

OCTOBER 24, 2007

## IRS Suspends Deferral Reporting for 2007 and Provides Interim Guidance on Reporting and Withholding Requirements for IRC §409A Violations

On October 23, 2007, the IRS issued Notice 2007-89, which suspends the reporting requirements imposed by Internal Revenue Code Section 409A (“§409A”) for amounts deferred during 2007 under a nonqualified deferred compensation plan that has been operated in compliance with the requirements of §409A. This Notice also provides interim guidance on the reporting and withholding requirements for amounts includible in income as a result of a violation of the requirements of §409A.

### **Background**

Under §409A plan sponsors are required to report:

- (i) all amounts deferred under a nonqualified deferred compensation plan subject to §409A during the year (plus earnings) in either box 12 of Form W-2 using Code Y (for employees) or in box 15a of Form 1099-MISC (for non-employees); and
- (ii) any amounts includible in gross income due to the failure of the plan to comply with the requirements of §409A in either box 12 of Form W-2 using Code Z (for employees) or in box 15b of Form 1099-MISC (for non-employees). For an employee, such amounts are considered “wages” for withholding purposes, and would also be reported as such on line 2 of the plan sponsor’s Form 941 and in box 1 of Form W-2. For a non-employee, such amounts would also be reported as non-employee compensation in box 7 of 1099-MISC.

In November 2006, the IRS issued Notice 2006-100, which suspended the §409A reporting requirements (described in item (i) above) for amounts deferred in the 2006 calendar year under a nonqualified deferred compensation plan that has been operated in compliance with the requirements of §409A. For any amounts includible in gross income during 2005 or 2006 due to the failure of the plan to comply with the requirements of §409A, Notice 2006-100 required such amounts to be reported on the appropriate form (referenced in item (ii) above) and it provided interim guidance on the reporting and withholding requirements for such amounts.

### **Notice 2007-89 – Interim Guidance for the 2007 Tax Year**

Notice 2007-89 generally extends the interim guidance provided under Notice 2006-100 to make such guidance applicable for the 2007 tax year. Specifically, Notice 2007-89 further suspends the reporting requirements (described in item (i) above) for amounts deferred in the 2007 calendar year under a nonqualified deferred compensation plan that has been operated in compliance with the requirements of §409A. For any amounts includible in gross income during 2007 due to the failure of the plan to comply with the requirements of §409A, the Notice requires that such amounts be reported on the appropriate form (referenced in item (ii) above) and it provides interim guidance on the reporting and withholding requirements for such amounts.

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As previously noted, Notice 2007-89 is intended as interim guidance only. The Notice indicates that the IRS and Treasury Department are currently formulating general guidance with respect to income inclusion requirements, reporting and withholding requirements and other related issues, and comments are requested on all aspects of these requirements. Clark Consulting will continue to keep you apprised of any developments as they occur.

Please visit <http://www.irs.gov/pub/irs-drop/n-07-89.pdf> if you would like to obtain a complete copy of Notice 2007-89.

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