# Part III. Administrative, Procedural, and Miscellaneous

## Modification of Q&A–23 of Notice 2007–7

## Notice 2007–99

### I. Purpose

This notice modifies Q&A–23 of Notice 2007–7, 2007–5 I.R.B. 395. Notice 2007–7, Q&A–23, states that the exclusion provided under § 402(l) of the Internal Revenue Code with respect to the payment of certain health insurance premiums by certain pension plans does not apply to premiums paid to an accident or health plan that is self-insured.

### II. Background

Section 402(l) of the Internal Revenue Code, which was added by section 845(a) of Pension Protection Act of 2006, P.L. 109–280 ("PPA '06"), provides for an exclusion from gross income up to $3,000 annually for certain distributions paid from an eligible governmental plan that are used to pay qualified health insurance premiums of an eligible retired public safety officer or his or her spouse or dependents. The term "qualified health insurance premiums" is defined in § 402(l)(4)(D) as "premiums for coverage for the eligible retired public safety officer, his spouse, and dependents, by an accident or health *insurance* plan or qualified long-term care insurance contract (as defined in § 7702B(b))." (Emphasis added.) Section 402(l)(5)(A) further limits the exclusion to premiums that are paid "directly to the provider of the accident or health *insurance* plan or qualified long-term care insurance contract." (Emphasis added.) Section 402(l) applies to distributions in taxable years beginning after December 31, 2006.

Notice 2007–7, Q&A–23, provides that premiums paid to self-insured accident or health plans are not eligible for the § 402(l) exclusion from gross income because, in order to receive favorable tax treatment under § 402(l), the accident or health plan receiving the premium payments must be an accident or health insurance plan. Thus, the plan must be providing insurance issued by an insurance company regulated by a State (including a managed care organization that is treated as issuing insurance).

In general, §§ 104(a)(3) and 105(b) and (c) exclude from gross income certain amounts received through accident or health insurance. Under § 105(e)(1), amounts received under an accident or health plan for employees are treated as received through accident or health insurance for purposes of §§ 104 and 105. Section 1.105–5(a) of the Income Tax Regulations provides that an accident or health plan may be either insured or self-insured.

On August 2, 2007, S. 1974, the Pension Protection Technical Corrections Act of 2007, was introduced in the Senate and, on August 3, 2007, H.R. 3361, the Pension Protection Technical Corrections Act of 2007, was introduced in the House of Representatives. Both bills have identical provisions — § 9(i)(1)(B) and (C) of S. 1974 and H.R. 3361 — which would revise section 845(a) of PPA '06 by deleting the word "insurance" from the term "accident or health insurance plan," which occurs in both the definition of qualified health insurance premiums in § 402(l)(4)(D) of the Code and the direct payment requirement in § 402(l)(5)(A). Because of these pending technical corrections and special considerations involving eligible retired public safety officers, Notice 2007–7, Q&A–23, is being modified.

### III. Modification of Notice 2007–7, Q&A–23

Notice 2007–7, Q&A–23, is modified as follows:

Q–23. Can the accident or health plan receiving the payments of qualified health insurance premiums be a self-insured plan?

A–23. Yes. An accident or health plan, which is defined under § 105(e), includes a self-insured plan. See § 1.105–5(a) of the Income Tax Regulations.

### IV. EFFECT ON OTHER DOCUMENTS

Notice 2007–7 is modified.

### DRAFTING INFORMATION

The principal author of this notice is Angelique Carrington of Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this notice, please call the Employee Plans customer assistance service Monday through Friday between 8:30 a.m. and 4:30 p.m. Eastern time at (877) 829–5500 (a toll-free number) or e-mail Ms. Carrington at *RetirementPlanQuestions@irs.gov*.

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## Transition Relief and Guidance on Corrections of Certain Failures of a Nonqualified Deferred Compensation Plan to Comply with § 409A(a) in Operation

## Notice 2007–100

### I. PURPOSE

This notice provides transition relief and guidance on the correction of certain failures of a nonqualified deferred compensation plan to comply with § 409A(a) in operation (an operational failure). This transition relief and additional guidance includes:

- Methods for correcting certain operational failures during the taxable year of the service provider in which the failure occurs to avoid income inclusion under § 409A(a).
- Transition relief limiting the amount includible in income under § 409A(a) for certain operational failures occurring in a service provider's taxable year beginning before January 1, 2010, that involve only limited amounts.
- An outline of, and request for comments on, a potential corrections program that would permit service recipients and service providers to limit the amounts required to be included in income under § 409A(a) due to certain operational failures.

## II. CORRECTIONS OF CERTAIN OPERATIONAL FAILURES IN THE SAME TAXABLE YEAR AS THE FAILURE OCCURS

A. *General Requirements*

If an unintentional operational failure to comply with § 409A(a) occurs, but the operational failure is corrected in accordance with this § II, no amount is required to be included in income under § 409A(a) as a result of the failure. The relief provided by this § II applies only to unintentional operational failures, which means an unintentional failure to comply with plan provisions that satisfy the requirements of § 409A(a) and the guidance thereunder, or an unintentional failure to follow the requirements of § 409A(a) in practice, due to one or more inadvertent errors in the operation of the plan. This § II does not provide relief for plan terms and provisions that fail to meet the requirements of § 409A and the applicable guidance or for operational failures for which a correction is not described in this § II.[1] Relief is not available under this § II with respect to any intentional failure to comply with the terms of a plan or the requirements of § 409A in the operation of a plan. In addition, relief is not available under this § II with respect to any exercise of a stock right that otherwise would result in a failure to comply with § 409A. Relief otherwise available under this § II is conditioned upon the timely filing and providing of the information required by § IV of this notice.

The relief provided under this § II is not available unless, in addition to correcting the operational failure in accordance with this § II, the service recipient takes commercially reasonable steps to avoid a recurrence of the operational failure. If the same or a substantially similar operational failure has occurred previously, the relief is not available for any taxable year of the service provider beginning after December 31, 2008, unless the service recipient demonstrates that the service recipient had established practices and procedures reasonably designed to ensure that such an operational failure would not recur, had taken commercially reasonable steps to avoid a recurrence of the operational failure, and the operational failure occurred despite the diligent efforts of the service recipient.

Relief is not available under this § II with respect to any intentional failure to comply with the terms of a plan or the requirements of § 409A in the operation of a plan. The relief provided in this section also is not available with respect to an operational failure that is egregious, or where the failure is directly or indirectly related to participation in an abusive tax avoidance transaction (meaning for this purpose any listed transaction under § 1.6011–4(b)(2)).

In each instance, the taxpayer claiming the relief has the burden of demonstrating that the taxpayer was eligible for the relief and that the requirements of this section have been met. Any application of the relief provided in this section is subject to examination by the IRS.

