

§ 1.409A-2

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this section, and §§1.409A-2 through 1.409A-6.

[T.D. 9321, 72 FR 19276, Apr. 17, 2007; 72 FR 41620, July 31, 2007]

§ 1.409A-2 Deferral elections.

(a) *Initial elections as to the time and form of payment*—(1) *In general.* A plan that is, or constitutes part of, a non-qualified deferred compensation plan meets the requirements of section 409A(a)(4)(B) only if under the terms of the plan, compensation for services performed during a service provider's taxable year (the service year) may be deferred at the service provider's election only if the election to defer such compensation is made and becomes irrevocable not later than the latest date permitted in this paragraph (a). An election will not be considered to be revocable merely because the service provider or service recipient may make an election to change the time and form of payment pursuant to paragraph (b) of this section, or the service recipient may accelerate the time of payment pursuant to §1.409A-3(j)(4) (exceptions to prohibition on accelerated payments). Whether a plan provides a service provider an opportunity to elect the time or form of payment of compensation is determined based upon all the facts and circumstances surrounding the determination of the time and form of payment of the compensation. For purposes of this section, an election to defer includes an election as to the time of the payment, an election as to the form of the payment or an election as to both the time and the form of the payment, but does not include an election as to the medium of payment (for example, an election between a payment of cash or a payment of property). Except as otherwise expressly provided in this section, an election will not be considered made until such election becomes irrevocable under the terms of the applicable plan. Accordingly, a plan may provide that an election to defer may be changed at any time before the last permissible date for making such an election. Where a plan provides the service provider a right to make an initial deferral election, and further provides that the election remains in effect until terminated or modified by the service pro-

vider, the election will be treated as made as of the date such election becomes irrevocable as to compensation for services performed during the relevant service year. For example, where a plan provides that a service provider's election to defer a set percentage will remain in effect until changed or revoked, but that as of each December 31 the election becomes irrevocable with respect to salary payable in connection with services performed in the immediately following year, the initial deferral election with respect to salary payable with respect to services performed in the immediately following year will be deemed to have been made as of the December 31 upon which the election became irrevocable. For purposes of this paragraph (a), the reference to a service period or a performance period refers to the period of service for which the right to the compensation arises, and may include periods before the grant of a legally binding right to the compensation. For example, where a service recipient grants a bonus based upon services performed in the calendar year 2010, but retains the discretion to rescind the bonus until 2011 such that the promise of the bonus is not a legally binding right, the period of service or performance period to which the compensation relates is the calendar year 2010.

(2) *Service recipient elections.* A plan that provides for a deferral of compensation for services performed during a service provider's taxable year that does not provide the service provider with an opportunity to elect the time or form of payment of such compensation must designate the time and form of payment by no later than the later of the time the service provider first has a legally binding right to the compensation or, if later, the time the service provider would be required under this section to make such an election if the service provider were provided such an election. Such designation is treated as an initial deferral election for purposes of this section. Where a plan permits a service recipient to exercise discretion to disregard a service provider election as to the time or form of a payment, any service provider election that is subject to such discretion will be treated

as revocable so long as such discretion may be exercised.

(3) *General rule.* A plan that is, or constitutes part of, a nonqualified deferred compensation plan meets the requirements of section 409A(a)(4)(B) if under the terms of the plan, compensation for services performed during a service provider's taxable year (the service year) may be deferred at the service provider's election only if the election to defer such compensation is made not later than the close of the service provider's taxable year next preceding the service year.

(4) *Initial deferral election with respect to short-term deferrals.* If a service provider has a legally binding right to a payment of compensation in a subsequent taxable year that, absent a deferral election, would be treated as a short-term deferral within the meaning of § 1.409A-1(b)(4), an election to defer such compensation may be made in accordance with the requirements of paragraph (b) of this section, applied as if the amount were a deferral of compensation and the scheduled payment date for the amount were the date the substantial risk of forfeiture lapses. Notwithstanding the requirements of paragraph (b) of this section, such a deferral election may provide that the deferred amounts will be payable upon a change in control event (as defined in § 1.409A-3(i)(5)) without regard to the five-year additional deferral requirement in paragraph (b) of this section.

(5) *Initial deferral election with respect to certain forfeitable rights.* If a service provider has a legally binding right to a payment in a subsequent year that is subject to a condition requiring the service provider to continue to provide services for a period of at least 12 months from the date the service provider obtains the legally binding right to avoid forfeiture of the payment, an election to defer such compensation may be made on or before the 30th day after the service provider obtains the legally binding right to the compensation, provided that the election is made at least 12 months in advance of the earliest date at which the forfeiture condition could lapse. For purposes of this paragraph (a)(5), a condition will not be treated as failing to require the service provider to continue to provide

services for a period of at least 12 months from the date the service provider obtains the legally binding right merely because the condition immediately lapses upon the death or disability (as defined in § 1.409A-3(i)(4)) of the service provider, or upon a change in control event (as defined in § 1.409A-3(i)(5)), provided that if death, disability, or a change in control event occurs and the condition lapses before the end of such 12-month period, a deferral election may be given effect only if the deferral election is permitted under this section without regard to this paragraph (a)(5).

(6) *Initial deferral election with respect to fiscal year compensation.* In the case of a service recipient with a taxable year that is not the same as the taxable year of the service provider, a plan may provide that fiscal year compensation may be deferred at the service provider's election if the election to defer such compensation is made not later than the close of the service recipient's taxable year immediately preceding the first taxable year of the service recipient in which any services are performed for which such compensation is payable. For purposes of this paragraph (a)(6), the term *fiscal year compensation* means compensation relating to a period of service coextensive with one or more consecutive taxable years of the service recipient, of which no amount is paid or payable during the service recipient's taxable year or years constituting the period of service. For example, fiscal year compensation generally would include a bonus to an individual employee with a calendar year taxable year that is based on a service period consisting of the service recipient's two consecutive taxable years ending September 30, 2011, where the amount will be paid after the end of the second of such taxable years, but would not include either a bonus based on a service period consisting of one or more calendar years or salary that would otherwise be paid during such taxable years of the service recipient.

(7) *First year of eligibility—(i) In general.* In the case of the first year in which a service provider becomes eligible to participate in a plan, the service provider may make an initial deferral election within 30 days after the date

the service provider becomes eligible to participate in such plan, with respect to compensation paid for services to be performed after the election. In the case of a plan that does not provide for service provider elections with respect to the time or form of a payment, the time and form of the payment must be specified on or before the date that is 30 days after the date the service provider first becomes eligible to participate in such plan. For compensation that is earned based upon a specified performance period (for example, an annual bonus), where a deferral election is made in the first year of eligibility but after the beginning of the performance period, the election must apply only to the compensation paid for services performed after the election. For this purpose, an election will be deemed to apply to compensation paid for services performed after the election if the election applies to no more than an amount equal to the total amount of the compensation for the performance period multiplied by the ratio of the number of days remaining in the performance period after the election over the total number of days in the performance period.

