

September 20, 2016

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Internal Revenue Service
CC:PA:LPD:PR (REG-123854-12)
Room 5203
P. O. Box 7604, Ben Franklin Station
Washington, DC 20044

Re: Comments Regarding Application of Section 457 to Nonqualified Deferred Compensation Regulations (IRS REG 147196-07) and Comments Regarding Application of Section 409A to Nonqualified Deferred Compensation Plans (IRS REG 123854-12)

Ladies and Gentlemen:

Thank you for giving Ice Miller LLP ("Ice Miller") the opportunity to comment on the proposed regulations under Code Sections 409A and 457 issued on June 22, 2016.

DESCRIPTION OF ICE MILLER LLP

Ice Miller is a full-service law firm located in Indianapolis, Indiana; Chicago, Illinois; DuPage County, Illinois; New York, New York; Columbus, Ohio; Cleveland, Ohio; and Washington, D.C. Ice Miller has served public pension plans in tax, employee benefits, and fiduciary areas for more than 25 years.

COMMENTS

A. Substantial Risk of Forfeiture (457 Regulations)

Proposed Regulation Section 1.457-12(e)(2)(i) provides that the addition or extension of any risk of forfeiture after a legally binding right to compensation arises is disregarded, unless the addition or extension satisfies the requirements of paragraphs (e)(2)(ii) through (v). Under paragraphs (e)(2)(ii) through (v), the addition or extension of a substantial risk of forfeiture is taken into account to extend the period in which there is a substantial risk of forfeiture if (i) the present value of the amount subject to the additional or extended risk of forfeiture is materially greater (*i.e.*, at least 25% greater) than the present value of the amount that the employee would have received absent the extension or addition, (ii) the employee is required to provide at least two additional years of service (or refrain from competing for at least two additional years), and

(iii) certain timing and non-substitution rules are followed in effectuating the addition or extension.

Section 1.409A-1(d) of the current Section 409A regulations contains the following provisions within the definition of a "substantial risk of forfeiture:"

Except as provided with respect to certain transaction-based compensation under § 1.409A-3(i)(5)(iv), the addition of any risk of forfeiture after the legally binding right to the 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. An amount will not 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 amount of compensation, unless the present value of the amount subject to a substantial risk of forfeiture (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 this purpose, compensation that the service provider would receive for continuing to perform services regardless of whether the service provider elected to receive the amount that is subject to a substantial risk of forfeiture is not taken into account in determining whether the present value of the right to the amount subject to a substantial risk of forfeiture is materially greater than the amount the recipient otherwise could have elected to receive absent such risk of forfeiture. For example, a salary deferral generally may not be made subject to a substantial risk of forfeiture. But, for example, where 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 will be treated as subject to a substantial risk of forfeiture.

We suggest that the definition of "substantial risk of forfeiture" (which was not modified in the proposed regulations under Code Section 409A issued on June 22, 2016) contained in Treasury Regulation Section 1.409A-1(d) be revised, in the case of amounts subject to Section 457(f), to specifically permit additions or extensions of the risk of forfeiture as permitted under paragraphs (e)(2)(ii) through (v) of Proposed Regulation Section 1.457-12. In the absence of such a change, it appears that the extension of a substantial risk of forfeiture under Proposed Regulation Section 1.457-12(e)(2)(i) could conceivably result in a violation of Section 409A.

B. Substantial Risk of Forfeiture (409A Regulations)

We also note that the first sentence of the Treasury Regulation Section 1.409A-1(d) could be read to preclude changes that appear to be permitted by language set out later in the same paragraph. To address this issue and the potential inconsistency between the regulations under Code Sections 409A and 457(f), we recommend that the first sentence of Treasury Regulation Section 1.409A-1(d) be revised to read as follows:

Except as provided with respect to certain transaction-based compensation under § 1.409A-3(i)(5)(iv), as provided in this paragraph, or in the case of amounts subject to Code Section 457(f), with respect to additions or extensions of risks of forfeiture permitted under Treasury Regulation 1.457-12(e)(2), the addition of any risk of forfeiture after the legally binding right to the 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.

Again, we appreciate very much the opportunity to submit these comments for your consideration regarding the application of Section 409A and Section 457(f) to Nonqualified Deferred Compensation Plan regulations to governmental pension plans. We look forward to your continued development/promulgation of the 409A and 457(f) regulations, and would be pleased to address any questions you may have regarding these comments.

Very truly yours,

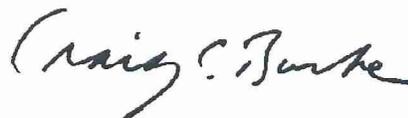
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