§ 1307.12 Distribution to supplier or manufacturer.

(a) Any person lawfully in possession of a controlled substance listed in any schedule may distribute (without being registered to distribute) that substance to the person from whom he/she obtained it or to the manufacturer of the substance, or, if designated, to the manufacturer's registered agent for accepting returns, provided that a written record is maintained which indicates the date of the transaction, the name, form and quantity of the substance, the name, address, and registration number, if any, of the person making the distribution, and the name, address, and registration number, if known, of the supplier or manufacturer. In the case of returning a controlled substance in Schedule I or II, an order form shall be used in the manner prescribed in part 1305 of this chapter and be maintained as the written record of the transaction. Any person not required to register pursuant to sections 302(c) or 1007(b)(1) of the Act (21 U.S.C. 822(c) or 957(b)(1)) shall be exempt from maintaining the records required by this section.

* * * * *

Dated: July 3, 2003.

Laura M. Nagel,

Deputy Assistant Administrator, Office of Diversion Control.

[FR Doc. 03–17578 Filed 7–10–03; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 602

[TD 9075]

RIN 1545–AX52

Compensation Deferred Under Eligible Deferred Compensation Plans

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations that provide guidance on deferred compensation plans of state and local governments and tax-exempt entities. The regulations reflect the changes made to section 457 by the Tax Reform Act of 1986, the Small Business Job Protection Act of 1996, the Taxpayer Relief Act of 1997, the Economic Growth and Tax Relief Reconciliation Act of 2001, the Job Creation and Worker Assistance Act of 2002, and other legislation. The regulations also make various technical changes and clarifications to the existing final regulations on many discrete issues. These regulations provide the public with guidance necessary to comply with the law and will affect plan sponsors, administrators, participants, and beneficiaries.

DATES: *Effective Date:* These final regulations are effective July 11, 2003.

Applicability Date: These regulations apply to taxable years beginning after December 31, 2001. See "Effective date of the regulations" for additional information concerning the applicability of these regulations.

FOR FURTHER INFORMATION CONTACT: Cheryl Press, (202) 622–6060 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in these final regulations has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545–1580. Responses to this collection of information are mandatory.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by the Office of Management and Budget.

The estimated burden per respondent varies from .033 hour to 2 hours per trust established depending upon individual respondents' circumstances, with an estimated average of one hour for each trust established, and from 20 hours to 50 hours per application for approval as a custodian with an estimated average of 35 hours for each application submitted to qualify as a custodian.

Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be sent to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, W:CAR:MP:T:T:SP Washington, DC 20224, and to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503.

Books or records relating to this collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

Section 131 of the Revenue Act of 1978 (92 Stat. 2779) added section 457 to the Internal Revenue Code of 1954. On September 27, 1982, final regulations (TD 7836, 1982–2 C.B. 91) under section 457 (the 1982 regulations) were published in the **Federal Register** (47 FR 42335). The 1982 regulations provided guidance for complying with the changes to the applicable tax law made by the Revenue Act of 1978 relating to deferred compensation plans maintained by state and local governments and rural electric cooperatives.

Section 1107 of the Tax Reform Act of 1986 (100 Stat. 2494) extended section 457 to tax-exempt organizations. Section 6064 of the Technical and Miscellaneous Act of 1988 (102 Stat. 3700) codified certain exceptions for certain plans. Notice 88–68, 1988–1 C.B. 556, addressed the treatment of nonelective deferred compensation of nonemployees, and provided an exception under which section 457 does not to apply to certain church plans.

Section 1404 of the Small Business Job Protection Act of 1996 (110 Stat. 1755) added section 457(g) which requires that section 457(b) plans maintained by state and local government employers hold all plan assets and income in trust, or in custodial accounts or annuity contracts (described in section 401(f) of the Internal Revenue Code), for the exclusive benefit of participants and beneficiaries.

Section 1071 of the Taxpayer Relief Act of 1997 (111 Stat. 788) permits certain accrued benefits to be cashed out.

Sections 615, 631, 632, 634, 635, 641, 647, and 649 of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) (115 Stat. 38) included increases in elective deferral limits, repeal of the rules coordinating the section 457 plan limit with contributions to certain other types of plans, catch-up contributions for individuals age 50 or over, extension of qualified domestic relation order rules to section 457 plans, rollovers among various qualified plans, section 403(b) contracts and individual retirement arrangements (IRAs), and transfers to purchase service credits under governmental pension plans.

Section 411(o)(8) and (p)(5) of the Job Creation and Worker Assistance Act of 2002 (116 Stat. 21) clarified certain provisions in EGTRRA concerning section 457 plans, including the use of certain compensation reduction

elections to be taken into account in determining includible compensation.

On May 8, 2002, a notice of proposed rulemaking (REG–105885–99) was published in the **Federal Register** (67 FR 30826) to issue new regulations under section 457, including amending the 1982 regulations to conform them to the legislative changes that had been made to section 457 since 1982.

Following publication of the proposed regulations, comments were received and a public hearing was held on August 28, 2002. After consideration of the comments received, the proposed regulations are adopted by this Treasury decision, subject to a number of changes that are generally summarized below.

Summary of Comments Received and Changes Made

1. Excess Deferrals

The proposed regulations addressed the income tax treatment of excess deferrals and the effect of excess deferrals on plan eligibility under section 457(b). The proposed regulations provided that an eligible governmental plan may self-correct and distribute excess deferrals and continue to satisfy the eligibility requirements of section 457(b) (including the distribution rules and the funding rules) by reason of a distribution of excess deferrals. However, the proposed regulations provided that if an excess deferral arose under an eligible plan of a tax-exempt employer, the plan was no longer an eligible plan.

Commentators objected to the less favorable treatment for eligible plans of tax-exempt employers.

After consideration of the comments received, the regulations extend self-correction for excess deferrals to eligible plans of tax-exempt employers. If there is an excess deferral under such plan, the plan may distribute to a participant any excess deferrals (and any income allocable to such amount) not later than the first April 15 following the close of the taxable year of the excess deferrals, comparable to the rules for qualified plans under section 402(g). In such a case, the plan will continue to be treated as an eligible plan. However, in accordance with section 457(c), any excess deferral is included in the gross income of a participant for the taxable year of the excess deferral. If an excess deferral is not corrected by distribution, the plan is an ineligible plan under which benefits are taxable in accordance with ineligible plan rules.

The income tax treatment and payroll tax reporting of distributions of excess deferrals from eligible section 457(b) governmental plans are similar to the treatment and reporting of distribution of excess deferrals from tax-qualified plans. Such amounts should be reported on Form 1099 and taxed in the year of distribution to the extent of distributed earnings on the excess deferrals. For eligible section 457(b) tax-exempt plans, the excess deferrals are subject to income tax in the year of distribution to the extent of distributed earnings on the excess deferrals and such earnings should be reported on Form W–2 for the year of distribution. See also Notice 2003–20, 2003–19 I.R.B. 894, for information regarding the withholding and reporting requirements applicable to eligible plans generally.

2. Aggregation Rules in the Proposed Regulations

The proposed regulations included several rules that aggregate multiple plans for purposes of meeting the eligibility requirements of section 457(b). These regulations retain all of these rules. For example, the regulations provide that in any case in which multiple plans are used to avoid or evade the eligibility requirements under the regulations, the Commissioner may apply the eligibility requirements as if the plans were a single plan. Also, an eligible employer is required to have no more than one normal retirement age for each participant under all of the eligible plans it sponsors. In addition, all deferrals under all eligible plans under which an individual participates by virtue of his or her relationship with a single employer are treated as though deferred under a single plan for purposes of determining excess deferrals. Finally, annual deferrals under all eligible plans are combined for purposes of determining the maximum deferral limits.

Few comments were received with respect to the aggregation rules under the proposed regulations. However, one commentator requested that, where it is determined that multiple eligible plans maintained by a single employer, which have been aggregated pursuant to the proposed regulations, contain excess deferrals, the employer have the ability to disaggregate those plans solely for the purpose of either (1) distributing the excess deferrals under the self-correcting mechanism or (2) limiting the characterization of such plans as "ineligible" to the one(s) that actually contain the excess deferrals. Taking into account the ability for all eligible plans to self-correct by distribution, these regulations retain without material revision the aggregation rules that were in the proposed regulations.

3. Deferral of Sick, Vacation, and Back Pay

The proposed regulations would have allowed an eligible plan to permit participants to elect to defer compensation, including accumulated sick and vacation pay and back pay, only if an agreement providing for the deferral is entered into before the beginning of the month in which the amounts would otherwise be paid or made available and the participant is an employee in that month. Comments requested that terminating participants be allowed to elect deferral for accumulated sick and vacation pay and back pay even if the participant is not employed at the time of the deferral.

The final regulations retain the rule under which the deferral election must be made during employment and before the beginning of the month when the compensation would have been payable. However, the regulations include a special rule that allows an election for sick pay, vacation pay, or back pay that is not yet payable (subject of course to the maximum deferral limitations of section 457 in the year of deferral). Under the special rule, an employee who is retiring or otherwise having a severance from employment during a month may nevertheless elect to defer, for example, his or her unused vacation pay after the beginning of the month, provided that the vacation pay would otherwise have been payable before the employee has a severance from employment and the election is made before the date on which the vacation pay would otherwise have been payable.

4. Unforeseeable Emergency Distributions

The proposed regulations added examples that would illustrate when an unforeseeable emergency occurred. In particular, one example provided that the need to pay for the funeral expenses of a family member may constitute an unforeseeable emergency. Several commentators requested clarification in the final regulations of the definition of family member. The regulations have been modified to define a family member as a spouse or dependent as defined in section 152(a).

5. Plan Terminations, Plan-to-Plan Transfers, and Rollovers

The regulations include certain rules regarding plan terminations, plan-to-plan transfers, and rollovers. These topics have been affected by the statutory changes that impose a trust requirement on eligible governmental plans. The direct rollovers that were permitted by EGTRRA beginning in

2002 for eligible governmental plans provide participants affected by these types of events the ability to retain their retirement savings in a funded, tax-deferred savings vehicle by rollover to an IRA, qualified plan, or section 403(b) contract. The regulations provide a outline for the different plan termination and plan-to-plan transfer alternatives available to sponsors of eligible governmental plans in these situations.

a. Plan Terminations

The regulations allow a plan to have provisions permitting plan termination whereupon amounts can be distributed without violating the distribution requirements of section 457. Under the regulations, an eligible plan is terminated only if all amounts deferred under the plan are paid to participants as soon as administratively practicable. If the amounts deferred under the plan are not distributed, the plan is treated as a frozen plan and must continue to comply with all of the applicable statutory requirements necessary for plan eligibility.

b. Plan-to-Plan Transfers Among Eligible Governmental Plans and Purchase of Permissive Service Credit by Plan-to-Plan Transfer

The proposed regulations would have allowed plan-to-plan transfers between eligible governmental plans under new circumstances, as well as the purchase of permissive service credits by transfer from an eligible governmental plan to a governmental defined benefit plan, but only if the transfers were made by plans within the same State. Commentators objected to the requirement under the new transfer rules that the transfers be to plans within the same State.

Upon consideration of the comments received, the regulations allow transfers among eligible governmental plans in three situations. In each case, the transferor plan must provide for transfers, the receiving plan must provide for the receipt of transfers, and the participant or beneficiary whose amounts deferred are being transferred must be entitled to an amount deferred immediately after the transfer that is at least equal to the amount deferred with respect to that participant or beneficiary immediately before the transfer. Transfers are permitted among eligible governmental plans in the following three cases:

- A person-by-person transfer is permitted for any beneficiary and for any participant who has had a severance from employment with the transferring employer and is performing services for the entity maintaining the receiving plan (whether or not the other plan is within the same State).
- No severance from employment is required if the entire plan's assets for all participants and beneficiaries are transferred to another eligible governmental plan within the same State.
- No severance from employment is required for a transfer from one eligible governmental plan of an employer to another eligible governmental plan of the same employer.

The final regulations also allow a plan-to-plan transfer from an eligible governmental plan to a governmental defined benefit plan for permissive service credit, without regard to whether the defined benefit plan is maintained by a governmental entity that is in the same State. In addition, language that was in an example which implied that section 415(n) (which addresses the application of maximum benefit limitations with respect to certain contributions) might apply to such a transfer has been eliminated because Treasury and the IRS have concluded that section 415(n) does not apply to such a transfer in any case in which the actuarial value of the benefit increase that results from the transfer does not exceed the amount transferred.

c. Plan-to-Plan Transfers Among Eligible Plans of Tax-Exempt Entities

The regulations retain the rule from the 1982 regulations allowing a plan-to-plan transfer after a participant has had a severance from employment.

d. Rollovers

The proposed regulations specified the treatment of amounts rolled into or out of an eligible governmental plan and stated that amounts rolled into the plan are treated as amounts deferred under the plan for purposes of the regulations. Some commentators requested that consideration be given to allowing eligible governmental plans to have the same flexibility that they claimed was permitted for qualified plans with respect to the timing of distributions of rolled-in assets. Specifically, these commentators requested the ability for an eligible governmental plan to allow a participant to receive a distribution of rolled-in assets even though the participant may not yet be eligible for a distribution of other assets held under the plan.

Commentators pointed out that, since section 402(c)(10) allows an eligible governmental plan to accept a rollover contribution only if the rolled-in assets from other plan types are separately accounted for (in order to apply the section 72(t) early withdrawal income tax for distributions from these assets), this ability should not cause administrative problems for plan sponsors. Commentators also asserted that the flexibility to design an eligible governmental plan to permit such distributions would be beneficial to its participants.

These regulations do not permit an eligible governmental plan to distribute rolled-in assets to a participant who is not yet eligible for a distribution until future guidance of general applicability is published that addresses this issue. Treasury and the IRS intend to issue, in the near future, guidance of general applicability resolving this issue in coordination with the applicable rules for qualified plans and section 403(b) contracts.

Commentators also requested clarification on the order of accounts for partial distributions to participants who have rolled-in assets that are subject to the early withdrawal income tax. They requested that consideration be given in final regulations to clarifying that the participant may be treated as receiving a partial distribution first from other plan assets to minimize the early withdrawal income tax that would otherwise apply. These regulations clarify that, if a rollover is received by an eligible governmental plan from an IRA, qualified plan, or section 403(b) contract, then distributions from the eligible governmental plan are subject to the early withdrawal income tax in accordance with the plan's method of accounting, *i.e.*, for purposes of applying the section 72(t) early withdrawal income tax, a distribution is treated as made from an eligible governmental plan's separate account for rollovers from an IRA, qualified plan, or section 403(b) contract only if the plan accounts for the distribution as a distribution from that account. Thus, for example, an eligible governmental plan may provide that any unforeseeable emergency withdrawal is made from other accounts to the extent possible, in which event the early withdrawal tax will not apply assuming that the plan only debits such other accounts to reflect the distribution.

The proposed regulations had requested comments on the issue of separate accounting for rolled-in amounts and asked if there are any special characteristics that would be lost if multiple types of separate accounts were not maintained. Commentators asked for the regulations to permit maintenance of a single rollover account for all amounts that are rolled into the eligible governmental plan. These regulations require separate accounting only to the extent mandated by section

402(c)(10), *i.e.*, only for rollovers from IRAs, qualified plans and section 403(b) contracts. Section 72(t)(9) provides that the early withdrawal income tax applies to distributions from rollovers attributable to IRAs, qualified plans, and section 403(b) contracts. Thus, if an eligible governmental plan accepts a rollover *from another eligible governmental plan* of an amount that was originally deferred under an eligible governmental plan and commingles that rollover in the same separate account that includes a rollover amount from an IRA, qualified plan, or section 403(b) contract, then distributions from that account will be subject to the early withdrawal income tax. Accordingly, in order to avoid this result, eligible governmental plans may choose to establish *three separate accounts* for a participant even though these regulations only require that a single separate rollover account be maintained for all amounts that are rolled into an eligible governmental plan: First, an account for all amounts deferred under that plan; second, an account for any rollover from another eligible governmental plan (disregarding any amounts that originated from an IRA, qualified plan, or section 403(b) contract); and third, an account for any rollover amount from an IRA, qualified plan, or section 403(b) contract (including any amounts rolled over from another eligible governmental plan that originated from an IRA, qualified plan, or section 403(b) contract). These regulations include an example illustrating that the early withdrawal income tax would not apply to a partial distribution from a plan with such accounts assuming that the plan debits either of the first two such other accounts to reflect the distribution.

6. Ineligible Plans

The proposed regulations included guidance regarding ineligible plans under section 457(f). Section 457(f) generally provides that, in the case of an agreement or arrangement for the deferral of compensation, the deferred compensation is included in gross income when deferred or, if later, when the rights to payment of the deferred compensation cease to be subject to a substantial risk of forfeiture. Section 457(f) was in section 457 when it was added to the Code in 1978 for governmental employees, and extended to employees of tax-exempt organizations (other than churches or certain church-controlled organizations) in 1986, because unfunded amounts held by a tax-exempt entity compound tax free like an eligible plan, a qualified plan, or a section 403(b) contract. Section 457(f) was viewed as essential in order to provide an incentive for employers that are not subject to income taxes to adopt an eligible plan, a qualified plan, or a section 403(b) contract.[1]

Section 457(f) does not apply to an eligible plan, a qualified plan, a section 403(b) contract, a section 403(c) contract, a transfer of property described in section 83, a trust to which section 402(b) applies, or a qualified governmental excess benefit arrangement described in section 415(m). The proposed regulations stated that section 457(f) applies if the date on which there is no substantial risk of forfeiture with respect to the compensation deferred precedes the date on which there is a transfer of property to which section 83 applies. The proposed regulations included several examples, including an example illustrating that section 457(f) does not fail to apply merely because benefits are subsequently paid by a transfer of property. Comments were requested on the coordination of sections 457(f) and 83 under the proposed regulations.

In response, a number of commentators objected to the proposed coordination of sections 457(f) and 83, including arguing that the proposed regulation would place tax-exempt organizations at a competitive disadvantage when it comes to attracting and retaining executive talent because it would effectively eliminate the use of discounted mutual fund options as a tax effective component of total compensation. Some commentators also asserted that the proposed regulations were ambiguous as to their applicability to steeply discounted mutual fund options, and recommended that, if the provision is not removed, at a minimum future guidance should be more specific.

The final regulations retain the interpretation of the coordination of sections 457(f) and 83 that was in the proposed regulations, and also clarify the application of the rule by adding an example involving an option grant. The regulations also include a clarification that, when benefits are paid or made available under an ineligible plan, the amount included in gross income is equal to the amount paid or made available, but only to the extent that the amount exceeds the amount the participant included in gross income when he or she obtained a vested right to the benefit.

7. Severance Pay and Other Exceptions

In 2000, the IRS issued Announcement 2000–1 (2000–1 C.B. 294), which provided interim guidance on certain broad-based, nonelective plans of a state or local government that were in existence before 1999. Comments were requested on arrangements, such as those maintained by certain state or local governmental educational institutions, under which supplemental compensation is payable as an incentive to terminate employment, or as an incentive to retain retirement-eligible employees, to ensure an appropriate workforce during periods in which a temporary surplus or deficit in workforce is anticipated. Treasury and the IRS continue to be interested in receiving comments on this issue, which should be sent to the following address: Internal Revenue Service, Attn: CC:DOM:CORP:R (Section 457 Plans), Room 5201, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Written comments may be hand delivered Monday through Friday between 8 a.m. and 4 p.m. to: Internal Revenue Service, Courier's Desk, Attn: CC:PA:RU (Section 457 Plans), 1111 Constitution Avenue, NW., Washington, DC 20224. Alternatively, written comments may be submitted electronically via the Internet by selecting the "Tax Regs" option on the IRS Home Page, or by submitting them directly to the IRS Internet site at: *http://www.irs.gov/tax_regs/reglist.html*. Comments should be received by October 9, 2003.

8. Effective Date of the Regulations

The proposed regulations included a general effective date under which the regulations would have applied to taxable years beginning after December 31, 2001. This is the general effective date for the changes made in section 457 by EGTRRA. Commentators did not express concern about this effective date and some commentators also stated that eligible governmental plans have adopted plan amendments to address the changes that have been allowed by EGTRRA, so that it would be appropriate to have the final regulations effective date coincide with the effective date for EGTRRA.

These regulations are generally applicable to taxable years beginning after December 31, 2001, subject to certain specific transition rules. Under one of these transition rules, for taxable years beginning after December 31, 2001, and before January 1, 2004, a plan will not fail to be an eligible plan if it

[1] See generally the *Report to the Congress on the Tax Treatment of Deferred Compensation under Section 457*, Department of the Treasury, January 1992 (available from the Office of Tax Policy, Room 5315, Treasury Department, 1500 Pennsylvania Avenue NW., Washington DC 20220).

is operated in accordance with a reasonable, good faith interpretation of section 457(b). Whether a plan is operated in accordance with a reasonable, good faith interpretation of section 457(b) will generally be determined based on all of the relevant facts and circumstances, including the extent to which the employer has resolved unclear issues in its favor. The regulations state that a plan will be deemed to be operated in accordance with a reasonable, good faith interpretation of section 457(b) if it is operated in accordance with the terms of these regulations. The IRS will also deem a plan to be operated in accordance with a reasonable, good faith interpretation of section 457(b) if it is operated in accordance with the terms of the 1982 regulations as in effect for taxable years beginning before January 1, 2002 (to the extent those 1982 regulations are consistent with subsequent changes in law, including EGTRRA) or in accordance with the terms of the 2001 proposed regulations. However, a plan will be deemed not to be operated in accordance with a reasonable, good faith interpretation of section 457(b) if it is operated in a manner that is inconsistent with the terms of the 1982 regulations as in effect for taxable years beginning before January 1, 2002 (to the extent those 1982 regulations are consistent with subsequent changes in law, including EGTRRA) except to the extent permitted under either these final regulations or the 2001 proposed regulations.

Further, there is a special delayed effective date for the rule under which an eligible governmental plan cannot distribute rollover account benefits to a participant who is not yet eligible for a distribution. Thus, this rule is not applicable until years beginning after December 31, 2003, since this issue is expected to be resolved before that date.

The regulations also retain the rule in the proposed regulations under which the regulations do not apply with respect to an option that lacked a readily ascertainable fair market value (within the meaning of section 83(e)(3)) at grant that was granted on or before May 8, 2002. Thus, the status of such an option under section 457(f) would be determined without regard to these regulations.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. It is hereby certified that the collection of information in these regulations will not have a significant economic impact on a substantial number of small entities. The collection of information in the regulations is in section 1.457–8(a)(3)(ii)(B) and consists of the requirement that a custodian of a custodial account may be a person other than a bank only if the person demonstrates to the satisfaction of the Commissioner that the manner in which the person will administer the custodial account will be consistent with the requirement of section 457(g)(1) and (3) of the Code. This certification is based on the fact that the cost of submitting this information is small, even for small entities. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 602

Reporting and recordkeeping requirements.

Amendments to the Regulations

■ Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *.

■ **Par. 2.** Sections 1.457–1, 1.457–2, 1.457–3 and 1.457–4 are revised to read as follows:

§ 1.457–1 General overviews of section 457.

Section 457 provides rules for nonqualified deferred compensation plans established by eligible employers as defined under § 1.457–2(d). Eligible employers can establish either deferred compensation plans that are eligible plans and that meet the requirements of section 457(b) and §§ 1.457–3 through 1.457–10, or deferred compensation plans or arrangements that do not meet the requirements of section 457(b) and §§ 1.457–3 through 1.457–10 and that are subject to tax treatment under section 457(f) and § 1.457–11.

§ 1.457–2 Definitions.

This section sets forth the definitions that are used under §§ 1.457–1 through 1.457–11.

(a) *Amount(s) deferred. Amount(s) deferred* means the total annual deferrals under an eligible plan in the current and prior years, adjusted for gain or loss. Except as provided at §§ 1.457–4(c)(1)(iii) and 1.457–6(a), amount(s) deferred includes any rollover amount held by an eligible plan as provided under § 1.457–10(e).

(b) *Annual deferral(s)*—(1) *Annual deferral(s)* means, with respect to a taxable year, the amount of compensation deferred under an eligible plan, whether by salary reduction or by nonelective employer contribution. The amount of compensation deferred under an eligible plan is taken into account as an annual deferral in the taxable year of the participant in which deferred, or, if later, the year in which the amount of compensation deferred is no longer subject to a substantial risk of forfeiture.

