

*(REPRINTED FROM PRACTICAL TAX STRATEGIES, JULY 2008, AT PAGE 14.)*

## **RETIREMENT PLANNING FOR UNFUNDED DEFERRED PAY UNDER SECTION 409A**

*By VORRIS J. BLANKENSHIP*

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A retiree may suffer harsh consequences if a nonqualified deferred compensation plan fails to conform to Section 409A or fails to operate in conformity with the section. The retiree must include in gross income all unpaid plan benefits not subject to a substantial risk of forfeiture and not previously taxed.<sup>1</sup> The retiree also must pay a 20% penalty tax on the taxable benefits and must pay interest on the taxes the retiree would have incurred in prior years without the deferral.<sup>2</sup>

Fortunately, deferred compensation cannot be included in a retiree's gross income a second time after first being included due to a violation of Section 409A. However, in the absence of such a violation, no provision of Section 409A requires inclusion of deferred compensation in gross income. Instead, other well-established rules of income inclusion continue to apply. Specifically, deferred compensation continues to be includable in gross income on actual cash payment or constructive receipt, or on payment with property or other cash equivalent.<sup>3</sup>

Section 409A is largely regulatory in nature, with the onerous consequences of a 409A violation providing powerful incentives for compliance. Consequently, to discuss the normal effect of Section 409A on retirees, this article assumes that plan provisions fully comply with the section, and that the employer operates the plan in conformity with the section.

The article also generally assumes that the employer and the retiree are complying with the final regulations issued on 4/10/07.<sup>4</sup> For purposes of Section 409A, an employer is a "service recipient"—defined essentially as the employing person for whom an employee performs services and who confers on the employee the legally binding right to compensation, and all persons with whom such employing person would be considered a single employer under Sections 414(b) and (c).<sup>5</sup>

These regulations are fully effective for 2009 and subsequent years, except for certain collectively bargained plans. Section 409A and the regulations do not apply to deferrals under collective bargaining agreements in effect on 10/3/04, but only until 12/31/09.<sup>6</sup> Even for prior years, taxpayers may rely on any of the provisions of the final regulations in lieu of previous IRS guidance.<sup>7</sup> (Note, however, that the previous IRS guidance does provide some excellent one-time planning opportunities during the remainder of 2008, as discussed in some detail later in this article.)

The discussion in the article is also limited to the type of nonqualified plan in which a retiree's right to payment depends solely on the employer's unsecured promise. Thus, the discussion will not deal with the treatment of retirees under plans that involve either the funding or the segregation of assets, whether or not the funds or segregated assets are

subject to the claims of creditors. Consequently, rabbi trusts are outside the scope of this article.

Unfunded “eligible” plans under Section 457(b) are also outside the scope of this article, because Section 409A does not apply to such plans.<sup>8</sup> Nor does Section 409A apply to unfunded plans providing bona fide vacation leave, sick leave, compensatory time, disability pay, or death benefits (Section 409A(d)(1)(B)), or to unfunded qualified governmental excess benefit arrangements, Archer Medical Savings Accounts, Health Savings Accounts, or any other medical reimbursement arrangement.<sup>9</sup> Finally, the article does not deal with independent contractors, split-dollar life insurance, foreign plans, or nonresident aliens.

The term “retiree,” as used here, means a taxpayer who has ceased to work for remuneration, having no intention to resume either part-time or full-time work. The term “participant” means either an employee or a retiree who participates in a plan.

The article divides the discussion into the following nine parts:

- (1) The 409A definition of deferred compensation, to the extent relevant to retirees.
- (2) The allowable terms of a plan participant's initial election to defer compensation, discussed in the context of retirement planning.
- (3) The dates and events at or after retirement that may trigger the payment of deferred compensation.
- (4) Allowable deviations from designated payment dates.
- (5) Elections to change the time and form of payment available in retirement situations.
- (6) The prohibition of post-retirement accelerations of payments.
- (7) Issues associated with multiple elections or multiple payment times or events.
- (8) Some examples of typical retirement situations.
- (9) Effective dates and related planning for the remainder of 2008.

## Deferred compensation defined

Generally, a plan provides deferred compensation under Section 409A when a participant acquires “a legally binding right” to compensation that is or may be payable in a future tax year. Such compensation may include nontaxable compensation (other than in a cafeteria plan) that is exchangeable for taxable compensation, or that a participant receives in exchange for taxable compensation.<sup>10</sup>

For this purpose, the term “plan” includes any written agreement, method, program, or other arrangement—applied as if the employer divided multi-employee plans into separate plans maintained for each employee.<sup>11</sup> The regulations then aggregate each employee's deferrals under his or her plans into nine categories, each of which is considered a separate plan for that employee. Those categories are:

- (1) Involuntary separation plans.
- (2) Expense reimbursement plans.
- (3) Stock right plans.
- (4) Foreign income plans.
- (5) Split-dollar life insurance plans.
- (6) Other account balance plans elected by the employee.
- (7) Other account balance plans not elected by the employee.
- (8) Other nonaccount balance plans.

(9) All other plans.<sup>12</sup>

A participant does not have a legally binding right to compensation if any other person has complete discretion to reduce or eliminate the compensation. However, the regulations ignore discretion for this purpose if its exercise depends on the occurrence of some objective event or if the discretion lacks substance. Discretion may lack substance, for example, because of a family or economic relationship between the participant and the person with the discretionary power.<sup>13</sup>

Deferred compensation also includes any earnings on the compensation.<sup>14</sup> The regulations state that a participant generally acquires a legally binding right to earnings at the time of deferral of the underlying compensation.<sup>15</sup>

The regulations also provide some significant (and some insignificant) exclusions from the definition of deferred compensation. The following sections describe the exclusions potentially applicable to retiring or retired participants.

**Regular payroll payments.** Deferred compensation does not include any portion of a regularly scheduled payroll payment made after the end of the tax year earned.<sup>16</sup> It would be unusual (although possible) for a retiree to receive such a payment.

**Short-term deferrals.** Deferred compensation does not include short-term deferrals. A deferral is short-term if the governing plan does not specifically provide for a deferred payment and, absent exceptional circumstances,<sup>17</sup> the deferral is includable in gross income before the end of a 2 1/2-month period. The 2 1/2-month period ends on the 15th day of the third month after the later of the retiree's or the employer's tax year in which the retiree first possesses a legally binding right to the payment unhampered by a substantial risk of forfeiture.<sup>18</sup>

Thus, a substantial risk of forfeiture may extend the short-term payment period. However, it would rarely (if ever) extend the payment period for a retiree because, under Section 409A, the risk must generally be associated with the continued performance of substantial services.<sup>19</sup> Consequently, such a forfeiture risk will generally lapse at or before retirement.

The regulations also provide that a payment may be subject to a substantial risk of forfeiture if the payment is conditioned on achievement of a business goal, such as attaining a designated level of earnings or equity, or completing an initial public offering. However, the purpose of the compensation must relate to achievement of the goal. That is, the compensation apparently must provide some incentive for the participant to continue to work toward achievement of the goal—something that would not be relevant in a retirement context.<sup>20</sup>

**Indemnification and liability insurance.** Deferred compensation does not include payments under a plan provision indemnifying or insuring a retiree against certain claims for damages and expenses. However, a claim must be bona fide and based on the retiree's previous conduct as an employee, and a payment must be permissible under applicable law.<sup>21</sup>

**Certain legal settlements.** Deferred compensation does not include payments in settlement of a bona fide claim based on wrongful termination, employment discrimination, labor standards violations, or worker's compensation statutes. Nor does deferred compensation include payments or reimbursements of reasonable attorney's

fees or other expenses related to the claim. Whether the claim is bona fide and disputed is a question of fact.<sup>22</sup>

**Separation pay plans.** Deferred compensation generally includes payments of compensation conditioned on separation from service (including retirement) if payable in a tax year after earned.<sup>23</sup> However, several exceptions apply for compensation exclusively conditioned on separation from service:<sup>24</sup>

(1) *Involuntary separations under union contracts.* Deferred compensation generally does not include separation pay under a collectively bargained plan that provides for separation pay only on involuntary separation. To qualify, the collective bargaining agreement must be a bona fide agreement recognized by the Secretary of Labor, and the employer and bona fide employee representatives must negotiate the separation pay plan at arm's length.<sup>25</sup> Also, more than one-half the members of the union must be employees who are not owners, officers, or executives of the employer.<sup>26</sup>

(2) *Dollar limited involuntary separations.* The regulations exclude other involuntary separation payments if the plan requires payment by the end of the tax year following the year of separation—but only to the extent the payments are within a dollar limit. The dollar limit is twice the lesser of (a) the participant's ongoing annual rate of pay for the tax year preceding separation or (b) an inflation-adjusted statutory amount (\$230,000 for 2008).<sup>27</sup> For this purpose, involuntary separations may include a separation effectively caused by negative changes imposed by the employer (e.g., changes in an employee's pay, authority, duties, or working conditions).<sup>28</sup>

(3) *Voluntary window programs.* The regulations exclude separation payments under a "window" program if the plan requires payment by the end of the tax year following the year of separation, and the payments are within the dollar limits described in item 2 immediately above. An employer may establish such a program only for employees who elect to separate voluntarily from service during a window of no more than 12 months. The program cannot be part of a recurring pattern of providing similar programs.<sup>29</sup>

(4) *Separation expense reimbursement plans.* Deferred compensation does not include plan payments or reimbursements for otherwise deductible business expenses or for reasonable outplacement or moving expenses (e.g., loss on sale of a residence) incurred due to a separation. However, the exclusion from deferred compensation applies to payments made only on or before the end of the second tax year following the year of separation—provided the plan does not provide for any additional payments after the end of the third tax year following separation.<sup>30</sup>