B. *Failure to Defer Amount or Incorrect Payment Corrected in the Same Taxable Year*

This § II.B applies to amounts of nonqualified deferred compensation that, under the terms of the plan and any applicable deferral election, and § 409A and the applicable guidance, should not have been paid or made available to a service provider in a taxable year of the service provider, but were paid or made available in that year due to an unintentional operational failure with respect to the plan, other than a payment that fails to meet the requirements of § 409A(a)(2)(B)(i) and the applicable guidance thereunder (requirement to delay for six months payments to a specified employee upon separation from service). For rules relating to correction of certain payments made in violation of § 409A(a)(2)(B)(i) and the applicable guidance under that section, see § II.C of this notice.

An amount to which this § II.B applies is treated as having been timely deferred in accordance with the terms of the plan and any applicable deferral election (or as having continued to be deferred under the terms of the plan) if the service provider repays to the service recipient the amount that was erroneously paid or made available to the service provider on or before the last day of the service provider's taxable year in which such amount was erroneously paid or made available, and immediately after such repayment the service provider has a legally binding right under the plan to be paid the amount that would have been due if such amount had not been erroneously paid or made available to the service provider during such taxable year, at the same time and in the same form of payment that the amount would have been payable if such amount had not been erroneously paid or made available to the service provider during such taxable year.

In addition, if the total of all amounts to which this § II.B applies that are erroneously paid or made available under a plan (as defined for purposes of § 409A) in a service provider's taxable year exceeds the limit on elective deferrals that would apply to a qualified plan under § 402(g)(1)(B) for the year in which the erroneous payment was made and the service provider is an insider (as defined in this § II.B) with respect to the service recipient, to qualify for the relief provided in this section, the service provider must also pay interest to the service recipient at the time the service provider repays the amount to the service recipient equal to the amount of the erroneous payment ($E$) multiplied by the short-term applicable Federal rate (AFR) under § 1274(d)(1) ($r$) multiplied by a fraction, the numerator of which is the number of days from the erroneous payment date to the repayment date ($n_1$) and the denominator of which is the number of days in such taxable year ($n_2$), or ($E$ x $r$ x $n_1/n_2$). For purposes of the preceding sentence, $r$ is the short-term AFR, based on annual compounding, for the month in which the erroneous payment was paid or made available to the service provider. For purposes of counting days under this § II.B, the first day of the period is disregarded and the last day is taken into account. Where a repayment is made through a reduction of the service provider's other compensation, the repayment date occurs on each date the compensation otherwise would have been paid to the service provider, and if the amount withheld on a repayment date is less than the entire erroneous payment, the interest calculation in the preceding sen-

[1] Reliance on the transition relief provided in Notice 2007–86, 2007–46 I.R.B. 990, the preamble to the final regulations under § 409A, 72 Fed. Reg. 19234, Notice 2006–79, 2006–43 I.R.B. 763, the preamble to the proposed regulations under § 409A, 70 Fed. Reg. 57930, or Notice 2005–1, 2005–1 C.B. 274, for the years to which such transition relief applies, does not preclude a taxpayer from qualifying for the relief provided in this notice with respect to unintentional operational errors occurring in taxable years beginning before January 1, 2009.

tence is applied by substituting the unpaid balance immediately before the repayment for the amount of the erroneous payment.

For purposes of this notice, a service provider is an insider with respect to a service recipient if the service provider is a director or officer of the service recipient or is directly or indirectly the beneficial owner of more than 10 percent of any class of any equity security of the service recipient, determined in accordance with the rules of the Securities and Exchange Commission under § 16 of the Securities Exchange Act of 1934, as amended, 15 USC 78p, without regard to whether the service recipient has any class of equity securities registered under § 12 of such Act, 15 USC 78l. See 17 CFR § 240.16a–1(a) (beneficial owner) and (f) (officer). In the case of a service recipient that is not a corporation, such rules are applied by analogy.

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 last day of such taxable year. Alternatively, in lieu of such repayment, the service recipient may reduce the service provider's compensation that otherwise would have been paid during such taxable year by an equivalent amount on or before the last day of such taxable year. In either case, an amount will not be treated as paid by the service provider if, in connection with such payment, the service recipient pays the service provider, or otherwise provides a benefit (including 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.

The amount erroneously paid to the service provider that is repaid by the service provider to the service recipient is not required to be included in income by the service provider, or reported as income to the service provider on a Form W–2 or Form 1099 by the service recipient. To the extent employment taxes have been withheld and paid with respect to such payment, appropriate adjustments should be made under the applicable rules under § 6413. 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 to pay any required interest on the erroneous payment, is includible in income (and wages if the service provider is an employee); however, any employment taxes withheld and paid with respect to the original erroneous payment may be applied to satisfy the requirement to withhold and pay employment taxes on such compensation, in which case no adjustment to the employment taxes previously withheld and paid should be made.

For purposes of this § II.B, the service provider's account balance or other amount of deferred compensation under the plan may be adjusted for earnings (or losses) retroactive to the date the amount should have been credited to the service provider's account or otherwise deferred (or if the amount should have otherwise remained deferred compensation after the end of the service provider's taxable year, retroactive to the date the amount was paid or made available), provided that such adjustment must be made on or before the last day of such taxable year (or if it is impracticable to make the adjustment by the end of such taxable year, the service provider (in the case of earnings) and the service recipient (in the case of losses) must have a legally binding right to have such adjustment made on or before the last day of such taxable year).

The relief provided in this § II.B is not available with respect to any erroneous payment occurring during any taxable year of the service provider in which the service recipient experienced a substantial financial downturn or otherwise experienced financial or other issues that indicated a significant risk that the service recipient would not be able to pay the amount deferred when the payment became due.

In each of the following examples, it is assumed that Employer does not make any payment to Employee, or otherwise provide a benefit (including an obligation to pay an amount or provide a benefit in the future) to or on behalf of Employee, that is intended as a substitute for all or part of the amount that Employee pays to Employer (or the reduction in compensation otherwise payable to Employee), that Employee is an individual whose taxable year is the calendar year, that Employer did not experience a substantial financial downturn or otherwise experience financial or other issues that indicated a significant risk that the service recipient would not be able to pay the amount deferred when the payment became due, and that Employee and Employer each satisfy the other applicable requirements of this § II.

