Internal Revenue
bulletin

Bulletin No. 2010-3
January 19, 2010

HIGHLIGHTS OF THIS ISSUE

These synopses are intended only as aids to the reader in identifying the subject matter covered. They may not be relied upon as authoritative interpretations.

INCOME TAX

Rev. Rul. 2010–2, page 272.

Section 1274A — inflation adjusted numbers for 2010. This ruling provides the dollar amounts, increased by the 2010 inflation adjustment, for section 1274A of the Code. Rev. Rul. 2008–52 supplemented and superseded.

Rev. Rul. 2010–3, page 272.

Section 1256 contracts market to market. This ruling holds that the London International Financial Futures and Options Exchange (LIFFE), which is a United Kingdom derivatives market, is a qualified board or exchange within the meaning of section 1256(g)(7)(C) of the Code.

Notice 2010–7, page 296.

This notice modifies Notice 2008–88, 2008–42 I.R.B. 933, to extend the expiration dates from December 31, 2009 to December 31, 2010 of certain temporary rules allowing state and local government issuers to purchase and hold their own tax-exempt bonds under special reissuance standards for tax-exempt bonds. Notice 2008–88 amended and supplemented Notice 2008–41, 2008–15 I.R.B. 742, regarding reissuance standards for tax-exempt bonds to expand the circumstances and time periods during which the Treasury Department and the Service would treat a tax-exempt bond that is purchased by its state or local governmental issuer as continuing in effect without resulting in a reissuance or retirement of the purchased bond solely for purposes of section 103 and sections 141 through 150 of the Code, as amended. Notices 2008–41 and 2008–88 modified.

Notice 2010–10, page 299.

This notice provides guidance on the tax-exempt bond provisions for the Midwestern and Hurricane Ike disaster areas under the Heartland Disaster Tax Relief Act of 2008, the Tax Extenders and Alternative Minimum Tax Relief Act of 2008 (the Act) and section 1400N(a) of the Code, as modified by the Act. This notice also provides guidance on reimbursement expenditures made with proceeds of tax-exempt bonds issued for Midwestern and Hurricane Ike disaster areas and tax-exempt "Qualified Gulf Opportunity Zone Bonds" issued under section 1400N(a).

Rev. Proc. 2010–10, page 300.

Maximum vehicle values. This procedure provides the maximum vehicle values for use with the special valuation rules under regulations sections 1.61–21(d) and (e). These values are adjusted for inflation and must be adjusted annually by reference to the Consumer Price Index.

Rev. Proc. 2010–12, page 302.

Section 305. Section 305 treatment of a stock distribution by a publicly traded regulated investment company or real estate investment trust in which the shareholders have an election to receive money or stock, subject to an aggregate limitation on the amount of money to be distributed. Rev. Proc. 2009–15 amplified and superseded.

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Finding Lists begin on page ii.

Department of the Treasury
Internal Revenue Service

EMPLOYEE PLANS

Notice 2010–6, page 275.

This notice provides rules governing the taxation of nonqualified deferred compensation plans. Section 409A of the Code requires that a nonqualified deferred compensation plan meet certain plan document requirements, and that the plan be operated in compliance with the plan document. Notice 2010–6 permits taxpayers to correct certain failures of a nonqualified deferred compensation plan to comply with the plan document requirements of section 409A, or in certain circumstances, to limit the amount includible in income and additional taxes under section 409A as a result of a plan document failure. Notices 2008–113 and 2008–115 modified.

ADMINISTRATIVE

Notice 2010–8, page 297.

This notice provides interim rules extending the period for submission to the IRS (or an agent or contractor of the IRS) of taxpayer authorizations permitting disclosure of returns and return information pursuant to section 6103(c) of the Code.

Notice 2010–9, page 298.

The notice clarifies that, for calendar year 2009, filers of Form 1099–B, Form 1099–S, and certain information on Form 1099–MISC have until February 16, 2010, to report both the information required on these forms and certain other tax information furnished on the same date. Notice 2009–11 amplified.

Rev. Proc. 2010–10, page 300.

Maximum vehicle values. This procedure provides the maximum vehicle values for use with the special valuation rules under regulations sections 1.61–21(d) and (e). These values are adjusted for inflation and must be adjusted annually by reference to the Consumer Price Index.

The IRS Mission

Provide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and by applying the tax law with integrity and fairness to all.

Introduction

The Internal Revenue Bulletin is the authoritative instrument of the Commissioner of Internal Revenue for announcing official rulings and procedures of the Internal Revenue Service and for publishing Treasury Decisions, Executive Orders, Tax Conventions, legislation, court decisions, and other items of general interest. It is published weekly and may be obtained from the Superintendent of Documents on a subscription basis. Bulletin contents are compiled semiannually into Cumulative Bulletins, which are sold on a single-copy basis.

It is the policy of the Service to publish in the Bulletin all substantive rulings necessary to promote a uniform application of the tax laws, including all rulings that supersede, revoke, modify, or amend any of those previously published in the Bulletin. All published rulings apply retroactively unless otherwise indicated. Procedures relating solely to matters of internal management are not published; however, statements of internal practices and procedures that affect the rights and duties of taxpayers are published.

Revenue rulings represent the conclusions of the Service on the application of the law to the pivotal facts stated in the revenue ruling. In those based on positions taken in rulings to taxpayers or technical advice to Service field offices, identifying details and information of a confidential nature are deleted to prevent unwarranted invasions of privacy and to comply with statutory requirements.

Rulings and procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations, but they may be used as precedents. Unpublished rulings will not be relied on, used, or cited as precedents by Service personnel in the disposition of other cases. In applying published rulings and procedures, the effect of subsequent legislation, regulations, court decisions, rulings, and procedures must be considered, and Service personnel and others concerned are cautioned against reaching the same conclusions in other cases unless the facts and circumstances are substantially the same.

The Bulletin is divided into four parts as follows:

Part I.—1986 Code.
This part includes rulings and decisions based on provisions of the Internal Revenue Code of 1986.

Part II.—Treaties and Tax Legislation.
This part is divided into two subparts as follows: Subpart A, Tax Conventions and Other Related Items, and Subpart B, Legislation and Related Committee Reports.

Part III.—Administrative, Procedural, and Miscellaneous.
To the extent practicable, pertinent cross references to these subjects are contained in the other Parts and Subparts. Also included in this part are Bank Secrecy Act Administrative Rulings. Bank Secrecy Act Administrative Rulings are issued by the Department of the Treasury's Office of the Assistant Secretary (Enforcement).

Part IV.—Items of General Interest.
This part includes notices of proposed rulemakings, disbarment and suspension lists, and announcements.

The last Bulletin for each month includes a cumulative index for the matters published during the preceding months. These monthly indexes are cumulated on a semiannual basis, and are published in the last Bulletin of each semiannual period.

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

Part I. Rulings and Decisions Under the Internal Revenue Code of 1986

Section 301.—Distributions of Property

26 CFR 1.301–10: Rules applicable with respect to distributions of money and other property.

This revenue procedure provides temporary guidance regarding certain stock distributions by publicly traded regulated investment companies (RICs) and real estate investment trusts (REITs). See Rev. Proc. 2010-12, page 302.

Section 305.—Distributions of Stock and Stock Rights

26 CFR 1.305–1: Stock dividends.

This revenue procedure provides temporary guidance regarding certain stock distributions by publicly traded regulated investment companies (RICs) and real estate investment trusts (REITs). See Rev. Proc. 2010-12, page 302.

Section 483.—Interest on Certain Deferred Payments

This ruling provides the dollar amounts, increased by the 2010 inflation adjustment, for section 1274A of the Code. Rev. Rul. 2008–52 supplemented and superseded. See Rev. Rul. 2010-2, page 272.

