

## Part III – Administrative, Procedural, and Miscellaneous

### Reporting and Wage Withholding Under Internal Revenue Code § 409A

Notice 2006-100

#### **I. PURPOSE**

This notice provides guidance to employers and payers on their reporting and wage withholding requirements for calendar years 2005 and 2006 with respect to deferrals of compensation and amounts includible in gross income under § 409A of the Internal Revenue Code. This notice does not affect the application of § 3121(v)(2) or an employer's reporting obligations under § 31.3121(v)(2)-1 of the Employment Tax Regulations. In addition, this notice provides guidance to service providers on their income tax reporting and tax payment requirements with respect to amounts includible in gross income under § 409A for 2005 and 2006.

#### **II. BACKGROUND**

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

Section 885 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 all 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 certain requirements are met. 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 §§ 6041 and 6051 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-MISC (Miscellaneous Income), regardless of whether such deferred compensation is includible in gross income under § 409A(a).
- The Act amended § 3401(a) to provide that the term “wages” includes any amount includible in the 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).

#### **B. Notice 2005-1**

On December 20, 2004, the IRS issued Notice 2005-1 (2005-1 C.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 provides the following with respect to reporting and wage withholding requirements for deferred amounts:

- An employer should 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 should 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 and subject to income tax withholding. An employer should also report such amounts in box 12 of Form W-2 using code Z. See Q&A-33.

- A payer should 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 should 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 should 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. 57930 (Oct. 4, 2005). The proposed regulations incorporate and expand on the guidance provided in Notice 2005-1. 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).

### **D. Notice 2005-94**

On December 27, 2005 the IRS issued Notice 2005-94 (2005-52 I.R.B. 1208), which provided the following guidance to employers and payers on their reporting and withholding obligations with respect to deferrals of compensation and amounts includible in gross income under § 409A during calendar year 2005:

- The notice waived employers' and payers' reporting requirements under §§ 6041 and 6051 for calendar year 2005 with respect to annual deferrals of compensation within the meaning of § 409A.
- The notice provided that for 2005 employers are not required to include in the total amount of wages as defined in § 3401(a) amounts includible in gross income of an employee under § 409A that the employee neither actually nor constructively received during the 2005 calendar year. Additionally, the notice suspended employers' reporting requirements for calendar year 2005 with respect to such amounts.
- The notice suspended payers' reporting requirements for 2005 with respect to amounts includible in the gross income of a nonemployee under § 409A that the nonemployee neither actually nor constructively received during the 2005 calendar year.
- The notice provided that 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.
- For service providers, the notice provided that 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 subsequent published guidance. The notice stated that such subsequent

guidance would provide a period during which the service provider may report and pay such taxes due without incurring such penalties.

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

This section provides guidance on employers' and payers' reporting and wage withholding requirements for calendar years 2005 and 2006 with respect to annual deferrals of compensation within the meaning of § 409A and with respect to amounts includible in gross income under § 409A.

#### **A. 2005 and 2006 Annual Deferrals**

##### **1. Amounts Reportable on Form W-2**

For calendar years 2005 and 2006, an employer is not required to report amounts deferred during the year under a nonqualified deferred compensation plan subject to § 409A in box 12 of Form W-2 using code Y.

##### **2. Amounts Reportable on Form 1099-MISC**

For calendar years 2005 and 2006, a payer is not required to report amounts deferred during the year under a nonqualified deferred compensation plan subject to § 409A in box 15a of Form 1099-MISC.

#### **B. Reporting and Withholding on Amounts Includible in Gross Income under § 409A**

Section 3401(a) provides that for income tax withholding purposes the term "wages" includes any amount includible in gross income of an employee under § 409A, and payment of such amount is treated as having been made in the taxable year in which the amount is includible in gross income. Thus, for calendar year 2006, an

employer must treat amounts includible in gross income under § 409A as wages for income tax withholding purposes. An employer is required to report such amounts as wages paid on line 2 of Form 941, Employer's Quarterly Federal Tax Return, and in box 1 of Form W-2. An employer must also report such amounts as § 409A income in box 12 of Form W-2 using code Z. If the employee has received other regular wages from the employer during the calendar year, amounts includible in gross income under § 409A are supplemental wages for purposes of determining the amount of income tax required to be deducted and withheld under § 3402(a). See Publication 15 for the withholding rules with respect to supplemental wages. The amount required to be withheld is not increased on account of the additional income taxes imposed under § 409A(a)(1)(b). Employees should thus be aware that estimated tax payments may be required to avoid penalties under § 6654.

