

Interim Guidance Under Section 457A

Notice 2009-8

PURPOSE

This notice provides interim guidance on the application of § 457A to nonqualified deferred compensation plans of nonqualified entities. Section 457A generally provides that any compensation that is deferred under a nonqualified deferred compensation plan of a nonqualified entity is includible in gross income when there is no substantial risk of forfeiture of the rights to such compensation. For purposes of § 457A, the term *nonqualified deferred compensation plan* has the same meaning as provided under § 409A(d), subject to certain modifications. For purposes of § 457A, the term *nonqualified entity* means (a) any foreign corporation unless substantially all of its income is (i) effectively connected with the conduct of a trade or business in the United States, or (ii) subject to a comprehensive foreign income tax, and (b) any partnership unless substantially all of its income is allocated to persons other than (i) foreign persons with respect to whom such income is not subject to a comprehensive foreign income tax, and (ii) organizations which are exempt from tax under Title 26 of the United States Code. Section 457A is a provision of the Tax Extenders and Alternative Minimum Tax Relief Act of 2008, Div. C of Pub. L. No. 110-343 (TEAMTRA), which was enacted on October 3, 2008.

This guidance is intended as interim guidance to assist taxpayers in applying § 457A while the Treasury Department and the IRS consider further guidance on the application of § 457A. The Treasury Department and the IRS anticipate issuing further guidance on issues not addressed by this notice. Future guidance may also modify the guidance provided in this notice, for example by expanding upon the definition of a nonqualified entity as set forth in this notice. In addition, certain provisions of this notice refer to interim guidance under Notice 2008-115, 2008-52 I.R.B. 1367 (Dec. 29, 2008) (reporting and withholding obligations under § 409A for taxable years beginning on and after January 1, 2008), and proposed regulations under § 409A (proposed

§ 1.409A-4, REG-148326-05, 2008-51 I.R.B. 1325 [73 Fed. Reg. 74380] (Dec. 8, 2008)). Future guidance under § 457A may need to be adapted to any future changes to the guidance provided in Notice 2008-115 and the proposed § 409A regulations. However, as provided in the section entitled “**EFFECTIVE DATE,**” any future guidance under § 457A that would expand the coverage of § 457A will be prospective and will not apply to a service provider’s taxable year beginning before the issuance of such guidance.

Comments are requested on all aspects of this notice. See the section entitled “**REQUEST FOR COMMENTS**” for information on how to submit comments.

INTERIM GUIDANCE ON APPLICATION OF § 457A

A. Section 457A — In General

Q-1 When is compensation includible in gross income under § 457A?

A-1 As a general rule, § 457A provides that any compensation that is deferred under a nonqualified deferred compensation plan of a nonqualified entity is includible in gross income when there is no substantial risk of forfeiture of the rights to such compensation. However, deferred compensation is not includible in gross income if the amount of the compensation is not determinable, in which case additional taxes apply to such compensation at the time the amount of such compensation becomes determinable and is includible in gross income. Section B of this notice (Q&A-2 through Q&A-4) addresses the definition of the term *nonqualified deferred compensation plan*. Section C (Q&A-5 through Q&A-14) addresses which service providers are covered by § 457A and the definition of the term *nonqualified entity*. Section D (Q&A-15 through Q&A-18) addresses the calculation of the amount includible in income under § 457A. Section E (Q&A-19 through Q&A-21) addresses when deferred amounts are considered to be not determinable. Section F (Q&A-22 through Q&A-23) addresses the application of the effective dates. Section G (Q&A-24 through Q&A-27) addresses issues related to the coordination of § 457A with § 409A.

B. Definition of a Nonqualified Deferred Compensation Plan

Q-2 What is a nonqualified deferred compensation plan for purposes of § 457A?

A-2 (a) *General rule.* Except as otherwise provided in this A-2, for purposes of § 457A, the term *nonqualified deferred compensation plan* has the meaning given such term under § 409A(d) and § 1.409A-1(a). With respect to an arrangement between a partner and a partnership, taxpayers may rely upon the applicable guidance under § 409A, which as of January 9, 2008, included Notice 2005-1, Q&A-7, 2005-1 C.B. 274, § II.E of the preamble to the proposed § 409A regulations published on October 4, 2005 (REG-158080-04, 2005-2 C.B. 786 [70 Fed. Reg. 57930]) and § III.G of the preamble to the final § 409A regulations published on April 17, 2007 (T.D. 9321, 2007-1 C.B. 1123 [72 Fed. Reg. 19234]). However, see Q&A-3 through Q&A-4 of this notice regarding the definition of substantial risk of forfeiture and the application of the short-term deferral rule for purposes of § 457A.

(b) *Equity appreciation rights.* As provided in § 457A(d)(3)(A), the term *nonqualified deferred compensation plan* also includes any plan that provides a right to compensation based on the appreciation in value of a specified number of equity units of the service recipient. Accordingly, except as otherwise provided in this paragraph A-2(b), § 1.409A-1(b)(5)(i)(B) (exception for certain stock appreciation rights) does not apply for purposes of determining whether an arrangement provides for deferred compensation for purposes of § 457A. However, the exceptions from coverage under § 1.409A-1(b)(5)(i)(A) (exception for nonstatutory stock options on service recipient stock issued with an exercise price not less than fair market value at the date of grant and with no other deferral feature) and § 1.409A-1(b)(5)(i)(C) (exception for statutory stock options) apply. Solely for purposes of this paragraph A-2(b), the exception from coverage under § 1.409A-1(b)(5)(i)(B) may be applied so that a stock appreciation right which by its terms at all times must be settled in service recipient stock, and is settled in service recipient stock (and otherwise

meets the requirements of that section), will be excluded from coverage under § 457A. In addition, for purposes of applying the exception from coverage under § 1.409A-1(b)(5)(i)(A) to an equity interest in a non-corporate entity (meaning a right to purchase actual equity in such entity, and not a mere right to an amount equal to the appreciation in such equity), the rules of § 1.409A-1(b)(5)(i)(A) are applied by analogy.

(c) *Short-term deferral exception.* In applying § 1.409A-1(b)(4) (exception from the definition of deferred compensation for purposes of § 409A for certain short-term deferrals), the definition of substantial risk of forfeiture in Q&A-3 of this notice is applied in lieu of the definition in § 1.409A-1(d). In addition, deferred compensation for purposes of § 457A does not include a § 457A short-term deferral (as defined in Q&A-4).

Q-3 What is a substantial risk of forfeiture for purposes of § 457A?