*Example 1*: Employee, who is not an insider with respect to Employer, makes a timely election to defer 50% of a bonus payable in 2007 pursuant to an account balance plan maintained by Employer. The bonus is $100,000. Due to an unintentional operational failure with respect to the plan, Employer defers only 10% of the bonus, or $10,000, and pays Employee the other $90,000 in 2007 (including the $40,000 that should have been deferred). The deferral is treated as made in accordance with the terms of the plan and the deferral election if, on or before December 31, 2007, the additional $40,000 is credited to Employee's account balance and Employee pays Employer $40,000. The $40,000 erroneously paid to Employee is not required to be included in income by Employee or reported by Employer on Form W–2. Alternatively, in lieu of the $40,000 repayment by Employee to Employer, compensation otherwise payable to Employee in 2007 (such as salary payments) may be reduced by $40,000, provided that the $40,000 reduction in Employee's compensation used to repay the amount (but not the $40,000 erroneous payment) is included in income by Employee and reported as wages by Employer on the 2007 Form W–2. Employer may also adjust Employee's account to reflect the earnings (or losses) that would have been allocated to Employee's account had the amount been timely deferred and credited to Employee's account balance, if such adjustment for earnings (or losses) is made on or before December 31, 2007. Alternatively, if it is impracticable to make the adjustment on or before December 31, 2007, such adjustment may be made later retroactively to December 31, 2007, provided that Employee and Employer each has a legally binding right on December 31, 2007 with respect to such adjustment. For example, if the original incorrect deferral would have been credited with 10% in deemed investment earnings, the deferral plus earnings would be $11,000. This amount must be increased by the $40,000 repaid by Employee and may also be increased by an additional $4,000 ($40,000 multiplied by 10%), to result in the $55,000 account balance that would have been reflected had the amount been properly deferred. If the original incorrect deferral would have been charged with 10% in deemed investment losses, the deferral less losses would be $9,000. This account balance must be increased by the $40,000, but may also be reduced by $4,000, for a net increase of $36,000, to result in the $45,000 account balance that would have been reflected had the amount been properly deferred.

*Example 2*: Pursuant to a nonqualified deferred compensation plan sponsored by Employer, Employee, who is an insider with respect to Employer, is scheduled to receive a $10,000 installment payment in 2007 that is not subject to the 6-month delay for payments to specified employees upon separation from service under § 409A(a)(2)(B)(i). Due to an unintentional operational failure with respect to the plan, Employer pays Employee $11,000. The installment payment is treated as made in accordance

with the terms of the plan and the deferral election if on or before December 31, 2007, the excess $1,000 payment is credited to Employee's account balance, and Employee pays Employer $1,000. The $1,000 is not required to be included in income by Employee or reported by Employer as wages on Form W–2. Alternatively, in lieu of the $1,000 payment by Employee to Employer, Employee's compensation otherwise payable in 2007 (such as salary payments) may be reduced by $1,000, provided that the $1,000 reduction in Employee's compensation used to repay the amount (but not the $1,000 erroneous payment) is included in income by Employee and reported by Employer as wages on the 2007 Form W–2. Because the excess $1,000 payment does not exceed the applicable limit on elective deferrals that would apply to a qualified plan under § 402(g)(1)(B), Employee is not required to pay any interest to qualify for the relief. Employer may also adjust Employee's account to reflect the earnings (or losses) that would have been allocated to Employee's account had the amount been timely deferred and credited to Employee's account balance, if such adjustment for earnings (or losses) is made on or before December 31, 2007. Alternatively, if it is impracticable to make the adjustment on or before December 31, 2007, such adjustment may be made later retroactively to December 31, 2007, provided that on December 31, 2007, Employee and Employer each has a legally binding right with respect to such adjustment.

*Example 3*: Employee, who is an insider with respect to Employer, makes a timely election to defer 80% of a $100,000 bonus payable on July 1, 2009, pursuant to an account balance plan maintained by Employer. Due to an unintentional operational failure with respect to the plan, Employer defers only 10% of the bonus, or $10,000, and pays Employee the other $90,000 (including $70,000 that should have been deferred) on July 1, 2009. Assume for purposes of this example that the short-term AFR, based on annual compounding, for July 2009 is 4.0 percent. Employer notifies Employee of the error and Employee pays Employer $70,705.75 on October 1, 2009, consisting of the $70,000 erroneous payment plus interest equal to $705.75 ($70,000 x .04 x 92/365) (because the erroneous payment exceeds the limit on elective deferrals that would apply to a qualified plan under § 402(g)(1)(B) for 2009 and Employee is an insider). The deferral is treated as made in accordance with the terms of the plan under this § II.B. The $70,000 is not required to be included in income by Employee or reported as wages by Employer on Form W–2. Alternatively, in lieu of the $70,705.75 payment by Employee to Employer, compensation otherwise payable to Employee in 2009 (such as salary payments) may be reduced by $70,000 plus applicable interest, in which case the reduction in Employee's compensation used to repay the amount plus interest (but not the erroneous $70,000 payment) must be reported by Employer as wages on the 2009 Form W–2 issued to Employee and included in Employee's income for 2009. Employer may also adjust Employee's account to reflect the earnings that would have been allocated to Employee's account had the amount been timely deferred and credited to Employee's account balance, if such adjustment for earnings is made on or before December 31, 2009. Alternatively, if it is impracticable to make the adjustment on or before December 31, 2009, such adjustment may be made retroactively to December 31, 2009, provided that Employee and Employer each have a legally binding right on December 31, 2009 with respect to such adjustment.

### C. *Incorrect Payment in Violation of § 409A(a)(2)(B)(i) Corrected in the Same Taxable Year*

This section applies to amounts of nonqualified deferred compensation that, under the terms of the plan and any applicable deferral election, and § 409A(a)(2)(B)(i) (requirement to delay for six months payments to a specified employee upon separation from service) and the applicable guidance, should not have been paid or made available to a service provider for at least six months following the service provider's separation from service, but that were paid or made available to the service provider before the expiration of such six-month period due to an unintentional operational failure with respect to the plan. For the ability to correct certain other payments in violation of § 409A and the applicable guidance, see § II.B of this notice.

With respect to an amount to which this § II.C applies, the service provider will not be treated as having failed to comply with § 409A(a)(2)(B)(i) and the terms of the plan and any applicable deferral election as a result of the amount being paid or made available at the earlier date if, on or before the last day of the service provider's taxable year in which the amount was paid or made available, the service provider repays to the service recipient the amount that was erroneously paid or made available to the service provider, immediately after such repayment the service provider has a legally binding right to receive such amount from the service recipient on the date that is the same number of days after the later of (i) the date the amount would otherwise have been payable under the terms of the plan and the applicable deferral election or (ii) the date of the repayment as the number of days from the date the service recipient made the erroneous payment to the service provider through the date the service provider repaid the erroneous payment to the service recipient, and the repaid amount is not paid or made available to the service provider before such date. For purposes of counting days under this § II.C, the first day of the period is disregarded and the last day is taken into account (for example, if on June 1, 2008, a service recipient mistakenly paid a service provider an amount that the service provider repaid on June 30, 2008, there would be 29 days from the date of payment through the date of repayment).

If the requirements of this § II.C are met, the original payment from the service recipient to the service provider that has been repaid to the service recipient is not required to be reported as income on Form W–2 or Form 1099, as applicable. To the extent employment taxes have been withheld and paid with respect to such payment, appropriate adjustments should be made under the applicable rules under § 6413. However, the subsequent payment of the amount by the service recipient to the service provider is required to be reported appropriately as income on Form W–2 or Form 1099, as applicable, and subject to the applicable employment taxes. If the payment is deductible by the service recipient, the taxable year in which such deduction is allowable will be determined in accordance with § 404(a)(5) and the service recipient's method of accounting.

