

Highlights of Final Rules For Nonqualified Defined Contribution Plans

Provision Addressed	Highlights of Final Rules
Definition of Nonqualified Deferred Compensation Plan	<ul style="list-style-type: none"> • A nonqualified deferred compensation plan is any plan that provides for the deferral of compensation, including section 457(f) plans. • There are nine general categories of nonqualified deferred compensation plans, with elective contributions and nonelective contributions to nonqualified defined contribution plans treated as separate plans. • Section 409A rules do not apply to: <ul style="list-style-type: none"> • Qualified defined contribution plans, including 401(k) plans; • Section 403(b) arrangements; and • Section 457(b) plans.
Definition of Deferred Compensation	<ul style="list-style-type: none"> • A plan provides for the deferral of compensation if, under the terms of the plan, the employee has a legally binding right during a taxable year to compensation that is or may be payable to the employee in a later taxable year.
Plan Aggregation Rules	<ul style="list-style-type: none"> • All elective contributions made by an employee under all nonqualified plans sponsored by the same employer (modified controlled group rules apply) are treated as being made under a single plan. • All nonelective contributions made for an employee to all nonqualified plans sponsored by the same employer are treated as being made under a single plan.
Definition of Employer	<ul style="list-style-type: none"> • Unless specified in the plan, the controlled group common ownership percentage for purposes of section 409A is 50%, rather than 80%. • A plan may designate any ownership percentage between 50% and 80%. • For purposes of determining whether an employee has terminated employment with the controlled group, the ownership percentage can be lowered to no less than 20%. • Any ownership percentage other than 50% must be specified in the plan and must be added to the plan no later than the time the employee must elect a payment option.
Written Plan Requirement	<ul style="list-style-type: none"> • All nonqualified plans must be documented in writing. • Plans documents reflecting the 409A provisions must be adopted no later than December 31, 2008.

SOURCES: Final Regulation §1.409A-1 through 1.409A-6

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	<ul style="list-style-type: none"> • Plans established after 12/31/08 must be reflected in written documents no later than the end of the plan year in which the initial contribution is made. • Each employee may have his own plan document, but all plans of the same type are aggregated and treated as one plan when applying the 409A rules. • There is no specific form, format or specimen plan language used to create a plan document; a collection of documents describing different aspects of the plan will satisfy the plan document requirement. • A written plan must contain the following minimum information: <ul style="list-style-type: none"> • The amount or formula used to determine the amount of deferred compensation; • The conditions under which a deferral election may be made; • The time and form of payment rules; and • Any rules that would restrict the payment of benefits to “specified” employees. • It is not acceptable to simply say the plan will operate in compliance with 409A.
Initial Deferral Election Rules	<ul style="list-style-type: none"> • Election must be made by the last day of individual’s tax year (generally, December 31) immediately preceding the year in which the compensation will be received. • The election must indicate both the time and form of distribution. • “Evergreen” elections (i.e., elections that stay in effect year after year unless changed) are acceptable. • A newly-hired or eligible employee may make a deferral election within the first 30 days of participation but that election will only apply to compensation earned after the election is made.
Performance Based Compensation	<ul style="list-style-type: none"> • Defined as: compensation that depends on the satisfaction of pre-established performance criteria where there is substantial uncertainty that the criteria will be met. • Does not include any amount that will be paid regardless of performance or based upon a level of performance that is substantially certain to be met. • Performance criteria can be established up to 90 days after the performance period begins. • The portion of any performance bonus that can be deferred by a newly-hired or eligible employee is determined by multiplying the compensation by a ratio of number of days remaining to end of performance period over total days in the performance period.



Cancellation of Deferral Elections	<ul style="list-style-type: none"> • A plan may cancel a deferral election for the rest of the deferral period if: <ul style="list-style-type: none"> • The individual receives a payment from the nonqualified plan due to an unforeseeable emergency; • The cancellation is needed for the employee to obtain a hardship distribution from a 401(k) plan or a 403(b) arrangement; or • The individual becomes disabled.
Payment Timing	<ul style="list-style-type: none"> • The plan must designate either a specific date or calendar year following the occurrence of a specified event for making the related payment. • A payment is made by the designated date as long as the payment is made by the latest of: <ul style="list-style-type: none"> • The designated date; • A later date in the same tax year; • The 15th day of the third calendar month following the designated date as long as the employee is not allowed to designate the taxable year of the distribution. • For a plan that designates only the year in which the payment is to be made, the first scheduled payment is deemed to be paid as of January 1 for purposes of making a change to the payment schedule (i.e., 12 months prior to scheduled payment date would be 12 months prior to January 1).
Later Changes in the Time and Form of Payment	<ul style="list-style-type: none"> • A change in the time or form of a previously-elected payment may not take effect for 12 months and must provide for a new commencement date at least five years after the original beginning date. In addition, an election to change any payment scheduled to be made at a specified time or according to a fixed schedule must be made 12 months before the date the first amount was scheduled to be paid. • An installment payout can be considered a series of individual payments or a single payment. A plan must treat all installment payments consistently. • The rules regarding changes in the form and time of payment apply separately to each payout election. For example, if the participant elects to receive a distribution in 5 annual installments upon separation from service or in a lump sum upon death, the participant can change the form of one distribution without changing the other form. • An intervening event may override an existing payment schedule already in payment status. For example, a plan could provide that a participant will receive 6 installment payments upon termination, but also provide that if the participant dies after the payments begin, all remaining benefits will be paid in a lump sum.