For nonemployees, § 6041(g)(2) requires a payer to report to a nonemployee any amount that is includible in gross income under § 409A that is not treated as wages under § 3401(a). Thus, for calendar year 2006, 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 as § 409A income in box 15b of Form 1099-MISC.

#### **1. Calculation of Amounts Includible in Income under § 409A(a) – In General**

Section 409A(a)(1)(A)(i) provides that if at any time during a taxable year a nonqualified deferred compensation plan fails to meet the requirements of § 409A(a)(2), (3) or (4), all compensation deferred under the plan for the taxable year and all preceding taxable years shall be includible in gross income for the taxable year to the

extent not subject to a substantial risk of forfeiture and not previously included in gross income. Accordingly, for purposes of this notice, the amount includible in gross income under § 409A(a) and required to be reported by the employer or payer equals the portion of the total amount deferred under the plan that, as of December 31, 2006, is not subject to a substantial risk of forfeiture as defined in Notice 2005-1, Q&A-6, or the proposed regulations, and has not been included in income in a previous year, plus any amounts of deferred compensation paid or made available to the service provider under the plan during the calendar year 2006. For purposes of this paragraph, an employer or payer may treat an amount as previously included in income if properly reported by the employer or payer on a 2005 Form W-2, Form 1099-MISC, or Form W-2c or corrected Form 1099-MISC. Thus, amounts properly reported on a 2005 Form W-2 or Form 1099-MISC, or Form W-2c or corrected Form 1099-MISC should not be reported again on a 2006 Form W-2 or Form 1099-MISC. For the definition of a plan, including the plan aggregation rules, see Notice 2005-1, Q&A-9, and proposed § 1.409A-1(c).

Amounts includible in gross income under § 409A(a) include only amounts deferred that are subject to § 409A. Accordingly, for purposes of this section III.B.1., references to amounts deferred under a plan, including references to account balances, refer solely to amounts deferred that are subject to § 409A and not, for example, to amounts deferred that were earned and vested prior to January 1, 2005 and that are not otherwise subject to § 409A due to the application of the effective date provisions. For rules regarding the application of the effective date provisions of § 409A to nonqualified deferred compensation plans, see Notice 2005-1, Q&A-16 to Q&A-18, and proposed § 1.409A-6.

The provisions of this notice addressing the calculation of the amounts includible in income are intended as interim guidance only. The Treasury Department and the IRS are currently formulating general guidance with respect to the calculation of the amounts includible in income, as well as other related issues. For information regarding the submission of comments on these topics, see section V. of this notice.

## **2. Wage Payment Date of Amounts Includible in Income under § 409A(a)**

Amounts includible in gross income under § 409A(a) in 2006 that are either actually or constructively received (disregarding the application of § 409A) by an employee during the calendar year 2006, are considered a payment of wages by the employer when received by the employee for purposes of withholding, depositing, and reporting the income tax at source on wages under § 3401(a).

Amounts includible in gross income under § 409A(a) in 2006 that are neither actually nor constructively received (disregarding the application of § 409A) by the employee during the calendar year 2006, are treated as a payment of wages on December 31, 2006 for purposes of withholding, depositing, and reporting the income tax at source on wages under § 3401(a). If as of December 31, 2006 the employer does not withhold income tax from the employee on such wages, or withholds less than the amount of income taxes required to be withheld under § 3402 from the employee, the employee will receive credit under § 31 for 2006 if the employer follows one of two possible options. Under the first option, notwithstanding § 31.6205-1(c)(4), the employer withholds or recovers from the employee the amount of the undercollection after December 31, 2006 and before February 1, 2007, and reports as wages for the quarter ending December 31, 2006 such amounts that were neither actually nor

