



Section 409A Change-in-Control Payment Events

A Lexis Practice Advisor® Practice Note by
Alan M. Levine, Morrison Cohen LLP



Alan M. Levine

This practice note discusses the change-in-control events that can be used to trigger payment under a nonqualified deferred compensation (NQDC) arrangement that is subject to I.R.C. § 409A and its implementing regulations (Section 409A). Section 409A governs the federal tax treatment of a wide variety of NQDC arrangements, which are generally defined as any legally binding compensation arrangement where payment is or can be made in a taxable year after the taxable year in which the arrangement is created. The strict rules regarding the time and form of payment of NQDC arrangements subject to Section 409A limit distributions to six permissible payment events, including the change-in-control events described in this practice note. As a result, if the NQDC arrangement (1) is subject to Section 409A (referred to here as a 409A arrangement), and (2) has a payment trigger that includes a change-in-control event, then the 409A arrangement must use a definition of change in control that meets the requirements of Section 409A (referred to here as a permissible or 409A change-in-control event). Otherwise there would be significant adverse tax consequences for the employee (or other service provider).

If the NQDC arrangement were not subject to Section 409A (due to the arrangement being exempt by always being subject to a substantial risk of forfeiture by the employee (or other service provider) or by taking advantage of the short-term deferral rule), it would not need to comply with these change-in-control rules. For more information on how to qualify for an exemption from Section 409A's change-in-control rules by structuring payment schedules to comply with these exemptions, see *Taxation of Compensation and Benefits* P 20.09.

Section 409A issues should be considered in advance of granting change-in-control agreements or plans, when administering agreements and plans that are subject to Section 409A, and during the due diligence process in the context of corporate transactions to identify potential noncompliance issues.

This practice note covers:

- Determination of the Relevant Corporation
- Types of Permissible and Impermissible Change-in-Control Payment Events
- Rules Related to the Timing and Distribution of Change-in-Control Payments

For more information on I.R.C. § 409A generally, see [Understanding Nonqualified Deferred Compensation Arrangements and Internal Revenue Code Section 409A](#). For more information on permissible distributions under Section 409A, see *Employee Compensation and Benefits Tax Guide* P 1403, § 1403.2.



DETERMINATION OF THE RELEVANT CORPORATION

The first step in determining whether or not you have a permissible change-in-control event is to identify the relevant corporation that is the target of the event. The relevant corporation under Section 409A is generally the entity (the so-called service recipient) for which the employee (or other service provider) actually provides services or an entity in the chain of corporations that includes the service recipient. However, not all members of the service recipient's affiliated group are included. Specifically, a 409A change-in-control event must relate to one of the following:

- The corporation for whom the employee (or other service provider) is performing services at the time of the change-in-control event
- The corporation that is liable for the payment of the deferred compensation (or all corporations liable for the payment if more than one corporation is liable), but only if the reason for making such corporation(s) liable is not to avoid payment of federal income taxes, and either:
 - The deferred compensation is for services that the employee (or other service provider) performed for such corporation(s) –or–
 - There is a bona fide business purpose for such corporation(s) to be liable for such payment
- A corporation that owns more than 50% of the total fair market value and total voting power of a corporation described in either of the first two bullets (a majority shareholder), or any corporation in a chain of corporations in which each corporation is a majority shareholder of another corporation in the chain, ending in a corporation described in either of the first two bullets

26 C.F.R. § 1.409A-3(i)(5)(ii).

Examples. The following examples illustrate the above rules, assuming in all cases that Corporation C is solely liable for payment of the deferred compensation:

- Corporation A is a majority shareholder of Corporation B, which in turn is a majority shareholder of Corporation C, which is the service recipient. Under these facts, the 409A arrangement of Corporation C could provide for a distribution on a 409A change-in-control event linked to the ownership of Corporation A, even though Corporation A's indirect ownership of Corporation C may be a minority interest.
- Using the same facts as in the above example, except that Corporation B also is a majority shareholder of Corporation D. Under these facts, the 409A arrangement of Corporation C could not provide for a distribution on a 409A change-in-control event linked to the ownership of Corporation D.
- Using the same facts as in the above examples, except that Corporation B owns 51% of the total voting power of Corporation C, but only 49% of its total fair market value. As a result, Corporation B is not a majority shareholder of Corporation C. Under these facts, the 409A arrangement of Corporation C could not provide for a distribution on a 409A change-in-control event linked to the ownership of Corporation B, even though Corporation B has the same voting rights as in the first example, and is the owner of a higher proportion of the total fair market value of Corporation C than Corporation A had in the first example.
- Corporation C is a majority shareholder of Corporation E. A disposition of Corporation C's stock in Corporation E would not constitute a 409A change-in-control event of Corporation C for a 409A arrangement of Corporation C, but could potentially represent a 409A change-in-control event with respect to Corporation C's assets. (See "Change in the Ownership of a Substantial Portion of a Corporation's Assets," below.)

Corporate Status

By its terms, Section 409A only refers to corporations when defining the relevant corporation, so partnerships, limited liability companies, and other non-corporate entities are not specifically addressed. In the preamble to the proposed regulations under I.R.C. § 409A (issued in late 2005), the Treasury Department and IRS stated that they plan to issue regulations under I.R.C. § 409A(a)(3) that will allow the acceleration of payments upon a change in the ownership of an entity taxed as a partnership or in the ownership of a substantial portion of the assets of such entity. To date, no such guidance has been issued. In the meantime, the proposed regulations state that the current Section 409A rules regarding permissible payments upon a change-in-control event may be applied by analogy to partnerships and other non-corporate entities that are taxed as partnerships. The only modification is that references to a majority shareholder will refer to a partner that (1) owns more than 50% of the capital and profits interests of such partnership and (2) either alone or together with others is vested with the continuing exclusive authority to make the management decisions necessary to conduct the business for which the partnership was formed. 70 Fed. Reg. 57,930, 57,948 (Oct. 4, 2005).

TYPES OF PERMISSIBLE AND IMPERMISSIBLE CHANGE-IN-CONTROL PAYMENT EVENTS

The next step in determining whether you have a permissible change-in-control event is to determine whether or not there is a permissible trigger with respect to the relevant corporation.

There are only three types of permissible change-in-control payment events. These are:

- **Change in the ownership of a corporation** (e.g., the sale of a corporation or merger with an unrelated corporation in which the target corporation's stock remains outstanding after the change-in-control event)
- **Change in the effective control of a corporation** (e.g., a change in the majority-owned shareholders or a change in the constitution of the board of directors of the corporation)
- **Change in the ownership of a substantial portion of a corporation's assets**

26 C.F.R. § 1.409A-3(i)(5)(v), (vi), (vii).

Section 409A provides definitions of each type of event (discussed below), which contain certain minimum threshold percentages that a 409A arrangement must use to determine whether an applicable change in control has occurred. The event constituting the change in control also must be objectively determinable, and any requirement that any person certify that the event is an applicable change in control must be ministerial and not involve any discretionary authority. For a description of the rules regarding the ability of a relevant corporation to terminate a 409A arrangement on a 409A change-in-control event and make payment under that arrangement, see [Plan Terminations under Section 409A Checklist](#).

A plan does not have to provide for payment on all permissible change-in-control events, as long as the events that are used are compliant. Also, the permissible percentages for 409A change-in-control events are the minimum requirements that are necessary to comply with Section 409A. You can always make the triggers more difficult to satisfy or include more stringent requirements, as long as the percentage(s) or requirement(s) are set forth in the plan no later than the date by which the time and form of payment must be established under Section 409A (generally, when the plan is established or the award granted, whichever is later).

For 409A arrangements that contain terms related to change-in-control events that are ambiguous or undefined, the IRS has provided guidance stating that any such terms will be interpreted consistently with the change-in-control definitions provided in Section 409A, as long as there is a so-called Section 409A savings clause contained in the arrangement and it does not expressly contain events that would not otherwise be impermissible under Section 409A. Absent a savings clause, if the 409A arrangement has been interpreted in a manner that is

compliant with Section 409A and the ambiguous or undefined terms were not intentionally used (and still does not contain events that would not otherwise be impermissible under Section 409A), it may also be possible to avoid penalty. I.R.S. Notice 2010-6, 2010-1 C.B. 275 (Section IV.B).