Specified Employees	<ul style="list-style-type: none"> • Payments made to a specified employee (i.e., key employee) must be delayed at least 6 months following his separation from service. • Applies to company with publicly-traded stock and to all members of a controlled group if any one member of the controlled group has publicly-traded stock, including stock traded on a foreign exchange. • Identification of specified employees is based on the 12-month period prior to an "identification date." • The identification date can be any date chosen by the employer; can only change it 12 months in advance. • Employee is a specified employee for the 12-month period beginning no later than the 1st day of the 4th month after the identification date.
Disability	<ul style="list-style-type: none"> • A plan may provide that an employee is disabled if determined to be totally disabled by the Social Security Administration or Railroad Retirement Board. • A plan may consider an employee to be disabled if he is determined to be disabled for purposes of a disability insurance program, as long as that definition of disability complies with the general 409A definition.
Multiple Payment Events	<ul style="list-style-type: none"> • A plan may allow different forms of payment to be made upon the occurrence of the earlier of two events or the occurrence of the later of two events. <i>For example, a plan may allow for installments upon termination or, if earlier, a lump sum upon death.</i>
Delay in Payment by Employer	<ul style="list-style-type: none"> • In certain situations (e.g., payment will not be tax deductible because it constitutes excess), a scheduled payment may be delayed. • All payments to similarly situated employees must be handled on a reasonably consistent basis.
Plan Terminations	<ul style="list-style-type: none"> • A plan may be terminated within 30 days preceding or 12 months following a change of corporate control; • A plan may be terminated within 12 months of a corporate dissolution, or with the approval of a bankruptcy court; or • A plan may be voluntarily terminated for reasons other than the financial health of the employer provided that: <ul style="list-style-type: none"> • All nonqualified defined contribution plans of the same type sponsored by the controlled group employer are terminated; • No payments other than those due under the plan are made within 12 months of the termination; • All assets are distributed within 24 months of the termination; and, • The employer does not adopt a new arrangement of the same type for a period of three years.



<p>Nonqualified Plans Linked to Qualified Plans</p>	<ul style="list-style-type: none"> • Nonqualified plan payments may be based on a payment election made under a qualified plan only until December 31, 2008. • An amendment to increase or decrease benefits or to cease future accruals under a qualified plan does not result in a deferral election or an acceleration of a payment under a linked nonqualified deferred compensation plan. • The addition, removal, increase or reduction of a subsidized benefit or ancillary benefit or a participant's election of that benefit under the qualified plan, will not constitute either a deferral election or an acceleration of a payment under the linked nonqualified plan. • If a person increases or decreases deferrals under a 401(k) plan, that action can increase or decrease deferrals to the NQ plan as long as the change in deferrals is limited to the deferral limit under the 401(k) plan, e.g., \$15,500 for 2008. This rule applies separately to the corresponding change to any employer match.
<p>Material Modifications</p>	<ul style="list-style-type: none"> • If a plan is materially modified but that provision is removed before the date the modification is exercised by any participant or, if earlier, the end of the calendar year in which the change was made, the change will not be treated as a "material modification" of the plan. • It is not a material modification to change a notional investment to a predetermined actual investment or to add a rabbi trust.
<p>Transition Relief Ends December 31, 2008</p>	<ul style="list-style-type: none"> • The deadline for amending plans to reflect the provisions of the new law and guidance is December 31, 2008. • Plans may be amended to provide for new payment elections and participants may make new payment elections on or before December 31, 2008, without violating the new rules. However, new payment elections may not be made for any payment due in 2008 and any payment due after December 31, 2008 cannot be paid in 2008. • Nonqualified plan distributions may remain linked to a distribution option selected under a qualified plan, through December 31, 2008.