constructively received but are includible in income under § 409A on Form 941 for that quarter and in box 1 of the employee's Form W-2 for 2006. Under the second option, the employer pays the income tax withholding liability on behalf of the employee (without deduction from the employee's wages or other reimbursement by the employee), and reports the gross amount of wages and the income tax withholding liability for the quarter ending December 31, 2006 as including such amounts that were neither actually nor constructively received but are includible in income under § 409A as well as the wages resulting from paying the income tax on the employee's behalf on Form 941 and in box 1 of the employee's Form W-2 for 2006. See Rev. Rul. 58-113 (1958-1 C.B. 362) for methods of computing gross wages when paying income tax on behalf of an employee. In addition, for purposes of the deposit requirements associated with such wages, if the income tax withholding liability with respect to such wages is paid to the IRS by the due date of the Form 941 for the quarter ending December 31, 2006 on which the wages are reported, then the amount of income tax withholding liability will be considered to have been deposited in accordance with the rules of § 31.6302-1(c). Thus, penalties for failure to deposit taxes under § 6656 will not be imposed with respect to such amount.

### **3. 2006 Amounts Includible in Income under §409A(a)**

The following sections provide guidance for calculating the total amount deferred under the plan as of December 31, 2006 for purposes of determining the amount required to be included in gross income under § 409A(a) in accordance with the rules described in section III.B.1. of this notice.

#### **a. Account Balance Plans**

For plans subject to § 3121(v)(2) that are account balance plans as defined in § 31.3121(v)(2)-1(c)(1)(ii)(A), the amount deferred as of December 31, 2006 equals the amount that would be treated as an amount deferred under § 31.3121(v)(2)-1(c)(1) on December 31, 2006 if the entire account balance (including all principal amounts, adjusted for income, gain or loss credited to the employee's account) as of December 31, 2006 were treated as a principal amount credited to the employee's account on December 31, 2006. These same rules apply for purposes of determining the amount reported on Form 1099-MISC for calendar year 2006 with respect to a nonemployee participating in a plan that would be subject to § 3121(v)(2) if the nonemployee service provider were an employee and that otherwise is an account balance plan as defined in § 31.3121(v)(2)-1(c)(1)(ii)(A).

**b. Nonaccount Balance Plans - Amounts that are Reasonably Ascertainable**

For plans subject to section 3121(v)(2) that are nonaccount balance plans as defined in § 31.3121(v)(2)-1(c)(2)(i), where the amount deferred is reasonably ascertainable within the meaning of § 31.3121(v)(2)-1(e)(4), the amount deferred as of December 31, 2006 equals the present value of all future payments to which the employee has obtained a legally binding right as of December 31, 2006, calculated in accordance with § 31.3121(v)(2)-1(c)(2) as if the employee had obtained all of such rights on December 31, 2006. Section 31.3121(v)(2)-1(e)(4)(i)(B) provides that an amount deferred is considered reasonably ascertainable on the first date on which the amount, form, and commencement date of the benefit payments attributable to the amount deferred are known, and the only actuarial or other assumptions regarding

future events or circumstances needed to determine the amount deferred are interest and mortality. An amount does not fail to be reasonably ascertainable if alternative forms or commencement dates are available that provide an actuarially equivalent benefit to the normal benefit commencing at the normal commencement date. These same rules apply for purposes of determining the amount reported on Form 1099-MISC for calendar year 2006 with respect to a nonemployee participating in a plan that would be subject to § 3121(v)(2) if the nonemployee service provider were an employee and that otherwise is a nonaccount balance plan as defined in § 31.3121(v)(2)-1(c)(2)(i).

**c. Amounts Deferred Under Stock Rights Covered by § 409A**

For a plan that is not subject to § 3121(v)(2) and is a stock right as defined in proposed § 1.409A-1(l), the amount deferred as of December 31, 2006 equals the amount that the service provider would be required to include in income if the stock right were immediately exercisable and exercised on December 31, 2006. In general, this will mean with respect to a stock right outstanding as of December 31, 2006, the amount deferred as of December 31, 2006 equals the fair market value of the underlying stock less the sum of the exercise price and any amount paid by the service provider for the stock right.

