

Understanding the new Section 409A plan document correction program

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Congress enacted Section 409A to place strict rules on nonqualified deferred compensation plans and arrangements. These rules and the corresponding regulations are extensive and complex. Section 409A places requirements on the election to defer compensation, how the deferred compensation is funded and when the deferred compensation may be distributed by the service recipient to the service provider. The term “service provider” refers to individuals who are performing services, including employees, independent contractors and directors. The term “service recipient” refers to the individual or entity for whom the service provider is providing services. For ease of reading, this article refers to service providers and service recipients as “employees” and “employers,” respectively.

The plan or arrangement under which the deferred compensation is provided must meet the Section 409A requirements in operation and in written form. To comply with the requirements in written form, employers must have a written plan document. Due to the complexity of the Section 409A rules, compliance with Section 409A requires great attention to detail. It is unlikely that a plan will comply with Section 409A without the creation of a flawless plan document and administrative procedures to adhere to the plan’s written terms. A failure to comply with the Section 409A rules in operation and written form results in all vested deferred compensation being immediately included in the employee’s income.² A 20 percent additional income tax applies to the amounts required to be included in income, as well as a “premium interest tax.”³ The premium interest tax is designed to collect interest from employees on income taxes they would have paid in prior taxable years if the amounts in the plan had not been deferred.

The IRS has established two separate programs that allow taxpayers to correct failures to comply with Section 409A; one for operational failures and another for written plan document failures. If applied properly, these programs allow employees to avoid some, if not all, of the harsh penalties that apply when a plan does not meet the Section 409A requirements in operation or written form. Specifically, in 2008, the IRS issued Notice 2008-113, which allows for the correction of certain Section 409A failures that occur during the operation of a nonqualified deferred compensation plan.⁴ In early 2010, the IRS issued Notice 2010-6 in order to allow taxpayers “to voluntarily correct many types of failures to comply with the document requirements applicable under [Section 409A] to nonqualified deferred compensation plans . . .”⁵ Thus, put simply, Notice 2010-6 provides taxpayers with a voluntary correction program to use when a deferred compensation plan’s written document fails to comply with the multitude of requirements under Section 409A.

The “document correction program,” as the IRS refers to it in Notice 2010-6, is intended to motivate taxpayers to review nonqualified deferred compensation plans in order to identify and correct any provisions that fail to comply with Section 409A.⁶ Taxpayers will be motivated to conduct these reviews because the program may be used to “avoid or reduce the current income inclusion and additional taxes under [Section] 409A.”⁷ As this language from the Notice suggests, some of the corrections result in a complete avoidance of the consequences of a Section 409A compliance failure, while other corrections may result in a reduction (but not a complete avoidance) of these consequences. If an employee is required to include a portion of the amount deferred under the plan in income under Section 409A, the employee is required to pay income tax at ordinary income tax rates, plus the 20 percent additional tax.⁸ However, the employee is not required to pay the premium interest tax on the deferred compensation includible in income under Section 409A.⁹

This article will explore the various provisions of the correction program, including the following:

- Eligibility requirements to participate in the program
- Written document failures that can be corrected under the program and the amendments, which vary based on the specific failure, that must be made to correct those failures
- Actions and reporting requirements that apply to all document failures corrected under the program
- Special amendment period and transition relief afforded to taxpayers

Eligibility to participate in the correction program

The document correction program is available only if the employee, the employer and the plan are eligible to participate in the program. There are three eligibility requirements, as follows:

- Neither the employee nor the employer may be under audit by the IRS¹⁰
- The plan document failure must be inadvertent and unintentional¹¹
- The plan document failure cannot be directly or indirectly related to participation in any listed transaction¹²

Each of these requirements is discussed in more detail below.

Employee and employer under audit

The document correction program is meant to encourage taxpayers to correct document failures immediately, rather than waiting until the IRS performs an audit.¹³ This is the case because taxpayers generally may not use the document correction program if the employee or employer is under audit for a taxable year in which the document failure existed.¹⁴ The IRS has provided some transition relief with respect to the audit prohibition, but, as discussed below, this transition relief applies only to non-individual employers and is available for only a limited amount of time.

Notice 2010-6 contains very specific criteria for determining whether an employee or employer is considered under audit.¹⁵ Different criteria apply based on whether the employee or employer is an individual or non-individual. An individual is considered under audit if the individual’s federal income tax return (e.g., federal Form 1040) is under audit for any reason. This applies whether the individual is an employee or employer.

Conversely, a service provider or employer that is a non-individual is under audit for purposes of determining eligibility for the document correction program only if the entity receives written notification from the examining agent specifically citing nonqualified deferred compensation as an issue under audit. The Notice states that examples of written notification from an examining agent include an audit plan, an information document request (IDR), and a notification of proposed adjustment.

For non-individual employers, the IRS has provided transition relief for the requirement that the employer may not be under audit for a taxable year in which the document failure existed.¹⁶ This transition relief applies only for corrections made on or before Dec. 31, 2011. Under this transition relief, if the non-individual employer is under audit, but the examining agent has not identified the specific document failure with respect to any plan of the employer, the failure may be corrected under the program on or before Dec. 31, 2011. The IRS has not provided similar transition relief for individual employers or employees.

As mentioned above, the document correction must be completed before an audit begins for the taxable year in which the document failure existed. Thus, it is important to determine when the correction is treated as completed. The Notice provides that the correction is considered completed on the latest of the following dates:

- The date on which the correction is adopted
- The date on which the correction is effective
- The date on which the correction is set forth in writing in one or more documents¹⁷

It is important for employers to complete the correction as soon as possible after a document failure is discovered. Completing the correction soon after discovering the failure will reduce the risk that the IRS may begin an audit of the employee or employer before the correction is completed.

The IRS provides an example in the Notice that highlights the importance of the correction timing.¹⁸ In the example, an employer discovers that a document failure existed during 2010 and 2011. On Jan. 1, 2012, the employer uses the document correction program to correct the failure. Neither the employer nor the employee is under audit at that time. According to the example, the failure will be treated as corrected under the program, even if the employer or employee is subsequently audited for 2010 or 2011.

The Notice does not address a situation in which an employee or employer has been audited for a taxable year during which a document failure existed, but the audit has been closed without any income tax adjustments for deferred compensation. Presumably, the document failure may be corrected under the program after the audit is closed because the employee or employer is not currently under audit at the time of the document correction.