(5) *Post-separation medical expenses.* Deferred compensation does not include payments or reimbursements provided by a separation plan for otherwise deductible medical expenses incurred during the COBRA protection period (determined by ignoring the overall medical deduction limitations).<sup>31</sup>

(6) *Additional overall exclusion amount.* A participant may also exclude from deferred compensation an additional amount of separation pay limited to the maximum annual elective deferrals allowable under Section 402(g)(1)(B) adjusted for inflation (\$15,500 for 2008).<sup>32</sup>

The above-listed exclusions are cumulative. For example, the regulations allow the exclusion of reimbursements under item 4, above (e.g., for moving expenses), without reducing the limit on the exclusion for involuntary separation payments under item 2. Further, a participant may use the fixed dollar amount excludable under item 6 in addition to the exclusions allowable for any other items.<sup>33</sup>

*Separation pay as a short-term deferral.* An involuntary separation payment failing the above tests for exclusion from deferred compensation might still qualify for exclusion as a short-term deferral. Such a payment would have to satisfy the general requirements for short-term deferral discussed above, including payment before the end of a 2 1/2-month period. As explained above, the 2 1/2-month period ends on the 15th day of the third month after the later of the retiree's or the employer's tax year in which the retiree first possesses a legally binding right to the payment unhampered by a substantial risk of forfeiture. <sup>34</sup>

For this purpose, a payment is subject to a substantial risk of forfeiture so long as it is conditioned on an involuntary separation from service without cause, and the risk was initially substantial that such a separation would not occur. <sup>35</sup> Thus, a separation payment so conditioned will normally extend the allowable short-term payment period until after retirement.

**Excluded stock rights.** The regulations exclude "stock rights" from the definition of deferred compensation if certain conditions are satisfied. For this purpose, stock rights include "nonstatutory stock options" and "stock appreciation rights." <sup>36</sup> Nonstatutory stock options are generally options to purchase employer stock that do not qualify under Sections 421 through 424. (Statutory stock rights may become subject to Section 409A if an employer modifies, extends, or renews them in a way that disqualifies them as statutory rights. <sup>37</sup>) Stock appreciation rights (historically known as "phantom stock") are rights to compensation dependent on the performance, but not the ownership, of employer stock.

*Exclusion of nonstatutory stock options.* The regulations generally exclude a nonstatutory stock option from deferred compensation if the exercise price of the option may never be less than the fair market value of the stock on the date of grant of the option. The employer must establish the number of shares subject to the option on the grant date. In addition, the option cannot include any deferral feature other than that allowed by Section 83 and the regulations thereunder, namely, income deferral until (1) exercise or disposition of the option or (2) vesting of the acquired stock, if later. <sup>38</sup>

The regulations provide extensive guidance regarding the determination of the fair market value of stock. <sup>39</sup>

*Exclusion of stock appreciation rights.* The regulations generally exclude a stock appreciation right from deferred compensation if the following conditions are satisfied:

- (1) On the grant date, the employer must designate the number of hypothetical shares on which appreciation is to be computed.
- (2) The appreciation payable on exercise of the right cannot be greater than the fair market value of the hypothetical stock on the exercise date, less the fair market value of the stock on the grant date.
- (3) The stock appreciation right cannot include any other deferral feature. <sup>40</sup>

*Common stock and other equity interests.* The excluded stock rights must also generally relate to employer common stock that does not have any distribution preferences other than (1) for more such common stock or (2) corporate liquidation preferences. The stock also cannot be subject to a permanent restriction that may result in a sale of the stock at a price other than fair market value. Nevertheless, other types of equity interests may qualify for the exclusion by analogy. For example, American depositary receipts or shares, mutual company units, and interests in certain other nonstock entities may

qualify.<sup>41</sup> The regulations also allow the use of related corporation stock if certain ownership and other criteria are satisfied.<sup>42</sup>

*Modifications and extensions.* Regs. 1.409A-1(b)(5)(v)(A) and (B) treat a reduction in the exercise price of a nonstatutory stock option, or an increase in the potential deferred amount for a stock appreciation right, as if it were the issuance of a new stock right. Reg. 1.409A-1(b)(5)(v)(C)(1) also treats an extension of the exercise period as creating a new stock right if the fair market value of the stock does not then exceed the exercise price of the option or if, because of the fair market value of the stock, there is then no profit in the stock appreciation right. The new stock right is then tested in the usual way to determine whether it qualifies for the exclusion from deferred compensation.

A new stock right is not created merely because the exercise period is reduced, or the grantor exercises reserved discretion to allow a transfer of the right. Nor is a new stock right created by adding a plan provision allowing payment of the exercise price with stock, or allowing the withholding of stock to pay taxes or the exercise price.<sup>43</sup> Finally, a new stock right is generally not created by a change in the time of vesting.<sup>44</sup>

The exclusion of a stock right from deferred compensation is lost if the stock right is converted to a legally binding right to future-year compensation or a feature is added that would have disqualified the option at the time of grant. The exclusion is also generally lost if its exercise period is extended when either:

- (1) The fair market value of optioned stock exceeds the exercise price.
- (2) There is then some profit in a stock appreciation right.<sup>45</sup>

Nevertheless, the exclusion is not lost merely because of an extension to the later of ten years after the original grant or for all or part of any originally existing alternative exercise period. The exclusion also is not lost if the employer provides an extended exercise period ending 30 days after an exercise would no longer violate a federal, state, or local law.<sup>46</sup>

In a somewhat different context, modification of a stock right in a “corporate transaction” may not result in creation of a new stock right. For this purpose, the regulations define a “corporate transaction” as a merger, consolidation, property acquisition, stock acquisition, separation, reorganization, or liquidation. Generally, stock rights involved in a corporate transaction do not become new stock rights merely because of a substitution of comparable stock of a new employer, or because of a resulting change in the number of shares involved. However, the changes must not increase the deferral amount or increase the ratio of (1) the actual or deemed exercise price to (2) the stock value.<sup>47</sup>

Adjustments for stock dividends or stock splits do not affect the treatment of stock rights if the aggregate exercise price or deferral amount remains unchanged.<sup>48</sup>

*Rights to dividends.* The regulations treat a right to receive accumulated dividends on the exercise of stock rights as an integral part of the stock rights. Thus, the dividend rights received on exercise of the rights either effectively reduce the exercise price or otherwise increase the deferral. Either way, the stock rights could then lose their exclusion from deferred compensation. On the other hand, the exclusion is not lost if the dividend rights are not contingent on the exercise of the stock rights but are instead payable in any event—although such noncontingent dividend rights will themselves then become deferred compensation.<sup>49</sup>

*Stock rights qualifying as short-term deferrals.* A stock right failing the general test for exclusion from deferred compensation might still qualify for exclusion as a short-term deferral. Such a stock right would have to satisfy the general requirements for short-term deferral discussed above, including payment before the end of a 2 1/2-month period. In addition, however, the stock right must not be exercisable after the end of the 2 1/2-month period.<sup>50</sup> As explained above, the 2 1/2-month period ends on the 15th day of the third month after the later of the retiree's or the employer's tax year in which the retiree first possesses a legally binding right to the stock right unhampered by a substantial risk of forfeiture.<sup>51</sup>

Unfortunately, however, the short-term deferral exclusion for stock rights is generally of limited utility. It allows a maximum exercise period of only 2 1/2 to 14 1/2 months, depending on circumstances. Assume, for example, that a participant has a stock right with a substantial risk of forfeiture that lapses on July 1 of the calendar tax year (of both the participant and employer). If the stock right otherwise qualifies as a short-term deferral, it will qualify for the exclusion from deferred compensation only if it may not be exercised at any time other than the 8 1/2-month period from the July 1 lapse date until March 15 of the succeeding tax year.

*Failure to satisfy the exclusion.* Despite the difficulty of excluding stock rights from deferred compensation, the consequences of failure to exclude them are onerous. That is, stock rights that become subject to the requirements of Section 409A normally fail to satisfy those requirements and thus are likely to trigger the imposition of taxes, interest, and penalties.

A stock right is by its nature generally exercisable, and thus payable, at a time chosen by the holder of the right. Such a feature is generally incompatible with the Section 409A requirement that deferred compensation be payable only on objectively determined dates or events. Consequently, employers should do their utmost to protect plan participants by structuring stock rights that clearly comply with the requirements for exclusion.

**Restricted property, including trust or annuity plans.** A retiree's current or prior receipt of unvested property (restricted property), or the retiree's right to receive unvested property in the future, is not deferred compensation under Section 409A. It is not deferred compensation even if it is attributable to an interest in a nonqualified trust or annuity plan or a transfer to or from such a plan. However, a retiree's legally binding right to receive substantially vested property at some future time ordinarily is deferred compensation.<sup>52</sup>

## Initial deferral elections

Although a plan qualifying under Section 409A may allow a participant to make initial elections to defer compensation, the participant would normally make such elections well before retirement. That is, a plan participant generally must make an initial deferral election during his or her tax year preceding the year of performance of the related services.<sup>53</sup> Even when the regulations deviate from this rule, a participant still must ordinarily make the initial deferral election before retirement.

