

# **Rabbi Trusts – The Basics and Beyond**

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While rabbi trusts have been around for over 20 years, they only recently have generated significant interest outside the employee benefits and executive compensation community. In this article, we review the basics of rabbi trusts, address some of the unique issues that can arise in connection with their use, and explain the heightened interest in rabbi trusts on Capitol Hill and elsewhere.

We assume that readers have a basic familiarity with the rules for nonqualified deferred compensation arrangements (deferred compensation plans) under the Internal Revenue Code (the "code") and the Employee Retirement Income Security Act (ERISA).

## **Background<sup>1</sup>**

Rabbi trusts are so named because the first such trust approved by the IRS in 1980 was established for the benefit of a rabbi.<sup>2</sup> Presumably, this rabbi was concerned that promised deferred compensation benefits might not be paid when his service to the congregation ended. The congregation proposed to place assets in a trust and restrict their use to the payment of such benefits. Because the trust assets remained subject to the claims of the congregation's creditors, the IRS ruled that the rabbi would not be taxed on the amounts that were deposited in the trust.

Like the rabbi in the original IRS ruling, many employees fear that a hostile buyer or new management may try to avoid paying the deferred compensation benefits that have been promised to them. To alleviate these concerns, an employer may establish a rabbi trust with an independent financial institution serving as trustee. Such a rabbi trust will *not* protect an employee from the risk of his or her employer becoming insolvent and unable to meet its obligations under a deferred compensation plan. However, if properly structured, a rabbi trust will provide an employee with significant protection from a change in the control of his or her employer, or from the employer otherwise having a change of heart and attempting to avoid making payments due under the deferred compensation plan.

Ideally, an employee would like to see his or her employer set beyond the reach of its creditors an amount sufficient to provide deferred compensation benefits. Unfortunately, for the reasons discussed below, such funding of the benefits would cause adverse results under the tax code and ERISA. Because the creditors of an employer have access to rabbi trust assets, placing assets in such a trust will not trigger these adverse results. Thus, the use of rabbi trusts has become widespread, and these trusts are the vehicle of choice for informally funding deferred compensation plans.<sup>3</sup>

## **Treatment of Rabbi Trusts under the Tax Code**

Before discussing the treatment of rabbi trusts under the tax code, it is necessary to briefly address the constructive receipt rules, the economic benefit doctrine, and I.R.C. §83.

## **Constructive Receipt**

A taxpayer may be subject to taxation on an amount prior to actually receiving it if he or she is treated as having constructively received the amount. The constructive receipt rules apply when an amount has been set aside and a taxpayer may draw upon it without substantial limitations or restrictions.<sup>4</sup>

Accordingly, to avoid early taxation of benefits, a deferred compensation plan must place substantial restrictions on an employee's ability to receive his or her benefits. For example, an employee cannot have the right to demand an immediate lump-sum payment of his or her entire deferred compensation plan benefit at any time.

## **Economic Benefit Doctrine**

An employee also may be taxable on the value of his or her deferred compensation plan benefits before actually receiving them under the "economic benefit" doctrine. This doctrine provides that an employee may have to currently include in income economic or financial benefits received as compensation, though not in the form of cash. The doctrine applies when assets are unconditionally and irrevocably paid into a fund or trust to be used for the employee's sole benefit.<sup>5</sup>

## **I.R.C. §83**

The concept behind the economic benefit doctrine was codified in I.R.C. §83, which governs the taxation of compensatory transfers of property. Property is defined for this purpose as follows:

[T]he term "property" includes real and personal property other than either money or an unfunded and unsecured promise to pay money or property in the future. The term also includes a beneficial interest in assets (including money) which are transferred or set aside from the claims of creditors of the transferor, for example, in a trust or escrow account.<sup>6</sup>

Generally, an employee will be taxable on such property when the property is transferable or no longer subject to a substantial risk of forfeiture. Thus, an employee will be taxable on an amount his or her employer places outside the reach of its creditors when the employee's right to the amount is not subject to a substantial risk of forfeiture.