**d. Other Deferred Amounts**

For all deferred amounts not addressed in section III.B.2.a., b., or c. of this notice, the amount deferred as of December 31, 2006 must be determined under a reasonable, good faith application of a reasonable, good faith method. For this purpose, a reasonable, good faith application of a reasonable, good faith method generally must reflect reasonable, good faith assumptions with respect to any

contingencies as to the timing or amount of any payment. Generally, the use of an assumption with respect to a contingency that results in the amount deferred being the lowest potential value of the future payment will be presumed not to be a reasonable, good faith assumption unless clear and convincing evidence demonstrates that the assumption is reasonable. For example, where a payment may be made in more than one form, the assumption that the payment will be made in the least valuable form will be presumed not to be a reasonable, good faith assumption unless clear and convincing evidence demonstrates otherwise. If a portion of a deferred amount can be calculated under section III.B.2.a., b., or c. of this notice, a reasonable, good faith method of calculation will in fact be a combination of two methods. The method applicable under section III.B.2.a., b., or c. of this notice must be applied to the portion, and the balance of the deferred amount must be determined under a reasonable good faith method.

**e. Mandatory bifurcation**

For purposes of the application of this section, the portion of a nonqualified deferred compensation plan that qualifies as an account balance plan under § 31.3121(v)(2)-1(c)(1)(ii), or would qualify as an account balance plan if the service provider were an employee, and provides that the amount payable to the service provider under the portion is determined independently of the amount payable under the other portion of the plan, must be treated separately as an account balance plan. Cf. § 31.3121(v)(2)-1(c)(1)(iii)(B).

**4. 2005 Amounts Includible in Gross Income under § 409A(a)**

Employers and payers, including employers and payers who relied on Notice 2005-94 for calendar year 2005, which suspended employers' and payers' reporting

requirements with respect to deferrals of compensation includible in gross income under § 409A, are required to file an original or a corrected information return and furnish an original or a corrected payee statement (Form W-2 or 1099-MISC) for calendar year 2005 reporting any previously unreported amounts includible in gross income under § 409A for calendar year 2005 as determined under guidance provided by this notice for calendar year 2006. (If the employer or payer paid no wages or income to the service provider in 2005 other than amounts taxable under § 409A, the payer will be preparing an original Form W-2 or Form 1099-MISC, not a Form W-2c or a corrected Form 1099-MISC for 2005.) Failure to file information returns and furnish payee statements as specified in this notice may result in liability for penalties under §§ 6721 and 6722. The original or corrected information return and the original or corrected payee statement for calendar year 2005 must be filed and furnished by the deadlines applicable for filing an information return and furnishing a payee statement reporting amounts includible in income in calendar year 2006. (Generally, this means the original or corrected information return must be filed by February 28, 2007, and the original or corrected payee statement must be furnished by January 31, 2007. See the 2006 instructions for Form W-2 and Form 1099.) An employer or payer who is required to file an original or a corrected information return and furnish an original or a corrected payee statement for calendar year 2005 must calculate the amounts includible in gross income using the rules provided in this notice. An employer or payer is not liable for income tax withholding under § 3403 or penalties for 2005 with respect to any previously unreported amounts of gross income includible under § 409A reported on an original

Form W-2 or Form 1099-MISC, or Form W-2c or a corrected Form 1099-MISC for 2005 in accordance with the guidance provided by this notice.

#### **5. Amounts Includible in Income under § 409A(b)**

Section 409A(b)(1) provides generally that in the case of assets set aside (directly or indirectly) in a trust (or other arrangement determined by the Secretary) for purposes of paying deferred compensation under a nonqualified deferred compensation plan, such assets shall be treated as property transferred in connection with the performance of services for purposes of § 83 whether or not such assets are available to satisfy claims of general creditors at the time set aside if such assets (or such trust or other arrangement) are located outside of the United States, or at the time transferred if such assets (or such trust or other arrangement) are subsequently transferred outside of the United States.

Section 409A(b)(2) provides that in the case of compensation deferred under a nonqualified deferred compensation plan, there is a transfer of property within the meaning of § 83 with respect to such compensation as of the earlier of the date on which the plan first provides that assets will become restricted to the provision of benefits under the plan in connection with a change in the employer's financial health, or the date on which assets are so restricted, whether or not such assets are available to satisfy claims of general creditors.

Section 409A(b)(3) as amended by the Pension Protection Act of 2006, Public Law 109-280 (120 Stat. 780), provides that if, during a restricted period with respect to a single-employer defined benefit pension plan, assets are set aside or reserved in, or transferred to, a trust or other arrangement for purposes of paying deferred

compensation for an applicable covered employee under a nonqualified deferred compensation plan of the plan sponsor or a member of its controlled group, or a nonqualified deferred compensation plan of the plan sponsor or a member of its controlled group provides that assets will become restricted to the provision of benefits, or assets are so restricted, in connection with such restricted period (or similar financial measure determined by the Secretary), the assets are treated as a transfer of property for purposes of § 83 whether or not such assets are available to satisfy claims of general creditors.