(ii) *Eligibility to participate.* For purposes of this paragraph (a)(7), a service provider is eligible to participate in a plan at any time during which, under the plan's terms and without further amendment or action by the service recipient, the service provider is eligible to accrue an amount of deferred compensation under the plan other than earnings on amounts previously deferred, even if the service provider has elected not to accrue (or has not elected to accrue) an amount of deferred compensation. Where a service provider has been paid all amounts deferred under a plan, and on and before the date of the last payment was not eligible to continue (or to elect to continue) to participate in the plan for periods after the last payment (other than through an election of a different time and form of payment with respect to the amounts paid), the service provider may be treated as initially eligible to participate in a plan as of the first date following such payment that the service provider becomes eligible to accrue an additional amount of de-

ferred compensation. Where a service provider has ceased being eligible to participate in a plan (other than the accrual of earnings), regardless of whether all amounts deferred under the plan have been paid, and subsequently becomes eligible to participate in the plan again, the service provider may be treated as being initially eligible to participate in the plan if the service provider had not been eligible to participate in the plan (other than the accrual of earnings) at any time during the 24-month period ending on the date the service provider again becomes eligible to participate in the plan.

(iii) *Application to excess benefit plans.* For purposes of this paragraph (a)(7), a service provider is treated as initially eligible to participate in an excess benefit plan as of the first day of the service provider's taxable year immediately following the first year the service provider accrues a benefit under the excess benefit plan; and any election made within 30 days following such date is treated as applying to benefits accrued under such plan for services performed before the election. For purposes of this paragraph (a)(7), the term *excess benefit plan* means all non-qualified deferred compensation plans in which a service provider participates, to the extent such plans do not provide for an election between current compensation (including a short-term deferral) and deferred compensation and solely provide deferred compensation equal to the excess of the benefits the service provider would have accrued under a qualified employer plan (as defined in § 1.409A-1(a)(2)) in which the service provider also participates, in the absence of one or more of the limits incorporated into the plan to reflect one or more of the limits on contributions or benefits applicable to the qualified employer plan under the Internal Revenue Code, over the benefits the service provider actually accrues under the qualified employer plan. For purposes of this paragraph (a)(7), once a service provider has accrued a benefit or deferred compensation under a plan in any year, the service provider will not become eligible for an initial deferral election based upon an accrual or deferral under an excess benefit plan in a subsequent year, even if the benefit

or deferred compensation accrued in a previous year is forfeited or eliminated.

(8) *Initial deferral election with respect to performance-based compensation.* In the case of any performance-based compensation (as defined in §1.409A-1(e)), an initial deferral election may be made with respect to such performance-based compensation on or before the date that is six months before the end of the performance period, provided that the service provider performs services continuously from the later of the beginning of the performance period or the date the performance criteria are established through the date an election is made under this paragraph (a)(8), and provided further that in no event may an election to defer performance-based compensation be made after such compensation has become readily ascertainable. For purposes of this paragraph (a)(8), if the performance-based compensation is a specified or calculable amount, the compensation is readily ascertainable if and when the amount is first substantially certain to be paid. If the performance-based compensation is not a specified or calculable amount because, for example, the amount may vary based upon the level of performance, the compensation, or any portion of the compensation, is readily ascertainable when the amount is first both calculable and substantially certain to be paid. For this purpose, the performance-based compensation is bifurcated between the portion that is readily ascertainable and the amount that is not readily ascertainable. Accordingly, in general any minimum amount that is both calculable and substantially certain to be paid will be treated as readily ascertainable.

(9) *Nonqualified deferred compensation plans linked to qualified employer plans or certain other arrangements.* If a nonqualified deferred compensation plan provides that the amount deferred under the plan is determined under the formula for determining benefits under a qualified employer plan (as defined in §1.409A-1(a)(2)) or a broad-based foreign retirement plan (as defined in §1.409A-1(a)(3)(v)) maintained by the service recipient but applied without regard to one or more limitations applicable to

the qualified employer plan under the Internal Revenue Code or to the broad-based foreign retirement plan under other applicable law, or that the amount deferred under the nonqualified deferred compensation plan is determined as an amount offset by some or all of the benefits provided under the qualified employer plan or the broad-based foreign retirement plan, an increase in amounts deferred under the nonqualified deferred compensation plan that results directly from the operation of the qualified employer plan or broad-based foreign retirement plan (other than service provider actions described in paragraphs (a)(9)(iii) and (iv) of this section) including changes in benefit limitations applicable to the qualified employer plan or the broad-based foreign retirement plan under the Internal Revenue Code or other applicable law does not constitute a deferral election under the nonqualified deferred compensation plan, provided that such operation does not otherwise result in a change in the time or form of a payment under the nonqualified deferred compensation plan, and provided further that such change in the amounts deferred under the nonqualified deferred compensation plan does not exceed that change in the amounts deferred under the qualified employer plan or the broad-based foreign retirement plan, as applicable. In addition, with respect to such a nonqualified deferred compensation plan, the following actions or failures to act will not constitute a deferral election under the nonqualified deferred compensation plan even if in accordance with the terms of the nonqualified deferred compensation plan, the actions or inactions result in an increase in the amounts deferred under the plan, provided that such actions or inactions do not otherwise affect the time or form of payment under the nonqualified deferred compensation plan and provided further that with respect to actions or inactions described in paragraphs (a)(9)(i) or (ii), the change in the amount deferred under the nonqualified deferred compensation plan does not exceed the change in the amounts deferred under the qualified employer plan or the broad-based foreign retirement plan, as applicable:

(i) A service provider's action or inaction under the qualified employer plan or broad-based foreign retirement plan with respect to whether to elect to receive a subsidized benefit or an ancillary benefit under the qualified employer plan or broad-based foreign retirement plan.

(ii) The amendment of a qualified employer plan or broad-based foreign retirement plan to add or remove a subsidized benefit or an ancillary benefit, or to freeze or limit future accruals of benefits under the qualified plan or freeze or limit future accruals of benefits or reduce existing benefits under the broad-based foreign retirement plan.

(iii) A service provider's action or inaction under a qualified employer plan with respect to elective deferrals and other employee pre-tax contributions subject to the contribution restrictions under section 401(a)(30) or section 402(g), including an adjustment to a deferral election under such qualified employer plan, provided that for any given taxable year, the service provider's action or inaction does not result in an increase in the amounts deferred under all nonqualified deferred compensation plans in which the service provider participates (other than amounts described in paragraph (a)(9)(iv) of this section) in excess of the limit with respect to elective deferrals under section 402(g)(1)(A), (B), and (C) in effect for the taxable year in which such action or inaction occurs.