In most instances, the employer will be the party who discovers a plan document failure, and will be the party who undertakes the process of correcting the failure. Because neither the employee nor the employer can be under audit for a taxable year in which the failure existed, the employer will have to ask its employees who participate in the plan whether they are under audit, a matter which the

employees may view as none of the employer's concern. It is quite possible that an employee will refuse to divulge such information.

As discussed later in the article, in order to meet the requirements of the correction program, an employer must correct all document failures substantially similar to the failure being corrected. Thus, the employer must correct the document failure for all employees, including any employee who is under audit. An employee who is under audit will not receive the relief under the program (i.e., the compensation deferred by that employee will be subject to the Section 409A penalties: immediate income inclusion of all vested deferred amounts, the 20 percent additional tax, and the premium interest tax), but the failure must still be corrected in order for the relief to apply to all of the other employees affected by the failure.

The Notice does not address a situation in which the employer cannot determine whether an employee is under audit. Thus, employers must make the decision whether to apply the relief under the Notice to the employee, or to exclude the employee from the correction program relief. If the employee is excluded from the relief, the employer must report the full amount deferred under the plan as a Section 409A violation.

In order to incentivize employees to divulge whether they are under audit, employers may consider explaining the tax consequences of a Section 409A failure to the employee and that the consequences will apply if he or she is excluded from the relief under the Notice. This may persuade the employee to tell the employer whether or not he or she is under audit.

Suppose that one employee is under audit, while many others are not under audit. The Notice does not explicitly address this situation. Presumably, the employer can still use the correction program for those employees who are not under audit. All of the penalties under Section 409A will be imposed on the employees who are under audit because they are not eligible for the relief provided by the document correction program.

Of course, if the employer is under audit, then the document correction program is not available for any of the employees, regardless of their individual examination status. In this situation, the employer must report the vested amounts deferred under the plan to all employees as a Section 409A failure.

Inadvertent and unintentional written document failures

The document correction program is available only for document failures that are "inadvertent and unintentional."¹⁹ The Notice merely states this requirement, with no further elaboration whatsoever. It appears that the intention of this requirement is to deny taxpayers use of the correction program if the employer or employee knowingly failed to comply with Section 409A. In other words, if the employer and/or the employee purposefully failed to comply with Section 409A when drafting the plan document, the correction program is not available.

As discussed below in this article, the employer and employee must attach disclosures to their respective income tax returns when using the document correction program. The disclosures will alert an examining agent that the employer or employee participated in the correction program.²⁰ The agent is likely to review whether the program eligibility requirements were met and whether the employee and

employer fulfilled all of the requirements for a valid correction under the program. It remains to be seen how closely the IRS will look at the requirement that the document failure was inadvertent and unintentional.

One of the challenges associated with the requirement that the failure must be inadvertent and unintentional is that the taxpayer has the burden of demonstrating eligibility for the program.²¹ The IRS points out in the Notice that the “taxpayer claiming the relief has the burden of demonstrating eligibility for the relief . . .,” and further points out that a “taxpayer’s eligibility for the relief provided in this notice is subject to examination by the IRS.”²² For this purpose, the taxpayer is the employee because the income tax consequences of a Section 409A failure are borne by the employee rather than the employer. Therefore, the relief provided by the document correction program is provided to the employee. Of course, an employer plays a major role in helping to demonstrate eligibility for participation in the program, so employers should fully document eligibility to participate in the program. Thus, employers should consider preparing a written analysis that addresses the issue of whether the document failure was inadvertent and unintentional. The analysis may come in very handy if and when an IRS examination occurs.

Failures related to participation in a listed transaction

A plan document failure is not eligible for correction under the program if the failure relates to participation in a listed transaction.²³ A listed transaction is a transaction that is the same as or substantially similar to one of the types of transactions that the IRS has determined to be a tax avoidance transaction and has identified by notice, regulation, or other form of published guidance as a listed transaction.²⁴ From time to time, the IRS announces new listed transactions, usually by issuing either a notice or a revenue ruling. Periodically, the IRS issues a notice which provides an updated comprehensive list of these transactions. The most recent such notice is Notice 2009-59.²⁵

This particular requirement reflects the fact that the IRS simply does not want to provide employees with any relief whatsoever from the Section 409A penalties if the deferred compensation plan is being used as part of a listed transaction.

As discussed above, all of the eligibility requirements must be met in order to correct a plan document failure under the program. After it has been determined that the employee and employer are not under audit, the failure is unintentional and inadvertent, and the failure is not related to a listed transaction, the correction program can be utilized to correct the written document failure. The remainder of this article is devoted to a discussion of the failures that may be corrected under the program and the procedures that must be used when making the corrections.

Failures that may be corrected and the applicable correction procedures

As discussed above, only taxpayers who are eligible for the correction program are able to use the program to correct a document failure. Further, only a document failure specifically listed in the Notice may be corrected under the program. Thus, it is important to understand which specific document failures are covered by the program.²⁶

The Notice separates the document failures into the following categories:

- Impermissible definition of an otherwise permissible payment event
- Impermissible payment periods following a permissible payment event
- Certain impermissible payment events and payment schedules
- Failure to include the six-month delay for specified employees
- Provisions allowing impermissible initial and subsequent deferral elections
- Certain ambiguous plan terms

The correction for each of the document failures contains many details, including conditions for making the correction and a specific correction procedure. These details vary depending on the failure that is being corrected. It is not feasible to cover each document failure and applicable correction in detail in this article. However, Table 1 in Appendix A provides a list of all the document failures that may be corrected under the program, the deadline for making the correction and a summary of the correction procedures and tax consequences related to each document failure.

To provide a general understanding of how the correction program is applied to a document failure, this article explores the correction procedures and possible tax consequences that apply to one specific failure. As listed above, an impermissible definition of a permissible payment event is one of the categories of document failures that may be corrected under the program. Included in this category of document failures is the impermissible definition of “separation from service.” Separation from service is one of the six permissible payment events under Section 409A.²⁷ The document failure for an impermissible definition of separation from service was chosen for purposes of this article to provide an understanding of the correction program because the correction procedures and possible tax consequences that apply to this failure are applicable to several of the other document failures.