Section 409A(b)(4), as amended by the Pension Protection Act, provides that for each taxable year that assets treated as transferred under § 409A(b) remain set aside in a trust or other arrangement subject to § 409A(b)(1) or (2), any increase in value in, or earnings with respect to, such assets shall be treated as an additional transfer of property under this subsection (to the extent not previously included in income).

Notice 2006-33 (2006-15 I.R.B. 754, April 10, 2006) provides transition guidance related to the application of § 409A(b) to certain arrangements outstanding as of March 21, 2006. Under that relief, amounts transferred to trusts under the arrangement on or before March 21, 2006 that triggered the income inclusion and additional taxes under § 409A(b), or arrangements that otherwise triggered the income inclusion and additional taxes under § 409A(b) on or before March 21, 2006, generally are treated as not having triggered the inclusion or additional tax provisions of § 409A(b), provided that the arrangements become compliant with § 409A(b) before January 1, 2008. Nothing in this notice is intended to modify that relief.

However, where amounts have been transferred to a trust under an arrangement that triggers the income inclusion and additional taxes under § 409A(b), or the arrangement otherwise triggers the income inclusion and additional taxes under § 409A(b), and the transfer is not eligible for the relief in Notice 2006-33 (for example because the transfer occurred after March 21, 2006), employers and payers must make a reasonable, good faith application of a reasonable, good faith method to determine the amount includible in income for purposes of reporting. In addition, employers must treat the amount as wages for purposes of § 3401. Amounts includible in income under § 409A(b) that are not eligible for the relief in Notice 2006-33 are treated as wages paid on the date the deemed transfer of property under § 83 described in § 409A(b) would be required to be included in income under the rules of § 83, for purposes of withholding, depositing and reporting the income tax at source on wages under § 3401(a).

**C. Protection from Future Additional Reporting or Withholding for 2005 and 2006**

An employer or payer who complies with the rules of this notice regarding computing amounts includible in gross income under § 409A and withholding and reporting for calendar years 2005 and 2006 will not be liable for additional income tax withholding or penalties, or be required to file a subsequent corrected information return or furnish a corrected payee statement, as a result of future published guidance with respect to the computation of amounts includible in gross income under § 409A. If it is subsequently determined that the employer did not apply the rules of this notice in determining amounts includible in gross income under § 409A and in wages under § 3401(a) for calendar years 2005 or 2006 as provided in this notice, any recalculation of

these amounts will result in additional liability for income tax withholding under § 3403 for these years, plus any applicable penalties. In addition, an employer or payer who does not apply the rules of this notice in determining amounts includible in gross income under § 409A and in wages under § 3401(a) for calendar years 2005 or 2006 will be required to file an original or a corrected information return and furnish an original or a corrected payee statement. For purposes of determining any amount includible in income under § 409A in a subsequent year, an amount will not be treated as previously included in income unless the amount has been reported appropriately on an information return and payee statement, or has been included in income by the service provider in a previous year.

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

This section provides guidance on service providers' income tax reporting and tax payment requirements for calendar years 2005 and 2006 with respect to deferrals of compensation that are includible in gross income under § 409A.

##### **A. Amounts Required to be Included in Income**

A service provider must report as income and pay any taxes due relating to amounts includible in gross income under § 409A for calendar year 2006. In addition, if a service provider has not reported as income and paid any tax due relating to amounts includible in gross income under § 409A for calendar year 2005, calculated in accordance with this notice, the service provider must file an amended return and pay any taxes due relating to such amounts. If the service provider files an amended return and pays any taxes due relating to such amounts calculated in accordance with this

notice, the IRS will not assert penalties under §§ 6651(a)(1) and (2), 6654, and 6662. If the service provider is required to file an amended return for 2005 in order to report amounts includible in income under § 409A, the service provider must file such amended return and pay any additional taxes owing by the due date for the service provider's 2006 income tax return, including extensions, in order to avoid penalties.

