

BUSINESS CONNECTIONS

**ANALYSIS OF FINAL REGULATIONS UNDER CODE SECTION 409A
(ADDED BY AMERICAN JOBS CREATION ACT OF 2004)**

Subject	Rule	Commentary
Definition of non-qualified deferred compensation plan	<ul style="list-style-type: none"> • Plan that provides for “deferral of compensation” • Deferral of compensation means a service provider has a legally binding right during a taxable year to compensation that, pursuant to its terms, is or may be payable to (or on behalf of) the service provider in a later year. 	<ul style="list-style-type: none"> • “Legally binding right” means contractual right that is enforceable under applicable laws governing the contract, as well as any other enforceable right created under applicable law, such as a statute. • A right to receive payment does not fail to be a “legally binding right” merely because conditions are attached to the service provider’s right to receive the payment. • <u>Example</u>: if the plan provides that a service provider has the right to receive a payment upon separation from service, the plan generally will result in a deferral of compensation since it is possible that the separation from service will occur in a later year. • Payment for a non-compete agreement generally would be subject to 409A because the legally binding right arises in one year and the payment actually occurs in a later year.

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Short-term deferrals	<p>A deferral of compensation does not occur for purposes of 409A if the arrangement under which payment is made does not provide for deferred payment and payment is actually made no later than the 15th day of the third month following the later of: (1) the end of the service provider’s taxable year, or (2) the end of the service recipient’s taxable year, in which the legally binding right to payment arises or, if later, the right ceases to be subject to a substantial risk of forfeiture.</p>	<ul style="list-style-type: none"> • Final regulations liberalize standard under which a payment can be a short-term deferral if payment is delayed beyond the 2 and one-half month period due to unforeseeable events. The final regulations provide generally that payment may be delayed where the payment would jeopardize the ability of the service recipient to continue as a going concern. • Although a plan need not specify a payment date to qualify for the short-term deferral exception to coverage under section 409A, the short-term deferral exclusion does not apply if the payment event or date <u>is specified</u> and will or may occur after the end of the short-term deferral period. Installment payments generally will not qualify if one or more installments are paid after short-term period expires.
Substantial risk of forfeiture defined	<p>Compensation is subject to a substantial risk of forfeiture if entitlement to the amount is conditioned on the performance of substantial future services or the occurrence of a condition related to the purpose of the compensation, and the possibility of forfeiture is substantial. If the service provider’s entitlement to the amount is conditioned on the service provider’s involuntary separation from service without cause, the amount is treated as being subject to a substantial risk of forfeiture.</p>	<ul style="list-style-type: none"> • Generally, conditions under the discretionary control of the service provider (other than the decision whether or not to continue providing services) are not treated as creating a substantial risk of forfeiture. Therefore, a requirement that an employee sign a release of claims to receive a benefit <u>is not</u> treated as a substantial risk of forfeiture.
Stock options and stock rights	[reserved]	[reserved]

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Separation pay plans—defined	Separation pay refers only to compensation to which the service provider’s right is conditioned upon a separation from service (including a separation from service due to death or disability) and not to compensation the service provider could receive without separating from service (such as an amount also payable upon a change in control, as a result of an unforeseeable emergency, or on a date certain).	
Separation pay plans that do <u>not</u> provide for deferred compensation within the meaning of 409A	<ul style="list-style-type: none"> • Certain bona fide collectively bargained arrangements • Certain arrangements providing separation pay due solely to an involuntary separation from service or participation in a window program in limited amounts and for a limited period of time • Certain foreign separation pay arrangements • Certain reimbursement arrangements providing for expense reimbursements or in-kind benefits for a limited period of time following a separation from service • Certain rights to limited amounts of separation pay. 	<ul style="list-style-type: none"> • Exceptions may be used in combination, i.e., some payments may be exempt due to limited amounts upon involuntary separation from service and other payments may be exempt under reimbursement arrangements provision.

