

SECTION OF TAXATION

State Bar of Texas



September 26, 2012

OFFICERS:

Tina R. Green, Chair
Capshaw Green, PLLC
2801 Richmond Road #46
Texarkana, Texas 75503
(903) 223-9544
(888) 371-7863 (fax)
tgreen@capshawgreen.com

Elizabeth A. Copeland, Chair-Elect
Oppenheimer Blend Harrison & Tate, Inc.
711 Navarro, Suite 600
San Antonio, Texas 78205-1796
(210) 224-2000
(210) 224-7540 (fax)
ecopeland@obht.com

Andrius R. Kontrimas, Secretary
Fulbright & Jaworski LLP
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
(713) 651-5151
(713) 651-5246 (fax)
akontrimas@fulbright.com

Alyson Outenreath, Treasurer
Texas Tech University
School of Law
1802 Hartford Avenue
Lubbock, Texas 79409-0004
(806) 742-3990 Ext. 238
(806) 742-1629 (fax)
alyson.outenreath@ttu.edu

COUNCIL MEMBERS:

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VIA U.S. MAIL

Mr. Douglas H. Shulman
Commissioner
Internal Revenue Service
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Comments on Proposed Regulation relating to property transferred in connection with the performance of service under Section 83 of the Internal Revenue Code

Dear Commissioner Shulman:

On behalf of the Section of Taxation of the State Bar of Texas, I am pleased to submit the enclosed response to the request of the Department of the Treasury and the Internal Revenue Service for comments concerning the proposed regulations relating to property transferred in connection with the performance of service under section 83 of the Internal Revenue Code of 1986, as amended.

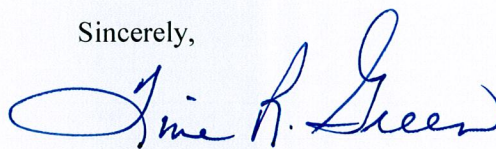
THE REQUEST FOR ADDITIONAL GUIDANCE AND ACCOMPANYING COMMENTS ENCLOSED WITH THIS LETTER ARE BEING PRESENTED ONLY ON BEHALF OF THE SECTION OF TAXATION OF THE STATE BAR OF TEXAS. THIS REQUEST AND THESE COMMENTS SHOULD NOT BE CONSTRUED AS REPRESENTING THE POSITION OF THE BOARD OF DIRECTORS, THE EXECUTIVE COMMITTEE OR THE GENERAL MEMBERSHIP OF THE STATE BAR OF TEXAS. THE SECTION OF TAXATION, WHICH HAS SUBMITTED THESE COMMENTS, IS A VOLUNTARY SECTION OF MEMBERS COMPOSED OF LAWYERS PRACTICING IN A SPECIFIED AREA OF LAW. THE REQUEST FOR THE ISSUANCE OF ADDITIONAL GUIDANCE AND ACCOMPANYING COMMENTS ARE SUBMITTED AS A RESULT OF THE APPROVAL OF THE COMMITTEE ON GOVERNMENT SUBMISSION OF THE SECTION OF TAXATION AND PURSUANT TO THE PROCEDURES ADOPTED BY THE COUNCIL OF THE SECTION OF TAXATION, WHICH IS THE GOVERNING BODY OF THAT SECTION. NO APPROVAL OR DISAPPROVAL OF THE GENERAL MEMBERSHIP OF THIS SECTION HAS BEEN OBTAINED FOR

1414 Colorado Street, Austin, TX 78701
(512) 427-1463 or (800) 204-2222

THIS REQUEST FOR ADDITIONAL GUIDANCE AND ACCOMPANYING COMMENTS AND THIS REQUEST AND THESE COMMENTS REPRESENT THE VIEWS OF THE MEMBERS OF THE SECTION OF TAXATION WHO PREPARED THEM.

We commend the Service for permitting us to submit this request for additional guidance, and we appreciate being extended the opportunity to participate in this process.

Sincerely,

A handwritten signature in blue ink that reads "Tina R. Green". The signature is fluid and cursive, with a large initial "T" and "G".

Tina R. Green
Chair, Section of Taxation
State Bar of Texas

RESPONSE TO REQUEST FOR COMMENTS REGARDING PROPOSED REGULATIONS
RELATING TO THE TRANSFER OF PROPERTY IN CONNECTION WITH THE PERFORMANCE
OF SERVICES UNDER SECTION 83 OF THE INTERNAL REVENUE CODE

This response to the request for comments in the notice of proposed rulemaking, REG 141075-09, relating to property transferred in connection with the performance of services under section 83 of the Internal Revenue Code of 1986, as amended (the "Code"), is presented on behalf of the Section of Taxation of the State Bar of Texas. The principal drafters of these comments are Heather C. Panick and Henry Talavera, who are both Vice-Chairs of the Employee Benefits Committee, along with Jeffrey Blair, the Chair of the Corporate Tax Committee. The Committee on Government Submissions ("COGS") of the Section of Taxation of the State Bar of Texas has approved these comments. Substantive comments were provided by Stephanie M. Schroepfer and Susan A. Wetzel. Stephanie M. Schroepfer is the Chair of COGS and Susan A. Wetzel is the Chair of the Employee Benefits Committee on behalf of COGS. Mark A. Bodron reviewed these comments on behalf of COGS.

