

SECTION 409A MODIFICATIONS TO EXISTING AGREEMENTS

Definitions

- Asset sale
- Disability
- Unit or share sale
- Change of control

Acceleration of benefits – any existing acceleration provisions should be deleted.

The following distribution choices do not result in an impermissible acceleration (the timing and amount of income inclusion is the same):

- Cash and property
- Lump sum and fully taxable annuity
- Actuarially equivalent life annuities

A plan may permit the participant to elect installments under a fixed schedule rather than an annuity.

Acceleration of vesting does not violate Section 409A as long as it does not accelerate the time of payment.

Payment or restriction of assets upon a change in employer's financial condition constitutes a transfer of property pursuant to Section 83, and Section 409A will apply, on the **earlier** of:

- (1) the date on which the plan first provides for the restriction, or
- (2) the date on which the assets are restricted.

NOTE: any increase in value, or earnings with respect to such assets will be treated as an additional transfer pursuant to Section 83 (per 409A(b)(3)).

Elective Arrangements – must specify time or schedule of payment at the date of deferral. With respect to distributions made at a specified time or schedule, only a specified **date** (when I am age 64, the plan will pay \$2,000 per month until paid), and **not an event** (when I retire to Hawaii, the plan will pay \$2,000 per month until paid) will qualify.

Timing of elections

- Initial – No later than the end of the immediately preceding taxable year
- Mid-year Eligibility – 30 days following the date the person becomes eligible

Plan Alternatives

- Participant may make new election annually
- Election may stand unless changed (an “evergreen election”)

Irrevocability – Elections are irrevocable, except for
Unforeseeable emergencies
401(k) hardship distributions

Non-elective Arrangements – plan must establish the time and form of payment no later than the date the employee obtains a legally binding right to the compensation.

If only a year is specified, January 1 is the presumed distribution date.
Payments are deemed made on the designated date if made by the **latter** of:
the first administratively feasible date after the designated date,
the end of the calendar year containing the designated date, or
2 ½ months following the designated date.

Payment Elections – plan terms will control
Plan can “hard wire” an election
Plan may permit employer or employee to make election
NOTE: If employee permitted to elect, plan should have a default payment election
Each separately identified amount to which an employee is entitled to payment under a plan on a determinable date is a separate payment
A life annuity is a single payment
Installments are a single payment unless the plan says otherwise, then each payment is separate
This impacts desire to defer payments 5 years into future and ability to pick and choose payments to be deferred.

Language for permitted delayed payments
Potential violation of Section 162(m) – deductibility of excess compensation
Breach of securities laws, loan covenants, or contractual obligations

Language for permitted distributions in the event of:
Unforeseeable emergencies
Divestiture from conflict of interest
Casualty loss
Domestic relations order
De minimus cash out
To pay tax upon violation of 409A

Impact on Endorsement Method Split Dollar Agreements (“SDA’s”)

Application of Section 409A
Death only SDA’s excluded from 409A under exception for death plans
Loan Regime SDA’s do not have deferral of compensation unless there is some loan forgiveness or there is no interest charged
Endorsement Method SDA’s may provide for deferral of compensation (right to future transfer of interests in a policy owned by the employee)

Impact of 409A compliance and grandfathered status of pre-Sept. 18, 2003 SDA's
Change for 409A compliance will not constitute a material modification

Review to determine if need to modify SDA to reflect fixed payment amount and date, as well as election timing rules.

Review impact of Notice 2007-34 for divided benefit structure:
Cost of current life insurance protection is death benefit
Access to policy cash value (if any) is subject to 409A, unless have short-term deferral.