Part III – Administrative, Procedural and Miscellaneous

§ 457(b) Plans and Federal Credit Unions

Notice 2005-58

I. PURPOSE

This notice addresses certain income tax issues with respect to nonqualified deferred compensation plans maintained by federal credit unions, including whether a federal credit union can maintain an eligible nonqualified deferred compensation plan described in § 457(b) of the Internal Revenue Code (the "Code").

The provisions of this notice are applicable to any nonqualified deferred compensation plan maintained by a federal credit union described in § 501(c)(1) until publication of guidance regarding the definition of a "governmental plan" under § 414(d).

II. BACKGROUND

Section 457 provides rules regarding the taxation of a nonqualified deferred compensation plan of an eligible employer. For this purpose, the term "eligible employer" is defined in § 457(e)(1)(A) as a state, a political subdivision of a state, and any agency or instrumentality of a state or political subdivision of a state. In addition, § 457(e)(1)(B) includes as an eligible employer "any other organization (other than a governmental unit) exempt from tax under" subtitle A

of the Internal Revenue Code. [Emphasis added.] Section 1.457-2(e) of the Income Tax Regulations provides that the term "eligible employer" does not include "the federal government or any agency or instrumentality thereof." Thus, agencies or instrumentalities of the federal government are not eligible employers described in § 457(e)(1)(A) or (B).

In 2004, the IRS issued a private letter ruling (LTR 200430013) to a federal credit union indicating that because federal credit unions chartered under the Federal Credit Union Act are not eligible employers under § 457(e)(1), the nonqualified deferred compensation plan to be established by the requesting entity is not an eligible plan under § 457(b). This private letter ruling was based on prior published authority indicating that federal credit unions chartered under the Federal Credit Union Act are federal instrumentalities for purposes of § 501(c)(1). Rev. Rul. 69-283, 1969-1 C.B. 156. See also Rev. Rul. 55-133, 1955-1 C.B. 138 (superseded by Rev. Rul. 60-169) ("Federal credit unions are recognized as instrumentalities of the United States within the meaning of section 501(c)(1) of the Internal Revenue Code"); Rev. Rul. 60-169, 1960-1 C.B. 621 (obsoleted on other grounds by Rev. Rul. 89-94, 1989-2 C.B. 233) ("Federal credit unions organized and operated in accordance with the Federal Credit Union Act are recognized as instrumentalities of the United Stated within the meaning of section 501(c)(1) of the Code.")

Section 6110(k)(3) provides that a private letter ruling applies only to the taxpayer who requested it and is not to be cited or treated as precedent with respect to any other taxpayer. Therefore, no federal credit union, other than the

credit union to whom the private letter ruling was issued, is entitled to rely on the 2004 private letter ruling with respect to whether § 457 applies to its nonqualified deferred compensation plan. In addition, the 2004 private letter ruling did not address the application of other provisions of the Internal Revenue Code to a nonqualified deferred compensation plan maintained by a federal credit union.

III. CURRENT TREATMENT OF FEDERAL CREDIT UNION 457 PLANS

Treasury and the IRS intend to publish guidance regarding the meaning of the term "governmental plan" under § 414(d). Treasury and the IRS have determined that, until § 414(d) guidance is published, a plan in effect on [INSERT DATE THIS NOTICE IS PUBLISHED IN THE INTERNAL REVENUE BULLETIN] that is maintained by a federal credit union and is intended to be an eligible nonqualified deferred compensation plan of a non-governmental tax-exempt entity under § 457(b) will not fail to be a § 457(b) plan solely because the employer establishing and maintaining it is a federal credit union described in § 501(c)(1), provided that the federal credit union has consistently claimed the status of a non-governmental tax-exempt organization for all employee benefit plan purposes, including § 414(d) and the parallel definition of a "governmental plan" in section 3(32) of the Employee Retirement Income Security Act of 1974 (ERISA). In addition, because eligible § 457(b) plans are not subject to § 409A of the Code (providing new requirements for most nonqualified deferred compensation plans), if the federal credit union treats its nonqualified deferred compensation plan as an eligible § 457(b) plan pursuant to this notice, that plan

will not be subject to the requirements of § 409A. If future § 414(d) guidance contains rules providing that a federal credit union is not an eligible employer under § 457, the guidance will include a reasonable transition period during which any federal credit union that has consistently claimed the status of a non-governmental tax-exempt organization will be permitted to revise its arrangements in order to avoid possible adverse tax consequences for participants in its nonqualified deferred compensation plan that was intended to constitute an eligible plan under § 457(b).

Pending further guidance, a federal credit union that has consistently claimed the status of a non-governmental tax-exempt organization for all employee benefit plan purposes may treat § 457(f) as applying to any nonqualified plan it maintains (other than an eligible § 457(b) plan) that provides for a deferral of compensation. Note that § 409A applies to arrangements to which § 457(f) applies. See Q&A-6 of Notice 2005-1, 2005-2 I.R.B. 274, 279.

DRAFTING INFORMATION

The principal author of this notice is John A. Tolleris of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt & Government Entities). For further information regarding this notice contact John A. Tolleris at (202) 622-6060 (not a toll-free call).