

Notice 2017-75

Guidance Under Section 409A for Pre-2009 Section 457A Deferrals

I. Purpose

This notice provides guidance on the application of Internal Revenue Code (Code) section 409A with respect to amounts that are includible in income pursuant to section 801(d)(2) of the Tax Extenders and Alternative Minimum Tax Relief Act of 2008, Div. C of Pub. L. No. 110-343 (TEAMTRA). Section 801(a) of TEAMTRA added section 457A to the Code. Section 457A generally applies to deferred amounts that are attributable to services performed after December 31, 2008. However, if section 457A does not apply to a deferred amount solely because the amount is attributable to services performed before 2009, section 801(d)(2) of TEAMTRA provides that the amount is includible in gross income in the later of the last taxable year beginning before 2018 or the taxable year of vesting. This guidance provides that a nonqualified deferred compensation plan that is subject to the provisions of Code section 409A will not fail to meet the requirements of section 409A solely because payments of deferred amounts under the plan are accelerated to pay income taxes on the amounts includible in income pursuant to section 801(d)(2) of TEAMTRA. This notice is intended to supplement, not supersede or modify, the guidance provided in Notice 2009-8, 2009-4 IRB 347 (Jan. 26, 2009).

II. Background

A. Section 457A and Section 801(d)(2) of TEAMTRA

Section 457A generally provides that compensation 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 this purpose, section 457A(d)(3) provides that the term “nonqualified deferred compensation plan” has the meaning provided under section 409A(d), subject to certain modifications, and section 457A(b) provides that 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) tax-exempt organizations.

Section 457A was added to the Code by section 801(a) of TEAMTRA, which was enacted on October 3, 2008. Section 801(d)(1) of TEAMTRA provides that “the amendments made by this section shall apply to amounts deferred which are attributable to services performed after December 31, 2008.” Section 801(d)(2) of TEAMTRA further provides, however, that

any amount deferred to which the amendments made by this section do not apply solely by reason of the fact that the amount is attributable to services performed before January 1, 2009, to the extent such amount is not includible in gross income in a taxable year beginning before 2018, . . . shall be includible in gross income in the later of – (A) the last taxable year

beginning before 2018, or (B) the taxable year in which there is no substantial risk of forfeiture of the rights to such compensation

B. Section 409A and Accelerated Distributions

Section 409A(a)(3) provides that, except as provided in regulations issued by the Secretary, a nonqualified deferred compensation plan may not permit the acceleration of the time or schedule of any payment under the plan. Section 1.409A-3(j) provides that a nonqualified deferred compensation plan may permit the acceleration of the time or schedule of any payment only pursuant to an exception provided in § 1.409A-3(j)(4). Section 1.409A-3(j)(4) does not provide an exception that allows a service provider to receive an accelerated distribution to pay income taxes due on amounts includible in income under section 801(d)(2) of TEAMTRA.

C. Notice 2009-8 and the Application of Section 409A to Pre-2009 Section 457A Deferrals

Notice 2009-8, Q&A-25 provides that, for deferred amounts attributable to services performed before January 1, 2009, that are required to be included in gross income in the later of the last taxable year beginning before 2018 or the taxable year in which there is no substantial risk of forfeiture of the rights to the compensation (pre-2009 section 457A deferrals), 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 section 801(d)(2) of TEAMTRA will not be treated as an impermissible acceleration under section 409A(a)(3) and § 1.409A-3(j) provided that the change in the time and form of payment was established in writing and effective on or before

December 31, 2011. In addition, Notice 2009-8, Q&A-25 provides that, 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 subject to the requirements of section 409A due to 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 may be required to be included in income under section 801(d)(2) of TEAMTRA is not treated as a material modification of the arrangement under § 1.409A-6(a)(4) provided that the change in the time and form of payment is established in writing and effective on or before December 31, 2011.

III. Guidance Permitting Accelerated Distributions to Pay Income Taxes on Pre-2009 Section 457A Deferrals

Pursuant to the authority provided in section 409A(a)(3), the Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) intend to issue regulations applicable as of December 08, 2017 providing the relief set forth in this paragraph; taxpayers may rely on the relief described in this paragraph until the regulations are finalized. The regulations will permit the acceleration of payments under a nonqualified deferred compensation plan to pay Federal, state, local, and foreign income taxes due on pre-2009 section 457A deferrals that are includible in gross income. Specifically, the Treasury Department and the IRS intend to issue regulations providing that a change in the time and form of payment under a nonqualified deferred compensation plan to pay Federal, state, local, and foreign income taxes on pre-2009 section 457A deferrals will not be treated as an impermissible acceleration under section 409A(a)(3) and § 1.409A-3(j)(1). These regulations will also provide that, 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 subject to the requirements of section 409A due to the effective date rules under § 1.409A-6, a change in the time and form of payment of the deferred amount to pay Federal, state, local, and foreign income taxes on pre-2009 section 457A deferrals will not be treated as a material modification of such arrangement under § 1.409A-6(a)(4). The relief provided in these regulations will apply only to the extent that that the amount of any distribution to pay Federal, state, local, and foreign income taxes on pre-2009 section 457A deferrals is not more than an amount equal to the Federal, state, local, and foreign income tax withholding that would have been remitted by an employer if there had been a payment of wages equal to the income includible by the service provider under section 801(d)(2) of TEAMTRA.

IV. Drafting Information

The principal author of this notice is William McNally of the Office of Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the Treasury Department and the IRS participated in its development. For further information regarding this notice, contact Mr. McNally at (202) 317-5600 (not a toll-free call).