A-3 (a) *General rule.* For purposes of § 457A, the rights of a person to compensation are subject to a substantial risk of forfeiture only if such person's rights to such compensation are conditioned upon the future performance of substantial services by such person. Thus, for example, the rights of a person to compensation (including a stock right) are not subject to a substantial risk of forfeiture merely because those rights are subject to the occurrence of a condition related to a purpose of the compensation, or are conditioned, directly or indirectly, upon the refraining from the performance of services. The addition of any risk of forfeiture after the legally binding right to compensation arises, or any extension of a period during which compensation is subject to a risk of forfeiture is disregarded for purposes of determining whether such compensation is subject to a substantial risk of forfeiture. However, an amount may be considered subject to a substantial risk of forfeiture beyond the date or time at which the recipient otherwise could have elected to receive the compensation if the present value of such amount (disregarding, in determining the present value, the risk of forfeiture) is materially greater than the present value of the amount the recipient otherwise could have elected to receive absent such risk of forfeiture. For purposes of determining whether an amount that is

subject to a risk of forfeiture is materially greater than the amount the recipient otherwise could have elected to receive absent such risk of forfeiture, compensation, such as salary, that the service provider would receive for continuing to perform services is not taken into account. For example, if a bonus plan provides an election between a cash payment or restricted stock units with a present value that is materially greater (disregarding the risk of forfeiture) than the present value of such cash payment and that will be forfeited absent continued services for a period of years, the right to the restricted stock units generally is treated as subject to a substantial risk of forfeiture.

(b) *Stock rights.* For the application of the definition of a substantial risk of forfeiture to a stock right (as defined in § 1.409A-1(l)), see § 1.409A-1(d)(2).

(c) *Enforcement of forfeiture condition.* For rules on the determination of whether the risk of forfeiture is substantial with respect to the rights of a service provider that owns a significant amount of the total voting power or value of the service recipient, see § 1.409A-1(d)(3).

Q-4 What is a short-term deferral for purposes of § 457A (a § 457A short-term deferral)?

A-4 (a) *General rule.* Deferred compensation for purposes of § 457A does not include a short-term deferral as provided under § 457A(d)(3)(B) (a § 457A short-term deferral). The term § 457A *short-term deferral* refers to compensation that is paid not later than 12 months after the end of the service recipient's taxable year during which the right to the payment of the compensation is first no longer subject to a substantial risk of forfeiture. For purposes of this special rule, the service recipient is the person for whom the service provider is directly providing services at the time the right to the payment of such compensation is first no longer subject to a substantial risk of forfeiture. In addition, as provided in Q&A-2(c), any amount qualifying as a short-term deferral under § 1.409A-1(b)(4), applied using the definition of substantial risk of forfeiture for § 457A purposes as described in Q&A-3, does not constitute deferred compensation for purposes of § 457A.

(b) *Example.* If on January 1, 2009, an employee is provided a right to a future payment of \$10,000 if the employee continues providing services to his or her employer through January 1, 2011, and the

amount is paid out not later than 12 months after the end of the employer's taxable year that includes January 1, 2011, the arrangement is not subject to § 457A. However, if the amount is not paid to the employee before the end of that 12-month period, the arrangement is subject to § 457A and \$10,000 is includible in the employee's gross income on January 1, 2011.

C. Nonqualified Entities

Q-5 To which types of service providers does § 457A apply?

A-5 A service provider subject to § 457A may include an individual, corporation, subchapter S corporation, partnership, personal service corporation (as defined in § 269A(b)(1)), noncorporate entity that would be a personal service corporation if it were a corporation, qualified personal service corporation (as defined in § 448(d)(2)), and noncorporate entity that would be a qualified personal service corporation if it were a corporation. A service provider may be subject to § 457A regardless of whether such person accounts for gross income from the performance of services under the cash receipts and disbursements method of accounting or under the accrual method of accounting. However, an independent contractor is not a service provider subject to § 457A if an arrangement with respect to the independent contractor would be excluded from coverage under § 1.409A-1(f)(2) (generally excluding arrangements with independent contractors having multiple unrelated clients, but not excluding arrangements with such independent contractors that provide management services).

Q-6 What is a nonqualified entity for purposes of § 457A?

A-6 For purposes of § 457A, as provided in § 457A(b), the term *nonqualified entity* means—(1) any foreign corporation unless substantially all of its income is (A) effectively connected with the conduct of a trade or business in the United States, or (B) subject to a comprehensive foreign income tax; and (2) any partnership unless substantially all of its income is allocated to persons other than (A) foreign persons with respect to whom such income is not subject to a comprehensive foreign income tax, and (B) organizations which are exempt from tax under Title 26 of the United States Code.

Q-7 How is it determined whether an entity is a foreign corporation or a partner-

ship for purposes of determining whether an entity is a nonqualified entity under § 457A?

A-7 For purposes of § 457A, the term *foreign corporation* means a corporation as defined in § 7701(a)(3) that is not domestic as defined in § 7701(a)(4). For purposes of § 457A, the term *partnership* has the meaning given that term in § 7701(a)(2).

Q-8 How is it determined whether substantially all of a foreign corporation's income is subject to a comprehensive foreign income tax?

A-8 (a) *In general.* For purposes of § 457A, substantially all of the income of a foreign corporation is subject to a comprehensive foreign income tax if, for the taxable year of the foreign corporation ending with or within the service provider's relevant taxable year (as determined in accordance with Q&A-13)—

(i) either (A) the foreign corporation is eligible for the benefits of a comprehensive income tax treaty between its country of residence and the United States (as determined in accordance with Q&A-10), or (B) the foreign corporation demonstrates to the satisfaction of the Secretary that it is resident for tax purposes in a foreign country that has a comprehensive income tax; and

(ii) the foreign corporation is not taxed by the foreign corporation's country of residence under any regime or arrangement that is materially more favorable than the corporate income tax otherwise generally imposed by such country.

(b) *Exception where nonresidence source income is excluded.* Notwithstanding paragraph A-8(a), substantially all of the income of a foreign corporation will not be treated as subject to a comprehensive foreign income tax if—

(i) the foreign corporation's taxable income determined under the laws of its country of residence excludes, in whole or in part, nonresidence source income realized by the foreign corporation; and

(ii) the aggregate amount of nonresidence source income of the foreign corporation that is excluded for the relevant taxable year (the excluded amount) exceeds 20 percent of the gross income of the foreign corporation.

(c) *Excluded income.* For purposes of paragraph A-8(b)—

(i) the foreign corporation's taxable income under the laws of its country of residence excludes an item of nonresidence source income if the foreign corporation's taxable income does not include such income, or excludes such income by means of exemption, exclusion (including an exclusion from gross income), deduction (including a dividends received deduction or dividends paid deduction (or similar provision)), by means of taxation of such income at a rate of tax less than 50 percent of the generally applicable rate, or by other means;

(ii) the foreign corporation's gross income is defined as the foreign corporation's gross income as determined under the income tax laws of the foreign corporation's country of residence plus all nonresidence source income of the foreign corporation to the extent not otherwise included in the foreign corporation's gross income;

(iii) the term *nonresidence source income* means any items of income that would be included in gross income, determined under the principles of § 61, from sources outside the foreign corporation's country of residence, including dividends distributed by corporations that are not resident in the foreign corporation's country of residence; and

(iv) an item of nonresidence source income is not included in the excluded amount to the extent that such item of nonresidence source income is—(A) effectively connected with the conduct of a trade or business in the United States under § 882 and the regulations thereunder that is not exempt from U.S. federal income tax pursuant to a treaty obligation of the United States (for example, because the income is not attributable to a permanent establishment); (B) a dividend from a corporation that is domestic (within the meaning of § 7701(a)(4)); or (C) a dividend from a corporation substantially all of the income of which is subject to a comprehensive foreign income tax (determined by applying the principles of this A-8).

