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

THE STATE OF NEW YORK ex rel. ERIC RASMUSEN, Plaintiff,	Index No. 100175/2013
- against -	Hon. Charles E. Ramos IAS Part 53
CITIGROUP INC., Defendant.	Mot. Seq. No. 002

AFFIRMATION OF EDMUND POLUBINSKI III

Edmund Polubinski III affirms pursuant to CPLR 2106 that the following is true:

1. I am an attorney licensed to practice law before the Courts of the State of New York. I am a member of the firm of Davis Polk & Wardwell LLP, counsel for defendant Citigroup Inc. I submit this affirmation in support of defendant's motion to dismiss the complaint.

2. Attached hereto as Exhibit 1 is a true and correct copy of a TaxProf Blog post by Eric J. Rasmusen entitled Rasmusen: How I Came To Be Suing Citigroup for $2.4 Billion as a Tax Whistleblower, dated October 21, 2015, which is available at http://taxprof.typepad.com/taxprof_blog/2015/10/rasmusen-.html (last accessed January 26, 2017).

3. Attached hereto as Exhibit 2 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.

4. Attached hereto as Exhibit 3 is a true and correct copy of the complaint filed in the above-captioned action, dated January 24, 2013.

5. Attached hereto as Exhibit 4 is a true and correct excerpt of United States Senate Committee on Finance Report Number 83-1622, dated June 18, 1954, consisting of the cover page and page 53.

6. Attached hereto as Exhibit 5 is a true and correct copy of I.R.S. Notice 2008-100, 2008-2 C.B. 1081, dated November 3, 2008.

7. Attached hereto as Exhibit 6 is a true and correct copy of I.R.S. Notice 2009-14, 2009-7 I.R.B. 516, dated February 17, 2009.

8. Attached hereto as Exhibit 7 is a true and correct copy of I.R.S. Notice 2009-38, 2009-18 I.R.B. 901, dated May 4, 2009.

9. Attached hereto as Exhibit 8 is a true and correct copy of I.R.S. Notice 2010-2, 2010-2 I.R.B. 251, dated January 11, 2010.

10. Attached hereto as Exhibit 9 is a true and correct copy of I.R.S. Notice 2008-83, 2008-2 C.B. 905, dated October 20, 2008.

11. Attached hereto as Exhibit 10 is a true and correct copy of a press release issued by United States Senator Charles Grassley entitled Grassley Seeks Inspector General Review of Treasury Bank Merger Move, dated November 14, 2008, which is available at http://www.grassley.senate.gov/news/news-releases/grassley-seeks-inspector-general-review-treasury-bank-merger-move (last accessed January 26, 2017).

12. Attached hereto as Exhibit 11 is a true and correct copy of a Washington Post article by Amit R. Paley entitled A Quiet Windfall for U.S. Banks, dated November 10, 2008, which is available at http://www.washingtonpost.com/wp-dyn/content/article/2008/11/09/AR2008110902155.html (last accessed January 26, 2017).

13. Attached hereto as Exhibit 12 is a true and correct excerpt of the United States House of Representatives Conference Report Number 111-16, dated February 12, 2009, consisting of the cover page and pages 554-55.

14. Attached hereto as Exhibit 13 is a true and correct excerpt of Citigroup Inc.'s Form 10-K for the fiscal year 2010, dated February 25, 2011, consisting of the cover page and pages 77, 140, and 201-02.

15. Attached hereto as Exhibit 14 is a true and correct excerpt of Citigroup Inc.'s Form 10-K for the fiscal year 2009, dated February 26, 2010, consisting of the cover page and pages 168-69.

16. Attached hereto as Exhibit 15 is a true and correct copy of an internet post by Eric J. Rasmusen entitled Why Citigroup's Motion to Dismiss Is Wrong, dated December 14, 2015, which is available at http://www.rasmusen.org/citigroup/2015.12.08reply-notes.pdf (last accessed January 26, 2017).

17. Attached hereto as Exhibit 16 is a true and correct copy of the webpage http://www.rasmusen.org/citigroup/ (last accessed January 26, 2017).

18. Attached hereto as Exhibit 17 is a true and correct copy of a Washington Post article by Binyamin Appelbaum entitled U.S. Gave Up Billions in Tax Money in Deal for Citigroup's Bailout Repayment, dated December 16, 2008, which is available at http://www.washingtonpost.com/wp-dyn/content/article/2009/12/15/AR2009121504534.html (last accessed January 26, 2017).

19. Attached hereto as Exhibit 18 is a true and correct copy of a Credit Writedowns blog post by Edward Harrison entitled U.S. Forfeiting Billions in Future Taxes to Let Citi Repay TARP, dated December 16, 2009, which is available at

https://www.creditwritedowns.com/2009/12/u-s-forfeiting-billions-in-future-taxes-to-let-citi-repay-tarp.html (last accessed January 26, 2017).

20. Attached hereto as Exhibit 19 is a true and correct copy of a TPM Muckraker blog post by Justin Elliott entitled Obama Admin Grants Mega Tax Break to Citi in Bailout Deal, dated December 16, 2009, which is available at http://talkingpointsmemo.com/muckraker/obama-admin-grants-mega-tax-break-to-citi-in-bailout-deal (last accessed January 26, 2017).

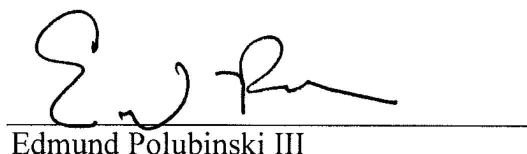
21. Attached hereto as Exhibit 20 is a true and correct excerpt of a report of the Congressional Oversight Panel entitled January Oversight Report, Exiting TARP and Unwinding Its Impact on the Financial Markets, dated January 13, 2010, consisting of the cover page and pages 12-16.

22. Attached hereto as Exhibit 21 is a true and correct copy of a University of Michigan Journal of Law Reform article by Sunil Shenoi entitled Undoing Undue Favors: Providing Competitors with Standing to Challenge Favorable IRS Actions, dated winter 2010.

23. Attached hereto as Exhibit 22 is a true and correct copy of a policy paper by Eric B. Rasmusen and J. Mark Ramseyer entitled Can the Treasury Exempt Its Own Companies From Tax? The $45 Billion GM NOL Carryforward, which was published in The Cato Papers On Public Policy, Volume 1.

24. Attached hereto as Exhibit 23 is a true and correct copy of the New York State Department of Taxation and Finance, Office of Tax Policy Analysis Advisory Opinion Number TSB-A-07(2)C, dated March 19, 2007.

Dated: New York, New York
January 26, 2017



Edmund Polubinski III

Exhibit 1

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

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Exhibit 2

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

Taxpayer Protection Bureau
Office of the New York Attorney General
120 Broadway, 22nd Floor
New York, New York 10271
Tel.: (212) 416-6012

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 3

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

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.

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MOTION OFFICE
EX-PARTE
NEW YORK COUNTY
N.Y.S. SUPREME COURT

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
<u>Government's Bailout of Citigroup</u>

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

HODGSON RUSS LLP
Attorneys for Eric Rasmusen

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Exhibit 4

Union Calendar No. 1635

83D CONGRESS, 2d Session | SENATE | REPORT No. 1622

INTERNAL REVENUE CODE OF 1954

REPORT

OF THE

COMMITTEE ON FINANCE

UNITED STATES SENATE

TO ACCOMPANY

H. R. 8300

A BILL TO REVISE THE INTERNAL REVENUE LAWS OF THE UNITED STATES

JUNE 18, 1954.—Ordered to be printed

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1954

48590°

(2) Changes made by committee

Your committee added two items to the list of those in the House bill. These are (1) the deduction of deficiency dividends in the case of personal holding companies, and (2) percentage depletion with respect to mine tailings.

E. Special Limitation on Net Operating Loss Carryover (sec. 382)

(1) *House changes accepted by committee*

Under present law where a controlling interest in a corporation is acquired for the purpose of avoiding or evading tax liabilities the Internal Revenue Service may disallow the benefits of a deduction, credit, or allowance which would otherwise be enjoyed by the acquiring person or corporation. This provision has proved ineffectual, however, because of the necessity of proving that tax avoidance was the primary purpose of the transaction. It has also been so uncertain in its effects as to place a premium on litigation and a damper on valid business transactions.

The House bill added a provision designed to limit undue tax benefits of this character by restricting the amount of net operating loss carryover which may be deducted where 50 percent or more of the participating interest in a corporation was acquired by new owners. Your committee adopted this provision with modifications noted below.

(2) Changes made by committee

Your committee has adopted a provision to limit the application of this provision relating to purchase to those areas in which abuse has most often arisen, that is, the purchase of the stock of a corporation with a history of losses for the purpose of using its loss carryovers to offset gains of a business unrelated to that which produced the losses. Accordingly, your committee has provided that if more than 50 percent of the stock of a corporation is purchased within a 2-year period and if the corporation thereafter engages in a different type of business, then the loss carryover is eliminated.

Your committee also limits the allowance of net operating loss carryovers as a result of a tax-free reorganization. Your committee considers it appropriate to allow such carryovers in full only when the shareholders of the predecessor loss corporation have a substantial continuing interest in the successor corporation. Thus, if the shareholders of the old loss corporation have 20 percent of the stock of the new corporation the loss carryover is available to the new corporation without diminution. The amount of the carryover is reduced proportionately, however, if the old shareholders receive less than this percentage. Thus, if they have only 10 percent of the stock in the successor corporation, only 50 percent of the loss carryover is available to it.

XIII. Pension, Profit-Sharing, and Stock Bonus Plans

The House bill made a major departure in the qualification requirements for pension, profit-sharing, and stock bonus plans. The aim was to replace the Commissioner's discretion under present law with clear rules that would permit any employer to determine whether or not a plan was qualified and to do so in a way that would qualify all reasonable plans without opening the door to discriminatory plans. These broad objectives have received general approval. However, the

Exhibit 5

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 6

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 7

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 rep-

resented 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 8

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 9

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 10

Grassley Seeks Inspector General Review of Treasury Bank Merger Move

Nov 14, 2008

Grassley Seeks Inspector General Review of Treasury Bank Merger Move

WASHINGTON – Sen. Chuck Grassley, ranking member of the Committee on Finance, today asked the Treasury Department inspector general to review the circumstances and any possible conflicts of interest involving the Treasury Department's administrative move that gives a big tax break to banks that acquire poorly performing banks.

"Treasury's move took a lot of people by surprise," Grassley said. "It was a big policy change for an agency to take administratively. Treasury didn't involve Congress, so there were no checks and balances to vet the policy. The relationships of the players involved might give the appearance of conflicts of interest. I'm asking the inspector general to look at Treasury's move after the fact and make sure the agency was fair, unbiased and above board in its actions."

The text of Grassley's request letter to the inspector general follows here.

November 14, 2008

Via Electronic Transmission

The Honorable Eric M. Thorson

Inspector General

U.S. Department of Treasury

1500 Pennsylvania Avenue, NW

Washington, DC 20220

Dear Inspector General Thorson:

I am writing to ask you to conduct an investigation into the facts and circumstances leading to the Treasury Department's issuance of Notice 2008-83 ("Notice") on September 30, 2008, as well as possible conflicts of interest involving Department of the Treasury ("Treasury") officials, former Goldman Sachs executives, and board members in the sale of Wachovia Corporation to Wells Fargo.

The Notice changes the rules governing the deductibility of losses under section 382(h) of the Internal Revenue Code as it applies to banks. While section 382 provides Treasury the authority to issue regulations to implement section 382, Treasury's action raises significant questions about whether it exceeded implementing authority by attempting to change the law. Prior to the Notice, the amount of income that an acquiring bank could shelter in order to be able to absorb the losses of a bank it acquired was limited. Now, the Notice allows an acquiring bank to use an acquired bank's losses to shelter its income without limitation.

As you know, Treasury Secretary Henry M. Paulson, Jr. was formerly the Chairman and CEO of Goldman Sachs. Former Goldman Sachs board member Edward M. Liddy was selected to lead AIG when the Treasury loaned AIG the first $85 billion of $150 billion of taxpayer funds. Neel Kashkari is the head of Treasury's new Office of Financial Stability, created to oversee the $700 billion of funds authorized by Congress for the bailout, and was a former vice-president at Goldman Sachs. Secretary Paulson's team at Treasury also includes senior advisors formerly at Goldman Sachs, such as Dan Jester and Steve Shafran.

Given these relationships, there is reason for concern about the appearance of preferential treatment created by the Treasury Department's decision to issue Notice 2008-83. 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. Robert Steel, the CEO of Wachovia, was a former Undersecretary for Domestic Finance and was a vice chairman at Goldman Sachs prior to that. He joined Treasury in 2006 to work on issues pertaining to Fannie Mae and Freddie Mac. Mr. Steel left Treasury to become chief executive of Wachovia just this summer.

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. It also potentially enabled

Wachovia's senior executives to qualify for parachute payments that may not have been available under the Citibank deal.

The facts and circumstances surrounding the issuance of the Notice, particularly as it relates to Wells Fargo's purchase of Wachovia Corporation, raise concerns about the independence of the decision makers. Since the Notice and the FDIC's intervention are part of the federal government's larger efforts to stabilize the economy, I ask that your office conduct this investigation since you have broader jurisdiction over Treasury than the Treasury Inspector General for Tax Administration. As part of your investigation, please obtain and review all documents and communication related to the issuance of Notice 2008-83, including all records of communication between Treasury officials, individuals at Wells Fargo, and/or Wachovia Corporation or their representatives.

Should you agree to conduct the examination, please provide periodic updates on your progress. Moreover and in the event that the Office of the Inspector General has any difficulty obtaining access to any of the materials or persons needed to conduct this review in an efficient and effective manner, I request that you contact me immediately. Thank you in advance for your assistance in this matter and should you wish to discuss this request in further detail please contact Ellen McCarthy and Jason Foster of my staff at (202) 224-4515.

Sincerely,

Chuck Grassley

United States Senate

Exhibit 11

A Quiet Windfall For U.S. Banks

Advertisement

With Attention on Bailout Debate, Treasury Made Change to Tax Policy

By Amit R. Paley
Washington Post Staff Writer
Monday, November 10, 2008

The financial world was fixated on Capitol Hill as Congress battled over the Bush administration's request for a $700 billion bailout of the banking industry. In the midst of this late-September drama, the Treasury Department issued a five-sentence notice that attracted almost no public attention.

But corporate tax lawyers quickly realized the enormous implications of the document: Administration officials had just given American banks a windfall of as much as $140 billion.

The sweeping change to two decades of tax policy escaped the notice of lawmakers for several days, as they remained consumed with the controversial bailout bill. When they found out, some legislators were furious. Some congressional staff members have privately concluded that the notice was illegal. But they have worried that saying so publicly could unravel several recent bank mergers made possible by the change and send the economy into an even deeper tailspin.

"Did the Treasury Department have the authority to do this? I think almost every tax expert would agree that the answer is no," said George K. Yin, the former chief of staff of the Joint Committee on Taxation, the nonpartisan congressional authority on taxes. "They basically repealed a 22-year-old law that Congress passed as a backdoor way of providing aid to banks."

The story of the obscure provision underscores what critics in Congress, academia and the legal profession warn are the dangers of the broad authority being exercised by Treasury Secretary Henry M. Paulson Jr. in addressing the financial crisis. Lawmakers are now looking at whether the new notice was introduced to benefit specific banks, as well as whether it inappropriately accelerated bank takeovers.

The change to Section 382 of the tax code -- a provision that limited a kind of tax shelter arising in corporate mergers -- came after a two-decade effort by conservative economists and Republican administration officials to eliminate or overhaul the law, which is so little-known that even influential tax experts sometimes draw a blank at its mention. Until the financial meltdown, its opponents thought it would be nearly impossible to revamp the section because this would look like a corporate giveaway, according to lobbyists.

Andrew C. DeSouza, a Treasury spokesman, said the administration had the legal authority to issue the notice as part of its power to interpret the tax code and provide legal guidance to companies. He described the Sept. 30 notice, which allows some banks to keep more money by lowering their taxes, as a way to help financial institutions during a time of economic crisis. "This is part of our overall effort to provide relief," he said.

The Treasury itself did not estimate how much the tax change would cost, DeSouza said.

A Tax Law 'Shock'

The guidance issued from the IRS caught even some of the closest followers of tax law off guard because it seemed to come out of the blue when Treasury's work seemed focused almost exclusively on the bailout.

"It was a shock to most of the tax law community. It was one of those things where it pops up on your screen and your jaw drops," said Candace A. Ridgway, a partner at Jones Day, a law firm that represents banks that could benefit from the notice. "I've been in tax law for 20 years, and I've never seen anything like this."

More than a dozen tax lawyers interviewed for this story -- including several representing banks that stand to reap billions from the change -- said the Treasury had no authority to issue the notice.

Several other tax lawyers, all of whom represent banks, said the change was legal. Like DeSouza, they said the legal authority came from Section 382 itself, which says the secretary can write regulations to "carry out the purposes of this section."

Section 382 of the tax code was created by Congress in 1986 to end what it considered an abuse of the tax system: companies sheltering their profits from taxation by acquiring shell companies whose only real value was the losses on their books. The firms would then use the acquired company's losses to offset their gains and avoid paying taxes.

Lawmakers decried the tax shelters as a scam and created a formula to strictly limit the use of those purchased losses for tax purposes.

But from the beginning, some conservative economists and Republican administration officials criticized the new law as unwieldy and unnecessary meddling by the government in the business world.

"This has never been a good economic policy," said Kenneth W. Gideon, an assistant Treasury secretary for tax policy under President George H.W. Bush and now a partner at Skadden, Arps, Slate, Meagher & Flom, a law firm that represents banks.

The opposition to Section 382 is part of a broader ideological battle over how the tax code deals with a company's losses. Some conservative economists argue that not only should a firm be able to use losses to offset gains, but that in a year when a company only loses money, it should be entitled to a cash refund from the government.

During the current Bush administration, senior officials considered ways to implement some version of the policy. A Treasury paper in December 2007 -- issued under the names of Eric Solomon, the top tax policy official in the department, and his deputy, Robert Carroll -- criticized limits on the use of losses and suggested that they be relaxed. A logical extension of that argument would be an overhaul of 382, according to Carroll, who left his position as deputy assistant secretary in the Treasury's office of tax policy earlier this year.

Yet lobbyists trying to modify the obscure section found that they could get no traction in Congress or with the Treasury.

"It's really been the third rail of tax policy to touch 382," said Kevin A. Hassett, director of economic policy studies at the American Enterprise Institute.

'The Wells Fargo Ruling'

As turmoil swept financial markets, banking officials stepped up their efforts to change the law.

Senior executives from the banking industry told top Treasury officials at the beginning of the year that Section 382 was bad for businesses because it was preventing mergers, according to Scott E. Talbott, senior vice president for the Financial Services Roundtable, which lobbies for some of the country's largest financial institutions. He declined to identify the executives and said the discussions were not a concerted lobbying effort. Lobbyists for the biotechnology industry also raised concerns about the provision at an April meeting with Solomon, the assistant secretary for tax policy, according to talking points prepared for the session.

DeSouza, the Treasury spokesman, said department officials in August began internal discussions about the tax change. "We received absolutely no requests from any bank or financial institution to do this," he said.

Although the department's action was prompted by spreading troubles in the financial markets, Carroll said, it was consistent with what the Treasury had deemed in the December report to be good tax policy.

The notice was released on a momentous day in the banking industry. It not only came 24 hours after the House of Representatives initially defeated the bailout bill, but also one day after Wachovia agreed to be acquired by

Citigroup in a government-brokered deal.

The Treasury notice suddenly made it much more attractive to acquire distressed banks, and Wells Fargo, which had been an earlier suitor for Wachovia, made a new and ultimately successful play to take it over.

The Jones Day law firm said the tax change, which some analysts soon dubbed "the Wells Fargo Ruling," could be worth about $25 billion for Wells Fargo. Wells Fargo declined to comment for this article.

The tax world, meanwhile, was rushing to figure out the full impact of the notice and who was responsible for the change.

