

***Qualified Retirement Plans***  
***Practice Alert***  
*August 2008*

**Non Qualified Plans - Fixit**

Under IRC §409(A) the design and operation of non qualified plans became more complex and subject to significant regulatory rules. As in the case of qualified plan with complexity comes opportunity for errors in the form of omissions and regulatory non compliance. Recently the Internal Revenue Service issued guidance for the correction of a limited number of defects in non qualified plans. If these procedures are followed the excessive penalties suffered by both the employer and employee covered under the non qualified plan will not apply. These are voluntary procedures similar to the voluntary programs available for qualified plans. To take advantage of this program the employer must have procedures in place to avoid operational errors.

Under IRC §409(A) distributions from non qualified plans can only be made in the event of separation from service, disability, death, a specific period of time as specified in the plan document, a change of control of the employer sponsor or an unforeseeable emergency. Furthermore an officer earning more than \$130,000 or a 1% owner with compensation of more than \$150,000 who separates from service may not take a distribution for six months. An unintentional failure to comply with the plan provisions can be corrected under this program but must be corrected in the same year as it occurred. In addition the employer must adopt procedures to insure that the same failure does not recur.

Included in the correction procedure are failures to defer the correct amount and distribution to an employee in error or distribution of an incorrect amount. In each case the acceptable correction is to return the excess distribution to the employer by the employee or to increase or decrease the deferral to reflect the correct amount. Again these corrections must be made in the same tax year. Errors caused by non compliant plan documents, i.e. proper language in the plan document, cannot be corrected under this program.

Any sponsor of a non qualified plan that takes advantage of this correction device must file, with its federal tax return, a notice entitled "Section 409(A) Relief Under Section II of Notice 2007-100." The IRS is considering extending this program and will review comments submitted toward this end. So far not many companies have used the program since it is new and the regulations governing non qualified plans are still in transition. Currently the program is only available through 2009. After that year errors discussed above would be subject to a 20% penalty tax. In some cases the premium interest penalty, equal to 20 % of the compensation which would be required to be included in gross income, may not be levied

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