

IRS, Treasury Guidance Responding to 2008 Economic Crisis

In response to the financial and economic crisis that intensified in September and October of 2008, the Emergency Economic Stabilization Act of 2008 (2008 Act), enacted on October 3, 2008, authorized Treasury to provide assistance for troubled assets of financial institutions. In addition to issuing guidance under this authority, the IRS and Treasury have issued guidance—much of it under § 382—providing relief from various tax provisions for business entities affected by the crisis and measures designed to facilitate transactions that taxpayers had become reluctant to undertake. Here's a summary of the unrivaled coverage you'll find from BNA Tax & Accounting. To take learn more and take a trial to the BNA Tax and Accounting Center, visit www.bna.com/trials and enter Priority Code TMAP58DA..

Federal Financial Assistance to Banks

Background: Section 597 states generally that federal financial assistance provided to a bank or domestic building and loan association is includible in income. The Emergency Economic Stabilization Act created the Troubled Asset Relief Program (TARP), which affects banks and other financial institutions.

- Discussion and analysis of federal assistance to financial institutions: **Tax Management Portfolios 540, IV.B.2.c.(6), and 560, V.B.1.f.**

Rev. Proc. 2008-64

Treating certain entities' losses from Fannie Mae and Freddie Mac preferred stock as ordinary.

The Emergency Economic Stabilization Act treats as ordinary income or loss certain gain or loss recognized by banks and other financial institutions on the sale or exchange of preferred stock of Fannie Mae and Freddie Mac. This revenue procedure generally extends that treatment to some partnerships in which such a financial institution is a partner and other taxpayers receiving the stock in carryover-basis transactions, effective after October 29, 2008.

- Rev. Proc. 2008-64 (210 TaxCore, 10/30/08).
- **Daily Tax Report** article on Rev. Proc. 2008-64 (210 DTR G-12, 10/30/08).
- Discussion and analysis of Fannie Mae and Freddie Mac preferred stock: **Tax Management Portfolio 741, VI.B. and C.**

Notice 2008-101

Exempting amounts furnished to a financial institution under TARP.

The IRS states that no amount furnished by Treasury to a financial institution under TARP will be treated as the provision of federal financial assistance within the meaning of Section 597. Any future guidance to the contrary will not apply retroactively to transactions with Treasury.

- Notice 2008-101 (199 TaxCore, 10/15/08).
- **Daily Tax Report** article on Notice 2008-101 (199 DTR G-1, 10/15/08).

Executive Compensation Limitations

Background: Section 162(m) generally limits to \$1 million the deduction for compensation

paid to certain corporate executives. Section 280G provides that a corporate executive's excess parachute payments are not deductible and imposes an excise tax for those amounts. The Emergency Economic Stabilization Act added new Section 162(m)(5), reducing the \$1 million deduction limitation to \$500,000 for some years and turning off application of exceptions such as the exception for performance-based compensation. Section 280G(e) expands the definition of "parachute payment" to include certain payments made contingent on severance from employment. The Act also establishes the Troubled Asset Auction Program (TAAP), the Capital Purchase Program (CPP), and the Programs for Systemically Significant Failing Institutions (PSSFI).

- Discussion and analysis of the \$1 million limit on deduction for otherwise deductible compensation: **Tax Management Portfolio 390, IX.A.**

- Discussion and analysis of golden parachutes generally: **Tax Management Portfolio 396, I.A.**

Notice 2008-94

Providing question-and-answer guidance on application of new Sections 162(m)(5) and 280G(e).

The IRS and Treasury provide that any financial institution that sells more than \$300 million of troubled assets to Treasury in TAAP is prohibited from October 3, 2008, and for the term of the program, from entering into new executive employment contracts that include golden parachutes. The Notice also provides guidance in a question-and-answer format on the \$500,000 deduction limitation, prohibition on deduction of certain golden parachute payments to senior executives, and 20% excise tax on senior executives for those payments.

- Notice 2008-94 (199 TaxCore, 10/15/08).

- **Daily Tax Report** article on Notice 2008-94 (199 DTR G-2, 10/15/08).

Treasury Interim Rule 2008-24781

Announcing more stringent executive compensation rules for period during which Treasury holds equity issued under CPP.

A participating financial institution must ensure that incentive compensation does not encourage senior executive officers to take unnecessary risks that threaten the value of the institution, must require recovery of any bonus or incentive compensation paid to a senior executive based on statements that later prove to be materially inaccurate, must not make golden parachute payments to a senior executive, and must agree not to deduct more than \$500,000 of executive compensation for each senior executive.

- Treasury Interim Rule 2008-24781 (199 TaxCore, 10/15/08).

- **Daily Tax Report** article on Treasury Executive Compensation Rules (199 DTR G-2, 10/15/08).

Treasury News Release on Executive Compensation Rules

Announcing more stringent executive compensation rules for firms participating in PSSFI.

Similar standards as those under Treasury Interim Rule 2008-24781 apply to firms participating in PSSFI, except that golden

parachutes are defined more strictly to prohibit any payments to departing executives.

- Treasury News Release on Executive Compensation Rules (199 TaxCore, 10/15/08).

- **Daily Tax Report** article on the Treasury News Release on Executive Compensation Rules (199 DTR G-2, 10/15/08).

