

“(B) EXCEPTION FOR COMPENSATION BASED ON GAIN RECOGNIZED ON AN INVESTMENT ASSET.—

“(i) IN GENERAL.—To the extent provided in regulations prescribed by the Secretary, if compensation is determined solely by reference to the amount of gain recognized on the disposition of an investment asset, such compensation shall be treated as subject to a substantial risk of forfeiture until the date of such disposition.

“(ii) INVESTMENT ASSET.—For purposes of clause (i), the term ‘investment asset’ means any single asset (other than an investment fund or similar entity)—

“(I) acquired directly by an investment fund or similar entity,

“(II) with respect to which such entity does not (nor does any person related to such entity) participate in the active management of such asset (or if such asset is an interest in an entity, in the active management of the activities of such entity), and

“(III) substantially all of any gain on the disposition of which (other than such deferred compensation) is allocated to investors in such entity.

“(iii) COORDINATION WITH SPECIAL RULE.—Paragraph (3)(B) shall not apply to any compensation to which clause (i) applies.

“(2) COMPREHENSIVE FOREIGN INCOME TAX.—The term ‘comprehensive foreign income tax’ means, with respect to any foreign person, the income tax of a foreign country if—

“(A) such person is eligible for the benefits of a comprehensive income tax treaty between such foreign country and the United States, or

“(B) such person demonstrates to the satisfaction of the Secretary that such foreign country has a comprehensive income tax.

“(3) NONQUALIFIED DEFERRED COMPENSATION PLAN.—

“(A) IN GENERAL.—The term ‘nonqualified deferred compensation plan’ has the meaning given such term under section 409A(d), except that such term shall include any plan that provides a right to compensation based on the appreciation in value of a specified number of equity units of the service recipient.

“(B) EXCEPTION.—Compensation shall not be treated as deferred for purposes of this section if the service provider receives payment of such compensation not later than 12 months after the end of the taxable year of the service recipient during which the right to the payment of such compensation is no longer subject to a substantial risk of forfeiture.

“(4) EXCEPTION FOR CERTAIN COMPENSATION WITH RESPECT TO EFFECTIVELY CONNECTED INCOME.—In the case of a foreign corporation with income which is taxable under section 882, this section shall not apply to compensation which, had such compensation had been paid in cash on the date that such compensation ceased to be subject to a substantial risk of forfeiture, would have been deductible by such foreign corporation against such income.

“(5) APPLICATION OF RULES.—Rules similar to the rules of paragraphs (5) and (6) of section 409A(d) shall apply.

“(e) REGULATIONS.—The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this section, including regulations disregarding a

substantial risk of forfeiture in cases where necessary to carry out the purposes of this section.”

(b) CONFORMING AMENDMENT.—Section 26(b)(2), as amended by the Housing Assistance Tax Act of 2008, is amended by striking “and” at the end of subparagraph (V), by striking the period at the end of subparagraph (W) and inserting “, and”, and by adding at the end the following new subparagraph:

“(X) section 457A(c)(1)(B) (relating to determinability of amounts of compensation).”

(c) CLERICAL AMENDMENT.—The table of sections of subpart B of part II of subchapter E of chapter 1 is amended by inserting after the item relating to section 457 the following new item:

“Sec. 457A. Nonqualified deferred compensation from certain tax indifferent parties.”

(d) EFFECTIVE DATE.—

(1) IN GENERAL.—Except as otherwise provided in this subsection, the amendments made by this section shall apply to amounts deferred which are attributable to services performed after December 31, 2008.

(2) APPLICATION TO EXISTING DEFERRALS.—In the case of any amount deferred to which the amendments made by this section do not apply solely by reason of the fact that the amount is attributable to services performed before January 1, 2009, to the extent such amount is not includible in gross income in a taxable year beginning before 2018, such amounts shall be includible in gross income in the later of—

(A) the last taxable year beginning before 2018, or

(B) the taxable year in which there is no substantial risk of forfeiture of the rights to such compensation (determined in the same manner as determined for purposes of section 457A of the Internal Revenue Code of 1986, as added by this section).

(3) ACCELERATED PAYMENTS.—No later than 120 days after the date of the enactment of this Act, the Secretary shall issue guidance providing a limited period of time during which a nonqualified deferred compensation arrangement attributable to services performed on or before December 31, 2008, may, without violating the requirements of section 409A(a) of the Internal Revenue Code of 1986, be amended to conform the date of distribution to the date the amounts are required to be included in income.

(4) CERTAIN BACK-TO-BACK ARRANGEMENTS.—If the taxpayer is also a service recipient and maintains one or more nonqualified deferred compensation arrangements for its service providers under which any amount is attributable to services performed on or before December 31, 2008, the guidance issued under paragraph (4) shall permit such arrangements to be amended to conform the dates of distribution under such arrangement to the date amounts are required to be included in the income of such taxpayer under this subsection.

(5) ACCELERATED PAYMENT NOT TREATED AS MATERIAL MODIFICATION.—Any amendment to a nonqualified deferred compensation arrangement made pursuant to paragraph (4) or (5) shall not be treated as a material modification of the arrangement for purposes of section 409A of the Internal Revenue Code of 1986.

ORDERS FOR TUESDAY,
SEPTEMBER 30, 2008

Mr. WHITEHOUSE. Madam President, I ask unanimous consent that when the Senate completes its business today, it stand in recess until 10 a.m. on Tuesday, September 30; that following the prayer and pledge, the Journal of proceedings be approved to date, the time for the two leaders be reserved for their use later in the day, and the Senate resume consideration of H.R. 2095.

The PRESIDING OFFICER. Without objection, it is so ordered.

PROGRAM

Mr. WHITEHOUSE. Madam President, tomorrow the Senate will resume consideration of the rail safety/Amtrak legislation postcloture. There will be no rollcall votes during Tuesday’s session.

RECESS UNTIL 10 A.M. TOMORROW

Mr. WHITEHOUSE. Madam President, if there is no further business to come before the Senate, I ask unanimous consent that it stand in recess under the previous order.

There being no objection, the Senate, at 5:06 p.m., recessed until Tuesday, September 30, 2008, at 10 a.m.

NOMINATIONS

Executive nominations received by the Senate:

ENVIRONMENTAL PROTECTION AGENCY

G. DAVID BANKS, OF MISSOURI, TO BE AN ASSISTANT ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, VICE JUDITH ELIZABETH AYRES, RESIGNED.

DEPARTMENT OF TRANSPORTATION

DAVID KELLY, OF NEW YORK, TO BE ADMINISTRATOR OF THE NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, VICE NICOLE R. NASON, RESIGNED.

IN THE AIR FORCE

THE FOLLOWING NAMED OFFICER FOR APPOINTMENT IN THE UNITED STATES AIR FORCE TO THE GRADE INDICATED WHILE ASSIGNED TO A POSITION OF IMPORTANCE AND RESPONSIBILITY UNDER TITLE 10, U.S.C., SECTION 601:

To be lieutenant general

MAJ. GEN. JOHN C. KOZIOL

THE FOLLOWING NAMED OFFICER FOR APPOINTMENT IN THE UNITED STATES AIR FORCE TO THE GRADE INDICATED UNDER TITLE 10, U.S.C., SECTION 624:

To be major general

BRIG. GEN. STEPHEN L. HOOG