For purposes of determining the amount required to be included in income under § 409A, the same standards apply to a service provider as apply to an employer or payer when calculating the amount required to be reported, provided that an amount is treated as previously included in income only if the amount has been included in the service provider's income in a previous taxable year (regardless of whether reported on a Form W-2 or 1099-MISC). Accordingly, an employee or other service provider must calculate the amounts required to be included in gross income under the same methods and standards as set forth in section III. Whether a service provider has complied with the requirements of this notice is determined independently of whether the employer or payer has complied with the requirements of this notice. Thus, if the service provider includes in income the same amount reported by the employer or payer, the service provider has not necessarily complied with the terms of this notice.

If the service provider does not report and pay taxes due with respect to amounts includible in gross income under § 409A for calendar year 2005 or 2006 in accordance with the guidance contained in this notice, the IRS may assert additional income taxes and penalties under §§ 6651(a)(1) and (2), 6654, and 6662 if it is determined that the amount of taxes reported and paid for calendar year 2005 or 2006 was underreported or underpaid. 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 or 2006. For purposes of determining the amount includible in income under § 409A in a subsequent year, the service provider may treat an amount as previously included in income only if the service provider has actually included the amount in gross income in a previous year.

**B. Calculation of Additional Tax under § 409A(a)(1)(B)(i)(I)**

Section 409A(a)(1)(B)(i)(I) provides that if compensation is required to be included in gross income under § 409A(a)(1)(A), the tax imposed on such income is increased by the sum of two additional taxes equal to the amount of interest determined under § 409A(a)(1)(B)(ii) plus an amount equal to 20% of the compensation which is required to be included in gross income. Section 409A(a)(1)(B)(ii) provides that the amount of interest is the amount of interest at the underpayment rate plus 1 percentage point on the underpayments that would have occurred had the deferred compensation been includible in gross income for the taxable year in which first deferred or, if later, the first taxable year in which such deferred compensation is not subject to a substantial risk of forfeiture.

Section 885(d)(1) of the Act provides that § 409A generally applies to amounts deferred after December 31, 2004. Section 885(d)(2)(B) of the Act provides that amounts deferred in taxable years beginning before January 1, 2005, shall be treated as amounts deferred in a taxable year beginning on or after such date if the plan under which the deferral is made is materially modified after October 3, 2004. Accordingly, for purposes of the calculation of the additional tax under § 409A(a)(1)(B)(ii), taxpayers may treat amounts deferred under a plan that were originally deferred on or before

January 1, 2005 but became subject to § 409A due to the material modification of the plan after October 3, 2004 as deferred on January 1, 2005.

## **V. REQUEST FOR COMMENTS**

The provisions of this notice are intended as interim guidance only. The Treasury Department and the IRS are currently formulating general guidance with respect to the income inclusion requirements, the additional taxes, and the reporting and withholding requirements of § 409A. The Treasury Department and the IRS request comments on all aspects of these requirements, including but not limited to the topics addressed in this notice.

Comments must be submitted by **[INSERT DATE 90 DAYS AFTER PUBLICATION]**. All materials submitted will be available for public inspection and copying.

Comments may be submitted to Internal Revenue Service, CC:PA:LPD:RU (Notice 2006-100), Room 5203, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may also be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to the Courier's Desk at 1111 Constitution Avenue, NW, Washington DC 20224, Attn: CC:PA:LPD:RU (Notice 2006-100), Room 5203.

Submissions may also be sent electronically via the internet to the following email address: [Notice.comments@irs.counsel.treas.gov](mailto:Notice.comments@irs.counsel.treas.gov). Include the notice number (Notice 2006-100) in the subject line.

## **VI. EFFECT ON OTHER DOCUMENTS**

Notice 2005-94 is superseded. Notice 2005-1 is modified.

## **VII. EFFECTIVE DATE**

This notice is effective with respect to employers' and payers' reporting and wage withholding requirements and with respect to service providers' filing requirements and tax payment obligations relating to amounts includible in gross income under § 409A for calendar years 2005 and 2006.

#### **VIII. DRAFTING INFORMATION**

The principal author of this notice is Don M. Parkinson of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Governments Entities), although other Treasury and IRS officials participated in its development. For further information on the provisions of this notice addressing the calculation of the amount includible in income under § 409A, contact Stephen Tackney on (202) 927-9639; for further information on other provisions of this notice, including the reporting and withholding provisions contained in this notice, contact Mr. Parkinson on (202) 622-6040 (not toll free numbers).