

## **LAST CHANCE FOR CORRECTING CODE SECTION 409A RELATED PLAN DOCUMENT FAILURES IN NONQUALIFIED DEFERRED COMPENSATION PLANS WITHOUT PENALTY**

This is a reminder that the deadline for correcting document failures of nonqualified deferred compensation plans under IRS Notice 2010-6 is December 31, 2010. IRS Notice 2010-6 permits correction of many common types of plan document failures while avoiding the severe adverse tax consequences of 409A violations. Certain corrections can be made after December 31, 2010, but penalties will apply. Therefore, it is important that any necessary action be taken promptly.

### **The December 31, 2010, deadline for correction under IRS Notice 2010-6**

As discussed in previous Client Alerts, Code Section 409A imposes restrictions on the design, operation and administration of nonqualified deferred compensation arrangements. Earlier this year, the Treasury Department and the Internal Revenue Service issued Notice 2010-6, which provides methods for voluntarily correcting certain types of failures to comply with the document requirements of Code Section 409A. The purpose of the program is to encourage the review of nonqualified deferred compensation plans for provisions that do not comply with Code Section 409A and to correct those provisions promptly.

### **Failures Eligible for Correction**

Many, but not all plan document failures are eligible for correction under Notice 2010-6. The following are some, but not all, of the failures that may be corrected under the program:

- Ambiguous plan terms (e.g., payment “as soon reasonably practicable”).
- Failure to define (or improperly defined) payment events in the document, such as “termination of employment,” “change in control event,” or “disability”.
- A provision that provides for payment more than 90 days following a permissible payment event.
- A payment period that is dependent upon an employment-related action (e.g., execution of a release of claims or noncompetition or nonsolicitation agreement).
- An impermissible payment event or payment schedule.
- Impermissible employer discretion to accelerate payments.
- Failure to include the six-month delay for payments to “specified employees.”
- Impermissible deferral elections.

### **Reporting Requirements Under the Program**

To correct a document failure under the program, the employer generally must attach a compliance statement to its federal income tax return for the year in which it makes a correction. The compliance statement must include, among other things, the name and taxpayer identification number of each employee affected by the failure, the name of the plan or agreement with respect to which the failure occurred, and the amount of the payment involved for each failure. The employer must also provide a compliance statement to each affected employee along with the employee’s W-2, which must be attached to the employee’s income tax return.

## Action Items

Any employer who has not already done so should:

- Assemble a list of all plans, agreements, and contracts that could potentially be subject to Section 409A. Any arrangement that gives an employee the right to compensation that will or may be paid in a later year could be subject to Section 409A, including, but not limited to, certain stock options, stock appreciation rights, supplemental executive retirement plans (“SERPs”), cash bonus plans, employment agreements, severance agreements, and change in control agreements. Keep in mind that unwritten plans or arrangements may also be subject to 409A.
- Review and correct any plan failures. All affected plans should be reviewed and any failures corrected by December 31, 2010.

## Conclusion

IRS Notice 2010-6 provides a valuable opportunity for employers to correct certain plan document failures under Code Section 409A without adverse tax consequences. This program provides a special incentive to identify and correct any plan document problems before December 31, 2010.

## **Additional Information**

If you have any questions regarding this client alert, please contact [Michael Gunter](#) or [Elisa Cawood](#). You may also contact the Womble Carlyle attorney with whom you usually work or one of our Employee Benefits attorneys listed on the following webpage:

[Womble Carlyle Sandridge & Rice Employee Benefits Lawyers](#)

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