Preservation of Tax Losses

Background: Section 382 provides generally 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 that year. Under Section 382(h), built-in losses also are subject to the limitation. The Section 382 limitation for a post-change year is generally the fair market value of the loss corporation's stock immediately before the ownership change, multiplied by the applicable long-term tax-exempt rate. Whether an ownership change has occurred is generally determined as of the "testing date." IRS and Treasury are relaxing the Section 382 limitation, or suspending its applicability altogether, in some situations.

- Discussion and analysis of loss corporations: **Tax Management Portfolio 780, III.D.**

- Discussion and analysis of ownership changes generally: **Tax Management Portfolio 780, III.**

- Discussion and analysis of the §382 limitation generally: **Tax Management Portfolio 780, III.F.**

- Discussion and analysis of the "testing date" rules generally applicable: **Tax Management Portfolio 780, III.B.1.**

- Discussion and analysis of the general applicability of Section 382 to built-in losses: **Tax Management Portfolio 780, III.H.**

- Discussion and analysis of the "change date" generally: **Tax Management Portfolio 780, III.B.4.b.**

Notice 2008-100

Turning off loss carryover limitation when Treasury acquires additional shares of loss corporation.

IRS and Treasury provide guidance (and will issue regulations) that no change in Treasury's ownership of a loss corporation that Treasury acquired in the CPP (discussed above) will be an ownership change. Also, the shares that any loss corporation redeems from Treasury will be treated as never having been outstanding, for purposes of measuring owner shifts. In addition, warrants will be treated as options (not stock), an option acquired by Treasury will not be deemed exercised, and no capital contribution by Treasury will be considered part of a plan a principal purpose of which is to avoid or increase the limitation. Taxpayers may rely on these rules now.

- Notice 2008-100 (199 TaxCore, 10/15/08).

- **Daily Tax Report** article on Notice 2008-100 (199 DTR G-2, 10/15/08).

- Discussion and analysis of warrants and options for §382 purposes, and of the "deemed exercise" rule for options: **Tax Management Portfolio 780, III.C.2.d.**

- Discussion and analysis of capital contributions generally: **Tax Management Portfolio 759, III.E.3.**

- Discussion and analysis of disqualified capital contributions: **Tax Management Portfolio 780, III.F.1.e.(1).**

Notice 2008-84

Turning off loss carryover limitation when United States acquires greater-than-50 percent interest in loss corporation.

IRS and Treasury will issue regulations under Section 382(m) providing that the "testing date" (as defined in Regulations Section 1.382-2(a)(4)) does not include any date as of the close of which the United States owns a more-than-50 percent interest in a Section 382 loss corporation. The regulations will apply to any taxable year ending after Sept. 25, 2008.

- Notice 2008-84 (188 TaxCore, 9/29/08).

- **Daily Tax Report** article on Notice 2008-84 (188 DTR G-1, 9/29/08).

Notice 2008-83

Turning off built-in loss treatment and pre-change-date-deduction treatment of deductions for losses or bad debts following certain banks' ownership changes.

For purposes of Section 382(h), any deduction properly allowed after an ownership change to a bank for losses on loans or bad debts (including for a reasonable addition to a reserve for bad debts) will not be treated as (i) a built-in loss or (ii) a deduction attributable to periods before the change date. A corporation that is a "bank" (as defined in Section 581) both immediately before and after the change date may rely on this notice now.

Note: In response to controversy over Notice 2008-83, which is widely perceived as facilitating Wells Fargo & Co.'s acquisition of Wachovia Corp., the Treasury Inspector General has agreed to investigate Treasury's issuance of Notice 2008-83, and two bills have been introduced, S. 3692 to rescind Notice 2008-83 and H.R. 7300 to limit the notice's applicability.

- Notice 2008-83 (190 TaxCore, 10/1/08).

- **Daily Tax Report** article on Notice 2008-83 (190 DTR G-6, 10/1/08).

- **Daily Tax Report** article on Treasury Inspector General's investigation of Notice 2008-83 (223 DTR GG-1, 11/19/08).

- S. 3692 226 TaxCore, 11/24/08).

- **Daily Tax Report** article on S. 3692 (226 DTR G-7, 11/24/08).

- H.R. 7300 227 TaxCore, 11/25/08).

- **Daily Tax Report** article on introduction of H.R. 7300 (225 DTR G-9, 11/21/08).

- Discussion and analysis of federal income tax definition of "bank": **Tax Management Portfolio 503, V.B.1.**

- Discussion and analysis of entity classification of banks: **Tax Management Portfolio 700, II.Q.**

- Discussion and analysis of bad debt deduction for banks: **Tax Management Portfolio 538, VI.B.2.**

Notice 2008-78

Taking into account capital contributions to provide corporations more leeway in using losses following changes of ownership.

IRS and Treasury issued rules in this notice—and said they intend to issue regulations—providing relief from Section 382(l)(1)(B) by stating that a capital contribution is not presumed to be part of a plan the principal purpose of which is to avoid or increase a Section 382 limitation solely as a result of having been made during the two-year period ending on the change date. The rules (in the notice and the forthcoming regulations) also provide relief from Section 382(l)(1)(A) by setting forth four safe harbors under which a capital contribution will not be considered part of a plan.

- Notice 2008-78 (188 TaxCore, 9/29/08).

- **Daily Tax Report** article on Notice 2008-78 (188 DTR G-6, 9/29/08).

