



Strategic Financing of Deferred Compensation

The Evolution of an Executive Benefits Program



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With the passage of the American Jobs Creation Act and enactment of Internal Revenue Code Section 409A, almost every company in America has been auditing its deferred compensation plan and determining what steps need to be taken in order for the plan to come into compliance by the end of 2005. As companies revisit their deferred plans they also should take this opportunity to examine their benefits financing strategy. This article will present a historical view of deferred compensation, as well as the intricacies of various financing strategies that are being implemented by companies throughout the United States.

The establishment of the Employee Retirement Income Security Act (ERISA) in 1974 brought new governance standards into the employee benefits world, and such words as “nondiscrimination” and “minimum

standards" became commonplace business terms. ERISA, and numerous other subsequent Internal Revenue Service (IRS) limitations on qualified plans, have forced corporations to seek new strategies to allow highly compensated executives (those most adversely affected) to set aside additional money for retirement. The focus began to shift from a qualified retirement benefit environment to a nonqualified arena in which nondiscrimination and minimum standards were no longer hurdles to be overcome.

A new world of nonqualified benefits programs emerged as a result of the changes brought on by ERISA. A new industry also was developed to assist corporations in the design, implementation and administration of supplemental retirement plans for executives and other highly compensated employees. This industry focused on executive benefits programs and explored new methods to provide additional benefits for clients. One such emerging development in the nonqualified world was the deferred compensation plan (DCP).

In the years following the passage of ERISA, many organizations began offering DCPs to eligible employees. They are given an opportunity to plan for retirement in ways that are not typically offered in a qualified 401(k) or pension environment. The corporate world is an ever-changing landscape. And similar to most executive compensation plans, the DCP has undergone a continuing evolution.

The New and Improved DCP

Although DCPs are not new to corporate America, 10 to 20 years ago they were not as prevalent as they are today. According to Clark Consulting's 2004 "Executive Benefit Survey," 94 percent of corporate America now sponsors a DCP. This increased prevalence is not solely a result of the natural evolution of these plans. The development of new DCP features has driven this substantial growth. For example, when

DCPs first came on to the corporate scene in the 1980s and early 1990s, most plans offered only a "fixed rate" investment option (Clark Consulting 1994). The investment option was typically tied to a benchmark (such as a Moody's rate, T-Bill plus 1 percent or some other variety of low interest-bearing investment) and did not provide executives with any diversification opportunities. Most companies that offered this fixed-rate DCP did not informally fund the plan due to the fact that their own internal hurdle rate was generally greater than the rate of return offered within the plan. As a result of this design, the corresponding internal use of capital (i.e. amounts deferred rather than paid) actually generated a gain on the company's balance sheet in most years due to the internal return on the compensation not paid actually exceeding the deferred liability created by the plan.

By the early 1990s, Clark Consulting's experience with clients was that most of their executives were experiencing returns in their investment portfolios far greater than those offered in the DCPs. These executives were interested in a similar investment opportunity in their DCPs, which they were bringing to the attention of their HR departments. The lion's share of their retirement income was accumulating in their non-qualified, rather than qualified, plans. This often disturbing realization, coupled with the increased prevalence of 401(k) plans, daily valuation options and the 1990s booming stock market, drove executives to begin demanding that their DCP accounts offer competitive investment options rather than the low fixed rates traditionally provided. Motivated by the mandate from executives for multiple investment options and diversification opportunities, HR departments turned to the executive benefits industry for guidance and assistance in reconfiguring their plans. In response, the industry crafted the variable DCP, which gave executives access to hypothetical or "benchmark" mutual funds similar to those offered in their 401(k) plan. (DCPs

cannot be formally funded under ERISA, and participants' accounts are not formally invested in mutual funds, as they would be in a qualified plan.) In the past 10 years, the prevalence of companies using 401(k)-type funds as benchmarks for their nonqualified DCP increased significantly, from 6 percent of respondents in 1994 to 46 percent of respondents in 2004 (Clark Consulting 1994, 2004).

mitigate the risk. What had previously been viewed as purely an HR issue (i.e., revamping and improving an executive benefits program) was suddenly creating a much larger corporate ripple, and finance departments began to identify the deleterious impact the DCP now had on the corporate financial statements.