Section 1256.—Section 1256 Contracts Marked to Market

(Also: §§ 446, 481, 7805; 1.446–1, 301.7805–1.)

Section 1256 contracts market to market. This ruling holds that the London International Financial Futures and Options Exchange (LIFFE), which is a United Kingdom derivatives market, is a qualified board or exchange within the meaning of section 1256(g)(7)(C) of the Code.

Rev. Rul. 2010–3

ISSUE

Is London International Financial Futures and Options Exchange ("LIFFE"), which is a regulated exchange of the United Kingdom, a qualified board or exchange within the meaning of section 1256(g)(7)(C) of the Internal Revenue Code?

LAW AND ANALYSIS

Section 1256(g)(7) provides that the term "qualified board or exchange" means:

(A) a national securities exchange which is registered with the Securities and Exchange Commission,

(B) a domestic board of trade designated as a contract market by the Commodity Futures Trading Commission, or

(C) any other exchange, board of trade, or other market which the Secretary determines has rules adequate to carry out the purposes of section 1256.

HOLDING

The Internal Revenue Service determines that LIFFE, which is a regulated exchange of the United Kingdom, is a qualified board or exchange within the meaning of section 1256(g)(7)(C).

EFFECTIVE DATE

Under the authority of section 7805(b)(8) of the Code, this revenue ruling is effective for LIFFE Contracts (futures contracts and futures contract options) entered into on or after January 1, 2010.

CHANGE IN METHOD OF ACCOUNTING

A change in the treatment of LIFFE Contracts to comply with this revenue ruling is a change in method of accounting within the meaning of sections 446 and 481 and the regulations thereunder. The Commissioner grants consent to taxpayers to change to the section 1256 mark to market method for the first taxable year during which the taxpayer holds a LIFFE Contract that was entered into on or after January 1, 2010. Such a taxpayer need not file a Form 3115, *Application for Change in Accounting Method*, and LIFFE Contracts that were entered into before January 1, 2010 will not be covered by the change in method for which consent is granted. Because the change is being made on a "cut-off" basis, there is no potential omission or duplication of income or deductions, and therefore no adjustment under section 481 is required.

DRAFTING INFORMATION

The principal author of this revenue ruling is Andrea Hoffenson of the Office of Associate Chief Counsel (Financial Institutions & Products). For further information regarding this revenue ruling, contact Andrea Hoffenson at (202) 622–3930 (not a toll-free call).

Section 1274.—Determination of Issue Price in the Case of Certain Debt Instruments Issued for Property

This ruling provides the dollar amounts, increased by the 2010 inflation adjustment, for section 1274A of the Code. Rev. Rul. 2008–52 supplemented and superseded. See Rev. Rul. 2010-2, page 272.

Section 1274A.—Special Rules for Certain Transactions Where Stated Principal Amount Does Not Exceed $2,800,000

26 CFR 1.1274A–1: Special rules for certain transactions where stated principal amount does not exceed $2,800,000.
(Also §§ 483, 1274.)

Section 1274A — inflation adjusted numbers for 2010. This ruling provides the dollar amounts, increased by the 2010 inflation adjustment, for section 1274A of the Code. Rev. Rul. 2008–52 supplemented and superseded.

Rev. Rul. 2010–2

This revenue ruling provides the dollar amounts, increased by the 2010 inflation adjustment, for § 1274A of the Internal Revenue Code.

BACKGROUND

In general, §§ 483 and 1274 determine the principal amount of a debt instrument given in consideration for the sale or exchange of nonpublicly traded property. In addition, any interest on a debt instrument subject to § 1274 is taken into account under the original issue discount provisions of the Code. Section 1274A, however,

modifies the rules under §§ 483 and 1274 for certain types of debt instruments.

In the case of a "qualified debt instrument," the discount rate used for purposes of §§ 483 and 1274 may not exceed 9 percent, compounded semiannually. Section 1274A(b) defines a qualified debt instrument as any debt instrument given in consideration for the sale or exchange of property (other than new § 38 property within the meaning of § 48(b), as in effect on the day before the date of enactment of the Revenue Reconciliation Act of 1990) if the stated principal amount of the instrument does not exceed the amount specified in § 1274A(b). For debt instruments arising out of sales or exchanges before January 1, 1990, this amount is $2,800,000.

In the case of a "cash method debt instrument," as defined in § 1274A(c), the borrower and lender may elect to use the cash receipts and disbursements method of accounting. In particular, for any cash method debt instrument, § 1274 does not apply, and interest on the instrument is accounted for by both the borrower and the lender under the cash method of accounting. A cash method debt instrument is a qualified debt instrument that meets the following additional requirements: (A) In the case of instruments arising out of sales or exchanges before January 1, 1990, the stated principal amount does not exceed $2,000,000; (B) the lender does not use an accrual method of accounting and is not a dealer with respect to the property sold or exchanged; (C) § 1274 would have applied to the debt instrument but for an election under § 1274A(c); and (D) an election under § 1274A(c) is jointly made with respect to the debt instrument by the borrower and lender. Section 1.1274A–1(c)(1) of the Income Tax Regulations provides rules concerning the time for, and manner of, making this election.

Section 1274A(d)(2) provides that, for any debt instrument arising out of a sale or exchange during any calendar year after 1989, the dollar amounts stated in § 1274A(b) and § 1274A(c)(2)(A) are increased by the inflation adjustment for the calendar year. Any increase due to the inflation adjustment is rounded to the nearest multiple of $100 (or, if the increase is a multiple of $50 and not of $100, the increase is increased to the nearest multiple of $100). The inflation adjustment for any calendar year is the percentage (if any) by which the CPI for the preceding calendar year exceeds the CPI for calendar year 1988. Section 1274A(d)(2)(B) defines the CPI for any calendar year as the average of the Consumer Price Index as of the close of the 12-month period ending on September 30 of that calendar year.

INFLATION-ADJUSTED AMOUNTS UNDER § 1274A

For debt instruments arising out of sales or exchanges after December 31, 1989, the inflation-adjusted amounts under § 1274A are shown in Table 1.

Rev. Rul. 2010–2 Table 1
Inflation-Adjusted Amounts Under § 1274A

Calendar Year of Sale or Exchange	1274A(b) Amount (qualified debt instrument)	1274A(c)(2)(A) Amount (cash method debt instrument)
1990	$2,933,200	$2,095,100
1991	$3,079,600	$2,199,700
1992	$3,234,900	$2,310,600
1993	$3,332,400	$2,380,300
1994	$3,433,500	$2,452,500
1995	$3,523,600	$2,516,900
1996	$3,622,500	$2,587,500
1997	$3,723,800	$2,659,900
1998	$3,823,100	$2,730,800
1999	$3,885,500	$2,775,400
2000	$3,960,100	$2,828,700
2001	$4,085,900	$2,918,500
2002	$4,217,500	$3,012,500
2003	$4,280,800	$3,057,700
2004	$4,381,300	$3,129,500
2005	$4,483,000	$3,202,100
2006	$4,630,300	$3,307,400
2007	$4,800,800	$3,429,100
2008	$4,913,400	$3,509,600
2009	$5,131,700	$3,665,500
2010	$5,115,100	$3,653,600

Note: These inflation adjustments were computed using the All-Urban, Consumer Price Index, 1982–1984 base, published by the Bureau of Labor Statistics.

EFFECT ON OTHER DOCUMENTS

Rev. Rul. 2008–52, 2008–49 I.R.B. 1233, is supplemented and superseded.

DRAFTING INFORMATION

The author of this revenue ruling is Andrea M. Hoffenson of the Office of the Associate Chief Counsel (Financial Institutions and Products). For further information regarding this revenue ruling, please contact Ms. Hoffenson at (202) 622–3930 (not a toll-free call).

