

## 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)

#### Notice 2010-6

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## **I. PURPOSE**

This notice provides methods for taxpayers to voluntarily correct many types of failures to comply with the document requirements applicable under § 409A of the Internal Revenue Code (Code) to nonqualified deferred compensation plans and thereby avoid or reduce the current income inclusion and additional taxes under § 409A. This document correction program is intended to encourage taxpayers to review nonqualified deferred compensation plans to identify provisions that fail to comply with the requirements of § 409A and § 1.409A-1(c) of the Income Tax Regulations (a document failure), and to correct those plan provisions promptly, while also not providing an advantage to taxpayers participating in plans that initially fail to comply with § 409A over taxpayers participating in plans drafted in compliance with § 409A.

Accordingly, this notice provides:

- Clarification that certain language commonly included in plan documents will not cause a document failure.
- Relief permitting correction of certain document failures without current income inclusion or additional taxes under § 409A, provided, in certain circumstances, that the corrected plan provision does not affect the operation of the plan within one year following the date of correction.
- Relief limiting the amount currently includible in income and the additional taxes under § 409A for certain document failures if correction of the failure affects the operation of the plan within one year following the date of correction.

- Relief permitting correction of certain document failures without current income inclusion or additional taxes under § 409A, if the plan is the service recipient's first plan of that type (disregarding any plans not subject to § 409A or any plans under which all deferred amounts have previously been paid or forfeited) and the failure is corrected within a limited period following adoption of the plan.
- Transition relief permitting corrections of certain document failures without current income inclusion or additional taxes under § 409A, if the document failure is corrected by December 31, 2010, and any operational failures resulting from the document failure are also corrected in accordance with Notice 2008-113, 2008-51 IRB 1305, by December 31, 2010.

This notice also clarifies certain aspects of Notice 2008-113, which addresses certain failures of nonqualified deferred compensation plans to comply with § 409A in operation (operational failures), including clarification of:

- The application of the subsequent year correction method to late payments of amounts deferred.
- The calculation of the amount that must be paid to the service provider as a correction of a late payment of an amount deferred under a plan if the payment would have been made in property, such as shares of stock.
- The calculation of the amount that must be repaid by the service provider as a correction of an early payment of an amount deferred under a plan if the early payment was made in property, such as shares of stock.

## II. BACKGROUND

Section 409A was added to the Code by § 885 of the American Jobs Creation Act of 2004, Public Law 108-357 (118 Stat. 1418). Section 409A generally provides that, unless certain requirements are met, amounts deferred under a nonqualified deferred compensation plan for all taxable years are currently includible in gross income to the extent not subject to a substantial risk of forfeiture and not previously included in gross income. Section 409A further provides that amounts includible in income under § 409A are subject to two additional taxes, a 20% additional tax and an additional tax calculated as the underpayment interest determined at a premium interest rate that would have been due had the amounts deferred been includible in income when first deferred or first no longer subject to a substantial risk of forfeiture, whichever is later. Thus, a failure to comply with the requirements of § 409A may have severely adverse tax consequences. Final regulations under § 409A were issued by the IRS and the Treasury Department on April 17, 2007 (72 Fed. Reg. 19234), effective for taxable years beginning on or after January 1, 2009 (see Notice 2007-86, 2007-46 IRB 990).

A nonqualified deferred compensation plan must comply with the requirements of § 409A both in form and in operation. On December 3, 2008, the Treasury Department and the IRS issued Notice 2008-113, 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 2008-113 also provided guidance limiting the amount includible in income under § 409A(a) for certain operational failures involving amounts that exceeded the limit.

Notice 2008-113 requested comments with respect to potential guidance permitting the correction of document failures. In response, the Treasury Department and the IRS received various comments requesting that relief also be available for document failures and containing suggestions for corrections. The Treasury Department and the IRS have reviewed all of the comments submitted and are issuing this notice to provide relief for numerous types of document failures.

The Treasury Department and the IRS are issuing this notice primarily to address document failures. Notice 2008-113 remains in effect to address operational failures. However, § XIII of this notice provides certain modifications to Notice 2008-113, clarifying certain aspects of that notice, that are effective for service provider taxable years beginning on or after January 1, 2010. For further information regarding the effective dates, see § XIV of this notice.

### **III. ELIGIBILITY REQUIREMENTS AND EFFECT OF CORRECTION**

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

A taxpayer is not eligible for the relief provided in §§ V through XI of this notice for a document failure unless the taxpayer demonstrates that all of the following requirements have been met: (i) the requirements of this § III applicable to the document failure; (ii) the requirements of the particular section in §§ V through XI of this notice providing the correction method and relief applicable to the document failure; and (iii) the information and reporting requirements of § XII of this notice. The taxpayer claiming the relief has the burden of demonstrating eligibility for the relief and that each of the requirements in the preceding sentence have been met. A taxpayer's eligibility for the relief provided in this notice is subject to examination by the IRS.

## B. Correction of Plans Containing Substantially Similar Document Failures

The relief provided in §§ V through XI of this notice is not available with respect to a plan for which a document failure has been identified and corrected unless, in addition to satisfying the requirements of the applicable sections of this notice, the service recipient takes commercially reasonable steps to: (i) identify all other nonqualified deferred compensation plans that have a document failure that is substantially similar to the document failure initially identified and corrected (regardless of whether the other plan provides deferred compensation for any of the same service providers that participate in the plan with the initially identified and corrected document failure) and (ii) correct all such failures in a manner consistent with this notice.

## C. Relief not Available to Service Providers and Certain Service Recipients Under Examination

Except where specifically noted in this notice, the relief provided in §§ V through XI of this notice is not available for a service provider participating in a nonqualified deferred compensation plan if a federal income tax return of the service provider or a federal tax return of the service recipient is under examination with respect to nonqualified deferred compensation for any taxable year in which the document failure existed. For this purpose, an individual service provider or service recipient is treated as under examination with respect to nonqualified deferred compensation if the individual is under examination with respect to the individual's federal income tax return (for example, Form 1040) for the taxable year. Any other type of service provider or service recipient is treated as under examination with respect to nonqualified deferred compensation if the service provider or service recipient receives written notification (for example, by examination plan, information document request (IDR), or notification of

proposed adjustments or income tax examination changes) from the examining agent(s) specifically citing nonqualified deferred compensation as an issue under consideration. See § XI.D for certain transition relief through December 31, 2011, regarding federal tax returns of non-individual service recipients under examination.

A service provider and service recipient will not fail to qualify for relief, however, merely because the service provider or service recipient becomes under examination with respect to nonqualified deferred compensation after the date of correction, if all of the requirements of this notice for relief are otherwise satisfied and the service provider and the service recipient were not under examination on the date of the correction. For example, assume a document failure exists during 2010 and 2011, but not in any prior years. The date of correction of the document failure is January 1, 2012, at which time the federal tax returns of the service provider and service recipient for 2010 and 2011 are not under examination. Provided that the service recipient and service provider otherwise satisfy the requirements of this notice (including any requirements of inclusion of income, payment of additional taxes, reporting and taking commercially reasonable steps to identify and correct all plans with substantially similar document failures), the document failure will remain eligible for the relief so that for purposes of any subsequent examination of the service provider's or the service recipient's federal tax returns for 2010 and 2011, the failure will be treated as corrected.

D. Relief not Available for Intentional Failures or Listed Transactions

The relief provided in §§ V through XI of this notice applies only to failures to comply with the plan document requirements under § 409A(a) and § 1.409A-1(c) that are inadvertent and unintentional. In addition, the relief provided in this notice is not



available if the failure is directly or indirectly related to participation in any listed transaction under §1.6011-4(b)(2)).

E. Amounts Included in Income as a Condition of Correction

If the applicable section of this notice under which the correction is made requires that the service provider include an amount deferred in income under § 409A(a), the relief provided under such section is conditioned upon (i) the service provider including the amount in income on the appropriate tax return and paying all applicable Federal taxes, including the additional 20% tax under § 409A(a)(1)(B)(i)(II) but not the premium interest tax under § 409A(a)(1)(B)(i)(I), and (ii) the service recipient complying with the information statement reporting requirements set forth in the applicable section of this notice (for example, Form W-2 reporting). Provided that the service provider has actually included the amount in income under § 409A(a) pursuant to the applicable section of this notice and paid the additional tax due on such amount under § 409A(a)(1)(B)(i)(II), the amount included in income will be treated for all subsequent periods as an amount previously included in income for purposes of § 409A(c) and the regulations thereunder.

If the applicable section of this notice under which the correction is made requires that the service provider include an amount deferred in income under § 409A(a), such as 50% of the amount deferred under the plan, the amount deferred to which the income inclusion requirement applies is only the amount deferred to which the corrected plan provision applies, and the calculation of the amount deferred is based upon the plan provision in effect immediately before the correction.

#### F. Date of Correction; Income Inclusion Upon Correction of Multiple Failures

For purposes of this notice, the date of correction of a document failure is the latest of the date on which the correction is adopted, the date on which the correction is effective and the date on which the correction is set forth in writing in one or more documents. Under many sections of this notice the most favorable relief is available only if certain events do not occur within one year following the date of the correction. For purposes of applying this notice, one year following a date means the period beginning on such date and ending on the first anniversary of such date. For example, one year following April 1, 2010, means April 1, 2011.

Special rules apply if two or more document failures that apply to the same deferred amount under a plan are corrected, and two or more of the sections of this notice pursuant to which the corrections are made with respect to that deferred amount require as a condition of the correction that the service provider include a percentage of the amount deferred in income under § 409A. In that situation, if two or more sections of this notice would require a percentage of the amount deferred to be included in income in the same taxable year, the service provider is only required to include in income, and the service recipient is only required to report as income to the service provider, the percentage of the deferred amount required to be included in income under the section of this notice pursuant to which a correction is made with respect to that deferred amount that requires the largest percentage to be included in income for that taxable year. For example, if application of each of two document corrections to the same deferred amount would require that the service provider include 50% of the deferred amount subject to the corrected plan provision in income under § 409A during

the same taxable year as a condition of each correction, the service provider will only be required to include 50% of the deferred amount in income under § 409A (and not 100%).

If, in the situation described in the first sentence of the preceding paragraph, the applicable sections of this notice would require a percentage of the amount deferred to be included in income under § 409A as a condition of correction in two or more taxable years, then, solely for purposes of determining the amount deferred that must be included in income under § 409A as a condition of correction in a taxable year after the first taxable year in which such an inclusion is required as a condition of correction, the service provider may treat two times the amount included in income under § 409A as a condition of correction in a prior taxable year with respect to the amount deferred as previously included in income. For example, assume that an employee is entitled to a payment upon a separation from service that includes any reduction in the level of services provided, payable at the discretion of the employer over a period not to exceed three years. On April 1, 2011, the employer corrects the definition of the term “separation from service” but the employee has a reduction in services on June 1, 2011 (within one year of the correction) so that the employee is required to include in income under § 409A as a condition of correction 50% of the \$100x deferred under the plan, or \$50x. On April 1, 2012, the employer corrects the impermissible discretion with respect to the payment schedule following the permissible payment event. The employee separates from service on August 1, 2012 (within one year of the correction) so that the employee is required to include in income under § 409A as a condition of correction 50% of the amount deferred under the plan subject to the provision. However, solely for

this purpose, the employee is entitled to treat two times the \$50x included in income during 2011, or \$100x, as previously included in income. Assume that the amount deferred under the plan for 2012 subject to the provision is \$150x. Solely for purposes of determining the amount that must be included as a condition of correction, the \$150x is reduced by the \$100x deemed to be previously included in income. Accordingly, the employee must include \$25x (50% x 50x) in income under § 409A as a condition of the second correction.

G. Linked Plans and Stock Rights not Eligible for Relief

Except as specifically provided in § XI.B of this notice, the relief provided under this notice does not apply to a plan to the extent that the document failure is due to the amount deferred under the plan being determined by, or the time or form of payment being affected by, the amount deferred under, or the payment provisions of, one or more other nonqualified deferred compensation plans or one or more qualified plans (as defined in § 1.409A-1(a)(2)). In addition, the relief provided under this notice does not apply to a stock right. For certain relief with respect to a stock right with an exercise price that is less than the fair market value of the underlying shares of stock at the date of grant, see Notice 2008-113, §§ IV.D and V.E.

H. New or Modified Payment Events Required as a Condition of Correction

Many of the corrections available under this notice are conditioned upon the plan being amended to adopt a new or modified payment event for an amount deferred. Nothing in these conditions is intended to prohibit or alter the ability of the plan to be modified at any time to include death, disability or an unforeseeable emergency as a payment event (see § 1.409A-3(i)(3)), or to adopt any of the permissible exceptions to

the rule prohibiting accelerated payments (see § 1.409A-3(j)(4)). In addition, nothing in these conditions is intended to prohibit or alter the ability to provide for a subsequent deferral election under the plan that complies with the requirements of § 409A, provided that the subsequent deferral election requirements apply, both in form and in operation, to the deferred amount based upon the plan provisions after correction under this notice.