Jones Day released a widely circulated commentary that concluded that the change could cost taxpayers about $140 billion. Robert L. Willens, a prominent corporate tax expert in New York City, said the price is more likely to be $105 billion to $110 billion.

Over the next month, two more bank mergers took place with the benefit of the new tax guidance. PNC, which took over National City, saved about $5.1 billion from the modification, about the total amount that it spent to acquire the bank, Willens said. Banco Santander, which took over Sovereign Bancorp, netted an extra $2 billion because of the change, he said. A spokesman for PNC said Willens's estimate was too high but declined to provide an alternate one; Santander declined to comment.

Attorneys representing banks celebrated the notice. The week after it was issued, former Treasury officials now in private practice met with Solomon, the department's top tax policy official. They asked him to relax the limitations on banks even further, so that foreign banks could benefit from the tax break, too.

Congress Looks for Answers

No one in the Treasury informed the tax-writing committees of Congress about this move, which could reduce revenue by tens of billions of dollars. Legislators learned about the notice only days later.

DeSouza, the Treasury spokesman, said Congress is not normally consulted about administrative guidance.

Sen. Charles E. Grassley (R-Iowa), ranking member on the Finance Committee, was particularly outraged and had his staff push for an explanation from the Bush administration, according to congressional aides.

In an off-the-record conference call on Oct. 7, nearly a dozen Capitol Hill staffers demanded answers from Solomon for about an hour. Several of the participants left the call even more convinced that the administration had overstepped its authority, according to people familiar with the conversation.

But lawmakers worried about discussing their concerns publicly. The staff of Sen. Max Baucus (D-Mont.), chairman of the Finance Committee, had asked that the entire conference call be kept secret, according to a person with knowledge of the call.

"We're all nervous about saying that this was illegal because of our fears about the marketplace," said one congressional aide, who like others spoke on condition of anonymity because of the sensitivity of the matter. "To the extent we want to try to publicly stop this, we're going to be gumming up some important deals."

Grassley and Sen. Charles E. Schumer (D-N.Y.) have publicly expressed concerns about the notice but have so far avoided saying that it is illegal. "Congress wants to help," Grassley said. "We also have a responsibility to make sure power isn't abused and that the sensibilities of Main Street aren't left in the dust as Treasury works to inject remedies into the financial system."

Carol Guthrie, spokeswoman for the Democrats on the Finance Committee, said it is in frequent contact with the Treasury about the financial rescue efforts, including how it exercises authority over tax policy.

Lawmakers are considering legislation to undo the change. According to tax attorneys, no one would have legal standing to file a lawsuit challenging the Treasury notice, so only Congress or Treasury could reverse it. Such action could undo the notice going forward or make it clear that it was never legal, a move that experts say would be unlikely.

But several aides said they were still torn between their belief that the change is illegal and fear of further destabilizing the economy.

"None of us wants to be blamed for ruining these mergers and creating a new Great Depression," one said.

Some legal experts said these under-the-radar objections mirror the objections to the congressional resolution authorizing the war in Iraq.

"It's just like after September 11. Back then no one wanted to be seen as not patriotic, and now no one wants to be seen as not doing all they can to save the financial system," said Lee A. Sheppard, a tax attorney who is a contributing editor at the trade publication Tax Analysts. "We're left now with congressional Democrats that have spines like overcooked spaghetti. So who is going to stop the Treasury secretary from doing whatever he wants?"

View all comments that have been posted about this article.

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Exhibit 12

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

111TH CONGRESS
1st Session

HOUSE OF REPRESENTATIVES

REPORT
111–16

MAKING SUPPLEMENTAL APPROPRIATIONS FOR JOB PRESERVATION AND CREATION, INFRASTRUCTURE INVESTMENT, ENERGY EFFICIENCY AND SCIENCE, ASSISTANCE TO THE UNEMPLOYED, AND STATE AND LOCAL FISCAL STABILIZATION, FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 2009, AND FOR OTHER PURPOSES

CONFERENCE REPORT

TO ACCOMPANY

H.R. 1

FEBRUARY 12, 2009.—Ordered to be printed

received unemployment compensation under State or Federal law for not less than four weeks during the one-year period ending on the hiring date.

For purposes of the disconnected youths, it is intended that a low level of formal education may satisfy the requirement that an individual is not readily employable by reason of lacking a sufficient number of skills. Further, it is intended that the Internal Revenue Service, when providing general guidance regarding the various new criteria, shall take into account the administrability of the program by the State agencies.

6. Clarification of regulations related to limitations on certain built-in losses following an ownership change (sec. 1431 of the House bill, sec. 1281 of the Senate amendment, sec. 1261 of the conference agreement, and sec. 382 of the Code)

PRESENT LAW

Section 382 limits the extent to which a "loss corporation" that experiences an "ownership change" may offset taxable income in any post-change taxable year by pre-change net operating losses, certain built-in losses, and deductions attributable to the pre-change period.[50] In general, the amount of income in any post-change year that may be offset by such net operating losses, built-in losses and deductions is limited to an amount (referred to as the "section 382 limitation") determined by multiplying the value of the loss corporation immediately before the ownership change by the long-term tax-exempt interest rate.[51]

A "loss corporation" is defined as a corporation entitled to use a net operating loss carryover or having a net operating loss carryover for the taxable year in which the ownership change occurs. Except to the extent provided in regulations, such term includes any corporation with a "net unrealized built-in loss" (or NUBIL),[52] defined as the amount by which the fair market value of the assets of the corporation immediately before an ownership change is less than the aggregate adjusted basis of such assets at such time. However, if the amount of the NUBIL does not exceed the lesser of (i) 15 percent of the fair market value of the corporation's assets or (ii) $10,000,000, then the amount of the NUBIL is treated as zero.[53]

An ownership change is defined generally as an increase by more than 50-percentage points in the percentage of stock of a loss corporation that is owned by any one or more five-percent (or great-

[50] Sec. 383 imposes similar limitations, under regulations, on the use of carryforwards of general business credits, alternative minimum tax credits, foreign tax credits, and net capital loss carryforwards. Sec. 383 generally refers to sec. 382 for the meanings of its terms, but requires appropriate adjustments to take account of its application to credits and net capital losses.

[51] If the loss corporation had a "net unrealized built-in gain" (or NUBIG) at the time of the ownership change, then the sec. 382 limitation for any taxable year may be increased by the amount of the "recognized built-in gains" (discussed further below) for that year. A NUBIG is defined as the amount by which the fair market value of the assets of the corporation immediately before an ownership change exceeds the aggregate adjusted basis of such assets at such time. However, if the amount of the NUBIG does not exceed the lesser of (i) 15 percent of the fair market value of the corporation's assets or (ii) $10,000,000, then the amount of the NUBIG is treated as zero. Sec. 382(h)(1).

[52] Sec. 382(k)(1).

[53] Sec. 382(h)(3).

er) shareholders (as defined) within a three-year period.[54] Treasury regulations provide generally that this measurement is to be made as of any "testing date," which is any date on which the ownership of one or more persons who were or who become five-percent shareholders increases.[55]

Section 382(h) governs the treatment of certain built-in losses and built-in gains recognized with respect to assets held by the loss corporation at the time of the ownership change. In the case of a loss corporation that has a NUBIL (measured immediately before an ownership change), section 382(h)(1) provides that any "recognized built-in loss" (or RBIL) for any taxable year during a "recognition period" (consisting of the five years beginning on the ownership change date) is subject to the section 382 limitation in the same manner as if it were a pre-change net operating loss.[56] An RBIL is defined for this purpose as any loss recognized during the recognition period on the disposition of any asset held by the loss corporation immediately before the ownership change date, to the extent that such loss is attributable to an excess of the adjusted basis of the asset on the change date over its fair market value on

[54] Determinations of the percentage of stock of any corporation held by any person are made on the basis of value. Sec. 382(k)(6)(C).

[55] See Treas. Reg. sec. 1.382–2(a)(4) (providing that "a loss corporation is required to determine whether an ownership change has occurred immediately after any owner shift, or issuance or transfer (including an issuance or transfer described in Treas. Reg. sec. 1.382–4(d)(8)(i) or (ii)) of an option with respect to stock of the loss corporation that is treated as exercised under Treas. Reg. sec. 1.382–4(d)(2)" and defining a "testing date" as "each date on which a loss corporation is required to make a determination of whether an ownership change has occurred") and Temp. Treas. Reg. sec. 1.382–2T(e)(1) (defining an "owner shift" as "any change in the ownership of the stock of a loss corporation that affects the percentage of such stock owned by any 5-percent shareholder"). Treasury regulations under section 382 provide that, in computing stock ownership on specified testing dates, certain unexercised options must be treated as exercised if certain ownership, control, or income tests are met. These tests are met only if "a principal purpose of the issuance, transfer, or structuring of the option (alone or in combination with other arrangements) is to avoid or ameliorate the impact of an ownership change of the loss corporation." Treas. Reg. sec. 1.382–4(d). Compare prior temporary regulations, Temp. Reg. sec. 1.382–2T(h)(4) ("Solely for the purpose of determining whether there is an ownership change on any testing date, stock of the loss corporation that is subject to an option shall be treated as acquired on any such date, pursuant to an exercise of the option by its owner on that date, if such deemed exercise would result in an ownership change."). Internal Revenue Service Notice 2008–76, I.R.B. 2008–39 (September 29, 2008), released September 7, 2008, provides that the Treasury Department intends to issue regulations modifying the term "testing date" under sec. 382 to exclude any date on or after which the United States acquires stock or options to acquire stock in certain corporations with respect to which there is a "Housing Act Acquisition" pursuant to the Housing and Economic Recovery Act of 2008 (P.L. 110–289). The Notice states that the regulations will apply on and after September 7, 2008, unless and until there is additional guidance. Internal Revenue Service Notice 2008–84, I.R.B. 2008–41 (October 14, 2008), provides that the Treasury Department intends to issue regulations modifying the term "testing date" under sec. 382 to exclude any date as of the close of which the United States owns, directly or indirectly, a more than 50 percent interest in a loss corporation, which regulations will apply unless and until there is additional guidance. Internal Revenue Service Notice 2008–100, 2008–14 I.R.B. 1081 (released October 15, 2008) provides that the Treasury Department intends to issue regulations providing, among other things, that certain instruments acquired by the Treasury Department under the Capital Purchase Program (CPP) pursuant to the Emergency Economic Stabilization Act of 2008 (P.L. 100–343) ("EESA") shall not be treated as stock for certain purposes. The Notice also provides that certain capital contributions made by Treasury pursuant to the CPP shall not be considered to have been made as part of a plan the principal purpose of which was to avoid or increase any sec. 382 limitation (for purposes of section 382(1)(1)). The Notice states that taxpayers may rely on the rules described unless and until there is further guidance; and that any contrary guidance will not apply to instruments (i) held by Treasury that were acquired pursuant to the CCP prior to publication of that guidance, or (ii) issued to Treasury pursuant to the CCP under written binding contracts entered into prior to the publication of that guidance. Internal Revenue Service Notice 2009–14, 2009–7 I.R.B. 1 (January 30, 2009) amplifies and supersedes Notice 2008–100, and provides additional guidance regarding the application of sec. 382 and other provisions of law to corporations whose instruments are acquired by the Treasury Department under certain programs pursuant to EESA.

[56] Sec. 382(h)(2). The total amount of the loss corporation's RBILs that are subject to the section 382 limitation cannot exceed the amount of the corporation's NUBIL.

Exhibit 13

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 ☐ Smaller reporting company
(Do not check if a 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.

INCOME TAXES

Citigroup is subject to the income tax laws of the U.S., its states and local municipalities and the foreign jurisdictions in which Citi operates. These tax laws are complex and are subject to differing interpretations by the taxpayer and the relevant governmental taxing authorities. In establishing a provision for income tax expense, Citi must make judgments and interpretations about the application of these inherently complex tax laws. Citi must also make estimates about when in the future certain items will affect taxable income in the various tax jurisdictions, both domestic and foreign.

Disputes over interpretations of the tax laws may be subject to review and adjudication by the court systems of the various tax jurisdictions or may be settled with the taxing authority upon audit. Deferred taxes are recorded for the future consequences of events that have been recognized in the financial statements or tax returns, based upon enacted tax laws and rates. Deferred tax assets (DTAs) are recognized subject to management's judgment that realization is more likely than not.

At December 31, 2010, Citigroup had recorded net DTAs of approximately $52.1 billion, an increase of $6.0 billion from $46.1 billion at December 31, 2009. Excluding the impact of the adoption of SFAS 166/167, the DTAs increased $1.0 billion during 2010. The adoption of SFAS 166/167 on January 1, 2010 resulted in an increase to the DTAs of approximately $5.0 billion related to the loan losses recorded upon consolidation of Citi's credit card trusts.

Although realization is not assured, Citigroup believes that the realization of the recognized net DTAs of $52.1 billion at December 31, 2010 is more likely than not based upon expectations as to future taxable income in the jurisdictions in which the DTAs arise, and based on available tax planning strategies, as defined in ASC 740, *Income Taxes*, that would be implemented, if necessary, to prevent a carryforward from expiring.

The following table summarizes Citi's net DTAs balance at December 31, 2010 and 2009:

Jurisdiction/Component

In billions of dollars	**DTAs balance December 31, 2010**	DTAs balance December 31, 2009
U.S. federal		
Net operating loss (NOL)	**$ 3.9**	$ 5.1
Foreign tax credit (FTC)	**13.9**	12.0
General business credit (GBC)	**1.7**	1.2
Future tax deductions and credits	**21.8**	17.5
Other	**0.3**	0.5
Total U.S. federal	**$41.6**	$36.3
State and local		
New York NOLs	**$ 1.1**	$ 0.9
Other state NOLs	**0.6**	0.4
Future tax deductions	**2.9**	3.0
Total state and local	**$ 4.6**	$ 4.3
Foreign		
APB 23 subsidiary NOLs	**$ 0.5**	$ 0.7
Non-APB 23 subsidiary NOLs	**1.5**	0.4
Future tax deductions	**3.9**	4.4
Total foreign	**$ 5.9**	$ 5.5
Total	**$52.1**	$46.1

Included in the net U.S. federal DTAs of $41.6 billion are deferred tax liabilities of $4 billion that will reverse in the relevant carryforward period and may be used to support the DTAs, and $0.3 billion in compensation deductions that reduced additional paid-in capital in January 2011 and for which no adjustment to such DTAs is permitted at December 31, 2010, because the related stock compensation was not yet deductible to Citi. In general, Citi would need to generate approximately $105 billion of taxable income during the respective carryforward periods to fully realize its U.S. federal, state and local DTAs.

The Company is currently under audit by the Internal Revenue Service and other major taxing jurisdictions around the world. It is thus reasonably possible that significant changes in the gross balance of unrecognized tax benefits may occur within the next 12 months, but the Company does not expect such audits to result in amounts that would cause a significant change to its effective tax rate.

The following are the major tax jurisdictions in which the Company and its affiliates operate and the earliest tax year subject to examination:

Jurisdiction	Tax year
United States	2006
Mexico	2005
New York State and City	2005
United Kingdom	2008
Japan	2005
Brazil	2006
Singapore	2003
Hong Kong	2004
Ireland	2006

Foreign pretax earnings approximated $12.3 billion in 2010, $6.1 billion in 2009 and $9.3 billion in 2008 (of which, $0.1 billion profit, $0.6 billion loss and $4.4 billion profit, respectively, are in discontinued operations). As a U.S. corporation, Citigroup and its U.S. subsidiaries are currently subject to U.S. taxation on all foreign pretax earnings earned by a foreign branch. Pretax earnings of a foreign subsidiary or affiliate are subject to U.S. taxation when effectively repatriated. The Company provides income taxes on the undistributed earnings of non-U.S. subsidiaries except to the extent that such earnings are indefinitely invested outside the United States. At December 31, 2010, $32.1 billion of accumulated undistributed earnings of non-U.S. subsidiaries were indefinitely invested. At the existing U.S. federal income tax rate, additional taxes (net of U.S. foreign tax credits) of $8.6 billion would have to be provided if such earnings were remitted currently. The current year's effect on the income tax expense from continuing operations is included in the "Foreign income tax rate differential" line in the reconciliation of the federal statutory rate to the Company's effective income tax rate.

Income taxes are not provided for the Company's "savings bank base year bad debt reserves" that arose before 1988, because under current U.S. tax rules such taxes will become payable only to the extent such amounts are distributed in excess of limits prescribed by federal law. At December 31, 2010, the amount of the base year reserves totaled approximately $358 million (subject to a tax of $125 million).

The Company has no valuation allowance on deferred tax assets at December 31, 2010 and December 31, 2009.

In billions of dollars

Jurisdiction/Component	DTA balance December 31, 2010	DTA balance December 31, 2009
U.S. federal		
Net operating loss (NOL)	**$ 3.9**	$ 5.1
Foreign tax credit (FTC)	**13.9**	12.0
General business credit (GBC)	**1.7**	1.2
Future tax deductions and credits	**21.8**	17.5
Other	**0.3**	0.5
Total U.S. federal	**$41.6**	$36.3
State and local		
New York NOLs	**$ 1.1**	$ 0.9
Other state NOLs	**0.6**	0.4
Future tax deductions	**2.9**	3.0
Total state and local	**$ 4.6**	$ 4.3
Foreign		
APB 23 subsidiary NOLs	**0.5**	0.7
Non-APB 23 subsidiary NOLs	**1.5**	0.4
Future tax deductions	**3.9**	4.4
Total foreign	**$ 5.9**	$ 5.5
Total	**$52.1**	$46.1

The following table summarizes the amounts of tax carryforwards and their expiry dates as of December 31, 2010:

In billions of dollars

Year of expiration	Amount
U.S. foreign tax credit carryforwards	
2016	$ 0.4
2017	5.0
2018	5.3
2019	1.3
2020	1.9
Total U.S. foreign tax credit carryforwards	**$13.9**
U.S. federal net operating loss (NOL) carryforwards	
2028	$ 4.1
2029	7.1
Total U.S. federal NOL carryforwards (1)	**$11.2**
New York State NOL carryforwards	
2027	$ 0.1
2028	10.4
2029	2.4
Total New York State NOL carryforwards (1)	**$12.9**
New York City NOL carryforwards	
2028	$ 4.9
2029	2.2
Total New York City NOL carryforwards (1)	**$ 7.1**

(1) Pretax.

With respect to the New York NOLs, the Company has recorded a net deferred tax asset of $1.1 billion, along with less significant net operating losses in various other states for which the Company has recorded a net deferred tax asset of $0.6 billion and which expire between 2012 and 2031. In addition, the Company has recorded deferred tax assets in foreign subsidiaries, for which an assertion has been made that the earnings are indefinitely reinvested, for foreign net operating loss carryforwards of $487 million (which expire in 2012–2019) and $60 million (with no expiration), respectively.

Although realization is not assured, the Company believes that the realization of the recognized net deferred tax asset of $52.1 billion is more likely than not based upon expectations as to future taxable income in the jurisdictions in which the DTAs arise and available tax planning strategies, as defined in ASC 740, *Income Taxes*, (formerly SFAS 109) that would be implemented, if necessary, to prevent a carryforward from expiring. Included in the net U.S. federal DTA of $41.6 billion are $4 billion in DTLs that will reverse in the relevant carryforward period and may be used to support the DTA, and $0.3 billion in compensation deductions that reduced additional paid-in capital in January 2011 and for which no adjustment was permitted to such DTA at December 31, 2010 because the related stock compensation was not yet deductible to Citi. In general, the Company would need to generate approximately $105 billion of taxable income during the respective carryforward periods to fully realize its U.S. federal, state and local DTAs.

As a result of the losses incurred in 2008 and 2009, the Company is in a three-year cumulative pretax loss position at December 31, 2010. A cumulative loss position is considered significant negative evidence in assessing the realizability of a DTA. The Company has concluded that there is sufficient positive evidence to overcome this negative evidence. The positive evidence includes two means by which the Company is able to fully realize its DTA. First, the Company forecasts sufficient taxable income in the carryforward period, exclusive of tax planning strategies, even under stressed scenarios. Secondly, the Company has sufficient tax planning strategies, including potential sales of businesses and assets, in which it could realize the excess of appreciated value over the tax basis of its assets. The amount of the DTA considered realizable, however, is necessarily subject to the Company's estimates of future taxable income in the jurisdictions in which it operates during the respective carryforward periods, which is in turn subject to overall market and global economic conditions.