Q-9 How is it determined whether substantially all of a foreign corporation's income is effectively connected with the conduct of a trade or business in the United States?

A-9 For purposes of § 457A, substantially all of the income of a foreign corporation is treated as effectively connected

with the conduct of a trade or business in the United States if, for the taxable year of the foreign corporation ending with or within the service provider's relevant taxable year (as determined under Q&A-13), at least 80 percent of the gross income of the foreign corporation (as defined in paragraph A-8(c)(ii)) is effectively connected with the conduct of a trade or business in the United States under § 882 and the regulations thereunder that is not exempt from U.S. federal income tax pursuant to a treaty obligation of the United States (for example, because the income is not attributable to a permanent establishment).

Q-10 When is a foreign person eligible for the benefits of a comprehensive income tax treaty for purposes of § 457A?

A-10 For purposes of § 457A, the term *comprehensive income tax treaty* means every income tax treaty of the United States in force as of January 9, 2009, other than the income tax treaty with Bermuda and the income tax treaty with the Netherlands Antilles. To be eligible for the benefits of such a comprehensive income tax treaty for purposes of § 457A, a foreign person must be a resident within the meaning of such term under the relevant treaty and must satisfy any other relevant requirements of that treaty, including the requirements under any applicable limitation on benefits provision.

Q-11 How is it determined whether substantially all of a partnership's income for a taxable year is allocated to persons other than (A) foreign persons with respect to whom such income is not subject to a comprehensive foreign income tax and (B) organizations which are exempt from tax under Title 26 of the United States Code?

A-11 (a) *In general.* Under § 457A(b)(2), a partnership is not a nonqualified entity with respect to a taxable year if it has income and substantially all of its income for the taxable year is allocated to persons not described in § 457A(b)(2)(A) or (B) (a person not described in § 457A(b)(2)(A) or (B) is referred to herein as an *eligible person*). Substantially all of a partnership's income is treated for purposes of § 457A(b)(2) as allocated to eligible persons with respect to a taxable year only if at least 80 percent of the gross income of the partnership for such taxable year is allocated to eligible persons, as provided in paragraph A-11(e) below. The paragraphs of this A-11 below

provide guidance on whether substantially all of the income of a partnership that is the sponsor (see Q&A-14) of a nonqualified deferred compensation plan is allocated to eligible persons, including determining—(i) the gross income of such a partnership; (ii) which persons may be treated as receiving allocations of such gross income; and (iii) which allocations of gross income will be treated as made to eligible persons. An item or portion of an item of gross income may be treated for purposes of this Q&A-11 as allocated to any one of (and only one of) the following: (i) a partnership, if the partnership is the sponsor (see Q&A-14) of the nonqualified deferred compensation plan and subject to a comprehensive foreign income tax with respect to such income as provided in paragraph A-11(f), (ii) a partner of the partnership, or (iii) any direct or indirect owner of the partner.

(b) *Gross income and allocations for U.S. relevant partnerships.* With respect to a U.S. relevant partnership that is the sponsor (see Q&A-14) of a nonqualified deferred compensation plan, the term *gross income of the partnership* has the same meaning as for purposes of § 702(c) (see also §§ 1.702-1(c) and 1.704-1(b)(1)(vii)). A partnership is a U.S. relevant partnership if it either (i) is required to file a return of partnership income under § 6031 or (ii) determines the distributive share of income of any partner in accordance with § 704. If a U.S. relevant partnership allocates any income net of deductions, gross income is treated as being allocated to the partner who received the related allocation of net income to the extent such net income is derived from gross income (determined under § 702(c) principles). Allocations of income to the partners are the actual tax allocations of the partnership determined under § 704 for the partnership's relevant taxable year under Q&A-13 of this notice. Gross income of a foreign partnership, or a domestic partnership that is treated under the laws of a foreign country as resident in that country for tax purposes, that is the sponsor (see Q&A-14) of the nonqualified deferred compensation plan may be treated as allocated to the partnership.

(c) *Gross income and allocations for partnerships that are not U.S. relevant partnerships.* Gross income of a partnership that is the sponsor (see Q&A-14) of a

nonqualified deferred compensation plan that is not a U.S. relevant partnership is determined for the partnership's relevant taxable year under Q&A-13 of this notice using any reasonable method that incorporates the principles of § 61. Further, for purposes of this Q&A-11, gross income of a partnership that is the sponsor (see Q&A-14) of a nonqualified plan and is not a U.S. relevant partnership is deemed allocated to a partner to the extent that the partner includes such income in its gross income on a current basis under the income tax laws of the country of which such partner is a resident (except if included in income solely by reason of an anti-deferral regime, for example, §§ 951 *et seq.*, §§ 1293 *et seq.*, or comparable provisions of foreign law), whether or not such income is distributed to such person. Gross income of a partnership that is not a U.S. relevant partnership and that is the sponsor (see Q&A-14) of the nonqualified deferred compensation plan may be treated as allocated to the partnership.

(d) *Tiered ownership.* (i) An item or portion of an item of gross income of the partnership that is the sponsor (see Q&A-14) of a nonqualified deferred compensation plan that is allocated to a partner pursuant to paragraph A-11(b) or (c) may be treated as income allocated to any one direct or indirect owner of such partner that takes such income into account on a current basis under the income tax laws of the country of which such owner is a resident (except if included in income solely by reason of an anti-deferral regime, for example, §§ 951 *et seq.*, §§ 1293 *et seq.*, or comparable provisions of foreign law), whether or not such income is distributed to such owner.

(ii) An item or portion of an item of gross income of the partnership that is the sponsor (see Q&A-14) of a nonqualified deferred compensation plan that is allocated pursuant to paragraph A-11(b) or (c) to a partner that is a trust or estate that is a United States person, as defined in § 7701(a)(30), may be treated as allocated to a beneficiary of the trust or estate if the beneficiary takes such income into account on a current basis.

(e) *Gross income allocations to eligible persons.* Gross income is allocated to an eligible person to the extent—

(i) gross income that is derived in an unrelated trade or business as described

in § 512(a) is allocated to an organization subject to U.S. federal income tax on such income under § 511;

(ii) gross income that is effectively connected with the conduct of a trade or business in the United States, within the meaning of § 871(b) or § 882(a), as applicable (*effectively connected income*), is allocated to a person subject to U.S. federal income tax on such income under § 871(b) or § 882(a), as applicable, and not exempt from U.S. federal income tax pursuant to a treaty obligation of the United States;

(iii) gross income is allocated to a United States person (as defined in § 7701(a)(30)) other than (A) an organization exempt from tax under Title 26 of the United States Code; (B) a domestic partnership within the meaning of § 7701(a)(30)(B); or (C) a trust or estate, except to the extent the trust or estate is subject to U.S. federal income tax in respect of such income and such income is neither included in the gross income of a beneficiary under § 652 or § 662 nor paid or permanently set aside for a charitable purpose within the meaning of § 642(c); or

(iv) gross income that is not effectively connected income is allocated to a person that is not a United States person, as defined in § 7701(a)(30) (a foreign person) (a foreign person is deemed to include for these purposes and for purposes of paragraph A-11(f) below a domestic partnership that is the sponsor (see Q&A-14) of the nonqualified deferred compensation plan and that is treated under the laws of a foreign country as resident in that country for tax purposes), who is subject to a comprehensive foreign income tax with respect to such income as provided in paragraph A-11(f) below.

