

## Part III – Administrative, Procedural, and Miscellaneous

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

Notice 2008-115

#### **I. PURPOSE**

This notice provides interim guidance to employers and payers on their reporting and wage withholding requirements with respect to amounts includible in gross income under § 409A of the Internal Revenue Code. This notice also provides interim guidance to employers and payers on their reporting requirements with respect to all deferrals of compensation 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. Generally, these requirements reflect an extension of the guidance provided in Notice 2006-100 and Notice 2007-89 applicable to calendar years 2005, 2006, and 2007.

This interim guidance is effective for calendar year 2008 and will remain in effect for subsequent calendar years until the Treasury Department and the IRS issue further guidance. The Treasury Department and the IRS do not anticipate that further guidance will be issued until the recently proposed regulations under § 409A addressing the calculation of the amount includible in income under § 409A(a) and the calculation of the additional taxes under § 409A(a) are finalized. See 73 Fed. Reg. 74380 (Dec. 8, 2008). The Treasury Department and the IRS further anticipate that with respect to

annual deferral reporting (Form W-2, box 12, code Y and Form 1099-MISC, box 15a), such guidance will not be made effective before the calendar year beginning after such regulations are finalized.

## **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, 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 reports 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 reports 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 also reports such amounts in box 12 of Form W-2 using code Z. See Q&A-33.
- A payer reports 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 reports 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 also reports such amounts in box 15b of Form 1099-MISC. See Q&A-35.

### **C. Final Regulations**

On April 10, 2007, the IRS issued final regulations regarding the application of § 409A, applicable for taxable years beginning on or after January 1, 2009. See 72 Fed. Reg. 19234 (April 17, 2007) and Notice 2007-86, 2007-46 I.R.B. 990 (October 22, 2007). The regulations generally incorporate and expand on the guidance provided in

Notice 2005-1. Under Notice 2007-86, taxpayers generally are not required to comply with the final regulations until January 1, 2009, but taxpayers may rely on the final regulations for periods before January 1, 2009. The final regulations generally supersede Notice 2005-1 for periods beginning after 2008. However, the regulations do not address reporting and withholding requirements, and accordingly do not supersede Notice 2005-1, Q&A-24 through Q&A-38, which address those issues. See Preamble to the Final Regulations, Effect on Other Documents, 72 Fed. Reg. 19275.

#### **D. Notice 2007-89**

On October 23, 2007, the IRS issued Notice 2007-89, 2007-46 I.R.B. 998, which provided 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 2007. The notice permanently waived employers' and payers' reporting requirements under §§ 6041 and 6051 for calendar year 2007 with respect to annual deferrals of compensation within the meaning of § 409A (Form W-2, box 12, code Y and Form 1099-MISC, box 15a). The notice also provided guidance regarding the calculation of amounts includible in income under § 409A, and the application of the employer and payer reporting and withholding requirements for such amounts under § 409A (Form W-2, box 12, code Z and Form 1099-MISC, box 15b).

#### **E. Notice 2008-113 and Notice 2007-100**

On December 3, 2007, the IRS issued Notice 2007-100, 2007-52 I.R.B. 1243, which provided transition relief and guidance on the correction of certain failures of a nonqualified deferred compensation plan to comply with § 409A(a) in operation. On

December 5, 2008, the IRS issued Notice 2008-113, 2008-51 I.R.B. \_\_\_ (Dec. 22, 2008), which clarified and expanded upon Notice 2007-100. Notice 2008-113 obsoletes Notice 2007-100 for taxable years beginning on or after January 1, 2009, though taxpayers may rely on either notice for taxable years beginning before January 1, 2009. For employers, payers, and service providers entitled to the transition relief, the notices modified Notice 2006-100 and Notice 2007-89 with respect to (i) the amount that is required to be included in income by a service provider under § 409A(a), and (ii) the amount that is required to be reported by the employer or payer as an amount includible in income under § 409A(a). Nothing in this notice is intended to limit or modify any relief available under Notice 2008-113 or Notice 2007-100.

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

This section provides interim guidance on employers' and payers' reporting and wage withholding requirements.

