



## IRS Says Treasury's Acquisition of Equity Under TARP Not a Change of Control for Section 409A

*The IRS has issued Notice 2009-49, which clarifies that for purposes of Internal Revenue Code Section 409A, an acquisition by the Treasury Department of preferred stock, common stock, warrants or other equity rights in a financial institution or other entity under the Emergency Economic Stabilization Act of 2008 (a "Treasury EESA Equity Acquisition Transaction") is not considered a change in ownership or effective control, or a change in ownership of a substantial portion of the assets of the corporation. Therefore, it is not a permissible payment event under Section 409A.*

### Background

The Troubled Asset Relief Program (TARP) was implemented on October 3, 2008 under the Emergency Economic Stabilization Act of 2008 (EESA) for the purpose of restoring liquidity and stability to the financial system. TARP gave Treasury the authority to purchase equity in troubled financial institutions and other entities.

Under Section 409A, compensation deferred under a nonqualified deferred compensation arrangement may not be distributed earlier than one of six specified events, one of which is a change in the ownership or effective control of the corporation, or in the ownership of a substantial portion of the assets of the corporation.

### Notice 2009-49

The IRS has now addressed whether the acquisition of preferred stock, common stock, warrants to purchase common stock or other types of equity of a financial institution or other entity is considered a permissible payment event under Section 409A. In [Notice 2009-49](#), the IRS says that a Treasury EESA Equity Acquisition Transaction is not a change in ownership or effective control for this purpose.

The IRS states further that it will amend regulations under Section 409A to incorporate this guidance, effective for transactions occurring on or after June 4, 2009.

### Conclusion

The IRS guidance is a useful clarification for affected entities. Buck's consultants are available to discuss this or any other issues regarding the rules under Section 409A.

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*This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.*