(iv) A service provider's action or inaction under a qualified employer plan with respect to elective deferrals and other employee pre-tax contributions subject to the contribution restrictions under section 401(a)(30) or section 402(g), and after-tax contributions by the service provider to a qualified employer plan that provides for such contributions, that affects the amounts that are credited under one or more nonqualified deferred compensation plans as matching amounts or other similar amounts contingent on such elective deferrals, employee pre-tax contributions, or after-tax contributions, provided that the total of such matching or contingent amounts, as applicable, never exceeds 100 percent of the matching or contingent amounts

that would be provided under the qualified employer plan absent any plan-based restrictions that reflect limits on qualified plan contributions under the Internal Revenue Code.

(10) *Changes in elections under a cafeteria plan.* A change in an election under a cafeteria plan does not constitute a deferral election with respect to an amount deferred under a nonqualified deferred compensation plan to the extent that the change in the amount deferred under the nonqualified deferred compensation plan results solely from the application of the change in amount eligible to be treated as compensation under the terms of the nonqualified deferred compensation plan resulting from the election change under the cafeteria plan, to a benefit formula under the nonqualified deferred compensation plan based upon the service provider's eligible compensation, and only to the extent that such change applies in the same manner as any other increase or decrease in compensation would apply to such benefit formula.

(11) *Initial deferral election with respect to certain separation pay.* In the case of separation pay (as defined in § 1.409A-1(m)), where such separation pay is the subject of bona fide, arm's length negotiations at the time of the separation from service, an initial deferral election may be made at any time up to the time the service provider obtains a legally binding right to the payment. This paragraph (a)(11) does not apply to any separation pay to which the service provider obtained a legally binding right before the negotiations at the time of the separation from service, including a right to a payment subject to a condition such as that the service provider separate from service other than for cause. In the case of separation pay due to participation in a window program (as defined in § 1.409A-1(b)(9)(vi)), an initial deferral election may be made at any time before the time the election to participate in the window program becomes irrevocable.

(12) *Initial deferral election with respect to certain commissions—(i) Sales commission compensation.* For purposes of this paragraph (a), a service provider earning sales commission compensation is treated as providing the services to

which such compensation relates only in the service provider's taxable year in which the customer remits payment to the service recipient or, if applied consistently to all similarly situated service providers, the service provider's taxable year in which the sale occurs. For purposes of this paragraph (a)(12), the term *sales commission compensation* means compensation or portions of compensation earned by a service provider if a substantial portion of the services provided by such service provider to a service recipient consist of the direct sale of a product or service to an unrelated customer, the compensation paid by the service recipient to the service provider consists of either a portion of the purchase price for the product or service or an amount substantially all of which is calculated by reference to the volume of sales, and payment of the compensation is either contingent upon the service recipient receiving payment from an unrelated customer for the product or services or, if applied consistently to all similarly situated service providers, is contingent upon the closing of the sales transaction and such other requirements as may be specified by the service recipient before the closing of the sales transaction. For this purpose, a customer is treated as an unrelated customer only if the customer is not related to either the service provider or the service recipient. A person is treated as related to another person if the person would be treated as related to the other person under §1.409A-1(f)(2)(ii) or the person would be treated as providing management services to the other person under §1.409A-1(f)(2)(iv).

(ii) *Investment commission compensation*. For purposes of this paragraph (a), a service provider earning investment commission compensation is treated as providing the services to which such compensation relates over the 12 months preceding the date as of which the overall value of the assets or asset accounts is determined for purposes of the calculation of the investment commission compensation. For purposes of this paragraph (a)(12), the term *investment commission compensation* means the compensation or the portion of compensation earned by a service pro-

vider if a substantial portion of the services provided by such service provider to a service recipient to which such compensation relates consists of sales of financial products or other direct customer services to an unrelated customer with respect to customer assets or customer asset accounts, the customer retains the right to terminate the customer relationship and may move or liquidate the assets or asset accounts without undue delay (which may be subject to a reasonable notice period), such compensation consists of a portion of the value of the overall assets or asset account balance, an amount substantially all of which is calculated by reference to the increase in the value of the overall assets or account balance during a specified period, or both, and the value of the overall assets or account balance and investment commission compensation is determined at least annually. For this purpose, a customer is treated as an unrelated customer only if the customer is not related to either the service provider or the service recipient. A person is treated as related to another person if the person would be treated as related to the other person under §1.409A-1(f)(2)(ii) or the person would be treated as providing management services to the other person under §1.409A-1(f)(2)(iv).

(iii) *Commission compensation and related persons*. The rules of paragraphs (a)(12)(i) and (ii) of this section apply to sales commission compensation and investment commission compensation involving a related customer, provided that substantial sales from which commission compensation arises are made, or substantial services from which commission compensation arises are provided, to unrelated customers by the service recipient, the sales and service arrangement and the commission arrangement with respect to the related customer are bona fide, arise from the service recipient's ordinary course of business, and are substantially the same, both in terms and in practice, as the terms and practices applicable to unrelated customers (as defined in such paragraphs) to which individually or in the aggregate substantial sales are made or substantial services provided by the service recipient.

(13) *Initial deferral election with respect to compensation paid for final payroll period*—(i) *In general.* Unless a plan provides otherwise, compensation payable after the last day of the service provider's taxable year solely for services performed during the final payroll period described in section 3401(b) containing the last day of the service provider's taxable year or, with respect to a non-employee service provider, a period not longer than the payroll period described in section 3401(b), where such amount is payable pursuant to the timing arrangement under which the service recipient normally compensates service providers for services performed during a payroll period described in section 3401(b), or with respect to a non-employee service provider, a period not longer than the payroll period described in section 3401(b), is treated as compensation for services performed in the subsequent taxable year in which the payment is made. The preceding sentence does not apply to any compensation paid during such period for services performed during any period other than such final payroll period, such as a payment of an annual bonus. Any amendment of a plan after December 31, 2007, to add a provision providing for a differing treatment of such compensation may not be effective for 12 months from the date the amendment is executed and enacted.

(ii) *Transition rule.* For purposes of this paragraph (a)(13), a plan that was adopted and effective before December 31, 2007, whether written or unwritten, will be treated as designating such compensation for services performed in the taxable year in which the payroll period ends, unless otherwise set forth in writing before December 31, 2007.