(f) *Comprehensive Foreign Income Tax.* For purposes of this A-11 a foreign person is subject to a comprehensive foreign income tax with respect to an item of income of the partnership only if both—

(i) The foreign person takes such income into account on a current basis under the income tax laws of the country in which the foreign person is resident (except if included in income solely by reason of an anti-deferral regime, for example, §§ 951 *et seq.*, §§ 1293 *et seq.*, or comparable provisions of foreign law), whether or not such income is distributed to such foreign person; and

(ii)(A) In the case of a foreign person that is not a nonresident alien individual—(I) the foreign person is an entity that is not fiscally transparent under the law of the entity’s jurisdiction (as defined in § 1.894-1(d)(3)(ii)) with respect to such income; (II) the foreign person satisfies the requirements of Q&A-8(a)(i) and (ii) treating the foreign person as the “foreign corporation” for this purpose; and (III) such income is not excluded from such foreign person’s taxable income by means of exemption, exclusion, dividends paid deduction or dividends received deduction (or similar provision), by means of taxation of such income at a rate less than 50 percent of the generally applicable rate, or by other means; or

(B) In the case of a foreign person that is a nonresident alien individual—(I) such nonresident alien individual is eligible for the benefits of a comprehensive income tax treaty with the United States, or such nonresident alien individual demonstrates to the satisfaction of the Secretary that such nonresident alien individual is subject to a comprehensive foreign income tax; and (II) such income is not excluded from such foreign person’s taxable income by means of exemption, exclusion (including an exclusion from gross income), deduction (including a dividends paid deduction or dividends received deduction (or similar provision)), by means of taxation of such income at a rate less than 50 percent of the generally applicable rate, or by other means.

(g) *Examples.* The following examples illustrate the rules in this A-11. For purposes of Examples 1 through 3, assume the following. PRS is a domestic partnership. PRS has two partners, A, a domestic corporation that is not an organization exempt from tax under Title 26 of the United States Code, and B, an entity exempt from tax pursuant to § 501(a). Under the PRS partnership agreement, A is allocated the first \$700 of net income, and any remaining net income is allocated 75% to A and 25% to B. Net losses are allocated 75% to A and 25% to B. Assume that B’s distributive share of income of PRS does not constitute unrelated business taxable income to B and that all of PRS’ allocations of income, gain, loss and deduction satisfy the requirements of § 704.

Example 1. For the taxable year ending on December 31, 2009, PRS has \$1,500 in gross income

and no other gains, losses or deductions. Under the PRS partnership agreement, A is allocated the first \$700 of net income, and the remaining \$800 of net income is allocated \$600 to A (75% x \$800) and \$200 to B (25% x \$800). In 2009, PRS is not a nonqualified entity under § 457A(b)(2) and this Q&A-11 because \$1,300 of gross income is allocated to A, which is at least 80% of the gross income of PRS (80% x \$1,500 = \$1,200).

Example 2. For its taxable year ending December 31, 2009, PRS has \$1,000 in ordinary income, \$300 of deductions (or net ordinary income of \$700), \$8,000 of gains, and no losses. Under the PRS partnership agreement, A is allocated the first \$700 of net income, and the \$8,000 of gain is allocated \$6,000 to A (75% x \$8,000) and \$2,000 to B (25% x \$8,000). In 2009, PRS is a nonqualified entity under § 457A(b)(2) and this Q&A-11 because \$7,000 of gross income is allocated to A, which is less than 80% of the gross income of PRS (80% x \$9,000 = \$7,200).

Example 3. For its taxable year ending December 31, 2009, PRS has a \$1,400 net loss (\$100 of gross income, \$1,500 of deductions, and no other gains or losses). Under the PRS partnership agreement, A is allocated \$1,050 of the net loss (75% x \$1,400). B is allocated \$350 of the net loss (25% x \$1,400). Under § 702(c), A’s share of gross income of PRS is \$75 (75% x \$100). In 2009, PRS is a nonqualified entity under § 457A(b)(2) and this Q&A-11 because less than 80% of PRS’ gross income is allocated to A (80% x \$100 = \$80).

Example 4. In 2009, K and B are partners in KB partnership, a partnership organized under the laws of foreign country 1 that is fiscally transparent under the laws of foreign country 1. KB is a partnership for U.S. federal income tax purposes and a U.S. relevant partnership hereunder. K is an entity organized under the laws of foreign country 2, and K is fiscally transparent under the laws of foreign country 2 and has in effect an election to be treated as a corporation for U.S. federal tax purposes. B is a domestic corporation that is not an organization exempt from tax under Title 26 of the United States Code. The owners of K are S, an individual who is a citizen and resident of foreign country 3, and J, a foreign corporation. S is eligible for the benefits of a comprehensive income tax treaty with the United States and takes into account under the income tax laws of country 3 her share of gross income of K on a current basis, whether or not such income is distributed to S. S’s share of such income is taxed under the laws of country 3 at a rate not less than the generally applicable rate, is not otherwise excluded from S’s income and is not included in income by reason of an anti-deferral regime. J is not subject to tax on its share of income of K. Income of KB is not effectively connected income. KB is a calendar year taxpayer. Foreign country 1 does not impose a tax on the income of KB, and foreign country 2 does not impose a tax on the income of K.

Because KB is a U.S. relevant partnership, KB must determine its gross income of KB for U.S. federal tax purposes and whether at least 80% of this gross income is allocated during 2009 to eligible persons.

(i) Gross income of KB allocated to B is income described in paragraph A-11(e)(iii) and is therefore allocated to an eligible person.

(ii) Because K is fiscally transparent under the laws of country 2, gross income of KB allocated to K is not income subject to a comprehensive foreign income tax in the hands of K for purposes of paragraph A-11(f). However, gross income of KB that is taken into account by S is treated as gross income that is allocated to eligible persons because S is a nonresident alien individual who is eligible for the benefits of a comprehensive income tax treaty with the United States and includes her share of K’s gross income on a current basis whether or not distributed to S, such income is taxed under the laws of country 3 at a rate not less than the generally applicable rate and not otherwise excluded from S’s income and is not included in income by reason of an anti-deferral regime.

(iii) Gross income of KB that is allocated to K and taken into account by J is not income that is allocated to eligible persons because neither K nor J is subject to a comprehensive foreign income tax with respect to such income.

