

October 1, 2007

Via Regular Mail and Electronic Delivery

The Honorable Donald L. Korb  
Chief Counsel  
Internal Revenue Service  
Room 3026  
1111 Constitution Avenue, N.W.  
Washington, D.C. 20224

The Honorable Eric Solomon  
Assistant Secretary (Tax Policy)  
Department of the Treasury  
Room 3112  
1500 Pennsylvania Avenue, N.W.  
Washington, D.C. 20220

Dear Messrs Korb and Solomon:

On behalf of the undersigned, we are writing to follow up on the August 29, 2007 letter from numerous trade associations requesting that the Internal Revenue Service and the Department of the Treasury provide a one-year delay in the effective date of Treas. Reg. §1.409A (T.D. 9321, April 17, 2007) (the “409A Final Regulations”). Subsequently, Notice 2007-78 was issued, which provides a partial extension of certain documentary requirements for Code section 409A. While we appreciate the effort to issue Notice 2007-78 in a short time frame, we respectfully submit that Notice 2007-78 provides relief in relatively few cases. In particular, the Notice does not extend the documentary compliance effective date for determining the time and form of payouts under Code section 409A. This is the central and most difficult decision that must be made under these arrangements and there is simply not enough time from the publication of the Final Regulations in April until the January 1, 2008 effective date to make and implement these decisions.

The issues that we discussed in our August 29, 2007 letter remain. Notice 2007-78 does not significantly change the likelihood of errors with respect to the establishment and implementation of the “time and form” of payout provisions under the Final Regulations. Even if, in some cases, Notice 2007-78 would help avoid a technical failure under Code section 409A as of January 1, 2008, companies will find themselves locked into design decisions that are not consistent with their compensation and incentive goals because of the operational consistency requirements that Notice 2007-78 imposes. As a practical matter, the time for final decisions under Code section 409A did not begin until the Final Regulations were issued in April 2007. Our members, the vast majority of whom had been anticipating changes and who were already making tentative design decisions, could not make final decisions until the Final Regulations were issued. There is not enough time prior to January 1, 2008, to analyze and comprehend the changes in the Final Regulations, make final design decisions and then communicate those decisions to employees. Employees also need time and information to understand the plans and make informed decisions about their participation

since many of those decisions are either irrevocable or may be changed only in very limited circumstances. The vast majority of the problems that undoubtedly will arise in 2008 could be avoided if our members simply had more time to fully consider their design options under the Final Regulations and make deliberate decisions about adapting their plans and their employment practices to those final rules.

Once again, we urge you to provide guidance as soon as possible that delays the effective date of the Final Regulations until January 1, 2009. In the interim, taxpayers would continue to utilize the applicable transition rules provided in Sections XII and XIII of the preamble to the Final Regulations and conform to a reasonable and good faith interpretation standard of the statutory provisions, including the Final Regulations. The additional time period is critical to ensure that employers fully understand their options under the 409A Final Regulations and have the opportunity to make orderly and appropriate business decisions.

Thank you for your consideration. We would be happy to talk with you further about our concerns.

Sincerely,

American Benefits Council  
American Council of Life Insurers  
Association for Advanced Life Underwriting  
HR Policy Association  
ERISA Industry Committee  
Financial Services Roundtable  
National Association of Manufacturers  
National Rural Electric Cooperative Association  
U.S. Chamber of Commerce  
WorldatWork

c:

Ms. Karen Gilbreath Sowell (Treasury)

Mr. Tom Reeder (Treasury)

Ms. Helen Morrison (Treasury)

Ms. Nancy J. Marks (IRS)

Mr. Alan Tawshunsky (IRS)

Mr. Stephen Tackney (IRS)

Mr. William Schmidt (IRS)