A plan document that provides for payment upon separation from service, but provides an incorrect definition of separation from service, violates Section 409A.²⁸ The Notice sets forth two specific circumstances under which this impermissible definition can be corrected.²⁹ The first circumstance involves a situation where the plan treats an event as a payment event, but the event does not qualify as a separation from service under Section 409A. In other words, in this first circumstance, the plan’s definition of separation from service is more liberal than permitted under Section 409A. A correction under this first circumstance is available only if the erroneous plan provision relates to the following specific changes in employment status:

- Level of service provided by the employee (e.g., change from full-time employment to part-time employment)
- Capacity in which the individual provides services (e.g., change in status from an employee to an independent contractor)
- Employer (e.g., change of employment by one subsidiary to employment by another subsidiary)

The second circumstance under which an impermissible definition of separation from service can be corrected is a situation where the plan’s definition of a separation from service would result in no payment being made under the plan, but the payment should have been made under the Section 409A

definition of separation from service. In other words, in the second circumstance, the plan's definition of separation from service is more restrictive than permitted under Section 409A.

The document correction must be completed before certain events occur. If a failure to operate in accordance with Section 409A occurs because of the plan's definition of separation from service (i.e., because of the document failure), the correction program is not available. Thus, the correction must be completed prior to an event that would have resulted in a payment under the plan's original definition of separation from service, but is not a valid separation from service under Section 409A. Also, the correction must be made before an event occurs that is a valid separation from service under Section 409A, but would not have resulted in a payment event under the original terms of the plan. If the correction is not made before these deadlines, the failure is not eligible for correction under the program.

The deadlines for making the correction apply on an employee-by-employee basis. Thus, if the correction is not made by the deadline for one employee, but the correction is made before the deadline for other employees covered by the plan, the correction program is available for the other employees. With respect to the employee for whom the deadline had passed, all of the vested compensation deferred under the plan by that employee will be subject to the Section 409A penalties.

To correct an impermissible definition of separation from service, the plan document must be amended to provide for a definition of separation from service that complies with Section 409A. The amendment must state that it is effective immediately. Great care must be taken in drafting the amendment because, except to the extent necessary to comply with Section 409A, the revised definition may not:

- expand the definition of separation from service to include an event that would not have been a separation from service under the original terms of the plan; or
- narrow the definition of separation from service to exclude an event that would have been a separation from service under the original terms of the plan.

In other words, the scope of the amendment must be limited to curing the defect in the plan's definition of separation from service; the amendment may not be used to expand or narrow the payment events under the plan unless the payment event must be expanded or narrowed to comply with Section 409A.

The employee will not be required to include any of the deferred compensation in income under Section 409A due to the document failure or document correction, unless certain events occur within one year of the date the failure is treated as corrected. This one-year period begins on the date the correction is considered completed and ends on the one-year anniversary of the date the correction is considered completed. Thus, it is important to understand when the correction is treated as completed, which was discussed in detail earlier in this article.

If an event occurs within the one-year period that would have resulted a payment under the original plan terms, but not under the terms of the amended plan, the employee is required to include 50 percent of the vested amount deferred under the plan in income under Section 409A and pay the additional 20 percent tax on that income. However, the employee is not required to pay the premium

interest tax on the amount included in income.³⁰ The same result applies if an event occurs within the one-year period that is a separation from service under Section 409A, but would not have resulted in a payment under the terms of the original plan. However, if either event occurs after the expiration of the one-year period, the employee is not required to include an amount in income under Section 409A.

This one-year period and the associated adverse tax consequences apply to many of the written document failures that can be corrected under the program. Table 1 in Appendix A indicates whether the one-year period rule applies to each document failure and the tax consequences that may apply. The one-year period, and the adverse tax consequences associated with certain events that occur within the one-year period, demonstrate the IRS's intent to encourage taxpayers to promptly correct written document failures. Correcting a document failure as soon as it is identified increases the likelihood that the one-year period will expire before any of the events occur that could result in adverse tax consequences under the correction program.

The following is an example of how the correction program applies to an impermissible definition of separation from service.

ABC Company sponsors a nonqualified deferred compensation plan, and Jane, an employee of the company, is a participant in the plan. Jane has deferred \$100,000 of compensation under the plan. The plan provides that the deferred compensation will be paid to Jane upon separation from service. The plan's definition of separation from service meets the requirements of Section 409A, except the definition includes an employee's change in status from an employee to an independent contractor.

Fortunately, ABC Company discovers early in 2012 that a change in employment status from employee to independent contractor status does not comply with Section 409A's definition of separation from service. Thus, on June 1, 2012, ABC Company amends the written plan document to exclude a change in status from employee to independent contractor from the definition of separation from service, and to provide that payment will be made only when Jane separates from service within the meaning of Section 409A. Jane continues to provide services to ABC Company as an employee until she retires and stops providing services to the company on Dec. 31, 2013.

Despite the impermissible definition of separation from service, Jane is not required to include an amount in income under Section 409A. The plan was corrected in accordance with Notice 2010-6, and no event occurred within the one-year period that would have resulted in a payment under the terms of the original plan that was not a separation from service under Section 409A (i.e., Jane's status did not change from employee to independent contractor on or before May 31, 2013).

Alternatively, assume Jane terminates her employment status with ABC Company and becomes an independent contractor on April 15, 2013. Under the original terms of the plan, Jane would have received a deferred compensation payment because her status changed from employee to independent contractor. However, Jane will not receive a payment under the amended plan. Since Jane's change in employment status occurred within the one-year period, 50 percent of the vested amount deferred is includible in Jane's income under Section 409A in 2013. ABC Company must report \$50,000 on Jane's Form W-2, Box 1 and Box 12 using Code Z for the 2013 taxable year. Jane is required to include \$50,000 in income in 2013 and pay income tax on the \$50,000 at ordinary income tax rates, plus the 20

percent additional tax. Fortunately, it is permissible for the plan to make a payment to Jane to pay her taxes, and the payment will not cause a violation of Section 409A.³¹

Consider a similar situation, but instead of switching from an employee to an independent contractor on April 15, 2013, Jane retires on April 15, 2013, and provides no additional services to ABC Company thereafter. This event qualifies as a separation from service under Section 409A. Because Jane would have received a payment under the original terms of the plan, and will receive a payment under the terms of the corrected plan, Jane is not required to include an amount in income under Section 409A even though she separated from service within the one-year period.

The example above demonstrates how the correction program applies to an impermissible definition of separation from service. Similar procedures apply to nearly all of the document failures that can be corrected under the program. Due to the level of detail involved with the correction procedures for each failure that can be corrected under the program, employers and employees must pay special attention to the correction procedures in Notice 2010-6 to ensure all of the requirements are met. If one of the requirements is not met, the employee will not receive relief from the full penalties under Section 409A.