However, there are many examples of impermissible change-in-control payment events. These include:

- Shareholder approval of a transaction (even if the transaction would otherwise constitute a permissible change-in-control event)
- A corporation's filing for Chapter 11 bankruptcy
- Obtaining financing for the corporation
- An initial public offering (IPO) that does not otherwise constitute a permissible change-in-control event
- A change in the ownership, change in the effective control, or change in the ownership of a substantial portion of the assets of, a corporation, as defined under I.R.C. § 280G and 26 C.F.R. 1.280G-1 (Section 280G). For a comparison of the change-in-control event definitions under Sections 280G and 409A, see [Section 280G/409A Change-In-Control Event Comparison Chart](#). (For more information on Section 280G generally, see [IRC Sections 280G and 4999: Understanding the Excise Tax and Lost Tax Deduction for Excess Change-in-Control Compensation](#) and Executive Compensation § 9.05.)

Change in the Ownership of a Corporation

A change in the ownership of a corporation occurs when a person (or persons acting as a group, as described below) acquires (by transfer or issuance) stock that, together with stock already owned by such person or group, constitutes more than 50% of the total fair market value or total voting power of the stock of the corporation. 26 C.F.R. § 1.409A-3(i)(5)(v)(A). As noted above, the more than 50% trigger can be increased to any greater percentage in order to achieve the goals of the 409A arrangement. This payment trigger applies only where there is a transfer (or issuance) of a corporation's stock and that stock remains outstanding after the transaction, and it does not apply to asset sales.

Change in the Effective Control of a Corporation

Notwithstanding that a corporation has not undergone a change in its ownership under the above rule, a change in the effective control of a corporation occurs on the date that:

- Any person (or more than one person acting as a group) acquires (or has acquired during the 12-month period ending on the date of the most recent acquisition by such person or persons) ownership of stock of the corporation possessing 30% or more of the total voting power of the stock of such corporation (note that the Section 280G threshold is 20%) –or–
- A majority of the members of the corporation's board of directors are replaced during any 12-month period by directors whose appointment or election is not endorsed by a majority of the members of the corporation's board of directors before the date of the appointment or election

26 C.F.R. § 1.409A-3(i)(5)(vi)(A). Similar to the rules on changes in ownership, any greater percentages of ownership or board membership may be used.

When identifying the relevant corporation for purposes of determining whether a change in the effective control of a corporation (described below), the relevant corporation is only the corporation in which no other corporation is a majority shareholder. 26 C.F.R. § 1.409A-3(i)(5)(vi)(A)(2). Because of this special rule, you would generally only look to a parent corporation to determine whether a change in effective control has occurred (although there is some ambiguity regarding whether this rule applies to both the 30% change and the change in the composition

of the board). Also, a change in effective control may occur in a transaction in which another corporation involved in the transaction has a change in ownership or a change in the ownership of a substantial portion of the corporation's assets. This means that two or more corporations can have a 409A change-in-control event arising from the same transaction.

Change in the Ownership of a Substantial Portion of a Corporation's Assets

A change in the ownership of a substantial portion of a corporation's assets occurs if one unrelated person (or more than one unrelated person acting as a group) acquires within a 12-month period, assets (including stock or other assets) from the business that have a total gross fair market value equal to 40% or more of the total gross fair market value of all of the assets of the business immediately before such acquisition or acquisitions. 26 C.F.R. § 1.409A-3(i)(5)(vii)(A). (The threshold percentage under Section 280G is 33 1/3%.) For this purpose, gross fair market value is the value of the stock or other assets determined without regard to any liabilities associated with such assets. In addition, a deemed asset sale under I.R.C. § 338 is not a sale or disposition of assets for purposes of Section 409A under proposed regulations issued in 2016. 81 Fed. Reg. 40,572 (June 22, 2016).

Rules of Application

The following definitions and rules apply for purposes of the 409A change-in-control analysis.

