

JANUARY 9, 2008

TREASURY, IRS ESTABLISH A LIMITED CORRECTIONS PROGRAM FOR CERTAIN IRC §409A OPERATIONAL ERRORS

On December 3, 2007, the Treasury Department and the IRS issued Notice 2007-100 (the "Notice"), which establishes a limited corrections program for certain inadvertent errors that occur in the operation of a nonqualified deferred compensation plan.

OVERVIEW

Under the statutory requirements of Internal Revenue Code section 409A ("§409A"), if there is a violation of §409A with respect to amounts deferred by or on behalf of a participant, then all amounts deferred by or on behalf of the affected participant under the plan (determined in accordance with the §409A "plan aggregation rules") are included in the participant's income, and would be subject to an additional 20% penalty and interest at the underpayment rate plus one percentage point.

Under the Notice, certain operational errors that are corrected in the same tax year will not be treated as a violation of §409A—i.e., by satisfying the requirements of the Notice to correct the error, the arrangement is deemed to be brought into operational compliance with §409A; therefore, the income inclusion and penalty provisions of §409A will not apply. In addition, with respect to certain de minimis operational errors that are not corrected in the same taxable year, the Notice provides transition relief for tax years beginning before January 1, 2010, which limits the amount of income inclusion and penalties associated with such failure. In such cases, the error will be treated as a violation of §409A, but the relief in the Notice may mitigate the impact of the violation. Importantly, the Notice also indicates that a more extensive corrections program for operational errors is being considered by the IRS and the Notice requests comments with respect to such program.

A summary of the Notice is provided below. A complete copy of the Notice is available at http://www.treas.gov/press/releases/reports/not2007100_publication_.pdf.

I. GENERAL REQUIREMENTS.

In order to be eligible to use the relief contained in the Notice, the following general requirements must be satisfied:

- ◆ The relief in the Notice only applies to unintentional operational errors. So, for example, the Notice does not provide relief for plan document failures (i.e., where the terms of a plan document fail to conform to the requirements of §409A);
- ◆ The error must be corrected in accordance with the Notice and the plan sponsor must take commercially reasonable steps to avoid a recurrence of the error; and
- ◆ If the same (or a substantially similar) operational error has previously occurred, the relief in the Notice is only available for taxable years beginning after December 31, 2008, if the plan sponsor can demonstrate that (i) procedures were in place to ensure that there would not be a recurrence of the operational error, (ii) commercially reasonable steps had been taken to prevent the recurrence, and (iii) the operational error occurred despite the plan sponsor's diligent efforts.

Any application of the relief provided in the Notice is subject to examination by the IRS.

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CORRECTION OF CERTAIN OPERATIONAL ERRORS IN THE SAME TAXABLE YEAR

II. RELIEF FOR CERTAIN OPERATIONAL ERRORS THAT ARE CORRECTED IN THE SAME TAXABLE YEAR.

Under the Notice, certain operational errors that are corrected in the same tax year will not be treated as a violation of §409A—i.e., by satisfying the requirements of the Notice to correct the error, the arrangement is deemed to be brought into operational compliance with §409A; therefore, the income inclusion and penalty provisions of §409A will not apply. The requirements that must be satisfied in order to correct an operational error in the same taxable year are summarized in the table below.

