

110TH CONGRESS }
2d Session

HOUSE OF REPRESENTATIVES

{ REPORT
110-658

RENEWABLE ENERGY AND JOB CREATION
ACT OF 2008

R E P O R T

TOGETHER WITH

ADDITIONAL AND DISSENTING VIEWS

TO ACCOMPANY

H.R. 6049



MAY 20, 2008.—Committed to the Committee of the Whole House of the
State of the Union and ordered to be printed

(4) The special arbitrage expenditure rules for certain construction bond proceeds apply to available construction proceeds of Gulf Opportunity Zone Bonds issued to finance qualified project costs, treating such bonds as a construction issue (sec. 148(t)(4)(C));

(5) Interest on the bonds is not a preference item for purposes of the alternative minimum tax preference for private activity bond interest (sec. 57(a)(5)); and

(6) No portion of the proceeds of the bonds may be used to provide any property described in section 144(c)(6)(B) (i.e., any private or commercial golf course, country club, massage parlor, hot tub facility, suntan facility, racetrack or other facility used for gambling, or any store the principal purpose of which is the sale alcoholic beverages for consumption off premises).

REASONS FOR CHANGE

The Committee believes that areas affected by Hurricane Katrina need additional recovery tools. The Committee believes that the Gulf Opportunity Zone bonds are a valuable resource for promoting recovery in the affected areas. The Committee believes that the Gulf Opportunity Zone bonds should be expanded so that this resource may be utilized by those areas that were not originally designated as part of the Gulf Opportunity Zone, but were severely impacted by the hurricane.

EXPLANATION OF PROVISION

The provision adds Colbert County, Alabama and Dallas County, Alabama to the Gulf Opportunity Zone for the purpose of issuing Gulf Opportunity Zone Bonds.

EFFECTIVE DATE

The provision is effective as if included in the Gulf Opportunity Zone Act.

TITLE IV—REVENUE PROVISIONS

A. MODIFY TAX TREATMENT OF OFFSHORE NONQUALIFIED DEFERRED COMPENSATION

(Sec. 401 of the bill and new sec. 457A of the Code)

PRESENT LAW

In general

Under present law, the determination of when amounts deferred under a nonqualified deferred compensation arrangement are includible in the gross income of the person earning the compensation depends on the facts and circumstances of the arrangement. A variety of tax principles and Code provisions may be relevant in making this determination, including the doctrine of constructive receipt, the economic benefit doctrine,²⁵⁶ the provisions of section 83 relating generally to transfers of property in connection with the performance of services, provisions relating specifically to non-

²⁵⁶ See, e.g., *Sproull v. Commissioner*, 16 T.C. 244 (1951), *aff'd, per curiam*, 194 F.2d 541 (6th Cir. 1952); Rev. Rut. 60–31, 1960–1 C.B. 174.

exempt employee trusts (sec. 402(b)) and nonqualified annuities (sec. 403(c)), and the requirements of section 409A.

In general, the time for income inclusion of nonqualified deferred compensation depends on whether the arrangement is unfunded or funded. If the arrangement is unfunded, then the compensation generally is includible in income by a cash-basis taxpayer when it is actually or constructively received. If the arrangement is funded, then income is includible for the year in which the individual's rights are transferable or not subject to a substantial risk of forfeiture.

An arrangement generally is considered funded if there has been a transfer of property under section 83. Under that section, a transfer of property occurs when a person acquires a beneficial ownership interest in such property. The term "property" is defined very broadly for purposes of section 83.²⁵⁷ Property includes real and personal property other than money or an unfunded and unsecured promise to pay money in the future. Property also includes a beneficial interest in assets (including money) that are transferred or set aside from claims of the creditors of the transferor; for example, in a trust or escrow account. Accordingly, if, in connection with the performance of services, vested contributions are made to a trust on an individual's behalf and the trust assets may be used solely to provide future payments to the individual, the payment of the contributions to the trust constitutes a transfer of property to the individual that is taxable under section 83. On the other hand, deferred amounts generally are not includible in income if nonqualified deferred compensation is payable from general corporate funds that are subject to the claims of general creditors, as such amounts are treated as unfunded and unsecured promises to pay money or property in the future.