#### I. Effect of Correction

If a document failure is eligible for correction under, and is fully corrected in accordance with, the requirements of this § III, the applicable provisions of §§ V through XI of this notice (including any requirement of a service recipient to report, and a service provider to include an amount in income under § 409A(a) and pay all applicable taxes, including an additional tax under § 409A(a)), and the reporting requirements of § XII of this notice, then, except as otherwise provided in this notice, the service recipient will not be required to report, and the service provider will not be required to include in income under § 409A(a), any amount as income under § 409A(a) for any taxable year of the service provider before the taxable year in which the document failure is properly corrected, solely as a result of the document failure being in the written plan during any such earlier year. For purposes of this notice, a plan provision is fully corrected only if the plan provision, and any substantially similar plan provision, has been corrected in accordance with this notice with respect to all deferred amounts under the plan to which the plan provision, or the substantially similar plan provision, applies (other than deferred amounts not subject to § 409A, such as grandfathered amounts as defined under § 1.409A-6).

This notice does not address the application of any other provision of the Code or any other rule of law or tax doctrine, including the constructive receipt doctrine and the economic benefit doctrine, to a nonqualified deferred compensation plan due to the plan provisions either before or as a result of the correction of a plan provision under this notice, or due to the operation of the plan either before or as a result of the correction of a plan provision under this notice.

J. References to the Internal Revenue Code; Certain Terms

For purposes of this notice, references to sections of the Code include references to the regulations and any other applicable guidance thereunder. For purposes of this notice, the term “payment event” refers to an event set forth in the applicable plan, the occurrence of which will result in the payment of compensation, the terms “permissible payment event” or “permissible payment event under § 409A” refer to any event the occurrence of which will result in the payment of compensation that satisfies the requirements of § 409A(a) and § 1.409A-3(a), and the terms “impermissible payment event” or “impermissible payment event under § 409A” refer to any event the occurrence of which will result in the payment of compensation that does not satisfy the requirements of § 409A(a) and § 1.409A-3(a).

As provided by § 1.409A-1(c)(3)(viii), the plan aggregation rules of § 1.409A-1(c)(2)(i) do not apply to the written plan requirements of § 1.409A-1(c)(3), so that deferrals of compensation under an agreement, method, program, or other arrangement that fails to meet the requirements of § 409A solely due to a failure to meet the written plan requirements of § 1.409A-1(c)(3) are not aggregated with deferrals of compensation under other agreements, methods, programs, or other arrangements that

meet such requirements. Accordingly, for purposes of this notice (other than § X and § XIII of this notice, and any references to the correction of an operational failure), the terms “arrangement”, “plan” and “nonqualified deferred compensation plan” refer to a plan or arrangement subject to the requirements of § 409A(a), without reference to the aggregation rules of § 1.409A-1(c)(2)(i).

References in this notice to amounts deferred under a plan in the context of a dollar amount deferred (for example, a requirement to include in income under § 409A(a) a specified percentage of the amount deferred under the plan) refer to the dollar amount determined under applicable guidance. As of January 5, 2010, the applicable guidance for this purpose is Notice 2008-115, 2008-52 IRB 1367, which also permits taxpayers to rely upon the proposed regulations under § 1.409A-4, issued on December 8, 2008 (73 Fed. Reg. 74380). Under this guidance, the amount deferred under a plan is determined as of the last day of the service provider’s taxable year. If an amount is required to be included in income as a condition of a document correction without regard to whether a subsequent event occurs, the amount deferred under the plan is determined as of the last day of the service provider’s taxable year during which the correction is made. If an amount is required to be included in income as a condition of a document correction only if an event occurs within a certain period of time following the document correction (generally one year), the amount deferred under the plan is determined as of the last day of the service provider’s taxable year during which the event occurs.

References in this notice to the application of a corrected plan provision refer to the change in the operation of the plan that results from compliance with the corrected

plan provision in lieu of the pre-correction plan provision. Nothing in this notice is intended to imply that compliance with a corrected plan provision is elective or that a failure to comply with a corrected plan provision would not otherwise be an operational failure under § 409A(a).

#### **IV. APPLICATION OF § 409A(a) TO CERTAIN AMBIGUOUS PLAN TERMS**

##### **A. Terms Providing for a Payment “As Soon as Practicable” or Substantially Similar Language Following a Permissible Payment Event.**

###### **1. Eligibility**

This section applies to a plan provision that sets forth a permissible payment event under § 409A(a) and § 1.409A-3(a), but requires payment “as soon as reasonably practicable” following the permissible payment event, or under conditions substantially similar to as soon as practicable following the permissible payment event.

###### **2. Application of § 409A**

Except as otherwise provided in this § IV.A, a plan provision does not fail to satisfy the requirement to designate a permissible payment event under § 1.409A-3(b), and does not otherwise result in a document failure, merely because it includes a phrase described in § IV.A.1 of this notice. For purposes of § 1.409A-3(d) (rules regarding the timeliness of payments), and the application of the subsequent deferral rules and anti-acceleration rules under § 409A, the permissible payment event under § 409A(a) is treated as the payment date. Thus, if the payment is not made by the later of the end of the service provider’s taxable year in which the permissible payment event occurs or the fifteenth day of the third calendar month following the permissible payment event, the failure to pay will constitute an operational failure unless the service provider can demonstrate that the delay qualifies for a timeliness exception under the regulations



(for example, the payment would have jeopardized the ability of the service recipient to continue as a going concern pursuant to § 1.409A-3(d)). The resulting operational failure may qualify for the correction of operational failures involving late payments pursuant to Notice 2008-113 provided that all other applicable requirements of that notice are met. Notwithstanding the foregoing, if a plan contains a provision otherwise eligible for this section and the service recipient has a pattern or practice of making late payments that do not qualify for a timeliness exception under the regulations, that plan and any other plan of the service recipient containing language similar to that provision will be treated as having failed to set forth a permissible payment date (regardless of whether the other plan provides deferred compensation to any service provider that participates in the plan otherwise eligible for this section).

**B. Permissible Payment Event with no Definition or an Ambiguous Definition**

1. Eligibility

This section applies to a plan provision that designates a payment event but does not define the payment event or has an ambiguous definition of the payment event, if the plan provision could reasonably be interpreted to be compliant with § 409A, but could also reasonably be interpreted to include an impermissible payment event under § 409A (or to not include events that must be included in the definition of a permissible payment event under § 409A). For example, the use of the term “termination of employment” as a payment event in a plan could be interpreted to mean only events that constitute a separation from service for purposes of § 1.409A-3(a)(1), or also to include events that do not constitute a separation from service for purposes of § 1.409A-3(a)(1) (and to exclude events that must be included in the definition of a

separation from service). Similarly, the use of the term “acquisition” of the service recipient as a payment event in a plan could be interpreted to mean only events that constitute a change in control event under § 1.409A-3(a)(5), or also to include events that do not constitute a change in control event under § 1.409A-3(a)(5). If the plan also contains a provision requiring that the term be interpreted to comply with the requirements of § 409A (or a plan provision with the same effect), this section does not apply because the provision is not ambiguous and complies with the requirements of § 409A and § 1.409A-3(a).

If the particular plan provision has been interpreted by the service recipient, on or after January 1, 2009, such that a pattern or practice of the application of a specific interpretation has been established that does not satisfy the requirements of § 409A, the plan provision will no longer be treated as ambiguous either with respect to the plans to which the service recipient has applied the interpretation, or any other plan of the service recipient with substantially similar language (regardless of whether the plans provide deferred compensation to the same service provider or service providers), and therefore will not be eligible for the relief in this § IV.B (but see § V of this notice). Similarly, if the particular plan provision has been interpreted by a court with jurisdiction over the enforcement of the contract, the term will no longer be treated as ambiguous either with respect to the plan at issue in the decision or with respect to any other plan of the service recipient with substantially similar language over which the same court has jurisdiction (regardless of whether the plans provide deferred compensation to the same service provider or service providers). If the definition of the payment event in the plan explicitly includes events that would not constitute a permissible payment event

under § 409A, or explicitly excludes events that are required for the payment event to be treated as a permissible payment event under § 409A, this section does not apply (but see § V of this notice).

## 2. Application of § 409A

Except as otherwise provided in this § IV.B, a payment provision eligible for this section will not result in the plan failing to satisfy the requirements of § 409A(a) and § 1.409A-3(a). If an amount is paid pursuant to the provision in a manner that is not compliant with the requirements of § 409A(a) (or, pursuant to the provision, the plan fails to make a payment of an amount required to be paid to comply with the requirements of § 409A(a)), that payment (or failure to make a payment) may be treated as an operational failure eligible for relief under Notice 2008-113 despite the interpretation of the written plan provision in a manner that does not comply with § 409A(a), provided that the plan is amended in accordance with this section before the end of the service provider's taxable year during which the operational failure is corrected in accordance with Notice 2008-113. Notwithstanding the foregoing, if the facts and circumstances indicate that the service recipient has intentionally used an ambiguous term for a payment event in a plan, the plan and any other plan of the service recipient with the same or substantially similar language (regardless of whether the plans include any of the same service providers) will not be eligible for relief under this section. An amendment satisfies the requirements of this section if the amendment either: (i) adds language requiring that the terms of the plan be interpreted as necessary to comply with the requirements of § 409A(a), or (ii) sets forth explicit definitions of the terms of the plan that comply with the requirements of § 409A(a)

(including by cross-reference to the relevant regulations under § 409A(a)), provided that in either case, except as necessary to satisfy the requirements of § 1.409A-3(a), the amendment may not have the effect of either expanding the definition to include as a payment event any event that was not a payment event under the plan before the amendment, or narrowing the definition to eliminate as a payment event any event that was a payment event under the plan before the amendment. For purposes of applying the previous sentence, it is assumed that no permissible alternative definitions were designated under the plan (for example, a permissible alternative definition of separation from service under § 1.409A-1(h)) other than those designations timely made and explicitly provided in the plan before the correcting amendment.

#### C. Examples

The following examples illustrate the provisions of this § IV.

Example 1 (as soon as reasonably practicable payment provision). Employee A is an employee of Employer who participates in a plan that provides for a lump sum payment “as soon as reasonably practicable” following the earliest of separation from service, death, disability or a change in control of Employer, but does not specify any other time limit for when payment must be completed. The definitions of the payment events under the plan satisfy the requirements of § 1.409A-3(a). A change in control event occurs with respect to Employer on December 1, 2010, resulting in Employee A being entitled to a lump sum payment under the plan.

Conclusion: The plan provision providing for payment “as soon as reasonably practicable” following the payment event does not cause the plan to fail to designate a permissible payment date under § 409A and § 1.409A-3(b). However, if the amount is

not actually paid to Employee A by the later of the end of the 2010 calendar year or the fifteenth day of the third calendar month following the change in control event (in this case, March 15, 2011), and the late payment does not satisfy the requirements of a timeliness exception under the § 409A regulations, the plan will have an operational failure with respect to the payment to Employee A that may be eligible for correction under Notice 2008-113.

Example 2 (ambiguous definition of payment event). Employee B is an employee of Employer whose employment agreement with Employer provides for payment of \$100x upon Employee B's "termination of employment." The employment agreement does not define what events constitute a "termination of employment" and does not include a provision that the terms of the agreement must be interpreted in a manner consistent with § 409A. To date, employees of Employer with substantially similar plan provisions have never reduced their employment to part-time and have only been paid upon an event that constitutes a complete cessation of services to Employer with no anticipated return to providing services to Employer. Consequently, there is no pattern or practice of paying amounts upon payment events that would not constitute separations from service under § 409A or § 1.409A-3(a)(1), or not paying amounts upon payment events that would constitute separations from service under § 409A(a) and § 1.409A-3(a)(1). There is no indication that the term was intentionally left vague. On April 1, 2010, before any amendment of the employment agreement, Employee B ceases providing services to Employer with no anticipated return and Employer determines that Employee B has become entitled to the payment of \$100x. Employer pays Employee B the \$100x on April 1, 2010.

Conclusion: The plan provision providing for payment upon a “termination of employment” will not cause the employment agreement to fail to satisfy the document requirements of § 409A(a) and § 1.409A-3(a) to the extent the term is not interpreted to provide for payment under circumstances that would cause the employment agreement to fail to satisfy the requirements of § 409A(a) and § 1.409A-3(a) in operation. The agreement may be amended at any time to provide either (i) the plan provision must be interpreted to comply with the requirements of § 409A, or (ii) an explicit definition of termination of employment that qualifies as a separation from service under § 1.409A-3(a)(1), provided that in either case the amendment may not have the effect of either expanding the definition to include as a payment event any event that was not a payment event under the plan before the amendment, or narrowing the definition to eliminate as a payment event any event that was a payment event under the plan before the amendment, except as necessary to satisfy the requirements of § 1.409A-3(a)(1) (applied as if no alternative definition of separation from service permitted under § 1.409A-1(h) was designated under the plan other than a designation timely-made and explicitly provided in the pre-correction plan provision). The payment of \$100x on April 1, 2010, will not be an operational failure and will not result in the employment agreement being treated as failing to satisfy the requirements of § 409A(a) and § 1.409A-3(a)(1).

Example 3 (ambiguous definition of payment event): The same facts as in Example 2, except that the employment agreement is between Employer and Employee C. Employee C provided, on average, 40 hours of service to Employer over the 36-month period ending on April 1, 2010. On April 1, 2010, before any amendment of the

agreement, Employee C changes status from an employee to an independent contractor and is expected to provide 20 hours of service per week to Employer, which would not be a separation from service under § 1.409A-3(a)(1). Employer determines that under the agreement Employee C is not entitled to a payment of \$100x because Employee C has not had a separation of service from Employer.