For example, a participant must necessarily make an initial election before retirement for the first year of eligibility under a plan (other than an excess benefit plan).<sup>54</sup> Similarly, a participant must make an initial election before retirement for compensation that is forfeitable,<sup>55</sup> performance-based,<sup>56</sup> paid for a fiscal year,<sup>57</sup> or annualized part-year compensation.<sup>58</sup>



Nevertheless, in certain circumstances, an initial election could be available at or shortly after retirement. For example, a participant may make an initial deferral election under an excess benefit plan within 31 days after the end of the year he or she first became eligible to participate in the plan, even though the election follows retirement.<sup>59</sup> A participant in a plan deferring sales commissions may be able to make an initial election during the tax year preceding the year of customer payment, even though that is after retirement.<sup>60</sup> A participant may normally make an initial election in the tax year a regular payroll period starts if the payroll period ends in the subsequent year, even though the participant retires before making the election.<sup>61</sup>

Finally, a participant may make an initial deferral election at retirement for separation pay *attributable to negotiations conducted at retirement*. It does not matter whether the participant's retirement is voluntary or involuntary. However, the participant must make his or her election at or before obtaining a binding legal right to the separation pay, and the negotiations must be bona fide and at arm's-length. For a window retirement program, a participant must make an initial deferral election before his or her election to participate in the program becomes irrevocable.<sup>62</sup>

## Payment dates or events

Generally, a plan may provide for the payment of a participant's deferred compensation only on or after specified dates or events. Those dates and events are:

- (1) A specific time or fixed schedule.
- (2) Separation from service (including retirement).
- (3) Disability.
- (4) Death.
- (5) An unforeseeable emergency.
- (6) A change in the employer's ownership or control.<sup>63</sup>

Bear in mind that more than one of these permissible payment dates and events may apply to the same deferred compensation (e.g., payment at the earlier of age 70, death, or disability).<sup>64</sup>

**Specific time or fixed schedule.** A plan may provide for payment to a retiree at a specific date (e.g., at age 70) or during a specific period within, or consisting of, a tax year (e.g., the tax year 2010 or the last 120 days of the tax year 2010). Alternatively, the plan may provide for payments to a retiree on a fixed schedule (e.g., installment payments or a life annuity), provided each scheduled payment is to be made on a specific date or during a specific period within, or consisting of, a tax year.<sup>65</sup> If certain conditions are satisfied, a plan may even base payments under the fixed schedule on receipts from sales made by the employer in the ordinary course of business.<sup>66</sup>

The plan may limit each payment under a fixed schedule to an objectively determined amount (e.g., limited to a percentage of employer net income), with the unpaid amount carried over to a future payment date. The plan may also apply the limitation to a group of participants, with the effect of the limitation allocated among the participants in an objectively determined way. Furthermore, the plan may reduce a retiree's payments under a fixed schedule by any Social Security payments, or by disability payments under the employer's broad-based disability plan.<sup>67</sup>

In-kind benefits provided to a retiree or reimbursement of a retiree's expenses may also qualify as payments made at a specific time or on a fixed schedule. However, these in-kind benefits or reimbursements must be objectively defined and payable for an



objectively prescribed period. They cannot be subject to replacement by other benefits. Except for certain medical expenses, the amount provided for one tax year cannot affect the amount provided for any other year. Finally, the plan must pay expense reimbursements by the end of the tax year following the year of incurrence of the expense. <sup>68</sup> Reg. 1.409A-3(i)(1)(vi), Example 7 involves the reimbursement of a retiree's country club dues limited to \$30,000 for each separate tax year, with no carryover of unused amounts to any other year.

**Retiree's separation from service.** A plan may provide for the payment of deferred compensation on separation from service (including retirement), or at a date or during a period determined by reference to the date of separation. Alternatively, the plan may provide for payments on a fixed schedule commencing at a time determined by reference to the date of separation (e.g., commencing one year after retirement). <sup>69</sup> Note that these rules do not apply to separation pay to the extent such pay qualifies for exclusion from deferred compensation. Thus, for example, the rules do not apply to involuntary separation payments that qualify as short-term deferrals excluded from deferred compensation.

Special rules are applicable to a retiring key employee of a publicly traded employer designated as a "specified employee." During the six-month period immediately following a specified employee's retirement, a plan generally may not make deferred compensation payments triggered by the retirement. Instead, the plan may make all the missed payments on the first day after the end of the six-month period or, alternatively, may defer all payments triggered by the retirement for an additional six months. There are some exceptions to this rule, relating to the death of the specified employee, domestic relations orders, conflicts of interest, or payment of employment taxes. <sup>70</sup> Reg. 1.409A-1(i) provides extensive rules for identifying specified employees.

**Retiree's death.** A plan may provide for the payment of deferred compensation to a beneficiary at the retiree's death, or at a time or during a period determined by reference to the date of death. Alternatively, the plan may provide for payments to the beneficiary on a fixed schedule commencing at a time determined by reference to the date of death. <sup>71</sup> Although Section 409A does not apply to a plan that from its inception is a bona fide death benefit plan, an employer may not convert existing deferred compensation into excludable death benefits by amending the plan to provide only for death benefits. <sup>72</sup>

**Unforeseeable emergency.** A plan may allow a participant to apply for the payment of deferred compensation in an amount reasonably needed for an unforeseeable emergency (after taking into account other reasonably available funds). An unforeseeable emergency is a severe financial hardship suffered by the retiree due to accident or illness of the retiree or the retiree's spouse, beneficiary, or dependent. It also includes retiree hardship due to casualty or other similar circumstances beyond the retiree's control. For example, medical expenses or funeral expenses incurred by the retiree, or foreclosure on the retiree's residence, may give rise to an unforeseeable emergency. <sup>73</sup>

**Retiree's disability.** A plan may provide for the payment of deferred compensation, or a fixed schedule of payments, on a participant's disability. <sup>74</sup> However, the plan generally must limit qualifying disabilities to the inability to perform substantially gainful work, or to the receipt of three months of employer disability benefits (the latter unlikely for a retired person). The disability must also be attributable to a physical or mental medical condition that will likely last at least 12 months or from which the retiree will probably die. Alternatively, the plan could use a more restrictive definition of disability (but generally could not use a more expansive definition). <sup>75</sup>

A plan may also provide that a determination of disability for Social Security purposes is also sufficient for purposes of Section 409A. The Social Security provision is very similar, generally defining disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."<sup>76</sup>

## PLANNING TIP

Making payment (or accelerated payment) of a retiree's deferred compensation dependent on post-retirement disability is not as entirely strange as it may sound. Large medical expenses may accompany disability. Those medical expenses may create a severe financial hardship justifying unforeseeable emergency payments (discussed above). Reg. 1.409A-3(i)(3)(i), however, provides that a plan can make such hardship payments only after the retiree has liquidated and used other personal assets to pay medical expenses (at least to the extent such liquidation and use does not itself cause a severe financial hardship). Thus, the retiree may need disability payments to replace the retirement income no longer received from the liquidated investment assets.

Although Section 409A does not apply to a plan that from its inception is a bona fide disability plan, an employer may not convert deferred compensation to disability benefits by subsequently amending the plan so that it provides only disability benefits.<sup>77</sup>

**Change in employer control.** A plan may provide for the payment of deferred compensation, or a fixed schedule of payments, on a change in the ownership or control of a corporate employer (referred to hereafter as a "change in control"). Alternatively, a plan may provide for payments as of a date or during a period determined by reference to the change in control.<sup>78</sup> This payment trigger could be important to a retiree who is concerned about new management and its ability to sustain the business and pay deferred compensation. For this purpose, a change in control includes:

- (1) The acquisition of stock that, together with stock already owned, is more than 50% of the fair market value or voting power of the outstanding stock of the corporate employer.<sup>79</sup>
- (2) The acquisition of stock that, together with stock acquired during the previous 12 months, possesses 30% or more of the total voting power of the corporation's stock.<sup>80</sup>
- (3) The replacement within a 12-month period of a majority of the board of directors of the corporation, if the previous board of directors has not endorsed the replacements.<sup>81</sup>
- (4) The acquisition within a 12-month period of assets of the corporation having a fair market value that is 40% or more of the fair market value of all the corporation's assets (disregarding corporate liabilities).<sup>82</sup>

The regulations require use of the attribution rules in Section 318(a) to determine ownership of stock.<sup>83</sup> The regulations also provide rules for determining when an acquisition by a group is a change in control.<sup>84</sup> In addition, the regulations provide rules for determining when an acquisition of assets by a related party is not a change in control.<sup>85</sup>

**Alternative permissible dates or events.** As already noted, a plan may provide that a payment of deferred compensation will be made on the earlier of two or more permissible dates or events (e.g., on the earlier of age 70 or death). Similarly, a plan may provide that a fixed schedule of payments will commence at the earlier of several permissible

dates or events. Conversely, a plan may provide for a payment or for the commencement of a schedule of payments at the later of several permissible dates or events (e.g., the later of age 65 or retirement).