(14) *Elections to annualize recurring part-year compensation.* In the case of a service provider receiving recurring part-year compensation, an election to defer all or a portion of the recurring part-year compensation to be earned during a particular service period is considered to meet the requirements of this paragraph (a) if the election is made before the services for which the recurring part-year compensation is paid begin, and the election does not defer payment of any of the recurring part-year compensation to a date be-

yond the last day of the 13th month following the first date of the service period. For purposes of this paragraph (a)(14), the term *recurring part-year compensation* means compensation paid for services rendered in a position that the service recipient and service provider reasonably anticipate will continue on similar terms and conditions in subsequent years, and will require services to be provided during successive service periods each of which comprises less than 12 months (for example, a teacher providing services during a school year comprised of 10 consecutive months), and each of which periods begins in one taxable year of the service provider and ends in the next such taxable year. The rules of this paragraph (a)(14) apply to a particular amount of compensation only once, so that an amount deferred under this rule may not again be treated as recurring part-year compensation for purposes of this paragraph and subject to a second deferral election under this paragraph (a)(14).

(15) *USERRA rights.* The requirements of this paragraph (a) are deemed satisfied to the extent an initial deferral election is provided to satisfy the requirements of the Uniformed Service Employment and Reemployment Rights Act of 1994, as amended, 38 U.S.C. 4301-4334.

(b) *Subsequent changes in time and form of payment*—(1) *In general.* A plan that permits under a subsequent election a delay in a payment or a change in the form of payment (a subsequent deferral election), including a subsequent deferral election made by a service provider or a service recipient, satisfies the requirements of section 409A(a)(4)(C) only if the conditions of this paragraph (b) are met. For purposes of this paragraph (b), except as otherwise expressly provided in this section, a subsequent deferral election is not considered made until such election becomes irrevocable under the terms of the plan. Accordingly, a plan may provide that a subsequent deferral election may be changed at any time before the last permissible date for making such a subsequent deferral election. Where a plan permits a subsequent deferral election, the requirements of this paragraph are satisfied

only if the following conditions are met:

(i) The plan requires that such election not take effect until at least 12 months after the date on which the election is made.

(ii) In the case of an election related to a payment not described in §1.409A-3(a)(2) (payment on account of disability), §1.409A-3(a)(3) (payment on account of death), or §1.409A-3(a)(6) (payment on account of the occurrence of an unforeseeable emergency), the plan requires that the payment with respect to which such election is made be deferred for a period of not less than five years from the date such payment would otherwise have been paid (or in the case of a life annuity or installment payments treated as a single payment, five years from the date the first amount was scheduled to be paid).

(iii) The plan requires that any election related to a payment described in §1.409A-3(a)(4) (payment at a specified time or pursuant to a fixed schedule) be made not less than 12 months before the date the payment is scheduled to be paid (or in the case of a life annuity or installment payments treated as a single payment, 12 months before the date the first amount was scheduled to be paid).

(2) *Definition of payments for purposes of subsequent changes in the time or form of payment*—(i) *In general.* Except as provided in paragraphs (b)(2)(ii) and (iii) of this section, the term *payment* refers to each separately identified amount to which a service provider is entitled to payment under a plan on a determinable date, and includes amounts applied for the benefit of the service provider. An amount is separately identified only if the amount may be objectively determined under a nondiscretionary formula. For example, an amount identified as 10 percent of the account balance as of a specified payment date would be a separately identified amount. A payment includes the provision of any taxable benefit, including payment in cash or in kind. In addition, a payment includes, but is not limited to, the transfer, cancellation, or reduction of an amount of deferred compensation in exchange for benefits under a welfare benefit plan, a fringe benefit excludible under section

119 or section 132, or any other benefit that is excludible from gross income. For additional rules relating to the application of this paragraph (b) to amounts payable at a fixed time or pursuant to a fixed schedule, see §1.409A-3(i)(1).

(ii) *Life annuities*—(A) *In general.* The entitlement to a life annuity is treated as the entitlement to a single payment. Accordingly, an election to delay payment of a life annuity, or to change the form of payment of a life annuity, must be made at least 12 months before the scheduled commencement of the life annuity, and must defer the payment for a period of not less than five years from the originally scheduled commencement of the life annuity. For purposes of §1.409A-1, this section, and §§1.409A-3 through 1.409A-6, the term *life annuity* means a series of substantially equal periodic payments, payable not less frequently than annually, for the life (or life expectancy) of the service provider, or a series of substantially equal periodic payments, payable not less frequently than annually, for the life (or life expectancy) of the service provider, followed upon the death or end of the life expectancy of the service provider by a series of substantially equal periodic payments, payable not less frequently than annually, for the life (or life expectancy) of the service provider's designated beneficiary (if any). Notwithstanding the foregoing, a schedule of payments does not fail to be an annuity solely because such plan provides for an immediate payment of the actuarial present value of all remaining annuity payments if the actuarial present value of the remaining annuity payments falls below a predetermined amount, and the immediate payment of such amount does not constitute an accelerated payment for purposes of §1.409A-3(j), provided that such feature, including the predetermined amount, is established by no later than the time and form of payment is otherwise required to be established, and provided further that any change in such feature, including the predetermined amount, is a change in the time and form of payment. A change in designated beneficiary before any annuity payment has been made under the plan is not a change in the

time or form of payment. A change in the form of a payment before any annuity payment has been made under the plan, from one type of life annuity to another type of life annuity with the same scheduled date for the first annuity payment, is not considered a change in the time and form of a payment, provided that the annuities are actuarially equivalent applying reasonable actuarial methods and assumptions. For purposes of this paragraph (b)(2)(ii), a requirement that a service provider obtain the consent of a spouse or other potential recipient of a survivor annuity to change a beneficiary or form of payment is disregarded, so that any annuity form that the service recipient could elect to receive with such consent is considered currently available.

(B) *Certain features disregarded.* Notwithstanding the foregoing provisions of this paragraph (b)(2)(ii), the following features are disregarded for purposes of determining whether a payment form is a life annuity within the meaning of this paragraph (b)(2)(ii), but are not disregarded for purposes of determining whether a life annuity is the actuarial equivalent of another life annuity except as otherwise provided in this paragraph (b)(2)(ii):

(1) Term certain features under which annuity payments continue for the longer of the life of the annuitant or a fixed period of time.

(2) Pop-up features under which payments increase upon the death of the beneficiary or another event that eliminates the right to a survivor annuity.

(3) Cash refund features under which payment is provided upon the death of the last annuitant in an amount that is not greater than the excess of the present value of the annuity at the annuity starting date over the total of payments before the death of the last annuitant.

(4) Features under which an annuity form of payment provides higher periodic payments before the expected commencement of benefits under the Social Security Act (42 U.S.C. ch. 7) or the Railroad Retirement Act (45 U.S.C. 231 *et seq.*) and lower periodic payments after such expected commencement date, so that the combined periodic

payments under the arrangement and the Social Security Act or the Railroad Retirement Act, as applicable, are approximately level before and after such expected commencement date (Social Security or Railroad Retirement leveling features).