(2) If the amount of compensation deferred under the plan during a taxable year is not subject to a substantial risk of forfeiture, the amount taken into account as an annual deferral is not adjusted to reflect gain or loss allocable to the compensation deferred. If, however, the amount of compensation deferred under the plan during the taxable year is subject to a substantial risk of forfeiture, the amount of compensation deferred that is taken into account as an annual deferral in the taxable year in which the substantial risk of forfeiture lapses must be adjusted to reflect gain or loss allocable to the compensation deferred until the substantial risk of forfeiture lapses.

(3) If the eligible plan is a defined benefit plan within the meaning of section 414(j), the annual deferral for a taxable year is the present value of the increase during the taxable year of the participant's accrued benefit that is not subject to a substantial risk of forfeiture (disregarding any such increase attributable to prior annual deferrals). For this purpose, present value must be determined using actuarial assumptions and methods that are reasonable (both individually and in the aggregate), as determined by the Commissioner.

(4) For purposes solely of applying § 1.457–4 to determine the maximum amount of the annual deferral for a participant for a taxable year under an eligible plan, the maximum amount is reduced by the amount of any deferral for the participant under a plan described at paragraph (k)(4)(i) of this

section (relating to certain plans in existence before January 1, 1987) as if that deferral were an annual deferral under another eligible plan of the employer.

(c) *Beneficiary. Beneficiary* means a person who is entitled to benefits in respect of a participant following the participant's death or an alternate payee as described in § 1.457–10(c).

(d) *Catch-up. Catch-up* amount or *catch-up* limitation for a participant for a taxable year means the annual deferral permitted under section 414(v) (as described in § 1.457–4(c)(2)) or section 457(b)(3) (as described in § 1.457–4(c)(3)) to the extent the amount of the annual deferral for the participant for the taxable year is permitted to exceed the plan ceiling applicable under section 457(b)(2) (as described in § 1.457–4(c)(1)).

(e) *Eligible employer. Eligible employer* means an entity that is a State that establishes a plan or a tax-exempt entity that establishes a plan. The performance of services as an independent contractor for a State or local government or a tax-exempt entity is treated as the performance of services for an eligible employer. The term *eligible employer* does not include a church as defined in section 3121(w)(3)(A), a qualified church-controlled organization as defined in section 3121(w)(3)(B), or the Federal government or any agency or instrumentality thereof. Thus, for example, a nursing home which is associated with a church, but which is not itself a church (as defined in section 3121(w)(3)(A)) or a qualified church-controlled organization as defined in section 3121(w)(3)(B)), would be an eligible employer if it is a tax-exempt entity as defined in paragraph (m) of this section.

(f) *Eligible plan.* An *eligible plan* is a plan that meets the requirements of §§ 1.457–3 through 1.457–10 that is established and maintained by an eligible employer. An *eligible governmental plan* is an eligible plan that is established and maintained by an eligible employer as defined in paragraph (l) of this section. An arrangement does not fail to constitute a single eligible governmental plan merely because the arrangement is funded through more than one trustee, custodian, or insurance carrier. An *eligible plan of a tax-exempt entity* is an eligible plan that is established and maintained by an eligible employer as defined in paragraph (m) of this section.

(g) *Includible compensation. Includible compensation* of a participant means, with respect to a taxable year, the participant's compensation, as defined in section 415(c)(3), for services performed for the eligible employer. The amount of includible compensation is determined without regard to any community property laws.

(h) *Ineligible plan. Ineligible plan* means a plan established and maintained by an eligible employer that is not maintained in accordance with §§ 1.457–3 through 1.457–10. A plan that is not established by an eligible employer as defined in paragraph (e) of this section is neither an eligible nor an ineligible plan.

(i) *Nonelective employer contribution.* A *nonelective employer contribution* is a contribution made by an eligible employer for the participant with respect to which the participant does not have the choice to receive the contribution in cash or property. Solely for purposes of section 457 and §§ 1.457–2 through 1.457–11, the term *nonelective employer contribution* includes employer contributions that would be described in section 401(m) if they were contributions to a qualified plan.

(j) *Participant. Participant* in an eligible plan means an individual who is currently deferring compensation, or who has previously deferred compensation under the plan by salary reduction or by nonelective employer contribution and who has not received a distribution of his or her entire benefit under the eligible plan. Only individuals who perform services for the eligible employer, either as an employee or as an independent contractor, may defer compensation under the eligible plan.

(k) *Plan. Plan* includes any agreement or arrangement between an eligible employer and a participant or participants (including an individual employment agreement) under which the payment of compensation is deferred (whether by salary reduction or by nonelective employer contribution). The following types of plans are not treated as agreements or arrangement under which compensation is deferred: a bona fide vacation leave, sick leave, compensatory time, severance pay, disability pay, or death benefit plan described in section 457(e)(11)(A)(i) and any plan paying length of service awards to bona fide volunteers (and their beneficiaries) on account of qualified services performed by such volunteers as described in section 457(e)(11)(A)(ii). Further, the term *plan* does not include any of the following (and section 457 and §§ 1.457–2 through 1.457–11 do not apply to any of the following)—

(1) Any nonelective deferred compensation under which all individuals (other than those who have not satisfied any applicable initial service requirement) with the same relationship with the eligible employer are covered under the same plan with no individual variations or options under the plan as described in section 457(e)(12), but only to the extent the compensation is attributable to services performed as an independent contractor;

(2) An agreement or arrangement described in § 1.457–11(b);

(3) Any plan satisfying the conditions in section 1107(c)(4) of the Tax Reform Act of 1986 (100 Stat. 2494) (TRA '86) (relating to certain plans for State judges); and

(4) Any of the following plans or arrangements (to which specific transitional statutory exclusions apply)—

(i) A plan or arrangement of a tax-exempt entity in existence prior to January 1, 1987, if the conditions of section 1107(c)(3)(B) of the TRA '86, as amended by section 1011(e)(6) of Technical and Miscellaneous Revenue Act of 1988 (102 Stat. 3700) (TAMRA), are satisfied (see § 1.457–2(b)(4) for a special rule regarding such plan);

(ii) A collectively bargained nonelective deferred a compensation plan in effect on December 31, 1987, if the conditions of section 6064(d)(2) of TAMRA are satisfied;

(iii) Amounts described in section 6064(d)(3) of TAMRA (relating to certain nonelective deferred compensation arrangements in effect before 1989); and

(iv) Any plan satisfying the conditions in section 1107(c)(4) or (5) of TRA '86 (relating to certain plans for certain individuals with respect to which the Service issued guidance before 1977).

(l) *State. State* means a State (treating the District of Columbia as a State as provided under section 7701(a)(10)), a political subdivision of a State, and any agency or instrumentality of a State.

(m) *Tax-exempt entity. Tax-exempt entity* includes any organization exempt from tax under subtitle A of the Internal Revenue Code, except that a governmental unit (including an international governmental organization) is not a tax-exempt entity.

(n) *Trust. Trust* means a trust described under section 457(g) and § 1.457–8. Custodial accounts and contracts described in section 401(f) are treated as trusts under the rules described in § 1.457–8(a)(2).

§ 1.457–3 General introduction to eligible plans.

(a) *Compliance in form and operation.* An eligible plan is a written plan established and maintained by an eligible employer that is maintained, in both form and operation, in accordance with the requirements of §§ 1.457–4 through 1.457–10. An eligible plan must contain all the material terms and conditions for benefits under the plan. An eligible plan may contain certain optional features not required for plan eligibility under section 457(b), such as distributions for unforeseeable emergencies, loans, plan-to-plan transfers, additional deferral elections, acceptance of rollovers to the plan, and distributions of smaller accounts to eligible participants. However, except as otherwise specifically provided in §§ 1.457–4 through 1.457–10, if an eligible plan contains any optional provisions, the optional provisions must meet, in both form and operation, the relevant requirements under section 457 and §§ 1.457–2 through 1.457–10.

(b) *Treatment as single plan.* In any case in which multiple plans are used to avoid or evade the requirements of §§ 1.457–4 through 1.457–10, the Commissioner may apply the rules under §§ 1.457–4 through 1.457–10 as if the plans were a single plan. See also § 1.457–4(c)(3)(v) (requiring an eligible employer to have no more than one normal retirement age for each participant under all of the eligible plans it sponsors), the second sentence of § 1.457–4(e)(2) (treating deferrals under all eligible plans under which an individual participates by virtue of his or her relationship with a single employer as a single plan for purposes of determining excess deferrals), and § 1.457–5 (combining annual deferrals under all eligible plans).

§ 1.457–4 Annual deferrals, deferral limitations, and deferral agreements under eligible plans.

(a) *Taxation of annual deferrals.* Annual deferrals that satisfy the requirements of paragraphs (b) and (c) of this section are excluded from the gross income of a participant in the year deferred or contributed and are not includible in gross income until paid to the participant in the case of an eligible governmental plan, or until paid or otherwise made available to the participant in the case of an eligible plan of a tax-exempt entity. See § 1.457–7.

(b) *Agreement for deferral.* In order to be an eligible plan, the plan must provide that compensation may be deferred for any calendar month by salary reduction only if an agreement providing for the deferral has been entered into before the first day of the month in which the compensation is paid or made available. A new employee may defer compensation payable in the calendar month during which the participant first becomes an employee if an agreement providing for the deferral is entered into on or before the first day on which the participant performs services for the eligible employer. An eligible plan may provide that if a participant enters into an agreement providing for deferral by salary reduction under the plan, the agreement will remain in effect until the participant revokes or alters the terms of the agreement. Nonelective employer contributions are treated as being made under an agreement entered into before the first day of the calendar month.

(c) *Maximum deferral limitations*—(1) *Basic annual limitation.* (i) Except as described in paragraphs (c)(2) and (3) of this section, in order to be an eligible plan, the plan must provide that the annual deferral amount for a taxable year (the plan ceiling) may not exceed the lesser of—

(A) The applicable annual dollar amount specified in section 457(e)(15): $11,000 for 2002; $12,000 for 2003; $13,000 for 2004; $14,000 for 2005; and $15,000 for 2006 and thereafter. After 2006, the $15,000 amount is adjusted for cost-of-living in the manner described in paragraph (c)(4) of this section; or

(B) 100 percent of the participant's includible compensation for the taxable year.

(ii) The amount of annual deferrals permitted by the 100 percent of includible compensation limitation under paragraph (c)(1)(i)(B) of this section is determined under section 457(e)(5) and § 1.457–2(g).

(iii) For purposes of determining the plan ceiling under this paragraph (c), the annual deferral amount does not include any rollover amounts received by the eligible plan under § 1.457–10(e).

(iv) The provisions of this paragraph (c)(1) are illustrated by the following examples:

Example 1. (i) *Facts.* Participant A, who earns $14,000 a year, enters into a salary reduction agreement in 2006 with A's eligible employer and elects to defer $13,000 of A's compensation for that year. Participant A is not eligible for the catch-up described in paragraph (c)(2) or (3) of this section, participates in no other retirement plan, and has no other income exclusions taken into account in computing includible compensation.

(ii) *Conclusion.* The annual deferral limit for A in 2006 is the lesser of $15,000 or 100 percent of includible compensation, $14,000. A's annual deferral of $13,000 is permitted under the plan because it is not in excess of $14,000 and thus does not exceed 100 percent of A's includible compensation.

Example 2. (i) *Facts.* Assume the same facts as in *Example 1*, except that A's eligible employer provides an immediately vested, matching employer contribution under the plan for participants who make salary reduction deferrals under A's eligible plan. The matching contribution is equal to 100 percent of elective contributions, but not in excess of 10 percent of compensation (in A's case, $1,400).

(ii) *Conclusion.* Participant A's annual deferral exceeds the limitations of this paragraph (c)(1). A's maximum deferral limitation in 2006 is $14,000. A's salary reduction deferral of $13,000 combined with A's eligible employer's nonelective employer contribution of $1,400 exceeds the basic annual limitation of this paragraph (c)(1) because A's annual deferrals total $14,400. A has an excess deferral for the taxable year of $400, the amount exceeding A's permitted annual deferral limitation. The $400 excess deferral is treated as described in paragraph (e) of this section.

Example 3. (i) *Facts.* Beginning in year 2002, Eligible Employer X contributes $3,000 per year for five years to Participant B's eligible plan account. B's interest in the account vests in 2006. B has annual compensation of $50,000 in each of the five years 2002 through 2006. Participant B is 41 years old. B is not eligible for the catch-up described in paragraph (c)(2) or (3) of this section, participates in no other retirement plan, and has no other income exclusions taken into account in computing includible compensation. Adjusted for gain or loss, the value of B's benefit when B's interest in the account vests in 2006 is $17,000.

(ii) *Conclusion.* Under this vesting schedule, $17,000 is taken into account as an annual deferral in 2006. B's annual deferrals under the plan are limited to a maximum of $15,000 in 2006. Thus, the aggregate of the amounts deferred, $17,000, is in excess of the B's maximum deferral limitation by $2,000. The $2,000 is treated as an excess deferral described in paragraph (e) of this section.

(2) *Age 50 catch-up*—(i) *In general.* In accordance with section 414(v) and the regulations thereunder, an eligible governmental plan may provide for catch-up contributions for a participant who is age 50 by the end of the year, provided that such age 50 catch-up contributions do not exceed the catch-up limit under section 414(v)(2) for the taxable year. The maximum amount of age 50 catch-up contributions for a taxable year under section 414(v) is as follows: $1,000 for 2002; $2,000 for 2003; $3,000 for 2004; $4,000 for 2005; and $5,000 for 2006 and thereafter. After 2006, the $5,000 amount is adjusted for cost-of-living. For additional guidance, see regulations under section 414(v).

(ii) *Coordination with special section 457 catch-up.* In accordance with sections 414(v)(6)(C) and 457(e)(18), the age 50 catch-up described in this paragraph (c)(2) does not apply for any

taxable year for which a higher limitation applies under the special section 457 catch-up under paragraph (c)(3) of this section. Thus, for purposes of this paragraph (c)(2)(ii) and paragraph (c)(3) of this section, the special section 457 catch-up under paragraph (c)(3) of this section applies for any taxable year if and only if the plan ceiling taking into account paragraph (c)(1) of this section and the special section 457 catch-up described in paragraph (c)(3) of this section (and disregarding the age 50 catch-up described in this paragraph (c)(2)) is larger than the plan ceiling taking into account paragraph (c)(1) of this section and the age 50 catch-up described in this paragraph (c)(2) (and disregarding the special section 457 catch-up described in paragraph (c)(3) of this section). Thus, if a plan so provides, a participant who is eligible for the age 50 catch-up for a year and for whom the year is also one of the participant's last three taxable years ending before the participant attains normal retirement age is eligible for the larger of—

(A) The plan ceiling under paragraph (c)(1) of this section and the age 50 catch-up described in this paragraph (c)(2) (and disregarding the special section 457 catch-up described in paragraph (c)(3) of this section) or

(B) The plan ceiling under paragraph (c)(1) of this section and the special section 457 catch-up described in paragraph (c)(3) of this section (and disregarding the age 50 catch-up described in this paragraph (c)(2)).

(iii) *Examples.* The provisions of this paragraph (c)(2) are illustrated by the following examples:

Example 1. (i) *Facts.* Participant C, who is 55, is eligible to participate in an eligible governmental plan in 2006. The plan provides a normal retirement age of 65. The plan provides limitations on annual deferrals up to the maximum permitted under paragraphs (c)(1) and (3) of this section and the age 50 catch-up described in this paragraph (c)(2). For 2006, C will receive compensation of $40,000 from the eligible employer. C desires to defer the maximum amount possible in 2006. The applicable basic dollar limit of paragraph (c)(1)(i)(A) of this section is $15,000 for 2006 and the additional dollar amount permitted under the age 50 catch-up is $5,000 for 2006.

(ii) *Conclusion.* C is eligible for the age 50 catch-up in 2006 because C is 55 in 2006. However, C is not eligible for the special section 457 catch-up under paragraph (c)(3) of this section in 2006 because 2006 is not one of the last three taxable years ending before C attains normal retirement age. Accordingly, the maximum that C may defer for 2006 is $20,000.

Example 2. (i) *Facts.* The facts are the same as in *Example 1*, except that, in 2006, C will attain age 62. The maximum amount that C can elect under the special section 457 catch-up under paragraph (c)(3) of this section is $2,000 for 2006.

(ii) *Conclusion.* The maximum that C may defer for 2006 is $20,000. This is the sum of the basic plan ceiling under paragraph (c)(1) of this section equal to $15,000 and the age 50 catch-up equal to $5,000. The special section 457 catch-up under paragraph (c)(3) of this section is not applicable since it provides a smaller plan ceiling.

Example 3. (i) *Facts.* The facts are the same as in *Example 2*, except that the maximum additional amount that C can elect under the special section 457 catch-up under paragraph (c)(3) of this section is $7,000 for 2006.

(ii) *Conclusion.* The maximum that C may defer for 2006 is $22,000. This is the sum of the basic plan ceiling under paragraph (c)(1) of this section equal to $15,000, plus the additional special section 457 catch-up under paragraph (c)(3) of this section equal to $7,000. The additional dollar amount permitted under the age 50 catch-up is not applicable to C for 2006 because it provides a smaller plan ceiling.

(3) *Special section 457 catch-up*—(i) *In general.* Except as provided in paragraph (c)(2)(ii) of this section, an eligible plan may provide that, for one or more of the participant's last three taxable years ending before the participant attains normal retirement age, the plan ceiling is an amount not in excess of the lesser of—

(A) Twice the dollar amount in effect under paragraph (c)(1)(i)(A) of this section; or

(B) The underutilized limitation determined under paragraph (c)(3)(ii) of this section.

(ii) *Underutilized limitation.* The underutilized amount determined under this paragraph (c)(3)(ii) is the sum of—

(A) The plan ceiling established under paragraph (c)(1) of this section for the taxable year; plus

(B) The plan ceiling established under paragraph (c)(1) of this section (or under section 457(b)(2) for any year before the applicability date of this section) for any prior taxable year or years, less the amount of annual deferrals under the plan for such prior taxable year or years (disregarding any annual deferrals under the plan permitted under the age 50 catch-up under paragraph (c)(2) of this section).

(iii) *Determining underutilized limitation under paragraph (c)(3)(ii)(B) of this section.* A prior taxable year is taken into account under paragraph (c)(3)(ii)(B) of this section only if it is a year beginning after December 31, 1978, in which the participant was eligible to participate in the plan, and in which compensation deferred (if any) under the plan during the year was subject to a plan ceiling established under paragraph (c)(1) of this section. This paragraph (c)(3)(iii) is subject to the special rules in paragraph (c)(3)(iv) of this section.

(iv) *Special rules concerning application of the coordination limit for years prior to 2002 for purposes of determining the underutilized limitation*—(A) *General rule.* For purposes of determining the underutilized limitation for years prior to 2002, participants remain subject to the rules in effect prior to the repeal of the coordination limitation under section 457(c)(2). Thus, the applicable basic annual limitation under paragraph (c)(1) of this section and the special section 457 catch-up under this paragraph (c)(3) for years in effect prior to 2002 are reduced, for purposes of determining a participant's underutilized amount under a plan, by amounts excluded from the participant's income for any prior taxable year by reason of a nonelective employer contribution, salary reduction or elective contribution under any other eligible section 457(b) plan, or a salary reduction or elective contribution under any 401(k) qualified cash or deferred arrangement, section 402(h)(1)(B) simplified employee pension (SARSEP), section 403(b) annuity contract, and section 408(p) simple retirement account, or under any plan for which a deduction is allowed because of a contribution to an organization described in section 501(c)(18) (pre-2002 coordination plans). Similarly, in applying the section 457(b)(2)(B) limitation for includible compensation for years prior to 2002, the limitation is 33⅓ percent of the participant's compensation includible in gross income.

(B) *Coordination limitation applied to participant.* For purposes of determining the underutilized limitation for years prior to 2002, the coordination limitation applies to pre-2002 coordination plans of all employers for whom a participant has performed services, whether or not those are plans of the participant's current eligible employer. Thus, for purposes of determining the amount excluded from a participant's gross income in any prior taxable year under paragraph (c)(3)(ii)(B) of this section, the participant's annual deferrals under an eligible plan, and salary reduction or elective deferrals under all other pre-2002 coordination plans, must be determined on an aggregate basis. To the extent that the combined deferrals for years prior to 2002 exceeded the maximum deferral limitations, the amount is treated as an excess deferral under paragraph (e) of this section for those prior years.

(C) *Special rule where no annual deferrals under the eligible plan.* A participant who, although eligible, did not defer any compensation under the eligible plan in any year before 2002 is not subject to the coordinated deferral limit, even though the participant may have deferred compensation under one of the other pre-2002 coordination plans. An individual is treated as not having deferred compensation under an eligible plan for a prior taxable year if all annual deferrals under the plan are distributed in accordance with paragraph (e) of this section. Thus, to the extent that a participant participated solely in one or more of the other pre-2002 coordination plans during a prior taxable year (and not the eligible plan), the participant is not subject to the coordinated limitation for that prior taxable year. However, the participant is treated as having deferred an amount in a prior taxable year, for purposes of determining the underutilized limitation for that prior taxable year under this paragraph (c)(3)(iv)(C), to the extent of the participant's aggregate salary reduction contributions and elective deferrals under all pre-2002 coordination plans up to the maximum deferral limitations in effect under section 457(b) for that prior taxable year. To the extent an employer did not offer an eligible plan to an individual in a prior given year, no underutilized limitation is available to the individual for that prior year, even if the employee subsequently becomes eligible to participate in an eligible plan of the employer.

(D) *Examples.* The provisions of this paragraph (c)(3)(iv) are illustrated by the following examples:

Example 1. (i) *Facts.* In 2001 and in years prior to 2001, Participant D earned $50,000 a year and was eligible to participate in both an eligible plan and a section 401(k) plan. However, D had always participated only in the section 401(k) plan and had always deferred the maximum amount possible. For each year before 2002, the maximum amount permitted under section 401(k) exceeded the limitation of paragraph (c)(3)(i) of this section. In 2002, D is in the 3-year period prior to D's attainment of the eligible plan's normal retirement age of 65, and D now wants to participate in the eligible plan and make annual deferrals of up to $30,000 under the plan's special section 457 catch-up provisions.

(ii) *Conclusion.* Participant D is treated as having no underutilized amount under paragraph (c)(3)(ii)(B) of this section for 2002 for purposes of the catch-up limitation under section 457(b)(3) and paragraph (c)(3) of this section because, in each of the years before 2002, D has deferred an amount equal to or in excess of the limitation of paragraph (c)(3)(i) of this section under all of D's coordinated plans.

Example 2. (i) *Facts.* Assume the same facts as in *Example 1*, except that D only deferred $2,500 per year under the section 401(k) plan for one year before 2002.

(ii) *Conclusion.* D is treated as having an underutilized amount under paragraph (c)(3)(ii)(B) of this section for 2002 for purposes of the special section 457 catch-up limitation. This is because D has deferred an amount for prior years that is less than the limitation of paragraph (c)(1)(i) of this section under all of D's coordinated plans.

Example 3. (i) *Facts.* Participant E, who earned $15,000 for 2000, entered into a salary reduction agreement in 2000 with E's eligible employer and elected to defer $3,000 for that year under E's eligible plan. For 2000, E's eligible employer provided an immediately vested, matching employer contribution under the plan for participants who make salary reduction deferrals under E's eligible plan. The matching contribution was equal to 67 percent of elective contributions, but not in excess of 10 percent of compensation before salary reduction deferrals (in E's case, $1,000). For 2000, E was not eligible for any catch-up contribution, participated in no other retirement plan, and had no other income exclusions taken into account in computing taxable compensation.

(ii) *Conclusion.* Participant E's annual deferral equaled the maximum limitation of section 457(b) for 2000. E's maximum deferral limitation in 2000 was $4,000 because E's includible compensation was $12,000 ($15,000 minus the deferral of $3,000) and the applicable limitation for 2000 was one third of the individual's includible compensation (one-third of $12,000 equals $4,000). E's salary reduction deferral of $3,000 combined with E's eligible employer's matching contribution of $1,000 equals the limitation of section 457(b) for 2000 because E's annual deferrals totaled $4,000. E's underutilized amount for 2000 is zero.