Q-12 Does § 457A apply to deferred compensation that would have been deductible against income of a foreign corporation which is taxable under § 882 if the compensation had been paid in cash on the date that such compensation ceased to be subject to a substantial risk of forfeiture?

A-12 In the case of a foreign corporation with income which is taxable under § 882, § 457A does not apply to compensation that, had such compensation been paid in cash on the date that such compensation ceased to be subject to a substantial risk of forfeiture, would have been deductible under the principles of § 882 and the regulations thereunder by such foreign corporation against such income. If such compensation expense would not have been part of the corporation’s cost of goods sold, the compensation will be considered to have been deductible by the foreign corporation against such income only to the extent that the compensation would be properly allocated and apportioned to such income under the principles of § 1.861-8 *et seq.* If such compensation expense would have been part of the corporation’s cost of goods sold, the compensation will be considered to have been deductible by the corporation against such income using any reasonable method that is satisfactory to the Secretary based on all facts and circumstances.

Q-13 When is the determination made whether an entity is a nonqualified entity?

A-13 (a) *General rule.* The determination of whether an entity is a nonqualified entity is made as of the last day of each of the service provider’s taxable years in which the nonqualified deferred compensation is no longer subject to a substantial risk of forfeiture and remains de-

ferred. Accordingly, if the plan sponsor becomes a nonqualified entity during a service provider's taxable year and is a nonqualified entity as of the last day of the service provider's taxable year, amounts deferred under the plan are subject to § 457A for that taxable year of the service provider and the amounts are includible in income to the extent that the amounts are not subject to a substantial risk of forfeiture and have not previously been included in income. Similarly, if the plan sponsor ceases to be a nonqualified entity during a service provider's taxable year, and is not a nonqualified entity as of the last day of the service provider's taxable year, amounts deferred under the plan are not subject to § 457A for that taxable year of the service provider. Comments are requested regarding alternative approaches to determine whether and when nonqualified deferred compensation becomes subject to § 457A where the nonqualified deferred compensation is no longer subject to a substantial risk of forfeiture and is still deferred, and the entity becomes a nonqualified entity in a subsequent taxable year. See the section below entitled "Request for Comments" for information on the submission of comments.

(b) *Special rule for partnerships.* Whether a partnership is a nonqualified entity as of the last day of the service provider's taxable year is determined based on the allocations (or deemed allocations) of gross income by the partnership for the partnership's taxable year ending with or within the service provider's taxable year. If a partnership does not yet have a taxable year that has ended or ends on the last day of the service provider's taxable year, a reasonable, good faith estimate of such allocation (or deemed allocation) of the partnership for its current taxable year must be used to determine whether it is a nonqualified entity.

Q-14 How is it determined whether a nonqualified deferred compensation plan is a plan of a nonqualified entity?

A-14 The determination of whether a nonqualified deferred compensation plan is a plan of a nonqualified entity (for purposes of this notice, whether a nonqualified entity is the "sponsor", or one of the "sponsors", of the plan) is determined as of the last day of the service provider's relevant taxable year as determined under

Q&A-13. For this purpose, with respect to any amount deferred under a plan, the sponsor of the plan is any entity or entities which, if the entity paid the amount deferred in cash to the service provider in the relevant taxable year (as determined under Q&A-13), would be entitled to a compensation deduction under U.S. federal income tax principles.

D. Amount Includible in Income

Q-15 Does § 457A apply to a right to earnings on deferred compensation that is subject to § 457A?

A-15 Yes. For purposes of § 457A and this notice, references to deferred compensation include references to income (whether actual or notional) attributable to such compensation or such income. When the right to earnings is specified under the terms of the plan, the legally binding right to earnings arises at the time of the deferral of the compensation to which the earnings relate. Accordingly, rights to reasonable earnings credited on at least an annual basis are includible in gross income under § 457A when the right to the earnings credited is no longer subject to a substantial risk of forfeiture (as defined in Q&A-3 of this notice). The right to earnings that are not reasonable earnings, or that are not credited at least annually, will result in some or all of the earnings being treated as currently deferred amounts in accordance with rules analogous to the rules set forth in proposed § 1.409A-6(b)(2)(iii) (crediting of earnings and losses), § 1.409A-6(b)(2)(ii)(B) (use of an unreasonable actuarial assumption or method), and § 1.409A-6(b)(3)(ii) (account balance plans — unreasonable rate of return).

Q-16 How is the amount includible in income under § 457A determined?

A-16 Except as provided in Q&A-19 and Q&A-20, for purposes of § 457A, the amount includible in income is determined under the rules applicable to the determination of amounts includible in income under § 409A(a). For the currently applicable rules, see Notice 2008-115, which provides certain rules including a rule permitting taxpayers to rely upon proposed § 1.409A-4.

Q-17 If an amount is included in gross income under § 457A before the amount is paid to the service provider, is the amount

also includible in income when the amount is paid to the service provider?

A-17 To the extent a deferred amount is included in income under § 457A before the amount is paid to the service provider, the amount is not includible in income when the amount is paid to the service provider. However, after such amount is included in income by the service provider, § 457A may continue to apply to the right to future reasonable earnings on such previously included amounts (see Q&A-15). For purposes of determining the amount previously included in income that is not includible in income at the time of the payment, taxpayers may rely upon rules that are the same as the rules of proposed § 1.409A-4(f).

Q-18 If an amount is included in income under § 457A before the amount is paid to the service provider, and before such amount is paid the right to the amount is forfeited or otherwise permanently lost, is the service provider entitled to a loss?

A-18 Yes. If an amount is included in income under § 457A before the amount is paid to the service provider and, before such amount is paid, the right to the amount is forfeited or otherwise permanently lost, the service provider may rely upon rules that are the same as the rules of proposed § 1.409A-4(g) for purposes of determining the availability of any loss.

E. Deferred Amounts that are not Determinable

Q-19 When is the deferred amount to which a service provider is entitled treated as not determinable for purposes of § 457A?

A-19 (a) *In general.* For purposes of § 457A, the deferred amount to which a service provider is entitled is treated as not determinable if the deferred amount would be calculated under proposed § 1.409A-4(b)(2)(iv) (application of the general calculation rules to formula amounts), if such rule were effective. Under proposed § 1.409A-4(b)(2)(iv), for a plan that is not an account balance plan, an amount payable in a future taxable year is a formula amount (and thus not determinable) to the extent that the amount payable in a future taxable year is dependent upon factors that, after applying the assumptions and other rules set out in the proposed regulations, are not determinable

as of the end of the service provider's taxable year. This generally occurs where the amount of the payment (and not the timing of the payment) is unknown at the end of the taxable year because it is based upon factors that remain variable as of the end of the taxable year. For example, an annual bonus based on annual profits as of December 31, 2010 is a formula amount (and thus an indeterminable amount) at all times prior to December 31, 2010. However, the deferred amount is determinable as of December 31, 2010 because the information necessary to calculate the bonus exists, regardless of whether the calculation of the annual profits is readily available.

Q-20 When is a deferred amount that is treated as not determinable at the time that the compensation is otherwise includible in gross income under § 457A required to be included in income?

