

February 2, 2007

Memorandum to Our Investment Management Clients

**Senate Approves Minimum Wage Increase Bill
Containing Proposed New Limits on Deferred Compensation**

On February 1st, the Senate passed the Fair Minimum Wage Act of 2007 (the “Senate Bill”). In addition to increasing the federal minimum wage, the Senate Bill contains the \$8 billion in small business tax breaks and accompanying revenue offsets, including the proposed new limitation on the amount of annual compensation that may be deferred by a “participant” in a nonqualified deferred compensation plan subject to Section 409A of the Internal Revenue Code, that were passed by the Senate Finance Committee on January 17th.¹

The next step in the legislative process is the reconciliation of the Senate Bill with the minimum wage bill that the House passed on January 10th which did not contain any accompanying tax provisions. While the leaders in the House previously have opposed the addition of tax provisions to its bill, earlier this week Congressman Rangel, Chairman of the House Ways and Means Committee, indicated some willingness on behalf of the House to negotiate with the Senate on enacting a smaller business tax package than the \$8 billion worth of tax breaks included in the Senate Bill.

Based on published reports, it appears likely that the Senate Bill will be held at the Senate during the negotiations² between the Senate Finance Committee and the House Ways and Means Committee to resolve the differences between the bills passed by the two chambers of Congress. No announcement has been made regarding when these negotiations will take place or be finalized.

Since the Senate Finance Committee vote two weeks ago on the tax provisions contained in the Senate Bill, a number of business groups have informed the Senate of their concerns that the proposed deferred compensation cap passed by the Senate Finance Committee (i) is not targeted at the abusive arrangements involved in Enron that initially attracted the attention of Congress, and (ii) could effect employees other than those that are viewed as highly-compensated and thereby have a significant adverse effect on the ability of businesses to attract

¹ The Senate Bill, as currently drafted, would limit the dollar amount that a “participant” in a nonqualified deferred compensation arrangement could defer with respect to any year to the lesser of (i) \$1 million, or (ii) the average annual compensation that the “participant” derived from the employer maintaining the arrangement during the five-year period preceding the year for which the limitation is being determined.

² If the Senate Bill were to be sent immediately to the House for consideration, the House has indicated it may reject the Senate Bill because the House is constitutionally empowered to initiate all tax legislation and the House-passed minimum wage bill does not contain any tax provisions.

and retain “mid-level” employees.³ Whether, and the extent to which, these lobbying efforts will affect the ultimate enactment of the deferred compensation cap is unclear at this time.

We will continue to keep you apprised of any significant developments relating to the deferred compensation cap proposal contained in the Senate Bill.

Seward & Kissel LLP

³ These concerns result from the Senate Bill’s treatment of “earnings” attributable to nonqualified deferred compensation as additional deferred compensation for that year in applying the proposed \$1 million annual limitation.