

[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9659]

RIN 1545-BJ15

Property Transferred in Connection with the Performance of Services under Section 83

AGENCY: Internal Revenue Service, Department of Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to property transferred in connection with the performance of services under section 83 of the Internal Revenue Code (Code). These final regulations affect certain taxpayers who receive property transferred in connection with the performance of services.

DATES: Effective Date: These regulations are effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

Applicability Date: For dates of applicability, see §1.83-3(l).

FOR FURTHER INFORMATION CONTACT: Thomas Scholz or Michael Hughes at (202) 317-5600 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

On May 30, 2012, the Department of Treasury (Treasury) and the Internal Revenue Service (IRS) published a notice of proposed rulemaking (REG-141075-09) in the **Federal Register** (77 FR 31783) under section 83 of the Code. Treasury and the IRS received two

comments responding to the notice of proposed rulemaking. No public hearing was requested and no public hearing was held. After consideration of these comments, Treasury and the IRS adopt the proposed regulations as final regulations with the modifications described in this preamble.

Explanation of Provisions

Section 83 of the Code addresses the tax consequences of the transfer of property in connection with the performance of services. These final regulations provide several clarifications regarding whether a substantial risk of forfeiture exists in connection with property subject to section 83. Specifically, the final regulations clarify that (1) except as specifically provided in section 83(c)(3) and §§1.83-3(j) and (k), a substantial risk of forfeiture may be established only through a service condition or a condition related to the purpose of the transfer, (2) in determining whether a substantial risk of forfeiture exists based on a condition related to the purpose of the transfer, both the likelihood that the forfeiture event will occur and the likelihood that the forfeiture will be enforced must be considered, and (3) except as specifically provided in section 83(c)(3) and §§1.83-3(j) and (k), transfer restrictions do not create a substantial risk of forfeiture, including transfer restrictions that carry the potential for forfeiture or disgorgement of some or all of the property, or other penalties, if the restriction is violated.

Summary of Comments

Treasury and the IRS received two written comments on the notice of proposed rulemaking. The first comment was not responsive to the notice of proposed rulemaking. The second comment expressed concern that the proposed regulations result in a narrowing of the circumstances that would establish a substantial risk of forfeiture and requested clarification regarding whether an involuntary separation from service without cause could establish a substantial risk of forfeiture. The comment noted that, for purposes of section 409A, an amount

that is payable only upon a service provider's involuntary separation from service without cause is subject to a substantial risk of forfeiture if the possibility of forfeiture is substantial, and it suggested that these regulations specifically state that an involuntary separation without cause may qualify as a substantial risk of forfeiture under section 83 in appropriate circumstances.

These regulations are intended to clarify the definition of a substantial risk of forfeiture and are consistent with the interpretation that the IRS historically has applied, and therefore from the perspective of Treasury and the IRS they do not constitute a narrowing of the requirements to establish a substantial risk of forfeiture. See Robinson v. Commissioner, 805 F.2d 38 (1st Cir. 1986). Further, Treasury and the IRS believe that these regulations should not be modified to state that an involuntary separation from service without cause may qualify as a substantial risk of forfeiture under section 83. While a service provider's right to receive property (or an amount in cash) in the future upon the service provider's involuntary separation from service without cause may be subject to a substantial risk of forfeiture for purposes of section 409A if the possibility of forfeiture is substantial, a substantial risk of forfeiture under section 83 can exist only when property is actually transferred in connection with the performance of services. A right to receive property in the future is generally not property for purposes of section 83. See §1.83-3(e). Accordingly, an involuntary separation from service without cause cannot qualify as a substantial risk of forfeiture under section 83 if property is not transferred until after the separation from service occurs.

When a transfer of property does occur, a substantial risk of forfeiture may be established through a substantial services condition or a condition related to the purpose of the transfer if the possibility of forfeiture is substantial. The acceleration of vesting upon an involuntary separation from service without cause (or separation from service as a result of death or disability) will not

cause a requirement of substantial services that otherwise would be treated as a substantial risk of forfeiture to fail to qualify as a substantial risk of forfeiture, provided that facts and circumstances do not demonstrate that the occurrence of an involuntary separation from service without cause is likely to occur during the agreed upon service period.