(5) Features providing for an increase in the annuity payment in a manner described in § 1.401(a)(9)-6, Q&A-14(a)(1) or (2) (eligible cost-of-living adjustments).

(C) *Subsidized joint and survivor annuities.* For purposes of this paragraph (b)(2)(ii), a joint and survivor annuity will not fail to be treated as actuarially equivalent to a single life annuity due solely to the value of a subsidized survivor annuity benefit, provided that the annual lifetime annuity benefit available to the service provider under the joint and survivor annuity is not greater than the annual lifetime annuity benefit available to the service provider under the single life annuity alternative, and provided that the annual survivor annuity benefit is not greater than the annual lifetime annuity benefit available to the service provider under the joint and survivor annuity.

(D) *Actuarial assumptions and methods.* For purposes of this paragraph (b)(2)(ii), at any given time the same actuarial assumptions and methods must be used in valuing each annuity payment option, in determining whether the payments are actuarially equivalent and such assumptions must be reasonable. This requirement applies over the entire term of the service provider's participation in the plan, such that the annuity payment must be actuarially equivalent at all times for the annuity payment options to be treated as one time and form of payment. There is no requirement that the same actuarial methods and assumptions be used over the term of a service provider's participation in a plan. Accordingly, a plan may change the actuarial assumptions and methods used to determine the life annuity payments provided that all of the actuarial assumptions and methods are reasonable.

(iii) *Installment payments.* The entitlement to a series of installment payments that is not a life annuity is treated as the entitlement to a single payment, unless 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. For purposes of §1.409A-1, this section, and §§1.409A-3 through 1.409A-6, a series of installment payments refers to an entitlement to the payment of a series of substantially equal periodic amounts to be paid over a predetermined period of years, except to the extent any increase (or decrease) in the amount reflects reasonable earnings (or losses) through the date the amount is paid. For this purpose, a series of installment payments over a predetermined period and a series of installment payments over a shorter or longer period, or a series of installment payments over the same predetermined period but with a different commencement date, are different times and forms of payment. Accordingly, a change in the predetermined period or the commencement date is a change in the time and form of payment. Notwithstanding the foregoing, a schedule of payments does not fail to be an installment payment solely because such plan provides for an immediate payment of all remaining installments if the present value of the deferred amount to be paid in the remaining installment payments falls below a predetermined amount, and the immediate payment of such amount does not constitute an accelerated payment for purposes of §1.409A-3(j), provided that such feature including the predetermined amount is established by no later than the time and form of payment is otherwise required to be established, and provided further that any change in such feature including the predetermined amount is a change in the time and form of payment.

(iv) *Transition rule.* For purposes of this section, a plan that was adopted and effective before December 31, 2007, whether written or unwritten, that fails to make a designation as to whether the entitlement to a series of payments is to be treated as an entitlement to a series of separate payments under paragraph (b)(2)(iii) of this section, may make such designation on or before December 31, 2007, provided such designation is set forth in writing on or before December 31, 2007.

(3) *Beneficiaries.* The rules of this paragraph (b) governing changes in the time and form of payment apply to elections by beneficiaries with respect to the time and form of payment, as well as elections by service providers or service recipients with respect to the time and form of payment to beneficiaries. An election to change the identity of a beneficiary does not constitute a change in the time and form of payment merely because the election changes the identity of the recipient of the payment, if the time and form of the payment is not otherwise changed. In addition, an election to change the identity of a beneficiary before the initial payment of a life annuity does not constitute a change in the time and form of payment if the change in the time of payments stems solely from the different life expectancy of the new beneficiary, such as in the case of a joint and survivor annuity.

(4) *Domestic relations orders.* The rules of this paragraph (b) 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 (as defined in section 414(p)(1)(B)).

(5) *Coordination with prohibition against acceleration of payments.* For purposes of applying the prohibition against the acceleration of payments in §1.409A-3(j), the definition of payment is the same as the definition in paragraph (b)(2) of this section. Accordingly, a change in the form of a payment that results in a more rapid schedule for payments generally will not constitute an acceleration of a payment, if the change in the form of payment is made in compliance with the subsequent deferral rules. For example, a change in form from a 10-year installment payment treated as a single payment to a lump-sum payment would not constitute an acceleration if the change in the form of the payment is made in compliance with the requirements of paragraph (b)(1) of this section, generally meaning that the election to change to a lump-sum payment

must be made at least 12 months before the installment payments were scheduled to commence and the lump-sum payment could not be made until at least five years after the date the installment payments were scheduled to commence. See § 1.409A-3(j)(4)(i) with respect to situations in which the failure to accelerate a payment or the modification of a plan term relating to certain accelerated payments will not be subject to the rules of this paragraph (b).

(6) *Application to multiple payment events.* In the case of a plan that permits a payment upon each of a number of potential permissible payment events, such as the earlier of a fixed date or separation from service, the requirements of paragraph (b)(1) of this section are applied separately to each payment (as defined in paragraph (b)(2) of this section) due upon each payment event. Notwithstanding the foregoing, the addition or deletion of a permissible payment event to a plan under which amounts were previously deferred is subject to the rules of this paragraph (b) where the addition or deletion of the permissible payment event may result in a change in the time or form of payment of the amount deferred. For application of the rules governing accelerations of payments to the addition of a permissible payment event to amounts deferred, see § 1.409A-3(j).

(7) *Delay of payments under certain circumstances.* A payment may be delayed to a date after the designated payment date under any of the circumstances described in this paragraph (b)(7), and the provision will not fail to meet the requirements of establishing a permissible payment event and the delay in the payment will not constitute a subsequent deferral election, so long as the service recipient treats all payments to similarly situated service providers on a reasonably consistent basis.

(i) *Payments subject to section 162(m).* A payment may be delayed to the extent that the service recipient reasonably anticipates that if the payment were made as scheduled, the service recipient's deduction with respect to such payment would not be permitted due to the application of section

162(m), provided that the payment is made either during the service provider's first taxable year in which the service recipient reasonably anticipates, or should reasonably anticipate, that if the payment is made during such year, the deduction of such payment will not be barred by application of section 162(m) or during the period beginning with the date of the service provider's separation from service and ending on the later of the last day of the taxable year of the service recipient in which the service provider separates from service or the 15th day of the third month following the service provider's separation from service, and provided further that where any scheduled payment to a specific service provider in a service recipient's taxable year is delayed in accordance with this paragraph, the delay in payment will be treated as a subsequent deferral election unless all scheduled payments to that service provider that could be delayed in accordance with this paragraph are also delayed. Where the payment is delayed to a date on or after the service provider's separation from service, the payment will be considered a payment upon a separation from service for purposes of the rules under § 1.409A-3(i)(2) (payments to specified employees upon a separation from service) and, in the case of a specified employee, the date that is six months after a service provider's separation from service is substituted for any reference to a service provider's separation from service in the first sentence of this paragraph. No election may be provided to the service provider with respect to the timing of the payment under this paragraph (b)(7)(i).