A-20 A deferred amount that is treated as not determinable at the time that the compensation is otherwise includible in gross income under § 457A is required to be included in gross income when the deferred amount becomes determinable. For purposes of calculating the amount includible in gross income at such time, the rules of Q&A-16 apply.

Q-21 What additional taxes apply to a deferred amount that is treated as not determinable at the time that the compensation is otherwise includible in gross income under § 457A?

A-21 When a deferred amount that is treated as not determinable at the time that the compensation is otherwise includible in gross income under § 457A becomes determinable and must be included in gross income, the tax for the taxable year in which the compensation is includible in gross income is increased by the sum of (a) an amount equal to 20 percent of the amount of the compensation and (b) the premium interest tax on the compensation. For purposes of this A-21, the premium interest tax is the amount of interest at the underpayment rate under § 6621 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 the deferred compensation is not subject to a substantial risk of forfeiture (as defined in Q&A-3 of this notice). For pur-

poses of calculating the premium interest tax, rules analogous to the rules provided in proposed § 1.409A-4(d) apply, if such rule were effective.

F. *Effective Dates for Application of § 457A*

Q-22 What is the effective date of § 457A?

A-22 Section 457A applies to amounts deferred that are attributable to services performed after December 31, 2008. In the case of any amount deferred to which § 457A would not otherwise apply solely by reason of the fact that the amount is attributable to services performed before January 1, 2009, to the extent the amount deferred is not included in gross income in a taxable year beginning before 2018, that amount deferred is includible in gross income in the later of (a) the last taxable year beginning before January 1, 2018 or (b) the first taxable year in which there is no substantial risk of forfeiture of the right to the amount deferred (as defined in Q&A-3 of this notice).

Q-23 For purposes of applying the effective date, how are the periods of service to which the compensation is attributable determined?

A-23 (a) *Services to which compensation is attributable.*

(1) *General rule: compensation attributable to a service period based on plan formula.* If a service provider obtains a legally binding right to compensation under a plan on or before December 31, 2008, and as of December 31, 2008 that plan provides for benefit payments under a formula that relates to a specific period of service in a year (such as relating to compensation paid during that period), the compensation is attributable to that specific period, except as otherwise provided in this A-23. To the extent that, based on the terms of the plan as of December 31, 2008, compensation is not attributable to services performed in a particular period, then the compensation generally is attributable to services performed during the year in which the employee obtains the legally binding right to the compensation. If a service provider is entitled to compensation only upon an involuntary separation from service, the amount attributable to services performed on or before December 31, 2008 is the amount the ser-

vice provider would be entitled to based upon the years of service and compensation earned as of December 31, 2008 (disregarding any requirement to perform further services). Any additional amount to which the service provider becomes entitled after December 31, 2008 due solely to additional services performed after December 31, 2008 is attributable to service performed after December 31, 2008. A right to reasonable earnings on amounts deferred attributable to services performed before December 31, 2008 is treated as attributable to services performed before December 31, 2008, but only to the extent further services were not required after December 31, 2008 to retain the right to the earnings.

(2) *Legally binding right.* Compensation is not attributable to a period of services prior to the date the service provider obtains a legally binding right to the compensation. A service provider does not have a legally binding right to compensation to the extent that compensation may be reduced unilaterally or eliminated by the service recipient or other person after the services creating the right to the compensation have been performed. However, if the facts and circumstances indicate that the discretion to reduce or eliminate the compensation is available or exercisable only upon a condition, or the discretion to reduce or eliminate the compensation lacks substantive significance, then the employee has a legally binding right to the compensation. For this purpose, compensation is not considered subject to unilateral reduction or elimination merely because it may be reduced or eliminated by operation of the objective terms of the plan, such as the application of a nondiscretionary, objective provision creating a substantial risk of forfeiture. (See §§ 1.409A-1(b)(1) and 31.3121(v)(2)-1(b)(3)(i) for additional rules regarding when an employee obtains a legally binding right to compensation.)

(3) *Substantial risk of forfeiture.* To the extent that under a plan's terms as of December 31, 2008, a service provider's right to compensation is subject to a substantial risk of forfeiture (as defined in Q&A-3) in the form of a requirement to continue to perform substantial future services for the service recipient after December 31, 2008, the compensation generally is for services performed over the period of time

that the service provider is required to continue to perform substantial future services for the service recipient and is attributed to that period on a *pro rata* basis, unless the compensation is attributable to a different period under the rule in paragraph A-23(b)(1). For purposes of applying the effective date, if the substantial risk of forfeiture lapses after December 31, 2008, but before the substantial risk of forfeiture would otherwise have lapsed under the terms of the plan as of December 31, 2008 if the service provider had continued providing services (such as due to death, disability or an acceleration of the vesting requirement), the allocation remains prorated over the period from when the service provider obtained the legally binding right to the payment to the date that the substantial risk of forfeiture would otherwise have lapsed under the terms of the plan as of December 31, 2008 if the service provider had continued providing services.

(4) *Plan terms as of December 31, 2008.* A plan's terms as of December 31, 2008, include only the plan's terms as in effect on December 31, 2008, and do not include any amendment to such plan terms after December 31, 2008, even if the amendment to such plan terms is made effective retroactively to a date earlier than January 1, 2009. Notwithstanding the foregoing, the terms of a plan may be amended retroactively to provide that a substantial risk of forfeiture that would otherwise lapse on or after January 1, 2009 will be treated as having lapsed effective before January 1, 2009, provided that the amendment is made in writing and effective before July 1, 2009, and provided further that any shortening of the period during which a deferred amount was subject to a substantial risk of forfeiture must be applied consistently to every service provider participating in that arrangement or a substantially similar arrangement.

(b) *Examples.* For purposes of these examples, the description of the terms of the relevant plan refers to the terms of the plan as of December 31, 2008, except where otherwise provided.

Example 1. Employee A obtains on January 1, 2006 a legally binding right to be paid \$400,000 at the end of December, 2014, but only if A continues to be employed on December 31, 2010. In this case, a *pro rata* portion of the compensation is attributable to services performed during 2006, 2007, 2008, 2009, and 2010, so that 60% of the amount deferred is attributable to services performed before 2009.

Example 2. Employee C obtains on December 31, 2007 a legally binding right to be paid on February 1, 2014 an amount equal to 10% of employee C's salary during the period from January 1, 2008 through December 31, 2009, and employee C's salary is \$400,000 for each of 2008 and 2009. In this case, the compensation is attributable *pro rata* to services performed in 2008 and 2009, so that 50% of the amount deferred is attributable to services performed in 2008.

Example 3. Employee D obtains on December 31, 2007 a legally binding right to be paid on January 1, 2014 an amount equal to 20% of D's highest annual salary times the number of years of service completed by D before January 1, 2010, but only if D remains employed through December 31, 2009. Employee D remains employed through December 31, 2009 and has an annual salary of \$400,000 in 2008. Under the terms of the plan in this case, under the rule in paragraph A-23(a)(1), the compensation attributable to services performed in 2008 is the present value of \$80,000 (20% of Employee D's annual salary in 2008 times 1 year of service) payable on January 1, 2014.