(v) *Normal retirement age*—(A) *General rule.* For purposes of the special section 457 catch-up in this paragraph (c)(3), a plan must specify the normal retirement age under the plan. A plan may define normal retirement age as any age that is on or after the earlier of age 65 or the age at which participants have the right to retire and receive, under the basic defined benefit pension plan of the State or tax-exempt entity (or a money purchase pension plan in which the participant also participates if the participant is not eligible to participate in a defined benefit plan), immediate retirement benefits without actuarial or similar reduction because of retirement before some later specified age, and that is not later than age 70½. Alternatively, a plan may provide that a participant is allowed to designate a normal retirement age within these ages. For purposes of the special section 457 catch-up in this paragraph (c)(3), an entity sponsoring more than one eligible plan may not permit a participant to have more than one normal retirement age under the eligible plans it sponsors.

(B) *Special rule for eligible plans of qualified police or firefighters.* An eligible plan with participants that include qualified police or firefighters as defined under section 415(b)(2)(H)(ii)(I) may designate a normal retirement age for such qualified police or firefighters that is earlier than the earliest normal retirement age designated under the general rule of paragraph (c)(3)(i)(A) of this section, but in no event may the normal retirement age be earlier than age 40. Alternatively, a plan may allow a qualified police or firefighter participant to designate a normal retirement age that is between age 40 and age 70½.

(vi) *Examples.* The provisions of this paragraph (c)(3) are illustrated by the following examples:

Example 1. (i) *Facts.* Participant F, who will turn 61 on April 1, 2006, becomes eligible to participate in an eligible plan on January 1, 2006. The plan provides a normal retirement age of 65. The plan provides limitations on annual deferrals up to the maximum permitted under paragraphs (c)(1) through (3) of this section. For 2006, F will receive compensation of $40,000 from the eligible employer. F desires to defer the maximum amount possible in 2006. The applicable basic dollar limit of paragraph (c)(1)(i)(A) of this section is $15,000 for 2006 and the additional dollar amount permitted under the age 50 catch-up in paragraph (c)(2) of this section for an individual who is at least age 50 is $5,000 for 2006.

(ii) *Conclusion.* F is not eligible for the special section 457 catch-up under paragraph (c)(3) of this section in 2006 because 2006 is not one of the last three taxable years ending before F attains normal retirement age. Accordingly, the maximum that F may defer for 2006 is $20,000. See also paragraph (c)(2)(iii) *Example 1* of this section.

Example 2. (i) *Facts.* The facts are the same as in *Example 1* except that, in 2006, F elects to defer only $2,000 under the plan (rather than the maximum permitted amount of $20,000). In addition, assume that the applicable basic dollar limit of paragraph (c)(1)(i)(A) of this section continues to be $15,000 for 2007 and the additional dollar amount permitted under the age 50 catch-up in paragraph (c)(2) of this section for an individual who is at least age 50 continues to be $5,000 for 2007. In F's taxable year 2007, which is one of the last three taxable years ending before F attains the plan's normal retirement age of 65, F again receives a salary of $40,000 and elects to defer the maximum amount permissible under the plan's catch-up provisions prescribed under paragraph (c) of this section.

(ii) *Conclusion.* For 2007, which is one of the last three taxable years ending before F attains the plan's normal retirement age of 65, the applicable limit on deferrals for F is the larger of the amount under the special section 457 catch-up or $20,000, which is the basic annual limitation ($15,000) and the age

50 catch-up limit of section 414(v) ($5,000). For 2007, F's special section 457 catch-up amount is the lesser of two times the basic annual limitation ($30,000) or the sum of the basic annual limitation ($15,000) plus the $13,000 underutilized limitation under paragraph (c)(3)(ii) of this section (the $15,000 plan ceiling in 2006, minus the $2,000 contributed for F in 2006), or $28,000. Thus, the maximum amount that F may defer in 2007 is $28,000.

Example 3. (i) *Facts.* The facts are the same as in *Examples 1* and *2*, except that F does not make any contributions to the plan before 2010. In addition, assume that the applicable basic dollar limitation of paragraph (c)(1)(i)(A) of this section continues to be $15,000 for 2010 and the additional dollar amount permitted under the age 50 catch-up in paragraph (c)(2) of this section for an individual who is at least age 50 continues to be $5,000 for 2010. In F's taxable year 2010, the year in which F attains age 65 (which is the normal retirement age under the plan), F desires to defer the maximum amount possible under the plan. F's compensation for 2010 is again $40,000.

(ii) *Conclusion.* For 2010, the maximum amount that F may defer is $20,000. The special section 457 catch-up provisions under paragraph (c)(3) of this section are not applicable because 2010 is not a taxable year ending before the year in which F attains normal retirement age.

(4) *Cost-of-living adjustment.* For years beginning after December 31, 2006, the $15,000 dollar limitation in paragraph (c)(1)(i)(A) of this section will be adjusted to take into account increases in the cost-of-living. The adjustment in the dollar limitation is made at the same time and in the same manner as under section 415(d) (relating to qualified plans under section 401(a)), except that the base period is the calendar quarter beginning July 1, 2005 and any increase which is not a multiple of $500 will be rounded to the next lowest multiple of $500.

(d) *Deferral of sick, vacation, and back pay under an eligible plan*—(1) *In general.* An eligible plan may provide that a participant may elect to defer accumulated sick pay, accumulated vacation pay, and back pay under an eligible plan if the requirements of section 457(b) are satisfied. For example, the plan must provide, in accordance with paragraph (b) of this section, that these amounts may be deferred for any calendar month only if an agreement providing for the deferral is entered into before the beginning of the month in which the amounts would otherwise be paid or made available and the participant is an employee in that month. In the case of accumulated sick pay, vacation pay, or back pay that is payable before the participant has a severance from employment, the requirements of the preceding sentence are deemed to be satisfied if the agreement providing for the deferral is entered into before the amount is currently available (as defined in regulations under section 401(k)).

(2) *Examples.* The provisions of this paragraph (d) are illustrated by the following examples:

Example 1. (i) *Facts.* Participant G, who is age 62 in 2003, is an employee who participates in an eligible plan providing a normal retirement age of 65. Under the terms of G's employer's eligible plan and G's sick leave plan, G may, during November of 2003 (which is one of the three years prior to normal retirement age), make a one-time election to contribute amounts representing accumulated sick pay to the eligible plan in December of 2003 (within the maximum deferral limitations). Alternatively, such amounts may remain in the "bank" under the sick leave plan. No cash out of the sick pay is available until the month in which a participant ceases to be employed by the employer. The total value of G's accumulated sick pay (determined, in accordance with the terms of the sick leave plan, by reference to G's current salary) is $4,000 in December of 2003.

(ii) *Conclusion.* Under the terms of the eligible plan and sick leave plan, G may elect before December of 2003 to defer the $4,000 value of accumulated sick pay under the eligible plan, provided that G's other annual deferrals to the eligible plan for 2003, when added to the $4,000, do not exceed G's maximum deferral limitation for the year.

Example 2. (i) *Facts.* Same facts as in *Example 1*, except that G will separate from service on January 17, 2004, and elects, on January 4, 2004, to defer G's accumulated sick and vacation pay (which totals $12,000) that is payable on January 15, 2004.

(ii) *Conclusion.* G may elect before January 15, 2004 to defer the accumulated sick and vacation pay under the eligible plan, even if the election is made after the beginning of January, because the agreement providing for the deferral is entered into before the amount is currently available and G does not cease to be an employee before the amount is currently available. G will have $12,000 of includible compensation in 2004 because the deferral is taken into account in the definition of includible compensation.

Example 3. (i) *Facts.* Employer X maintains an eligible plan and a vacation leave plan. Under the terms of the vacation leave plan, employees generally accrue three weeks of vacation per year. Up to one week's unused vacation may be carried over from one year to the next, so that in any single year an employee may have a maximum of four weeks vacation time. At the beginning of each calendar year, under the terms of the eligible plan (which constitutes an agreement providing for the deferral), the value of any unused vacation time from the prior year in excess of one week is automatically contributed to the eligible plan, to the extent of the employee's maximum deferral limitations. Amounts in excess of the maximum deferral limitations are forfeited.

(ii) *Conclusion.* The value of the unused vacation pay contributed to X's eligible plan pursuant to the terms of the plan and the terms of the vacation leave plan is treated as an annual deferral to the eligible plan in the calendar year the contribution is made. No amounts contributed to the eligible plan will be considered made available to a participant in X's eligible plan.

(e) *Excess deferrals under an eligible plan*—(1) *In general.* Any amount deferred under an eligible plan for the taxable year of a participant that exceeds the maximum deferral limitations set forth in paragraphs (c)(1) through (3) of this section, and any amount that exceeds the individual limitation under § 1.457–5, constitutes an excess deferral that is taxable in accordance with § 1.457–11 for that taxable year. Thus, an excess deferral is includible in gross income in the taxable year deferred or, if later, the first taxable year in which there is no substantial risk of forfeiture.

(2) *Excess deferrals under an eligible governmental plan other than as a result of the individual limitation.* In order to be an eligible governmental plan, the plan must provide that any excess deferral resulting from a failure of a plan to apply the limitations of paragraphs (c)(1) through (3) of this section to amounts deferred under the eligible plan (computed without regard to the individual limitation under § 1.457–5) will be distributed to the participant, with allocable net income, as soon as administratively practicable after the plan determines that the amount is an excess deferral. For purposes of determining whether there is an excess deferral resulting from a failure of a plan to apply the limitations of paragraphs (c)(1) through (3) of this section, all plans under which an individual participates by virtue of his or her relationship with a single employer are treated as a single plan (without regard to any differences in funding). An eligible governmental plan does not fail to satisfy the requirements of paragraphs (a) through (d) of this section or §§ 1.457–6 through 1.457–10 (including the distribution rules under § 1.457–6 and the funding rules under § 1.457–8) solely by reason of a distribution made under this paragraph (e)(2). If such excess deferrals are not corrected by distribution under this paragraph (e)(2), the plan will be an ineligible plan under which benefits are taxable in accordance with § 1.457–11.

(3) *Excess deferrals under an eligible plan of a tax-exempt employer other than as a result of the individual limitation.* If a plan of a tax-exempt employer fails to comply with the limitations of paragraphs (c)(1) through (3) of this section, the plan will be an ineligible plan under which benefits are taxable in accordance with § 1.457–11.

However, a plan may distribute to a participant any excess deferrals (and any income allocable to such amount) not later than the first April 15 following the close of the taxable year of the excess deferrals. In such a case, the plan will continue to be treated as an eligible plan. However, any excess deferral is included in the gross income of a participant for the taxable year of the excess deferral. If the excess deferrals are not corrected by distribution under this paragraph (e)(3), the plan is an ineligible plan under which benefits are taxable in accordance with § 1.457–11. For purposes of determining whether there is an excess deferral resulting from a failure of a plan to apply the limitations of paragraphs (c)(1) through (3) of this section, all eligible plans under which an individual participates by virtue of his or her relationship with a single employer are treated as a single plan.

(4) *Excess deferrals arising from application of the individual limitation.* An eligible plan may provide that an excess deferral that is a result solely of a failure to comply with the individual limitation under § 1.457–5 for a taxable year may be distributed to the participant, with allocable net income, as soon as administratively practicable after the plan determines that the amount is an excess deferral. An eligible plan does not fail to satisfy the requirements of paragraphs (a) through (d) of this section or §§ 1.457–6 through 1.457–10 (including the distribution rules under § 1.457–6 and the funding rules under § 1.457–8) solely by reason of a distribution made under this paragraph (e)(4). Although a plan will still maintain eligible status if excess deferrals are not distributed under this paragraph (e)(4), a participant must include the excess amounts in income as provided in paragraph (e)(1) of this section.

(5) *Examples.* The provisions of this paragraph (e) are illustrated by the following examples:

Example 1. (i) *Facts.* In 2006, the eligible plan of State Employer X in which Participant H participates permits a maximum deferral of the lesser of $15,000 or 100 percent of includible compensation. In 2006, H, who has compensation of $28,000, nevertheless defers $16,000 under the eligible plan. Participant H is age 45 and normal retirement age under the plan is age 65. For 2006, the applicable dollar limit under paragraph (c)(1)(i)(A) of this section is $15,000. Employer X discovers the error in January of 2007 when it completes H's 2006 Form W–2 and promptly distributes $1,022 to H (which is the sum of the $1,000 excess and $22 of allocable net income).

(ii) *Conclusion.* Participant H has deferred $1,000 in excess of the $15,000 limitation provided for under the plan for 2006. The $1,000 excess must be included by H in H's income for 2006. In order to correct the failure and still be an eligible plan, the plan must distribute the excess deferral, with allocable net income, as soon as administratively practicable after determining that the amount exceeds the plan deferral limitations. In this case, $22 of the distribution of $1,022 is included in H's gross income for 2007 (and is not an eligible rollover distribution). If the excess deferral were not distributed, the plan would be an ineligible plan with respect to which benefits are taxable in accordance with § 1.457–11.

Example 2. (i) *Facts.* The facts are the same as in *Example 1*, except that X uses a number of separate arrangements with different trustees and annuity insurers to permit employees to defer and H elects deferrals under several of the funding arrangements none of which exceeds $15,000 for any individual funding arrangement, but which total $16,000.

(ii) *Conclusion.* The conclusion is the same as in *Example 1*.

Example 3. (i) *Facts.* The facts are the same as in *Example 1*, except that H's deferral under the eligible plan is limited to $11,000 and H also makes a salary reduction contribution of $5,000 to an annuity contract under section 403(b) with the same Employer X.

(ii) *Conclusion.* H's deferrals are within the plan deferral limitations of Employer X. Because of the repeal of the application of the coordination limitation under former paragraph (2) of section 457(c), H's salary reduction deferrals under the annuity contract are no longer considered in determining H's applicable deferral limits under paragraphs (c)(1) through (3) of this section.

Example 4. (i) *Facts.* The facts are the same as in *Example 1*, except that H's deferral under the eligible governmental plan is limited to $14,000 and H also makes a deferral of $4,000 to an eligible governmental plan of a different employer. Participant H is age 45 and normal retirement age under both eligible plans is age 65.

(ii) *Conclusion.* Because of the application of the individual limitation under § 1.457–5, H has an excess deferral of $3,000 (the sum of $14,000 plus $4,000 equals $18,000, which is $3,000 in excess of the dollar limitation of $15,000). The $3,000 excess deferral, with allocable net income, may be distributed from either plan as soon as administratively practicable after determining that the combined amount exceeds the deferral limitations. If the $3,000 excess deferral is not distributed to H, each plan will continue to be an eligible plan, but the $3,000 must be included by H in H's income for 2006.

Example 5. (i) *Facts.* Assume the same facts as in *Example 3*, except that H's deferral under the eligible governmental plan is limited to $14,000 and H also makes a deferral of $4,000 to an eligible plan of Employer Y, a tax-exempt entity.

(ii) *Conclusion.* The results are the same as in *Example 3*, namely, because of the application of the individual limitation under § 1.457–5, H has an excess deferral of $3,000. If the $3,000 excess deferral is not distributed to H, each plan will continue to be an eligible plan, but the $3,000 must be included by H in H's income for 2006.

Example 6. (i) Facts. Assume the same facts as in *Example 5*, except that X is a tax-exempt entity and thus its plan is an eligible plan of a tax-exempt entity.

(ii) *Conclusion.* The results are the same as in Example 5, namely, because of the application of the individual limitation under § 1.457–5, H has an excess deferral of $3,000. If the $3,000 excess deferral is not distributed to H, each plan will continue to be an eligible plan, but the $3,000 must be included by H into H's income for 2006.

■ **Par. 3.** Sections 1.457–5 through 1.457–12 are added to read as follows:

§ 1.457–5 Individual limitation for combined annual deferrals under multiple eligible plans

(a) *General rule.* The individual limitation under section 457(c) and this section equals the basic annual deferral limitation under § 1.457–4(c)(1)(i)(A), plus either the age 50 catch-up amount under § 1.457–4(c)(2), or the special section 457 catch-up amount under § 1.457–4(c)(3), applied by taking into account the combined annual deferral for the participant for any taxable year under all eligible plans. While an eligible plan may include provisions under which it will limit deferrals to meet the individual limitation under section 457(c) and this section, annual deferrals by a participant that exceed the individual limit under section 457(c) and this section (but do not exceed the limits under § 1.457–4(c)) will not cause a plan to lose its eligible status. However, to the extent the combined annual deferrals for a participant for any taxable year exceed the individual limitation under section 457(c) and this section for that year, the amounts are treated as excess deferrals as described in § 1.457–4(e).

(b) *Limitation applied to participant.* The individual limitation in this section applies to eligible plans of all employers for whom a participant has performed services, including both eligible governmental plans and eligible plans of a tax-exempt entity and both eligible plans of the employer and eligible plans of other employers. Thus, for purposes of determining the amount excluded from a participant's gross income in any taxable year (including the underutilized limitation under § 1.457–4 (c)(3)(ii)(B)), the participant's annual deferral under an eligible plan, and the participant's annual deferrals under all other eligible plans, must be determined on an aggregate basis. To the extent that the combined annual deferral amount exceeds the maximum deferral limitation applicable under § 1.457–4 (c)(1)(i)(A), (c)(2), or (c)(3), the amount

is treated as an excess deferral under § 1.457–4(e).

(c) *Special rules for catch-up amounts under multiple eligible plans.* For purposes of applying section 457(c) and this section, the special section 457 catch-up under § 1.457–4 (c)(3) is taken into account only to the extent that an annual deferral is made for a participant under an eligible plan as a result of plan provisions permitted under § 1.457–4 (c)(3). In addition, if a participant has annual deferrals under more than one eligible plan and the applicable catch-up amount under § 1.457–4 (c)(2) or (3) is not the same for each such eligible plan for the taxable year, section 457(c) and this section are applied using the catch-up amount under whichever plan has the largest catch-up amount applicable to the participant.

(d) *Examples.* The provisions of this section are illustrated by the following examples:

Example 1. (i) *Facts.* Participant F is age 62 in 2006 and participates in two eligible plans during 2006, Plans J and K, which are each eligible plans of two different governmental entities. Each plan includes provisions allowing the maximum annual deferral permitted under § 1.457–4(c)(1) through (3). For 2006, the underutilized amount under § 1.457–4 (c)(3)(ii)(B) is $20,000 under Plan J and is $40,000 under Plan K. Normal retirement age is age 65 under both plans. Participant F defers $15,000 under each plan. Participant F's includible compensation is in each case in excess of the deferral. Neither plan designates the $15,000 contribution as a catch-up permitted under each plan's special section 457 catch-up provisions.

(ii) *Conclusion.* For purposes of applying this section to Participant F for 2006, the maximum exclusion is $20,000. This is equal to the sum of $15,000 plus $5,000, which is the age 50 catch-up amount. Thus, F has an excess amount of $10,000 which is treated as an excess deferral for Participant F for 2006 under § 1.457–4(e).

Example 2. (i) *Facts.* Participant E, who will turn 63 on April 1, 2006, participates in four eligible plans during 2006: Plan W which is an eligible governmental plan; and Plans X, Y, and Z which are each eligible plans of three different tax-exempt entities. For 2006, the limitation that applies to Participant E under all four plans under § 1.457–4 (c)(1)(i)(A) is $15,000. For 2006, the additional age 50 catch-up limitation that applies to Participant E under all four plans under § 1.457–4 (c)(2) is $5,000. Further, for 2006, different limitations under § 1.457–4(c)(3) and (c)(3)(ii)(B) apply to Participant E under each of these plans, as follows: under Plan W, the underutilized limitation under § 1.457–4 (c)(3)(ii)(B) is $7,000; under Plan X, the underutilized limitation under § 1.457–4 (c)(3)(ii)(B) is $2,000; under Plan Y, the underutilized limitation under § 1.457–4 (c)(3)(ii)(B) is $8,000; and under Plan Z, § 1.457–4 (c)(3) is not applicable since normal retirement age is age 62 under Plan Z. Participant E's includible compensation is in each case in excess of any applicable deferral.

(ii) *Conclusion.* For purposes of applying this section to Participant E for 2006, Participant E could elect to defer $23,000 under Plan Y, which is the maximum deferral limitation under § 1.457–4 (c)(1) through (3), and to defer no amount under Plans W, X, and Z. The $23,000 maximum amount is equal to the sum of $15,000 plus $8,000, which is the catch-up amount applicable to Participant E under Plan Y and which is the largest catch-up amount applicable to Participant E under any of the four plans for 2006. Alternatively, Participant E could instead elect to defer the following combination of amounts: an aggregate total of $20,000 to any of the four plans; or $22,000 to Plan W and none to any of the other three plans.

(iii) If the underutilized amount under Plans W, X, and Y for 2006 were in each case zero (because E had always contributed the maximum amount or E was a new participant) or an amount not in excess of $5,000, the maximum exclusion under this section would be $20,000 for Participant E for 2006 ($15,000 plus the $5,000 age 50 catch-up amount), which Participant E could contribute to any of the plans.

§ 1.457–6 Timing of distributions under eligible plans.

(a) *In general.* Except as provided in paragraph (c) of this section (relating to distributions on account of an unforeseeable emergency), paragraph (e) of this section (relating to distributions of small accounts), § 1.457–10(a) (relating to plan terminations), or § 1.457–10(c) (relating to domestic relations orders), amounts deferred under an eligible governmental plan may not be paid to a participant or beneficiary before the participant has a severance from employment with the eligible employer or when the participant attains age 70½, if earlier. For rules relating to loans, see paragraph (f) of this section. This section does not apply to distributions of excess amounts under § 1.457–4(e). However, except to the extent set forth by the Commissioner in revenue rulings, notices, and other guidance published in the Internal Revenue Bulletin, this section applies to amounts held in a separate account for eligible rollover distributions maintained by an eligible governmental plan as described in § 1.457–10(e)(2).

(b) *Severance from employment*—(1) *Employees.* An employee has a severance from employment with the eligible employer if the employee dies, retires, or otherwise has a severance from employment with the eligible employer. See regulations under section 401(k) for additional guidance concerning severance from employment.

(2) *Independent contractors*—(i) *In general.* An independent contractor is considered to have a severance from employment with the eligible employer upon the expiration of the contract (or in the case of more than one contract, all contracts) under which services are performed for the eligible employer if the expiration constitutes a good-faith and complete termination of the contractual relationship. An expiration does not constitute a good faith and complete termination of the contractual relationship if the eligible employer anticipates a renewal of a contractual relationship or the independent contractor becoming an employee. For this purpose, an eligible employer is considered to anticipate the renewal of the contractual relationship with an independent contractor if it intends to contract again for the services provided under the expired contract, and neither the eligible employer nor the independent contractor has eliminated the independent contractor as a possible provider of services under any such new contract. Further, an eligible employer is considered to intend to contract again for the services provided under an expired contract if the eligible employer's doing so is conditioned only upon incurring a need for the services, the availability of funds, or both.

(ii) *Special rule.* Notwithstanding paragraph (b)(2)(i) of this section, the plan is considered to satisfy the requirement described in paragraph (a) of this section that no amounts deferred under the plan be paid or made available to the participant before the participant has a severance from employment with the eligible employer if, with respect to amounts payable to a participant who is an independent contractor, an eligible plan provides that—

(A) No amount will be paid to the participant before a date at least 12 months after the day on which the contract expires under which services are performed for the eligible employer (or, in the case of more than one contract, all such contracts expire); and

(B) No amount payable to the participant on that date will be paid to the participant if, after the expiration of the contract (or contracts) and before that date, the participant performs services for the eligible employer as an independent contractor or an employee.

(c) *Rules applicable to distributions for unforeseeable emergencies*—(1) *In general.* An eligible plan may permit a distribution to a participant or beneficiary faced with an unforeseeable emergency. The distribution must satisfy the requirements of paragraph (c)(2) of this section.

