

## Part III – Administrative, Procedural, and Miscellaneous

### Relief and Guidance on Corrections of Certain Failures of a Nonqualified Deferred Compensation Plan to Comply with § 409A(a) in Operation

#### **Notice 2008-113**

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**I. PURPOSE**

This notice provides procedures under which taxpayers can obtain relief from the full application of the income inclusion and the additional taxes under § 409A with

respect to certain failures of a nonqualified deferred compensation plan to comply with § 409A(a) in operation (an operational failure), including:

- Methods for correcting certain operational failures during the service provider's taxable year in which the failure occurs and, for certain service providers also during the subsequent taxable year, to avoid income inclusion under § 409A(a).
- Relief limiting the amount includible in income under § 409A(a) for certain operational failures during a service provider's taxable year that involve only limited amounts.
- Relief limiting the amount includible in income under § 409A(a) for certain operational failures regardless of whether the failure involves only limited amounts, but subject to further required actions to correct the failure.
- Special transition relief for certain operational failures occurring before January 1, 2008.

Comments are also requested on whether procedures for the correction of a failure of a plan to comply with the plan document requirements of §1.409A-1(c) should be adopted. See § XI of this notice.

## **II. BACKGROUND**

On December 3, 2007, the Treasury Department and the IRS issued Notice 2007-100, 2007-52 IRB 1243, setting forth guidance permitting the correction of certain operational failures, and providing transition relief limiting the amount includible in income under § 409A(a) for certain operational failures involving limited amounts. Notice 2007-100 also described potential guidance that would limit the amount includible in income under § 409A(a) for certain operational failures involving amounts

that exceeded the limit. Comments were requested with respect to all aspects of the notice. The Treasury Department and the IRS have reviewed all of the comments submitted, and are issuing this notice as a successor to Notice 2007-100. This notice incorporates, clarifies and expands upon the guidance provided in Notice 2007-100, and accordingly Notice 2007-100 is obsolete. For further information, see § X of this notice.

### **III. ELIGIBILITY REQUIREMENTS**

#### **A. In General**

A taxpayer is not eligible for the relief provided in §§ IV through VIII of this notice unless all of the applicable requirements of this § III are met, as well as the requirements of the particular section providing the applicable relief and the notice and the reporting requirements of § IX. In each instance, the taxpayer claiming the relief has the burden of demonstrating that the taxpayer was eligible for the relief and that the requirements of this notice have been met. Any application of the relief provided in this notice is subject to examination by the IRS.

#### **B. Avoidance of Recurrence of Operational Failure**

The relief provided under §§ IV through VIII of this notice is not available unless, in addition to meeting the applicable requirements of the relevant section, the service recipient takes commercially reasonable steps to avoid a recurrence of the operational failure. If the same or a substantially similar operational failure has occurred previously, the relief is not available for any taxable year of the service provider beginning after December 31, 2009, unless the service recipient or service provider demonstrates that the service recipient had established practices and procedures reasonably designed to

ensure that such an operational failure would not recur and had taken commercially reasonable steps to avoid a recurrence of the operational failure and that the operational failure occurred despite the service recipient's diligent efforts.

C. Relief not Available to Service Providers Under Examination

The relief provided in §§ V through VIII is not available if a federal income tax return of the relevant service provider for the service provider's taxable year in which the operational failure occurred is under examination with respect to the plan. For this purpose, an individual service provider is treated as under examination with respect to the plan if the individual is under examination with respect to the individual's federal income tax return (for example, Form 1040) for the taxable year.

D. Additional Eligibility Requirements

Sections IV through VIII of this notice do not provide relief for plan terms and provisions that fail to meet the requirements of § 409A or for operational failures that are not described in those sections.<sup>1</sup> The Treasury Department and the IRS are requesting comments as to whether an additional program to address plan document failures would be feasible and advisable (see § XI of this notice). In addition, relief is not available under §§ IV through VIII of this notice with respect to any exercise of a stock right that otherwise would result in a failure to comply with § 409A. Relief otherwise available under §§ IV through VIII of this notice is conditioned upon the timely filing and providing of the information required by § IX of this notice. The relief provided by §§ IV

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<sup>1</sup> Reliance on the transition relief provided in Notice 2007-86, 2007-46 IRB 990, the preamble to the final regulations under § 409A, 72 Fed. Reg. 19234, Notice 2006-79, 2006-43 IRB 763, the preamble to the proposed regulations under § 409A, 70 Fed. Reg. 57930, or Notice 2005-1, 2005-1 CB 274, for the years to which such transition relief applies, does not preclude a taxpayer from qualifying for the relief provided in this notice with respect to operational failures occurring in taxable years beginning before January 1, 2009.

through VIII of this notice applies only to operational failures that are inadvertent and unintentional. For this purpose, an inadvertent and unintentional operational failure means a failure to comply with plan provisions that satisfy the requirements of § 409A(a), or an inadvertent unintentional failure to follow the requirements of § 409A(a) in practice, due to one or more inadvertent and unintentional errors in the operation of the plan. In addition, the relief provided in this section is not available if the failure is directly or indirectly related to participation in any listed transaction under §1.6011-4(b)(2)).

E. Required Repayments by the Service Provider

If to qualify for any applicable relief a service provider is required to repay to the service recipient an amount erroneously paid or made available to the service provider, such as required in §§ IV.A, IV.B, V.B, V.C, VII.B and VII.C, the amount erroneously paid or made available to the service provider refers to the gross amount paid to, or on behalf of, the service provider, before the application of any withholding requirements such as the Federal employment tax withholding requirements. The service provider may satisfy the requirement to repay the service recipient the amount erroneously paid to the service provider and interest (if applicable) by paying the service recipient the equivalent amount on or before the applicable deadline. Alternatively, in lieu of such repayment, the service recipient may reduce the service provider's compensation that otherwise would have been paid on or before such applicable deadline by an equivalent amount. To the extent that, in lieu of repayment, the service recipient reduces other compensation that would have been paid to the service provider, the other compensation that would have been paid to the service provider, but instead is used to

repay the erroneous payment or interest (if applicable), is includible in income (and wages if the service provider is an employee).

The amount will not be treated as repaid by the service provider if, in connection with such payment, the service recipient pays the service provider, or otherwise provides a benefit (including an obligation to pay an amount or provide a benefit in the future), intended as a substitute for all or part of the amount the service provider is required to repay the service recipient.

F. Eligibility for Relief for a Taxable Year in which the Service Recipient Experiences a Financial Downturn or Other Financial Issue

The relief provided in §§ IV through VIII is not available with respect to any erroneous payment occurring during any taxable year of the service provider in which the service recipient experiences a substantial financial downturn, or otherwise experiences financial or other issues, if such downturn or other issue indicates a significant risk that the service recipient will not be able to pay the amount deferred when the payment becomes due.

G. Definition of Insider

Certain sections of this notice provide additional eligibility requirements for relief, or do not provide relief, if the affected service provider is an insider with respect to a service recipient. For purposes of this notice, a service provider is an insider with respect to a service recipient if the service provider is a director or officer of the service recipient or is directly or indirectly the beneficial owner of more than 10% of any class of any equity security of the service recipient, determined in accordance with the rules of the Securities and Exchange Commission under § 16 of the Securities Exchange Act of 1934, as amended, 15 USC 78p, without regard to whether the service recipient has

any class of equity securities registered under § 12 of such Act, 15 USC 78I. See 17 CFR § 240.16a-1(a) (beneficial owner) and (f) (officer). In the case of a service recipient that is not a corporation, such rules are applied by analogy.

#### H. Determining Certain Periods of Days

To apply the requirements of certain sections of this notice, a period of days must be calculated and applied. For example, the number of days that a service provider retained amounts erroneously paid to the service provider may be required to be calculated. For purposes of counting days under this notice, the first day of the period is disregarded and the last day is taken into account. For example, if on June 1, 2009, a service recipient erroneously paid a service provider an amount that the service provider repaid on June 30, 2009, there would be 29 days from the date of payment through the date of repayment. If the period of days required to be calculated ends upon the service provider's repayment, and the repayment is made through a reduction of the service provider's other compensation, the repayment date occurs on each date the compensation otherwise would have been paid to the service provider.

#### I. Adjustments for Earnings and Losses

The relief provided in certain sections of this notice permits or requires that deferred amounts be adjusted to reflect earnings and losses, provided that such adjustments must be made by a specified deadline. If it is impracticable to make the adjustment by the applicable deadline, the adjustment will be treated as made if, on or before the applicable deadline, the service provider (in the case of earnings) or the service recipient (in the case of losses) has a legally binding right to have such adjustment made.



## J. References to the Internal Revenue Code

For purposes of this notice, references to sections of the Internal Revenue Code include references to any applicable guidance thereunder.

## **IV. CORRECTIONS OF CERTAIN OPERATIONAL FAILURES IN THE SAME TAXABLE YEAR AS THE FAILURE OCCURS**

### A. Failure to Defer Amount or Incorrect Payment of Amount Payable in a Subsequent Taxable Year Corrected in the Same Taxable Year as the Failure

#### 1. Relief for Amounts to which § IV.A Applies

This § IV.A applies if during a service provider's taxable year an operational failure occurs that is described in § IV.A.2(a) and the requirements of § IV.A.2(b) through (d) and § IV.A.4 are met. An amount to which this § IV.A applies is treated as having been timely deferred in accordance with the terms of the plan and any applicable deferral election (or as having continued to be deferred under the terms of the plan).

#### 2. Amounts to which § IV.A Applies

(a) A failure is described in this § IV.A.2(a) if an amount of nonqualified deferred compensation that, under the terms of the plan and any applicable deferral election, and § 409A, should not have been paid or made available to a service provider in a taxable year of the service provider, was erroneously paid or made available to the service provider in that year, other than a payment that fails to meet the requirements of § 409A(a)(2)(B)(i) (requirement to delay for six months payments to a specified employee upon separation from service). For rules relating to correction of certain payments that fail to meet the requirements of § 409A(a)(2)(B)(i), see § IV.B of this notice.

(b) The service provider repays to the service recipient the amount that was erroneously paid or made available to the service provider on or before the last day of the service provider's taxable year in which such amount was erroneously paid or made available. If the service provider was not an insider (as defined in § III.G) at any time during the taxable year in which such amount was erroneously paid or made available, and if repayment of such amount would cause an immediate and heavy financial need as defined in §1.401(k)-1(d)(3)(iii), in lieu of immediate repayment the service recipient and the service provider may enter into a legally binding agreement to have such amounts repaid over a specified period that ends not later than 24 months from the due date (without extensions) for the federal income tax return for the service provider's taxable year during which the amount was erroneously paid or made available to the service provider, provided that the service provider must also pay interest on the amount repaid to the service recipient. For this purpose, the interest rate must be no less than the short-term applicable Federal rate (AFR) under § 1274(d)(1), based on annual compounding, for the month in which the erroneous payment was paid or made available. If the amount paid or withheld on a repayment date is less than the entire erroneous payment, for each repayment date the interest calculation is applied by substituting the unpaid balance immediately before the repayment for the amount of the erroneous payment. The repayment requirement of this § IV.A.2(b) will not be met unless all payments (including interest) are made by the end of the period specified in such agreement.

