

Rev. Proc. 98-40

SECTION 1. PURPOSE

This Revenue Procedure describes the conditions under which the sponsor of an eligible deferred compensation plan under § 457(b) of the Internal Revenue Code may obtain a ruling from the Service that takes into account changes made by the Small Business Job Protection Act of 1996, Pub. L. No. 104-188 ("SBJ PA") and the Taxpayer Relief Act of 1997, Pub. L. No. 105-34 ("TRA '97").

SECTION 2. BACKGROUND AND GENERAL INFORMATION

.01 Section 457 applies to nonqualified deferred compensation plans established by state and local government and tax-exempt employers. These plans may be either eligible plans that meet the requirements of § 457(b) or ineligible § 457(f) plans. Under § 457(a), compensation deferred pursuant to eligible plans that meet the requirements of § 457(b) and the income attributable to such deferred compensation are not includible in gross income until the taxable year in which the deferred amounts are actually paid or made available to the plan participant or beneficiary.

.02 Significant revisions were made to § 457 by the SBJ PA and by TRA '97, including a new trust requirement for compensation deferred under governmental § 457(b) plans and provision for limited in-service distribution of certain small § 457(b) plan amounts. In response to these SBJ PA amendments, Revenue Procedure 96-56, 1996-2 C.B. 389, announced that, due to study of these changes, the Service would suspend issuance of rulings regarding the tax effects of provisions under the SBJ PA affecting § 457(b) plans until further notice. Notice 96-63, 1996-2 C.B. 228, invited comments on whether the Service should publish model language to provide § 457(b) plan sponsors with a streamlined method for amending their plans to comply with the new SBJ PA provisions relating to § 457(b) plans.

.03 Guidance regarding the SBJ PA statutory amendments was provided in Notice 98-8, 1998-4 I.R.B. 6. In addition, the Service is publishing Revenue Procedure 98-41 in this issue of the Internal Revenue Bulletin to provide model plan amendments for § 457(b) plans.

SECTION 3. SECTION 457(b) RULING PROCEDURAL REQUIREMENTS

.01 Section 5.19 of Revenue Procedure 98-3, 1998-1 I.R.B. 100, 110, currently provides that the Service will not issue rulings regarding the tax effects of provisions under the SBJ PA affecting § 457(b) plans. Effective on August 10, 1998, except as provided in Section 4 below, the Service will consider all requests for rulings for § 457(b) plans made in accordance with Revenue Procedure 98-1, 1998-1 I.R.B. 7 (including payment of the required user's fee), the additional requirements of this Section 3, and any other rule adopted by the Service from time to time. See Section 5 below regarding the impact of this revenue procedure on Revenue Procedure 98-3.

.02 If a ruling is requested for a § 457(b) plan that has previously received a private letter ruling, the ruling request must include a copy of the previous ruling letter. Private letter ruling requests for § 457(b) plans that have been amended more than twice since the plan was established must contain a restated plan document incorporating all amendments and proposed amendments. In the case of a restated plan, the ruling request must clearly identify the changes made to the plan since any prior private letter ruling was issued (for example, by underscoring the location of all changes in the restated plan document). In the case of a plan intended to be a § 457(b) plan maintained by a state or local government entity, a copy of the trust agreement, custodial account agreement, or annuity contract must be included with the private letter ruling request. (If there are more than 3 trust agreements, custodial account agreements, or annuity contracts, representative samples of these documents may be provided.)

SECTION 4. LIMITATIONS ON ISSUANCE OF § 457(b) RULINGS

.01 The Service will not issue a new private letter ruling concerning a § 457(b) plan that has previously received a private letter ruling if that plan is amended solely to conform it to the SBJ PA changes by adding one or more of the model amendments contained in Revenue Procedure 98-41 (and to replace obsolete terms or delete provisions inconsistent with the model amendments so adopted). However, the Service will consider a private letter ruling request for a pre-existing § 457(b) plan even though the employer had previously received a favorable private letter ruling, if the employer has made amendments to its § 457(b) plan after it had received that ruling (other than adoption of model amendments and conforming changes). For example, the Service will consider a private letter ruling request from a plan sponsor that had received a favorable ruling in 1984 regarding its § 457(b) plan, and that has since amended that plan to conform with changes in the law, such as amendments made to conform with the Tax Reform Act of 1986.

.02 The Service will issue a private letter ruling concerning a § 457(b) plan maintained by a state or local government employer only if the plan includes provisions reflecting § 457(g), including the guidance provided in Sections VI, VII, or VIII of Notice 98-8. Model Amendment 4 of Revenue Procedure 98-41 may be used for this purpose.

.03 The Service will not issue a private letter ruling for a § 457 plan if the plan provides that a loan may be made from assets held by the plan to any participants or beneficiaries under the plan.

SECTION 5. EFFECT ON REVENUE PROCEDURE 98-3

.01 The first sentence of Section 5.19 of Revenue Procedure 98-3 (barring rulings regarding the tax effects of the SBJ PA affecting § 457(b) plans) is modified to read as follows: The tax effect of provisions under the Small Business Job Protection Act affecting plans described in § 457(b) if such provisions do not com-

ply with Section 4 of Revenue Procedure 98-40.

.02 The second sentence of Section 5.19 of Revenue Procedure 98-3 (authorizing advance rulings on § 457(b) plans based on the law in effect prior to enactment of the SBJPA) is deleted.

.03 Revenue Procedure 98-3 is amplified by adding to Section 5 the following: Section 457. Deferred Compensation Plans of State and Local Governments and Tax-Exempt Organizations. The tax treatment of any § 457 plan that provides that a loan may be made from assets held by such plan to any participants or beneficiaries under the plan.

SECTION 6. EFFECTIVE DATE

This revenue procedure applies to all ruling requests, including any pending in the National Office before August 10, 1998.

DRAFTING INFORMATION

The principal author of this revenue procedure is John Tolleris of the Office of Associate Chief Counsel (Employee Benefits/ Exempt Organizations). However, other personnel from the Internal Revenue Service and Treasury participated in its development. For further information regarding this revenue procedure, contact John Tolleris at (202) 622-6030 (not a toll-free number).