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Section 457 and Tax Treatment of Federal Credit Union Plans

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Introduction

To the average consumer, whether their checking account, savings account, credit card, debit/ATM card, home mortgage loan, car loan, or small business loan comes from a large commercial bank, small community bank,[1] credit union, or other financial institution doesn't make much of a difference because most of these products look and act the same, with minor differences in interest rates and other terms. However, when you take a step back and look at the legal environment in which the financial institutions offering these financial products operate, major differences come to light. A significant example is how credit unions' cultural and regulatory oversight differ from banks. These differences are reflected in the historical structure of the compensation of senior officers that is typically provided by banks and thrifts, compared to credit unions. This article will examine those differences and will discuss recent developments governing the application of Code §457[2] to nonqualified deferred compensation plans maintained by federal credit unions.

Overview of Banks v. Credit Unions

Banks are "for profit," stock-based corporate entities in which nondepositors may invest, while credit unions are "not-for-profit," nonstock entities that are mutually owned by depositors. The members of banks' boards of directors are typically compensated for their services, whereas most credit union boards of directors are uncompensated. Banks focus on readily measurable financial rates of return, such as net income, return on assets, and return on equity. In contrast, credit unions provide financial services to a community of members with a common link, such as employment with a particular employer, living or working in a certain geographic area, or other "community-based" factors. Culturally, the differences have affected how the compensation packages offered by credit unions differ from those offered by banks, even though both banks and credit unions often find themselves in direct competition for the same talent pool of employees and executives.

Regulatory Oversight of Banks

To understand how the compensation packages offered by credit unions differ from those offered by banks, the regulatory scheme governing banks and credit unions must first be sorted out. The Federal Deposit Insurance Corporation (FDIC) assigns a classification code for all banks, based on the bank's charter type (commercial bank or savings institution), charter agent (state or federal), Federal Reserve (Fed) membership status (member or nonmember) and primary federal regulator (but note that state-chartered banks are subject to both federal and state supervision). The following chart sets forth the FDIC's classification codes for banks.[3]

Bank Charter Class	Description
N	Commercial bank; national (federal) charter and Fed member, supervised by the Office of the Comptroller of the Currency (OCC)
SM	Commercial bank, state charter and Fed member, supervised by the Federal Reserve Board (FRB)
NM	Commercial bank, state charter and Fed nonmember, supervised by the FDIC
SB	Savings banks, state charter, supervised by the FDIC
SA	Savings associations, state or federal charter, supervised by the Office of Thrift Supervision (OTS)
OI	Insured U.S. branch of a foreign chartered institution

Bank regulators also focus on “safety and soundness” principles that affect the bank's operations as a whole, which may include specific rules with respect to employment agreements, severance packages and other aspects of executive and board compensation. Such principles are manifested in the rules and regulations published by the various state and federal regulatory agencies (i.e., FDIC, OCC, FRB, and OTS). Often these rules are similar,[4] but not identical. Therefore, the particular compensation package that a bank may offer board members or executives must be measured against the rules of that bank's regulator.

In addition, banks that have publicly traded stock are subject to the rules and regulations of the Securities and Exchange Commission (SEC) (e.g., annual and periodic disclosure of executive officers' and board members' compensation arrangements), the stock market on which their shares are traded (e.g., Nasdaq requires shareholder approval of equity-based compensation plans), and the Financial Accounting Standards Board (FASB) (e.g., method of accounting for stock options and other compensation). Publicly traded banks must also comply with the corporate governance rules enacted by the Sarbanes-Oxley Act of 2002 (SOX). In addition, shareholder organizations (such as Institutional Shareholder Services (ISS)) often monitor publicly traded banks' executive and board compensation packages. Like other corporate taxpayers, most banks file IRS Form 1120 as their annual federal tax return, and are subject to the same IRS audit procedures as other corporate taxpayers with respect to executive compensation matters.[5]