A plan generally may not allow more than one time and form of payment for each permissible payment date or event, with a few exceptions. Under one exception, a plan may allow alternative payment schedules depending on whether a permissible payment event occurs on or before a specific date or occurs after that date. For example, the plan might provide for a lump-sum payment if death occurs on or before age 60, but a schedule of payments if death occurs after age 60. However, this exception is available only for payments triggered by disability, death, an unforeseeable emergency, or a change in control. For a separation from service, a plan may provide for a different time and form of payment for:

- (1) Retirement within two years or less after a change in control.
- (2) Retirement before or after a specified age, or before or after a specified age in combination with a minimum number of years of service.
- (3) A retirement not described in items 1 or 2.<sup>86</sup>

**Disputes and refusals to pay.** Failure to make a payment on the designated payment date or during a designated payment period does not violate the requirements of Section 409A if the retiree did not consent to the failure to pay. However, this exception will not apply if the retiree or certain related parties actually made the decision not to make the payment, or the failure to pay was due to the retiree's failure to take any action reasonably required by the plan.<sup>87</sup>

Likewise, the exception will not apply if the retiree does not accept the portion of the payment unconditionally offered by the employer, or does not promptly make a reasonable and good faith effort to collect the remainder of the payment. The regulations presume the collection effort was inadequate if the retiree did not give the employer notice of nonpayment within 90 days after the payment was due, or did not start enforcement action within 180 days.<sup>88</sup>

If the employer concedes liability for the payment, or the parties reach a legally binding settlement or final adjudication, the employer must make any additional payment before the end of the following calendar year.<sup>89</sup>

**Earnings on deferred compensation.** If a plan credits actual or notional earnings on deferred compensation no less frequently than annually, the plan may treat the earnings as deferred compensation separate from the underlying compensation. In such a case, the plan may provide for a different time and form of payment for the earnings.<sup>90</sup>

## Payment dates and allowable deviations

As explained above, a plan may provide for payment to a retiree at a specific date or on a fixed schedule. Alternatively, the plan may provide for payment during a specific period within, or consisting of, a tax year, whether the payment is a separate payment or one of a fixed schedule of payments. For subsequent deferral purposes, the regulations treat the first day of a payment period as the date of payment.<sup>91</sup>

These same rules apply to payments on a designated date or fixed schedule determined by reference to death, disability, a separation from service, an unforeseeable emergency, or a change in control. In addition, for any such event, a plan may provide for payment

during a specified period of 90 days or less that overlaps two tax years, provided the retiree does not control the tax year of payment. This 90-day rule does not apply to payments required on a specific date or fixed schedule not tied to one of the named events.<sup>92</sup>

**Allowable deviations from plan payment dates.** The regulations give plans some flexibility to deviate from designated payment dates or periods. They allow a plan to make a payment after the designated date as long as it is within the same tax year.<sup>93</sup> Although this rule will generally be of use in many different situations, one interesting application involves short-term deferrals. By specifying a payment date that is on or before the end of the 2 1/2-month payment period applicable to short-term deferrals, a plan may be able to avoid a violation of Section 409A if it should ultimately fail to make a timely short-term payment.

For example, assume a plan granted a participant a right to separation pay on involuntary retirement without cause, payable on February 15 of the tax year following separation. Assume the participant was in fact involuntarily retired without cause on 7/1/09. The separation pay will likely qualify as a short-term deferral (discussed above) excluded from deferred compensation if the plan pays it by 3/15/10. However, if the plan does not pay it by March 15, the plan may nevertheless be able to avoid a violation of Section 409A by making payment by the end of 2010 (the year containing the specified February 15 payment date).<sup>94</sup> Note that a payment after March 15 would violate Section 409A in the absence of the specified February 15 payment date.

A plan may also make a payment of deferred compensation within a period beginning 30 days prior to the designated payment date and ending on the 15th day of the third calendar month following the designated date—provided the retiree is not able to choose the tax year of payment.<sup>95</sup> Thus, for example, a plan required to make payment on 1/15/10 could make payment on that date or any time thereafter during the tax year 2010, or the plan could make the payment during the 30-day period beginning 12/16/09. For a payment due on 12/15/10, the plan could make the payment any time during the period 11/15/10 (30 days earlier) to 3/15/11 (2 1/2 calendar months later).

For purposes of applying these rules to designated payment periods, the payment date is the first day of any payment period within a tax year, or the first day of a payment period consisting of a tax year.<sup>96</sup> Unfortunately, the regulations are silent regarding the deemed payment date for a 90-day payment period that overlaps tax years (available in the case of certain triggering events discussed above).

**Other permitted delays of payments.** A plan may delay a payment if either:

- (1) The plan cannot calculate the payment amount due to events beyond the control of the retiree or beneficiary.
- (2) The payment would jeopardize the going-concern status of the employer.

However, the employer must make the payment in the retiree's first tax year feasible.<sup>97</sup>

In addition, a plan may delay payments to avoid a loss of employer deductions due to excess compensation under Section 162(m). Alternatively, the plan may delay payment if it reasonably believes that timely payment would violate a provision of law other than federal tax law (e.g., federal securities law). The regulations also excuse delays caused by an unforeseeable emergency or a change in control of the employer, or delays attributable to other events or conditions the IRS may identify in the future.<sup>98</sup> Finally,

provisions of the Uniformed Services Employment and Reemployment Rights Act of 1994 <sup>99</sup> override many payment requirements under Section 409A and the regulations. <sup>100</sup>

## Changes in time or form of payment

A Section 409A plan may allow a participant, beneficiary, or employer to elect to further delay a deferred compensation payment or change the form of the payment (a “subsequent deferral election”), if certain conditions are satisfied. <sup>101</sup> For this purpose, a payment means the payment of any deferred compensation amount the participant is entitled to receive on a determinable date or dates. It includes amounts payable in cash or in kind, for the benefit of the participant, for welfare plan benefits, fringe benefits, or benefits excludable from gross income. <sup>102</sup>

In no event, though, may a plan allow a subsequent deferral election to affect payments that become due within 12 months after the election becomes irrevocable. In addition, the electing participant or beneficiary must defer the affected payments for at least five additional years if the payments were due:

- At a specific time.
- On a fixed schedule.
- At separation from service (including retirement).
- On a change in control.

The additional five-year deferral does not apply to payments triggered by death, disability, or unforeseeable emergencies. <sup>103</sup>

For purposes of applying the 12-month and five-year constraints, the regulations treat payments due during a specified period as due on the first day of the period. <sup>104</sup> Thus, for example, if a plan must make a payment during calendar year 2010, the due date for subsequent deferral purposes is 1/1/10. The participant must make any subsequent deferral election by 1/1/09 (12-months earlier), and the payment date must be extended until at least 1/1/15 (if the five-year rule is applicable).

Note that a participant need not comply with the requirements for a subsequent deferral election merely to change beneficiaries, unless the time and form of payment is otherwise affected. <sup>105</sup> Note also that the regulations treat the term “scheduled payments” as including both life annuities and a series of installment payments. <sup>106</sup>

**Subsequent deferral elections involving life annuities.** The subsequent deferral rules treat a life annuity as if it were a single payment due on the commencement of the annuity. Thus, a participant must make a subsequent deferral election with respect to a life annuity at least 12 months before the annuity commences. In addition, the participant must delay commencement of the annuity for at least five years unless commencement is triggered by death, disability, or unforeseeable emergency. For example, an annuity due to commence on the participant's 65th birthday may commence instead on the participant's 70th birthday, if a participant so elects on or before his or her 64th birthday. <sup>107</sup>

*Allowable non-complying elections.* Nevertheless, a plan may allow a change of beneficiary under a life annuity at any time before the first annuity payment even if the change does not satisfy the conditions for a subsequent deferral election. Reg. 1.409A-2(b)(2)(ii)(A) allows the beneficiary change even though the old and new beneficiaries do not have the same life expectancy. Thus, for example, a plan could allow a change of

beneficiary from the participant's spouse to the participant's child under a joint and survivor annuity without regard to the requirements imposed on subsequent deferral elections.

Similarly, a change before the first annuity payment from one type of life annuity to another type of life annuity generally need not satisfy the conditions imposed on subsequent deferral elections. However, the participant may not change the date of the first annuity payment, and the two life annuities must be actuarially equivalent (i.e., have the same present value). <sup>108</sup> The plan must determine actuarial equivalence by applying the same reasonable actuarial assumptions and methods to the valuation of both the old and new annuities. <sup>109</sup>

Nevertheless, the regulations generally treat a subsidized joint and survivor annuity as if it were actuarially equivalent to an alternative single life annuity of lesser value, if certain conditions are satisfied. Specifically, the participant's periodic payment under the subsidized joint and survivor annuity may not be more than his or her payment under the single life annuity. In addition, the participant's periodic payment under the subsidized annuity may not be less than the beneficiary's periodic payment under the subsidized annuity. <sup>110</sup> A subsidized joint and survivor annuity occurs most commonly when an employer bears some or all of the cost of a survivor annuity for the employee's spouse.

*Section 409A definition of life annuity.* The regulations define a life annuity as a series of substantially equal periodic payments received annually or more frequently, measured by the lives or life expectancies of a participant or a participant and beneficiary. The plan must make the payments over the participant's lifetime, the joint and survivor lifetimes of the participant and beneficiary, a period equal to the participant's life expectancy, or a period equal to the joint and survivor life expectancy of the participant and beneficiary. <sup>111</sup>

It does not matter that the life annuity:

- (1) Guarantees payments for a term certain.
- (2) Guarantees total payments equal to the original value of the annuity.
- (3) Increases participant benefits on elimination of a survivor annuity.
- (4) Provides certain cost-of-living increases.

Neither does it matter that the plan may offset the annuity payments by any Social Security or Railroad Retirement payments. <sup>112</sup> It is also irrelevant whether a participant must have the consent of his or her spouse to change beneficiaries or forms of payment. <sup>113</sup>

Bear in mind that the life annuities discussed here are those for which annuity payments are dependent entirely on the unsecured promise of the employer. If instead an employer purchases and transfers a commercial annuity to a participant on the occurrence of a payment date or event, the fair market value of the annuity is immediately taxable to the participant. <sup>114</sup>

**Subsequent deferral elections involving installment payments.** The subsequent deferral rules generally treat a series of installment payments as a single payment due on commencement of the installment payments. Thus, a participant must generally satisfy the subsequent deferral rules to elect to change the time of commencement. An election is also required to shorten or lengthen the period of payment of the installments. Nevertheless, a plan may provide for the immediate payment of all remaining installments if the present value of the payments falls below an amount previously



established by the plan and the prepayment is not otherwise a forbidden acceleration of payments. <sup>115</sup> (See below for a discussion of forbidden accelerations of payments.)