As discussed above, if the arrangement is unfunded, then the compensation generally is includible in income by a cash-basis taxpayer when it is actually or constructively received under section 451.²⁵⁸ Income is constructively received when it is credited to a person's account, set apart, or otherwise made available so that it may be drawn on at any time. Income is not constructively received if the taxpayer's control of its receipt is subject to substantial limitations or restrictions. A requirement to relinquish a valuable right in order to make withdrawals is generally treated as a substantial limitation or restriction.

Prior to the enactment of section 409A, arrangements had developed in an effort to provide employees with security for nonqualified deferred compensation, while still allowing deferral of income inclusion under the constructive receipt doctrine (which applies to unfunded arrangements). One such arrangement is a "rabbi trust." A rabbi trust is a trust or other fund established by the employer to hold assets from which nonqualified deferred compensation payments will be made. The trust or fund is generally irrevocable and does not permit the employer to use the assets for purposes other than to provide nonqualified deferred compensation, except that the terms of the trust or fund provide that the assets are subject to the claims of the employer's creditors in the case of insol-

²⁵⁷Treas. Reg. sec. 1.83-3(e). This definition, in part, reflects previous IRS rulings on nonqualified deferred compensation.

²⁵⁸Treas. Reg. secs. 1.451-1 and 1.451-2.

vency or bankruptcy. In the case of a rabbi trust, these terms have been the basis for the conclusion that the creation of a rabbi trust does not cause the related nonqualified deferred compensation arrangement to be funded for income tax purposes.²⁵⁹ As a result, no amount is included in income by reason of the rabbi trust; generally income inclusion occurs as payments are made from the trust.

Section 409A

Reason for enactment

The Congress enacted section 409A²⁶⁰ because it was concerned that many nonqualified deferred compensation arrangements had developed which allowed improper deferral of income. Executives often used arrangements that allowed deferral of income, but also provided security of future payment and control over amounts deferred. For example, nonqualified deferred compensation arrangements often contained provisions that allowed participants to receive distributions upon request, subject to forfeiture of a minimal amount (i.e., a “haircut” provision). In addition, Congress was aware that since the concept of a rabbi trust was developed, techniques had been used that attempted to protect the assets from creditors despite the terms of the trust. For example, the trust or fund would be located in a foreign jurisdiction, making it difficult or impossible for creditors to reach the assets.

Prior to the enactment of section 409A, while the general tax principles governing deferred compensation were well established, the determination whether a particular arrangement effectively allowed deferral of income was generally made on a facts and circumstances basis. There was limited specific guidance with respect to common deferral arrangements. The Congress believed that it was appropriate to provide specific rules regarding whether deferral of income inclusion should be permitted and to provide a clear set of rules that would apply to these arrangements. The Congress believed that certain arrangements that allow participants inappropriate levels of control or access to amounts deferred should not result in deferral of income inclusion. The Congress also believed that certain arrangements, such as offshore trusts, which effectively protect assets from creditors of the employer, should be treated as funded and not result in deferral of income inclusion to the extent the amounts are vested.

General requirements of section 409A

In general.—Under section 409A, all amounts deferred by a service provider under a nonqualified deferred compensation plan²⁶¹ for all taxable years are currently includible in gross income of the service provider to the extent such amounts are not subject to a

²⁵⁹This conclusion was first provided in a 1980 private ruling issued by the IRS with respect to an arrangement covering a rabbi; hence, the popular name “rabbi trust.” Priv. Ltr. Rul. 8113107 (Dec. 31, 1980).

²⁶⁰Section 409A was added to the Code by sec. 885 of the American Job Creation Act of 2004, Pub. L. No. 108–357.

²⁶¹A plan includes an agreement or arrangement, including an agreement or arrangement that includes one person. Amounts deferred also include actual or notional earnings.

substantial risk of forfeiture²⁶² and not previously included in gross income, unless certain requirements are satisfied. If the requirements of section 409A are not satisfied, in addition to current income inclusion, interest at the rate applicable to underpayments of tax plus one percentage point is imposed on the underpayments that would have occurred had the compensation been includible in income when first deferred, or if later, when not subject to a substantial risk of forfeiture. The amount required to be included in income is also subject to a 20-percent additional tax.