(2) *Requirements*—(i) *Unforeseeable emergency defined.* An unforeseeable emergency must be defined in the plan

as a severe financial hardship of the participant or beneficiary resulting from an illness or accident of the participant or beneficiary, the participant's or beneficiary's spouse, or the participant's or beneficiary's dependent (as defined in section 152(a)); loss of the participant's or beneficiary's property due to casualty (including the need to rebuild a home following damage to a home not otherwise covered by homeowner's insurance, *e.g.*, as a result of a natural disaster); or other similar extraordinary and unforeseeable circumstances arising as a result of events beyond the control of the participant or the beneficiary. For example, the imminent foreclosure of or eviction from the participant's or beneficiary's primary residence may constitute an unforeseeable emergency. In addition, the need to pay for medical expenses, including non-refundable deductibles, as well as for the cost of prescription drug medication, may constitute an unforeseeable emergency. Finally, the need to pay for the funeral expenses of a spouse or a dependent (as defined in section 152(a)) may also constitute an unforeseeable emergency. Except as otherwise specifically provided in this paragraph (c)(2)(i), the purchase of a home and the payment of college tuition are not unforeseeable emergencies under this paragraph (c)(2)(i).

(ii) *Unforeseeable emergency distribution standard.* Whether a participant or beneficiary is faced with an unforeseeable emergency permitting a distribution under this paragraph (c) is to be determined based on the relevant facts and circumstances of each case, but, in any case, a distribution on account of unforeseeable emergency may not be made to the extent that such emergency is or may be relieved through reimbursement or compensation from insurance or otherwise, by liquidation of the participant's assets, to the extent the liquidation of such assets would not itself cause severe financial hardship, or by cessation of deferrals under the plan.

(iii) *Distribution necessary to satisfy emergency need.* Distributions because of an unforeseeable emergency must be limited to the amount reasonably necessary to satisfy the emergency need (which may include any amounts necessary to pay any federal, state, or local income taxes or penalties reasonably anticipated to result from the distribution).

(d) *Minimum required distributions for eligible plans.* In order to be an eligible plan, a plan must meet the distribution requirements of section 457(d)(1) and (2). Under section 457(d)(2), a plan must meet the minimum distribution requirements of section 401(a)(9). See section 401(a)(9) and the regulations thereunder for these requirements. Section 401(a)(9) requires that a plan begin lifetime distributions to a participant no later than April 1 of the calendar year following the later of the calendar year in which the participant attains age 70½ or the calendar year in which the participant retires.

(e) *Distributions of smaller accounts*—(1) *In general.* An eligible plan may provide for a distribution of all or a portion of a participant's benefit if this paragraph (e)(1) is satisfied. This paragraph (e)(1) is satisfied if the participant's total amount deferred (the participant's total account balance) which is not attributable to rollover contributions (as defined in section 411(a)(11)(D)) is not in excess of the dollar limit under section 411(a)(11)(A), no amount has been deferred under the plan by or for the participant during the two-year period ending on the date of the distribution, and there has been no prior distribution under the plan to the participant under this paragraph (e). An eligible plan is not required to permit distributions under this paragraph (e).

(2) *Alternative provisions possible.* Consistent with the provisions of paragraph (e)(1) of this section, a plan may provide that the total amount deferred for a participant or beneficiary will be distributed automatically to the participant or beneficiary if the requirements of paragraph (e)(1) of this section are met. Alternatively, if the requirements of paragraph (e)(1) of this section are met, the plan may provide for the total amount deferred for a participant or beneficiary to be distributed to the participant or beneficiary only if the participant or beneficiary so elects. The plan is permitted to substitute a specified dollar amount that is less than the total amount deferred. In addition, these two alternatives can be combined; for example, a plan could provide for automatic distributions for up to $500, but allow participants or beneficiary to elect a distribution if the total account balance is above $500.

(f) *Loans from eligible plans*—(1) *Eligible plans of tax-exempt entities.* If a participant or beneficiary receives (directly or indirectly) any amount deferred as a loan from an eligible plan of a tax-exempt entity, that amount will be treated as having been paid or made available to the individual as a distribution under the plan, in violation of the distribution requirements of section 457(d).

(2) *Eligible governmental plans.* The determination of whether the availability of a loan, the making of a loan, or a failure to repay a loan made from a trustee (or a person treated as a trustee under section 457(g)) of an eligible governmental plan to a participant or beneficiary is treated as a distribution (directly or indirectly) for purposes of this section, and the determination of whether the availability of the loan, the making of the loan, or a failure to repay the loan is in any other respect a violation of the requirements of section 457(b) and the regulations, depends on the facts and circumstances. Among the facts and circumstances are whether the loan has a fixed repayment schedule and bears a reasonable rate of interest, and whether there are repayment safeguards to which a prudent lender would adhere. Thus, for example, a loan must bear a reasonable rate of interest in order to satisfy the exclusive benefit requirement of section 457(g)(1) and § 1.457–8(a)(1). See also § 1.457–7(b)(3) relating to the application of section 72(p) with respect to the taxation of a loan made under an eligible governmental plan, and § 1.72(p)-1 relating to section 72(p)(2).

(3) *Example.* The provisions of paragraph (f)(2) of this section are illustrated by the following example:

Example. (i) *Facts.* Eligible Plan X of State Y is funded through Trust Z. Plan X permits an employee's account balance under Plan X to be paid in a single sum at severance from employment with State Y. Plan X includes a loan program under which any active employee with a vested account balance may receive a loan from Trust Z. Loans are made pursuant to plan provisions regarding loans that are set forth in the plan under which loans bear a reasonable rate of interest and are secured by the employee's account balance. In order to avoid taxation under § 1.457–7(b)(3) and section 72(p)(1), the plan provisions limit the amount of loans and require loans to be repaid in level installments as required under section 72(p)(2). Participant J's vested account balance under Plan X is $50,000. J receives a loan from Trust Z in the amount of $5,000 on December 1, 2003, to be repaid in level installments made quarterly over the 5-year period ending on November 30, 2008. Participant J makes the required repayments until J has a severance from employment from State Y in 2005 and subsequently fails to repay the outstanding loan balance of $2,250. The $2,250 loan balance is offset against J's $80,000 account balance benefit under Plan X, and J elects to be paid the remaining $77,750 in 2005.

(ii) *Conclusion.* The making of the loan to J will not be treated as a violation of the requirements of section 457(b) or the regulations. The cancellation of the loan at severance from employment does not cause Plan X to fail to satisfy the requirements for plan eligibility under section 457. In addition, because the loan satisfies the maximum amount and repayment

requirements of section 72(p)(2), J is not required to include any amount in income as a result of the loan until 2005, when J has income of $2,250 as a result of the offset (which is a permissible distribution under this section) and income of $77,750 as a result of the distribution made in 2005.

§ 1.457–7 Taxation of Distributions Under Eligible Plans.

(a) *General rules for when amounts are included in gross income.* The rules for determining when an amount deferred under an eligible plan is includible in the gross income of a participant or beneficiary depend on whether the plan is an eligible governmental plan or an eligible plan of a tax-exempt entity. Paragraph (b) of this section sets forth the rules for an eligible governmental plan. Paragraph (c) of this section sets forth the rules for an eligible plan of a tax-exempt entity.

(b) *Amounts included in gross income under an eligible governmental plan—*(1) *Amounts included in gross income in year paid under an eligible governmental plan.* Except as provided in paragraphs (b)(2) and (3) of this section (or in § 1.457–10(c) relating to payments to a spouse or former spouse pursuant to a qualified domestic relations order), amounts deferred under an eligible governmental plan are includible in the gross income of a participant or beneficiary for the taxable year in which paid to the participant or beneficiary under the plan.

(2) *Rollovers to individual retirement arrangements and other eligible retirement plans.* A trustee-to-trustee transfer in accordance with section 401(a)(31) (generally referred to as a direct rollover) from an eligible government plan is not includible in gross income of a participant or beneficiary in the year transferred. In addition, any payment made from an eligible government plan in the form of an eligible rollover distribution (as defined in section 402(c)(4)) is not includible in gross income in the year paid to the extent the payment is transferred to an eligible retirement plan (as defined in section 402(c)(8)(B)) within 60 days, including the transfer to the eligible retirement plan of any property distributed from the eligible governmental plan. For this purpose, the rules of section 402(c)(2) through (7) and (9) apply. Any trustee-to-trustee transfer under this paragraph (b)(2) from an eligible government plan is a distribution that is subject to the distribution requirements of § 1.457–6.

(3) *Amounts taxable under section 72(p)(1).* In accordance with section 72(p), the amount of any loan from an eligible governmental plan to a participant or beneficiary (including any pledge or assignment treated as a loan under section 72(p)(1)(B)) is treated as having been received as a distribution from the plan under section 72(p)(1), except to the extent set forth in section 72(p)(2) (relating to loans that do not exceed a maximum amount and that are repayable in accordance with certain terms) and § 1.72(p)–1. Thus, except to the extent a loan satisfies section 72(p)(2), any amount loaned from an eligible governmental plan to a participant or beneficiary (including any pledge or assignment treated as a loan under section 72(p)(1)(B)) is includible in the gross income of the participant or beneficiary for the taxable year in which the loan is made. See generally § 1.72(p)–1.

(4) *Examples.* The provisions of this paragraph (b) are illustrated by the following examples:

Example 1. (i) *Facts.* Eligible Plan G of a governmental entity permits distribution of benefits in a single sum or in installments of up to 20 years, with such benefits to commence at any date that is after severance from employment (up to the later of severance from employment or the plan's normal retirement age of 65). Effective for participants who have a severance from employment after December 31, 2001, Plan X allows an election—as to both the date on which payments are to begin and the form in which payments are to be made—to be made by the participant at any time that is before the commencement date selected. However, Plan X chooses to require elections to be filed at least 30 days before the commencement date selected in order for Plan X to have enough time to be able to effectuate the election.

(ii) *Conclusion.* No amounts are included in gross income before actual payments begin. If installment payments begin (and the installment payments are payable over at least 10 years so as not to be eligible rollover distributions), the amount included in gross income for any year is equal to the amount of the installment payment paid during the year.

Example 2. (i) *Facts.* Same facts as in *Example 1*, except that the same rules are extended to participants who had a severance from employment before January 1, 2002.

(ii) *Conclusion.* For all participants (that is, both those who have a severance from employment after December 31, 2001, and those who have a severance from employment before January 1, 2002, including those whose benefit payments have commenced before January 1, 2002), no amounts are included in gross income before actual payments begin. If installment payments begin (and the installment payments are payable over at least 10 years so as not to be eligible rollover distributions), the amount included in gross income for any year is equal to the amount of the installment payment paid during the year.

(c) *Amounts included in gross income under an eligible plan of a tax-exempt entity—*(1) *Amounts included in gross income in year paid or made available under an eligible plan of a tax-exempt entity.* Amounts deferred under an eligible plan of a tax-exempt entity are includible in the gross income of a participant or beneficiary for the taxable year in which paid or otherwise made available to the participant or beneficiary under the plan. Thus, amounts deferred under an eligible plan of a tax-exempt entity are includible in the gross income of the participant or beneficiary in the year the amounts are first made available under the terms of the plan, even if the plan has not distributed the amounts deferred. Amounts deferred under an eligible plan of a tax-exempt entity are not considered made available to the participant or beneficiary solely because the participant or beneficiary is permitted to choose among various investments under the plan.

(2) *When amounts deferred are considered to be made available under an eligible plan of a tax-exempt entity—*(i) *General rule.* Except as provided in paragraphs (c)(2)(ii) through (iv) of this section, amounts deferred under an eligible plan of a tax-exempt entity are considered made available (and, thus, are includible in the gross income of the participant or beneficiary under this paragraph (c)) at the earliest date, on or after severance from employment, on which the plan allows distributions to commence, but in no event later than the date on which distributions must commence pursuant to section 401(a)(9). For example, in the case of a plan that permits distribution to commence on the date that is 60 days after the close of the plan year in which the participant has a severance from employment with the eligible employer, amounts deferred are considered to be made available on that date. However, distributions deferred in accordance with paragraphs (c)(2)(ii) through (iv) of this section are not considered made available prior to the applicable date under paragraphs (c)(2)(ii) through (iv) of this section. In addition, no portion of a participant or beneficiary's account is treated as made available (and thus currently includible in income) under an eligible plan of a tax-exempt entity merely because the participant or beneficiary under the plan may elect to receive a distribution in any of the following circumstances:

(A) A distribution in the event of an unforeseeable emergency to the extent the distribution is permitted under § 1.457–6(c).

(B) A distribution from an account for which the total amount deferred is not in excess of the dollar limit under section 411(a)(11)(A) to the extent the

distribution is permitted under § 1.457–6(e).

(ii) *Initial election to defer commencement of distributions*—(A) *In general.* An eligible plan of a tax-exempt entity may provide a period for making an initial election during which the participant or beneficiary may elect, in accordance with the terms of the plan, to defer the payment of some or all of the amounts deferred to a fixed or determinable future time. The period for making this initial election must expire prior to the first time that any such amounts would be considered made available under the plan under paragraph (c)(2)(i) of this section.

(B) *Failure to make initial election to defer commencement of distributions.* Generally, if no initial election is made by a participant or beneficiary under this paragraph (c)(2)(ii), then the amounts deferred under an eligible plan of a tax-exempt entity are considered made available and taxable to the participant or beneficiary in accordance with paragraph (c)(2)(i) of this section at the earliest time, on or after severance from employment (but in no event later than the date on which distributions must commence pursuant to section 401(a)(9)), that distribution is permitted to commence under the terms of the plan. However, the plan may provide for a default payment schedule that applies if no election is made. If the plan provides for a default payment schedule, the amounts deferred are includible in the gross income of the participant or beneficiary in the year the amounts deferred are first made available under the terms of the default payment schedule.

(iii) *Additional election to defer commencement of distribution.* An eligible plan of a tax-exempt entity is permitted to provide that a participant or beneficiary who has made an initial election under paragraph (c)(2)(ii)(A) of this section may make one additional election to defer (but not accelerate) commencement of distributions under the plan before distributions have commenced in accordance with the initial deferral election under paragraph (c)(2)(ii)(A) of this section. Amounts payable to a participant or beneficiary under an eligible plan of a tax-exempt entity are not treated as made available merely because the plan allows the participant to make an additional election under this paragraph (c)(2)(iii). A participant or beneficiary is not precluded from making an additional election to defer commencement of distributions merely because the participant or beneficiary has previously received a distribution under § 1.457–6(c) because of an unforeseeable emergency, has received a distribution of smaller amounts under § 1.457–6(e), has made (and revoked) other deferral or method of payment elections within the initial election period, or is subject to a default payment schedule under which the commencement of benefits is deferred (for example, until a participant is age 65).

(iv) *Election as to method of payment.* An eligible plan of a tax-exempt entity may provide that an election as to the method of payment under the plan may be made at any time prior to the time the amounts are distributed in accordance with the participant or beneficiary's initial or additional election to defer commencement of distributions under paragraph (c)(2)(ii) or (iii) of this section. Where no method of payment is elected, the entire amount deferred will be includible in the gross income of the participant or beneficiary when the amounts first become made available in accordance with a participant's initial or additional elections to defer under paragraphs (c)(2)(ii) and (iii) of this section, unless the eligible plan provides for a default method of payment (in which case amounts are considered made available and taxable when paid under the terms of the default payment schedule). A method of payment means a distribution or a series of periodic distributions commencing on a date determined in accordance with paragraph (c)(2)(ii) or (iii) of this section.

(3) *Examples.* The provisions of this paragraph (c) are illustrated by the following examples:

Example 1. (i) *Facts.* Eligible Plan X of a tax-exempt entity provides that a participant's total account balance, representing all amounts deferred under the plan, is payable to a participant in a single sum 60 days after severance from employment throughout these examples, unless, during a 30-day period immediately following the severance, the participant elects to receive the single sum payment at a later date (that is not later than the plan's normal retirement age of 65) or elects to receive distribution in 10 annual installments to begin 60 days after severance from employment (or at a later date, if so elected, that is not later than the plan's normal retirement age of 65). On November 13, 2004, participant K, a calendar year taxpayer, has a severance from employment with the eligible employer. K does not, within the 30-day window period, elect to postpone distributions to a later date or to receive payment in 10 fixed annual installments.

(ii) *Conclusion.* The single sum payment is payable to K 60 days after the date K has a severance from employment (January 12, 2005), and is includible in the gross income of K in 2005 under section 457(a).

Example 2. (i) *Facts.* The terms of eligible Plan X are the same as described in *Example 1.* Participant L participates in eligible Plan X. On November 11, 2003, L has a severance from the employment of the eligible employer. On November 24, 2003, L makes an initial deferral election not to receive the single-sum payment payable 60 days after the severance, and instead elects to receive the amounts in 10 annual installments to begin 60 days after severance from employment.

(ii) *Conclusion.* No portion of L's account is considered made available in 2003 or 2004 before a payment is made and no amount is includible in the gross income of L until distributions commence. The annual installment payable in 2004 will be includible in L's gross income in 2004.

Example 3. (i) *Facts.* The facts are the same as in *Example 1,* except that eligible Plan X also provides that those participants who are receiving distributions in 10 annual installments may, at any time and without restriction, elect to receive a cash out of all remaining installments. Participant M elects to receive a distribution in 10 annual installments commencing in 2004.

(ii) *Conclusion.* M's total account balance, representing the total of the amounts deferred under the plan, is considered made available and is includible in M's gross income in 2004.

Example 4. (i) *Facts.* The facts are the same as in *Example 3,* except that, instead of providing for an unrestricted cashout of remaining payments, the plan provides that participants or beneficiaries who are receiving distributions in 10 annual installments may accelerate the payment of the amount remaining payable to the participant upon the occurrence of an unforeseeable emergency as described in § 1.457–6(c)(1) in an amount not exceeding that described in § 1.457–6(c)(2).

(ii) *Conclusion.* No amount is considered made available to participant M on account of M's right to accelerate payments upon the occurrence of an unforeseeable emergency.

Example 5. (i) *Facts.* Eligible Plan Y of a tax-exempt entity provides that distributions will commence 60 days after a participant's severance from employment unless the participant elects, within a 30-day window period following severance from employment, to defer distributions to a later date (but no later than the year following the calendar year the participant attains age 70½). The plan provides that a participant who has elected to defer distributions to a later date may make an election as to form of distribution at any time prior to the 30th day before distributions are to commence.

(ii) *Conclusion.* No amount is considered made available prior to the date distributions are to commence by reason of a participant's right to defer or make an election as to the form of distribution.

Example 6. (i) *Facts.* The facts are the same as in *Example 1,* except that the plan also permits participants who have made an initial election to defer distribution to make one additional deferral election at any time prior to the date distributions are scheduled to commence. Participant N has a severance from employment at age 50. The next day, during the 30-day period provided in the plan, N elects to receive distribution in the form of 10 annual installment payments

beginning at age 55. Two weeks later, within the 30-day window period, N makes a new election permitted under the plan to receive 10 annual installment payments beginning at age 60 (instead of age 55). When N is age 59, N elects under the additional deferral election provisions, to defer distributions until age 65.

(ii) *Conclusion.* In this example, N's election to defer distributions until age 65 is a valid election. The two elections N makes during the 30-day window period are not additional deferral elections described in paragraph (c)(2)(iii) of this section because they are made before the first permissible payout date under the plan. Therefore, the plan is not precluded from allowing N to make the additional deferral election. However, N can make no further election to defer distributions beyond age 65 (or accelerate distribution before age 65) because this additional deferral election can only be made once.

§ 1.457–8 Funding rules for eligible plans.

(a) *Eligible governmental plans*—(1) *In general.* In order to be an eligible governmental plan, all amounts deferred under the plan, all property and rights purchased with such amounts, and all income attributable to such amounts, property, or rights, must be held in trust for the exclusive benefit of participants and their beneficiaries. A trust described in this paragraph (a) that also meets the requirements of §§ 1.457–3 through 1.457–10 is treated as an organization exempt from tax under section 501(a), and a participant's or beneficiary's interest in amounts in the trust is includible in the gross income of the participants and beneficiaries only to the extent, and at the time, provided for in section 457(a) and §§ 1.457–4 through 1.457–10.

(2) *Trust requirement.* (i) A trust described in this paragraph (a) must be established pursuant to a written agreement that constitutes a valid trust under State law. The terms of the trust must make it impossible, prior to the satisfaction of all liabilities with respect to participants and their beneficiaries, for any part of the assets and income of the trust to be used for, or diverted to, purposes other than for the exclusive benefit of participants and their beneficiaries.

(ii) Amounts deferred under an eligible governmental plan must be transferred to a trust within a period that is not longer than is reasonable for the proper administration of the participant accounts (if any). For purposes of this requirement, the plan may provide for amounts deferred for a participant under the plan to be transferred to the trust within a specified period after the date the amounts would otherwise have been paid to the participant. For example, the plan could provide for amounts deferred under the plan at the election of the participant to be contributed to the trust within 15 business days following the month in which these amounts would otherwise have been paid to the participant.

(3) *Custodial accounts and annuity contracts treated as trusts*—(i) *In general.* For purposes of the trust requirement of this paragraph (a), custodial accounts and annuity contracts described in section 401(f) that satisfy the requirements of this paragraph (a)(3) are treated as trusts under rules similar to the rules of section 401(f). Therefore, the provisions of § 1.401(f)–1(b) will generally apply to determine whether a custodial account or an annuity contract is treated as a trust. The use of a custodial account or annuity contract as part of an eligible governmental plan does not preclude the use of a trust or another custodial account or annuity contract as part of the same plan, provided that all such vehicles satisfy the requirements of section 457(g)(1) and (3) and paragraphs (a)(1) and (2) of this section and that all assets and income of the plan are held in such vehicles.

(ii) *Custodial accounts*—(A) *In general.* A custodial account is treated as a trust, for purposes of section 457(g)(1) and paragraphs (a)(1) and (2) of this section, if the custodian is a bank, as described in section 408(n), or a person who meets the nonbank trustee requirements of paragraph (a)(3)(ii)(B) of this section, and the account meets the requirements of paragraphs (a)(1) and (2) of this section, other than the requirement that it be a trust.

(B) *Nonbank trustee status.* The custodian of a custodial account may be a person other than a bank only if the person demonstrates to the satisfaction of the Commissioner that the manner in which the person will administer the custodial account will be consistent with the requirements of section 457(g)(1) and (3). To do so, the person must demonstrate that the requirements of § 1.408–2(e)(2) through (6) (relating to nonbank trustees) are met. The written application must be sent to the address prescribed by the Commissioner in the same manner as prescribed under § 1.408–2(e). To the extent that a person has already demonstrated to the satisfaction of the Commissioner that the person satisfies the requirements of § 1.408–2(e) in connection with a qualified trust (or custodial account or annuity contract) under section 401(a), that person is deemed to satisfy the requirements of this paragraph (a)(3)(ii)(B).

(iii) *Annuity contracts.* An annuity contract is treated as a trust for purposes of section 457(g)(1) and paragraph (a)(1) of this section if the contract is an annuity contract, as defined in section 401(g), that has been issued by an insurance company qualified to do business in the State, and the contract meets the requirements of paragraphs (a)(1) and (2) of this section, other than the requirement that it be a trust. An annuity contract does not include a life, health or accident, property, casualty, or liability insurance contract.

(4) *Combining assets.* [Reserved]

(b) *Eligible plans maintained by tax-exempt entity*—(1) *General rule.* In order to be an eligible plan of a tax-exempt entity, the plan must be unfunded and plan assets must not be set aside for participants or their beneficiaries. Under section 457(b)(6) and this paragraph (b), an eligible plan of a tax-exempt entity must provide that all amounts deferred under the plan, all property and rights to property (including rights as a beneficiary of a contract providing life insurance protection) purchased with such amounts, and all income attributable to such amounts, property, or rights, must remain (until paid or made available to the participant or beneficiary) solely the property and rights of the eligible employer (without being restricted to the provision of benefits under the plan), subject only to the claims of the eligible employer's general creditors.

(2) *Additional requirements.* For purposes of a paragraph (b)(1) of this section, the plan must be unfunded regardless of whether or not the amounts were deferred pursuant to a salary reduction agreement between the eligible employer and the participant. Any funding arrangement under an eligible plan of a tax-exempt entity that sets aside assets for the exclusive benefit of participants violates this requirement, and amounts deferred are generally immediately includible in the gross income of plan participants and beneficiaries. Nothing in this paragraph (b) prohibits an eligible plan from permitting participants and their beneficiaries to make an election among different investment options available under the plan, such as an election affecting the investment of the amounts described in paragraph (b)(1) of this section.

