August 29, 2007

Via Regular Mail and Electronic Delivery

Mr. Kevin Brown
Acting Commissioner
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington , D.C. 20224

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 Brown, Korb and Solomon:

We are writing to request that the Internal Revenue Service and the Department of the Treasury publish guidance that provides a one-year delay in the effective date of Treas. Reg. §1.409A (T.D. 9321, April 17, 2007) (the "409A Final Regulations"). Specifically, we urge guidance providing that taxpayers may continue to rely on a reasonable and good faith interpretation of Internal Revenue Code section 409A, including the 409A Final Regulations, through December 31, 2008, including transition rules that otherwise would expire on December 31, 2007, and that documentary compliance is not required prior to January 1, 2009.

Our members are highly concerned about the significant likelihood for error and noncompliance absent a delay in the January 1, 2008 effective date for the 409A Final Regulations. Given the draconian penalty regime that is associated with Code section 409A and the inability to cure even the most inadvertent or minor failures, taxpayers need further time to fully comprehend the voluminous regulatory guidance that was issued in April and make reasoned decisions about how to design their plans and their administrative systems to ensure compliance. We do not believe that anyone's interests are served – neither the government's nor

the taxpayers' – by a regulatory effective date that, notwithstanding best efforts, many will not be able satisfy in January.

Our members are not companies that have waited until the eleventh hour to consider how to respond to Code section 409A. Many are publicly-traded companies with sophisticated internal and external expertise in tax, legal and human resources. Other members provide consulting and legal services on compensation and benefits issues and are themselves extensively involved in helping employers conform their arrangements to the Code section 409A requirements. Notwithstanding the level of expertise available to many of our members, they find themselves in an extraordinary situation. Given the volume and complexity of the 409A Final Regulations, we are finding that reasonable and otherwise fully informed practitioners arrive at opposite interpretations. Moreover, because section 409A failures can involve either impermissible acceleration or impermissible deferral of income, it is not always clear what, if any, conservative interpretation is available in a particular factual circumstance. While interpretive questions may be expected in the wake of any significant regulatory project, there is no opportunity to wait for the "dust to settle" or to sort out interpretive questions in the future. The effective date of the 409A Final Regulations means that companies must act now.

Even in cases where companies opted to try to comply earlier by redesigning their plans and documents under the prior proposed regulations, those documents and administrative systems must now be re-reviewed and typically need to be modified again to reflect changes in the Final Regulations or, at minimum, a more nuanced understanding of a concept in the Final Regulations. For example, the Final Regulations made significant changes to the definition of "separation from service," which is a linchpin concept under Code section 409A, and requires a careful analysis of not only the plan document but the administrative and human resource systems that are used to track employment and leaves of absences. As another example, the Final Regulations introduced the concept of a prohibited "substitution," which affects employment agreements, negotiated terminations, and arrangements entered in mergers and acquisitions. These provisions are not "looseners" or optional design techniques that taxpayers may choose whether to utilize or not. Rather, these are examples of fundamental concepts that must be satisfied under the Final Regulations and that require a detailed factual analysis of the

employer's plans, administrative operations and employment practices. To try to ensure compliance, employers must undertake broad educational efforts of the business managers, corporate lawyers, and administrators who heretofore have never been involved in managing or administering deferred compensation arrangements but, because of the breadth of Code section 409A, may make a business decision that could inadvertently cause deferred compensation arrangements to run afoul of the rules.

Of particular concern for employers is the fact that without an extension, there will be significant number of failures that will result in phantom income inclusion. In particular, failures in documentation can result in income inclusion for any individual with a vested benefit covered by the document, without regard to whether there is any actual or constructive receipt of the amounts. Further, if the individual actually receives a lower amount, or perhaps no payment at all, there is no guidance on the extent to which the individual is able to claim a loss with respect to the phantom income inclusion. The potential for these phantom income inclusions with no effective mechanism for reversal puts a premium on anticipating future possible circumstances and drafting accordingly, a complexity that only adds to the burden associated with full compliance by January 1, 2008.

Ensuring compliance with the Final Regulations in the current time frame is proving to be daunting even for the largest and most sophisticated employers, let alone smaller privately-held companies with fewer resources. There is simply not enough time before the January 1, 2008 effective date for many employers to make reasoned and well informed decisions. 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
ERISA Industry Committee
Financial Services Roundtable
HR Policy Association
National Association of Manufacturers
National Rural Electric Cooperative Association
Profit Sharing/401(k) Council of America
Small Business Council of America
U.S. Chamber of Commerce
WorldatWork

c:
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)