## **IRS Guidance on Rabbi Trusts**

If an employer deposits assets in a rabbi trust to provide funds for an employee's deferred compensation benefits, the employee could be subject to taxation if (1) the employee is treated as in constructive receipt of the benefits, (2) the employee is treated as having received an economic benefit from the deposit, or (3) the deposit amounted to a transfer of property from the employer to the employee.

The initial 1980 rabbi trust ruling was controversial within the IRS according to Mike Thrasher, former assistant chief counsel (Employee Benefits and Exempt Organizations). Some at the IRS believed strongly that the segregation of assets in such a trust would trigger taxation under the economic benefit doctrine, despite creditors having access to the amounts in the event of insolvency. But in the end, the IRS ruled that the rabbi would not be subject to tax at the time his congregation placed assets in the trust. The ruling briefly reviewed authorities on constructive receipt and economic benefit (but not §83), before simply stating this conclusion.

After suspending rulings on the subject for a period of time, the IRS went on to issue numerous rulings on rabbi trusts, clarifying, among other things, that:

- depositing assets in such a trust will not constitute a transfer of property under §83, implicate the economic benefit doctrine, or cause an employee to be in constructive receipt of plan benefits; and
- such a trust would be treated as a grantor trust and the employer establishing the trust would be subject to tax on the trust's income.<sup>7</sup>

These rulings were typically conditioned on (1) the creditors' rights provisions of the trust agreement being enforceable under federal and state law, and (2) the deferred compensation plan not being considered "funded" under ERISA (see discussion on this issue below).

In August 1992, after issuing many similar rulings on rabbi trusts, the IRS issued a "model" rabbi trust in order to "aid taxpayers and to expedite the processing of ruling requests on these arrangements."<sup>8</sup> The model was issued in conjunction with an update of the procedures for when the IRS would rule on deferred compensation plans.<sup>9</sup> The IRS made clear that it would only issue a ruling on a rabbi trust going forward if the trust agreement conforms to the terms of the IRS's model.<sup>10</sup>

### **Treatment of Rabbi Trusts Under ERISA**

So-called "top hat" retirement plans are exempt from almost all of the substantive rules of ERISA.<sup>11</sup> In order to qualify as a top hat plan, a plan must be (1) unfunded, and (2) "maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees."<sup>12</sup> If a deferred compensation plan fails to fit within this exemption, it would need to comply with all of the substantive requirements of ERISA (e.g., funding, vesting, and fiduciary rules).

The courts generally have concluded that a deferred compensation plan will be considered "unfunded" for this purpose if the employer has not set aside assets outside the reach of its creditors to meet its obligations under the plan (similar to the economic benefit rules discussed above).<sup>13</sup> Thus, courts have held that an employer's purchase of insurance policies to fund such obligations will not cause a plan to be funded, even though the employer makes clear that it intends to use the policy proceeds for such purpose.<sup>14</sup>

In a series of opinion letters, the Department of Labor (DOL) has taken the position that the setting aside of assets in a rabbi trust will not cause a plan to be funded under ERISA.<sup>15</sup> When the IRS issued its model rabbi trust in 1992, the DOL addressed the issue in a letter to the IRS as follows:

The Department is generally of the view that any determination of the "unfunded" status of a plan of deferred compensation requires an examination of the surrounding facts and circumstances, including the status of the plan under non-ERISA law. In the absence of pertinent legislative history defining "unfunded" for purposes of Title I of ERISA, the Department believes that, in the case of an excess benefit or "top hat" plan, the position adopted by the Service regarding the tax consequences to trust beneficiaries should be accorded weight under Title I... . Therefore, based on the facts and representations submitted as part of your request, and consistent with the Department's general views described above, it is the opinion of the Department that a plan will not fail to be "unfunded" for purposes of sections 4(b)(5), 201(2), 301(a)(3) and 401(a)(1) solely because there is maintained in connection with such plan a "rabbi trust" that conforms to the model trust described in the draft Revenue Procedure.<sup>16</sup>

The DOL also stated in the letter that a rabbi trust provision requiring an employer to deposit amounts in the trust would not alter this result.