Section 409A does not limit the amount that may be deferred under a nonqualified deferred compensation plan. The Secretary of the Treasury is authorized to prescribe regulations as are necessary or appropriate to carry out the purposes of section 409A. The Secretary of the Treasury published final regulations under section 409A on April 17, 2007.²⁶³

Under these regulations, the term “service provider” includes an individual, corporation, subchapter S corporation, partnership, personal service corporation (as defined in section 269A(b)(1)), noncorporate entity that would be a personal service corporation if it were a corporation, or qualified personal service corporation (as defined in section 448(d)(2)) for any taxable year in which such individual or entity accounts for gross income from the performance of services under the cash receipts and disbursements method of accounting.²⁶⁴ Section 409A does not apply to a service provider that provides significant services to at least two service recipients that are not related to each other or the service provider. This exclusion does not apply to a service provider who is an employee or a director of a corporation (or similar position in the case of an entity that is not a corporation).²⁶⁵ In addition, the exclusion does not apply to an entity that operates as the manager of a hedge fund or private equity fund. This is because the exclusion does not apply to the extent that a service provider provides management services to a service recipient. Management services for this purpose means services that involve the actual or de facto direction or control of the financial or operational aspects of a trade or business of the service recipient or investment management or advisory services provided to a service recipient whose primary trade or business includes the investment of financial assets, such as a hedge fund.²⁶⁶

Permissible distribution events.—Under section 409A, distributions from a nonqualified deferred compensation plan may be allowed only upon separation from service (as determined by the Secretary of the Treasury), death, a specified time (or pursuant to a fixed schedule), change in control of a corporation (to the extent provided by the Secretary of the Treasury), occurrence of an unforeseeable emergency, or if the service provider becomes disabled. A nonqualified deferred compensation plan may not allow distributions other than upon the permissible distribution events and, ex-

²⁶² The rights of a person to compensation are subject to a substantial risk of forfeiture if the person's rights to such compensation are conditioned upon the performance of substantial services by any individual.

²⁶³ On October 22, 2007, the IRS announced that during 2008, taxpayers are not required to comply with the final regulations. Instead, taxpayers must operate a plan in compliance with section 409A and the otherwise applicable guidance. To the extent an issue is not addressed, a reasonable, good faith interpretation of the statute must be used. Notice 2007-86.

²⁶⁴ Treas. Reg. sec. 1.409A-1(f)(1).

²⁶⁵ Treas. Reg. sec. 1.409A-1(f)(2).

²⁶⁶ Treas. Reg. sec. 1.409A-1(f)(2)(iv).

cept as provided in regulations by the Secretary of the Treasury, may not permit acceleration of a distribution. In the case of a specified employee who separates from service, distributions may not be made earlier than six months after the date of the separation from service or upon death. Specified employees are key employees²⁶⁷ of publicly-traded corporations.

Elections.—Section 409A requires that a plan must provide that compensation for services performed during a taxable year may be deferred at the service provider's election only if the election to defer is made no later than the close of the preceding taxable year, or at such other time as provided in Treasury regulations. In the case of any performance-based compensation based on services performed over a period of at least 12 months, such election may be made no later than six months before the end of the service period. The time and form of distributions must be specified at the time of initial deferral. A plan may allow changes in the time and form of distributions subject to certain requirements.

Back-to-back arrangements.—Back-to-back service recipients (i.e., situations under which an entity receives services from a service provider such as an employee, and the entity in turn provides services to a client) that involve back-to-back nonqualified deferred compensation arrangements (i.e., the fees payable by the client are deferred at both the entity level and the employee level) are subject to special rules under section 409A. For example, the final regulations generally permit the deferral agreement between the entity and its client to treat as a permissible distribution event those events that are specified as distribution events in the deferral agreement between the entity and its employee. Thus, if separation from employment is a specified distribution event between the entity and the employee, the employee's separation generally is a permissible distribution event for the deferral agreement between the entity and its client.²⁶⁸

Offshore funding arrangements.—Section 409A requires current income inclusion in the case of certain offshore funding of nonqualified deferred compensation. Under section 409A, in the case of assets set aside (directly or indirectly) in a trust (or other arrangement determined by the Secretary of the Treasury) for purposes of paying nonqualified deferred compensation, such assets are treated as property transferred in connection with the performance of services under section 83 (whether or not such assets are available to satisfy the claims of general creditors) at the time set aside if such assets (or trust or other arrangement) are located outside of the United States or at the time transferred if such assets (or trust or other arrangement) are subsequently transferred outside of the United States. Any subsequent increases in the value of, or any earnings with respect to, such assets are treated as additional transfers of property.