(c) Immediately after such repayment (or agreement to repay) the service provider has a legally binding right under the plan to be paid the amount that would

have been due if such amount had not been erroneously paid or made available to the service provider during such taxable year, at the same time and in the same form of payment that the amount would have been payable if such amount had not been erroneously paid or made available to the service provider during such taxable year.

(d) If the total of all amounts to which this § IV.A applies that are erroneously paid or made available under a plan (as defined for purposes of § 409A) in a service provider's taxable year exceeds the limit on elective deferrals that would apply to a qualified plan under § 402(g)(1)(B) for the year in which the erroneous payment was made and the service provider was an insider (as defined in § III.G of this notice) with respect to the service recipient at any time during the taxable year in which the erroneous payment was made, the service provider pays interest to the service recipient at the time the service provider repays the amount to the service recipient equal to the amount of the erroneous payment ( $E$ ) multiplied by an interest rate that is no less than the short-term applicable Federal rate (AFR) under § 1274(d)(1) ( $r$ ) multiplied by a fraction, the numerator of which is the number of days from the erroneous payment date to the repayment date ( $n_1$ ) and the denominator of which is the number of days in such taxable year ( $n_2$ ), or  $(E \times r \times n_1/n_2)$ . For purposes of the preceding sentence,  $r$  is the short-term AFR, based on annual compounding, for the month in which the erroneous payment was paid or made available to the service provider. If the amount paid or withheld on a repayment date is less than the entire erroneous payment, for each repayment date the interest calculation is applied by substituting the unpaid balance immediately before the repayment for the amount of the erroneous payment. For rules regarding the counting of days, see § III.H of this notice.

### 3. Reporting and Withholding Requirements

The amount erroneously paid to the service provider that is repaid by the service provider to the service recipient is not required to be included in income by the service provider, or reported as income to the service provider on a Form W-2 or Form 1099 by the service recipient. To the extent employment taxes have been withheld and paid with respect to such payment and would not otherwise have been due absent such payment, appropriate adjustments should be made in accordance with the applicable rules under § 6413. To the extent that, in lieu of repayment, the service recipient reduces other compensation that would have been paid to the service provider, the other compensation that would have been paid to the service provider, but instead is used to repay the erroneous payment or to pay any required interest on the erroneous payment, is includible in income (and wages if the service provider is an employee); however, any employment taxes withheld and paid with respect to the original erroneous payment may be applied to satisfy the requirement to withhold and pay employment taxes on such compensation, in which case no adjustment to the employment taxes previously withheld and paid should be made.

### 4. Adjustments for Earnings

For purposes of this § IV.A, the service provider's account balance or other amount of deferred compensation under the plan may be adjusted for earnings (or losses) retroactive to the date the amount should have been credited to the service provider's account or otherwise deferred (or if the amount should have otherwise remained deferred compensation after the end of the service provider's taxable year,

retroactive to the date the amount was paid or made available), provided that such adjustment must be made on or before the last day of such taxable year.

## 5. Examples

In each of the following examples, it is assumed that Employee is an individual whose taxable year is the calendar year and Employee and Employer both satisfy the applicable requirements of §§ III and IX of this notice.

Example 1: Employee, who is not an insider with respect to Employer, makes a timely election to defer 50% of a bonus payable in 2009 pursuant to an account balance plan maintained by Employer. The bonus is \$100,000. Employer erroneously defers only 10% of the bonus, or \$10,000, and pays Employee the other \$90,000 in 2009 (including the \$40,000 that should have been deferred). The deferral is treated as made in accordance with the terms of the plan and the deferral election if, on or before December 31, 2009, the additional \$40,000 is credited to Employee's account balance and Employee pays Employer \$40,000. The \$40,000 erroneously paid to Employee is not required to be included in income by Employee or reported as income by Employer on Form W-2. Alternatively, in lieu of the \$40,000 repayment by Employee to Employer, compensation otherwise payable to Employee in 2009 (such as salary payments) may be reduced by \$40,000, provided that the \$40,000 reduction in Employee's compensation used to repay the amount (but not the \$40,000 erroneous payment) is included in income by Employee and reported as wages by Employer on the 2009 Form W-2. Employer may also adjust Employee's account to reflect the earnings (or losses) that would have been allocated to Employee's account had the amount been timely deferred and credited to Employee's account balance, if such adjustment for earnings

(or losses) is made on or before December 31, 2009. For example, if the original \$10,000 deferral would have been credited with 10% in deemed investment earnings, the deferral plus earnings would be \$11,000. This amount must be increased by the \$40,000 repaid by Employee and may also be increased by an additional \$4,000 (\$40,000 multiplied by 10%), to result in the \$55,000 account balance that would have been reflected had the amount been properly deferred. If the original incorrect deferral would have been charged with 10% in deemed investment losses, the deferral less losses would be \$9,000. This account balance must be increased by the \$40,000, but may also be reduced by \$4,000, for a net increase of \$36,000, to result in the \$45,000 account balance that would have been reflected had the amount been properly deferred.

Example 2: Employee, who is an insider with respect to Employer, makes a timely election to defer 80% of a \$100,000 bonus payable on July 1, 2010, pursuant to an account balance plan maintained by Employer. Employer erroneously defers only 10% of the bonus, or \$10,000, and pays Employee the other \$90,000 (including \$70,000 that should have been deferred) on July 1, 2010. Assume for purposes of this example that the short-term AFR, based on annual compounding, for July 2010 is 4.0%. Employer notifies Employee of the error and Employee pays Employer \$70,705.75 on October 1, 2010, consisting of the \$70,000 erroneous payment plus interest equal to \$705.75 ( $\$70,000 \times .04 \times 92/365$ ) (because the erroneous payment exceeds the limit on elective deferrals that would apply to a qualified plan under § 402(g)(1)(B) for 2010 and Employee is an insider). The \$70,000 is not required to be included in income by Employee or reported as income by Employer on Form W-2. Alternatively, in lieu of the

\$70,705.75 payment by Employee to Employer, compensation otherwise payable to Employee in 2010 (such as salary payments) may be reduced by \$70,000 plus applicable interest, in which case the reduction in Employee's compensation used to repay the amount plus applicable interest (but not the erroneous \$70,000 payment) must be reported by Employer as wages on the 2010 Form W-2 issued to Employee and included in Employee's income for 2010. Employer may also adjust Employee's account to reflect the earnings that would have been allocated to Employee's account had the amount been timely deferred and credited to Employee's account balance, if such adjustment for earnings is made on or before December 31, 2010. Employer must include in income any interest paid to Employer.

**B. Incorrect Payment of Amount Payable in Same Taxable Year or Incorrect Payment in Violation of § 409A(a)(2)(B)(i) Corrected in the Same Taxable Year as the Failure**

1. Relief for Amounts to which § IV.B Applies

With respect to an amount to which this § IV.B applies, the service provider will not be treated as having failed to comply with § 409A(a)(2)(B)(i) (if applicable) and the terms of the plan and any applicable deferral election as a result of the amount being paid or made available at the earlier date.

2. Amounts to which § IV.B Applies

This § IV.B applies if during a service provider's taxable year an operational failure occurs that is described in § IV.B.2(a) and the requirements of § IV.B.2(b) and § IV.B.4 are met.

(a) A failure is described in this § IV.B.2(a) if an amount of nonqualified deferred compensation that, under the terms of the plan and any applicable deferral election, should not have been paid or made available to a service provider until a later date in

the same taxable year, was erroneously paid or made available to the service provider more than 30 days before such later due date, or an amount of nonqualified deferred compensation that, under the terms of the plan and any applicable deferral election, and § 409A(a)(2)(B)(i) (requirement to delay for six months payments to a specified employee upon separation from service) and the applicable guidance, (i) would have been payable during the six months following the service provider's separation from service if the service provider had not been a specified employee, (ii) because the service provider was a specified employee the amount should not have been paid or made available to a service provider within the six months after the service provider's separation from service, and (iii) such amount was erroneously paid or made available to the service provider during such six-month period.

(b) On or before the last day of the service provider's taxable year in which the amount was paid or made available, the service provider repays to the service recipient the amount that was erroneously paid or made available to the service provider, and immediately after such repayment the service provider has a legally binding right to receive such amount from the service recipient on the date that (i) if the repayment is made on or before the date the amount would otherwise have been payable under the terms of the plan and the applicable deferral election, is the same number of days after the date the amount would otherwise have been payable as the number of days from the date the service recipient made the erroneous payment to the service provider through the date the service provider repaid the erroneous payment to the service recipient, and (ii) if the repayment is made after the date the amount would otherwise have been payable under the terms of the plan and the applicable deferral election, is



the same number of days after the date the amount is repaid as the number of days from the date the service recipient made the erroneous payment to the service provider through the date the amount would otherwise have been payable under the terms of the plan and the applicable deferral election. For rules regarding the counting of days, see § III.H of this notice.

### 3. Reporting and Withholding Requirements

If the requirements of this § IV.B are met, the original payment from the service recipient to the service provider that has been repaid to the service recipient is not required to be reported as income on Form W-2 or Form 1099, as applicable. To the extent employment taxes have been withheld and paid with respect to such payment, and would not otherwise have been due absent such payment, appropriate adjustments should be made under the applicable rules under § 6413. However, the subsequent payment of the amount by the service recipient to the service provider is required to be reported appropriately as income on Form W-2 or Form 1099, as applicable, and subject to the applicable employment taxes. If the payment is deductible by the service recipient, the taxable year in which such deduction is allowable will be determined in accordance with § 404(a)(5) and the service recipient's method of accounting.

### 4. Adjustment for Earnings

For purposes of this § IV.B, the service provider's account balance or other amount of deferred compensation under the plan may not be adjusted for earnings, but may be adjusted for losses, retroactive to the date the amount was erroneously paid or made available, provided that such adjustment must be made on or before the applicable deadline for repayment.

## 5. Examples

In each of the following examples, it is assumed that Specified Employee is an individual whose taxable year is the calendar year, at all relevant times Specified Employee is a specified employee of Employer for purposes of § 409A(a)(2)(B)(i), and Specified Employee and Employer both satisfy the applicable requirements of §§ III and IX of this notice.

