

Client Alert

Treasury and IRS Issue Interim 409A Reporting and Disclosure Guidance for 2005 and 2006

On November 30, 2006, the Treasury Department and Internal Revenue Service issued interim guidance regarding reporting and withholding requirements under 409A for 2005 and 2006. The new guidance:

- eliminates reporting obligations for compensation deferred in 2005 and 2006;
- provides rules for employers and other payers to report and withhold on amounts includible in income under 409A for 2005 or 2006; and
- provides rules for individuals to calculate taxes owed on amounts includible in income for 2005 and 2006 by virtue of 409A.

The new guidance, in the form of Notice 2006-100, supersedes prior guidance issued by Treasury and the IRS on this topic in late 2005. The prior guidance was contained in Notice 2005-94. For the link to Notice 2006-100 and prior guidance on 409A reporting and disclosure requirements, [click here](#) or go to www.chadbourne.com/409A.htm.

Highlights of the New Guidance

Here are some of the highlights of Notice 2006-100:

- ***No Reporting of Deferred Compensation Required in 2005 and 2006.*** Amounts deferred under a nonqualified deferred compensation plan in 2005 and 2006 do not have to be reported on the individuals' Form W-2s or 1099-MISCs for those years. This aspect of the new guidance is consistent with the relief provided by the IRS last year.
- ***Reporting Requirements for Amounts Includible in Income Under 409A for 2005 and 2006.*** Amounts includible in income under 409A must be reported by payers to the IRS, and on Form W-2s and 1099-MISCs provided to individuals, for 2005 and 2006. This means that payers may be required to issue amended Form W-2s and 1099-MISCs for 2005. The deadlines for filing with the IRS and providing individuals with forms for 2005 are the same dates by which filing with the IRS and providing such forms for 2006 must be completed (generally, those dates are February 28, 2007 and January 31, 2007, respectively).
- ***Withholding for Amounts Includible in Income Under 409A for 2006.*** Depending on whether the individual has received wages during 2006 apart from any amount includible in income under 409A, businesses will be required to withhold in the usual course or at the supplemental wage rate. However, because withholding is not increased for any 409A tax imposed on the income, individuals may be required to file estimated tax payments during the year. The new guidance contains a transition rule where, if a payer has not withheld a sufficient amount by December 31, 2006, the payer may pursue one of two options in order to make sure that any withholding liability is satisfied. Note that a payer is not liable for income tax withholding with respect to previously unreported amounts that will now be required to be reported for 2005.

- **Determining the Amount Includible in Income Under 409A.** For purposes of calculating the amount that will be subject to any 409A taxes, the new guidance provides interim rules for amounts includible in income under 409A(a) (the provisions governing deferrals and payments) or 409A(b) (the provisions governing offshore funding and financial health triggers). The rules are complicated and address, among other issues, how to determine the “payment date” of 409A amounts, including amounts that are not actually or constructively received by the individual but are nonetheless includible in income.
- **Relief from Future Guidance.** Payers who comply with this interim guidance will not be required to further withhold or to file corrected forms for 2005 and 2006 as a result of any future guidance issued by Treasury and the IRS regarding 409A reporting and withholding obligations.
- **Individuals Must Include 409A Amounts in Income for 2005 and 2006.** If an amount is subject to tax under 409A for 2005 or 2006, individuals must include that amount in income, plus the two additional taxes imposed by 409A (the 20% tax and the interest determined using the underpayment rate plus one percentage point). Individuals may be required to file an amended tax return for 2005, which must be filed by the deadline for the individual’s 2006 tax return in order to avoid additional penalties.
- **Comments Requested.** Treasury and the IRS have requested comments on any aspect of the new guidance. The guidance is clear that the included provisions are interim guidance only.

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December 2006

For Additional Information

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