### **Insolvency and Change in Control**

The trustee of a rabbi trust is responsible for investing the assets set aside in the trust and making payment of trust assets to the participants in the deferred compensation plan. However, the trustee generally performs these and other administrative tasks at the direction of the employer. Two common exceptions to this general rule are when the employer is insolvent and when there has been a change in control of the employer.

#### **Insolvency**

As discussed above, the assets held in a rabbi trust must be made available to the creditors of the employer when the employer becomes insolvent. Following the IRS's model, most rabbi trusts provide that an employer is insolvent when the employer is either (1) is unable to pay its debts as they become due, or (2) is subject to a pending proceeding as a debtor under the United States Bankruptcy Code.<sup>17</sup>

Trustees of rabbi trusts do not have an affirmative obligation to periodically determine whether the employer is insolvent. Under most rabbi trust agreements, the employer must designate a board member or officer who is responsible for notifying the trustee of the employer's insolvency. Some rabbi trusts also provide that a creditor's claim that the employer is insolvent can trigger a duty of inquiry on the part of the trustee as to the employer's insolvency. However, these rabbi trusts generally provide that, in connection with that inquiry, the trustee does not need to make an independent determination of the employer's insolvency, but rather can rely on the response that it receives from the employer.

If the employer is insolvent, the trustee discontinues further payments from the rabbi trust to the participants in the deferred compensation plan. Thereafter, the distribution of trust assets to the plan participants or to the employer's creditors are often made in accordance with an order of a bankruptcy court or the agreement of all parties with a potential interest in the assets. Rabbi trust agreements generally provide that payments to participants also can resume if it is determined that the employer is no longer insolvent.

#### **Change in Control**

As noted above, one of the principal reasons rabbi trusts are established is to provide deferred compensation plan participants with a level of protection should control of their employer change through a merger, acquisition, or substantial change in the composition of the board of directors. Rabbi trusts generally attempt to address the participants' concerns arising from a change in control in a number of ways.

Most rabbi trusts provide that, on or before a change in control, the employer is required to set aside in the rabbi trust sufficient assets to pay the benefits owed to deferred compensation plan participants. Most rabbi trusts are also irrevocable or become irrevocable upon a change of control, so that trust assets cannot be returned to the employer before the participants' benefits are paid. Accordingly, while employers typically remain responsible for making benefit payments, participants often look to the rabbi trust as the principal source of payment after a change in control.

Often the trust agreement provides that, after a change in control, the employer's authority to direct the trustee ceases and the trustee is granted discretionary authority to administer the rabbi trust, including the authority to determine what amounts should be paid from the trust as benefits to the plan participants. Accordingly, the trustee, rather than the employer, decides the amounts payable to participants under the deferred compensation plans. In some cases, prior to the change in control the employer provides the trustee with a schedule of the amount of the benefits owed to the plan participants. In other cases, the trustee is required to calculate the amount of the benefits owed to the participants under the terms of the plan. If the trustee is to calculate the amount of the benefit, it is important to specify in the trust agreement the procedures that the trustee will follow in reaching its decision, bearing in mind that the Department of Labor's claims regulations apply to a deferred compensation plan, even if it qualifies as a top hat plan.<sup>18</sup>

Further, if, after a change in control, the trustee is granted discretionary authority to administer the trust, it is important to have language in either the trust agreement or the underlying deferred compensation plan document discussing the interplay between the rabbi trust and the plan. To avoid ambiguity, the documents should specify whether the plan document or the trust agreement controls in the event of a conflict between the two.

Additional safeguards for participants after a change in control should also be considered. For example, provisions could be added to a trust agreement that prohibit a change in the trustee or the amendment of the agreement after a change in control without the consent of the deferred compensation plan participants. Some trust agreements also require the employer to deposit an additional amount in the trust on or before a change in control to cover litigation costs plan participants incur to obtain their benefits.