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

TABLE OF CONTENTS

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 I.R.B. 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 (T.D. 9321, 2007–1 C.B. 1123 [72 Fed. Reg. 19234]), effective for taxable years beginning on or after January 1, 2009 (see Notice 2007–86, 2007–2 C.B. 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 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 I.R.B. 1367, which also permits taxpayers to rely upon the proposed regulations under § 1.409A–4, issued on December 8, 2008 (REG–148326–05, 2008–51 I.R.B. 1325 [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 permis-

sible 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 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.[1]

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 applied 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.

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

[1] 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.

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 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 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 service provider 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 90th 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 90th 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 service provider 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 60th 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 60th 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 the pre-correction plan provision applied 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 applied 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 times or 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 times or forms of payment for that service provider. The plan may be corrected by amending the plan to provide that the time or form of payment upon a voluntary separation from service will be the same time or 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 time or 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 applied 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 times or 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 times or forms of payment for that service provider. Until that time, the plan may be corrected by amending the plan to remove the times or forms of payment, in accordance with the next sentence, until the remaining times or 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 times or forms of payment should be removed, the remaining time or form of payment must be the time or form of payment resulting in, or potentially resulting in, the latest final payment date, and if two times or forms of payment result in, or potentially result in, the same latest final payment date, the time or form of payment commencing, or potentially commencing, at the latest possible date, and if those two dates are the same, the time or 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 applied 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 time or 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 time or form of payment, that time or 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 time or 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 or 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 applied 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 ser-

vice 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 reimbursement 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 reimbursement or in-kind benefits (which may not be amended as part of the plan correction). If the pre-correction reimbursement or in-kind 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 in-kind 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 reimbursement 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 reimbursement or in-kind benefits, 50% of the amount deferred under the plan to which the pre-correction plan provision applied 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 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 in income 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 or 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 applied (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 to which the pre-correction plan provision applied, 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 or 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 failures 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 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 15th 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 amounts 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 I.R.B. 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@irscounsel.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).

Extension of Temporary Rules Allowing Governmental Issuers to Purchase and Hold Their Own Tax-Exempt Bonds

Notice 2010–7

SECTION 1. PURPOSE

This notice modifies Notice 2008–88, 2008–42 I.R.B. 933 (October 20, 2008), to extend the expiration dates from December 31, 2009 to December 31, 2010 of certain temporary rules allowing state and local governmental issuers to purchase and hold their own tax-exempt bonds under special reissuance standards for tax-exempt bonds. The intent of the extensions of these temporary rules is to facilitate liquidity and stability in the tax-exempt bond market in recognition of some continuing credit enhancement and liquidity constraints in this market.

Notice 2008–88 amended and supplemented Notice 2008–41, 2008–15 I.R.B. 742 (April 14, 2008), regarding reissuance standards for tax-exempt bonds to expand the circumstances and time periods during which the Treasury Department and the Internal Revenue Service ("IRS") would treat a tax-exempt bond that is purchased by its state or local governmental issuer as continuing in effect without resulting in a reissuance or retirement of the purchased bond solely for purposes of § 103 and §§ 141 through 150 of the Internal Revenue Code, as amended ("Code"). (Except as noted, section references in this notice are to the Code and the Income Tax Regulations). Defined terms in Notice 2008–41 and Notice 2008–88 shall have the same meanings when used in this notice.

SECTION 2. BACKGROUND

A debt instrument generally is treated as retired or extinguished when an issuer acquires its own debt because a merger of the interests of the issuer and the holder occurs. Notice 2008–41 provides that under certain rules for qualified tender bonds, a bond purchased by or on behalf of a governmental issuer pursuant to a qualified tender right is not retired until the end of the 90-day period from and after the date of such purchase. In response to liquidity constraints in the tax exempt bond market, § 3.2(3)(b) of Notice 2008–41 extended the 90-day period to 180-days for any purchase by or on behalf of a governmental issuer pursuant to a qualified tender right as long as such purchase occurred before October 1, 2008.

In response to auction failures in the auction rate bond sector of the tax-exempt bond market, Notice 2008–41 provided other temporary rules. Section 4 of Notice 2008–41 allowed governmental issuers to purchase their own tax-exempt auction rate bonds on a temporary basis without resulting in a reissuance or retirement of the purchased tax-exempt bonds solely for purposes of § 103 and §§ 141 to 150 if the governmental issuer purchased the tax-exempt auction rate bonds before October 1, 2008, and held those bonds for not more than a 180-day period from the date of purchase. Section 6.2 of Notice 2008–41 allowed temporary waivers of interest rate caps on auction rate bonds to be disregarded in determining whether there was a significant modification of such bonds under § 1.1001–3(e)(2) if the agreement to waive such a cap and the period during which such waiver was in effect both were within the period between November 1, 2007 and October 1, 2008.

In light of the then-continuing liquidity constraints in the tax-exempt bond market, Notice 2008–88 expanded the types of bonds eligible for relief under Notice 2008–41 and extended the time period for such relief provisions to apply. Section 3.1 of Notice 2008–88 provided that tax-exempt qualified tender bonds and tax-exempt commercial paper purchased by a governmental issuer would continue in effect without resulting in a reissuance or retirement of such bonds if, irrespective of when the governmental issuer purchased such bonds, the governmental issuer held the bonds until not later than December 31 2009. In addition, § 3.1 of Notice 2008–88 clarified that, in the case of the purchase of any particular obligation of tax-exempt commercial paper, including a purchase at maturity, a refinancing of that purchased tax-exempt commercial paper during the permitted holding period would be treated as part of the same issue as that of the purchased tax-exempt commercial paper.

Section 3.2 of Notice 2008–88 extended the application of the special 180-day holding period (in lieu of the general 90-day holding period) for qualified tender bonds to those qualified tender bonds purchased pursuant to qualified tender rights until December 31, 2009. In addition, § 3.2 of Notice 2008–88 extended the application of § 6.2 of Notice 2008–41 to disregard certain waivers of interest rate caps on tax-exempt auction rate bonds until December 31, 2009.

SECTION 3. INTERIM GUIDANCE AND RELIANCE

3.1 In General

Pending the promulgation and effective date of future administrative or regulatory guidance, taxpayers may rely on the interim guidance provided in this notice.

3.2 Extension of Certain Temporary Rules

Section 3.1 of Notice 2008–88 regarding purchases by a governmental issuer of qualified tender bonds or tax-exempt commercial paper is amended to extend the final date for a governmental issuer to purchase or hold such tax-exempt bonds without resulting in a reissuance or retirement of the purchased bonds until December 31, 2010. In addition, refinancing of purchased tax-exempt commercial paper during this extended period will continue to be treated as part of the same issue as the purchased tax-exempt commercial paper.

The provision of § 3.2 of Notice 2008–88 that extended § 3.2(3)(b) of Notice 2008–41 regarding the purchase of bonds pursuant to qualified tender rights for which the special 180-day holding period applies is amended to extend the final date for such purchases to December 31, 2010.

The provision of § 3.2 of Notice 2008–88 that extended § 6.2 of Notice 2008–41 regarding the treatment of certain waivers of interest rate caps on tax-exempt auction rate bonds is amended to extend the final date on which covered waivers are disregarded to December 31, 2010.

SECTION 4. EFFECT ON OTHER DOCUMENTS

This notice modifies Notice 2008–88 and Notice 2008–41.

SECTION 5. EFFECTIVE DATE

This notice is effective as of March 25, 2008, which is the effective date of Notice 2008–88 and Notice 2008–41. Issuers of tax-exempt bonds may apply and rely on this notice to the same extent and in the same manner as provided in § 8 of Notice 2008–41.

SECTION 6. DRAFTING INFORMATION

The principal author of this notice is Aviva M. Roth, Office of the Chief Counsel (Financial Institutions and Products). However, other personnel from the IRS and the Treasury Department participated in its development. For further information regarding this notice, contact Aviva M. Roth at (202) 622–3980 (not a toll-free call).