Interest at the underpayment rate plus one percentage point is imposed on the underpayments of tax that would have occurred had the amounts set aside been includible in income for the taxable year in which first deferred or, if later, the first taxable year not

²⁶⁷ Key employees are defined in section 416(i) and generally include officers (limited to 50 employees) having annual compensation greater than \$145,000 (for 2007), five percent owners, and one percent owners having annual compensation from the employer greater than \$150,000.

²⁶⁸ Treas. Reg. sec. 1.409A-3(i)(6).

subject to a substantial risk of forfeiture. The amount required to be included in income also is subject to an additional 20-percent tax.

The special funding rule does not apply to assets located in a foreign jurisdiction if substantially all of the services to which the nonqualified deferred compensation relates are performed in such foreign jurisdiction. The Secretary of the Treasury has authority to exempt arrangements from the provision if the arrangements do not result in an improper deferral of U.S. tax and will not result in assets being effectively beyond the reach of creditors.

Definition of substantial risk of forfeiture

Under the Treasury regulations, compensation is subject to a substantial risk of forfeiture if entitlement to the amount is conditioned upon either the performance of substantial future services by any person or the occurrence of a condition related to a purpose of the compensation, provided that the possibility of forfeiture is substantial.²⁶⁹

Definition of nonqualified deferred compensation

Under section 409A, a nonqualified deferred compensation plan generally includes any plan 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. A qualified employer plan means a qualified retirement plan, tax-deferred annuity, simplified employee pension, and SIMPLE. A qualified governmental excess benefit arrangement (sec. 415(m)) and an eligible deferred compensation plan (sec. 457(b)) is a qualified employer plan.

The Treasury regulations also provide that certain other types of plans are not considered deferred compensation, and thus are not subject to section 409A. For example, if a service recipient transfers property to a service provider, there is no deferral of compensation merely because the value of the property is either not includible in income under section 83 by reason of the property being substantially nonvested or is includible in income because of a valid section 83(b) election.²⁷⁰ Special rules apply in the case of stock options.²⁷¹ Another exception applies to amounts that are not deferred beyond a short period of time after the amount is no longer subject to a substantial risk of forfeiture.²⁷² Under this exception, there generally is no deferral for purposes of section 409A if the service provider actually or constructively receives the amount on or before the last day of the applicable 2½ month period. The applicable 2½ month period is the period ending on the later of the 15th day of the third month following the end of: (1) the service provider's first taxable year in which the right to the payment is no longer subject to a substantial risk of forfeiture; or (2) the service recipient's first taxable year in which the right to the payment is no longer subject to a substantial risk of forfeiture.

²⁶⁹ Treas. Reg. sec. 1.409A-1(d)(1).

²⁷⁰ Treas. Reg. Sec. 1.409A-1(b)(6).

²⁷¹ Treas. Reg. Sec. 1.409A-1(b)(5).

²⁷² Treas. Reg. sec. 1.409A-1(b)(4).

Special rules apply in the case of stock appreciation rights (“SARs”).²⁷³ Under the final Treasury regulations, a SAR is a right to compensation based on the appreciation in value of a specified number of shares of service recipient stock occurring between the date of grant and the date of exercise of such right. The final regulations generally provide that a SAR does not result in a deferral of compensation for purposes of section 409A (and thus is not subject to section 409A) if the compensation payable under the SAR is not greater than the excess of the fair market value of the underlying stock on the date the SAR is exercised over the fair market value of the underlying stock on the date the SAR is granted.²⁷⁴

The Treasury regulations provide exclusions from the definition of nonqualified deferred compensation in the case of services performed by individuals who participate in certain foreign plans, including plans covered by an applicable treaty and broad-based foreign retirement plans.²⁷⁵ In the case of a U.S. citizen or lawful permanent alien, nonqualified deferred compensation plan does not include a broad-based foreign retirement plan, but only with respect to the portion of the plan that provides for nonelective deferral of foreign earned income and subject to limitations on the annual amount deferred under the plan or the annual amount payable under the plan. In general, foreign earned income refers to amounts received by an individual from sources within a foreign country that constitutes earned income attributable to services.