Despite the general rule, a plan may change the single payment treatment of a series of installments by expressly designating installments as a series of separate payments. In that case, the participant must make a separate subsequent deferral election for each payment to delay that payment or change the form of the payment. <sup>116</sup>

**Elections affecting short-term deferrals.** Although the regulations generally do not treat a short-term deferral as deferred compensation, an employee may be able to treat it as such for purposes of electing an additional deferral. To make the election, the employee must have a legally binding right to a short-term deferral that, because of a substantial risk of forfeiture, is not payable until a future tax year. For purposes of the election, the regulations define the payment date for the short-term deferral as the date the substantial risk of forfeiture lapses. Although the election must generally satisfy the usual requirements for a subsequent deferral, it need not extend the deferral period for five additional years for payments triggered by a change in control. <sup>117</sup>

Note that a participant would have to make any short-term deferral election before retirement. As noted above, the original payment date for a short-term deferral is always the date of lapse of a substantial risk of forfeiture. However, a substantial risk of forfeiture generally lapses at or before retirement because, under Section 409A, the risk is closely associated with the continued performance of substantial services. Thus, an already retired participant could not satisfy the subsequent deferral requirement that he or she make the election 12 months before the original payment date (i.e., 12 months or more before retirement).

**Domestic relations orders.** Elections to change the time or form of payment made under a domestic relations order by someone other than the participant need not satisfy subsequent deferral election requirements if the payments are not made to the participant. A domestic relations order is a judgment, decree, or order of a state court relating to alimony, marital property, or child support that provides for payments to a spouse, former spouse, child, or other dependent. The domestic relations order need not be a QDRO under Section 414(p)(1). <sup>118</sup>

**Multiple payment dates or events.** If a payment of deferred compensation may be made on the occurrence of more than one permissible date or event (e.g., the earlier of a specified age, disability, or death), the subsequent election rules generally apply separately to each such date or event. The rules also apply to the addition, deletion, or substitution of a payment date or event that could delay the time of payment or change the form of payment. <sup>119</sup>

**Subsequent deferral elections by beneficiaries.** As noted above, the regulations provide that a beneficiary may make a subsequent deferral election regarding the time or form of payment. However, payment events for a beneficiary are more limited than for a participant. The regulations do not allow the death, disability, or separation from service of a beneficiary to trigger a payment for the beneficiary. <sup>120</sup> Section 409A(a)(2)(A)(iii) does specify "death" as a payment event without indicating whose death may trigger the payment. However, the regulations limit the payment event to the death of the participant. The drafters of the regulations may have been worried about the specter of multi-generational deferrals if successive beneficiaries could select his or her death as a payment event.



Furthermore, the regulations make it clear that only the participant may suffer an unforeseeable emergency that triggers a payment (although the cause of the emergency may be the illness or accident of the participant's spouse, dependent, or beneficiary).<sup>121</sup> Thus, the subsequent deferral elections available to a beneficiary are limited to payments triggered by specific dates, fixed schedules, or changes in control.

Unfortunately, even these limited subsequent deferral elections are not available to a beneficiary who does not have sufficient time to make the election 12 months before a payment date. Thus, during his or her lifetime, a participant may want to provide for delayed payments at his or her death to give the beneficiary adequate time to make the election.

## Accelerations of payments

Generally, a plan cannot allow the acceleration of a payment of deferred compensation to a participant or beneficiary.<sup>122</sup> For this purpose, the definition of payment is the same as for the subsequent deferral rules discussed above. It is important to note, however, that an accelerated payment is permissible if it is merely incident to a subsequent deferral election. For example, a qualifying subsequent deferral election changing the form of payment from a series of installment payments treated as a single payment to a lump-sum payment is not a prohibited acceleration.<sup>123</sup>

A plan generally may not allow the addition, deletion, or substitution of permissible payment dates or events if that could result in an acceleration of a payment. Nevertheless, the regulations do allow the addition of death, disability, and unforeseeable emergencies as earlier alternative payment events.<sup>124</sup> In addition, a mere change in the identity of a beneficiary is not a prohibited acceleration. Thus, in the case of a life annuity, it does not matter that the new beneficiary has a shorter life expectancy than the old beneficiary.<sup>125</sup>

The regulations recognize a number of other types of early payments that are not prohibited accelerations. The immediately following discussion describes the exceptions relevant to retirees.

**Domestic relations orders.** Pursuant to a domestic relations order, a plan may accelerate payments to a person other than the participant. The domestic relations order need not be a QDRO.<sup>126</sup>

**Conflicts of interest.** A plan may accelerate payments if that will allow a participant to avoid violation of an ethics or conflicts of interest law (even though another course of action might also have that effect). However, if the relevant law is foreign, the plan may only accelerate payments of certain income from sources in the foreign country promulgating the law.<sup>127</sup>

**Section 457 plans.** Section 409A does not apply to “eligible deferred compensation plans” of tax-exempt entities and state or local governments under Section 457.<sup>128</sup> However, Section 409A does apply to other unfunded deferred compensation provided by those entities—even though Section 457(f) may independently require inclusion of that compensation in gross income as it vests.<sup>129</sup> Thus, a retiree might have to pay tax on vested compensation even though Section 409A does not then allow the plan to make payment. Fortunately, though, the plan may accelerate deferred compensation payments in an amount equal to the income tax withholding that would have been required by all taxing authorities if the vested amount had actually been paid.<sup>130</sup>

**Limited cashouts.** A plan may give an employer discretion to make (or may simply require) a lump-sum payment of the total amount deferred by a retiree when that total is less than an amount specified by the plan. However, the specified amount may not itself be greater than the maximum annual elective deferrals allowed under Section 402(g)(1)(B). For 2008, that maximum is \$15,500 after adjustment for inflation. [131](#)

**Plan termination: corporate liquidation.** An employer generally may accelerate payments made to terminate and liquidate a plan within 12 months of a corporate dissolution taxable under Section 331, or with the approval of a bankruptcy court in Chapter 11. A retiree must include the payments in gross income when actually or constructively received, but at least by the later of:

- (1) The calendar year of plan termination and liquidation.
- (2) The first calendar year the payment is administratively practical. [132](#)

**Plan termination: change in control.** An employer generally may accelerate payments made to terminate a plan in connection with a change in control of the employer. However, the employer must irrevocably act to terminate and liquidate the plan within 30 days before or 12 months after the change in control. In addition, all plan participants experiencing the change must receive all deferred amounts within 12 months of the date the employer took its irrevocable action. In the case of a change due to an asset purchase, only the employer responsible for payment of the deferred compensation after the purchase may terminate the plan. [133](#)

**Other plan terminations.** Apart from corporate liquidations and changes in control, an employer may still generally accelerate a retiree's payments after the employer's irrevocable action to terminate and liquidate a plan. The plan must make all liquidation payments within 24 months after the employer's irrevocable action, except that it may not make any payments during the first 12 months of that period (other than previously scheduled payments). In addition, within three years of such action, the employer may not adopt a new plan with specified similarities to the terminated plan. Furthermore, the termination and liquidation must not be "proximate to a downturn in the financial health" of the employer. [134](#)

**State, local, or foreign taxes.** Some state, local, or foreign governments may impose taxes on income deferred under Section 409A before the income is payable. If so, the employer may accelerate the distribution of deferred income in amounts necessary to pay the state, local, or foreign tax. The employer may also distribute an additional amount sufficient to reimburse the participant for the federal income taxes due on the distributions, including the federal income tax on the reimbursement (i.e., by pyramiding the federal tax reimbursement). [135](#)

**Offsets of participant liability to employer.** If a participant is liable for a debt to the employer that arose in the ordinary course of the employment relationship, the employer may accelerate some deferred compensation to offset the debt. However, the employer may apply the offset only when the debt is otherwise due, and the offset in any one tax year of the employer may not exceed \$5,000. [136](#)

**Bona fide disputes with the employer.** An employer may accelerate payment of deferred compensation to a retiree to settle a bona fide dispute regarding the retiree's right to receive the deferred amount. Whether a dispute is bona fide depends on all the facts and circumstances. However, the regulations presume a dispute is not bona fide if the settlement amount is more than 75% of the present value of the disputed amount, or

if the employer makes the settlement payment “proximate to a downturn in [its] financial health.” <sup>137</sup>

**Linkage to a qualified retirement plan.** Some nonqualified deferred compensation plans provide for the reduction of deferrals in the amount of some or all of the benefits available under a qualified plan. Thus, a change in qualified plan benefits may reduce benefits under the nonqualified plan. However, Reg. 1.409A-3(j)(5) generally provides that such a reduction is not an acceleration of deferred payments if the reduction is due to changes in benefit limitations imposed on the qualified plan by the Code or other applicable law.

Reg. 1.409A-3(j)(5) also provides that accelerated payments do not include a reduction in a participant's nonqualified deferrals due to the employer's amendment of a qualified plan to increase benefits. Nor is it an acceleration if the reduction of deferrals is due to a qualified plan amendment to add or remove subsidized or ancillary benefits, or due to a participant's election to receive or not receive such benefits.

## Multiple elections or payment events

Reg. 1.409A-2(b)(6) provides that subsequent deferral elections generally apply separately to each payment date or event. For example, assume a plan provides that a participant is entitled to an annuity at age 65 or, if earlier, a lump-sum payment on separation from service. If the participant remains employed and elects (more than 12 months before age 65) to delay the age 65 annuity, the five-year rule requires delay until at least age 70. However, the lump-sum payable on separation from service remains substantially unchanged and thus not subject to subsequent deferral requirements. <sup>138</sup>

Nevertheless, the regulations do not apply subsequent deferral requirements separately to the addition, deletion, or substitution of a payment date or event. <sup>139</sup> For example, substitution of a change-in-control event for a separation-from-service event would not satisfy subsequent deferral requirements because it could result in an additional deferral of less than five years. Nor would the substitution satisfy anti-acceleration rules because the change in control could occur before separation from service. <sup>140</sup>

**Favored payment events.** As noted above, Section 409A generally treats payments triggered by death, disability, or unforeseeable emergency more favorably than other types of payments. For example, the anti-acceleration rules generally do not apply to the favored payment events. <sup>141</sup> Furthermore, the five-year additional deferral requirement applies only to subsequent deferral elections “related to” one of the less favored payment dates or events. <sup>142</sup> Thus, because the regulations generally apply the subsequent deferral requirements separately to each payment date or event, the five-year rule normally would not affect any of the favored payment events involved in an election.