Actions required to participate in the document correction program

The eligibility requirements and the correction procedures for each specific document failure are not the only requirements that employers and employees are required to meet in order to utilize the correction program. Employers and employees are also required to complete the actions discussed below in order to meet the requirements of the correction program.³² These actions include the following:

- The employer must identify and correct all “substantially similar” document failures.³³
- Depending on the specific document failure and various other conditions, the employer must report income to the employee in connection with the failure.³⁴ The employee, in turn, must include the income on his or her tax return, and pay the applicable taxes.³⁵ As outlined in Table 1 in Appendix A, only certain document failures require the inclusion of income.
- For the year in which the correction is made and possibly the subsequent year, the employer must disclose information to the IRS.³⁶
- The employer must provide certain information related to the correction to the employee.³⁷ The employee must then attach this information to his or her federal income tax return.³⁸

Each of these actions is discussed in more detail below. It is important to bear in mind that each of these actions must be completed regardless of document failure that is being corrected. If one of these actions is not taken, then the correction will not meet the requirements of the correction program.

Correct all “substantially similar” document failures

The document correction program is not available with respect to a specific document failure unless the employer takes the following “commercially reasonable steps”:

- Identify all other nonqualified deferred compensation plans that have a failure that is “substantially similar” to the specific document failure that is being corrected under the program.

- Properly correct all of the substantially similar identified failures under the program.³⁹

Given these requirements, an employer cannot choose to use the document correction program for an error in one plan, while at the same time choosing not to use the program for the same or similar error in another plan. Put another way, an employer must choose to use the document correction program for all of the plans in which the error exists, or simply not use the program at all for that error. It is an “all or nothing” decision. In the Notice, the IRS points out that this rule applies even when the plans with substantially similar failures cover completely different employees.⁴⁰

The Notice does not define the terms “substantially similar” or “commercially reasonable steps.” Employers will have to subjectively determine whether an error in one plan is “substantially similar” to an error in another plan, and whether “commercially reasonable” steps have been taken to identify and correct the error in all plans. Employers should consider documenting the approach taken to identifying all plans with similar errors. In the event of an IRS audit, this documentation will be helpful in demonstrating that commercially reasonable steps were taken to identify the errors.

Report income to the employee

Depending on the specific document failure and various other conditions, an employer may be required to report income to employees in connection with the failure and the subsequent document correction.⁴¹ Not all document corrections require an amount to be included in income under Section 409A, but some do include this requirement. As discussed above, some document failures require the employee to include a portion of the amount deferred under the plan in income under Section 409A if an event occurs within the one-year period after the correction. For those corrections that require an amount to be included in income, the specific amount varies based on the document failure. Table 1 in Appendix A provides a list of the document failures that may be corrected under the program and a summary of the amounts, if any, required to be included in income under Section 409A due to the document failure.

If the correction that applies to the specific document failure requires that the employee include an amount in income, then the employer is required to report the income to the employee on Form W-2 (for employees) or Form 1099-MISC (for non-employees).⁴² Not surprisingly, the correction program also requires that the employee actually include the income on his or her tax return. Specifically, the employee must fulfill the following requirements:⁴³

- Include the amount in income on the “appropriate” tax return.
- Pay regular income tax on the amount.
- Pay the 20 percent additional tax on the amount.⁴⁴

For failures corrected under the program, employees are not required to pay the “premium interest tax” that is usually required when a nonqualified deferred compensation plan fails to comply with Section 409A.⁴⁵ The IRS does not explain in the Notice why it decided not to require payment of the premium interest tax under the document correction program.

It is interesting to note that the employee must report income on the “appropriate” tax return. Thus, even if the employee reports income, but reports the income in the wrong year, the employee will not

get the relief afforded by the document correction program. As discussed earlier in this article, an employee may be required to include an amount of the deferred compensation in income under Section 409A if an event occurs within the one-year period. The amount may be includible in income in the year the correction is made or in the subsequent taxable year, depending on whether the event occurs during the year the correction is made or in the subsequent year. It is of utmost importance that the employer report the income on the appropriate year’s Form W-2 (for employees) or Form 1099-MISC (for non-employees), and that the employee then report the income on his or her return for that year.

An employer may discover that the plan has more than one document failure that may be corrected under the program. Each of these document failures may require the employee to include a portion of the plan balance in income, but the amount that must be included in income may not be the same for each failure. In this situation, the employee is required to include in income only the percentage of the deferred amount under the correction that requires the largest amount to be included in income.⁴⁶

For example, suppose a plan contains two document failures that may be corrected under the program. The first failure requires 25 percent of the vested amount deferred to be included in income, while the second failure requires 50 percent of the vested amount deferred to be included in income. If both failures are corrected, the employee is required to include only 50 percent of the vested amount deferred in income, rather than an amount for both failures.

Disclose information to the IRS

In addition to the employer’s possible Form W-2 or Form 1099-MISC reporting requirements, the employer must disclose certain other information to the IRS.⁴⁷ Specifically, the employer must prepare a statement entitled “Section 409A Document Correction under section [insert the appropriate section(s)] of Notice 2010-6.” The “appropriate section” of the Notice refers to the section of Notice 2010-6 that provides the specific correction procedures for the document failure that is being corrected. For example, “§V.A.” would be appropriate for correcting a plan provision that provides an impermissible definition of separation from service.

The statement filed with the IRS must contain certain information,⁴⁸ which is outlined in Table 2.

Table 2 Information disclosure for each document failure						
Employee's name	Employee's tax ID number	Name of plan containing the failure	Amount of deferred compensation involved in document failure	Date an event occurred, if any, causing inclusion of amount in income under Section 409A	Percentage of amount deferred, if any, that is required to be included in income under Section 409A	Amount reported to employee as includible in income under Section 409A as part of correction

This information must be provided for each employee who is participating in the document correction program and for each failure that is corrected under the program. In addition to the information outlined in Table 2, the information statement must contain the following:

- a statement that the document failure is eligible for correction under the program,
- a statement indicating the Section of the Notice under which the failure was corrected,

- a statement that the employer has taken all actions necessary to correct the failure by the last day of the taxable year, and
- the date of correction.

The information statement must be attached to the employer's timely filed (including extensions) original tax return for the taxable year in which the correction is made to the plan document.⁴⁹ If an employee is required to include an amount in income in the taxable year subsequent to the taxable year when the correction is made, then the employer must also attach this statement to its timely filed original tax return for the taxable year subsequent to the taxable year the plan failure is corrected.⁵⁰

Disclose information to the employee

In addition to disclosing information to the IRS, the employer must supply the employee with a statement disclosing information concerning the document correction.⁵¹ This statement is similar to the statement the employer files with the IRS. The statement must be entitled "Section 409A Document Correction under § [insert appropriate section(s)] of Notice 2010-6," and must set forth the information described below.

