

Part III - Administrative, Procedural, and Miscellaneous

TAX EFFECTS OF THE ACQUISITION OF INSTRUMENTS BY THE TREASURY DEPARTMENT UNDER CERTAIN PROGRAMS PURSUANT TO THE EMERGENCY ECONOMIC STABILIZATION ACT OF 2008

This notice provides additional guidance regarding the application of section 382 of the Code and other provisions of law to corporations whose instruments are acquired by the Treasury Department pursuant to the Emergency Economic Stabilization Act of 2008, P.L. 110-343 (EESA). This notice amplifies and supersedes Notice 2009-14, 2009-7 I.R.B. 516, to address other EESA programs and provide additional guidance.

Notice 2009-38

I. Purpose.

The Internal Revenue Service (Service) and Treasury Department (Treasury) intend to issue regulations implementing certain of the rules as described below. Pending the issuance of further guidance, taxpayers may rely on the rules set forth in this notice to the extent provided herein.

Section 101(a)(1) of EESA authorizes the Secretary to establish the Troubled Asset Relief Program (TARP). Section 102(a) of EESA authorizes the Secretary to also establish a program to guarantee troubled assets. This notice provides guidance to corporate issuers with respect to Treasury's acquisition of instruments pursuant to the following EESA programs: (i) the Capital Purchase Program for publicly-traded issuers (Public CPP); (ii) the Capital Purchase Program for private issuers (Private CPP); (iii) the Capital Purchase Program for S corporations (S Corp CPP); (iv) the Targeted Investment Program (TARP TIP); (v) the Asset Guarantee Program; (vi) the Systemically Significant Failing Institutions Program; (vii) the Automotive Industry Financing Program; and (viii) the Capital Assistance Program for publicly-traded issuers (TARP CAP). Unless otherwise specified below, a reference to "the Programs" shall include any of the various EESA programs described in the preceding sentence.

II. Background.

Section 382(a) of the Internal Revenue Code (Code) provides that the taxable income of a loss corporation for a year following an ownership change may be offset by pre-change losses only to the extent of the section 382 limitation for such year. An ownership change occurs with respect to a corporation if it is a loss corporation on a testing date and, immediately after the close of the testing date, the percentage of stock of the corporation owned by one or more 5-percent shareholders has increased by more than 50 percentage points over the lowest percentage of stock of such corporation owned by such shareholders at any time

during the testing period. See §1.382-2T(a)(1) of the Income Tax Regulations. Section 382(m) of the Code provides that the Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of sections 382 and 383.

Section 101(c)(5) of EESA provides that the Secretary is authorized to issue such regulations and other guidance as may be necessary or appropriate to carry out the purposes of EESA.

Except as otherwise provided, any definitions and terms used in this notice have the same meaning as they do in section 382 of the Code (and the regulations thereunder) or in EESA, as applicable. Unless otherwise specified, a reference to “section” is to the particular section of the Code or regulations.

III. Guidance Regarding Corporations Whose Instruments are Acquired by the Treasury Pursuant to EESA

Taxpayers may rely on the rules described in this Section III to the extent provided below.

RULES:

A. Characterization of instruments (other than warrants) issued to Treasury. Any instrument issued to Treasury pursuant to any of the Programs except TARP CAP, whether owned by Treasury or subsequent holders, shall be treated for all Federal income tax purposes as an instrument of indebtedness if denominated as such, and as stock described in section 1504(a)(4) if denominated as preferred stock. No instrument so denominated shall be treated as stock for purposes of section 382 while held by Treasury or by other holders, except that preferred stock described in section 1504(a)(4) will be treated as stock for purposes of section 382(e)(1). In the case of any instrument issued to Treasury pursuant to TARP CAP, the appropriate classification of such instrument shall be determined by applying general principles of Federal tax law.

B. Characterization of warrants issued to Treasury. For all Federal income tax purposes, any warrant to purchase stock issued to Treasury pursuant to any of the Programs except Private CPP and S Corp CPP, whether owned by Treasury or subsequent holders, shall be treated as an option (and not as stock). While held by Treasury, such warrant will not be deemed exercised under §1.382-4(d)(2). For all Federal income tax purposes, any warrant to purchase stock issued to Treasury pursuant to the Private CPP shall be treated as an ownership interest in the underlying stock, which shall be treated as preferred stock described in section 1504(a)(4). For all Federal income tax purposes, any warrant issued to Treasury pursuant to the S Corp CPP shall be treated as an ownership interest in the underlying indebtedness.

C. Value-for-value exchange. For all Federal income tax purposes, any amount received by an issuer in exchange for instruments issued to Treasury under the Programs shall be treated as received, in its entirety, as consideration for such instruments.

D. Section 382 treatment of stock acquired by Treasury. For purposes of section 382, with respect to any stock (other than preferred stock described in section 1504(a)(4)) issued to Treasury pursuant to the Programs (either directly or upon the exercise of a warrant), the ownership represented by such stock on any date on which it is held by Treasury shall not be considered to have caused Treasury's ownership in the issuing corporation to have increased over its lowest percentage owned on any earlier date. Except as described below, such stock is considered outstanding for purposes of determining the percentage of stock owned by other 5-percent shareholders on a testing date.

E. Section 382 treatment of redemptions of stock from Treasury. For purposes of measuring shifts in ownership by any 5-percent shareholder on any testing date occurring on or after the date on which an issuing corporation redeems stock held by Treasury that had been issued to Treasury pursuant to the Programs (either directly or upon the exercise of a warrant), the stock so redeemed shall be treated as if it had never been outstanding.

F. Section 382(l)(1) not applicable with respect to capital contributions made by Treasury pursuant to the Programs. For purposes of section 382(l)(1), any capital contribution made by Treasury pursuant to the Programs shall not be considered to have been made as part of a plan a principal purpose of which was to avoid or increase any section 382 limitation.

G. Certain exchanges. Paragraphs (C), (D), (E), and (F), but not paragraphs (A) and (B), of this notice apply to "Covered Instruments" as though such instruments were issued directly to Treasury under the Programs. For purposes of this notice, the term "Covered Instrument" means any instrument acquired by Treasury in exchange for an instrument that was issued to Treasury under the Programs. In addition, the term also includes any instrument acquired by Treasury in exchange for a Covered Instrument. General principles of Federal tax law determine the characterization of all Covered Instruments.

IV. Reliance on Notice.

Taxpayers may rely on the rules described in Section III of this notice. These rules will continue to apply unless and until there is additional guidance. Any future contrary guidance will not apply to any instrument (i) issued to Treasury pursuant to the Programs, or acquired by Treasury in an exchange described in Section III(G) of this notice, prior to the publication of that guidance, or (ii) issued to Treasury pursuant to the Programs, or acquired by Treasury in an exchange described in Section III(G) of this notice, under a binding contract entered into

prior to the publication of that guidance. In exercising its authority under EESA in this notice, the Treasury and the Service intend no implication regarding the Federal income tax results that would obtain with respect to instruments that are not specifically described in this notice. Accordingly, the Federal income tax consequences of instruments not described in this notice continue to be determined based upon the application of general principles of Federal tax law to the specific facts and circumstances of each case.

V. Effect on Other Documents.

This notice amplifies and supersedes Notice 2009-14, 2009-7 I.R.B. 516.

Drafting Information

The principal author of this notice is Keith Stanley of the Office of Associate Chief Counsel (Corporate). For further information regarding this notice, contact Keith Stanley on (202) 622-7750 (not a toll-free call).