For example, assume a participant is entitled to a life annuity at age 65 or installment payments at her earlier death. Assume that, 12 months before age 65, the participant made a subsequent deferral election delaying commencement of the age 65 annuity, and also requiring payment at her earlier death of a lump sum (rather than the installment payments). In that event, the five-year rule requires a delay in commencement of the annuity until at least age 70 (a less favored date or event). However, the lump sum payable at her death (a favored event) is not subject to the five-year rule.

By contrast, the regulations generally do not apply subsequent deferral requirements separately to payment dates or events in an election involving additions, deletions, or substitutions of dates or events. <sup>143</sup> Thus, such an election might be in some way “related

to” both a favored payment event and a less favored payment date or event. The question then becomes whether the five-year rule applies because of the presence of a less favored payment date or event. Unfortunately, the regulations do not provide an answer, and the subsequent deferral examples in the regulations studiously avoid analysis of favored payment events. <sup>144</sup>

Fortunately, however, the legislative history states somewhat more clearly that the five-year rule does not apply to an election “relating to distributions on account of” a favored event. <sup>145</sup> Thus, if an election adds a favored payment event or substitutes a favored event for a less favored date or event, it appears irrelevant whether the election also relates in some way to the less favored date or event. This conclusion is consistent with the Service’s overall view that the addition of a favored event is normally not abusive. <sup>146</sup> In that vein, it does seem unlikely that Congress intended to impose additional payment delays for participants who suffer the misfortune of death, disability, or unforeseeable emergency.

To illustrate, a participant entitled to a payment at age 65 could make a subsequent deferral election to substitute payment at her death for the age 65 payment. The election is clearly related to payment at death—a favored payment event generally not subject to the five-year rule or the anti-acceleration rules. Thus, the election should be valid provided the participant makes it at least 12 months before the participant’s 65th birthday.

On the other hand, the five-year rule might very well apply to an election substituting an age 65 payment for a payment at death. Although the election may relate in some ways to both the old payment event and the new payment date, elimination of the payment at death may mean that the election does not, in the words of the legislative history, “relat[e] to distributions on account of” a favored event.

**Successive deferral elections.** In laying down the requirements for subsequent deferral elections, Section 409A and the regulations refer simply to “a” subsequent deferral election provided by a plan. <sup>147</sup> Nowhere do they expressly prohibit multiple or successive elections. Rather, they indicate a reasonably expansive availability of elections that comply with the rules. The regulations state that complying elections are available to participants, beneficiaries, and employers. <sup>148</sup> In addition, election requirements apply separately to each one of an array of payment dates and events. <sup>149</sup>

Furthermore, the Preamble to the proposed regulations states that, after an event establishing a time and form of payment, an employee may make a subsequent deferral election establishing a new time and form of payment. The Preamble gives, as an example, a payment due three years after an employee’s separation from service. After his or her separation, the employee may then elect to change the time and form of the payment, provided the election satisfies the 12-month and five-year requirements. <sup>150</sup> Thus, the employee may elect a new payment date or event, even though another payment event (separation) has already occurred.

## PLANNING TIP

Successive elections for payment events that require additional five-year deferrals may become a bit impractical as the aggregate deferral period lengthens. However, successive elections for favored payment events may be very useful. For example, as considerations change during the joint lifetimes of a participant and beneficiary, the participant may find it very useful to be able to change the form of payment at death (a favored event), without having to worry about adding an additional five-year deferral.

## Typical retirement situations

Generally, an employee entitled to unfunded deferred compensation payments should begin reassessing deferral elections at least 18 to 24 months before retirement. The employee is then in a better position to evaluate retirement needs than in earlier years when the compensation was originally deferred. The employee will also still have time to satisfy the requirement that he or she make subsequent deferral elections at least 12 months before retirement (if retirement is the payment event).

Examples of some typical retirement situations follow. For purposes of these examples, assume the relevant deferred compensation plans provide all the elections and exceptions allowed by Section 409A and the regulations. Note also that the conclusions reached in the examples are based on this article's previous analysis and interpretation of the final regulations.

**Example 1: Lump sum, moderate assets, change in control concerns.** A participant in an unfunded deferred compensation plan long ago elected to receive his plan benefits in a lump sum on separation from service. The plan has been crediting interest annually at a market rate, and will continue to do so as long as compensation is deferred. In 2009, the participant expects to retire in about 18 months. However, he is concerned about the lump-sum benefit pushing him into high income tax brackets.

Assume the participant and his spouse have sufficient assets and retirement income to support themselves for five years after retirement without resorting to his deferred compensation. Thus, the participant may want to make a subsequent deferral election 12 months or more before retirement to receive an annuity or installment payments commencing five years after retirement. If he makes the election, he will receive the payments over a period of years when, on average, he will likely fall into lower tax brackets.

Depending on circumstances, the participant will also likely want his election to provide for payment at his death, disability, or unforeseeable emergency,<sup>151</sup> whether or not scheduled payments have begun before those events.<sup>152</sup>

Assume further that the participant is satisfied with the financial ability of his employer to make payments during retirement years, but that he is concerned about the unknown risks of a change in control of the employer. If this concern outweighs the participant's desire for tax deferral, his election may specify that, on a change in control occurring after payments have begun, he will receive any remaining payments in a lump sum.<sup>153</sup> Sadly, though, the regulations do not appear to offer the participant any relief if the change in control occurs within five years after retirement.<sup>154</sup>

**Example 2: High tax brackets, substantial assets, disabled child.** The facts are the same as in Example 1, except that the participant and his spouse have sufficient assets and income to support them and their disabled child during their lifetimes, without resort to the participant's deferred compensation. In addition, they expect to be subject to taxation in the highest tax brackets for the remainder of their lives. They are unconcerned about a change in control of the participant's employer. Based on these facts, the participant could elect 12 months or more before retirement to delete the lump-sum payment at retirement and add death, disability, and an unforeseeable emergency as payment events.<sup>155</sup> Payment at death could be in the form of a schedule of payments for their disabled child.<sup>156</sup>

**Example 3: High tax brackets, substantial assets, change in control concerns.**

Assume the same facts as in Example 2 except that the participant and his spouse are concerned about a change in control of the employer. In that case, the participant may make a subsequent deferral election 12 months or more before retirement to receive the lump-sum payment five years after retirement or, if later, on a change in control of the employer.<sup>157</sup>

Of course, without more, the participant and his beneficiaries would never receive payment if his employer did not experience a change in control. Thus, the participant would also want the election to provide for payment at his earlier death, disability, or unforeseeable emergency.<sup>158</sup> Payment at death could be in the form of a schedule of payments for their disabled child, with the proviso that, on a change in control, the plan will pay the child's remaining scheduled payments in a lump sum.<sup>159</sup>

**Example 4: Elections by beneficiary.** The facts are the same as in Example 3, except the participant's child is not disabled. Rather, payment of a lump sum to the child would unwisely push the child into higher tax brackets. In that situation, the participant could again provide for a schedule of payments to the child at the participant's death.<sup>160</sup>

However, if the payments start immediately on the participant's death, the child will be unable to make a subsequent deferral election for some or all of the payments. That is, the child will be unable to satisfy the requirement that he make the election 12 months before the first payment is due.<sup>161</sup> Consequently, the participant might wish to delay the commencement of the scheduled payments to give his child time to make an election. For example, commencement of payments 18 months after the participant's death would give the child six months to make the election and still satisfy the 12-month rule.

Unfortunately, however, the beneficiary cannot provide in a subsequent deferral election for payments at the beneficiary's death, disability, separation from service, or unforeseeable emergency. The regulations include as payment events the death, disability, or separation from service of the employee (but not the beneficiary), or an unforeseeable emergency that is a severe financial hardship to the employee (but not the beneficiary).<sup>162</sup> Instead, the election may provide for payment only at a particular time, on a fixed schedule, or on a change in control of the employer. Of course, for those latter types of payments, the regulations require an additional five-year deferral.<sup>163</sup>

**Example 5: Installment payments as separate payments.** A retiree began receiving annual installment payments on retirement, and a provision of the governing plan treats each installment as a separate payment. The retiree subsequently inherited money that pushed her into higher tax brackets. Consequently, she would like to defer the remaining installment payments to a later date or dates. In that situation, she may make a subsequent deferral election for those installment payments due more than 12 months after the election. The election may provide that each installment will be paid five years (or some longer period) after the original due date of the installment. However, the election cannot affect a payment due within 12 months after the election.<sup>164</sup>

If the plan did not provide that the retiree must treat each of the installment payments as a separate payment, the retiree would have to treat the installments as a single payment due at commencement of the installments. In that event, the retiree could not make a subsequent deferral election because it would then be too late to make the election 12 months before the commencement of installments (i.e., too late to make the election 12 months before her retirement.)<sup>165</sup> However, treatment of installment payments as a single payment can have its advantages, as illustrated by the following example.



**Example 6: Installment payments treated as a single payment.** A participant in an unfunded deferred compensation plan long ago elected to receive her plan benefits in annual installment payments on separation from service. No provision of the governing plan treats the installments as separate payments; thus, the participant must treat them as a single payment due at retirement. In 2009, the participant expects to retire in about 18 months. She would like to defer the installment payments to a later date and then receive a single lump-sum payment.