#### **A. Annual Deferrals – Amounts Reportable on Form W-2 or Form 1099-MISC**

Until the Treasury Department and the IRS issue further guidance, 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. In addition, until the Treasury Department and the IRS issue further guidance, 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 - 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, 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. 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), regardless of whether the employer has paid the employee any regular wages during the calendar year of the payment. See Publication 15, (Circular E), Employer’s Tax Guide, 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). To the extent future guidance requires additional withholding, that guidance will only be prospective. 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, 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. Nonemployees should be aware that estimated tax payments may be required to avoid penalties under § 6654.

### **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 (meaning the aggregated plan as defined for purposes of § 409A) that, as of December 31 of the applicable calendar year, is not subject to a substantial risk of forfeiture (as defined for purposes of § 409A), 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 applicable calendar year. 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 Form W-2, Form 1099-MISC, or Form W-2c or corrected Form 1099-MISC for a prior calendar year. Thus, amounts properly reported on a Form W-2 or Form 1099-MISC, or Form W-2c or corrected Form 1099-MISC for a prior calendar year should not be reported again on a Form W-2 or Form 1099-MISC for a subsequent calendar year.

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 § 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 have proposed regulations addressing (i) the calculation of the amount includible in income under § 409A(a), and (ii) the calculation of the additional taxes under § 409A(a). When the regulations are finalized and become effective, the final regulations will obsolete this notice with respect to those topics. Accordingly, comments with respect to those topics should be submitted in accordance with the ADDRESSES section of the preamble to the proposed regulations. See 73 Fed. Reg. 74380 (Dec. 8, 2008). For the submission of comments with respect to other topics not addressed by the proposed regulations, 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) that are either actually or constructively received (disregarding the application of § 409A) by an employee 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) that are neither actually nor constructively received (disregarding the application of § 409A) by the employee during the applicable calendar year, are treated as a payment of wages on December 31 of that calendar year for purposes of withholding, depositing, and reporting the income tax at source on wages under § 3401(a). If as of December 31 of the applicable calendar year, 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 that calendar year 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 of the applicable calendar year and before February 1 of the subsequent calendar year, and reports as wages for the quarter ending December 31 of the applicable calendar year, 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 2008. 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 of the applicable calendar year, as including such amounts that were neither actually nor constructively received but are includible in income under § 409A, as well as the Federal Insurance

Contributions Act, Federal Unemployment Tax Act, and income tax withholding wages resulting from paying the income tax on the employee's behalf, on Form 941 and Form 940, Employer's Annual Federal Unemployment (FUTA) Tax Return, and in box 1 of the employee's Form W-2 for that initial calendar year. See Rev. Rul. 58-113, 1958-1 C.B. 362, and Rev. Rul. 86-14, 1986-1 C.B. 304, 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 of the applicable calendar year, 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. Amounts Includible in Income under § 409A(a)**

The following sections provide guidance for calculating the total amount deferred under the plan, 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 a plan that is an account balance plan as defined in § 1.409A-1(c)(2)(i)(A) or (B), the amount deferred as of December 31 of a calendar year equals the amount that would be treated as an amount deferred under § 31.3121(v)(2)-1(c)(1) on December 31 of that calendar year if the entire account balance under such plan (including all principal amounts, adjusted for income, gain or loss credited to the service provider's

account) as of December 31 of that calendar year were treated as a principal amount credited to the service provider's account on December 31 of that calendar year.

These same calculation rules apply for purposes of determining the amount reported on Form 1099-MISC for a calendar year with respect to a nonemployee participating in an account balance plan. For purposes of this section, a plan described in § 1.409A-1(c)(2)(i)(A) (elective account balance plan) is not aggregated with a plan described in § 1.409A-1(c)(2)(i)(B) (nonelective account balance plan).

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

For a plan that is a nonaccount balance plan as defined in § 1.409A-1(c)(2)(i)(C), 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 of a calendar year equals the present value of all future payments to which the service provider has obtained a legally binding right as of December 31 of that calendar year, calculated in accordance with § 31.3121(v)(2)-1(c)(2) as if the service provider had obtained all of such rights on December 31 of that calendar year. 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. In addition, an amount deferred does not fail to be reasonably ascertainable on a date merely because the exact amount of the benefit payable cannot readily be calculated on that date or merely because the exact amount of the benefit payable depends on future changes in the cost of living. If the exact amount of the benefit payable depends on future changes in the cost of living, the amount deferred must be determined using a reasonable assumption as to the future changes in the cost of living. These same rules apply for purposes of determining the amount reported on Form 1099-MISC for a calendar year with respect to a nonemployee participating in a nonaccount balance plan.