Notice 2008-76

Turning off loss carryover limitation when the United States acquires obligations and other securities under the 2008 Housing and Economic Recovery Act.

IRS and Treasury will issue regulations under Section 382(m) providing that the "testing date" (as defined in Regulations Section 1.382-2(a)(4)) does not include any date on or after the date on which the United States (or an agency or instrumentality thereof) acquires, in a "Housing Act Acquisition," stock or an option to acquire stock in a corporation. The regulations will apply after Sept. 6, 2008.

- Notice 2008-76 (174 TaxCore, 9/9/08).

- **Daily Tax Report** article on Notice 2008-76 (174 DTR G-11, 9/9/08).

Money Market Share-Price Guarantee

Background: To address "temporary dislocations in credit markets," Treasury has opened a temporary share-price guarantee program for money market funds. Treasury has the option to renew the program. The purpose of the program is to protect shareholders for amounts they hold in money market funds. The guarantee will be triggered if a participating fund's net asset value falls below \$0.995 (referred to as "breaking the buck").

Guarantee Program *Providing help to eligible money market funds by guaranteeing a share price of at least \$1.*

On Sept. 29, 2008, Treasury opened its Temporary Guarantee Program for Money Market Funds, under which Treasury—for an initial three-month term (which has been extended)—will guarantee the share price of any publicly offered money market mutual fund (retail or institutional) that is regulated under Rule 2a-7 of the Investment Company Act of 1940 and applies for, and pays a fee for, participation in the program. The program covers shareholders for amounts held in funds as of the close of business on Sept. 19, 2008. To participate, a fund with a net asset value per share of at least \$0.9975 as of the close of business on Sept. 19 must pay a fee of 0.01 percent, 1 basis point, based on the number of shares then outstanding; the fee is 0.015 percent, 1.5 basis

points for a fund with a net asset value of at least \$0.995 and below \$0.9975. The guarantee will be triggered if a fund's net asset value falls below \$0.995. Treasury has received approval of the president to make available as necessary the assets of the Exchange Securitization Fund to guarantee program payments.

- Treasury News Release on Temporary Guarantee Program (189 Taxcore, 9/30/08).

Notice 2008-81

Announcing Temporary Guarantee Program, and confirming that program will not jeopardize tax-exempt funds' exemptions.

Treasury announced its Temporary Guarantee Program (described above) to enable money market funds to maintain stable \$1 per share net asset values, and said that participation in the program will not be treated as a federal guarantee that jeopardizes the tax-exempt treatment of payments by "tax-exempt money market funds" (i.e., money market funds holding enough of their total assets in tax-exempt bonds to be eligible to pay Section 852(b)(5) exempt interest dividends).

- Notice 2008-81 (184 Taxcore, 9/23/08).

- **Daily Tax Report** article on Notice 2008-81 (184 DTR GG-1, 9/23/08).

- Discussion and analysis of tax-exempt bonds generally: **Tax Management Portfolio 501, X.A.2.**

- Discussion and analysis of federally guaranteed bonds: **Tax Management Portfolio 501, X.A.2.b.(7).**

- Discussion and analysis of §852(b)(5) exempt interest dividends: **Tax Management Portfolio 740, X.**

Notice 2008-92

Announcing that participation in Temporary Guarantee Program will not violate diversification requirements and will not trigger investor control rules.

IRS and Treasury will not assert that participation in the Temporary Guarantee Program by an "insurance-dedicated money market fund" (a fund with beneficial interests held by investors permitted under Regulations Section 1.817-5(h)(1)) causes a violation of the Section 817(h) diversification requirements in the case of a segregated asset account investing in the fund, or that the fund's participation causes the holder of a variable contract supported by a segregated asset account investing in the fund to be treated as an owner of the fund.

- Notice 2008-92 (195 TaxCore, 10/8/08).

- **Daily Tax Report** article on Notice 2008-92 (195 DTR G-1, 10/8/08).

- Discussion and analysis of the adequate-diversification requirements: **Tax Management Portfolio 546, VI.A.7.**

- Discussion and analysis of investor control: **Tax Management Portfolio 546, VI.A.8.c.**

Technical Correction

Announcing technical correction that will permit participation by funds with policy of maintaining stable net asset value.

Funds that have a policy of maintaining a stable net asset value or

share price that is greater than \$1.00, and had that policy on September 19, 2008, are eligible to participate in the guarantee program (provided they meet the original criteria). Funds that are eligible as a result of the technical correction must enroll by October 10, 2008.

**Extension
Announcement**

Announcing extension of guarantee program until April 30, 2009.

Funds that currently participate in the guarantee program are eligible to participate in the "program extension period" as defined in the guarantee program entered into with respect to each participating fund. The "program extension period" begins on December 19, 2008 and its new termination date is April 30, 2009.

Nonrecognition in Certain Securities Lending Transactions

Background: Section 1058(a) provides that a taxpayer transferring securities under an agreement that meets the requirements of Section 1058(b) for an obligation under the agreement, or exchanging rights under the agreement for securities identical to the transferred securities, recognizes no gain or loss. Brokers frequently borrow securities to complete sales of securities because of delays that they face in obtaining securities from sellers and transfer agent. Encouraging brokers to borrow securities in these transactions is considered desirable from a market standpoint. Because a large number of securities loans have terminated as a result of default by borrowers, IRS saw a need to address the application of Section 1058(a) to situations in which securities are transferred under a Section 1058(b) agreement, the transferee subsequently defaults under the agreement as a result of its (or an affiliate's) bankruptcy, and no more than 30 days later the transferor uses collateral provided under the agreement to purchase identical securities.