Timing of the service recipient’s deduction

Special statutory provisions govern the timing of the deduction for nonqualified deferred compensation, regardless of whether the arrangement covers employees or nonemployees and regardless of whether the arrangement is funded or unfunded.²⁷⁶ Under these provisions, the amount of nonqualified deferred compensation that is includible in the income of the service provider is deductible by the service recipient for the taxable year in which the amount is includible in the service provider’s income.²⁷⁷ Thus, for example, in the case of an unfunded nonqualified deferred compensation plan, a deduction to the taxable service recipient is deferred until the deferred compensation is actually paid or made available to the service provider.

²⁷³ Treas. Reg. sec. 1.409A-1(b)(5).

²⁷⁴ Treas. Reg. sec. 1.409A-1(b)(5)(i)(B).

²⁷⁵ Treas. Reg. sec. 1.409A-1(a)(3).

²⁷⁶ Secs. 404(a)(5), (b) and (d) and sec. 83(h).

²⁷⁷ In the case of a publicly held corporation, no deduction is allowed for a taxable year for remuneration with respect to a covered employee to the extent that the remuneration exceeds \$1 million. Code sec. 162(m). The Code defines the term “covered employee” in part by reference to Federal securities law. In light of changes to Federal securities law, the Internal Revenue Service interprets the term covered employee as the principal executive officer of the taxpayer as of the close of the taxable year or the 3 most highly compensated employees of the taxpayer for the taxable year whose compensation must be disclosed to the taxpayer’s shareholders (other than the principal executive officer or the principal financial officer). Notice 2007-49, 2007-25 I.R.B. 1429. For purposes of the deduction limit, remuneration generally includes all remuneration for which a deduction is otherwise allowable, although commission-based compensation and certain performance-based compensation are not subject to the limit. Remuneration does not include compensation for which a deduction is allowable after a covered employee ceases to be a covered employee. Thus, the deduction limitation often does not apply to deferred compensation that is otherwise subject to the deduction limitation (e.g., is not performance-based compensation) because the payment of the compensation is deferred until after termination of employment.

Section 457

Special income recognition rules apply in the case of a participant in a deferred compensation plan that is sponsored by a State or local government or an organization that is exempt from Federal income tax under section 501(a). Section 457 provides for different income inclusion rules, for two basic types of deferred compensation arrangements: (1) arrangements that limit the amount of compensation that may be deferred (generally, \$15,500 in 2007) and that meet certain other requirements specified in section 457(b) (referred to as a “section 457(b) plan” or an “eligible deferred compensation plan”); and (2) arrangements that do not satisfy the requirements of section 457(b) (referred to as a “section 457(f) plan” or an “ineligible deferred compensation plan”). Section 457 does not provide a limit on the amount of compensation that may be deferred under a section 457(f) plan.

A participant in a section 457(b) plan does not recognize income with respect to the participant’s interest in such plan until the time of actual distribution (or, if earlier, the time the participant’s interest is made available to the participant, but only in the case of a section 457(b) plan maintained by a tax-exempt sponsor other than a State or local government). In contrast, a participant in a section 457(f) plan must include amounts deferred under such a plan in gross income for the first taxable year in which there is no substantial risk of forfeiture of the rights to such compensation.

Charitable contributions

In general, a deduction is permitted for charitable contributions, subject to certain limitations that depend on the type of taxpayer, the property contributed, and the donee organization. The amount of deduction generally equals the fair market value of the contributed property on the date of the contribution. Charitable deductions are provided for income, estate, and gift tax purposes.

