



DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
WASHINGTON, D.C. 20224

CHIEF COUNSEL

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Section 83 – Property Transferred in Connection With Performance of Services  
83.03-01 Substantial Risk of Forfeiture

Section 457 – Deferred Compensation Plans of State and Local Governments  
457.08-07 Substantial Risk of Forfeiture

Section 3121 – Definitions  
3121.16-02 Nonqualified Deferred Compensation Plans

The Honorable Angus S. King  
United States Senator  
4 Gabriel Drive, Suite 3  
Augusta, ME 04330

Attention:

Dear Senator King:

I am responding to your inquiry dated June 13, 2014, on behalf of your constituent, \_\_\_\_\_, Treasurer of \_\_\_\_\_, who sought clarification of the term “substantial risk of forfeiture” used in section VI-B of Notice 2003-20, 2003-1 Cumulative Bulletin 894.

As a general matter, we cannot provide binding legal advice to taxpayers unless they request a formal ruling as described in Revenue Procedure 2014-1, 2014-1 Internal Revenue Bulletin 1. However, we reviewed the facts provided by \_\_\_\_\_ and can provide general information, which we hope will be helpful.

Notice 2003-20 describes the withholding and reporting requirements applicable to eligible deferred compensation plans described in Internal Revenue Code (the Code) section 457(b). Section VI of the notice addresses the Federal Insurance Contributions Act (FICA) payment and reporting requirements for annual deferrals under a section 457(b) plan. Section VI-B of the notice addresses special timing rules that apply in determining when amounts deferred under a nonqualified deferred compensation

plan (including employers' contributions) must be taken into account.

An employer must take amounts deferred under a section 457(b) plan into account for FICA tax purposes as of the later of when the employee performs the services or when there is no substantial risk of forfeiture of the rights to such amounts.

We determine if a substantial risk of forfeiture exists in accordance with the principles of section 83 of the Code and its related regulations. For purposes of section 83, whether a risk of forfeiture is substantial or not depends upon specific facts and circumstances.

A substantial risk of forfeiture exists only if rights in property are conditioned, directly or indirectly, upon the future performance of substantial services. The regularity of the performance of services and the time spent in performing such services usually indicate if the required services are substantial.

Generally, if a section 457(b) plan has a vesting requirement for nonelective employer contributions (for example, 3 years of employment), an employee's rights to the nonelective contributions are subject to a substantial risk of forfeiture until the employee has satisfied the vesting requirement (Notice 2003-20, Section VI-C, Example 2).

I hope this information is helpful. If you have any questions, please contact me or  
at ( ) .

Sincerely,

Lynne Camillo  
Branch Chief, Employment Tax Branch 2  
(Tax Exempt and Government Entities)