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### Reporting Corrections

To take advantage of the documentary correction program, the company must attach a specific schedule to its corporate tax return for the year of correction and, in some cases, the following year. The schedule must include specific information about the error and its correction, and it must include the name and Social Security Number of all affected participants.

A similar schedule must be provided to each affected participant, and that schedule must be attached to the affected participants' individual tax returns.

## 409A Documentary Correction Program Action Required by Year End

Earlier this week, the IRS announced its long-awaited correction program for Code Section 409A **document** errors. This program allows some (but not all) errors and omissions in nonqualified deferred compensation plan documents to be corrected with either reduced tax penalties or no tax penalties. ***Because some of the most favorable provisions of the correction program are only available during 2010, employers should begin reviewing their Code Section 409A arrangements immediately.***

All nonqualified deferred compensation arrangements that are subject to Code Section 409A were required to be amended to comply with Code Section 409A by December 31, 2008. Although the IRS had previously issued a program for correcting **operational** errors, until now there had been no way to correct a plan that was either improperly amended or not amended at all.

**Overview.** Under the new documentary correction program, certain inadvertent and unintentional errors in written documents may be corrected. The program sets out several specific types of document errors that may be corrected and the specific steps that are necessary to correct each error.

**Example:** *A plan of a publicly traded company was not timely amended to provide for the 6-month delay for distributions upon a key employee's separation from service. This error may be corrected with respect to any key employee who has not yet separated from service by amending the plan to provide that distributions to any key employee will not be made until the later of (i) 18 months after the corrective amendment is adopted, or (ii) 6 months after the key employee separates from service.*

**Specific Corrections Required.** The types of corrective amendments that are permissible are generally much more limited than an amendment that could have been adopted by December 31, 2008. For example, if a plan does not have at least one payment trigger that complies with Code Section 409A, the plan must be amended to provide for payment upon the later of (i) separation from service, or (ii) 6 years after the amendment is adopted. Other permissible Code Section 409A payment triggers (such as payment on a designated date or upon a change in control) may not be included.

**Not All Errors May be Corrected.** Only errors that directly relate to Code Section 409A compliance may be corrected. It is not possible to use the program to otherwise amend a plan to comply with its historical or intended operation. (In other words, operational errors may not be corrected by amending the document.)



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Moreover, not all failures to comply with Code Section 409A may be corrected. For example, a nonqualified plan that provides for payment at the same time and in the same form as a qualified retirement plan may **not** be corrected under this program.

**Operational Corrections May Also Be Required.** Corrections made during 2010 typically require the plan to be treated as if it had complied with Code Section 409A since January 1, 2009. This means that a past distribution that would not have been permitted under the terms of the amended plan (had the plan been timely amended by December 31, 2008) will need to be corrected in accordance with the IRS's previous guidance on correcting Code Section 409A **operational** errors.

**Example:** *A plan provides for distributions on any termination of employment, not just a termination of employment that qualifies as a Code Section 409A separation from service. If the plan is retroactively amended to provide for payment only on a Code Section 409A separation from service, any participant who received a distribution on any other termination of employment would have received an early distribution. These early distributions would need to be corrected under the **operational** correction program (i.e., in most cases, the early distributions would need to be paid back to the plan, and some penalties would apply).*

**All Substantially Similar Errors Must Be Corrected.** To take advantage of the correction program, the company must also take "commercially reasonable" steps to identify and correct substantially similar errors in any of its other plans or programs subject to Code Section 409A.

**Additional Penalties for Errors Corrected After 2010.** Finally, errors that are corrected after the end of 2010 are potentially subject to additional tax penalties. For most corrections that are made after the end of 2010, these penalties apply if a distribution would have been made under the improper plan provision, or a distribution is made under an amended provision, within 1 year of the date of the correction. In either of these cases, a percentage (most commonly 50%) of the amount that would have been includable in income had the plan document not been corrected becomes currently taxable. These amounts are also subject to the 20% penalty tax, but the premium interest tax will not apply.

Because of these penalties that will be imposed on plan participants — typically a company's most senior and highly paid executives — **now** is the time to review any Code Section 409A arrangements that were not amended by the end of 2008 or any that might have been amended incorrectly or less than completely.

**Contact Information.** For assistance with reviewing any of your Code Section 409A plans and programs or correcting any documentary errors, please contact Don Mazursky (404.888.8840), David Putnal (404.888.8836), Glenn Infinger (404.888.8845), Toby Walls (404.888.8870) or Teri King (404.888.8847).

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