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Separation pay plans making payment upon involuntary separation from service or under window program	<p>A separation pay plan is exempt from 409A if payments under the plan are:</p> <ul style="list-style-type: none"> • available only upon an involuntary separation from service or participation in a window program, • payable no later than the end of the second taxable year of the service provider following the year of the separation from service, and • limited to an amount that is generally the lesser of two times the service provider’s annual compensation or two times the limit on compensation set forth in section Code Section 401(a)(17). 	<ul style="list-style-type: none"> • This exception only applies where the payment is available <u>solely</u> due to an involuntary separation from service of the service provider, or the service provider’s participation in a window program, and not to a plan providing for a payment upon a voluntary separation from service or other event. • Where a service provider is entitled to a payment that qualifies for the exception except that it exceeds the dollar limit, only the excess over the limit will be subject to section 409A. (This would allow the plan to pay the amount up to the dollar limit without regard to the six-month payment delay that applies to payments due to separation from service for specified employees.) • Whether a separation from service is involuntary is determined based on all the facts and circumstances. For this purpose, any characterization of the separation from service as voluntary or involuntary by the service provider and the service recipient in the documentation relating to the separation from service is rebuttably presumed to properly characterize the nature of the separation from service. • The final regulations provide that where the right to a payment is contingent upon a voluntary separation from service following an occurrence that constitutes good reason for the service provider to terminate his or her services (e.g., substantial pay cut, demotion), the right may be treated as payable only upon an involuntary separation from service where the good reason condition is such that the service provider’s separation from service effectively is an involuntary separation for purposes of section 409A. The final regulations contain a safe harbor allowing plans to treat “good reason” terminations as involuntary terminations.

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Separation pay plans providing expense reimbursements and fringe benefits	Certain plans under which a service recipient reimburses certain types of expenses (for example, reasonable moving expenses or reasonable outplacement expenses directly related to a termination of the service provider's services) actually incurred by a service provider following a separation from service are not nonqualified deferred compensation plans for purposes of section 409A, if such reimbursements are available only for expenses incurred, and the reimbursements are made, during a limited period (generally not after the second taxable year of the service provider following the separation from service).	<ul style="list-style-type: none"> • The final regulations clarify that a right to a benefit that is excludible from income will not be treated as a deferral of compensation for purposes of section 409A. For example, an arrangement to provide health coverage to retirees generally would not be subject to section 409A, as long as the benefits are excludible from income under section 105 (must be insured or non-discriminatory plan). • The exception to 409A for these arrangements applies regardless of whether separation from service was voluntary or involuntary.
Separation pay plans paying "incidental" benefits	Taxpayer may treat a right or rights under a separation pay plan to a payment or payments of an aggregate amount not to exceed the applicable dollar amount under section 402(g)(1)(B) (\$15,500 for 2007) for the year of the separation from service as not providing for a deferral of compensation.	<ul style="list-style-type: none"> • Tie to 402(g) is to allow automatic cost-of-living increases. • Applies to any type of separation pay plan, but only once with respect to all amounts paid by the service recipient to the service provider.

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Plans/arrangements not subject to 409A	<ul style="list-style-type: none"> • Qualified retirement plan • “Eligible” deferred compensation plans under 457(b) • Bona fide sick leave or vacation plan • Disability plan • Death benefit plan • Certain medical expense reimbursement arrangements • Certain independent contractor arrangements 	<ul style="list-style-type: none"> • Final regulations clarify that taxable medical reimbursement plans (which would include self-funded plans that discriminate in favor of highly compensated individuals) do not qualify for the general exemption for medical expense reimbursement arrangements. • Adds a safe harbor to determine whether a service provider is in fact an independent contractor for purposes of this exemption. • If service provider was independent contractor subject to this exception in the year the legally binding right to payment arose, amount deferred in that year will not become subject to 409A in a later year if service provider becomes employee or other type of service provider subject to 409A in a later year.

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Plan aggregation rules	Deferrals in each of the following categories must be treated as made under a single plan in applying 409A: <ul style="list-style-type: none"> • All deferrals under account balance plans providing for elective contributions • All deferrals under account balance plans providing for non-elective contributions (including matching contributions) • All deferrals under non-account balance plans • All deferrals under separation pay plans triggered by involuntary separation from service or participation in window program • All deferrals under plans providing for in-kind benefits or expense reimbursements • All deferrals under split-dollar life insurance arrangements • All deferrals under plans providing for stock rights 	<ul style="list-style-type: none"> • These rules come into play in determining when a service provider is “first” eligible for a plan for purposes of the special timing rule for deferrals in first year of eligibility. • These rules also come into play if a plan is terminated. In some situations, plans that must be aggregated with the terminating plan must also be terminated for the termination to be permitted under 409A.