Certain practitioners informally requested clarification regarding the application of section 83(c)(3) to a variation of the facts set forth in Example 4 of proposed regulation §1.83-3(j)(2). Specifically, practitioners asked whether the purchase of shares in a transaction not exempt from section 16(b) of the Securities Exchange Act of 1934 prior to the exercise of a stock option that would not otherwise give rise to section 16(b) liability would defer taxation of the stock option exercise. Treasury and the IRS do not believe that such a non-exempt purchase of shares would defer taxation of the subsequent stock option exercise. This result is consistent with Example 3 of §1.83-3(j)(2). In response to these requests for clarification, Treasury and the IRS have revised Example 4 of proposed regulation §1.83-3(j)(2) to address the situation raised.

Applicability Date

These regulations apply to property transferred on or after January 1, 2013.

Effect on Other Documents

Rev. Rul. 2005-48 (2005-2 CB 259) is obsolete as of **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

Special Analyses

It has been determined that this final regulation is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13653. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and

because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, the notice of proposed rule making preceding these final regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal authors of these final regulations are Thomas Scholz and Michael Hughes, Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). Other personnel from Treasury and the IRS also participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of 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. Section 1.83-3 is amended by:

1. Revising paragraph (c)(1).
2. Adding Example 6 and Example 7 to paragraph (c)(4).
3. Adding Example 4 to paragraph (j)(2).
4. Removing paragraph (j)(3).
5. Removing paragraph (k).
6. Redesignating paragraph (k)(1) as paragraph (k).

7. Adding paragraph (l).

The revisions and additions read as follows:

§1.83-3 Meaning and use of certain terms.

* * * * *

(c) Substantial risk of forfeiture. (1) In general. For purposes of section 83 and these regulations, whether a risk of forfeiture is substantial or not depends upon the facts and circumstances. Except as set forth in paragraphs (j) and (k) of this section, a substantial risk of forfeiture exists only if rights in property that are transferred 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 a purpose of the transfer if the possibility of forfeiture is substantial. Property is not transferred subject to a substantial risk of forfeiture if at the time of transfer the facts and circumstances demonstrate that the forfeiture condition is unlikely to be enforced. Further, property is not transferred subject to a substantial risk of forfeiture to the extent that the employer is required to pay the fair market value of a portion of such property to the employee upon the return of such property. The risk that the value of property will decline during a certain period of time does not constitute a substantial risk of forfeiture. A nonlapse restriction, standing by itself, will not result in a substantial risk of forfeiture. A restriction on the transfer of property, whether contractual or by operation of applicable law, will result in a substantial risk of forfeiture only if and to the extent that the restriction is described in paragraph (j) or (k) of this section. For this purpose, transfer restrictions that will not result in a substantial risk of forfeiture include, but are not limited to, restrictions that if violated, whether by transfer or attempted transfer of the property, would result in the forfeiture

of some or all of the property, or liability by the employee for any damages, penalties, fees, or other amount.

* * * * *

(4) * * *

Example 6. On April 3, 2013, Y corporation grants to Q, an officer of Y, a nonstatutory option to purchase Y common stock. Although the option is immediately exercisable, it has no readily ascertainable fair market value when it is granted. Under the option, Q has the right to purchase 100 shares of Y common stock for \$10 per share, which is the fair market value of a Y share on the date of grant of the option. On August 1, 2013, Y sells its common stock in an initial public offering. Pursuant to an underwriting agreement entered into in connection with the initial public offering, Q agrees not to sell, otherwise dispose of, or hedge any Y common stock from August 1 through February 1 of 2014 (“the lock-up period”). Q exercises the option and Y shares are transferred to Q on November 15, 2013, during the lock-up period. The underwriting agreement does not impose a substantial risk of forfeiture on the Y shares acquired by Q because the provisions of the agreement do not condition Q’s rights in the shares upon anyone’s future performance (or refraining from performance) of substantial services or on the occurrence of a condition related to the purpose of the transfer of shares to Q. Accordingly, neither section 83(c)(3) nor the imposition of the lock-up period by the underwriting agreement precludes taxation under section 83 when the shares resulting from exercise of the option are transferred to Q.