Although many of the people who participated in preparing, reviewing and approving these comments have clients who will be affected by the federal tax law principles addressed by these comments and frequently advise clients on the application of such principles, none of the participants (or the firms or organizations to which such participants belong) have been engaged by a client to make a government submission with respect to, or otherwise influence the development or outcome of, the subject matter of these comments.

Contact Persons: Heather C. Panick
Jackson Lewis, LLP
1415 Louisiana, Suite 3325
Houston, Texas 77002
Direct: (713) 568-7848
Fax: (713) 650-0405
Email: panickh@jacksonlewis.com

Jeffrey M. Blair
Hunton & Williams, LLP
1445 Ross Ave., Suite 3200
Dallas, Texas 75202
Direct (214) 468-3306
Fax: (214) 740-7107
Email: jblair@hunton.com

Henry Talavera
Polsinelli Shughart, P.C.
Saint Ann Court
2501 N. Harwood Street
Suite 1900
Dallas, Texas 75201
Direct: (214) 661-5538
Fax: (214) 853-5138
Email: htalavera@polsinelli.com

Date: September 26, 2012

This comment letter is in response to the request of the Internal Revenue Service (the “IRS”) and the Department of the Treasury for comments concerning the notice of proposed rulemaking, REG 141075-09, relating to property transferred in connection with the performance of services under section 83 of the Code (the “Proposed Regulation”).

Section 1.83-3(c) of the Proposed Regulation would rewrite the existing guidance concerning the types of restrictions that may create a substantial risk of forfeiture (an “SRF”) sufficient to defer income recognition for federal income taxation purposes.

In general, the Proposed Regulation specifies that whether property is subject to an SRF depends upon the facts and circumstances. The Proposed Regulations further state that an SRF exists:

- *Only* where rights in transferred property are conditioned, directly or indirectly, upon the future performance (or refraining from performance) of substantial services by any person, or upon the occurrence of a condition related to the purpose of the transfer; and
- the possibility of forfeiture is substantial.

Use of the Term “Only” May Result in a Narrowing of Permissible SRFs

We respectfully suggest that the IRS and the Treasury revise section 1.83-3(c) of the Proposed Regulation by replacing the words “exists only” with the words “is presumed to exist”.

We are concerned that the insertion of the word “only” would turn a current regulatory example of facts and circumstances, which might create an SRF, into an exclusive list of circumstances which create an SRF. As written under the Proposed Regulations, those circumstances must relate directly or indirectly to future performance (or refraining from performance) of substantial services by any person or a condition related to the purpose of the transfer. We find no support in the legislative history for this narrowing of the Treasury Regulations as currently written. We believe that there could be other circumstances under which an SRF may occur based on the particular facts, as was recognized by the IRS and the Treasury when the Treasury Regulations were initially drafted. We suggest that the reason the Treasury Regulations were initially drafted as they are was to provide flexibility in crafting SRFs.

Involuntary Separation as SRF

We respectfully suggest that in finalizing the Proposed Regulation, the IRS and the Treasury consider expressly clarifying that, under appropriate facts and circumstances, an involuntary separation may qualify as an SRF. We suggest that the IRS and the Treasury consider adding language relating to involuntary separations that is similar to language contained in the Treas. Reg. §1.409A-1(d)(1).

For purposes of section 409A of the Code, Treas. Reg. §1.409A-1(d)(1) expressly states that “[i]f a service provider’s entitlement to the amount is conditioned on the occurrence of the service provider’s involuntary separation from service without cause, the right is subject to a substantial risk of forfeiture if the possibility of forfeiture is substantial.” For purposes of section 409A of the Code, the IRS and the Treasury generally defined an involuntary separation from service as a separation from service due to the

independent exercise of the unilateral authority of the service recipient to terminate the service provider's services. Treas. Reg. §1.409A-1(n)(1). For purposes of section 409A of the Code, the IRS and the Treasury state that a service provider's voluntary separation from service will be treated as an involuntary separation from service in certain limited circumstances where the voluntary separation from service under the conditions effectively constitutes an involuntary separation from service. Treas. Reg. §1.409A-1(n)(2). In order for a "good reason" voluntary resignation to qualify as an involuntary separation from service for purposes of section 409A of the Code, the resignation must be due to an action taken by the service recipient that results in a material, negative change to the service provider in the service relationship, such as the duties to be performed, the conditions under which the duties are to be performed, or the compensation to be received for performing such services. *Id.*

The specific inclusion of language related to involuntary separations from service in the definition of an SRF for purposes of section 409A coupled with the absence of any reference to involuntary separations from service in the definition of an SRF for purposes of section 83 could lead to confusion concerning whether, in appropriate circumstances, an involuntary separation from service may qualify as an SRF for purposes of section 83.

Accelerated Vesting Upon Involuntary Separation Does Not Destroy Otherwise Valid SRF

We respectfully suggest that, in finalizing the Proposed Regulation, the IRS and the Treasury consider expressly clarifying that, under appropriate facts and circumstances, the inclusion of language in a compensatory transfer of property award that an SRF will lapse immediately upon the occurrence of an involuntary separation will not adversely affect the status of the SRF for federal income taxation purposes. Similar to situations addressed in private letter rulings, compensatory transfers of property are commonly designed to provide for SRFs based upon requirements to provide substantial future services, coupled with features for accelerated vesting upon the occurrence of involuntary separations.