Extension of the Timeframe for Disclosures to Persons Designated in a Written Request or Consent Pursuant to Section 6103(c)

Notice 2010–8

This notice provides interim rules extending the period for submission to the IRS (or an agent or contractor of the IRS) of taxpayer authorizations permitting disclosure of returns and return information pursuant to section 6103(c). Specifically, this notice extends from 60 days to 120 days the period within which a signed and dated authorization must be received by the IRS in order for it to be effective. The IRS will apply the interim rules in this notice until the Treasury Department and the IRS amend the regulation under section 6103(c).

BACKGROUND

Section 6103(c) provides that, subject to the requirements and conditions set forth by the Secretary in the regulation, returns and return information may be disclosed to persons designated by the taxpayer in a request for or consent to disclosure. The Treasury Regulation under section 6103(c) sets out the requirements for such disclosures to designees. 26 C.F.R. 301.6103(c)–1(b). An authorization for disclosure must include the following items in a written document pertaining solely to the authorization: (1) the taxpayer's identity (name, address, taxpayer identifying number) that enables the IRS to clearly identify the taxpayer; (2) the identity of the person to whom disclosure is to be made; (3) the type of return or return information to be disclosed; and (4) the taxable year or years covered by the return or return information. 26 C.F.R. 301.6103(c)–1(b)(1). The taxpayer must sign and date the written document.

The regulation bars disclosure of a return or return information unless the written request for or written consent to disclosure is received by the IRS (or an agent or contractor of the IRS) within 60 days following the date upon which the written request was signed and dated by the taxpayer. 26 C.F.R. 301.6103(c)–1(b)(2).

INTERIM GUIDANCE

The IRS recognizes the importance of limiting the effective period of authorizations provided pursuant to section 6103(c). Reasonable limitation on the effective period of written authorizations helps ensure the currency of the authorization and protects taxpayer privacy. The current 60 day period, however, has proven problematic. Some institutions charged with assisting taxpayers in their financial dealings have encountered difficulty in obtaining written authorizations and submitting the authorizations to the IRS within the 60 days allowed by the existing regulation. To reduce burdens on taxpayers and the institutions and professionals assisting them, the IRS will amend the regulation under section 6103(c) to extend from 60 days to 120 days the effective period of taxpayer-provided authorizations. In the interim, disclosures otherwise permitted under section 6103(c) will be made provided the IRS receives the written authorization within 120 days following the date upon which the request or consent was signed and dated by the taxpayer. This interim rule will apply to all authorizations executed on or after the date that is sixty days prior to the publication of this notice.

COMMENTS

Interested parties are invited to submit comments on this notice by January 25, 2010. Written comments should be submitted to: Internal Revenue Service; CC:PA:LPD:PR (Notice 2010–8); Room 5203; P.O. Box 7604; Ben Franklin Station; Washington, DC 20044. Alternatively, comments may be hand delivered between the hours of 8:00 a.m. and 4:00 p.m.

Monday to Friday to: CC:PA:LPD:PR (Notice 2010–8); Courier's Desk; Internal Revenue Service; 1111 Constitution Avenue, NW; Washington, DC. Comments may also be transmitted electronically via the following e-mail address: *Notice.Comments@irscounsel.treas.gov*. Please include "Notice 2010–8" in the subject line of any electronic communications. All comments will be available for public inspection and copying in their entirety.

EFFECTIVE DATE FOR INTERIM GUIDANCE

These interim rules regarding the effective period for authorizations of disclosures to third-party designees are applicable from the date of publication of this notice. Forthcoming changes to the existing regulation under section 6103(c) will be applicable, once promulgated, as of the publication date of this notice.

DRAFTING INFORMATION

The principal author of this notice is Mark E. Cottrell of the Office of Associate Chief Counsel (Procedure & Administration). For further information regarding this notice, contact Mark E. Cottrell at (202) 622–4570 (not a toll-free call).

Certain Annual Tax Reporting Statements May be Furnished by February 16, 2010, Without Penalty

Notice 2010–9

PURPOSE

This notice provides additional time for furnishing certain annual tax reporting statements for reportable items from calendar year 2009.

BACKGROUND

Section 403 of the Energy Improvement and Extension Act of 2008, Div. B of Pub. L. No. 110–343, 122 Stat. 3765, enacted on October 3, 2008, amended section 6045(b) to change from January 31 to February 15 the deadline for furnishing to customers the information statements required by section 6045. These statements are Form 1099–B, "*Proceeds From Broker and Barter Exchange Transactions*"; Form 1099–S, "*Proceeds From Real Estate Transactions*"; and, when reporting payments to attorneys or substitute payments by brokers in lieu of dividends or interest, Form 1099–MISC, "*Miscellaneous Income*." Because February 15, 2010, is a Federal holiday, filers of these statements will meet the deadline under section 6045(b) for reportable items from calendar year 2009 if they furnish the statements by February 16, 2010. *See* section 7503. Section 6722 imposes a penalty on any reporting entity that fails to furnish any required payee statement by its deadline.

The Act also added language to section 6045(b) to permit reporting entities, in the case of a "consolidated reporting statement (as defined in regulations)," to furnish by February 15 a statement that otherwise would be required by January 31. Because January 31, 2010, is a Sunday, information returns that are ordinarily due on January 31 will be timely if they are furnished by February 1, 2010. *See* section 7503. There is not yet a regulatory definition of the term "consolidated reporting statement."

On February 2, 2009, the IRS published Notice 2009–11, 2009–5 I.R.B. 420, which provided that, for reportable items from calendar year 2008, brokers had until February 17, 2009, to report all items that they customarily reported on their annual composite form recipient statements. Notice 2009–11 applied to reportable items from calendar year 2008 only.

DEADLINE FOR REPORTING ITEMS FROM 2009

This notice applies to reporting entities that are required to furnish information statements under section 6045. This notice provides that such reporting entities have until February 16, 2010, to report any item that they would otherwise be required to report by February 1, 2010, if the reporting entity furnishes the reporting statement to the same recipient or same group of recipients on the same date as a statement reporting items required by section 6045 (regardless of whether the statements relate to the same or different accounts or transactions). This additional time applies only to items that a reporting entity must report to a recipient based on the same relationship between the reporting entity and the recipient as the items required by section 6045 (for example, broker, payor, or real estate settlement agent to customer), and not as a result of any other relationship between the parties such as debtor to creditor or employer to employee.

Accordingly, the additional time provided by this notice applies to the following forms if the requirements of this notice are met: Form 1099–DIV, "*Dividends and Distributions*"; Form 1099–INT, "*Interest Income*"; Form 1099–MISC, "*Miscellaneous Income*"; Form 1099–OID, "*Original Issue Discount*"; Form 1099–PATR, "*Taxable Distributions Received From Cooperatives*"; Form 1099–Q, "*Payments From Qualified Education Programs (Under Sections 529 and 530)*"; Form 1099–R, "*Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc.*"; and Form 5498, "*IRA Contribution Information*."

This notice also provides that, if a customer has an account with a securities broker for which a Form 1099–B would be required to be furnished under section 6045 if a sale had occurred during the year, the additional time permitted by this notice applies to other items the broker must report to the customer based on the broker-to-customer relationship regardless of whether the customer's transactional history for 2009 triggered an obligation to furnish Form 1099–B to that customer, provided that the statement reporting the other items is furnished on the same date as the date on which the Form 1099–B would have been furnished.

This notice modifies the 2009 *General Instructions for Forms 1099, 1098, 3921, 3922, 5498, and W–2G* and applies to the reporting of items from calendar year 2009 only.