Example 7. Assume the same facts as in Example 6, except that on August 1, 2013, Y also adopts an insider trading compliance program, under which, as applied to 2013, insiders (such as Q) may trade Y shares only during a limited number of days following each quarterly earnings release (“a trading window”). Under the program, if Q trades Y shares outside a trading window without Y’s permission, Y has the right to terminate Q’s employment. However, the exercise of the nonstatutory options outside a trading window for Y shares is not prohibited under the insider trading compliance program. Q fully exercises the option, and Y shares are transferred to Q, on November 15, 2013. The exercise of the option occurs outside a trading window, and, on the date of exercise, Q is in possession of material nonpublic information concerning Y that would subject him to liability under Rule 10b-5 under the Securities Exchange Act of 1934 if Q sold the Y shares while in possession of such information. Neither the insider trading compliance program nor the potential liability under Rule 10b-5 impose a substantial risk of forfeiture on the Y shares acquired by Q because the provisions of the program and Rule 10b-5 do not condition Q’s rights in the shares upon anyone’s future performance (or refraining from performance) of substantial services or on the occurrence of a condition related to the purpose of the transfer of shares to Q. Accordingly, none of section 83(c)(3), the imposition of the trading windows by the insider trading compliance program, and the potential liability under Rule 10b-5 preclude taxation under section 83 when the shares resulting from exercise of the option are transferred to Q.

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(j) * * *

(2) * * *

Example 4. (i) On June 3, 2013, Y corporation grants to Q, an officer of Y, a nonstatutory option to purchase Y common stock. Y stock is traded on an established securities market. Although the option is immediately exercisable, it has no readily ascertainable fair market value when it is granted. Under the option, Q has the right to purchase 100 shares of Y common stock for \$10 per share, which is the fair market value of a Y share on the date of grant of the option. The grant of the option is not one that satisfies the requirements for a transaction that is exempt from section 16(b) of the Securities Exchange Act of 1934. On December 15, 2013, Y stock is trading at more than \$10 per share. On that date, Q fully exercises the option, paying the exercise price in cash, and receives 100 Y shares. Q's rights in the shares received as a result of the exercise are not conditioned upon the future performance of substantial services. Because no exemption from section 16(b) was available for the June 3, 2013 grant of the option, the section 16(b) liability period expires on December 1, 2013. Accordingly, the section 16(b) liability period expires *before* the date that Q exercises the option and the Y common stock is transferred to Q. Thus, the shares acquired by Q pursuant to the exercise of the option are not subject to a substantial risk of forfeiture under section 83(c)(3) as a result of section 16(b). As a result, section 83(c)(3) does not preclude taxation under section 83 when the shares acquired pursuant to the December 15, 2013 exercise of the option are transferred to Q.

(ii) Assume the same facts as in paragraph (i) of this Example 4 except that Q exercises the nonstatutory option on October 30, 2013 when Y stock is trading at more than \$10 per share. The shares acquired are subject to a substantial risk of forfeiture under section 83(c)(3) as a result of section 16(b) through December 1, 2013.

(iii) Assume the same facts as in paragraph (i) of this Example 4 except that on November 5, 2013, Q also purchases 100 shares of Y common stock on the public market. The purchase of the shares is not a transaction exempt from section 16(b) of the Securities Exchange Act of 1934. Because no exemption from section 16(b) was available for the November 5, 2013 purchase of shares, the section 16(b) liability period with respect to such shares will last for a period of six months after the November 5, 2013 purchase of shares. Notwithstanding the non-exempt purchase of Y common stock on November 5, 2013, the shares acquired by Q pursuant to the December 15, 2013 exercise of the option are not subject to a substantial risk of forfeiture under section 83(c)(3) as a result of section 16(b). As a result, section 83(c)(3) does not preclude taxation under section 83 when the shares acquired pursuant to the December 15, 2013 exercise of the option are transferred to Q.

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(l) Effective/applicability date. This section applies to property transferred on or after January 1, 2013. For rules relating to property transferred before that date, see §1.83-3 as contained in 26 CFR part 1 (as of April 1, 2012).

John Dalrymple,
Deputy Commissioner for Services and Enforcement.

Approved: January 31, 2014.

Mark J. Mazur,
Assistant Secretary of the Treasury (Tax Policy).

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