In general, for individuals, the amount deductible is a percentage of the taxpayer’s contribution base, which is the taxpayer’s adjusted gross income computed without regard to any net operating loss carryback. The applicable percentage of the contribution base varies depending on the type of donee organization and property contributed. Cash contributions by an individual taxpayer to public charities, private operating foundations, and certain types of private nonoperating foundations may not exceed 50 percent of the taxpayer’s contribution base. Charitable contributions in excess of applicable percentage limits generally may be carried over to the five succeeding taxable years.

REASONS FOR CHANGE

Under present law, there is a tension in the case of a non-qualified deferred compensation agreement between a service provider and a taxable service recipient. This arises because the timing rule under the Code defers the service recipient’s deduction for nonqualified deferred compensation until the taxable year in which such compensation is includible in the service provider’s gross income. This tension may limit the amount of compensation that a service recipient is willing to permit a service provider to defer under a nonqualified deferred compensation arrangement. Even

when this tension does not limit the amount of compensation that a service recipient is willing to permit a service provider to defer under a nonqualified deferred compensation arrangement, this tension ensures that the cost of allowing this deferral is borne by the service recipient.

Under present law, the ability to defer nonqualified deferred compensation is limited in certain cases in which this tension is not present. When this tension is not present, the cost of allowing service providers to defer under a nonqualified deferred compensation arrangement is not borne by the service recipient. Instead, this cost is borne by the Treasury. In order to limit the cost to the Treasury, Congress passed special rules limiting deferral in certain situations. Specifically, section 457 provides special rules that limit deferred compensation arrangements sponsored by State and local governments and other tax-exempt entities.

The Committee has become aware of other situations in which the present law tension does not exist. Specifically, foreign corporations that are not subject to a comprehensive income tax and partnerships that are comprised of foreign persons and U.S. tax-exempt entities are indifferent to the timing of deductions for nonqualified deferred compensation. The Committee believes that in such cases additional rules should apply that limit the ability to defer service provider compensation.

EXPLANATION OF PROVISION

In general

Under the provision, any compensation that is deferred under a nonqualified deferred compensation plan of a nonqualified entity is includible in gross income by the service provider when there is no substantial risk of forfeiture of the service provider's rights to such compensation. The provision applies in addition to the requirements of section 409A (or any other provision of the Code or general tax law principle) with respect to nonqualified deferred compensation.

Nonqualified deferred compensation

For purposes of the provision, the term nonqualified deferred compensation plan is defined in the same manner as for purposes of section 409A. As under section 409A, the term nonqualified deferred compensation includes earnings with respect to previously deferred amounts. Earnings are treated in the same manner as the amount deferred to which the earnings relate.

Under the provision, nonqualified deferred compensation includes any arrangement under which compensation is based on the increase in value of a specified number of equity units of the service recipient. Thus, stock appreciation rights (SARs) are treated as nonqualified deferred compensation under the provision, regardless of the exercise price of the SAR. It is not intended that the term nonqualified deferred compensation plan include an arrangement taxable under section 83 providing for the grant of an option on employer stock with an exercise price that is not less than the fair market value of the underlying stock on the date of grant if such arrangement does not include a deferral feature other than the feature that the option holder has the right to exercise the option in

the future. The provision is not intended to change the tax treatment of incentive stock options meeting the requirements of section 422 or options granted under an employee stock purchase plan meeting the requirements of section 423. Similarly, nonqualified deferred compensation for purposes of the provision does not include a transfer of property to which section 83 is applicable (such as a transfer of restricted stock), provided that the arrangement does not include a deferral feature.

Compensation is not treated as deferred for purposes of the provision if the service provider receives payment of the compensation not later than 12 months after the end of the taxable year of the service recipient during which the right to the payment of such compensation is no longer subject to a substantial risk of forfeiture.

Nonqualified entity

The term nonqualified entity includes certain foreign corporations and certain partnerships (either domestic or foreign). A foreign corporation is a nonqualified entity unless substantially all of such income is effectively connected with the conduct of a United States trade or business or is subject to a comprehensive foreign income tax. A partnership is a nonqualified entity unless substantially all of such income is allocated to persons other than foreign persons with respect to whom such income is not subject to a comprehensive income tax and organizations which are exempt from U.S. income tax.