§ 1.457–9 Effect on eligible plans when not administered in accordance with eligibility requirements.

(a) *Eligible governmental plans.* A plan of a State ceases to be an eligible governmental plan on the first day of the first plan year beginning more than

180 days after the date on which the Commissioner notifies the State in writing that the plan is being administered in a manner that is inconsistent with one or more of the requirements of §§ 1.457–3 through 1.457–8, or 1.457–10. However, the plan may correct the plan inconsistencies specified in the written notification before the first day of that plan year and continue to maintain plan eligibility. If a plan ceases to be an eligible governmental plan, amounts subsequently deferred by participants will be includible in income when deferred, or, if later, when the amounts deferred cease to be subject to a substantial risk of forfeiture, as provided at § 1.457–11. Amounts deferred before the date on which the plan ceases to be an eligible governmental plan, and any earnings thereon, will be treated as if the plan continues to be an eligible governmental plan and will not be includible in participant's or beneficiary's gross income until paid to the participant or beneficiary.

(b) *Eligible plans of tax-exempt entities.* A plan of a tax-exempt entity ceases to be an eligible plan on the first day that the plan fails to satisfy one or more of the requirements of §§ 1.457–3 through 1.457–8, or § 1.457–10. *See* § 1.457–11 for rules regarding the treatment of an ineligible plan.

§ 1.457–10 Miscellaneous provisions.

(a) *Plan terminations and frozen plans*—(1) *In general.* An eligible employer may amend its plan to eliminate future deferrals for existing participants or to limit participation to existing participants and employees. An eligible plan may also contain provisions that permit plan termination and permit amounts deferred to be distributed on termination. In order for a plan to be considered terminated, amounts deferred under an eligible plan must be distributed to all plan participants and beneficiaries as soon as administratively practicable after termination of the eligible plan. The mere provision for, and making of, distributions to participants or beneficiaries upon a plan termination will not cause an eligible plan to cease to satisfy the requirements of section 457(b) or the regulations.

(2) *Employers that cease to be eligible employers*—(i) *Plan not terminated.* An eligible employer that ceases to be an eligible employer may no longer maintain an eligible plan. If the employer was a tax-exempt entity and the plan is not terminated as permitted under a paragraph (a)(2)(ii) of this section, the tax consequences to participants and beneficiaries in the previously eligible (unfunded) plan of an ineligible employer are determined in accordance with either section 451 if the employer becomes an entity other than a State or § 1.457–11 if the employer becomes a State. If the employer was a State and the plan is neither terminated as permitted under paragraph (a)(2)(ii) of this section nor transferred to another eligible plan of that State as permitted under paragraph (b) of this section, the tax consequences to participants in the previously eligible governmental plan of an ineligible employer, the assets of which are held in trust pursuant to § 1.457–8(a), are determined in accordance with section 402(b) (section 403(c) in the case of an annuity contract) and the trust is no longer to be treated as a trust that is exempt from tax under section 501(a).

(ii) *Plan termination.* As an alternative to determining the tax consequences to the plan and participants under paragraph (a)(2)(i) of this section, the employer may terminate the plan and distribute the amounts deferred (and all plan assets) to all plan participants as soon as administratively practicable in accordance with paragraph (a)(1) of this section. Such distribution may include eligible rollover distributions in the case of a plan that was an eligible governmental plan. In addition, if the employer is a State, another alternative to determining the tax consequences under paragraph (a)(2)(i) of this section is to transfer the assets of the eligible governmental plan to an eligible governmental plan of another eligible employer within the same State under the plan-to-plan transfer rules of paragraph (b) of this section.

(3) *Examples.* The provisions of this paragraph (a) are illustrated by the following examples:

Example 1. (i) *Facts.* Employer Y, a corporation that owns a State hospital, sponsors an eligible governmental plan funded through a trust. Employer Y is acquired by a for-profit hospital and Employer Y ceases to be an eligible employer under section 457(e)(1) or § 1.457–2(e). Employer Y terminates the plan and, during the next 6 months, distributes to participants and beneficiaries all amounts deferred that were under the plan.

(ii) *Conclusion.* The termination and distribution does not cause the plan to fail to be an eligible governmental plan. Amounts that are distributed as eligible rollover distributions may be rolled over to an eligible retirement plan described in section 402(c)(8)(B).

Example 2. (i) *Facts.* The facts are the same as in *Example 1*, except that Employer Y decides to continue to maintain the plan.

(ii) *Conclusion.* If Employer Y continues to maintain the plan, the tax consequences to participants and beneficiaries will be determined in accordance with either section 402(b) if the compensation deferred is funded through a trust, section 403(c) if the compensation deferred is funded through annuity contracts, or § 1.457–11 if the compensation deferred is not funded through a trust or annuity contract. In addition, if Employer Y continues to maintain the plan, the trust will no longer be treated as exempt from tax under section 501(a).

Example 3. (i) *Facts.* Employer Z, a corporation that owns a tax-exempt hospital, sponsors an unfunded eligible plan. Employer Z is acquired by a for-profit hospital and is no longer an eligible employer under section 457(e)(1) or § 1.457–2(e). Employer Z terminates the plan and distributes all amounts deferred under the eligible plan to participants and beneficiaries within a one-year period.

(ii) *Conclusion.* Distributions under the plan are treated as made under an eligible plan of a tax-exempt entity and the distributions of the amounts deferred are includible in the gross income of the participant or beneficiary in the year distributed.

Example 4. (i) *Facts.* The facts are the same as in *Example 3*, except that Employer Z decides to maintain instead of terminate the plan.

(ii) *Conclusion.* If Employer Z maintains the plan, the tax consequences to participants and beneficiaries in the plan will thereafter be determined in accordance with section 451.

(b) *Plan-to-plan transfers*—(1) *General rule.* An eligible governmental plan may provide for the transfer of amounts deferred by a participant or beneficiary to another eligible governmental plan if the conditions in paragraph (b)(2), (3), or (4) of this section are met. An eligible plan of a tax-exempt entity may provide for transfers of amounts deferred by a participant to another eligible plan of a tax-exempt entity if the conditions in paragraph (b)(5) of this section are met. In addition, an eligible governmental plan may accept transfers from another eligible governmental plan as described in the first sentence of this paragraph (b)(1), and an eligible plan of a tax-exempt entity may accept transfers from another eligible plan of a tax-exempt entity as described in the preceding sentence. However, a State may not transfer the assets of its eligible governmental plan to a tax-exempt entity's eligible plan and the plan of a tax-exempt entity may not accept such a transfer. Similarly, a tax-exempt entity may not transfer the assets of its eligible plan to an eligible governmental plan and an eligible governmental plan may not accept such a transfer. In addition, if the conditions in paragraph (b)(4) of this section (relating to permissive past service credit and repayments under section 415) are met, an eligible governmental plan of a State may provide for the transfer of amounts

deferred by a participant or beneficiary to a qualified plan (under section 401(a)) maintained by a State. However, a qualified plan may not transfer assets to an eligible governmental plan or to an eligible plan of a tax-exempt entity, and an eligible governmental plan or the plan of a tax-exempt entity may not accept such a transfer.

(2) *Requirements for post-severance plan-to-plan transfers among eligible governmental plans.* A transfer under paragraph (b)(1) of this section from an eligible governmental plan to another eligible governmental plan is permitted if the following conditions are met—

(i) The transferor plan provides for transfers;

(ii) The receiving plan provides for the receipt of transfers;

(iii) The participant or beneficiary whose amounts deferred are being transferred will have an amount deferred immediately after the transfer at least equal to the amount deferred with respect to that participant or beneficiary immediately before the transfer; and

(iv) In the case of a transfer for a participant, the participant has had a severance from employment with the transferring employer and is performing services for the entity maintaining the receiving plan.

(3) *Requirements for plan-to-plan transfers of all plan assets of eligible governmental plan.* A transfer under paragraph (b)(1) of this section from an eligible governmental plan to another eligible governmental plan is permitted if the following conditions are met—

(i) The transfer is from an eligible governmental plan to another eligible governmental plan within the same State;

(ii) All of the assets held by the transferor plan are transferred;

(iii) The transferor plan provides for transfers;

(iv) The receiving plan provides for the receipt of transfers;

(v) The participant or beneficiary whose amounts deferred are being transferred will have an amount deferred immediately after the transfer at least equal to the amount deferred with respect to that participant or beneficiary immediately before the transfer; and

(vi) The participants or beneficiaries whose deferred amounts are being transferred are not eligible for additional annual deferrals in the receiving plan unless they are performing services for the entity maintaining the receiving plan.

(4) *Requirements for plan-to-plan transfers among eligible governmental plans of the same employer.* A transfer under paragraph (b)(1) of this section from an eligible governmental plan to another eligible governmental plan is permitted if the following conditions are met—

(i) The transfer is from an eligible governmental plan to another eligible governmental plan of the same employer (and, for this purpose, the employer is not treated as the same employer if the participant's compensation is paid by a different entity);

(ii) The transferor plan provides for transfers;

(iii) The receiving plan provides for the receipt of transfers;

(iv) The participant or beneficiary whose amounts deferred are being transferred will have an amount deferred immediately after the transfer at least equal to the amount deferred with respect to that participant or beneficiary immediately before the transfer; and

(v) The participant or beneficiary whose deferred amounts are being transferred is not eligible for additional annual deferrals in the receiving plan unless the participant or beneficiary is performing services for the entity maintaining the receiving plan.

(5) *Requirements for post-severance plan-to-plan transfers among eligible plans of tax-exempt entities.* A transfer under paragraph (b)(1) of this section from an eligible plan of a tax-exempt employer to another eligible plan of a tax-exempt employer is permitted if the following conditions are met—

(i) The transferor plan provides for transfers;

(ii) The receiving plan provides for the receipt of transfers;

(iii) The participant or beneficiary whose amounts deferred are being transferred will have an amount deferred immediately after the transfer at least equal to the amount deferred with respect to that participant or beneficiary immediately before the transfer; and

(iv) In the case of a transfer for a participant, the participant has had a severance from employment with the transferring employer and is performing services for the entity maintaining the receiving plan.

(6) *Treatment of amount transferred following a plan-to-plan transfer between eligible plans.* Following a transfer of any amount between eligible plans under paragraphs (b)(1) through (b)(5) of this section—

(i) The transferred amount is subject to the restrictions of § 1.457–6 (relating to when distributions are permitted to be made to a participant under an eligible plan) in the receiving plan in the same manner as if the transferred amount had been originally been deferred under the receiving plan if the participant is performing services for the entity maintaining the receiving plan, and

(ii) In the case of a transfer between eligible plans of tax-exempt entities, except as otherwise determined by the Commissioner, the transferred amount is subject to § 1.457–7(c)(2) (relating to when amounts are considered to be made available under an eligible plan of a tax-exempt entity) in the same manner as if the elections made by the participant or beneficiary under the transferor plan had been made under the receiving plan.

(7) *Examples.* The provisions of paragraphs (b)(1) through (6) of this section are illustrated by the following examples:

Example 1. (i) *Facts.* Participant A, the president of City X's hospital, has accepted a position with another hospital which is a tax-exempt entity. A participates in the eligible governmental plan of City X. A would like to transfer the amounts deferred under City X's eligible governmental plan to the eligible plan of the tax-exempt hospital.

(ii) *Conclusion.* City X's plan may not transfer A's amounts deferred to the tax-exempt employer's eligible plan. In addition, because the amounts deferred would no longer be held in trust for the exclusive benefit of participants and their beneficiaries, the transfer would violate the exclusive benefit rule of section 457(g) and § 1.457–8(a).

Example 2. (i) *Facts.* County M, located in State S, operates several health clinics and maintains an eligible governmental plan for employees of those clinics. One of the clinics operated by County M is being acquired by a hospital operated by State S, and employees of that clinic will become employees of State S. County M permits those employees to transfer their balances under County M's eligible governmental plan to the eligible governmental plan of State S.

(ii) *Conclusion.* If the eligible governmental plans of County M and State S provide for the transfer and acceptance of the transfer (and the other requirements of paragraph (b)(1) of this section are satisfied), then the requirements of paragraph (b)(2) of this section are satisfied and, thus, the transfer will not cause either plan to violate the requirements of section 457 or these regulations.

Example 3. (i) *Facts.* City Employer Z, a hospital, sponsors an eligible governmental plan. City Employer Z is located in State B. All of the assets of City Employer Z are being acquired by a tax-exempt hospital. City Employer Z, in accordance with the plan-to-plan transfer rules of paragraph (b) of this section, would like to transfer the total amount of assets deferred under City Employer Z's eligible governmental plan to the acquiring tax-exempt entity's eligible plan.

(ii) *Conclusion.* City Employer Z may not permit participants to transfer the amounts to

the eligible plan of the tax-exempt entity. In addition, because the amounts deferred would no longer be held in trust for the exclusive benefit of participants and their beneficiaries, the transfer would violate the exclusive benefit rule of section 457(g) and § 1.457–8(a).

Example 4. (i) *Facts.* The facts are the same as in *Example 3*, except that City Employer Z, instead of transferring all of its assets to the eligible plan of the tax-exempt entity, decides to transfer all of the amounts deferred under City Z's eligible governmental plan to the eligible governmental plan of County B in which City Z is located. County B's eligible plan does not cover employees of City Z, but is willing to allow the assets of City Z's plan to be transferred to County B's plan, a related state government entity, also located in State B.

(ii) *Conclusion.* If City Employer Z's (transferor) eligible governmental plan provides for such transfer and the eligible governmental plan of County B permits the acceptance of such a transfer (and the other requirements of paragraph (b)(1) of this section are satisfied), then the requirements of paragraph (b)(3) of this section are satisfied and, thus, City Employer Z may transfer the total amounts deferred under its eligible governmental plan, prior to termination of that plan, to the eligible governmental plan maintained by County B. However, the participants of City Employer Z whose deferred amounts are being transferred are not eligible to participate in the eligible governmental plan of County B, the receiving plan, unless they are performing services for County B.

Example 5. (i) *Facts.* State C has an eligible governmental plan. Employees of City U in State C are among the eligible employees for State C's plan and City U decides to adopt another eligible governmental plan only for its employees. State C decides to allow employees to elect to transfer all of the amounts deferred for an employee under State C's eligible governmental plan to City U's eligible governmental plan.

(ii) Conclusion. If State C's (transferor) eligible governmental plan provides for such transfer and the eligible governmental plan of City U permits the acceptance of such a transfer (and the other requirements of paragraph (b)(1) of this section are satisfied), then the requirements of paragraph (b)(4) of this section are satisfied and, thus, State C may transfer the total amounts deferred under its eligible governmental plan to the eligible governmental plan maintained by City U.

(8) *Purchase of permissive past service credit by plan-to-plan transfers from an eligible governmental plan to a qualified plan*—(i) *General rule.* An eligible governmental plan of a State may provide for the transfer of amounts deferred by a participant or beneficiary to a defined benefit governmental plan (as defined in section 414(d)), and no amount shall be includible in gross income by reason of the transfer, if the conditions in paragraph (b)(8)(ii) of this section are met. A transfer under this paragraph (b)(8) is not treated as a distribution for purposes of § 1.457–6. Therefore, such a transfer may be made before severance from employment.

(ii) *Conditions for plan-to-plan transfers from an eligible governmental plan to a qualified plan.* A transfer may be made under this paragraph (b)(8) only if the transfer is either—

(A) For the purchase of permissive past service credit (as defined in section 415(n)(3)(A)) under the receiving defined benefit governmental plan; or

(B) A repayment to which section 415 does not apply by reason of section 415(k)(3).

(iii) *Example.* The provisions of this paragraph (b)(8) are illustrated by the following example:

Example. (i) *Facts.* Plan X is an eligible governmental plan maintained by County Y for its employees. Plan X provides for distributions only in the event of death, an unforeseeable emergency, or severance from employment with County Y (including retirement from County Y). Plan S is a qualified defined benefit plan maintained by State T for its employees. County Y is within State T. Employee A is an employee of County Y and is a participant in Plan X. Employee A previously was an employee of State T and is still entitled to benefits under Plan S. Plan S includes provisions allowing participants in certain plans, including Plan X, to transfer assets to Plan S for the purchase of past service credit under Plan S and does not permit the amount transferred to exceed the amount necessary to fund the benefit resulting from the past service credit. Although not required to do so, Plan X allows Employee A to transfer assets to Plan S to provide a past service benefit under Plan S.

(ii) *Conclusion.* The transfer is permitted under this paragraph (b)(8).

(c) *Qualified domestic relations orders under eligible plans*—(1) *General rule.* An eligible plan does not become an ineligible plan described in section 457(f) solely because its administrator or sponsor complies with a qualified domestic relations order as defined in section 414(p), including an order requiring the distribution of the benefits of a participant to an alternate payee in advance of the general rules for eligible plan distributions under § 1.457–6. If a distribution or payment is made from an eligible plan to an alternate payee pursuant to a qualified domestic relations order, rules similar to the rules of section 402(e)(1)(A) shall apply to the distribution or payment.

(2) *Examples.* The provisions of this paragraph (c) are illustrated by the following examples:

Example 1. (i) *Facts.* Participant C and C's spouse D are divorcing. C is employed by State S and is a participant in an eligible plan maintained by State S. C has an account valued at $100,000 under the plan. Pursuant to the divorce, a court issues a qualified domestic relations order on September 1, 2003 that allocates 50 percent of C's $100,000 plan account to D and specifically provides for an immediate distribution to D of D's share within 6 months of the order. Payment is made to D in January of 2004.

(ii) *Conclusion.* State S's eligible plan does not become an ineligible plan described in section 457(f) and § 1.457–11 solely because its administrator or sponsor complies with the qualified domestic relations order requiring the immediate distribution to D in advance of the general rules for eligible plan distributions under § 1.457–6. In accordance with section 402(e)(1)(A), D (not C) must include the distribution in gross income. The distribution is includible in D's gross income in 2004. If the qualified domestic relations order were to provide for distribution to D at a future date, amounts deferred attributable to D's share will be includible in D's gross income when paid to D.

Example 2. (i) *Facts.* The facts are the same as in *Example 1*, except that S is a tax-exempt entity, instead of a State.

(ii) *Conclusion.* State S's eligible plan does not become an ineligible plan described in section 457(f) and § 1.457–11 solely because its administrator or sponsor complies with the qualified domestic relations order requiring the immediate distribution to D in advance of the general rules for eligible plan distributions under § 1.457–6. In accordance with section 402(e)(1)(A), D (not C) must include the distribution in gross income. The distribution is includible in D's gross income in 2004, assuming that the plan did not make the distribution available to D in 2003. If the qualified domestic relations order were to provide for distribution to D at a future date, amounts deferred attributable to D's share would be includible in D's gross income when paid or made available to D.

(d) *Death benefits and life insurance proceeds.* A death benefit plan under section 457(e)(11) is not an eligible plan. In addition, no amount paid or made available under an eligible plan as death benefits or life insurance proceeds is excludable from gross income under section 101.

(e) *Rollovers to eligible governmental plans*—(1) *General rule.* An eligible governmental plan may accept contributions that are eligible rollover distributions (as defined in section 402(c)(4)) made from another eligible retirement plan (as defined in section 402(c)(8)(B)) if the conditions in paragraph (e)(2) of this section are met. Amounts contributed to an eligible governmental plan as eligible rollover distributions are not taken into account for purposes of the annual limit on annual deferrals by a participant in § 1.457–4(c) or § 1.457–5, but are otherwise treated in the same manner as amounts deferred under section 457 for purposes of §§ 1.457–3 through 1.457–9 and this section.

(2) *Conditions for rollovers to an eligible governmental plan.* An eligible governmental plan that permits eligible rollover distributions made from another eligible retirement plan to be paid into the eligible governmental plan is required under this paragraph (e)(2) to provide that it will separately account for any eligible rollover distributions it receives. A plan does not fail to satisfy this requirement if it separately accounts for particular types of eligible rollover distributions (for example, if it maintains a separate account for eligible rollover distributions attributable to annual deferrals that were made under other eligible governmental plans and a separate account for amounts attributable to other eligible rollover distributions), but this requirement is not satisfied if any such separate account includes any amount that is not attributable to an eligible rollover distribution.

(3) *Example.* The provisions of this paragraph (e) are illustrated by the following example:

Example. (i) *Facts.* Plan T is an eligible governmental plan that provides that employees who are eligible to participate in Plan T may make rollover contributions to Plan T from amounts distributed to an employee from an eligible retirement plan. An eligible retirement plan is defined in Plan T as another eligible governmental plan, a qualified section 401(a) or 403(a) plan, or a section 403(b) contract, or an individual retirement arrangement (IRA) that holds such amounts. Plan T requires rollover contributions to be paid by the eligible retirement plan directly to Plan T (a direct rollover) or to be paid by the participant within 60 days after the date on which the participant received the amount from the other eligible retirement plan. Plan T does not take rollover contributions into account for purposes of the plan's limits on amounts deferred that conform to § 1.457–4(c). Rollover contributions paid to Plan T are invested in the trust in the same manner as amounts deferred under Plan T and rollover contributions (and earnings thereón) are available for distribution to the participant at the same time and in the same manner as amounts deferred under Plan T. In addition, Plan T provides that, for each participant who makes a rollover contribution to Plan T, the Plan T record-keeper is to establish a separate account for the participant's rollover contributions. The record-keeper calculates earnings and losses for investments held in the rollover account separately from earnings and losses on other amounts held under the plan and calculates disbursements from and payments made to the rollover account separately from disbursements from and payments made to other amounts held under the plan.

(ii) *Conclusion.* Plan T does not lose its status as an eligible governmental plan as a result of the receipt of rollover contributions. The conclusion would not be different if the Plan T record-keeper were to establish two separate accounts, one of which is for the participant's rollover contributions attributable to annual deferrals that were made under an eligible governmental plan and the other of which is for other rollover contributions.

(f) *Deemed IRAs under eligible governmental plans.* See regulations under section 408(q) for guidance regarding the treatment of separate accounts or annuities as individual retirement plans (IRAs). *§ 1.457–11 Tax treatment of participants if plan is not an eligible plan.*

(a) *In general.* Under section 457(f), if an eligible employer provides for a deferral of compensation under any agreement or arrangement that is an ineligible plan—

(1) Compensation deferred under the agreement or arrangement is includible in the gross income of the participant or beneficiary for the first taxable year in which there is no substantial risk of forfeiture (within the meaning of section 457(f)(3)(B)) of the rights to such compensation;

(2) If the compensation deferred is subject to a substantial risk of forfeiture, the amount includible in gross income for the first taxable year in which there is no substantial risk of forfeiture includes earnings thereon to the date on which there is no substantial risk of forfeiture;

(3) Earnings credited on the compensation deferred under the agreement or arrangement that are not includible in gross income under paragraph (a)(2) of this section are includible in the gross income of the participant or beneficiary only when paid or made available to the participant or beneficiary, provided that the interest of the participant or beneficiary in any assets (including amounts deferred under the plan) of the entity sponsoring the agreement or arrangement is not senior to the entity's general creditors; and

(4) Amounts paid or made available to a participant or beneficiary under the agreement or arrangement are includible in the gross income of the participant or beneficiary under section 72, relating to annuities.

(b) *Exceptions.* Paragraph (a) of this section does not apply with respect to—

(1) A plan described in section 401(a) which includes a trust exempt from tax under section 501(a);

(2) An annuity plan or contract described in section 403;

(3) That portion of any plan which consists of a transfer of property described in section 83;

(4) That portion of any plan which consists of a trust to which section 402(b) applies; or

(5) A qualified governmental excess benefit arrangement described in section 415(m).

(c) *Amount included in income.* The amount included in gross income on the applicable date under paragraphs (a)(1) and (a)(2) of this section is equal to the present value of the compensation (including earnings to the extent provided in paragraph (a)(2) of this section) on that date. For purposes of applying section 72 on the applicable date under paragraphs (a)(3) and (4) of this section, the participant is treated as having paid investment in the contract (or basis) to the extent that the deferred compensation has been taken into account by the participant in accordance with paragraphs (a)(1) and (a)(2) of this section.