Example 4. Employee E obtains on December 31, 2008 a legally binding right to be paid \$400,000 on February 1, 2010 (without any requirement of continued employment). Under these facts and circumstances, the compensation is not attributable to services performed in a period of time after December 31, 2008.

Example 5. Employee F obtains on December 31, 2008 a stock appreciation right with a 10-year term and an exercise price equal to the fair market value of the stock on December 31, 2008 (without any requirement of continued employment in order to be able to exercise the right and receive payment). The compensation is not attributable to services performed in a period of time after December 31, 2008.

Example 6. Employee G obtains on January 1, 2008 a stock appreciation right with a 10-year term and an exercise price equal to the fair market value of the stock on January 1, 2008, but the stock appreciation right can be exercised only after the employee has continued his or her employment for three more years (through December 31, 2010). In this case, the amount deferred under the stock appreciation right is attributable to services performed from January 1, 2008 through December 31, 2010, so that one-third of the amount deferred is attributable to services performed before January 1, 2009.

Example 7. Employee H obtains on January 1, 2000 a right to a retirement benefit payable solely upon separation from service (including separation from service due to death or disability) as a life annuity equal to a monthly payment of 3% multiplied by the average of the highest three years of compensation multiplied again by the number of years of service Employee H had completed with the service recipient. As of December 31, 2008, Employee H had completed 15 years of service and the average of the highest three years of compensation was \$250,000. The deferred amount attributable to services performed on or before December 31, 2008 equals the present value of the life annuity calculated using the years of service completed and the compensation earned as of December 31, 2008. Any increase in the deferred amount due to an additional year of service or an increase in compensation after Decem-

ber 31, 2008 would be a deferred amount attributable to services performed after December 31, 2008.

Example 8. Employee J obtains on January 1, 2008 a right to a bonus equal to 10% of the increase in the value of a pool of assets, calculable and payable one year after Employee J's separation from service. Because any increase in the value through the date of payment would not be due to Employee J's continued services, the entire deferred amount is attributable to services performed during 2008.

Example 9. Employee K obtains on January 1, 2008 a right to an amount payable on January 1, 2014, but only if Employee K continues to provide services through December 31, 2010, or dies or becomes disabled before December 31, 2010. On July 1, 2010, Employee K dies. Because under the terms of the plan as of December 31, 2008, Employee K was required to continue to provide services through December 31, 2010, one-third of the deferred amount continues to be attributable to services performed before January 1, 2009.

Example 10. Employee L obtains on January 1, 2008 a right to an amount payable on January 1, 2014, but only if Employee L continues to provide services through December 31, 2010, or dies or becomes disabled before December 31, 2010. On January 1, 2010, the arrangement is amended so that Employee L is entitled to payment of the amount regardless of whether Employee L continues to provide services after December 31, 2009. For purposes of the effective date of § 457A, this amendment is disregarded and only one-third of the amount deferred is treated as attributable to services performed on or before December 31, 2008.

Example 11. Employee M obtains on January 1, 2008 a right to an amount payable on January 1, 2014, but only if Employee M continues to provide services through December 31, 2010, or dies or becomes disabled before December 31, 2010. On March 15, 2009, the arrangement is amended so that Employee M is entitled to payment of the amount regardless of whether Employee M continues to provide services after December 31, 2008. Provided that the same amendment is made and applied consistently to every service provider participating in the same or a substantially similar arrangement sponsored by the same service recipient, the amendment is not disregarded for purposes of the effective date under § 457A and all of the amount deferred is treated as attributable to services performed on or before December 31, 2008.

G. Coordination with § 409A

Q-24 How does § 457A coordinate with § 409A?

A-24 Sections 457A and 409A may both apply to amounts deferred under the same arrangement. For purposes of applying § 409A to arrangements covered by § 457A, rules similar to those addressing arrangements subject to § 457(f) apply. Accordingly, an inclusion in income under § 457A is treated as a payment for purposes of the short-term deferral rule under § 1.409A-1(b)(4). In addition, until further guidance, the inclusion in income

under § 457A of earnings on amounts subject to § 457A is treated as a payment in accordance with a fixed schedule of payments if the earnings are reasonable, are credited at least annually, and are included in income under § 457A for the later of the taxable year in which such earnings are credited or when such amounts would otherwise be includible in income under § 457A. However, the right to an amount that is not subject to § 457A because it is a § 457A short-term deferral under Q&A-4 is subject to § 409A unless the arrangement also qualifies as a short-term deferral under § 1.409A-1(b)(4).

Q-25 What transition rules apply under § 409A with respect to amounts covered by § 457A that are attributable to services performed before January 1, 2009?

A-25 Solely with respect to a deferred amount attributable to services performed before January 1, 2009, a change in the time and form of payment to conform the date of distribution to the date the amount may be required to be included in income under § 457A(d)(2) will not be treated as an impermissible acceleration under § 409A(a)(3) and § 1.409A-3(j)(1), provided that such change in the time and form of payment is established in writing and effective on or before December 31, 2011. To the extent a deferred amount attributable to services performed before January 1, 2009 was earned and vested before December 31, 2004 and is not otherwise covered by § 409A due to the application of the effective date rules under § 1.409A-6, a change in the time and form of payment solely to conform the date of distribution to the date the amounts may be required to be included in income under § 457A(d)(2) is not treated as a material modification of such arrangement under § 1.409A-6(a)(4), provided that such change in the time and form of payment is established in writing and effective on or before December 31, 2011.

Q-26 What transition rules apply under § 409A with respect to amounts covered by § 457A that are attributable to services performed after December 31, 2008?

A-26 In general, the right to a deferred amount to which § 457A applies will not constitute a deferred amount under § 409A because the amount will be “paid” for purposes of the short-term deferral rule under § 1.409A-1(b)(4) no later than the time at which the right to the amount is no longer

subject to a substantial risk of forfeiture. Accordingly, a plan provision stating that an amount will be payable in cash at the time the amount is includible in income under § 457A will not be required because the right to payment of such amount will not be subject to § 409A. However, payment timing issues under § 409A may arise if the right to a deferred amount becomes subject to § 457A in a future year (for example, because the plan sponsor becomes a nonqualified entity), or ceases to be subject to § 457A in a future year (because the plan sponsor ceases to be a nonqualified entity before the right to the substantial risk of forfeiture lapses). In addition, payment timing issues may arise if earnings on deferred compensation become includible in gross income under § 457A, to the extent such earnings would otherwise have been accumulated and paid at a deferred date. To address these issues, until further guidance the payment of a deferred amount during the service provider’s taxable year in which such amount becomes includible in income under § 457A will not constitute an impermissible acceleration of a payment under § 409A(a)(3) or § 1.409A-3(j). However, plan provisions will still be necessary to address use of the § 457A short-term deferral rule (see Q&A-4).

Q-27 What transition rules apply under § 409A with respect to certain back-to-back arrangements attributable to services performed before January 1, 2009?