The statement must include all of the information that was included on the statement the employer filed with the IRS. In addition to the information that was included on the statement the employer filed with the IRS, the statement must include the following:

- a statement that the employee is entitled to the relief provided in the Notice with respect to a failure to comply with Section 409A, and
- a statement that the employee is required to attach a copy of the statement to the employee's tax return for the taxable year the correction is made and in the subsequent taxable year if the employee is required to include an amount in income in the subsequent taxable year.⁵²

The employer must supply this statement to the employee by the deadline for providing an information return (i.e., Form W-2 or Form 1099-MISC) to the employee for the taxable year that the correction is made. If the employee is required to include an amount in income under Section 409A in the taxable year subsequent to the year that the failure was corrected, the employer must provide this statement to the employee for the subsequent year as well.

The Notice requires the employee to attach the statement received from the employer to his or her timely filed (including extensions) original income tax return for the taxable year the correction is made.⁵³ If the employee is required to recognize income under Section 409A in the taxable year subsequent to the year the correction is made, the employee should receive an additional statement from the employer for the subsequent taxable year. The employee is then required to attach the statement to his or her tax return for the subsequent taxable year when the amount is included in income under Section 409A.

The actions discussed above must be taken by either the employee or employer, as appropriate, in order to meet the requirements of the Notice. The required actions may be summarized as follows:

- The employer must identify and correct all substantially similar document failures.

- The employer must file the appropriate information statement with the IRS and supply the appropriate statement to the affected employee.
- The employee must attach the statement to his or her income tax return.
- The employer must identify any events that occur during the one-year period that require the employee to include a portion of the deferred compensation in income under Section 409A.
- If such an event does occur during the one-year period, the employer is required to report income to the employee, and the employee must pay tax on the income.
- If the event occurs in the year subsequent to when the correction was completed, the employer is required to supply an additional information statement to the employee for that year and file the information statement with the IRS for that year.
- The employee must attach the statement to his or her income tax return for the subsequent year.

These actions, along with the specific correction procedures for each document failure, will require a great deal of attention by the employer. However, the benefit to the employee of properly correcting a document failure most likely outweighs the burden placed on the employer.

Special amendment period and transition relief

Taxpayers should be aware of a special amendment period and certain transition relief that is available to correct failures. The Notice provides a special amendment period for “initially adopted” plans. The Notice also provides for transition relief until Dec. 31, 2010, for all failures eligible for correction under the program. For certain failures, transition relief is available through Dec. 31, 2011.

Special amendment period following an employer’s initial adoption of a plan

Taxpayers may amend an “initially adopted” deferred compensation plan document to correct a failure without including any amount in income under Section 409A.⁵⁴ As discussed above, employees are sometimes required to include an amount in income under Section 409A because of a document failure. An employee will not be required to include an amount in income under Section 409A because of the failure if the plan is amended to correct the failure before the deadline applicable to this relief for initially adopted plans.

This relief for initially adopted plans is available if the document failure is corrected within a certain time period following the adoption of the plan. The correction must be completed before the end of the calendar year in which the plan was adopted if the first legally binding right to deferred compensation under the plan was received by any employee between Jan. 1 and Sept. 30.⁵⁵ If the first legally binding right to deferred compensation was received after Sept. 30, then the correction must be completed by the 15th day of the third calendar month following the month in which the first legally binding right was received.

The relief for initially adopted plans is available only if the failure can be corrected under the document correction program. That is, only document failures specified in the Notice are eligible for the relief for initially adopted plans.

Any payments made under the original terms of the plan (i.e., under the provision that violated Section 409A) that would not have been paid under the corrected plan must be treated as operational failures and corrected under Notice 2008-113. Likewise, any payments that were not made under the original

terms of the plan that would have been made under the corrected plan must be corrected as an operational failure. Any operational failure must be corrected by the end of the calendar year in which the document failure is corrected. If a payment (or a failure to make a payment) is not treated as an operational failure and corrected under the operational correction program, the relief for initially adopted plan is not available.

The operational correction program under Notice 2008-113 allows employers and employees to correct failures to comply with Section 409A in operation. For example, failing to defer compensation (i.e., paying the amount currently) even though the employee made an election to defer such compensation is considered an operational failure. The correction procedures for operational failures generally include the following:

- For a payment made erroneously to the employee, the employee must repay the amount to the employer
- For a failure to make a payment to the employee, the payment must be made to the employee

If the operational failure is corrected in the same taxable year that the operational failure occurs, the employee is not required to include any amount in gross income. For operational failures corrected in the year immediately after the year in which failure occurred, the employee may be required to include the erroneous payment or the amount that was not paid to the employee in income under Section 409A. The amounts includible in income under Section 409A are subject to the 20 percent additional income tax. Operational failures not corrected within the timeframes discussed above are not eligible for the operational correction program.

This special amendment period for initially adopted plans is very beneficial to taxpayers who adopt a plan and almost immediately determine that the document contains a failure. However, this relief is of no assistance to employers who sponsor plans that have been in effect for many years. The good news is that the IRS has provided transition relief for those older plans as well, as described below.

Transition relief

The Notice provides broad transition relief for any document failure that can be corrected under the correction program. The document failures listed in the notice, as outlined in Table 1 in Appendix A, may be corrected on or before Dec. 31, 2010, without the employee including any deferred amount in income under Section 409A as a result of the failure and subsequent correction.

The Notice also provides that two specific document failures must be corrected on or before Dec. 31, 2011, in order for the failures to be eligible for the correction program. In other words, these two document failures may not be corrected after Dec. 31, 2011. These document failures include the following:

- Impermissible provisions linking two or more nonqualified deferred compensation plans
- Payments schedules that are determined by the timing of payments received by the employer

Deferred compensation plans that contain impermissible provisions that determine the amount deferred under one plan by reference to another plan (i.e., “linked plans”) may be corrected on or

before Dec. 31, 2011 without encountering any of the Section 409A penalties.⁵⁶ To correct this document failure, the time and form of payment under both plans must be made identical. Any permissible payment event contained in either plan must be retained, so the correction may require an amendment to add a payment event that is contained in one plan to the other plan. If the plans contain the same payment events but different schedules for the timing of payment, both plans must use the payment schedule that would result in the latest final payment.

