

Draft Date: 12/08/2005

### Part III – Administrative, Procedural, and Miscellaneous

Suspension of employer and payer reporting and wage withholding requirements with respect to deferrals of compensation under § 409A for calendar year 2005; no assertion of penalties against service providers in certain circumstances.

Notice 2005-94

#### I. PURPOSE

This Notice suspends employers' and payers' reporting and wage withholding requirements for calendar year 2005 with respect to deferrals of compensation within the meaning of § 409A of the Internal Revenue Code (the Code).

However, future published guidance may require an employer or payer to file a corrected information return and to furnish a corrected payee statement reporting any previously unreported amounts includible in gross income under § 409A.

This Notice does not affect the application of § 3121(v)(2) or an employer's reporting obligations under Treas. Reg. § 31.3121(v)(2)-1.

This Notice does not affect a service provider's filing requirements, individual income tax liability, or interest on underpayments of tax. However, pursuant to this Notice, the IRS will not assert penalties under §§ 6651(a)(1) and (2), 6654, and 6662 with respect to amounts includible in gross income under § 409A for

calendar year 2005 if the service provider reports and pays any taxes due with respect to such amounts in accordance with future published guidance.

## II. BACKGROUND

### A. The American Jobs Creation Act of 2004

Section 885(a) of the American Jobs Creation Act of 2004, Pub. Law No. 108-357, 118 Stat. 1418 (the Act) added § 409A, which provides, inter alia, that amounts deferred under a nonqualified deferred compensation plan for all taxable years are currently includible in gross income to the extent not subject to a substantial risk of forfeiture and not previously included in gross income, unless the plan meets certain requirements. Section 885(b) of the Act amended the Code to impose the following reporting and wage withholding requirements with respect to deferrals of compensation within the meaning of § 409A:

- The Act amended §§ 6051 and 6041 to require that an employer or payer report all deferrals for the year under a nonqualified deferred compensation plan on a Form W-2 (Wage and Tax Statement) or a Form 1099 (Miscellaneous Income).
- The Act amended § 3401(a) to provide that the term “wages” includes any amount includible in gross income of an employee under § 409A.
- The Act amended § 6041 to require that a payer report amounts includible in gross income under § 409A that are not treated as wages under § 3401(a) as gross income.

## B. Notice 2005-1

On December 20, 2004, the IRS issued Notice 2005-1 (2005-2 I.R.B. 274 (published as modified on January 6, 2005)), which provides guidance with respect to the application of § 409A. Additionally, in accordance with the amendments made by § 885(b) of the Act, Notice 2005-1 imposes the following reporting and wage withholding requirements with respect to deferred amounts:

- An employer must report to an employee the total amount of deferrals for the year under a nonqualified deferred compensation plan in box 12 of Form W-2 using code Y. See Q&A-29.
- An employer must report amounts includible in gross income under § 409A and in wages under § 3401(a) in box 1 of Form W-2 as wages paid to the employee during the year. An employer must also report such amounts in box 12 of Form W-2 using code Z. See Q&A-33.
- A payer must report to a nonemployee the total amount of deferrals for the year under a nonqualified deferred compensation plan in box 15a of Form 1099-MISC. See Q&A-30.
- A payer must report amounts includible in gross income under § 409A and not treated as wages under § 3401(a) as nonemployee compensation in box 7 of Form 1099-MISC. A payer must also report such amounts in box 15b of Form 1099-MISC. See Q&A-35.

## C. Proposed Regulations

On September 29, 2005, the IRS issued proposed regulations regarding the application of § 409A. See 70 Fed. Reg. 58930 (Oct. 4, 2005). The proposed regulations incorporate and expand on the guidance provided in Notice 2005-1 and are proposed to be generally applicable for taxable years beginning on or after January 1, 2007. As stated in the preamble to the proposed regulations, taxpayers may rely on the proposed regulations for periods preceding the effective date of the final regulations. However, the proposed regulations do not affect the applicability of this notice (and generally do not affect the application of other guidance issued with respect to § 409A, including Notice 2005-1).

### III. INTERIM EMPLOYER AND PAYER REPORTING AND WAGE WITHHOLDING PROVISIONS

This notice suspends employers' and payers' reporting and wage withholding requirements for calendar year 2005 with respect to deferrals of compensation within the meaning of § 409A. In lieu thereof the following reporting and wage withholding provisions apply for calendar year 2005 until superseded by future published guidance:

#### A. Amounts reportable on Form 941 and Form W-2

- For calendar year 2005, an employer is not required to report deferrals for the year under a nonqualified deferred compensation plan as § 409A deferrals in box 12 of Form W-2 using code Y.
- For calendar year 2005, an employer is not required to include in the total amount of wages as defined in § 3401(a) amounts includible in the gross

income of an employee under § 409A that the employee has neither actually nor constructively received during the calendar year. Thus, an employer may exclude such amounts from wages for income tax withholding purposes and is not required to report such amounts as wages paid to the employee in box 2 of Form 941 or in box 1 of Form W-2. Additionally, an employer is not required to report such amounts as § 409A income in box 12 of Form W-2 using code Z. However, see paragraph III.C. of this notice regarding an employer's potential obligation to file a corrected information return and to furnish a corrected payee statement.

**B. Amounts reportable on Form 1099**

- For calendar year 2005, a payer is not required to report deferrals for the year under a nonqualified deferred compensation plan as § 409A deferrals in box 15a of Form 1099-MISC.
- For calendar year 2005, a payer is not required to report amounts includible in the gross income of a nonemployee under § 409A that the nonemployee has neither actually nor constructively received during the calendar year. Thus, a payer is not required to report such amounts as nonemployee compensation in box 7 of Form 1099-MISC or as § 409A income in box 15b of Form 1099-MISC. However, see paragraph III.C. of this Notice regarding a payer's potential obligation to file a corrected information return and to furnish a corrected payee statement.

**C. Corrected Information Return and Corrected Payee Statement**

Future published guidance may require an employer or payer to file a corrected information return and to furnish a corrected payee statement for calendar year 2005 reporting any previously unreported amounts includible in gross income under § 409A.

#### IV. SERVICE PROVIDER REQUIREMENTS WITH RESPECT TO AMOUNTS INCLUDIBLE IN GROSS INCOME UNDER § 409A

A service provider must file a return and pay any taxes due relating to amounts includible in gross income under § 409A for calendar year 2005. However, the IRS understands that it is likely that service providers will find it difficult to determine the correct amount and timing of inclusions under § 409A without reporting from the employer or payer. The IRS is working on guidance regarding the employers' and payers' reporting and withholding requirements, and that guidance is expected to be issued in the first half of 2006. Consequently, the IRS will not assert penalties under §§ 6651(a)(1) and (2), 6654, and 6662 with respect to amounts includible in gross income under § 409A for calendar year 2005 if the service provider reports and pays any taxes due with respect to such amounts in accordance with future published guidance. Such future guidance will provide a period during which the service provider may report and pay any taxes due with respect to amounts includible in gross income under § 409A without incurring such penalties. However, interest imposed under Chapter 67 of the Code will apply to any underpayments of tax resulting from a service provider's failure to include amounts includible in gross income under § 409A for calendar year 2005.

## V. EFFECT ON OTHER DOCUMENTS

This notice suspends employers' and payers' reporting and wage withholding requirements for calendar year 2005 with respect to deferrals of compensation within the meaning of § 409A as set forth in Notice 2005-1.

## VI. EFFECTIVE DATE

This notice is effective with respect to employers' and payers' reporting and wage withholding requirements for calendar year 2005 and with respect to service providers' filing requirements and tax payment obligations relating to amounts includible in gross income under § 409A for calendar year 2005.

## VII. DRAFTING INFORMATION

The principal author of this notice is Frederick L. Wesner of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities), though other Treasury and IRS officials participated. For further information regarding this notice, contact Mr. Wesner on (202) 622-6040 (not a toll free number).