- Discussion and analysis of securities acquired under Section 1058(b) agreements: **Tax Management Portfolio 560, III.B.5.**

**Revenue Procedure
2008-63**

Treating purchase of identical securities following termination of securities loan by borrower's bankruptcy as exchange of rights.

For taxable years ending after Dec. 31, 2007, IRS will treat the purchase by certain lenders of collateral provided under a Section 1058(b) securities loan agreement as an exchange of rights under the agreement for identical securities under Section 1058(a) and, thus, as triggering no gain or loss.

- Revenue Procedure 2008-63 (188 Taxcore, 9/29/08).
- **Daily Tax Report** article on Rev. Proc. 2008-63 (188 DTR G-5, 9/29/08).

No-Challenge Positions in Auction Rate Securities Claims

Background: An auction rate security is a security in which the payment rate is reset periodically under a process designed to produce the minimum rate necessary to enable all interested sellers to sell the security to willing buyers at the par amount of the security plus accrued but unpaid periodic payments. On Feb. 12, 2008, auctions of auction rate securities began to fail (i.e., the auction or remarketing failed to produce buyers for all interested sellers at a payment rate at or below the maximum rate specified by the security's terms). As a result, many taxpayers could not sell auction rate securities for par amount. The natural outcome of these failures is litigation in which taxpayers assert claims against

another person for its conduct relating to auction rate securities (e.g., failure to disclose the potential for illiquidity).

**Revenue Procedure
2008-58***

● Discussion and analysis of auction rate securities: **Tax Management Portfolio 501, X.A.2.b.(3).(b).(2).**

Permitting without challenge certain taxpayer-friendly positions on settlements of potential legal claims relating to auction rate securities.

IRS will not challenge the following positions by taxpayers receiving certain settlement offers before June 30, 2009, that include window periods not extending beyond Dec. 31, 2012, and require taxpayers to deliver auction rate securities purchased before Feb. 14, 2008: (1) the taxpayer continues to own the securities on receiving or accepting the offer; (2) the taxpayer does not realize any income as a result of receiving or accepting the offer and does not reduce the basis of the security from its original purchase price; or (3) the taxpayer's amount realized from the sale of the security during the window period to the person offering the settlement is the full amount of the cash proceeds received.

● Rev. Proc. 2008-58 (189 TaxCore, 9/30/08).

● **Daily Tax Report** article on Rev. Proc. 2008-58 (189 DTR G-6, 9/30/08).

Relief for Tax-Exempt Bond Market

Background: Notice 2008-41 was issued in April 2008 in response to auction failures and liquidity constraints in the auction rate bond sector of the tax-exempt bond market.

● Discussion and analysis of modifications of tax-exempt bonds generally: **Tax Management Portfolio 535, III.G.6.**

● Discussion and analysis of reissuance standards for state and local bonds: **Tax Management Portfolio 501, X.A.2.b.(3).(b).**

Notice 2008-88

Expanding circumstances and periods during which tax-exempt bonds purchased by their governmental issuers will be treated as continuing in effect.

This notice expands the relief in Notice 2008-41 to provide that IRS and Treasury—solely for purposes of Sections 103 and 141 through 150—will treat a tax-exempt "qualified tender bond" (a tax-exempt bond with features specified in Notice 2008-41) or tax-exempt commercial paper purchased by its state or local government issuer as temporarily continuing in effect without resulting in a reissuance or retirement of the purchased bond if the issuer holds the bond not later than Dec. 31, 2009. The notice is effective as of March 25, 2008.

● Notice 2008-88 (191 Taxcore, 10/2/08).

● **Daily Tax Report** article on Notice 2008-88 (191 DTR G-2, 10/2/08).

Notice 2008-80

Providing criteria for partnerships investing in tax-exempt bonds in qualifying for monthly closing elections.

* as corrected

This notice contains a proposed revenue procedure designed to promote stability in the tax-exempt bond market by providing more specific eligibility criteria that partnerships investing in tax-exempt bonds must meet to qualify for monthly closing elections to allow their partners to take into account monthly the inclusions required by §§702 and 707(c). Eligible tax-exempt bond partnerships may rely immediately on the proposed revenue procedure.

- Notice 2008-80 (181 Taxcore, 9/18/08).
- **Daily Tax Report** article on Notice 2008-80 (181 DTR G-9, 9/18/08).
- Discussion and analysis of monthly closing elections: **Tax Management Portfolio 712, II.C.**
- Discussion and analysis of §702 segregation of partnership items: **Tax Management Portfolio 712, II.B.**
- Discussion and analysis of §707(c) guaranteed payments: **Tax Management Portfolio 712, VI.**

Increased Lending Flexibility for Foreign Corporations

Background: Section 956 provides that some investments of earnings in "United States property" by controlled foreign corporations (CFCs) result in the taxation to the company's U.S. shareholders of a pro rata portion of the company's earnings and profits. "United States property" is defined to include an "obligation" of a U.S. person, but Notice 88-108 effectively excludes from the definition of "obligation" an obligation that would be an investment in "United States property" if held at the end of a CFC's taxable year, so long as the obligation is collected within 30 days from the time it is incurred. The exclusion does not apply if the CFC holds for 60 or more calendar days during the taxable year obligations that would be an investment in "United States property" if held at the end of the CFC's taxable year.

