

Notice 2008-113
Relief and Corrections with Regard to Certain 409A Failures

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Notice 2008-113
Relief and Corrections with Regard to Certain 409A Failures

- I. **Methods for correcting certain operational failures that are corrected within the same taxable year as the failure occurs. (Page 3)**
- II. **For Non Insiders Only - (i.e., officers, directors and 10% owners, to correct certain operational failures that are corrected in the taxable year immediately following the taxable year in which the failure occurs (Page 5)**
- III. **Relief limiting the amount includible in income under Section 409A for certain operational failures that involve only limited amounts (generally, amounts that do not exceed the elective deferral limit for qualified plans under Section 402(g)(1)(B), which is \$16,500 for 2009) (Page 7)**
- IV. **Relief limiting the amount includible in income under Section 409A for certain operational failures, regardless of the amount involved, subject to additional required actions (Page 8)**
- V. **Special transition relief for "non-insiders" with respect to certain operational failures that occur prior to January 1, 2008. (Page 9)**

GENERAL REQUIREMENTS FOR UTILIZING CORRECTIONS AND RELIEF PROGRAM

- Types of failure addressed-Under deferral, Excess Deferral, Incorrect Benefit Payment
- Failure must be inadvertent and unintentional.
- Take commercially reasonable steps to avoid recurrence of the operational failure and generally be able to demonstrate
- Cannot use corrections program for an operational failure that occurs while under IRS tax return examination.
- Must satisfy Certain Information and Reporting Requirements
- NO RELIEF FOR DOCUMENT FAILURE

I. Correcting certain operational failures during year failure occurs

A. (a) under deferral or (b) incorrect payment that was to occur in a subsequent yr (other than a failed specified employee payment)

THE FAILURE	CORRECTION	EARNINGS	W2/1099	REPORTING
<ul style="list-style-type: none"> • Under deferral or incorrect Payt due in a future yr. • Not a Specified EE Violation 	<ul style="list-style-type: none"> • Pay back before end of yr in cash or salary reduction. • After repayt, legally binding right to receive payt at the original time and form. • <u>If not insider * <i>and</i> 401(k) hardship</u> can agree to pay amount over max 24 mo. period, measured from the due date of federal tax for the year erroneously paid. • Must pay interest**. .If paid in installments, pay interest on unpaid balance. • <u>If >402(g)(1)(B) *** <i>and</i> insider *- add interest**</u> to payment: 	Earnings or losses adjustment optional before last day of tax yr.	<ul style="list-style-type: none"> • No inclusion in w2 on amounts repaid. • If reducing comp then amt repaid included in w2. 	<ul style="list-style-type: none"> • Plan Sponsor must attach statement to its tax return. • Plan Sponsor provides Notice to Participant. ****

* Insider if officer, director, or more than 10% owner

** Use Short term AFR

*** 16,500 for 2011

**** No longer required per Notice 2010-80

I. Continued

B. (a) Incorrect payment of amount payable in same taxable year, OR (b) incorrect payment to Specified Employee.

THE FAILURE	CORRECTION	EARNINGS	W2/1099	REPORTING
<ul style="list-style-type: none"> • Incorrect payt of amount payable too early in same taxable year as due. • Incorrect payment to Specified Employee 	Repay before end of year and actually pay within a calculated # of days (formula stated in Notice.)	<ul style="list-style-type: none"> • No adjustment for earnings allowed, may adjust for losses 	<ul style="list-style-type: none"> • No w2 adjustment 	<ul style="list-style-type: none"> • Plan Sponsor must attach statement to its tax return. • Plan Sponsor provides Notice to Participant.**

C. Excess deferral (or Failure to Pay an Amount) corrected in same tax yr.

THE FAILURE	CORRECTION	EARNINGS	W2/1099	REPORTING
Excess deferral corrected in same tax yr	<ul style="list-style-type: none"> • Repay excess to participant before end of year • Reduce acct balance accordingly. 	<ul style="list-style-type: none"> • If insider *- <u>must adjust</u> for earnings before yr end, if not insider-optional • Adjustment for losses- optional for all 	<ul style="list-style-type: none"> • No w2 adjustment 	<ul style="list-style-type: none"> • Plan Sponsor must attach statement to its tax return. • Plan Sponsor provides Notice to Participant.**

* Insider if officer, director, or more than 10% owner

** No longer required per Notice 2010-80

II. Correcting certain operational failures for non insiders * during tax yr immediately following the tax year in which failure occurs

A. (a) Under deferral or (b) incorrect payment that was to occur in a subsequent yr (other than a failed specified employee payment)