Regulatory Oversight of Credit Unions

Like banks, credit unions may have either a federal or state charter, but quite unlike banks, there is only one federal regulator for credit unions, which is the National Credit Union Administration (NCUA). State-chartered credit unions must also comply with the rules and regulations set by the applicable state-level credit union regulatory agency. Credit unions are tax-exempt organizations and as such, file an annual IRS Form 990, which is open to public inspection. State-chartered credit unions file an individual Form 990 with full executive compensation disclosure, but federal-chartered credit unions submit their information to NCUA, which files one, unified Form 990 for all federal credit unions, with abbreviated executive compensation disclosure. Also, *state-chartered* credit unions, which are tax-exempt under Code §501(c)(14), are subject to the general private inurement rules that apply to tax exempt organizations, whereas *federal* credit unions, which are tax-exempt under Code §501(c)(1),[6] are generally exempt from the private inurement rules. Therefore, in theory, the executive compensation packages provided by state credit unions are subject to greater IRS scrutiny than those offered by federal credit unions.

Executive Compensation Packages: Banks v. Credit Unions

Design Considerations (Other than Tax)

Keeping in mind the differences in regulatory structure and oversight between "for profit" banks and "not-for-profit" credit unions, we now turn to how those differences affect the design of executive compensation packages for credit union executives. A primary executive compensation obstacle for all tax exempt organizations is their inability to offer equity-based incentive compensation. To make up for that limitation, tax-exempt organizations generally offer executives more nonqualified deferred compensation. In a recent survey of credit unions, 49 percent of all respondents reported that they have at least one nonqualified deferred compensation plan.[7] A major factor underlying this trend is the number of executives nearing retirement age. Experts predict that nearly half of credit union chief executive officers (CEOs) will be eligible for retirement in the next 10 years.[8] Furthermore, the Credit Union National Association (CUNA), a leading trade organization for both federal and state-chartered credit unions, estimates that as many as *4,000* credit union CEO positions may have to be filled by 2012, which makes the search for executive talent very competitive.[9]

The demand for credit union executive talent comes at a time when many for-profit companies (including banks) are freezing or terminating their traditional defined benefit pension plans and their nonqualified deferred compensation plans that are based on a defined benefit plan model. Those nonqualified plans are often are "excess benefit plans," which are tied to the tax-qualified defined benefit plan, and are designed to "make the executive whole" for amounts that are cut back under IRS limits on tax-qualified retirement plans.

Credit unions frequently offer executives "employer-pay-all," supplemental retirement plans (SERPs) based on the defined benefit plan model. In fact, a recent survey found that 75 percent of all SERPs established by credit unions under Code §457(f) are based on a defined benefit model, using a benefit formula based on the replacement of a percentage of the executive's final salary at retirement (typically 60 percent), rather than targeting the delivery of a flat benefit amount.[10] Therefore, even though credit unions cannot offer equity-based compensation, they fill that gap by offering defined benefit model retirement benefits. Such plans may be equally as valuable, or even more attractive than equity-based compensation to the members of the baby boom generation, whose ages now span from the mid-40's to the mid-60's, which is typically the time when securing a retirement income stream often looms large executives' financial planning.

Nonqualified deferred compensation plans maintained by credit unions (and banks) are generally structured as unfunded, unsecured promises to pay money in the future to a select group of management or highly compensated employees, so that the plans can be exempt under the "top hat" exemption from many of the reporting and disclosure obligations under the Employee Retirement Income Security Act of 1974 (ERISA). Nevertheless, credit unions (and banks) often informally fund their nonqualified deferred compensation plans through rabbi trusts or "bank owned life insurance" (BOLI). NCUA, the oversight and rule-making organization that governs credit unions, establishes and maintains rules that are designed to provide "safety and soundness" for the assets of credit unions nationwide. Among those rules, NCUA prevents credit unions from investing assets in certain types of investment vehicles where the credit unions' principal may be at too great of a risk. However, in 2004, NCUA amended its rules so that credit unions are now allowed to informally fund all “employee and officer” benefit liabilities using investments that would otherwise be impermissible for credit union assets. In addition, the NCUA amendments allowed for pooling of all liabilities when measuring the benefit obligations.[11] The recent changes in the NCUA rules are likely to result in greater expansion of credit unions' use of nonqualified deferred compensation plans as a critical element of executive recruiting and retention.[12]

