“(A) The amendments made by paragraph (1)(A) and (3) [amending this section and sections 1022 and 4975 of this title] shall take effect on the date of the enactment of this Act (Oct. 22, 1981).

“(B) The amendments made by subparagraphs (B), (C), and (D) of paragraph (1) [amending this section] shall apply after December 31, 1986, to stock acquired after December 31, 1979.”

**Effective Date of 1984 Amendment**

Amendment by section 474(r)(15) of Pub. L. 98-369 applicable to taxable years beginning after Dec. 31, 1980, and to carrybacks from such years, see section 475(a) of Pub. L. 98-369, set out as a note under section 21 of this title.


**Effective Date of 1983 Amendment**

Amendment by Pub. L. 97-448 effective, except as otherwise provided, as if it had been included in the provision of the Internal Revenue Code of 1981, Pub. L. 97-34, to which such amendment relates, see section 109 of Pub. L. 97-448, set out as a note under section 1 of this title.

**Effective Date of 1981 Amendment**

Amendment by section 331(c)(1) of Pub. L. 97-34 applicable to taxable years ending after Dec. 31, 1982, see section 331(c)(2) of Pub. L. 97-34, set out as a note under section 404 of this title.


**Effective Date of 1980 Amendments**

Section 224(b) of Pub. L. 96-605 provided that: “The amendment made by subsection (a) [amending this section] shall apply with respect to qualified investment for taxable years beginning after December 31, 1979.” Amendment by Pub. L. 96-222 effective, except as otherwise provided, as if it had been included in the provisions of the Revenue Act of 1978, Pub. L. 95-600, to which such amendment relates, see section 201 of Pub. L. 96-222, set out as a note under section 32 of this title.

**Effective Date**


“(1) In General.—Except as otherwise provided in this subsection and subsection (h) [set out as an Effective Date of 1976 Amendment note under section 4955 of this title], the amendments made by this section [amending sections 409A (now 409) and 6091 of this title and amending sections 46, 48, 50, 50A, 50, 410, 411, 415, 416, 418, and 4955 of this title] shall apply with respect to qualified investment for taxable years beginning after December 31, 1978.

“(2) Election to Have Amendments Apply During 1978.—At the election of the taxpayer, paragraph (1) shall be applied by substituting ‘December 31, 1977’ for ‘December 31, 1978’; except that in the case of a plan in existence before December 31, 1978, any such election shall not affect the required allocation of employer securities attributable to qualified investment for taxable years beginning before January 1, 1979. An election under the preceding sentence shall be made at such time and in such manner as the Secretary of the Treasury or his delegate shall prescribe. Such an election, once made, shall be irrevocable.

“(4) Right to Demand Employer Securities, Etc.—Paragraphs (1)(A) and (2) of section 409A(h) of the Internal Revenue Code of 1986 (as added by subsection (a)) (now section 409A) shall apply to distributions after December 31, 1978, made by a plan to which section 409A of such Code applies.

“(5) Subsection (f)(7).—The amendment made by subsection (f)(7) [amending section 415 of this title] shall apply to years beginning after December 31, 1978.

“(6) Retroactive Application of Amendment Made by Subsection (d).—In determining the regular tax deduction under section 56(c) of the Internal Revenue Code of 1986 for any taxable year beginning before January 1, 1979, the amount of the credit allowable under section 38 of such Code shall be determined without regard to section 46(a)(2)(B) of such Code (as in effect before the enactment of the Energy Tax Act of 1978 [Nov. 9, 1978]).”

**Plan Amendments Not Required Until January 1, 1989**

For provisions directing that if any amendments made by subtitle A or subtitle C of title XI [§§ 1101–1147] and title XVIII [§§ 1800–1899A] of Pub. L. 95-600 require an amendment to any plan, such plan amendment shall not be required to be made before the first plan year beginning on or after Jan. 1, 1989, see sections 1140 of Pub. L. 99-514, as amended, set out as a note under section 401 of this title.

§ 409A. Inclusion in gross income of deferred compensation under nonqualified deferred compensation plans

(a) Rules relating to constructive receipt

(1) Plan failures

(A) Gross income inclusion

(i) In general

If at any time during a taxable year a nonqualified deferred compensation plan—(I) fails to meet the requirements of paragraphs (2), (3), and (4), or (II) is not operated in accordance with such requirements,

all compensation deferred under the plan for the taxable year and all preceding taxable years shall be includible in gross income for the taxable year to the extent not subject to a substantial risk of forfeiture and not previously included in gross income.