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Written plan requirement	Generally, to satisfy the requirement that a plan be in writing, the document or documents constituting the plan must specify, at the time an amount is deferred, the amount to which the service provider has a right to be paid (or, in the case of an amount determinable under an objective, nondiscretionary formula, the terms of such formula), and the payment schedule or payment triggering events that will result in a payment of the amount.	<ul style="list-style-type: none"> ● Plan must set forth in writing: <ul style="list-style-type: none"> ▪ The conditions under which an initial deferral election may be made ▪ The conditions under which subsequent deferral elections may be made ▪ A plan must provide for the six-month delay requirement applicable to payments to specified employees upon a separation from service no later than the time the provision may become applicable to a separation from service of the specified employee. ● A plan is not required to set forth in writing the limited exceptions to the anti-acceleration provisions.
Initial election to defer compensation—non-elective plan	If the service provider has no election as to the time and form of payment of an amount of deferred compensation, the service recipient may set the time and form of payment on any date on or before the later of (i) the latest date the service provider would have been permitted under these regulations to elect such time and form of payment if an election had been provided to the service provider, or (ii) the date the service recipient grants the legally binding right to the compensation.	

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Initial election to defer—elective plan	<ul style="list-style-type: none"> • <u>General rule</u>: compensation for services provided during the service provider’s taxable year may be deferred at the service provider’s election only if the election is made not later than the last day of the service provider’s taxable year immediately preceding the service year. • <u>First year of eligibility</u>: notwithstanding general rule, service provider may make election within first 30 days of becoming eligible, with respect to compensation paid for services to be performed after the election. • <u>Amounts subject to forfeiture</u>: notwithstanding general rule, initial deferral election can be made within 30 days after obtaining legally binding right to compensation, provided that the compensation is subject to forfeiture if service provider does not provide services for at least 12 months after obtaining legally binding right. 	<ul style="list-style-type: none"> • Special timing rules apply for short-term deferrals and fiscal year compensation. • For first year of eligibility, bonus payments based in part on pre-participation services may be deferred as long as the deferred bonus amount is pro-rated to exclude amount attributable to pre-participation services. • “Ad hoc” bonus awards can be deferred, provided that the legally binding right to receive the bonus is subject to a forfeiture condition requiring the service provider to perform continued services for a period of at least 12 months after attaining the legally binding right to receive the bonus. • Services related to a commission payment generally are treated as having been performed in the year in which the customer remits payment to the service recipient or, in the case when customer payments are deferred, the year in which the transaction generating the commission is completed.

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Initial election to defer— performance based compensation	Where deferral election applies to “performance based compensation,” election may be made no later than 6 months before end of the performance period, provided that, at the time the election is made, the amount is not readily ascertainable.	<ul style="list-style-type: none"> • For the special timing rule to apply to a service provider, the service provider must provide services from the later of (i) the date the performance period starts or (ii) the date the performance criteria are established, through the date the initial deferral election is made. • Where the right to a specified amount is subject to a performance requirement being met, the amount is treated as readily ascertainable when it is substantially certain that the performance requirement will be met. With respect to the right to an amount of compensation that varies based upon the <u>level</u> of performance, the payment, or any portion of the payment, is treated as readily ascertainable to the extent the amount or the payment is calculable and the performance requirement is substantially certain to be met. Accordingly, any minimum amount that is calculable and for which the performance requirement entitling the service provider to the payment is substantially certain to be met generally will be treated as readily ascertainable (and could not be deferred under this special timing rule.)

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Performance based compensation—defined	<p>Compensation the amount of which, or the entitlement to which, is contingent on the satisfaction of pre-established organizational or individual performance criteria relating to a performance period of at least 12 consecutive months. Organizational or individual performance criteria are considered pre-established if established in writing by not later than 90 days after the commencement of the period of service to which the criteria relate, provided that the outcome is substantially uncertain at the time the criteria are established.</p>	<ul style="list-style-type: none"> • Subjective performance criteria are permissible, as long as they are bona fide and relate to the performance of the participant service provider, or a group or business unit that includes the participant service provider, and neither the participant service provider nor a family member of the participant service provider determines whether the subjective criteria have been met.
Initial election to defer—revocation of election	<p>A plan may provide for a cancellation of a service provider’s deferral election, or such a cancellation may be made, due to an unforeseeable emergency or a hardship distribution under a 401(k) plan or due to the service provider’s disability.</p>	<ul style="list-style-type: none"> • The revocation must be initiated by the service recipient, not the service provider. • A disability refers to any medically determinable physical or mental impairment resulting in the service provider’s inability to perform the duties of his or her position or any substantially similar position, where such impairment can be expected to result in death or can be expected to last for a continuous period of not less than six months. • The deferral election must be revoked, and any new election must comply with the timing rules for initial deferral elections.