Conclusion: The plan provision providing for payment upon “termination of employment” will not cause the employment agreement to fail to satisfy the document requirements of § 409A(a) and § 1.409A-3(a) to the extent the term is not interpreted to provide for payment under circumstances that would cause the employment agreement to fail to satisfy the requirements of § 409A(a) and § 1.409A-3(a) in operation. The agreement may be amended at any time to provide either (i) that the plan provision must be interpreted to comply with the requirements of § 409A, or (ii) an explicit definition of termination of employment that qualifies as a separation from service under § 1.409A-3(a)(1), provided that the definition does not add a payment event that would not have been a payment event under the pre-correction plan provision, or remove a payment event that would have been a payment event under the pre-correction plan provision, except as necessary to satisfy the requirements of § 1.409A-3(a)(1) applied as if no alternative definition of separation from service permitted under § 1.409A-1(h) was designated under the plan, other than a designation timely made and explicitly provided in the pre-correction plan provision.

## **V. CORRECTION OF IMPERMISSIBLE DEFINITIONS OF OTHERWISE PERMISSIBLE PAYMENT EVENTS**

### **A. Impermissible Definition of Separation from Service**

#### **1. Eligibility**

This section applies to a plan provision that provides for a payment upon an event involving a change in the relationship between the service provider and the service recipient related to the level of services provided by the service provider (for example, a change from full-time to part-time employment), the capacity in which the service provider provides the services to the service recipient (for example, a change in status from an employee to an independent contractor), or the recipient of the services provided by the service provider (for example, a change from employment by one subsidiary to employment by another subsidiary) that does not qualify as a separation from service under § 1.409A-3(a)(1) but is treated as a payment event under the plan. This section also applies to a plan provision that fails to provide for a payment upon an event that is a separation from service under § 1.409A-3(a)(1) (without reference to any permissible alternative definition of separation from service under § 1.409A-1(h) that may be designated under a plan).

## 2. Correction

A plan provision eligible for this section may be corrected in accordance with this section before the date an event occurs that would not be a separation from service under § 1.409A-3(a)(1) but is a payment event under the plan, or the date an event occurs that is a separation from service under § 1.409A-3(a)(1) but is not a payment event under the plan. The plan may be corrected by amending the plan to provide for a payment event that satisfies the requirements of § 1.409A-3(a)(1), provided that the amendment may not have the effect of either expanding the definition to include as a payment event any event that was not a payment event under the plan before the amendment, or narrowing the definition to eliminate as a payment event any event that



was a payment event under the plan before the amendment, except as necessary to satisfy the requirements of § 1.409A-3(a)(1) (without reference to any permissible alternative definition of separation from service under § 1.409A-1(h) that may be designated under a plan). The amendment must be effective immediately. If, within one year following the date of correction, an event occurs that is not a separation from service under § 1.409A-3(a)(1) but would have required payment under the pre-correction plan provision, or that is a separation from service under § 1.409A-3(a)(1) but would not have required payment under the pre-correction plan provision, and results in the corrected plan provision being applied to avoid a payment that would have been due under the pre-correction plan provision, or to make a payment that would not have been due under the pre-correction plan provision, 50% of the amount deferred under the plan to which the pre-correction plan provision would have applied must be included in income under § 409A by the affected service provider in the service provider's taxable year within which the event occurs.

#### B. Impermissible Definition of a Change in Control Event

##### 1. Eligibility

This section applies to a provision of a plan of a service recipient that provides, for a service provider with respect to whom that service recipient satisfies the requirements of § 1.409A-3(i)(5)(ii) (identification of relevant corporations), for a payment upon the sale of some or all of the equity or assets of the service recipient (other than specifically identified assets or a specifically identified type of assets), or a change in the effective control of the service recipient, but that includes events that would not qualify as a change in control event under § 1.409A-3(a)(5). For this

purpose, with respect to a parent corporation or other parent entity, a payment event based upon the sale of an identified subsidiary constitutes the sale of a specified asset, and accordingly employees of the parent corporation would not be eligible for the relief provided in this section (though employees of the subsidiary corporation may be eligible for the relief). In addition, the requirement of a public offering of securities, securing of financing, or similar event does not constitute a sale of some or all of the equity or assets of a service recipient, or a change in effective control of a service recipient, for purposes of this section.<sup>1</sup>

## 2. Correction

A plan provision eligible for this section may be corrected in accordance with this section before the date an event occurs that is not a change in control event under § 1.409A-3(a)(5) but is a payment event under the plan. The plan may be corrected by amending the plan to provide for a change in control event that satisfies the requirements of § 1.409A-3(a)(5), provided that the amendment may not cause an event that was not a payment event under the original terms of the plan to become a payment event under the plan. The amendment must be effective immediately. If, within one year following the date of correction, a transaction occurs that is not a change in control event under § 1.409A-3(a)(5) and results in the corrected plan provision being applied to avoid a payment that would have been due under the pre-correction plan provision, 25% of the amount deferred under the plan to which the pre-correction plan provision applies must be included in income under § 409A(a) by the

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<sup>1</sup> However, until further guidance is issued, for purposes of identifying and correcting failures eligible for this section, taxpayers may apply the guidance provided in Section III.G of the Preamble to the final regulations issued under § 409A regarding application of change in control events by analogy to partnerships.

affected service provider in the service provider's taxable year within which the event occurs.

C. Impermissible Definition of Disability

1. Eligibility

This section applies to a plan provision that provides for a payment event related to the service provider's illness or other incapacity and resulting inability to perform the service provider's duties as a service provider to the service recipient, but that does not qualify as disabled within the meaning of §§ 409A(a)(2)(A)(ii) and 409A(a)(2)(C) and §§ 1.409A-3(a)(2) and 1.409A-3(i)(4).

2. Correction

A plan provision eligible for this section may be treated by the service recipient and service provider as not failing to satisfy the requirements of § 409A(a) and § 1.409A-3(a)(2) before an event occurs that is not a disability within the meaning of §§ 409A(a)(2)(A)(ii) and 409A(a)(2)(C) and § 1.409A-3(a)(2) but is a payment event under the plan. The plan may be corrected by amending the plan provision either to remove the payment event or to define the payment event as a disability within the meaning of §§ 409A(a)(2)(A)(ii) and 409A(a)(2)(C) and § 1.409A-3(a)(2) . The amendment must be effective immediately. The plan may be corrected in the same manner after an event occurs that is not a disability within the meaning of §§ 409A(a)(2)(A)(ii) and 409A(a)(2)(C) and § 1.409A-3(a)(2) but is a payment event under the plan, but only if the entire amount, if any, paid under the plan due to the event would be eligible for correction under Notice 2008-113 if the plan were treated as having

had a compliant plan provision regarding the disability payment, and the payment is treated as an operational failure and is corrected under Notice 2008-113.

#### D. Examples

The following examples illustrate the provisions of this § V. For each example, assume that the employee and employer are eligible to correct the impermissible provision under § III of this notice at all relevant times.

Example 1 (impermissible definition of separation from service). Employer consists of one parent corporation and two 80%-owned subsidiaries. Employee D is an employee of the parent corporation who participates in a plan providing for \$100x when Employee D separates from service from the parent corporation, defined to be a separation from service under § 1.409A-3(a)(1) except that the term also includes a transfer from employment by the parent corporation to employment by either of the subsidiaries. On January 10, 2011, Employee D transfers from the parent corporation to a subsidiary corporation.

Conclusion: Because the plan provision was not corrected before Employee D transferred from the parent corporation to a subsidiary corporation, regardless of whether Employee D is paid \$100x, the plan fails to satisfy the requirements of § 409A(a) and § 1.409A-3(a)(1) for 2011 and all previous years in which the plan contained that plan provision, and Employee D must include amounts in income and pay the additional taxes under § 409A(a) accordingly.

Example 2 (impermissible definition of separation from service). The same facts as in Example 1, except that the plan is with Employee E, instead of Employee D, and Employee E does not transfer employment on January 10, 2011. On March 1, 2011,

Employer amends the plan to remove a transfer from the parent corporation to either of the subsidiaries as a separation from service payment event under the plan. On July 1, 2011, Employee E transfers employment from the parent corporation to one of the subsidiary corporations.

Conclusion: Employer and Employee E corrected the provision before Employee E transferred from the parent corporation to one of the subsidiary corporations, but Employee E transferred from the parent corporation to a subsidiary corporation within one year following the date of correction. Provided that Employer does not pay Employee E any amount under the plan due to the event, Employer reports 50% of the amount deferred under the plan to which the pre-correction plan provision applies as an amount includible in income under § 409A(a) for 2011 on the Form W-2, Box 1 and Box 12 using Code Z, for Employee E, and Employee E includes 50% of the amount deferred in income under § 409A(a) and pays all applicable Federal taxes, including the additional 20% tax on such amount (but not the additional premium interest tax), Employee E will not be required to include in income under § 409A(a) any further amount solely as a result of the pre-correction plan provision.

Example 3 (impermissible definition of separation from service). The same facts as in Example 2, except that the plan is with Employee F, instead of Employee E, and Employee F does not transfer employment on July 1, 2011. On May 1, 2012, Employee F transfers employment from the parent corporation to one of the subsidiary corporations.

Conclusion: Employer and Employee F corrected the provision before Employee F transferred from the parent corporation to one of the subsidiary corporations, and

Employee F did not transfer from the parent corporation to a subsidiary corporation within one year following the date of correction. Provided that Employer does not pay Employee E any amount under the plan due to the event, Employee F will not be required to include any amount in income under § 409A(a) solely as a result of the pre-correction plan provision.

Example 4 (impermissible definition of a change in control payment event).

Employee G is an employee of Employer. Employee G participates in a plan that provides for a payment of \$100x to Employee G upon the earliest of Employee G attaining age 65, death, or a “change in control” of Employer. The definition of “change in control” under the plan does not satisfy the definition of a change in control event under § 1.409A-3(a)(5) solely because the definition includes an initial public offering of more than 30% of the stock of Employer. On February 15, 2011, at which time Employee G is age 50, Employer amends the definition of change in control under the plan to delete the occurrence of an initial public offering of Employer stock as a “change in control” of Employer and does not add any other change in control events that would cause a payment under the plan, regardless of whether the additional event is permissible under § 1.409A-3(a)(5). Employer has an initial public offering of 33% of Employer stock on July 1, 2011.

Conclusion: Employer and Employee G corrected the provision before the initial public offering, but the initial public offering occurred within one year following the date of correction. Provided that Employer does not pay Employee G any amount under the plan due to the event, Employer reports 25% of the amount deferred under the plan to which the pre-correction plan provision applied as an amount includible in income under

§ 409A(a) for 2011 on the Form W-2, Box 1 and Box 12 using Code Z, for Employee G, and Employee G includes 25% of the amount deferred in income under § 409A(a) and pays all applicable Federal taxes, including the additional 20% tax on such amount (but not the additional premium interest tax), Employee G will not be required to include in income under § 409A(a) any further amount solely as a result of the pre-correction plan provision.

Example 5 (impermissible definition of a disability provision). Employee H is an employee of Employer who participates in a plan that provides for payments of \$100x to Employee H upon the earlier of Employee H's separation from service (as defined under § 1.409A-1(h)), death or disability. The definition of disability requires only that the employee be unable to continue for a period of six months his or her duties in the employee's position of employment at the time of the disability. On July 1, 2011, Employee H suffers an illness that qualifies as a disability under the plan but does not qualify as a disability under § 1.409A-3(a)(2). On July 15, 2011, Employee H receives a payment of \$100x. On August 1, 2011, the plan is amended so that the definition of disability under the plan would qualify as a disability under § 1.409A-3(a)(2). On September 15, 2011, Employer and Employee H treat the \$100x as an operational failure under Notice 2008-113 and Employee H repays Employer the \$100x and meets all the other requirements of Notice 2008-113.

Conclusion: Because the plan provision defining disability was corrected and all payments received under the plan due to the impermissible payment event were treated as operational failures and corrected under Notice 2008-113, Employer and Employee

H are not required to treat the plan as failing to satisfy the requirements of § 409A(a) and § 1.409A-3(a)(2) solely due to the plan provision defining disability.

Example 6 (impermissible definition of a disability provision). The same facts as in Example 6, except that the plan is between Employer and Employee J, and on July 1, 2011, Employee J does not suffer an illness but instead is injured in a manner that qualifies as a disability under the plan and as a disability under § 1.409A-3(a)(2).

Conclusion: Because the injury to Employee J qualifies as both a payment event under the plan and a disability under § 1.409A-3(a)(2), Employee J must be paid \$100x. A failure to pay the \$100x would be an operational failure that may be eligible for correction under Notice 2008-113.

## **VI. CORRECTION OF IMPERMISSIBLE PAYMENT PERIODS FOLLOWING A PERMISSIBLE PAYMENT EVENT**

### **A. Payment Periods of Longer than 90 Days Following a Permissible Payment Event**

#### **1. Eligibility**

This section applies to a plan provision that provides that payment will be made following a permissible payment event under § 409A, but designates the period immediately following such payment event during which payment may be made or commenced as later than 90 days and earlier than 366 days following such payment event.