The term comprehensive foreign income tax means with respect to a foreign person, the income tax of a foreign country if (1) such person is eligible for the benefits of a comprehensive income tax treaty between such foreign country and the United States, or (2) such person demonstrates to the satisfaction of the Secretary of the Treasury that such foreign country has a comprehensive income tax.

In the case of a foreign corporation with income that is taxable under section 882, the provision does not apply to compensation which, 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 by such foreign corporation against such income.

Additional rules

For purposes of the provision, compensation of a service provider is subject to a substantial risk of forfeiture only if such person's right to the compensation is conditioned upon the future performance of substantial services by any person. Thus, compensation is subject to a substantial risk of forfeiture only if entitlement to the compensation is conditioned on the performance of substantial future services and the possibility of forfeiture is substantial. Substantial risk of forfeiture does not include a condition related to a purpose of the compensation (other than future performance of substantial services), regardless of whether the possibility of forfeiture is substantial.

To the extent provided in regulations prescribed by the Secretary, if compensation is determined solely by reference to the amount of gain recognized on the disposition of an investment asset, such compensation is treated as subject to a substantial risk

of forfeiture until the date of such disposition. Investment asset means any single asset (other than an investment fund or similar entity) (1) acquired directly by an investment fund or similar entity, (2) with respect to which such entity does not (nor does any person related to such entity) participate in the active management of such asset (or if such asset is an interest in an entity, in the active management of the assets of such entity), and (3) substantially all of any gain on the disposition of which (other than the nonqualified deferred compensation) is allocated to investors of such entity. The rule only applies if the compensation is determined solely by reference to the gain upon the disposition of an investment asset. Thus, for example, the rule does not apply in the case of an arrangement under which the amount of this compensation is reduced for losses on the disposition of any other asset. With respect to any gain attributable to the period before the asset is treated as no longer subject to a substantial risk of forfeiture, it is intended that Treasury regulations will limit the application of this rule to gain attributable to the period that the service provider is performing services.

The rule is intended to apply to compensation contingent on the disposition of a single asset held as a long-term investment, provided that the service provider does not actively manage the asset (other than the decision to purchase or sell the investment). If the asset is an interest in an entity (such as a company that produces products or services), the rule does not apply if the service provider actively participates in the management of the entity. Active management is intended to include participation in the day-to-day activities of the asset, but does not include the election of a director or other voting rights exercised by shareholders.

The rule is intended to apply solely to compensation arrangements relating to passive investments by an investment fund in a single asset. For example, if an investment fund acquires XYZ operating corporation, the rule is intended to apply to an arrangement that the fund manager receive 20 percent of the gain from the disposition of XYZ operating corporation if the fund manager does not actively participate in the management of XYZ operating corporation. In contrast, the rule does not apply if the investment fund holds two or more operating corporations and the fund manager's compensation is based on the net gain resulting from the disposition of the operating corporations. The rule does not apply to the disposition of a foreign subsidiary which holds a variety of assets the investment of which is managed by the service provider.

Under the provision, if the amount of any deferred compensation is not determinable at the time that such compensation is otherwise required to be taken into account into income under the provision, the amount is taken into account when such amount becomes determinable. This rule applies in lieu of the general rule of the provision, under which deferred compensation is taken into account in income when such compensation is no longer subject to a substantial risk of forfeiture. In addition, the income tax with respect to such amount is increased by the sum of (1) an interest charge, and (2) an amount equal to 20 percent of such compensation. The interest charge is equal to the interest at the rate applicable to underpayments of tax plus one percentage point imposed on the underpayments that would have occurred had the compensation been

includible in income when first deferred, or if later, when not subject to a substantial risk of forfeiture.

Treasury regulations

It is intended that the Secretary of the Treasury issue regulations as to when an amount is not determinable for purposes of the provision. It is intended that an amount of deferred compensation is not determinable at the time the amount is no longer subject to a substantial risk of forfeiture if the amount varies depending on the satisfaction of an objective condition. For example, if a deferred amount varies depending on the satisfaction of an objective condition at the time the amount is no longer subject to substantial risk of forfeiture (e.g., no amount is paid unless a certain threshold is achieved, 100 percent is paid if the threshold is achieved, and 200 percent is paid if a higher threshold is achieved), the amount deferred is not determinable.