(ii) Application only to affected participants

Clause (i) shall only apply with respect to all compensation deferred under the plan for participants with respect to whom the failure relates.

(B) Interest and additional tax payable with respect to previously deferred compensation

(i) In general

If compensation is required to be included in gross income under subparagraph (A) for a taxable year, the tax imposed by
(2) Distributions

(A) In general

The requirements of this paragraph are met if the plan provides that compensation deferred under the plan may not be distributed earlier than—

(i) separation from service as determined by the Secretary (except as provided in subparagraph (B)(i)),

(ii) the date the participant becomes disabled (within the meaning of subparagraph (C)),

(iii) death,

(iv) a specified time (or pursuant to a fixed schedule) specified under the plan at the date of the deferral of such compensation,

(v) to the extent provided by the Secretary, 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, or

(vi) the occurrence of an unforeseeable emergency.

(B) Special rules

(i) Specified employees

In the case of any specified employee, the requirement of subparagraph (A)(i) is met only if distributions may not be made before the date which is 6 months after the date of separation from service (or, if earlier, the date of death of the employee).

For purposes of the preceding sentence, a specified employee is a key employee (as defined in section 152(a)) of the participant, a dependent (as defined in section 152(a)) of the participant, the participant’s spouse, or a dependent (as defined in section 152(a)) of the participant, loss of the participant’s property due to casualty, or other similar extraordinary and unforeseeable circumstances arising as a result of events beyond the control of the participant.

(ii) Unforeseeable emergency

For purposes of subparagraph (A)(vi)—

(I) the amount of interest determined under clause (ii), and

(II) an amount equal to 20 percent of the amount includible in gross income for the taxable year in which first deferred or, if later, the first taxable year in which such deferred compensation is not subject to a substantial risk of forfeiture.

(ii) Interest

For purposes of clause (i), the interest determined under this clause for any taxable year is the amount of interest at the underpayment rate plus 1 percentage point on the underpayments that would have occurred had the deferred compensation been includible in gross income for the taxable year in which first deferred or, if later, the first taxable year in which such deferred compensation is not subject to a substantial risk of forfeiture.

(3) Acceleration of benefits

The requirements of this paragraph are met if the plan does not permit the acceleration of the time or schedule of any payment under the plan, except as provided in regulations by the Secretary.

(4) Elections

(A) In general

The requirements of this paragraph are met if the participant—

(i) is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or can be expected to last for a continuous period of not less than 12 months, or

(ii) is, by reason of any medically determinable physical or mental impairment which 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.

(B) Initial deferral decision

(i) In general

The requirements of this subparagraph are met if the plan provides that compensation for services performed during a taxable year may be deferred at the participant’s election only if the election to defer such compensation is made not later than the close of the preceding taxable year or at such other time as provided in regulations.

(ii) First year of eligibility

In the case of the first year in which a participant becomes eligible to participate
in the plan, such election may be made with respect to services to be performed subsequent to the election within 30 days after the date the participant becomes eligible to participate in such plan.

(ii) Performance-based compensation

In the case of any performance-based compensation based on services performed over a period of at least 12 months, such election may be made no later than 6 months before the end of the period.

(C) Changes in time and form of distribution

The requirements of this subparagraph are met if, in the case of a plan which permits under a subsequent election a delay in a payment or a change in the form of payment—

(i) the plan requires that such election may 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 clause (i), (iii), or (vi) of paragraph (2)(A), the plan requires that the payment with respect to which such election is made be deferred for a period of not less than 5 years from the date such payment would otherwise have been made, and

(iii) the plan requires that any election related to a payment described in paragraph (2)(A)(iv) may not be made less than 12 months prior to the date of the first scheduled payment under such paragraph.

(b) Rules relating to funding

(1) Offshore property in a trust

In the case of assets set aside (directly or indirectly) in a trust (or other arrangement determined by the Secretary) for purposes of paying deferred compensation under a nonqualified deferred compensation plan, for purposes of section 83 such assets shall be treated as property transferred in connection with the performance of services whether or not such assets are available to satisfy claims of general creditors.

(A) at the time set aside if such assets (or such trust or other arrangement) are located outside of the United States, or

(B) at the time transferred if such assets (or such trust or other arrangement) are subsequently transferred outside of the United States.

This paragraph shall not apply to assets located in a foreign jurisdiction if substantially all of the services to which the nonqualified deferred compensation relates are performed in such jurisdiction.

