

Notice 2010-6 Summary/Required 409A Document Provisions

Required 409A Document Provisions

I. Mandatory Document Provisions

- ❖ If Elective Deferrals permitted, the conditions under which deferrals can be made- (i.e., calendar year prior to earning, 30 day initial eligibility).
- ❖ If subsequent deferral elections permitted –state the rules (“1 year/5/year”).
- ❖ The permissible events that will result in a payment.
- ❖ The amount (or method or formula to determine the amount) to be paid and the time and form of payment for each permissible payment event.
- ❖ 6 month delay for Specified Employees (if a public company)

II. Provisions to include in the Document if Utilized

- ❖ Alternative definition of Specified Employee Dates.
- ❖ PV of future payments falls below a certain amount –Specify the Amount.
- ❖ Limited Cash out amount, plus whether automatic or discretionary.
- ❖ Alternative percentages for Change of Control Options.
- ❖ Alternative percentages for Separation from Service

Notice 2010-6 Document Corrections Program

Transition relief on Document Failures available in 2010

Any document that is eligible for correction under 2010-6 may be corrected before 12/31/2010 with no document penalty assessed if:

(a) Any payment made before 12/31/2010 that would not have been paid under the corrected provision or, (b) any payment not made before 12/31/2010 that would have been paid under the corrected provision **MUST BE CORRECTED UNDER 2008-113 AND MAY INCUR A PENALTY UNDER THAT CORRECTION PROGRAM**

Examples: (a) Impermissible Definition of COC, corrected in 2010, and no payment has been made under this impermissible definition. There is no penalty.

(b) Same as example (a) but a payment was made under the impermissible definition. If corrected under 2008-113, there will be no documentary failure. (Note- there may be penalties under 2008-113).

Tax Penalty under 2010-6

- ❖ One Year look rule of 2010-6 – if non compliant provision corrected but the non – compliant event occurs within 1 year of date of correction, then 50%, or 25% of amount deferred included, **plus** 20% penalty tax.
- ❖ Items that cannot be corrected could look to 2008-113 for some tax relief (Operational Failures).
- ❖ Some items cannot be corrected at all and are subject to Full 409A penalties.

Items That Do Not Have to be Corrected

“As Soon as Practicable...” – ONLY ITEM THAT DOES NOT REQUIRE A CORRECTION as long as the sponsor does not have a pattern of failing to meet the designated distribution rules (i.e., later of end of year or 2 ½ months following event)

Items That Can be Corrected Without Notice ONLY CORRECTION OF AMBIGUOUS PLAN TERMS

Items That Can be Corrected With No Tax Penalty or One Year Look Penalty

<u>Ambiguous Plan Term</u> – No penalty if fixed before payout or if paid out in a compliant manner	(If paid out in a non compliant manner, then operational failure and possible 2008-113 penalties).
<u>Incorrect Definition of Disability</u>	No Penalty if corrected before benefit is paid. May require 2008-113 correction and penalty if benefit was paid)
<u>Impermissible Definition of Separation from Service or Change of Control.</u>	If correction before the event occurs, then <i>One Year Look (50% for SOS, 25% for COC) penalty applies</i> . If corrected after event occurs, then full 409A penalties*
<u>Payment period longer than 90 days</u> - No Penalty if fixed before the occurrence of the event.	Otherwise, if correction within a “reasonable” period of time (not specified) after occurrence of payment event and the benefit is actually paid within 90 days, then 50% penalty If above not satisfied, full 409A penalties*
<u>Payment Event dependent upon employee release, non-compete, etc.</u> No penalty if fixed before the occurrence of the event.	Otherwise, full 409A Penalties*
<u>Service Recipient Discretion to Accelerate Payments</u> – No penalty if corrected before discretion is exercised	If the payment is made before the correction, then full 409A penalties, AND no relief under 2008-113 even if payment is returned
<u>Impermissible Plan Deferral Election</u> – No penalty if revoked before being applied. (Example - Plan contains initial deferral elections provision that do not comply with 409A such as invalid performance based bonus election period)	If not revoked (i.e., has been “applied”), <ul style="list-style-type: none"> • Must correct document (remove provision) no later than the end of the participant’s 2nd taxable year immediately following the taxable year of impermissible election. • Amounts subject to the non compliant deferral election must be treated as an operational failure and corrected under 2008-113 (i.e., over deferral) if an actual deferral was made
<u>Impermissible Discretion to Change the Time and Form of Payment or Violation of Subsequent Deferral Election Rules (1 yr/5 yr)</u> – No penalty if corrected and Plan has a default time and form of payment and no discretion has been exercised.	If no default option, must correct before the event occurs (i.e., remove impermissible discretion to select time and form, or impermissible discretion to delay, or revoke impermissible subsequent deferral election). <i>One Year Look (50%) penalty applies</i>
<u>Correction Following Initial Adoption</u> (Applies to a plan provision that is eligible for correction under any section of the Notice)	No penalty if the plan is amended (and any operational corrected under 2008-113) by the later of the end of the calendar year in which, or the 15th day of the 3rd month following the date, the first legally binding right to deferred compensation (i.e., first deferral) arose under the plan and all other plans that may be aggregated with the plan if a single service provider participated in all of the plans (i.e., under any plan that may exist of the same type)
<u>Failure to include 6 month delay</u>	<ul style="list-style-type: none"> ▪ Must correct before event Separation from Service occurs ▪ Amount payable under the plan that is subject to the 6 month delay may not be paid before the later of (i) 18 months following the date of correction or (ii) 6 months following the date of the payment event. ▪ <i>One Year Look (50%) penalty applies</i>
<u>Plan with both permissible and impermissible Payment Events</u> – No penalty if corrected before irrevocable election is made	<ul style="list-style-type: none"> • Otherwise, if corrected AFTER election was made but BEFORE event occurs, <i>One Year Look (50%) penalty applies</i> • If corrected after the event occurs, then full 409A penalties.*

<u>Certain Impermissible Alternative Payment Schedules</u> (Example: payable in more than 1 time and form for a specific event and not permitted under 409A)	<ul style="list-style-type: none"> • Must correct before event occurs • <i>One Year Look</i> (50%) penalty applies
<u>Impermissible Reimbursement or In-Kind Benefit Provisions</u> Example: expenses in 1 year cannot affect the expenses in another year	<ul style="list-style-type: none"> • Must correct before event occurs • <i>One Year Look</i> (50%) penalty applies

*** Unless some tax relief provided by 2008-113 (Correction of Operational Failures)**

Items That Can be Corrected Only With Penalty

<u>Plans with only Impermissible Payment Events</u> (Example-Plan pays only upon child attending college)	<ul style="list-style-type: none"> ▪ Must correct BEFORE event(s) occurs. ▪ <u>Always Reportable income</u> of 50% of amount deferred (in year correction occurs) to which pre-correction applies plus 20% tax. ▪ Must remove the event(s) and replace with ONLY the “later of Separation from Service and 6th anniversary of the date of correction (i.e., limited to only to this one payment event). ▪ If corrected after the event occurs-full 409A tax penalties*
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