The relief provided in this section is not available with respect to any erroneous payment occurring during any taxable year of the service provider in which the service recipient experienced a substantial financial downturn or otherwise experienced financial or other issues that indicated a significant risk that the service recipient would not be able to pay the amount deferred when the payment became due.

In each of the following examples, it is assumed that: Specified Employee is an individual whose taxable year is the calendar year; at all relevant times Specified Employee is a specified employee of Employer for purposes of § 409A(a)(2)(B)(i); at all relevant times Employer is not experiencing any substantial financial downturn or any other financial or other issue that indicates a significant risk that Employer would not be able to pay the relevant deferred amounts when due; and Employee and Employer each satisfy the other applicable requirements of this § II.

*Example 1*: Under a nonqualified deferred compensation plan sponsored by Employer, Specified Employee has a legally binding right to a payment of deferred compensation on the first day of the seventh month following Specified Employee's separation from service. Specified Employee separates from service on November 15, 2007 so that the payment

is due on June 1, 2008. Due to an unintentional operational failure with respect to the plan, Employer pays Specified Employee the amount of deferred compensation on May 1, 2008. Employer discovers the error on July 1, 2008, and Specified Employee repays the amount to Employer on July 1, 2008 (61 days after the erroneous payment). Provided that immediately after such repayment Specified Employee has a legally binding right to receive the amount from Employer on August 31, 2008 (61 days after the July 1, 2008 repayment date) and Employer does not repay the amount to Specified Employee before that date, Specified Employee will not be treated as having failed to comply with § 409A(a)(2)(B)(i) and the terms of the plan and the applicable deferral election solely as a result of the early payment.

*Example 2*: Under a nonqualified deferred compensation plan sponsored by Employer, Specified Employee has a legally binding right to a payment of deferred compensation payable on the first day of the seventh month following separation from service. Specified Employee separates from service on May 1, 2008 so that the payment is due on December 1, 2008. Due to an unintentional operational failure with respect to the plan, Employer pays Specified Employee the amount of deferred compensation on May 1, 2008. Employer discovers the error and Specified Employee repays the amount to Employer on July 1, 2008 (61 days after the erroneous payment). Provided that immediately after such repayment Specified Employee has a legally binding right to receive the amount from Employer on January 31, 2009 (61 days after December 1, 2008) and Employer does not repay the amount to Specified Employee before that date, Specified Employee will not be treated as having failed to comply with § 409A(a)(2)(B)(i) and the terms of the plan and the applicable deferral election solely as a result of the early payment. The erroneous payment is not includible in Specified Employee's income, and is not required to be reported on the 2008 Form W–2. Such amount is includible in Specified Employee's income in the year in which the amount is repaid by Employer to Specified Employee pursuant to the plan, and is required to be reported on that year's Form W–2 and subject to applicable employment taxes.

### D. *Excess Deferred Amount Corrected in the Same Taxable Year*

If under the terms of a plan and an applicable deferral election, and § 409A and the applicable guidance, an amount that should not have been deferred compensation under the plan is credited to the service provider's account or otherwise treated as deferred compensation under the plan as a result of an unintentional operational failure with respect to 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, the excess amount is not treated as an amount deferred under the plan if the excess amount is paid to the service provider on or before the last day of the service provider's taxable year in which the excess amount was incorrectly treated as deferred compensation. The amount to which the service provider has a legally binding right under the plan at the end of the year must be adjusted to reflect the payment (for example, through a reduction in the account balance). In addition, if the service provider is an insider with respect to the service recipient (as defined in § II.B of this notice), the remaining account balance (or other deferred compensation under the plan) must be adjusted for positive earnings retroactive to the date the excess amount was incorrectly credited to the service provider's account or otherwise incorrectly treated as deferred under the plan, provided that such adjustment must be made on or before the last day of the service provider's taxable year in which such amount was incorrectly treated as deferred compensation under the plan (or if it is impracticable to make the adjustment by the end of such year, the service recipient must have a legally binding right on the last day of such taxable year to make such adjustment retroactively to such date). In other cases, such adjustment may be (but is not required to be) made. Where the amount was subject to losses, the remaining account balance (or other deferred compensation under the plan) is not required to be adjusted, but may be adjusted for such losses retroactive to the date the excess amount was incorrectly credited to the service provider's account or otherwise incorrectly treated as deferred under the plan, provided that such adjustment must be made on or before the last day of the service provider's taxable year in which such amount was incorrectly treated as deferred compensation under the plan (or if it is impracticable to make the adjustment by the end of such taxable year, the service provider must have a legally binding right on the last day of such taxable year to require that such an adjustment be made retroactively to the date of the failure). The service recipient may (but is not required to) pay reasonable interest to (or otherwise reasonably compensate) the service provider to reflect the time value of money with respect to the late payment, provided that such interest or other compensation is paid or made available by the end of the service provider's taxable year in which such amount was incorrectly treated as deferred compensation under the plan.

This relief is not applicable to a service recipient's failure to timely pay in the proper taxable year of a service provider amounts that were deferred in one or more previous taxable years of the service provider. However, see § 1.409A–3(d) for certain circumstances under which such payments may be treated as made in accordance with a designated payment date.

*Example*: Employee, who is an insider with respect to Employer and whose taxable year is the calendar year, makes a timely election pursuant to an account balance plan to defer 10% of a bonus otherwise payable in 2007. The bonus is $100,000. Due to an unintentional operational failure with respect to the plan, Employer defers 50% of the bonus, or $50,000, and pays Employee $50,000 (instead of deferring $10,000 and paying Employee $90,000). The excess $40,000 will not be treated as deferred under the plan if on or before December 31, 2007, Employer pays Employee $40,000 of the account balance under the plan, and Employee and Employer each satisfy the other applicable requirements of this § II. The remaining account balance must be adjusted for earnings and may be adjusted for losses that were allocable to such amount under the plan. For example, if the account was credited with 10% in deemed investment earnings, the account balance must be reduced by both the $40,000 paid to Employee and the $4,000 in earnings, or $44,000, to result in the $11,000 account balance that would have been reflected had the deferred compensation under the plan been properly deferred. The adjustment must be made by December 31, 2007, except that the adjustment can be made later, retroactively as of that date, if it is impracticable to make the adjustment by December 31, 2007 and the service recipient has a legally binding right on that date to make such a retroactive adjustment. If the account was charged with 10% in deemed investment losses, the account balance must be reduced by the $40,000, but may be increased not later than December 31, 2007, by the $4,000 in losses on the improperly deferred amount, for a net reduction of $36,000, to result in the $9,000 account balance that would have been reflected had the deferred compensation under the plan been properly deferred. Alternatively, if it is impracticable to make the adjustment on or before December 31, 2007, such $4,000 adjustment may be made later retroactively to December 31, 2007, provided that the service provider has a legally binding right on December 31, 2007, to have such adjustment made. Employer may (but is not required to) pay Employee reasonable interest on the $40,000 erroneous deferral provided such payment is made by December 31, 2007.