Based upon the foregoing discussion, as well as tax planning opportunities and other factors discussed below, the U.S. federal and New York State and City net operating loss carryforward period of 20 years provides enough time to utilize the DTAs pertaining to the existing net operating loss carryforwards and any NOL that would be created by the reversal of the future net deductions that have not yet been taken on a tax return.

The U.S. foreign tax credit carryforward period is 10 years. In addition, utilization of foreign tax credits in any year is restricted to 35% of foreign source taxable income in that year. Further, overall domestic losses that the Company has incurred of approximately $47 billion are allowed to be reclassified as foreign source income to the extent of 50% of domestic source income produced in subsequent years and such resulting foreign source income is in fact sufficient to cover the foreign tax credits being carried forward. As such, the foreign source taxable income limitation will not be an impediment to the foreign tax credit carryforward usage as long as the Company can generate sufficient domestic taxable income within the 10-year carryforward period. Under U.S. tax law, NOL carry-forwards must generally be used against taxable income before foreign tax credits (FTCs) or general business credits (GBCs) can be utilized.

Regarding the estimate of future taxable income, the Company has projected its pretax earnings predominantly based upon the "core" businesses in Citicorp that the Company intends to conduct going forward. These "core" businesses have produced steady and strong earnings in the past. In 2010, operating trends were positive and credit costs improved. The Company has already taken steps to reduce its cost structure. Taking these items into account, the Company is projecting that it will generate sufficient pretax earnings within the 10-year carryforward period alluded to above to be able to fully utilize the foreign tax credit carryforward, in addition to any foreign tax credits produced in such period. Until the U.S. federal NOL carryforward is fully utilized, the FTCs and GBCs will likely continue to increase. The Company's net DTA will decline as additional domestic GAAP taxable income is generated.

The Company has also examined tax planning strategies available to it in accordance with ASC 740 that would be employed, if necessary, to prevent a carryforward from expiring. These strategies include repatriating low-taxed foreign source earnings for which an assertion that the earnings are indefinitely reinvested has not been made, accelerating U.S. taxable income into or deferring U.S. tax deductions out of the latter years of the carryforward period (e.g., selling appreciated intangible assets and electing straight-line depreciation), accelerating deductible temporary differences outside the U.S., holding onto available-for-sale debt securities with losses until they mature and selling certain assets that produce tax exempt income, while purchasing assets that produce fully taxable income. In addition, the sale or restructuring of certain businesses can produce significant U.S. taxable income within the relevant carryforward periods.

The Company's ability to utilize its DTAs to offset future taxable income may be significantly limited if the Company experiences an "ownership change," as defined in Section 382 of the Internal Revenue Code of 1986, as amended (the "Code"). In general, an ownership change will occur if there is a cumulative change in the Company's ownership by "5% 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, Citigroup 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.

Exhibit 14

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, 2009

Commission file number 1-9924

Citigroup Inc.

(Exact name of registrant as specified in its charter)

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

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

Securities registered pursuant to Section 12(b) of the Act: See Exhibit 99.02

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. X Yes ☐ 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, 2009 was approximately $16.3 billion.

Number of shares of common stock outstanding on January 31, 2010: 28,476,886,087

Documents Incorporated by Reference: Portions of the Registrant's Proxy Statement for the annual meeting of stockholders scheduled to be held on April 20, 2010, are incorporated by reference in this Form 10-K in response to Items 10, 11, 12, 13 and 14 of Part III.

The Company is currently under audit by the Internal Revenue Service and other major taxing jurisdictions around the world. It is thus reasonably possible that significant changes in the gross balance of unrecognized tax benefits may occur within the next 12 months but the Company does not expect such audits to result in amounts that would cause a significant change to its effective tax rate, other than the following item. The Company expects to conclude the IRS audit of its U.S. Federal consolidated income tax returns for the years 2003-2005 within the next 12 months. The gross uncertain tax positions at December 31, 2009 for the items expected to be resolved is approximately $66 million plus gross interest of $10 million. The potential tax benefit to continuing operations could be approximately $72 million.

The following are the major tax jurisdictions in which the Company and its affiliates operate and the earliest tax year subject to examination:

Jurisdiction	Tax year
United States	2003
Mexico	2008
New York State and City	2005
United Kingdom	2007
Japan	2006
Brazil	2005
Singapore	2003
Hong Kong	2004
Ireland	2005

Foreign pretax earnings approximated $6.8 billion in 2009, $10.3 billion in 2008, and $9.1 billion in 2007 ($0.6 billion loss, $4.4 billion profit, and $0.8 billion profit of which, respectively, are in discontinued operations). As a U.S. corporation, Citigroup and its U.S. subsidiaries are subject to U.S. taxation currently on all foreign pretax earnings earned by a foreign branch. Pretax earnings of a foreign subsidiary or affiliate are subject to U.S. taxation when effectively repatriated. The Company provides income taxes on the undistributed earnings of non-U.S. subsidiaries except to the extent that such earnings are indefinitely invested outside the United States. At December 31, 2009, $27.3 billion of accumulated undistributed earnings of non-U.S. subsidiaries were indefinitely invested. At the existing U.S. federal income tax rate, additional taxes (net of U.S. foreign tax credits) of $7.4 billion would have to be provided if such earnings were remitted currently. The current year's effect on the income tax expense from continuing operations is included in the "Foreign income tax rate differential" line in the reconciliation of the federal statutory rate to the Company's effective income tax rate.

Income taxes are not provided for on the Company's savings bank base year bad debt reserves that arose before 1988 because under current U.S. tax rules such taxes will become payable only to the extent such amounts are distributed in excess of limits prescribed by federal law. At December 31, 2009, the amount of the base year reserves totaled approximately $358 million (subject to a tax of $125 million).

The Company has no valuation allowance on deferred tax assets at December 31, 2009 and December 31, 2008.

In billions of dollars

Jurisdiction/Component	DTA Balance December 31, 2009	DTA Balance December 31, 2008
U.S. Federal		
Net Operating Loss (NOL)	**$ 5.8**	$ 4.6
Foreign Tax Credit (FTC)	**12.0**	10.5
General Business Credit (GBC)	**1.2**	0.6
Future Tax Deductions and Credits	**17.5**	19.9
Other	**0.5**	0.9
Total U.S. Federal	**$36.3**	$36.5
State and Local		
New York NOLs	**$ 0.9**	$ 1.2
Other State NOLs	**0.4**	0.4
Future Tax Deductions	**3.0**	2.7
Total State and Local	**$ 4.3**	$ 4.3
Foreign		
APB 23 Subsidiary NOLs	**0.7**	0.2
Non-APB 23 Subsidiary NOLs	**0.4**	0.9
Future Tax Deductions	**4.4**	2.6
Total Foreign	**$ 5.5**	$ 3.7
Total	**$46.1**	$44.5

The following table summarizes the amounts of tax carryforwards and their expiry dates as of December 31, 2009:

In billions of dollars

Year of Expiration	Amount
U.S. foreign tax credit carryforwards	
2016	$ 0.4
2017	5.1
2018	5.3
2019	1.2
Total U.S. foreign tax credit carryforwards	**$12.0**
U.S. Federal net operating loss (NOL) carryforwards	
2028	$ 9.2
2029	5.4
Total U.S. Federal NOL carryforwards [1]	**$14.6**
New York State NOL carryforwards	
2028	$10.7
2029	1.2
Total New York State NOL carryforwards [1]	**$11.9**
New York City NOL carryforwards	
2028	$ 3.7
2029	1.2
Total New York City NOL carryforwards [1]	**$ 4.9**

(1) Pretax.

With respect to the New York NOLs, the Company has recorded a net deferred tax asset of $0.9 billion, along with less significant net operating losses in various other states for which the Company has recorded a deferred tax asset of $0.4 billion and which expire between 2012 and 2029. In addition, the Company has recorded deferred tax assets in foreign subsidiaries, for which an assertion has been made that the earnings have been indefinitely reinvested, for net operating loss carryforwards of $607 million (which expire 2012 - 2019) and $69 million (with no expiration).

Although realization is not assured, the Company believes that the realization of the recognized net deferred tax asset of $46.1 billion is more likely than not based on expectations as to future taxable income in the jurisdictions in which the DTAs arise and available tax planning strategies, as defined in ASC 740, *Income Taxes*, (formerly SFAS 109) that could be implemented if necessary to prevent a carryforward from expiring. Included in the net U.S. Federal DTA of $36.3 billion are $5 billion in DTLs that will reverse in the relevant carryforward period and may be used to support the DTA , and $0.5 billion in compensation deductions, which reduced additional paid-in capital in January, 2010 and for which no adjustment was permitted to such DTA at December 31, 2009 because the related stock compensation was not yet deductible to the Company. In general, the Company would need to generate approximately $86 billion of taxable income during the respective carryforward periods to fully realize its U.S. Federal, state and local DTAs.

As a result of the recent losses incurred, the Company is in a three-year cumulative pretax loss position at December 31, 2009. A cumulative loss position is considered significant negative evidence in assessing the realizability of a DTA. The Company has concluded that there is sufficient positive evidence to overcome this negative evidence. The positive evidence includes two means by which the Company is able to fully realize its DTA. First, the Company forecasts sufficient taxable income in the carryforward period, exclusive of tax planning strategies, even under stressed scenarios. Secondly, the Company has sufficient tax planning strategies, including potential sales of businesses and assets, in which it could realize the excess of appreciated value over the tax basis of its assets, in an amount sufficient to fully realize its DTA. The amount of the DTA considered realizable, however, could be significantly reduced in the near term if estimates of future taxable income during the carryforward period are significantly lower than forecasted due to deterioration in market conditions.

Based upon the foregoing discussion, as well as tax planning opportunities and other factors discussed below, the U.S. Federal and New York State and City net operating loss carryforward period of 20 years provides enough time to utilize the DTAs pertaining to the existing net operating loss carryforwards and any NOL that would be created by the reversal of the future net deductions which have not yet been taken on a tax return.

The U.S. foreign tax credit carryforward period is 10 years. In addition, utilization of foreign tax credits in any year is restricted to 35% of foreign source taxable income in that year. Further, overall domestic losses that the Company has incurred of approximately $45 billion are allowed to be reclassified as foreign source income to the extent of 50% of domestic source income produced in subsequent years and such resulting foreign source income is in fact sufficient to cover the foreign tax credits being carried forward. As such, the foreign source taxable income limitation will not be an impediment to the foreign tax credit carryforward usage as long as the Company can generate sufficient domestic taxable income within the 10-year carryforward period.

Regarding the estimate of future taxable income, the Company has projected its pretax earnings, predominantly based upon the "core" businesses that the Company intends to conduct going forward. These "core" businesses have produced steady and strong earnings in the past. During 2008 and 2009, the "core" businesses were negatively affected by the large increase in consumer credit losses during this sharp economic downturn cycle. The Company has already taken steps to reduce its cost structure. Taking these items into account, the Company is projecting that it will generate sufficient pretax earnings within the 10-year carryforward period alluded to above to be able to fully utilize the foreign tax credit carryforward, in addition to any foreign tax credits produced in such period.

Exhibit 15

December 14, 2015

Why Citigroup's Motion to Dismiss Is Wrong

We must submit our reply memo to Citigroup by February 5, 2016. Comments welcomed.

Citigroup's motion to dismiss is based on two arguments: previous disclosure of the alleged underpayment in government reports and the news media, and IRS permission not to pay New York taxes via Treasury "Notices" that interpret Section 382 to exclude government ownership of shares. It is significant that the motion includes no defense whatsoever of Treasury's interpetation of Section 382. Citigroup relies entirely on the argument that if Treasury says it's the law, it's the law and does not try to rebut our arguments about Section 382's meaning.

Previous disclosure is important because the False Claims Act says the court "shall" dismiss an action "if substantially the same allegations or transactions as alleged in the action were publicly disclosed" in any of three places, including

> "(ii) in a federal, New York state, or New York local government report, audit, or investigation that is made on the public record or disseminated broadly to the general public . . .;
>
> (iii) in the news media . . . ." (N.Y. Fin. Law § 190(9)(b))

Citigroup's brief says that in 2009 both federal investigations and the news media criticized the Treasury Notices and Citigroup for underpaying federal taxes. That is not the subject of the Plaintiff's action, however. The subject is Citigroup's underpayment of New York taxes. The state underpayment was not mentioned or discussed in any forum whatsoever. Rasmusen derives his factual knowledge of it from Citigroup's annual reports. Citigroup is not a government agency or a news organization.

IRS permission is important because if it has the force of law, Citigroup has not violated the law. The issue is whether Citigroup had at least a 50% ownership change. Notice 2009-14 says that it is "guidance", that "Taxpayers may rely on the rules described in this Section," and, most importantly:

> "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."

If, however, the IRS says that "white" means "black", that assertion does not have the force of law and taxpayers may not rely on it, even if the IRS says they can. If the IRS says that "stock acquired by Treasury shall not be considered to have caused Treasury's ownership in the issuing corporation to have increased," that does not have the force of law, and taxpayers may not rely on it.

Even a Treasury legal claim that did not directly contradict a statute would lack authority in court if Treasury issued it as a Notice rather than going through the APA's notice-and-comment procedures, if Treasury merely asserted it rather than providing explanation, if Treasury had a financial conflict of interest, or if the interpretation undermined the statute's purpose. In the present action, an additional obstacle is that U.S. Treasury assertions are not controlling authority for New York State law. New York law incorporates federal statutes, but it is administered by state agencies, agencies to which the state gives less deference than federal law gives federal agencies.

Exhibit 16

New York State ex rel. Eric Rasmusen v. Citigroup, Inc. Page (December 2, 2016)

In General

The U.S. Treasury let Citigroup take billions of dollars of illegal tax deductions to help Citigroup during the financial crisis. Citigroup took these deductions for its New York State taxes too. New York law lets a private person sue a delinquent taxpayer. That's what I am doing.

What Citigroup did. In July 2009, Citigroup issued new stock to the U.S. Treasury and the general public (see here and here and here. When enough ownership changes hands, a corporation loses the ability to set off past operating losses (NOL's) against future income to reduce its income tax (Tax Code Section 382). The U.S. Treasury issued several "Notices" claiming that Section 382 does not apply when the U.S. Treasury is the stockholder. This attracted much adverse comment, and an investigation by the inspector-general which has still to issue its findings. Treasury did not address the exception's illegality, but replied that they needed to do it to save the banks. The special exception had the effect of reducing Citigroup's taxes and raising its stock's value by many billions of dollars.

This lawsuit. New York State's False Claims Act allows private individuals to act as "relators" for the State, suing delinquent taxpayers "qui tam" to compel them to pay their taxes in return for a reward. I, Eric Rasmusen, am the relator, and Hodgson-Russ LLP represents me. The legal pleadings (the complaint) formally lists our allegations for the court. The suit was initially filed "under seal" so New York Attorney-General Eric Schneiderman could decide whether to join us, which we very much wanted. He has declined, without saying why Citigroup doesn't owe the taxes. If Citigroup owes $800 million in New York tax, the Act trebles that to $2.4 billion. That could fund a rebate of more than $200 for every household in New York State. Whether the actual amount is $800 million we will not know for sure until we see Citigroup's state tax returns.

Removal to Federal Court. On October 2, 2015, Citigroup asked to remove the case from the New York state court to the 2nd circuit federal district court. If a federal court rules that the NOL deductions are improper and Section 382 applies to Citigroup, then Section 383, which deals with tax credits, will apply also. That would not matter to the state taxes, but it would be hugely important for federal taxes, since Citigroup valued its NOL's and tax credits at $21 billion in 2009 and most of that would vanish.

Citigroup moves to dismiss the case (the crucial stage of the lawsuit). On December 7, 2015, Citigroup moved to dismiss, submitting this brief in support. Here is our reply. Citigroup filed its a reply brief on March 18. On December 2, 2016, Judge Kaplan ruled that the case had no essential federal question, and remanded it to New York court. Presumably, Citigroup will renew its motion to dismiss there.

Assemblymen inquire. On March 14, 2016, 18 members of the New York Assembly wrote to Attorney-General Schneiderman asking him to explain why he was not joining the lawsuit.

For more information, see the FAQs page. The case is case #1:15-cv-7826, United States District Court, Southern District of New York, *State of New York ex rel. Eric Rasmusen v. Citigroup, Inc.* The rest of this long webpage consists of links to information about various aspects of the case.

For most people, the following links will be enough:

- Citigroup Accused of Improperly Avoiding $800 Million in New York State Taxes, New York Times (Dealbook), Lynnley Browning, October 19 (October 20 in print).
- "Western NY lawmakers want Citigroup to pay," Albany Times Union Capitol Confidential, Rick Karlin, March 16, 2016.

- "Obama Admin Grants Mega Tax Break To Citi In Bailout Deal," Talking Points blog, JUSTIN ELLIOTT, DECEMBER 16, 2009 (perhaps the best single, brief, article).

- SIG TARP engagement memo for Rep. Dennis Kucinich's request to assess the decision to exempt Citigroup from section 382, August 10, 2010.

- "Ex-Watchdogs Condemn A.I.G. Tax Exemption," KEVIN ROOSE, The New York Times, Dealbook, March 13, 2012. (Republican and Democratic Senators and Representatives condemn the 382 waiver, using AIG as their example)

- "Can the Treasury Exempt its Own Companies from Tax? The $45 Billion GM NOL Carryforward," J. Mark Ramseyer and Eric Rasmusen, The Cato Papers on Public Policy, 2011, Vol 1, Article 1, pp. 1-54, edited by Jeffrey Miron. (the article that led to the suit)

Contact information for reporters:

Eric Rasmusen, erasmuse@indiana.edu, (812) 345-8573.
J. Mark Ramseyer (co-author with Rasmusen of the GM paper), ramseyer@law.harvard.edu, 617-496-4878, http://hls.harvard.edu/faculty/directory/10697/Ramseyer, http://www.business-associations.com/.
Citigroup. general press number: 212-793-0710. Mark Costiglio, (212) 559-4114, has been the spokesmen in stories about this lawsuit.

- Citigroup's attorney at Davis-Polk is Edmund Polubinski, edmund.polubinski@davispolk.com, (212)450-4695.

New York Attorney General Schneiderman: NYAG.Pressoffice@ag.ny.gov. New York City Press Office: (212) 416-8060. Albany Press Office: (518) 776-2427.
New York Governor Cuomo.press.office@exec.ny.gov. NYC Press Office: 212.681.4640. Albany Press Office: 518.474.8418.
New York Department of Taxation and Finance (under Gov. Cuomo): "Reporters and other media representatives: Call 518-457-7377."
Office of the Special Inspector General For The Troubled Asset Relief Program: "Please direct all media inquiries to the Press Office at (202) 927-8940 or use our online form."
Hodgson-Russ attorneys representing Eric Rasmusen. John Sinatra: jsinatra@hodgsonruss.com, 716.848.1414. Daniel Oliverio: DOliverio@hodgsonruss.com, 716.848.1433. Aaron Saykin: ASaykin@hodgsonruss.com, 716.848.1345.

For Expert Comment: Leiter's Top Ten Tax Law Faculty in Scholarly Impact, 2009-2013 (not in order here)

- Daniel N. Shaviro (New York University): (212) 998-6187, daniel.shaviro@nyu.edu.
- Leandra Lederman (Indiana University): (812) 855-6149, llederma@indiana.edu.
- Michael Graetz (Columbia): (212) 854-7681, michael.graetz@law.columbia.edu.
- David Weisbach (Chicago): 773-702-3342, d-weisbach@uchicago.edu.
- Louis Kaplow* (Harvard University): 617-495-4101.
- Mark Gergen (Berkeley): 510-643-9577, Email Address: mgergen@law.berkeley.edu.
- Kristin Hickman (Minnesota): 612-624-2915, E: khickman@umn.edu.
- Brian Galle (Georgetown): bdg9@law.georgetown.edu, 202-662-4039.
- Edward Zelinsky (Yeshiva University): Zelinsky@yu.edu.
- Victor Fleischer (University of San Diego): vic@SanDiego.edu, (619) 260-2320.
- Avi-Yonah, Reuven (University of Michigan): 734.647.4033, aviyonah@umich.edu.
- Joseph Bankman (Stanford): jbankman@stanford.edu, 650-725-3825.
- Larry Zelenak (Duke): zelenak@law.duke.edu, 919-613-7267.
- Not on the Leiter list, but someone I think I've seen cited as being pro-Treasury on Section 382 is Edward Kleinbard (University of Southern California): ekleinbard@law.usc.edu (213) 740-4582.

An interesting event: I received a flattering letter with a check for $65.00 from a small charitable foundation that is pleased with my lawsuit.

- **2015-2016 Media Coverage**
  - Western NY lawmakers want Citigroup to pay, Rick Karlin, Albany Times-Union, March 16, 2016.
  - NY Pols Ask Schneiderman Why He Skipped $2.4B Citi Suit Jack Newsham, Law360, March 16, 2016.
  - 18 Assemblymembers Ask A.G. Schneiderman to Speak Up and Explain His Stance on Whistleblower Lawsuit Pending Against Citigroup HEZI ARIS, Yonkers Tribune, March 15, 2016.
  - Citigroup Accused of Improperly Avoiding $800 Million in New York State Taxes or here, TAX NOTES, David Sawyer, October 22, 2015.
  - Professor/whistleblower sues Citigroup for $800 million, plans to donate to charity , LegalNewline.com, Hanna Nakano, October 23.
  - Citigroup Accused of Improperly Avoiding $800 Million in New York State Taxes, New York Times (Dealbook), Lynnley Browning, October 19 (October 20 in print).
  - Whistleblower, an Indiana economist, says Citigroup owes New York State $2.4 billion, Tom Precious, Buffalo News, October 15.
  - Rasmusen: How I Came To Be Suing Citigroup For $2.4 Billion As A Tax Whistleblower, TaxProf blog, Eric Rasmusen, October 21.
  - Financial Crisis Fallout: Lawsuit Seeks $2.4 Billion From Citigroup Over Bailout-Era Tax Liabilities, Owen David, International Business Times, October 20. (same story in San Jose News, Liberia News, Perth News, Omaha News, Philippine News, Ireland News, etc.)
  - Citigroup faces lawsuit from Indiana Univ. professor for allegedly underpaying taxes, Legal Newsline.com, Hoang Tran, October 19.
  - Law Suit for Billions Against Citigroup Because of Treasury's 2009 Waiver of Section 382's Rule about Losing NOL's after an Ownership Change, Procedurally Taxing blog, Eric Rasmusen, October 20.

Other Links, in Sections

- **2015 Media Coverage**
- **Legal Papers for This Suit**
- Government Documents: Statutes, Regulations, and Notices
  - The EESA Notices
  - Administration Defenses of the 382 Waiver
  - Corporate Income Tax Law
- Media Coverage
  - The December 16, 2009 Flurry of Reporting
  - Comment on the Same Tax Break As Given to AIG
- Tax Whistleblower Laws
  - The New York State Whistleblower Law

- State Qui Tam Tax Whistleblower Laws in General
- IRS Hostility to Tax Whistleblowers

- People and Other Persons
  - About Citigroup
  - About Professor Eric Rasmusen
  - About Hodgson-Russ, LLP
  - About Eric Schneiderman, Attorney-General of New York State
    - AG Schneiderman and the Tax Whistleblower Law
    - AG Schneiderman and Politics
  - About the Special Inspector-General for TARP
  - New York State politics

- Other Items

Legal Papers for This Suit

- Citigroup's December 2015 motion to dismiss
- My February 2016 brief in opposition to the motion to dismiss
- PACER the docket system for all papers in the federal suit, 2nd Circuit, Case #1:15-cv-07826.
- The state court complaint, filed 2013 under seal.)
- The court's order unsealing the case (June 4, 2015)
- Affidavit of the complaint being served to Citigroup (September 12, 2015)
- Citigroup's notice and reasons for removal from state to federal court (October 2, 2015)
- Stipulation and order setting the briefing schedule
- Citigroup's brief in support of the motion to dismiss, and the exhibits of old documents in support of it.
- My short notes for the reply due February 15. I put it here to encourage my friends (briefs always look very convincing until you read what the other side has to say) and to encourage comment on what the reply brief should say. There's some tricky procedural angles.

Government Documents: Statutes, Regulations, and Notices

The EESA Notices

- IRS-Notice2009-14.htm
- IRS-Notice_2009-38.htm
- IRS-Notice2010-2.htm
- The Emergency Economic Stabilization Act of 2008.
- Notice 2008-83: Application of Section 382(h) to Banks, U.S. Treasury, October 20, 2008; and A Quiet "Windfall For U.S. Banks," Amit R. Paley, Washington Post, November 10, 2008. (This,

"the Wells-Fargo Notice," was an earlier, 2008, notice potentially giving 100s of billions of dollars in illegal tax breaks to banks. Congress was outraged and passed a bill which repudiated the notice a few months later). See the Stimulus Bill of 2009. Pages 228-229 repudiate the Wells Fargo Notice.

- Corporate Income Tax Law
  - N.Y. TAX. LAW, Section 1453: Computations of entire net income. (see (k-1) in particular)
  - U.S. Code › Title 26 › Subtitle A › Chapter 1 › Subchapter C › Part V › § 382. (limitation on net operating losses)
  - Section 383 (tax credits after ownership change) of the Tax Code, and its regulations.
  - The Stimulus Bill of 2009. Pages 228-229 repudiate the Wells Fargo Notice.

- Administration Defenses of the 382 Waiver
  - "Just the Facts: Government Investments in Private Companies, the Tax Code and Taxpayers' Interests," Treasury Notes, Emily McMahon, 3/1/2012.
  - "U.S. isn't evading taxes on Citigroup," Letters to the Editor, Washington Post, Herb Allison, Assistant Secretary for Financial Stability at the US Treasury, December 22, 2009.
  - "Briefing by White House Press Secretary Robert Gibbs, 12/16/09" (search for "Citigroup") and "White House Defends Citigroup Tax Break," CBS News, December 16, 2009.

2009-2014 Media Coverage and Political Commentary on the Citigroup Waiver

- December 22, 2009 Letter from Senator Grassley to Secretary Geithner about the Special 382 Treatment of Citigroup. (Congressional Record)
  - The December 16, 2009 Flurry of Reporting
    - "U.S. gave up billions in tax money in deal for Citigroup's bailout repayment," Binyamin Appelbaum, Washington Post, December 16, 2009. (a very influential article)
    - "U.S. forfeiting billions in future taxes to let Citi repay TARP," EDWARD HARRISON, Credit Writedown blog, 16 DECEMBER 2009. (an opinion piece on the NOL exemption with lots of detail)
    - "Obama Admin Grants Mega Tax Break To Citi In Bailout Deal," Talking Points blog, JUSTIN ELLIOTT, DECEMBER 16, 2009. (perhaps the best single, brief, article)
    - "The $48 billion TARP puzzle," Washington Post, Dylan Matthews, July 27, **2012.**
    - "No New Tax Break for Citi?" December 16, 2009. ABCNEWS.COM, (ABC shilling for Treasury, giving without attribution the Treasury story as if it were fact)

  - Comment on the Same Tax Break As Given to AIG
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- "AIG's past losses cost taxpayers now and into the future," Opinions, The Washington Post, Elizabeth Warren, Damon Silvers, Mark McWatters and Kenneth Troske, March 29, 2012.
- "AIG's Tax Break: a "Stealth Bailout"? The insurance giant benefits from a waiver most acquired companies can't get," Beth Braverman, CFO.com, March 23, 2012.
- "The True Cost of the AIG Bailout," James Tilson and Robert E. Prasch, The Big Picture blog, January 28th, 2013.

- Extraordinary Financial Assistance Provided to Citigroup, Inc., SIGTARP 11-002 January 13, 2011.
- "AIG Joins Citigroup, GM in Deferred Tax Asset 'Hall of Fame'" Noah Buhayar, Bloomberg, July 8, 2011.
- "Elizabeth Warren on Bailouts," Modeled Behavior blog, March 16th, 2012.

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  - The New York False Claims Act.
  - "New York's Tax Whistleblower Statute Whistleblowers and Qui Tam Suits: Adventures in Tax Enforcement," slides from the FTA Annual Conference--- June 13, 2011, William J. Comiskey, Esq., Hodgson Russ LLP.
  - "Qui Tam Troubles, Part IV: Does New York Have the Answer?" Amy Hamilton, Tax Analysts, JULY 7, 2014.

- State Qui Tam Tax Whistleblower Laws in General
  - "Much Ado About Qui Tam for State Taxes," Tax Analysts, Deddeh Ansumana Jones, APRIL 3, 2015.
  - "Qui Tam for Tax?: Lessons from the States," Franziska Hertel, Columbia Law Review, November 2013, Issue 7, Notes, Volume 113.
  - "Not Just Whistling Dixie: The Case for Tax Whistleblowers in the States," Dennis J. Ventry Jr., University of California, Davis - School of Law, Villanova Law Review, Vol. 59, No. 3, 2014.

- IRS Hostility to Tax Whistleblowers
  - The federal whistleblower statute, 6 U.S. Code § 7623 - Expenses of detection of underpayments and fraud, etc.
  - The IRS Manual on whistleblower award procedures," Part 25. Special Topics, Chapter 2. Information and Whistleblower Awards, Section 2. Whistleblower Awards

- "What Happens to a Claim for an Informant Award (Whistleblower)," IRS
- "Whistleblower - Informant Award," IRS, IRS news about the program and table of contents for information about it.
- "ANOTHER WHISTLEBLOWER GETS BLOWN," The Taishoff Law Firm, 08/30/2013.
- "DOJ Seeks To Limit Whistleblower Award In Verizon Case," Legal Times, SEPTEMBER 20, 2011. (Justice tries to award the bare minimum in a $94 million case)
- Grassley Releases Hold on Treasury Nominees After Receiving Agency Responses on Whistleblower Office,Jul 30, 2012.

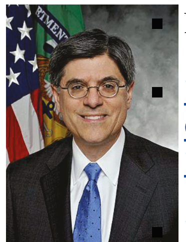
- William J. Wilkins,IRS Chief Counsel 2009-present.
- "IRS Whistleblower Office: A Taxing Affair," Project on Government Oversight, March 26, 2015.

"Exclusive: Attorney Details Mismanagement in IRS Chief Counsel's New York Offices," MARCH 19, 2014. by David Cay Johnston

- "New Leadership for the IRS Whistleblower Office," July 23, 2015 , Tax Whistleblower Report (see the comments too)
- Timothy Geithner , Secretary of the Treasury in 2009.

Timothy Geithner

- "IRS Commissioner Responds to Senator Grassley's Question Regarding the Whistleblower Office," , Tax Whistleblower Report, June 4, 2015, (see the comments too)
- "America the not so brave: America has led the global assault on tax dodgers and their enablers. But the reality still lags behind the rhetoric," , The Economist, May 23rd 2015.



- Bio of Jack Lew, Secretary of the Treasury in 2015.
- "Supplement to Petitioner's Motion for Summary Judgment," Meidenger v. Commissioner (example of the claim forms, etc. in a pleadings appendix) and "Meidenger v. Commissioner of the IRS," Docket No. 16513-12W (he won).
- "Lost Opportunities: The Underuse of Tax Whistleblowers," Karie Davis-Nozemack Georgia Tech - College of Management and Sarah Webber University of Dayton67 ADMINISTRATIVE LAW REVIEW, June 2015. (half of it is on IRS obstruction: the section "PERCEIVED OBSTACLES TO WHISTLEBLOWER DEBRIEFING")
- "Tax Whistleblower: Update on IRS Whistleblower Program," Forbes, Views, Dean Zerbe, June 9, 2015. (on WHISTLEBLOWER 21276-13W v. Commissioner, where the IRS put up procedural objections to paying because the whistleblower went to the FBI first)
- Incomplete Data Hinders IRS's Ability to Manage Claim Processing Time and Enhance External Communication GAO-11-683: Aug 10, 2011.

"CIVIL FALSE CLAIMS ACT: Recent Developments Increase Possibility of FCA Claims Against Recipients of TARP Funds and Contractors Retained by Treasury for TARP Services," Fried Frank law firm advisory report (02/02/2009).

People and Organizations

- **About Citigroup**

- Bio of the current CEO of Citigroup, Michael Corbat.
- Wall Street Journal, Heard on the Street, "Unlocking Citi's Trapped Tax Asset," March 13, 2012, David Reilly.

- Citigroup's Annual report for 2009 and its 2014 10-K statement.

- Citigroup financial statement Taxes Note extracted from the 2009 and 2010 annual reports.

- "Extraordinary Financial Assistance Provided to Citigroup, Inc." SIGTARP(January 2011).

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- "Citigroup $2.42 Billion Issue Erases Bailout,"

  Charles Mead Donal Griffin, Bloomberg Business, September 10, 2013. (a readable but number-filled description of the full bailout, though it is unclear about the public issuing of shares)

- "Sheila Bair Calls Citigroup The 'Worst Bank'," The Huffington Post, Christine Conetta, 1.23.2014.

- "'Enough is enough': Elizabeth Warren launches fiery attack after Congress weakens Wall Street regs," Wonkblog, The Washington Post, December 12, 2014 (prepared speech and video of Elizabeth Warren). (has details on Obama Administatration personnel from Citigroup, and how it got more bailout money than any other bank)

- **About Eric Rasmusen**

Eric Rasmusen has published widely in the fields of law-and-economics, industrial organization, Japanese studies, and game theory. He is the Dan R. and Catherine M. Dalton Professor of Business Economics and Public Policy at the Kelley School of Business, Indiana University, Bloomington, Indiana.

- Eric Rasmusen vitae (resume, list of publications)

- "Can the Treasury Exempt its Own Companies from Tax? The $45 Billion GM NOL Carryforward," J. Mark Ramseyer and Eric Rasmusen, The Cato Papers on Public Policy, 2011, Vol 1, Article 1, pp. 1-54, edited by Jeffrey Miron. (the article that led to the suit)

- Eric Rasmusen's best-known book is *Games and Information,* 4th edition (2006), with book chapters, and problem answers, extra problems, and so forth. See too *Readings in Games and Information* (2001), an edited book of readings on how to use game theory, including "Aphorisms on Writing, Speaking, and Listening".

- **About Hodgson-Russ, LLP**

Professor Rasmusen is represented by Hodgson, Russ, LLP. The firm was founded in 1817 in Buffalo, New York, and its former partners include Presidents Fillmore and Cleveland (a history is here). Hodgon-Russ currently has more than 230 attorneys, including a large Canadian practice. One of its specialities is qui tam whistleblower suits.

Attorneys involved in the case include John Sinatra (litigation), Richard Campbell (tax), Reetapurna Dutta (qui tam), and Dan Oliverio (litigation, chairman of the law firm)

- **About Eric Schneiderman, Attorney-General of New York State**

Official bio of Eric T. Schneiderman

"The Man the Banks Fear Most: Wall Street's gone largely unpunished for its role in wrecking the economy—- until New York Attorney General Eric Schneiderman came along," The American Prospect, Harold Myerson, April 23, 2012.

- "Occupy Albany: New York's far-left attorney general," Walter Olson, Opinion, The New York Post, July 26, 2015.

- AG Schneiderman and the Tax Whistleblower Law
  - "The tax whistleblower case against Sprint: NY attorney general gets it, the IRS doesn't," Erika Kelton, Forbes, April 20, 2012.
  - "New York AG's Tax Probes Energize Whistleblowers, Set Advisers on Edge," Amy Hamilton, Tax Analysts, OCTOBER 16, 2012.
  - "A.G. Schneiderman Announces $6.2 Million Settlementwith Lantheus Medical Imaging & Bristol-Myers Squibb For Failing To Pay New York Corporate Income Taxes," press release, March 14, 2014.
  - "A.G. Schneiderman Announces $1.56 Million Settlement With New Jersey Appliance Retailer For Failing To Pay New York Taxes," press release, August 22nd 2014.
  - "A.G. Schneiderman Wins Right To Proceed With Groundbreaking Tax Fraud Lawsuit Against Sprint For Approximately $400 Million," press release, February 27th 2014.
  - "New York AG suing tanning salon over 'deceptive advertising'," Julia Marsh, The New York Post, April 23, 2015.

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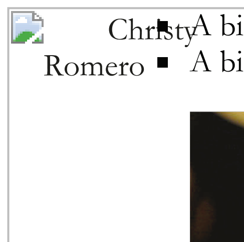
  - "The Left Flank Attorney General Eric Schneiderman has taken on the role of liberal gatekeeper—trying to goad Barack Obama and Andrew Cuomo away from the Democratic center," New York Magazine, Chris Smith, Jan 6, 2013.

- "AG Schneiderman erases Cuomo's rule on official emails," Carl Campanile, The New York Post, March 13, 2015.
- "Eric Schneiderman mulling run for governor against Cuomo," Fredric U. Dicker, The New York Post, March 16, 2015.
- "Eric Schneiderman rips Cuomo's ethics reforms," Kirstan Conley and Carl Campanile, The New York Post, March 30, 2015.
- "Lovett: N.Y. Attorney General Eric Schneiderman gearing up for possible gubernatorial run in 2018," NEW YORK DAILY NEWS Monday, April 27, 2015.
- "Cuomo probes agencies about Schneiderman's performance," Carl Campanile, The New York Post, June 4, 2015.

- **About the Special Attorney General for the Troubled Asset Relief Program (SIGTARP)**
  - SIG TARP engagement memo for Rep. Dennis Kucinich's request to assess the decision to exempt Citigroup from section 382, August 10, 2010.
  - A memo on the history of the SIGTARP evaluation, with links and quotes.
  - December 22, 2009 Letter from Senator Grassley to Secretary Geithner about the Special 382 Treatment of Citigroup. (Congressional Record). He scolded Treasury and asked it for specific information, much the same as in the SIGTARP memo. Did he ever get an answer? Probably not.


Christy Romero

- A bio of the current SIGTARP, Christy L. Romero.
- A bio of the SIGTARP 2008-2011, Neil Barofsky.

- August 3, 2015 letter from SIGTARP Romero and dozens of other inspectors-general deploring the Obama Administration's new policy of blocking them from seeing certain kinds of agency documents.

- **About New York State Politics**
  - The State of Politics (Times Warner Cable News blog)
  - Capitol Confidential (Albany Timesunion)
  - DailyPolitics (New York Daily News)
  - Politico New York (Politico)
  - The Empire Page portal to state politics news and blogs
  - Politics on the Hudson (Gannett)

Other Items

- FINANCE COMMITTEE QUESTIONS FOR THE RECORD United States Senate Committee on Finance Hearing on Confirmation of Mr. Timothy F. Geithner to be Secretary of the U.S. Department of Treasury January 21, 2009 (See question 28, on the Wells-Fargo notice)

- Thursday, January 22, 2009 Geithner Blames Turbo Tax For His Tax Troubles By Paul Caron

- "Obama Administration Helps Wall Street Criminals Dodge Accountability: Obama administration proposal would aid big banks that have pleaded guilty to felony antitrust charges," Shahien Nasiripour, Huffington Post (September 1, 2015) (on the Obama Administration's 2015 proposal to exempt Citigroup and JP Morgan Chase from being blocked from making certain loans because of their felony convictions.

- Notice 2008-83: Application of Section 382(h) to Banks, U.S. Treasury, October 20, 2008; and A Quiet "Windfall For U.S. Banks," Amit R. Paley, Washington Post, November 10, 2008. (This, "The Wells-Fargo Notice," was an earlier, 2008, notice potentially giving over 100 billion dollars in illegal tax breaks to banks. Congress was outraged and passed a bill which repudiated the notice a few months later. It matters as evidence that Treasury is willing to violate the law and outrage Congress)

URL: http://www.rasmusen.org/citigroup. Comments, including, especially, links you think should be added: *Erasmuse@Indiana.edu.*

Exhibit 17

U.S. gave up billions in tax money in deal for Citigroup's bailout repayment

Advertisement

By Binyamin Appelbaum
Washington Post Staff Writer
Wednesday, December 16, 2009; A01

The federal government quietly agreed to forgo billions of dollars in potential tax payments from Citigroup as part of the deal announced this week to wean the company from the massive taxpayer bailout that helped it survive the financial crisis.

The Internal Revenue Service on Friday issued an exception to long-standing tax rules for the benefit of Citigroup and a few other companies partially owned by the government. As a result, Citigroup will be allowed to retain billions of dollars worth of tax breaks that otherwise would decline in value when the government sells its stake to private investors.

While the Obama administration has said taxpayers are likely to profit from the sale of the Citigroup shares, accounting experts said the lost tax revenue could easily outstrip those profits.

The IRS, an arm of the Treasury Department, has changed a number of rules during the financial crisis to reduce the tax burden on financial firms. The rule changed Friday also was altered last fall by the Bush administration to encourage mergers, letting Wells Fargo cut billions of dollars from its tax bill by buying the ailing Wachovia.

"The government is consciously forfeiting future tax revenues. It's another form of assistance, maybe not as obvious as direct assistance but certainly another form," said Robert Willens, an expert on tax accounting who runs a firm of the same name. "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."

Treasury officials said the most recent change was part of a broader decision initially made last year to shelter companies that accepted federal aid under the Troubled Assets Relief Program from the normal consequences of such an investment. Officials also said the ruling benefited taxpayers because it made shares in Citigroup more valuable and asserted that without the ruling, Citigroup could not have repaid the government at this time.

"This rule was designed to stop corporate raiders from using loss corporations to evade taxes, and was never intended to address the unprecedented situation where the government owned shares in banks," Treasury spokeswoman Nayyera Haq said. "And it was certainly not written to prevent the government from selling its shares for a profit."

Congress, concerned that Treasury was rewriting tax laws, passed legislation earlier this year that reversed the ruling that benefited Wells Fargo and restricted the ability of the IRS to make further changes. A Democratic aide to the Senate Finance Committee, which oversees federal tax policy, said the Obama administration had the legal authority to issue the new exception, but Republican aides to the committee said they were reviewing the issue.

A senior Republican staffer also questioned the government's rationale. "You're manipulating tax rules so that the market value of the stock is higher than it would be under current law," said the aide, speaking on the condition of anonymity. "It inflates the returns that they're showing from TARP and that looks good for them."

The administration and some of the nation's largest banks have hastened to part company in recent weeks. Bank of America, followed by Citigroup and Wells Fargo, agreed to repay federal aid. While the healthiest banks escaped earlier this year, the new round of departures involves banks still facing serious financial problems.

The banks say the strings attached to the bailout, including limits on executive compensation, have restricted their ability to compete and return to health. Executives also have chafed under the stigma of living on the

federal dole. President Obama chided bankers at the White House on Monday for not trying hard enough to make small-business loans.

The Obama administration also is eager to wind down a program that has become one of its largest political liabilities. Officials defend the program as necessary and effective, but the president has acknowledged that the bailout is "wildly unpopular" and officials have been at pains to say they do not enjoy helping banks.

Federal regulators initially told Citigroup and other troubled banks that they would be required to hold on to the federal aid for some time as they return to health. But in recent months, the government switched to pushing the companies to repay the money as soon as possible. All nine firms that took federal money last October now have approved plans to pay it back.

This urgency has come despite the lingering concerns of many financial experts about the companies' health. These analysts said they worry that the firms could face rising losses next year as high unemployment and economic weakness continue to drive great numbers of borrowers into default.

"They are rolling the dice big time," said Christopher Whalen, a financial analyst with Institutional Risk Analytics. "My fear is that the banks will definitely have to raise a lot more capital next year. The question is from whom and on what terms."

The Citigroup repayment deal required significant sacrifices by both sides, underscoring the mutual determination to get it done. Citigroup was required to replace its federal aid with an equal amount of money from private investors, more than any other bank. The government concluded that Citigroup needed the IRS ruling because a reduction in the value of its tax breaks would have eroded its capital, forcing the company to raise more money, officials said.

Federal tax law lets companies reduce taxable income in a good year by the amount of losses in bad years. But the law limits the transfer of those benefits to new ownership as a way of preventing profitable companies from buying losers to avoid taxes. Under the law, the government's sale of its 34 percent stake in Citigroup, combined with the company's recent sales of stock to raise money, qualified as a change in ownership.

The IRS notice issued Friday saves Citigroup from the consequences by stipulating that the government's share sale does not count toward the definition of an ownership change. The company, which pushed for the ruling, did not return calls for comment.

At the end of the third quarter, Citigroup said that the value of its past losses was about $38 billion, allowing it to avoid taxes on its next $38 billion in profits. Under normal IRS rules, a change in control would sharply reduce the amount of profits that Citigroup could shelter from taxes in any given year, making it much more difficult for Citigroup to realize the entire benefit before the tax breaks expired.

The precise value of the IRS ruling depends on Citigroup's future profitability and other factors, but two accounting experts said it was fair to estimate that Citigroup would save at least several billion dollars as a result.

Treasury acknowledged that the tax break was significant, but a senior official said the benefit was unavoidable. Either the government changed the rules and parted ways with Citigroup or the company kept the government as a shareholder and kept the tax break anyway.

"The choice is whether Treasury sells or doesn't sell," the official said.

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Exhibit 18

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U.S. forfeiting billions in future taxes to let Citi repay TARP

16 December 2009 00:50 by Edward Harrison

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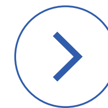

The Washington Post is reporting that the federal government has quietly decided to exempt Citigroup from a large future tax bill in allowing it to exit the TARP program. This is a backdoor bailout worth billions and is an outrage that demonstrates the lengths to which government will go to gift these organizations taxpayer money.

At issue is accounting for loss carry-forwards. Basically, it works like this: if a company loses money in one year, the company can then offset its profit during a fixed number of subsequent years with that prior loss to reduce its tax bill. For instance, if Megacorp loses $100 million in year 0, but makes $200 million in Year 1, it can pay Year 1 taxes as if it had only made $100 million. This tax treatment is designed to level the playing field for cyclical companies that operate at a loss for part of the business cycle.

The problem, however, is that this can be used by predators in mergers. The predator company can swoop in and buy a company in a deal that makes no sense except to gain a tax benefit from the huge net operating losses (NOLs) it inherits from its prey. In order to prevent tax-motivated acquisitions of loss-making companies, the IRS limits how much of the NOLs a company can use post-merger. In Canada, unclaimed NOLs expire immediately when change of control occurs.

During the credit crisis, the Bush Administration relaxed these rules. Initially Treasury Secretary Hank Paulson benefitted Fannie Mae and Freddie Mac under IRS Issue Notice 2008-76 (link below) when they were taken into

conservatorship. (See **Yves Smith's post here** .) Treasury then rewrote tax law to include banks under IRS Issue Notice 2008-83 (link below). For example, Wells Fargo was exempted from a change of control NOL loss when it acquired Wachovia. I assume the same was true in all the bank mergers after Lehman failed. The rationale for the exemption was that tax law needed to make accommodation as it was only designed to prevent the kind of predatory acquisition I mentioned earlier.

But the law is the law and it applies to everyone. Exemptions under this law are a huge hidden freebie. In November of last year **the Washington Post quoted the number $140 billion** as the windfall for banks.

> The financial world was fixated on Capitol Hill as Congress battled over the Bush administration's request for a $700 billion bailout of the banking industry. In the midst of this late-September drama, the Treasury Department issued a five-sentence notice that attracted almost no public attention.
>
> But corporate tax lawyers quickly realized the enormous implications of the document: Administration officials had just given American banks a windfall of as much as $140 billion.
>
> The sweeping change to two decades of tax policy escaped the notice of lawmakers for several days, as they remained consumed with the controversial bailout bill. When they found out, some legislators were furious. Some congressional staff members have privately concluded that the notice was illegal. But they have worried that saying so publicly could unravel several recent bank mergers made possible by the change and send the economy into an even deeper tailspin.
>
> "Did the Treasury Department have the authority to do this? I think almost every tax expert would agree that the answer is no," said George K. Yin, the former chief of staff of the Joint Committee on Taxation, the nonpartisan congressional authority on taxes. "They basically repealed a 22-year-old law that Congress passed as a backdoor way of providing aid to banks."

The story of the obscure provision underscores what critics in Congress, academia and the legal profession warn are the dangers of the broad authority being exercised by Treasury Secretary Henry M. Paulson Jr. in addressing the financial crisis. Lawmakers are now looking at whether the new notice was introduced to benefit specific banks, as well as whether it inappropriately accelerated bank takeovers.

Senator Chuck Grassley questioned whether Wells Fargo and Wachovia had received "preferential treatment" because Wachovia CEO Robert Steel was a former Undersecretary for Domestic Finance in the Bush Administration and a vice chairman at Goldman Sachs (see press release below). In fact, as Paulson consulted no one on the tax-writing committees before promulgating these edicts, Congress inserted language into the Stimulus Bill earlier this year in order to shut down the executive branch's ability to create these exemptions, specifically repealing IRS Notice 2008-83. I should re-iterate that the provision repealing Notice 2008-83 was added specifically to prevent the executive branch from acting outside of its authority in interpreting tax law.

The House draft version says:

SEC. 1431. CLARIFICATION OF REGULATIONS RELATED TO LIMITATIONS ON CERTAIN BUILT-IN LOSSES FOLLOWING AN OWNERSHIP CHANGE.

(a) FINDINGS.—Congress finds as follows:

- (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).
- (3) The legal authority to prescribe Internal Revenue Service Notice 2008–83 is doubtful.

- (4) However, as taxpayers should generally be able to rely on guidance issued by the Secretary of the Treasury legislation is necessary to clarify the force and effect of Internal Revenue Service Notice 2008–83 and restore the proper application under the Internal Revenue Code of 1986 of the limitation on built-in losses following an ownership change of a bank.

Yet here we are again with Citigroup receiving an exemption. I broached about Citi last month when I asked **How is Citi going to deal with $38 billion in deferred tax assets?** My question at the time was whether Citigroup when make enough money to use these loss carry-forwards. If not, they would need to take a writedown.

However, the issue with the government concerns accounting for change of control in a merger. The government's 34 percent stake in Citi is enough to count as a change of control under tax law in the event of sale. A sale of that stake by the government should reduce the $38 billion in deferred tax assets that Citigroup has on its balance sheet, meaning they should have to write this down immediately. But, apparently they are being gifted taxpayer money as Secretary Geithner and the IRS have exempted Citi. Now in all fairness, the concept that Citi should pay more taxes to the government as a result of that very government selling a controlling interest is a bit twisted.

Nevertheless, Robert Willens, my tax professor from my business school days, is apoplectic. The Post quotes him saying:

> The government is consciously forfeiting future tax revenues. It's another form of assistance, maybe not as obvious as direct assistance but certainly another form… 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.

As you would expect, this revelation has turned partisan. The Post says:

> A Democratic aide to the Senate Finance Committee, which oversees federal tax policy, said the Obama administration had the legal authority to issue the new

> exception, but Republican aides to the committee said they were reviewing the issue.
>
> A senior Republican staffer also questioned the government's rationale. "You're manipulating tax rules so that the market value of the stock is higher than it would be under current law," said the aide, speaking on the condition of anonymity. "It inflates the returns that they're showing from TARP and that looks good for them."

Treasury is defending this decision by saying this is not a 'new' exemption, but one that applies to the aid guidelines that financial institutions received when TARP was first formulated. I thought those provisions were repealed in the stimulus bill.

Experts calculate this decision will cost the treasury several billion dollars. Personally, I am astounded that the handouts keep coming.

Sources

- **U.S. gave up billions in tax money in deal for Citigroup's bailout repayment** – Washington Post
- **Application of Section 382 in the Case of Certain Acquisitions Made Pursuant to the Housing and Economic Recovery Act of 2008** – IRS (pdf)
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- **Grassley Seeks Inspector General Review of Treasury Bank Merger Move** – Senate Press Release, 14 Nov 2008 (pdf)
- **H.R.1: 111th Congress, 1st session** – U.S. House of Representatives (pdf)

About Edward Harrison

Edward Harrison is the founder of Credit Writedowns and a former career diplomat, investment banker and technology executive with over twenty years of business experience. He is also a **regular economic and financial commentator** on BBC World News, CNBC Television, Business News Network, CBC, Fox Television and RT Television. He speaks six languages and reads another five, skills he uses to provide a more global perspective. Edward holds an MBA in Finance from Columbia University and a BA in Economics from Dartmouth College. Edward also writes a premium financial newsletter. Sign up here for a **free trial**.

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Edward Harrison is the founder of Credit Writedowns and a former career diplomat, investment banker and technology executive with over twenty years of business experience. He is also a regular economic and financial commentator on BBC World News, CNBC Television, Business News Network, CBC, Fox Television and RT Television. He speaks six languages and reads another five, skills he uses to provide a more global perspective. Edward holds an MBA in Finance from Columbia University and a BA in Economics from Dartmouth College. Edward also writes a premium financial newsletter. Sign up here for a free trial.

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Exhibit 19

They've got muck; we've got rakes. TPM Muckraker

Obama Admin Grants Mega Tax Break To Citi In Bailout Deal

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Newscom / Bill Clark
ByJustin ElliottPublishedDecember 16, 2009, 6:35 PM EST
Did the Obama Administration just deliver a $38 billion stealth bailout to Citigroup?

According to several outside experts the answer is yes, but the Treasury is maintaining an IRS ruling that granted Citi a $38 billion tax break was routine and proper. The *Washington Post* first reported the news of the IRS ruling in a front-page story today.

The IRS decision came as part of a deal for Citi to pay back $20 billion, which was announced earlier this week amid mutual back-patting. One benefit for Citi is being freed from salary restrictions.

But with the IRS notice, "all Citi is doing is saying to the government, we'll give you $20 billion if you give us the $38 billion tax dodge," Barry Ritholtz, the chief market strategist for Fusion IQ, tells TPMmuckraker. "It's a giant fraud."

Here's the gist of the tax maneuver: Companies are allowed to offset tax payments with previous losses, but the law bars this practice in the case of transfers of ownership. That's so a money-losing company cannot be bought by a "predator company" for the sole purpose of gaining the tax advantage of the losses of the "prey company." Citi's deal with Treasury involves transactions, including the government's selling of its 34 percent stake in the company, that amount to an ownership change. The IRS ruling allows Citi to offset past losses despite the ownership change.

$38 billion is the amount Citi claims in past losses, which means that under the IRS ruling Citi can "avoid taxes on its next $38 billion in profits," the *Post* notes.

Ritholtz says the deal is about Citi -- "the least healthy of the major banks" -- not wanting to be the odd man out, as others pay back bailout money.

Neither the White House, which declined our request for comment, nor the Treasury has mounted a public defense of the IRS decision, but ABC lays out the full response of anonymous Treasury officials here. The basic argument is that the TARP presents a unique set of circumstances that are not a real transfer of ownership in the original sense of the tax law that is being exempted.

But one tax accounting expert told the *Post*:

> "The government is consciously forfeiting future tax revenues. It's another form of assistance, maybe not as obvious as direct assistance but certainly another form," said Robert Willens, an expert on tax accounting who runs a firm of the same name. "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."

The decision on the IRS ruling, which involved senior Treasury officials, has been presented by Treasury as a fait accompli, essentially the only possible interpretation of an existing rule.

But the *New York Times* reported that federal officials and Citi "had discussed the tax issues since late last summer as they worked through potential hurdles to the bank's payback plans." Doesn't exactly sound like a routine ruling.

Treasury spokesperson Nayyera Haq tells us that the rule "was never intended to address the unprecedented situation where the government owned shares in banks - which is why additional guidance was needed to ensure an orderly TARP exit."

Edward Harrison, finance specialist at the economic consultancy Global Macro Advisors, delves into the argument here, concluding that while the move is not unprecedented, it very much is a handout of taxpayer money.

Harrison tells TPMmuckraker: "I look it as a chutzpah move to get in there and give some freebies to Citigroup so they don't have to raise more capital."

There's also the question of whether the IRS has the authority to make a decision with such far-ranging effects -- one that applies to companies other than Citi in which the government has ownership stakes.

Says Ritholz: "What they're doing looks awfully a lot like legislation and much less like administrative decision making."

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Exhibit 20

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 21

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Note

UNDOING UNDUE FAVORS: PROVIDING COMPETITORS WITH STANDING TO CHALLENGE FAVORABLE IRS ACTIONS

Sunil Shenoi [a1]

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The Internal Revenue Service occasionally creates rules, notices, or regulations that allow taxpayers to pay less than they would under a strict reading of the law. Sometimes, however, these IRS actions are directly contrary to federal law and have significant economic impact. Challenging favorable IRS actions through litigation will likely be unsuccessful because no plaintiff can satisfy the requirements for standing. To address this situation, this Note proposes a statutory reform to provide competitors with standing to challenge favorable IRS actions in court.

I. Introduction

Most taxpayers dread the Internal Revenue Service (IRS) for its hard-earned reputation of finding ways to take away taxpayers' hard-earned money. Occasionally, the IRS creates rules, notices, or regulations that are actually favorable to taxpayers, in terms of allowing them to pay less than might be required under a strict reading of the law. As welcome a gift as this may be to the taxpayers that save money under the IRS action, some favorable actions by the IRS can be just as inappropriate as an IRS action that requires taxpayers to pay more than the law requires.

The inappropriateness of a favorable IRS action is not based on how much or how little a taxpayer must pay in taxes. Rather, some favorable IRS actions are inappropriate because they are directly contrary to federal law. The IRS may not have legal authority to take such actions, and such actions can have significant economic impact. Agency actions that are not authorized by statute or are contrary to federal law are inconsistent with the role of an administrative agency, lack accountability, and essentially bypass this country's system of checks and balances. Despite these grave consequences, little can be done to challenge favorable IRS actions, as it is unlikely that any party has standing to successfully bring a ***532** lawsuit against the IRS. Thus, favorable IRS actions are effectively unreviewable in a court of law.

This Note proposes a statutory reform to allow favorable IRS actions to be challenged in court. Part II will provide a sampling of favorable actions by the IRS that negate or override statutes and judicially-made law. Part II will then focus on IRS Notice 2008-83 as a recent example of favorable action and will describe the problems accompanying it, namely, the potentially huge economic costs, the IRS's lack of authority to issue the notice, and the IRS's effective waiver of existing federal law. Part III uses Notice 2008-83 to illustrate that currently available political and judicial remedies inadequately counteract a favorable IRS action's harm. Part IV proposes a statutory reform that provides judicial standing for competitors to challenge favorable IRS actions. In addition, Part IV demonstrates that such a reform would withstand judicial scrutiny. Finally, Part IV considers a number of policy issues related to the proposed reform.

II. Favorable IRS Actions: What Are They and Why Are They Bad?

As part of the IRS's responsibility for administering and enforcing tax laws, the IRS provides interpretations of tax law to facilitate understanding and compliance by taxpayers. On some issues where the law is unclear, the IRS occasionally takes a position that is favorable to taxpayers, in the sense that taxpayers pay less in taxes under the position chosen by the IRS than they would under an alternative position the IRS could have taken. This Note focuses on IRS actions that are favorable to taxpayers but also directly contrary to federal law, whether such law is congressionally or judicially created. Such actions are problematic because the IRS may not have legal authority to take the favorable action and such action can have a significant economic impact. Favorable IRS actions with these characteristics also have serious policy implications, in that they are inconsistent with the role of an administrative agency, lack accountability, and essentially bypass this country's system of checks and balances.

Surprisingly, the IRS has a history of acting in taxpayers' favor and diverging from federal law. For example, the IRS contravened the Supreme Court regarding whether a company can deduct fees paid to investment banks to facilitate a merger. In INDOPCO, Inc. v. Commissioner, the Court held that such fees could not be deducted; instead, the fees had to be capitalized because they would yield ***533** benefits beyond the current tax year.[1] The IRS later backed away from the Court's "future benefit" test[2] by establishing regulations that were more favorable to taxpayers than the Court's decision.[3] The regulations permitted deductions for investment banking expenses, resulting in immediate tax savings, whereas the Court's decision would have caused taxpayers to realize benefits over a period of years.

The Court and the IRS have also differed over whether stock used in hedging transactions qualifies as a capital or an ordinary asset. This categorization is important because it affects the tax rate on gains from the sale of those assets. In Arkansas Best Corp. v. Commissioner, the Court held that the business motivation for acquiring and selling stock is irrelevant to determining whether stock is a capital asset.[4] The Court stated, however, that business motivation is relevant for determining the applicability of statutory exclusions from capital assets, such as whether the stock qualified as inventory.[5] The Court's decision suggested that sales of shares in hedging transactions were capital assets. The IRS responded by issuing regulations providing a number of hedging transactions with ordinary income treatment,[6] in apparent conflict with the Court's decision in Arkansas Best. The IRS regulations were more favorable to the taxpayer because ordinary income tax rates are higher than capital income tax rates, and thus losses on ordinary assets save more in taxes than losses on capital assets.

While these examples provide a small sampling of favorable actions by the IRS that are contrary to Supreme Court decisions, the IRS's favorable actions can also conflict with federal statutes. This Note will focus on Notice 2008-83, one of the IRS's actions that has conflicted with a federal statute, to better illustrate the consequences of favorable IRS action.

***534 A. Overview of IRS Notice 2008-83**

In mid-September 2008, the sudden demise of two of the largest financial institutions in the world, Lehman Brothers and Merrill Lynch, rocked the global economy.[7] As the financial world focused on the U.S. government's proposed $700 billion bailout of the banking industry, the IRS and the United States Department of the Treasury Department (the Treasury) undertook a number of steps to provide their own form of relief for troubled financial institutions.[8] One of these steps occurred on September 30, 2008, when the IRS issued Notice 2008-83.[9] Within a few weeks, the controversy surrounding Notice 2008-83's questionable authority and potentially massive tax implications elevated it to the front pages of some of the largest newspapers in the country.[10]

To understand the controversy surrounding Notice 2008-83, it is necessary to understand some basic principles of corporate tax law. As a taxable entity, a corporation has a number of tax attributes, such as earnings and profits, tax credits, or a net operating loss.[11] A tax attribute may be considered favorable if it has a positive effect on the corporation, such as saving taxes or increasing revenue. When a corporation undertakes certain types of transactions, such as a merger, it may lose some of the

tax attributes, favorable or otherwise, that it possessed prior to that transaction. [12] For situations where a tax attribute would survive a transaction, Congress has enacted special rules to "prevent trafficking in favorable tax attributes." [13]

Section 382 of the Internal Revenue Code is one such rule that limits the use of a favorable tax attribute. Section 382 applies when ***535** two requirements have been met. First, § 382 applies only to loss corporations, [14] which are those corporations that have a net operating loss or a net unrealized built-in loss. [15] A net operating loss means the amount by which a corporation's tax deductions are greater than its gross income. [16] A net unrealized built-in loss occurs with respect to an asset that the corporation owns when that asset's fair market value is less than its cost. [17] For example, a mortgage owned by a bank would have a $400,000 net unrealized built-in loss if the bank purchased it for $1 million at the peak of the housing boom, but the value of the mortgage later fell to $600,000 after the credit crisis started and the bank realized the lender was less likely to pay back the loan. [18]

The second § 382 requirement is that the loss corporation must undergo an "ownership change." [19] An ownership change occurs when a shareholder that owns five percent or more of the corporation's stock, as of a given date, increases his ownership by more than fifty percent over a given period. [20] Ownership changes may occur in the context of reorganizations, such as mergers. [21]

To illustrate the operation of § 382, consider the following hypothetical. If X Corporation has net unrealized built-in losses of $100 million, and then Y Corporation acquires X Corporation, Y Corporation may be able to deduct X Corporation's $100 million in net unrealized built-in losses, which means that Y Corporation pays less in corporate taxes than it otherwise would. [22] Y Corporation's ability ***536** to reduce its tax liability by acquiring X Corporation's losses makes those losses quite valuable. Section 382 limits "trafficking in tax attributes" [23] by limiting the amount of X Corporation's losses that Y Corporation can deduct to offset its own gross income in any year after its acquisition of X Corporation. [24] Thus, instead of Y Corporation deducting $100 million in losses acquired from Corporation X in the year after the acquisition, Y Corporation might have to wait a number of years to deduct the entire amount of the acquired losses. [25]

Notice 2008-83, in only a couple of sentences, completely changed the operation of § 382 in the context of bank acquisitions of other corporations. [26] Continuing with the hypothetical transaction between X Corporation and Y Corporation, Notice 2008-83 would treat the net unrealized built-in losses acquired from X Corporation as if they were not attributable to X before the acquisition--in effect, the losses would be treated as originating in Y Corporation. [27] As a result, § 382's limitation on the amount of the losses that Y Corporation can deduct each year after the acquisition would not apply, and Y Corporation could deduct the entire amount of the net unrealized built-in losses in the tax year immediately after the acquisition.

Notice 2008-83's change to § 382's application was not merely theoretical; it had significant practical consequences as well. At the time of Wells Fargo's 2008 acquisition of Wachovia, Wachovia had $74 billion in mortgage-related losses. [28] Consequently, Notice 2008-83 permitted Wells Fargo to immediately deduct the entire $74 billion in mortgage losses acquired from Wachovia. In contrast, ***537** had § 382 been applied as Congress intended, the provision could have required Wachovia to spread the deductions from those mortgage losses over twenty years. [29]

B. Economic Impact

Notice 2008-83 provided significant economic benefits to banks because it allowed banks to offset their income with losses acquired from another corporation, which meant they paid less in taxes on that income. An equally important consequence was that every dollar of corporate tax saved by a bank as a result of Notice 2008-83 was a dollar that the federal government failed to collect in that year. Thus although Congress battled over the decision to spend $700 billion to bail out troubled banks, [30] the true bailout cost was $700 billion plus corporate taxes lost by Notice 2008-83.

The question, then, is how much did Notice 2008-83 save banks and cost the federal government? The answer depends on determining the fair market value of a bank's assets, which is normally a complicated task. [31] Since Notice 2008-83 greatly benefitted banks with mortgage losses, valuation of such losses is even more difficult due to the "currently contracted market for loans." [32] A number of sources cite as authoritative a report that estimated the net tax savings to banks as $140 billion. [33] The authors of the $140 billion estimate subsequently issued another report that qualified their $140 billion estimate as a maximum that relied on a number of ***538** "very big" assumptions. [34] This report cautioned that the best way to determine the tax savings to banks is to review the actual amount of built-in gains and losses in the SEC filings for a bank acquisition, such as the two bank deals that occurred soon after Notice 2008-83 was issued. [35] Presumably having performed this task, or relying on "those with actual knowledge of the real figures," the authors concluded that the tax "benefit [to banks] was not a significant tax subsidy." [36] However, the report did not reveal a revised estimate of the actual monetary tax benefits to banks. [37]

Nevertheless, other reports [38] make clear that Notice 2008-83 provided extraordinary tax savings to banks and an equal amount of lost revenue for the federal government. Notice 2008-83 likely allowed Wells Fargo to save approximately $19.4 billion in taxes through its acquisition of Wachovia, specifically, its $74 billion in losses from mortgage-related securities and loans. [39] Moreover, Wells Fargo only paid approximately $14.3 billion for Wachovia, so the tax savings paid for the acquisition. [40] Similarly, PNC Financial Services Group likely enjoyed tax savings with a present value equal to the entire $5.2 billion it spent to acquire National City Corporation. ***539** [41] Wells Fargo and PNC may not be able to utilize the full value of their acquired losses for quite some time because "[t]ax losses only work when you have a lot of income, and right now the [banks] don't have a lot of income." [42] Nevertheless, Notice 2008-83 likely cost the federal government over $20 billion in future corporate tax revenue from only two bank acquisitions, such that even if the estimates are discounted to net present value, the federal government has still lost a tremendous amount of money.

Aside from the impact on the federal government, Notice 2008-83 also had financial implications for state government tax revenues. This secondary impact occurred because "states with corporate income taxes almost universally base their corporate taxes on federal rules." [43] Thus, if Notice 2008-83 reduced a bank's federal tax liability, that bank could also have reduced state tax liability in any state in which that bank operates. California, for example, could have lost nearly $2 billion over the next ten years due to Notice 2008-83. [44] Notice 2008-83's impact on states is not unique to California--the financial services industry provides a substantial portion of the gross domestic product for Delaware (32.5%), New York (18%), Connecticut (16.5%), and Rhode Island (12.1%). [45]

States are free to decouple their tax laws from federal tax laws, so that a change at the federal level will not automatically apply to them, and California has attempted to do just that. [46] However, the regulatory process can take nine to twelve months to complete. [47] In ***540** the meantime, states lose significant tax revenues--in 2008 alone, California could have lost approximately $300 million in corporate tax revenue due to Notice 2008-83. [48] This is not to say that the Treasury should consult with state governments before making changes. [49] Nevertheless, implementing a rule change with such sweeping economic magnitude through the legislative process instead of an IRS notice would have provided state governments with notice and time to decouple their own laws before losing corporate tax revenue.

Beyond tax savings and lost tax revenue, Notice 2008-83 affected the economy by providing "an artificial competitive advantage to banks that can afford to expand now by effectively offering a tax break for acquiring other banks." [50] The Notice had an immediate impact on the competitive landscape of the financial industry. For example, Wachovia had agreed to be purchased by Citigroup on September 29, 2008, the IRS issued Notice 2008-83 on September 30, and then Wells Fargo--which had earlier tried to acquire Wachovia--made a larger and ultimately successful bid to acquire Wachovia. [51] The Treasury's foray into economic policy may have been further misguided because Notice 2008-83 "could have [had] the unintended consequence of

motivating more financial firms wanting future tax deductions to shelter their earnings to buy competitors, leading to more consolidation in the financial industry than would be necessary to restore stability in the financial sector." [52]

Notice 2008-83 had a significant impact on the tax revenues of the federal government, as well as many state governments. Lower tax revenues may mean that federal and state governments will be forced to impose a higher tax on their citizens to make up the lost revenues. Alternatively, federal and state governments may be forced to cut programs and services, which could disproportionately impact needy populations. In addition, Notice 2008-83 altered the financial industry's competitive landscape by facilitating transactions that were unlikely to happen on their own, and by ***541** causing transactions to happen in a way they otherwise would not have. Considering these severe consequences, "favorable" IRS actions may not be as welcome or appropriate as originally imagined. [53]

C. Policy Implications

The impact of favorable IRS actions goes far beyond the economic realm. Favorable IRS actions may be contrary to Congress's clear statement on a subject and such action may be taken without legal authority. Actions with these characteristics, if unchecked, are troublesome because they imply that agencies--whose members are not elected by the public--can act outside their role and supersede Congress, without accountability through the political process.

1. IRS Supersedes Congress on Substantive Policy

Notice 2008-83 modified § 382's operation in two ways that were inconsistent with the plain meaning of § 382's text. The first modification to § 382 dealt with the types of losses that are subject to § 382's limitation. The statute unambiguously states that in the years after a corporation undergoes an ownership change, the post-change corporation is limited in how much it can offset its taxable income with "pre-change losses." [54] Pre-change losses are losses incurred by the corporation prior to the ownership change, and include both net operating losses [55] and net unrealized built-in losses. [56] In addition, pre-change losses must have been incurred in the same taxable year as the ownership change [57] and must be "allocable to the period . . . before the" date of ownership change. [58] Notice 2008-83 exempted net unrealized built-in losses from § 382's coverage by stating that they were not allocable to the period ***542** before the date of ownership change. [59] Thus, Notice 2008-83 was plainly inconsistent with § 382.

Notice 2008-83 then went a step further and allowed only banks to claim the exemption on net unrealized built-in losses. [60] This extremely favorable treatment [61] for banks has no textual basis in the statute because § 382 states that it applies to "any new loss corporation," [62] which "includes any corporation with a net unrealized built-in loss." [63] Thus, Notice 2008-83 was inconsistent with § 382's text.

The Treasury also disregarded Congress's policy for implementing § 382. Under § 382(k), the Treasury can use regulations to redefine which corporations, including those with net unrealized built-in losses, qualify as a loss corporation. [64] However, the Treasury and the IRS did not implement a new definition of loss corporation through regulations. [65] By using a notice instead, the IRS contravened Congress's specified mechanism for implementing statutory policy.

Beyond outright inconsistencies, Notice 2008-83 also departed from the history and legislative intent of § 382. Prior to the Tax Reform Act of 1986, § 382 eliminated "all or a portion of a corporation's net operating loss carryover" when an ownership change occurred. [66] The 1986 amendments to § 382 adopted the current approach, which permits only a fraction of the net operating loss carryover to be deducted each year after the ownership change. [67] Consequently, the IRS should not have used Notice 2008-83 to override a carefully considered legislative scheme that has been in existence for over twenty years. [68]

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***543** 2. IRS Acts Without Legal Authority

Notice 2008-83's end-run around the established legislative scheme of § 382 raises the question of whether the IRS or the Treasury Department had the legal authority to issue the notice. Media coverage of Notice 2008-83 included discussion of this issue but statements that the Treasury lacked legal authority to issue Notice 2008-83 were conclusory and lacked legal analysis or explanation. [69]

Various parties have put forth justifications for Notice 2008-83's legal authority. The most common of these relies on § 382(m), which expressly permits the Treasury Secretary to "prescribe such regulations as may be necessary or appropriate to carry out the purposes of this section." [70] However, Notice 2008-83's exclusion of net unrealized built-in losses from the definition of pre-change losses, resulting in unfettered deductions of net unrealized built-in losses, did not seem to "carry out the purposes" [71] of § 382, when the purpose was to "limit[] the extent to which . . . built-in losses . . . can be utilized." [72] Indeed, the Joint Committee on Taxation found that "Notice 2008-83 [was] inconsistent with the congressional intent in enacting . . . section 382(m)" and that "the legal authority to prescribe Notice 2008-83 [was] doubtful." [73]

Moreover, "there is no ambiguity in the language of 382 that the Notice [was] intended to cure." [74] Of course, § 382(m) lists only five ***544** types of allowable regulations, and Congress's use of the phrase "including (but not limited to)" when describing five types of allowable regulations indicates that Congress expected the Treasury to create other types of regulations. [75] However, § 382(m) does not seem to authorize Notice 2008-83 because § 382(m) "does not authorize the Secretary to provide exemptions or special rules that are restricted to particular industries or classes of taxpayers." [76] In addition, the IRS did not create regulations through a notice and comment process, which might permit an administrative agency to issue policy with broader scope that it otherwise might have. [77]

An alternative justification for 2008-83's legal authority comes from the Troubled Asset Relief Program (TARP). [78] Under TARP, "Treasury [has] broad authority to purchase assets and securities." [79] However, "[TARP] does not grant authority to re-write tax legislation in whatever manner promotes bank mergers. . . . If Congress wanted to give Treasury the authority to fiddle with 382, it clearly could have done so." [80] Congress could have also chosen to allow the Treasury to waive sections of the Internal Revenue Code, but it chose not to. The argument that Congress could or should have been more specific is a standard response to any question of legislative interpretation. In this case, however, it is especially relevant considering Congress gave Treasury only very specific, narrow authority to create regulations regarding gains or losses of preferred stock in Fannie Mae and Freddie Mac. [81] Thus, TARP is unlikely to provide Treasury with valid authority to issue Notice 2008-83.

Another theory authorizing Notice 2008-83 relies on Notice 2003-65. The theory is that Notice 2008-83 was a "continuation of the regulatory authority exercised in Notice 2003-65," [82] in which the Treasury and the IRS provided initial guidance on the identification of built-in gains and losses under § 382(h). [83] The problem ***545** with this theory is that the Treasury's legal authority to issue Notice 2008-83 would depend upon another notice it issued; the Treasury, however, cannot set the bounds of its own authority. Moreover, just because Treasury issued Notice 2003-65 does not mean it had legal authority to issue Notice 2008-83. Notice 2003-65's validity likely stems from the fact that it provided guidance on the meaning of a key term in 382(h), in contrast to Notice 2008-83, which waives application of 382(h)(1)(B) altogether. Consequently, Notice 2003-65 does not appear to authorize Notice 2008-83's sweeping changes to § 382.

Notice 2008-83 might also be justified based on absolute need. In this case, the need arises from "illiquidity in the financial markets," [84] difficulty in valuing financial assets, [85] and a generally dire economic climate. A regulatory agency's powers are

limited, however, to those delegated from Congress in an authorizing statute, [86] and dire conditions do not legally justify the agency's reach for powers beyond those provided in the authorizing statute.

Ultimately, the IRS's legal authority to issue Notice 2008-83 likely did not exist. Although no judicial opinion was issued to support this conclusion, recent federal legislation confirmed that "[t]he legal authority to prescribe Internal Revenue Service Notice 2008-83 [was] doubtful." [87] Nevertheless, Notice 2008-83 demonstrates that a favorable IRS action can supersede a Congressional statute, and that such an action can be taken without legal authority. Allowing an administrative agency to act in such a way is dangerous because the agency lacks direct political accountability. Combined with the significant economic consequences to federal and state governments, as well as to private industry, it is clear that permitting favorable IRS action is not desirable and that such action must be challenged.

III. Current Remedies Are Insufficient

To challenge favorable IRS actions, opponents can appeal to Congress to overturn the action via statute, petition the IRS to ***546** revoke its action, avail themselves of the tax whistleblowing statute, or challenge the IRS action directly through a lawsuit. Each of these methods has drawbacks, and, using Notice 2008-83 as an example, this Part will demonstrate that such methods are unlikely to reverse the damage done by favorable action.

A. Legislative and Executive Remedies

One way to overturn an agency action is for Congress to pass a statute. Recourse through legislation is a significant impediment because of the difficulty in obtaining sufficient political support for a legislative proposal. Favorable IRS actions may be even more difficult to overturn via statute because favorable actions tend to mean fewer taxes, which is usually a popular position across the political spectrum. [88] In the case of Notice 2008-83, overturning an action meant to help the economy may have been politically impossible because it could have been seen as unpatriotic or could have invited blame for ushering in another Great Depression. [89] Even if Congress is successful in overturning an IRS action, considerable time may pass before the legislative repeal occurs or takes effect.

Notice 2008-83 was a rare instance of a favorable IRS action that proved so unpopular, Congress repealed it only four and a half months after the IRS issued it. [90] Still, Notice 2008-83's repeal occurred in the midst of a number of unique circumstances. First, in the November 2008 elections the Democrats gained control of the Presidency and strengthened their control over Congress. [91] In addition, America was in the midst of a severe economic crisis, [92] the financial industry received a large portion of the blame for the economic crisis, [93] and corporations that received seemingly unwarranted benefits during the economic crisis faced significant ***547** backlash. [94] While these factors aligned to favor repeal of an action benefitting an unpopular group, such alignment is infrequent and legislative repeal is typically more difficult to obtain.

Even though Congress did repeal Notice 2008-83, the repeal was prospective. [95] Consequently, Congress's action did not fully counteract Notice 2008-83's effects, such as the huge tax breaks enjoyed by Wells Fargo and PNC in their acquisitions of Wachovia and National City Corporation, respectively. [96] Understandably, Congress was concerned that retroactive repeal might create a chilling effect on compliance with future IRS actions. [97] Retroactive repeal could also exacerbate the financial crisis that Notice 2008-83 sought to ameliorate, as the banks that acquired distressed banks due to their increased value under Notice 2008-83 would instead be saddled with those distressed banks' enormous losses. Nevertheless, prospective repeal is problematic because for the four and a half months it took for Congress to pass the necessary legislation, the IRS blatantly operated beyond its authority, waived a clear provision of a federal statute, and caused significant economic impact. Thus, even if a prospective legislative repeal occurs, it may be useful to have a way to prevent or rectify the harm that occurred prior to such repeal.