Subject	Rule	Commentary
Election to defer separation pay	Where the service provider had no prior right to separation pay, and where the separation pay is the subject of bona fide, arm's length negotiations, the initial deferral election may be made at any time before the service provider obtains a legally binding right to the payment.	<p data-bbox="1236 99 2049 147">Document hosted at JDSUPRA™ http://www.jdsupra.com/post/documentViewer.aspx?fid=23c20e3a-edae-4122-8dc9-ad8753f83e37</p> <ul style="list-style-type: none"> <li data-bbox="1121 159 1898 370">• The final regulations expand this rule to include voluntary as well as involuntary separations from service. This rule will not apply where there is a pre-existing severance agreement or plan in place, even if rights under the pre-existing agreement were subject to a substantial risk of forfeiture.

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Time and form of payment	Generally, a single time and form of payment must be designated with respect to each payment that is payable upon a payment event. The plan must either provide that the date of the distribution event is the payment date or specify another payment date that is objectively determinable and nondiscretionary at the time the event occurs.	<ul style="list-style-type: none"> • The final regulations retain the rule that permits a plan to provide for a different time and form of payment, depending upon whether the permissible payment event occurs before or after a specified date (e.g., before or after the service provider attains age 55). • A payment will be treated as made on a fixed date or on a fixed schedule if the payment or payments are made by the end of the calendar year in which a specified payment event, occurs or, if later, the 15th day of the third month following such fixed date or due date. • A payment also may generally be made not earlier than 30 days <u>before</u> the scheduled date according to the plan, provided that the service provider is not able directly or indirectly to designate the taxable year of payment. • Plans may designate an entire taxable year of the service provider as the specified date of payment and may make payment on any date within that year. For purposes of subsequent deferral rules, payment is treated as made on first day of year. • If the plan does not specify a payment date (e.g., amount will be paid “as soon as administratively practicable”), the final regulations provide that such a provision will be a specified payment date only if the period during which such payment may be made is restricted either (i) to a specified taxable year of the service provider or (ii) to a period of not more than 90 days and the service provider is not provided an election as to the taxable year of the payment.

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Permissible payment events	<ul style="list-style-type: none"> • Service provider’s separation from service • Service provider’s disability • Service provider’s death • A time or a fixed schedule • Change in ownership or effective control of service recipient • Unforeseeable emergency 	
Payment event—separation from service	<p>The general standard for determining whether the employee has terminated employment is based on whether the facts and circumstances indicate that the service recipient and employee reasonably anticipated either (i) that no further services would be performed after a certain date or (ii) that the level of bona fide services the employee would perform after such date (whether as an employee or as an independent contractor) would permanently decrease to no more than 20 percent of the average level of bona fide services performed over the immediately preceding 36-month period (or the full period in which the employee provided services to the employer (whether as an employee or as an independent contractor) if the employee has been providing services for less than 36 months).</p>	<ul style="list-style-type: none"> • Rebuttable presumptions are provided where service provider continues to provide some services after the anticipated termination date or has a significant reduction in hours worked without an actual termination of employment. • To determine whether a separation from service has occurred, the service recipient is defined as all entities within the controlled group, so transfer from one affiliate to another generally will not trigger a distribution. • The final regulations provide that an employment relationship is treated as continuing while the individual is on sick leave, or other bona fide leave of absence, if the period of such leave does not exceed six months, or if longer, so long as the individual retains a right to reemployment with the service recipient under an applicable statute or by contract. For disability leave, the six-month period is extended to up to 29 months, regardless of whether the service provider has a contractual re-employment right. • Generally, payments that start due to separation from service <u>cannot be suspended</u> if the participant is subsequently rehired.

