

December 9, 2005

**IRS Suspends Reporting and Withholding Requirements for
Deferred Compensation Arrangements under Section 409A**

As part of the American Jobs Creation Act of 2004, Congress added new rules applicable to nonqualified deferred compensation arrangements under Code section 409A and also imposed new reporting and withholding requirements with respect to such arrangements. These new rules are generally effective in 2005. Plan sponsors and administrators have been concerned that the IRS has not issued guidance on how to determine and report 2005 deferrals for these purposes. Yesterday, the IRS finally issued Notice 2005-94, which suspends the reporting and wage withholding requirements for 2005. A copy of Notice 2005-94 is attached.

Notice 2005-94 provides generally that:

- Deferrals for 2005 (and earnings thereon) are not required to be reported on an employee's Form W-2 or on a non-employee's Form 1099-MISC (e.g., no Code Y reporting for 2005);
- For 2005, employers are not required to report as wages amounts includible in an employee's income under section 409A that the employee has neither actually nor constructively received during 2005 (i.e., no reporting on box 2 of Form 941 or box 1 and 12 (Code Z) of Form W-2), or to withhold income taxes on such amounts, and other payers are not required to report amounts includible in a non-employee's income under section 409A that the non-employee has neither actually nor constructively received during 2005 (i.e., no reporting on box 7 or 15b of Form 1099-MISC); and
- Future guidance may, however, require employers and payers to file corrected information returns and furnish corrected payee statements for 2005 (i.e., Form W-2 or 1099-MISC) that report any previously unreported amounts includible in income under section 409A. The failure to comply will likely trigger reporting and withholding penalties (and interest). Importantly, this does not impact Code Y reporting.

The IRS expects to issue additional guidance in the first half of 2006 regarding the reporting and withholding requirements. Employees (and non-employees) will not be subject to penalties for underreporting with respect to amounts includible in gross income under section 409A for 2005 if they report and pay any taxes due with respect to such amounts in accordance with future guidance. However, interest will apply on any underpayments of tax resulting from the employee's (or non-employee's) failure to include amounts in 2005 on his or her income tax return.

If you have any questions regarding this notice or about compliance with section 409A, please feel free to contact Bill Sweetnam, Brigen Winters, John McGuiness, or Elizabeth Dold.