(ii) *Payments that would violate Federal securities laws or other applicable law.* A payment may be delayed where the service recipient reasonably anticipates that the making of the payment will violate Federal securities laws or other applicable law; provided that the payment is made at the earliest date at which the service recipient reasonably anticipates that the making of the payment will not cause such violation. The making of a payment that would cause inclusion in gross income or the application of any penalty provision or other provision of the Internal Revenue

Code is not treated as a violation of applicable law.

(iii) *Other events and conditions.* A service recipient may delay a payment upon such other events and conditions as the Commissioner may prescribe in generally applicable guidance published in the Internal Revenue Bulletin (see § 601.601(d)(2) of this chapter). For additional rules applicable to certain delayed payments pursuant to a change in control event, see § 1.409A-3(i)(5)(iv). For additional rules applicable to amounts payable because of an unforeseeable emergency, see § 1.409A-3(i)(3).

(8) *USERRA rights.* The requirements of this paragraph (b) are deemed met to the extent an election to change the time or form of a payment of deferred compensation is provided to satisfy the requirements of the Uniformed Services Employment and Reemployment Rights Act of 1994, as amended, 38 U.S.C. 4301-4344.

(9) *Examples.* The following examples illustrate the application of the provisions of this section. For purposes of these examples, each employee is an individual with a calendar year taxable year, and is employed by the specified employer:

Example 1. Initial election to defer salary. Employer ZZ sponsors a plan under which Employee A may elect to defer a percentage of Employee A's salary. Employee A has participated in the plan in prior years. To satisfy the requirements of this section with respect to salary earned in calendar year 2008, if Employee A elects to defer any amount of such salary, the deferral election (including an election as to the time and form of payment) must be made no later than December 31, 2007.

Example 2. Designation of time and form of payment where an initial deferral election is not provided. Employer YY has a taxable year ending September 30. On July 1, 2008, Employer YY enters into a legally binding obligation to pay Employee B a \$10,000 bonus. The amount is not subject to a substantial risk of forfeiture and does not qualify as performance-based compensation as described in § 1.409A-1(e). Employer YY does not provide Employee B an election as to the time and form of payment. Unless the amount is to be paid in accordance with the short-term deferral rule of § 1.409A-1(b)(4), Employer YY must specify the time and form of payment on or before July 1, 2008, to satisfy the requirements of this section.

Example 3. Initial election to defer bonus payable based on services during calendar year.

Employer XX has a taxable year ending September 30. Employee C participates in a bonus plan under which Employee C is entitled to a bonus for services performed during the calendar year that, absent an election by Employee C, will be paid on March 15 of the following year. The amount is not subject to a substantial risk of forfeiture and does not qualify as performance-based compensation as described in § 1.409A-1(e). If Employee C elects to defer the payment of the bonus with respect to services rendered during calendar year 2008, Employee C must elect the time and form of payment not later than December 31, 2007, to satisfy the requirements of this section.

Example 4. Initial election to defer bonus payable based on services during fiscal year other than calendar year. Employer WW has a taxable year ending September 30. Employee D participates in a bonus plan under which Employee D is entitled to a bonus for services performed during Employer WW's fiscal year that, absent an election by Employee D, will be paid on December 15 of the calendar year in which the fiscal year ends. The amount is not subject to a substantial risk of forfeiture and does not qualify as performance-based compensation as described in § 1.409A-1(e). The amount qualifies as fiscal year compensation. If Employee D elects to defer the payment of the amount related to the fiscal year ending September 30, 2009, to satisfy the requirements of this section Employee D must elect the time and form of payment not later than September 30, 2008.

Example 5. Initial election to defer bonus payable only if service provider completes at least 12 months of services after the election. Employer VV has a calendar year taxable year. On March 1, 2008, Employer VV grants Employee E a \$10,000 bonus, payable on March 1, 2010 (with reasonable interest), provided that Employee E continues performing services as an employee of Employer VV through March 1, 2010. The amount does not qualify as performance-based compensation as described in § 1.409A-1(e), and Employee E already participates in another account balance non-qualified deferred compensation plan. Employee E may make an initial deferral election on or before March 31, 2008 (within 30 days after obtaining a legally binding right), because at least 12 months of additional services are required after the date of election for the risk of forfeiture to lapse.

Example 6. Initial election to defer bonus that would otherwise constitute a short-term deferral. The same facts as Example 5, except that Employee E does not make an initial deferral election on or before March 31, 2008. Because the right to the compensation would not be treated as a deferral of compensation pursuant to § 1.409A-1(b)(4) absent a deferral election (because the arrangement would be treated as a short-term deferral), Employee

E may make an initial deferral election provided that the election may not become effective for 12 months and must defer the payment at least 5 years from March 1, 2010 (the first date the payment could become substantially vested). Accordingly, Employee E may make an election before March 1, 2009, provided that the election defers the payment to a date on or after March 1, 2015 (other than a payment due to death, disability, unforeseeable emergency, or a change in control event).

Example 7. Initial election to defer sales commissions. Employer UU has a calendar year taxable year. As part of Employee F's services for Employer UU, Employee F sells refrigerators to customers unrelated to Employee F or Employer UU. Under the employment arrangement, Employee F is entitled to 10% of the sales price of any refrigerator Employee F sells, payable only upon the receipt of payment from the customer who purchased the refrigerator. For purposes of the initial deferral rule, Employee F is treated as performing the services related to each refrigerator sale in the calendar year in which each customer pays for the refrigerator.

Example 8. Initial election to defer renewal sales commissions. The same facts as *Example 7*, except that Employee F also sells warranties related to the refrigerators sold. Under the warranty arrangement, refrigerator warranty customers are entitled in a future year to extend the warranty for an additional cost to be paid at the time of the extension. Under Employee F's arrangement with Employer UU, Employee F is entitled to 10% of the amount paid for an extension of any warranty, payable upon the receipt of payment from the customer extending the warranty. For purposes of the initial deferral election rule, Employee F is treated as performing the services related to the amount paid for the extension of the warranty in the taxable year in which the customer pays for the warranty extension.

Example 9. Initial election to defer investment commissions. Employer TT is in the trade or business of managing financial assets for customer accounts. Customers who deposit funds in an account with Employer TT are entitled to remove the account balance of such account upon 60 days notice to Employer TT. Employee G sells financial products and provides continuing customer service to certain unrelated customers involving the deposit and maintenance of funds in customer accounts managed by Employer TT. Under the employment arrangement, Employee G is entitled to a set percentage of the aggregate value of the assets held in the accounts of customers to whom Employee G sold financial products and provides customer service. Under the arrangement, the aggregate value of the assets held in the accounts is determined as of June 30 of each

year, and unless Employee G elects to defer the payment, the amount is payable to Employee G in a lump sum on December 31 of the year in which the valuation is made. Employee G has no control over the valuation of the assets held in the accounts, or the calculation of the amount due Employee G. For purposes of the initial deferral rule, Employee G is treated as providing the services to which a payment relates during the July 1 through June 30 period ending on the June 30 date as of which the assets held in the account are valued.