- Discussion and analysis of modifications of "United States property" generally: **Tax Management Portfolio 929, II.**
- Discussion and analysis of "obligations of U.S. persons" and Notice 88-108: **Tax Management Portfolio 929, II.F.**

Notice 2008-91

Expanding Notice 88-108 exclusion period from 30 to 60 days.

To facilitate liquidity in the near term, IRS and Treasury will issue regulations providing that, for Section 956 purposes, a CFC may choose to exclude from the definition of "obligation" an obligation held by the CFC that would be an investment in "United States property" if the obligation is collected within 60 days from the time it is incurred. The exclusion does not apply if the CFC holds for 180 or more calendar days during its taxable year obligations that would be an investment in "United States property." A CFC may apply Notice 2008-91 or Notice 88-108, but not both. Notice 2008-91 applies for the first two taxable years of foreign corporation ending after Oct. 3, 2008.

- Notice 2008-91 (194 Taxcore, 10/7/08).
- **Daily Tax Report** article on Notice 2008-91 (194 DTR G-1, 10/7/08).

Federal Financial Assistance to Banks

Background: Section 597 states generally that federal financial assistance provided to a bank or domestic building and loan association is includible in income. The Emergency Economic Stabilization Act created the Troubled Asset Relief Program (TARP), which affects banks and other financial institutions.

- Discussion and analysis of federal assistance to financial institutions: **Tax Management Portfolios 540, IV.B.2.c.(6), and 560, V.B.1.f.**

Notice 2008-101

Exempting amounts furnished to a financial institution under TARP.

The IRS states that no amount furnished by Treasury to a financial institution under TARP will be treated as the provision of federal financial assistance within the meaning of Section 597. Any future guidance to the contrary will not apply retroactively to transactions with Treasury.

- Notice 2008-101 (199 TaxCore, 10/15/08).
- **Daily Tax Report** article on Notice 2008-101 (199 DTR G-1, 10/15/08).

Executive Compensation Limitations

Background: Section 162(m) generally limits to \$1 million the deduction for compensation paid to certain corporate executives. Section 280G provides that a corporate executive's excess parachute payments are not deductible and imposes an excise tax for those amounts. The Emergency Economic Stabilization Act added new Section 162(m)(5), reducing the \$1 million deduction limitation to \$500,000 for some years and turning off application of exceptions such as the exception for performance-based compensation. Section 280G(e) expands the definition of "parachute payment" to include certain payments made contingent on severance from employment. The Act also establishes the Troubled Asset Auction Program (TAAP), the Capital Purchase Program (CPP), and the Programs for Systemically Significant Failing Institutions (PSSFI).

- Discussion and analysis of the \$1 million limit on deduction for otherwise deductible compensation: **Tax Management Portfolio 390, IX.A.**

- Discussion and analysis of golden parachutes generally: **Tax Management Portfolio 396, I.A.**

Notice 2008-94

Providing question-and-answer guidance on application of new Sections 162(m)(5) and 280G(e).

The IRS and Treasury provide that any financial institution that sells more than \$300 million of troubled assets to Treasury in TAAP is prohibited from October 3, 2008, and for the term of the program, from entering into new executive employment

contracts that include golden parachutes. The Notice also provides guidance in a question-and-answer format on the \$500,000 deduction limitation, prohibition on deduction of certain golden parachute payments to senior executives, and 20% excise tax on senior executives for those payments.

- Notice 2008-94 (199 TaxCore, 10/15/08).

- **Daily Tax Report** article on Notice 2008-94 (199 DTR G-2, 10/15/08).

Treasury Interim Rule
2008-24781

Announcing more stringent executive compensation rules for period during which Treasury holds equity issued under CPP.

A participating financial institution must ensure that incentive compensation does not encourage senior executive officers to take unnecessary risks that threaten the value of the institution, must require recovery of any bonus or incentive compensation paid to a senior executive based on statements that later prove to be materially inaccurate, must not make golden parachute payments to a senior executive, and must agree not to deduct more than \$500,000 of executive compensation for each senior executive.

- Treasury Interim Rule 2008-24781 (199 TaxCore, 10/15/08).

- **Daily Tax Report** article on Treasury Executive Compensation Rules (199 DTR G-2, 10/15/08).

Treasury News Release
on Executive
Compensation Rules

Announcing more stringent executive compensation rules for firms participating in PSSFI.

Similar standards as those under Treasury Interim Rule 2008-24781 apply to firms participating in PSSFI, except that golden parachutes are defined more strictly to prohibit any payments to departing executives.

- Treasury News Release on Executive Compensation Rules (199 TaxCore, 10/15/08).

- **Daily Tax Report** article on the Treasury News Release on Executive Compensation Rules (199 DTR G-2, 10/15/08).

Preservation of Tax Losses

Background: Section 382 provides generally 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 that year. Under Section 382(h), built-in losses also are subject to the limitation. The Section 382 limitation for a post-change year is generally the fair market value of the loss corporation's stock immediately before the ownership change, multiplied by the applicable long-term tax-exempt rate. Whether an ownership change has occurred is generally determined as of the "testing date." IRS and Treasury are relaxing the Section 382 limitation, or suspending its applicability altogether, in some situations.

