

# Notice of Proposed Rulemaking by Cross-Reference to Temporary Regulations and Notice of Public Hearing

## Prohibited Allocations of Securities in an S Corporation

### REG-129709-03

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice of proposed rulemaking by cross-reference to temporary regulations and notice of public hearing.

**SUMMARY:** In this issue of the Bulletin, the IRS is issuing temporary regulations (T.D. 9081) that provide guidance on identifying disqualified persons and determining whether a plan year is a nonallocation year under section 409(p) and on the definition of synthetic equity under section 409(p)(5). These proposed regulations would generally affect plan sponsors of, and participants in, ESOPs holding stock of Subchapter S corporations. The text of those temporary regulations also serves as the text of these proposed regulations. This document also provides notice

of a public hearing on these proposed regulations.

**DATES:** Written or electronic comments must be received by October 17, 2003.

Requests to speak (with outlines of oral comments to be discussed) at the public hearing scheduled for November 17, 2003, at 10 a.m. must be received by October 27, 2003.

**ADDRESSES:** Send submissions to: CC:PA:LPD:PR (REG-129709-03), room 5203, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 5 p.m. to: CC:PA:LPD:PR (REG-129709-03), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC. Alternatively, taxpayers may submit comments electronically directly to the IRS Internet site at [www.irs.gov/reg](http://www.irs.gov/reg). The public hearing will be held in room 6718, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC.

#### FOR FURTHER INFORMATION

**CONTACT:** Concerning the proposed regulations, John Ricotta at 622-6060; concerning submissions of comments, Sonya Cruse, (202) 622-4693 (not toll-free numbers).

#### SUPPLEMENTARY INFORMATION:

##### Background

Temporary regulations (T.D. 9081) on page 420 of this issue of the Bulletin amend the Income Tax Regulations (26 CFR part 1) relating to section 409(p). The temporary regulations contain rules relating to the identification of disqualified persons and determination whether a plan year is a nonallocation year under section 409(p) and the definition of synthetic equity under section 409(p)(5). The text of those temporary regulations also serves as the text of these proposed regulations. The preamble to the temporary regulations explains the temporary regulations.

##### Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant

regulatory action as defined in Executive Order 12866. 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. Because §1.409(p)-1 imposes no new collection of information on small entities, 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 Internal Revenue Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

#### Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) that are submitted timely to the IRS. All comments will be available for public inspection and copying.

Comments are requested with respect to issues raised by S corporation ESOPs established by March 14, 2001, that will need to comply with the requirements of section 409(p) beginning in 2005. For these ESOPs, the inclusion of deferred compensation as synthetic equity can be avoided by distributing such deferred compensation before 2005. Some employers may prefer other transition approaches. For example, a preferable transition approach may be to spin off and terminate the portion of a plan benefitting disqualified persons. Comments are requested on whether guidance is needed to address these possible transition approaches.

Comments are also requested on issues that are reserved in the regulations with respect to whether certain interests in an S corporation should be treated as synthetic equity, including the extent to which rights to acquire assets of the S corporation or another person are established for reasonable business purposes and should not be treated as synthetic equity. While comments can be filed as late as October 17, 2003, commentators are encouraged to file comments as early as possible because the IRS and Treasury intend to move forward to address these issues as early as 2003.

Commentators may also wish to comment on section 409(p)-related issues that are not directly raised in the proposed regulations. For example, commentators may wish to comment on the extent to which administrative guidance may be needed on an interim basis to deal with specific structures used to avoid or evade the purpose of section 409(p).

A public hearing has been scheduled for November 17, 2003, at 10 a.m. in room 6718 of the Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC. All visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts at the Constitution Avenue entrance. For information about having your name placed on the building access list to attend the hearing, see the "FOR FURTHER INFORMATION CONTACT" section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit written comments and an outline

of the topics to be discussed and the time to be devoted to each topic (signed original and eight (8) copies) by October 27, 2003. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

### **Drafting Information**

The principal author of these regulations is John Ricotta of the Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and Treasury participated in their development.

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### **Proposed Amendments to the Regulations**

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

## **PART 1—INCOME TAXES**

Paragraph 1. The authority citation for part 1 is amended by an entry in numerical order to read in part as follows:

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

Section 1.409(p)-1 also issued under 26 U.S.C. 409(p)(7)(A). \* \* \*

Par. 2. Section 1.409(p)-1 is added to read as follows:

*§1.409(p)-1 Prohibited allocation of securities in an S corporation.*

[The text of proposed §1.409(p)-1 is the same as the text of §1.409(p)-1T published elsewhere in this issue of the Bulletin].

Robert E. Wenzel,  
*Deputy Commissioner for Services and Enforcement.*

(Filed by the Office of the Federal Register on July 18, 2003, 8:45 a.m., and published in the issue of the Federal Register for July 21, 2003, 68 F.R. 43058)