Part III - Administrative, Procedural, and Miscellaneous

Application of Section 382 To Loss Corporations Whose Instruments Are Acquired By The Treasury Department Under The Capital Purchase Program Pursuant To The Emergency Economic Stabilization Act Of 2008

Notice 2008-100

This notice provides guidance regarding the application of section 382 to loss corporations whose instruments are acquired by the Treasury Department (Treasury) under the Capital Purchase Program (CPP) pursuant to the Emergency Economic Stabilization Act of 2008, P.L. 110-343 (the “Act”).

I. PURPOSE

The Internal Revenue Service (Service) and Treasury intend to issue regulations regarding the application of section 382 with respect to the CPP pursuant to the Act. Pending the issuance of further guidance, taxpayers may rely on the rules set forth in this notice to the extent provided herein.

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 that may be offset by pre-change losses cannot exceed 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 101(a)(1) of the Act authorizes the Secretary to establish the Troubled Asset Relief Program. Under the CPP, Treasury will acquire preferred stock and warrants from qualifying financial institutions.

Section 101(c)(5) of the Act 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 the Act. 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.

Except as otherwise provided, any definitions and terms used herein have the same meaning as they do in section 382 of the Code and the regulations thereunder or in the CPP.

III. GUIDANCE REGARDING THE APPLICATION OF SECTION 382 TO LOSS CORPORATIONS WHOSE INSTRUMENTS ARE ACQUIRED BY TREASURY PURSUANT TO THE CPP

The Service and Treasury intend to issue regulations that set forth rules described in this Section III. Taxpayers may rely on the rules described in this Section III to the extent provided below.

RULES:

A. General rule. With respect to any shares of stock of a loss corporation acquired by Treasury pursuant to the CPP (either directly or upon the exercise of an option), the ownership represented by such shares on any date on which they are held by Treasury shall not be considered to have caused Treasury's ownership in the loss corporation to have increased over its lowest percentage owned on any earlier date. Except as provided in Sections III.B and III.C below, such shares are considered outstanding for purposes of determining the percentage of loss corporation stock owned by other 5-percent shareholders on a testing date.

B. Redemptions of stock owned by 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 the loss corporation redeems shares of its stock held by Treasury that were acquired pursuant to the CPP, the shares so redeemed shall be treated as if they had never been outstanding.

C. Treatment of preferred stock acquired by Treasury pursuant to the CPP. For all Federal income tax purposes, any preferred stock of a loss corporation acquired by Treasury pursuant to the CPP, whether owned by Treasury or another person, shall be treated as stock described in section 1504(a)(4) of the Code.

D. Treatment of warrants acquired by Treasury pursuant to the CPP. For all Federal income tax purposes, any warrant to purchase stock of a loss corporation that is acquired by Treasury pursuant to the CPP, whether held by Treasury or another person, shall be treated as an option (and not as stock).

E. Options held by Treasury not deemed exercised. For purposes of §1.382-4(d), any option (within the meaning of §1.382-4(d)(9)) held by Treasury that is acquired pursuant to the CPP will not be deemed exercised under §1.382-4(d)(2).

F. Section 382(l)(1) not applicable with respect to capital contributions made by Treasury to a loss corporation pursuant to the CPP. For purposes of section 382(l)(1) of the Code, any capital contribution made by Treasury to a loss corporation pursuant to the CPP 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.

IV. RELIANCE ON NOTICE

The Service and Treasury intend to issue regulations that set forth rules described in Section III of this notice. Taxpayers may rely on the rules described in Section III for purposes of applying section 382 with respect to loss corporations whose instruments are acquired by Treasury pursuant to the CPP. These rules will continue to apply unless and until there is additional guidance. Any future contrary guidance will not apply to instruments (i) held by Treasury that were acquired pursuant to the CPP prior to the publication of that guidance, or (ii) issued to Treasury pursuant to the CPP under written binding contracts entered into prior to the publication of that guidance.

DRAFTING INFORMATION

The principal author of this notice is Keith E. Stanley of the Office of Associate Chief Counsel (Corporate). For further information regarding this notice contact Keith E. Stanley on (202) 622-7700 (not a toll-free call).