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Executive Compensation E-News

IRS SUSPENDS NEW CODE SECTION 409A REPORTING AND WITHHOLDING OBLIGATIONS FOR 2005

On December 8, 2005, the Internal Revenue Service ("IRS") suspended the employer and payer reporting and wage withholding requirements for deferred compensation under Internal Revenue Code ("Code") section 409A for the 2005 calendar year. Notice 2005-94, 2005-52 I.R.B. 1208. The new reporting and withholding obligations imposed under Code section 409A were discussed in detail in our September 27, 2005 e-newsletter. This newsletter and others relating to 409A are available on our Web site at <http://www.reinhartlaw.com> under "Executive Compensation-Publications."

For calendar year 2005, employers are not required to report deferrals of compensation within the meaning of Code section 409A on IRS Form W-2 (in Box 12, using Code y) or 1099-MISC (in Box 15a). In addition, employers are not required to report and withhold on amounts includible in gross income under Code section 409A in 2005.

The IRS is expected to publish further guidance in the first half of 2006. Although current reporting requirements are suspended, the IRS may require employers and payers to file corrected information returns and payee statements for any previously unreported amounts includible in 2005 gross income under Code section 409A.

Comment: Employers have until December 31, 2006 to bring plans into compliance with Code section 409A, provided that the plans are operated in good faith compliance with the law during 2005 and 2006. In its recently issued proposed regulations, the IRS did not provide guidance on calculating the amount includible in income under Code section 409A. This issue was reserved for future guidance, and the IRS should address the amount includible in income in 2005 in light of the 2005/2006 grace period for compliance.

Employees and other service providers are required to report deferred compensation includible in gross income under 409A on their tax returns for 2005. However, the IRS will not assert certain penalties on the service provider for failing to report such amounts, provided that the service provider reports such amounts and pays the associated tax in accordance with future IRS guidance.

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It is expected that future IRS guidance will provide a period of time during which the service provider may report and pay taxes on amounts includible in income by reason of Code section 409A. While not subject to penalties if paid within this time period, interest will still accrue on unpaid taxes.

Notice 2005-94 does not suspend or change the reporting of Social Security and Medicare wages applicable to nonqualified deferred compensation plans. To the extent applicable, employers should continue to report the appropriate amounts in Boxes 3, 5 and 11 of Form W-2.

Please contact any of the attorneys on the Reinhart Executive Compensation Team, or your own Reinhart attorney, if you have questions about the impact of section 409A and Notice 2005-94 on the reporting and withholding requirements for your nonqualified deferred compensation plans.

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