(d) *Coordination of section 457(f) with section 83.*— (1) *General rules.* Under paragraph (b)(3) of this section, section 457(f) and paragraph (a) of this section do not apply to that portion of any plan which consists of a transfer of property described in section 83. For this purpose, a transfer of property described in section 83 means a transfer of property to which section 83 applies. Section 457(f) and paragraph (a) of this section do not apply if the date on which there is no substantial risk of forfeiture with respect to compensation deferred under an agreement or arrangement that is not an eligible plan is on or after the date on which there is a transfer of property to which section 83 applies. However, section 457(f) and paragraph (a) of this section apply if the date on which there is no substantial risk of forfeiture with respect to compensation deferred under an agreement or arrangement that is not an eligible plan precedes the date on which there is a transfer of property to which section 83 applies. If deferred compensation payable in property is includible in gross income under section 457(f), then, as provided in section 72, the amount includible in gross income when that property is later transferred or made available to the service provider is the excess of the value of the property at that time over the amount previously included in gross income under section 457(f).

(2) *Examples.* The provisions of this paragraph (d) are illustrated in the following examples:

Example 1. (i) *Facts.* As part of an arrangement for the deferral of compensation, an eligible employer agrees on December 1, 2002 to pay an individual rendering services for the eligible employer a specified dollar amount on January 15, 2005. The arrangement provides for the payment to be made in the form of property having a fair market value equal to the specified dollar

amount. The individual's rights to the payment are not subject to a substantial risk of forfeiture (within the meaning of section 457(f)(3)(B)).

(ii) *Conclusion.* In this *Example 1*, because there is no substantial risk of forfeiture with respect to the agreement to transfer property in 2005, the present value (as of December 1, 2002) of the payment is includible in the individual's gross income for 2002. Under paragraph (a)(4) of this section, when the payment is made on January 15, 2005, the amount includible in the individual's gross income is equal to the excess of the fair market value of the property when paid, over the amount that was includible in gross income for 2002 (which is the basis allocable to that payment).

Example 2. (i) *Facts.* As part of an arrangement for the deferral of compensation, individuals A and B rendering services for a tax-exempt entity each receive in 2010 property that is subject to a substantial risk of forfeiture (within the meaning of section 457(f)(3)(B) and within the meaning of section 83(c)(1)). Individual A makes an election to include the fair market value of the property in gross income under section 83(b) and individual B does not make this election. The substantial risk of forfeiture for the property transferred to individual A lapses in 2012 and the substantial risk of forfeiture for the property transferred to individual B also lapses in 2012. Thus, the property transferred to individual A is included in A's gross income for 2010 when A makes a section 83(b) election and the property transferred to individual B is included in B's gross income for 2012 when the substantial risk of forfeiture for the property lapses.

(ii) *Conclusion.* In this *Example 2*, in each case, the compensation deferred is not subject to section 457(f) or this section because section 83 applies to the transfer of property on or before the date on which there is no substantial risk of forfeiture with respect to compensation deferred under the arrangement.

Example 3. (i) *Facts.* In 2004, Z, a tax-exempt entity, grants an option to acquire property to employee C. The option lacks a readily ascertainable fair market value, within the meaning of section 83(e)(3), has a value on the date of grant equal to $100,000, and is not subject to a substantial risk of forfeiture (within the meaning of section 457(f)(3)(B) and within the meaning of section 83(c)(1)). Z exercises the option in 2012 by paying an exercise price of $75,000 and receives property that has a fair market value (for purposes of section 83) equal to $300,000.

(ii) *Conclusion.* In this *Example 3*, under section 83(e)(3), section 83 does not apply to the grant of the option. Accordingly, C has income of $100,000 in 2004 under section 457(f). In 2012, C has income of $125,000, which is the value of the property transferred in 2012, minus the allocable portion of the basis that results from the $100,000 of income in 2004 and the $75,000 exercise price.

Example 4. (i) *Facts.* In 2010, X, a tax-exempt entity, agrees to pay deferred compensation to employee D. The amount payable is $100,000 to be paid 10 years later in 2020. The commitment to make the $100,000 payment is not subject to a substantial risk of forfeiture. In 2010, the present value of the $100,000 is $50,000. In 2018, X transfers to D property having a fair market value (for purposes of section 83) equal to $70,000. The transfer is in partial settlement of the commitment made in 2010 and, at the time of the transfer in 2018, the present value of the commitment is $80,000. In 2020, X pays D the $12,500 that remains due.

(ii) *Conclusion.* In this *Example 4*, D has income of $50,000 in 2010. In 2018, D has income of $30,000, which is the amount transferred in 2018, minus the allocable portion of the basis that results from the $50,000 of income in 2010. (Under section 72(e)(2)(B), income is allocated first. The income is equal to $30,000 ($80,000 minus the $50,000 basis), with the result that the allocable portion of the basis is equal to $40,000 ($70,000 minus the $30,000 of income).) In 2020, D has income of $2,500 ($12,500 minus $10,000, which is the excess of the original $50,000 basis over the $40,000 basis allocated to the transfer made in 2018).

§ 1.457–12 Effective dates.

(a) *General effective date.* Except as otherwise provided in this section, §§ 1.457–1 through 1.457–11 apply for taxable years beginning after December 31, 2001.

(b) *Transition period for eligible plans to comply with EGTRRA.* For taxable years beginning after December 31, 2001, and before January 1, 2004, a plan does not fail to be an eligible plan as a result of requirements imposed by the Economic Growth and Tax Relief Reconciliation Act of 2001 (115 Stat. 385) (EGTRRA) (Public Law 107–16) June 7, 2001, if it is operated in accordance with a reasonable, good faith interpretation of EGTRRA.

(c) *Special rule for distributions from rollover accounts.* The last sentence of § 1.457–6(a) (relating to distributions of amounts held in a separate account for eligible rollover distributions) applies for taxable years beginning after December 31, 2003.

(d) *Special rule for options.* Section 1.457–11(d) does not apply with respect to an option without a readily ascertainable fair market value (within the meaning of section 83(e)(3)) that was granted on or before May 8, 2002.

(e) *Special rule for qualified domestic relations orders.* Section 1.457–10(c) (relating to qualified domestic relations orders) applies for transfers, distributions, and payments made after December 31, 2001.

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

■ **Par. 4.** The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

■ **Par. 5.** In § 602.101, paragraph (b) is amended by adding an entry in numerical order to the table to read as follows:

§ 602.101 OMB Control numbers.

* * * * *

(b) * * *

CFR part or section where identified and described	Current OMB control No.
* * * * *	
1.457–8	1545–1580
* * * * *	

Robert E. Wenzel,

Deputy Commissioner for Services and Enforcement.

Approved: July 2, 2003.

Pamela F. Olson,

Assistant Secretary of Treasury (Tax Policy)

[FR Doc. 03–17523 Filed 7–10–03; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

31 CFR Part 50

RIN 1505–AA96

Terrorism Risk Insurance Program

AGENCY: Departmental Offices, Treasury.

ACTION: Final rule.

SUMMARY: The Department of the Treasury (Treasury) is issuing this rule in final form as part of its implementation of Title I of the Terrorism Risk Insurance Act of 2002 (Act). That Act established a temporary Terrorism Risk Insurance Program (Program) under which the Federal Government will share the risk of insured loss from certified acts of terrorism with commercial property and casualty insurers until the Program sunsets on December 31, 2005. Treasury published an interim final rule with a request for comment on February 28, 2003. That rule set forth the purpose and scope of the Program and key definitions that Treasury will use in implementing the Program. It was the first in a series of regulations that Treasury will be issuing to implement the Program. This final rule generally adopts the interim final rule, but makes revisions in the definition of "affiliate" and certain other changes described in the preamble.

DATES: This final rule is effective July 11, 2003.

SUBTITLE A -- INCOME TAXES

Chapter 1 -- Normal Taxes and Surtaxes

Subchapter E -- Accounting Periods and Methods of Accounting

Part II -- Methods of accounting

Subpart B -- Taxable year for which items of gross income included

Sec. 457. Deferred compensation plans of State and local governments and tax-exempt organizations

IRCODE Sec. 457

Note:

(a) Year of inclusion in gross income

(1) In general

Any amount of compensation deferred under an eligible deferred compensation plan, and any income attributable to the amounts so deferred, shall be includible in gross income only for the taxable year in which such compensation or other income --

(A) is paid to the participant or other beneficiary, in the case of a plan of an eligible employer described in subsection (e)(1)(A), and

(B) is paid or otherwise made available to the participant or other beneficiary, in the case of a plan of an eligible employer described in subsection (e)(1)(B).

(2) Special rule for rollover amounts

To the extent provided in section 72(t)(9), section 72(t) shall apply to any amount includible in gross income under this subsection.

(b) Eligible deferred compensation plan defined

For purposes of this section, the term "eligible deferred compensation plan" means a plan established and maintained by an eligible employer--

(1) in which only individuals who perform service for the employer may be participants,

(2) which provides that (except as provided in paragraph (3)) the maximum amount which may be deferred under the plan for the taxable year (other than rollover amounts) shall not exceed the lesser of--

(A) the applicable dollar amount, or

(B) 100 percent of the participant's includible compensation,

(3) which may provide that, for 1 or more of the participant's last 3 taxable years ending before he attains normal retirement age under the plan, the ceiling set forth in paragraph (2) shall be the lesser of--

(A) twice the dollar amount in effect under subsection (b)(2)(A), or

(B) the sum of--

(i) the plan ceiling established for purposes of paragraph (2) for the taxable year (determined without regard to this paragraph), plus

(ii) so much of the plan ceiling established for purposes of paragraph (2) for taxable years before the taxable year as has not previously been used under paragraph (2) or this paragraph,

(4) which provides that compensation will be deferred for any calendar month only if an agreement providing for such deferral has been entered into before the beginning of such month,

(5) which meets the distribution requirements of subsection (d), and

(6) except as provided in subsection (g), which provides that--

(A) all amounts of compensation deferred under the plan,

(B) all property and rights purchased with such amounts, and

(C) all income attributable to such amounts, property, or rights,

shall remain (until made available to the participant or other beneficiary) solely the property and rights of the employer (without being restricted to the provision of benefits under the plan), subject only to the claims of the employer's general creditors.

A plan which is established and maintained by an employer which is described in subsection (e)(1)(A) and which is administered in a manner which is inconsistent with the requirements of any of the preceding paragraphs shall be treated as not meeting the requirements of such paragraph as of the 1st plan year beginning more than 180 days after the date of notification by the Secretary of the inconsistency unless the employer corrects the inconsistency before the 1st day of such plan year.

(c) Limitation

The maximum amount of the compensation of any one individual which may be deferred under subsection (a) during any taxable year shall not exceed the amount in effect under subsection (b)(2)(A) (as modified by any adjustment provided under subsection (b)(3)).

(d) Distribution requirements

(1) In general

For purposes of subsection (b)(5), a plan meets the distribution requirements of this subsection if--

(A) under the plan amounts will not be made available to participants or beneficiaries earlier than--

(i) the calendar year in which the participant attains age 70-1/2,

(ii) when the participant has a severance from employment with the employer, or

(iii) when the participant is faced with an unforeseeable emergency (determined in the manner prescribed by the Secretary in regulations),

(B) the plan meets the minimum distribution requirements of paragraph (2), and

(C) in the case of a plan maintained by an employer described in subsection (e)(1)(A), the plan meets requirements similar to the requirements of section 401(a)(31).

Any amount transferred in a direct trustee-to-trustee transfer in accordance with section 401(a)(31) shall not be includible in gross income for the taxable year of transfer.

(2) Minimum distribution requirements

A plan meets the minimum distribution requirements of this paragraph if such plan meets the requirements of section 401(a)(9).

(3) Special rule for government plan

An eligible deferred compensation plan of an employer described in subsection (e)(1)(A) shall not be treated as failing to meet the requirements of this subsection solely by reason of making a distribution described in subsection (e)(9)(A).

(e) Other definitions and special rules

For purposes of this section--

(1) Eligible employer

The term "eligible employer" means--

(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 this subtitle.

(2) Performance of service

The performance of service includes performance of service as an independent contractor and the person (or governmental unit) for whom such services are performed shall be treated as the employer.

(3) Participant

The term "participant" means an individual who is eligible to defer compensation under the plan.

(4) Beneficiary

The term "beneficiary" means a beneficiary of the participant, his estate, or any other person whose interest in the plan is derived from the participant.

(5) Includible compensation

The term "includible compensation" has the meaning given to the term "participant's compensation" by section 415(c)(3).

(6) Compensation taken into account at present value

Compensation shall be taken into account at its present value.

(7) Community property laws

The amount of includible compensation shall be determined without regard to any community property laws.

(8) Income attributable

Gains from the disposition of property shall be treated as income attributable to such property.

(9) Benefits of tax exempt organization plans not treated as made available by reason of certain elections, etc

In the case of an eligible deferred compensation plan of an employer described in subsection (e)(1)(B)--

(A) Total amount payable is dollar limit or less

The total amount payable to a participant under the plan shall not be treated as made available merely because the participant may elect to receive such amount (or the plan may distribute such amount without the participant's consent) if --

(i) the portion of such amount which is not attributable to rollover contributions (as defined in section 411(a)(11)(D)) does not exceed the dollar limit under section 411(a)(11)(A), and

(ii) such amount may be distributed only if --

(I) no amount has been deferred under the plan with respect to such participant during the 2-year period ending on the date of the distribution and

(II) there has been no prior distribution under the plan to such participant to which this subparagraph applied.

A plan shall not be treated as failing to meet the distribution requirements of subsection (d) by reason of a distribution to which this subparagraph applies.

(B) Election to defer commencement of distributions

The total amount payable to a participant under the plan shall not be treated as made available merely because the participant may elect to defer commencement of distributions under the plan if --

(i) such election is made after amounts may be available under the plan in accordance with subsection (d)(1)(A) and before commencement of such distributions, and

(ii) the participant may make only 1 such election.

(10) Transfers between plans

A participant shall not be required to include in gross income any portion of the entire amount payable to such participant solely by reason of the transfer of such portion from 1 eligible deferred compensation plan to another eligible deferred compensation plan.

(11) Certain plans excluded

(A) In general

The following plans shall be treated as not providing for the deferral of compensation:

(i) Any bona fide vacation leave, sick leave, compensatory time, severance pay, disability pay, or death benefit plan.

(ii) Any plan paying solely length of service awards to bona fide volunteers (or their beneficiaries) on account of qualified services performed by such volunteers.

(B) Special rules applicable to length of service award plans

(i) Bona fide volunteer

An individual shall be treated as a bona fide volunteer for purposes of subparagraph (A)(ii) if the only compensation received by such individual for performing qualified services is in the form of --

(I) reimbursement for (or a reasonable allowance for) reasonable expenses incurred in the performance of such services, or

(II) reasonable benefits (including length of service awards), and nominal fees for such services, customarily paid by eligible employers in connection with the performance of such services by volunteers.

(ii) Limitation on accruals

A plan shall not be treated as described in subparagraph (A)(ii) if the aggregate amount of length of service awards accruing with respect to any year of service for any bona fide volunteer exceeds $3,000.

(C) Qualified services

For purposes of this paragraph, the term "qualified services" means fire fighting

and prevention services, emergency medical services, and ambulance services.

(12) Exception for nonelective deferred compensation of nonemployees

(A) In general

This section shall not apply to nonelective deferred compensation attributable to services not performed as an employee.

(B) Nonelective deferred compensation

For purposes of subparagraph (A), deferred compensation shall be treated as nonelective only if all individuals (other than those who have not satisfied any applicable initial service requirement) with the same relationship to the payor are covered under the same plan with no individual variations or options under the plan.

(13) Special rule for churches

The term "eligible employer" shall not include a church (as defined in section 3121(w)(3)(A)) or qualified church-controlled organization (as defined in section 3121(w)(3)(B)).

(14) Treatment of qualified governmental excess benefit arrangements

Subsections (b)(2) and (c)(1) shall not apply to any qualified governmental excess benefit arrangement (as defined in section 415(m)(3), and benefits provided under such an arrangement shall not be taken into account in determining whether any other plan is an eligible deferred compensation plan.

(15) Applicable dollar amount

(A) In general

The applicable dollar amount shall be the amount determined in accordance with the following table:

For taxable years beginning in calendar year:	The applicable in dollar amount:
2002	$11,000
2003	$12,000
2004	$13,000
2005	$14,000
2006 or thereafter	$15,000.

(B) Cost-of-living adjustment

In the case of taxable years beginning after December 31, 2006, the Secretary shall adjust the $15,000 amount under subparagraph (A) at the same time and in the same manner as under section 415(d), except that the base period shall be the calendar quarter beginning July 1, 2005, and any increase under this paragraph which is not a multiple of $500 shall be rounded to the next lowest multiple of $500.

(16) Rollover amounts

(A) General rule-

In the case of an eligible deferred compensation plan established and maintained by an employer described in subsection (e)(1)(A), if --

(i) any portion of the balance to the credit of an employee in such plan is paid to such employee in an eligible rollover distribution (within the meaning of section 402(c)(4)),

(ii) the employee transfers any portion of the property such employee receives in such distribution to an eligible retirement plan described in section 402(c)(8)(B), and

(iii) in the case of a distribution of property other than money, the amount so transferred consists of the property distributed, then such distribution (to the extent so transferred) shall not be includible in gross income for the taxable year in which paid.

(B) Certain rules made applicable

The rules of paragraphs (2) through (7) and (9) of section 402(c) and section 402(f) shall apply for purposes of subparagraph (A).

(C) Reporting

Rollovers under this paragraph shall be reported to the Secretary in the same manner as rollovers from qualified retirement plans (as defined in section 4974(c)).

(17) Trustee-to-trustee transfers to purchase permissive service credit

No amount shall be includible in gross income by reason of a direct trustee-to-trustee transfer to a defined benefit governmental plan (as defined in section 414(d)) if such transfer is --

(A) for the purchase of permissive service credit (as defined in section 415(n)(3)(A)) under such plan, or

(B) a repayment to which section 415 does not apply by reason of subsection (k)(3) thereof.

(18) Coordination with catch-up contributions for individuals age 50 or older

In the case of an individual who is an eligible participant (as defined by section 414(v)) and who is a participant in an eligible deferred compensation plan of an employer described in paragraph (1)(A), subsections (b)(3) and (c) shall be applied by substituting for the amount otherwise determined under the applicable subsection the greater of--

(A) the sum of--

(i) the plan ceiling established for purposes of subsection (b)(2) (without regard to subsection (b)(3)), plus

(ii) the applicable dollar amount for the taxable year determined under section 414(v)(2)(B)(i), or

(B) the amount determined under the applicable subsection (without regard to this paragraph).

(f) Tax treatment of participants where plan or arrangement of employer is not eligible

(1) In general

In the case of a plan of an eligible employer providing for a deferral of compensation, if such plan is not an eligible deferred compensation plan, then--

(A) the compensation shall be included in the gross income of the participant or beneficiary for the 1st taxable year in which there is no substantial risk of forfeiture of the rights to such compensation, and

(B) the tax treatment of any amount made available under the plan to a participant or beneficiary shall be determined under section 72 (relating to annuities, etc.).

(2) Exceptions

Paragraph (1) shall not apply to--

(A) a plan described in section 401(a) which includes a trust exempt from tax under

section 501(a),

(B) an annuity plan or contract described in section 403,

(C) that portion of any plan which consists of a transfer of property described in section 83,

(D) that portion of any plan which consists of a trust to which section 402(b) applies, and

(E) a qualified governmental excess benefit arrangement described in section 415(m).

(3) Definitions

For purposes of this subsection--

(A) Plan includes arrangements, etc.

The term "plan" includes any agreement or arrangement.

(B) Substantial risk of forfeiture

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

(g) Governmental plans must maintain set-asides for exclusive benefit of participants

(1) In general

A plan maintained by an eligible employer described in subsection (e)(1)(A) shall not be treated as an eligible deferred compensation plan unless all assets and income of the plan described in subsection (b)(6) are held in trust for the exclusive benefit of participants and their beneficiaries.

(2) Taxability of trusts and participants

For purposes of this title --

(A) a trust described in paragraph (1) shall be treated as an organization exempt from taxation under section 501(a), and

(B) notwithstanding any other provision of this title, amounts in the trust shall be includible in the gross income of participants and beneficiaries only to the extent,

and at the time, provided in this section.

(3) Custodial accounts and contracts

For purposes of this subsection, custodial accounts and contracts described in section 401(f) shall be treated as trusts under rules similar to the rules under section 401(f).

Communications Excise Tax; Section 4251

Notice 2004–57

The Internal Revenue Service (Service) has received inquiries concerning the scope of the communications excise tax imposed by § 4251 of the Internal Revenue Code. These inquiries were precipitated, in part, by conflicting results in recent litigation. *Compare American Bankers Ins. Group v. United States*, 308 F. Supp. 2d 1360 (S.D. Fla. 2004), *appeal docketed*, No. 04–10720-EE (11th Cir. Feb. 12, 2004) *with Office Max, Inc. v. United States*, 309 F. Supp. 2d 984 (N.D. Ohio 2004). This notice confirms that the Service will continue to assess and collect the tax under § 4251 on all taxable communications services, including those communications services similar to those at issue in the cases.

Persons paying for taxable communications services (taxpayers) are required to pay the tax to a collecting agent (the person receiving the payment on which tax is imposed), and collecting agents are required to pay over the tax to the United States Treasury and to file the required returns. Taxpayers may preserve any claims for overpayments by filing administrative claims for refund with the Service pursuant to § 6511.

Failure to pay the tax to the collecting agent may result in the imposition of penalties, as well as interest.

DRAFTING INFORMATION

The principal author of this notice is Cynthia A. McGreevy of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this notice, contact Ms. McGreevy at (202) 622–3130 (not a toll-free call).

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26 CFR 601.201: Rulings and determination letters.

Rev. Proc. 2004–56

SECTION 1. PURPOSE

This Revenue Procedure provides model amendments that may be used by a State or local government eligible employer (as defined in § 457(e)(1)(A) of the Internal Revenue Code) to amend or draft its eligible § 457(b) plan to reflect the requirements of § 457 and the regulations thereunder.

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. Under § 457, eligible employers may establish three different types of plans or arrangements: (1) eligible plans established by State and local government entities (eligible § 457(b) governmental plans); (2) eligible plans established by other tax-exempt entities (eligible § 457(b) plans of tax-exempt entities); and (3) ineligible plans under § 457(f). Under the last sentence of § 457(b), the Commissioner may notify an eligible § 457(b) governmental plan that it is administered in a manner that is inconsistent with § 457(b).

.02 Final regulations under § 457 (T.D. 9075, 2003–39 I.R.B 608) were published in the Federal Register (68 FR 41230) on July 11, 2003. These regulations replaced existing final regulations that were published in the Federal Register on September 27, 1982 (47 FR 42335) (T.D.7836, 1982–2 C.B. 91). The final regulations provide guidance for complying with the changes made to § 457 by the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107–16 (EGTRRA), the Taxpayer Relief Act of 1997, Pub. L. No. 105–34 (TRA '97), and the Small Business Job Protection Act of 1996, Pub. L. No. 104–188 (SBJPA). The regulations also provide guidance on many non-EGTRRA issues, such as the tax treatment of excess deferrals, plan loans, plan terminations, and unforeseeable emergencies.

.03 Sections 615, 631, 632, 634, 635, 641, 646, 647, and 649 of EGTRRA made changes to eligible § 457(b) governmental plans, including increases in elective deferral limits, repeal of the rules coordinating the § 457 plan limits with contributions to certain other types of plans, catch-up contributions for individuals age 50 or over, extension of qualified domestic relation order rules to § 457 plans, rollovers to and from various types of eligible retirement plans, § 403(b) contracts and individual retirement arrangements (IRAs), and transfers to purchase permissive service credits under governmental defined benefit plans.

.04 Rev. Proc. 98–41, 1998–2 C.B. 135, provided model amendments that may be used for eligible § 457(b) governmental plans to reflect the revisions made to § 457 by the SBJPA, including the requirement that eligible § 457(b) governmental plans hold all assets and income in trust for the exclusive benefit of participants and beneficiaries.

SECTION 3. USE OF THE MODEL AMENDMENTS

Any State or local government employer may amend its eligible § 457(b) defined contribution governmental plan to comply with one or more of the changes made to § 457 by the SBJPA, TRA '97, EGTRRA, and the regulations issued under § 457 by adopting one or more of the Model Amendments contained in the Appendix to this revenue procedure. With respect to the benefit provisions relating to each of the Model Amendments, the Model Amendments have been prepared to conform with the applicable § 457(b) requirements, taking into account the general requirement that an eligible plan must include all of the material terms and conditions for benefits under the plan. For example, the Model Amendments do not incorporate the applicable legal requirements by reference, but instead describe those requirements in a manner intended to enable the plan administrator to implement the plan provisions on the basis of the language of the Model Amendments to the extent feasible.