- Discussion and analysis of loss corporations: **Tax Management Portfolio 780, III.D.**

- Discussion and analysis of ownership changes generally: **Tax Management Portfolio 780, III.**

- Discussion and analysis of the §382 limitation generally: **Tax Management Portfolio 780, III.F.**
- Discussion and analysis of the "testing date" rules generally applicable: **Tax Management Portfolio 780, III.B.1.**
- Discussion and analysis of the general applicability of Section 382 to built-in losses: **Tax Management Portfolio 780, III.H.**
- Discussion and analysis of the "change date" generally: **Tax Management Portfolio 780, III.B.4.b.**

Notice 2008-100

Turning off loss carryover limitation when Treasury acquires additional shares of loss corporation.

IRS and Treasury provide guidance (and will issue regulations) that no change in Treasury's ownership of a loss corporation that Treasury acquired in the CPP (discussed above) will be an ownership change. Also, the shares that any loss corporation redeems from Treasury will be treated as never having been outstanding, for purposes of measuring owner shifts. In addition, warrants will be treated as options (not stock), an option acquired by Treasury will not be deemed exercised, and no capital contribution by Treasury will be considered part of a plan a principal purpose of which is to avoid or increase the limitation. Taxpayers may rely on these rules now.

- Notice 2008-100 (199 TaxCore, 10/15/08).
- **Daily Tax Report** article on Notice 2008-100 (199 DTR G-2, 10/15/08).
- Discussion and analysis of warrants and options for §382 purposes, and of the "deemed exercise" rule for options: **Tax Management Portfolio 780, III.C.2.d.**
- Discussion and analysis of capital contributions generally: **Tax Management Portfolio 759, III.E.3.**
- Discussion and analysis of disqualified capital contributions: **Tax Management Portfolio 780, III.F.1.e.(1).**

Notice 2008-84

Turning off loss carryover limitation when United States acquires greater-than-50 percent interest in loss corporation.

IRS and Treasury will issue regulations under Section 382(m) providing that the "testing date" (as defined in Regulations Section 1.382-2(a)(4)) does not include any date as of the close of which the United States owns a more-than-50 percent interest in a Section 382 loss corporation. The regulations will apply to any taxable year ending after Sept. 25, 2008.

- Notice 2008-84 (188 TaxCore, 9/29/08).
- **Daily Tax Report** article on Notice 2008-84 (188 DTR G-1, 9/29/08).

Notice 2008-83

Turning off built-in loss treatment and pre-change-date-deduction treatment of deductions for losses or bad debts following certain banks' ownership changes. For purposes of Section 382(h), any deduction properly allowed after an ownership change to a bank for losses on loans or bad debts (including for a reasonable addition to a reserve for bad

debts) will not be treated as (i) a built-in loss or (ii) a deduction attributable to periods before the change date. A corporation that is a "bank" (as defined in Section 581) both immediately before and after the change date may rely on this notice now.

- Notice 2008-83 (190 TaxCore, 10/1/08).

- **Daily Tax Report** article on Notice 2008-83 (190 DTR G-6, 10/1/08).

- Discussion and analysis of federal income tax definition of "bank": **Tax Management Portfolio 503, V.B.1.**

- Discussion and analysis of entity classification of banks: **Tax Management Portfolio 700, II.Q.**

- Discussion and analysis of bad debt deduction for banks: **Tax Management Portfolio 538, VI.B.2.**

Notice 2008-78

Taking into account capital contributions to provide corporations more leeway in using losses following changes of ownership.

IRS and Treasury issued rules in this notice—and said they intend to issue regulations—providing relief from Section 382(l)(1)(B) by stating that a capital contribution is not presumed to be part of a plan the principal purpose of which is to avoid or increase a Section 382 limitation solely as a result of having been made during the two-year period ending on the change date. The rules (in the notice and the forthcoming regulations) also provide relief from Section 382(l)(1)(A) by setting forth four safe harbors under which a capital contribution will not be considered part of a plan.

- Notice 2008-78 (188 TaxCore, 9/29/08).

- **Daily Tax Report** article on Notice 2008-78 (188 DTR G-6, 9/29/08).

Notice 2008-76

Turning off loss carryover limitation when the United States acquires obligations and other securities under the 2008 Housing and Economic Recovery Act.

IRS and Treasury will issue regulations under Section 382(m) providing that the "testing date" (as defined in Regulations Section 1.382-2(a)(4)) does not include any date on or after the date on which the United States (or an agency or instrumentality thereof) acquires, in a "Housing Act Acquisition," stock or an option to acquire stock in a corporation. The regulations will apply after Sept. 6, 2008.

- Notice 2008-76 (174 TaxCore, 9/9/08).

- **Daily Tax Report** article on Notice 2008-76 (174 DTR G-11, 9/9/08).

Money Market Share-Price Guarantee

Background: To address "temporary dislocations in credit markets," Treasury has opened a three-month share-price guarantee program for money market funds. Treasury has the option to renew the program. The purpose of the program is to protect shareholders for amounts they hold in money market funds. The guarantee will be triggered if a participating fund's net asset value falls below \$0.995 (referred to as "breaking the buck").

Guarantee Program *Providing help to eligible money market funds by guaranteeing a share price of*

at least \$1.