THE FAILURE	CORRECTION	EARNINGS	W2/1099	REPORTING
<ul style="list-style-type: none"> • Under deferral or incorrect Payt due in a future yr. • Not a Specified EE Violation 	<ul style="list-style-type: none"> • Pay back to sponsor before end of yr. following yr. of failure- in cash or salary reduction. • No repayt required if payt was scheduled to be made in this following yr., BUT must pay interest (see below) • After repayt, legally binding right to receive payt at the original time and form. • <u>If 401(k) hardship-</u> can agree to pay amount over max 24 mo. period, measured from the due date of federal tax for the year erroneously paid. • Must pay interest**. If installments, pay on unpaid balance. 	<p>Earnings adjustment or Losses optional before last day of tax yr. in which repayt is made.</p>	<ul style="list-style-type: none"> • If paid back in cash, Include in w2 for year of erroneous payt. Participant can take a tax deduction (of repayt amount-not interest) in the year of repayt. • If reducing comp to repay then amount repaid included in w2 for year of repayt. Participant can take a tax deduction (of repayt amount-not interest) in the year of repayt 	<ul style="list-style-type: none"> • Plan Sponsor must attach statement to its tax return • Plan Sponsor provides Notice to Participant. • Participant must attach info. to its tax return for the year failure discovered.

* Cannot be an insider in the year of failure or the following year. Insider if officer, director, or more than 10% owner

** Use Short term AFR

B. (a) Incorrect payment of amount payable too early in same taxable year, OR (b) incorrect payment to Specified Employee

THE FAILURE	CORRECTION	EARNINGS	W2/1099	REPORTING
<ul style="list-style-type: none"> • Incorrect pay of amount payable too early in same taxable year as due. • Incorrect payment to Specified Employee 	Repay before end of tax year following year of erroneous payment, and actually pay, under legally binding right, on later of (i) date the amount would otherwise be payable under the terms of the plan, or (ii) the end of the period measured from the date of repay that = no. of days from the date the amount was originally paid, through the date the participant repaid the amount. .	<ul style="list-style-type: none"> • No adjustment for earnings allowed • May adjust for losses 	<ul style="list-style-type: none"> • If repay and actual pay in same tax yr- Include in W2 in repay yr. Do not include in W2 when actual pay. made. • If repay and actual pay in different yr.- take a deduction in repay yr, and, include in W2 income in actual pay yr. 	<ul style="list-style-type: none"> • Plan Sponsor must attach statement to its tax return • Plan Sponsor provides Notice to Participant. • Participant must attach info. to its tax return for the year failure discovered

C. Excess deferral (or Failure to Pay an Amount) corrected in tax year immediately following yr. of failure.

THE FAILURE	CORRECTION	EARNINGS	W2/1099	REPORTING
Excess deferral corrected in yr. following yr. of failure	<ul style="list-style-type: none"> • Repay to participant before end of year following yr. of failure. • Reduce acct balance accordingly. 	<ul style="list-style-type: none"> • <u>Must adjust for earnings</u> • <u>May adjust for losses</u> 	<ul style="list-style-type: none"> • Include in W2 in year of repay 	<ul style="list-style-type: none"> • Plan Sponsor must attach statement to its tax return • Plan Sponsor provides Notice to Participant. • Participant must attach info. to its tax return for the year failure discovered

III. . Relief limiting amount includible for certain failures during tax year of limited amount AND NOT corrected in same taxable yr (otherwise no relief need from 409A penalties)

A. (a) Limited Under deferral OR (b) incorrect payment (whether due in a taxable yr but paid early, paid but due in a subsequent yr, or (c) Specified Employee Violation

THE FAILURE	CORRECTION	EARNINGS	W2/1099	REPORTING
<ul style="list-style-type: none"> • Under deferral • Incorrect payment (whether due in a taxable yr but paid early ,or paid but due in a subsequent yr, or Spec EE Violation) • Violation not greater than 402(g)(1)(B) ***, with plan aggregation 	<ul style="list-style-type: none"> • No repay of under deferral or incorrect payment • Participant pays 20% penalty tax but not penalty interest 	Earnings adjustment (or losses) optional before last day of tax yr.	<ul style="list-style-type: none"> • W2 correction for year in which the incorrect payt was made • Participant must file amended return for the year of violation reflecting additional tax, and include payt as income. .File amended return by end of 2nd taxable year following the year of failure. 	<ul style="list-style-type: none"> • Plan Sponsor must attach statement to its tax return • Plan Sponsor provides Notice to Participant. • Participant must attach info. to its tax return for the year failure discovered

