



### Section 409A Document Correction Opportunity

IRS Issues Guidance for Correction for Documentation of Non-qualified Deferred Compensation Arrangement under Section 409A Requirements

Since 2005, nonqualified deferred compensation plans have been subject to requirements under Section 409A as to operational as well as documentation issues. During the period 2005-2009, plan sponsors were given a grace period for bringing their plan documents into compliance with the Section 409A documentation requirements. However, because the application of the new rules was complicated, extensive and in many cases uncertain, the IRS has now issued guidance regarding voluntary corrections of documentation failures (IRS Notice 2010-6), which may provide additional opportunities to avoid the penalties applicable to a violation.

The key elements for the availability of most voluntary correction opportunities under the Notice are as follows:

1. A taxpayer claiming relief under the Notice will have the burden of demonstrating eligibility for the relief/satisfaction of the applicable requirements - would be subject to IRS review upon audit.
2. The relief is not available for an individual whose federal income tax return for the tax year in question is being audited by the IRS as of the date of correction (for a non-individual, only where, as part of an IRS audit the examining agent has specifically cited nonqualified deferred compensation as an issue under consideration).
3. The relief is available solely for inadvertent and unintentional compliance failures.
4. To obtain the relief with respect to a particular plan, the plan sponsor must take commercially reasonable steps to identify all other nonqualified deferred compensation plans with substantially similar documentation failures and also correct those failures.

Full correction in accordance with the Notice by December 31, 2010 will avoid the need for reporting and paying additional taxes for many corrected documentation violations. In addition, however, the correction may need to be made within certain time periods and/or prior to the occurrence of certain operational events relating to the affected language. In many instances, the most favorable relief would be available only if certain events do not occur within one year of the correction date. Consequently, time is of the essence and prompt corrective action should be taken.

Parties to nonqualified deferred compensation plans, both service recipients (e.g., employers) and service providers (e.g., employees and consultants), who have not had their plans/agreements reviewed recently for Section 409A compliance should work with their tax counsel in this regard immediately, to avail themselves of the correction opportunities made available by the Notice, many of which are time/transaction sensitive. For more information regarding Section 409A see our previously published alert, "*Executive Compensation After The American Job Creation Act*," at [www.loeb.com](http://www.loeb.com).

If you have any questions regarding the above-described laws and what they might mean for you, please contact Marla Aspinwall at [maspinwall@loeb.com](mailto:maspinwall@loeb.com) or at 310.282.2377, or Dana Scott Fried at [dfried@loeb.com](mailto:dfried@loeb.com) or at 212.407.4185.

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