The regulations provide that an eligible § 457(b) governmental plan may contain certain optional features not required for plan eligibility under § 457(b), such as in service distributions from rollover accounts, distributions for unforeseeable emergencies, loans, plan to plan transfers, and distributions of smaller accounts to eligible participants. Accordingly, these Model Amendments contain optional as well as required provisions that may be used in adopting an eligible § 457(b) governmental plan. However, if the optional provisions are used, the optional provisions must meet, in both form and operation, the relevant requirements under the

Code and the regulations, as well as operate in accordance with the terms of the plan.

SECTION 4. RELIANCE BY EMPLOYERS ON MODEL AMENDMENTS

If an eligible governmental employer adopts one or more of these Model Amendments for its plan that is intended to be an eligible § 457(b) governmental plan, the plan will be treated as meeting the plan requirements for eligibility under § 457(b) with respect to these provisions. An employer may adopt the applicable Model Amendment provided in this revenue procedure on a word-for-word basis or adopt an Amendment that is substantially similar in all material respects. However, these Model Amendments are limited in scope. Therefore, use of the Model Amendments does not have the same status as a private letter ruling which provides that a plan is an eligible § 457(b) governmental plan. In addition, if an eligible governmental employer adopts one or more of the Model Amendments, the plan must be operated in accordance with the Model Amendments and must continue to satisfy in both form and operation any other requirements of § 457 in order to maintain eligibility. To the extent an employer's plan does not include the Model Amendments or an amendment that is substantially similar in all respects, an eligible governmental employer who requests a private letter ruling from the IRS on plan eligibility under § 457 must clearly highlight and describe in the written request how its plan provisions differ from the Model Amendments.

SECTION 5. DATE AMENDMENTS ARE ADOPTED

Pursuant to this revenue procedure, for purposes of the last sentence of § 457(b), an eligible § 457(b) governmental plan will be treated as having adopted timely amendments to reflect the requirements of EGTRRA described in section 2.03 of this revenue procedure if the related Model Amendment, or any other amendment that satisfies that requirement, is adopted no later than December 31, 2005, the amendment is effective as of a date not later than the latest date permitted under § 457(b), and the operation of the plan since that date is not inconsistent with the amendment.

SECTION 6. AREAS NOT COVERED BY THIS REVENUE PROCEDURE

This revenue procedure does not apply to eligible § 457(b) plans of tax-exempt entities or ineligible plans under § 457(f).

SECTION 7. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 98–41 is superseded.

SECTION 8. COMMENTS REQUESTED

Treasury and IRS are interested in receiving comments on the Model Amendments contained in this revenue procedure and any other Model Amendments that interested parties believe should be added to this revenue procedure. Comments should be sent to the following address: Internal Revenue Service, Attn: CC:DOM:CORP:R (Section 457 Plans), Room 5201, P. O. Box 7604, Ben Franklin Station, Washington, DC 20044. Written comments may be hand delivered Monday through Friday between 8 a.m. and 4 p.m. to: Internal Revenue Service, Courier's Desk, Attn: CC:PA:RU (Section 457 Plans), 1111 Constitution Avenue, NW, Washington, DC 20224. Alternatively, written comments may be submitted electronically via the Internet by selecting the "Tax Regs" option on the IRS Home Page, or by submitting them directly to the IRS Internet site at *http:/www.irs.gov/tax_regs/reglist.html*. Comments should be received by November 30, 2004.

SECTION 9. PAPERWORK REDUCTION ACT

The collection of information contained in this revenue procedure has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545–1904.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

The collection of information in this revenue procedure is pursuant to § 457(b) of the Code and § 1.457–1 of the Income Tax Regulations. Sections 2.2, 2.4, and 2.6 of the Appendix to this revenue procedure deal with the election to defer compensation and the information that has to be provided to the administrator of the plan by a participant in the plan. Sections 5.2, 5.3, 5.4, 5.10 and 6.3 of the Appendix to this revenue procedure deal with the participant's rights to distribution and the notification that the participant must give to the administrator of the plan. Section 8.6 of the Appendix to this revenue procedure deals with the procedure that an administrator of a plan must follow when distributees cannot be located. This information is required to enable sponsors of plans of state or local governments described in this revenue procedure to make the necessary amendments to ensure compliance with the statutory requirements of § 457(b) and the regulations thereunder. The likely respondents are state or local governments.

The estimated total annual reporting and/or recordkeeping burden is 41,040 hours.

The estimated annual burden per respondent/recordkeeper varies from 3 to 8 hours, depending on individual circumstances, with an estimated average of 4 hours. The estimated number of respondents and/or recordkeepers is 10,260.

The estimated frequency of responses is occasional.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally tax returns and tax return information are confidential, as required by 26 U.S.C. § 6103.

DRAFTING INFORMATION

The principal author of this revenue procedure is Vernon S. Carter of the Office of the Division Counsel/Associate Chief Counsel (Tax Exempt & Government Entities). For further information regarding this revenue procedure, contact Vernon S. Carter at (202) 622–6060 (not a toll-free call).

APPENDIX FOR REVENUE PROCEDURE 2004–56
MODEL AMENDMENTS

Note to sponsors: *The Model Amendments in this Appendix are designed for use by eligible governmental employers maintaining eligible § 457(b) defined contribution plans that permit employees to elect to defer compensation, that are maintained on the basis of the calendar year, and that provide for the use of one or more trusts to satisfy the requirements of § 457(g). In this Appendix presenting the Model Amendment language, the portions printed in italics are explanatory notes for the benefit of the §457(b) plan sponsor and are not to be included in the Model Amendments. In addition, certain items indicated by brackets can be filled in by the plan sponsor as required or as appropriate.*

MODEL AMENDMENT 1
Definition of Terms

Section 1
Definition of Terms Used in Model Amendments

The following words and terms, when used in the Model Amendments, have the meaning set forth below and should be adopted as part of the corresponding Model Amendment, as identified at the end of each definition below and also as identified at the end of each Model Amendment.

1.1 ***"Administrator"***: [Insert Identity of person, committee or organization appointed to administer the Plan]. ***Note:*** *This definition is used in Model Amendments 2, 3, 4, 5, 6, and 8.*

1.2 **"Account Balance"**: The bookkeeping account maintained with respect to each Participant which reflects the value of the deferred Compensation credited to the Participant, including the Participant's Annual Deferrals, the earnings or loss of the Fund (net of Fund expenses) allocable to the Participant, any transfers for the Participant's benefit, and any distribution made to the Participant or the Participant's Beneficiary. If a Participant has more than one Beneficiary at the time of the Participant's death, then a separate Account Balance shall be maintained for each Beneficiary. The Account Balance includes any account established under Section 6 for rollover contributions and plan-to-plan transfers made for a Participant, the account established for a Beneficiary after a Participant's death, and any account or accounts established for an alternate payee (as defined in section 414(p)(8) of the Code). ***Note:*** *This definition is used in Model Amendments 2, 3, 4, 5, 6, and 8.*

Note: *A plan is not required to maintain a separate account for each Beneficiary in order to satisfy section 401(a)(9), but this Model Amendment provides for such separate accounts so that installment payments are permitted to be made over each beneficiary's life expectancy as permitted under § 1.401(a)(9)–8, A–2(a)(2) of the Income Tax Regulations. However, because, under the Model Amendment, each separate account is permitted to have only a single beneficiary, certain beneficiary designations are not permitted under the Model Amendment, such as a death benefit in the form of a fixed dollar payment that is not determined as of the date of death and that is not to be maintained in a separate account to which gains and losses are credited.*

1.3 **"Annual Deferral"**: The amount of Compensation deferred in any year. ***Note:*** *This definition is used in Model Amendments 2, 3, 4, 5, 6 and 7.*

1.4 **"Beneficiary"**: The designated person (or, if none, the Participant's estate) who is entitled to receive benefits under the Plan after the death of a Participant. ***Note:*** *This definition is used in Model Amendments 2, 4, 5, 6 and 8.*

1.5 **"Code"**: The Internal Revenue Code of 1986, as now in effect or as hereafter amended. All citations to sections of the Code are to such sections as they may from time to time be amended or renumbered. ***Note:*** *This definition is used in Model Amendments 2, 3, 4, 5, 6, 7, and 8.*

1.6 **"Compensation"**: All cash compensation for services to the Employer, including salary, wages, fees, commissions, bonuses, and overtime pay, that is includible in the Employee's gross income for the calendar year, plus amounts that would be cash compensation for services to the Employer includible in the Employee's gross income for the calendar year but for a compensation reduction election under section 125, 132(f), 401(k), 403(b), or 457(b) of the Code (including an election to defer compensation under Section 3). ***Note:*** *This definition is used in Model Amendments 2, 3, 4, and 5.*

1.7 **"Employee"**: Each natural person, whether appointed or elected, who is employed by the Employer as a common law employee, excluding any employee who is included in a unit of employees covered by a collective bargaining agreement that does not specifically provide for participation in the Plan. *Note: This definition is used in Model Amendments 2, 3, 4, and 6.*

Note: A plan is not required to be offered to all employees and may provide for specific classes of employees to be excluded.

1.8 **"Employer"**: [Name of State entity]. *Note: This definition is used in Model Amendments 2, 3, 4, 6, and 8.*

Note: State means a State (treating the District of Columbia as a State as provided under § 7701(a)(10)), a political subdivision of a State, and any agency or instrumentality of a State.

1.9 **"Includible Compensation"**: An Employee's actual wages in box 1 of Form W–2 for a year for services to the Employer, but subject to a maximum of $200,000 (or such higher maximum as may apply under section 401(a)(17) of the Code) and increased (up to the dollar maximum) by any compensation reduction election under section 125, 132(f), 401(k), 403(b), or 457(b) of the Code (including an election to defer Compensation under Section 3). *Note: This definition is used in Model Amendment 3.*

1.10 **"Normal Retirement Age"**: Age 65. *Note: This definition is used in Model Amendments 3 and 5. See Note after Section 3.3.*

1.11 **"Participant"**: An individual who is currently deferring Compensation, or who has previously deferred Compensation under the Plan by salary reduction and who has not received a distribution of his or her entire benefit under the Plan. Only individuals who perform services for the Employer as an Employee may defer Compensation under the Plan. *Note: This definition is used in Model Amendments 2, 3, 4, 5, 6, 7, and 8.*

1.12 **"Plan"**: [INSERT NAME OF PLAN]. *Note: This definition is used in Model Amendments 2, 3, 4, 5, 6, 7 and 8.*

1.13 **"Severance from Employment"**: The term Severance from Employment means the date that the Employee dies, retires, or otherwise has a severance from employment with the Employer, as determined by the Administrator (and taking into account guidance issued under the Code). *Note: This definition is used in Model Amendments 2, 4, 5, and 6.*

1.14 **"Trust Agreement"**: The written agreement (or declaration) made by and between the Employer and the Trustee under which the Trust Fund is maintained. *Note: This definition is used in Model Amendment 7.*

1.15 **"Trust Fund"**: The trust fund created under and subject to the Trust Agreement. *Note: This definition is used in Model Amendments 2, 7, and 8.*

1.16 **"Trustee"**: The Trustee duly appointed and currently serving under the Trust Agreement. *Note: This definition is used in Model Amendments 4, 5, 7 and 8.*

1.17 **"Valuation Date"**: [Each business day/The last day of the calendar month/The last day of the calendar quarter/Each December 31]. *Note: This definition is used in Model Amendments 4 and 5.*

MODEL AMENDMENT 2
Participation and Contributions

Section 2
Participation and Contributions

2.1 ***Eligibility***. Each Employee shall be eligible to participate in the Plan and defer Compensation hereunder immediately upon becoming employed by the Employer.

Note: As indicated above, this Model Amendment assumes that the employer has a broad based plan with an immediate eligibility, that the plan is limited to elective contributions, and that the plan has no matching or other employer non-elective contributions.

2.2 ***Election Required for Participation***. An Employee may elect to become a Participant by executing an election to defer a portion of his or her Compensation (and have that amount contributed as an Annual Deferral on his or her behalf) and filing it with the Administrator. This participation election shall be made on the deferral agreement provided by the Administrator under which the Employee agrees to be bound by all the terms and conditions of the Plan. The Administrator may establish a minimum deferral amount, and may change such minimums from time to time. The participation election shall also include designation of investment funds and a designation of Beneficiary. Any such election shall remain in effect until a new election is filed.

2.3 ***Commencement of Participation***. An Employee shall become a Participant as soon as administratively practicable following the date the Employee files a participation election pursuant to Section 2.2. Such election shall become effective no earlier than the calendar month following the month in which the election is made. A new Employee may defer compensation payable in the calendar month during which the Participant first becomes an Employee if an agreement providing for the deferral is entered into on or before the first day on which the Participant performs services for the Employer.

2.4 ***Information Provided by the Participant***. Each Employee enrolling in the Plan should provide to the Administrator at the time of initial enrollment, and later if there are any changes, any information necessary or advisable for the Administrator to administer the plan, including, without limitation, whether the Employee is a participant in any other eligible plan under Code section 457(b).

2.5 ***Contributions Made Promptly***. Annual Deferrals by the Participant under the Plan shall be transferred to the Trust Fund within a period that is not longer than is reasonable for the proper administration of the Participant's Account Balance. For this purpose, Annual Deferrals shall be treated as contributed within a period that is not longer than is reasonable for the proper administration if the contribution is made to the Trust Fund within 15 business days following the end of the month in which the amount would otherwise have been paid to the Participant.

2.6 ***Amendment of Annual Deferrals Election***. Subject to other provisions of the Plan, a Participant may at any time revise his or her participation election, including a change of the amount of his or her Annual Deferrals, his or her investment direction and his or her designated Beneficiary. Unless the election specifies a later effective date, a change in the amount of the Annual Deferrals shall take effect as of the first day of the next following month or as soon as administratively practicable if later. A change in the investment direction shall take effect as of the date provided by the Administrator on a uniform basis for all Employees. A change in the Beneficiary designation shall take effect when the election is accepted by the Administrator.

2.7 ***Leave of Absence***. Unless an election is otherwise revised, if a Participant is absent from work by leave of absence, Annual Deferrals under the Plan shall continue to the extent that Compensation continues.

2.8 ***Disability***. A disabled Participant may elect Annual Deferrals during any portion of the period of his or her disability to the extent that he or she has actual Compensation (not imputed Compensation and not disability benefits) from which to make contributions to the Plan and has not had a Severance from Employment.

Note: *The following definitions from Model Amendment 1 are used in this Model Amendment 2: Administrator, Account Balance, Annual Deferral, Beneficiary, Employee, Participant, Plan, Severance from Employment, and Trust Fund.*

MODEL AMENDMENT 3
Limitations on Amounts Deferred

Section 3
Limitations on Amounts Deferred

3.1 ***Basic Annual Limitation.*** The maximum amount of the Annual Deferral under the Plan for any calendar year shall not exceed the lesser of (i) the Applicable Dollar Amount or (ii) the Participant's Includible Compensation for the calendar year. The Applicable Dollar Amount is the amount established under section 457(e)(15) of the Code applicable as set forth below:

For the following years:	The Applicable Dollar Amount is:
2002	$11,000
2003	$12,000
2004	$13,000
2005	$14,000
2006 or thereafter	$15,000 Adjusted for cost-of-living after 2006 to the extent provided under section 415(d) of the Code.

3.2 ***Age 50 Catch-up Annual Deferral Contributions***. A Participant who will attain age 50 or more by the end of the calendar year is permitted to elect an additional amount of Annual Deferrals, up to the maximum age 50 catch-up Annual Deferrals for the year. The maximum dollar amount of the age 50 catch-up Annual Deferrals for a year is as follows:

For the following years:	The maximum age 50 catch-up dollar amount is:
2002	$1,000
2003	$2,000
2004	$3,000
2005	$4,000
2006 or thereafter	$5,000, adjusted for cost-of-living after 2006 to the extent provided under the Code.

3.3 ***Special Section 457 Catch-up Limitation***. If the applicable year is one of a Participant's last 3 calendar years ending before the year in which the Participant attains Normal Retirement Age and the amount determined under this Section 3.3 exceeds the amount computed under Sections 3.1 and 3.2, then the Annual Deferral limit under this Section 3 shall be the lesser of:

(a) An amount equal to 2 times the Section 3.1 Applicable Dollar Amount for such year; or

(b) The sum of:

(1) An amount equal to (A) the aggregate Section 3.1 limit for the current year plus each prior calendar year beginning after December 31, 2001, during which the Participant was an Employee under the Plan, minus (B) the aggregate amount of Compensation that the Participant deferred under the Plan during such years, plus

(2) An amount equal to (A) the aggregate limit referred to in section 457(b)(2) of the Code for each prior calendar year beginning after December 31, 1978, and before January 1, 2002, during which the Participant was an Employee (determined without regard to Sections 3.2 and 3.3), minus (B) the aggregate contributions to Pre–2002 Coordination Plans for such years.

However, in no event can the deferred amount be more than the Participant's Compensation for the year. ***Note:*** *This limitation is required because the Model Amendment is limited to elective contributions.*

Note: *Generally, for purposes of the special § 457 catch-up definition in Section 3.3, a plan must specify the normal retirement age under the plan. A plan may define normal retirement age as any age that is on or after the earlier of age 65 or the age at which participants have the right to retire and receive, under the basic defined benefit pension plan of the employer (or a money purchase pension plan in which the participant also participates if the participant is not eligible to participate in a defined benefit plan), immediate retirement benefits without actuarial or similar reduction because of retirement before some later specified age, and that is not later than age 70½. Alternatively, a plan may provide that a participant is allowed to designate a normal retirement age within these ages. For purposes of the special § 457 catch-up in Section 3.3, an entity sponsoring more than one eligible plan may not permit a participant to have more than one normal retirement age under the eligible plans it sponsors.*

Note: Special rule for eligible plans of qualified police or firefighters. An eligible plan with participants that include qualified police or firefighters as defined under § 415(b)(2)(H)(ii)(I) of the Code may designate a normal retirement age for such qualified police or firefighters that is earlier than the earliest normal retirement age designated under the general rule above, but in no event may the normal retirement age be earlier than age 40. Alternatively, a plan may allow a qualified police or firefighter participant to designate a normal retirement age that is between age 40 and age 70½.

3.4 ***Special Rules***. For purposes of this Section 3, the following rules shall apply:

(a) *Participant Covered By More Than One Eligible Plan.* If the Participant is or has been a participant in one or more other eligible plans within the meaning of section 457(b) of the Code, then this Plan and all such other plans shall be considered as one plan for purposes of applying the foregoing limitations of this Section 3. For this purpose, the Administrator shall take into account any other such eligible plan maintained by the Employer and shall also take into account any other such eligible plan for which the Administrator receives from the Participant sufficient information concerning his or her participation in such other plan.

(b) *Pre-Participation Years.* In applying Section 3.3, a year shall be taken into account only if (i) the Participant was eligible to participate in the Plan during all or a portion of the year and (ii) Compensation deferred, if any, under the Plan during the year was subject to the Basic Annual Limitation described in Section 3.1 or any other plan ceiling required by section 457(b) of the Code.

(c) *Pre–2002 Coordination Years.* For purposes of Section 3.3(b)(2)(B), "contributions to Pre–2002 Coordination Plans" means any employer contribution, salary reduction or elective contribution under any other eligible Code section 457(b) plan, or a salary reduction or elective contribution under any Code section 401(k) qualified cash or deferred arrangement, Code section 402(h)(1)(B) simplified employee pension (SARSEP), Code section 403(b) annuity contract, and Code section 408(p) simple retirement account, or under any plan for which a deduction is allowed because of a contribution to an organization described in section 501(c)(18) of the Code, including plans, arrangements or accounts maintained by the Employer or any employer for whom the Participant performed services. However, the contributions for any calendar year are only taken into account for purposes of Section 3.3(b)(2)(B) to the extent that the total of such contributions does not exceed the aggregate limit referred to in section 457(b)(2) of the Code for that year.

Note: *See generally § 1.457–4(c)(3)(iv) of the Income Tax Regulations for rules relating to the application of the coordination limit for years prior to 2002 for purposes of determining the underutilized limit.*

(d) *Disregard Excess Deferral.* For purposes of Sections 3.1, 3.2 and 3.3, an individual is treated as not having deferred compensation under a plan for a prior taxable year to the extent Excess Deferrals under the plan are distributed, as described in Section 3.5. To the extent that the combined deferrals for pre–2002 years exceeded the maximum deferral limitations, the amount is treated as an Excess Deferral for those prior years.

3.5 ***Correction of Excess Deferrals***. If the Annual Deferral on behalf of a Participant for any calendar year exceeds the limitations described above, or the Annual Deferral on behalf of a Participant for any calendar year exceeds the limitations described above when combined with other amounts deferred by the Participant under another eligible deferred compensation plan under section 457(b) of the Code for which the Participant provides information that is accepted by the Administrator, then the Annual Deferral, to the extent in excess of the applicable limitation (adjusted for any income or loss in value, if any, allocable thereto), shall be distributed to the Participant. ***Note:*** *See § 1.457–4(e)(1) of the Income Tax Regulations for the federal income tax treatment of a distribution of excess deferrals.*

Note: *See generally §§ 1.457–4 and 1.457–5 of the Income Tax Regulations for rules relating to limitations on contributions.*

3.6 ***Protection of Persons Who Serve in a Uniformed Service***. An Employee whose employment is interrupted by qualified military service under Code section 414(u) or who is on a leave of absence for qualified military service under Code section 414(u) may elect to make additional Annual Deferrals upon resumption of employment with the Employer equal to the maximum Annual Deferrals that the Employee could have elected during that period if the Employee's employment with the Employer had continued (at the same level of Compensation) without the interruption or leave, reduced by the Annual Deferrals, if any, actually made for the Employee during the period of the interruption or leave. This right applies for five years following the resumption of employment (or, if sooner, for a period equal to three times the period of the interruption or leave).

Note: *The following definitions from Model Amendment 1 are used in this Model Amendment 3: Administrator, Account Balance, Annual Deferral, Code, Compensation, Employee, Includible Compensation, Normal Retirement Age, Participant, and Plan.*

MODEL AMENDMENT 4
Loans

Section 4
Loans

4.1 ***Loans.*** A Participant who is an Employee may apply for and receive a loan from his or her Account Balance as provided in this Section 4. Any such loan may not be for an amount less than the minimum amount specified by the Administrator. If not specified by the Administrator, the minimum loan amount shall be [$1,000].

4.2 ***Maximum Loan Amount.*** No loan to a Participant hereunder may exceed the lesser of:

(a) $50,000, reduced by the greater of (i) the outstanding balance on any loan from the Plan to the Participant on the date the loan is made or (ii) the highest outstanding balance on loans from the Plan to the Participant during the one-year period ending on the day before the date the loan is approved by the Administrator (not taking into account any payments made during such one-year period), or

(b) one half of the value of the Participant's vested Account Balance (as of the Valuation Date immediately preceding the date on which such loan is approved by the Administrator).

For purposes of this Section 4.2, any loan from any other plan maintained by a participating employer shall be treated as if it were a loan made from the Plan, and the Participant's vested interest under any such other plan shall be considered a vested interest under this Plan; provided, however, that the provisions of this paragraph shall not be applied so as to allow the amount of a loan under this Section 4.2 to exceed the amount that would otherwise be permitted in the absence of this paragraph.

4.3 ***Terms of Loan.*** The terms of the loan shall:

(a) require level amortization with payments not less frequently than quarterly throughout the repayment period, except that alternative arrangements for repayment may apply in the event that the borrower is on an *bona fide* unpaid leave of absence for a period not to exceed one year for leaves other than a qualified military leave within the meaning of section 414(u) of the Code or for the duration of a leave which is due to qualified military service;

(b) require that the loan be repaid within five years unless the Participant certifies in writing to the Administrator that the loan is to be used to acquire any dwelling unit which within a reasonable time is to be used (determined at the time the loan is made) as a principal residence of the Participant; and

(c) provide for interest at a rate equal to one percentage point above the prime rate as published in the *[Insert name of a nationally recognized newspaper that publishes the prime rate daily]* on the first business day of the month in which the loan is approved by the Administrator.