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Payment event—separation from service—“key employees”	Payment of nonqualified deferred compensation to specified employees on account of separation from service may not occur before the date that is six months after the date of separation from service (or, if earlier, the date of death of the employee). Generally, the specified employees are “key employees” under Code Section 416 (top heavy rules) employed by a publicly-traded company.	<ul style="list-style-type: none"> • Regulations provide for alternative methods of compliance to simplify administration, including: <ul style="list-style-type: none"> ▪ Delay separation from service payments to <u>all</u> participants by 6 months ▪ Use a method other than Code Section 416 to designate specified employees, provided that the alternative method is reasonably designed to include all specified employees, the alternative method is an objectively determinable standard providing no direct or indirect election to any service provider regarding the application of the rule, and the alternative method results in no more than 200 service providers being identified in the class as of any date (e.g., the top 200 employees ranked by pay). • The final regulations provide that the first day of the fourth month after the date as of which specified employees are identified will be the specified employee effective date if the service recipient does not specify another date. However, the final regulations permit a service recipient to designate a different specified employee effective date after the specified employee identification date, provided that the specified employee effective date may not be later than the first day of the fourth month following the specified employee identification date. • Special rules apply after corporate transactions.

Subject	Rule	Commentary
Payment event—disability	A participant is disabled if the participant is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that can be expected to result in death or can be expected to last for a continuous period of not less than 12 months, or is, by reason of any medically determinable physical or mental impairment that can be expected to result in death or can be expected to last for a continuous period of not less than 12 months, receiving income replacement benefits for a period of not less than 3 months under an accident and health plan covering employees of the participant's employer.	<p style="text-align: right;">Document hosted at JDSUPRA™</p> <p>http://www.jdsupra.com/post/documentViewer.aspx?fid=23c20e3a-edae-4122-8dc9-ad8753f83e37</p> <ul style="list-style-type: none"> • The determination of whether a service provider is disabled may be made by any person, including the administrator of a disability insurance program, and the plan need not specify who will make the determination. • A plan may provide that a service provider will be deemed disabled if the service provider is determined to be totally disabled by the Social Security Administration or the Railroad Retirement Board.
Payment event—death	Plan must specify time and form of payment due to death. Any changes to the time and form of payment to a beneficiary are subject to the general rules governing subsequent deferrals and accelerated payments, whether these elections are made by either the service provider or the beneficiary.	<ul style="list-style-type: none"> • IRS specifically rejected suggestions that beneficiary be given one free election upon the service provider's death.

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Payment event—specified time or fixed schedule of payments	Amounts must be payable at a specified time or pursuant to a fixed schedule.	<div style="font-size: small; margin-bottom: 10px;"> http://www.jdsupra.com/post/documentViewer.aspx?fid=23c20e3a-edae-4122-8dc9-ad8753f83e37 </div> <ul style="list-style-type: none"> • See “Time and form of payment,” above for flexibility on the actual payment date where a specified time of payment is elected. For example, a plan provision providing for payment within the service provider’s taxable year that includes December 31, 2008, would be treated as a fixed date of payment. • For purposes of applying “subsequent deferral” rule, the 12-month prior election rule is applied to the earliest possible date that an amount could be paid. For example, if the specified payment date is a particular taxable year, the payment is deemed to be payable on January 1 of that year. • The final regulations provide that a right to reimbursements or in-kind benefits will meet the requirement of a fixed time and form of payment if (i) the reimbursement plan provides for the reimbursement of expenses incurred during an objectively prescribed period, (ii) the amount of reimbursable expenses incurred or in-kind benefits available in one taxable year of the service provider cannot affect the amount of reimbursable expenses or in-kind benefits available in a different taxable year, and (iii) the reimbursement payment is made by no later than the end of the service provider’s taxable year following the taxable year in which the expense is incurred. • A cap or limitation on amounts paid during a particular period will not cause a payment to violate 409A if (i) the limitation is established on or before the date the time and form of payment is otherwise required to be set, (ii) the limitation is based on a fixed or nondiscretionary, objectively determinable formula beyond the discretionary control of the service provider, and (iii) the plan specifies the time and form of payment of the amount in excess of the limitation.