On Sept. 29, 2008, Treasury opened its Temporary Guarantee Program for Money Market Funds, under which Treasury—for an initial three-month term—will guarantee the share price of any publicly offered money market mutual fund (retail or institutional) that is regulated under Rule 2a-7 of the Investment Company Act of 1940 and applies for, and pays a fee for, participation in the program. The program covers shareholders for amounts held in funds as of the close of business on Sept. 19, 2008. To participate, a fund with a net asset value per share of at least \$0.9975 as of the close of business on Sept. 19 must pay a fee of 0.01 percent, 1 basis point, based on the number of shares then outstanding; the fee is 0.015 percent, 1.5 basis points for a fund with a net asset value of at least \$0.995 and below \$0.9975. The guarantee will be triggered if a fund's net asset value falls below \$0.995. Treasury has received approval of the president to make available as necessary the assets of the Exchange Securitization Fund to guarantee program payments.

- Treasury News Release on Temporary Guarantee Program (189 Taxcore, 9/30/08).

Notice 2008-81

Announcing Temporary Guarantee Program, and confirming that program will not jeopardize tax-exempt funds' exemptions.

Treasury announced its Temporary Guarantee Program (described above) to enable money market funds to maintain stable \$1 per share net asset values, and said that participation in the program will not be treated as a federal guarantee that jeopardizes the tax-exempt treatment of payments by "tax-exempt money market funds" (i.e., money market funds holding enough of their total assets in tax-exempt bonds to be eligible to pay Section 852(b)(5) exempt interest dividends).

- Notice 2008-81 (184 Taxcore, 9/23/08).

- **Daily Tax Report** article on Notice 2008-81 (184 DTR GG-1, 9/23/08).

- Discussion and analysis of tax-exempt bonds generally: **Tax Management Portfolio 501, X.A.2.**

- Discussion and analysis of federally guaranteed bonds: **Tax Management Portfolio 501, X.A.2.b.(7).**

- Discussion and analysis of §852(b)(5) exempt interest dividends: **Tax Management Portfolio 740, X.**

Notice 2008-92

Announcing that participation in Temporary Guarantee Program will not violate diversification requirements and will not trigger investor control rules.

IRS and Treasury will not assert that participation in the Temporary Guarantee Program by an "insurance-dedicated money market fund" (a fund with beneficial interests held by investors permitted under Regulations Section 1.817-5(h)(1)) causes a violation of the Section 817(h) diversification requirements in the case of a segregated asset account investing in

the fund, or that the fund's participation causes the holder of a variable contract supported by a segregated asset account investing in the fund to be treated as an owner of the fund.

- Notice 2008-92 (195 TaxCore, 10/8/08).
- **Daily Tax Report** article on Notice 2008-92 (195 DTR G-1, 10/8/08).
- Discussion and analysis of the adequate-diversification requirements: **Tax Management Portfolio 546, VI.A.7.**
- Discussion and analysis of investor control: **Tax Management Portfolio 546, VI.A.8.c.**

Technical Correction *Announcing technical correction that will permit participation by funds with policy of maintaining stable net asset value.*

Funds that have a policy of maintaining a stable net asset value or share price that is greater than \$1.00, and had that policy on September 19, 2008, are eligible to participate in the guarantee program (provided they meet the original criteria). Funds that are eligible as a result of the technical correction must enroll by October 10, 2008.

Nonrecognition in Certain Securities Lending Transactions

Background: Section 1058(a) provides that a taxpayer transferring securities under an agreement that meets the requirements of Section 1058(b) for an obligation under the agreement, or exchanging rights under the agreement for securities identical to the transferred securities, recognizes no gain or loss. Brokers frequently borrow securities to complete sales of securities because of delays that they face in obtaining securities from sellers and transfer agent. Encouraging brokers to borrow securities in these transactions is considered desirable from a market standpoint. Because a large number of securities loans have terminated as a result of default by borrowers, IRS saw a need to address the application of Section 1058(a) to situations in which securities are transferred under a Section 1058(b) agreement, the transferee subsequently defaults under the agreement as a result of its (or an affiliate's) bankruptcy, and no more than 30 days later the transferor uses collateral provided under the agreement to purchase identical securities.

- Discussion and analysis of securities acquired under Section 1058(b) agreements: **Tax Management Portfolio 560, III.B.5.**

Revenue Procedure 2008-63 *Treating purchase of identical securities following termination of securities loan by borrower's bankruptcy as exchange of rights.*

For taxable years ending after Dec. 31, 2007, IRS will treat the purchase by certain lenders of collateral provided under a Section 1058(b) securities loan agreement as an exchange of rights under the agreement for identical securities under Section 1058(a) and, thus, as triggering no gain or loss.

- Revenue Procedure 2008-63 (188 Taxcore, 9/29/08).
- **Daily Tax Report** article on Rev. Proc. 2008-63 (188 DTR G-5, 9/29/08).

No-Challenge Positions in Auction Rate Securities Claims

Background: An auction rate security is a security in which the payment rate is reset periodically under a process designed to produce the minimum rate necessary to enable all interested sellers to sell the security to willing buyers at the par amount of the security plus

accrued but unpaid periodic payments. On Feb. 12, 2008, auctions of auction rate securities began to fail (i.e., the auction or remarketing failed to produce buyers for all interested sellers at a payment rate at or below the maximum rate specified by the security's terms). As a result, many taxpayers could not sell auction rate securities for par amount. The natural outcome of these failures is litigation in which taxpayers assert claims against another person for its conduct relating to auction rate securities (e.g., failure to disclose the potential for illiquidity).