There are two constituencies to consider when discussing financing strategies for a DCP — the

Many CFOs and/or treasurers were not willing to take on the risk associated with a variable DCP and were demanding a solution to mitigate the risk.

As consulting firms assisted HR departments in redesigning DCPs to "look and feel" like a 401(k), and companies began implementing this provision in their plans, a new financing issue was created for the employer sponsoring the plan — how to efficiently hedge the new variable-investment DCPs. Though on the surface it seemed unlikely, other departments outside the realm of human resources began experiencing an impact from this evolution.

The HR/Finance Partnership

What began, from the HR perspective, as a simple revision to an existing executive compensation plan subsequently created significant concern and involvement from finance departments. When the change in plan design shifted from fixed to variable investment rates, the DCP investment options began to return gains in excess of the company's hurdle rate — catching the eye of finance executives. Many CFOs and/or treasurers were not willing to take on the risk associated with a variable DCP and were demanding a solution to

participants in the plan and the company. In recent years, a debate revolving around the subject of security has arisen which implies that, "If I, as an executive, voluntarily defer a portion of my salary or bonus, I want to know that the company has set aside monies equal to my contributions and invested in a similar fashion to my investments. I want some level of assurance that the dollars will be available at the time I expect to receive a distribution."

For most corporations, the best solution was, and is, to informally fund the DCP liability. Recently, during a meeting at a *Fortune* 100 company, the senior HR executive said, "I am responsible for a \$1.5 billion 401(k) plan of which I completely understand the financing. Why is it then that I cannot grasp the financing of our deferred compensation plan, which is a fraction of the size of the 401(k) plan?" (Anonymous 2004). The way to demystify this process is to identify the corporate financing objectives prior to determining a funding strategy for the DCP, because these objectives typically influence the solution utilized. From a

high-level perspective, most corporations can be categorized as being either cash-flow sensitive or earnings sensitive.

The Cash-Flow Sensitive Solution

“Cash-flow sensitive corporations” are more concerned with having cash neutrality rather than mitigating profit and loss (P&L) expenses. In addition these companies often have liquidity requirements and do not want their cash tied up in something that doesn’t allow immediate access. For these corporations, the most widely used solution is to informally fund their DCP with monies equal to the employees’ after-tax DCP contributions. This is typically referred to as “*funding = after-tax deferrals,*” where the net after-tax cash flow from the benefits liability plus the financing asset is neutral. This cash-flow sensitive solution is not particularly advantageous from a P&L perspective, as the monies

set aside for the financing are less than the monies deferred by the participants. Thus, there is less money earning interest on the asset side than on the liability side, resulting in an asset/liability mismatch. For those companies more concerned with the cash flow neutrality of putting in a DCP, there must be explicit understanding of how the resulting asset will line up with the liability. This is not a reason for a cash-flow sensitive company to cease offering a plan, but it is simply recognizing the benefit of being cash-flow neutral compared to the reduced positive impact on the P&L and balance sheet. (See Figures 1 and 2).

