



WASHINGTON REPORT

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Subject: **IRS Indicates That TARP Equity Purchases Do Not Cause Changes in Control That Would Allow Accelerated Distributions for 409A Purposes**

Major References: [*IRS Notice 2009-49*](#)

Prior AALU Washington Reports: 09-71; 09-44; 09-22; 09-12; 09-09; 09-07; 8-114; 08-96; 08-85; 08-80; 07-50; 07-48; 07-44; 07-41; 07-38

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The Internal Revenue Service issued Notice 2009-49 to provide that equity purchases under the Troubled Asset Recovery Program ("TARP") do not cause changes in control that would allow accelerated distributions for Revenue Code section 409A purposes. In taking this position, the IRS noted that to allow accelerated distributions following such government purchases would be inconsistent with the purposes of TARP and 409A. The notice provides that this position is effective for TARP equity purchases entered into on or after June 4, 2009.

Under section 409A, distributions can be made only on account of one or more of six specified events, including a change in control of the employer. For this purpose, the term "change in control" is defined by the statute and final regulations issued in April 2007 (see our Bulletins Nos. 07-50; 07-48; 07-44; 07-41 and 07-38). In certain cases, the government's purchase of equity interests in companies participating in TARP may cause a change in control within the meaning of section 409A. If so, to the extent the nonqualified deferred compensation arrangements maintained by the companies provide for accelerated distributions on account of a change in control, the government's purchase would trigger an

accelerated distribution to the participants in the deferred compensation arrangements, many of whom are senior executives of the companies participating in TARP.

The IRS noted that the final 409A regulations were issued before TARP and do not include any special rules regarding equity purchases under that program. The agency commented further that allowing such accelerated distributions does not accommodate the purposes of TARP and 409A and is contrary to the public interest. As an example, the Service pointed out that the accelerated payment of nonqualified deferred compensation as a result of an equity purchase under TARP could, in direct contradiction of TARP's aims, inappropriately reduce the liquidity of the company participating in the program.

To prevent these accelerated distributions from occurring, the Revenue Service indicated that equity purchases under TARP do not constitute a change in control event for purposes of 409A; therefore, accelerated distributions under 409A are not permitted. The IRS signaled further that it intends to amend the final 409A regulations to incorporate the guidance provided in the notice.

The guidance will be specifically applicable to equity purchases under TARP that are entered into on or after June 4, 2009. This suggests equity purchases that occurred prior to that date can cause changes in control under 409A and trigger accelerated distributions of deferred compensation amounts. It is not known how many prior equity purchases have occurred or how much accelerated deferred compensation may have been involved.

Any AALU member who wishes to obtain a copy of IRS Notice 2009-49 may do so through the following means: (1) use hyperlink above next to "Major References," (2) log onto the AALU website at www.aalu.org and enter the *Member Portal* using your last name and birth date and select *Current Washington Report* for linkage to source material or (3) email Anthony Raglani at raglani@aalu.org and include a reference to this *Washington Report*.

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