4.4 ***Security for Loan; Default.***

(a) *Security.* Any loan to a Participant under the Plan shall be secured by the pledge of the portion of the Participant's interest in the Plan invested in such loan.

(b) *Default.* In the event that a Participant fails to make a loan payment under this Section 4 within 90 days after the date such payment is due, a default on the loan shall occur. In the event of such default, (i) all remaining payments on the loan shall be immediately due and payable, (ii) effective as of the first day of the calendar month next following the month in which any such loan default occurs, the interest rate for such loan shall be (if higher than the rate otherwise applicable) the rate being charged on loans from the Plan that are approved by the Administrator in the month in which such default occurs, (iii) no contributions shall be made on such Participant's behalf prior to the first payroll period that follows by 12 calendar months the date of repayment in full of such loan, and (iv) the Participant shall be permanently ineligible for any future loans from the Plan.

In the case of any default on a loan to a Participant, the Administrator shall apply the portion of the Participant's interest in the Plan held as security for the loan in satisfaction of the loan on the date of Severance from Employment. In addition, the Administrator shall take any legal action it shall consider necessary or appropriate to enforce collection of the unpaid loan, with the costs of any legal proceeding or collection to be charged to the Account Balance of the Participant.

Notwithstanding anything elsewhere in the Plan to the contrary, in the event a loan is outstanding hereunder on the date of a Participant's death, his or her estate shall be his or her Beneficiary as to the portion of his or her interest in the Plan invested in such loan (with the Beneficiary or Beneficiaries as to the remainder of his or her interest in the Plan to be determined in accordance with otherwise applicable provisions of the Plan).

4.5 ***Repayment.*** The Participant shall be required, as a condition to receiving a loan, to enter into an irrevocable agreement authorizing the Employer to make payroll deductions from his or her Compensation as long as the Participant is an Employee and to transfer such payroll deduction amounts to the Trustee in payment of such loan plus interest. Repayments of a loan shall be made by payroll deduction of equal amounts (comprised of both principal and interest) from each paycheck, with the first such deduction to be made as soon as practicable after the loan funds are disbursed; provided however, that a Participant may prepay the entire outstanding balance of his loan at any time (but may not make a partial prepayment); and provided, further, that if any payroll deductions cannot be made in full because a Participant is on an unpaid leave of absence or is no longer employed by a participating employer (that has consented to make payroll deductions for this purpose) or the Participant's paycheck is insufficient for any other reason, the Participant shall pay directly to the Plan the full amount that would have been deducted from the Participant's paycheck, with such payment to be made by the last business day of the calendar month in which the amount would have been deducted.

Note: *Loans are not required to be repaid by payroll withholding. See § 1.457–6(f)(2) of the Income Tax Regulations for additional rules that may apply if loans are not repaid by payroll withholding.*

Note: *See § 1.72(p)–1 of the Income Tax Regulations for the federal income tax treatment of loans generally.*

Note: *The following definitions from Model Amendment 1 are used in this Model Amendment 4: Administrator, Account Balance, Code, Compensation, Employee, Employer, Severance from Employment, Participant, Plan, Trustee and Valuation Date.*

MODEL AMENDMENT 5
Distribution of Benefits

Section 5
Benefit Distributions

5.1 ***Benefit Distributions At Retirement or Other Severance from Employment.*** Upon retirement or other Severance from Employment (other than due to death), a Participant is entitled to receive a distribution of his or her Account Balance under any form of distribution permitted under Section 5.3 commencing at the date elected under Section 5.2. If a Participant does not elect otherwise, the distribution shall be paid as soon as practicable following Normal Retirement Age or, if later, following retirement or other Severance from Employment and payment shall be made in [quarterly] [monthly] installments of the minimum annual payments described in paragraph (b) of Section 5.3.

5.2 ***Election of Benefit Commencement Date.*** A Participant may elect to commence distribution of benefits at any time after retirement or other Severance from Employment by a notice filed at least [30 days] before the date on which benefits are to commence. However, in no event may distribution of benefits commence later than the date described in Section 5.8.

5.3 ***Forms of Distribution.*** In an election to commence benefits under Section 5.2, a Participant entitled to a distribution of benefits under this Section 5 may elect to receive payment in any of the following forms of distribution:

(a) a lump sum payment of the total Account Balance or

(b) annual installment payments through the year of the Participant's death, the amount payable each year equal to a fraction of the Account Balance equal to one divided by the distribution period set forth in the Uniform Lifetime Table at section 1.401(a)(9)–9, A–2, of the Income Tax Regulations for the Participant's age on the Participant's birthday for that year. If the Participant's age is less than age 70, the distribution period is 27.4 plus the number of years that the Participant's age is less than age 70. At the Participant's election, this annual payment can be made in monthly or quarterly installments. The Account Balance for this calculation (other than the final installment payment) is the Account Balance as of the end of the year prior to the year for which the distribution is being calculated. Payments shall commence on the date elected under Section 5.2. For any year, the Participant can elect distribution of a greater amount (not to exceed the amount of the remaining Account Balance) in lieu of the amount calculated using this formula.

5.4 ***Death Benefit Distributions.*** Commencing in the calendar year following the calendar year of the Participant's death, the Participant's Account Balance shall be paid to the Beneficiary in a lump sum.

Alternatively, if the Beneficiary with respect to the Participant's Account Balance is a natural person, at the Beneficiary's election, distribution can be made in annual installments (calculated in a manner that is similar to installments under Section 5.3) with the distribution period determined under this paragraph. If the Beneficiary is the Participant's surviving spouse, the distribution period is equal to the Beneficiary's life expectancy using the single life table in section 1.401(a)(9)–9, A–1, of the Income Tax Regulations for the spouse's age on the spouse's birthday for that year. If the Beneficiary is not the Participant's surviving spouse, the distribution period is the Beneficiary's life expectancy determined in the year following the year of the Participant's death using the single life table in section 1.401(a)(9)–9, A–1, of the Income Tax Regulations for the Beneficiary's age on the Beneficiary's birthday for that year, reduced by one for each year that has elapsed after that year. For any year, a Beneficiary can elect distribution of a greater amount (not to exceed the amount of the remaining Account Balance) in lieu of the amount calculated using this formula.

Note: *A plan is not required to include the particular forms of payment that are in Section 5.3 and Section 5.4, and may include additional forms of payment so long as the material terms and conditions for those other forms are set forth in the plan and the additional forms of payment satisfy the requirements of § 401(a)(9) of the Code.*

5.5 ***Account Balances of $5,000 or Less***. Notwithstanding Sections 5.2, 5.3 and 5.4, if the amount of a Participant's Account Balance is not in excess of $5,000 (or the dollar limit under section 411(a)(11) of the Code, if greater) on the date that payments commence under Section 5.3 or on the date of the Participant's death, then payment shall be made to the Participant (or to the Beneficiary if the Participant is deceased) in a lump sum equal to the Participant's Account Balance as soon as practicable following the Participant's retirement, death, or other Severance from Employment.

5.6 ***Amount of Account Balance***. Except as provided in Section 5.3, the amount of any payment under this Section 5 shall be based on the amount of the Account Balance on the preceding Valuation Date.

5.7 ***Revocation of Prior Election***. Any election made under this Section 5 may be revoked at any time.

5.8 ***Latest Distribution Date***. In no event shall any distribution under this Section 5 begin later than the later of (a) April 1 of the year following the calendar year in which the Participant attains age 70½ or (b) April 1 of the year following the year in which the Participant retires or otherwise has a Severance from Employment. If distributions commence in the calendar year following the later of the calendar year in which the Participant attains age 70½ or the calendar year in which the Severance from Employment occurs, the distribution on the date that distribution commences must be equal to the annual installment payment for the year that the Participant has a Severance from Employment determined under paragraph (b) of Section 5.3 and an amount equal to the annual installment payment for the year after Severance from Employment determined under paragraph (b) of Section 5.3 must also be paid before the end of the calendar year of commencement.

5.9 ***In-Service Distributions From Rollover Account***. If a Participant has a separate account attributable to rollover contributions to the plan, the Participant may at any time elect to receive a distribution of all or any portion of the amount held in the rollover account.

Note: A plan is not required to permit in-service distribution from a rollover account. See Rev. Rul. 2004–12, 2004–7 I.R.B. 478.

5.10 ***Unforeseeable Emergency Distribution***.

(a) *Distribution*. If the Participant has an unforeseeable emergency before retirement or other Severance from Employment, the Participant may elect to receive a lump sum distribution equal to the amount requested or, if less, the maximum amount determined by the Administrator to be permitted to be distributed under this Section 5.10.

(b) *Unforeseeable emergency defined.* An unforeseeable emergency is defined as a severe financial hardship of the Participant resulting from: an illness or accident of the Participant, the Participant's spouse, or the Participant's dependent (as defined in section 152(a)); loss of the Participant's property due to casualty (including the need to rebuild a home following damage to a home not otherwise covered by homeowner's insurance, *e.g.*, as a result of a natural disaster); the need to pay for the funeral expenses of the Participant's spouse or dependent (as defined in section 152(a) of the Code); or other similar extraordinary and unforeseeable circumstances arising as a result of events beyond the control of the Participant. For example, the imminent foreclosure of or eviction from the Participant's primary residence may constitute an unforeseeable emergency. In addition, the need to pay for medical expenses, including non-refundable deductibles, as well as for the cost of prescription drug medication, may constitute an unforeseeable emergency. Except as otherwise specifically provided in this Section 5.10, neither the purchase of a home nor the payment of college tuition is an unforeseeable emergency.

(c) *Unforeseeable emergency distribution standard.* A distribution on account of unforeseeable emergency may not be made to the extent that such emergency is or may be relieved through reimbursement or compensation from insurance or otherwise, by liquidation of the Participant's assets, to the extent the liquidation of such assets would not itself cause severe financial hardship, or by cessation of deferrals under the plan.

(d) *Distribution necessary to satisfy emergency need.* Distributions because of an unforeseeable emergency may not exceed the amount reasonably necessary to satisfy the emergency need (which may include any amounts necessary to pay any federal, state, or local income taxes or penalties reasonably anticipated to result from the distribution).

5.11 ***Mandatory Distributions for Certain Account Balances of $5,000 or Less.*** At the direction of the Administrator, a Participant's total Account Balance shall be paid in a lump sum as soon as practical following the direction if (a) the total Account Balance does not exceed $5,000 (or the dollar limit under section 411(a)(11) of the Code, if greater), (b) the Participant has not previously received a distribution of the total amount payable to the Participant under this Section 5.11 and (c) no Annual Deferral has been made with respect to the Participant during the two-year period ending immediately before the date of the distribution.

Note: *This Model Amendment (Section 5.11) may be adopted for a § 457(b) plan to provide for the mandatory de minimis distribution option permitted under § 457(e)(9)(A) of the Code. If it wishes, the plan sponsor may also substitute in the following Model Amendments a consistent figure lower than $5,000 in place of "$5,000 (or the dollar limit under § 411(a)(11) of the Code, if greater)." In addition, the plan may allow participants to choose whether or not they wish to receive payment under this provision.*

5.12 ***Rollover Distributions.***

(a) A Participant or the surviving spouse of a Participant (or a Participant's former spouse who is the alternate payee under a domestic relations order, as defined in section 414(p) of the Code) who is entitled to an eligible rollover distribution may elect, at the time and in the manner prescribed by the Administrator, to have all or any portion of the distribution paid directly to an eligible retirement plan specified by the Participant in a direct rollover.

(b) For purposes of this Section 5.12, an eligible rollover distribution means any distribution of all or any portion of a Participant's Account Balance, except that an eligible rollover distribution does not include (a) any installment payment under Section 5.3 for a period of 10 years or more (b) any distribution made under Section 5.10 as a result of an unforeseeable emergency, or (c) for any other distribution, the portion, if any, of the distribution that is a required minimum distribution under section 401(a)(9). In addition, an eligible retirement plan means an individual retirement account described in section 408(a) of the Code, an individual retirement annuity described in section 408(b) of the Code, a qualified trust described in section 401(a) of the Code, an annuity plan described in section 403(a) or 403(b) of the Code, or an eligible governmental plan described in section 457(b) of the Code, that accepts the eligible rollover distribution.

Note: *Section 402(f) and § 457(e)(16)(B) of the Code require a plan administrator to provide a written explanation to any recipient of an eligible rollover distribution. The written explanation must cover the direct rollover rules, the mandatory income tax withholding on distributions not directly rolled over, the tax treatment of distributions not rolled over (including the special tax treatment available for certain lump sum distributions), and when distributions may be subject to different restrictions and tax consequences after being rolled over. Section 402(f) provides that this explanation must be given within a reasonable period of time before the plan makes an eligible rollover distribution. See Notice 2002–3, 2002–1 C.B. 289 that contains a Safe Harbor Explanation that plan administrators may provide to recipients of eligible rollover distributions from employer plans in order to satisfy the notice requirement.*

Note: In determining the portion of any distribution that is a required minimum distribution for a year and thus not an eligible rollover distribution, for any participant who, during the calendar year of distribution, is age 70½ or older and who has had a Severance from Employment, the amount of the minimum annual installment payment described in paragraph (b) of Section 5.3 may be treated as the amount of the required minimum distribution. For distributions to a surviving spouse, any distribution made before the calendar year in which the participant would have attained age 70½ is not a required minimum distribution. For the calendar year in which the participant would have attained age 70½ or any later year, the amount of the minimum annual installment payment described in paragraph (b) of Section 5.3 may be treated as the amount of the required minimum distribution.

Note: See generally § 1.457–6 of the Income Tax Regulations for rules relating to restrictions on distributions.

Note: The following definitions from Model Amendment 1 are used in this Model Amendment 5: Administrator, Account Balance, Annual Deferral, Beneficiary, Code, Normal Retirement Age, Participant, Plan, Severance from Employment, and Valuation Date.

MODEL AMENDMENT 6
Rollovers to the Plan and Transfers

Section 6
Rollovers to the Plan and Transfers

6.01 ***Eligible Rollover Contributions to the Plan.***

(a) A Participant who is an Employee and who is entitled to receive an eligible rollover distribution from another eligible retirement plan may request to have all or a portion of the eligible rollover distribution paid to the Plan. The Administrator may require such documentation from the distributing plan as it deems necessary to effectuate the rollover in accordance with section 402 of the Code and to confirm that such plan is an eligible retirement plan within the meaning of section 402(c)(8)(B) of the Code.

(b) For purposes of Section 6.01(a), an eligible rollover distribution means any distribution of all or any portion of a Participant's benefit under another eligible retirement plan, except that an eligible rollover distribution does not include: (1) any installment payment for a period of 10 years or more, (2) any distribution made as a result of an unforeseeable emergency or other distribution which is made upon hardship of the employee, or (3) for any other distribution, the portion, if any, of the distribution that is a required minimum distribution under section 401(a)(9) of the Code. In addition, an eligible retirement plan means an individual retirement account described in section 408(a) of the Code, an individual retirement annuity described in section 408(b) of the Code, a qualified trust described in section 401(a) of the Code, an annuity plan described in section 403(a) or 403(b) of the Code, or an eligible governmental plan described in section 457(b) of the Code, that accepts the eligible rollover distribution.

(c) The Plan shall establish and maintain for the Participant a separate account for any eligible rollover distribution paid to the Plan from any eligible retirement plan that is not an eligible governmental plan under section 457(b) of the Code. In addition, the Plan shall establish and maintain for the Participant a separate account for any eligible rollover distribution paid to the Plan from any eligible retirement plan that is an eligible governmental plan under section 457(b) of the Code.

6.02 ***Plan-to-Plan Transfers to the Plan.*** At the direction of the Employer, the Administrator may permit a class of Participants who are participants in another eligible governmental plan under section 457(b) of the Code to transfer assets to the Plan as provided in this Section 6.02. Such a transfer is permitted only if the other plan provides for the direct transfer of each Participant's interest therein to the Plan. The Administrator may require in its sole discretion that the transfer be in cash or other property acceptable to the Administrator. The Administrator may require such documentation from the other plan as it deems necessary to effectuate the transfer in accordance with section 457(e)(10) of the Code and section 1.457–10(b) of the Income Tax Regulations and to confirm that the other plan is an eligible governmental plan as defined in section 1.457–2(f) of the Income Tax Regulations. The amount so transferred shall be credited to the Participant's Account Balance and shall be held, accounted for, administered and otherwise treated in the same manner as an Annual Deferral by the Participant under the Plan, except that the transferred amount shall not be considered an Annual Deferral under the Plan in determining the maximum deferral under Section 3.

6.03 ***Plan-to-Plan Transfers from the Plan.***

(a) At the direction of the Employer, the Administrator may permit a class of Participants and Beneficiaries to elect to have all or any portion of their Account Balance transferred to another eligible governmental plan within the meaning of section 457(b) of the Code and section 1.457–2(f) of the Income Tax Regulations. A transfer is permitted under this Section 6.03(a) for a Participant only if the Participant has had a Severance from Employment with the Employer and is an employee of the entity that maintains the other eligible governmental plan. Further, a transfer is permitted under this Section 6.03(a) only if the other eligible governmental plan provides for the acceptance of plan-to-plan transfers with respect to the Participants and Beneficiaries and for each Participant and Beneficiary to have an amount deferred under the other plan immediately after the transfer at least equal to the amount transferred.

(b) Upon the transfer of assets under this Section 6.03, the Plan's liability to pay benefits to the Participant or Beneficiary under this Plan shall be discharged to the extent of the amount so transferred for the Participant or Beneficiary. The Administrator may require such documentation from the receiving plan as it deems appropriate or necessary to comply with this Section 6.03 (for example, to confirm that the receiving plan is an eligible governmental plan under paragraph (a) of this Section 6.03, and to assure that the transfer is permitted under the receiving plan) or to effectuate the transfer pursuant to section 1.457–10(b) of the Income Tax Regulations.

Note: *See § 1.457–10(b)(4) of the Income Tax Regulations for rules relating to plan-to-plan transfers among eligible governmental plans of the same employer (and, for this purpose, the employer is not treated as the same employer if the participant's compensation is paid by a different entity).*

6.04 ***Permissive Service Credit Transfers.***

(a) If a Participant is also a participant in a tax-qualified defined benefit governmental plan (as defined in section 414(d) of the Code) that provides for the acceptance of plan-to-plan transfers with respect to the Participant, then the Participant may elect to have any portion of the Participant's Account Balance transferred to the defined benefit governmental plan. A transfer under this Section 6.04(a) may be made before the Participant has had a Severance from Employment.

(b) A transfer may be made under Section 6.04(a) only if the transfer is either for the purchase of permissive service credit (as defined in section 415(n)(3)(A) of the Code) under the receiving defined benefit governmental plan or a repayment to which section 415 of the Code does not apply by reason of section 415(k)(3) of the Code.

Note: *See generally § 1.457–10(b) and (e) of the Income Tax Regulations for rules relating to transfers and rollovers, including rules permitting in service transfers among eligible § 457(b) governmental plans of the same employer.*

Note: *The following definitions from Model Amendment 1 are used in this Model Amendment 6: Administrator, Account Balance, Beneficiary, Code, Employee, Employer, Participant, Plan, and Severance from Employment.*

MODEL AMENDMENT 7
Trust Funds

Section 7
Trust Funds

The following Model Amendments may be used to reflect the mandatory trust requirement applicable to eligible plans of state and local government entities under § 457(g) of the Code. Plan assets may instead be invested in whole or in part in annuity contracts or custodial accounts, in which case additional requirements will apply. See § 1.457–8 of the Income Tax Regulations.

Trust Fund. All amounts of Annual Deferrals, all property and rights purchased with such amounts, and all income attributable to such amounts, property, or rights shall be held and invested in the Trust Fund in accordance with this Plan and the Trust Agreement. The Trust Fund, and any subtrust established under the Plan, shall be established pursuant to a written agreement that constitutes a valid trust under the law of [INSERT NAME OF STATE]. The Trustee shall ensure that all investments, amounts, property, and rights held under the Trust Fund are held for the exclusive benefit of Participants and their Beneficiaries. The Trust Fund shall be held in trust pursuant to the Trust Agreement for the exclusive benefit of Participants and their Beneficiaries and defraying reasonable expenses of the Plan and of the Trust Fund. It shall be impossible, prior to the satisfaction of all liabilities with respect to Participants and their Beneficiaries, for any part of the assets and income of the Trust Fund to be used for, or diverted to, purposes other than for the exclusive benefit of Participants and their Beneficiaries.

Note: See generally § 1.457–8 of the Income Tax Regulations for rules relating to funding.

Note: The following definitions from Model Amendment 1 are used in this Model Amendment 7: Annual Deferral, Beneficiary, Code, Participant, Plan, Trust Agreement, Trust Fund, and Trustee.

MODEL AMENDMENT 8
Miscellaneous

The following provisions are optional provisions that are not required to be adopted.

Section 8
Miscellaneous

8.1 ***Non-Assignability.*** Except as provided in Section 8.2 and 8.3, the interests of each Participant or Beneficiary under the Plan are not subject to the claims of the Participant's or Beneficiary's creditors; and neither the Participant nor any Beneficiary shall have any right to sell, assign, transfer, or otherwise convey the right to receive any payments hereunder or any interest under the Plan, which payments and interest are expressly declared to be non-assignable and non-transferable.

8.2 ***Domestic Relation Orders.*** Notwithstanding Section 8.1, if a judgment, decree or order (including approval of a property settlement agreement) that relates to the provision of child support, alimony payments, or the marital property rights of a spouse or former spouse, child, or other dependent of a Participant is made pursuant to the domestic relations law of any State ("domestic relations order"), then the amount of the Participant's Account Balance shall be paid in the manner and to the person or persons so directed in the domestic relations order. Such payment shall be made without regard to whether the Participant is eligible for a distribution of benefits under the Plan. The Administrator shall establish reasonable procedures for determining the status of any such decree or order and for effectuating distribution pursuant to the domestic relations order.

Note: See generally § 414(p) of the Code and § 1.457–10(c) of the Income Tax Regulations for rules regarding domestic relations orders.

8.3 ***IRS Levy.*** Notwithstanding Section 8.1, the Administrator may pay from a Participant's or Beneficiary's Account Balance the amount that the Administrator finds is lawfully demanded under a levy issued by the Internal Revenue Service with respect to that Participant or Beneficiary or is sought to be collected by the United States Government under a judgment resulting from an unpaid tax assessment against the Participant or Beneficiary.

8.4 ***Mistaken Contributions.*** If any contribution (or any portion of a contribution) is made to the Plan by a good faith mistake of fact, then within one year after the payment of the contribution, and upon receipt in good order of a proper request approved by the Administrator, the amount of the mistaken contribution (adjusted for any income or loss in value, if any, allocable thereto) shall be returned directly to the Participant or, to the extent required or permitted by the Administrator, to the Employer.

8.5 ***Payments to Minors and Incompetents.*** If a Participant or Beneficiary entitled to receive any benefits hereunder is a minor or is adjudged to be legally incapable of giving valid receipt and discharge for such benefits, or is deemed so by the Administrator, benefits will be paid to such person as the Administrator may designate for the benefit of such Participant or Beneficiary. Such payments shall be considered a payment to such Participant or Beneficiary and shall, to the extent made, be deemed a complete discharge of any liability for such payments under the Plan.

8.6 ***Procedure When Distributee Cannot Be Located.*** The Administrator shall make all reasonable attempts to determine the identity and address of a Participant or a Participant's Beneficiary entitled to benefits under the Plan. For this purpose, a reasonable attempt means (a) the mailing by certified mail of a notice to the last known address shown on [Insert Name of the Employer]'s or the Administrator's records, (b) notification sent to the Social Security Administration or the Pension Benefit Guaranty Corporation (under their program to identify payees under retirement plans), and (c) the payee has not responded within 6 months. If the Administrator is unable to locate such a person entitled to benefits hereunder, or if there has been no claim made for such benefits, the Trust Fund shall continue to hold the benefits due such person.

Note: The following definitions from Model Amendment 1 are used in this Model Amendment 8: Administrator, Account Balance, Beneficiary, Employer, Participant, Plan, Trust Fund, and Trustee.