Related Persons

There is no change in the ownership of a substantial portion of a corporation's assets if the transfer occurs to a related person (determined as of immediately after the transfer of the assets), which includes any:

- Shareholder of the corporation if the transfer is in exchange for or with respect to the shareholder's stock
- Entity for which 50% or more of the total value or voting power is owned, directly or indirectly, by the corporation
- Person (or more than one person acting as a group) that owns, directly or indirectly, 50% or more of the total value or voting power of all the outstanding stock of the corporation –or–
- Entity for which at least 50% of the total value or voting power is owned, directly or indirectly, by a person described in the preceding bullet

26 C.F.R. § 1.409A-3(i)(5)(vii)(B).

Attribution of Stock Ownership

I.R.C. § 318(a) applies to determine stock ownership under the 409A change-in-control payment events. Stock underlying a vested option is considered owned by the individual who holds the vested option (and stock underlying an unvested option is not considered owned by the individual who holds the unvested option). For purposes of the preceding sentence, however, if a vested option is exercisable for stock that is not substantially vested (as defined by §1.83-3(b) and (j)), the stock underlying the option is not treated as owned by the individual who holds the option. 26 C.F.R. § 1.409A-3(i)(5)(iii).

Persons Acting as a Group

To determine whether persons are acting as a group under the above rules, the following apply:

- Persons will not be considered to be acting as a group solely because they purchase or own stock of the same corporation at the same time, or as a result of the same public offering.
- Persons will be considered to be acting as a group if they are owners of a corporation that enters into a merger, consolidation, purchase or acquisition of stock, or similar business transaction with the corporation.

- If a person (or entity) owns stock in both corporations that enter into a transaction, for each corporation the shareholder is considered to be acting as a group with other shareholders solely to the extent of the person's pre-transaction ownership in that corporation (and not with respect to any of the person's ownership interests in the other corporation).
- An increase in the percentage of stock owned by a person, or persons acting as a group, that occurs because the corporation acquires its stock in exchange for property is treated as an acquisition under these rules.
- However, if any person or group owns more than 50% (or such higher percentage substituted by the 409A arrangement) of the total fair market value or total voting power of the corporation's stock, the acquisition of additional stock by the same person or group does not constitute a change in the ownership or effective control of a corporation.

26 C.F.R. § 1.409A-3(i)(5)(v)(B), (vi)(D), (vii)(C), (v)(A).

Examples. The following examples illustrate the above rules:

- Corporation A is a majority shareholder of Corporation B, which in turn is a majority shareholder of Corporation C (the service recipient). Corporation C is the sole entity liable for the deferred compensation. Corporation A sells 49% of the total fair market value of the stock of Corporation B to an unrelated third party, but the stock sold has no voting rights. Thereafter, the sole shareholder of Corporation A sells all of the stock in Corporation A to an unrelated third party. Neither sale constitutes a change in ownership of Corporation B or C. Corporation A's sale of the interest in Corporation B represented a sale of less than 50% of the total fair market value and less than 50% of the total voting power of the stock of Corporation B, so that sale did not constitute a change of ownership of Corporation B (nor did it constitute a change in effective control of Corporation B). At the time of the sale of Corporation A's stock, Corporation A was no longer a majority shareholder in Corporation B, so Corporation A was not part of a chain of ownership of Corporation C, so there was no change in ownership or change in effective control of Corporation C. The sale of Corporation A's stock was a change in ownership of Corporation A, but that transaction does not trigger payment to Corporation C's employees.
- Using the same facts as in the above example, except that the stock that Corporation A sold had at least 30% of the total voting power of Corporation B. The sale of Corporation B's stock is not a change in ownership, but is a change in B's effective control that can be used to trigger payment to Corporation C's employees. The sale of Corporation A's stock is still not a change in ownership that can be used to trigger payment to Corporation C's employees.
- Using the same facts as in the first example, except that the sale of Corporation A's stock occurs before Corporation A's sale of Corporation B's stock. The sale of Corporation A's stock constitutes a change in Corporation A's ownership that can be used to trigger payment for Corporation C's employees. However, Corporation A's subsequent sale of Corporation B's stock could still not be used because the applicable threshold is not met for a change in ownership of Corporation B or C, and there is no change in effective control of Corporation B or C.
- Using the same facts as in the first example, except that, for a substantial business purpose unrelated to tax avoidance, Corporation A was liable (or jointly liable with Corporation C) for payment of the deferred compensation. The sale of Corporation A's stock constitutes a change in A's ownership that can be used to trigger payment for Corporation C's employees.
- Corporation A merges into Corporation B, whereby the shareholders of Corporation A receive Corporation B stock in exchange for their Corporation A stock. Immediately after the merger, the former shareholders of Corporation A own stock with a fair market value equal to 51% of the value of the stock of Corporation B, and

