

December 6, 2010

## IRS Expands Code § 409A Correction Guidance

On November 30, 2010, the IRS issued [Notice 2010-80](#), providing additional relief for employers<sup>1</sup> that voluntarily correct failures under Internal Revenue Code (Code) § 409A pursuant to [Notice 2008-113](#) (correction procedures for certain operational failures) or [Notice 2010-6](#) (correction procedures for certain plan document failures). Of immediate importance is the relief provided from some of the information and reporting requirements for certain document corrections made before January 1, 2011 and the elimination of the requirement that the employer provide the employee information regarding a same-year operational correction. Notice 2010-80 also expands the relief available with respect to payments contingent upon the execution of a release or upon some other employment-related condition. Finally, the Notice clarifies the availability of the document correction program to linked plans under certain circumstances and expands its availability for limited stock right issues.

### Information and Reporting Relief

Notice 2010-6 eliminates the taxes that would otherwise be payable in connection with the correction of certain plan document failures if the correction is made during a transition period that ends on December 31, 2010. That favorable treatment is, however, conditioned upon the employer providing detailed information to the employee regarding any correction and on the employee including information regarding the correction with his tax return. Notice 2010-80 eliminates both of those requirements for corrections made during the transition period. Although the employer still must attach correction information to its tax return, the relief in Notice 2010-80 is significant for employers who make plan document corrections on or before December 31, 2010.

Notice 2010-80 also eliminates the requirement under Notice 2008-113 that the employer provide information to an employee regarding an operational correction made in the same taxable year as the failure occurs.

### Release Provisions

In Notice 2010-6, the IRS made clear its position that the common practice of making the timing of certain payments conditional upon the execution by the employee of a release of claims<sup>2</sup> violates Code § 409A unless the timing of the payment is structured within very limited parameters. Although Notice 2010-80 does not provide the hoped-for reversal of the IRS's position regarding releases, it does offer some additional flexibility when structuring the timing of payments.

Under Notice 2010-80, document failures involving payments dependent upon the employee executing a release may be corrected by removing the employee's ability to delay or accelerate the timing of the payment or by structuring the payments under one of the following methods:

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<sup>1</sup> Relief under Notice 2010-80 also applies to other service recipients and service providers, but we use the terms employers and employees for convenience.

<sup>2</sup> The restrictions described with respect to releases apply to any employment-related action, such as the execution of a non-solicitation or non-competition agreement.

- If the plan provides for payment within a designated period that is a permissible payment period under Regulation § 1.409A-3(b), the plan can provide that the payment will be made on the last day of the designated period. If the period begins in one taxable year and ends in the next taxable year, the payment must be made in the next taxable year.
- If the plan does not provide for payment within a designated period, the plan can provide for the payment to be made either:
  - On the 60th or 90th day following a permissible payment event; or
  - During a specified period not longer than 90 days following a permissible payment event. If the period begins in one taxable year and ends in the next taxable year, the payment must be made in the next taxable year.

Failures eligible for correction on or before December 31, 2010 will not be treated as failing to comply with Code § 409A with respect to an amount deferred under the plan that is paid on or before March 31, 2011. Failures eligible for correction on or before December 31, 2010 with respect to an amount paid after March 31, 2011 will not be treated as failing to comply with Code § 409A provided that:

- If the potential payment period begins in one taxable year and ends in the next taxable year, the deferred amount is paid in the next taxable year, or if paid in the first taxable year, the payment is treated as an operational failure and corrected in accordance with Notice 2008-13; and
- If any amounts remain deferred after December 31, 2012 (other than any remaining installment, annuity, or other payments of an amount that has already become payable under the plan provision), the plan provision is corrected on or before December 31, 2012.

This transitional relief is available to payments made to individuals who become participants in a deferred compensation plan after December 31, 2010 if the plan provisions were in effect on December 31, 2010.

## Linked Plans and Stock Rights

Notice 2010-80 clarifies that linked plans with document failures are eligible for relief under Notice 2010-6 if that the linkage does not affect the time and form of payments.

Notice 2010-80 also expands the eligibility for document correction relief under Notice 2010-6 to include stock options and stock appreciation rights that were intended at the time of grant (or upon a modification pursuant to applicable transition relief) to be subject to, and compliant with, Code § 409A.



*If you have any questions about this Legal Alert, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.*

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