EXAMPLE

This notice is illustrated by the following example:

Broker, a securities broker, customarily furnishes an annual composite form recipient statement (as described in Section 4.2 of Rev. Proc. 2008–36, 2008–33 I.R.B. 340) to its customers in order to report dividends as required by section 6042(c) and the gross proceeds of the sale of securities and other items as required by section 6045(b). To report interest or original issue discount as required by section

6049(c), Broker customarily furnishes separate Form 1099–INT and Form 1099–OID statements to its customers instead of reporting these items on the composite form recipient statement.

For calendar year 2009, Broker furnished annual composite form recipient statements on February 11, 2010, to all customers with taxable accounts that received reportable dividends or sold securities or other items in 2009. Because only 80 percent of the customers receiving these composite form recipient statements sold securities or other items in 2009, only 80 percent of the annual composite form recipient statements contained information that section 6045(b) requires to be reported, whereas the remaining 20 percent of the annual composite form recipient statements contained only dividend information required to be reported by section 6042(c).

Broker also furnished Form 1099–INT and Form 1099–OID statements on February 11, 2010, to all customers with taxable accounts with interest or original issue discount required to be reported under section 6049(c). To certain customers, Broker furnished only Form 1099–INT or Form 1099–OID or both and did not furnish a composite form recipient statement because these customers did not receive reportable dividends and did not sell securities or other items in 2009.

As set forth in this notice, the IRS will treat Broker as having met its reporting deadline requirements under sections 6042(c) and 6049(c) for items from calendar year 2009 because: (1) sections 6042(c) and 6049(c) otherwise require Broker to furnish statements for these items on or before February 1, 2010; (2) Broker reported these items on a statement furnished on or before February 16, 2010; (3) Broker reported these items on a statement furnished to each customer on the same date that Broker either: (a) furnished to the customer a statement reporting items required by section 6045, or (b) would have furnished Form 1099–B to the customer if the customer had sold securities during the year; and (4) Broker was required to report these items to the customer as a result of the same broker-to-customer relationship as its obligation under section 6045. The IRS will therefore not assess any penalties under section 6722 based on the date that Broker furnished the statements reporting the items required under sections 6042(c) and 6049(c) even though some customers received a composite form recipient statement that reported no sales and other customers received no composite form recipient statement.

EFFECT ON OTHER DOCUMENTS

Notice 2009–11 is amplified.

DRAFTING INFORMATION

The principal author of this notice is Stephen Schaeffer of the Office of Associate Chief Counsel (Procedure & Administration). For further information regarding this notice, please contact Stephen Schaeffer at (202) 622–4910 (not a toll-free call).

Tax-Exempt Bonds in Certain Disaster Areas

Notice 2010–10

SECTION 1. PURPOSE

This notice provides guidance on the tax-exempt bond provisions for the Midwestern and Hurricane Ike disaster areas under the Heartland Disaster Tax Relief Act of 2008, Subtitle A of Title VII of the Tax Extenders and Alternative Minimum Tax Relief Act of 2008 (Division C of Public Law 110–343, 122 Stat. 3765, enacted on October 3, 2008) (Act) and § 1400N(a) of the Internal Revenue Code (Code), as modified by the Act. This notice also provides guidance on reimbursement expenditures made with proceeds of tax-exempt bonds issued for Midwestern and Hurricane Ike disaster areas and tax-exempt "Qualified Gulf Opportunity Zone Bonds" issued under § 1400N(a) of the Code. (Except as noted, section references in this Notice are to the Code and the Income Tax Regulations.)

SECTION 2. BACKGROUND

Section 1400N(a) of the Code permits certain tax-exempt bond financing in a Gulf Opportunity Zone, which includes areas in the States of Alabama, Louisiana and Mississippi affected by Hurricane Katrina.

The Act authorizes certain tax-exempt bond financing in a Midwestern disaster area as defined under § 702(b) of the Act which includes certain counties in certain Midwestern States affected by severe storms, tornados, or flooding (Midwestern Disaster Area), and in a Hurricane Ike disaster area as defined under § 704(c) of the Act which includes certain counties in Texas and parishes in Louisiana affected by Hurricane Ike (Hurricane Ike Disaster Area). These disasters are sometimes referred to in this Notice as "Midwestern Disaster" and "Hurricane Ike," respectively.

Sections 702 and 704 of the Act provide generally that the special provisions for tax-exempt bond financing in the Gulf Opportunity Zone under § 1400N(a) of the Code apply with certain modifications to tax-exempt bond financing in the Midwestern and Hurricane Ike Disaster Areas. Tax-exempt bonds that meet these modified requirements are referred to as "Qualified Midwestern Disaster Area Bonds" or "Qualified Hurricane Ike Disaster Area Bonds" in relevant provisions of § 1400N(a), as modified by the Act.

Previously, in Notice 2008–109, 2008–50 I.R.B. 1282 (December 15, 2008), the Internal Revenue Service (IRS) provided guidance on the counties included within the Midwestern and Hurricane Ike Disaster Areas and the relevant State population information needed to determine the State volume caps applicable to these disaster area bonds.

Sections 702(d)(1)(A)(i) and 704(a)(1)(A) of the Act generally provide a modified definition of qualified project costs under § 1400N(a)(2)(A)(i) that may be financed with Qualified Midwestern Disaster Area Bonds and Qualified Hurricane Ike Disaster Area Bonds that treat costs as qualified project costs only if: (1) in the case of a project involving a private business use (as defined in § 141(b)(6)), either the person using the property suffered a loss in a trade or business attributable to a Midwestern Disaster or Hurricane Ike or is a person designated for purposes of this section by the Governor of the State in which the project is located as a person carrying on a trade or business replacing a trade or business with respect to which another person suffered such a loss, and, (2) in the case of a project relating to public utility property, the project involves repair or reconstruction of public utility property damaged by a Midwestern Disaster or Hurricane Ike.

Sections 702(d)(1)(C) and 704(a)(3) of the Act modify § 1400N(a)(2)(C) to require that Qualified Midwestern Disaster Area Bonds and Qualified Hurricane Ike Disaster Area Bonds be "designated" for volume cap allocation purposes on the basis of providing assistance to areas in the order in which such assistance is most needed.

Certain interpretive questions have arisen under the Act regarding determinations of qualified project costs, designations of areas of greatest need, the scope of gubernatorial discretion on these matters, and the scope of eligible financing by public utilities with Qualified Midwestern Disaster Area Bonds and Qualified Hurricane Ike Disaster Area Bonds. In addition, certain interpretive questions have arisen

on the use of proceeds of Qualified Midwestern Disaster Area Bonds, Qualified Hurricane Ike Disaster Area Bonds and Qualified Gulf Opportunity Zone Bonds issued under § 1400N(a) to finance "reimbursements" of original expenditures previously paid from other sources of funds after the date of the occurrence of the applicable disaster under the general reimbursement expenditure rules for tax-exempt bonds.

SECTION 3. INTERIM GUIDANCE AND RELIANCE

3.1 In General

Pending the promulgation and effective date of future administrative or regulatory guidance, taxpayers may rely on the interim guidance provided in this notice.

3.2 Certain Determinations of Qualified Project Costs for Projects Involving Private Business Use

In the case of a project involving private business use under § 141(b)(6), for purposes of determining qualified project costs that may be financed with proceeds of Qualified Midwestern Disaster Area Bonds and Qualified Hurricane Ike Disaster Area Bonds under § 1400N(a)(2)(A)(i), as modified by the Act, the determination of whether a loss in a trade or business has been suffered and whether a person is carrying on a trade or business replacing a trade or business with respect to which another person suffered such a loss may be made by the Governor of the State in which the project is located in any reasonable manner as the Governor shall determine in good faith in such Governor's discretion. In addition, a duly authorized designee of such Governor under applicable State law may make these determinations.