As noted in Figures 1 and 2, the after-tax funding strategy generates a cash-flow neutral position, but there is a funding shortfall from both a P&L and balance-sheet perspective. This is the manner in which a balance must be struck between the company’s need to preserve its cash, and maintain a minimal gap

FIGURE 1 DCP Neutral Cash-Flow Strategy – Combined Cash Flow

Year	Employee Deferrals (Adjustment to Compensation)	Tax Effect @ 40%	Net Cash Inflow from Benefits	Investment Cash Outflow from Funding Vehicle	Combined Net Cash Flow
1	\$100,000	\$(40,000)	\$60,000	\$(60,000)	\$0
2	\$110,000	\$(44,000)	\$66,000	\$(66,000)	\$0
3	\$121,000	\$(48,400)	\$72,600	\$(72,600)	\$0
4	\$133,100	\$(53,240)	\$79,860	\$(79,860)	\$0
5	\$146,410	\$(58,564)	\$87,846	\$(87,846)	\$0
Totals	\$610,510	\$(244,204)	\$366,306	\$(366,306)	\$0

FIGURE 2 DCP Cash-Neutral Strategy — Pretax Impact on the Profit and Loss and Balance Sheet*

Year	Employee Deferrals	Hypothetical 8% Earnings Rate (Pretax P&L Impact)	Accrued Balance-Sheet Liability	Financing Vehicle Investment	Hypothetical 8% Earnings Rate (Pretax P&L Impact)	Accrued Balance-Sheet Asset
1	\$(100,000)	\$(8,000)	\$(108,000)	\$60,000	\$4,800	\$64,800
2	\$(110,000)	\$(17,440)	\$(235,440)	\$66,000	\$10,464	\$141,264
3	\$(121,000)	\$(28,515)	\$(384,955)	\$72,600	\$17,109	\$230,973
4	\$(133,100)	\$(41,444)	\$(559,500)	\$79,860	\$24,867	\$335,700
5	\$(146,410)	\$(56,473)	\$(762,382)	\$87,846	\$33,884	\$457,429
Totals	\$(610,510)	\$(151,872)		\$366,306	\$91,123	

* Depending on the funding vehicle utilized, there may be costs and/or taxes incurred which could impact both the pretax and after-tax combined profit and loss impact to the company.

between the liability and the asset. Although there is positive P&L produced from the funding vehicle — which offsets the negative impact from the liability — there is an alternative strategy, which may provide a more favorable P&L impact for the organization.

The P&L Solution

In contrast to cash-flow sensitive companies, an earnings'-sensitive company is often more concerned with its annual and quarterly earnings than its cash outflows. For these corporations, the most widely used solution is to informally fund their DCP with monies equal to the employees' pretax DCP contributions. This is typically referred to as "*funding = deferrals*," and although there is no additional cash-flow requirement from the corporation to fund the plan, there is a negative cash-flow impact (See Figure 3).

This impact is the result of a greater negative outflow of monies informally set aside for the pretax financing of the plan as compared to the positive after-

tax cash-flow impact of the liability. In contrast to the cash-flow sensitive solution, the P&L solution sets aside the same amount of monies in the financing assets as are contributed into the DCP accounts. Therefore, the same approximate amount of money is earning interest on both the asset and liability. (See Figure 4.)

For those finance departments seeking a solution for financing their DCP with minimal P&L impact, the negative cash-flow impact is negligible compared to the more favorable P&L offset that they may receive when funding on a dollar-for-dollar basis.

The primary financing objective of minimizing the impact on P&L from the DCP is, for many companies, coupled with an equally critical security objective. Those companies often choose to utilize a strategy referred to as "*asset = liability*." The advent of investment-oriented DCPs has induced corporate financial officers to set aside funds and match assets to liabilities, thus minimizing the P&L impact. This financing objective, while quite similar to the "*funding*

FIGURE 3 Cash Flow from DCP Profit and Loss Focus Funding Strategy – Combined Cash Flow

Year	Employee Deferrals (Adjustment to Compensation)	Tax Effect @ 40%	Net Cash Flow from Benefits	Investment in Funding Vehicle	Combined Net Cash Flow
1	\$100,000	\$(40,000)	\$60,000	\$(100,000)	\$(40,000)
2	\$110,000	\$(44,000)	\$66,000	\$(110,000)	\$(44,000)
3	\$121,000	\$(48,400)	\$72,600	\$(121,000)	\$(48,400)
4	\$133,100	\$(53,240)	\$79,860	\$(133,100)	\$(53,240)
5	\$146,410	\$(58,564)	\$87,846	\$(146,410)	\$(58,564)
Totals	\$610,510	\$(244,204)	\$366,306	\$(610,510)	\$(244,204)