Tax Considerations

“For Profit” v. “Tax Exempt”

Two very different sets of IRS rules apply to nonqualified deferred compensation plans, based on whether the employer who establishes the plan is a “for profit” entity or tax exempt entity. Nonqualified deferred compensation plans maintained by “for profit” employers (such as banks, thrifts and savings and loan associations) are taxed under Code §§61, 83, and 451, while nonqualified deferred compensation plans maintained by tax exempt employers (such as credit unions) are taxed under Code §457. Code §457 is further broken down into “eligible” plans that comply with the requirements of Code §457(b) and “ineligible” plans that are maintained under Code §457(f) because they do not qualify for the more beneficial tax treatment under Code §457(b).

The main difference between the “for profit” and “tax exempt” deferred compensation income tax structures is the timing of when the amounts deferred are taxed. Deferred compensation is not taxed to an employee of a “for profit” employer until such amounts are actually or constructively received by the employee.[13] Amounts are not constructively received by an employee if such amounts are subject to a “substantial risk of forfeiture,” which, for this purpose, includes having those amounts remain subject to the claims of the employer's creditors until the amounts are paid to the employee.[14] In other words, so long as amounts deferred by an employee of a “for profit” employer remain subject to the claims of the employer's creditors, the employee will not be taxed on those amounts.

A different definition of “substantial risk of forfeiture” applies to amounts deferred under a tax exempt organization's “ineligible” Code §457(f) plan.[15] For an ineligible 457 plan, “substantial risk of forfeiture” means that the employee must perform “substantial future services” in order to receive the deferred compensation.[16] If the employee is not required to perform “substantial future services” in order to receive the deferred amount, then the employee is immediately taxed on the full value of the amount deferred, even though that amount is not distributed to the employee at the time it becomes taxable income to the employee.[17] In other words, at the time that the employee has a vested right to the deferred amount, the employee will be taxed on full value of the amount deferred, even if that amount is not paid to the executive until a later date. Thus, a credit union executive is often presented with a nonqualified deferred compensation plan with *no vesting* until retirement and upon retirement, a lump-sum payment is made in order for the executive to have cash to pay the taxes that are due upon vesting, whereas executives of banks, thrifts and/or savings and loan associations can gradually become vested in their benefit and deferred amounts are not taxed to them until the benefit is paid (and such benefits are often payable in installments over 10 or more years).

To further confuse things, amounts deferred under a tax exempt organization's “eligible” Code §457(b) plan are not taxed until the amounts are paid or otherwise made available. Thus, unlike an “ineligible” 457(f) plan, amounts deferred under an eligible 457 plan are not taxed when they become vested, but rather are taxed when each installment is paid to the employee.[18] The tax treatment for eligible 457 plans is similar to the tax treatment that applies to amounts deferred under Code §401(k) plans.[19]

"Governmental" v. "Nongovernmental" Tax Exempt Employers

Nonqualified deferred compensation plans maintained by tax exempt employers are further distinguished by whether the plan is a "governmental plan" or "nongovernmental plan." As noted above, federal credit unions (FCUs) are exempt from taxation as an instrumentality of the federal government under Code §501(c)(1). Code §457(e)(1) defines an "eligible employer" as

> *(A) a State, political subdivision of a State, and any agency or instrumentality of a State or political subdivision of a State, and*
>
> *(B) any other organization **(other than a governmental unit)** exempt from tax under [the Code].*

(Emphasis added.)