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Tax gross up payments may qualify as “specified time or fixed schedule” payments	If it is deferred compensation, the right to a tax gross-up payment satisfies the requirement of a fixed time and form of payment if the plan provides that the tax gross up payment will be made, and the payment is made, by the end of the service provider’s taxable year next following the service provider’s taxable year in which the related taxes are remitted to the taxing authority.	<p style="text-align: right;">Document hosted at JDSUPRA™ http://www.jdsupra.com/post/documentViewer.aspx?fid=23c20e3a-edae-4122-8dc9-ad8753f83e37</p>
Payment event—change in control	Payments may be made upon change in ownership of corporation, change in effective control of corporation, or change in ownership of substantial portion of the assets of a corporation. These terms are defined in the final regulations.	Until further guidance, a non-stock, non-profit corporation may apply the change in effective control provisions in §1.409A-3(i)(5) (relating to a change in the composition of the board of directors) by analogy to changes in the composition of its board of directors, trustees, or other governing body.

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Payment event— unforeseeable emergency	An unforeseeable emergency is a severe financial hardship to the service provider resulting from an illness or accident of the service provider, the service provider's spouse, the service provider's beneficiary, or the service provider's dependent; loss of the service provider's property due to casualty (including the need to rebuild a home following damage to a home not otherwise covered by insurance, for example, not as a result of a natural disaster); or other similar extraordinary and unforeseeable circumstances arising as a result of events beyond the control of the service provider.	<ul style="list-style-type: none"> • The imminent foreclosure of or eviction from the service provider's primary residence, the need to pay for medical expenses, including nonrefundable deductibles, as well as for the costs of prescription drug medication, and the need to pay funeral expenses may constitute an unforeseeable emergency. • A distribution on account of unforeseeable emergency may not be made to the extent that such emergency is or may be relieved through reimbursement or compensation from insurance or otherwise, by liquidation of the service provider's assets, to the extent the liquidation of such assets would not cause severe financial hardship, or by cessation of deferrals under the plan. • Pursuant to Pension Protection Act, expands hardships to apply rule to service provider's "beneficiary" if it would apply to service provider's spouse or tax dependent.
Multiple payment events	A plan may provide for a payment based upon the earlier of, or the later of, a series of events, provided that each payment event would otherwise satisfy the requirements of section 409A.	<ul style="list-style-type: none"> • The final regulations also provide that for purposes of the subsequent deferral and acceleration rules, each payment event will be viewed separately for purposes of analyzing the effect of a change in the time and form of payment.

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Modifications of distribution timing or form	<p>A change in the form of a distribution or in the time of a distribution is permitted, provided that:</p> <ul style="list-style-type: none"> • the modified election must not take effect earlier than 12 months after the modification election is made; and • in the case of a postponed payment, the first payment subject to the modification must be deferred for at least 5 years from the date the payment would have been made under the original schedule; and • for a scheduled distribution, the modification election must be made at least 12 months prior to the date of the first scheduled payment. 	<ul style="list-style-type: none"> • The final regulations clarify that the rules governing changes in the time and form of payment apply both to service providers and service recipients. Accordingly, a service provider, a service recipient, or both a service provider and a service recipient may have and exercise discretion to defer a deferred compensation payment after the time and form of payment have been specified, provided that such discretion is limited to changes that comply with the requirements of the regulations addressing subsequent changes in the time and form of payment. • The entitlement to a series of installment payments that is not a life annuity is treated as the entitlement to a single payment, <u>unless</u> the plan provides at all times with respect to the amount deferred that the right to the series of installment payments is to be treated as a right to a series of separate payments. (Plan can make this designation at any time before December 31, 2007.) • In some situations, actuarially equivalent life annuities can be treated as a single form of payment to avoid the subsequent election timing rules. • The final regulations provide that the addition of death, disability, or an unforeseeable emergency as a potentially earlier payment event is a permissible acceleration. This provision does not apply to the addition of death, disability, or an unforeseeable emergency as a potentially <u>later</u> payment event. • The anti-acceleration provisions apply to the addition of a specified date or fixed schedule, a change in control event, or separation from service as a potentially earlier payment event, including the substitution of one of these payment events for another payment event.