### **Alternative Funding Devices**

In an effort to avoid or minimize the insolvency risk that remains with a rabbi trust, employers and employees sometimes look for alternative funding vehicles for deferred compensation plans. Two of the more well-known alternatives are secular trusts and rabbi trusts with financial triggers.

#### **Secular Trusts**

The assets of a so-called "secular trust" are not subject to the claims of an employer's creditors. Thus, funding deferred compensation plans through a secular trust provides complete benefit security for employees. For the same reason, the economic benefit rules and I.R.C. §83 apply upon the deposit of assets into such a trust.<sup>19</sup> Thus, an employee will generally be taxable on the value of the employee's vested interest in the trust assets.<sup>20</sup>

Given the tax results for employees, secular trusts are not commonly used. However, several large publicly traded corporations recently established such arrangements.<sup>21</sup> The firestorm of negative publicity that resulted over the establishment of the trusts will probably further limit their appeal—at least for public companies—for some time.

#### **Rabbi Trusts With Financial Triggers**

In order to increase the security provided by a rabbi trust, some have suggested adding financial triggers to the trust agreement. A trust could provide, for example, that when an employer's finances deteriorate to a certain predetermined level, the trust assets would be paid out to plan participants or moved to a secular trust.

The addition of financial triggers to a rabbi trust would prevent an IRS ruling on the effect of the trust, as it would no longer fit within the IRS's model.<sup>22</sup> If such triggers effectively remove the trust assets from the reach of an employer's creditors, employees may be immediately taxable on vested amounts deposited in the trust under § 83 or the economic benefit rules. Depending on the timing, a payment made upon a triggering event also may run afoul of bankruptcy rules on preferential and fraudulent transfers.<sup>23</sup> As discussed below, recently enacted legislation will effectively prohibit the use of such financial distress triggers.

### **Litigation Involving Rabbi Trusts**

There has been a significant increase in litigation involving deferred compensation plans in recent years. However, there are very few cases specifically addressing the rabbi trusts established in connection therewith. We discuss below some of the rabbi trust issues that the courts have considered.

The Seventh Circuit recently concluded that a bank's security interest in the intangible property of a company did not extend to the assets that were in a rabbi trust the company had previously established.<sup>24</sup> The court reasoned that the trust agreement provided that the assets would remain "subject to the claims of the general creditors of [the company]" and that only unsecured creditors were "general creditors."<sup>25</sup> The court further reasoned that the bank did not have a claim to the trust assets as, under the express terms of the trust agreement, the company could not create a security interest in favor of any creditor in the trust corpus.<sup>26</sup> The court advised, however, that a different result would have been reached had the bank secured an interest in the assets before the company had contributed them to the rabbi trust.<sup>27</sup>

There also is a series of cases involving the rabbi trusts established by defunct banks and savings and loan associations.<sup>28</sup> In these cases the courts have concluded that the placement of the financial institution into "receivership" amounted to the "bankruptcy" and "insolvency" of the financial institution under the terms of the trust agreements. Therefore, the assets held in the trust were subject to the claims of the financial institution's creditors.<sup>29</sup>

Finally, the Fourth Circuit ruled last year that a participant in a deferred compensation plan lacked standing to maintain a federal securities lawsuit individually or on behalf of the rabbi trust related to the trust's investment in certain insurance contracts.<sup>30</sup> The court reasoned that the plan participant had no beneficial interest in the assets held in the rabbi trust.<sup>31</sup>

### **Recent Developments**

Following the recent financial scandals at a number of major public companies, executive compensation in corporate America came under increasing scrutiny from the media, shareholders, politicians, and regulators. Among other perceived abuses, media reports highlighted deferred compensation practices that protect an executive's benefits despite his employer's insolvency.

