



The ERISA Industry Committee

Advocating the Employee Benefits Interests of America's Largest Employers

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COMARISON OF CURRENT NON-QUALIFIED DEFERRED COMPENSATION RULES WITH PROPOSED CHANGES IN H.R. 2896/S. 1637

PROVISION	H.R. 2896, AMERICAN JOBS CREATION ACT OF 2003	S. 1637, JUMPSTART OUR BUSINESS STRENGTH ACT OF 2004
ELECTION REQUIREMENTS	<ul style="list-style-type: none">• Initial election must be made during the preceding taxable year. If taxpayer becomes eligible during taxable year, election must be made within 30 days.• Subsequent elections may not take effect for at least 12 months after election is made.• Payment under a subsequent election must be delayed for at least 5 years from the original payment date (except in cases of death, disability, or unforeseeable emergency).• Subsequent elections related to a payment at a specified time or pursuant to a fixed schedule must be made at least 12 months prior to the date of the first scheduled payment.	Same, but only one subsequent election is permitted per amount deferred.
ACCELERATION REQUIREMENTS	<ul style="list-style-type: none">• Prohibited• Treasury may provide for limited exceptions.	Same.

PROVISION	H.R. 2896, AMERICAN JOBS CREATION ACT OF 2003	S. 1637, JUMPSTART OUR BUSINESS STRENGTH ACT OF 2004
DISTRIBUTION REQUIREMENTS	<p>Distributions permitted:</p> <ul style="list-style-type: none"> • after a time or according to a schedule specified on the date compensation is deferred • after a change in ownership or control, as defined by Treasury • in the case of an unforeseeable emergency resulting in severe financial hardship due to illness, accident, casualty, or other unforeseeable circumstances • separation from service, as determined by Treasury • death • disability, within the meaning of the Social Security Act. 	<p>Same, generally, except:</p> <ul style="list-style-type: none"> • Disability payments could also be made by reason of a medically determinable physical or mental impairment that can be expected to result in death within the next 12 months. • For participants subject to sec. 16 of the Securities Act of 1934, change in control distributions could not be made earlier than one year after the change in control; if so, they are treated as excess parachute payments under IRC §280G. • Key employees cannot receive payout sooner than 6 months after separation from service.

PROVISION	H.R. 2896, AMERICAN JOBS CREATION ACT OF 2003	S. 1637, JUMPSTART OUR BUSINESS STRENGTH ACT OF 2004
DEFINITION OF NON-QUALIFIED DEFERRED COMPENSATION	Any plan or arrangement that provides for the deferral of compensation, other than a “qualified employer plan” or any bona fide vacation leave, sick leave, compensatory time, disability pay, or death benefit plan. “Qualified employer plan” means a tax-qualified plan, tax-deferred annuity, SEP, SIMPLE, or governmental 457(b) plan.	Same.
RESTRICTIONS ON INVESTMENT OPTIONS	None.	Investment options must be comparable to those available under the qualified employer plan with the fewest investment options. If there is no such plan, options are determined according to Treasury.
OFFSHORE RABBI TRUSTS	<ul style="list-style-type: none"> • Assets set aside in an offshore trust for the purpose of paying non-qualified deferred compensation are treated as transferred property under IRC §83. Earnings treated as additional transfers of property. • Amounts taxable as long as assets remain outside of the U.S. • Treasury may provide for exceptions. 	Same, with an exception for assets located in a foreign jurisdiction if substantially all of the services to which deferred compensation relates are performed in such foreign jurisdiction.

PROVISION	H.R. 2896, AMERICAN JOBS CREATION ACT OF 2003	S. 1637, JUMPSTART OUR BUSINESS STRENGTH ACT OF 2004
PLANS WITH FINANCIAL HEALTH FUNDING TRIGGER	Assets considered transferred under IRC §83 and related earnings.	Same.
RESTRICTIONS ON DEFERRAL OF STOCK GAINS/RESTRICTED STOCK.	None.	Deferral of gains attributable to the exercise of stock options and vesting of restricted stock or any other property based on employer securities prohibited. Taxpayer taxed immediately on the present value of the right to the stock.
INCREASE IN WITHHOLDING	None.	Withholding is increased to the highest income tax rate on supplemental wage payments to an employee to the extent that those payments exceed \$1 million. Currently applies to payments made this year.
PENALTIES FOR VIOLATION	<ul style="list-style-type: none"> • All compensation deferred under the arrangement for that year and all preceding years is includable in gross income. Under current language, this would apply to all participants in the arrangement, even if the violation pertained to only one individual. • In addition, interest at the underpayment rate plus 1 percent penalty. 	Same, except the penalty is 10 percent.
EFFECTIVE DATE	Amounts deferred after December 31, 2003, with certain exceptions.	Amounts deferred after December 31, 2004.