

## **IRS Notice 2006-100 Affirms Aspects of Section 409A Nonqualified Plan Requirements**

On November 30, 2006, the IRS released additional guidance on *Reporting and Wage Reporting under Internal Revenue Code (IRC) Section 409A* in Notice 2006-100. The long-awaited guidance provides relief on a portion of the requirements but affirms other aspects thereof. Additional guidance will be issued on calculating the amount of deferred compensation to report for various deferred compensation plan types.

### **Background**

IRC section 409A provides that all amounts deferred under a nonqualified deferred compensation (NQDC) plan for all tax years are currently includible in gross income if the requirements set out under IRC section 409A are not met. Recall that previously released regulations required employers to report the following on Form W-2 in box 12 with the indicated letter code:

- Y - Current year deferrals (including any associated earnings on the deferrals) under a section 409A nonqualified deferred compensation plan.
  
- Z - Income under section 409A due to participation in a nonqualified deferred compensation plan (which must also be included in box 1 of Form W-2).

Code Y reporting is essentially informational. Code Z reporting alerts the IRS of amounts that are not only subject to ordinary income taxes but are also subject to a substantial additional tax and interest on the related under-payment of tax.

Similar reporting requirements applied on Form 1099-MISC for nonemployees. Nonemployee deferrals, which correspond to code Y for employees, had to be reported on Form 1099-MISC in box 15a. Nonemployee amounts includible in income, which corresponds with code Z for employees, must be reported on Form 1099-MISC, in box 15b and box 7.

### **Reporting Changes**

In Notice 2006-100, the IRS announced that informational reporting of the deferrals into a nonqualified plan (W-2 box 12, code Y and 1099-MISC, box 15a), is not required (for 2005 or 2006).

However, the notice retains the requirement that deferred compensation that must be taken into income and therefore reported in box 1, (Wages, Tips, Other Compensation) or in 1099-MISC box 7 (Nonemployee compensation) must be reported. Moreover, the notice explains that this reporting is required for 2005 as well as for 2006.

### **Impact of 2005 Reporting**

Employee reporting for 2005 would require an original Form W-2 for affected employees who did not receive an original W-2 for 2005. If an affected employee received a W-2 for 2005, corrected reporting on Form W-2c would be applicable. In either case, affected employees would be required to file amended tax returns for 2005.

### **Withholding Tax Procedural Relief and Guidance**

With the IRS notice and guidance coming with only one month remaining in 2006, the IRS realized that some affected employees may be under-withheld. The IRS indicated in Notice 2006-100 that it will allow employers to collect withholding up through January 31, 2007 and treat it as if collected in 2006.

As an alternative, IRS' explained that employers could choose to pay the associated withholding tax for affected employees using an acceptable "gross-up" technique.

### **Guidance for Service Providers**

When not referring specifically to employees or nonemployees, the IRS refers to recipients of deferred compensation generically as service providers. Deferred compensation which is included in come is treated as supplemental earnings and will therefore not include withholding to cover the applicable additional 20 percent excise tax.

Notice 2006-100 alerts service providers that they may be under-withheld as a result of deferred compensation being reported as currently taxable. The IRS advises affected employees to make estimated tax payments.

In addition, the notice informs service providers that they must report and pay taxes on nonqualified deferred income that is includible in income under 409A even if the amounts are not reported to them by the employer on Form W-2 (or W-2c) or by the payer on Form 1099-MISC.

**Effective**

Generally, IRS Notice 2006-100 applies to annual reporting for 2005 and 2006. The notice does not apply to amounts deferred prior to the effective date of IRC section 409A, except for plans that were materially modified after October 3, 2004.

**Complete Information**

This briefing does not address every aspect of Notice 2006-100 or previous, related regulations. If you have any type of nonqualified compensation arrangement that results in the deferral of wages or any other type of remuneration into a future year, you are strongly encouraged to read Notice 2006-100 in its entirety. A link to [Notice 2006-100](#) can be found on the IRS' web site under [Latest News](#). Notice 2006-100 includes references to previous regulations and guidance and explains its relationship thereto.