For decades, FCUs sponsored 457 plans under subsection 457(e)(1)(B) (i.e., the rules that apply to nongovernmental tax exempt organizations), on the theory that: (1) FCUs ***are not*** "instrumentalities of a State," and therefore are not governed by subsection 457(e)(1)(A); however, (2) FCUs ***are*** tax exempt entities and ***are not*** "governmental units" (because FCUs ***are*** "instrumentalities" of the federal (but not state) government, and FCUs ***are not*** "units" of the federal government).

On July 21, 2005, the IRS issued Notice 2005-58, which concluded that FCUs may be "governmental units" and therefore may not be eligible to maintain nonqualified deferred compensation plans under Code §457(b) or (f).[20] Notice 2005-58 announced that, in light of this possible new interpretation, the IRS was re-considering whether FCUs are in fact "eligible" to sponsor nonqualified deferred compensation plans under Code §457. If FCUs are not eligible to sponsor such plans under Code §457, then the tax treatment of those arrangements would be significantly different for employees. Specifically, such arrangements would be taxed under the rules described above that apply to "for profit employers." Notice 2005-58 has caused significant concern among employers and employees in the FCU community.

Notice 2005-58 stated that FCUs which have consistently treated their nonqualified deferred compensation plans before July 21, 2005, as being subject to Code §457 would not suffer retroactively effective adverse tax consequences if the IRS determines that FCUs are not eligible sponsors of nonqualified deferred compensation plans under Code §457. However, the Notice was notably silent with respect to whether a FCU can create a new nonqualified deferred compensation plan under Code §457 after July 21, 2005. As of the date of this article, the IRS has informally stated that they have no view on whether a FCU can or cannot create a new Code §457 plan under these circumstances.

That uncertainty seems likely to continue for quite a while. Recently, several federal government officials informally confirmed that an interagency task force is being formed to study (for purposes of ***all*** employee benefit plan rules) the "big picture" question of: "*What is a governmental plan?"* The task force needs to reconcile, among other things, the discrepancy between §3(32) of ERISA, which defines "governmental plan" as including ***federal***, state and local governments and instrumentalities thereof[21] with Code §457(e)(1), which defines "eligible employer" as excluding the federal government and instrumentalities thereof. The task force will consist of representatives from the IRS, Treasury Department, Labor Department, and Pension Benefit Guaranty Corporation. However, as of the date of this article, the task force has not yet held its first meeting because members are still being determined. Furthermore, due to other pressing regulatory priorities being handled by the individuals who will staff the interagency task force, this is likely to be a very slow moving project. A best estimate is that it will be at least two years before the task force finalizes its recommendations and probably another year after that before any new guidance is issued.

In the meantime, the good news is that FCUs that had Code §457 nonqualified deferred compensation plans in place before July 21, 2005, can rely on IRS Notice 2005-58 for protection from any adverse retroactive application of any new rules that may be issued. The bad news is that FCUs that did not have Code §457 arrangements in place as of July 21, 2005, but are considering adopting such a plan to help employees save for retirement may be adversely taxed retroactively if they adopt a nonqualified deferred compensation plan under Code §457 after July 21, 2005. However, if the IRS ever sought to impose that treatment, it is likely that the affected taxpayer would challenge the IRS position in court and it is uncertain which party would prevail. On one hand, laws are not supposed to be given retroactive effect. On the other hand, Notice 2005-58 was a published announcement of the IRS's enforcement position, which puts taxpayers on notice regarding the retroactive effect of any new interpretation of existing law. Due to the unsettled nature of the IRS interpretation, a FCU that attempts to establish a nonqualified deferred compensation arrangement under the “for profit” employer rules set forth in Code §§61, 83, and 451 would be taking action contrary to decades of pattern and practice established by hundreds of FCUs that have Code §457 plans. Even worse, it seems that it will be a long time before any further official guidance is forthcoming on this issue.