Example 1: Under a nonqualified deferred compensation plan sponsored by Employer, Specified Employee has a legally binding right to a payment of deferred compensation on the first day of the seventh month following Specified Employee's separation from service. Specified Employee separates from service on December 15, 2008, so that the payment is due on July 1, 2009. Employer erroneously pays Specified Employee the amount of deferred compensation on March 1, 2009 (122 days before the original payment due date). Employer discovers the error on May 1, 2009, and Specified Employee repays the amount to Employer on June 1, 2009 (92 days after the erroneous payment). Provided that immediately after such repayment Specified Employee has a legally binding right to receive the amount from Employer on October 1, 2009 (92 days after the July 1, 2009 original payment due date) and Employer does not repay the amount to Specified Employee before that date, Specified Employee will not be treated as having failed to comply with § 409A(a)(2)(B)(i) and the terms of the plan and the applicable deferral election solely as a result of the early payment.

Example 2: Under a nonqualified deferred compensation plan sponsored by Employer, Specified Employee has a legally binding right to a payment of deferred

compensation payable as a lump sum payment December 1, 2009 (and so not subject to the six-month delay requirement of § 409A(a)(2)(B)(i)). Employer erroneously pays Specified Employee the amount of deferred compensation on September 1, 2009 (91 days early). Employer discovers the error and Specified Employee repays the amount to Employer on November 1, 2009 (61 days after the erroneous payment). Provided that immediately after such repayment Specified Employee has a legally binding right to receive the amount from Employer on January 31, 2010 (61 days after the original payment due date) and Employer does not repay the amount to Specified Employee before that date, Specified Employee will not be treated as having failed to comply with the terms of the plan and the applicable deferral election solely as a result of the early payment. The erroneous payment is not includible in Specified Employee's income, and is not required to be reported as income on the 2009 Form W-2. Such amount is includible in Specified Employee's income in the year in which the amount is repaid by Employer to Specified Employee, and is required to be reported as income on that year's Form W-2 and subject to applicable income taxes.

C. Excess Deferred Amount Corrected in the Same Taxable Year

1. Relief for Amounts to which § IV.C Applies

An excess amount to which this § IV.C applies is not treated as an amount deferred under the plan.

2. Amounts to which § IV.C Applies

This § IV.C applies if during a service provider's taxable year an operational failure occurs that is described in §§ IV.C.2(a) and the requirements of § IV.C.2(b) and (c) and § IV.C.3 are met.

(a) A failure is described in this § IV.C.2(a) if, under the terms of a plan and an applicable deferral election, and § 409A, an amount that should not have been deferred compensation under the plan is erroneously credited to the service provider's account or otherwise treated as deferred compensation under the plan, and such excess amount otherwise would have been paid to the service provider during the service provider's taxable year in which the excess amount was incorrectly credited to the service provider's account or otherwise treated as deferred compensation under the plan. However, a service recipient's failure to timely pay in the proper taxable year of a service provider amounts that were deferred in one or more previous taxable years of the service provider is not a failure described in this § IV.C.2(a), but see § 1.409A-3(d) for certain circumstances under which such payments may be treated as made in accordance with a designated payment date.

(b) The excess amount is paid to the service provider on or before the last day of the service provider's taxable year in which the excess amount was incorrectly treated as deferred compensation.

(c) The amount to which the service provider has a legally binding right under the plan at the end of the year is adjusted to reflect the payment (for example, through a reduction in the account balance). The service recipient may (but is not required to) pay reasonable interest to (or otherwise reasonably compensate) the service provider to reflect the time value of money with respect to the late payment, provided that such interest or other compensation is paid or made available by the end of the service provider's taxable year in which such amount was incorrectly treated as deferred compensation under the plan.

### 3. Adjustment for Earnings

If the service provider was an insider with respect to the service recipient (as defined in § III.G of this notice) at any time during the service provider's taxable year during which the failure occurred, the remaining account balance (or other deferred compensation under the plan) is adjusted for earnings retroactive to the date the excess amount was incorrectly credited to the service provider's account or otherwise incorrectly treated as deferred under the plan, provided that such adjustment must be made on or before the last day of the service provider's taxable year in which such amount was incorrectly treated as deferred compensation under the plan. If the service provider was not an insider, such adjustment may be made (but is not required). If the amount was subject to losses, the remaining account balance (or other deferred compensation under the plan) is not required to be adjusted, but may be adjusted for such losses retroactive to the date the excess amount was incorrectly credited to the service provider's account or otherwise incorrectly treated as deferred under the plan, provided that such adjustment must be made on or before the last day of the service provider's taxable year in which such amount was incorrectly treated as deferred compensation under the plan.

### 4. Example

In the following example, it is assumed that Employee is an individual whose taxable year is the calendar year and Employee and Employer both satisfy the applicable requirements of §§ III and IX of this notice.

Example: Employee, who is an insider with respect to Employer and whose taxable year is the calendar year, makes a timely election pursuant to an account

balance plan to defer 10% of a bonus otherwise payable in 2008. The bonus is \$100,000. Employer erroneously defers 50% of the bonus, or \$50,000, and pays Employee \$50,000 (instead of deferring \$10,000 and paying Employee \$90,000). The excess \$40,000 will not be treated as deferred under the plan if on or before December 31, 2008, Employer pays Employee \$40,000 of the account balance under the plan. The remaining account balance must be adjusted for earnings and may be adjusted for losses that were allocable to such amount under the plan. Employer may (but is not required to) pay Employee reasonable interest on the \$40,000 erroneous deferral provided such payment is made by December 31, 2008.

D. Correction of Exercise Price of Otherwise Excluded Stock Rights

1. Relief for Amounts to which § IV.D Applies

If this § IV.D applies to a stock right, the stock right is treated from the date of grant as not providing for a deferral of compensation for purposes of § 409A.

2. Amounts to which § IV.D Applies.

This § IV.D applies if during a service provider's taxable year a failure occurs that is described in § IV.D.2(a) and the requirements of § IV.D.2(b) are met.

(a) A failure is described in this § IV.D.2(a) if, under the terms of a stock right, the stock right would not provide for a deferral of compensation under § 1.409A-1(b)(5)(i)(A) (excluded stock options) or § 1.409A-1(b)(5)(i)(B) (excluded stock appreciation rights), except that the exercise price of the stock right is erroneously established at less than the fair market value of the underlying stock on the date of grant.

(b) Before the stock right is exercised and not later than the last day of the service provider's taxable year in which the service recipient granted the service provider the stock right, the exercise price is reset to an amount not less than the fair market value of the underlying stock on the date of grant.

### 3. Example

In the following example, it is assumed that Employee is an individual whose taxable year is the calendar year and Employee and Employer both satisfy the applicable requirements of §§ III and IX of this notice.

Example: On January 1, 2009, Employer grants Employee a stock option to purchase 100 shares of stock, and the stock option otherwise would not provide for a deferral of compensation for purposes of § 409A except that due to an error the exercise price is set at an amount below the fair market value of the stock on January 1, 2009. On July 1, 2009, Employee partially exercises the stock option and purchases 40 shares, but retains a stock option to purchase 60 shares. Provided that before the earlier of January 1, 2009 or the exercise of the remaining stock option to purchase 60 shares, the exercise price of the stock option to purchase 60 shares is reset to a price at or above the fair market value of the underlying stock on January 1, 2009, the stock option to purchase 60 shares may qualify for the relief provided in this section. Because the exercise price was not reset before the exercise on July 1, 2009, the portion of the stock option that was exercised to purchase 40 shares is not eligible for the relief provided in this section.

## **V. CORRECTIONS OF CERTAIN OPERATIONAL FAILURES INVOLVING NON-INSIDER SERVICE PROVIDERS IN THE TAXABLE YEAR IMMEDIATELY FOLLOWING THE TAXABLE YEAR IN WHICH THE FAILURE OCCURS**

### **A. In General**

The relief provided in this § V is available only with respect to service providers that are not insiders as defined in § III.G of this notice at any time during the service provider's taxable year in which the operational failure occurs, or at any time during the immediately following taxable year. The relief is available with respect to such service providers regardless of whether the same or a substantially similar failure occurred with respect to a service provider that is an insider, but in no case is the relief available with respect to a service provider that is an insider at any time during either taxable year. For example, if an operational failure under an arrangement results in two erroneous \$10,000 payments, one to a service provider that is an insider and one to a service provider that is not an insider, the relief provided in this § V may be available with respect to the service provider that is not an insider (provided that all other requirements are met), but is not available with respect to the service provider that is an insider. The relief provided in this § V may be available regardless of whether relief is also available under § VI or VII of this notice, so that the relief provided in this section may be utilized in lieu of the relief otherwise available under § VI or VII of this notice.

### **B. Failure to Defer Amount or Incorrect Payment of Amount Payable in a Subsequent Taxable Year Corrected in the Taxable Year Immediately Following the Failure**

#### **1. Relief for Amounts to which § V.B Applies**

An amount to which this § V.B applies is treated as having been timely deferred in accordance with the terms of the plan and any applicable deferral election (or as having continued to be deferred under the terms of the plan).



## 2. Amounts to which § V.B Applies

This § V.B applies if during a service provider's taxable year an operational failure that is described in § V.B.2(a) and the requirements of § V.B.2(b) through (d) and §§ V.B.3 and 4 are met.

(a) A failure is described in this § V.B.2(a) if an amount of nonqualified deferred compensation that, under the terms of the plan and any applicable deferral election, and § 409A, should not have been paid or made available to a service provider in a taxable year of the service provider, erroneously was paid or made available in that year, and such payment is not a payment that fails to meet the requirements of § 409A(a)(2)(B)(i) (requirement to delay for six months payments to a specified employee upon separation from service).

(b) The service provider repays to the service recipient the amount that was erroneously paid or made available to the service provider during the service provider's taxable year immediately following the taxable year in which such amount was erroneously paid or made available. If repayment of such amount would cause an immediate and heavy financial need as defined in §1.401(k)-1(d)(3)(iii), the service recipient and the service provider may enter into a legally binding agreement to have such amounts repaid over a specified period that ends not later than 24 months from the due date (without extensions) for the federal income tax return for the service provider's taxable year during which the amount was erroneously paid or made available to the service provider. However, the repayment requirement of this § IV.B.2(d) will not be met unless all payments are made by the end of the period specified in such agreement. If the amount erroneously paid or made available to the

service provider is otherwise payable under the terms of the plan during the subsequent taxable year during which repayment would be required under this § V.B.2(b), no repayment is required. However, the service provider must pay the interest payment set forth in § V.B.2(d) below assuming that the first date during the subsequent taxable year at which the amount otherwise could have been paid in compliance with the plan terms is the date of repayment.

(c) Immediately after such repayment (or agreement to repay), the service provider has a legally binding right under the plan to be paid the amount that would have been due if such amount had not been erroneously paid or made available to the service provider during such taxable year, at the same time and in the same form of payment that the amount would have been payable if such amount had not been erroneously paid or made available to the service provider during such taxable year.