Example 10. Initial election to defer part-year compensation. Employee H provides services as a teacher to Employer SS, a school system. The period of services routinely begins on the second Monday of August of one year and ends on the first Friday of June of the subsequent year. Employer SS provides an election to Employee H to receive the compensation for the period of services ratably over the period beginning on the second Monday of August of one year and ending on the last day of August of the subsequent year. Because the compensation constitutes recurring part-year compensation, as defined in paragraph (a)(14) of this section, and because the schedule will provide that all of the recurring part-year compensation is paid no later than September 30 of the subsequent year, Employee H will be deemed to have made a timely deferral election with respect to such recurring part-year compensation if Employee H elects before the first day of the service period to have the recurring part-year compensation paid under such schedule.

Example 11. Initial election to defer negotiated separation pay. Employer RR decides to terminate Employee J's employment involuntarily. As part of the process of terminating Employee J, Employer RR enters into bona fide, arm's length negotiations with respect to the terms of Employee J's termination of employment. As part of the process, Employer RR offers Employee J an amount that is in addition to any amounts to which Employee J is otherwise entitled, payable either as a lump sum payment at the end of 3 years or in 3 annual payments starting at the date of termination of employment. The election of the time and form of payment by Employee J may be made at any time before Employee J accepts the offer and obtains a legally binding right to the additional amount. The election may not apply to any amount to which Employee J already had a legally binding right.

Example 12. Election of time and form of payments under a window program. Employer QQ establishes a window program, as defined in §1.409A-1(b)(9)(vi). Individuals who elect to terminate employment under the window program are entitled to receive an amount equal to 2 weeks pay multiplied by every year of service with Employer QQ. The individuals participating in the window program

may elect to receive the payment as either a lump sum payment payable on the first day of the month after making the election to participate in the window program, or as a payment of 3 equal annual installments on each January 1 of the first 3 years following the election to participate in the window program. Employee K is eligible to participate in the window program. Employee K will be treated as making a timely deferral election if the election as to the time and form of payment is made on or before the date Employee K's election to participate in the window program becomes irrevocable.

Example 13. Initial election to defer salary earned during final payroll period beginning in one calendar year and ending in the subsequent calendar year. Employer PP pays the salary of its employees, including Employee L, on a bi-weekly basis. One bi-weekly payroll period runs from December 24, 2008, through January 6, 2009, with a scheduled payment date of January 13, 2009. Employer PP sponsors, and Employee L participates in, a nonqualified deferred compensation plan under which Employee L may defer a specified percentage of his annual salary. The plan does not specify that any salary compensation paid for the payroll period in which falls January 1 is to be treated as compensation for services performed during the year preceding the year in which falls that January 1. For purposes of applying the initial deferral election rules, Employee L is deemed to have performed the services for the payroll period December 24, 2008, through January 6, 2009, during the calendar year 2009.

Example 14. Application of deferral election rules and anti-acceleration rules to a nonqualified deferred compensation plan linked to a qualified plan. Employee M participates in a qualified retirement plan that is a defined benefit plan that offers a subsidized early retirement benefit to employees who have attained age 55 and completed 30 years of service. Employee M, who has attained age 55 and completed 30 years of service, also participates in a nonqualified deferred compensation plan, under which the benefit payable is calculated under a formula, with that benefit then reduced by any benefit that Employee M has accrued under the qualified retirement plan. In 2008, Employee M fails to elect the subsidized early retirement benefit under the qualified retirement plan, with the effect that the amounts payable under the nonqualified deferred compensation plan are increased by an amount equal to the reduction in the benefit payable under the qualified plan. In 2009, Employer NN amends the qualified retirement plan to increase benefits under the plan, resulting in a decrease in the amounts payable under the nonqualified deferred compensation plan equal to the increase in the benefit payable under the qualified plan. Neither of these actions constitutes a deferral election or an accelera-

tion of a payment under the nonqualified deferred compensation plan.

Example 15. Subsequent deferral election. Employee N participates in a nonqualified deferred compensation plan. Employee N elects to be paid in a lump sum payment at the earlier of age 65 or separation from service. Employee N anticipates that he will work after age 65, and wishes to defer payment to a later date. Provided that Employee N continues in employment and makes the election by his 64th birthday, Employee N may elect to receive a lump sum payment at the earlier of age 70 or separation from service.

Example 16. Subsequent deferral election rule—change in form of payment from lump sum payment to life annuity. Employee P participates in a nonqualified deferred compensation plan. Employee P elects to be paid in a lump sum payment at age 65. Employee P wishes to change the payment form to a life annuity. Provided that Employee P makes the election on or before his 64th birthday, Employee P may elect to receive a life annuity commencing at age 70.

Example 17. Subsequent deferral election rule—change in form of payment from life annuity to lump sum payment. Employee Q participates in a nonqualified deferred compensation plan. Employee Q elects to be paid in a life annuity at age 65. Employee Q wishes to change the payment form to a lump sum payment. Provided that Employee Q makes the election on or before his 64th birthday, Employee Q may elect to receive a lump sum payment at age 70.

Example 18. Subsequent deferral election rule—installment payments designated as separate payments. Employee R, whose taxable year is the calendar year, participates in a nonqualified deferred compensation plan that provides for payment in a series of 5 equal annual amounts, each designated as a separate payment. The first payment is scheduled to be made on January 1, 2010. Provided that Employee R makes the election on or before January 1, 2009, Employee R may elect for the first payment scheduled to be made on January 1, 2010, to be made on January 1, 2015. If Employee R makes that election, but does not elect to defer the remaining payments, the remaining payments continue to be due upon January 1 of the 4 consecutive calendar years commencing on January 1, 2011.

Example 19. Subsequent deferral election rule—change in form of payment from installment payments not designated as separate payments to lump sum payment. Employee S participates in a nonqualified deferred compensation plan that provides for payment in a series of 5 equal annual amounts that are not designated as a series of 5 separate payments. The first amount is scheduled to be paid on January 1, 2010. Employee S wishes to receive the entire amount equal to the sum of all 5 of the amounts to be paid as a

lump sum payment. Provided that Employee S makes the election on or before January 1, 2009, Employee S may elect to receive a lump sum payment on or after January 1, 2015.