Code §409A and Tax Exempt Employers

The American Jobs Creation Act of 2004[22] enacted new Code §409A, which made sweeping changes to the tax treatment of nonqualified deferred compensation for almost all employers, including “for profit” employers, as well as tax exempt employers, including both federal and state credit unions.[23] Although plans established and maintained under Code §457(b) (i.e., “eligible plans”) are exempt from new Code §409A, plans established and maintained under Code §457(f) (i.e., “ineligible plans”) are not exempt. Accordingly, effective Jan. 1, 2005, ineligible plans must be in operational compliance with *both* Code §§457(f) and with 409A. Plan documents must be in compliance with both sets of rules by Dec. 31, 2006.[24] The penalties for noncompliance with Code §409A are: (1) 20 percent excise tax on the amount deferred; (2) interest at the underpayment rate plus 1 percent (which currently would be approximately 9 percent interest); and (3) immediate income inclusion of the amount deferred.[25]

As discussed above, for purposes of Code §457(f), “substantial risk of forfeiture” means that the employee deferring income under an ineligible plan must not be fully vested (i.e., the individual must be required to perform “substantial future services” in order to avoid immediate taxation of the amounts deferred). Under new Code §409A, unless certain requirements are satisfied, all amounts deferred under a nonqualified deferred compensation plan (including a 457(f) plan) are currently includible in gross income to the extent not subject to a “substantial risk of forfeiture.” Before enactment of Code §409A, a covenant not to compete was generally thought of as a requirement to perform substantial future services. However, under Code §409A(a)(1)(A)(i), the amount is not subject to a substantial risk of forfeiture merely because the right to the amount is conditioned, directly or indirectly, upon the refraining from performance of services. Therefore, it is no longer possible to use a covenant not to compete as the basis for claiming that an amount deferred under an ineligible 457 plan is subject to a “substantial risk of forfeiture.”

In addition, before enactment of Code §409A, it was generally accepted practice (although such practice was never approved by the IRS) that individuals who deferred amounts under a 457(f) plan could elect a "rolling risk of forfeiture" which generally involved further delaying the vesting of amounts that were about to become vested. This is no longer possible under Code §409A.[26] Furthermore, it is unclear whether requiring post-employment consulting services and/or confidentiality covenants (which were typical planning techniques under Code §457(f) to delay taxation of benefits from ineligible plans) would or would not constitute a "substantial risk of forfeiture" under new Code §409A. Accordingly, the enactment of Code §409A has significantly increased the difficulty of creating ineligible 457(f) plans that satisfy these new requirements. In fact, one IRS official has informally stated that Code §457(f) plans are no longer possible after Code §409A. Although that view seems overly broad, it is nevertheless much more difficult to draft an ineligible 457(f) plan that satisfies both the requirements of Code §409A and the needs of the executives.

Increased IRS Audits of Executive Compensation and Tax Exempt Employers

Currently, the IRS has at least four separate audit initiatives involving executive compensation that could affect credit unions. Here is a very brief summary of these programs.

In August 2004, the IRS launched a new enforcement effort called the "Tax Exempt Compensation Enforcement Project" (TECEP), which initially targeted 2,000 charities and foundations that are tax exempt under Code §501(c)(3) in order to identify and stop payment of "excessive compensation and benefits" and other abuses of exempt purpose assets. Responses to the 2,000 inquiries were processed in 2005, and the IRS is currently evaluating the results of that effort.

Although federal credit unions, which are tax exempt under Code §501(c)(1), and state credit unions, which are tax exempt under Code §501(c)(14), were not the direct subjects of the investigation of Code §501(c)(3) tax exempt entities, nevertheless, the IRS has used what it learned about executive compensation in 501(c)(3) organizations to develop applications to all tax exempt organizations. Accordingly, executive compensation appears to be an area of heightened IRS scrutiny for all tax exempt organizations.