**Revenue Procedure
2008-58***

● Discussion and analysis of auction rate securities: **Tax Management Portfolio 501, X.A.2.b.(3).(b).(2).**

Permitting without challenge certain taxpayer-friendly positions on settlements of potential legal claims relating to auction rate securities.

IRS will not challenge the following positions by taxpayers receiving certain settlement offers before June 30, 2009, that include window periods not extending beyond Dec. 31, 2012, and require taxpayers to deliver auction rate securities purchased before Feb. 14, 2008: (1) the taxpayer continues to own the securities on receiving or accepting the offer; (2) the taxpayer does not realize any income as a result of receiving or accepting the offer and does not reduce the basis of the security from its original purchase price; or (3) the taxpayer's amount realized from the sale of the security during the window period to the person offering the settlement is the full amount of the cash proceeds received.

● Rev. Proc. 2008-58 (189 TaxCore, 9/30/08).

● **Daily Tax Report** article on Rev. Proc. 2008-58 (189 DTR G-6, 9/30/08).

Relief for Tax-Exempt Bond Market

Background: Notice 2008-41 was issued in April 2008 in response to auction failures and liquidity constraints in the auction rate bond sector of the tax-exempt bond market.

Notice 2008-88

● Discussion and analysis of modifications of tax-exempt bonds generally: **Tax Management Portfolio 535, III.G.6.**

● Discussion and analysis of reissuance standards for state and local bonds: **Tax Management Portfolio 501, X.A.2.b.(3).(b).**

Expanding circumstances and periods during which tax-exempt bonds purchased by their governmental issuers will be treated as continuing in effect.

This notice expands the relief in Notice 2008-41 to provide that IRS and Treasury—solely for purposes of Sections 103 and 141 through 150—will treat a tax-exempt "qualified tender bond" (a tax-exempt bond with features specified in Notice 2008-41) or tax-exempt commercial paper purchased by its state or local government issuer as temporarily continuing in effect without resulting in a reissuance or retirement of the purchased bond if the issuer holds the bond not later than Dec. 31, 2009. The notice is effective as of March 25, 2008.

* as corrected

Notice 2008-80

- Notice 2008-88 (191 Taxcore, 10/2/08).
 - **Daily Tax Report** article on Notice 2008-88 (191 DTR G-2, 10/2/08).
- Providing criteria for partnerships investing in tax-exempt bonds in qualifying for monthly closing elections.*

This notice contains a proposed revenue procedure designed to promote stability in the tax-exempt bond market by providing more specific eligibility criteria that partnerships investing in tax-exempt bonds must meet to qualify for monthly closing elections to allow their partners to take into account monthly the inclusions required by §§702 and 707(c). Eligible tax-exempt bond partnerships may rely immediately on the proposed revenue procedure.

- Notice 2008-80 (181 Taxcore, 9/18/08).
- **Daily Tax Report** article on Notice 2008-80 (181 DTR G-9, 9/18/08).
- Discussion and analysis of monthly closing elections: **Tax Management Portfolio 712, II.C.**
- Discussion and analysis of §702 segregation of partnership items: **Tax Management Portfolio 712, II.B.**
- Discussion and analysis of §707(c) guaranteed payments: **Tax Management Portfolio 712, VI.**

Increased Lending Flexibility for Foreign Corporations

Background: Section 956 provides that some investments of earnings in "United States property" by controlled foreign corporations (CFCs) result in the taxation to the company's U.S. shareholders of a pro rata portion of the company's earnings and profits. "United States property" is defined to include an "obligation" of a U.S. person, but Notice 88-108 effectively excludes from the definition of "obligation" an obligation that would be an investment in "United States property" if held at the end of a CFC's taxable year, so long as the obligation is collected within 30 days from the time it is incurred. The exclusion does not apply if the CFC holds for 60 or more calendar days during the taxable year obligations that would be an investment in "United States property" if held at the end of the CFC's taxable year.

Notice 2008-91

- Discussion and analysis of modifications of "United States property" generally: **Tax Management Portfolio 929, II.**
- Discussion and analysis of "obligations of U.S. persons" and Notice 88-108: **Tax Management Portfolio 929, II.F.**

Expanding Notice 88-108 exclusion period from 30 to 60 days.

To facilitate liquidity in the near term, IRS and Treasury will issue regulations providing that, for Section 956 purposes, a CFC may choose to exclude from the definition of "obligation" an obligation held by the CFC that would be an investment in "United States property" if the obligation is collected within 60 days from the time it is incurred. The exclusion does not apply if the CFC holds for 180 or more calendar days during its taxable year obligations that would be an investment in "United States property." A CFC may apply Notice 2008-91 or Notice 88-108,

but not both. Notice 2008-91 applies for the first two taxable years of foreign corporation ending after Oct. 3, 2008.

- Notice 2008-91 (194 Taxcore, 10/7/08).

- ***Daily Tax Report*** article on Notice 2008-91 (194 DTR G-1, 10/7/08).

By Allen Calboun.

Copyright©2008 by The Bureau of National Affairs, Inc.