

Executive Benefits BULLETIN

December 9, 2005

IRS Suspends §409A Reporting and Withholding Requirements for 2005

Further Guidance Expected in 2006

New reporting and withholding requirements for nonqualified deferred compensation arrangements were imposed by Section 409A of the Internal Revenue Code (“§409A”) for amounts actually deferred after December 31, 2004. On December 8, 2005, the IRS issued Notice 2005-94 to suspend the reporting and withholding requirements under §409A for the 2005 calendar year.

Under §409A, a plan sponsor is required to report on Form W-2 (for employees) and Form 1099-MISC (for non-employees) (i) all amounts deferred under a nonqualified deferred compensation plan during the year (plus earnings) and (ii) any amounts includible in gross income due to the failure of the plan to comply with the requirements of §409A. In addition, any amounts includible in gross income of an employee under §409A are considered “wages” for withholding purposes and also must be reported as such on the plan sponsor’s Form 941. Notice 2005-94 suspends the reporting and withholding requirements under §409A for the 2005 calendar year and indicates that further guidance is expected to be released in the first half of 2006. Such guidance should include the method for calculating the amounts deferred and the amounts includible in gross income under §409A for reporting and withholding purposes.

The IRS cautions in Notice 2005-94 that the anticipated guidance may require the plan sponsor to file a corrected Form 941 and to furnish a corrected Form W-2 or Form 1099-MISC for 2005 – such corrected forms would disclose amounts includible in gross income under §409A that were previously unreported. A participant will not be subject to penalties for any late payment of taxes with respect to such amounts if the participant reports and pays any taxes due in accordance with future published guidance; however, the participant may be subject to interest for underpayment of tax on such amounts.

Notice 2005-94 does not affect FICA or other withholding and reporting obligations applicable to nonqualified deferred compensation arrangements. A copy of Notice 2005-94 is included with this *Executive Benefits Bulletin* for your reference. Clark Consulting will continue to keep you apprised of any developments as they occur regarding the reporting and withholding requirements for amounts subject to §409A.