

# 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:

