UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE STATE OF NEW YORK ex rel. ERIC RASMUSEN, Plaintiff, - against - CITIGROUP INC., Defendant.	No. 1:15-cv-07826-LAK

DECLARATION OF EDMUND POLUBINSKI III

EDMUND POLUBINSKI III declares pursuant to 28 U.S.C. §1746:

1. I am an attorney licensed to practice in the State of New York, and I am admitted to practice before this Court. I am a partner with the law firm of Davis Polk & Wardwell LLP, counsel for Defendant Citigroup Inc.

2. I submit this Declaration in support of Defendant's Motion to Dismiss the Complaint and to place before this Court certain documents relevant to this Motion.

3. Attached hereto as **Exhibit A** is a true and correct copy of I.R.S. Notice 2008-100, 2008-2 C.B. 1081.

4. Attached hereto as **Exhibit B** is a true and correct copy of I.R.S. Notice 2009-14, 2009-7 I.R.B. 516.

5. Attached hereto as **Exhibit C** is a true and correct copy of I.R.S. Notice 2009-38, 2009-18 I.R.B. 901.

6. Attached hereto as **<u>Exhibit D</u>** is a true and correct copy of I.R.S. Notice 2010-2, 2010-2 I.R.B. 251.

7. Attached hereto as **<u>Exhibit E</u>** is a true and correct copy of I.R.S. Notice 2008-83, 2008-2 C.B. 905.

8. Attached hereto as **<u>Exhibit F</u>** is a true and correct copy of the Notice of Election to Decline Intervention filed by New York State in the instant case, which was served upon Defendant Citigroup Inc. on October 6, 2015.

9. Attached hereto as **<u>Exhibit G</u>** is a true and correct excerpt of a January 13, 2010 report of the Congressional Oversight Panel entitled <u>January Oversight Report, Exiting Tarp and Unwinding its Impact on the Financial Markets</u>, consisting of the cover page and pages 12–16.

10. Attached hereto as **<u>Exhibit H</u>** is a true and correct excerpt of Defendant Citigroup Inc.'s Form 10-K for the fiscal year 2010, consisting of the cover page and page 77.

11. Attached hereto as **<u>Exhibit I</u>** is a true and correct copy of a blog post by Eric J. Rasmusen entitled <u>Rasmusen: How I Came to Be Suing Citigroup for $2.4 Billion as a Tax Whistleblower</u>, published on TaxProf Blog (Oct. 21, 2015), which is available at http://taxprof.typepad.com/taxprof_blog/2015/10/rasmusen-.html.

12. Attached hereto as **<u>Exhibit J</u>** is a true and correct copy of the Sponsors Memorandum for the New York False Claims Act, 2010 A.B. 11568, submitted to the New York Assembly on October 29, 2010.

13. Attached hereto as **<u>Exhibit K</u>** is a true and correct copy of the Complaint.[1]

[1] The Complaint was originally filed in New York State Supreme Court, New York County on January 24, 2013 under Index Number 100175/2013. It was unsealed on September 2, 2015.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 7, 2015
New York, New York

s/ Edmund Polubinski III

EXHIBIT A

Internal Revenue bulletin

Bulletin No. 2008-44
November 3, 2008

HIGHLIGHTS OF THIS ISSUE

These synopses are intended only as aids to the reader in identifying the subject matter covered. They may not be relied upon as authoritative interpretations.

INCOME TAX

T.D. 9424, page 1012.

Final regulations under section 1502 of the Code provide rules for determining the tax consequences of a member's transfer (including by deconsolidation and worthlessness) of loss shares of subsidiary stock. The regulations also provide that section 362(e)(2) generally does not apply to transactions between members of a consolidated group.

REG–157711–02, page 1087.

This document contains a partial withdrawal of proposed regulations under section 1502 of the Code. Proposed section 1.1502-13(e)(4), which would have suspended the application of section 362(e)(2) in the case of intercompany transactions, and section 1502-32(c)(1)(ii), relating to the treatment of items attributable to property transferred in an intercompany section 362(e)(2) transaction, are withdrawn.

Notice 2008–94, page 1070.

This notice provides guidance on certain executive compensation provisions of the Emergency Economic Stabilization Act of 2008 (EESA). Section 302 of EESA added new sections 162(m)(5) and 280G(e) to the Code. Section 162(m) limits the deductibility of compensation paid to certain corporate executives and section 280G provides that a corporate executive's excess parachute payments are not deductible and imposes (under Code section 4999) an excise tax on the executive for those amounts.

Notice 2008–95, page 1076.

This notice provides instructions on how and where to file amended returns to take advantage of section 3082(a) of Public Law 110–289. This notice also provides a benefit to certain taxpayers who took casualty loss deductions resulting from Hurricanes Katrina, Wilma, or Rita and who later received certain grants in compensation.

Notice 2008–96, page 1077.

This notice updates and amplifies the procedures for the allocation of credits under the qualifying advanced coal project program of section 48A of the Code. Notice 2007–52 updated and amplified.

Notice 2008–97, page 1080.

This notice provides that no allocation of credits will be conducted in 2008–09 under the qualifying gasification project program of section 48B of the Code. Notice 2007–53 updated.

Notice 2008–100, page 1081.

Section 382. This document provides guidance regarding section 382 treatment of interests in a loss corporation acquired by the federal government pursuant to the Emergency Economic Stabilization Act of 2008.

Notice 2008–101, page 1082.

This notice provides clarification that, unless and until guidance is issued to the contrary, no amount furnished by the Treasury Department to a financial institution pursuant to the Troubled Asset Relief Program (TARP) established by the Secretary of the Treasury under the Emergency Economic Stabilization Act of 2008 will be treated as the provision of federal financial assistance within the meaning of section 597 of the Code.

(Continued on the next page)

Announcements of Disbarments and Suspensions begin on page 1090.
Finding Lists begin on page ii.

Department of the Treasury
Internal Revenue Service

employment with the employer maintaining the plan.

The 2007 final regulations require a pension plan's normal retirement age to be an age that is not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed. The 2007 final regulations provide that a normal retirement age of 62 or later (or age 50 or later, in the case of a plan in which substantially all of the participants are qualified public safety employees (within the meaning of § 72(t)(10)(B))) is deemed to satisfy this requirement, and a normal retirement age lower than 55 is presumed not to satisfy the requirement unless the Commissioner determines otherwise on the basis of facts and circumstances. Whether a normal retirement age that is at least 55 but below 62 satisfies the requirement is based on facts and circumstances.

The 2007 final regulations are generally effective May 22, 2007, with a later effective date for governmental plans and certain collectively bargained plans. For governmental plans, the 2007 final regulations are effective for plan years beginning on or after January 1, 2009.

Notice 2007–69 provided temporary relief for certain plans that may have to change their definition of normal retirement age to satisfy the 2007 final regulations. The relief is available to certain plans that might otherwise be required to be amended to raise the plan's normal retirement age effective before the first day of the first plan year beginning after June 30, 2008. Because the 2007 final regulations are not effective for governmental plans until 2009, the relief in Notice 2007–69 does not apply to governmental plans.

Notice 2007–69 pointed out that the 2007 final regulations do not contain a safe harbor or other guidance with respect to a normal retirement age conditioned on the completion of a stated number of years of service, stating that a plan under which a participant's normal retirement age changes to an earlier date upon completion of a stated number of years of service typically will not satisfy the vesting or accrual rules of § 411. The notice asked for comments from sponsors of plans that are not subject to the requirements of § 411, such as governmental plans, on whether such a plan may define normal retirement age based on years of service. Specifically, comments were requested on whether and how a pension plan with a normal retirement age conditioned on the completion of a stated number of years of service satisfies the requirement in § 1.401(a)–1(b)(1)(i) that a pension plan be maintained primarily to provide for the payment of definitely determinable benefits after retirement or attainment of normal retirement age and how such a plan satisfies the pre-ERISA vesting rules.

III. Extension of Effective Date of 2007 Final Regulations for Governmental Plans

The Service and Treasury intend to amend the 2007 final regulations to change the effective date for governmental plans to plan years beginning on or after January 1, 2011. Governmental plan sponsors may rely on this notice with respect to the extension until such time as the 2007 final regulations are so amended.

DRAFTING INFORMATION

The principal author of this notice is James P. Flannery of the Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this notice, please contact Mr. Flannery via e-mail at *retirementplanquestions@irs.gov.*

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 at (202) 622–7700 (not a toll-free call).

Clarification of Troubled Asset Relief Program Funds Under Section 597

Notice 2008–101

The purpose of this notice is to provide clarification on the treatment under section 597 of the Internal Revenue Code (Code) of amounts furnished to a financial institution pursuant to the Troubled Asset Relief Program (TARP) of the Emergency Economic Stabilization Act of 2008, Div. A of Pub. Law No. 110–343 (EESA), which was enacted on October 3, 2008.

Unless and until guidance is issued by the Department of the Treasury and the Internal Revenue Service to the contrary, no amount furnished by the Department of the Treasury to a financial institution pursuant to the TARP established by the Secretary under EESA will be treated as the provision of Federal financial assistance within the meaning of section 597 of the Code and the regulations thereunder. Any future contrary guidance will not apply to transactions with the Department of the Treasury, or to securities issued by financial institutions to the Department of the Treasury, prior to the publication of that guidance, or pursuant to written binding contracts entered into prior to that date.

Except with respect to the treatment of amounts furnished pursuant to TARP as expressly described in this notice, no inference should be drawn from this notice regarding the treatment under section 597 of the Code or the regulations thereunder of any other program or payments.

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26 CFR 1.168(k)–1: Additional first year depreciation deduction.
(Also: §§ 38, 41, 52, 53, 168, 6401.)

Rev. Proc. 2008–65

SECTION 1. PURPOSE

This revenue procedure provides guidance under § 3081 of the Housing and Economic Recovery Act of 2008, Pub. L. No. 110–289, 122 Stat. 2654 (July 30, 2008) (Housing Act). Section 3081(a) of the Housing Act amends § 168(k) of the Internal Revenue Code by adding § 168(k)(4), allowing corporations to elect not to claim the 50-percent additional first year depreciation for certain new property acquired after March 31, 2008, and placed in service generally before January 1, 2009, and instead to increase their business credit limitation under § 38(c) or alternative minimum tax (AMT) credit limitation under § 53(c). This revenue procedure clarifies the rules regarding the effects of making the § 168(k)(4) election, the property eligible for the election, and the computation of the amount by which the business credit limitation and AMT credit limitation may be increased if the election is made. The Internal Revenue Service (IRS) and Treasury Department intend to publish future guidance regarding the time and manner for making the § 168(k)(4) election, for allocating the credit limitation increases allowed by the election, and for making the election to apply § 3081(b) of the Housing Act by certain automotive partnerships, and regarding the procedures applicable to partnerships with corporate

EXHIBIT B

Internal Revenue
bulletin

Bulletin No. 2009-7
February 17, 2009

HIGHLIGHTS OF THIS ISSUE

These synopses are intended only as aids to the reader in identifying the subject matter covered. They may not be relied upon as authoritative interpretations.

INCOME TAX

T.D. 9441, page 460.
REG–144615–02, page 561.

Final, temporary, and proposed regulations under section 482 of the Code provide guidance with respect to the sharing of costs and risks under cost sharing arrangements. The regulations replace the existing guidance under regulations section 1.482–7 to provide clarification and additional guidance regarding the scope and valuation of the external inputs for which arm's length consideration must be provided as an entry condition into cost sharing ("buy-ins" under former regulations section 1.482–7), as well as to address other technical and procedural issues that have arisen in the course of administering the cost sharing rules. A public hearing on the proposed regulations is scheduled for April 21, 2009.

Notice 2009–14, page 516.

Section 382. This notice provides additional guidance regarding the application of section 382 treatment of interest in a loss corporation acquired by the federal government pursuant to the Emergency Economic Stabilization Act of 2008 (EESA). Notice 2008–100 amplified and superseded.

Rev. Proc. 2009–17, page 517.

Substitute tax forms and schedules. Requirements are set forth for privately designed and printed federal tax forms and conditions under which the Service will accept computer prepared and computer-generated tax forms and schedules. Rev. Proc. 2007–68 superseded.

Finding Lists begin on page ii.

Department of the Treasury
Internal Revenue Service

Part III. Administrative, Procedural, and Miscellaneous

Treatment of Corporations Whose Instruments are Acquired by the Treasury Department Under Certain Programs Pursuant to the Emergency Economic Stabilization Act of 2008

Notice 2009–14

This notice provides additional guidance regarding the application of section 382 and other provisions of law to corporations whose instruments are acquired by the Treasury Department (Treasury) pursuant to the Emergency Economic Stabilization Act of 2008, P. L. 110–343 (EESA). This notice amplifies and supersedes Notice 2008–100, 2008–44 I.R.B. 1081, to address other EESA programs.

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). This notice provides guidance to corporate issuers with respect to five programs established under EESA: (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); and (v) the Automotive Industry Financing Program (TARP Auto). 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 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 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 herein have the same meaning as they do in section 382 of the Code and the regulations thereunder or in EESA. Unless otherwise specified, a reference herein to "section" is to the particular section of the Code or regulations thereunder.

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. *Treatment of indebtedness and preferred stock acquired by Treasury*. For all Federal income tax purposes, any instrument issued to Treasury pursuant to the Programs, whether owned by Treasury or subsequent holders, shall be treated as an instrument of indebtedness if denominated as such, and as stock described in section 1504(a)(4) if denominated as preferred stock. Any amount received by an issuer under the Programs shall be treated as received, in its entirety, as consideration in exchange for the instruments issued. No such instrument shall be treated as stock for purposes of section 382 while held by Treasury or by other holders, except that preferred stock will be treated as stock for purposes of section 382(e)(1).

B. *Treatment of warrants acquired by Treasury*. For all Federal income tax purposes, any warrant to purchase stock acquired by Treasury pursuant to the Public CPP, TARP TIP, and TARP Auto, 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 acquired by 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 acquired by Treasury pursuant to the S Corp CPP shall be treated as an ownership interest in the underlying indebtedness.

C. *Section 382 treatment of stock acquired by Treasury*. For purposes of section 382, with respect to any stock (other than preferred stock) acquired by 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.

D. *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 the issuing corporation redeems stock held by Treasury that was acquired 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.

E. *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.

IV. Reliance on Notice.

Taxpayers may rely on the rules described in Section III. 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 Programs prior to the publication of that guidance, or (ii) issued to Treasury pursuant to the Programs under binding contracts entered into prior to the publication of that guidance. In exercising its authority under EESA in this notice, the Treasury and the Service do not intend to suggest that similar Federal income tax results would obtain with respect to instruments similar to those described herein that are not issued under the Programs. Accordingly, the Federal income tax consequences of instruments not issued under the Programs should continue to be determined based upon specific facts and circumstances.

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 at (202) 622–7750 (not a toll-free call).

Note. This revenue procedure will be reproduced as the next revision of IRS Publication 1167, General Rules and Specifications for Substitute Forms and Schedules.

Rev. Proc. 2009–17

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EXHIBIT C

Internal Revenue bulletin

Bulletin No. 2009-18
May 4, 2009

HIGHLIGHTS OF THIS ISSUE

These synopses are intended only as aids to the reader in identifying the subject matter covered. They may not be relied upon as authoritative interpretations.

INCOME TAX

REG–144689–04, page 906.

Proposed regulations under section 706 of the Code relate to the determination of partners' distributive shares of partnership items of income, gain, loss, deduction and credit when a partner's interests varies during a partnership taxable year. The regulations also modify the existing regulations regarding the required taxable year of a partnership.

Notice 2009–37, page 898.

This notice announces the phase-out of the new qualified hybrid motor vehicle credit and the new advanced lean burn technology motor vehicle credit for passenger automobiles and light trucks manufactured by Ford Motor Company that are purchased for use or lease in the United States beginning on April 1, 2009.

Notice 2009–38, page 901.

Section 382. 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 (EESA). Notice 2009–14 amplified and superseded.

EMPLOYEE PLANS

Notice 2009–39, page 902.

Weighted average interest rate update; corporate bond indices; 30-year Treasury securities; segment rates. This notice contains updates for the corporate bond weighted average interest rate for plan years beginning in April 2009; the 24-month average segment rates; the funding transitional segment rates applicable for April 2009; and the minimum present value transitional rates for March 2009.

Announcement 2009–34, page 916.

Request for comments on revenue procedure for section 403(b) prototype plans. The Service intends to establish a program for the pre-approval of prototype plans under section 403(b) of the Code. This announcement includes a draft revenue procedure that contains the Service's proposed procedures for issuing opinion letters as to the acceptability under section 403(b) of the form of prototype plans. The Service posted draft sample plan language on the *irs.gov* website for use in drafting section 403(b) prototype plan. The Service seeks public input before finalizing these procedures and sample plan language, and invites interested persons to submit comments.

EMPLOYMENT TAX

Rev. Rul. 2009–11, page 896.

Differential wage payments to active duty members of the uniformed services. This ruling provides that differential pay that employers pay to their employees who leave their job to go on active military duty is subject to income tax withholding, but is not subject to Federal Insurance Contributions Act (FICA) or Federal Unemployment Tax Act (FUTA) taxes. Additionally, the ruling provides that employers may use the aggregate procedure or optional flat rate withholding to calculate the amount of income taxes required to be withheld on these payments, and that these payments must be reported on Form W–2. Rev. Rul. 69–136 modified and superseded.

(Continued on the next page)

Finding Lists begin on page ii.

Department of the Treasury
Internal Revenue Service

The principal author of this notice is Patrick S. Kirwan of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this notice, contact Mr. Kirwan at (202) 622–3110 (not a toll-free call).

Application of Section 382 to Corporations Whose Instruments are Acquired by the Treasury Department Under Certain Programs Pursuant to the Emergency Economic Stabilization Act of 2008

Notice 2009–38

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.

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 at (202) 622–7750 (not a toll-free call).

Update for Weighted Average Interest Rates, Yield Curves, and Segment Rates

Notice 2009–39

This notice provides guidance as to the corporate bond weighted average interest rate and the permissible range of interest rates specified under § 412(b)(5)(B)(ii)(II) of the Internal Revenue Code as in effect for plan years beginning before 2008. It also provides guidance on the corporate bond monthly yield curve (and the corresponding spot segment rates), the 24-month average segment rates, and the funding transitional segment rates under § 430(h)(2). In addition, this notice provides guidance as to the interest rate on 30-year Treasury securities under § 417(e)(3)(A)(ii)(II) as in effect for plan years beginning before 2008, the 30-year Treasury weighted average rate under § 431(c)(6)(E)(ii)(I), and the minimum present value segment rates under § 417(e)(3)(D) as in effect for plan years beginning after 2007.

CORPORATE BOND WEIGHTED AVERAGE INTEREST RATE

Sections 412(b)(5)(B)(ii) and 412(l)(7)(C)(i), as amended by the Pension Funding Equity Act of 2004 and by the Pension Protection Act of 2006 (PPA), provide that the interest rates used to calculate current liability and to determine the required contribution under § 412(l) for plan years beginning in 2004 through 2007 must be within a permissible range based on the weighted average of the rates of interest on amounts invested conservatively in long term investment grade corporate bonds during the 4-year period ending on the last day before the beginning of the plan year.

Notice 2004–34, 2004–1 C.B. 848, provides guidelines for determining the corporate bond weighted average interest rate and the resulting permissible range of interest rates used to calculate current liability. That notice establishes that the corporate bond weighted average is based on the monthly composite corporate bond rate derived from designated corporate bond indices. The methodology for determining the monthly composite corporate bond rate as set forth in Notice 2004–34 continues to apply in determining that rate. See Notice 2006–75, 2006–2 C.B. 366.

The composite corporate bond rate for March 2009 is 7.22 percent. Pursuant to Notice 2004–34, the Service has determined this rate as the average of the monthly yields for the included corporate bond indices for that month.

The following corporate bond weighted average interest rate was determined for plan years beginning in the month shown below.

EXHIBIT D

Internal Revenue
bulletin

Bulletin No. 2010-2
January 11, 2010

HIGHLIGHTS OF THIS ISSUE

These synopses are intended only as aids to the reader in identifying the subject matter covered. They may not be relied upon as authoritative interpretations.

INCOME TAX

Rev. Rul. 2010–1, page 248.

Federal rates; adjusted federal rates; adjusted federal long-term rate and the long-term exempt rate. For purposes of sections 382, 642, 1274, 1288, and other sections of the Code, tables set forth the rates for January 2010.

Notice 2010–1, page 251.

This notice provides that after a Code section 338(g) or 338(h)(10) election, new target and old target are treated as the same corporation for purposes of section 807(e)(4).

Notice 2010–2, page 251.

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 and disposed of by the Treasury Department pursuant to the Emergency Economic Stabilization Act of 2008, (EESA). Notice 2009–38 amplified and superseded.

Notice 2010–3, page 253.

This notice modifies Notice 2008–55 to extend the date by which an initial liquidity facility may be added to support certain auction rate preferred stock to December 31, 2010. Notice 2008–55 modified.

Notice 2010–4, page 253.

This notice provides guidance and limited penalty relief to middlemen and trustees for transition year reporting for widely held mortgage trusts (WHMTs). The notice also provides guidance on the preparation of Forms 1099 and written tax information statements and on furnishing tax information packages for certain non-mortgage widely held fixed investment trusts (NMWHFITs). The notice also provides guidance on trust interest holders' (TIHs') treatment of transition payments.

Notice 2010–5, page 256.

This notice provides for funds that otherwise qualify for the exception under sections 1.148(d)(1)(i) through (v) to guarantee bonds in an amount equal to 500% of the cost of the assets of the fund. The notice also solicits public comment with respect to this change.

EXEMPT ORGANIZATIONS

Rev. Proc. 2010–9, page 258.

Determination letters and rulings. This document sets forth procedures for issuing determination letters and rulings on the exempt status of organizations under sections 501 and 521 of the Code. The procedures also apply to the revocation and modification of determination letters or rulings, and provide guidance on the exhaustion of administrative remedies for purposes of declaratory judgment under section 7428. Rev. Proc. 2009–9 superseded.

TAX CONVENTIONS

Announcement 2010–2, page 271.

This document is a Competent Authority Agreement entered into on October 1, 2009, by the competent authorities of the United States of America and Germany with respect to the taxation of certain consular employees under the U.S.-Germany income tax treaty and protocol.

(Continued on the next page)

Finding Lists begin on page ii.

Department of the Treasury
Internal Revenue Service

Part III. Administrative, Procedural, and Miscellaneous

Section 807(e)(4) Exception for § 338 Regulations

Notice 2010–1

Section 1.338–1(b)(1) of the Income Tax Regulations provides that after an election under § 338(g) or § 338(h)(10) of the Internal Revenue Code, new target is generally treated as a new corporation unrelated to old target for purposes of subtitle A of the Code. Section 1.338–1(b)(2) provides exceptions for provisions in subtitle A under which new target and old target are treated as the same corporation. Sections 1.338–1(b)(2)(i) through (vii) enumerate seven such exceptions. Section 1.338–1(b)(2)(viii) authorizes the addition of other exceptions by designation of such in the Internal Revenue Bulletin. This notice designates such an exception.

Section 807(e)(4)(A) provides that in the case of a "qualified foreign contract," the amount of the reserve under § 807 is not less than the minimum reserve required by the laws, regulations, or administrative guidance of the regulatory authority of the foreign country in which the foreign life insurance branch of the domestic life insurance company has its principal place of business. For this purpose, § 807(e)(4)(B) defines a "qualified foreign contract" as a contract issued by a foreign life insurance branch (which has its principal place of business in a foreign country) of a domestic life insurance company if (1) the contract is issued on the life or health of a resident of that country; (2) the domestic life insurance company was required by the foreign country (as of the time it began operations in the country) to operate in the country through a branch; and (3) the foreign country is not contiguous to the United States.

The Internal Revenue Service and Treasury believe it would be inappropriate to treat new target as a new corporation unrelated to old target for purposes of § 807(e)(4)(B). The fact that § 1.338–1(b)(1) would otherwise treat new target as a new corporation for Federal income tax purposes does not result in a change in the terms of the contracts that are qualified foreign contracts within the meaning of § 807(e)(4)(B), nor does it alter the requirements of the regulatory authority of the foreign country that were in effect when old target's foreign life insurance branch began operations in that country. *Cf.* § 1.338–1(b)(2)(vii) (treating new target and old target as the same corporation for purposes of electing to use an insurance company's historical loss payment pattern to compute discounted unpaid losses).

Accordingly, pursuant to the authority of § 1.338–1(b)(2)(viii), for purposes of § 807(e)(4), new target and old target, within the meaning of § 1.338–2(c)(17), are treated as the same corporation.

This notice is effective for qualified stock purchases occurring on or after December 10, 2009. In addition, taxpayers may elect to apply this notice to any qualified stock purchase with respect to which the election under § 338(g) or § 338(h)(10) is due on or after such date by treating new target and old target as the same corporation for purposes of § 807(e)(4).

The principal author of this notice is Jean Brenner of the Office of Associate Chief Counsel (Corporate). For further information regarding this notice, contact Ms. Brenner at (202) 622–4732 (not a toll-free call).

Application of Section 382 to Corporations Whose Instruments are Acquired and Disposed of by the Treasury Department Under Certain Programs Pursuant to the Emergency Economic Stabilization Act of 2008

Notice 2010–2

This notice provides additional guidance regarding the application of section 382 of the Internal Revenue Code and other provisions of law to corporations whose instruments are acquired and disposed of by the Treasury Department pursuant to the Emergency Economic Stabilization Act of 2008, P.L. 110–343 (EESA). This notice amplifies and supersedes Notice 2009–38, 2009–18 I.R.B. 901, to provide additional guidance.

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 section 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 7805(a) of the Code provides that except where such authority is expressly given to any person other than an officer or employee of Treasury, the Secretary shall prescribe all needful rules and regulations for the enforcement of Title 26, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.

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 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 section 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 and redeemed from 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 provided in the following sentence, such stock is considered outstanding for purposes of determining the percentage of stock owned by other 5-percent shareholders on any testing date. 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.

E. *Section 382 treatment of stock sold by Treasury to public shareholders*. If Treasury sells stock that was issued to it pursuant to the Programs (either directly or upon the exercise of a warrant) and the sale creates a public group ("New Public Group"), the New Public Group's ownership in the issuing corporation shall not be considered to have increased solely as a result of such a sale. A New Public Group's ownership shall be treated as having increased to the extent the New Public Group increases its ownership pursuant to any transaction other than a sale of stock by Treasury, including pursuant to a stock issuance described in section 1.382–3(j)(2) or a redemption (see section 1.382–2T(j)(2)(iii)(C)). Such stock is considered outstanding for purposes of determining the percentage of stock owned by other 5-percent shareholders on any testing date, and section 382 (and the regulations thereunder) shall otherwise apply to the New Public Group in the same manner as with respect to other public groups.

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, 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 2009–38, 2009–18 I.R.B. 901.

DRAFTING INFORMATION

The principal author of this notice is Rubin B. Ranat of the Office of Associate Chief Counsel (Corporate). For further information regarding this notice, contact Rubin B. Ranat at (202) 622–7530 (not a toll-free call).

Auction Rate Preferred Stock—Extension of Date for Addition of a Liquidity Facility

Notice 2010–3

This notice modifies Notice 2008–55, 2008–27 I.R.B. 11 (July 7, 2008), to extend the date by which an initial liquidity facility may be added to support certain auction rate preferred stock from December 31, 2009 to December 31, 2010.

SECTION 1. Background

In Notice 2008–55, the Internal Revenue Service (IRS) provided guidance regarding the effect of adding certain liquidity facilities to support certain auction rate preferred stock on the equity character of the stock for Federal income tax purposes. In Notice 2008–55, the IRS confirmed that the IRS will not challenge the equity characterization of the auction rate preferred stock as a result of adding a liquidity facility agreement if certain requirements are satisfied. Among other requirements under Notice 2008–55, the auction rate preferred stock must have been outstanding on February 12, 2008, or issued after that date to refinance, directly or indirectly, auction rate preferred stock that was outstanding on that date. In addition, the liquidity facility must be an initial liquidity facility with respect to the auction rate preferred stock that is entered into on or before December 31, 2009, or a liquidity facility that renews, replaces, or extends such an initial liquidity facility, either directly or in a series of liquidity facilities.

SECTION 2. Scope and Application

This notice extends the time period during which an initial liquidity facility can be entered into under § 3.2 of Notice 2008–55 from December 31, 2009 until December 31, 2010.

SECTION 3. Effect on Other Guidance

This notice modifies Notice 2008–55.

SECTION 4. Drafting Information

The principal author of this notice is Alfred C. Bishop of the Office of Associate Chief Counsel (Corporate). For further information regarding this notice, please contact Mr. Bishop at (202) 622–7930.

WHFIT Transition Guidance

Notice 2010–4

SECTION I: PURPOSE

This notice provides guidance to trustees, middlemen and trust interest holders (TIHs) of widely held fixed investment trusts (WHFITs) regarding the WHFIT reporting rules in § 1.671–5 of the Income Tax Regulations. Specifically, this notice provides (1) guidance on transition payments (as defined in Section III below) and limited penalty relief for trustees and middlemen required to file Forms 1099 and furnish written tax information statements under the widely held mortgage trust (WHMT) safe harbor in § 1.671–5(g); (2) guidance regarding the TIHs' treatment of the transition payments; (3) guidance regarding the inclusion of WHFIT interest, dividend, and miscellaneous income in the summary totals on Forms 1099; (4) guidance regarding the format of the written tax information statement provided to TIHs under § 1.671–5(e); and (5) guidance regarding the obligations of trustees and middlemen with respect to reporting under the WHFIT rules for certain non-mortgage WHFITs (NMWHFITs).

SECTION II: BACKGROUND

Section 1.671–5 provides the WHFIT reporting rules. A WHFIT is an arrangement classified as a trust under § 301.7701–4(c), provided that: (i) the trust is a United States person under § 7701(a)(30)(E); (ii) the beneficial owners of the trust are treated as owners under subpart E, part I, subchapter J, chapter 1 of the Code; and (iii) at least one interest in the trust is held by a middleman. See § 1.671–5(b)(22). A WHMT is a WHFIT, the assets of which consist only of mortgages, regular interests in a REMIC, interests in another WHMT, reasonably required reserve funds, amounts received with respect to these assets, and during a brief initial funding period, cash and short-term contracts to purchase these assets. See § 1.671–5(b)(23).

Trustees of fixed investment trusts frequently do not know the identities of the beneficial owners of the trust interests because the trust interests are often held in the name of a middleman. Thus, trustees are unable to communicate tax information directly to the beneficial owners of the trust interests. The WHFIT reporting rules in § 1.671–5 provide rules that specifically require the sharing of tax information among trustees, middlemen, and beneficial owners of the trust interests. To accomplish this, § 1.671–5 generally requires trustees to make trust tax information available to middlemen. Sections 1.671–5(d) and (e) require middlemen, and in some cases, trustees, to file a Form 1099 with the IRS and to furnish a written tax information statement to a TIH for the trust interests that the trustee or middleman holds on behalf of, or for the account of, the TIH.

Section 1.671–5(n) provides that the WHFIT reporting rules are applicable January 1, 2007. The preamble to the

EXHIBIT E

Internal Revenue bulletin

Bulletin No. 2008-42
October 20, 2008

HIGHLIGHTS OF THIS ISSUE

These synopses are intended only as aids to the reader in identifying the subject matter covered. They may not be relied upon as authoritative interpretations.

SPECIAL ANNOUNCEMENT

Announcement 2008–94, page 964.

The Twenty-First Annual Institute on Current Issues in International Taxation, jointly sponsored by the Internal Revenue Service and the George Washington University Law School, will be held on December 8 and 9, 2008, at the J.W. Marriott Hotel in Washington, D.C.

INCOME TAX

T.D. 9422, page 898.

Final regulations under section 1361 of the Code contain guidance on S corporations with respect to the American Jobs Creation Act of 2004 (AJCA) and the Gulf Opportunity Zone Act of 2005 (GOZA). The regulations clarify certain shareholder rules. The regulations provide certain S corporation stock disposition rules for various trusts. The regulations describe information that needs to be provided in the electing small business trust (ESBT) election statement if an ESBT has certain powers. The regulations clarify the definition of a potential current beneficiary of an ESBT in certain situations. The regulations provide that the Commissioner may provide relief for inadvertent qualified subchapter S subsidiary (QSub) terminations and inadvertently invalid QSub elections. The regulations provide for the treatment of losses when S corporation stock is transferred between spouses or incident to divorce. Notice 2005–91 obsoleted.

REG–143544–04, page 947.

Proposed regulations under section 336(e) of the Code provide rules that, when finalized, would permit taxpayers to make an election to treat certain sales, exchanges, and distributions of another corporation's stock as taxable sales of that corporation's assets.

Notice 2008–83, page 905.

Section 382. This notice concerns the application of section 382(h) of the Code to banks.

Notice 2008–86, page 925.

Extension of replacement period for livestock sold on account of drought. This notice explains the circumstances under which the 4-year replacement period under section 1033(e)(2) of the Code is extended for livestock sold on account of drought. The Appendix to this notice contains a list of the counties that experienced exceptional, extreme, or severe drought during the preceding 12-month period ending August 31, 2008. Taxpayers may use this list to determine if an extension is available.

Notice 2008–88, page 933.

This notice provides that the Treasury Department and the IRS will treat a tax-exempt "qualified tender bond" (as defined in Notice 2008–41) or "tax-exempt commercial paper" (as defined in section 2 of this notice) that is purchased by its "governmental issuer" (as defined in Notice 2008–41) on a temporary basis as continuing in effect without resulting in a reissuance or retirement of the purchased tax-exempt bond if the governmental issuer holds the bond until not later than December 31, 2009. This notice also extends the final date for the purchase of bonds pursuant to a qualified tender right, and the final date on which covered waivers of interest rate caps are disregarded, to December 31, 2009. Notice 2008–41 amended and supplemented.

(Continued on the next page)

Finding Lists begin on page ii.

Department of the Treasury
Internal Revenue Service

Part III. Administrative, Procedural, and Miscellaneous

Application of Section 382(h) to Banks

Notice 2008–83

SECTION 1. OVERVIEW

The Internal Revenue Service and Treasury Department are studying the proper treatment under section 382(h) of the Internal Revenue Code (Code) of certain items of deduction or loss allowed after an ownership change to a corporation that is a bank (as defined in section 581) both immediately before and after the change date (as defined in section 382(j)). As described below under the heading Reliance on Notice, such banks may rely upon this guidance unless and until there is additional guidance.

SECTION 2. TREATMENT OF DEDUCTIONS UNDER SECTION 382(h)

For purposes of section 382(h), any deduction properly allowed after an ownership change (as defined in section 382(g)) to a bank with respect to losses on loans or bad debts (including any deduction for a reasonable addition to a reserve for bad debts) shall not be treated as a built-in loss or a deduction that is attributable to periods before the change date.

SECTION 3. RELIANCE ON NOTICE

Corporations described in section 1 of this notice may rely on the treatment set forth in this notice, unless and until there is additional guidance.

SECTION 4. SCOPE

This notice does not address the application of any provision of the Code other than section 382.

The principal author of this notice is Mark S. Jennings of the Office of Associate Chief Counsel (Corporate). For further information regarding this notice, contact Mark S. Jennings at (202) 622–7750 (not a toll-free call).

Updated Static Mortality Tables for the Years 2009 Through 2013

Notice 2008–85

This notice provides the static mortality tables to be used under § 430(h)(3)(A) of the Internal Revenue Code (Code) and § 303(h)(3)(A) of the Employee Retirement Income Security Act of 1974 (ERISA). These tables apply for purposes of calculating the funding target and other items for valuation dates occurring during calendar years 2009 through 2013.

This notice also includes a modified "unisex" version of the mortality tables for use in determining minimum present value under § 417(e)(3) of the Code and § 205(g)(3) of ERISA for distributions with annuity starting dates that occur during stability periods beginning in calendar years 2009 through 2013.

BACKGROUND

Section 412 of the Code provides minimum funding requirements that generally apply for defined benefit plans. The Pension Protection Act of 2006, Public Law 109–280 (PPA), makes extensive changes to those minimum funding requirements that generally apply for plan years beginning on or after January 1, 2008. Section 430, which was added by PPA, specifies the minimum funding requirements that apply to defined benefit plans that are not multiemployer plans pursuant to § 412. Section 430(a) defines the minimum required contribution for a defined benefit plan that is not a multiemployer plan by reference to the plan's funding target for the plan year.

Section 430(h)(3) provides rules regarding the mortality tables to be used under § 430. Under § 430(h)(3)(A), except as provided in § 430(h)(3)(C) or (D), the Secretary is to prescribe by regulation mortality tables to be used in determining any present value or making any computation under § 430. Those tables are to be based on the actual experience of pension plans and projected trends in such experience.

Section 430(h)(3)(C) provides that, upon request by a plan sponsor and approval by the Secretary, substitute mortality tables that meet the applicable requirements may be used in lieu of the standard mortality tables provided under § 430(h)(3)(A). Section 430(h)(3)(D) provides for the use of separate mortality tables with respect to certain individuals who are entitled to benefits on account of disability. These separate mortality tables are permitted to be used with respect to disabled individuals in lieu of the generally applicable mortality tables provided pursuant to § 430(h)(3)(A) or the substitute mortality tables under § 430(h)(3)(C).

Determination of Minimum Funding Requirements under § 430

On July 31, 2008, the IRS issued final regulations under § 430(h)(3), at 73 FR 44632 (T.D. 9419, 2008–40 I.R.B. 790). These regulations provide for mortality tables, based on the tables contained in the RP–2000 Mortality Tables Report[1], adjusted for mortality improvement using Projection Scale AA as recommended in that report. Section 1.430(h)(3)–1 generally requires the use of separate tables for nonannuitant and annuitant periods for large plans (those with over 500 participants as of the valuation date). Sponsors of small plans (those with 500 or fewer participants as of the valuation date) are permitted to use a combined table that applies the same mortality rates to both annuitants and nonannuitants.

Section 1.430(h)(3)–1 of the final regulations outlines the methodology that the IRS will use to establish mortality tables as provided under § 430(h)(3)(A). The mortality tables set forth in § 1.430(h)(3)–1 are based on expected mortality as of 2000 and reflect the impact of expected improvements in mortality. The regulations permit plan sponsors to apply the projection of mortality improvement in either of two ways: through use of static tables that are updated annually to reflect expected improvements in mortality, or through use of

[1] The RP–2000 Mortality Tables Report was released by the Society of Actuaries in July, 2000. Society of Actuaries, RP–2000 Mortality Tables Report, at *http://www.soa.org/ccm/content/research-publications/experience-studies-tools/the-rp–2000-mortality-tables/*.

EXHIBIT F

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

[SEALED], Plaintiff, v. [SEALED], Defendant.	Index No. 13-100175 Filed under Seal in Camera Pursuant to NEW YORK FALSE CLAIMS ACT, N.Y. STATE FIN. LAW §190(2)(b)

FILED UNDER SEAL PURSUANT TO
NEW YORK FALSE CLAIMS ACT, N.Y. STATE FIN. LAW §190(2)(b)

-NOT FOR POSTING ON ELECTRONIC CASE LISTINGS-

ERIC T. SCHNEIDERMAN, Attorney General
of the State of New York

Thomas Teige Carroll
Bureau Chief

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Attorney for State of New York

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

STATE OF NEW YORK *ex rel.* ERIC RASMUSEN, Plaintiff, - against - CITIGROUP, INC., Defendant.	Index No. 13-100175 Filed under Seal in Camera Pursuant to NEW YORK FALSE CLAIMS ACT, N.Y. FIN. LAW §190(2)(b)

New York State's Notice of Election to Decline Intervention
Pursuant to NY State Finance Law § 190(2)(f)

This action raises claims pertaining, in part, to funds paid by the State of New York (the "State"). Pursuant to the New York False Claims Act (State Finance Law § 190(2)(f)), the State of New York hereby notifies the Court of its decision not to supersede and convert this into a civil enforcement action or to intervene in this action.

Pursuant to 13 N.Y.C.R.R. § 400.4(c), Eric Rasmusen, as the *qui tam* plaintiff, has 30 days to decide whether to proceed with the action.

If the *qui tam* plaintiff elects to proceed with the action, the *qui tam* plaintiff shall so advise the Court and the State, and cause the Complaint to be unsealed. The *qui tam* plaintiff shall provide the State or any applicable local government with a copy of any document filed with the Court on or about the date it is filed, or any order issued by the Court on or about the date it is issued. The *qui tam* plaintiff shall notify the State or any applicable local government within five business days of any decision, order or verdict resulting in judgment in favor of the State or local government. N.Y. State Fin. Law § 190(2)(f).

After the Complaint is unsealed, the *qui tam* plaintiff shall serve the Complaint on defendants pursuant to applicable law. 13 N.Y.C.R.R. § 400.4(c)(1).

If the *qui tam* plaintiff elects not to proceed with the action, the *qui tam* plaintiff shall either: (i) voluntarily discontinue the action, without an order and without unsealing the action, by filing with the Court a notice of discontinuance and serving a copy of this notice on the State, who may move to unseal the Complaint; or (ii) seek to voluntarily discontinue the action by order of Court by making an *in camera* motion to unseal the Complaint and dismiss the action. 13 N.Y.C.R.R. § 400.4(c)(2).

The State requests that, should either the *qui tam* plaintiff or defendants propose that this action be settled, this Court solicit the written consent of the State before ruling or granting its approval. The State may not be bound by an act of the *qui tam* plaintiff. N.Y. State Fin. Law § 190(5)(a).

The State reserves its right to order any deposition transcripts.

The State also reserves its right to intervene in this action, for good cause. N.Y. State Fin. Law § 190(5)(a).

A proposed order accompanies this notice.

Dated: New York, New York
July 30, 2014

Respectfully submitted,

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York

By:
Thomas Teige Carroll

Bureau Chief
Tel.: (212) 416-6012

Attorney for the State of New York

TO: Daniel C. Oliverio, Esq.
Hodgson Russ LLP
140 Pearl Street, Suite 100
Buffalo, New York 14202-4040
(*by regular mail*)

At IAS Part 11 of the Supreme Court of the State of New York, held in and for the County of New York at the Courthouse at 60 Centre Street, New York, New York, on the _____ day of __________, 2014.

PRESENT: Hon. Joan A. Madden
Justice of the Supreme Court

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

[SEALED], Plaintiffs, - against - [SEALED], Defendants.	Index No. 100175/13 Filed under Seal in Camera Pursuant to NEW YORK FALSE CLAIMS ACT, N.Y. STATE FIN. LAW §190(2)(b)

[PROPOSED] ORDER

Upon consideration of the notification of the Attorney General of the State of New York by Assistant Attorney General Thomas Teige Carroll dated July 30, 2014, that the State of New York (the "State") has declined to convert this action to a civil enforcement action or to intervene in this action pursuant to the New York False Claims Act, State Finance Law § 190(2)(f), and pursuant to 13 N.Y.C.R.R. § 400.4, it is hereby Ordered that:

1. The *qui tam* plaintiff shall by ______________, 2014 notify the Court and the State as to whether he intends to continue or discontinue the action.

2. Should the *qui tam* plaintiff elect not to proceed, the Complaint shall be dismissed.

3. Should the *qui tam* plaintiff elect not to proceed with the action, the Complaint, this Order, and the Notice of Election to Decline Intervention by the State of New York shall be unsealed unless the *qui tam* plaintiff seeks to voluntarily discontinue the action, without an order

and without unsealing the action, by filing with the Court a notice of discontinuance and serving a copy of this notice on the State.

4. Should the *qui tam* plaintiff seek to voluntarily dismiss the action without unsealing the action then the State may make an *in camera* motion to unseal the Complaint, the Notice of Election to Decline Intervention, and this Order.

5. Should the *qui tam* plaintiff elect to continue the action, the *qui tam* plaintiff shall so advise the Court and the State, and cause the Complaint to be unsealed. After the Complaint is unsealed, the *qui tam* plaintiff shall serve the Complaint on defendant pursuant to the provisions of the Civil Practice Law and Rules and other applicable law.

6. Should the *qui tam* plaintiff elect to continue the action, the Notice of Election to Decline Intervention by the State of New York shall be served by the *qui tam* plaintiff upon defendant only after service of the Complaint. All previously filed documents in the Court's file in this action shall remain under seal and not be made public, except for the Complaint, this Order, and the Notice of Election to Decline Intervention by the State of New York.

7. The *qui tam* plaintiff shall serve the State with a copy of any document filed by any party or non-party with the Court on or about the date it is filed, including pleadings, motions, and supporting memoranda and materials.

8. All orders of this Court shall be served upon the State by the *qui tam* plaintiff.

9. The State shall serve a copy of this Order upon the *qui tam* plaintiff within ten (10) days of receipt.

ENTER:

____
J.S.C.

EXHIBIT G

CONGRESSIONAL OVERSIGHT PANEL

JANUARY OVERSIGHT REPORT *

EXITING TARP AND UNWINDING ITS IMPACT ON THE FINANCIAL MARKETS

JANUARY 13, 2010.—Ordered to be printed

* Submitted under Section 125(b)(1) of Title 1 of the Emergency Economic Stabilization Act of 2008, Pub. L. No. 110–343

many large entities that their loss could cause significant problems in the global financial system. Risk is multi-faceted, and because risk derives from the very different functions and activities of the various financial institutions, it will be very difficult to find a one-size-fits-all definition of too big to fail.

In Section G of this report, the Panel reviews some of the options that are currently being proposed to address the risks posed by too big to fail institutions. The Panel takes no view on those options, but notes that it is essential that the unwinding of the TARP includes steps to address the moral hazard and market distortion that the TARP and related programs created.

6. Certain Tax Issues Affecting TARP Exit

TARP exit strategy and the operation of the CPP are affected by a series of Treasury Department decisions that limit the applicability of the Internal Revenue Code (Code) rules limiting the use of a corporation's net operating losses (NOLs).[44] NOLs can reduce the future income and hence the tax liability of a financial institution, or of any other corporation.[45] Equally important, a bank holding company's tier 1 regulatory capital will ordinarily include a portion of its NOLs.[46] Any cap on an institution's available NOLs could be expected to have a negative effect on the institution's value and regulatory capital position. If the institution has a large number of NOLs, the effect is likely to be substantial.

The NOL limitation rules, contained in section 382 of the Code, limit the annual availability of a corporation's NOLs after a "change in control" of that corporation to a small percentage of the otherwise usable amount.[47] The corporation does not have to be sold to trigger the limitation; a change in control occurs if the percentage of the corporation's stock owned by any of its "five percent shareholders" increases by more than 50 percent over a three-year period, whether by the corporation's sale or otherwise. A "five percent shareholder" is any shareholder that owns five percent or more of the stock of the corporation. The stock owned by all shareholders who are not five percent shareholders is treated as being owned by one or more groups which may be treated as five percent shareholders, referred to as the "public groups."

The Internal Revenue Service (IRS) issued several notices (the EESA Notices) containing guidance about the application of section

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[44] An NOL, conceptually, is the excess of a corporation's deductions over its taxable income. Section 382 also applies to what are called "built-in losses" (in simplest terms, the amount by which the value of an asset is less than its cost), and its companion section 383 applies in a similar way to the carryforward of unused tax credits. NOLs, built-in losses, and tax credits together form a corporation's "deferred tax assets," whose value is greater than the value of the corporation's NOLs alone. Although not technically correct, the term "NOL" is used here for ease of presentation to refer to all three tax attributes.

[45] A corporation is generally permitted to carry forward NOLs for 20 years, to offset its future income.

[46] 12 CFR § 225 at appendix A.II.A.1. To summarize the rule, NOLs may constitute up to 10 percent of tier 1 capital, to the extent that the institution "is expected to realize [a tax deduction by their use] within one year . . . based on its projections of future taxable income for that year . . . ." 12 CFR § 225 at appendix A.II.B.4.a.i.

[47] 26 U.S.C. § 382. The limitation may be severe. If a change in control occurs, the amount of income that the "post-change" corporation can offset by "pre-change" losses is capped at a small percentage of the corporation's value, which is roughly equal to its market capitalization. This percentage, called "the long-term tax-exempt rate" and set monthly by the IRS, is currently at 4.14 percent. Thus, at present, a corporation whose market capitalization was $1 billion could use the NOLs generated before its change in control only to the extent of $41.4 million of taxable income each year.

382 to institutions engaged in transactions with the Treasury Department under EESA. The Notices extended to transactions under any of the TARP programs. The first three EESA Notices, issued in October 2008, January 2009, and April 2009, allowed Treasury to take, and the institutions to redeem eventually, stock and warrants without causing a change in ownership under section 382.[48] Any other result would have increased substantially the uncertainty created by TARP and the potential cost of participation in its programs. The tax and regulatory capital costs of participation by financial institutions might well have greatly limited TARP's effectiveness. All of the EESA Notices to date have been issued under both the Secretary's authority to issue income tax regulations and to issue "such regulations and other guidance as may be necessary or appropriate to define terms or carry out the authorities or purposes of [EESA]."[49]

In addition, the IRS issued a Notice at the end of September 2008, prior to the enactment of EESA, stating that important elements of section 382 would not apply to a change in ownership of a bank.[50] Any bank was allowed to rely on the Notice, but it was identified as having been issued to facilitate the acquisition of Wachovia by Wells Fargo and at least one other bank acquisition.[51] That Notice was rescinded by Congress, however, as part of the economic stimulus legislation, for any ownership change after January 16, 2009.[52] The effective date excluded transactions under

[48] IRS Notice 2008–100 (Oct. 15, 2008) (online at www.irs.gov/irb/2008-44__IRB/ar13.html); IRS Notice 2009–14 (Jan. 31, 2009) (online at www.irs.gov/pub/irs-drop/n-09-14.pdf); IRS Notice 2009–38 (April 13, 2009) (online at www.irs.gov/irb/2009-18__IRB/ar09.html). Each of the Notices was described as "amplifying" and was designated as "superseding" the immediately prior Notice. The first Notice applied only to preferred shares and warrants issued under the CPP. The second expanded the treatment to include the TIP, SSFI, and the AIFP. It also added a provision excepting from section 382 Treasury's ownership of stock "other than preferred stock." The April Notice extended the guidance to the CAP and AGP, and in anticipation of Treasury's exchange of preferred stock for common stock of Citigroup, exempted Treasury's receipt of that stock from section 382, even though such stock was not received directly under the TARP program. The Revenue Service had previously issued similar guidance for two pre-EESA transactions that were part of the financial stability effort.

[49] 12 U.S.C. § 5211(c)(5). In addition to the Secretary's overall authority to issue income tax regulations, section 382(m) specifically authorizes the Secretary to issue "such regulations as may be necessary or appropriate to carry out the purposes of this section." 26 U.S.C. § 382(m).

[50] IRS Notice 2008–83 (Sept. 30, 2008) (online at www.irs.gov/irb/2008-42__IRB/ar08.html). The items involved were "any deduction . . . for losses on loans or bad debts (including any deduction for a reasonable addition to a reserve for bad debts)."

[51] *See* Crowell & Moring, *Tax Notice Drives Wachovia Takeover Turmoil* (Oct. 6, 2008) (online at www.crowell.com/NewsEvents/Newsletter.aspx?id=1032); Baker Hostetler, *IRS Net Operating Loss Guidance to Banks* (Oct. 9, 2009) (online at www.bakerlaw.com/irs-net-operating-loss-guidance-to-banks-10-9-2008/); Press Release, *Grassley Seeks Inspector General Review of Treasury Bank Merger Move* (Nov. 14, 2008) (online at finance.senate.gov/press/Gpress/2008/prg111408c.pdf) ("The Notice, issued just days before Congress voted on the Emergency Economic Stabilization Act of 2008, appears to have had the effect of benefiting Wachovia Corporation executives and Wells Fargo . . . Treasury's issuance of the Notice apparently enabled Wells Fargo to take over Wachovia despite a pending bid from Citibank. Without the issuance of the Notice, Wells Fargo would have only been able to shelter a limited amount of income. Under the Notice, however, Wells Fargo could reportedly shelter up to $74 billion in profits"). *See also* Sen. Charles E. Schumer, *Schumer Seeks Answers from IRS, Treasury on Tax Code Change That Subsidizes Bank Acquisitions* (Oct. 30, 2008) (online at schumer.senate.gov/new__website/record.cfm?id=304737) ("Wells Fargo . . . stands to save $19.4 billion as a result of the tax change, PNC Financial is estimated to save more than $5.1 billion in its takeover of Cleveland-based National City").

[52] Congress found that:

(1) The delegation of authority to the Secretary of the Treasury under section 382(m) of the Internal Revenue Code of 1986 does not authorize the Secretary to provide exemptions or special rules that are restricted to particular industries or classes of taxpayers.

(2) Internal Revenue Service Notice 2008–83 is inconsistent with the congressional intent in enacting such section 382(m).

Continued

contracts entered into on or before January 16, so that the Notice did apply to lift the section 382 limitations for the acquisition of Wachovia. The accompanying Conference Committee Report mentioned without comment the EESA Notices that existed at the time of the report.[53]

The fourth EESA Notice was issued in December 2009.[54] The December Notice expands the prior guidance by stating that a sale by the Treasury Department of stock it had received under any of the EESA programs to a "public group," that is, to a group of less than five percent shareholders, would not trigger an ownership change. The December Notice applies to all Treasury shareholdings. Its most immediate application and likely most significant application, however, is to the planned sale of the shares of Citigroup that Treasury holds.[55]

The application of the section 382 limitations to Citigroup would have been harsh.[56]

Citigroup reported deferred tax assets (DTA) of $38 billion as of September 30, 2009, and stated that it would require "approximately $85 billion of taxable income during the respective carry-forward periods to fully realize its U.S. federal, state and local DTA."[57] Given Citigroup's current market capitalization of $80.02 billion, it could use its NOLs only to offset $3.31 billion in taxable income annually, under the section 382 limitation.[58]

Of course, any application of the limitation would have also reduced Citigroup's capital. Citigroup reported that as of September 30, 2009 "[a]pproximately $13 billion of [its] net deferred tax asset is included in Tier 1 and Tier 1 Common regulatory capital."[59] Citigroup reported that its tier 1 common and tier 1 regulatory capital were approximately $90 billion, and $126 billion respectively. It is difficult to calculate the capital reduction that imposition of the 382 limitations would cause, but the reduction would likely be a significant percentage of the $13 billion, and Citigroup would have been required to raise capital from other sources to restore its

(3) The legal authority to prescribe Internal Revenue Service Notice 2008–83 is doubtful.
American Recovery and Reinvestment Act (ARRA), Pub. L. No. 111–5, at § 1261 (2009).

[53] *Conference Report to Accompany H.R. 1,* at 555–560, 111th Cong. (2009) (H.R. Rept. 111–16) (online at legislative.nasa.gov/ConferenceReport%20111-16.pdf).

[54] IRS Notice 2010–2 (Dec. 11, 2009) (online at www.irs.gov/pub/irs-drop/n-10-02.pdf).

[55] This section does not discuss the possible impact of the December Notice on future sales of stock held by Treasury under the Automotive Industry Financing Program, SSFI, or any common stock acquired by Treasury pursuant to its CPP warrants. However, as noted in the text, the December notice is likely to have its greatest significance as applied to Citigroup because any triggering of section 382 will likely reduce a financial institution's tier 1 capital. in the value of Citigroup's NOLs and in the amount of its tier 1 capital.

[56] Citigroup recognized the risk of the application of section 382. In early June 2009, as part of its Exchange Offer with Treasury, and as described in its 2009 Third Quarter 10–Q, its Board had adopted a "tax benefits preservation plan . . . to minimize the likelihood of an ownership change [under section 382] and thus protect Citigroup's ability to utilize certain of its deferred tax assets, such as net operating loss and tax credit carry forwards, to offset future income." However, the 10–Q continued: "[d]espite adoption of the [p]lan, future stock issuance our transactions in our stock that may not be in our control, including sales by the USG, may . . . limit the Company's ability to utilize its deferred tax asset and reduce its [tangible common equity] and stockholders equity." Citigroup, *Quarterly Report for the Third Quarter of 2009 (10–Q)*, at 11 (online at www.citibank.com/citi/fin/data/q0903c.pdf?ieNocache=106) (hereinafter "Citigroup Third Quarter 10–Q").

[57] It is not possible, or very difficult, to discern from public information how much taxable income Citigroup would need in order to use its DTAs if it were subject to section 382 limitations. Use of DTAs is not one to one against taxable income.

[58] $3.23 billion is Citigroup's market capitalization multiplied by the long-term tax exempt rate. *See supra* note 47.

[59] Citigroup Third Quarter 10–Q, *supra* note 56, at 11.

capital position.[60] Under the worst set of circumstances, such a reduction in tier 1 capital might have left Citigroup undercapitalized and postponed its eligibility for exit from the TARP altogether.

By eliminating the section 382 limitations, the Treasury Department avoided either reducing the value of its shares (and the capital held by Citigroup) or being forced to sell its shares serially over a period of years, in amounts small enough not to increase the holdings of Citigroup's public stockholders by more than five percent.

Nonetheless, the December Notice has attracted criticism as an additional subsidy to Citigroup and a loss to the taxpayers.[61] Section 382 is a highly reticulated statute, and this departure from its operation, under the authority both of the Code and EESA, has raised concerns.[62]

Congress' rescission of the September 2008 Notice directed at the Wells Fargo-Wachovia transaction is inconclusive.[63] The legislation indicated a congressional belief that section 382 was not intended to apply differently to "particular industries."[64] However, the Notice was arguably directed at private transactions and was announced before the enactment of EESA.[65] In addition, by the time Congress acted to reverse that Notice, the CPP, TIP, and SSFI were in operation, and the significance of the EESA Notices was apparent. The first two EESA Notices are cited in the ARRA Conference Committee Report without comment, positive or negative, and Congress has taken no action, either in ARRA or thereafter to rescind the EESA Notices.

Given the previous guidance, it is difficult to understand why Treasury waited until December 2009 to extend the earlier guidance to a sale of its shares to the public.[66] Treasury staff has indicated that, before the decision was made to sell the shares to the public, it was possible that Citigroup would repurchase the shares

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[60] Without an ability to know the amount of the $13 billion figure made up of federal NOLs, a precise calculation is impossible.

[61] House Committee on Oversight and Government Reform, Subcommittee on Domestic Policy, Opening Statement of Committee Chairman Dennis Kucinich, *The U.S. Government as Dominant Shareholder: How Should Taxpayers' Ownership Rights be Exercised?* (*Part II*), at 3 (Dec. 17, 2009) (online at oversight.house.gov/images/stories/121709__111th__DP__Opening__Statement__Chairman__Kucinich__121709.pdf); Sen. Charles Grassley, *Grassley Urges Fair Tax Treatment for Small Businesses Compared to Large Banks* (Dec. 23, 2009) (online at grassley.senate.gov/news/Article.cfm?customel__dataPageID__1502=24632). Senator Jim Bunning has introduced a bill to rescind 2010–2, and to require Treasury to receive congressional authorization for any future regulations under section 382 that provide an "exemption or special rule . . . which is restricted to dispositions of instruments acquired by the Secretary." S. 2916, 111th Cong. (Dec. 18, 2009).

[62] Binyamin Appelbaum, *U.S. gave up billions in tax money in deal for Citigroup's bailout repayment*, Washington Post (Dec. 16, 2009) (online at www.washingtonpost.com/wp-dyn/content/article/2009/12/15/AR2009121504534.html) (quoting Robert Willens, a tax accounting expert, that "I've been doing taxes for almost 40 years, and I've never seen anything like this, where the IRS and Treasury acted unilaterally on so many fronts").

[63] IRS Notice 2008-83 (Sept. 30, 2008) (online at www.irs.gov/irb/2008-42__IRB/ar08.html).

[64] *See* ARRA, *supra* note 52.

[65] Although EESA was close to enactment at the end of September, the consensus was that the TARP would be used to purchase "troubled assets" from financial institutions. Congressional Oversight Panel, *August Oversight Report: The Continued Risk of Troubled Assets* (Aug. 11, 2009) (online at cop.senate.gov/documents/cop-081109-report.pdf) (hereinafter "COP August Oversight Report").

[66] Some tax experts believe that the conclusion was implicit in the prior assurance that section 382 could not apply to any repurchase of CPP shares from Treasury. Amy Elliot, *Criticism of Notice Allowing Citigroup to Keep NOLs is Unfounded, Official Says,* Tax Analysts (Dec. 17, 2009) ("Most thought that 'even if it wasn't a redemption that shouldn't matter,'" said Todd B. Reinstein, a partner with Pepper Hamilton LLP. "If it was a sale to a public group it should be the same treatment. This just . . . confirms that").

itself, making the December Notice unnecessary; the Notice would, however, have been necessary in any event with respect to the other institutions in which Treasury continues to hold a common stock interest.[67] It is also possible that Treasury did not want to run a risk of attracting a negative congressional reaction such as that which led to the reversal of Notice 2008–83.

Treasury has pointed out to staff of the Panel that the December Notice balances the policies of section 382 and EESA by limiting the EESA relief to sales to the public and not to any freestanding five percent shareholders. This avoids the primary thrust of section 382 by not creating any single shareholder or shareholders with more than five percent of Citigroup stock through its sale. The limitation is significant, but its relevance in this case depends to some degree on the relationship between the timing of the Notice and Treasury's decision to sell its Citigroup shares to the public.

Assistant Secretary of the Treasury for Financial Stability Herb Allison's initial response to the criticism of the December Notice, in a letter to The Washington Post, emphasized that Treasury could not avoid taxes because it did not pay taxes.[68] The response sidesteps the fact that section 382 applies to Citigroup, not Treasury, and that the operation of the statute is not limited to sales of a company. A second argument, that Citigroup should not "be treated differently simply because the government intervened" comes closer to the core of the matter. The December Notice eliminated what could have been a major obstacle to the severance of Treasury's ownership of Citigroup common stock. Without the Notice, Treasury could still have eliminated the costs of the section 382 limitations for Citigroup by selling its shares into the market over a number of years, causing no revenue loss. Calculations of the extent to which taxpayers benefited or not from the lifting of the section 382 limitation are extremely difficult in any event, because they depend on assumptions about Citigroup's income in future years if use of its NOLs had been limited, and the value to the taxpayers of realizing an immediate gain from the sale of the Citigroup shares.

Finally, the EESA Notices, however sound in themselves, illustrate again the inherent conflict implicit in Treasury's administration of the TARP. In this case the conflict is a three-way one, pitting Treasury's responsibilities as TARP administrator, regulator, and tax administrator against one another. Perhaps the most troublesome aspect of the debate over the December Notice is posed by this conflict, in the perception that income tax flexibility is especially, and quickly, available for large financial institutions at a time of general economic difficulty.

C. Historical Precedents: the RFC and the RTC

The TARP is not the first U.S. government program to involve large-scale U.S. government acquisition of private assets.[69] The Re-

[67] Treasury conversations with Panel staff (Jan. 7, 2009).

[68] Assistant Secretary Herbert Allison, Letter to the Editor, *U.S. Isn't Evading Taxes on Citigroup,* Washington Post (Dec. 22, 2009) (online at www.washingtonpost.com/wp-dyn/content/article/2009/12/22/AR2009122200040.html).

[69] *See generally* Congressional Oversight Panel, *April Oversight Report: Assessing Treasury's Strategy: Six Months of TARP,* at 35–50 (Apr. 7, 2009) (online at cop.senate.gov/documents/cop-040709-report.pdf) (hereinafter "COP April Oversight Report").

EXHIBIT H

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

FORM 10-K

ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF
THE SECURITIES EXCHANGE ACT OF 1934

For the fiscal year ended December 31, 2010

Commission file number 1-9924

Citigroup Inc.

(Exact name of registrant as specified in its charter)

Delaware **(State or other jurisdiction of incorporation or organization)**	**52-1568099** **(I.R.S. Employer Identification No.)**
399 Park Avenue, New York, NY **(Address of principal executive offices)**	**10043** **(Zip code)**

Registrant's telephone number, including area code: (212) 559-1000

Securities registered pursuant to Section 12(b) of the Act: See Exhibit 99.01

Securities registered pursuant to Section 12(g) of the Act: none

Indicate by check mark if the Registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act. ☐ Yes X No

Indicate by check mark if the Registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Act. ☐ Yes X No

Indicate by check mark whether the Registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the Registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. X Yes ☐ No

Indicate by check mark whether the Registrant has submitted electronically and posted on its corporate Web site, if any, every Interactive Data File required to be submitted and posted pursuant to Rule 405 of Regulation S-T (§232.405 of this chapter) during the preceding 12 months (or for such shorter period that the Registrant was required to submit and post such files). X Yes ☐ No

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K (§229.405 of this chapter) is not contained herein, and will not be contained, to the best of Registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K. ☐

Indicate by check mark whether the Registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer or a smaller reporting company. See the definitions of "large accelerated filer," "accelerated filer," and "smaller reporting company" in Rule 12b-2 of the Exchange Act.

X Large accelerated filer ☐ Accelerated filer ☐ Non-accelerated filer (Do not check if a smaller reporting company) ☐ Smaller reporting company

Indicate by check mark whether the Registrant is a shell company (as defined in Rule 12b-2 of the Exchange Act). ☐ Yes X No

The aggregate market value of Citigroup Inc. common stock held by non-affiliates of Citigroup Inc. on June 30, 2010 was approximately $108.8 billion.

Number of shares of common stock outstanding on January 31, 2011: 29,056,025,228

Documents Incorporated by Reference: Portions of the Registrant's Proxy Statement for the annual meeting of stockholders scheduled to be held on April 21, 2011, are incorporated by reference in this Form 10-K in response to Items 10, 11, 12, 13 and 14 of Part III.

a short-term Liquidity Coverage Ratio (LCR) and a long-term, structural Net Stable Funding Ratio (NSFR). The LCR, which will become a minimum requirement on January 1, 2015, is designed to ensure banking organizations maintain an adequate level of unencumbered cash and high quality unencumbered assets that can be converted into cash to meet liquidity needs. The NSFR, which will become a minimum requirement by January 1, 2018, is designed to promote the medium- and long-term funding of assets and activities over a one-year time horizon. The LCR must be at least 100%, while the NSFR must be greater than 100%.

Citi may not be able to maintain adequate liquidity in light of the liquidity standards proposed by the Basel Committee or other regulators in the U.S. or abroad, or Citi's costs to maintain such liquidity levels may increase. For example, Citi could be required to increase its long-term funding to meet the NSFR, the cost of which could also be negatively effected by the regulatory requirements aimed at facilitating the orderly resolution of financial institutions. Moreover, Citigroup's ability to maintain and manage adequate liquidity is dependent upon the continued economic recovery as well as the scope and effect of any other legislative or regulatory developments or requirements relating to or impacting liquidity.

During 2010, consistent with its strategy, Citigroup continued to divest relatively higher yielding assets from Citi Holdings. The desire to maintain adequate liquidity continued to cause Citigroup to invest its available funds in lower-yielding assets, such as those issued by the U.S. government. As a result, during 2010, the yields across both the interest-earning assets and the interest-bearing liabilities continued to remain under pressure. The lower asset yields more than offset the lower cost of funds, resulting in continued low NIM. There can be no assurance that Citigroup's NIM will not continue to be negatively impacted by these factors.

Citigroup's ability to utilize its DTAs to offset future taxable income may be significantly limited if it experiences an "ownership change" under the Internal Revenue Code.

As of December 31, 2010, Citigroup had recognized net DTAs of approximately $52.1 billion, which are included in its tangible common equity. Citigroup's ability to utilize its DTAs to offset future taxable income may be significantly limited if Citigroup experiences an "ownership change" as defined in Section 382 of the Internal Revenue Code of 1986, as amended (Code). In general, an ownership change will occur if there is a cumulative change in Citigroup's ownership by "5-percent shareholders" (as defined in the Code) that exceeds 50 percentage points over a rolling three-year period.

A corporation that experiences an ownership change will generally be subject to an annual limitation on its pre-ownership change DTAs equal to the value of the corporation immediately before the ownership change, multiplied by the long-term tax-exempt rate (subject to certain adjustments), provided that the annual limitation would be increased each year to the extent that there is an unused limitation in a prior year. The limitation arising from an ownership change under Section 382 on Citigroup's ability to utilize its DTAs will depend on the value of Citigroup's stock at the time of the ownership change. Under IRS Notice 2010-2, Citi did not experience an ownership change within the meaning of Section 382 as a result of the sales of its common stock held by the U.S. Treasury.

The value of Citi's DTAs could be reduced if corporate tax rates in the U.S., or certain foreign jurisdictions, are decreased.

There have been recent discussions in Congress and by the Obama Administration regarding potentially decreasing the U.S. corporate tax rate. In addition, the Japanese government has proposed reductions in the national and local corporate tax rates by 4.5% and 0.9%, respectively, which could be enacted as early as the first or second quarter of 2011. While Citigroup may benefit in some respects from any decreases in these corporate tax rates, any reduction in the U.S. corporate tax rate would result in a decrease to the value of Citi's DTAs, which could be significant. Moreover, if the legislation in Japan is enacted as proposed, it would require Citi to take an approximate $200 million charge in the quarter in which the legislation is so enacted.

The expiration of a provision of the U.S. tax law that allows Citigroup to defer U.S. taxes on certain active financing income could significantly increase Citi's tax expense.

Citigroup's tax provision has historically been reduced because active financing income earned and indefinitely reinvested outside the U.S. is taxed at the lower local tax rate rather than at the higher U.S. tax rate. Such reduction has been dependent upon a provision of the U.S. tax law that defers the imposition of U.S. taxes on certain active financing income until that income is repatriated to the U.S. as a dividend. This "active financing exception" is scheduled to expire on December 31, 2011, and while it has been scheduled to expire on numerous prior occasions and has been extended each time, there can be no assurance that the exception will continue to be extended. In the event this exception is not extended beyond 2011, the U.S. tax imposed on Citi's active financing income earned outside the U.S. would increase after 2011, which could further result in Citi's tax expense increasing significantly.

Citigroup may not be able to continue to wind down Citi Holdings at the same pace as it has in the past two years.

While Citigroup intends to dispose of or wind down the Citi Holdings businesses as quickly as practicable yet in an economically rational manner, and while Citi made substantial progress towards this goal during 2009 and 2010, Citi may not be able to dispose of or wind down the businesses or assets that are part of Citi Holdings at the same level or pace as in the past two years. *BAM* primarily consists of the MSSB JV, pursuant to which Morgan Stanley has call rights on Citi's ownership interest in the venture over a three-year period beginning in 2012. Of the remaining assets in *SAP*, as of December 31, 2010, approximately one-third are held-to-maturity. In *LCL*, approximately half of the remaining assets consist of U.S. mortgages as of December 31, 2010, which will run off over time, and larger businesses such as CitiFinancial. As a result, Citi's ability to simplify its organization may not occur as rapidly as it has in the past. In addition, the ability of Citigroup to continue to reduce its risk-weighted assets or limit its expenses through, among other things, the winding down of Citi Holdings may be adversely affected depending on the ultimate pace or level of Citi Holdings business divestitures, portfolio run-offs and asset sales.

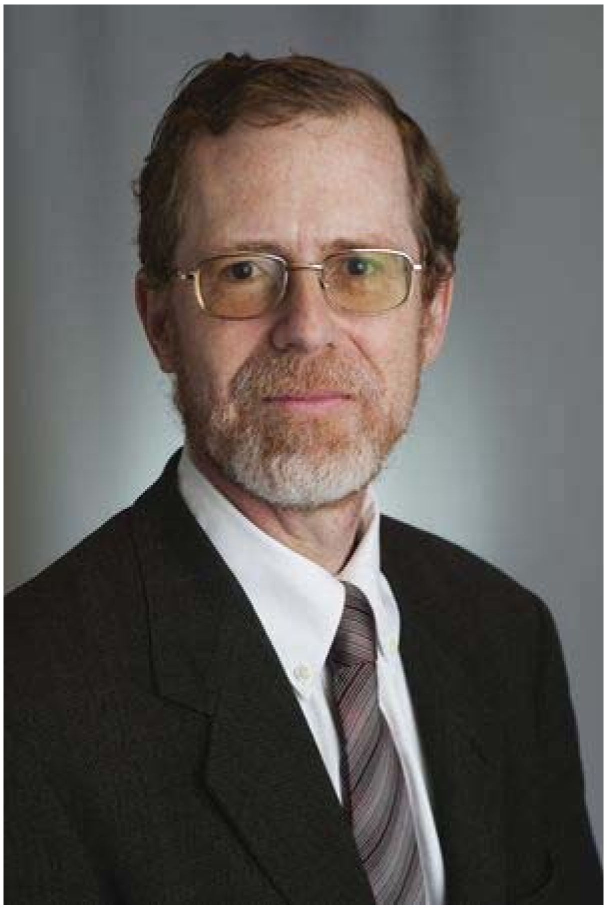
EXHIBIT I

TaxProf Blog

Editor: Paul L. Caron
Pepperdine University School of Law
Wednesday, October 21, 2015

Rasmusen: *How I Came To Be Suing Citigroup For $2.4 Billion As A Tax Whistleblower*

By Paul Caron



TaxProf Blog op-ed: *How I Came To Be Suing Citigroup for $2.4 Billion as a Tax Whistleblower*, by Eric Rasmusen (Indiana University, Kelley School of Business):

Back in 2011 I wrote an article on General Motors and Tax Code Section 382 with J. Mark Ramseyer, who teaches corporations and Japanese law, for The Cato Papers on Public Policy. The U.S. Treasury had issued a series "EESA Notices" (e.g. IRS Notice 2009-14) saying that it interpreted Section 382 as saying that the U.S. Treasury would not be counted as a "shareholder" in thinking about whether an ownership change had occurred. There was no such exception in the statute, and Treasury offered no reasoning, so we were outraged. It mattered because if Section 382 applies, then after an ownership change a corporation loses its Net Operating Losses (NOL's), the past losses it can carry forward to set off against future income in profitable years to reduce income tax.

Our article was "real science" in that ultimately we changed our mind, concluding that GM had not yet underpaid its taxes. GM fell into a legitimate exception, because of two special features: (1) It had gone into Chapter 11, and (2) The U.S. Treasury was a major creditor, and and "old and cold" one who had not lent money intending to convert it to shares later. Thus, this ownership change counted as a reorganization. I struggled a bit, because the formal ownership transfer occurred as a 363 sale rather than a real Chapter 11 reorganization, but Mark convinced me that it still counted as a reorganization. Section 382 would still have been triggered if the U.S.

government had sold its stock within 3 years but it waited long enough to avoid the trigger (perhaps having read our article?).

Citigroup and AIG were a different matter. They didn’t go into bankruptcy,so they weren’t reorganizations. In the case of Citigroup, the government hadn’t bought over 50% of the shares, but combined with a new issue to the public at the same time, Citigroup did go over the Section 382 threshold.

One of the points of our article, though, was that nobody could do anything about it. If Treasury says it’s not going to collect taxes from somebody, nobody can go to court to make it do so. The only remedy is political---impeach the Secretary of the Treasury, or elect a new President. We suggested that standing should be given to Congress, or to a pair of Congressmen, which could be done by statute. We were quite happy with the article--- perhaps the most entertaining piece ever written on Section 382 of the federal tax code.

I then came across the New York State False Claims Act. It had been amended recently, with the sponsorship of Eric Schneiderman, then a State Senator and now New York Attorney General, to allow qui tam suits for treble damages by private citizens against delinquent large New York State taxpayers. Citigroup is in New York, and listed $900 million in New York NOL’s. So I contacted Hodgson-Russ, a generalist Buffalo law firm founded in 1817 that has branched into qui tam law. We filed suit in 2013 under seal, so the Attorney-General could have a chance to look it over and start an undercover investigation if he wished.

The New York State tax authorities were interested at first, but then their interest faded, and Attorney-General Schneiderman eventually declined to join the case, to our regret. If he’d joined, he could use his investigatory powers and, for instance, have the tax people look at Citigroup’s tax returns immediately instead of waiting for discovery. Also, the False Claims Act requires scienter. The taxpayer is liable for qui tam and treble damages suits only if he “knowingly presents, or causes to be presented a false or fraudulent claim for payment or approval” (False Claims Act, 189-1(a)). But he’s liable for the tax payment even without scienter.

One reason we waited so long was in the hope that the SIGTARP, the inspector-general for TARP, would issue his report on the issue of Citigroup and 382. This had been requested by Rep. Dennis Kucinich in 2010 to determine “(1) the rationale behind Treasury’s decision to issue the Waiver; (2) whether Treasury was aware of any tax effect that may result from the issuance of the waiver; (3) determine the principal decision makers involved in issuing the Waiver; and (4) the extent to which Treasury’s policy to timely dispose of TARP investments factored into the decision to issue the Waiver.” Senator Grassley had requested the same kind of information from Treasury, without response as far as we know, so this is a rare example of consensus suspicion by the right-wing Republicans and the left-wing Democrats. Or, perhaps it’s an example of their impotence, since the investigation is still ongoing, 5 years later.

At any rate, after Attorney-General Schneiderman declined to supersede us (but we'd still love him to--- Mr. S., are you reading this?), the court unsealed the case. We served the complaint on Citigroup in September and they removed the case to the Southern District of New York on October 2.

There are lots of interesting legal issues. This is already getting long, so I'll just list four of them.

1. Can we say either than Citigroup did not have scienter because the IRS said Section 382 didn't apply, or that it did because Citigroup has smart lawyers and knew that the IRS had no basis for its assertion?

2. New York State piggybacks on the federal statute, rather than writing out its own Section 382. If a federal court rules that for federal income taxes Section 382 does not apply to Citigroup, must it also rule that for state income taxes Section 382 does not apply, or must it follow (or try to predict) the state court? We can ask the same question of deferral to federal agency regulations and interpretations.

3. What weight should an unreasoned IRS Notice carry in court? Does it make a difference if the Treasury is personally interested in the issue, rather than just interested on behalf of the U.S. citizens? (This, I think, is pretty easy--- no weight, though if you did answer "yes" to unquestioning deference, the question of motivation remains interesting.)

4. In this case, the whistleblower's suit is based on specialized legal analysis rather than private facts. For purposes of the reward, should this be counted as information revealed in the media, or not? (Mark and I spent a lot of time sweating over Section 382--- and Section 383 (tax credits) is even worse!)

For those who want to delve into documents, I've posted some FAQ's and a lot of links. This is 2nd Circuit, case #1:15-cv-07826, and you need to search by the case number on PACER, not by "Rasmusen" as of yesterday, probably because Rasmusen is just the relator , suing on behalf of the State of New York.

New York Times: Citigroup Accused of Improperly Avoiding $800 Million in New York State Taxes, by Lynnley Browning:

An economics professor has filed a lawsuit against Citigroup accusing the bank of using an unusual federal tax break during the financial crisis to avoid paying $800 million in New York State taxes.

In a lawsuit transferred to Federal District Court in Manhattan on Oct. 2, Eric B. Rasmusen, a professor of business economics and public policy at the Kelley School of Business at Indiana University, challenged the validity of the unusual federal tax break for the bank's New York State returns. His claim, originally filed under seal in New York State Supreme Court in 2013, seeks treble damages, or $2.4 billion, under the False Claims Act.

http://taxprof.typepad.com/taxprof_blog/2015/10/rasmusen-.html

EXHIBIT J

NY Spons. Memo., 2010 A.B. 11568

New York Sponsors Memorandum, 2010 A.B. 11568

October 29, 2010
New York Assembly
233rd Legislature, 2010 Regular Session

SPONSORS MEMO:

NEW YORK STATE ASSEMBLY

MEMORANDUM IN SUPPORT OF LEGISLATION

submitted in accordance with Assembly Rule III, Sec 1(e)

BILL NUMBER: A11568

SPONSOR: Rules(Silver)

TITLE OF BILL: An act to amend the state finance law, in relation to establishing the New York fraud, enforcement and recovery act

PURPOSE: The bill amends and strengthens New York's "False Claims Act" (State Finance Law Art. XIII, section 187, et seq.), enacted in 2007. The New York False Claims Act allows private parties to bring civil ("qui tam") actions on behalf of the state to recover fraudulent payments and overpayments made to third-party suppliers of goods and services. The state may intervene in such an action, or allow the action to proceed as a private lawsuit. In either event, if the lawsuit is successful, the qui tam plaintiff (and, through him or her, his or her counsel) may share in a portion of any monetary recovery. The federal False Claims Act (31 U.S.C. 3729 et seq.) was amended in 2009, and again in 2010 as a part of the federal Health Care Reform Act. The bill addresses several issues that have arisen in the courts since the enactment of the New York False Claims Act. It strengthens the Act to assure that the New York law continues to be at least as effective as the federal Act. It allows qui tam plaintiffs to bring actions for tax fraud, but only when the net income or sales of the defendant total $1 million or more and the damages pleaded in the action exceed $350,000. It also strengthens the protections for whistleblowers -- both private persons and government employees -- who uncover information concerning the misuse of government funds.

SUMMARY OF PROVISIONS: Section 1: Amends section 188 of the State Finance Law, the definitional section, to make clear that the Act applies to contractors, grantees and other organizations receiving government funds. Other amendments in this section conform state law to recent amendments to the federal False Claims Act. Section 2: Amends section 189 of the State Finance Law to conform more closely to the federal Act and confirm that "damages" which may be awarded under current law, includes consequential damages. Section 3: Amends section 189 of the State Finance Law to authorize actions under the False Claims Act alleging tax fraud, but only when the net income or sales of the defendant total one million dollars or more, and the damages pleaded in the action exceed $350,000. Section 4: Amends section 190 of the State Finance Law to make clear that a local government may bring a False Claim action not only on its own behalf but also on behalf, of a subdivision of such local govern- ment. Section 5: Amends section 190 of the State Finance Law to clarify that the initial sealing of pleadings filed in a qui tam, False Claims action does not preclude the Attorney General from reviewing certain informa-tion and sharing certain information with other agencies when such information is needed for the purposes of investigating or prosecuting related matters. Section 6: Amends section 190 of the State Finance Law to clarify that when the first pleading in a qui tam, False Claims Act action is timely filed, the statute of limitations is satisfied by such filing. Section 7: Amends section 190 of the State Finance Law to provide that a qui tam plaintiff shall keep the government apprised of the filing of court documents and decisions favoring the government in such court proceedings. Section 8: Amends section 190 of the State Finance Law to clarify that, while a claim that is filed after information about the fraud has been "publicly disclosed," information received in response to a FOIL request is not "publicly disclosed" for purposes of defeating a False Claims Act action. Similarly, the bill provides that mere posting on the internet of information concerning "allegations or transactions" does not consti- tute such "public disclosure." Section 9: Amends section 190 of the State Finance Law regarding whist-leblower protections. This section provides that remedies such as rein-statement and financial compensation are available to former employees of a defendant company, not just "employees," and that such remedies are available even if the disclosure (which led to a qui tam verdict favor- ing the plaintiff) violated a contract, employment term or duty owed to the employer. The amendment provides that any law enforcement authority may, nonetheless, still bring a civil or criminal action for any violation of law. Section 10: Current law sets the statute of limitations for a False Claims Act action at no less than 6 years and, in certain circumstances, up to 10 years. This amendment to section 192 of the State Finance Law sets the statute of limitations at 10 years for all such cases. Section 11: Amends section 192 of the State Finance Law to make clear that the initial pleadings in a False Claims Act case need not necessar- ily identify each specific claim that is alleged to have been fraudu- lent, if the facts alleged would provide a reasonable indication that one or more violations of the Act occurred, and the allegations in the pleading provide adequate notice to permit the government to investigate and the defendants to fairly defend against the allegations made. Section 12: Amends section 190 of the State Finance Law to make clear that any activity by a former government employee in connection with the securing of rights, protections or benefits related to a False Claims Act action does not violate provisions of the Public Officers Law that, often times,temporarily bar former employees from appearing or practic- ing before their former employers.

JUSTIFICATION AND FISCAL IMPLICATIONS: This bill would help ensure that the state receives its share of New York health care recoveries from the federal government, which presently total more than $20 million per year. In addition, the bill would help increase the amount of fraudulently- paid funds recovered by state and local governments under the False Claims Act. It would also decrease the amount of state and local govern- ment funds lost to fraud by deterring government suppliers and contrac- tors from submitting false and fraudulent claims in an attempt to obtain or increase the payment of government funds.

EFFECTIVE DATE: This bill would be effective immediately and would apply to all false claims, records and statements made or used prior to, on or after the April 1, 2007 effective date of the New York False Claims Act.

LEGISLATIVE HISTORY: This is a new bill.

NY Spons. Memo., 2010 A.B. 11568

End of Document

EXHIBIT K

STATE OF NEW YORK
SUPREME COURT : COUNTY OF NEW YORK

THE STATE OF NEW YORK

ex rel.

ERIC RASMUSEN,

Plaintiff,

v.

CITIGROUP, INC.,

Defendant.

CONFIDENTIAL
FILED UNDER SEAL

Index No.: 13 100175

FILED
SEP 02 2015
COUNTY CLERK'S OFFICE
NEW YORK

COMPLAINT

Plaintiff, the State of New York *ex rel.* Eric Rasmusen, alleges as its Complaint against Defendant as follows:

INTRODUCTION

1. This is an action to recover damages, treble damages, and penalties on behalf of the State on account of false and fraudulent records or statements made, used, or caused to be made or used by Defendant, as well as its agents, employees, co-conspirators, and consolidated subsidiaries[1] (collectively, "Defendant" or "Citigroup") material to an obligation to pay money to the State in violation of the New York False Claims Act, State Finance Law §§

[1] Upon information and belief, Citigroup consolidates subsidiaries in which it holds, directly or indirectly, more than 50% of the voting rights or where it exercises control.

187, *et seq.*, as amended ("the Act"). These violations involve the intentional and knowing failure to pay approximately $800 million in taxes owed to the State, including its agencies and departments (in particular, the Department of Taxation and Finance), through unlawful deductions from taxable income.

2. Specifically, upon information and belief, Citigroup defrauded the State by failing to pay taxes owed pursuant to the State's franchise tax through the improper deduction of net operating losses from taxable income after undergoing ownership changes resulting from the federal government's purchase and sale of stock.

3. The Act provides that any person who knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the State shall be liable to the State for a civil penalty of between $6,000 and $12,000 for each violation of the Act, plus three times the amount of damages sustained by the State from the violation. The Act's *Qui Tam* provisions further allow any person ("the relator") to bring a civil action for violations of the Act on behalf of the person and the State and to share in any recovery.

4. Based on these provisions of the Act, Eric Rasmusen, as plaintiff/relator, seeks to recover damages, treble damages, and civil penalties arising from materially false records and statements, knowingly made, used, or caused to be made or used by Citigroup to avoid the payment of taxes lawfully owed to the State. Rasmusen also seeks to recover attorneys' fees and costs of this civil action brought to recover the statutory penalties and damages from Citigroup for violations of the Act.

PARTIES

5. Plaintiff/relator Eric Rasmusen is the Dan R. and Catherine M. Dalton Professor of Business Economics and Public Policy at Indiana University's Kelley School of Business. Rasmusen is a resident of the State of Indiana.

6. Rasmusen brings this action for violations of section 187, *et seq.*, of the Act, on behalf of himself and the State pursuant to section 190(2) of the Act.

7. Upon information and belief, Citigroup is a global diversified financial services holding company providing a broad range of financial products to consumers, institutions, corporations, and governments. It is incorporated in Delaware and has its principal executive offices at 399 Park Avenue, New York City, New York, 10022.

8. Upon information and belief, the net income or sales of Citigroup exceeds one million dollars for the relevant taxable years, and the damages to the State resulting from Citigroup's violations of the Act exceed $350,000.

JURISDICTION AND VENUE

9. Citigroup is doing business in New York and is subject to this Court's jurisdiction.

10. Upon information and belief, Citigroup is authorized to do business in New York.

11. Venue is proper in this county under CPLR 503(a).

ALLEGATIONS OF FACT

The Deduction from Taxable Income of Net Operating Losses under Federal and New York State Law

12. At all relevant times, Citigroup has been subject to both federal and New York State income taxation.

13. The Internal Revenue Code ("IRC") sets forth a number of deductions that can be taken, under federal law, when computing taxable income. 26 U.S.C. § 161. One of these deductions is the net operating loss,[2] or "NOL," deduction. Federal law allows as a deduction an amount equal to the aggregate of the NOL carryovers to the taxable year plus the NOL carrybacks to such year. *Id.* at § 172.

14. Section 382 of the IRC, however, limits the ability of a corporation to carry forward NOLs if the corporation experiences an "ownership change" between the time it incurs the NOLs and the time it uses the NOLs to reduce its taxes. *Id.* at § 382(a), (c).

15. The purpose of this provision is to prevent "loss trafficking" by ensuring that NOLs cannot be used to reduce taxes for corporate shareholders who did not actually bear the corporation's losses. In other words, NOLs can only be carried forward to reduce a corporation's taxes if the corporation is owned by substantially the same shareholders that incurred the losses in the first place.

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[2] A "net operating loss" is defined as the excess of deductions over gross income. *Id.* at § 172(c).

16. New York imposes a franchise tax on banking corporations based on a percentage of their entire net income or an alternative minimum tax. *See* N.Y. Tax Law §§ 1451, 1455. Unless the alternative minimum tax applies, the franchise tax is calculated, for taxable years after January 1, 2007, at 7 1/10% of entire net income or the portion thereof allocated to New York State. *Id.* at 1455.

17. Like federal law, New York allows a corporation to take a NOL deduction and, for taxable years beginning on or after January 2001, the New York NOL is "presumably" the same as the federal NOL calculated under section 172 of the IRC, with certain modifications. N.Y. Tax Law § 1453(k-1).

18. The franchise tax incorporates the NOL deduction under section 172 of the IRC and, thus, also incorporates the NOL limitation on carryovers in section 382 of the IRC.

The 2008 Recession and the Government's Bailout of Citigroup

19. In 2008, Congress enacted the Emergency Economic Stabilization Act of 2008 ("EESA"), which authorized the Department of the Treasury ("Treasury") to take steps to restore liquidity and stability to the financial system. In exercising this authority, EESA required that Treasury prevent the unjust enrichment of financial institutions and generally required Treasury to maximize overall returns to taxpayers.

20. One of the programs established by EESA was the Troubled Asset Relief Program ("TARP"). Through TARP, Treasury purchased equity interests in publicly traded companies, one of which was Citigroup.

21. Specifically, in October 2008, Treasury purchased $25 billion of preferred stock in Citigroup. Then, in November 2008, Treasury invested an additional $20 billion in Citigroup.

22. These transactions constituted an ownership change within the meaning of section 382 for Citigroup.

23. In October 2008, in an attempt to bolster the failing economy, the IRS issued Revenue Notice 2008-83, which provided preferential tax treatment for banks that had undergone an ownership change within the meaning of section 382.

24. Congress, however, prospectively repealed this notice when it enacted the American Recovery and Reinvestment Act of 2009 ("ARRA"). Congress expressly stated in ARRA that the IRS was not authorized to provide exemptions or special rules that are restricted to particular industries or classes of taxpayers.

25. Then, effectively ignoring the prohibition on preferential treatment expressed by Congress in ARRA, the IRS issued Notice 2009-38 in April 2009 as "guidance" to corporate issuers. This notice provided relief from the restrictions on carrying forward NOLs in section 382 for Citigroup and other businesses benefitted by Treasury's purchases of stock. In other words, this Notice cancelled the restriction on the use of NOLs carried forward after the ownership change triggered by Treasury's purchases of stock.

26. In December 2009, the IRS superseded Notice 2009-38 with Notice 2010-2. This Notice, similar to the previous one, was issued as "guidance" and provided that the section 382 limitation would not be triggered by Treasury's purchase of stock. But, the Notice

went further, providing that Treasury's *sale* of stock also would not trigger the NOL limitation in section 382.

27. Citigroup purchased back the $20 billion of Treasury's stock in December 2009 and, in February 2009, Treasury converted its $25 billion of preferred stock into common stock.

28. In April 2010, approximately four months after the government issued Notice 2010-2, Treasury began to sell its Citigroup common stock and, as of December 2010, Treasury no longer owned any Citigroup stock.

29. Treasury's sale of its Citigroup stock constituted another ownership change within the meaning of section 382.

30. The federal government realized $6,850,000,000 of profit from its sale of Citigroup stock. But, while the federal government realized a short-term profit, it will lose significantly more through the loss in tax revenue as a result of Citigroup's avoidance of the restriction on NOL deductions set forth in section 382.

31. Moreover, shareholders who purchased Treasury's stock in Citigroup in 2010 paid more for that stock that they would have if Citigroup adhered to the section 382 limitation because Citigroup was worth more as a company with the unrestricted use of its NOLs.

32. Upon information and belief, the IRS Notices were not approved by Congress, are contrary to the language and purpose of section 382 of the IRC, defy ARRA's

prohibition on preferential treatment of classes of taxpayers, conflict with the requirements of EESA, and constitute arbitrary and capricious action by Treasury.

33. Upon information and belief, because the IRS Notices were improperly promulgated by the IRS, Citigroup was not entitled to rely upon them to reduce its taxable income for purposes of the IRC or, for that matter, the New York Tax Law.

34. Upon information and belief, even if the IRS Notices are valid as a matter of federal law, they were not adopted or incorporated into the New York State Tax Law and, thus, Citigroup was not entitled to rely upon them to reduce its New York State tax liability.

35. Nevertheless, on information and belief, Citigroup did just this on its federal and state tax returns.

Violations of the False Claims Act

36. Upon information and belief, between 2010 and 2012, Citigroup knowingly made, used, or caused to be made or used, or is knowingly making, using or causing to be made or used, false records or statements material to an obligation to pay money to the State.

37. Specifically, upon information and belief, Citigroup knowingly prepared false State tax returns with excessive and improper NOL deductions to reduce its taxable income and avoid the payment of taxes owed to the State pursuant to the State's franchise tax.

38. Upon information and belief, as a result of the knowingly false records or statements used by Citigroup to avoid the payment of taxes to the State, the State did not receive approximately $800 million in tax revenues to which it was entitled.

39. Upon information and belief, as a result of the knowingly fraudulent conduct of Citigroup, Citigroup is liable to the State for taxes owed to the State, trebled, plus penalties, interest, and attorneys' fees under the Act. *See* N.Y. State Fin. Law § 189(1)(g).

JURY DEMAND

40. Rasmusen demands a jury on all issues and matters triable by a jury.

RELIEF REQUESTED

WHEREFORE,

a) For treble damages under State Finance Law §§ 189(1)(g) in an amount to be determined at trial, plus penalties, costs, interest, and attorneys' fees;

b) For the damages sustained by the State; and

c) For award of such other and further relief as this Court deems proper as a matter of law or under the New York False Claims Act, State Finance Law §§ 187, *et seq.*

Dated: Buffalo, New York
January 24, 2013

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Attorneys for Eric Rasmusen

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