CORRECTION OF CERTAIN OPERATIONAL ERRORS IN THE SAME TAXABLE YEAR

Issue	Provisions in the Notice
<p>Failure to Defer an Amount</p>	<p>The Notice provides relief where an amount that should have been credited to, or deferred under, a nonqualified plan was inadvertently paid to a participant due to an unintentional operational error. Specifically, under the Notice the amount erroneously paid to the participant will be treated as if it were timely deferred in accordance with the terms of the plan and the applicable requirements of §409A, if the following requirements are satisfied:</p> <ul style="list-style-type: none"> ◆ Amount Must be Recouped by Plan Sponsor in the Same Taxable Year. The Notice requires that either: <ul style="list-style-type: none"> • The participant must repay such amount (plus the interest factor, if any, described below) to the plan sponsor on or before the last day of the participant’s taxable year in which the erroneous payment was made; or • The plan sponsor must reduce the participant’s compensation that otherwise would have been paid to such participant during the remainder of the taxable year (e.g., base salary) by an equivalent amount (plus the interest factor, if any, described below). ◆ Interest Must be Paid by Participants Who are Considered to be “Insiders.” If the total amount erroneously paid to the participant during the taxable year exceeds the applicable dollar amount under IRC §402(g)(1)(B) in effect for the year (e.g., \$15,500 in 2008) <u>and</u> the participant is considered to be an “insider” under section 16 of the Securities Exchange Act of 1934 (e.g., a director or officer of the service recipient or a beneficial owner of more than 10% of any class of equity security of the service recipient), the participant is also required to pay interest to the plan sponsor, the amount of which must be determined pursuant to a formula provided in the Notice. ◆ Information and Reporting Requirements. A plan sponsor that uses the relief described above is also required to satisfy the information and reporting requirements provided in the Notice. <i>These information and reporting requirements are summarized in Part IV of this bulletin.</i> <p><i>Example – Please refer to example 1 in Part VI of this bulletin for an illustration of how this relief would be applied to correct a failure to defer an amount.</i></p>

CORRECTION OF CERTAIN OPERATIONAL ERRORS IN THE SAME TAXABLE YEAR

CORRECTION OF CERTAIN OPERATIONAL ERRORS IN THE SAME TAXABLE YEAR (CONT.)

Issue	Provisions in the Notice
<p>Failure to Comply with the Six-Month Delay Requirement for Certain Payments to a “Specified Employee”</p>	<p>§409A generally requires that payments triggered by the separation from service of a “specified employee” of a publicly traded company must be delayed for a period of at least six months following the participant’s separation from service. Under the Notice, amounts subject to this six-month delay requirement that were inadvertently paid to a participant before the end of the applicable six-month period due to an unintentional operational error will not be treated as a violation of §409A if the following requirements are satisfied:</p> <ul style="list-style-type: none"> ◆ Amount Must be Repaid by Participant in the Same Taxable Year. On or before the last day of the participant’s taxable year in which the erroneous payment was made, the participant must repay such amount to the plan sponsor. ◆ Additional Period of Delay for the Distribution is Required. The amount cannot be (re-) distributed from the plan to the participant until the date that is determined by adding the number of days that elapse between the erroneous payment date and the date on which such amount is repaid by the participant, to <u>the later of</u> (i) the date on which the amount was otherwise payable under the terms of the plan, or (ii) the date on which the participant repaid such amount to the plan sponsor. ◆ Information and Reporting Requirements. A plan sponsor that uses the relief described above is also required to satisfy the information and reporting requirements provided in the Notice. <i>These information and reporting requirements are summarized in Part IV of this bulletin.</i> <p><i>Example – Please refer to example 2 in Part VI of this bulletin for an illustration of how this relief would be applied to correct a failure to comply with the six-month delay requirement for certain payments to a “specified employee.”</i></p>
<p>Amount Erroneously Deferred</p>	<p>The Notice provides relief where an amount should <u>not</u> have been deferred into a nonqualified plan but was erroneously credited to the plan due to an unintentional operational error. Specifically, under the Notice this type of error will not be treated as violation of §409A if (i) the amount would have otherwise been paid to the participant during the same taxable year in which it was erroneously treated as deferred compensation, and (ii) the following requirements are satisfied:</p> <ul style="list-style-type: none"> ◆ Amount Must be Paid to the Participant in the Same Taxable Year. The erroneous deferral amount must be distributed from the plan to the participant on or before the last day of the participant’s taxable year in which it was incorrectly treated as deferred compensation. ◆ Earnings Adjustment Required for “Insiders”. If the affected participant is an “insider” under section 16 of the Securities Exchange Act of 1934, the participant’s account balance, if any, remaining in the plan (after the erroneous deferral amount has been paid out) must be adjusted to remove any positive earnings attributable to such amount retroactive to the date the amount was incorrectly credited to the plan. If earnings attributable to such amount were negative, an adjustment may (but is not required) to be made by the plan sponsor. Note that with respect to a participant who is <u>not</u> considered to be an “insider”, the Notice permits but does not require an earnings adjustment to be made by the plan sponsor. ◆ Information and Reporting Requirements. A plan sponsor that uses the relief described above is also required to satisfy the information and reporting requirements provided in the Notice. <i>These information and reporting requirements are summarized in Part IV of this bulletin.</i> <p><i>Example – Please refer to example 3 in Part VI of this bulletin for an illustration of how this relief would be applied to correct an amount that was erroneously deferred.</i></p>

