



Section of Taxation

10th Floor
740 15th Street N.W.
Washington, DC 20005-1022
(202) 662-8670
FAX: (202) 662-8682
E-mail: tax@abanet.org

September 15, 2006

Hon. Mark W. Everson
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Dear Commissioner Everson:

On behalf of the Section of Taxation of the American Bar Association, we urge the Internal Revenue Service and the Treasury Department to immediately publish transition relief from certain requirements of Section 409A of the Internal Revenue Code. The views expressed in this letter have not been approved by the Board of Governors or the House of Delegates of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

The Proposed Regulations under Section 409A contemplate an effective date of January 1, 2007, and provide certain transition rules, which will end on December 31, 2006. At present, for example, current guidance requires taxpayers to satisfy the documentary compliance rules of Section 409A by December 31, 2006 even though final regulations have not been published. As you know, plan amendments cannot be finalized until final guidance on which taxpayers can rely is published. More importantly, compliance requires certain corporate actions for which a reasonable lead time is needed. Thus, as a practical matter, even if you issue the final guidance later this year, taxpayers will no longer be able to meet this end-of-year deadline. Nevertheless, because you have not officially announced any delay, many large record-keepers are requiring plan sponsors to make decisions by the end of September. They agree that this lead time is needed to facilitate updates to systems that will be used for administering nonqualified deferred compensation plans under Section 409A beginning on January 1, 2007. As a result, plan sponsors are being required to make decisions on plan design without the benefit of final regulations.

We recognize that Treasury staff are sympathetic to these concerns and, indeed, have informally indicated that the effective date will be deferred. However, in the absence of formal guidance, it is difficult for benefits tax counsel to advise their clients that they do not have to make these decisions right now. It is, therefore, critical that taxpayers and their advisers receive guidance on effective date and transition rules pertaining to Section 409A. This guidance should be published now, and not delayed until the final regulations are released.

Thank you for your consideration of this request.

Sincerely yours,

Susan P. Serota
Chair, Section of Taxation

cc: Eric Solomon, Acting Deputy Assistant Secretary of Treasury (Policy)
Donald L. Korb, Chief Counsel, Internal Revenue Service

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