Section 3.3 Qualified Project Costs for Public Utility Property

In the case of a project relating to public utility property, qualified project costs that may be financed with proceeds of Qualified Midwestern Disaster Area Bonds and Qualified Hurricane Ike Disaster Area Bonds include the repair or reconstruction of public utility property (as defined in § 168(i)(10)) damaged by a Midwestern Disaster or Hurricane Ike, as applicable, as provided in § 1400N(a)(2)(A)(i), as modified by the Act. In addition, public utilities may also use proceeds of Qualified Midwestern Disaster Area Bonds and Qualified Hurricane Ike Disaster Area Bonds to finance qualified project costs of projects involving private business use under the first prong of the definition of qualified project costs under § 1400N(a)(2)(A)(i), as modified by the Act, as more particularly described in § 3.2 of this Notice.

Section 3.4 Designations of Areas of Greatest Need

For purposes of the requirement to designate allocations of Qualified Midwestern Disaster Area Bonds and Qualified Hurricane Ike Disaster Area Bonds to provide assistance to areas in the order in which such assistance is most needed under § 1400N(a)(2)(C), as modified by the Act, the Governor of the State in which the Qualified Midwestern Disaster Area Bonds and Qualified Hurricane Ike Disaster Area Bonds are issued or the Bond Commission of such State required to approve such bonds, as applicable under § 1400N(a)(2)(C), may make such designations in any reasonable manner as such Governor or Bond Commission shall determine in good faith in the discretion of such Governor or Bond Commission, as applicable. In addition, a duly authorized designee of such Governor or Bond Commission under applicable State law may make these determinations.

Section 3.5 Certain Reimbursement Expenditures

The reimbursement expenditure rules under § 1.150–2 of the Income Tax Regulations apply to Qualified Midwestern Disaster Area Bonds, Hurricane Ike Disaster Area Bonds, and Qualified Gulf Opportunity Zone Bonds in the same manner as they apply to exempt facility bonds under § 1.142–4, except that, in the case of these disaster area bonds, issuers are treated as having met the official intent requirement under § 1.150–2(e) for original expenditures paid on or after the date of the occurrence of the applicable disaster (i.e., the Midwestern Disaster, Hurricane Ike, or Hurricane Katrina) and before December 31, 2009. Further, in the case of Qualified Midwestern Disaster Area Bonds, Hurricane Ike Disaster Area Bonds, and Gulf Opportunity Zone Bonds, the maximum reimbursement period under § 1.150–2(d)(2) is treated as ending no earlier than December 31, 2010.

SECTION 4. EFFECTIVE DATE

This Notice is effective on December 18, 2009. This notice applies to Qualified Midwestern Disaster Area Bonds and Qualified Hurricane Ike Disaster Area Bonds issued after October 3, 2008. In addition, § 3.5 of this notice on reimbursement expenditures also applies to Qualified Gulf Opportunity Zone Bonds issued after December 21, 2005.

SECTION 5. DRAFTING INFORMATION

The principal authors of this notice are Carla A. Young and James A. Polfer, Office of the Associate Chief Counsel (Financial Institutions and Products). However, other personnel from the IRS and the Treasury Department participated in its development. For further information regarding this notice, contact James A. Polfer at (202) 622–3980 (not a toll-free call).

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26 CFR 1.61–21: Taxation of Fringe Benefits.
(Also: §§ 61, 280F.)

Rev. Proc. 2010–10

SECTION 1. PURPOSE

.01 This revenue procedure provides: (1) the maximum value of employer-provided vehicles first made available to employees for personal use in calendar year 2010 for which the vehicle cents-per-mile valuation rule provided under section 1.61–21(e) of the Income Tax Regulations may be applicable is $15,300 for a passenger automobile and $16,000 for a truck or van; (2) the maximum value of employer-provided vehicles first made available to employees for personal use in calendar year 2010 for which the fleet-average valuation rule provided under section 1.61–21(d) of the regulations may be applicable is $20,300 for a passenger automobile and $21,000 for a truck or van.

SECTION 2. BACKGROUND

.01 If an employer provides an employee with a vehicle that is available to the employee for personal use, the value of the personal use must generally be included in the employee's income and wages. Internal Revenue Code § 61; Treas. Reg. § 1.61–21.

.02 For employer-provided passenger automobiles (including trucks and vans) made available to employees for personal use that meet the requirements of section 1.61–21(e)(1) of the regulations, generally the value of the personal use may be determined under the vehicle cents-per-mile valuation rule of section 1.61–21(e). However, regulations section 1.61–21(e)(1)(iii)(A) provides that for a passenger automobile first made available after 1988 to any employee of the employer for personal use, the value of the personal use may not be determined under the vehicle cents-per-mile valuation rule for a calendar year if the fair market value of the passenger automobile (determined pursuant to regulations section 1.61–21(d)(5)(i) through (iv)) on the first date the passenger automobile is made available to the employee exceeds a specified dollar limit.

.03 For employer-provided vehicles available to employees for personal use for an entire year, generally the value of the personal use may be determined under the automobile lease valuation rule of section 1.61–21(d) of the regulations. Under this valuation rule, the value of the personal use is the Annual Lease Value. Provided the requirements of regulation section 1.61–21(d)(5)(v) are met, an employer with a fleet of 20 or more automobiles may use a fleet-average value for purposes of calculating the Annual Lease Values of the automobiles in the employer's fleet. The fleet-average value is the average of the fair market values of all the automobiles in the fleet. However, section 1.61–21(d)(5)(v)(D) of the regulations provides that for an automobile first made available after 1988 to an employee of the employer for personal use, the value of the personal use may not be determined under the fleet-average valuation rule for a calendar year if the fair market value of the automobile (determined pursuant to regulations section 1.61–21(d)(5)(i) through (v)) on the first date the passenger automobile is made available to the employee exceeds a specified dollar limit.

.04 The maximum passenger automobile values for applying the vehicle cents-per-mile and the fleet-average value rules reflect the automobile price inflation adjustment of Code section 280F(d)(7). The method of calculating this price inflation amount for automobiles other than trucks and vans uses the "new car" component of the CPI "automobile component". When calculating this price inflation adjustment for trucks and vans, the "new trucks" component of the CPI is used. This results in somewhat higher maximum values for trucks and vans. This change reflects the higher rate of price inflation that trucks and vans have been subject to since 1988, and is consistent with the change announced in Rev. Proc. 2003–75, 2003–2 C.B. 1018, for purposes of calculating depreciation deductions. *See also* Rev. Proc. 2009–24, 2009–17 I.R.B. 885. For purposes of this revenue procedure, the term "trucks and vans" refers to passenger automobiles that are built on a truck chassis, including minivans and sport utility vehicles (SUVs) that are built on a truck chassis.

SECTION 3. PROCEDURE

.01 Maximum Automobile Value for Using the Vehicle Cents-per-mile Valuation Rule. An employer providing a passenger automobile for the first time in calendar year 2010 for the personal use of any employee may determine the value of the personal use by using the vehicle cents-per-mile valuation rule in section 1.61–21(e) of the regulations if its fair market value on the date it is first made available does not exceed $15,300 for a passenger automobile other than a tuck or van, or $16,000 for a truck or van. If the fair market value of the passenger automobile exceeds this amount, the employer may determine the value of the personal use under the general valuation rules of regulations section 1.61–21(b) or under the special valuation rules of section 1.61–21(d) (Automobile lease valuation) or section 1.61–21(f) (Commuting valuation) if the applicable requirements are met. *See* Rev. Proc. 2008–13, 2008–6 I.R.B. 407, as modified by Announcement 2008–15, 2008–9 I.R.B. 511, for guidance on determining the maximum value of passenger automobiles first made available during calendar year 2008, and Rev. Proc. 2009–12, 2009–3 I.R.B. 321, for guidance on determining the maximum value of passenger automobiles first made available during calendar year 2009.