(d) The service provider pays interest to the service recipient at the time the service provider repays the amount to the service recipient with interest at a rate not less than the short-term applicable Federal rate (AFR) under § 1274(d)(1), based on annual compounding, for the month in which the erroneous payment was paid or made available, compounded as of the end of the service provider's taxable year. For this purpose, the interest rate is the short-term AFR for the month in which the erroneous payment was paid or made available. If the amount paid on a repayment date is less than the entire erroneous payment, for each repayment date the interest calculation is applied by substituting the unpaid balance immediately before the repayment for the amount of the erroneous payment.

### 3. Reporting and Withholding Requirements

The amount erroneously paid to the service provider that is repaid by the service provider to the service recipient is required to be included in income by the service provider, and reported as income to the service provider on a Form W-2 or Form 1099 by the service recipient, for the year in which the erroneous payment is made. As part of the relief provided by this section, the service provider is permitted to take a deduction in determining adjusted gross income equal to the repayment to the service recipient (but not including any interest payment), but is required to include the subsequent payment in income (and the service recipient is required to report the amount as income on Form W-2 or Form 1099). To the extent that, in lieu of repayment, the service recipient reduces other compensation that would have been paid to the service provider, the other compensation that would have been paid to the service provider but that instead is used to repay the erroneous payment or to pay any required interest on the erroneous payment, is includible in income (and wages if the service provider is an employee); however, with respect to the amount repaid (excluding any interest payment), the service provider is permitted to take a deduction in determining adjusted gross income for the amount of the repayment.

#### 4. Adjustment for Earnings

For purposes of this § V.B, the service provider's account balance or other amount of deferred compensation under the plan may be adjusted for earnings (or losses) retroactive to the date the amount should have been credited to the service provider's account or otherwise deferred (or if the amount should have otherwise remained deferred compensation after the end of the service provider's taxable year, retroactive to the date the amount was paid or made available), provided that such

adjustment must be made on or before the last day of the taxable year in which the repayment is made.

#### 5. Example

In the following example, it is assumed that Employee is an individual whose taxable year is the calendar year, at all relevant times Employee is not an insider as defined in § III.G of this notice, and Employee and Employer both satisfy the applicable requirements of §§ III and IX of this notice.

Example: Employee makes a timely election to defer 20% of a \$100,000 bonus payable on July 1, 2010, pursuant to an account balance plan maintained by Employer. Employer erroneously defers only 10% of the bonus, or \$10,000, and pays Employee the other \$90,000 (including \$10,000 that should have been deferred) on July 1, 2010. Assume for purposes of this example that the short-term AFR for July 2010 is 4.0%. Employer notifies Employee of the error and Employee pays Employer \$10,582.01 on October 1, 2011, consisting of the \$10,000 erroneous payment plus \$505.73 interest.<sup>2</sup> The deferral is treated as made in accordance with the terms of the plan under this § V.B. For 2010, the \$10,000 payment is required to be included in income by Employee and reported as wages by Employer on the 2010 Form W-2. For 2011, Employee may take a deduction with respect to the \$10,000 repayment in determining adjusted gross income, but may not deduct the interest payment. Alternatively, in lieu of the \$10,582.01 payment by Employee to Employer, compensation otherwise payable to Employee in 2011 (such as salary payments) may be reduced by \$10,000 plus applicable interest, in which case the reduction in Employee's compensation used to

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<sup>2</sup> Interest during 2010 =  $(\$10,000 \times (183/365) \times 4.0\%) = \$200.55$ . Interest during 2011 =  $(\$10,200.55 \times (273/365) \times 4.0\%) = \$305.18$ . Total interest =  $\$200.55 + \$305.18 = \$505.73$ .

repay the amount plus applicable interest must be reported by Employer as wages on the 2011 Form W-2 issued to Employee and included in Employee's income for 2011. In such a case, Employee may take a deduction with respect to the \$10,000 repayment in determining adjusted gross income, but may not deduct the interest payment. Employer may also adjust Employee's account to reflect the earnings that would have been allocated to Employee's account had the amount been timely deferred and credited to Employee's account balance, if such adjustment for earnings is made on or before December 31, 2011.

C. Incorrect Payment of Amount Payable in Same Taxable Year or Incorrect Payment in Violation of § 409A(a)(2)(B)(i) Corrected During Subsequent Taxable Year

1. Relief for Amounts to which § V.C Applies

With respect to an amount to which this § V.C applies, the service provider will not be treated as having failed to comply with § 409A(a)(2)(B)(i) (if applicable) and the terms of the plan and any applicable deferral election as a result of the amount being paid or made available as described in § V.C.2(a) of this notice.

2. Amounts to which § V.C Applies

This § V.C applies if during a service provider's taxable year an operational failure occurs that is described in § V.C.2(a) and the requirements of § V.C.2(b) and (c) and §§ V.C.3 and 4 are met.

(a) A failure is described in this § V.C.2(a) if an amount of nonqualified deferred compensation that, under the terms of the plan and any applicable deferral election, should not have been paid or made available to a service provider until a later date in the same taxable year, was erroneously paid or made available to the service provider during such taxable year but more than 30 days before such later due date, or an

amount of nonqualified deferred compensation that, under the terms of the plan and any applicable deferral election, and § 409A(a)(2)(B)(i) (requirement to delay for six months payments to a specified employee upon separation from service), (i) would have been payable during the six months following the service provider's separation from service if the service provider had not been a specified employee, (ii) because the service provider was a specified employee the amounts should not have been paid or made available to a service provider within six months after the service provider's separation from service, and (iii) such amount was erroneously paid or made available to the service provider before the expiration of such six-month period.

(b) On or before the last day of the service provider's taxable year immediately following the taxable year in which the amount was paid or made available, the service provider repays to the service recipient the amount that was erroneously paid or made available to the service provider.

(c) Immediately after such repayment the service provider has a legally binding right to receive such amount from the service recipient on the date that is the same number of days after the date the amount is repaid as the number of days from the date the service recipient made the erroneous payment to the service provider through the date the amount would otherwise have been payable under the terms of the plan and the applicable deferral election. For rules regarding the counting of days, see § III.H of this notice.

### 3. Reporting and Withholding Requirements

If the requirements of this § V.C are met, the original payment from the service recipient to the service provider that has been repaid to the service recipient is required

to be reported as income on Form W-2 or Form 1099, as applicable. If the repayment by the service provider to the service recipient and the subsequent payment from the service recipient to the service provider both occur within the same taxable year of the service provider, the service provider is not permitted to deduct the repayment, but also is not required to include the subsequent payment in income (and the service recipient is not required to report the amount as income on Form W-2 or Form 1099). As part of the relief provided in this section, if the repayment by the service provider to the service recipient and the subsequent payment from the service recipient to the service provider do not occur within the same taxable year of the service provider, the service provider is permitted a deduction in determining adjusted gross income equal to the amount of the repayment, but is required to include the subsequent payment in income (and the service recipient is required to report the amount as income on Form W-2 or Form 1099). To the extent that, in lieu of repayment, the service recipient reduces other compensation that would have been paid to the service provider, the other compensation that would have been paid to the service provider, but instead is used to repay the erroneous payment is includible in income (and wages if the service provider is an employee); however, with respect to the amount repaid, the service provider is permitted a deduction in determining adjusted gross income equal to the amount of the repayment.

#### 4. Adjustment for Earnings

For purposes of this § V.C, the service provider's account balance or other amount of deferred compensation under the plan may not be adjusted for earnings, but may be adjusted for losses, retroactive to the date the amount was erroneously paid or

made available, provided that such adjustment must be made on or before the applicable deadline for repayment.

#### 5. Example

In the following example, it is assumed that Employee is an individual whose taxable year is the calendar year, Employee is not an insider as defined in § III.G of this notice at all relevant times, and Employee and Employer both satisfy the applicable requirements of §§ III and IX of this notice.

Example: Under a nonqualified deferred compensation plan sponsored by Employer, Employee has a legally binding right to a payment of deferred compensation on the specified date of July 1, 2009. Employer erroneously pays Employee the amount of deferred compensation on May 1, 2009 (61 days before the original payment due date). Employer discovers the error on August 1, 2010, and Employee repays the amount to Employer on August 1, 2010. Provided that immediately after such repayment Employee has a legally binding right to receive the amount from Employer on October 1, 2010 (61 days after the August 1, 2010 repayment date) and Employer does not repay the amount to Employee before that date, Employee will not be treated as having failed to comply with the terms of the plan and the applicable deferral election solely as a result of the early payment.

#### D. Excess Deferred Amount Corrected in the Taxable Year Immediately Following the Year of the Failure

##### 1. Relief for Amounts to which § V.D Applies

An excess amount to which this § V.D applies is not treated as an amount deferred under the plan.

##### 2. Amounts to which § V.D. Applies



This § V.D applies if during a service provider's taxable year an operational failure occurs that is described in § V.D.2(a) and the requirements of § V.D.2(b) through (d) and § V.D.3 are met.

(a) A failure is described in this § V.D.2(a) if, under the terms of a plan and an applicable deferral election, and § 409A, an amount that should not have been deferred compensation under the plan is erroneously credited to the service provider's account or otherwise treated as deferred compensation under the plan, and such excess amount otherwise would have been paid to the service provider during the service provider's taxable year in which the excess amount was incorrectly credited to the service provider's account or otherwise treated as deferred compensation under the plan.

(b) The excess amount is paid to the service provider during the service provider's taxable year immediately following the taxable year in which the excess amount was incorrectly treated as deferred compensation.

(c) The amount to which the service provider has a legally binding right under the plan at the end of such immediately following taxable year is adjusted to reflect the payment (for example, through a reduction in the account balance).

(d) The service recipient does not pay interest to (or otherwise compensate) the service provider to reflect the time value of money with respect to the late payment.

### 3. Adjustment for Earnings

The remaining account balance (or other deferred compensation under the plan) must be adjusted for earnings and may be adjusted for losses retroactive to the date the excess amount was incorrectly credited to the service provider's account or otherwise incorrectly treated as deferred under the plan, provided that such adjustment must be

made on or before the last day of the service provider's taxable year in which such amount was incorrectly treated as deferred compensation under the plan.

#### 4. Example

In the following example, it is assumed that Employee is an individual whose taxable year is the calendar year, at all relevant times Employee is not an insider as defined in § III.G of this notice, and Employee and Employer both satisfy the applicable requirements of §§ III and IX of this notice.