### E. *Correction of Exercise Price of Otherwise Excluded Stock Rights*

This § II.E applies if under the terms of a stock right, the stock right would

not be nonqualified deferred compensation under § 1.409A–1(b)(5)(i)(A) (excluded stock options) or § 1.409A–1(b)(5)(i)(B) (excluded stock appreciation rights), except that the exercise price of the stock right is less than the fair market value of the underlying stock on the date of grant. This section applies only if the failure of the exercise price to equal or exceed the fair market value of the underlying stock results from an unintentional administrative error in determining the exercise price. If this section applies to a stock right, the stock right is treated from the date of grant as not providing for nonqualified deferred compensation for purposes of § 409A. This section applies if before the stock right is exercised and not later than the last day of a service provider's taxable year in which the service recipient granted the service provider the stock right, the exercise price is reset to an amount equal to or exceeding the fair market value of the underlying stock on the date of grant, and at all times before such increase in the exercise price the stock right otherwise would not have provided for nonqualified deferred compensation for purposes of § 409A. For example, assume that on January 1, 2008, an employer grants an employee a stock option to purchase 100 shares of stock, and the stock option would otherwise be excluded from coverage under § 409A except that due to an unintentional administrative error the exercise price is set at an amount below the fair market value of the stock on January 1, 2008. Assume further that on July 1, 2008, the employee partially exercises the stock option and purchases 40 shares, but retains a stock option to purchase 60 shares. Provided that on or before December 31, 2008, the exercise price of the remaining stock option to purchase 60 shares is reset to a price at or above the fair market value of the underlying stock on January 1, 2008, the stock option to purchase 60 shares may qualify for the relief provided in this section. Because the exercise price was not reset before July 1, 2008, the portion of the stock option that was exercised to purchase 40 shares is not eligible for the relief provided in this section.

## III. TRANSITION RELIEF FOR CERTAIN OPERATIONAL FAILURES INVOLVING LIMITED AMOUNTS OCCURRING DURING TAXABLE YEARS BEGINNING BEFORE 2010

### A. *General Requirements*

If an unintentional operational failure to comply with § 409A(a) occurs during a service provider's taxable year beginning before January 1, 2010, but the operational failure qualifies for the relief provided in this § III and is corrected in accordance with this § III, the amount required to be included in income under § 409A(a) as a result of the failure, and the resulting additional taxes under § 409A, are limited in accordance with the provisions of this section. In each instance, the taxpayer claiming the relief (the service provider, the service recipient, or both) has the burden of demonstrating that such taxpayer was eligible for the relief and that the requirements of this section have been met. Any application of the relief provided in this section is subject to examination by the IRS.

The relief provided by this section applies only to unintentional operational failures, which means an unintentional failure to comply with plan provisions that satisfy the requirements of § 409A(a) and the guidance thereunder, or an unintentional failure to follow the requirements of § 409A in practice, due to one or more inadvertent errors in the operation of the plan. This notice does not apply to plan terms that fail to meet the requirements of § 409A and applicable guidance or to operational failures for which a correction is not provided in this § III.

The relief provided under this § III is not available unless, in addition to correcting the operational failure in accordance with this § III, the service recipient takes commercially reasonable steps to avoid a recurrence of the operational failure. For any taxable year of the service provider beginning after December 31, 2008, if the same or a substantially similar operational failure has occurred previously, the service recipient must demonstrate that the service recipient had established practices and procedures reasonably designed to ensure that such an operational failure would not recur, had taken commercially reasonable steps to avoid a recurrence of the operational failure and that the operational failure occurred despite the diligent efforts of the service recipient. Relief otherwise available under this § III is conditioned upon the timely filing and providing of the information required by § IV of this notice.

The relief provided by this section is not available with respect to any failure unless all of the requirements of this section (other than the requirements of § IV of this notice) have been satisfied not later than the end of the second taxable year of the service provider following the taxable year of the service provider in which such failure occurred. In addition, the relief provided in this section is not available if a federal income tax return of the service provider for the taxable year of the service provider in which the failure occurred is under examination with respect to the plan. For this purpose, an individual service provider is treated as under examination with respect to the plan if the individual is under examination with respect to the individual's federal income tax return (for example, Form 1040) for the taxable year.

Relief is not available under this § III with respect to any intentional failure to comply with the terms of a plan or the requirements of § 409A in the operation of a plan. The relief provided in this section also is not available with respect to an operational failure that is egregious, or where the failure is directly or indirectly related to participation in an abusive tax avoidance transaction (meaning for this purpose any listed transaction under § 1.6011–4(b)(2)). The relief provided in this section also is not available with respect to a failure to comply with § 409A resulting from an exercise of a stock right.

### B. *Failure to Defer Limited Amount not Corrected in the Same Taxable Year and Certain Erroneous Payments*

This § III.B applies if during a service provider's taxable year beginning before January 1, 2010, an unintentional operational failure occurs that meets the following requirements:

(1) An amount should have been treated as deferred compensation under the terms of the plan and any applicable deferral election, and § 409A and the applicable guidance, but the amount was not credited

to the service provider's account or otherwise treated as deferred compensation during the service provider's taxable year, or did not remain deferred compensation after the end of such year;

(2) Because the amount was not credited to the service provider's account or otherwise treated as deferred compensation under the plan during such year, or did not remain deferred compensation under the plan after the end of such year, the amount was paid or made available to the service provider during the service provider's taxable year;

(3) Section II.B of this notice does not apply because relief is not available under § II.B of this notice with respect to the failure, the failure is not corrected under § II.B of this notice, or otherwise; and

(4) The amount paid or made available to the service provider does not exceed the limit on elective deferrals that would apply to a qualified plan under § 402(g)(1)(B) for the year of the operational failure.

In such a case, if the plan is otherwise compliant with the requirements of § 409A and the applicable guidance, the amount includible in income under § 409A(a) as a result of such payment is limited to the amount that should have been treated as deferred compensation under the plan (or should have continued to be deferred compensation under the plan) but was instead paid or made available to the service provider, and does not include any other amounts deferred under the plan. In addition, with respect to such amount includible in income under § 409A(a), the service provider is required to pay the additional tax under § 409A(a)(1)(B)(i)(II) (the additional 20% tax), but is not required to pay the additional tax under § 409A(a)(1)(B)(i)(I) (the premium interest tax).

For purposes of this section, a payment of an amount (including a payment of an amount that is one of a series of installment payments or life annuity payments) that under the terms of the plan and § 409A(a)(2)(B)(i) and the applicable guidance is required to be delayed for at least six months following a separation from service, but is paid before the completion of that six months, may be treated as the payment of an amount that should have continued to be deferred compensation. In addition, for purposes of this section, the plan includes any arrangements treated as a single plan under § 1.409A–1(c), so that this section will apply only if any and all erroneous payments under the plan, in the aggregate, of amounts that otherwise should have been treated as deferred compensation with respect to the service provider during the taxable year (or should have continued to be deferred compensation during the taxable year), do not exceed the limit on elective deferrals that would apply to a qualified plan under § 402(g)(1)(B) for such year. The relief provided in this § III.B is not available if the operational failure occurred during a taxable year of the service provider in which the service recipient experienced a substantial financial downturn or otherwise experienced financial or other issues that indicated a significant risk that the service recipient would not be able to pay the amount deferred when the payment became due.