In that event, the participant may make a subsequent deferral election 12 months or more before retirement to receive a lump-sum payment five years or more after retirement. Since the regulations treat the installment payments as a single payment at retirement, changing the form of payment to a lump-sum payment due five or more years later does not violate the requirements of either the subsequent deferral rules or the anti-acceleration rules.

## Effective dates and related planning

The IRS issued the Section 409A final regulations in April 2007.<sup>166</sup> Subsequent IRS guidance required employers to modify affected plans to comply with the regulations by the end of 2008, and required employers to operate their plans in compliance with the regulations during 2009 and thereafter.<sup>167</sup>

Before 2009, an employer must still generally operate a plan in compliance with the requirements of Section 409A, even if those requirements conflict with the terms of the plan. In determining compliance, the employer may rely on the provisions of the final regulations. Alternatively, an employer may rely on a provision of Notice 2005-1<sup>168</sup> or other applicable IRS guidance<sup>169</sup> even if that provision conflicts with the final regulations. If Notice 2005-1 or other guidance does not cover the issue, the employer may rely on a reasonable, good faith interpretation of the statute. Finally, an employer may rely on a provision of the proposed regulations, but only for years before 2008.<sup>170</sup>

**Planning opportunities in 2008.** Special planning opportunities are available in 2008. If a plan provides for elections for participants regarding the time and form of payments, participants may make the elections during 2008 without complying with the subsequent deferral and anti-acceleration requirements of Section 409A. However, any such elections cannot affect amounts otherwise payable in 2008 and cannot accelerate into 2008 any amounts otherwise payable after 2008. If a plan does not provide for these elections, the employer may amend the plan during 2008 to allow them.<sup>171</sup>

**Example 7: Lump sum, imminent retirement, moderate income.** A participant in an unfunded deferred compensation plan long ago elected to receive his plan benefits in a lump sum on separation from service. The plan has been crediting interest annually at a market rate and will continue to do so as long as compensation is deferred. In December 2008, the participant expects to retire in February 2009 (three months later). He is concerned about the lump-sum benefit pushing him into high income tax brackets, but needs the deferred compensation for support in retirement. Thus, he wants to receive it as periodic payments.

In that case, if the plan permits, the participant may make an election in December 2008 to receive scheduled payments commencing at retirement. The participant may also want his election to provide for payments on death, disability, unforeseeable emergency, or change in control—regardless of whether scheduled payments have then begun. No part of this election is subject to the 12-month rule, five-year rule, or the anti-acceleration provisions generally applicable after 2008.<sup>172</sup>



**Example 8: High tax brackets, substantial assets, disabled child.** The facts are the same as in Example 7 except that the participant and his spouse have sufficient assets and income to support them and their disabled child during their lifetimes, without resort to the participant's deferred compensation. In addition, they expect to be subject to taxation in the highest tax brackets for the remainder of their lives. In that case, even though it is less than 12 months before retirement, the participant may elect (assuming the plan allows the election) to delete the lump-sum payment at retirement and add death, disability, and an unforeseeable emergency as payment events. Payment at death could be in the form of a schedule of payments for their disabled child. [173](#)

**Example 9: High tax brackets, substantial assets, change in control concerns.** The facts are the same as in Example 8, except that the participant and his spouse are concerned about a change in control of the employer. In that case, the participant may make an election in December 2008 to receive the lump-sum payment at retirement or, if later, on a change in control. The participant would also likely want the election to provide for payment at an earlier death, disability, or unforeseeable emergency. The election is valid even though it does not comply with the final regulations applicable after 2008.

**Example 10: Elections by beneficiary.** The facts are the same as in Example 9, except the participant's child is not disabled. Rather, payment of a lump sum to the child at the participant's death would unwisely push the child into higher tax brackets. In that situation, the participant could again provide for a schedule of payments to the child. However, in all likelihood, the participant will not die until after 2008 when the final regulations are fully effective. Thus, the participant may want to provide for commencement of payments 18 months after his death to give his child at least six months to make a subsequent deferral election without violating the 12-month rule. [174](#)

**Stock rights relief in 2008.** During 2008, a plan may also allow a participant to elect to substitute a deferral complying with Section 409A for a stock right that does not comply—without regard to the requirements normally applicable to subsequent deferral elections or accelerations of payments. Furthermore, it does not matter that the stock right subject to replacement is exercisable in 2008 if it is also reasonably expected to be exercisable in a subsequent year. [175](#)

**Deferrals before 2005.** Section 409A generally does not apply to earned and vested amounts deferred before 2005 (or to earnings thereon) unless the employer materially modifies the plan after 10/3/04. [176](#) (Nor does Section 409A apply to deferrals under a collective bargaining agreement in effect on 10/3/04—but only until 12/31/09. [177](#)) For this purpose, application of Section 409A to post-2004 deferrals is not a material modification of a plan. Likewise, it is not a material modification to:

- (1) Eliminate future deferrals.
- (2) Reduce an existing benefit.
- (3) Comply with a domestic relations order.
- (4) Substitute a different form of life annuity for an existing life annuity. [178](#)

Furthermore, an employer may, with certain exceptions, cancel a pre-2005 discounted stock right, and before 2009, retroactively reissue the stock right modified to qualify for exclusion from Section 409A. [179](#)

## Conclusion

Section 409A effectively eliminated frivolous or abusive justifications for the acceleration of deferred compensation payments. Nevertheless, the final regulations recognize there are good policy reasons to allow exceptions for some other types of accelerations. Most of these excepted accelerations are within the control of the employer (e.g., plan terminations, offsets of retiree liability, and limited cashouts). However, of particular relevance to a retiree is his or her ability to accelerate payments on death, disability, or unforeseeable emergency (whether or not a schedule of payments begins before those events). A retiree may even elect to accelerate payments on a change in control, but only after scheduled payments have begun (assuming satisfaction of the 12-month rule).

Section 409A and the regulations are reasonably generous in allowing subsequent deferral elections. A retiree may make such an election long after earning the deferred compensation, provided only that it is at least 12 months before the payment date. Although the additional deferral for a retiree must be at least five years for a payment dependent on a specific date or change in control, Section 409A and the regulations generously dispense with this requirement for favored payment events (death, disability, or unforeseeable emergency).

For the remainder of 2008, special planning opportunities are still available. If a plan so provides, participants may make deferral elections during 2008 without complying with the subsequent deferral and anti-acceleration requirements of Section 409A. However, any such elections cannot affect amounts otherwise payable in 2008, and cannot accelerate into 2008 any amounts otherwise payable after 2008.

[1](#)

Sections 409A(a)(1)(A) and (d)(5).

[2](#)

Section 409A(a)(1)(B).

[3](#)

Section 409A(c).

[4](#)

TD 9321, 4/10/07. For a discussion of these regulations, see Salkin, "Deferred Compensation Final Regs. Are Highly Detailed (Part I)", 79 PTS 68 (August 2007), and Salkin, "Deferred Compensation Final Regs. Are Highly Detailed (Part II)", 79 PTS 160 (September 2007).

[5](#)

Reg. 1.409A-1(g).

[6](#)

Reg. 1.409A-6(a)(1)(ii).

[7](#)

Notice 2007-86, 2007-46 IRB 990.

[8](#)

Section 409A(d)(2)(B).

[9](#)

Section 409A(d)(2)(C); Reg. 1.409A-1(a)(5).

[10](#)

Reg. 1.409A-1(b)(1).

[11](#)

Regs. 1.409A-1(c)(1) and (3).

[12](#)

Reg. 1.409A-1(c)(2)(i).

[13](#)

[14](#) Reg. 1.409A-1(b)(1).  
[15](#) Section 409A(d)(5).  
[16](#) Reg. 1.409A-1(b)(2).  
[17](#) Reg. 1.409A-1(b)(3).  
[18](#) See Reg. 1.409A-1(b)(4)(ii) (for an explanation of these exceptional circumstances).  
[19](#) Reg. 1.409A-1(b)(4).  
[20](#) Section 409A(d)(4); Reg. 1.409A-1(d).  
[21](#) Reg. 1.409A-1(d)(1).  
[22](#) Reg. 1.409A-1(b)(10).  
[23](#) Reg. 1.409A-1(b)(11).  
[24](#) Reg. 1.409A-1(b)(9).  
[25](#) Reg. 1.409A-1(m).  
[26](#) Regs. 1.409A-1(b)(9)(ii) and (vi).  
[27](#) Section 7701(a)(46).  
[28](#) Reg. 1.409A-1(b)(9)(iii).  
[29](#) Reg. 1.409A-1(n)(2).  
[30](#) Regs. 1.409A-1(b)(9)(iii) and (vi).  
[31](#) Regs. 1.409A-1(b)(9)(v)(A) and (E).  
[32](#) Reg. 1.409A-1(b)(9)(v)(B).  
[33](#) Reg. 1.409A-1(b)(9)(v)(D).  
[34](#) Reg. 1.409A-1(b)(9)(i).  
[35](#) Reg. 1.409A-1(b)(4)(i)(A).  
[36](#) Reg. 1.409A-1(d)(1).  
[37](#) Reg. 1.409A-1(b)(5).  
[38](#) Reg. 1.409A-1(b)(5)(ii).  
[39](#) Reg. 1.409A-1(b)(5)(i)(A).  
[40](#) Reg. 1.409A-1(b)(5)(iv).  
[41](#) Regs. 1.409A-1(b)(5)(i)(B) and (iv).

[42](#) Reg. 1.409A-1(b)(5)(iii).