Example: Employee makes a timely election pursuant to an account balance plan to defer 10% of a bonus otherwise payable in 2010. The bonus is \$100,000. Employer erroneously defers 20% of the bonus, or \$20,000, and pays Employee \$80,000 (instead of deferring \$10,000 and paying Employee \$90,000). Employer pays Employee \$10,000 of the account balance under the plan on July 1, 2011. Provided that Employee includes in income the \$10,000 payment in 2011, Employee is not required to include any amount in income under § 409A. The remaining account balance must be adjusted for earnings and may be adjusted for losses that were allocable to such \$10,000 amount under the plan. However, Employer may not pay Employee interest on the \$10,000 erroneous deferral or otherwise compensate Employee for the loss of the use of such funds.

#### E. Correction of Exercise Price of Otherwise Excluded Stock Rights

##### 1. Relief for Amounts to which § V.E Applies

If this § V.E applies to a stock right, the stock right is treated from the date of grant as not providing for nonqualified deferred compensation for purposes of § 409A.

##### 2. Amounts to which § V.E. Applies

This § V.E applies if during a service provider's taxable year a failure occurs that is described in § V.E.2(a) and the requirements of § V.E.2(b) are met.

(a) A failure is described in this § V.E.2(a) if, under the terms of a stock right, the stock right would not provide for a deferral of compensation under § 1.409A-1(b)(5)(i)(A) (excluded stock options) or § 1.409A-1(b)(5)(i)(B) (excluded stock appreciation rights), except that the exercise price of the stock right is erroneously established at less than the fair market value of the underlying stock on the date of grant.

(b) Before the stock right is exercised and not later than the last day of the service provider's taxable year immediately following the service provider's taxable year in which the service recipient granted the service provider the stock right, the exercise price is reset to an amount equal to or exceeding the fair market value of the underlying stock on the date of grant, and at all times before such increase in the exercise price the stock right otherwise would not have provided for a deferral of compensation for purposes of § 409A.

### 3. Example

In the following example, it is assumed that Employee is an individual whose taxable year is the calendar year, Employee is not an insider as defined in § III.G of this notice at all relevant times, and Employee and Employer both satisfy the applicable requirements of §§ III and IX of this notice.

Example. On January 1, 2009, Employer grants Employee a stock option to purchase 100 shares of stock, and the stock option otherwise would not provide for a deferral of compensation under § 409A except that due to an administrative error the exercise price is set at an amount below the fair market value of the stock on January 1,

2009. On July 1, 2010, Employee partially exercises the stock option and purchases 40 shares, but retains a stock option to purchase 60 shares. Provided that before the later of January 1, 2011 or the date the remaining stock option to purchase 60 shares is exercised, the exercise price of the stock option to purchase 60 shares is reset to a price at or above the fair market value of the underlying stock on January 1, 2009, the stock option to purchase 60 shares may qualify for the relief provided in this section. Because the exercise price was not reset before the July 1, 2010 exercise, the portion of the stock option that was exercised to purchase 40 shares is not eligible for the relief provided in this section.

## **VI. RELIEF FOR CERTAIN OPERATIONAL FAILURES INVOLVING LIMITED AMOUNTS**

### **A. In General**

If an operational failure to comply with § 409A(a) occurs, but the operational failure qualifies for the relief provided in this § VI and the taxpayer meets the requirements of this § VI, the amount required to be included in income under § 409A(a) as a result of the failure, and the resulting additional taxes under § 409A, are limited in accordance with the provisions of this section. The relief provided by this section is not available with respect to any failure unless all of the requirements of this section (including any applicable requirement to file an original or amended return, but not including the requirements of § IX of this notice) have been satisfied not later than the end of the second taxable year of the service provider following the taxable year of the service provider in which such failure occurred. The relief provided in this section is available even if additional relief would otherwise be available under § V or § VII of this

notice if certain further actions were taken, so that the relief provided in this section may be utilized in lieu of the relief otherwise available under § V or § VII of this notice.

**B. Failure to Defer Limited Amount not Corrected in the Same Taxable Year and Certain Erroneous Payments of Limited Amounts**

**1. Relief for Amounts to which § VI.B Applies**

With respect to an amount to which § VI.B applies, the amount includible in income under § 409A(a) as a result of a payment described in § VI.B.2(a) is limited to the amount that should have been treated as deferred compensation under the plan (or should have continued to be deferred compensation under the plan) but was instead paid or made available to the service provider, and does not include any other amounts deferred under the plan. In addition, with respect to such amount includible in income under § 409A(a), the service provider is required to pay the additional tax under § 409A(a)(1)(B)(i)(II) (the additional 20% tax), but is not required to pay the additional tax under § 409A(a)(1)(B)(i)(I) (the premium interest tax).

**2. Amounts to which § VI.B Applies**

This § VI.B applies if during a service provider's taxable year an operational failure occurs that is described in § IV.B.2(a) and the requirements of § IV.B.2(b) and (c) and § VI.B.3 are met.

(a) A failure is described in this § IV.B.2(a) if an amount should have been treated as deferred compensation under the terms of the plan and any applicable deferral election, and § 409A, but the amount was not credited to the service provider's account or otherwise treated as deferred compensation during the service provider's taxable year, or did not remain deferred compensation after the end of such year, and because the amount was not credited to the service provider's account or otherwise

treated as deferred compensation under the plan during such year, or did not remain deferred compensation under the plan after the end of such year, the amount was paid or made available to the service provider during the service provider's taxable year. For purposes of this section, a payment of an amount (including a payment of an amount that is one of a series of installment payments or life annuity payments) that (a) under the terms of the plan and § 409A(a)(2)(B)(i) is required to be delayed for at least six months following a separation from service, but is paid within that six-month-period, or (b) is paid in the same taxable year in which the amount was payable under the plan, but more than 30 days before such due date, may be treated as the payment of an amount that should have continued to be deferred compensation.

(b) Sections IV.A, IV.B, V.B, V.C, VII.B and VII.C of this notice do not apply because relief is not available under such sections with respect to the failure, the failure is not corrected under such sections, or otherwise.

(c) The amount paid or made available to the service provider does not exceed the limit on elective deferrals that would apply to a qualified plan under § 402(g)(1)(B) for the year of the operational failure. For purposes of this section, the plan includes any arrangements treated as a single plan under § 1.409A-1(c), so that this section will apply only if any and all erroneous payments under the plan, in the aggregate, of amounts that otherwise should have been treated as deferred compensation with respect to the service provider during the taxable year (or should have continued to be deferred compensation during the taxable year), do not exceed the limit on elective deferrals that would apply to a qualified plan under § 402(g)(1)(B) for such year.

### 3. Reporting and Filing Requirements

The service recipient must report such payment on a Form W-2 (or Form W-2c) or Form 1099 (or corrected Form 1099), as applicable, as an amount includible in income under § 409A for the year in which the payment was made, including reporting such amount on a Form W-2, Box 12 using Code Z, if applicable. The service provider must include such amount in income on and pay the additional taxes under § 409A as described in this section with an original or amended federal income tax return for the taxable year in which the payment was made.

#### 4. Examples

It is assumed for purposes of the following examples that Employee is an individual whose taxable year is the calendar year and Employee and Employer both satisfy the applicable requirements of §§ III and IX of this notice.

Example 1: Employee makes a timely election to defer 10% of a bonus payable in 2008 pursuant to an account balance plan. The bonus is \$100,000. Employer erroneously defers only 8% of the bonus, or \$8,000, and pays Employee \$92,000 (instead of deferring \$10,000 and paying Employee \$90,000). Employer discovers the error on February 1, 2010. As a payment to Employee, Employer must treat the amount as a wage payment for employment tax and reporting purposes, as appropriate, including reporting as income and wages on the 2008 Form W-2. Employer is permitted to report as income under § 409A on the 2008 Form W-2 (or 2008 Form W-2c), Box 12, using Code Z, only \$2,000, and Employee is permitted to include in income under § 409A for 2008 only \$2,000. Furthermore, Employee is permitted to pay the additional 20% tax only with respect to the \$2,000 (or \$400 in additional income tax), and is not required to pay the premium interest tax. However, to qualify for the relief, Employee

must file an original or amended 2008 income tax return reflecting the additional tax on or before December 31, 2010.

Example 2: Employee is a specified employee entitled under a nonqualified deferred compensation plan to a life annuity commencing upon the first day of the seventh month following the specified employee's separation from service. The annuity payments are \$5,000 per month. Employee separates from service on April 18, 2008, and is scheduled to receive an initial annuity payment on November 1, 2008. Due to a miscalculation of the specified employee's separation from service date, Employee receives a \$5,000 payment on October 1, 2008, before the end of the six-month period following Employee's separation from service. Employer and Employee do not discover the error until 2010. Employer must treat the amount paid to Employee as a wage payment for employment tax and reporting purposes, as appropriate, including reporting as income on the 2008 Form W-2. Employer is permitted to report as income under § 409A on the 2008 Form W-2 (or 2008 Form W-2c), Box 12, using Code Z, only \$5,000, and Employee is permitted to include in income under § 409A in 2008 only \$5,000. Furthermore, Employee is permitted to pay the additional 20% tax only with respect to the \$5,000 (or \$1,000 in additional income tax), and is not required to pay the premium interest tax. However, to qualify for the relief, Employee must file an original or amended 2008 income tax return reflecting the additional tax on or before December 31, 2010.

C. Limited Excess Deferred Amount not Corrected in the Same Taxable Year

1. Relief for Amounts to which § VI.C Applies



With respect to amounts to which § VI.C applies, the amount includible in income under § 409A(a) as a result of an operational failure described in § VI.C.2(a) is limited to the excess amount paid to the service provider, and does not include any other deferred compensation under the plan, and such amount is includible in income only when paid to the service provider in accordance with this section. In addition, with respect to this amount includible in income under § 409A(a), the service provider is required to pay the additional 20% tax, but is not required to pay the premium interest tax.

## 2. Amounts to which § VI.C Applies

This § VI.C applies if during a service provider's taxable year an operational failure occurs that is described in § VI.C.2(a) and the requirements of § VI.C.2(b) through (d) and §§ VI.C.3 and 4 are met:

(a) A failure is described in this § VI.C.2(a) if, under the terms of the plan and any applicable deferral election, and § 409A, an amount of deferred compensation under the plan should have been paid or made available to the service provider during the service provider's taxable year, or an amount is treated as deferred compensation under the plan that should have been paid or made available to the service provider during the service provider's taxable year, but such amount erroneously is not paid or made available to the service provider.

(b) Sections IV.C, V.D and VII.D of this notice do not apply because relief is not available under such sections with respect to the failure, the failure is not corrected under such sections, or otherwise.

(c) The amount that should have been paid or made available to the service provider during that service provider's taxable year does not exceed the limit on elective

deferrals that would apply to a qualified plan under § 402(g)(1)(B) for such year. For purposes of this section, the plan includes any arrangements treated as a single plan under § 1.409A-1(c), so that this section will apply only if any and all erroneous deferrals under the plan, in the aggregate, of amounts that otherwise should have been paid during the service provider's taxable year to the service provider do not exceed the applicable limit on elective deferrals that would apply to a qualified plan under § 402(g)(1)(B).