Example 20. Subsequent deferral election rule—change in form of payment from installment payments designated as separate payments to lump sum payment. Employee T participates in a nonqualified deferred compensation plan that provides for payment in a series of 5 equal annual amounts each of which is designated as a separate payment. The first amount is scheduled to be paid on January 1, 2010. Employee T wishes to receive the entire amount equal to the sum of all 5 of the amounts in a single lump sum payment. Provided that Employee T makes the election on or before January 1, 2009, Employee T may elect to receive a lump sum payment on or after January 1, 2019.

Example 21. Subsequent deferral election rule—change in form of payment from one life annuity form to another life annuity form. Employee U participates in a nonqualified deferred compensation plan that permits Employee U to elect before Employee U's separation from service whether to be paid in the form of a single life annuity beginning on the first day of the month following Employee U's separation from service, or an annuity beginning on the first day of the month following Employee U's separation from service under which annuity payments continue for Employee U's lifetime but not less than 10 years. The two types of annuities are actuarially equivalent at all times applying reasonable actuarial methods and assumptions. For purposes of this section, the two types of annuities are treated as a single form of payment. Accordingly, the election provided under the plan is not treated as providing a subsequent deferral election or accelerated payment, and an election by Employee U under the plan between the two annuity options made before the first scheduled payment date for an annuity payment is not treated as a subsequent deferral election or an acceleration of a payment.

Example 22. Subsequent deferral election rule—change in time of payment from payment at specified age to payment at later of specified age or separation from service. Employee V participates in a nonqualified deferred compensation plan that provides for a lump sum payment at age 65. Employee V wishes to modify the plan so that the deferred amount will be payable upon the later of Employee V's attainment of a specified age or separation from service. Provided that Employee V makes such election on or before his 64th birthday, Employee V may modify the plan so Employee V will receive a lump sum payment upon the later of age 70 or separation from service.

Example 23. Subsequent deferral election rule—change in time of payment from payment at separation from service to payment at later of

separation from service or specified age. Employee W participates in a nonqualified deferred compensation plan that provides for a lump sum payment at separation from service. Employee W wishes to make the payment payable upon the later of separation from service or a predetermined age. Provided that Employee W makes such election on or before the date 1 year before a separation from service, Employee W may elect to receive a lump sum payment upon the later of the date 5 years following a separation from service or at a specified age.

Example 24. Subsequent deferral election rule—change in time of payment from payment at separation from service to payment at a change in control event. Employee X participates in a nonqualified deferred compensation plan that provides for a lump sum payment at separation from service. Employee X wishes to change the payment provision such that the payment is payable upon a change in control event. A change in the distribution provision to provide for a payment only upon a change in control event will violate the rules governing payment provisions, because the change could result in an acceleration if the change in control event occurs before Employee X separates from service, or a subsequent deferral if the change in control does not occur until after Employee X separates from service. However, provided that Employee X makes such election on or before the date 1 year before a separation from service, Employee X may elect to receive a payment upon the later of a change in control event or 5 years following a separation from service.

(c) *Special rules for certain resident aliens.* For the first taxable year of an individual in which such individual is a resident alien, a nonqualified deferred compensation plan is deemed to meet the requirements of paragraph (a) of this section if, with respect to compensation payable for services performed during that first taxable year or with respect to compensation the right to which is subject to a substantial risk of forfeiture as of the first day of that first taxable year, an initial deferral election is made by the end of such first taxable year, provided that the initial deferral election may not apply to amounts that have already been paid or made available to the service provider before the election is made. For any year after the first taxable year in which an individual is classified as a resident alien, this paragraph (c) does not apply, provided that a taxable year may again be treated as

the first taxable year in which an individual is classified as a resident alien if such individual is classified as a resident alien in that taxable year and has not been classified as a resident alien for the three consecutive taxable years immediately preceding that taxable year.

[T.D. 9321, 72 FR 19276, Apr. 17, 2007; 72 FR 41621, July 31, 2007]

§ 1.409A-3 Permissible payments.

(a) *In general.* The requirements of section 409A(a)(2)(A) are met only if the plan provides that an amount of deferred compensation under the plan may be paid only upon an event or at a time set forth in this paragraph (a):

(1) The service provider's separation from service (as defined in § 1.409A-1(h) and in accordance with paragraph (i)(2) of this section).

(2) The service provider becoming disabled (in accordance with paragraph (i)(4) of this section).

(3) The service provider's death.

(4) A time or a fixed schedule specified under the plan (in accordance with paragraph (i)(1) of this section).

(5) A change in the ownership or effective control of the corporation, or in the ownership of a substantial portion of the assets of the corporation (in accordance with paragraph (i)(5) of this section).

(6) The occurrence of an unforeseeable emergency (in accordance with paragraph (i)(3) of this section).

(b) *Designation of payment upon a permissible payment event.* Except as otherwise specified in this section, a plan provides for the payment upon an event described in paragraph (a)(1), (2), (3), (5), or (6) of this section if the plan provides the date of the event is the payment date, or specifies another payment date that is objectively determinable and nondiscretionary at the time the event occurs. A plan may also provide that a payment upon an event described in paragraph (a)(1), (2), (3), (5), or (6) of this section is to be made in accordance with a schedule that is objectively determinable and nondiscretionary based on the date the event occurs and that would qualify as a fixed schedule under paragraph (i)(1) of this section if the payment event were instead a fixed date, provided that the

schedule must be fixed at the time the permissible payment event is designated. In addition, a plan may provide that a payment, including a payment that is part of a schedule, is to be made during a designated taxable year of the service provider that is objectively determinable and nondiscretionary at the time the payment event occurs such as, for example, a schedule of three substantially equal payments payable during the first three taxable years following the taxable year in which a separation from service occurs. A plan may also provide that a payment, including a payment that is part of a schedule, is to be made during a designated period objectively determinable and nondiscretionary at the time the payment event occurs, but only if the designated period both begins and ends within one taxable year of the service provider or the designated period is not more than 90 days and the service provider does not have a right to designate the taxable year of the payment (other than an election that complies with the subsequent deferral election rules of § 1.409A-2(b)). Where a plan provides for a period of more than one day following a payment event during which a payment may be made, such as within 90 days following the date of the event, the payment date for purposes of the subsequent deferral rules under § 1.409A-2(b) is treated as the first possible date upon which a payment could be made under the terms of the plan. A plan may provide for payment upon the earliest or latest of more than one event or time, provided that each event or time is described in paragraphs (a)(1) through (6) of this section. For examples illustrating the provisions of this paragraph, see paragraph (i)(1)(vi) of this section.

(c) *Designation of alternative specified dates or payment schedules based upon date of permissible event.* Except as otherwise provided in this paragraph (c), for an amount of deferred compensation under a plan, the plan may designate only one time and form of payment upon the occurrence of each event described in paragraph (a)(1), (2),