

**TECHNICAL CORRECTION TAX BILL INTRODUCED TO CLARIFY NEW
DEFERRED COMPENSATION PROVISIONS**

November 29, 2004

The technical corrections are intended to clarify a number of provisions set forth in the American Jobs Creation Act of 2004. H.R. 5395 calls for, among other things, the clarification of the sweeping nonqualified deferred compensation provisions, including the two new funding rules relating to the use of off-shore rabbi trusts and the prohibition against certain types of triggers intended to protect the executive in the event of the employer's financial difficulty.

With respect to the new nonqualified deferred compensation provisions, the Tax Technical Corrections Act of 2004 is intended to clarify (although in a rather cryptic way) that:

- the 20% penalty tax and interest applicable to participants as a result of a violation of new Code section 409A are not treated as payments of regular tax for alternative minimum tax purposes;
- the five-year re-deferral limitation will not (as otherwise could be understood to be the requirement of the originally enacted statute) be mandatorily applied to each annual payment in a sequence of payments beginning with the payment in that sequence for which the re-deferral election is first made, i.e., each annual payment in a sequence of payments may be independently re-deferred pursuant to a separate annual re-deferral election;
- the transitional guidance (scheduled to be issued on or before December 21, 2004), in which plans will have an opportunity to conform to the requirements of new section 409A, applies to plans adopted before January 1, 2005; and
- the funding rules relating to the use of off-shore rabbi trusts and the prohibition against certain types of triggers intended to protect the executive in the event of the employer's financial difficulty are each fully effective January 1, 2005, i.e., the grandfather rules do not apply. (This provision also directs Treasury to issue transitional guidance in which employers may conform their current plan document and/or plan operation with the new funding rules. This means that employers that currently fund their nonqualified deferred compensation plan(s) through off-shore rabbi trusts, or have specific provisions in their plan document(s) that trigger "funding" based on the employer's "financial health" will have an opportunity to (i) pull back the off-shore assets and re-direct them into a U.S. based funding vehicle and/or (ii) amend their plan striking the "trigger" provisions.)

Although it appeared that the 108th Congress would adjourn once the all-important spending bills were passed (an omnibus spending package was passed by both Houses of Congress late Saturday night), Congressional leaders have indicated that both the House and Senate may reconvene December 6th and 7th to take up intelligence related matters. As the members reconvene, it is unclear whether there will be time or an effort to consider the technical correction bill. To be sure, the effective date of the recently enacted nonqualified deferred compensation provisions (i.e., January 1, 2005) left little time for employers, practitioners, and even the Treasury Department and the IRS to react to the changes. Therefore, the time sensitive nature of the new provisions may be a motivating factor for a push for enactment. If the measure does not receive any consideration in the last days of the 108th, the tax writing Committees have indicated that H.R. 5395 will be re-introduced in the first days of the 109th Congress.