(d) By the end of the service provider's second taxable year following the year in which the failure occurred, the service recipient pays the service provider the amount that should have been paid or made available to the service provider.

### 3. Reporting and Withholding

The service recipient must report such payment on a Form W-2 or Form 1099, as applicable, for the year of the payment in accordance with the requirements of this section. If the service recipient properly reports the payment as includible in income under § 409A on a Form W-2, if applicable, for the year in which the payment was made, including reporting such amount on Form W-2, Box 12 using Code Z, the service recipient will not be subject to penalties or liability for the failure to properly withhold under § 3402(d). The service provider must include such amount in income and pay the additional taxes under § 409A(a) as described in this section on an original or amended federal income tax return.

### 4. Adjustment for Earnings

Any earnings allocable to such amounts through the date of the payment must either be forfeited or added to the payment to the service provider, and any losses

allocable to such amounts through the date of the payment must either be permanently disregarded or subtracted from the payment to the service provider.

#### 5. Example

It is assumed for purposes of the following example that Employee is an individual whose taxable year is the calendar year and Employee and Employer both satisfy the applicable requirements of §§ III and IX of this notice.

Example: Employee makes a timely election to defer 8% of a bonus payable in 2009 into an account balance plan. The bonus is \$100,000. Employer erroneously defers 10% of the bonus, or \$10,000, and pays Employee \$90,000 (instead of deferring \$8,000 and paying Employee \$92,000). Employer discovers the error on February 1, 2010. On March 1, 2010, at which time Employee's account balance includes \$150 in earnings on the excess \$2,000 credited to the account, Employer pays Employee \$2,150. Employer reports the \$2,150 as income under § 409A on the 2010 Form W-2, Box 1 and Box 12, using Code Z. Provided that Employee reports such income and pays the applicable taxes, including the additional § 409A taxes, on a 2010 Form 1040, Employee is not required to include any additional amounts deferred under the plan in income under § 409A(a) or to include any amount in income under § 409A for years before 2010, and with respect to the \$2,150 includible in income under § 409A is required to pay only the additional 20% tax (or \$425 in additional income tax), and not the premium interest tax. Employer may also have paid Employee only the \$2,000 excess deferred amount if the \$150 in earnings on such amount were forfeited.

## **VII. RELIEF FOR CERTAIN OTHER OPERATIONAL FAILURES**

### A. General Requirements

If an operational failure to comply with § 409A(a) occurs but the operational failure qualifies for the relief provided in this § VII and is corrected in accordance with this § VII, the amount required to be included in income under § 409A(a) as a result of the failure, and the resulting additional taxes under § 409A, are limited in accordance with the provisions of this section. The relief provided by this section is not available with respect to any failure unless all of the requirements of this section (including any requirement to file an original or amended return, but not the requirements of § IX of this notice) have been satisfied not later than the end of the second taxable year of the service provider following the taxable year of the service provider in which such failure occurred.

**B. Failure to Defer Amount not Corrected in the Same Taxable Year and Certain Erroneous Payments**

**1. Relief for Amounts to which § VII.B Applies**

With respect to amounts to which §VII.B applies, the amount includible in income under § 409A(a) as a result of a payment described in § VII.B.2(a) is limited to the amount that should have been treated as deferred compensation under the plan (or should have continued to be deferred compensation under the plan) but was instead paid or made available to the service provider, and does not include any other amounts deferred under the plan. In addition, with respect to such amount includible in income under § 409A(a), the service provider is required to pay the additional tax under § 409A(a)(1)(B)(i)(II) (the additional 20% tax) for the year in which the amount is includible in income under § 409A(a) (the year of the failure), but is not required to pay the additional tax under § 409A(a)(1)(B)(i)(I) (the premium interest tax). If the requirements of this section are met, for taxable years following the year during which

the failure occurred, the amount repaid by the service provider is treated as an amount previously included in income for purposes of § 409A(c).

## 2. Amounts to which § VII.B Applies

This § VII.B applies if during a service provider's taxable year an operational failure occurs that is described in § VII.B.2(a) and the requirements of § VII.B.2(b) through (d) and §§ VII.B.3 and 4 are met:

(a) A failure is described in this § VII.B.2(a) if an amount of nonqualified deferred compensation that, under the terms of the plan and any applicable deferral election, and § 409A, should not have been paid or made available to a service provider in a taxable year of the service provider, was erroneously paid or made available to the service provider in that year, and such payment does not fail to meet the requirements of § 409A(a)(2)(B)(i) (requirement to delay for six months payments of a specified employee upon separation from service). For rules relating to correction of certain payments that fail to meet such requirements, see § VII.C of this notice;

(b) Sections IV.A, IV.B, V.B, V.C and VI.B of this notice do not apply because relief is not available under such sections with respect to such failure, the failure is not corrected under such sections, or otherwise;

(c) The service provider repays to the service recipient the amount that was erroneously paid or made available to the service provider on or before the last day of the service provider's second taxable year following the year in which the erroneous overpayment occurred, and immediately after such repayment the service provider has a legally binding right under the plan to be paid the amount that would have been due if such amount had not been erroneously paid or made available to the service provider,

at the same time and in the same form of payment that the amount would have been payable if such amount had not been erroneously paid or made available to the service provider.

(d) If the service provider is an insider (as defined in this § III.G) with respect to the service recipient, the service provider pays interest to the service recipient at the time the service provider repays the amount to the service recipient at a rate not less than the short-term applicable Federal rate (AFR) under § 1274(d)(1), based on annual compounding, for the month in which the erroneous payment was paid or made available, compounded as of the end of the service provider's taxable year. For this purpose, the interest rate is the short-term AFR for the month in which the erroneous payment was paid or made available. If the amount paid on a repayment date is less than the entire erroneous payment, for each repayment date the interest calculation is applied by substituting the unpaid balance immediately before the repayment for the amount of the erroneous payment.

### 3. Reporting and Withholding

The service recipient must report the erroneous payment as an amount includible in income under § 409A on a Form W-2 (or Form W-2c), under Box 12, Code Z, or Form 1099 (or corrected Form 1099), as applicable, for the year in which the erroneous payment was made. The service provider must include the amount of the erroneous payment in income under § 409A on and pay the additional taxes under § 409A(a) with an original or amended federal income tax return for the year in which the erroneous payment was made, and must not claim a deduction or other adjustment reflecting the

repayment for the year in which the service provider repays the amount to the service recipient.

#### 4. Adjustment for Earnings

For purposes of this § VII.B, the service provider's account balance or other amount of deferred compensation under the plan may be adjusted for earnings (or losses) retroactive to the date the amount should have been credited to the service provider's account or otherwise deferred (or if the amount should have otherwise remained deferred compensation after the end of the service provider's taxable year, retroactive to the date the amount was paid or made available), provided that such adjustment must be made on or before the applicable deadline for repayment.

#### 5. Example

It is assumed for purposes of the following example that Employee is an individual whose taxable year is the calendar year, at all relevant times Employee is not an insider with respect to Employer as defined in § III.G, and Employee and Employer both satisfy the applicable requirements of §§ III and IX of this notice.

Example: Employee makes a timely election to defer 50% of a bonus payable in 2008 pursuant to an account balance plan. The bonus is \$300,000. Employer erroneously defers only 25% of the bonus, or \$75,000, and pays Employee \$225,000 (instead of deferring \$150,000 and paying Employee \$150,000). Employer discovers the error on June 1, 2010. Employee pays \$75,000 to Employer on July 1, 2010 (or alternatively, Employer retains \$75,000 of compensation that Employee was otherwise due on July 1, 2010). As a payment to Employee, Employer must treat the 2008 payment as a wage payment for employment tax and reporting purposes, as

appropriate, including reporting as income and wages on the 2008 Form W-2.

Employer is permitted to report as income under § 409A on the 2008 Form W-2 (or 2008 Form W-2c), Box 12, using Code Z, only \$75,000, and Employee is permitted to include in income under § 409A for 2008 only \$75,000. Furthermore, for 2008

Employee is permitted to pay the additional 20% tax only with respect to the \$75,000 (or \$15,000 in additional income tax), and is not required to pay the premium interest tax.

The 2010 Form W-2 provided to the Employee must not reflect any reduction in income due to the repayment, including if the repayment were made through the reduction in compensation otherwise payable to the Employee, and Employee is not permitted a deduction or any other adjustment to income on Employee's 2010 Form 1040 reflecting the repayment. For future taxable years, Employee is treated for purposes of § 409A(c) as having previously included in income \$75,000 of the amount deferred under the plan.

C. Incorrect Payment of Amount Payable in Same Taxable Year or Incorrect Payment in Violation of § 409A(a)(2)(B)(i) not Corrected in the Same Taxable Year as the Failure

1. Relief for Amounts to which § VII.C Applies

With respect to amounts to which § VII.C applies, the amount includible in income under § 409A(a) as a result of a payment described in § VII.C.2(a) is limited to the amount that should have been treated as deferred compensation under the plan (or should have continued to be deferred compensation under the plan) but was instead paid or made available to the service provider, and does not include any other amounts deferred under the plan. In addition, with respect to such amount includible in income under § 409A(a), the service provider is required to pay the additional tax under § 409A(a)(1)(B)(i)(II) (the additional 20% tax), but is not required to pay the additional tax under § 409A(a)(1)(B)(i)(I) (the premium interest tax). Provided that the



requirements of this section are met, for taxable years following the year during which the failure occurred, the amount repaid by the service provider is treated as an amount previously included in income for purposes of § 409A(c).

## 2. Amounts to which § VII.C Applies

This § VII.C applies if during a service provider's taxable year an operational failure occurs that is described in § VII.C.2(a) and the requirements of § VII.C.2(b) through (d) and §§ VII.C.3 and 4 are met.

(a) A failure is described in this § VII.C.2(a) if an amount of nonqualified deferred compensation that, under the terms of the plan and any applicable deferral election, should not have been paid or made available to a service provider until a later date in the same taxable year, erroneously was paid or made available to the service provider during such taxable year more than 30 days before such later date, or an amount of nonqualified deferred compensation that, under the terms of the plan and any applicable deferral election, and § 409A(a)(2)(B)(i) (requirement to delay for six months payments to a specified employee upon separation from service), (i) would have been payable less than six months after the service provider's separation from service if the service provider had not been a specified employee, (ii) because the service provider was a specified employee the amounts should not have been paid or made available within the six-month period following the service provider's separation from service, and (iii) such amounts were erroneously paid or made available to the service provider within such six-month period.

(b) Sections IV.B, V.C, and VI.B of this notice do not apply because relief is not available under such sections with respect to such failure, the failure is not corrected under such sections, or otherwise.

