

Highlights of Final Rules For Nonqualified Defined Benefit 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. • There are nine general categories of nonqualified deferred compensation plans, with non-account balance plans (i.e., nonqualified defined benefit SERPs) being one of those nine categories. • Section 409A rules do not apply to qualified defined benefit 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 benefits accrued to an employee under all nonqualified defined benefit plans sponsored by the same employer (modified controlled group rules apply) are treated as being deferred 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 from 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. • Plan documents reflecting the 409A provisions must be adopted no later than December 31, 2008. • 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 benefits are accrued. • 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:

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

Page 1 of 3

Prudential Retirement and Prudential Financial are registered service marks of The Prudential Insurance Company of America, Newark, NJ and its affiliates.



Provision Addressed	Highlights of Final Rules
	<ul style="list-style-type: none"> • The formula for determining how benefits will be earned; • The time and form of payment rules; and • Any rules that would restrict the payment of benefits to “specified” employees. <ul style="list-style-type: none"> • It is not acceptable to simply say the plan will operate in compliance with 409A.
Payment Election Rules	<ul style="list-style-type: none"> • An employee must elect the time and form of benefit payment when he first accrues a benefit under the plan. • The payment election may be made within the first 30 days of the calendar year following the plan year in which the employee accrues his initial benefit. • Under certain circumstances the employer may delay payments based on valid business reasons.
Later Changes in the Time and Form of Payment	<ul style="list-style-type: none"> • A change in either the time or form of payment may not take effect for 12 months and must be deferred at least 5 years after the original payment date. If the payment is made as an annuity or as installment payments, the election must be made 12 months before the date the first amount was scheduled to be paid. • The payment does not have to be delayed 5 years if the employee changes the form of payment to be made in the event of death, disability or unforeseeable emergency. However, the change in the form of payment cannot take effect for 12 months. • An employee may elect a different form of annuity that is actuarially equivalent to the original annuity election without being subject to the “12-month/5-year rules.” • A plan can designate an installment payout as a series of individual payments or as a single payment. The plan must treat all installment payments consistently. • The rules regarding changes in the form and time of payment apply separately to each payout election. • An intervening event may override an existing payment schedule already in payment status.
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 group has publicly-traded stock, including stock traded on a foreign exchange. • Identification of key 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 if 12 months in advance. • Employee is a key employee for the 12-month period beginning no later than the 1st day of the 4th month after the identification date.

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



Provision Addressed	Highlights of Final Rules
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.
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 benefit plans 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.
Nonqualified Plans Linked to Qualified Plans	<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. • 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.
Material Modifications	<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.
Transition Relief Ends	<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. • Nonqualified plan distributions may remain linked to a distribution option selected under a qualified plan, through December 31, 2008. • Change in distribution options without triggering the 12 month / 5 year deferral rule ends December 31, 2008.

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

The Pension Analyst is published by Prudential Retirement, a Prudential Financial business, to provide clients with information on current legislation and regulatory developments affecting qualified retirement plans. This publication is distributed with the understanding that Prudential Retirement is not rendering legal advice. Plan sponsors should consult their attorneys about the application of any law to their retirement plans.