#### **2. Correction**

A plan provision eligible for this section may be corrected by amending the plan to either remove the period following the permissible payment event during which payment may be made or commenced, or to set forth a period immediately following the permissible payment event that complies with § 409A(a) and § 1.409A-3(b) (so that it is



a period not exceeding 90 days and the service provider does not have a right to designate the taxable year of payment). If the plan is not so amended before the occurrence of the permissible payment event with respect to any service provider, but is so amended within a reasonable time thereafter, the plan may be treated as not failing to comply with § 409A(a) and § 1.409A-3(b) (so that the amount is paid within 90 days of the payment event and the service provider does not have a right to designate the taxable year of payment) for the affected service provider solely due to the impermissible payment periods, provided that upon the occurrence of the permissible payment event the plan complies in operation with § 1.409A-3(b) with respect to the affected service provider, and 50% of the amount deferred under the plan to which the pre-correction plan provision applied is included in income under § 409A(a) by the affected service provider in the service provider's taxable year within which the permissible payment event occurs.

**B. Payment Periods Following a Permissible Payment Event Dependent Upon the Service Provider Completing Certain Employment-Related Actions**

**1. Eligibility**

This section applies to a plan provision that provides for payment upon a permissible payment event under § 409A, but conditions the payment on an employment-related action of the service provider such as the execution and submission of a noncompetition agreement, a nonsolicitation agreement, or a release of claims.

**2. Correction**

A plan provision eligible for this section may be corrected in accordance with this section before the date an event occurs that would be a permissible payment event

under § 409A to which the provision applies. The plan may be corrected by amending the plan to remove the ability of the service provider to delay or accelerate the timing of the payment as a result of the service provider's actions; provided, however, that if the plan provides for payment (subject to the service provider's action) within a designated period following the permissible payment event under § 409A that complies with § 1.409A-3(b), the amendment must provide for payment only on the last day of such designated period, and if the plan does not provide for payment (subject to the service provider's action) within a designated period following the permissible payment event under § 409A that complies with § 1.409A-3(b), the amendment must provide for payment only upon a fixed date either 60 or 90 days following the occurrence of the permissible payment event. The amendment may not otherwise change the time or form of payment.

### C. Examples

The following examples illustrate the provisions of this § VI. For each example, assume that the employee and employer are eligible to correct the impermissible provision under § III of this notice at all relevant times.

Example 1 (Payment Period in Excess of 90 Days Following Permissible Payment Event). Employee K is an employee of Employer whose employment agreement entitles Employee K to \$100x upon a separation from service (defined to comply with § 1.409A-1(h)), payable within 180 days following the separation from service and the exact timing within the 180 days is in the discretion of Employer. On February 1, 2011, Employee K has a separation from service from Employer. Employer pays Employee K \$100x on March 1, 2011, provides Employee K no election regarding

the timing of the payment and amends the employment agreement to comply with § 1.409A-3(b) within a reasonable period of time following February 1, 2011.

Conclusion: Employer paid Employee K \$100x within 90 days following Employee K's separation from service, Employer provided Employee K no election regarding the timing of the payment and Employer amended the employment agreement to comply with § 1.409A-3(b) within a reasonable period of time following Employee K's separation from service. Provided that Employer reports 50% of the amount deferred under the plan to which the pre-correction plan provision applied as an amount includible in income under § 409A(a) for 2011 on the Form W-2, Box 1 and Box 12 using Code Z, for Employee K, and Employee K includes the amount in income under § 409A(a) and pays all applicable Federal taxes, including the additional 20% tax on such amount (but not the additional premium interest tax), Employee K will not be required to include in income under § 409A(a) any further amount solely as a result of the plan provision providing a 180-day payment period.

Example 2 (impermissible payment period following a permissible payment event). The same facts as in Example 1, except that the agreement is between Employer and Employee L, and Employee L does not separate from service on March 1, 2011. On March 15, 2011, Employer amends Employee L's employment agreement to provide for payment within 90 days of Employee L's separation from service with the exact timing within the 90 days at the discretion of the employer. On April 1, 2011, Employee L has a separation from service from Employer and Employer pays Employee L \$100x on April 15, 2011, without providing Employee L any election regarding the timing of the payment.

Conclusion: Because Employer corrected Employee L's employment agreement before Employee L's separation from service, Employee L will not be required to include any amount in income under § 409A(a) solely as a result of the 180-day payment period under the pre-correction plan provision.

Example 3 (impermissible payment provision making timing of payment after a permissible payment event dependent upon employee action). Employee M is an employee of Employer whose employment agreement entitles Employee M to \$100x upon a separation from service (defined to comply with § 1.409A-1(h)). Employee M's employment agreement provides that the amount is payable within 90 days of Employee M's separation from service, but not until Employee M executes and submits a release of claims and any period during which Employee M may revoke the release pursuant to applicable law has expired before the end of the 90-day period. If Employee M fails to execute the release the amount is forfeited. On April 1, 2011, Employer and Employee M amend Employee M's employment agreement to provide for payment of the amount on the 90<sup>th</sup> day following Employee M's separation from service provided that Employee M has executed and submitted a release of claims and the statutory period during which Employee M is entitled to revoke the release of claims has expired on or before that 90<sup>th</sup> day. Employee M has a separation from service with Employer on June 1, 2011 and Employee M executes and submits a release of claims on June 30, 2011. Employer pays Employee \$100x on August 30, 2011.

Conclusion: Because Employer and Employee M corrected the amendment before Employee M's separation from service, and because Employer paid the amount

in compliance with the amended plan provision, Employee M is not required to include any amount in income under § 409A solely due to the pre-correction plan provision.

Example 4 (payment provision making timing of payment after a permissible payment event dependent upon employee action). Employee N is an employee of Employer whose employment agreement entitles Employee N to \$100x upon a separation from service (defined to comply with § 1.409A-1(h)). Employee N's employment agreement provides that the amount is payable upon Employee N executing and submitting a release of claims and after any period during which Employee N may revoke the release pursuant to applicable law has expired, but the agreement does not include any time limit for payment. On April 1, 2011, Employer and Employee N amend Employee N's employment agreement to provide for payment of \$100x on the 60<sup>th</sup> day following Employee N's separation from service, provided that Employee N has executed and submitted a release of claims and the statutory period during which Employee N is entitled to revoke the release of claims has expired on or before that 60<sup>th</sup> day. Employee N has a separation from service with Employer on June 16, 2011. Employee N executes and submits a release of claims on July 1, 2011. Employer pays Employee N \$100x on August 15, 2011.

Conclusion: Because Employer and Employee N corrected the provision before Employee N's separation from service, Employee N is not required to include any amount in income under § 409A(a) solely due to the pre-correction plan provision.

## **VII. CORRECTION OF CERTAIN IMPERMISSIBLE PAYMENT EVENTS AND PAYMENT SCHEDULES**

### **A. Plans with Permissible and Impermissible Payment Events under § 409A**

#### **1. Eligibility**

This section applies to a plan provision that, with respect to a deferred amount, provides both for one or more permissible payment events under § 409A, and one or more impermissible payment events under § 409A. This section does not apply to a payment event the occurrence of which is in the discretion of the service recipient, such as the right of the service recipient to use its discretion to pay some or all of an amount upon a different payment event (for example, service recipient discretion to terminate and liquidate the plan), or the service provider, such as the right of the service provider to an accelerated payment upon an agreement to forfeit a portion of the amount deferred (a haircut provision).

## 2. Correction

With respect to a service provider, a plan provision eligible for this section may be corrected in accordance with this section before the date a payment event that is impermissible under § 409A has been elected as a payment event by the service provider participating in the plan or otherwise applies to an amount deferred by the service provider. The plan may be corrected by amending the plan to remove such impermissible payment event. For this purpose, an impermissible payment event will not be treated as elected until the service provider's election is irrevocable under the terms of the plan. (Note that although this relief is available for a service provider who has not elected an impermissible payment event even though other service providers under a substantially similar plan have elected an impermissible payment event, eligibility for any correction under this notice for the service providers who have elected an impermissible payment event generally requires that the service recipient take commercially reasonable steps to identify and correct all substantially similar language

in other plans sponsored by the service recipient, including with respect to those who have not elected an impermissible payment event. See § III.B of this notice).

With respect to a service provider, to the extent one or more impermissible payment events under a plan provision eligible for this section has been elected by the service provider, or otherwise has become applicable to the service provider's deferred amount, a plan provision eligible for this section may be corrected in accordance with this section before the date any of the impermissible payment events occurs. The plan may be corrected by amending the plan to remove such impermissible payment events. The amendment must be effective immediately, and if any of the impermissible payment events that would have required payment under the pre-correction plan provision occur within one year following the date of correction, 50% of the amount deferred under the plan to which pre-correction plan provision applies must be included in income under § 409A(a) by the affected service provider for the service provider's taxable year within which the event occurs.

#### B. Plans with Only Impermissible Payment Events under § 409A

##### 1. Eligibility

This section applies to a plan provision that, with respect to a deferred amount, provides for payment only upon one or more impermissible payment events under § 409A and does not include any permissible payment events under § 409A.

##### 2. Correction

A plan provision eligible for this section may be corrected in accordance with this section before the date one or more of the impermissible payment events occurs to which the provision applies. The plan may be corrected by amending the plan to

remove the provision providing for the impermissible payment events before any impermissible payment event occurs, and replacing that provision with a provision providing for payment upon the later of the service provider's separation from service (as defined under § 1.409A-1(h) without reference to any permissible alternative definition that may be designated in the plan) and the sixth anniversary of the date of correction. In addition, the affected service provider must include 50% of the amount deferred under the plan to which the pre-correction plan provision applies in income under § 409A(a) in the service provider's taxable year within which the date of correction occurs.

### C. Certain Impermissible Alternative Payment Schedules

#### 1. Eligibility

This section applies to a plan provision that, with respect to a deferred amount, provides for more than one time or form of payment upon the occurrence of a single type of permissible payment event under § 409A in a manner that fails to satisfy the requirements of § 409A(a) and § 1.409A-3(c).

#### 2. Correction

To the extent the multiple forms of payment relate to the occurrence of a service provider's voluntary and involuntary separation from service (as defined under § 1.409A-1(n)), a plan provision eligible for this section may be corrected in accordance with this section before the date a separation from service occurs that could result in the impermissible multiple forms of payment for that service provider. The plan may be corrected by amending the plan to provide that the form of payment upon a voluntary separation from service will be the same form of payment that the pre-correction plan



provision provided for upon an involuntary separation from service (as defined under § 1.409A-1(n)), subject to the requirements of § 409A(a)(2)(B)(i), if applicable (the six-month delay requirement). The amendment must be effective immediately, and if a service provider has a voluntary separation from service within one year following the date of correction which results in the corrected plan provision being applied to avoid a form of payment that would have been due under the pre-correction plan provision, 50% of the amount deferred under the plan to which the pre-correction plan provision applies must be included in income under § 409A(a) by the affected service provider in the service provider's taxable year within which the event occurs.

To the extent the multiple forms of payment result from an alternative payment schedule relating to some factor other than whether a service provider's separation from service is voluntary or involuntary, a plan provision eligible for this section may be corrected in accordance with this section before the date a payment event occurs that could result in the impermissible multiple forms of payment for that service provider. Until that time, the plan may be corrected by amending the plan to remove forms of payment, in accordance with the next sentence, until the remaining forms of payment no longer cause the plan to fail to satisfy the requirements § 409A and § 1.409A-3(c). In determining which of two forms of payment should be removed, the remaining form of payment must be the form of payment resulting in, or potentially resulting in, the latest final payment date, and if two forms of payment result in, or potentially result in, the same latest final payment date, the form of payment commencing, or potentially commencing, at the latest possible date, and if those two dates are the same, the form of payment generally anticipated to result in the amount deferred being paid at later

dates,. The amendment must be effective immediately, and if a payment event corrected under this provision occurs within one year following the date of correction, 50% of the amount deferred under the plan to which the pre-correction plan provision applies must be included in income under § 409A(a) by the affected service provider in the service provider's taxable year within which the event occurs. If a form of payment has no possibility of applying to a service provider because the service provider is not eligible and can never become eligible, or is no longer eligible and cannot again become eligible, for such a form of payment, that form of payment is not required to be removed from the plan with respect to that service provider and the service recipient and service provider may treat the plan as not failing to satisfy the requirements of § 409A(a) and § 1.409A-3(c) with respect to that service provider merely because of the inclusion of that form of payment in the plan.

D. Impermissible Service Provider or Service Recipient Discretion with Respect to a Payment Schedule Following a Permissible Payment Event (Including Subsequent Deferral Elections)

1. Eligibility

This section applies to a plan provision that provides a service provider or a service recipient with discretion to change the time or form of payment of an amount due under the plan following a permissible payment event, causing the plan to fail to satisfy the requirements of § 409A(a), § 1.409A-2(b) or § 1.409A-3(j). However, this section does not apply to a plan provision that provides a service provider or service recipient discretion to change or modify payment events, such as the discretion to terminate the plan.