One such practice was the ability of employees to take distributions from deferred compensation plans (albeit with a "haircut") before they terminate employment, and, more specifically, prior to their employers' bankruptcy filings.<sup>32</sup> Concerns were also raised with respect to off-shore rabbi trusts, rabbi trusts with financial triggers, and other devices intended to prevent an employer's creditors from accessing assets set aside by the employer to meet its deferred compensation plan obligations.

The furor over the corporate scandals resulted in the enactment of the Sarbanes-Oxley Act of 2002. Sarbanes-Oxley primarily targeted accounting problems at public corporations. While the legislation

also addressed several perceived problems in the executive compensation area,<sup>33</sup> it did not address such issues in the deferred compensation area.

Adding fuel to the fire, the Joint Committee on Taxation (JCT) issued a report in 2003 which described certain aspects of Enron's deferred compensation plans and made recommendations for extensive changes in the tax laws for such plans.<sup>34</sup> The report recommended restrictions on rabbi trusts and prohibitions on the use of so-called "haircut" distributions and other provisions for the acceleration of payment.<sup>35</sup>

### **American Jobs Creation Act**

In response to many of these concerns, far reaching changes in the federal tax laws that apply to nonqualified deferred compensation plans were included in the American Jobs Creation Act of 2004<sup>36</sup> (the AJCA). Signed into law by the president on Oct. 22, 2004, the new rules under the AJCA apply to amounts deferred under such plans after 2004.

The AJCA adds a new § 409A to the code that applies to amounts "deferred" (generally, earned or vested) after 2004. For the first time, the code provides specific rules for deferral elections, distributions, and funding mechanisms under nonqualified deferred compensation plans. We outline below the key portions of the AJCA and the accompanying conference report, as they relate to rabbi trusts.

### **Offshore Rabbi Trusts**

Assets set aside (directly or indirectly) in an offshore trust for the purposes of paying nonqualified deferred compensation are treated as property transferred under code § 83 at the time set aside or transferred outside the United States, whether or not the assets are available to satisfy claims of general creditors. Earnings on such assets are treated as additional transfers of property. Thus, participants would be immediately taxed on deferred amounts when they are no longer subject to a substantial risk of forfeiture. Interest at the underpayment rate plus one percent is imposed on the underpayments that would have occurred had the compensation been taxable when first deferred or, if later, when not subject to a substantial risk of forfeiture. A 20 percent additional tax is also imposed upon the amount of compensation which is required to be included in a participant's gross income.

This rule does not apply to assets located in a foreign jurisdiction if the deferred compensation relates to services performed in such jurisdiction. The IRS is also granted regulatory authority to provide exceptions for arrangements that will not result in the improper deferral of U.S. tax and where assets will not be effectively beyond the reach of creditors.

### **Financial Distress Triggers**

A transfer of property occurs under code § 83 with respect to deferred compensation if a plan provides that, upon a change in the employer's financial health, assets will be restricted to the provision of plan benefits. Surprisingly, §409A provides that such a transfer occurs even if the "restricted" assets are subject to the claims of creditors. Thus, the conference report states that a transfer to a rabbi trust upon a change in the employer's financial health will implicate this provision. Fortunately, the report goes on to state that the provision is not intended to apply when assets are restricted for a reason other than a change in financial health (e.g., upon a change in control) or if assets are periodically restricted under a structured schedule and scheduled restrictions happen to coincide with a change in financial status.

Earnings on restricted assets are treated as additional transfers of property. Thus, participants would be immediately taxed on deferred amounts when they are no longer subject to a substantial risk of forfeiture. Interest and the additional 20 percent tax as described above would also apply. The IRS is granted regulatory authority to provide exceptions for arrangements that will not result in the improper deferral of U.S. tax and where assets will not be effectively beyond the reach of creditors.

Thus, the AJCA will basically eliminate the use of offshore rabbi trusts and those that employ financial distress triggers. It should not, however, alter the tax treatment of a typical domestic rabbi trust.