[43](#) Reg. 1.409A-1(b)(5)(iii)(E).

[44](#) Reg. 1.409A-1(b)(5)(v)(B).

[45](#) Reg. 1.409A-1(b)(5)(v)(E).

[46](#) Regs. 1.409A-1(b)(5)(v)(A) and (C)(1).

[47](#) Reg. 1.409A-1(b)(5)(v)(C)(1).

[48](#) Regs. 1.409A-1(b)(5)(v)(D) and 1.424-1.

[49](#) Reg. 1.409A-1(b)(5)(v)(H).

[50](#) Reg. 1.409A-1(b)(5)(i)(E).

[51](#) Reg. 1.409A-1(b)(4)(i)(E).

[52](#) Reg. 1.409A-1(b)(4)(i)(A).

[53](#) Reg. 1.409A-1(b)(6).

[54](#) Section 409A(a)(4)(B)(i); Reg. 1.409A-2(a)(3).

[55](#) Section 409A(a)(4)(B)(ii); Reg. 1.409A-2(a)(7).

[56](#) Reg. 1.409A-2(a)(5) .

[57](#) Section 409A(a)(4)(B)(iii); Reg. 1.409A-2(a)(8).

[58](#) Reg. 1.409A-2(a)(6).

[59](#) Reg. 1.409A-2(a)(14).

[60](#) Reg. 1.409A-2(a)(7)(iii).

[61](#) Reg. 1.409A-2(a)(12)(i).

[62](#) Reg. 1.409A-2(a)(13)(i).

[63](#) Regs. 1.409A-2(a)(11) and 1.409A-1(m).

[64](#) Section 409A(a)(2)(A); Reg. 1.409A-3(a).

[65](#) Regs. 1.409A-2(b)(6) and (b)(9), Examples 15 and 24, and 1.409A-3(j)(2); H. Rep't No. 108-755, 108th Cong. (2004); Staff of the Joint Committee on Taxation, *General Explanation of Tax Legislation Enacted in the 108th Congress* (JCS 5-105) ("Treatment of nonqualified deferred compensation plans").

[66](#) Reg. 1.409A-3(i)(1)(i).

[67](#) Reg. 1.409A-3(i)(1)(iii).

[68](#) Reg. 1.409A-3(i)(1)(ii).

[69](#) Reg. 1.409A-3(i)(1)(iv).

[70](#) Reg. 1.409A-3(b).

[71](#) Section 409A(a)(2)(B)(i); Reg. 1.409A-3(i)(2).

[72](#) Reg. 1.409A-3(b).

[73](#) Regs. 1.409A-1(a)(1) and (5).

[74](#) Section 409A(a)(2)(B)(ii); Reg. 1.409A-3(i)(3).

[75](#) Reg. 1.409A-3(b).

[76](#) Section 409A(a)(2)(C); Reg. 1.409A-3(i)(4).

[77](#) 42 U.S.C. section 423(d)(1)(A).

[78](#) Regs. 1.409A-1(a)(1) and (5).

[79](#) Reg. 1.409A-3(b).

[80](#) Reg. 1.409A-3(i)(5)(v).

[81](#) Reg. 1.409A-3(i)(5)(vi)(A).

[82](#) Reg. 1.409A-3(i)(5)(vi)(B).

[83](#) Reg. 1.409A-3(i)(5)(vii).

[84](#) Reg. 1.409A-3(i)(5)(iii).

[85](#) Regs. 1.409A-3(i)(5)(v)(B), (vi)(D), and (vii)(C).

[86](#) Reg. 1.409A-3(i)(5)(vii)(B).

[87](#) Reg. 1.409A-3(c).

[88](#) Reg. 1.409A-3(g).

[89](#) *Id.*

[90](#) *Id.*

[91](#) Reg. 1.409A-3(e).

[92](#) Reg. 1.409A-3(i)(1)(i).

[93](#) Reg. 1.409A-3(b).

[94](#) Reg. 1.409A-3(d).

[95](#) *Id.*

*Id.*  
[96](#)

*Id.*  
[97](#)

*Id.*  
[98](#)

Reg. 1.409A-2(b)(7).  
[99](#)

38 U.S.C. sections 4301-4344.  
[100](#)

Reg. 1.409A-2(b)(8).  
[101](#)

Section 409A(a)(4)(C); Regs. 1.409A-2(b)(1) and (3).  
[102](#)

Reg. 1.409A-2(b)(2)(i).  
[103](#)

Section 409A(a)(4)(C); Reg. 1.409A-2(b)(1).  
[104](#)

Reg. 1.409A-3(i)(1)(i).  
[105](#)

Reg. 1.409A-2(b)(3).  
[106](#)

Regs. 1.409A-2(b)(2)(ii) and (iii).  
[107](#)

Reg. 1.409A-2(b)(2)(ii)(A).  
[108](#)

*Id.*  
[109](#)

Reg. 1.409A-2(b)(2)(ii)(D).  
[110](#)

Reg. 1.409A-2(b)(2)(ii)(C).  
[111](#)

Reg. 1.409A-2(b)(2)(ii)(A).  
[112](#)

Reg. 1.409A-2(b)(2)(ii)(B).  
[113](#)

Reg. 1.409A-2(b)(2)(ii)(A).  
[114](#)

Section 83(a); H. Rep't No. 108-755, *supra* note 64.  
[115](#)

Reg. 1.409A-2(b)(2)(iii).  
[116](#)

*Id.*  
[117](#)

Reg. 1.409A-2(a)(4).  
[118](#)

Reg. 1.409A-2(b)(4).  
[119](#)

Reg. 1.409A-2(b)(6).  
[120](#)

Reg. 1.409A-3(a).  
[121](#)

Reg. 1.409A-3(i)(3).  
[122](#)

Section 409A(a)(3); Reg. 1.409A-3(j)(1).  
[123](#)

[124](#) Regs. 1.409A-2(b)(5) and 1.409A-3(j)(1).

[125](#) Reg. 1.409A-3(j)(2).

[126](#) Reg. 1.409A-3(j)(3).

[127](#) Reg. 1.409A-3(j)(4)(ii).

[128](#) Reg. 1.409A-3(j)(4)(iii)(B).

[129](#) Section 409A(d)(2)(B).

[130](#) Section 457(f).

[131](#) Reg. 1.409A-3(j)(4)(iv).

[132](#) Reg. 1.409A-3(j)(4)(v).

[133](#) Reg. 1.409A-3(j)(4)(ix)(A).

[134](#) Reg. 1.409A-3(j)(4)(ix)(B).

[135](#) Reg. 1.409A-3(j)(4)(ix)(C).

[136](#) Reg. 1.409A-3(j)(4)(xi).

[137](#) Reg. 1.409A-3(j)(4)(xiii) .

[138](#) Reg. 1.409A-3(j)(4)(xiv).

[139](#) Reg. 1.409A-2(b)(9), Example 15. See also Preamble to proposed regulations REG-158080-04, 10/29/05, XIII.C.

[140](#) Reg. 1.409A-2(b)(6).

[141](#) Reg. 1.409A-2(b)(9), Example 24.

[142](#) Reg. 1.409A-3(j)(2).

[143](#) Section 409A(a)(4)(C)(ii); Reg. 1.409A-2(b)(1)(ii).

[144](#) Reg. 1.409A-2(b)(6).

[145](#) Reg. 1.409A-2(b)(9), Examples 15-24.

[146](#) H. Rep't No. 108-755, *supra* note 64.

[147](#) Preamble to the regulations, *supra* note 4 at IX.C.

[148](#) Section 409A(a)(4)(C); Reg. 1.409A-2(b)(1).

[149](#) Regs. 1.409A-2(b)(1) and (3).

[150](#) Reg. 1.409A-2(b)(6).



Preamble to the proposed regulations, *supra* note 138 at Section VI.A.

[151](#)

Regs. 1.409A-2(b)(1) and 1.409A-3(j)(2).

[152](#)

Reg. 1.409A-3(j)(1).

[153](#)

Reg. 1.409A-3(j)(1).

[154](#)

Reg. 1.409A-2(b)(9), Example 24.

[155](#)

Regs. 1.409A-2(b)(1) and 1.409A-3(j)(2).

[156](#)

Reg. 1.409A-3(b).

[157](#)

Regs. 1.409A-2(b)(1) and 1.409A-3(j)(2).

[158](#)

*Id.*

[159](#)

Regs. 1.409A-3(b) and (j)(1).

[160](#)

Reg. 1.409A-3(b).

[161](#)

Preamble to the regulations, *supra* note 4 at VII.E.

[162](#)

Regs. 1.409A-3(a)(1), (2), (3), and (6), and 1.409A-3(i)(3)(i).

[163](#)

Reg. 1.409A-2(b)(1)(ii).

[164](#)

Regs. 1.409A-2(b)(1) and (2)(iii).

[165](#)

*Id.*

[166](#)

TD 9321.

[167](#)

Notice 2007-86, 2007-46 IRB 990.

[168](#)

2005-1 CB 274.

[169](#)

See, e.g., Notice 2006-4, 2006-1 CB 307; Notice 2006-64, 2006-2 CB 88; Notice 2006-79, 2006-2 CB 763.

[170](#)

Note 167 *supra*.

[171](#)

*Id.*

[172](#)

*Id.*

[173](#)

*Id.*

[174](#)

Reg. 1.409A-2(b)(1).

[175](#)

*Id.*

[176](#)

American Jobs Creation Act of 2004, Pub. L. No. 108-537, section 885(d); Reg. 1.409A-6(a).

[177](#)

Reg. 1.409A-6(a)(1)(ii).  
[178](#)

Reg. 1.409A-6(a)(4); note 168 *supra*.  
[179](#)

Note 167, *supra*.

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