2. Correction

A plan provision to which this section applies that provides a default time or form of payment that would be in effect if the service provider or service recipient did not exercise its discretion to change the time or form of payment, and that does not provide any discretion to change the time or form of payment after the payment event has occurred, will not be treated as failing to meet the requirements of § 409A(a) and § 1.409A-3(a), § 1.409A-3(j) or § 1.409A-2(b) if the service provider and service recipient do not exercise their discretion, or revoke any discretion exercised and the revocation occurs more than one year before the payment event occurs. However, if a service provider to the same service recipient participates in a plan with a substantially similar provision, and either the service provider or service recipient exercises its discretion under the plan to change the time and form of payment under the plan and does not revoke that exercise of discretion at least one year before the payment event occurs, then, to be eligible to correct that plan provision under this section the service recipient is required to take commercially reasonable steps to identify and correct all substantially similar provisions in other plans, including substantially similar provisions with respect to which the discretion has not been exercised by the service provider or service recipient or whose exercises of that discretion have been revoked.

In all other cases, a plan provision eligible for this section may be corrected in accordance with this section before the date a payment event occurs that is the subject of the plan provision eligible for this section. The plan may be corrected by amending the plan in accordance with this section.

To the extent that the plan has a default time or form of payment that would be in effect if the service provider or service recipient did not exercise its discretion to change

the time or form of payment, the plan may be amended to remove the service provider's or service recipient's discretion to change the time or form of payment. If the plan does not have a default time or form of payment that would be in effect if the service provider or service recipient did not exercise its discretion to change the time or form of payment, the plan may be amended to remove the service provider's or service recipient's discretion to change the time or form of payment, and to provide that the time or form of payment will be that potential time or form of payment under the terms of the plan in place immediately prior to the amendment that would result in the latest final payment date, and if two forms of payment result in, or potentially result in, the same latest final payment date, the form of payment commencing, or potentially commencing, at the latest possible date, and if those two dates are the same the form of payment generally resulting in the amount deferred being paid at later dates. In each case the amendment must be effective immediately. If a payment event to which the correction applies occurs within one year following the date of correction (including where a service provider or service recipient had exercised its discretion before the correction and had revoked the discretion within one year of the occurrence of the payment event), 50% of the amount deferred under the plan to which the pre-correction plan provision applies must be included in income under § 409A(a) by the affected service provider in the service provider's taxable year within which the event occurs.

#### E. Impermissible Service Recipient Discretion to Accelerate Payment Events

##### 1. Eligibility

This section applies to a plan provision that does not comply with § 1.409A-3(j)(4) that provides a service recipient with the discretion to accelerate and make a

payment regardless of whether a payment event has occurred, such as the discretion to terminate the plan and immediately pay all amounts deferred, and thus does not comply with § 409A(a) and § 1.409A-3(a) or § 1.409A-3(j).

2. Correction

With respect to a service provider, a plan provision eligible for this section may be corrected in accordance with this section before the earlier of the date the service recipient exercises its discretion to accelerate a payment under the plan and such discretion is irrevocable, or the date a payment has been made under the plan pursuant to the exercise of discretion. The plan may be corrected by amending the plan to remove the service recipient's discretion to accelerate the payment or to otherwise make the acceleration permissible under § 1.409A-3(j)(4).

F. Impermissible Reimbursement or In-Kind Benefit Provisions

1. Eligibility

This section applies to a plan provision that provides for a reimbursement or in-kind benefits subject to § 409A that does not comply with the requirements of § 409A(a) and § 1.409A-3(i)(1)(iv).

2. Correction

A plan provision eligible for this section may be corrected in accordance with this section before the date an event occurs that would result in the service provider becoming eligible to receive a reimbursement or in-kind benefits subject to § 409A. The plan may be corrected by amending the plan to provide for reimbursements or in-kind benefits that satisfy the requirements of § 409A(a) and § 1.409A-3(i)(1)(iv), provided that any amendment required to satisfy the requirements of § 1.409A-3(i)(1)(iv)(A)(3)

must cause the amount eligible for reimbursement or in-kind benefits to be allocated pro rata to the number of years during which the service provider may be eligible to receive the reimbursements or in-kind benefits (which may not be amended as part of the plan correction). If the pre-correction reimbursement or benefits were available for the service provider's or other individual's lifetime, the period for purposes of the proration requirement must be established based upon that service provider's or individual's life expectancy under reasonable actuarial assumptions. If the pre-correction reimbursement or benefits were available for a period ending with an event, the period for purposes of the proration requirement must be established based upon reasonable assumptions and may not be less than three years. The amendment must be effective immediately, and if an event occurs that would have made the service provider eligible for payment of reimbursements or in-kind benefits under the pre-correction plan provision within one year following the date of correction and results in the corrected plan provision being applied to avoid or reduce the availability or payment of reimbursements or in-kind benefits, 50% of the amount deferred under the plan to which the pre-correction plan provision applies must be included in income under § 409A in the service provider's taxable year within which the event occurs.

#### G. Examples

The following examples illustrate the provisions of this § VII. For each example, assume that the employee and employer are eligible to correct the impermissible provision under § III of this notice at all relevant times.

Example 1 (plan with permissible and impermissible payment events). Employee P is an employee of Employer whose employment agreement entitles Employee P to

\$100x payable upon the earlier of separation from service or an initial public offering of Employer stock. On January 1, 2011, Employer and Employee P amend the employment agreement to remove the payment event related to an initial public offering, so that the amount is payable solely upon Employee P's separation from service. An initial public offering of Employer stock occurs on September 1, 2011.

Conclusion: Employer and Employee P corrected the employment agreement before the initial public offering of Employer stock, but the initial public offering occurred within one year following the date of correction. Provided that Employer reports 50% of the amount deferred under the plan to which the pre-correction plan provision applied as an amount includible in income under § 409A(a) for 2011 on the Form W-2, Box 1 and Box 12 using Code Z, for Employee P, and Employee P includes 50% of the amount deferred in income under § 409A and pays all applicable Federal taxes, including the additional 20% tax on such amount (but not the premium interest tax), Employee P will not be required to include any further amounts in income under § 409A(a) solely as a result of the pre-correction plan provision.

Example 2 (plan with permissible and impermissible payment events). Employee Q is an employee of Employer whose employment agreement entitles Employee Q to \$100x payable upon the earlier of separation from service or an initial public offering of Employer stock. On July 1, 2011, Employer and Employee Q amend the employment agreement to remove the payment event related to an initial public offering, so that the amount is payable solely upon Employee Q's separation from service. An initial public offering of Employer stock occurs on September 1, 2012.

Conclusion: Employer and Employee Q corrected the employment agreement more than one year before the initial public offering of Employer stock. Provided that Employer does not pay Employee Q any amount pursuant to this plan provision due to the initial public offering, Employee Q will not be required to include any amount under § 409A(a) solely as a result of the pre-correction plan provision.

Example 3 (plan with only impermissible payment events). Employee R is an employee of Employer who participates in a plan providing for payment of \$100x to a service provider upon the service provider's child enrolling in an institution providing post-secondary education. On August 15, 2011, Employee R's child enrolls in an institution providing post-secondary education.

Conclusion: Because Employee R's child enrolled in an institution providing post-secondary education before the provision was corrected, regardless of whether Employee R is paid \$100x, the plan is not eligible for correction, and Employee R must include amounts in income and pay the additional taxes under § 409A(a) accordingly.

Example 4 (plan with only impermissible payment events). Employee S is an employee of Employer who participates in a plan providing for payment of \$100x to a service provider upon the service provider's child enrolling in an institution providing post-secondary education. On October 1, 2011, Employer and Employee S amend the plan to replace the provision providing for payment upon a service provider's child enrolling in an institution providing post-secondary education with a provision providing for payment upon the later of the service provider's separation from service\_(as defined under § 1.409A-1(h) without reference to any permissible alternative definition that may be designated in a plan) and October 1, 2017.



Conclusion: Employer and Employee S corrected the plan provision before a child of Employee S enrolled in an institution providing post-secondary education. Provided that Employer reports 50% of the amount deferred under the plan to which the pre-correction plan provision applied for Employee S as an amount includible in income under § 409A(a) for 2011 on the Form W-2, Box 1 and Box 12 using Code Z, for Employee S, and Employee S includes 50% of the amount deferred in income under § 409A(a) and pays all applicable Federal taxes, including the additional 20% tax on such amount (but not the additional premium interest tax), Employee S will not be required to include any further amount in income under § 409A(a) solely due to the pre-correction plan provision.

Example 5 (plan with impermissible alternative payment schedules). Employee T is an employee of Employer whose employment agreement with Employer provides for payment of \$100x in the form of a lump sum payment if Employee T has an involuntary separation from service with Employer, and \$100x in the form of ten annual installments if Employee T has a voluntary separation from service with Employer. On October 1, 2011, Employer amends the agreement to replace the provision providing for payment in the form of installments upon a voluntary separation from service with a provision providing for payment in the form of a lump sum upon a voluntary separation from service. Employee T has a voluntary separation from service with Employer on June 1, 2015.

Conclusion: Because Employee T and Employer corrected the plan provision before Employee T separated from service with Employer, and Employee T separated from service more than one year following the date of correction, Employee T will not be

required to include any amount under § 409A(a) solely due to the pre-correction plan provision.

Example 6 (plan with impermissible alternative payment schedules). All of Employer 's employees are classified as either Level 1 or Level 2 employees, depending upon the position in which they work and the division at which they work. Employee U is an employee of Employer whose employment agreement with Employer provides for a payment of \$100x in the form of a lump sum if Employee U separates from service at a time that Employee U is a Level 1 employee, or for payment of \$100x in the form of ten annual installments if Employee U separates from service at a time that Employee U is a Level 2 employee. On October 1, 2011, Employer amends the agreement to replace the provision providing for payment in the form of a lump sum payment upon a separation from service at the time Employee U is a Level 1 employee with a provision providing for payment in the form of ten annual installments upon Employee U's separation from service (regardless of Employee U's classification at the time). Employee U has a separation from service with Employer on June 1, 2012 at which time Employee U is a Level 2 employee.

Conclusion: Employer and Employee U corrected the plan provision before Employee U separated from service, and Employee U separated from service within a year of the correction. Provided that Employer pays \$100x to Employee U in ten annual installments, Employer reports 50% of the amount deferred under the plan to which the pre-correction plan provision applied as an amount includible in income under § 409A(a) for 2012 on the Form W-2, Box 1 and Box 12 using Code Z, for Employee U, and Employee U pays all applicable Federal taxes, including the additional 20% tax on such

amount (but not the additional premium interest tax), Employee U will not be required to include any further amount in income under § 409A(a) solely as a result of the pre-correction plan provision.

Example 7 (plan with impermissible service provider or service recipient discretion with respect to payment schedules following permissible payment events).

Employee V is an employee of Employer who participates in a plan providing for payment of \$100x to Employee V upon Employee V attaining age 65 in the form of ten annual installments, unless Employer otherwise determines in its sole discretion to pay the amount in the form of a lump sum payment. On February 1, 2011, Employer amends the plan with Employee V to remove Employer's discretion to change the time or form of payment, so that the amount is payable in the form of ten annual installments. Employee V attains age 65 on July 1, 2012.

Conclusion: Because Employer and Employee V corrected the provision before Employee V attained age 65, and because more than one year passed after the date of correction before Employee V attained age 65, Employee V will not be required to include an amount in income under § 409A(a) solely due to the pre-correction plan provision.

Example 8 (plan with impermissible service provider or service recipient discretion with respect to payment schedules following permissible payment events).

Employee W is an employee of Employer who participates in a plan providing for payment of \$100x to Employee W upon Employee W attaining age 65 in the form of a lump sum payment or annual installments not to exceed ten years, determined at the sole discretion of Employer. On February 1, 2011, Employer amends the plan with

Employee W to remove Employer's discretion to change the time or form of payment upon Employee W attaining age 65, so that the amount is payable in the form of ten annual installments upon Employee W attaining age 65. Employee W attains age 65 on January 2, 2012.

Conclusion: Employer and Employee W corrected the plan provision before Employee W attained age 65, but less than one year before Employee W attained age 65. Provided that Employer reports 50% of the amount deferred under the plan to which the pre-correction plan provision applied as an amount includible in income under § 409A(a) for 2012 on the Form W-2, Box 1 and Box 12 using Code Z, for Employee W, and Employee W includes 50% of the amount deferred in income under § 409A(a) and pays all applicable Federal taxes, including the additional 20% tax on such amount (but not the additional premium interest tax), Employee W will not be required to include any further amount in income under § 409A(a) solely as a result of the pre-correction plan provision.

Example 9 (plan with impermissible service provider or service recipient discretion with respect to payment schedules following permissible payment events).

Employee X is an employee of Employer who participates in a plan providing for payment of \$100x to Employee X upon Employee X's separation from service, provided that Employer may delay that payment for up to three years if certain cash flow targets are not met. On July 1, 2011, Employer amends the plan to remove its discretion to delay payment, and to remove any delay on payment due to a failure to meet prescribed cash flow targets. It replaces those provisions with a provision stating that payment will be delayed to the extent a payment would jeopardize the ability of the service recipient

to continue as a going concern, but only until such time as the making of the payment would not have such effect. Employee X separates from service on January 1, 2013.