Deferred compensation plans that contain a payment schedule that is based on the timing of payments received by the employer, and that payment schedule does not comply with Section 409A, may be corrected on or before Dec. 31, 2011.⁵⁷ This plan failure may be corrected by amending the payment schedule to comply with Section 409A. If the correction is made on or before Dec. 31, 2011, the plan will be treated as complying with Section 409A since Jan. 1, 2009. Thus, no amount will be includible in income under Section 409A due to this plan document failure.

The broad transition relief that expires at the end of 2010 and the transition relief that applies to the two specific failures discussed above require that any payment made before the plan was corrected that would not have been made under the amended provision (or any payment not made before the plan was corrected that would have been made under the amended provision) must be treated as an operational failure and corrected under Notice 2008-113. The operational correction must be made on or before Dec. 31, 2010, for the transition relief that expires on Dec. 31, 2010, and must be made on or before Dec. 31, 2011, for the transition relief that expires on Dec. 31, 2011. The operational correction program under Notice 2008-113 was briefly discussed above.

This transition relief further demonstrates the IRS's intent in Notice 2010-6 for taxpayers to identify written document failures and correct them promptly. This relief provides taxpayers with a valuable opportunity to review nonqualified deferred compensation plans immediately to determine whether the plans contain any provisions that do not comply with Section 409A. By correcting the document failures before Dec. 31, 2010, or in limited instances, Dec. 31, 2011, employees may be able to avoid including a portion of the deferred compensation in income under Section 409A.

Conclusion

The document correction program provides a great opportunity for employers and employees to correct written document failures. However, the document correction program is detailed and complex. The document failures listed in the Notice are the only failures that may be corrected under the program, and the list of failures in the Notice is not all-encompassing. In order to correct a document failure under the program, the employer and the employee must be eligible to participate in the program. If the eligibility requirements are met, then the failure can be corrected using the procedures that apply to the individual failure.

Employers and employees cannot rest after the plan document has been amended to correct the failure. They must disclose the appropriate information to the IRS after the failure is corrected. Also, the employer must be aware of any events that occur within the one-year period after the correction that may cause the employee to include a portion of the amount deferred in income under Section 409A. In order to receive the relief afforded by the correction program, the employer must report this income to

the employee and the employee must include the amounts in income and pay the 20 percent additional tax.

The IRS's intent is for taxpayers to promptly identify and correct plan failures. The Notice makes this intent clear by making the program unavailable to employers and employees who are under audit for a year in which a written document failure exists, and by providing full relief from the Section 409A penalties when certain events do not occur within the one-year period after the failure is corrected. Taxpayers should review their written plan documents immediately so they can begin the correction process for any identified plan failures as soon as possible. Taxpayers are incentivized even further by the transition relief for all failures that may be corrected under the program, which expires at the end of 2010.

Appendix A

Please note that certain terms are used throughout Table 1: **Permissible payment event** – permissible payment events are death, disability, a separation from service, a change in control, a fixed payment date and an unforeseeable emergency. **One-year period** – the one year period begins on the date the failure is considered corrected and ends on the first anniversary of the date of correction.

Table 1 Summary of document failures and correction procedures					
Document failure	Deadline for correction	Correction procedure	One-year rule applies	Amount includible in income under Section 409A	Section of the Notice
Impermissible definition of an otherwise permissible payment event					
Impermissible definition of "separation from service"	Before the date that an event occurs that results in a payment under the original terms of the plan but is not a valid separation from service under Reg. Sec. 1.409A-3(a)(1); or is a valid separation from service under Reg. Sec. 1.409A-3(a)(1) but not under the original terms of the plan.	Amend the plan document to provide for payment upon separation from service as defined under Reg. Sec. 1.409A-3(a)(1). The amendment may not expand/narrow definition of separation from service to include/exclude an event that would have been a separation from service under the original plan terms, except as necessary to comply.	Yes	If an event occurs within the one-year period that is not a separation from service under the terms of both the original plan and the amended plan, 50 percent of the vested amount deferred is includible in income under Section 409A in the taxable year the applicable event occurs.	§ V.A.
Impermissible definition of "change in control"	Before the date of an event that is not a valid change in control under Reg. Sec. 1.409A-3(a)(5), but is a payment event under the original terms of the plan.	Amend the plan document to provide for payment upon a change in control as defined under Reg. Sec. 1.409A-3(a)(5). The amendment may not expand or narrow the definition of change in control to include or exclude an event that would have been a change in control under the original plan terms, except as necessary to comply.	Yes	If an event occurs within the one-year period that is not a change in control under the terms of both the original plan and the amended plan, 25 percent of the vested amount deferred is includible in income under Section 409A in the taxable year the applicable event occurs.	§ V.B.

Table 1 Summary of document failures and correction procedures					
Document failure	Deadline for correction	Correction procedure	One-year rule applies	Amount includible in income under Section 409A	Section of the Notice
Impermissible definition of "disability"	The correction may be made before or after an event occurs that is not a valid disability under Sections 409A(a)(2)(A)(ii) and (C) and Reg. Sec. 1.409A-3(a)(2), but is a payment event under the original terms of the plan.	Amend the plan to remove the payment event from the plan or to define the payment event as a valid disability within the meaning of Sections 409A(a)(2)(A)(ii) and (C) and Reg. Sec. 1.409A-3(a)(2).	No	If the correction occurs prior to an event that is not a valid disability under Sections 409A(a)(2)(A)(ii) and (C) and Reg. Sec. 1.409A-3(a)(2), but is a payment event under the original terms of the plan, no amount is included in income under Section 409A. If the correction occurs after an event that is not a valid disability under Sections 409A(a)(2)(A)(ii) and (C) and Reg. Sec. 1.409A-3(a)(2), but is a payment event under the original terms of the plan, any payment based on the invalid definition of disability must be treated as an operational failure, and the employee must include an amount in income only to the extent required by the operational correction program under Notice 2008-113.	§ V.C.
Impermissible payment periods following a permissible payment event					
Payment periods longer than 90 days and earlier than 366 days following a permissible payment event (e.g., payable within one year of a change in control)	The correction may be made before a permissible payment event or the correction may be made within a reasonable time after the permissible payment event. The Notice does not define or provide an example of a "reasonable" time after the permissible payment event.	Amend the plan to either remove the period following the permissible payment event during which the payment may be made or set forth a period immediately following the payment event during which the payment may be made, provided that the period may not exceed 90 days.	No	If the correction is made before a permissible payment event, no amount is includible in income under Section 409A. If the correction is made after a permissible payment event, 50 percent of the vested amount deferred is includible in income in the taxable year the permissible payment event occurs.	§ VI.A.
Payment period following a permissible payment event dependent upon the employee completing a certain employment-related action (e.g., the employee's execution of a noncompetition agreement or release of claims against the employer)	Before the date of a permissible payment event.	Amend the plan to remove the ability for the employee to delay or accelerate the time of payment based on the employee's actions.	No	No compensation is required to be included in income under Section 409A.	§ VI.B.

