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### [Expanded Relief for Correcting 409A Document Failures under IRS Notice 2010-80](#)

Since our October 25, 2010 blog titled, ["Time Running Out to Obtain Maximum Relief for Correcting 409A Document Failures under IRS Notice 2010-6"](#), the IRS published [Notice 2010-80](#) on November 30, 2010, which expands the scope of the document correction program under [Notice 2010-6](#) and provides additional transition relief for employers to amend arrangements intended to comply with the requirements of [Section 409A of the Internal Revenue Code](#) ("409A"). As we previously reported, document corrections under Notice 2010-6 that are implemented before 2011 are treated as having been corrected on January 1, 2009, which can mean that any requirement of income inclusion under 409A as a condition of the relief would generally not apply. Therefore, with only ten days left in 2010, employers should strongly consider amending noncompliant arrangements that are eligible for correction under Notice 200-6 (as modified by Notice 2010-80) to take advantage of the maximum possible relief.

Notable improvements to the existing 409A correction programs as provided by Notice 2010-80 are as follows:

- Expansion of the document correction program to certain linked plans (i.e., nonqualified deferred compensation plans linked to tax-qualified plans), provided that the time and form of payment under the first plan is not affected by the amount deferred under, or the payment provisions of, the other plan.
- Expansion of the document correction program to include certain stock rights that were intended to comply with 409A as opposed to being exempt. Stock rights eligible for the document correction program now include those that are exercisable upon (1) a fixed date or a period beginning and ending within one taxable year, or (2) a permissible 409A payment event, such as upon a separation from service, death, disability or a change in control. Stock rights that were intended to be exempt from 409A (e.g., nonqualified stock options erroneously issued with a discounted exercise price) are not eligible for correction under the document correction program, but may be corrected under the operational correction program set forth in [Notice 2008-113](#).
- Additional correction methods for failures affecting payments at separation from service that are dependent upon the service provider completing certain employment-related actions (e.g., severance payments conditioned on the employee executing a general release of claims). Arrangements eligible for correction under this scenario typically involve payments commencing within a specified period (e.g., 60 or 90 days) following a separation from service, with the payments contingent on the employee executing a general release in favor of the employer. The IRS has taken the position that by conditioning payment on an action required by the employee, the employee has, in effect, impermissible discretion to delay or accelerate the timing of the payment. Notice 2010-80 improves the correction method by permitting payments to occur during a specified period not longer than 90 days following the permitted payment event, provided that if the specified period begins and ends in different tax years, the payment must be

made in the second tax year.

- Relaxed information reporting requirements to service providers for corrections made under transition relief ending December 31, 2010. Employers correcting eligible document failures under Notice 2010-6 by December 31, 2010 are no longer required to furnish the service provider with the statement detailing the correction, which contained identifying information and was to be filed with the service provider's individual tax return. Although the service provider statement is no longer required for corrections made by December 31, 2010, the employer must still file the information statement with its income tax return for the 2010 tax year.
- Relaxed information reporting requirements to service providers for operational corrections under Notice 2008-113 made within the same taxable year as the failure occurs.

### Summary

Notice 2010-80 improves upon available correction programs and provides additional tools to correct nonqualified deferred compensation arrangements so that they comply with 409A and potentially avoid 409A's harsh treatment for violations. Transition relief under Notice 2010-6 (as modified by Notice 2010-80) provides an incentive to correct eligible document failures before 2011 to obtain maximum possible relief, with the benefit of relaxed information reporting requirements.

If you have any questions regarding this information, please contact [Greg Schick](#) at (415) 774-2988 or [Michael Chan](#) at (213) 617-5537.

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