TRANSITION RELIEF FOR CERTAIN OPERATIONAL ERRORS THAT ARE NOT CORRECTED IN THE SAME TAXABLE YEAR

III. TRANSITION RELIEF FOR CERTAIN DE MINIMIS OPERATIONAL ERRORS THAT ARE NOT CORRECTED IN THE SAME TAXABLE YEAR.

With respect to certain de minimis operational errors that are not corrected in the same taxable year (i.e., errors not eligible for the relief summarized in *Part II* of this bulletin), the Notice provides transition relief for tax years beginning before January 1, 2010, which limits the amount of income inclusion and penalties associated with such failure—i.e., the error will be treated as a violation of §409A, but the relief in the Notice may mitigate the impact of the violation. As summarized in the table below, this transition relief is only available where (i) the amount impacted by the operational error does not exceed the applicable dollar amount under IRC §402(g)(1)(B) in effect for the year in which the operational error occurred (e.g., \$15,500 in 2008); and (ii) all of the applicable requirements of the Notice are satisfied by no later than the end of the participant’s second taxable year following the taxable year in which the operational error occurred.

TRANSITION RELIEF FOR CERTAIN DE MINIMIS OPERATIONAL ERRORS THAT ARE NOT CORRECTED IN THE SAME TAXABLE YEAR

Issue	Provisions in the Notice
Failure to Defer a Limited Amount	<p>The transition relief under the Notice is available where an amount, which does <u>not</u> exceed the applicable dollar amount under IRC §402(g)(1)(B) in effect for the year (e.g., \$15,500 in 2008), should have been credited to, or deferred under, a nonqualified plan but was inadvertently paid to a participant due to an unintentional operational error.</p> <p>◆ Only the Erroneous Amount is Includible in Income and Subject to 20% Penalty; No Premium Interest Tax Imposed. If the transition relief is utilized, then (i) <u>only</u> the amount subject to the error is includible in income and subject to an additional 20% tax, and (ii) the participant will <u>not</u> be required to pay the premium interest tax equal to the underpayment rate plus one percentage point that would otherwise have been imposed under §409A. Note that without this transition relief, <u>all</u> amounts deferred by or on behalf of the affected participant under the “plan” (determined in accordance with the §409A “plan aggregation rules”) would be included in the participant’s income and would be subject to <u>both</u> a 20% penalty and interest at the underpayment rate plus one percentage point.</p> <p>◆ Information and Reporting Requirements. A plan sponsor that uses the transition relief described above is also required to satisfy the information and reporting requirements provided in the Notice. <i>These information and reporting requirements are summarized in Part IV of this bulletin.</i></p> <p><i>Example – Please refer to example 4 in Part VI of this bulletin for an illustration of how this transition relief would be applied to a failure to defer a limited amount.</i></p>

TRANSITION RELIEF FOR CERTAIN OPERATIONAL ERRORS THAT ARE NOT CORRECTED IN THE SAME TAXABLE YEAR

TRANSITION RELIEF FOR CERTAIN DE MINIMIS OPERATIONAL ERRORS THAT ARE NOT CORRECTED IN THE SAME TAXABLE YEAR (CONT.)

Issue	Provisions in the Notice
<p>Failure to Comply with the Six-Month Delay Requirement for Certain Payments to a “Specified Employee”</p>	<p>As previously noted, §409A generally requires that payments triggered by the separation from service of a “specified employee” of a publicly traded company must be delayed for a period of at least six months following the participant’s separation from service. The transition relief under the Notice is available where an amount, which does <u>not</u> exceed the applicable dollar amount under IRC §402(g)(1)(B) in effect for the year (e.g., \$15,500 in 2008), was inadvertently paid to a participant before the end of the applicable six-month period due to an unintentional operational error.</p> <ul style="list-style-type: none"> ◆ Only the Erroneous Amount is Includible in Income and Subject to 20% Penalty; No Premium Interest Tax Imposed. If the transition relief is utilized, then (i) <u>only</u> the amount subject to the error is includible in income and subject to an additional 20% tax, and (ii) the participant will <u>not</u> be required to pay the premium interest tax equal to the underpayment rate plus one percentage point that would otherwise have been imposed under §409A. Note that without this transition relief, <u>all</u> amounts deferred by or on behalf of the affected participant under the “plan” (determined in accordance with the §409A “plan aggregation rules”) would be included in the participant’s income and would be subject to <u>both</u> a 20% penalty and interest at the underpayment rate plus one percentage point. ◆ Information and Reporting Requirements. A plan sponsor that uses the transition relief described above is also required to satisfy the information and reporting requirements provided in the Notice. <i>These information and reporting requirements are summarized in Part IV of this bulletin.</i> <p><i>Example – Please refer to example 5 in Part VI of this bulletin for an illustration of how this transition relief would be applied to a failure to comply with the six-month delay requirement for certain payments to a “specified employee.”</i></p>