Conclusion: Because Employer and Employee X corrected the plan provision more than one year before Employee X separated from service, Employee X will not be required to include an amount in income under § 409A(a) solely as a result of the pre-correction plan provision. Note that this correction required not only the removal of the discretion, but also the provision that payment would be delayed if certain cash flow targets were not met. The addition of the language providing for a delay if the payment would jeopardize the ability of the service recipient to continue as a going concern is not required as a condition of the correction, but may be added because the provision complies with the operational provisions of § 1.409A-3(d) (permitting delayed payments under certain circumstances, regardless of whether such circumstances are described in the plan).

Example 10 (plan permitting impermissible subsequent deferral election).

Employee Y is an employee of Employer who participates in a plan providing for payment at age 65. The plan further provides that an employee may elect at any time before 30 days before reaching age 65 to defer the payment for a period of at least 12 months. Employee Y never makes a subsequent deferral election under the plan, attains age 65 on March 1, 2011, and is paid the amount deferred under the plan.

Conclusion: Because Employee Y was only allowed to apply Employee Y's discretion to further defer the payment before the payment event occurred, and has never applied the subsequent deferral election provision, Employee Y will not be

required to include an amount in income under § 409A(a) solely due to the impermissible subsequent deferral plan provision.

Example 11 (plan permitting impermissible subsequent deferral election). The same facts as in Example 10, except that the participant is Employee Z who makes a subsequent deferral election to defer the payment to age 70 on June 1, 2011, when Employee Z is age 63. On July 1, 2011, Employee Z revokes the subsequent deferral election.

Conclusion: Because Employee Z was only allowed to apply Employee Z's discretion to further defer the time and form of payment before the payment event occurred, and revoked the subsequent deferral election more than one year before the payment event occurred (attaining age 65), Employee Z will not be required to include an amount in income under § 409A solely due to the pre-correction plan provision.

Example 12 (plan permitting impermissible subsequent deferral election). The same facts as in Example 10, except that the participant is Employee AA who makes a subsequent deferral election to defer the payment to age 67 on March 1, 2010, when Employee AA is age 63 and two months. Employee AA revokes the subsequent deferral election on September 1, 2011, when Employee AA is age 64 and eight months. Employee AA attains age 65 on January 1, 2012, and is not paid the amount deferred under the plan.

Conclusion: Because Employee AA exercised Employee AA's discretion to make a subsequent deferral election under the plan, but did not revoke the subsequent deferral election more than one year before the payment event occurred (Employee AA attaining age 65), and the plan provision was not corrected before Employee AA

attained age 65, Employee AA must include the amount deferred under the plan in income under § 409A(a).

Example 13 (plan permitting impermissible subsequent deferral election). The same facts as in Example 10, except that the participant is Employee BB who makes a subsequent deferral election to defer the payment to age 68 on March 1, 2010, when Employee BB is age 63 and six months. On June 1, 2011, when Employee BB is age 64 and eight months, the plan is amended to remove the subsequent deferral election provision and Employee BB's election is revoked.

Conclusion: Employee BB exercised Employee BB's discretion to make a subsequent deferral election under the plan and did not revoke the subsequent deferral election more than one year before the payment event occurred (Employee BB attaining age 65), but the plan provision was corrected before Employee BB attained age 65. Provided that Employer reports 50% of the amount deferred under the plan to which the pre-correction plan provision applied as an amount includible in income under § 409A(a) for 2011 on the Form W-2, Box 1 and Box 12 using Code Z, for Employee BB, and Employee BB includes 50% of the amount deferred in income under § 409A(a) and pays all applicable Federal taxes, including the additional 20% tax on such amount (but not the additional premium interest tax), Employee BB will not be required to include any further amount in income under § 409A(a) solely as a result of the pre-correction plan provision.

Example 14 (plan with impermissible service recipient discretion to accelerate payment events). Employee CC is an employee of Employer who participates in a plan that provides for payment of \$100x to Employee CC upon Employee CC's separation

from service, unless Employer otherwise elects in its sole discretion to pay all or a portion of such amount on an earlier date. On January 1, 2011, Employer exercises its discretion to accelerate payment to Employee CC and makes a \$50x lump sum payment on March 1, 2011. On July 1, 2011, Employer amends the plan to remove its discretion to pay all or a portion of the remaining amount on an earlier date, and to provide only that it may exercise discretion to terminate and pay amounts under the plan in compliance with 1.409A-3(j).

Conclusion: Because Employer exercised its discretion and made a payment before the correction of the plan provision, regardless of whether Employee CC returns the payment the plan fails to meet the requirements of § 409A(a) for periods during which the plan contained the provision, and Employee CC must include amounts in income and pay the additional taxes under § 409A(a) accordingly.

Example 15 (plan with impermissible service recipient discretion to accelerate payment events). Employee DD is an employee of Employer who participates in a plan that provides for payment of \$100x to Employee DD upon Employee DD's separation from service, unless Employer otherwise elects in its sole discretion to pay all or a portion of such amount on an earlier date. On March 1, 2011, Employer amends the plan to remove its discretion to pay all or a portion of such amount on an earlier date, and to provide only that it may exercise discretion to terminate and pay amounts under the plan in compliance with 1.409A-3(j). Employee DD has a separation from service on March 15, 2011.

Conclusion: Because Employer and Employee DD corrected the plan provision before Employer exercised its discretion, Employee DD will not be required to include



any amount in income under § 409A(a) solely as a result of the pre-correction plan provision.

Example 16 (plan with impermissible reimbursement or in-kind benefits provision). Employee EE is an employee of Employer who participates in a plan providing that Employee EE is eligible for reimbursement of country club dues for five years, up to an aggregate of \$100x, following Employee EE's separation from service with Employer after attaining age 65 and ten years of service. Employee EE attained age 65 and ten years of service during 2009. On April 1, 2011, Employer amends the plan to specify that Employee EE is only eligible for reimbursement of up to \$20x during each of the five years following the Employee EE's separation from service. Employee EE has a separation from service with Employer on December 15, 2011.

Conclusion: Employer and Employee EE corrected the plan provision before Employee EE separated from service with Employer but less than one year passed between the date of correction and Employee EE's separation from service. Provided that Employer reports 50% of the amount deferred under the plan to which the pre-correction plan provision applied as an amount includible in income under § 409A(a) for 2011 on the Form W-2, Box 1 and Box 12 using Code Z, for Employee EE, and Employee EE includes 50% of the amount deferred in income under § 409A(a) and pays all applicable Federal taxes, including the additional 20% tax on such amount (but not the additional premium interest tax), Employee EE will not be required to include any further amount in income under § 409A(a) solely as a result of the pre-correction plan provision.

Example 17 (plan with impermissible reimbursement or in-kind benefits provision). The same facts as in Example 16, except that the plan is with Employee FF and Employee FF has a separation from service with Employer on October 1, 2012.

Conclusion: Because Employer and Employee FF corrected the plan provision before Employee FF separated from service with Employer, and because more than one year passed between the date of correction and Employee FF's separation from service, Employee FF will not be required to include any amount in income under § 409A(a) solely as a result of the pre-correction plan provision.

#### **VIII. CORRECTION OF FAILURE TO INCLUDE SIX-MONTH DELAY OF PAYMENT FOR SPECIFIED EMPLOYEES**

##### 1. Eligibility

This section applies to a plan that fails to include a provision providing for a six-month delay of payment for a specified employee, to the extent required by § 409A(a)(2)(B)(i) and § 1.409A-1(c)(3).

##### 2. Correction

A plan eligible for this section may be corrected in accordance with this section before the date an event occurs that would be subject to the requirements of § 409A(a)(2)(B)(i) by amending the plan to add the requirements set forth under § 409A(a)(2)(B)(i) and to further provide that an amount payable under the plan that is subject to the requirements of § 409A(a)(2)(B)(i) may not be paid before the later of (i) 18 months following the date of correction, or (ii) six months following the date of the payment event. The amendment must be effective immediately. Provided that the requirements of this section are otherwise met, the correction will not constitute a subsequent change in the time or form of payment under § 1.409A-2(b). If a service

provider subject to the requirements of § 409A(a)(2)(B)(i) participates in the plan that is so amended and has a separation from service within one year following the date of correction that results in the corrected plan provision being applied to avoid a payment that would have been due under the pre-correction plan provision, 50% of the amount deferred under the plan to which the pre-correction plan provision applies (and that thus is delayed due to the amendment) must be included in income under § 409A(a) by the service provider in the service provider's taxable year within which the separation from service occurs.

### 3. Example

Employee GG is the chief executive officer of Employer, a corporation whose stock is publicly traded. Employee GG participates in a plan providing for a payment of \$100x in ten annual installments of \$10x commencing immediately when Employee GG separates from service from Employer but the plan does not include the six-month delay in payment as required by § 409A(a)(2)(B)(i). On September 1, 2011, Employer and Employee GG amend the plan to include the requirements under § 409A(a)(2)(B)(i) and to provide further that no amount will be payable before March 1, 2013 (18 months after September 1, 2011). Employee GG has a separation from service with Employer on December 1, 2011.

Conclusion: Employer and Employee GG corrected the plan provision before Employee GG separated from service, but Employee GG has a separation from service within one year following the date of correction, which results in a payment being delayed that would have been due under the pre-correction plan provision. Provided that Employer does not pay Employee GG any amount under the plan until March 1,

2013 (except, as provided by the plan due to death, disability (as defined under § 1.409A-3(i)(4)) or a permissible acceleration under § 1.409A-3(j)(4)), Employer reports as an amount includible in income under § 409A(a) for 2011 on the Form W-2, Box 1 and Box 12 using Code Z, for Employee GG 50% of the amount deferred under the plan that is delayed due to the correction, and Employee GG includes 50% of the amount deferred in income under § 409A(a) and pays all applicable Federal taxes, including the additional 20% tax on such amount (but not the additional premium interest tax), Employee GG will not be required to include any further amount in income under § 409A solely as a result of the pre-correction plan provision.

## **IX. CORRECTION OF PROVISIONS PROVIDING FOR IMPERMISSIBLE INITIAL DEFERRAL ELECTIONS**

### **1. Eligibility**

This section applies to a plan provision that provides for an initial election to defer compensation that does not comply with § 409A(a) and § 1.409A-2(a). Notwithstanding the foregoing, this section does not apply to any plan provision that is eligible for correction under § VII.D of this notice. Accordingly, this section generally applies to plan provisions providing elections to defer compensation that would not otherwise be deferred compensation, and not elections as to the time and form of payment of a deferred amount.

### **2. Correction**

A service provider is not required to include an amount in income under § 409A(a) solely because a plan includes a provision that provides for an initial election to defer compensation that does not comply with § 409A(a) and § 1.409A-2(a), if the provision has not been applied by the service provider or the service recipient with

respect to the service provider. If the service provider or service recipient takes the action necessary to make an election under the provision before the applicable deadline under § 1.409A-2(a), the provision will be treated as applied on the date of such applicable deadline unless the service provider or service recipient has revoked the election before the applicable deadline under the regulations. If the service provider or service recipient takes the action necessary to make an election under the provision after the applicable deadline under § 1.409A-2(a), the provision will be treated as applied on the date the necessary action is taken. Note that if a substantially similar provision under a plan has been applied by another service provider to the same service recipient, or by the same service recipient with respect to another service provider, to be eligible for correction the service recipient would be required to take commercially reasonable steps to identify and correct the provisions in all such plans. See § III.B of this notice.

A plan provision that is eligible for correction under this section that has been applied may be corrected in accordance with this section provided that the correction is made no later than the end of the service provider's second taxable year immediately following the taxable year during which occurs the applicable deadline for making an initial deferral election under § 409A(a) and § 1.409A-2(a). The plan may be corrected by amending the plan to remove the ability to make the impermissible initial deferral election, provided that any amounts that were not paid during one or more of the service provider's taxable years due to the impermissible initial deferral election are corrected in accordance with the provisions of Notice 2008-113 (including any income inclusion under § 409A(a) required by the applicable provision of Notice 2008-113) .

Notwithstanding § III of this notice, this correction will not have any retroactive effect on amounts deferred under the same provision in any previous year if the deferral was not corrected under this section for such previous year by the applicable deadline under this section, so that the plan provision will remain a plan document failure for the previous year and any resulting deferral will remain an operational failure.

### 3. Examples

Example 1 (plan permitting impermissible initial deferral election). Employee HH is an employee of Employer who participates in an annual bonus plan under which employees are awarded bonuses based on a calendar year of service, payable on March 15 of the following year. The bonus plan is not a performance-based compensation arrangement under § 1.409A-2(a)(8). The bonus plan provides that employees may make initial deferral elections to defer the bonus until separation from service (as defined under § 1.409A-1(h)), provided that the election is made no later than June 30 of the year in which the bonus is earned. Employee HH is not a new participant in the plan so that the applicable deadline under 1.409A-2(a) for the deferral of the bonus earned during 2012 (the 2012 annual bonus) is December 31, 2011. On November 1, 2011, Employee HH submits an election form electing to defer the 2012 annual bonus. On December 31, 2011, Employee HH revokes the deferral election for the 2012 annual bonus.

Conclusion: Because Employee HH revoked the impermissible deferral election on or before the applicable deadline for a permissible deferral election under §1.409A-2(a), the plan provision permitting the impermissible initial deferral election has not been

applied. Accordingly, Employee HH will not be required to include any amount in income under § 409A(a) for the 2012 annual bonus solely due to the plan provision.

