



AMERICAN BENEFITS
COUNCIL

July 8, 2005

Via Electronic and Regular Mail

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

Eric Solomon
Acting Assistant Secretary (Tax Policy)
Deputy Assistant Secretary for Regulatory Affairs
Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

RE: Request for Extension of Transition Period Under Code Section
409A

Dear Messrs. Korb and Solomon:

We are writing to request that the Internal Revenue Service and the Department of Treasury provide an extended transition and reliance period under Internal Revenue Code section 409A. Even if regulatory guidance is issued before the end of the summer, which we understand is the goal, employers and service providers need a transition period that extends well beyond December 31, 2005, when the current transition relief is scheduled to end under Notice 2005-1. We urge you to consider an additional 12-month reasonable and good faith transition period – through December 31, 2006. This additional time is necessary for employers and service providers to read and understand the new regulatory rules once they are issued, assess plan design alternatives, and, in many cases, obtain approvals of the compensation committee, board of directors or shareholders for new cash and equity plans that conform to Code section 409A or regulatory exceptions.

We commend your staffs' diligent efforts to develop and issue guidance under Code section 409A. This is a tremendous task. At our last count, the government has received over 540 pages of public commentary on Code section 409A. Just as the government has needed significant time to consider comments and develop regulatory rules, taxpayers will need significant time to understand the guidance that you issue and to develop conforming compensation programs. For publicly-traded companies,

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corporate governance standards require that such changes be fully vetted and considered by the compensation committees and, in some cases, the full boards of directors. Human resources professionals will need to develop clear communications for employees, and employees will need to make decisions and file new elections that will affect their savings and retirement plans for many years into the future. All of these steps require careful planning and take significant time to implement in an orderly fashion.

We want to reiterate that an extended transition period solely for "documentation" compliance is not enough. There are many open questions that affect plan design that are not addressed at all in Notice 2005-1 and that employers cannot fully assess until regulations are issued. Only the most rudimentary deferral plan could be drafted today in the absence of guidance and, even in that case, there are questions about whether common plan terms and provisions will conform to the regulatory rules under Code section 409A. Employers are expecting that they may need to make fundamental changes to many types of plans, such as supplemental defined benefit plans. Those decisions cannot be made and implemented in a few months after initial regulations are published.

Providing an orderly transition is, in our view, consistent with government's and the taxpayers' mutual interests. An extended transition period would not provide leave to ignore the rules but would provide that the reasonable and good faith standard under Notice 2005-1 would continue. Without an extended transition period, we believe that "foot faults," administrative errors, and other mistakes that result in violations of Code section 409A in 2006 are sure to occur. Congress intended to change the compensation practices of employers to conform to Code section 409A and the Service and Treasury should exercise their authority to ensure that employers have a reasonable time to make these decisions after the rules are issued.

We would be happy to discuss our concerns further with you. Please let us know if a meeting or follow up telephone call would be helpful to you.

Sincerely yours,

A handwritten signature in black ink that reads "Lynn Dudley". The signature is written in a cursive, flowing style.

Lynn Dudley
Vice President, Retirement Policy

cc: Catherine Fernandez (IRS)
Dan Hogans (Treasury)
Catherine Livingston (IRS)
Nan Marks (IRS)
Bob Misner (IRS)

Tom Reeder (Treasury)
William Schmidt (IRS)
Stephen Tackney (IRS)
Alan Tawshunsky (IRS)