Separate from TECEP, the IRS has an on-going audit initiative for Code §457(b) and (f) plans. However, that initiative has as its primary focus large plans (i.e., those with 2,500 or more participants) and the IRS has stated that this initiative will not include governmental plans. Nevertheless, given the unsettled question of whether federal credit unions are or are not governmental plans (and most FCUs believe that they are not governmental plans), this initiative may implicate Code §457(b) and (f) plans maintained by FCUs. This initiative will focus on whether there has been a failure to include vested contributions in income under ineligible 457 plans and whether all of the applicable limitations on deferrals and distributions were followed with respect to eligible 457 plans.

Yet another, separate, IRS audit initiative is targeting executive compensation generally, with a particular emphasis on taxation of nonqualified deferred compensation, split dollar life insurance, and fringe benefits. Although this initiative is being undertaken by the Large and Mid-Size Business (LMSB) Division of the IRS (involving "for profit" employers with assets of $10 million or more), the results of the LMSB initiative have already sent ripples through the audits that are regularly undertaken by the Small Business and Self-Employed (SBSE) Division as well as through the Tax Exempt and Governmental Entities (TEGE) Division (which is responsible for enforcement of tax-qualified retirement plans as well as tax exempt organizations). In particular, the executive compensation components of those audits also focus on employment tax (FICA, FUTA) as well as income tax issues, which are of permanent interest to the IRS for all taxpayers.

Finally, the IRS is actively training agents with respect to excessive executive compensation in tax exempt organizations under the "intermediate sanction rules" which technically only apply to Code §501(c)(3) and §501(c)(4) organizations.[27] However, given that the training includes general private inurement applications, credit unions would be wise to evaluate their executive compensation practices because it is foreseeable that the IRS's "intermediate sanctions" initiative could be broadened to include all tax exempt organizations.

Conclusion

Because credit unions are regulated financial institutions, most credit union executive compensation plans, including both eligible and ineligible 457 plans, have typically been conservatively designed, so some of the recent developments discussed above, such as the implications of new Code §409A and stepped-up IRS enforcement are not likely to have a significant adverse impact on the day-to-day operation of such arrangements. However, the IRS's recent shift in its interpretation of whether a federal credit union can sponsor a 457 plan at all is likely to have tremendous impact on the nonqualified deferred compensation programs maintained by those employers who are considering implementing new 457 plans in order to recruit or retain executive talent in light of the increased demand for experience executives. However, until further guidance is issued on that topic, federal credit unions are left wondering how to operate their enterprise without running afoul of the trap that the IRS has set for nonqualified deferred compensation arrangements.

Footnotes

[1] Community banks are also known as "thrift" or "savings and loan" associations. Often these organizations are "mutual" institutions – i.e., they are either wholly owned or majority-owned by their customers. However, community banks could also be organized as stock corporations owned by shareholders who may be customers but could also be mere investors.

[2] All Code section references are to the Internal Revenue Code of 1986, as amended.

[3] FDIC Institutional Directory, located at http://www2.fidc.gov.

[4] For example, banks use the six "CAMELS" components that are rated under the Uniform Financial Institutions Rating System: **C**apital; **A**ssets; **M**anagement, **E**arnings, **L**iquidity and **S**ensitivity to Market Risk.

[5] However, very small banks may be "S-corporations" and, as a "pass through entity" would not file an annual IRS Form 1120.

[6] Code §501(c)(1) provides that federal credit unions are exempt from tax as "a corporation organized under an Act of Congress which is an ***instrumentality*** of the United States."

[7] 2005 Employee and Executive Benefits Survey for the Credit Union Movement, published by Executive Compensation Solutions (Glendora, CA) and KG & Associates (Wichita, KS) (hereinafter ECS Survey), p. 54, available at http://www.ecs-m.com/.

[8] CEO & Board Succession Planning, Darla Demise, Credit Union National Association, July 2004.