TRANSITION RELIEF FOR CERTAIN OPERATIONAL ERRORS THAT ARE NOT CORRECTED IN THE SAME TAXABLE YEAR

TRANSITION RELIEF FOR CERTAIN DE MINIMIS OPERATIONAL ERRORS THAT ARE NOT CORRECTED IN THE SAME TAXABLE YEAR (CONT.)

Issue	Provisions in the Notice
<p>Limited Amount Erroneously Deferred</p>	<p>The transition relief under the Notice is available where an amount, which does <u>not</u> exceed the applicable dollar amount under IRC §402(g)(1)(B) in effect for the year (e.g., \$15,500 in 2008), should <u>not</u> have been deferred into a nonqualified plan but was erroneously credited to the plan due to an unintentional operational error.</p> <ul style="list-style-type: none"> ◆ Distribution from the Plan and Earnings Adjustment Required. In order to use the transition relief, the plan sponsor must pay the amount impacted by the operational error to the participant by the <u>later of</u> (i) the end of the participant’s taxable year in which the error was discovered or (ii) the 15th day of the third month following the date the error was discovered. Positive earnings, if any, attributable to the amount that was erroneously treated as deferred compensation must be either forfeited or added to the plan sponsor’s payment. Negative earnings, if any, must be either permanently disregarded or subtracted from the plan sponsor’s payment. ◆ Only the Erroneous Amount is Includible in Income and Subject to 20% Penalty; No Premium Interest Tax Imposed. If the transition relief is utilized, then (i) <u>only</u> the amount subject to the error (as adjusted by earnings, if applicable) is includible in income and subject to an additional 20% tax, and (ii) the participant will <u>not</u> be required to pay the premium interest tax equal to the underpayment rate plus one percentage point that would otherwise have been imposed under §409A. Note that without this transition relief, <u>all</u> amounts deferred by or on behalf of the affected participant under the “plan” (determined in accordance with the §409A “plan aggregation rules”) would be included in the participant’s income and would be subject to <u>both</u> a 20% penalty and interest at the underpayment rate plus one percentage point. ◆ Information and Reporting Requirements. A plan sponsor that uses the transition relief described above is also required to satisfy the information and reporting requirements provided in the Notice. <i>These information and reporting requirements are summarized in Part IV of this bulletin.</i> <p><i><u>Example</u> – Please refer to example 6 in Part VI of this bulletin for an illustration of how this transition relief would be applied to an amount that is erroneously deferred.</i></p>

INFORMATION AND REPORTING REQUIREMENTS

IV. INFORMATION AND REPORTING REQUIREMENTS.

A plan sponsor that uses any of the relief provided in the Notice must satisfy the information and reporting requirements provided in the Notice. These requirements are summarized in the table below.

