



Securities Industry Association

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William F. Sweetnam, Jr.
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U.S. Department of the Treasury
1111 Constitution Avenue, NW
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Dear Bill:

Thank you for taking the time to speak with me on Monday with respect to the just-enacted language in the FSC bill affecting non-qualified deferred compensation. As you know, the Securities Industry Association (SIA)¹ and its member companies were active in efforts to shape these provisions, particularly the language allowing mid-year deferral elections of performance-based bonuses.

Per your request, our companies have identified four issues that require prompt guidance from the Treasury, whether in the form of regulations, notices, or otherwise:

Deferral Elections Not Yet Made for 2004.

As you know, securities firms have traditionally allowed employees to make deferral elections late in the year with respect to bonuses to be paid early the following year. We believe the Treasury has authority to allow deferral elections made before the end of this year to be respected (and therefore not subject to immediate taxation), and I was encouraged by your comments on

¹ The Securities Industry Association, established in 1972 through the merger of the Association of Stock Exchange Firms and the Investment Banker's Association, brings together the shared interests of nearly 600 securities firms to accomplish common goals. SIA member-firms (including investment banks, broker-dealers, and mutual fund companies) are active in all U.S. and foreign markets and in all phases of corporate and public finance. According to the Bureau of Labor Statistics, the U.S. securities industry employs 790,600 individuals. Industry personnel manage the accounts of nearly 93-million investors directly and indirectly through corporate, thrift, and pension plans. In 2003, the industry generated \$213 billion in domestic revenue and an estimated \$283 billion in global revenues. (More information about SIA is available on its home page: www.sia.com.)

this issue during our conversation. Given the impending deadlines for making these elections, companies and employees urgently need reliable guidance on this and the related issue as to whether amounts deferred this year will be subject to the rules of H.R. 4520 or those in effect prior to its enactment.

Definition of "Performance-Based Compensation."

Generally, the conference agreement requires that deferral elections be made prior to the end of the preceding service period. An exception allows deferral elections with respect to "performance-based compensation" to be made at least six months before the end of the service period. The statement of managers does not exhaustively define the term "performance-based compensation" but clearly indicates that the definition is not required to meet all of the criteria in section 162(m).

SIA does not believe the definition in the bill or the statement of managers accompanying the conference agreement contemplates that only bonuses calculated on strictly mathematical formulae can meet this definition and believe it instead allows for other material criteria (e.g., relevant facts and circumstances relating to performance evaluations and attainment of previously set goals, objectives, or milestones) to be used in setting qualifying performance-based bonuses and urge Treasury to provide clarification on this issue.

Moreover, it is particularly important that guidance on this matter be issued promptly. Companies and their employees must know before the end of the year whether their system of calculating performance-based bonuses will meet the terms of H.R. 4520; if not, employees will be required to make all deferral elections this year with respect to 2005 compensation, including bonuses to be paid in 2006. For some non-calendar year companies, as noted below, those elections may have to occur before the end of November.

Definition of Material Modification.

The legislation generally provides that amounts deferred prior to January 1, 2005 are subject to the provisions of H.R. 4520 if there is a "material modification" with respect to the addition of rights, benefits, or features. Although the statement of managers provides some examples, SIA believes swift guidance is necessary to help plans ensure they do not inadvertently run afoul of these rules.

Non-Calendar Year Companies.

As the "service period" for these purposes is understood to mean the employer's fiscal year, without Treasury guidance it will be necessary for employees of several SIA member companies with November year ends to make deferral elections by the end of November with respect to year-end 2005 bonuses, which generally will not be paid until January 2006.

Accordingly, the need for prompt guidance with respect to these issues is particularly acute for these companies and their employees.

SIA and our member companies stand ready to provide you any additional information necessary to help you work through these complex matters. In addition, we recognize that other issues of concern will arise during the implementation of the provisions of H.R. 4520 and hope to be able to continue our dialogue as they do.

Thank you again for your consideration of our concerns. Given the time sensitivity of these four issues, we hope to be able to discuss them further with you very soon.

Sincerely,

Jon Traub
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