(2) Employer's financial health

In the case of compensation deferred under a nonqualified deferred compensation plan, there is a transfer of property within the meaning of section 83 with respect to such compensation as of the earlier of—

(A) the date on which the plan first provides that assets will become restricted to the provision of benefits under the plan in connection with a change in the employer's financial health, or

(B) the date on which assets are so restricted,

whether or not such assets are available to satisfy claims of general creditors.

(3) Treatment of employer's defined benefit plan during restricted period

(A) In general

If—

(i) during any restricted period with respect to a single-employer defined benefit plan, assets are set aside or reserved (directly or indirectly) in a trust (or other arrangement as determined by the Secretary) or transferred to such a trust or other arrangement for purposes of paying deferred compensation of an applicable covered employee under a nonqualified deferred compensation plan of the plan sponsor or member of a controlled group which includes the plan sponsor, or

(ii) a nonqualified deferred compensation plan of the plan sponsor or member of a controlled group which includes the plan sponsor provides that assets will become restricted to the provision of benefits under the plan to an applicable covered employee in connection with such restricted period (or other similar financial measure determined by the Secretary) with respect to the defined benefit plan, or assets are so restricted,

such assets shall, for purposes of section 83, be treated as property transferred in connection with the performance of services whether or not such assets are available to satisfy claims of general creditors. Clause (i) shall not apply with respect to any assets which are so set aside before the restricted period with respect to the defined benefit plan.

(B) Restricted period

For purposes of this section, the term “restricted period” means, with respect to any plan described in subparagraph (A)—

(i) any period during which the plan is in at-risk status (as defined in section 430(i));

(ii) any period the plan sponsor is a debtor or in a case under title 11, United States Code, or similar Federal or State law, and

(iii) the 12-month period beginning on the date which is 6 months before the termination date of the plan if, as of the termination date, the plan is not sufficient for benefit liabilities (within the meaning of section 401 of the Employee Retirement Income Security Act of 1974).

(C) Special rule for payment of taxes on deferred compensation included in income

If an employer provides directly or indirectly for the payment of any Federal, State, or local income taxes with respect to any compensation required to be included in gross income by reason of this paragraph—

(i) interest shall be imposed under subsection (a)(1)(B)(i)(I) on the amount of such payment in the same manner as if

1 So in original. The semicolon probably should be a comma.
such payment was part of the deferred compensation to which it relates,
(ii) such payment shall be taken into account in determining the amount of the additional tax under subsection (a)(1)(B)(i)(II) in the same manner as if such payment was part of the deferred compensation to which it relates, and
(iii) no deduction shall be allowed under this title with respect to such payment.

(D) Other definitions
For purposes of this section—
(i) Applicable covered employee
The term “applicable covered employee” means any—
(I) covered employee of a plan sponsor,
(II) covered employee of a member of a controlled group which includes the plan sponsor, and
(III) former employee who was a covered employee at the time of termination of employment with the plan sponsor or a member of a controlled group which includes the plan sponsor.

(ii) Covered employee
The term “covered employee” means an individual described in section 162(m)(3) or an individual subject to the requirements of section 16(a) of the Securities Exchange Act of 1934.

(4) Income inclusion for offshore trusts and employer’s financial health
For each taxable year that assets treated as transferred under this subsection remain set aside in a trust or other arrangement subject to paragraph (1), (2), or (3), any increase in value in, or earnings with respect to, such assets shall be treated as an additional transfer of property under this subsection (to the extent not previously included in income).

(5) Treatment of earnings
(a)(1) providing for the determination of amounts of deferral in the case of a nonqualified deferred compensation plan which is a defined benefit plan,
(b) relating to changes in the ownership and control of a corporation or assets of a corporation for purposes of subsection (a)(2)(A)(v),
(c) exempting arrangements from the application of subsection (b) if such arrangements

(c) No inference on earlier income inclusion or requirement of later inclusion
Nothing in this section shall be construed to prevent the inclusion of amounts in gross income under any other provision of this chapter or any other rule of law earlier than the time provided in this section. Any amount included in gross income under this section shall not be required to be included in gross income under any other provision of this chapter or any other rule of law later than the time provided in this section.

(d) Other definitions and special rules
For purposes of this section:
(1) Nonqualified deferred compensation plan
The term “nonqualified deferred compensation plan” means any plan that provides for the deferral of compensation, other than—
(A) a qualified employer plan, and
(B) any bona fide vacation leave, sick leave, compensatory time, disability pay, or death benefit plan.