(c) On or before the end of the second taxable year during which the failure occurred, the service provider repays to the service recipient the amount that was erroneously paid or made available to the service provider.

(d) Immediately after such repayment, the service provider has a legally binding right to receive such amount from the service recipient on the date that is that same number of days after the amount is repaid as the number of days from the date the service recipient made the erroneous payment to the service provider through the date the amount would otherwise have been payable under the terms of the plan and the applicable deferral election, and the repaid amount is not paid or made available to the service provider before such date (for rules regarding the counting of days, see § III.H of this notice).

### 3. Reporting and Withholding

The service recipient must report the erroneous payment as an amount includible in income under § 409A on a Form W-2 (or Form W-2c), under Box 12, Code Z, or Form 1099 (or corrected Form 1099), as applicable, for the year in which the erroneous payment was made. The service provider must include the amount of the erroneous payment in income under § 409A on and pay the additional taxes under § 409A(a) with an original or amended federal income tax return for the year in which the erroneous payment was made, and not claim a deduction or other adjustment reflecting the

repayment for the year in which the service provider repays the amount to the service recipient.

#### 4. Adjustment for Earnings

For purposes of this § VII.C, the service provider's account balance or other amount of deferred compensation under the plan may not be adjusted for earnings, but may be adjusted for losses, retroactive to the date the amount was erroneously paid or made available, provided that such adjustment must be made on or before the applicable deadline for repayment.

#### 5. Examples

In each of the following examples, it is assumed that Specified Employee is an individual whose taxable year is the calendar year, at all relevant times Specified Employee is a specified employee of Employer for purposes of § 409A(a)(2)(B)(i) and an insider with respect to Employer as defined in § III.G of this notice, and Specified Employee and Employer both satisfy the applicable requirements of §§ III and IX of this notice.

Example 1: Under a nonqualified deferred compensation plan sponsored by Employer, Specified Employee has a legally binding right to a \$100,000 payment of deferred compensation on the first day of the seventh month following Specified Employee's separation from service. Specified Employee separates from service on November 15, 2008 so that the payment is due on June 1, 2009. Employer erroneously pays Specified Employee \$100,000 on April 1, 2009 (61 days before the due date). Employer discovers the error on July 1, 2010, and Specified Employee repays the \$100,000 to Employer on July 1, 2010. Immediately after such repayment Specified

Employee has a legally binding right to receive \$100,000 from Employer on August 31, 2010 (61 days after the July 1, 2010 repayment date) and Employer does not repay the amount to Specified Employee before that date. Employer treats the payment as a 2009 wage payment for employment tax and reporting purposes, as appropriate, including reporting as income and wages on the 2009 Form W-2. Employer must report as income under § 409A on the 2009 Form W-2 (or 2009 Form W-2c), Box 12, using Code Z, only the \$100,000 payment, and Specified Employee is permitted to include in income under § 409A for 2009 only \$100,000. Furthermore, Specified Employee is permitted to pay the additional 20% tax only with respect to the \$100,000 (or \$20,000 in additional income tax), and is not required to pay the premium interest tax. The 2010 Form W-2 provided to Specified Employee must not reflect any reduction in income due to the repayment, including if the repayment were made through the reduction in compensation otherwise payable to Specified Employee, and Specified Employee is not permitted a deduction or any other adjustment to the 2010 Form 1040 reflecting the repayment. For 2010, Specified Employee is treated as having previously included in income \$100,000 of the amount deferred under the plan for purposes of § 409A(c).

Example 2: Under a nonqualified deferred compensation plan sponsored by Employer, Specified Employee has a legally binding right to a \$100,000 payment of deferred compensation on the specified date of July 1, 2009 (so that the payment is not subject to § 409A(a)(2)(B)(i)). Employer erroneously pays Specified Employee the \$100,000 on May 1, 2009 (61 days before the due date). Employer discovers the error on December 1, 2010, and Specified Employee repays the amount to Employer on December 1, 2010. Immediately after such repayment Specified Employee has a

legally binding right to receive the amount from Employer on January 31, 2011 (61 days after the December 1, 2010 repayment date) and Employer does not repay the amount to Specified Employee before that date. Employer treats the 2009 payment as a wage payment for employment tax and reporting purposes, as appropriate, including reporting as income and wages on the 2009 Form W-2. Employer is permitted to report as income under § 409A on the 2009 Form W-2 (or 2008 Form W-2c), Box 12, using Code Z, only the \$100,000 payment, and Specified Employee is permitted to include in income under § 409A for 2009 only \$100,000. Furthermore, Employee is permitted to pay the additional 20% tax only with respect to the \$100,000 (or \$20,000 in additional income tax), and is not required to pay the premium interest tax. The 2010 Form W-2 provided to Specified Employee must not reflect any reduction in income due to the repayment, including if the repayment were made through the reduction in compensation otherwise payable to Specified Employee, and Specified Employee is not permitted a deduction or any other adjustment to the 2010 Form 1040 reflecting the repayment. Beginning with the taxable year 2010, Specified Employee is treated as having previously included in income \$100,000 of the amount deferred under the plan for purposes of § 409A(c).

D. Excess Deferred Amount not Corrected in the Same Taxable Year

1. Relief for Amounts to which § VII.D Applies

With respect to amounts to which § VII.D applies, the amount includible in income under § 409A(a) as a result of a failure described in § VII.D.2(a) is limited to the excess amount paid to the service provider, and does not include any other deferred compensation under the plan, and the amount is includible in income only when paid to

the service provider in accordance with this section. In addition, with respect to this amount includible in income under § 409A(a), the service provider is required to pay the additional 20% tax, but is not required to pay the premium interest tax. Provided that the service provider includes such amount in income, pays the additional taxes and otherwise meets the requirements of this notice, for taxable years after the year of the failure the amount is treated as previously included in income for purposes of § 409A(c).

## 2. Amounts to which § VII.D. Applies

This § VII.D applies if an operational failure occurs during a service provider's taxable year that is described in § VII.D.2(a) and the requirements of § VII.D.2(b) through (c) and §§ VII.D.3 and 4 are met.

(a) A failure is described in this § VII.D.2(a) if, under the terms of the plan and any applicable deferral election, and § 409A, an amount of deferred compensation under the plan should have been paid or made available to the service provider during the service provider's taxable year, or an amount is treated as deferred compensation under the plan that should have been paid or made available to the service provider during the service provider's taxable year, but such amount erroneously is not paid or made available to the service provider;

(b) Sections IV.C, V.D and VI.C of this notice do not apply because relief is not available under such sections with respect to the failure, the failure is not corrected under such sections, or otherwise;

(c) By the end of the service provider's second taxable year following the taxable year during which the failure occurred, the service recipient pays the service provider the amount that should have been paid or made available to the service provider.

### 3. Reporting and Withholding

The service recipient must report such payment on a Form W-2 (or Form W-2c) or Form 1099 (or corrected Form 1099), as applicable, for the taxable year in which the payment was scheduled to be made under the terms of the plan (or, in the case of an amount that should not have been deferred, the taxable year in which the payment was scheduled to be made but for the erroneous deferral). If the service recipient properly reports the payment as includible in income under § 409A on a Form W-2, if applicable, for the year in which the payment was scheduled to be made, including reporting such amount on Form W-2, Box 12 using Code Z, the service recipient will not be subject to penalties or liability for the failure to properly withhold under § 3402(d). The service provider must include such amount in income on and pay the additional taxes under § 409A(a) with an original or amended federal income tax return for the taxable year in which the payment was scheduled to be made under the terms of the plan (or, in the case of an amount that should not have been deferred, the taxable year in which the payment was scheduled to be made but for the erroneous deferral).

### 4. Adjustment for Earnings

The remaining account balance (or other deferred compensation under the plan) must be adjusted for earnings and may be adjusted for losses retroactive to the date the excess amount was incorrectly credited to the service provider's account or otherwise incorrectly treated as deferred under the plan, provided that such adjustment must be made on or before the last day of the service provider's taxable year in which such amount was paid to the service provider under § VII.D.2(c). The service recipient may

not pay the service provider interest, or otherwise compensate the service provider for the use of such funds.

#### 5. Example

It is assumed for purposes of the following example that Employee is an individual whose taxable year is the calendar year, at all relevant times Employee is an insider with respect to Employee as defined in § III.G of this notice, and Employee and Employer both satisfy the applicable requirements of §§ III and IX of this notice.

Example: Employee makes a timely election to defer 10% of a bonus payable in 2009 into an account balance plan. The bonus is \$300,000. Employer erroneously defers 20% of the bonus, or \$60,000, and pays Employee \$240,000 (instead of deferring \$30,000 and paying Employee \$270,000). Employer discovers the error on February 1, 2010, so that the excess deferred amount of \$30,000 is not corrected by December 31, 2009. On March 1, 2010, at which time Employee's account balance includes \$1,500 in earnings on the excess \$30,000 credited to the account, Employer pays Employee \$30,000 and Employee forfeits the \$1,500 in earnings. Employer reports the \$30,000 as income under § 409A on the 2009 Form W-2, Box 1 and Box 12, using Code Z. Provided that Employee reports such income and pays the applicable taxes, including the additional § 409A taxes, on a timely filed 2009 Form 1040 (or amended 2009 Form 1040), and satisfies the other applicable requirements of this § VII, Employee is permitted to include in income under § 409A only \$30,000 and to pay only the additional 20% tax (or \$6,000 in additional income tax), and not the premium interest tax. Beginning with the taxable year 2010, Specified Employee is treated as



having previously included in income \$30,000 of the amount deferred under the plan for purposes of § 409A(c).

### **VIII. SPECIAL TRANSITION RULE FOR NON-INSIDERS**

With respect to a service provider that was not an insider at any time during the service provider's taxable year in which a failure occurred, such service provider may use the relief provided in § V.B, § V.C or § V.D of this notice with respect to an operational failure addressed by such sections that occurred on or before December 31, 2007, in which case for purposes of applying such section the service provider's taxable ending in 2009 will be treated as the taxable year next following the taxable year during which the failure occurred. With respect to an erroneous early payment addressed by § V.B, if the original due date for the payment would have occurred on or before December 31, 2009, the amount may be treated for purposes of applying § V.B as otherwise payable under the terms of the plan during the year immediately following the year of the failure for purposes of qualifying for the relief.