Table 1 Summary of document failures and correction procedures					
Document failure	Deadline for correction	Correction procedure	One-year rule applies	Amount includible in income under Section 409A	Section of the Notice
Certain impermissible payment events and impermissible payment schedules					
Plan with both permissible payment events (e.g., separation from service) and impermissible payment events (e.g., an initial public offering)	The correction may be made before or after an employee elects to receive payment upon the impermissible payment event or the impermissible payment event otherwise applies to the amount deferred. However, the correction must be made before the date any impermissible payment event actually occurs.	Amend the plan to remove the impermissible payment event.	Yes, but see exception ⁵⁸	If the failure is corrected before the employee elects to receive payment upon the impermissible payment event or the impermissible payment event otherwise applies to the amount deferred, no amount is includible in income under Section 409A. If the correction is made after such date, and the impermissible payment event occurs within the one-year period, 50 percent of the vested amount deferred is includible in income under Section 409A in the year the impermissible payment event occurs.	§ VII.A.
Plan with impermissible payment events but no permissible payment events (e.g., payment only upon an initial public offering)	Before the date one or more of the impermissible payment events occur.	Amend the plan to remove all impermissible payment events and to replace them with a provision providing for payment upon the later of separation from service or the sixth anniversary of the correction date.	No	50 percent of the vested amount deferred is includible in income under Section 409A in the year the correction is made.	§ VII.B.
Plan providing for more than one time or form of payment upon a single type of permissible payment event (e.g., lump-sum payment upon involuntary separation from service or annual installment payments upon voluntary separation from service)	Before a permissible payment event occurs.	If multiple payment schedules apply based on whether an employee voluntarily or involuntarily separates from service, amend the plan to provide that the form of payment upon voluntary separation from service will be the same form of payment that the pre-correction plan provided for upon involuntary separation from service. If multiple payment schedules relate to a factor other than the above- mentioned provision, amend the plan to remove the payment schedules, but retain the payment schedule that provides for the latest final payment date.	Yes	If a permissible payment event that is corrected under the program (i.e., the payment event to which multiple times or forms of payment applied) occurs within the one-year period, 50 percent of the vested amount deferred is includible in income under Section 409A in the taxable year the permissible payment event occurs.	§ VII.C.

Table 1 Summary of document failures and correction procedures					
Document failure	Deadline for correction	Correction procedure	One-year rule applies	Amount includible in income under Section 409A	Section of the Notice
Impermissible employee or employer discretion with respect to a payment schedule following a permissible payment event (e.g., payment upon employee attaining age 65 in the form of a lump-sum payment or annual installments not to exceed 10 years, determined at the employer's discretion at the time the payment event occurs)	Before a permissible payment event occurs.	If the plan provides for a default time and form of payment that would apply if discretion is not exercised, amend the plan to remove the discretion so that the payment is made under the default time and form of payment. If the plan does not have a default time and form of payment, amend the plan to remove the discretion and to provide that the time and form of payment will be the time and form of payment under the original terms of the plan that would result in the latest final payment date.	Yes	If a permissible payment event that is corrected under the program (i.e., the payment event to which the impermissible discretion applied) occurs within the one-year period, 50 percent of the vested amount deferred is includible in income under Section 409A in the taxable year the permissible payment event occurs.	§ VII.D.
Plan provision providing discretion to the employer to accelerate the time of payment regardless of whether a payment event has occurred (e.g., discretion to terminate the plan and immediately pay all amounts deferred)	Before the earlier of the date the employer exercises its discretion to accelerate a payment or the date a payment has been made under the plan pursuant to the exercise of discretion.	Amend the plan to remove the employer's discretion.	No	No income is includible under Section 409A.	§ VII.E.
Provisions for impermissible reimbursement of personal expenses or in-kind benefits (e.g., eligible for reimbursement of country club dues for five years after separation from service up to an aggregate amount)	Before an event occurs that would result in the employee becoming eligible to receive a reimbursement or in-kind benefits.	Amend the plan to provide for reimbursements or in-kind benefits that comply with Reg. Sec. 1.409A-3(i)(1)(iv). Other amendment requirements may apply.	Yes	If an event occurs that would have made the employee eligible for payment of reimbursements or in-kind benefits under the original plan within the one-year period and the event results in the amended plan being applied to avoid or reduce the payment, 50 percent of the vested amount deferred under the plan is includible in income under Section 409A in the taxable year the applicable event occurs.	§ VII.F.
Ambiguous plan terms					
Provisions providing for payment "as soon as practicable" or similar language after a permissible payment event (e.g., payment will be made as soon as practicable after Dec. 31)	No document correction is needed.	A plan amendment is not required. If a payment is not made upon the permissible payment event, the failure to pay is treated as an operational failure and may be corrected under Notice 2008-113.	No	No amount is includible in income under Section 409A because of the ambiguous plan term. However, if an operational failure occurs and is corrected under Notice 2008-113, an amount may be required to be included in income under the operational correction program.	§ IV.A.