Some earlier legislative proposals in response to the corporate scandals would have gone significantly beyond the restrictions in the AJCA. These proposals could have subjected an employee to taxes on deferred amounts (or invited the IRS to issue regulations doing the same) merely because amounts were set aside in a rabbi trust. Specifically, these proposals would have subjected an employee to tax on amounts set aside to fund vested deferred compensation benefits if the amounts did not remain solely the property of the employer or the employee had greater rights to the amounts than the employer's creditors.

### **IRS Activity**

In the fall of 2003, the IRS launched a pilot audit program aimed at executive compensation arrangements. Roughly two dozen larger employers were initially selected for the program, but IRS personnel have stated that such arrangements will soon become part of the service's regular audit package.<sup>37</sup> Deferred compensation arrangements were one of the eight areas of focus under the pilot program and were found to be the area of largest noncompliance. As a result, deferred compensation arrangements and any rabbi trusts used to informally fund these benefits will be routinely examined by IRS agents as part of large employer audits.

### **Conclusion**

Even after the recently enacted legislation, rabbi trusts should remain a key component of the executive compensation arrangements at many companies. Companies and their advisers need to ensure that these trusts are properly designed so that they meet their intended goal of providing security for deferred compensation plan participants while avoiding adverse tax results.

### **Footnotes**

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1 The authors wish to thank the members of their firm and John N. Smith, III of Wachovia Bank, N.A. for their contributions to this article.

2 Priv. Ltr. Rul. 8113107 (Dec. 31, 1980).

3 A recent survey found that rabbi trusts had been established for approximately 77 percent of the deferred compensation plans maintained by survey respondents. *Nonqualified Deferred Compensation: The Changing Landscape for a Key Component of Executive Compensation*, Watson Wyatt Worldwide (2003). A 2001 survey found that when employers informally fund such plans, rabbi trusts were overwhelmingly the favored vehicle. *Executive Benefits: A Survey of Current Trends—2001 Results*, Clark-Bardes Consulting—Compensation Resource Group, *Journal of Deferred Compensation*, Volume 7, Number 3, Spring 2002. Wachovia Bank reports that it alone provides rabbi trust services to 25 percent of Fortune 500 companies.

4 Treas. Reg. §1.451-2(a).



5 See *Sproull v. Commissioner*, 16 T.C. 244, 1 EXC 59 (1951), *aff'd per curiam*, 194 F.2d 541, 1 EXC 60 (6th Cir. 1952); Situation 4 of Rev. Rul. 60-31, 1960-1 C.B. 174. The doctrine will not apply to an employer's purchase of an insurance contract to provide funds for deferred compensation if the insurance contract is the employer's asset and subject to claims of the employer's creditors. See Rev. Rul. 72-25, 1972-1 C.B. 127, and Rev. Rul. 68-99, 1968-1 C.B. 193.

6 Treas. Reg. §1.83-3(e). IRS regulations provide for the interaction of § 83 and I.R.C. § 402(b), which addresses the taxation of transfers to a nonexempt employees trust (i.e., a secular trust). Treas. Reg. §1.83-8(a)(4).

7 See, e.g., Priv. Ltr. Rul. 8844020 (Nov. 4, 1988); see also Gen. Couns. Mem. 39,230 (Jan. 20, 1984) (analyzing potential constructive receipt, economic benefit, and §83 issues with rabbi trusts).

8 Rev. Proc. 92-64, 1992-2 C.B. 422.

9 Rev. Proc. 92-65, 1992-2 C.B. 428.

10 The model trust also clearly permitted the trust to hold shares of employer stock, an issue that the IRS had declined to rule on for a number of years. The issue of parent company stock in a rabbi trust that benefits subsidiary employees was ultimately addressed by the IRS in Treas. Reg. §1.1032-3 and Notice 2000-56, 2002-2 C.B. 393.