Another method of seeking repeal of a favorable IRS action is to petition the IRS to revoke it. In most cases, however, the IRS has little incentive to reverse course on a notice, [98] especially in the absence of judicial or statutory opposition to the IRS position. Additionally, the issues that arise when petitioning the IRS to take action are similar to those when lobbying Congress to take action: persuading the IRS to issue new guidance is difficult, considerable time may pass before such guidance is obtained, and the IRS may hesitate to issue retroactive repeal due to concerns about a chilling effect on compliance with future guidance and rulings. Furthermore, in contrast to the legislative repeal context, even if the IRS ***548** were to find a retroactive repeal palatable, the agency's legal authority to issue a retroactive repeal of a notice is unclear. [99] Thus, seeking recourse from the IRS is likely to be unsuccessful.

It is possible that an existing provision of the Internal Revenue Code could be used to address the problem of lost tax revenue from favorable IRS treatment. The Secretary of the Treasury has the power to initiate administrative or judicial action against individuals who underpaid their taxes or violated the internal revenue laws. [100] In 2006, Congress aided the Secretary's efforts by creating a tax whistleblowing program, which enables individuals to provide the Secretary with information about parties that violate tax laws. [101] Individuals can provide public or non-public information and the Treasury can reward them accordingly for their help. [102] This information can then be used by the Treasury and the IRS to initiate a suit against the party that saved taxes as a result of the IRS's favorable action. Such a suit is desirable because to determine whether that party's reduced tax liability was actually an underpayment in violation of tax laws, a court would have to evaluate the legitimacy of the IRS's favorable action in the first place. Yet for that very reason, the IRS is unlikely to bring such a suit. [103] Thus, the Internal Revenue Code's whistleblowing provisions are not likely to address the problem of favorable action.

B. Judicial Remedies

The final category of recourse against favorable IRS action is a lawsuit against the IRS that would seek declaratory or injunctive relief against application of the action. Declaratory or injunctive relief is advantageous because it sidesteps the thorny issue of retroactive repeal. If a successful lawsuit blocks application of the IRS action, then the harmful effects, such as the tax savings resulting from acquisitions under Notice 2008-83, may never materialize. ***549** Judicial recourse has its own obstacle, however: a plaintiff who brings suit to challenge a favorable IRS action is likely to have his case dismissed for lack of standing.

1. Overview of Standing Requirements

A plaintiff must have standing for a “court [to] decide the merits of the dispute or of particular issues.” [104] The Supreme Court has articulated a number of requirements that a plaintiff must satisfy to be granted standing. The first set of requirements derives from Article III of the U.S. Constitution, which restricts federal court jurisdiction to cases or controversies. [105] Since Article III's restrictions are constitutional, and therefore applicable in all contexts, Congress cannot override them by statute. [106] Article III requires that a plaintiff suffer an injury in fact. [107] In addition, the injury must be fairly traceable to the defendant's conduct, not the conduct of a third party. [108] Finally, a favorable court decision must be able to redress the injury. [109]

The Court has detailed the injury in fact requirement through many cases. To satisfy the injury in fact requirement, a plaintiff must allege a concrete and particularized injury that is actual or imminent. [110] The requisite injury may result from a violation of constitutional rights, common law rights, or statutory rights. [111] Moreover, qualifying injuries may be economic or non-economic, such as injuries that “reflect ‘aesthetic, conservational, and recreational’” values. [112]

The standing requirement related to injury in fact bars "generalized grievances." [113] A plaintiff's claim may be a generalized ***550** grievance if it is "shared in substantially equal measure by all or a large class of citizens." [114] Thus, a plaintiff will not have standing if "their only injury is as a citizen or a taxpayer concerned with having the government follow the law." [115]

A second set of standing requirements may be overridden by statute because they are derived, not from Article III, but from the Supreme Court. [116] These requirements are called prudential standing requirements, because the Court based them on prudent judicial administration. [117] The first prudential requirement is that a plaintiff may only sue under her own legal rights and not those of another person. [118]

Another prudential requirement, called the zone of interests test, applies when a person challenges an administrative agency regulation. The zone of interests test requires that the interest that the plaintiff seeks to protect must be arguably within the zone of interests to be protected or regulated by the statute at issue in the lawsuit. [119] To understand the interests Congress sought to protect in a comprehensive statutory scheme, a court may even consider the interests protected by statutes beyond the particular statute under which the plaintiff sued. [120] The zone of interests test "is not meant to be especially demanding." [121] To fail the zone of interests test, the plaintiff's interests must be "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." [122]

Aside from prudential requirements, a plaintiff may have standing if it meets the Article III standing requirements plus either the requirements of the taxpayer or legislator standing doctrines. ***551** To sue as a taxpayer, Flast v. Cohen requires the plaintiff to challenge an expenditure of funds under the Constitution's taxing and spending clause. [123] In addition, the taxpayer must show that the expenditure violates a constitutional provision. [124] Currently, taxpayer standing only seems permissible pursuant to the Establishment Clause. [125] Members of Congress can achieve standing in a lawsuit by either claiming individual harm [126] or an institutional injury. [127]

2. Lack of Standing to Challenge Favorable IRS Actions

Using Notice 2008-83 as an example, this Part will demonstrate that a plaintiff would be unsuccessful in challenging a favorable IRS action through litigation due to a lack of standing.

The first step in challenging the legitimacy of a favorable IRS action is to identify an appropriate plaintiff and defendant. In the case of Notice 2008-83, potential plaintiffs might have included a person (or group of people) suing as a citizen, a person (or group of people) suing as a taxpayer, members of Congress, competitor banks that could not take advantage of Notice 2008-83's waiver of § 382, or non-banking corporations that were not subject to Notice 2008-83's provisions. The likely defendants in such an action would have been the IRS or the banks that benefitted from Notice 2008-83.

Once the parties have been identified in a given suit, the plaintiff must meet judicial standing requirements. A person suing as a citizen, a competitor bank, or a non-banking corporation could have alleged that Notice 2008-83 was inconsistent with existing ***552** law [128] and that it allowed a select group of parties to unfairly save taxes. Such claims are unlikely to satisfy the injury in fact requirement because none of the parties "'personally suffered some actual or threatened injury.'" [129] The complained-of injuries would more likely be generalized grievances that were shared by large portions of the population. [130] The non-personal nature of the injuries would be the same with either the IRS or a beneficiary bank as the defendant. Thus, the failure to assert a valid injury in fact indicates that a person suing as a citizen, a competitor bank, and a non-banking corporation is unlikely to have standing.

A bank could have alternatively claimed that the Notice 2008-83 caused it to suffer a competitive injury due to the benefits enjoyed by one of its competitors. Continuing with the Wells Fargo-Wachovia example, [131] the plaintiff bank could have been a competitor of Wells Fargo, which saved taxes under Notice 2008-83, or a competitor of Wachovia, which became more valuable after issuance of the Notice. [132] Therefore, the competitive injury suffered might have qualified as a valid economic injury. Nevertheless, the plaintiff bank might still have difficulty satisfying the remaining standing requirements. Specifically, the benefit enjoyed by the plaintiff's competitor might have been more properly traced to the IRS's conduct, rather than that of the competitor bank. [133] Thus, while the causation requirement would likely have succeeded in a suit against the IRS, it would likely fail in a suit against a competitor bank. A suit against the IRS also might have satisfied the redressability requirement, because a favorable court decision granting declaratory or injunctive relief could have prevented application of Notice 2008-83, thereby rectifying the competitive injury suffered.

Even if the Article III requirements have been met on the basis of a competitive injury, however, a court must still apply the zone of interests test. [134] Applying this test, a suit by a competitor against the ***553** IRS would likely fail. The plaintiff's interests in this suit might have included interests in not allowing any taxpayer to obtain unwarranted tax breaks, not allowing a competitor to obtain a highly valuable tax break, not allowing government agencies to favor one industry over another, or not allowing government agencies to favor certain groups in an industry over other groups in the same industry. However, none of these interests appear to be what Congress had in mind when enacting § 382, [135] or any other provision of the Code. [136] Thus, the zone of interests test would likely fail, and the competitor plaintiff would not have standing to maintain his suit against the IRS.

A plaintiff who might have sued as a taxpayer, against either the IRS or a beneficiary of Notice 2008-83, would not likely have standing because the two-prong Flast v. Cohen test would not be satisfied. [137] First, Notice 2008-83 did not involve an expenditure of funds under the Constitution's taxing and spending clause, as required by Flast. [138] Since there was no expenditure, the secondary requirement that the expenditure violate a constitutional provision, in particular, the establishment clause, [139] need not be reached.

Members of Congress who sue to combat favorable IRS action would likely not have standing on the basis of either individual or institutional harm. Under Notice 2008-83, for example, a member of Congress could not have claimed individual harm because nobody was "singled out for specially unfavorable treatment" and nobody had been "deprived of something to which they personally are entitled," such as their seat in Congress. [140] In addition, a member of Congress could not claim an institutional injury because Notice 2008-83 did not impact Congress's ability to pass or reject legislation on the same subject in the future. [141] Thus, members of Congress would not likely have standing to challenge Notice 2008-83.

***554** Currently available litigation strategies fall short of either preventing or remedying the harm from favorable IRS actions. The difficulty in obtaining a federal statute or IRS action overturning an earlier favorable IRS action makes it unlikely to prevent harm occurring from the favorable action. In addition, even if a federal statute or IRS action is obtained, such remedy is likely to be prospective and would not rectify past harm. A suit seeking injunctive or declaratory relief can prevent realization of harm that occurs before and after the initiation of a lawsuit. A judicial remedy, however, has less chance of succeeding than legislation or agency action because current case law makes it unlikely that any person would have standing to challenge favorable IRS action. As the law stands, a suit with the fewest standing obstacles is a suit against the IRS by competitors of the beneficiaries of favorable IRS action.

IV. Solution: Congress Should Pass a Statute Authorizing Standing

Congress should pass a statute providing standing for competitors to challenge favorable IRS actions. The harms from favorable IRS action range from concrete, economic consequences to more theoretical concerns about the proper role of agencies, Congress, and political accountability. The seriousness of these harms demonstrates that favorable IRS actions should be

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challenged. This Part will review past efforts by Congress to provide standing through a statute, describe the details of a statutory reform that will permit standing to challenge favorable IRS action, analyze the legal validity of such a reform, and evaluate policy issues related to the statutory reform.

A. Past Attempts by Congress to Create Statutory Standing

The Supreme Court has stated that Congress has the power to create statutory standing. [142] Congress has used this power to confer standing based on a wide variety of injuries. To better understand the likelihood that the reform this Note proposes would survive judicial scrutiny, it is necessary to review some of Congress's attempts to confer statutory standing.

***555** In Trafficante v. Metropolitan Life Insurance Co., the Supreme Court upheld standing for a group of tenants in an apartment complex who alleged that the complex's owners discriminated in the renting of apartments. [143] The plaintiffs sued under the Fair Housing Act, which permitted suits by "persons aggrieved," defined broadly as "[a]ny person who claims to have been injured by a discriminatory housing practice." [144] The Court held that the "alleged injury to existing tenants by exclusion of minority persons from the apartment complex [was] the loss of important benefits from interracial associations." [145] The Court acknowledged that the plaintiffs qualified as "persons aggrieved" because doing so was consistent with "vindicating a policy that Congress considered to be of the highest priority." [146] Absent the statute, the plaintiffs' alleged injury may not have been sufficient to warrant standing. [147] Trafficante illustrates that plaintiffs must suffer an injury to have standing, but also that standing based on a broadly defined injury is more likely to be found if a greater policy issue is at stake.

Even after Trafficante, the validity of citizen-suit provisions has been contested. In Lujan v. Defenders of Wildlife, the plaintiffs filed a suit against the Department of the Interior under the citizen-suit provision of the Endangered Species Act (ESA). [148] The ESA requires federal agencies to consult with the Secretary of the Interior to ensure that their actions do not jeopardize species on the Interior's endangered species list. [149] The Secretary promulgated a regulation requiring "consultation only for actions taken in the United States or on the high seas." [150] Plaintiffs sued to restore the prior regulation, which extended the consultation requirement to actions taken overseas. [151] The Court rejected standing in this case because "the injury-in-fact requirement [was not] satisfied by ***556** congressional conferral upon all persons of an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law." [152]

Despite Lujan's apparent limitation on citizen-suit provisions, the Court did not bar citizen-suit provisions entirely. In Bennett v. Spear, the Bureau of Reclamation was operating a project under the authority of the Endangered Species Act to protect two species of fish by limiting water levels in two reservoirs. [153] Under the ESA's citizen-suit provision, the plaintiffs claimed the project's restriction on reservoir water injured them through their reduced use of the water for "'recreational, aesthetic and commercial purposes, as well as for their primary sources of irrigation water.'" [154] The Court agreed that the adverse impact from the water restrictions was a satisfactory injury in fact. [155] Thus, citizen-suit provisions could be used successfully if the plaintiffs met the Article III injury in fact requirement.

In addition to the use of enforcement-based citizen-suit provisions, Congress has established stand-alone, statutory rights as in the Federal Election Campaign Act (FECA). [156] FECA allows "aggrieved" persons to file a complaint with the Federal Election Commission if a violation of the statute occurs. [157] In Federal Election Commission v. Akins, the Federal Election Commission (FEC) decided that a particular group was not a "political committee" subject to FECA's reporting requirements. [158] Plaintiffs challenged the FEC's decision on the basis that the group was a political committee and that the group's failure to disclose information was a violation of the statute that injured the plaintiffs. [159] The Court agreed that the plaintiffs' inability to obtain information under FECA was a valid injury in fact. [160]

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After Lujan, Bennett, and Akins, it is clear that standing exists if Congress grants a statutory right and a person suffers a cognizable ***557** injury in fact from violation of that right. [161] However, not all Congressional attempts to create statutory rights to justify standing survive judicial scrutiny. Raines v. Byrd involved a challenge to the Line Item Veto Act, which permitted the President to "'cancel' certain spending and tax benefit measures after he has signed them into law." [162] The Act authorized legal relief for those adversely affected by the Act. [163] Six present and former members of Congress sued, claiming they were entitled to legal relief because the Act "adversely affected" them by "dilut[ing] their Article I voting power." [164] The Supreme Court rejected standing because the plaintiffs had not been "deprived of something to which they personally [were] entitled." [165] Raines illustrates that to survive judicial scrutiny the injury in fact must be personal and that the statutory right should focus on an injury and/or target the plaintiff more narrowly than "any individual adversely affected." [166]

Judicial scrutiny of Congressional attempts to provide private individuals with standing provides crucial lessons about how to successfully craft such a statute. The review of cases above shows that a plaintiff claiming to have suffered a statutorily defined injury will still need to satisfy the Article III requirement of injury in fact. [167] In addition, a statute that defines an injury broadly is more likely to be upheld if the statute attempts to effectuate an important social policy. [168] Furthermore, a properly drawn statutory right should provide an injury that is personal to the individual plaintiff. [169]

*558 B. Proposed Statutory Reform

A statutory reform to challenge favorable action by the IRS must appropriately define what favorable means. The term "favorable," as used in this Note, is synonymous with "beneficial," which means that a person receives or is entitled to an advantage. [170] An advantage is a "superiority of position or condition," [171] and the notion of superiority implies the existence of another person with a lesser status. Thus, between two people, X and Y, who start at the same position, an action is favorable if it causes X to be in a relatively better position than Y. [172] The range of favorable actions may be summarized as follows:

Table 1--Disadvantages Created by Favorable IRS Actions

#	X's Change in Status	Y's Change in Status	Net Result
1	Increase by A	No change (or decrease)	X's status is greater by A
2	Increase by A + B	Increase by A	X's status is greater by B
3	No change (or increase)	Decrease by A	X's status is greater by A
4	Decrease by A	Decrease by A + B	X's status is greater by B

To satisfy Article III's injury in fact requirement, an attempt to create statutory standing must focus on the relative injury suffered by person Y. The injury cannot focus exclusively on the effect on person Y, however, because in two of the four situations listed in Table 1 above, Y either feels no impact or benefits in some way from the IRS action. Thus, the statutory right, the violation of which would cause an injury in fact, must focus on the net result--the change in relative position between X and Y--in which Y ends with a lesser status in all four "favorable" scenarios.

This Note proposes a statutory reform to combat favorable IRS actions by creating a right to be free from "competitive disadvantage" due to an unlawful IRS action. [173] This provision would provide that any party suffering such "competitive disadvantage" could sue the IRS for injunctive or declaratory relief. Under the ***559** statute, competitive disadvantage would be a decrease in competitive position resulting from IRS action that:

1) provides one party with a measurable financial benefit, provides that party's competitor with either no financial benefit or a less valuable financial benefit, and the benefit is not created according to a proportional basis, [174] or

2) causes one party to suffer a measurable financial loss or detriment, causes that party's competitor to suffer either no loss or detriment, or a lesser loss or detriment, and the loss is not created according to a proportional basis. [175]

Both clauses above use two terms that warrant clarification. First, the term "measurable" means that a party must be able to estimate the dollar amount of the benefit or loss and have a reasonable basis for such estimate. [176] Requiring that the IRS action have a measurable impact, and that the plaintiff must have a reasonable basis for its estimate of the impact, helps weed out frivolous litigation. To further limit frivolous litigation, the proposed statute could require that defendants have high gross incomes and/or require that the IRS action create a sizeable competitive disadvantage in terms of the tax savings to the defendant. [177]

Another phrase requiring clarification is "proportional basis." The term proportional basis intends to weed out IRS actions that apply to all entities equally, but may have disparate impacts on two entities based on the relative proportions of some neutral characteristic of those entities. For example, an IRS regulation that lets each corporation deduct $1,000 of ordinary income for each employee would permit Company X, which has ten employees, to deduct more than Company Y, which has five employees. However, such a regulation should not be considered favorable because the deduction is simply proportional to a characteristic of Company X's business.

***560** Additionally, the statute would not be applicable if the defendant had already completed a transaction valued at $100 million or more in substantial reliance on the favorable IRS action. This provision aims to prevent criticism of suits under the proposed statute that, if successful, could have retroactive effect. Retroactive remedies are generally undesirable because they may discourage taxpayers' reliance on valid IRS guidance. [178] If the proposed statute had been in effect when Notice 2008-83 was issued, that Notice would have illustrated the problem of reliance. On September 29, 2008, Wachovia agreed to be purchased by Citigroup; on September 30, 2008, the IRS issued Notice 2008-83; [179] on October 3, 2008, Wells Fargo outbid Citigroup for Wachovia; [180] and Wells Fargo's acquisition of Wachovia closed on December 31, 2008. [181] From the timeline, it is clear that Wells Fargo relied on Notice 2008-83 in making its $11 billion bid for Wachovia. If Citigroup or another competitor sued prior to the deal's closing, [182] Wells Fargo could claim that Notice 2008-83 should not be invalidated because they would suffer an $11 billion penalty for substantially relying on the notice. However, Wells Fargo's reliance claim would have little weight because the deal had not yet closed, Wells Fargo would not yet have received the tax benefits from Notice 2008-83, and Wells Fargo would have the option of cancelling the deal with the only penalty being the administrative costs of planning the merger, not the full $11 billion that the acquisition would have cost.

On the other hand, if Citigroup or a competitor attempted to sue after December 31, 2008, Wells Fargo would have already spent $11 billion on the acquisition and would have realized the tax benefits from Notice 2008-83. If a court then invalidated Notice 2008-83, Wells Fargo's loss of its tax benefits would be fundamentally unfair because it had spent large amounts of money in reliance on Notice 2008-83. Thus, the "reliance threshold" aims to prevent suits where a party substantially relied on an IRS action. Although it is also unfair to invalidate tax benefits stemming from a $500 transaction, this Note employs a $100 million reliance threshold because if a defendant claims substantial reliance on the ***561** IRS action to evade suit under the proposed statute, a high threshold value gives weight to the substantial reliance claim. Of course, this Note would advocate the adoption of a higher or lower reliance threshold if that value better indicated reliance.