the former shareholders of Corporation B own stock with a fair market value equal to 49% of the value of the stock of Corporation B. Prior to the merger, several Corporation B shareholders also owned Corporation A stock (overlapping shareholders). In the merger, those overlapping shareholders received additional B stock by virtue of their ownership of A stock with a fair market value of 5% of the value of Corporation B stock. Including the B stock attributable to the A shares, the B shareholders hold 54% of Corporation B after the transaction. However, those overlapping shareholders are treated as acting as a group with the Corporation B shareholders only with respect to their ownership interest in Corporation B prior to the transaction. Therefore, because the Corporation B shareholders owned 49% of the value of Corporation B stock at that time, a change in the ownership of Corporation B occurs on the date of the merger.

RULES RELATED TO THE TIMING AND DISTRIBUTION OF CHANGE-IN-CONTROL PAYMENTS

Payment Dates and Schedules

A 409A arrangement that provides for payment in connection with a 409A change-in-control event generally must specify a payment date (or permissible Section 409A event), or a schedule, which is objectively determinable and nondiscretionary at the time the change in control occurs. 26 C.F.R. § 1.409A-3(b). There is some flexibility in the payment dates that are used, so long as the arrangement specifies:

- A calendar year (or shorter period within a calendar year, including a particular day, like the closing of a change-in-control transaction) in which the payment will be made –or–
- A period in which the payment may be made that is no longer than 90 days, whether or not it begins and ends in different calendar years (so long as the employee (or other service provider) does not have discretion to determine the year of payment)

26 C.F.R. § 1.409A-3(b), (i)(1)(vi).

Applying the above, a 409A arrangement that pays out on a 409A change-in-control event could, for example, provide that a distribution would occur within the same calendar year as the change in control. Or, it could provide that it would occur within 90 days following the change in control, even if that 90-day period spanned more than one calendar year. The arrangement could also be structured so as to provide for payment based on more than one event or time, so long as the arrangement is clear on the distribution date. For example, it can provide that the service provider will make the distribution on the earlier of attainment of age 60 or a 409A change in control. 26 C.F.R. § 1.409A-3(c). However, the arrangement cannot provide that the service provider will make the distribution on either the attainment of age 60 or a 409A change in control, as elected by the service provider or the service recipient. 26 C.F.R. § 1.409A-3(b).

With limited exceptions (see [Plan Terminations under Section 409A Checklist](#) for more information), the 409A arrangement must state at the time of the initial deferral (i.e., the point at which the service provider has a right to the deferred compensation) which of the permissible events will trigger the distribution. Thereafter, the distribution generally cannot be accelerated, and can be deferred only if the deferral meets certain conditions. 26 C.F.R. §§ 1.409A-3(j), 1.409A-2(b). For example, if the arrangement initially provides that payment will be made only upon separation from service, disability, or death, the service recipient cannot later decide to make payment upon a 409A change in control without complying with Section 409A's onerous subsequent election rules. Information on subsequent deferral elections can be found in [Understanding Nonqualified Deferred Compensation Arrangements and Internal Revenue Code Section 409A](#) and [Employee Compensation and Benefits Tax Guide P 1403, § 1403.2](#).