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

For a plan that provides stock rights as defined in § 1.409A-1(c)(2)(i)(H), the amount deferred as of December 31 of a calendar year equals the amount that the service provider would be required to include in income if the stock rights were immediately exercisable and exercised on December 31 of that calendar year. In general, this will mean that with respect to a stock right outstanding as of December 31 of a calendar year, the amount deferred as of December 31 of that calendar year 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 of a calendar year 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. For the ability to rely on the assumptions concerning time and form of payment set forth in the proposed regulations, see section V of this notice. 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.

#### **4. 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) 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) 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, 2006-1 C.B. 754, 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) by January 1, 2008. Section VI of Notice 2007-78, 2007-41 I.R.B. 780, and Notice 2007-86 provide that such relief is not extended beyond December 31, 2007, and nothing in this notice is intended to modify or extend 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, or the arrangement is not made compliant with § 409A(b) by January 1, 2008), 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). For amounts includible in income under § 409A(b) that were eligible for the relief in Notice 2006-33 (“grace period assets”) but are includible in income under § 409A(b) because the arrangement is not made compliant with § 409A(b) on or before December 31, 2007, Section VI of Notice 2007-78 provides that the date of the deemed transfer of property is January 1, 2008.

### **C. Protection from Future Additional Reporting or Withholding**

An employer or payer who complies with the rules of this notice regarding the calculation of the amounts includible in gross income under § 409A and withholding and reporting for a calendar year 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 calculation 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 a calendar year, any recalculation of these amounts will result in additional liability for income tax withholding under § 3403 for these years, plus any applicable penalties (e.g., §§ 6721 and 6722). 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 a calendar year 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 a calendar year 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 a calendar year. 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 as income under § 409A, 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 Form 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 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 2008 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 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 and properly 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. Reliance on the Proposed Regulations**

The Treasury Department and the IRS recently proposed regulations addressing the topics addressed by this notice with respect to (i) the calculation of the amount includible in income under § 409A(a) (including the identification and treatment of deferred amounts subject to a substantial risk of forfeiture and deferred amounts previously included in income), and (ii) the calculation of the additional taxes under § 409A(a). See 73 Fed. Reg. 74380 (Dec. 8, 2008). For example, the proposed regulations would require that certain assumptions be used if a deferred amount may be payable at alternative times and forms of payment. Until the Treasury Department and the IRS issue further guidance, compliance with the provisions of the proposed regulations with respect to the calculation of the amount includible in income under § 409A(a) and the calculation of the additional taxes under § 409A will be treated as

compliance with the requirements of this notice, provided that the taxpayer complies with all the provisions of the proposed regulations.

## **VI. REQUEST FOR COMMENTS**

The provisions of this notice are intended as interim guidance only. The Treasury Department and the IRS have proposed regulations addressing (i) the calculation of the amount includible in income under § 409A(a) and (ii) the calculation of the additional taxes under § 409A(a). When the regulations are finalized and become effective, the final regulations will obsolete this notice with respect to those topics. Accordingly, comments with respect to those topics should be submitted in accordance with the ADDRESSES section of the preamble to the proposed regulations. See 73 Fed. Reg. 74380 (Dec. 8, 2008). Comments with respect to other topics not addressed by the proposed regulations, such as the calculation of amounts includible in income under § 409A(b), should be submitted in accordance with this section.

Comments must be submitted by **March 29, 2009**. All materials submitted will be available for public inspection and copying. Comments may be submitted to Internal Revenue Service, CC:PA:LPD:RU (Notice 2008-XX), 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 2008-XX), 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 2008-XX) in the subject line.

## **VII. EFFECT ON OTHER DOCUMENTS**

Notice 2005-1 is modified. Notice 2006-100, Notice 2007-89, Notice 2007-100, and Notice 2008-113 are not affected by this notice.

#### **VIII. 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 service provider taxable years beginning on or after January 1, 2008.

#### **IX. 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, contact Mr. Parkinson on (202) 622-6040 (not toll-free numbers).