11 ERISA §§201(2), 301(a)(3), and 401(a)(1); see also *Duggan v. Hobbs*, 99 F.3d 307, 310, 1 EXC 269 (9th Cir. 1996) (ERISA exempts top hat plans from fiduciary, funding, participation and vesting requirements applicable to other employee benefit plans); *Olander v. Bucyrus-Erie Co.*, 187 F.3d 599, 604, 23 EBC 1369, 1 EXC 139 (7th Cir. 1999) (same). Unfunded "excess benefit plans" are completely exempt from ERISA under § 4(b)(5) of ERISA. But these plans are no longer very common because they are limited to providing benefits in excess of the I.R.C. § 415 limits.

12 ERISA §§201(2), 301(a)(3), and 401(a)(1).

13 See *Demery v. Extebank Deferred Compensation Plan (B)*, 216 F.3d 283, 24 EBC 2095,]1 EXC 141 (2d Cir. 2000); *Reliable Home Health Care, Inc. v. Union Central Ins. Co.*, 295 F.3d 505, 28 EBC 1660 (5th Cir. 2002).

14 *Id.*

15 Letter From Department of Labor to Internal Revenue Service, dated Dec. 13, 1985, *reprinted in* 13 BNA Pension Reporter 702, April 7, 1986; DOL Adv. Op. 89-22A (Sept. 21, 1989); DOL Adv. Op. 91-16A (Apr. 5, 1991); DOL Adv. Op. 92-13A (May 19, 1992).

16 DOL Adv. Op. 91-16A (Apr. 5, 1991).

17 See Rev. Proc. 92-64, 1992-2 C.B. 422.

18 See 29 C.F.R. § 2560.503-1.

19 As explained above, such "funding" of a deferred compensation plan will also subject the plan to the substantive requirements of ERISA.

20 See also I.R.C. § 402(b).

21 See Ellen E. Schultz & Theo Francis, *Executive Get Pension Security While Plans for Workers Falter*, WALL ST. J., Apr. 24, 2003.

22 The IRS did issue a ruling on a deferred compensation plan that would terminate if a financial trigger was reached. Priv. Ltr. Rul. 9508014 (Nov. 22, 1994). However, the trigger was included in the terms of the plan, and there was no mention in the ruling of a trust with such a trigger.

23 See 11 U.S.C. §§ 547 and 548.

24 Bank of America, N.A. v. Moglia, 330 F.3d 942, 30 EBC 1705 (7th Cir. 2003).

25 *Id.* at 946.

26 *Id.* at 946-47.

27 *Id.* at 947.

28 See, e.g., Goodman v. Resolution Trust Corp., 7 F.3d 1123, 2 EXC 22 (4th Cir 1993); Cortina v. Sovran Bank, N.A. 927 F. Supp. 439, 2 EXC 23 (S.D. Fla. 1994).

29 Goodman, 7 F.3d at 1127-1128; Cortina, 927 F. Supp. at 446.

30 Smith v. Pennington, 352 F.2d 884, 2 EXC 24 (4th Cir. 2003).

31 *Id.* at 889-90.

32 See Dan Feldstein & Eric Berger, *Enron's Retired Get Burned Too, Deferred-Salary Plan Fizzles*, HOUSTON CHRONICLE, Feb. 16, 2002; Rebecca Blumenstein et al., *As Global Crossing Crashed, Executives Got Loan Relief, Pension Payouts*, WALL ST. J., Feb. 21, 2002.

33 See, e.g., Sarbanes-Oxley Act of 2002 § 402 (prohibiting loans to executives), § 403 (requiring expedited reporting of insider transactions), § 306 (prohibiting insider trading during plan blackout periods).

34 Joint Committee on Taxation, *Report of Investigation of Enron Corporation and Related Entities Regarding Federal Tax and Compensation Issues, and Policy Recommendations* (JCS-3-03), Feb. 2003.

35 *Id.* The report also recommended prohibiting subsequent payment elections and participant-directed investments in deferred compensation plans.

36 Pub. L. No. 108-357.

37 *IRS Pilot Program Giving Indication of Future Audit Issues, Official Says*, 117 Pens. & Ben. Daily (BNA), June 18, 2004.