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Acceleration of payments	A plan may not permit the acceleration of the time or schedule of any payment or amount scheduled to be paid pursuant to the terms of the plan, and no such accelerated payment may be made whether or not provided for under the terms of such plan.	<ul style="list-style-type: none"> • An impermissible acceleration does not occur if payment is made in accordance with plan provisions or a valid initial or modified election as to the time and form of payment pursuant to which payment is required to be made on an accelerated schedule because of an intervening event (e.g., installments paid after separation from service convert to a single lump sum if the participant dies before all installments are paid).
Permissible accelerations—cashout rules	A service recipient may exercise discretion to cash-out a service provider’s <u>entire</u> benefit at any time that a service provider’s amount deferred under the plan is less than the applicable dollar amount under section 402(g)(1)(B) for that calendar year (\$15,500 for 2007).	<ul style="list-style-type: none"> • For this purpose, the plan aggregation rules apply, so a service recipient may not use this rule to cash out an amount under one arrangement but not another arrangement where the two arrangements would be treated as one plan. • The final regulations, unlike the proposed regulations, do not require that a service provider have separated from service for the service recipient to cash out the amount deferred. • As with all permissible accelerations, service provider may not exercise discretion to determine whether acceleration occurs.
Permissible accelerations—domestic relations orders	The timing rules governing changes in the time and form of payment do not apply to elections by individuals other than a service provider, with respect to payments to a person other than the service provider, to the extent such elections are reflected in, or made in accordance with, the terms of a domestic relations order.	

Subject	Rule	Commentary
Permissible accelerations— conflict of interest	A plan may provide for acceleration of the time or schedule of a payment under the plan, or a payment may be made under a plan, to the extent reasonably necessary to avoid the violation of an applicable Federal, state, local, or foreign ethics law or conflicts of interest law.	<p style="text-align: right;">Document hosted at JDSUPRA™ http://www.jdsupra.com/post/documentViewer.aspx?fid=23c20e3a-edae-4122-8dc9-ad8753f83e37</p>
Permissible accelerations— tax due under 457(f)	A plan subject to section 457(f) may provide for an acceleration of the time or schedule of a payment to a service provider, or a payment may be made under such a plan, to pay income taxes due upon a vesting event, provided that the amount of such payment is not more than an amount equal to the Federal, state, local, and foreign income tax withholding that would have been remitted by the employer if there had been a payment of wages equal to the income includible by the service provider under section 457(f) at the time of the vesting.	

Subject	Rule	Commentary
Permissible accelerations— taxes	A plan may provide for the acceleration of the time or schedule of a payment, or a payment may be made under the plan, to pay FICA tax, required income tax withholding, or other federal, state, local, or foreign taxes that apply to a deferred amount before it is payable under the terms of the plan.	
Permissible accelerations— 409A inclusion	A plan may provide for the acceleration of the time or schedule of a payment, or a payment under such plan may be made, at any time the plan fails to meet the requirements of section 409A.	
Permissible accelerations— service provider’s debt to service recipient	A plan may provide for the acceleration of the time or schedule of a payment, or a payment may be made under such plan, as satisfaction of a debt of the service provider to the service recipient, where such debt is incurred in the ordinary course of the service relationship between the service recipient and the service provider, the entire amount of reduction in any of the service recipient’s taxable years does not exceed \$5,000, and the reduction is made at the same time and in the same amount as the debt otherwise would have been due and collected from the service provider.	

Subject	Rule	Commentary
Permissible accelerations— settlement of dispute over deferred compensation.	A plan may provide for the acceleration of the time or schedule of one or more payments, or a payment may be made under such plan, where such payments occur as part of a settlement between the service provider and the service recipient of an arm's length, bona fide dispute as to the service provider's right to the deferred amount.	<p style="text-align: right;">Document hosted at JDSUPRA™ http://www.jdsupra.com/post/documentViewer.aspx?fid=23c20e3a-edae-4122-8dc9-ad8753f83e37</p>