FIGURE 4 DCP Profit and Loss Focus Funding Strategy – Pretax Impact on Profit and Loss and Balance Sheet

Year	Employee Deferrals	Hypothetical 8% Earnings Rate (Pretax P&L Impact)	Accrued Balance-Sheet Liability	Financing Vehicle Investment	Hypothetical 8% Earnings Rate (Pretax P&L Impact)	Accrued Balance-Sheet Asset
1	\$(100,000)	\$(8,000)	\$(108,000)	\$100,000	\$8,000	\$108,000
2	\$(110,000)	\$(17,440)	\$(235,440)	\$110,000	\$17,440	\$235,440
3	\$(121,000)	\$(28,515)	\$(384,955)	\$121,000	\$28,515	\$384,955
4	\$(133,100)	\$(41,444)	\$(559,500)	\$133,100	\$41,444	\$559,500
5	\$(146,410)	\$(56,473)	\$(762,382)	\$146,410	\$56,473	\$762,382
Totals	\$(610,510)	\$(151,872)		\$610,510	\$151,872	

= *deferrals*” approach, is slightly different in that the company commits to “truing up” the asset, at least annually, should there be any shortfall due to costs or taxes associated with the funding vehicle.

For many organizations, funding objectives and strategies often are predetermined based on corporate objectives. Once a company’s finance team overcomes this major hurdle and aligns its objectives with the DCP financing strategy, the next step involves determining an appropriate funding vehicle. This step requires a knowledge and understanding of the available options in a given market.

Funding Vehicles

What may appear to be a daunting task — determining an appropriate funding vehicle for the company — must be taken seriously and examined from multiple levels.

To date there have been three popular options used for the financing of DCPs:

- ▶ Unfunded — “pay as you go”
- ▶ Taxable investments (i.e. mutual funds)
- ▶ Institutional insurance (corporate-owned life insurance).

The Unfunded Approach

Historically, the unfunded approach was the most popular DCP “financing” strategy, but this strategy proved to be dangerously volatile when DCPs began shifting to variable-investment options. As companies began experiencing unpredictable swings in DCP liabilities due to the participants’ investment choices, hedging any exposed risk became a priority for finance departments.

Recently, a public company with \$4 billion in annual sales chose the unfunded strategy specifically because it viewed it as a “profit center” during the bear market. As a result of the unfunded approach, the company, whipsawed in 2003 when a large run-up

in the market occurred, has taken a material charge to earnings.

The unfunded model is a viable strategy if a company continues to offer a fixed rate as the only participant-investment option. Most organizations have, however, followed evolutionary trends and begun to offer participants 401(k)-type investment options. *Any company that offers investment options and continues to use an unfunded strategy should carefully reconsider this approach and its inherent dangers.*

Taxable Investments

Another option for companies looking to informally fund their DCP is the use of mutual funds. A company using this approach typically would purchase and hold the mutual funds that are used as investment benchmarks within the DCP. Because the possibility of variance exists unless the crediting rate on the participants’ accounts tracks the actual return, monies are generally moved between funds in a process known as rebalancing. Rebalancing generally occurs on a monthly basis. However, some companies move their money on a daily basis in accordance with their participants’ reallocations, as they view the daily movement of the asset in correlation with the liability as a violation of the rules associated with investor control. Any gains realized from rebalancing must be recognized as taxable income from a P&L perspective, and the company pays the income tax incurred.