[9] ESC Survey, p. 54. Note, however, that one NCUA board member has stated that she expects there will be 2,000 fewer credit unions by the time her term ends (i.e., in the next few years), due to consolidation in the financial services industry, so that may affect the number of CEO positions that need to be filled.

[10] ESC Survey, p. 57.

[11] See NCUA 2004 Opinion Letters under Rule 701.19.

[12] Note, however, that on July 6, 2006, FASB's Emerging Issues Task Force (EITF) published two draft abstracts of proposed guidelines that would change the accounting treatment of BOLI (see EITF Issue No. 06-05) and of split dollar life insurance arrangements (EITF Issue No. 06-04), based on discussions held at the June 15, 2006, EITF meeting. If approved, these guidelines would apply for fiscal years starting after Dec. 15, 2006. EITF Issue 06-04 would apply only to companies that use split dollar life insurance for retirees as well as active employees. Under the new rules, employers with experience-adjusted endorsement split dollar policies would have to recognize a liability for future benefits owed to employees. EITF Issue 06-05 would require employers to calculate the value of the BOLI by including the cash surrender value, surrender charges, cash stabilization reserve account, and recovery for the upfront deferred acquisition costs over a period of years, but such amounts should be offset by the employer's contractual limits on recovering more or less of the cash surrender value of the policies. Moreover, amounts that are recoverable by the policyholder in future periods in excess of one year from the surrender of the policy should be recognized at present value. In addition, EITF 06-05 addresses how employers must account for partial surrenders under multi-life policies when just a few of the policies are surrendered.

[13] Code §451(a).

[14] See Brisendine, Veal & Drigotas, 385-4th, T.M., *Deferred Compensation Arrangements*, p. A-13 et seq., citing Rev. Rul. 60-31, Rev. Proc. 71-19 and case law which forms the foundation for the taxation of nonqualified deferred compensation under the theories of economic benefit, assignment of income and dominion and control.

[15] Code §457(f)(3)(b) provides that an amount is subject to a "substantial risk of forfeiture" (and therefore will not be taxed) as long as the participant's right to receive a benefit is conditioned upon the participant's future performance of substantial services for the employer. When the requirement to perform such services ends (i.e., the participant is "fully vested"), the amount is taxed to the participant.

[16] Treas. Reg. §1.457-11(d) relies on Treas. Reg. §1.83-3(c)(1) for the definition of "substantial risk of forfeiture."

[17] See 385-4th T.M., *supra*, at p. A-93 et seq. for a discussion of Code §457(b) and (f) plans.

[18] See Alden J. Bianchi, *A Primer on the Effect of Internal Revenue Code §409A on Deferred Compensation of Tax Exempt Employers* (December 2005), in Journal Reports: Law & Policy (BNA Executive Compensation Library).

[19] See 385-4th T.M., *supra*, at p. A-93 et seq.

[20] Notice 2005-58 was the result of intense lobbying efforts by various credit union trade associations who sought IRS published guidance of general applicability for taxpayers in response to Private Letter Ruling 200430013. In that PLR, the IRS concluded that the particular federal credit union which requested the ruling was not an "eligible" employer within the meaning of Code §457 and therefore could not maintain a Code §457(f) plan.

[21] ERISA §3(32) provides, in pertinent part, "the term 'governmental plan' means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing."

[22] Pub. L. No. 108-357.

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[23] “Questions About 409A,” by Burns-Fazzi, Brock & Associates, Charlotte, North Carolina (2006) (available at http://www.bfbbenefit.com/affiliates).

[24] Note, however, that at the time this article is being written, there are informal statements from IRS and Treasury officials hinting that the Dec. 31, 2006, date may be extended for another year.

[25] Code §409A(a)(1).

[26] See Bianchi, *supra*, at pp. 7 and 14, and IRS Notice 2005-1, Q&A 10.

[27] See Code §4958 and the regulations thereunder.