It is assumed for purposes of the following examples that: Employee is an individual whose taxable year is the calendar year; Employee's tax return is not under examination for any relevant period; during all relevant periods Employer did not experience any financial downturn or financial or other issues indicating a significant risk that Employer would not be able to pay relevant deferred amounts when due; and Employee and Employer each satisfy the other applicable requirements of this § III.

*Example 1*: Employee makes a timely election to defer 10% of a bonus payable in 2007 pursuant to an account balance plan. The bonus is $10,000. Due to an unintentional operational failure with respect to the plan, Employer defers only 8% of the bonus, or $800, and pays Employee $9,200 (instead of deferring $1,000 and paying Employee $9,000). The amount is not corrected by December 31, 2007, when Employee's account balance is $100,000. As a payment to Employee, Employer must treat the amount as a wage payment for employment tax and reporting purposes, as appropriate, including reporting as income and wages on the 2007 Form W–2. Employer is permitted to report as income under § 409A on the 2007 Form W–2 (or 2007 Form W–2c), Box 12, using Code Z, only $200, and Employee is permitted to include in income under § 409A for 2007 only $200. Furthermore, Employee is permitted to pay the additional 20% tax only with respect to the $200 (or $40 in additional income tax), and is not required to pay the premium interest tax.

*Example 2*: Employee is a specified employee entitled under a nonqualified deferred compensation plan to a life annuity commencing upon the first day of the seventh month following the specified employee's separation from service. The annuity payments are $2,000 per month. Employee separates from service on April 18, 2007, and is scheduled to receive an initial annuity payment on November 1, 2007. Due to an inadvertent miscalculation of the specified employee's separation from service date, Employee receives a $2,000 payment on October 1, 2007, before the end of the 6-month period following Employee's separation from service. Employer and Employee do not discover the error until 2008, so that the relief provided in § II.C of this notice is not available. As a payment to Employee, Employer must treat the amount as a wage payment for employment tax and reporting purposes, as appropriate, including reporting as income on the 2007 Form W–2. Employer is permitted to report as income under § 409A on the 2007 Form W–2 (or 2007 Form W–2c), Box 12, using Code Z, only $2,000, and Employee is permitted to include in income under § 409A in 2007 only $2,000. Furthermore, Employee is permitted to pay the additional 20% tax only with respect to the $2,000 (or $400 in additional income tax), and is not required to pay the premium interest tax.

### C. *Limited Excess Deferred Amount not Corrected in the Same Taxable Year*

This § III.C applies if on or before the last day of a service provider's taxable year beginning before January 1, 2010, the following requirements are met:

(1) Under the terms of the plan and any applicable deferral election, and § 409A and the applicable guidance, an amount of deferred compensation under the plan should have been paid or made available to the service provider during the service provider's taxable year, or an amount is treated as deferred compensation under the plan that should have been paid or made available to the service provider during the service provider's taxable year, but such amount is not paid or made available due to an unintentional operational failure with respect to the plan;

(2) Section II.D of this notice does not apply because relief is not available under § II.D of this notice with respect to the failure, the failure is not corrected under § II.D of this notice, or otherwise;

(3) The amount that should have been paid or made available to the service provider during that service provider's taxable year does not exceed the limit on elective deferrals that would apply to a qualified plan under § 402(g)(1)(B) for such year;

(4) By the later of the end of the service provider's taxable year in which the failure is discovered or the fifteenth day of the third month following the date upon which the failure is discovered, the service recipient pays the service provider the amount that should have been paid or made available to the service provider, provided that

any earnings allocable to such amounts through the date of the payment are either forfeited or added to the payment to the service provider, and any losses allocable to such amounts through the date of the payment are either permanently disregarded or subtracted from the payment to the service provider, and the service recipient reports such payment on a Form W–2 or Form 1099, as applicable, in accordance with the requirements of this section; and

(5) The service provider includes such amount in income and pays the additional taxes under § 409A(a) as described in this section on a timely filed federal income tax return (including an income tax return filed in accordance with a timely request for extension, but not including an amended income tax return).

In such a case, if the plan otherwise complies with the requirements of § 409A and the applicable guidance, the amount includible in income under § 409A(a) as a result of such failure is limited to the excess amount paid to the service provider, and does not include any other deferred compensation under the plan, and the amount is includible in income only when paid to the service provider in accordance with this section. In addition, with respect to this amount includible in income under § 409A(a), the service provider is required to pay the additional 20% tax, but is not required to pay the premium interest tax. If the service recipient properly reports the payment as includible in income under § 409A on a Form W–2, if applicable, for the year in which the payment was made, including reporting such amount on Form W–2, Box 12 using Code Z, the service recipient will not be subject to penalties or liability for the failure to properly withhold under § 3402.

For purposes of this section, the plan includes any arrangements treated as a single plan under § 1.409A–1(c), so that this section will apply only if any and all erroneous deferrals under the plan, in the aggregate, of amounts that otherwise should have been paid during the service provider's taxable year to the service provider do not exceed the applicable limit on elective deferrals that would apply to a qualified plan under § 402(g)(1)(B).

*Example*: Employee, who has a calendar year taxable year, makes a timely election to defer 8% of a bonus payable in 2007 into an account balance plan. The bonus is $10,000. Due to an unintentional operational failure with respect to the plan, Employer defers 10% of the bonus, or $1,000, and pays Employee $9,000 (instead of deferring $800 and paying Employee $9,200). The plan otherwise complies with § 409A and the applicable guidance. Employer discovers the error on February 1, 2008, so that the excess deferred amount of $200 is not corrected by December 31, 2007. On March 1, 2008, at which time Employee's account balance includes $15 in earnings on the excess $200 credited to the account, Employer pays Employee $215. Employer reports the $215 as income under § 409A on the 2008 Form W–2, Box 1 and Box 12, using Code Z and satisfies the other applicable requirements of this § III, including the requirements of § IV of this notice. Provided that Employee reports such income and pays the applicable taxes, including the additional § 409A taxes, on a timely filed 2008 Form 1040 (including a 2008 Form 1040 filed under extension, but not an amended 2008 Form 1040), and satisfies the applicable requirements of § IV of this notice, Employee is not required to include any additional amounts deferred under the plan in income under § 409A(a) or to include any amount in income under § 409A for years before 2008, and with respect to the $215 includible in income under § 409A is required to pay only the additional 20% tax (or $42.50 in additional income tax), and not the premium interest tax. Employer may also have paid Employee only the $200 excess deferred amount if the $15 in earnings on such amount were forfeited.