A-27 (a) If the service provider is also a service recipient (the intermediate service recipient) and maintains one or more nonqualified deferred compensation arrangements for its service providers covered by § 457A under which any amount is attributable to services performed before January 1, 2009, a change in the time and form of payment of such amount solely to conform the date of payment to the date the amount is required to be included in income will not be treated as an impermissible acceleration under § 409A(a)(3) and § 1.409A-3(j)(1), provided that such change in the time and form of payment is established in writing and effective on or before December 31, 2011. To the extent a deferred amount covered by § 457A was earned and vested before December 31, 2004 and is not otherwise subject to § 409A due to the application of the effective date rules under § 1.409A-6, a change

in the time and form of payment solely to conform the date of distribution to the date the amount is required to be included in income under § 457A will not be treated as a material modification of such arrangement under § 1.409A-6(a)(4), provided that such change in the time and form of payment is established in writing and effective on or before December 31, 2011.

(b) With respect to a back-to-back arrangement under which a service provider provides services to a service recipient (the intermediate service recipient) that in turn provides services to another service recipient (the ultimate service recipient), to the extent the arrangement is covered by § 409A, all potential times and forms of payment under which the service provider may be paid a deferred amount by the intermediate service recipient must comply with the requirements of § 409A and § 1.409A-3. This means that the service provider must be payable upon a permissible payment event, which may include the service provider’s separation from service. However, a nonqualified deferred compensation arrangement that provides for the service provider to be paid when the intermediate service recipient separates from service from the ultimate service recipient is not a permissible payment event. Nothing in this A-27 should be interpreted as changing this requirement. In addition, no opinion is expressed as to whether such an arrangement would satisfy the requirements of the transition guidance for periods before the effective date of the final § 409A regulations (January 1, 2009). For the applicable transition rules, see Notice 2007-86, 2007-46 I.R.B. 990.

REQUEST FOR COMMENTS

The Treasury Department and the IRS anticipate issuing additional guidance with respect to § 457A. The Treasury Department and the IRS request comments on the topics addressed in this notice, and any other issues arising under § 457A. The Treasury Department and the IRS specifically request comments regarding the following topics:

1. Whether and to what extent a limitation on benefits provision or exchange of information program is relevant to the determination of what is a “comprehensive income tax treaty.”

2. The extent to which a reimbursement arrangement with respect to a domestic taxpayer service recipient and a non-qualified entity that has agreed to share or reimburse the domestic taxpayer service recipient's compensation costs should result in the domestic taxpayer service recipient also being treated as a nonqualified entity.

3. The potential scope of the exception to the definition of substantial risk of forfeiture that may be provided by regulation under § 457A(d)(1)(B), relating to the single investment asset.

4. The proper treatment of trusts that are partners in a partnership and beneficiaries of these trusts for purposes of determining to whom income of a partnership is allocated under § 457A(b)(2).

All materials submitted will be available for public inspection and copying.

Comments may be submitted to Internal Revenue Service, CC:PA:LPD:PR (Notice 2009-8), Room 5203, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may also be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to the Courier's Desk at 1111 Constitution Avenue, NW, Washington, DC 20224, Attn: CC:PA:LPD:PR (Notice 2009-8), Room 5203. Submissions may also be sent electronically via the internet to the following email address: Notice.comments@irs.counsel.treas.gov. Include the notice number (Notice 2009-8) in the subject line.

EFFECTIVE DATE

Until further guidance is issued, taxpayers may rely on the rules in this notice for purposes of § 457A effective from October 3, 2008 (the date of enactment of TEAMTRA). Further guidance that would expand the coverage of § 457A will be prospective and will not apply to a service provider's taxable years beginning before the issuance of such guidance.

CONTACT INFORMATION

For further information regarding this notice, contact Stephen Tackney of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt & Government Entities) at (202) 927-9639 (not a toll-free call).

26 CFR 601.601: Rules and regulations.
(Also: Part I, §§ 301, 305.)

Rev. Proc. 2009-15

SECTION 1. PURPOSE

Rev. Proc. 2008-68, 2008-52 I.R.B. 1373, provides temporary guidance regarding certain stock distributions by publicly traded real estate investment trusts (REITs). This revenue procedure amplifies and supersedes Rev. Proc. 2008-68 to extend the same treatment to publicly traded regulated investment companies (RICs).

SECTION 2. BACKGROUND

.01 Section 305(a) of the Internal Revenue Code ("Code") provides that, except as otherwise provided in section 305, gross income does not include the amount of any distribution of the stock of a corporation made by such corporation to its shareholders with respect to its stock.

.02 Section 305(b)(1) provides that section 305(a) shall not apply to a distribution by a corporation of its stock, and the distribution shall be treated as a distribution of property to which section 301 applies, if the distribution is, at the election of any of the shareholders (whether exercised before or after the declaration thereof), payable either in its stock or in property.

.03 Section 305(b)(2) provides that section 305(a) shall not apply to a distribution by a corporation of its stock, and the distribution shall be treated as a distribution of property to which section 301 applies, if the distribution (or a series of distributions of which such distribution is one) has the result of the receipt of property by some shareholders, and an increase in the proportionate interests of other shareholders in the assets or earnings and profits of the corporation.

.04 Section 1.305-2(a) of the Income Tax Regulations provides that under section 305(b)(1), if any shareholder has the right to an election or option with respect to whether a distribution shall be made either in money or any other property, or in stock or rights to acquire stock of the distributing corporation, then, with respect to all shareholders, the distribution of stock or rights to acquire stock is treated as a dis-

tribution of property to which section 301 applies regardless of—

(1) Whether the distribution is actually made in whole or in part in stock or in stock rights;

(2) Whether the election or option is exercised or exercisable before or after the declaration of the distribution;

(3) Whether the declaration of the distribution provides that the distribution will be made in one medium unless the shareholder specifically requests payment in the other;

(4) Whether the election governing the nature of the distribution is provided in the declaration of the distribution or in the corporate charter or arises from the circumstances of the distribution; or

(5) Whether all or part of the shareholders have the election.

.05 Section 1.305-1(b)(2) provides that where a corporation which regularly distributes its earnings and profits, such as a regulated investment company, declares a dividend pursuant to which the shareholders may elect to receive either money or stock of the distributing corporation of equivalent value, the amount of the distribution of the stock received by any shareholder electing to receive stock will be considered to equal the amount of the money which could have been received instead.

SECTION 3. SCOPE AND APPLICATION

The Internal Revenue Service will treat a distribution of stock by a corporation that qualifies as a RIC or as a REIT under part I or II, respectively, of subchapter M of the Code as a distribution of property to which section 301 applies by reason of section 305(b), and the amount of such distribution of stock will be considered to equal the amount of the money which could have been received instead, if —

(1) The distribution is made by the corporation to its shareholders with respect to its stock;

(2) Stock of the corporation is publicly traded on an established securities market in the United States;

(3) The distribution is declared with respect to a taxable year ending on or before December 31, 2009;

(4) Pursuant to such declaration each shareholder may elect to receive the share-