

**December 8, 2008**

**From COKALA Tax Group**

Here is your eBulletin for this week from the world of tax information reporting and tax withholding.

1. *OID tables – advance release of IRS Pub 1212*
2. *New tax treaty protocol with New Zealand is signed*
3. *Proposed Regulations issued for 3 percent tax withholding and Form 1099 reporting by governments and government agencies on payments for property and services*
4. *Nonqualified deferred compensation plans not expected to receive extended Sec.409A relief; Notice 2008-113 explains correction process; REG-148326-05 provides calculations*
5. *If you withheld tax from non-wage payments this year, start preparing for Form 945 filing*

**1. OID tables – advance release of IRS Pub 1212**

The IRS has issued the advance-release version of [Publication 1212](#) containing Original Issue Discount tables for all OID data received by the IRS from January 2008 through October 2008. A final version of Pub 1212 will be released sometime in January 2009 after OID data from November and December 2008 is added.

**2. New tax treaty protocol with New Zealand is signed**

A new protocol amending the tax treaty between the U.S. and New Zealand was signed for both nations on December 1. This protocol brings the treaty into conformity with newer U.S. tax treaty policy, including the elimination of the income category called *independent personal services*, which is replaced by simply treating that income as *business profits*. This applies to nonemployee professionals, artists including performing artists, athletes, independent contractor service providers, and similar recipients of U.S. source income for services. For royalty payments, the new protocol reduces the tax limit to 5 percent. The protocol also eliminates source-country taxation of certain direct dividends, and interest paid to banks and other financial enterprises when the payer of the interest is not a related party. The protocol does not make any changes to Article 20, *Students*, of the existing tax treaty. See <http://www.cokala.com/files/NewZealandProtocol2008.pdf>.

**3. Proposed Regulations issued for 3 percent tax withholding and Form 1099 reporting by governments and government agencies on payments for property and services**

New [REG-158747-06](#) provides guidance on how the new law requiring 3 percent federal withholding on payments by federal, state, county and local governments will work when it goes into effect at the beginning of 2011. These regulations apply to payments for services *and for property* (such as supplies, merchandise, materials; but not real estate) and *include payments to corporations*. Payments under \$10,000 are exempt from withholding, but anti-abuse provisions of the regulations prohibit dividing payments to reduce them under the \$10,000 threshold. Also exempt are payments to 501(c)(3) not-for-profit entities; to nonresident aliens; to Indian tribal governments; to a public assistance or disaster relief program. Utility payments and fuel surcharges are subject to the withholding requirement. So are payments made by credit card or purchasing card, which for government P-card users raises a question that at present has no answer – how to withhold 3 percent when the transaction flows through third-party transaction processors? Please see the complete REG-158747-06 for much more information.

All governments, and their agencies and instrumentalities, are included in this new requirement unless their non-payroll payments fall below a \$100 million threshold. Government AP departments will need to code many more vendors for Form 1099-MISC reporting, since corporations and vendors of merchandise will no longer be exempt. Systems will have to provide for withholding the 3 percent federal tax, and procedures will be needed to cover the timely deposit of withheld tax with the IRS throughout the year as well as filing of the annual reconciliation Form 945.

COKALA has a “white paper” available to subscribers at no charge that discusses the details of this regulation in practical terms, and includes recommendations to keep in mind when gearing up to implement compliance. If you have a complimentary short-term sample subscription, you can obtain the white paper for \$150; or become a regular subscriber and receive it at no charge. Please email or phone us to request the white paper.

**4. Nonqualified deferred compensation plans not expected to receive further extended Sec. 409A relief: Notice 2008-113 explains correction process; REG-148326-05 provides calculations**

Sec. 409A was added to the tax code by the American Jobs Creation Act of 2004, changing the tax treatment of nonqualified deferred compensation arrangements. Final regulations for 409A were issued by the IRS in April of 2007. This affects plans that provide for deferral of compensation, such as may be the case with nonqualified plans for bonuses, severance payments, and stock options granted to employees, partners, directors or other individuals. Unless such plans are amended and operated in conformity with the Sec. 409A rules, the amounts deferred are immediately included in the current gross income of participants, and in addition are subject to a 20 percent tax penalty. Transition relief from full Sec. 409A compliance was granted for 2007 and 2008, but recently the Treasury Department has given indication not to expect further relief after December 31, 2008. Thus the 409A regulations are expected to go into effect on January 1, 2009, with some rules for corrections procedures being issued by the IRS (see Notice 2008-113 below).

Human Resources and your tax counsel should be aware of whether your organization has nonqualified plans that still need to be amended before the end of this year, and whether there are reportable amounts for 2008 to report on Form 1099-MISC in Box 15b (or for employees, on Form W-2 using Code Z). We still understand that there may be relief for 2008 from reporting contributions in Box 15a of Form 1099-MISC (or for employees on Form W-2 using Code Y). In this regard, we will keep you posted.

**Notice 2008-113 for correcting failures:** New IRS [Notice 2008-113](#) provides procedures under which relief can be obtained from the tax penalty and having the total deferral amount included in income, through correcting a failure to meet Sec. 409A requirements that was due to an operational failure. If these procedures are used to obtain relief, the taxpayer has the burden of demonstrating eligibility for the relief and that all Notice 2008-113 requirements have been met. In addition, the service recipient must have taken commercially reasonable steps to avoid a recurrence of the operational failure. And, Notice 2008-113 relief is not available if a federal income tax return of the service provider is under examination with respect to the nonqualified deferred compensation plan. [REG-148326-05](#) is a proposed Regulation, published today, providing calculations for amounts includible in income under Sec. 409A and the additional taxes imposed under 409A.

**5. If you withheld tax from non-wage payments this year, start preparing for Form 945 filing**

If you withheld tax from non-payroll payments during 2008, you will use Form 945 to reconcile and report the federal income tax liabilities you accumulated, and tax deposits you made, during the year. Form 945 for 2008 is due on February 2, 2009. Advance review and balancing are necessary before preparing Form 945, because the payment and withholding amounts you report on Forms 1099, for the affected payees, must be in balance with the amounts you report on Form 945 – or you will be opening the door to an IRS penalty assessment. In addition, a transcript requested now from the IRS Service Center where your 945 is filed can show you whether your deposits were correctly posted.

As a COKALA subscriber, you have our support for questions on tax information reporting and tax withholding topics including those mentioned in this bulletin. Please email your questions to [clientservice@cokala.com](mailto:clientservice@cokala.com).

**Thank you for your business. It is a pleasure to serve you.**

COKALA Tax Information Reporting Solutions, LLC

phone 734.396.9041

[www.cokala.com](http://www.cokala.com)