## IV. INFORMATION AND REPORTING REQUIREMENTS

### A. *Information Required with Respect to Correction of an Operational Failure in the Same Taxable Year as the Failure Occurs*

A service recipient described in § II of this notice must attach to its timely-filed (including extensions) original federal income tax return for its taxable year in which the failure occurred a statement entitled "§ 409A Relief under § II of Notice 2007–100" setting out the information required by § IV.A.1 of this notice, and must provide to each service provider affected by such failure a statement entitled "§ 409A Relief under § II of Notice 2007–100" setting out the information required by § IV.A.2 of this notice by no later than the date (with extensions) on which it is required to provide an information return (Form W–2 or 1099) to such service provider for the calendar year in which such failure occurred (or if no information return is required for such service provider, not later than the January 31 following the calendar year in which such failure occurred). Notwithstanding the foregoing, to qualify for the relief described in § II.E of this notice (Correction of Exercise Price of Otherwise Excluded Stock Rights), the service recipient is not required to provide a statement to such service provider with respect to such failure. In addition, each taxpayer relying on the relief provided in § II of this notice must 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 (except in the case of a service provider for whom a correction has been made under § II.E of this notice).

#### 1. *Attachment to Service Recipient Tax Return for Failures Described in § II*

The service recipient must attach a statement to its federal income tax return stating that it is relying upon § II of this notice with respect to a correction of a failure to comply with § 409A and setting out the following information with respect to each such failure:

a. The name and taxpayer identification number of each service provider affected by the failure and whether such service provider is an insider with respect to the service recipient. Where the same or a substantially similar operational failure has occurred with respect to multiple service providers, the information required in § IV.A.1.b through e of this notice may be supplied only once with respect to such operational failure, provided that the identification of each service provider affected by the operational failure in this § IV.A.1.a references such information and the amount involved in the operational failure with respect to such service provider.

b. Identification of the nonqualified deferred compensation plan with respect to which such failure occurred.

c. A brief description of the failure and the circumstances under which it occurred, including the amount involved and date on which the failure occurred.

d. A brief description of the steps taken to correct the failure and the date on which such correction was completed.

e. A statement that the operational failure is eligible for the correction under the terms of this notice, and that the service recipient has taken all actions required, and otherwise met all requirements, for such correction.

2. *Information to be Provided to Service Provider for Failures Described in § II*

The service recipient must provide the following information to each service provider affected by correction of a failure to comply with § 409A who is entitled to relief under § II of this notice (other than § II.E of this notice (Correction of Exercise Price of Otherwise Excluded Stock Rights)) with respect to such failure:

a. A statement that the service provider is entitled to the relief provided in § II of this notice with respect to a failure to comply with § 409A.

b. The information described in § IV.A.1.b through e of this notice.

B. *Information Required with Respect to Transition Relief for Certain Operational Failures Involving Limited Amounts*

A service recipient described in § III.B or III.C of this notice must attach to its timely-filed (including extensions) original federal income tax return for its taxable year in which it discovers the failure a statement entitled "§ 409A Relief under § III of Notice 2007–100" setting out the information required by § IV.B.1 of this notice and, not later than the date (with extensions) on which it is required to provide an information return (Form W–2 or 1099) for the calendar year in which it discovers such failure 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 discovers such failure), must provide to each such service provider a statement entitled "§ 409A Relief under § III of Notice 2007–100" setting out the information required by § IV.B.2 of this notice. A service provider who is relying on the relief provided in § III.B or III.C of this notice with respect to a failure to comply with § 409A must attach to the service provider's timely-filed (including extensions) original federal income tax return for the year in which such failure was discovered the information required by § IV.B.3 of this notice. In addition, each taxpayer relying on the relief provided in § III of this notice must 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.

1. *Attachment to Service Recipient Tax Return for Failures Described in § III.B or III.C.*

The service recipient must attach a statement to its return setting out the following information with respect to each failure described in § III.B. or III.C of this notice:

a. The name and taxpayer identification number of each service provider affected by the failure. Where the same or a substantially similar operational failure has occurred with respect to multiple service providers, the information required in § IV.B.1.b through e of this notice may be supplied only once with respect to such operational failure, provided that the identification of each service provider affected by the operational failure in this § IV.B.1.a references such information and the amount involved in the operational failure with respect to such service provider.

b. Identification of the nonqualified deferred compensation plan with respect to which such failure occurred.

c. A brief description of the failure and the circumstances under which it occurred, including the amount involved and date on which the failure occurred.

d. A brief description of the steps taken by the service recipient to avoid a recurrence of the failure, including the date on which such steps were implemented.

e. A statement that the operational failure is eligible for the correction under the terms of this notice, and that the service recipient has taken all actions required, and otherwise met all requirements, for such correction.

2. *Information to be Provided to Service Provider for Failures Described in § III.B or III.C.*

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 § III.B or III.C of this notice with respect to such failure:

a. A statement that the service provider is entitled to the relief provided in § III.B or III.C of this notice (as applicable) 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 discovered.

b. The information described in § IV.B.1.b through e of this notice.

3. *Attachment to Service Provider Tax Return for Failures Described in § III.B or III.C.*

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.

## V. POTENTIAL PROGRAM TO CORRECT CERTAIN FAILURES TO COMPLY WITH § 409A(a) IN OPERATION

The Treasury Department and the IRS are considering establishing a corrections program under which taxpayers could correct certain failures to comply with § 409A(a) in the operation of a nonqualified deferred compensation plan (operational failures), including correction after the end of the service provider's taxable year in which an operational failure occurs. The Treasury Department and the IRS request comments on all aspects of this potential program. For information regarding the submission of comments, see § VI of this notice.

The program under consideration would cover failures that are not eligible for the transition relief provided in § III of this notice because the amount involved is too large. The program may also provide that the relief in § III for failures involving small amounts would be available permanently. In addition, it is expected that the program under consideration would, in general, permit a service provider with respect to whom an operational failure occurred that is addressed by the program but not eligible for the relief provided in § III of this notice, to include an amount in income, and pay the additional taxes under § 409A with respect to, only the amount involved in the operational failure, and not other amounts deferred under the plan. For example, if a service provider erroneously

deferred an additional $50,000 to a plan under which the service provider had previously deferred $1,000,000 (for a total of $1,050,000), and the $50,000 deferral and the error were corrected pursuant to the program, the service provider would not be required to include in income under § 409A, and pay the additional § 409A taxes with respect to, the $1,000,000 deferred under the plan that was not involved in the operational failure.

The Treasury Department and the IRS anticipate that the IRS would not issue a ruling, enter into a closing agreement or otherwise issue any formal approval evidencing that participating taxpayers had met the requirements of, and qualified for the relief available under, the program. Rather, if the IRS examined the relevant tax returns, the service recipient and service provider would have the burden of demonstrating that the applicable requirements had been met. The corrections program would be restricted to service providers that at the time of the correction are not under examination for the year or years in which the operational failure occurred, and would be limited to operational failures that are corrected promptly after discovery and in any case within two years after the occurrence. As part of the corrections program, the service recipient and the service provider would be required to satisfy information and reporting requirements substantially similar to those set forth in § IV.B of this notice and the service recipient and service provider would also be required to provide notice to the examining agent upon the commencement of an examination that the taxpayer was relying upon the relief provided under the program for years covered by the examination.