(2) Qualified employer plan
The term “qualified employer plan” means—
(A) any plan, contract, pension, account, or trust described in subparagraph (A) or (B) of section 219(g)(5) (without regard to subparagraph (A)(ii)),
(B) any eligible deferred compensation plan (within the meaning of section 457(b), and
(C) any plan described in section 415(m).

(3) Plan includes arrangements, etc.
The term “plan” includes any agreement or arrangement, including an agreement or arrangement that includes one person.

(4) Substantial risk of forfeiture
The rights of a person to compensation are subject to a substantial risk of forfeiture if such person’s rights to such compensation are conditioned upon the future performance of substantial services by any individual.

(5) Treatment of earnings
References to deferred compensation shall be treated as including references to income (whether actual or notional) attributable to such compensation or such income.

(6) Aggregation rules
Except as provided by the Secretary, rules similar to the rules of subsections (b) and (c) of section 414 shall apply.

(e) Regulations
The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this section, including regulations—
(1) providing for the determination of amounts of deferral in the case of a nonqualified deferred compensation plan which is a defined benefit plan,
(2) relating to changes in the ownership and control of a corporation or assets of a corporation for purposes of subsection (a)(2)(A)(v),
(3) exempting arrangements from the application of subsection (b) if such arrangements
will not result in an improper deferral of United States tax and will not result in assets being effectively beyond the reach of creditors,

(4) defining financial health for purposes of subsection (b)(2), and

(5) disregarding a substantial risk of forfeiture in cases where necessary to carry out the purposes of this section.


REFERENCES TO TEXT


Section 16(a) of the Securities Exchange Act of 1934, referred to in subsec. (b)(3)(D)(ii), is classified to section 78a(a) of Title 15, Commerce and Trade.

PRIOR PROVISIONS

A prior section 409A was renumbered section 409 of this title.

AMENDMENTS


Subsec. (b)(4), (5). Pub. L. 109–280 redesignated pars. (3) and (4) as (4) and (5), respectively, and substituted "paragraph (1), (2), or (3)" for "paragraph (1) or (2)" wherever appearing.


EFFECTIVE DATE OF 2008 AMENDMENT

Amendment by Pub. L. 110–458 effective as included in the provisions of Pub. L. 109–280 to which the amendment relates, except as otherwise provided, see section 112 of Pub. L. 110–458, set out as a note under section 72 of this title.

EFFECTIVE DATE OF 2006 AMENDMENT

Pub. L. 109–280, title I, § 116(c), Aug. 17, 2006, 120 Stat. 858, provided that: "The amendments made by this section ['amending section 409A of the Internal Revenue Code of 1986] shall apply to any nonelective deferred compensation provided under the plan on or after the date of the adoption of the amendment.'

EFFECTIVE DATE OF 2005 AMENDMENT

Amendment by Pub. L. 109–135 effective as if included in the provision of the American Jobs Creation Act of 2004, Pub. L. 108–357, to which such amendment relates, see section 403(nn) of Pub. L. 109–135, set out as a note under section 26 of this title.

EFFECTIVE DATE

Pub. L. 109–135, title IV, § 403(hh)(3)(A), Dec. 21, 2005, 119 Stat. 2631, provided that: "(A) which was in existence on May 1, 2004, (B) which was providing nonelective deferred compensation described in such section 457(e)(12) on such date, and (C) which is established or maintained by an organization incorporated on July 2, 1974.

If, after May 1, 2004, a plan described in the preceding sentence adopts a plan amendment which provides a material change in the classes of individuals eligible to participate in the plan, this paragraph shall not apply to any nonelective deferred compensation provided under the plan on or after the date of the adoption of the amendment.'

APPLICABILITY OF AMENDMENTS BY SUBTITLES A AND B OF TITLE I OF PUB. L. 109–280


GUIDANCE RELATING TO CONFORMANCE WITH FUNDING RULES

Pub. L. 109–135, title IV, § 403(hh)(3)(B), Dec. 21, 2005, 119 Stat. 2631, provided that: "Not later than 90 days after the date of the enactment of this Act (Dec. 21, 2005), the Secretary of the Treasury shall issue guidance under which a nonqualified deferred compensation plan which is in violation of the requirements of section 409A(b) of such Code shall be treated as not having violated such requirements if such plan comes into conformance with such requirements during such limited period as the Secretary may specify in such guidance.'