Table 1 Summary of document failures and correction procedures					
Document failure	Deadline for correction	Correction procedure	One-year rule applies	Amount includible in income under Section 409A	Section of the Notice
Plan provides a permissible payment event without defining the payment event or providing an ambiguous definition (e.g., payment upon "termination of employment" or an "acquisition," or payment upon separation from service without defining separation from service)	No document correction is needed unless the ambiguous payment event has been interpreted in a manner that does not comply with Section 409A. The payment event is considered "interpreted" to comply or not comply with Section 409A if the employer establishes a pattern or practice of making payments under the payment event or a court that has jurisdiction over the contract interprets the payment event to comply or not comply. If the interpretation results in a Section 409A failure, the deadline for correcting the failure is the deadline that applies to the appropriate document failure that can be corrected under the program, as covered elsewhere in this article.	In general, a plan amendment is not required. However, if the payment event has been interpreted in a manner that does not comply with Section 409A, the plan must be corrected in accordance with the correction procedures that apply to the appropriate plan failure that can be corrected under the program. If a payment is made resulting in a failure to comply with Section 409A, or a payment is not made resulting in a failure to comply with Section 409A, the failure may be corrected as an operational failure under Notice 2008-113, provided that the plan document is amended to properly define the permissible payment event under Section 409A. The plan amendment must be made before the end of the taxable year in which the operational failure is corrected.	No	No amount is includible in income under Section 409A because of the ambiguous payment event definition. However, if an operational failure occurs and is corrected under Notice 2008-113, an amount may be required to be included in income under the operational correction program.	§ IV.B.
Other document failures that can be corrected under Notice 2010-6					
Failure to include the six-month delay of payments for specified employees	Before the specified employee separates from service	Amend the plan to include the six-month delay for a specified employee and to provide that a payment subject to the six-month delay will not be paid before the later of 18 months following the date of correction or 6 months following the payment event.	Yes	If the specified employee separates from service within the one-year period, 50 percent of the vested amount deferred is includible in income under Section 409A in the taxable year the separation from service occurs.	§ VIII.
Provisions providing for an impermissible initial election to defer compensation (e.g., employee may elect to defer an annual bonus any time prior to the end of the year in which the bonus is earned)	Before the end of the second taxable year immediately following the taxable year the initial deferral election should have been made under Reg. Sec. 1.409A-2(a).	Amend the plan to remove the ability to make the impermissible deferral election. Any amounts deferred between the date the impermissible deferral election was made and the date the amendment is made to the plan must be corrected under Notice 2008-113 as an operational failure.	No	No amount is includible in income under Section 409A.	§ IX.

Notes

1. Jeffrey A. Martin, CPA, is a manager in the Washington National Tax Office of Grant Thornton LLP in Washington, DC, where he specializes in the taxation of compensation and employee benefits. G. Edgar Adkins, Jr., CPA, is a partner in the same office, and he also specializes in the income tax aspects of compensation and employee benefits. He is Immediate Post Chair of the AICPA's Employee Benefits Tax Technical Resource Panel.
2. Deferred compensation is includible in income under Section 409A only to the extent it is vested as of the end of the tax year in which a failure exists. Non-vested deferred compensation is not currently includible in income under Section 409A and will not subsequently be includible in income unless a failure exists in the year it vests. In general, deferred compensation is non-vested (i.e., subject to a substantial risk of forfeiture) if entitlement to the amount is conditioned on the performance of substantial future services by any person or the occurrence of a condition related to the purpose of the compensation, and the possibility of forfeiture is substantial. Reg. Sec. 1.409A-1(d)(1).
3. Section 409A(a)(1).
4. Notice 2008-113, 2008-51 IRB 1305. Further discussion of the "operations correction program" under Notice 2008-113 is beyond the scope of this article.
5. Notice 2010-6, 2010-3 IRB, § I.
6. Id.
7. Id.
8. Notice 2010-6, 2010-3 IRB, § III.E.
9. Id.
10. Notice 2010-6, 2010-3 IRB, § III.C.
11. Notice 2010-6, 2010-3 IRB, § III.D.
12. Id.
13. Notice 2010-6, 2010-3 IRB, § I.
14. Notice 2010-6, 2010-3 IRB, § III.A.
15. Notice 2010-6, 2010-3 IRB, § III.C.
16. Notice 2010-6, 2010-3 IRB, § XI.D.
17. Notice 2010-6, 2010-3 IRB, § III.F.
18. Notice 2010-6, 2010-3 IRB, § III.C.
19. Notice 2010-6, 2010-3 IRB, § III.D.

20. Notice 2010-6, 2010-3 IRB, § XII. B. and D.
21. Notice 2010-6, 2010-3 IRB, § III.A.
22. Id.
23. Notice 2010-6, 2010-3 IRB, § III.D.
24. Reg. Sec. 1.6011-4(b)(2).
25. Notice 2009-59, 2009-31 IRB 170.
26. Certain document failures may not be corrected under Notice 2010-6. These include document failures regarding (1) stock rights, and (2) linked plans (with limited exceptions for the latter, discussed later in the text, below, under “Special Amendment Period and Transition Relief”). See Notice 2010-6, Section III.G.
27. Reg. Sec. 1.409A-3(a). The other permissible payment events under Section 409A include death, disability, a change in control, a fixed payment date and an unforeseeable emergency.
28. A separation from service is defined under Reg. Sec. 1.409A-1(h) and generally includes when an employee retires, dies or otherwise terminates employment. A termination of employment is based on all of the facts and circumstances, but is presumed to have occurred when the level of service performed decreases to a level equal to 20 percent or less than the average level of services performed during the immediately preceding 36-month period.
29. Notice 2010-6, 2010-3 IRB, § V.A.
30. Notice 2010-6, 2010-3 IRB, § II.E.
31. Reg. Sec. 1.409A-3(j)(4)(xi).
32. Notice 2010-6, 2010-3 IRB, § III.
33. Notice 2010-6, 2010-3 IRB, § III.B.
34. Notice 2010-6, 2010-3 IRB, § III.E.
35. Id.
36. Notice 2010-6, 2010-3 IRB, § XII.A.
37. Id.
38. Id.
39. Notice 2010-6, 2010-3 IRB, § III.B.
40. Id.
41. Notice 2010-6, 2010-3 IRB, § III.E.
42. Id.
43. Id.
44. Section 409A(a)(1)(B)(i)(I)
45. Notice 2010-6, 2010-3 IRB, § III.E.
46. Notice 2010-6, 2010-3 IRB, § III.F.
47. Notice 2010-6, 2010-3 IRB, § XII.A.
48. Notice 2010-6, 2010-3 IRB, § XII.B.
49. Id.
50. Id.

51. Notice 2010-6, 2010-3 IRB, § XII.A.
52. Notice 2010-6, 2010-3 IRB, § XII.C.
53. Notice 2010-6, 2010-3 IRB, § XII.D.
54. Notice 2010-6, 2010-3 IRB, § X.
55. Section 409A does not define “legally binding right.” However, Section 409A does provide that an employee does not have a legally binding right to compensation to the extent that the compensation may be reduced unilaterally or eliminated by the employer or any other person after the services creating the right to the compensation have been performed. A legally binding right may exist even if the compensation is subject vesting conditions (Reg. Sec. 1.409A-1(b)(1)). Thus, an agreement that provides for payment of a certain amount to an employee at a future date, subject to vesting conditions, is a legally binding right.
56. Notice 2010-6, 2010-3 IRB, § XI.B.
57. Notice 2010-6, 2010-3 IRB, § XI.C.
58. Yes, but only if failure is corrected after an employee elects to receive payment upon the impermissible payment event or the impermissible payment event otherwise applies to the amount deferred.

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