Example 2 (plan permitting impermissible initial deferral election). The same facts as in Example 1, except that the participant is Employee JJ who also makes an election to defer the 2012 annual bonus on November 1, 2011, but does not revoke her deferral election for the 2012 annual bonus on or before December 31, 2011. On May 15, 2012, the deferral election provision is removed from the plan and Employee JJ's deferral election for the 2012 annual bonus is revoked.

Conclusion: Because Employee JJ did not revoke the impermissible deferral election until after the deadline for making an initial deferral election under § 1.409A-2(a), the provision has been applied. Because Employee JJ took the actions necessary to make the election on or before the applicable deadline under § 1.409A-2(a) for making an initial deferral election, the provision is treated as applied on the date of the deadline, December 31, 2011. Because the provision was removed from the plan before December 31, 2013, and because no amount had failed to be paid due to the application of the impermissible deferral election, no operational failure occurred, and Employee JJ will not be required to include an amount in income under § 409A(a). Note that to be eligible to make this correction, Employer would be required to take commercially reasonable steps to identify and remove any substantially similar provision in any plan of the Employer, including plans of other service providers and including plans under which the plan provision permitting an impermissible initial deferral election had not been applied. Note further that the correction of the provision with respect to the 2012 annual bonus will have no effect on the impermissible deferral of an annual

bonus or other amounts earned in 2011 or any earlier year, so that, for example, if a 2011 annual bonus were earned by Employee JJ and Employee JJ made an impermissible deferral election with respect to the 2011 bonus that was not corrected in accordance with this section, that amount would be subject to income inclusion and the additional taxes under § 409A(a) for the taxable year 2011 (the year in which Employee JJ's right to the bonus was first no longer subject to a substantial risk of forfeiture), regardless of whether Employee JJ's deferral election with respect to the 2011 annual bonus was subsequently revoked and Employee JJ was paid the bonus on or before March 15, 2012.

Example 3 (plan permitting impermissible initial deferral election). Employee KK is an employee of Employer who has been an employee of Employer for several years. Employee KK has been eligible for, but has not participated in, a plan under which an employee may elect to defer all or part of his salary to be payable at separation from service (as defined in § 1.409A-1(h)), provided that the election may only be applied to salary earned on or after the first day of the second month immediately subsequent to the date the employee makes an election to defer. For example, under the plan terms an election made in April may only apply to salary earned for June 1 or later. On April 15, 2011, Employee KK makes an election to defer 10% of any salary earned on or after June 1, 2011. The deferral election remains in effect through December 1, 2012, at which time Employer removes the provision from the plan and revokes Employee KK's election. Employer treats the failure to pay Employee KK 10% of Employee KK's salary earned from June 1, 2011, through December 1, 2012, as operational failures under Notice 2008-113 and corrects the failures during 2012 (treating the salary that would



have been paid during 2011 as a correction made during the taxable year after the taxable year of the operational failure, and the salary that would have been paid during 2012 as a correction made during the taxable year in which the operational failure occurred).

Conclusion: Because Employee KK took the actions necessary to make a deferral election under the plan provision before the applicable deadline for making an initial deferral election under 1.409A-2(a) (in this case, December 31, 2010), the provision is treated as applied on the date the actions were taken (April 15, 2011). Because Employer removed the plan provision on or before December 31, 2012, and revoked Employee KK's election and corrected the resulting operational failures under Notice 2008-113, Employee KK will not be required to include an amount in income under § 409A(a) solely as a result of the pre-correction plan provision. However, Employee KK may still be required to include an amount in income under § 409A(a) as a condition of correction under Notice 2008-113. Note that to be eligible to make this correction, Employer would be required to take commercially reasonable steps to identify and remove any substantially similar provision in any plan of the Employer, including plans of other service providers and including plans under which the plan provision permitting an impermissible initial deferral election had not been applied.

## **X. AMENDMENT PERIOD FOLLOWING A SERVICE RECIPIENT'S INITIAL ADOPTION OF A PLAN**

### **1. Eligibility and Correction**

This section applies to a plan provision that is eligible for correction under any other section of this notice, but only to the extent that the document failure is corrected no later than the later of the end of the calendar year in which, or the 15<sup>th</sup> day of the

third calendar month following, the date the first legally binding right to deferred compensation arose under that plan and all other plans of the service recipient that would be treated as the same plan under § 1.409A-1(c)(2) if a single service provider participated in all of such plans (for example, all nonaccount balance plans of the service recipient). For purposes of determining whether a service recipient has an additional plan to the one under which the legally binding right has first arisen, a taxpayer may disregard any plan not subject to § 409A (for example, a grandfathered plan as defined under § 1.409A-6) and any plan under which all amounts have been paid or forfeited such that the service recipient did not retain any obligation to make a payment under that plan at the time the legally binding right arises under the plan at issue. Provided that the plan is corrected in accordance with the applicable section of this notice by such deadline (including the requirement that all commercially reasonable steps to identify and correct any other plans with substantially similar language is met), any amounts paid that would not have been paid under the corrected plan provision if that provision had always been the plan provision are treated as operational failures and corrected under Notice 2008-113 by the end of the calendar year in which the document failure is corrected (and any amount not paid that would have been paid under the corrected plan provision if that provision had always been the plan provision are treated as operational failures and corrected under Notice 2008-113 by the end of the calendar year in which the document failure is corrected), the applicable section of this notice may be applied without applying any requirement in that section that an amount be includible in income under § 409A(a) if an event occurs within one year following the date of correction.

## 2. Example

On April 1, 2011, Employer establishes its first nonqualified deferred compensation plan that is a nonaccount balance plan. Employee LL, an employee of Employer, becomes eligible for a payment under the plan of \$100x by Employer upon the earlier of an initial public offering of Employer stock or separation from service. On September 15, 2011, Employer and Employee LL amend the plan in accordance with § VII.A of this notice to delete the payment event related to an initial public offering of Employer stock, so that the plan provides that the amount will only be paid upon Employee LL's separation from service. Because the amendment occurred by the end of the calendar year in which the first legally binding right arose under any nonaccount balance plan of Employer, Employer and Employee LL may apply the provisions of § VII.A of this notice without applying any requirements that Employee LL include an amount in income if certain events occur within one year following the date of correction. Accordingly, Employee LL will not be required to include any amount in income under § 409A(a) as a result of the pre-correction plan provision regarding payment upon an initial public offering even if there is a public offering of Employer stock on or before December 15, 2012 (provided that if there had been an initial public offering of Employer stock before September 15, 2011, and Employee LL had been paid an amount under the plan, the payment would be required to be treated as an operational failure and corrected under Notice 2008-113 by December 31, 2012).

## **XI. TRANSITION RELIEF**

### A. Correction of Document Failures Described in this Notice

#### 1. Relief for Corrections Made on or Before December 31, 2010

Solely for purposes of applying this notice, if a plan fails to satisfy the requirements of § 409A(a) in a manner that is eligible for correction under this notice, and the plan is corrected in accordance with this notice on or before December 31, 2010, the plan may be treated as having been corrected on January 1, 2009, for purposes of applying the relief provided under the applicable section of this notice, and any requirement of an income inclusion under § 409A as a condition of the relief will not apply (for example, an income inclusion under § 409A due to an event occurring within one year following the date of correction), provided that any payment made before December 31, 2010 that would not have been made under the amended provision (or any payment not made before December 31, 2010 that would have been made under the amended provision) is treated as an operational failure and corrected under Notice 2008-113 on or before December 31, 2010. Nothing in this section is intended to modify the requirements of Notice 2008-113, so that, for example, a service provider that was an insider with respect to a service recipient may be required to include an amount in income under § 409A to satisfy the requirements of Notice 2008-113 and be eligible for relief under this section. See Notice 2008-113, § VII.

## 2. Examples

The following examples illustrate the provisions of this § XI.A. For each example, assume that the employee and employer are eligible to correct the impermissible provision under § III of this notice.

Example 1. Employee MM is an employee of Employer who participates in a plan that provides for a payment of \$100x upon a separation from service that was defined to include transition from employee to independent contractor status and to

exclude any reduction in the hours of employment. In all other respects, the plan complies with § 409A(a). On July 1, 2009, Employee MM became an independent contractor and was paid \$100x. On April 1, 2010, Employer amends the plan in accordance with § V.A of this notice to define separation from service as a separation from service in accordance with § 1.409A-1(h) (designating no permissible alternative definition of separation from service under § 1.409A-1(h)).

Conclusion: Because Employer and Employee MM amended the plan before December 31, 2010 in accordance with § V.A of this notice, if the payment of \$100x is treated as an operational failure and corrected in accordance with the provisions of Notice 2008-113 on or before December 31, 2010, the plan may be treated as corrected under § V.A without application of the requirement of income inclusion under § 409A if an event occurs that would have been treated as a separation from service under the pre-correction provision but not under the corrected plan provision (or an event occurs that would not have been treated as a separation from service under the pre-correction plan provision but would be so treated under the corrected plan provision) within one year following the date of correction.

Example 2. Same facts as Example 1, except that the plan is with Employee NN, who reduced her hours from 40 hours per week to 10 hours per week on September 1, 2009 and was not paid any amount.

Conclusion: Because Employer and Employee NN amended the plan between Employer and Employee NN before December 31, 2010, in accordance with § V.A of this notice, if the failure to pay \$100x during 2009 is treated as an operational failure and corrected in accordance with the provisions of Notice 2008-113 on or before

December 31, 2010, the plan may be treated as corrected under § V.A without application of the requirement of an income inclusion under § 409A if an event occurs that would have been treated as a separation from service under the pre-correction provision but not under the corrected plan provision (or an event occurs that would not have been treated as a separation from service under the pre-correction provision but would be so treated under the corrected plan provision) within one year following the date of correction.

Example 3. The same facts as in Example 1, except that the plan is with Employee PP who continues providing services of 40 hours per week for Employer at all relevant times and received no payment.

Conclusion: For purposes of this notice the plan may be treated as corrected under § V.A without application of the requirement of an income inclusion under § 409A if an event occurs that would have been treated as a separation from service under the pre-correction provision but not under the corrected plan provision (or an event occurs that would not have been treated as a separation from service under the pre-correction provision but would be so treated under the corrected plan provision) within one year following the date of correction.

## B. Correction of Impermissible Provisions Linking Nonqualified Deferred Compensation Plans

### 1. Relief for Corrections Made on or Before December 31, 2011

This section applies to a nonqualified deferred compensation plan if the amount deferred under the plan is determined by, or the time or form of payment is affected by, the amount deferred under, or the payment provisions of, another nonqualified deferred compensation plan such that one or both of the plans fails to satisfy the requirements of

§ 409A(a). Provided that the plans are corrected in accordance with this section on or before December 31, 2011, the plans will not be treated as failing to satisfy the requirements of § 409A(a) solely due to the effect of the linkage between the two plans (so that one or both plans may continue to fail to satisfy the requirements of § 409A(a) due to a failure unrelated to the linkage between the two plans, in which case that failure would need to be addressed separately if eligible for correction under this notice). To correct under this section, the time or form of payment under the two plans must be made identical. For this purpose, any permissible payment event under § 409A that is a payment event under either plan must be retained. If the two plans contain the same permissible payment events under § 409A, but the payment events are defined differently, the amended payment event for the two plans must be the narrower definition (meaning the definition resulting in the smaller scope of events that would constitute payment events). If the two plans contain the same permissible payment event under § 409A, but the schedule of payments following the payment event are different, the amended schedule of payments must be the payment schedule resulting in, or potentially resulting in, the latest final payment date, and if two payment schedules result in, or potentially result in, the same latest final payment date, the payment schedule commencing, or potentially commencing, at the latest possible date, and if those two dates are the same the payment schedule generally resulting in the amount deferred being paid at later dates. If any amounts have been paid under one or more of the plans in a manner that would not have been consistent with the amended payment provisions had those payment provisions been the payment provisions since January 1, 2009, or have failed to be paid in a manner that would not have been consistent with the

amended payment provisions, the payments must be treated as operational failures and corrected under Notice 2008-113 on or before December 31, 2011 to be eligible for the relief under this section.

## 2. Example

Employee QQ is an employee of Employer. Employee QQ participates in a nonqualified deferred compensation plan that is a nonaccount balance plan providing for ten annual installments beginning at the earlier of separation from service or a change in control of Employer, with a change in control of Employer defined to include only a sale of the majority of the stock of Employer. The amount payable under the nonaccount balance plan is offset by the amount deferred under a nonelective account balance plan providing for a lump sum payment at the earliest of death, disability, unforeseeable emergency, change in control of Employer (defined to include all permissible change in control events under §1.409A-3(i)(5)) or separation from service. The plan fails to meet the requirement of designating a permissible payment event under § 1.409A-3(a)(1) due to the linkage between the plans because, for example, a contribution to the nonelective account balance plan would reduce the deferred amount under the nonaccount balance plan, causing an amount previously deferred under the nonaccount balance plan to become payable at the different times and forms of payment applicable under the nonelective account balance plan. The plans are amended on or before December 31, 2011, so that both plans provide payment upon the earliest of a change of control of Employer (defined to include only a sale of the majority of the stock of the employer), a separation from service, death, disability or unforeseeable emergency, and provide that a payment upon a change of control of



Employer or a separation from service will be made in ten annual installments beginning on the date of the payment event, and that a payment upon death, disability or unforeseeable emergency will be made as a lump sum payment on the date of the payment event.