GUIDANCE RELATING TO CHANGE OF OWNERSHIP OR CONTROL

Pub. L. 109–357, title VIII, § 885(e), Oct. 22, 2004, 118 Stat. 1640, provided that: "Not later than 90 days after the date of the enactment of this Act (Oct. 22, 2004), the Secretary of the Treasury shall issue guidance on what constitutes a change in ownership or effective control for purposes of section 409A of the Internal Revenue Code of 1986, as added by this section'.

GUIDANCE RELATING TO TERMINATION OF CERTAIN EXISTING ARRANGEMENTS

Pub. L. 109–357, title VIII, § 885(f), Oct. 22, 2004, 118 Stat. 1641, as amended by Pub. L. 109–135, title IV, § 403(hh)(4), Dec. 21, 2005, 119 Stat. 2632, provided that: "Not later than 60 days after the date of the enactment of this Act (Oct. 22, 2004), the Secretary of the Treasury shall issue guidance providing a limited period during which a nonqualified deferred compensation plan adopted before January 1, 2005, may, without violating the requirements of paragraphs (2), (3), and (4) of section 409A(a) of the Internal Revenue Code of 1986 (as added by this section), be amended—

"(1) to provide that a participant may terminate participation in the plan, or cancel an outstanding
deferral election with regard to amounts deferred after December 31, 2004, but only if amounts subject to the termination or cancellation are includible in income of the participant as earned (or, if later, when no longer subject to substantial risk of forfeiture), and
“(2) to conform to the requirements of such section 401A with regard to amounts deferred after December 31, 2004.”

SUBPART B—SPECIAL RULES

§ 410. Minimum participation standards
(a) Participation
(1) Minimum age and service conditions
(A) General rule
A trust shall not constitute a qualified trust under section 401(a) if the plan of which it is a part requires, as a condition of participation in the plan, that an employee complete a period of service with the employer or employers maintaining the plan extending beyond the later of the following dates—
(i) the date on which the employee attains the age of 21; or
(ii) the date on which he completes 1 year of service.

(B) Special rules for certain plans
(i) In the case of any plan which provides that after not more than 2 years of service each participant has a right to 100 percent of his accrued benefit under the plan which is nonforfeitable (within the meaning of section 411) at the time such benefit accrues, clause (ii) of subparagraph (A) shall be applied by substituting “2 years of service” for “1 year of service”.

(ii) In the case of any plan maintained exclusively for employees of an educational institution (as defined in section 170(b)(1)(A)(ii) by an employer which is exempt from tax under section 501(a) which provides that each participant having at least 1 year of service has a right to 100 percent of his accrued benefit under the plan which is nonforfeitable (within the meaning of section 411) at the time such benefit accrues, clause (i) of subparagraph (A) shall be applied by substituting “26” for “21”. This clause shall not apply to any plan to which clause (i) applies.

(2) Maximum age conditions
A trust shall not constitute a qualified trust under section 401(a) if the plan of which it is a part excludes from participation (on the basis of age) employees who have attained a specified age.

(3) Definition of year of service
(A) General rule
For purposes of this subsection, the term “year of service” means a 12-month period during which the employee has not less than 1,000 hours of service. For purposes of this paragraph, computation of any 12-month period shall be made with reference to the date on which the employee’s employment commenced, except that, under regulations prescribed by the Secretary of Labor, such computation may be made by reference to the first day of a plan year in the case of an employee who does not complete 1,000 hours of service during the 12-month period beginning on the date his employment commenced.

(B) Seasonal industries
In the case of any seasonal industry where the customary period of employment is less than 1,000 hours during a calendar year, the term “year of service” shall be such period as may be determined under regulations prescribed by the Secretary of Labor.

(C) Hours of service
For purposes of this subsection, the term “hour of service” means a time of service determined under regulations prescribed by the Secretary of Labor.

(D) Maritime industries
For purposes of this subsection, in the case of any maritime industry, 125 days of service shall be treated as 1,000 hours of service. The Secretary of Labor may prescribe regulations to carry out this subparagraph.

(4) Time of participation
A plan shall be treated as not meeting the requirements of paragraph (1) unless it provides that any employee who has satisfied the minimum age and service requirements specified in such paragraph, and who is otherwise entitled to participate in the plan, commences participation in the plan no later than the earlier of—
(A) the first day of the first plan year beginning after the date on which such employee satisfied such requirements, or
(B) the date 6 months after the date on which he satisfied such requirements, unless such employee was separated from the service before the date referred to in subparagraph (A) or (B), whichever is applicable.

(5) Breaks in service
(A) General rule
Except as otherwise provided in subparagraphs (B), (C), and (D), all years of service