Subject	Rule	Commentary Document hosted at JDSUPRA™
Permissible accelerations— termination of plan	<p>A plan may provide for the acceleration of the time and form of a payment, or a payment under such plan may be made, where the acceleration of the payment is made pursuant to a termination and liquidation of the plan in 3 specific situations:</p> <ul style="list-style-type: none"> • after certain corporate dissolutions or bankruptcies • after certain changes of control • termination without adoption of new plan (general provision). 	<ul style="list-style-type: none"> • Under the general provision, these requirements must be satisfied: <ul style="list-style-type: none"> ○ The termination and liquidation must not occur proximate to a downturn in the financial health of the service recipient; ○ The service recipient must terminate and liquidate all arrangements sponsored by the service recipient that would be aggregated with any terminated and liquidated arrangement if the same service provider had deferrals of compensation under all of the arrangements that are terminated and liquidated; ○ No payments in liquidation of the plan are made within 12 months of the date the service recipient takes all necessary action to irrevocably terminate and liquidate the plan other than payments that would be payable under the terms of the plan if the action to terminate and liquidate the plan had not occurred; ○ All termination payments are made within 24 months of the date the service recipient takes all necessary action to irrevocably terminate and liquidate the plan; and ○ The service recipient does not adopt a new plan that would be aggregated with any terminated and liquidated plan if the same service provider participated in both plans, at any time within three years following the date the service recipient takes all necessary action to irrevocably terminate and liquidate the plan.

Subject	Rule	Commentary Document hosted at JDSUPRA™
Permissible accelerations—qualified plan coordination	If amounts deferred under the plan vary in relation to limits applicable to a qualified retirement plan sponsored by the service recipient, a reduction in the amounts deferred under the plan does not constitute an impermissible “acceleration” of payment as long as the reduction does not change the time or form of payment under the plan and the reduction does not exceed the change in limits applicable to the qualified plan.	<ul style="list-style-type: none"> • The final regulations allow coordination between elective deferrals under a 401(k) plan and elective deferrals to a non-qualified plan, as long as the coordination amount does not result in a decrease in deferrals under the non-qualified plan in excess of the annual elective deferral limit applicable to the 401(k) plan.
Permissible accelerations—cafeteria plan elections	To the extent that a change in elections under a section 125 cafeteria plan affects deferrals to a plan, the change in deferrals is not an impermissible acceleration to the extent the change in deferred compensation results solely from the permitted change under section 125.	
Grandfathered amounts	Grandfathered amounts (i.e., amounts not subject to 409A) include any account balance that is earned and vested as of December 31, 2004, as well as the present value of any earned and vested right to future account credits, even if such amounts had not actually been credited to the account as of December 31, 2004.	

Subject	Rule	Commentary Document hosted at JDSUPRA™
Material modifications to grandfathered amounts	A modification of a plan is a material modification if a benefit or right existing as of October 3, 2004, is materially enhanced or a new material benefit or right is added, and such material enhancement or addition affects amounts earned and vested before January 1, 2005. Such material benefit enhancement or addition is a material modification whether it occurs pursuant to an amendment or to the service recipient's exercise of discretion under the terms of the plan.	<ul style="list-style-type: none"> • The final regulations do not specify the impact of a “material modification,” but it is presumed that a material modification would cause the plan to lose grandfathered status, at least in part. • Under the final regulations, an amendment to a grandfathered plan that requires a cancellation of deferrals for post-AJCA amounts to allow a participant to receive a pre-AJCA unscheduled distribution is not a “material modification” if the cancellation applies not sooner than the first possible date that such a cancellation could not result in a prohibited accelerated payment (generally the beginning of the subsequent calendar year for a service provider with a calendar year taxable year).
Effective date of regulations	The final regulations are generally effective January 1, 2008.	<ul style="list-style-type: none"> • For periods before January 1, 2008, the standards and transition rules set forth in Notice 2006-79 continue to apply. • If a deferral election made before January 1, 2008, was consistent with the proposed regulations or the applicable transition guidance, the initial deferral election will be deemed to comply with the provisions of section 409A, regardless of whether the period of deferral extends beyond December 31, 2007. • Transition relief is also granted where the plan defines a payment event in a way that is not permitted under the final regulations (e.g., separation from service).

Subject	Rule	Commentary
Plan documents	Where there have been deferrals of compensation under a plan as of January 1, 2008, but the deferred compensation has not been paid, the plan must be made compliant with section 409A on or before December 31, 2007, with respect to such deferred compensation.	These amendments are required only to bring the document into compliance effective January 1, 2008, and are not required to reflect any amendments made or actions taken under the transition rules to the extent such amendments or actions do not affect the plan's compliance with section 409A and these regulations for periods on or after January 1, 2008. <u>However</u> , the taxpayer must be able to demonstrate that the plan was operated in compliance with the transition guidance, including demonstrating that amounts were deferred or paid in compliance with the transition rules.

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