*** 16,500 for 2011

B. Limited (i) Excess Deferral OR (ii) Amount that should have been paid and was not- not corrected in same taxable year

THE FAILURE	CORRECTION	EARNINGS	W2/1099	REPORTING
Violation not greater than 402(g)(1)(B) ***, with plan aggregation	<ul style="list-style-type: none"> • Employer remits to participant excess deferral, or makes payt by end of 2nd taxable year following the year of failure • Participant pays 20% penalty tax but not penalty interest 	<ul style="list-style-type: none"> • Earnings allocable to such amount through the date of payt must be either forfeited or added to payt back to participant-losses either disregarded or subtracted from the payment back to participant. 	<ul style="list-style-type: none"> • Include in W2 for year of repayt • Participant pays penalty in year of repayt tax return 	<ul style="list-style-type: none"> • Plan Sponsor must attach statement to its tax return • Plan Sponsor provides Notice to Participant. • Participant must attach info. to its tax return for the year failure discovered

*** 16,500 for 2011

IV. Relief limiting Amount includible Regardless of Amount but subject to further requirements

A. (a) under deferral OR (b) incorrect payment of amount due in a later yr –other than Specified Employee Failure

THE FAILURE	CORRECTION	EARNINGS	W2/1099	REPORTING
<ul style="list-style-type: none"> • Under deferral or incorrect Payt due in a future yr. • Not a Specified EE Violation 	<ul style="list-style-type: none"> • Repay to Employer (either by cash or salary reduction) by <u>end of 2nd</u> taxable year following the year of failure. • If incorrect payt, reestablish the original time and form of payment. • If insider *- add interest ** (if not fully re-paid in lump sum, then add interest at each repayt date- no mention of 24 mos requirement-see I. A) • Participant pays 20% penalty tax but not penalty interest • 	<ul style="list-style-type: none"> • <u>Optional</u> adjustment for earnings or losses 	<ul style="list-style-type: none"> • Report for year of violation. • Participant includes in income and files an amended tax return. • Cannot take a deduction or a credit against income in the repayt year. (see II.B) 	<ul style="list-style-type: none"> • Plan Sponsor must attach statement to its tax return • Plan Sponsor provides Notice to Participant. • Participant must attach info. to its tax return for the year failure discovered

* Insider if officer, director, or more than 10% owner

** Use Short term AFR

B. (a) Incorrect payment of amount payable in same taxable year OR, (b) incorrect payment to Specified Employee

THE FAILURE	CORRECTION	EARNINGS	W2/1099	REPORTING
<ul style="list-style-type: none"> • Incorrect payt of amount payable too early in same taxable year as due. • Incorrect payment to Specified Employee 	<ul style="list-style-type: none"> • Repay to Employer (no mention of salary reduction) <u>by end of 2nd</u> taxable year following the year of failure • New payt date must be set within a certain number of days after repayt date 	<ul style="list-style-type: none"> • CANNOT adjust for earnings, <u>MAY</u> adjust for losses 	<ul style="list-style-type: none"> • W2-report for year of violation, Participant includes in income and files an amended tax return for year of violation. • Cannot take a deduction or a credit against income in the repayt year. (see II.B) 	<ul style="list-style-type: none"> • Plan Sponsor must attach statement to its tax return • Plan Sponsor provides Notice to Participant. • Participant must attach info. to its tax return for the year failure discovered

IV Continued

C. Excess Deferral (or Failure to Pay an Amount)not corrected in same taxable year

THE FAILURE	CORRECTION	EARNINGS	W2/1099	REPORTING
<ul style="list-style-type: none"> Excess Deferral not corrected in same taxable year 	<ul style="list-style-type: none"> Employer remits to participant excess deferral by end of 2nd taxable year following the year of failure Participant pays 20% penalty tax but not penalty interest 	<ul style="list-style-type: none"> MUST adjust for earnings, <u>MAY</u> adjust for losses 	<ul style="list-style-type: none"> Include in w2 for year of violation Participant files an amended tax return 	<ul style="list-style-type: none"> Plan Sponsor must attach statement to its tax return Plan Sponsor provides Notice to Participant. Participant must attach info. to its tax return for the year failure discovered

Special Transition relief FOR NON INSIDERS for operational failures occurring before 1/1/2008

- **Use II.** (Correcting certain operational failures for non insiders during tax yr immediately following the tax year in which failure occurs) for a failure that occurred before 1/1/2008.
- Use 2009 as the “year immediately following”. If payt was scheduled to be made on or before 12/31/2009, treat the payment as if it were to be paid in the year following the year of failure