

IRS Proposes Correction Program for Certain Unintentional, Operational Violations under Deferred Compensation Plans Subject to Section 409A

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Overview of Latest Developments

On Dec. 3 the IRS released Notice 2007-100, providing temporary correction methods for certain operational failures of non-qualified deferred compensation plans that would otherwise invoke the penalty taxes under Section 409A (“Section 409A”) of the Internal Revenue Code of 1986, as amended (California, which has enacted a parallel penalty tax may, in light of this notice, announce their own correction program).

In particular, it will be possible to correct some, but not all, operational failures of nonqualified deferred compensation arrangements if the correction is made in the same tax year as the failure. Correctable violations are those that are either:

- unintentional and contrary to plan provisions that comply with Section 409A, or
- due to an inadvertent error.

Relief is conditioned on the timely filing of information on the correction with the IRS and “commercially reasonable” steps are being taken to avoid recurrence of the failure.

It is expressly noted that relief is not available for exercise of a stock right that otherwise fails to comply with Section 409A.

Notice 2007-100 is quite detailed. We will continue to review the notice’s terms and provide further details at a later date. In addition, Notice 2007-100 also proposes for comment a corrections program that could be permanent. The comment period for the proposed correctional program closes March 3, 2008.

Notice 2007-100 can be viewed at <http://www.irs.gov/pub/irs-drop/n-07-100.pdf>.

For more information on this, or related matters, please contact any attorney in the Executive Compensation and Employee Benefits Group:

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