This tax implication is typically handled in one of two ways. For some companies, the cash required to pay the income tax liability will be paid out of corporate cash, resulting in an increase in the company’s cost of the plan. For others, the cash required to pay the income tax is netted against the plan assets, resulting in a funding shortfall where the plan liabilities are not fully hedged. Under the second option, because the plan liability grows tax-deferred and the asset is reduced by the taxes incurred from the realized gains, the asset reduction would create

an asset/liability mismatch. In either event the taxes related to the mutual funds are an additional plan cost. For example, if the plan had a liability of \$10 million earning 8 percent (assuming a 40-percent corporate tax rate, 50-percent turnover and no consideration for dividends or tax exclusions), the approximate annual tax cost would be \$160,000.

Unrealized gains present a different issue. If the company holds the security as "available for sale" (pursuant to FAS 115), unrealized gains within the funds cannot be recognized on the income statement until they are "turned over." If this accounting treatment

ambiguity, most finance departments will lean toward classifying the mutual funds as "available for sale," resulting in the P&L only reflecting those earnings which are turned over in a given year and considered taxable at the time.

The total costs of using mutual funds are usually less than other funding alternatives, such as an institutional insurance product, but the taxes on the realized gains (as shown in the example above) generally make this one of the most attractive strategies for companies that are not full taxpayers. If a company is not a full taxpayer, the tax cost in

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is applied, the cost basis of the funds is the only offsetting asset to current P&L charges. This results in ongoing P&L charges until the funds are rebalanced and the gains are ultimately recognized. Others may argue that an organization can classify such mutual fund holdings as "trading securities," which would allow for current recognition of *all* earnings for P&L purposes, even those amounts not attributed to turnover. A deferred tax liability is created for those earnings that were not turned over in that year. This is not considered standard practice, unless the organization is typically in the business of trading securities. Although an area of

the above scenario will be reduced on a pro rata basis to its tax bracket, which results in mutual funds being a viable funding option.

For organizations whose aggregate liability is not material (i.e. under \$1 million), utilizing mutual funds as a funding vehicle also can be advantageous — even if the organization is a full taxpayer. In contrast to the previous example of a plan with \$10 million, if a company had a \$500,000 DCP liability, the taxes associated with funding the plan with mutual funds would have been approximately \$8,000 (assuming a 40-percent corporate rate tax, 50-percent turnover and

no consideration for dividends or tax exclusions). This tax impact is often palatable for many finance departments whose primary goal is to hedge their DCP exposure while minimizing the complexities of doing so. Keep in mind that a liability, previously considered immaterial, can grow quickly and become material in a few years. The best course of action for companies with smaller plan liabilities is to periodically analyze the tax impact of their current financing strategy and objectives on a going-forward basis.

COLI — The Black Box

Another prevalent DCP financing strategy is a product referred to as institutional insurance or corporate-owned life insurance (COLI). According to the "2004 Executive Benefits Survey," 61 percent of companies which fund their DCPs utilize COLI, whereas 15 percent use mutual funds. The insurance is typically placed on the lives of plan participants, and the policy owner and beneficiary is generally a rabbi trust, which is used to secure plan benefits for the participants.

These insurance policies, designed and priced specifically for the institutional corporate market, carry reduced loads and expenses. The result is a pension-like, tax-deferred investment environment. Due to the unique tax advantages of COLI, the company is able to generate more efficient returns on the plan funding, which may provide positive long-term effects on both cash flow and P&L. COLI is a popular financing vehicle because of its favorable tax advantages, which include:

- ▶ Tax-deferred earnings
- ▶ Tax-free death proceeds
- ▶ Widely recognized mutual fund companies typically provide the funds wrapped inside the COLI contracts, without any tax impact.

Most individuals and companies understand the concepts attributed to mutual funds, but COLI is often viewed as a mysterious black box that is difficult to understand. Figure 5 provides a side-by-side comparison that outlines some fundamental differences and similarities between these two funding vehicles.