### **IX. INFORMATION AND REPORTING REQUIREMENTS**

#### **A. Information Required with Respect to Correction of an Operational Failure in the Same Taxable Year as the Failure Occurs**

A service recipient described in § IV of this notice must attach to its timely-filed (including extensions) original federal income tax return for its taxable year in which the failure occurred a statement entitled "§ 409A Relief under § IV of Notice 2008-113" setting out the information required by § IX.A.1 of this notice, and must provide to each service provider affected by such failure a statement entitled "§ 409A Relief under § IV of Notice 2008-113" setting out the information required by § IX.A.2 of this notice by no later than the date (with extensions) on which it is required to provide an information

return (Form W-2 or Form 1099) to such service provider for the calendar year in which such failure occurred (or if no information return is required for such service provider, not later than the January 31 following the calendar year in which such failure occurred). Notwithstanding the foregoing, to qualify for the relief described in § IV.D of this notice (Correction of Exercise Price of Otherwise Excluded Stock Rights), the service recipient is not required to provide a statement to such service provider with respect to such failure. In addition, each taxpayer relying on the relief provided in § IV of this notice must make reasonable efforts to provide notice to the examining agent upon the commencement of an examination of such taxpayer's federal tax return that the taxpayer was relying upon the relief provided under this notice for years covered by the examination (except in the case of a service provider for whom a correction has been made under § IV.D of this notice).

1. Attachment to Service Recipient Tax Return for Failures Described in § IV

The service recipient must attach a statement to its federal income tax return stating that it is relying upon § IV of this notice with respect to a correction of a failure to comply with § 409A and setting out the following information with respect to each such failure:

(a) The name and taxpayer identification number of each service provider affected by the failure and whether such service provider is an insider with respect to the service recipient. Where the same or a substantially similar operational failure has occurred with respect to multiple service providers, the information required in § IX.A.1(b) through (e) of this notice may be supplied only once with respect to such operational failure, provided that the identification of each service provider affected by

the operational failure in this § IX.A.1(a) references such information and the amount involved in the operational failure with respect to such service provider.

(b) Identification of the nonqualified deferred compensation plan with respect to which such failure occurred.

(c) A brief description of the failure and the circumstances under which it occurred, including the amount involved and date on which the failure occurred.

(d) A brief description of the steps taken to correct the failure and the date on which such correction was completed.

(e) A statement that the operational failure is eligible for the correction under the terms of this notice, and that the service recipient has taken all actions required, and otherwise met all requirements, for such correction.

## 2. Information to be Provided to Service Provider for Failures Described in § IV

The service recipient must provide the following information to each service provider affected by correction of a failure to comply with § 409A who is entitled to relief under § IV of this notice (other than § IV.D of this notice (Correction of Exercise Price of Otherwise Excluded Stock Rights)) with respect to such failure:

(a) A statement that the service provider is entitled to the relief provided in § IV of this notice with respect to a failure to comply with § 409A.

(b) The information described in § IX.A.1(b) through (e) of this notice.

## B. Information Required with Respect to Relief for Certain Operational Failures

A service recipient described in § V, § VI, or § VII of this notice must attach to its timely-filed (including extensions) original federal income tax return for its taxable year in which it discovers the failure, and for a service recipient described in § VIII of this notice its timely-filed (including extensions) original federal income tax return for the

taxable year including January 1, 2009, a statement entitled “§ 409A Relief under § [INSERT APPROPRIATE SECTION] of Notice 2008-113” setting out the information required by § IX.B.1 of this notice. In addition, not later than the date (with extensions) on which it is required to provide an information return (Form W-2 or 1099) for the calendar year in which it discovers such failure to a service provider who is affected by such failure (or if no information return is required for such service provider, not later than the January 31 following the calendar year in which it discovers such failure), or in the case of a service recipient described in § VIII, not later than January 31, 2010, must provide to each such service provider a statement entitled “§ 409A Relief under § [INSERT APPROPRIATE SECTION] of Notice 2008-113” setting out the information required by § IX.B.2 of this notice. A service provider who is relying on the relief provided in § V, § VI, or § VII of this notice with respect to a failure to comply with § 409A must attach to the service provider’s timely-filed (including extensions) original federal income tax return for the year in which such failure was discovered (or for a service provider who is relying on the relief provided in § VIII of this notice, the service provider’s timely-filed (including extensions) original federal income tax return for 2009) the information required by § IX.B.3 of this notice. In addition, each taxpayer relying on the relief provided in § V, § VI, § VII or § VIII of this notice must make reasonable efforts to provide notice to the examining agent upon the commencement of an examination of such taxpayer’s federal tax return that the taxpayer was relying upon the relief provided under this notice for years covered by the examination.

1. Attachment to Service Recipient Tax Return for Failures Described in § V, § VI, § VII or § VIII.

The service recipient must attach a statement to its return setting out the following information with respect to each failure described in § V, § VI, § VII or § VIII of this notice:

(a) The name and taxpayer identification number of each service provider affected by the failure. Where the same or a substantially similar operational failure has occurred with respect to multiple service providers, the information required in § IX.B.1(b) through (e) of this notice may be supplied only once with respect to such operational failure, provided that the identification of each service provider affected by the operational failure in this § IX.B.1(a) references such information and the amount involved in the operational failure with respect to such service provider.

(b) Identification of the nonqualified deferred compensation plan with respect to which such failure occurred.

(c) A brief description of the failure and the circumstances under which it occurred, including the amount involved and date on which the failure occurred.

(d) A brief description of the steps taken by the service recipient to avoid a recurrence of the failure, including the date on which such steps were implemented.

(e) A statement that the operational failure is eligible for the correction under the terms of this notice, and that the service recipient has taken all actions required, and otherwise met all requirements, for such correction.

2. Information to be Provided to Service Provider for Failures Described in § V, § VI, § VII or § VIII

The service recipient must provide the following information to each service provider affected by a failure to comply with § 409A who is entitled to relief under § V, § VI, § VII or § VIII of this notice with respect to such failure:

(a) A statement that the service provider is entitled to the relief provided in § V, § VI, § VII, or § VIII of this notice (as applicable) with respect to a failure to comply with § 409A and that the service provider must attach a copy of the statement to the service provider's income tax return for the taxable year in which the failure was discovered.

(b) The information described in § IX.B.1(b) through (e) of this notice.

3. Attachment to Service Provider Tax Return for Failures Described in § V, § VI, § VII or § VIII.

The service provider must attach to the service provider's income tax return a copy of the statement the service provider received from the service recipient with respect to each such failure.

## **X. EFFECT ON OTHER DOCUMENTS**

For taxable years beginning on or after January 1, 2009, Notice 2007-100 is obsolete. Taxpayers may rely on this Notice 2008-113 for taxable years beginning before January 1, 2009. For service recipients and service providers who are entitled to relief under this notice, Notice 2006-100, 2006-51 IRB 1109 (relating to reporting and wage withholding for 2006), and Notice 2007-89, 2007-46 IRB 998 (relating to reporting and wage withholding for 2007), are modified to conform to the provisions of this notice with respect to (i) the amount that is required to be included in income by a service provider under section 409A(a), and (ii) the amount that is required to be reported by the service recipient as an amount includible in income under section 409A(a) on Form

W-2, Box 1 and Box 12, using Code Z, or Form 1099-MISC, Box 7 and Box 15b, as applicable.

## **XI. REQUEST FOR COMMENTS**

The Treasury Department and the IRS are considering whether to extend the ability of certain service providers to repay an incorrect payment of a deferred amount over an extended period if the service provider would otherwise experience an immediate and heavy financial need as defined in §1.401(k)-1(d)(3)(iii) due to the repayment requirement to the relief provided in § VIII, subject to the service provider submitting an appropriate extension of the statute of limitations on assessment with respect to the taxable year in which the failure occurred. Comments are requested on all aspects of such potential relief, including whether such relief would be utilized and how such relief would be implemented.

The Treasury Department and the IRS are also considering whether a program providing relief in the case of a plan document failure that is brought into compliance with § 409A would be both feasible and advisable. To the extent such a program is adopted, the Treasury Department and the IRS intend that such guidance not allow taxpayers who sponsor or participate in a noncompliant plan an advantage in comparison to taxpayers who sponsor or participate in a compliant plan, by providing the sponsor of, or the participants in, the noncompliant plan greater flexibility to change the time and form of payment of deferred amounts than would have been available if no such plan document failure had occurred. In addition, the Treasury Department and the IRS intend that such a program maintain strong incentives for taxpayers to comply in full with the requirements of § 409A.

The Treasury Department and the IRS request comments on all aspects of such a potential program, including how such a program would apply to provisions governing the timing of deferral elections as well as provisions governing the times and forms of payments of amounts deferred. The Treasury Department and the IRS specifically request comments on the following issues:

- What types of failures would be eligible for the relief (and what types of failures would not be eligible for the relief)?
- Should relief be limited to minor or nonmaterial errors and if so how would the materiality of a failure be determined?
- To the extent eligibility for the relief is contingent upon whether a noncompliant plan provision has been put into effect, or whether a noncompliant plan provision is applicable to or affects an amount deferred, what standards would apply to determine whether such a noncompliant plan provision has been put into effect or otherwise applies to or affects an amount deferred?
- What rules would govern the appropriate correction for the noncompliant plan provision and how would such rules avoid granting an impermissible late subsequent deferral election or election to accelerate a payment?
- How would the correction and relief apply if the correction were made during the service provider's taxable year and would there be any distinction between amounts deferred before the correction and amounts deferred in the same year but after the correction?
- What information would service providers and service recipients be required to file with the IRS to make use of such correction procedure?



- What procedure would service recipients be required to implement to prevent a recurrence of the same or a substantially similar plan document failure?

Comments must be submitted by March 6, 2009. All materials submitted will be available for public inspection and copying. Comments may be submitted to Internal Revenue Service, CC:PA:LPD:RU (Notice 2008-113), Room 5203, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may also be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to the Courier's Desk at 1111 Constitution Avenue, NW, Washington, DC 20224, Attn: CC:PA:LPD:RU (Notice 2008-113), Room 5203. Submissions may also be sent electronically via the internet to the following email address: [Notice.comments@irs.counsel.treas.gov](mailto:Notice.comments@irs.counsel.treas.gov). Include the notice number (Notice 2008-113) in the subject line.

## **XII. PAPERWORK REDUCTION ACT**

The collection of information contained in this notice has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 USC. 3507) under control number 1545-2086.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

The collection of information in this notice is in § IX. This information is required to determine whether the taxpayers claiming the relief are eligible for the relief and that the applicable requirements for relief are met. The likely respondents are corporations and individuals.

The estimated annual reporting and/or recordkeeping burden is 5,000 hours.

The estimated annual burden per respondent/recordkeeper is .5 hours.

The estimated number of respondents is 10,000.

The estimated annual frequency of response is on occasion.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law.

Generally, tax return and tax return information are confidential, as required by § 6103.

### **XIII. DRAFTING INFORMATION**

The principal author of this notice is Stephen Tackney of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities), although other Treasury and IRS officials participated in its development. For further information on the provisions of this notice, contact Stephen Tackney at (202) 927-9639 (not a toll-free number).