Alternative Payment Schedules

A 409A arrangement may also allow for an alternative payment schedule if the event occurs on or before one (but not more than one) specified date. 26 C.F.R. § 1.409A-3(c). For example, an arrangement may provide that a service provider will receive a lump-sum payment of the service provider's entire benefit under the 409A arrangement on the first day of the month following a 409A change-in-control event that occurs before the service provider attains age 55, but will receive five substantially equal annual payments commencing on the first day of the month following a 409A change-in-control event that occurs on or after the service provider attains age 55.

A 409A arrangement can also provide for an alternative payment schedule in the event of a separation from service during a limited period of time not to exceed two years following a 409A change-in-control event (i.e., so-called double-trigger severance). 26 C.F.R. § 1.409A-3(c)(1). In this case, the 409A arrangement may provide for a non-compliant change-in-control definition, as long as, the separation from service meets the requirements under I.R.C. § 409A(a)(2)(A)(i) 26 C.F.R. § 1.409A-1(h) and 26 C.F.R. § 1.409A-3(a)(1), and there is no other separation-from-service trigger. This is because the involuntary separation from service alone qualifies as a permissible Section 409A payment event. However, where the 409A arrangement provides for one form of payment (e.g., cash installments) upon a separation from service and another form of payment (e.g., a lump sum) upon a separation from service occurring within two years following a change-in-control event, such arrangement must use a Section 409A-compliant change-in-control definition. 26 C.F.R. § 1.409A-3(c)(1).

For more information on alternative payment schedules, see [Section 409A and Severance Arrangements — Other Key Considerations](#).

Special Timing Rules for Transaction-Based Payments

Transaction-based payments (e.g., payments related to a change-in-control event where the service provider is an equity holder of the service recipient) are treated as being paid on the date the change-in-control event occurs, so long as they are paid:

- On the same schedule as the payments received by other equity holders –and–
- Not later than five years after the date of the change in control.

26 C.F.R. § 1.409A-3(i)(5)(iv)(A).

In addition, if, in connection with a change in ownership or a change in the ownership of a substantial portion of the corporation's assets, the payments related to equity become subject to a condition that constituted a substantial risk of forfeiture under Section 409A (determined without regard to any rules relating to additions or extensions), and the payments are made on the same schedule as the payments received by other equity holders, then it may be possible to use the short-term deferral exception to exempt these payments from Section 409A. *Id.*

Also, if, in connection with a change in ownership or a change in the ownership of a substantial portion of the corporation's assets, (1) the payments related to equity under a 409A arrangement are previously subject to a condition that constituted a substantial risk of forfeiture under Section 409A (determined without regard to any rules relating to additions or extensions), (2) that condition is extended or modified before and in connection with the change-in-control event, and (3) there is a bona fide business purpose for doing so, then the continued application of a fixed schedule of payments based on the lapse of the condition as modified or extended will not be treated as violating Section 409A's strict deferral election rules. 26 C.F.R. § 1.409A-3(i)(5)(iv)(B).

Because of these rules, be especially wary when drafting or reviewing transaction agreements containing equity payments or cashouts to employees (or other service providers) in which payments are delayed by escrow

agreements or earnouts. Such agreements may condition these delayed payments on events that do not qualify as a substantial risk of forfeiture under Section 409A, and therefore may constitute deferred compensation subject to Section 409A (but the special timing rule may apply).

2016 proposed regulations clarify that the special rules for transaction-based compensation apply to statutory stock options and stock rights that were exempt from Section 409A before the 409A change-in-control event. Accordingly, the purchase (or agreement to purchase) of the statutory stock option or stock right in a manner consistent with these rules does not result in the statutory stock option or stock right being treated as having provided for the deferral of compensation from the original grant date. 81 Fed. Reg. 40,575.

Learn more

[LEXISNEXIS.COM/PRACTICE-ADVISOR](https://www.lexisnexis.com/practice-advisor)

This document from Lexis Practice Advisor[®], a comprehensive practical guidance resource providing insight from leading practitioners, is reproduced with the permission of LexisNexis[®]. Lexis Practice Advisor includes coverage of the topics critical to practicing attorneys. For more information or to sign up for a free trial, visit [lexisnexis.com/practice-advisor](https://www.lexisnexis.com/practice-advisor). Reproduction of this material, in any form, is specifically prohibited without written consent from LexisNexis.