FIGURE 5 Attributes of Mutual Funds and Cost of Living Index

Attribute	Mutual Funds	COLI
Tax on gains from trading within a fund	Yes	No
Tax on gains from reallocation among funds	Yes	No
Positive profit and loss from unrealized gains	Maybe	Yes
Profit and loss over plan life	Negative	Positive
Front loads/expenses	Maybe/No	Yes/No
Cost recovery	No	Yes
Death proceeds	No	Yes, tax-free
Mortality charges	No	Yes
Net worth over plan life	Same investment strategies, with often the same managers May create similar returns Little, if any, difference	
Fund returns		
Fund operating or investment expenses	Negative	Positive
Liquidity	Amounts readily accessible	Loans and withdrawals available

The Blended Approach

When a finance team prepares an analysis of the two most prevalent funding vehicles, essentially, the tax characteristics of the two options are being compared. There are different options for different organizations in different situations. Understanding the financing objectives and strategies often will lead to the appropriate funding vehicle. Those organizations that

brings them together as an integrated solution. There are many instances in which this type of combination of funding vehicles is appropriate, and there are many others yet to be considered. The following provides a sampling of cases in which this blended strategy may be suitable.

- The corporation may be apprehensive about utilizing just one funding option and is more amenable

Those organizations that do not fit into a specific box, however, must often look for a solution that is fluid and flexible since their company may be in transition or have current needs that do not match their long-term strategy.

do not fit into a specific box, however, must often look for a solution that is fluid and flexible since their company may be in transition or have current needs that do not match their long-term strategy. For these companies, a blended approach may be the appropriate solution.

The majority of companies that are full taxpayers fund their DCPs with corporate-owned or trust-owned life insurance. Most companies in a lower-alternative tax bracket, or those companies with liabilities under \$1 million, typically utilize mutual funds to finance their DCPs. However, not all companies follow this singular approach, and many finance teams often wonder if there is something else out there. Some practitioners have developed a strategy that blends the two most prominent vehicles and their attractive attributes.

This strategy — *the blended approach* — takes the best of both the mutual fund and COLI strategies and

to diversifying its funding approach. In such instances, the corporation may purchase both mutual funds and COLI to finance its DCP.

- The blended approach can satisfy short-term liquidity needs. COLI is a long-term strategy, and until such time as withdrawals and loans can be taken from the COLI, mutual funds can be used for the short-to mid-term liquidity needs such as benefit payment obligations. Mutual funds coupled with COLI may be an appropriate fit for organizations looking to cover cash requirements during the next five to seven years, in addition to addressing their long-term financing needs.

- The company has a large existing liability obligation that it wants to fund immediately. The company is interested in utilizing COLI. However, it is inefficient to purchase excess insurance coverage in year one to cover this large obligation. These situations are best resolved

by investing the excess corporate monies in mutual funds within the first year, and then liquidating (or transferring) the funds into the COLI over a period of two to five years. This provides a combined balance-sheet asset for funding the liability and enables the company to purchase a more efficient COLI asset.

Companies can use mutual funds to hold the nonactively managed funds that typically experience minimal gains (i.e. money market, bonds or index funds). This provides liquidity and decreases the insurance costs. The active funds in the plan with larger potential for gains and turnover, such as growth funds, small cap, etc., are wrapped inside the COLI portfolio. This mitigates the taxes associated with actively managed funds. Practitioners should note that this strategy works best for plans that have a long history of significant account balances in fixed investments.

The Continuing Evolution of Financing Strategies

As DCP design continues to evolve, so must the financing strategies used by companies to hedge the corresponding liability. The last two decades have seen a shift from offering one fixed investment option to an array of variable options. Financing strategies have followed by moving from unfunded programs to informally funded strategies. Despite the enactment of Internal Revenue Code Section 409A, which has established guidance for DCPs, the growing need for financing options and flexibility has not been deterred. Organizational focus and finance objectives are moving targets, and as such, continuous analysis must be conducted to determine what the next generation of financing vehicles should look like. **WJ**

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