.02 Maximum Automobile Value for Using the Fleet-Average Valuation Rule. An employer with a fleet of 20 or more automobiles providing an automobile for the first time in calendar year 2010 for the personal use of any employee for an entire year may determine the value of the personal use by using the fleet-average valuation rule in regulations section 1.61–21(d)(5)(v) to calculate the Annual Lease Values of the automobiles in the fleet. The fleet-average valuation rule may not be used to determine the Annual Lease Value of any automobile if its fair market value on the date it is first made available exceeds $20,300 for a passenger automobile other than a truck or van, or $21,000 for a truck or van. If all other applicable requirements are met, an employer with a fleet of 20 or more vehicles consisting of passenger automobiles other than trucks or vans as well as trucks and vans may use the fleet-average valuation rule as long as none of the vehicles exceed their respective maximum allowable values. If the fair market value of any passenger automobile in the fleet exceeds these amounts, the employer may determine the value of the personal use under regulations section 1.61–21(f) (Commuting valuation) or the general valuation rules of section 1.61–21(b) or may determine the Annual Lease Value of such automobile separately under the automobile lease valuation rule of section 1.61–21(d)(2) if the applicable requirements are met.

SECTION 4. EFFECTIVE DATE

This revenue procedure applies to employer-provided passenger automobiles first made available to employees for personal use in calendar year 2010.

SECTION 5. DRAFTING INFORMATION

The principal author of this revenue procedure is Don M. Parkinson of the Office of the Division Counsel/Associate Chief Counsel (Tax Exempt & Government Entities). For further information regarding the maximum automobile val-

ues for applying the valuation rules of regulations section 1.61–21(e)(1)(iii)(A) (the vehicle cents-per-mile valuation rule), and section 1.61–21(d)(5)(v)(D) (the fleet average valuation rule), contact Don M. Parkinson at (202) 622–6040 (not a toll-free call).

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26 CFR 601.601: Rules and regulations.
(Also: Part I, §§ 301, 305.)

Rev. Proc. 2010–12

SECTION 1. PURPOSE

Rev. Proc. 2009–15, 2009–4 I.R.B. 356, amplifying and superseding Rev. Proc. 2008–68, 2008–52 I.R.B. 1373, provides temporary guidance regarding certain stock distributions by publicly traded real estate investment trusts (REITs) and regulated investment companies (RICs). This revenue procedure amplifies and supersedes Rev. Proc. 2009–15.

SECTION 2. BACKGROUND

.01 Section 305(a) of the Internal Revenue Code ("Code") provides that, except as otherwise provided in section 305, gross income does not include the amount of any distribution of the stock of a corporation made by such corporation to its shareholders with respect to its stock.

.02 Section 305(b)(1) provides that section 305(a) shall not apply to a distribution by a corporation of its stock, and the distribution shall be treated as a distribution of property to which section 301 applies, if the distribution is, at the election of any of the shareholders (whether exercised before or after the declaration thereof), payable either in its stock or in property.

.03 Section 305(b)(2) provides that section 305(a) shall not apply to a distribution by a corporation of its stock, and the distribution shall be treated as a distribution of property to which section 301 applies, if the distribution (or a series of distributions of which such distribution is one) has the result of the receipt of property by some shareholders, and an increase in the proportionate interests of other shareholders in the assets or earnings and profits of the corporation.

.04 Section 1.305–2(a) of the Income Tax Regulations provides that under section 305(b)(1), if any shareholder has the right to an election or option with respect to whether a distribution shall be made either in money or any other property, or in stock or rights to acquire stock of the distributing corporation, then, with respect to all shareholders, the distribution of stock or rights to acquire stock is treated as a distribution of property to which section 301 applies regardless of—

(1) Whether the distribution is actually made in whole or in part in stock or in stock rights;

(2) Whether the election or option is exercised or exercisable before or after the declaration of the distribution;

(3) Whether the declaration of the distribution provides that the distribution will be made in one medium unless the shareholder specifically requests payment in the other;

(4) Whether the election governing the nature of the distribution is provided in the declaration of the distribution or in the corporate charter or arises from the circumstances of the distribution; or

(5) Whether all or part of the shareholders have the election.

.05 Section 1.305–1(b)(2) provides that where a corporation which regularly distributes its earnings and profits, such as a RIC, declares a dividend pursuant to which the shareholders may elect to receive either money or stock of the distributing corporation of equivalent value, the amount of the distribution of the stock received by any shareholder electing to receive stock will be considered to equal the amount of the money which could have been received instead.

.06 Section 852(a) provides, in part, that except for section 852(c), the provisions of part I of subchapter M of Chapter 1 shall not apply to a RIC for a taxable year unless the deduction for dividends paid (as defined in section 561 with certain modifications) for the taxable year equals or exceeds a specified amount.

.07 Section 857(a) provides, in part, that except for subsection (d) of section 857 and subsection (g) of section 856, the provisions of part II of subchapter M of Chapter 1 shall not apply to a REIT for a taxable year unless the deduction for dividends paid during the year (as defined in section 561 with certain modifications) for the taxable year equals or exceeds a specified amount.

.08 Section 562(c) provides that the amount of any distribution shall not be considered as a dividend for purposes of computing the dividends paid deduction under section 561, unless such distribution is *pro rata*, with no preference to any share of stock as compared with other shares of the same class, and with no preference to one class of stock as compared with another class except to the extent that the former is entitled (without reference to waivers of their rights by shareholders) to such preference.

.09 Section 852(b)(7) provides that any dividend declared by a RIC in October, November, or December of any calendar year and payable to shareholders of record on a specified date in such a month shall be deemed to have been received by each shareholder on December 31 of such calendar year, and to have been paid by the RIC on December 31 of such calendar year (or, if earlier, as provided in section 855). The preceding sentence shall apply only if such dividend is actually paid by the RIC during January of the following calendar year.

.10 Section 855 provides, in relevant part, that if a RIC declares a dividend prior to the time prescribed by law for the filing of its return for a taxable year (including the period of any extension of time granted for filing such return), and distributes the amount of such dividend to shareholders in the 12-month period following the close of such taxable year and not later than the date of the first regular dividend payment made after such declaration, the amount so declared and distributed shall, to the extent the RIC elects in such return, be generally considered as having been paid during such taxable year. Except as provided in section 852(b)(7), the amounts distributed pursuant to this section shall be treated as received by the shareholder in the taxable year in which the distribution is made.

.11 Section 857(b)(9) provides that any dividend declared by a REIT in October, November, or December of any calendar year and payable to shareholders of record on a specified date in such a month shall be deemed to have been received by each shareholder on December 31 of such calendar year, and to have been paid by the REIT on December 31 of such calendar year (or, if earlier, as provided in section 858). The preceding sentence shall apply only if such dividend is actually paid by

the REIT during January of the following calendar year.

.12 Section 858 provides, in relevant part, that if a REIT declares a dividend before the time prescribed by law for the filing of its return for a taxable year (including the period of any extension of time granted for filing such return), and distributes the amount of such dividend to shareholders in the 12-month period following the close of such taxable year and not later than the date of the first regular dividend payment made after such declaration, the amount so declared and distributed shall, to the extent the REIT elects in such return, be generally considered as having been paid during such taxable year. Except as provided in section 857(b)(9), the amounts distributed pursuant to section 858 shall be treated as received by the shareholder in the taxable year in which the distribution is made.

.13 If there is a determination with respect to a RIC or a REIT that results in an adjustment that produces a tax deficiency for any taxable year, there are procedures under section 860 that enable the RIC or REIT to make a current distribution to its shareholders (a "deficiency dividend") that increases the RIC's or REIT's dividends-paid deduction for the earlier year of the deficiency.