Conclusion: Provided that any payments that were made before the amendment of the plan that would not have been made if the amended provision had been the payment provision under the plan on and after January 1, 2009, or any failures to make payments that would have been due before the amendment of the plan if the amended provision had been the payment provision under the plan on and after January 1, 2009, are treated as operational failures and corrected under Notice 2008-113 on or before December 31, 2011, Employee QQ and Employer may treat the two plans as not failing to satisfy the requirements of § 409A(a) solely due to the effect of the linkage of the two plans on the time or form of payment of deferred amounts under the plans.

C. Correction of Payment Schedules Determined by the Timing of Payments Received by the Service Recipient

1. Relief for Corrections Made on or Before December 31, 2011

If a nonqualified deferred compensation plan contains a payment provision that would satisfy the requirement for a fixed schedule of payments under §1.409A-3(i)(1)(iii) but for a failure to satisfy either one or both of the conditions set forth in §1.409A-3(i)(1)(iii)(C) or (D), the payment provision will not be treated as causing the plan to fail to be a fixed schedule of payments if the plan is amended to satisfy such conditions on or before December 31, 2011, and any payments made under the plan that would not have been made if the amended provision had been the payment provision under the plan since January 1, 2009, or any failures to make payments that would have been due

before the amendment of the plan if the amended provision had always been the payment provision under the plan, are treated as operational failures and corrected under Notice 2008-113 on or before December 31, 2011.

## 2. Example

Employee RR is an employee of Employer who participates in a nonqualified deferred compensation plan under which Employee RR is entitled to a payment of 20% of the amounts collected on any outstanding accounts receivable for which Employee RR was the primary contact at the time of Employee RR's separation from service, to the extent such amounts are collected on or before the third anniversary of Employee RR's separation from service. The accounts receivable arise from bona fide and routine transactions in the ordinary course of business of Employer. Employee RR does not at any time have effective control of Employer, of any customer from whom the accounts receivable are due, or of the collection of any of the accounts receivable. Employee RR separated from service on March 1, 2008. On February 1, 2009, Employee RR received a payment of 20% of the amount collected on the identified accounts receivable through December 31, 2008. The plan satisfies all of the requirements of § 1.409A-3(i)(1)(iii) except § 1.409A-3(i)(1)(iii)(D), the requirement that the payment schedule provide an objective nondiscretionary schedule under which the payments will be made to the service provider. On October 1, 2009, Employee RR and Employer amend the agreement to provide that each January 15 Employer will pay Employee RR an amount equal to 20% of the amounts collected on the identified accounts receivable during the previous calendar year. Because the payment to Employee RR on February 1, 2009, would not have failed to satisfy the operational requirements of § 409A(a) had

the amended payment provision been the payment provision of the plan since January 1, 2009, the payment is not required to be treated as an operational failure and corrected under Notice 2008-113. Employee RR and Employer may treat the plan as not failing to have a fixed schedule of payments for purposes of § 409A(a) for all periods prior to the amendment.

D. Service Recipients Under Examination for Returns Covering Periods Beginning on or Before December 31, 2011

Solely for purposes of applying § III.C of this notice, for corrections made on or before December 31, 2011, a non-individual service recipient that is under examination for periods beginning on or before December 31, 2011, will only be treated as under examination with respect to any specific document failure that has been identified as an issue in the examination (including any other plan of the service recipient with a substantially similar document failure). Therefore, for any document failure that has not yet been specifically identified, the requirements that the non-individual service recipient not be under examination with respect to the plan will be treated as satisfied and the document failure may be eligible for correction under the applicable section of this notice provided that all other eligibility requirements are met. For this purpose, a document failure will be treated as specifically identified in an examination of a federal tax return for a taxable year beginning before January 1, 2009, if the plan provision is identified as a provision that will have resulted in a document failure if the provision was not amended before the beginning of the first taxable year beginning on or after January 1, 2009.

## **XII. INFORMATION AND REPORTING REQUIREMENTS**

### **A. Information and Reporting Required for Correction of a Document Failure**

A service recipient described in any of §§ V through XI of this notice must attach to its timely-filed (including extensions) original federal income tax return for its taxable year in which it corrects the failure, a statement entitled “§ 409A Document Correction under § [INSERT APPROPRIATE SECTION(S)] of Notice 2010-6” setting out the information required by § XII.B of this notice. This statement must also be attached to the service recipient’s timely-filed (including extensions) original federal income tax return for the service recipient’s taxable year subsequent to the taxable year in which the failure was corrected, but only to the extent that a service provider is required to include an amount in income during such subsequent year to be eligible for the relief under 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) 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 corrects such failure) for the calendar year in which it corrects such failure, and for the subsequent calendar year to the extent the service provider is required to include an amount in income during such subsequent year to be eligible for relief under this notice, a service recipient described in any of §§ V through XI of this notice must provide to each such service provider a statement entitled “§ 409A Document Correction under § [INSERT APPROPRIATE SECTION(S)] of Notice 2010-6” setting out the information required by § XII.C of this notice. A service provider who is relying on the relief provided in §§ V through XI of this notice for a failure to comply with § 409A(a) must

attach to the service provider's timely-filed (including extensions) original federal income tax return for the year in which such failure was corrected the information required by § XII.D of this notice. This information must also be attached to the service provider's timely-filed (including extensions) original federal income tax return for the year subsequent to the year in which the failure was corrected, but only if the service provider is required to include an amount in income during that year to be eligible for the relief in this notice. In addition, each taxpayer relying on the relief provided in any of §§ V through XI 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. For purposes of this section, a section of this notice refers to each separate section of this notice, such that § VI.A and § VI.B are separate sections, and includes any use of the transition relief in § XI.

**B. Attachment to Service Recipient Tax Return for Failures Described in §§ V through XI of this Notice**

The service recipient must attach a statement to its return setting out the following information for each failure described in any of §§ V through XI of this notice:

(1) The name and taxpayer identification number of each service provider affected by the document failure. If the same or a substantially similar document failure has occurred for multiple service providers, the information required in §§ XII.B.(2) and (3) of this notice may be supplied only once for each such document failure, provided that the identification of each service provider affected by the document failure references such information.

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

(3) A statement that the document failure is eligible for the correction under the terms of this notice and identifying the section of this notice under which the document failure is corrected, that the service recipient has taken all actions required and otherwise met all requirements for such correction as of the last day of the service recipient's taxable year in which the correction is made, and also as of the last day of any subsequent taxable year of the service recipient during which an amount is required to be included in income under § 409A by a service provider as part of the correction, and providing the date of correction and the date of any event causing the inclusion of an amount in income under § 409A by the affected service provider.

(4) For each failure described in §§ V through XI of this notice, the amount involved in each document failure, and to the extent applicable, the amount reported by the service recipient as includible in income under § 409A(a) as part of the correction and the percentage of the amount involved in each document failure required to be included in income under § 409A(a) as part of the correction.

C. Information to be Provided to Service Provider for Failures Described in §§ V through XI of this Notice

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 through XI of this notice with respect to such failure:

(1) A statement that the service provider is entitled to the relief provided in §§ V through XI of this notice (identifying the applicable section of this notice under which the document failure is corrected) 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 corrected and also to the extent applicable, any subsequent taxable year in which an amount is included in income under § 409A by the service provider as part of the correction.

(2) The information described in § XII.B.(1) through (4) of this notice, but only to the extent that the information relates to a deferred amount of that service provider.

**D. Attachment to Service Provider Tax Return for Failures Described in §§ V through XI of this Notice**

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. If a service provider has included an amount in income to be eligible for relief under this notice, and that inclusion in income occurs in a year subsequent to the year the plan was corrected, the service provider must include the statement with the return for the year of the correction as well as the return for the year of income inclusion.

**XIII. MODIFICATIONS TO NOTICE 2008-113 AND NOTICE 2008-115**

A. The following sections are added as §§ III.K and III.L of Notice 2008-113:

**"K. 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. The service provider will only be required to pay the service recipient the net amount received after any withholding to the extent the service recipient has made a tax correction (e.g., an adjustment made on Form 941-X, Adjusted Employer's QUARTERLY Federal Tax Return or Claim for Refund) to recover the amount of taxes withheld on the amount erroneously paid. For purposes of this notice, a correction made by the service recipient to recover Federal or state taxes withheld on the amount erroneously paid shall be considered repayment by the service provider of an amount equal to the amount of taxes for which a tax correction is made by the service recipient. Alternatively, in lieu of repayment, the service recipient may reduce the service provider's compensation that otherwise would have been paid on or before the 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 the provision of a loan to the service provider or 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.

L. Determination of Amount Erroneously Paid or Amount Erroneously Deferred and the Date an Amount was Otherwise Payable

Generally if an amount has been erroneously paid to a service provider, the amount must be repaid by the service provider to the service recipient to qualify for the relief. For this purpose, if the amount erroneously paid to the service provider was paid in the form of property (such as stock), the amount that must be repaid equals the fair market value of the property at the time of the erroneous payment. Any difference between the fair market value of the property at the time of the erroneous payment and the fair market value of the property at the time of the repayment is treated as earnings or losses in accordance with the applicable section of this notice. If the amount erroneously paid to the service provider was paid in the form of property (such as stock), upon repayment of that amount, earnings and losses may be credited by otherwise adjusting the amount of property due to the service provider under the terms of the plan. For example, a service recipient erroneously distributes to a service provider 100 shares of stock worth \$5 per share on the date of distribution and the distribution fails to satisfy the requirements of § 409A because the shares are not payable under the terms of the plan until a future date. At the time of the correction under the terms of the applicable section of Notice 2008-113 (as modified), the service recipient's stock is worth \$10 per share. To satisfy the repayment requirement, the service provider must pay the service recipient \$500 (the amount of shares equal to the fair market value of the shares on the date of the erroneous payment) which may be accomplished through the return of 50 shares. If the applicable section of this notice

does not allow for the crediting of earnings, or the service recipient does not otherwise credit earnings, one method by which the service recipient may adjust for the earnings is by reducing the number of shares due to the service provider under the terms of the plan to 50 shares.

Generally if an amount has been erroneously deferred on behalf of a service provider, the service recipient must pay the amount erroneously deferred to the service provider to qualify for the relief. If the amount of the erroneous deferral was set as a dollar amount, the amount of the erroneous deferral equals the dollar amount regardless of whether the erroneous deferral was invested in, or subsequently denominated as, an amount of property (such as a number of shares of stock). If the amount of the erroneous deferral was based on certain property (for example, a certain number of shares of stock), the amount of the erroneous deferral equals the fair market value of the property at the time it would otherwise have been payable to the service provider had the erroneous deferral not occurred. For this purpose, the date the amount of the erroneous deferral is payable to the service provider is the first date under the plan during the taxable year that the amount became payable under the plan (disregarding any ability to pay up to 30 days early under §1.409A-3(d)).”

B. The following section replaces section V.D.2(a) of Notice 2008-113:

“(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. A failure is also 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 have been paid under the plan is not paid to the service provider during the taxable year in which falls the payment date (as determined under § III.K of this notice), and the failure to make such payment results in an operational failure under § 409A(a).”

C. Modification of Notice 2008-115

For service recipients and service providers who are entitled to relief under this notice, Notice 2008-115, 2008-52 IRB 1367 (relating to reporting and wage withholding for 2008 and subsequent years) is modified to conform to the provisions of this notice (including the modifications to Notice 2008-113 contained in § XIII.A and B of this notice) with respect to (i) the amount that is required to be included in income by a service provider under § 409A(a), and (ii) the amount that is required to be reported by the service recipient as an amount includible in income under § 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.

**XIV. EFFECT ON OTHER DOCUMENTS**

Taxpayers may rely on this Notice 2010-6 for taxable years beginning on or after January 1, 2009. The modifications to Notice 2008-113 (relating to operational corrections) contained in § XIII.A and B of this notice are effective for service provider taxable years beginning on or after January 1, 2010, but may be relied upon by taxpayers for service provider taxable years beginning before January 1, 2010; this

notice does not otherwise affect the guidance provided in Notice 2008-113. The modifications to Notice 2008-115 (relating to reporting and wage withholding for 2008 and subsequent years) described in § XIII.C of this notice are generally effective for service provider taxable years beginning on or after January 1, 2009; provided, however, that the modifications to Notice 2008-115 as a result of the guidance modifying Notice 2008-113 (relating to operational corrections) contained in § XIII.A and B of this notice are effective for service provider taxable years beginning on or after January 1, 2010, but may be relied upon by taxpayers for service provider taxable years beginning before January 1, 2010.

#### **XV. REQUEST FOR COMMENTS**

The Treasury Department and the IRS request comments regarding other document failures that commonly occur and methods to correct them. Comments must be submitted by April 5, 2010. All materials submitted will be available for public inspection and copying. Comments may be submitted to Internal Revenue Service, CC:PA:LPD:RU (Notice 2010-6), 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 2010-6), 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 2010-6) in the subject line.

## **XVI. 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 1545-2164.

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 § XII. 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.

## **XVII. DRAFTING INFORMATION**

The principal author of this notice is Keith Ranta 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 Keith Ranta at (202) 927-9639 (not a toll-free number).