The Secretary of the Treasury is also authorized to issue such regulations as may be necessary or appropriate to carry out the purposes of the provision, including regulations disregarding a substantial risk of forfeiture as necessary to carry out such purposes.

Under the provision, aggregation rules similar to those that apply under section 409A apply for purposes of determining whether a plan sponsor is a nonqualified entity. It is intended, however, that such aggregation rules are limited by the Secretary to operate in accordance with the purposes of the provision. For example, it is intended that the aggregation rules do not result in the application of the provision to employees of a U.S. subsidiary C corporation that is wholly owned by a nonqualified entity when the U.S. subsidiary sponsors the nonqualified deferred compensation plan in which the employees of the subsidiary participate. This is because the subsidiary is subject to the timing rule with respect to its deduction of its employees' nonqualified deferred compensation.

Charitable contributions of existing deferrals permitted

Under the provision, the 50-percent limit on the deduction for charitable contributions does not apply to qualified contributions to the extent of the qualified inclusion amount. A qualified contribution means a charitable contribution (1) of cash (2) made during the last taxable year beginning before 2018 (3) to an organization described in section 170(b)(1)(A) (in general, a public charity), other than a supporting organization described in section 509(a) or a donor advised fund described in section 4966(d)(2). The qualified inclusion amount is the amount includable in gross income under the provision during such last taxable year attributable to services performed on or before December 31, 2008.

In applying the percentage limitations on the deduction for charitable contributions under section 170(b) to the remaining charitable contributions, section 170(b) is applied without regard to the contributions to which the 50-percent limit does not apply, and the contribution base is reduced by that amount.

In applying the carryover rules of section 170(d), contributions that are not subject to the 50-percent limit under the provision are not taken into account, because those contributions are deductible in the current taxable year.

The provision may be illustrated by the following example:

Example.—Assume an individual for 2017 has a contribution base of \$1 million without regard to the qualified inclusion amount and a \$1 million qualified inclusion amount which increases the contribution base to \$2 million. The individual contributes \$2 million in cash to organizations described in section 170(b)(1)(A), of which \$1 million are qualified contributions. Without the waiver of the percentage limitation, the taxpayer's charitable contribution deduction would be \$1 million (i.e., 50 percent of a contribution base of \$2 million), and \$1 million would be carried forward. Under the provision, the individual is allowed a charitable contribution deduction of \$1.5 million—the sum of (1) \$1 million in qualified contributions up to the qualified inclusion amount plus (2) \$500,000 (the deduction that would be computed if the contribution base were reduced from \$2 million to \$1 million by the \$1 million contributions to which the section 170(b) limitation does not apply, and those contributions were not taken into account). \$500,000 is carried forward to future years.

EFFECTIVE DATE

The provision is effective with respect to amounts deferred which are attributable to services performed after December 31, 2008. In the case of an amount deferred which is attributable to services performed on or before December 31, 2008, to the extent such amount is not includible in gross income in a taxable year beginning before 2018, then such amount is includible in gross income in the later of (1) the last taxable year beginning before 2018, or (2) the taxable year in which there is no substantial risk of forfeiture of the rights to such compensation. Earnings on amounts deferred which are attributable to services performed on or before December 31, 2008, are subject to the provision only to the extent that the amounts to which such earnings relate are subject to the provision.

No later than 120 days after date of enactment, the Secretary shall issue guidance providing a limited period of time during which a nonqualified deferred compensation arrangement attributable to services performed on or before December 31, 2008, may, without violating the requirements of section 409A(a), be amended to conform the date of distribution to the date the amounts are required to be included in income. If the taxpayer is also a service recipient and maintains one or more nonqualified deferred compensation arrangements for its service providers under which any amount is attributable to services performed on or before December 31, 2008, the guidance shall permit such arrangements to be amended to conform the dates of distribution under the arrangement to the date amounts are required to be included in income of the taxpayer under the provision. An amendment made pursuant to the Treasury guidance will not be treated as a material modification of the arrangement for purposes of section 409A.