

**IRS ESTABLISHES CORRECTIONS PROGRAM FOR DOCUMENTARY  
NONCOMPLIANCE UNDER SECTION 409A OF THE INTERNAL REVENUE CODE**

Prior to January 1, 2009, U.S. taxpayers and their respective legal counsel and advisors spent countless hours and substantial resources amending nonqualified deferred compensation plans, agreements, and programs to comply with the documentary requirements of Section 409A of the Internal Revenue Code (“Section 409A”) and establishing internal procedures for satisfying the operational requirements of Section 409A. Notice 2008-113, issued by the Internal Revenue Service (the “IRS”) in December 2008, promptly established welcome (albeit limited) relief for the operational compliance failures that were considered likely to occur under Section 409A. However, because plans subject to Section 409A must satisfy documentary as well as operational requirements, any relief felt by taxpayers and their advisors on January 1, 2009, for having met the documentary compliance deadline was overshadowed by a multitude of lingering interpretive questions concerning the regulations and the draconian penalties that would appear to apply for even the most seemingly insignificant, and perhaps inadvertent, documentary compliance failures.

As we enter the second calendar year of required compliance with the final Section 409A regulations, the IRS has issued Notice 2010-6, which complements the operational noncompliance corrections program established by Notice 2008-113 by establishing a corrections program for nonqualified deferred compensation plans that fail to satisfy the documentary requirements of Section 409A. Although Notice 2010-6 is not exactly a second bite at the apple provided by the transition relief under the final Section 409A regulations in 2007 and 2008, taxpayers maintaining, participating in, or party to nonqualified deferred compensation plans subject to Section 409A should carefully consider whether this corrections program might be available to any plans that could have documentary compliance issues in order to avoid (or at least mitigate) the possibly substantial adverse tax consequences of failure to comply with Section 409A.

The relief provided by Notice 2010-6 permits taxpayers to remove or amend offending provisions in a noncompliant plan. In some cases, corrective action will require immediate income recognition and taxation under Section 409A of a portion of the deferred amounts under the plan, resulting in an additional 20% penalty tax (but no premium interest tax) on such amounts. Transition relief contained in Notice 2010-6, however, provides that to the extent that any documentary compliance failures are corrected in accordance with the corrections program on or before December 31, 2010, such failures will be treated as corrected on January 1, 2009, and no income inclusion will be required under Section 409A as a result of such corrective action, as would otherwise be required under the program.

Given the penalty-free transition relief that applies through the end of 2010, participants in and sponsors of nonqualified deferred compensation plans with potential documentary compliance issues should promptly take advantage of this relief to minimize any potential exposure to Section 409A penalties. Further, to the extent that plans were not reviewed for Section 409A compliance prior to January 1, 2009, plan participants and sponsors should take this opportunity to evaluate such plans with an eye to documentary compliance by year-end.

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If you have any questions concerning the foregoing or would like additional information, please contact David E. Rubinsky (212-728-8635, drubinsky@willkie.com), Jason R. Ertel (212-728-8120, jertel@willkie.com), or the Willkie attorney with whom you regularly work.

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