Issue	Provisions in the Notice
<p>Correction of an Operational Error in the <u>Same</u> Taxable Year</p>	<p>If a plan sponsor uses the relief provided in the Notice to correct an operational error in the same taxable year (<i>summarized in Part II of this bulletin</i>), the following information and reporting requirements must be satisfied:</p> <ul style="list-style-type: none"> ◆ Plan Sponsor Must Attach a Statement to its Federal Income Tax Return. The Notice requires the plan sponsor to attach a statement entitled “§409A Relief under §II of Notice 2007-100” to its federal income tax return. This statement must indicate that the plan sponsor is relying on the applicable relief in the Notice and must include the following information: <ul style="list-style-type: none"> • The name and taxpayer identification number of each participant affected by the operational error and whether such participant is an insider; • Identification of the nonqualified deferred compensation plan with respect to which the error occurred; • A brief description of the error and the circumstances under which it occurred, including the amount involved and the date on which the error occurred; • A brief description of the steps taken to correct the error and the date on which the correction was completed; and • A statement that the operational error is eligible for the correction under the terms of the Notice, and that the plan sponsor has taken all actions required, and otherwise met all requirements, for the correction. ◆ Plan Sponsor Must Also Provide a Statement to Affected Participants. The plan sponsor is also required under the Notice to provide a statement entitled “§409A Relief under §II of Notice 2007-100” to each participant affected by the operational error by no later than the date it is required to provide the Form W-2 or Form 1099 to the participant. The statement from the plan sponsor to each affected participant must state that the participant is entitled to the relief provided in the Notice with respect to the operational error, and must include the information required to be provided by the plan sponsor to the IRS, as listed above (e.g., description of the operational error and steps taken to correct it).

INFORMATION AND REPORTING REQUIREMENTS

Issue	Provisions in the Notice
<p>Use of Transition Relief for Certain Operational Errors that are <u>Not</u> Corrected in the Same Taxable year</p>	<p>If a plan sponsor uses the transition relief available under the Notice for certain de minimis operational errors that are <u>not</u> corrected in the same taxable year (<i>summarized in Part III of this bulletin</i>), the following information and reporting requirements must be satisfied:</p> <ul style="list-style-type: none"> ◆ Plan Sponsor Must Attach Statement to Federal Income Tax Return. The plan sponsor is required under the Notice to attach a statement entitled “§409A Relief under §III of Notice 2007-100” to its federal tax return for its taxable year in which it discovers the error. This statement must indicate that the plan sponsor is relying on the applicable relief in the Notice and must include the following information: <ul style="list-style-type: none"> • The name and taxpayer identification number of each participant affected by the operational error; • Identification of the nonqualified deferred compensation plan with respect to which the error occurred; • A brief description of the error and the circumstances under which it occurred, including the amount involved and the date on which the error occurred; • A brief description of the steps taken by the plan sponsor to avoid a recurrence of the error, including the date on which such steps were implemented; and • A statement that the operational error is eligible for the correction under the terms of the Notice, and that the plan sponsor has taken all actions required, and otherwise met all requirements, for the correction. ◆ Plan Sponsor Must Also Provide Statement to Affected Plan Participants. In addition, the plan sponsor is required under the Notice to provide a statement entitled “§409A Relief under §III of Notice 2007-100” to each plan participant affected by the operational error by no later than the date it is required to provide the Form W-2 or Form 1099 to the participant for the calendar year in which the error is discovered (or by no later than January 31 following the calendar year in which it discovered the error if no Form W-2 or Form 1099 is required). The statement from the plan sponsor to the affected participants must state that the participant is entitled to the relief provided in the Notice with respect to the operational error and that the participant must attach a copy of the statement to his or her income tax return for the year in which the error is discovered; the statement from the plan sponsor must also include the information required to be provided by the plan sponsor to the IRS, as listed above (e.g., description of error and steps taken to correct it). ◆ Plan Participant Required to Attach Statement to Federal Income Tax Return. Each plan participant impacted by the operational error is also required under the Notice to attach a copy of the statement provided by the plan sponsor (described above) to his or her federal income tax return for the year in which the error is discovered.

MORE EXTENSIVE CORRECTIONS PROGRAM UNDER CONSIDERATION

V. MORE EXTENSIVE CORRECTIONS PROGRAM FOR OPERATIONAL ERRORS UNDER CONSIDERATION.

The Notice indicates that the Treasury Department and the IRS are considering establishing a more extensive corrections program for certain operational errors. By way of example, the Notice indicates that this broader corrections program would be available for amounts larger than the Internal Revenue Code section 402(g)(1)(B) limit that applies to the relief described in *Part III* of this bulletin. Treasury and IRS request comments on all aspects of this potential program. Clark Consulting will keep you apprised as additional information on this program becomes available.

