are some form of directed trust these days.

There are several good reasons to seek the services of a corporate trustee. By far the most important one, however, is that qualified plan fiduciary responsibility, when distributed broadly over several parties, reduces the potential for conflicts of interest — and thus lowers the risk to you as the Plan Sponsor.

~ **William J. Bosch, CTFA**
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