SECTION 3. SCOPE AND APPLICATION

.01 *In general*. If a corporation qualifies as a RIC or as a REIT under part I or II, respectively, of subchapter M of the Code and makes a distribution that meets all of the requirements of section 3.02 of this revenue procedure—

(1) The Internal Revenue Service will treat the distribution of stock as a distribution of property to which section 301 applies by reason of section 305(b), and the amount of such distribution of stock will be considered to equal the amount of the money which could have been received instead; and

(2) If some shareholders receive a combination of stock and money that differs from the combination received by other shareholders and if the fair market value of the stock on the date of distribution differs from the amount of money which could have been received instead, those differences do not cause the distribution to be a preferential dividend under section 562(c).

.02 *Requirements for distribution*.

(1) The distribution is made by the corporation to its shareholders with respect to its stock;

(2) Stock of the corporation is publicly traded on an established securities market in the United States;

(3) The distribution is declared on or before December 31, 2012, with respect to a taxable year ending on or before December 31, 2011, whether declared and distributed prior to the close of the taxable year or whether declared and distributed pursuant to the provisions of sections 855, 852(b)(7), 858, 857(b)(9), or 860;

(4) Pursuant to such declaration each shareholder may elect to receive the shareholder's entire entitlement under the declaration in either money or stock of the distributing corporation of equivalent value subject to a limitation on the amount of money to be distributed in the aggregate to all shareholders (the "Cash Limitation"), provided that—

(a) such Cash Limitation is not less than 10% of the aggregate declared distribution, and

(b) if too many shareholders elect to receive money, each shareholder electing to receive money will receive a *pro rata* amount of money corresponding to the shareholder's respective entitlement under the declaration, but in no event will any shareholder electing to receive money receive less than 10% of the shareholder's entire entitlement under the declaration in money;

(5) The calculation of the number of shares to be received by any shareholder will be determined, over a period of up to two weeks ending as close as practicable to the payment date, based upon a formula utilizing market prices that is designed to equate in value the number of shares to be received with the amount of money that could be received instead. For purposes of applying subsection (4) of this Section 3.02, the value of the shares to be distributed shall be determined by using the formula described in the preceding sentence; and

(6) With respect to any shareholder participating in a dividend reinvestment plan ("DRIP"), the DRIP applies only to the extent that, in the absence of the DRIP, the shareholder would have received the distribution in money under subsection (4) of this Section 3.02.

SECTION 4. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 2009–15 is amplified and superseded.

SECTION 5. EFFECTIVE DATE

This revenue procedure is effective with respect to distributions declared on or after January 1, 2008.

SECTION 6. DRAFTING INFORMATION

The principal author of this revenue procedure is T. Ian Russell of the Office of Associate Chief Counsel (Corporate). For further information regarding this revenue procedure, contact T. Ian Russell at (202) 622–7550 (not a toll-free call).

Definition of Terms

Revenue rulings and revenue procedures (hereinafter referred to as "rulings") that have an effect on previous rulings use the following defined terms to describe the effect:

Amplified describes a situation where no change is being made in a prior published position, but the prior position is being extended to apply to a variation of the fact situation set forth therein. Thus, if an earlier ruling held that a principle applied to A, and the new ruling holds that the same principle also applies to B, the earlier ruling is amplified. (Compare with *modified*, below).

Clarified is used in those instances where the language in a prior ruling is being made clear because the language has caused, or may cause, some confusion. It is not used where a position in a prior ruling is being changed.

Distinguished describes a situation where a ruling mentions a previously published ruling and points out an essential difference between them.

Modified is used where the substance of a previously published position is being changed. Thus, if a prior ruling held that a principle applied to A but not to B, and the new ruling holds that it applies to both A and B, the prior ruling is modified because it corrects a published position. (Compare with *amplified* and *clarified*, above).

Obsoleted describes a previously published ruling that is not considered determinative with respect to future transactions. This term is most commonly used in a ruling that lists previously published rulings that are obsoleted because of changes in laws or regulations. A ruling may also be obsoleted because the substance has been included in regulations subsequently adopted.

Revoked describes situations where the position in the previously published ruling is not correct and the correct position is being stated in a new ruling.

Superseded describes a situation where the new ruling does nothing more than restate the substance and situation of a previously published ruling (or rulings). Thus, the term is used to republish under the 1986 Code and regulations the same position published under the 1939 Code and regulations. The term is also used when it is desired to republish in a single ruling a series of situations, names, etc., that were previously published over a period of time in separate rulings. If the new ruling does more than restate the substance of a prior ruling, a combination of terms is used. For example, *modified* and *superseded* describes a situation where the substance of a previously published ruling is being changed in part and is continued without change in part and it is desired to restate the valid portion of the previously published ruling in a new ruling that is self contained. In this case, the previously published ruling is first modified and then, as modified, is superseded.

Supplemented is used in situations in which a list, such as a list of the names of countries, is published in a ruling and that list is expanded by adding further names in subsequent rulings. After the original ruling has been supplemented several times, a new ruling may be published that includes the list in the original ruling and the additions, and supersedes all prior rulings in the series.

Suspended is used in rare situations to show that the previous published rulings will not be applied pending some future action such as the issuance of new or amended regulations, the outcome of cases in litigation, or the outcome of a Service study.

Abbreviations

The following abbreviations in current use and formerly used will appear in material published in the Bulletin.

A—Individual.
Acq.—Acquiescence.
B—Individual.
BE—Beneficiary.
BK—Bank.
B.T.A.—Board of Tax Appeals.
C—Individual.
C.B.—Cumulative Bulletin.
CFR—Code of Federal Regulations.
CI—City.
COOP—Cooperative.
Ct.D.—Court Decision.
CY—County.
D—Decedent.
DC—Dummy Corporation.
DE—Donee.
Del. Order—Delegation Order.
DISC—Domestic International Sales Corporation.
DR—Donor.
E—Estate.
EE—Employee.
E.O.—Executive Order.
ER—Employer.
ERISA—Employee Retirement Income Security Act.
EX—Executor.
F—Fiduciary.
FC—Foreign Country.
FICA—Federal Insurance Contributions Act.
FISC—Foreign International Sales Company.
FPH—Foreign Personal Holding Company.
F.R.—Federal Register.
FUTA—Federal Unemployment Tax Act.
FX—Foreign corporation.
G.C.M.—Chief Counsel's Memorandum.
GE—Grantee.
GP—General Partner.
GR—Grantor.
IC—Insurance Company.
I.R.B.—Internal Revenue Bulletin.
LE—Lessee.
LP—Limited Partner.
LR—Lessor.
M—Minor.
Nonacq.—Nonacquiescence.
O—Organization.
P—Parent Corporation.
PHC—Personal Holding Company.
PO—Possession of the U.S.
PR—Partner.
PRS—Partnership.
PTE—Prohibited Transaction Exemption.
Pub. L.—Public Law.
REIT—Real Estate Investment Trust.
Rev. Proc.—Revenue Procedure.
Rev. Rul.—Revenue Ruling.
S—Subsidiary.
S.P.R.—Statement of Procedural Rules.
Stat.—Statutes at Large.
T—Target Corporation.
T.C.—Tax Court.
T.D. —Treasury Decision.
TFE—Transferee.
TFR—Transferor.
T.I.R.—Technical Information Release.
TP—Taxpayer.
TR—Trust.
TT—Trustee.
U.S.C.—United States Code.
X—Corporation.
Y—Corporation.
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[1] A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2009–27 through 2009–52 is in Internal Revenue Bulletin 2009–52, dated December 28, 2009.

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[1] A cumulative list of current actions on previously published items in Internal Revenue Bulletins 2009–27 through 2009–52 is in Internal Revenue Bulletin 2009–52, dated December 28, 2009.

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