VI. EXAMPLES.

1. **Example – Failure to Defer an Amount that is Corrected in the Same Taxable Year:** Participant, who is not considered to be an “insider” of the Employer, made a timely election under Employer’s nonqualified deferred compensation plan (“DCP”) to defer 50% of his annual bonus payable in February 2008. The total amount of such bonus is \$100,000. Due to an unintentional operational error in February 2008, Employer only credits 30% of such bonus or \$30,000 to Participant’s account in the DCP and pays remainder of the bonus to Participant (including the additional \$20,000 that should have been credited to the DCP in accordance with Participant’s deferral election).

Under the Notice, the \$20,000 that was erroneously paid to the participant will be treated as timely deferred under the DCP if, on or before December 31, 2008, the Employer recoups the additional \$20,000 – either through a repayment from Participant or by reducing other compensation otherwise payable to Participant in 2008 (e.g., base salary) by an equivalent amount – and credits such amount to Participant’s account in the DCP.

Note: In the example above, the participant is not an “insider.” However, if the facts above were applied to a participant who was considered to be an “insider” under section 16 of the Securities Exchange Act of 1934 (e.g., a director or officer of the service recipient or a beneficial owner of more than 10% of any class of equity security of the service recipient), the participant would also be required to pay interest to the employer, the amount of which must be determined pursuant to a formula provided in the Notice.

2. **Example – Failure to Comply with the Six-Month Delay Requirement for Certain Payments to a “Specified Employee” that is Corrected in the Same Taxable Year:** Participant, who is considered to be a “specified employee” of the Employer, experiences a separation from service on May 1, 2008. Under the Employer’s nonqualified deferred compensation plan (“DCP”), the Participant’s DCP account will be eligible to be distributed from the DCP as a retirement benefit on December 1, 2008 (i.e., after the end of the six-month period following his separation of service). However, due to an unintentional operational error, Employer pays the retirement benefit to the Participant on June 1, 2008. Employer discovers the error and the Participant repays the erroneous benefit payment on July 3, 2008 (i.e., 32 days after the date the erroneous benefit payment was made by the Employer).

Under the Notice, the erroneous payment will not be treated as a violation of §409A, provided that the Employer does not re-distribute such amount from the DCP to the Participant before January 2, 2009 (i.e., 32 days after December 1, 2008, the original distribution date provided under the DCP).

3. **Example – Correction of an Amount that is Erroneously Deferred in the Same Taxable Year:** Participant, who is considered to be an “insider” of the Employer, made a timely election under Employer’s nonqualified deferred compensation plan (“DCP”) to defer 40% of his annual bonus payable in February 2008. The total amount of such bonus is \$100,000. Due to an unintentional operational error in February 2008, Employer credits 50% of such bonus or \$50,000 to Participant’s account in the DCP (rather than crediting \$40,000 to the DCP in accordance with Participant’s deferral election) and pays the remainder of the bonus to Participant.

Under the Notice, the \$10,000 erroneously credited to the DCP will not be treated as a violation of §409A, provided that (i) such amount is distributed to the Participant on or before December 31, 2008, and (ii) any positive earnings attributable the \$10,000 that were credited to Participant’s DCP account are removed retroactive to the date the \$10,000 was incorrectly credited to the DCP.

4. **Example – Transition Relief for Failure to Defer a Limited Amount that is Not Corrected in the Same Taxable Year:** Participant made a timely election under Employer’s nonqualified deferred compensation plan (“DCP”) to defer 20% of his annual bonus payable in February 2008. The total amount of such bonus is \$100,000. Due to an unintentional operational error in February 2008, Employer only credits 12% of such bonus or \$12,000 to Participant’s account in the DCP and pays remainder of the bonus to Participant (including the additional \$8,000 that should have been credited to the DCP in accordance with Participant’s deferral election). The error is not corrected by December 31, 2008. The value of Participant’s entire DCP account is \$500,000.

Because the error was not corrected in the same taxable year, the error will be treated as a violation of §409A. However, because the amount subject to the error –\$8,000 in this example – did not exceed the applicable dollar amount under IRC §402(g)(1)(B) in effect for the year in which the operational error occurred (e.g., \$15,500 in 2008), the Employer may utilize the transition relief provided in the Notice to mitigate the impact of the §409A violation. Specifically, by using the transition relief in the Notice, (i) only the amount subject to the error (\$8,000) is required to be includible in the participant’s income under §409A and reported on the 2008 W-2, Box 12, using Code Z. In addition, the Participant would only be required to pay the additional 20% tax with respect to the \$8,000 (i.e., \$1,600 in additional tax), and is not required to pay the premium interest tax that would have otherwise been imposed under §409A.

