



July 6, 2006

The Honorable Donald L. Korb
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RE: Code Section 409A Proposed Regulations

Dear Messrs. Korb, Solomon, Reeder and Ms. Marks:

On behalf of American Benefits Council, HR Policy Association, and American Council of Life Insurers, we are writing to urge you to consider re-proposing rather than finalizing the Proposed Regulations issued under Internal Revenue Code section 409A (70 Fed. Reg. 57984). We also urge that the re-proposed regulations include an effective date that is no earlier than one year from the publication of final regulations. In the interim, deferred compensation

arrangements would need to conform to a reasonable and good faith interpretation of the statutory rules under Code section 409A.

We believe that regulatory guidance under Code section 409A merits a further notice and comment period. The Proposed Regulations are voluminous and highly detailed. They reflect the complexity that Code section 409A has introduced for virtually all compensatory arrangements. Indeed, the Proposed Regulations impose an entirely new regulatory regime just for equity compensation alone. Even simple annual bonus plans must now be reviewed and amended to make certain that they do not fall within the ambit of Code section 409A.

At our last count, the IRS and Treasury had received over 100 comment letters on the Proposed Regulations, many of which are multi-paged detailed submissions, and many of which are submitted from trade group representatives and consultants who, in turn, represent hundreds of employers. It is apparent to us that the lawyers on your staff and at the Internal Revenue Service are working hard to fully consider these comments. We hope that the next round of guidance will provide needed clarification in many parts of the regulations and some substantial changes in certain areas. As an example, our members have expressed significant concerns about the new definition of “service recipient stock” and other requirements for equity compensation (*i.e.*, options and SARs.) We expect that the definition of “service recipient stock” will need to be significantly altered from the Proposed Regulations and we hope that the regulatory requirements for other option and SAR features, such as accommodating exercise extension periods for terminating employees, will be amended as well. Another example of an area that requires extensive clarification and modification is the application of Code section 409A to severance arrangements. Our members have raised a number of questions about the definition of “severance” and the standards for determining whether severance is subject to Code section 409A.

We have no doubt that the next round of changes on these topics, as well as others that may be addressed, will generate additional questions and concerns, although we cannot anticipate what those questions will be until the changes are published. We acknowledge that there may be discrete topics that are not significantly altered from the Proposed Regulations and that could be finalized or made temporary. Nonetheless, we believe that substantial portions of the regulations require significant changes, which makes it unlikely that the regulations, taken as a whole, will be ready to be fully finalized and enforced. We note that Code section 409A is beginning to be referred to by many practitioners as the “ERISA-fication” of nonqualified deferred compensation. Changes of this magnitude, understandably, take time to fully absorb. Re-proposing would give both the government and taxpayers the opportunity to live with those rules a bit longer and consider the issues and, in our view, is a better approach than re-opening a final regulation once it is published.

We do not believe that re-proposing the regulations would open the door to noncompliance. Code section 409A is effective now and, as you know, the consequences of noncompliance are significant. The income inclusion, interest, and 20-percent penalty for failure to conform to section 409A create the maximum incentives for both the government and taxpayers to “get it right.” Our members have made significant changes in light of the statutory rules and, given the draconian penalties, there is simply no incentive for aggressive

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interpretations. We need the certainty under Code section 409A that regulatory guidance would provide, but we would rather sacrifice some certainty during a transition period to ensure that the final rules are clear and fully and appropriately address the issues.

Thank you for considering this and the many previous comments that we have made on Code section 409A. We would be happy to discuss with you further our concerns if that would be helpful.

Sincerely yours,



Lynn Dudley
American Benefits Council



Tim Bartl
HR Policy Association



Ann Cammack
American Council of Life Insurers

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