

December 31 is Same-Year Correction Deadline for 409A Failures in 2009

December 2009

Pursuant to Notice 2008-113, the Internal Revenue Service is permitting corrections without penalty for certain unintentional operational failures under Section 409A of the Internal Revenue Code (Section 409A) that are corrected in the same year in which the failure occurs. Thus, the deadline for correcting such failures that occur during 2009 is December 31, 2009.

The following operational failures may be corrected without penalty if correction is completed in the same year that they occur:

- Payments made in 2009 that should have been deferred to a later year
- Payments that violate the six-month delay rule for "specified employees"
- Payments deferred to a later year that should have been made in 2009 (i.e., excess deferrals)
- Correction of a less than fair market value exercise price for stock options that would otherwise be exempt from Section 409A

To obtain relief for a same-year correction, the Notice sets forth certain steps that must be followed, including a requirement that the employer report certain information to the IRS and take steps to avoid recurrence of the failure.

Please note that while the Notice also permits correction of certain failures during later years, the Notice does not provide relief for the following Section 409A failures: (i) plan documentation failures; (ii) intentional operational failures; (iii) erroneous payments made during a year in which the employer experiences a substantial financial downturn if circumstances indicate that the employer will not be able to make the payment when it becomes due; and (iv) failures that are related to a "listed transaction" under Section 1.6011-4(b)(2) Treasury Regulation (generally relating to abusive tax avoidance transactions).

Although relief is not currently available for Section 409A documentation failures (i.e., documented

plan terms that violate Section 409A), IRS employees have indicated that a correction program for such failures may become available in the near future.

The Notice can be found [here](#).

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