Note: Without the transition relief provided in the Notice, all amounts deferred by or on behalf of the affected participant under the “plan” (determined in accordance with the §409A “plan aggregation rules”) –\$500,000 in the above example– would be included in the participant’s income and would be subject to both a 20% penalty and interest at the underpayment rate plus one percentage point.

5. **Example – Transition Relief for a Failure to Comply with the Six-Month Delay Requirement for Certain Payments to a “Specified Employee” that is Not Corrected in the Same Taxable Year:** Participant, who is considered to be a “specified employee” of the Employer, experiences a separation from service on May 1, 2008. Under the Employer’s nonqualified deferred compensation plan (“DCP”), the Participant’s DCP account will be eligible to be distributed in 15 annual installment payments commencing on December 1, 2008 (i.e., after the end of the six-month period following his separation of service). However, due to an unintentional operational error, Employer pays the first installment payment, equal to \$9,500, to the Participant on June 1, 2008. The error is not corrected by December 31, 2008.

Because the error was not corrected in the same taxable year, the error will be treated as a violation of §409A. However, because the amount subject to the error –\$9,500 in this example– did not exceed the applicable dollar amount under IRC §402(g)(1)(B) in effect for the year in which the operational error occurred (e.g., \$15,500 in 2008), the Employer may utilize the transition relief provided in the Notice to mitigate the impact of the §409A violation. Specifically, by using the transition relief in the Notice, (i) only the amount subject to the error (\$9,500) is required to be includible in the participant’s income under §409A and reported on the 2008 W-2, Box 12, using Code Z. In addition, the Participant would only be required to pay the additional 20% tax with respect to the \$9,500 (i.e., \$1,900 in additional tax), and is not required to pay the premium interest tax that would have otherwise been imposed under §409A.

Note: Without the transition relief provided in the Notice, all amounts deferred by or on behalf of the affected participant under the “plan” (determined in accordance with the §409A “plan aggregation rules”) would be included in the participant’s income and would be subject to both a 20% penalty and interest at the underpayment rate plus one percentage point.

6. **Example – Transition Relief for an Amount that is Erroneously Deferred but Not Corrected in the Same Taxable Year:** Participant made a timely election under Employer’s nonqualified deferred compensation plan (“DCP”) to defer 40% of his annual bonus payable in February 2008. The total amount of such bonus is \$100,000. Due to an unintentional operational error in February 2008, Employer credits 50% of such bonus or \$50,000 to Participant’s account in the DCP (rather than crediting \$40,000 to the DCP in accordance with Participant’s deferral election) and pays the remainder of the bonus to Participant. The error is not corrected by December 31, 2008. As of March 2, 2009, the Participant’s DCP account has been credited with \$500 of earnings attributable to the \$10,000 erroneous bonus deferral. On March 2, 2009, the Employer pays \$10,500 to the participant (i.e., the \$10,000 erroneous deferral, plus related earnings).

Because the error was not corrected in the same taxable year, the error will be treated as a violation of §409A. However, because the amount subject to the error (\$10,500 in this example) did not exceed the applicable dollar amount under IRC §402(g)(1)(B) in effect for the year in which the operational error occurred (e.g., \$15,500 in 2008), the Employer may utilize the transition relief provided in the Notice to mitigate the impact of the §409A violation. Specifically, by using the transition relief in the Notice, (i) only the amount subject to the error (\$10,500) is required to be includible in the participant’s income under §409A and reported on the 2008 W-2, Box 12, using Code Z. In addition, the Participant would only be required to pay the additional 20% tax with respect to the \$10,500 (i.e., \$2,100 in additional tax), and is not required to pay the premium interest tax that would have otherwise been imposed under §409A.

Note: Without the transition relief provided in the Notice, all amounts deferred by or on behalf of the affected participant under the “plan” (determined in accordance with the §409A “plan aggregation rules”) would be included in the participant’s income and would be subject to both a 20% penalty and interest at the underpayment rate plus one percentage point.