The Treasury Department and the IRS anticipate that the program would include the following limitations and requirements:

- Relief would only be available with respect to an operational failure that has occurred notwithstanding the service recipient's reasonable efforts to comply with the terms of the plan. Thus relief would only be available if the service recipient had established practices and procedures reasonably designed to ensure compliance with § 409A.

- Relief would only be available with respect to an operational failure if the service recipient also took commercially reasonable steps to avoid a recurrence of the same type of operational failure.

- Relief would also not be available to correct an operational failure that is egregious, intentional, or where the failure is directly or indirectly related to participation in an abusive tax avoidance transaction (meaning for this purpose any listed transaction under §1.6011–4(b)(2)).

- If the operational failure involved an accelerated payment that did not otherwise satisfy the plan's terms and the requirements of § 409A(a), the correction of the failure would require that the service provider return to the service recipient the amount improperly paid by the service provider to the service recipient. The service provider would not be entitled to any loss or deduction for either the year of the repayment or the year to which the correction applied. However, if the plan does not otherwise violate the provisions of § 409A and the applicable guidance, the service provider would be required thereafter to include in gross income only additional amounts subsequently paid from such plan (as if the amount taken into gross income in the year of the failure resulted in investment in the contract with respect to the amount that was actually included in gross income for the year of the erroneous payment).

- Relief would not be available for an accelerated payment that did not otherwise satisfy the terms of the plan and the requirements of § 409A(a) if the service recipient made the payment proximate to a financial downturn of the service recipient or the service recipient experiencing any financial or other issue that indicated a significant risk that the service recipient would not be able to pay the amount deferred when the payment became due under the plan.

- If the operational failure involved an amount that was improperly deferred (for example, the deferral of salary in excess of the applicable deferral election under the terms of the plan), or an amount of deferred compensation that was not paid to the service provider on the date applicable under the terms of the plan, the correction of the operational failure would require that the service recipient pay the amount to the service provider. The service provider would be required to include the amount in gross income in the service provider's taxable year in which the failure occurred and not at the time the service recipient made the corrective payment, with the service provider being required to report the amount on an original or amended return for such year and pay the appropriate tax thereon.

- Investment earnings (potentially including losses) in accordance with the terms of the plan for the period of time after the operational failure through the date of correction would be required to be taken into account.

- In addition to the requirement of income inclusion described above, the service provider would be required to pay income taxes, including the additional § 409A taxes (and any applicable interest on the underpayment of such § 409A taxes), as applicable. The service recipient would be required to file with the IRS and provide to the service provider a Form W–2c or corrected Form 1099, as applicable. If the service recipient and service provider met the requirements for the correction program, the service recipient would not be liable for any failure to withhold income taxes on the amount required to be included in income under § 409A as a result of the operational failure, to the extent the amounts required to be included in income had not been paid or made available to the service provider.

- Some or all of the relief may be available only to service providers that are not insiders with respect to the service recipient.

## VI. SUBMISSION OF COMMENTS

The Treasury Department and the IRS are currently considering formulating general guidance on the correction of operational failures under a nonqualified deferred compensation plan resulting in a

failure to meet the requirements of § 409A. Some of the guidance being considered has been set forth in this notice. The Treasury Department and the IRS request comments on all aspects of a potential corrections program, including but not limited to the topics addressed in this notice and specifically request comments on the following:

- With respect to the program under consideration described in § V of this notice, potential methods of tracking the "investment in the contract" created when an amount is included in income under § 409A but not yet paid to the service provider.
- With respect to the program under consideration described in § V of this notice, potential methods of addressing the service recipient's deduction for payments made, and the affect of repayments by the service provider to the service recipient on such deductions.

Comments must be submitted by March 3, 2008. All materials submitted will be available for public inspection and copying. Comments may be submitted to Internal Revenue Service, CC:PA:LPD:RU (Notice 2007–100), 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 2007–100), 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 2007–100) in the subject line.

### VII. EFFECT ON OTHER DOCUMENTS

For service recipients and service providers who are entitled to relief under this notice, Notice 2006–100, 2006–51 I.R.B. 1109 (relating to reporting and wage withholding for 2006) and Notice 2007–89, 2007–46 I.R.B. 998 (relating to reporting and wage withholding for 2007) are modified to conform to the provisions of this notice with respect to (i) the amount that is required to be included in income by a service provider under section 409A(a), and (ii) the amount that is required to be reported by the service recipient as an amount includible in income under section 409A(a) on Form W–2, Box 1 and Box 12, using Code V, or Form 1099–MISC, Box 7 and Box 15b, as applicable.

### VIII. 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 1545–2086.

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 section IV. 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.

### IX. DRAFTING INFORMATION

The principal authors of this notice are Stephen Tackney and Bill Schmidt 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 Stephen Tackney or Bill Schmidt at (202) 927–9639 (not a toll-free number).

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## Update for Weighted Average Interest Rates, Yield Curves, and Segment Rates

## Notice 2007–101

This notice provides guidance as to the corporate bond weighted average interest rate and the permissible range of interest rates specified under § 412(b)(5)(B)(ii)(II) of the Internal Revenue Code. It also provides guidance on the corporate bond monthly yield curve (and the corresponding spot segment rates), the 24-month average segment rates, and the funding transitional segment rates under § 430(h)(2). In addition, this notice provides guidance as to the interest rate on 30-year Treasury securities under § 417(e)(3)(A)(ii)(II) as in effect for plan years beginning before 2008, and the minimum present value segment rates under § 417(e)(3)(D) as in effect for plan years beginning after 2007.

CORPORATE BOND WEIGHTED AVERAGE INTEREST RATE

Sections 412(b)(5)(B)(ii) and 412(l)(7)(C)(i), as amended by the Pension Funding Equity Act of 2004 and by the Pension Protection Act of 2006 (PPA), provide that the interest rates used to calculate current liability and to determine the required contribution under § 412(l) for plan years beginning in 2004 through 2007 must be within a permissible range based on the weighted average of the rates of interest on amounts invested conservatively in long term investment grade corporate bonds during the 4-year period ending on the last day before the beginning of the plan year.

Notice 2004–34, 2004–1 C.B. 848, provides guidelines for determining the corporate bond weighted average interest rate and the resulting permissible range of interest rates used to calculate current liability. That notice establishes that the corporate bond weighted average is based on the monthly composite corporate bond rate derived from designated corporate bond indices. The methodology for determining the monthly composite corporate bond rate as set forth in Notice 2004–34 continues to apply in determining that rate. See Notice 2006–75, 2006–36 I.R.B. 366.

The composite corporate bond rate for November 2007 is 6.14 percent. Pursuant