Whatever the threshold amount, the proposed statute's use of a threshold invites criticism. The criticism may arise because one of the purposes of stopping favorable IRS action was to prevent economic harm from such actions and the reliance threshold allows some parties to get away with those economic benefits. This criticism is well-placed; effective enforcement of the tax laws, however, requires balancing policy concerns, such as reliance, with a strict desire to eliminate all economic harm from violation of the tax laws. [183] A large enough reliance interest, stemming from a tangible, completed transaction that cannot be undone

with minimal cost, may warrant limiting lawsuits. Of course, the reliance interest does not completely trump enforcement concerns, as a lawsuit could still be initiated prior to completion of the tangible transaction.

The statute would also encompass a number of smaller provisions. First, the statute should contain a severability provision, such that if a court holds invalid either the competitive disadvantage clause or the lost tax revenue clause, the remaining provision still has legal authority. Second, suits under the proposed statute should be confined to initiation in a particular court or circuit. [184] The benefit of this tactic is that duplicative suits brought under the competitive disadvantage provision or the lost tax revenue provision will be easier to detect and consolidate if they are brought in the same forum. In addition, having all cases in one court or circuit prevents problems stemming from consolidating separate suits that are brought in venues far away from each other.

*562 C. The Proposed Statute Withstands Judicial Scrutiny

The proposed statute is likely to withstand judicial scrutiny because it shares features with existing statutes and is consistent with case law upholding standing based on other federal statutes' standing provisions.

1. Features are Consistent with Past Precedent

The proposed statute is likely to be upheld because it shares a common goal with numerous federal statutes--the protection of competition. In some contexts, such as antitrust, unfair trade practices, and banking, Congress has explicitly allowed suits by competitors to protect them from injury. [185] Where Congress has not been explicit, courts have held that statutes can protect certain groups from harmful effects on competition stemming from an agency action. [186] Congress's frequent attempts to protect competition, combined with judicial validation of those attempts, suggest that the proposed statute is likely to be upheld.

The proposed statute is also likely to withstand judicial scrutiny because courts are familiar with the three substantive inquiries that must be undertaken when hearing a suit under the proposed statute. First, the substance of the statute involves the legitimacy of an underlying government action, [187] and such an inquiry is one with which most courts are likely familiar. The second inquiry determines whether a defendant substantially relied on the IRS action in undertaking a transaction valued at $100 million or more. A factual inquiry based on reliance should be familiar to courts because reliance is a basic principal of contract law. [188] Finally, courts must ***563** assess the appropriateness of injunctive or declaratory relief under the proposed statute. Again, courts are likely familiar with the application of equitable relief standards. Thus, a court's familiarity with both the merits and relief inquiries under the proposed statute suggest that the statute will withstand judicial scrutiny.

2. Standing is Likely to Be Upheld

The proposed statute's utility comes from its ability to provide a plaintiff with standing to challenge a favorable IRS action. This Part will demonstrate that a suit brought under the competitive disadvantage provision satisfies Article III and prudential standing requirements: injury in fact, causation, redressability, and zone of interests.

The competitive disadvantage injury proposed by this Note will satisfy Article III's injury in fact requirement because courts have frequently recognized similar competitive injuries as valid. In particular, increased competition resulting from agency action that is inconsistent with a statute can be a valid injury in fact. [189] The increased competition need not materialize; a sufficient injury in fact may be one resulting from an agency action that clearly threatens to competitively injure a plaintiff. [190] Competitive injuries, while most applicable to this Note for their frequent use in challenging agency actions, have also been recognized outside the administrative agency context. For example, courts have recognized that competitive injuries, such as a lesser opportunity to compete, satisfy the injury in fact requirement when challenging violations of the Equal Protection clause. [191] Thus, a competitive injury suffered ***564** under this Note's proposed statute is likely to satisfy the injury in fact requirement of judicial standing.

The causation and redressability requirements are also likely to be satisfied under the proposed competitive disadvantage provision. Causation will be met because, by definition, the competitive injury is caused by the IRS action. [192] Injunctive or declaratory relief is also likely to redress some or all of the competitive disadvantages suffered, depending on the situation prior to the favorable IRS action, the nature of the favorable IRS action, and the competitive injury that results.

To better show how equitable relief can redress competitive injuries, this Note will evaluate injuries resulting from Notice 2008-83. Prior to Notice 2008-83, Citigroup planned to acquire Wachovia for $2.1 billion, but after the IRS issued Notice 2008-83, Wells Fargo swooped in and acquired Wachovia for $11.7 billion. [193] Thus, Notice 2008-83 created three types of competitive disadvantage injuries. First, a competitor of Wachovia would have been disadvantaged by Wachovia's $9 billion increase in value because the future tax savings realized by a bank that acquired Wachovia under Notice 2008-83 made Wachovia a more attractive merger partner. [194] Citigroup suffered a disadvantage from its loss of the specific benefits it would have gained had it completed the Wachovia acquisition as intended in the absence of Notice 2008-83. Finally, Wells Fargo's competitors, especially Citigroup, were disadvantaged by Wells Fargo's acquisition of the future benefits from Wachovia's business.

The short-term competitive advantage gained by Wells Fargo, and the corresponding short-term disadvantage to its competitors, turned out to be quite significant; the merger became final on December 31, 2008 and Wells Fargo reported a $3 billion profit in the first quarter of 2009, largely attributable to the Wachovia acquisition. [195] The long-term disadvantage from the tax savings under Notice 2008-83 might be as high as $19.4 billion dollars. [196] Thus, if ***565** any of the competitors sued for injunctive or declaratory relief under the competitive disadvantage provision prior to the finalization of the Wells Fargo-Wachovia merger, a favorable court decision overruling or blocking Notice 2008-83's tax benefits would likely redress the competitor's disadvantage. [197] If a competitor sued after the merger completed, injunctive or declaratory relief might also redress competitive disadvantages relative to the merged entity. [198] These examples illustrate that a suit under the competitive disadvantage provision is likely to satisfy the redressability requirement.

Finally, the proposed statute is likely to satisfy the zone of interests test. [199] A plaintiff's interest in suing under the proposed statute is rooted in an interest in stopping the competitive disadvantage resulting from IRS actions. The proposed statute likewise aims to prevent the creation of competitive disadvantages from IRS actions. The zone of interests test is satisfied because the plaintiff's interest in suing is among the interests Congress would seek to protect. [200] Furthermore, courts have held that "competitors of financial institutions have standing to challenge agency action relaxing statutory restrictions on the activities of those institutions." [201] This holding is directly applicable to competitors who, under the proposed competitive disadvantage clause, would challenge favorable actions by the IRS--actions which can take the form of relaxed tax laws. [202] Therefore, the zone of interests test is likely to be met, and, combined with satisfaction of the Article III requirements, a court is likely to uphold standing under the proposed statute's competitive disadvantage clause.

*566 D. Policy Considerations

This Note proposes a reform that provides competitors with standing to challenge favorable IRS actions, and the previous Part demonstrates that courts are likely to grant standing to a party that sues under the proposed statute. The analysis is not complete, however, without considering policy implications of the proposed reform, such as whether a judicial remedy is an appropriate method of resolving the problem, whether the reform will flood the courts with litigation, and whether permitting private individuals to sue is a good idea.

One criticism of the proposed reform is that using the political process might be preferable to relying on a judicial remedy to address favorable IRS action. [203] This argument relies on the notion that standing is "built on . . . the idea of separation of

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powers,"[204] which in turn gives courts pause when deciding whether an action taken by the executive or legislative branches is unconstitutional.[205] Separation of powers also teaches that vindication of the public interest is the responsibility of the political branches of government,[206] and therefore, standing may not be appropriate when a large class of citizens share the same harm.[207] These concerns, while legitimate in theory, are not applicable to the problem of favorable IRS action. First, courts frequently decide the legality of agency actions and a federal statute clearly provides for such evaluations.[208] Second, simply because a large number of people have been harmed by an action does not mean that they should not have standing.[209] In particular, a concrete harm that is widely shared "does not deprive Congress of constitutional power to authorize its vindication in the federal courts."[210] Thus, a judicial remedy is permissible to combat favorable IRS action.

Even if a judicial remedy is permissible, it may be criticized as facilitating a flood of frivolous or abusive lawsuits, designed to hurt a competitor or enemy. This argument has many problems. First, ***567** standing is designed to weed out frivolous lawsuits[211] and this Note proposes suits only by a group of competitors, not the general population. In addition, the proposed statute limits suits by requiring that a party have reasonable basis for their estimation of the competitive benefit or disadvantage incurred from a favorable IRS action.[212] Furthermore, the statute could be modified to resemble the tax whistleblowing statute,[213] which uses monetary thresholds to deter frivolous suits.[214] Even if a party has standing, all suits brought under the proposed statute must be filed in the same jurisdiction, meaning duplicative suits can be eliminated or consolidated.[215] Finally, high litigation costs always provide a deterrent against abusive litigation. Consequently, abusive litigation is not likely to be a significant problem.

Another criticism of the proposed judicial remedy is that the problem of favorable IRS action does not necessarily warrant reliance on individual citizens acting as private attorneys general. In Trafficante v. Metropolitan Life Insurance Co., the Court granted standing to plaintiffs who sued as private attorneys general under a federal statute.[216] The Court permitted standing because suits by private persons were the "primary method of obtaining compliance with the [Civil Rights] Act."[217] In addition, Congress considered compliance with Civil Rights Act "to be of the highest priority" because it protected the quality of citizens' daily lives.[218]

Addressing discrimination in the civil rights era is far different from addressing the consequences of favorable IRS actions. However, the differing natures of the problems do not require different tactics to solve them, especially since the justifications for using private individuals to combat discrimination are also applicable to combating favorable IRS actions. For instance, suits by private individuals are likely the only effective remedy against favorable IRS actions, given that legislative and executive solutions are difficult to obtain or inadequate.[219] In addition, the recent backlash against ***568** bailed out banks using government funds to pay bonuses suggests that preserving tax revenues rightfully owed to the government is a high priority.[220] While not the same as racial integration, tax revenues play an important role in the daily lives of a nation's citizens through social welfare programs and other government services. In summary, the justifications for using private attorneys general in the civil rights context are also present in the context of combating favorable IRS actions. Therefore, the proposed statute's reliance on suits by private individuals is acceptable.

V. Conclusion

Favorable IRS actions that are contrary to federal law are a serious problem because the IRS may not have legal authority to take such actions and such actions can have a significant economic impact. In addition, favorable IRS actions of this sort are inconsistent with the role of an administrative agency, lack accountability, and essentially bypass this country's system of checks and balances. Due to the lack of available remedies that can effectively counteract the effects of favorable IRS actions, this Note proposes a new statute to permit judicial challenges of favorable IRS actions. By focusing on the injuries created by

favorable IRS actions, the proposed statutory reform provides standing to the competitors of those whom the IRS action favors. In enacting the proposed statute, Congress will help limit the effects of future IRS action that directly conflicts with federal law.

Footnotes

a1 University of Michigan Law School, J.D. 2009; Cornell University, M.Eng. 2003; Cornell University, B.S. 2002. I am indebted to Professor Reuven Avi-Yonah for his guidance on this Note and also to Professor Ted Becker for teaching me legal writing. I am grateful for all the hard work on this Note by Elizabeth Beerman and the University of Michigan Journal of Law Reform staff. Finally, I would like to thank my parents, sisters, and Deepti Singh for their encouragement and support throughout law school.

1 503 U.S. 79, 90 (1992).

2 See T.D. 9107, 2004-1 C.B. 448. The IRS's reversal is odd because the Court's opinion supported the position taken by the IRS during the litigation of that case. INDOPCO, 503 U.S. at 84.

3 William A. Klein et al., Federal Income Taxation 501 (14th ed. 2006) ("The rules found in the regulations are in some respects more favorable to taxpayers than the more stringent rules that might have been imposed under existing precedent.").

4 485 U.S. 212, 217 (1988) ("The broad definition of the term 'capital asset' explicitly makes irrelevant any consideration of the property's connection with the taxpayer's business ....").

5 Id. at 221.

6 Klein et al., supra note 3, at 694.

7 Gary Duncan, Lehman Collapse Sends Shockwave Round World, Times (London), Sept. 16, 2008, at 1; Lehman Brothers Collapse Stuns Global Markets, CNN.com, Sept. 15, 2008, http:// www.cnn.com/2008/BUSINESS/09/15/lehman.merrill.stocks.turmoil/index.html (on file with the University of Michigan Journal of Law Reform).

8 Jesse Drucker, Obscure Tax Breaks Increase Cost of Financial Rescue, Wall St. J., Oct. 18, 2008, at A3.

9 I.R.S. Notice 2008-83, 2008-42 I.R.B. 905.

10 See Drucker, supra note 8, at A3; Amit R. Paley, A Quiet Windfall for U.S. Banks, Wash. Post, Nov. 10, 2008, at A1; Andrew Ross Sorkin, Bank Deals Get Help from the I.R.S., N.Y. Times, Oct. 7, 2008, http:// dealbook.blogs.nytimes.com/2008/10/07/bank-deals-get-help-from-the-irs/ (on file with the University of Michigan Journal of Law Reform).

11 Douglas A. Kahn & Jeffrey S. Lehman, Corporate Income Taxation 967 (5th ed. 2001).

12 Id. ("[I]t is important to know whether that tax attribute survives: (1) a significant change in the ownership of the corporation's stock, (2) a significant change in the corporation's structure, (3) an absorption of the corporation's assets into a different corporation, (4) an amalgamation with one or more other corporations, or (5) a termination of the business previously conducted by the corporation.").

13 Id. at 969.

14 See I.R.C. §382 (2006); Temp. Treas. Reg. §1.382-2T(a)(1) (2007); Kahn & Lehman, supra note 11, at 1002.

15 §382(k)(1).

16 I.R.C. §172(c) (2006).

17 See §382(h)(3)(A)(i). In arriving at this definition, I have used two simplifying assumptions. The first assumption is that the asset's cost is a sufficient substitute for its "aggregate adjusted basis." Id. Second, I will ignore the threshold requirement for net unrealized built-in losses described in §382(h)(3)(B).

18 In the fourth quarter of 2007 alone, Wells Fargo was forced to recognize $1.4 billion in losses from mortgage related loans. Jonathan Stempel, UPDATE 2-Wells Fargo to Take $1.4 bln Charge for Bad Loans, Reuters, Nov. 27, 2007, http://www.reuters.com/article/fundsFundsNews/idUSN2754071620071127? sp=true (on file with the University of Michigan Journal of Law Reform).

19 I.R.C. §382(g); Temp. Treas. Reg. §1.382-2T(a)(1) (2007); Kahn & Lehman, supra note 11, at 1002.

20 I.R.C. §382(g); Temp. Treas. Reg. §1.382-2T(a)(1). The above definition of ownership change leaves out the concept of testing date, Temp. Treas. Reg. §1.382-2T(a)(2)(i), and testing period, Temp. Treas. Reg. §1.382-2T(d), because they are not critical for the reader to understand the impact of Notice 2008-83.

21 Kahn & Lehman, supra note 11, at 1017 ("Section 382 limitations can apply to reorganizations if there is an ownership change.").

22 The aggregate deduction may not be exactly equal to the amount of net operating losses or net unrealized built-in losses held by the acquired company prior to its acquisition. Id. at 1001 (Section 382 "permit[s] a deduction for such losses to approximately the same extent as would have been allowed if there had been no change of ownership and if instead the assets of the loss corporation had been contributed to a partnership that produced the annual income that was subsequently earned by the surviving corporation. The operation of the provision only approximates an equivalent consequence, but a rough equivalence is the aim of the statute."). However, this distinction is not relevant for the purpose of explaining the impact of Notice 2008-83.

23 See supra text accompanying note 13.

24 Kahn & Lehman, supra note 11, at 1000 (Section 382 "limits the amount of such carryover loss that can be deducted [by the acquiring corporation] in a taxable year after the change of ownership takes place.").

25 Id. ("In many circumstances, the application of §382 will not prevent the deduction of the entire amount of a net operating loss, but rather will affect the timing of the deduction by spreading it over a number of years."). Of course, the number of years it would take for the acquiring corporation to use the loss will be influenced by §382's limitation on the amount of loss. See supra text accompanying note 22.

26 See I.R.S. Notice 2008-83, 2008-42 I.R.B. 905.

27 Id. ("[A]ny deduction properly allowed after an ownership change ... to a bank with respect to losses on loans ... shall not be treated as a built-in loss or a deduction that is attributable to periods before the change date.").

28 See Drucker, supra note 8, at A3.

29 Id.

30 Emergency Economic Stabilization Act, Pub. L. 110-343, §115(a)(3), 122 Stat. 3765, 3780 (2008) (to be codified at 12 U.S.C. §5225). Of course, other bailout legislation may increase the cost well beyond $700 billion.

31 See generally Financial Accounting Standards Board, Statement of Financial Accounting Standards No. 157: Fair Value Measurements (2006) (on file with the University of Michigan Journal of Law Reform), available at http:// www.fasb.org/pdf/fas157.pdf (providing a 145 page framework for measuring fair market value).

32 RSM McGladrey, Inc., Recent Guidance Provides Significant Benefits in Bank Acquisitions 1 (2008) (on file with the University of Michigan Journal of Law Reform), available at http://www2.rsmmcgladrey.com/pdf/section_382_ bank_alert.pdf; see also SEC Press Release No. 2008-234, SEC Office of the Chief Accountant and FASB Staff Clarifications on Fair Value Accounting (Sept. 30, 2008) (on file with the University of Michigan Journal of Law Reform), available at http://www.sec.gov/news/press/2008/2008-234.htm (providing additional guidance on fair value measurements because "[t]he current environment has made questions surrounding the determination of fair value particularly challenging for preparers, auditors, and users of financial information.").

33 See, e.g., Alison Bennett, Federal Bills Would Rescind IRS Notice Lifting Restrictions on Banks Use of Net Operating Losses Following Acquisition, Tax Mgm't Wkly. St. Tax Rep.: Revenue, Nov. 28, 2008, at 2 (citing Carl M. Jenks et al., Major Tax Incentive For Bank Purchases: IRS Eliminates the Limitation on Banks' Built-In Losses Post-Purchase, 2008 Tax Notes Today 197-227 (Oct. 8, 2008)).

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34 Carl M. Jenks et al., Revisiting Notice 2008-83 2 (2008) (on file with the University of Michigan Journal of Law Reform), available at http:// www.jonesday.com/pubs/pubs_detail.aspx?pubID=S5711. Their "very big" assumptions arise from the fact that the $140 billion estimate was:

[E]xtrapolated from IMF estimates of $1 trillion of mortgage-related losses in the banking system, of which approximately $400 billion had not yet been taken into account. If those numbers were correct, if every bank with unrecognized losses had a change of ownership, if under applicable law all of those losses were in fact 'net built-in losses,' if there were no offsetting 'built-in gains,' and if the applicable 382 limitation would prevent, not just defer, the deduction of all such losses, then the total tax 'cost' of deducting those $400 billion of losses would be approximately $140 billion.

Id. Despite these assumptions, the tax savings to banks could be significantly higher than $140 billion because IMF estimates of the mortgage-related losses in the US banking system have spiraled upwards from $1 trillion to $2.7 trillion. See Peter Dattels & Laura Kodres, Further Action Needed to Reinforce Signs of Market Recovery: IMF, IMF Surv. Mag., Apr. 21, 2009, http:// www.imf.org/external/pubs/ft/survey/so/2009/RES042109C.htm (on file with the University of Michigan Journal of Law Reform).

35 Jenks et al., supra note 34, at 3. The author reviewed Wells Fargo's SEC filings but did not find any listing of the amount of built-in gains and losses.

36 Id.

37 The report did note one non-monetary benefit of Notice 2008-83, which is that it provided clarity "to the tax calculations of the combined banks going forward." Id.

38 The accuracy of the data upon which some reports rely to estimate Notice 2008-83's impact is not clear because they do not mention the source of the data, such as SEC filings or inside sources with knowledge of the actual financial figures. See Drucker, supra note 8, at A3. In addition, this Note assumes that, if not specified, these estimates of tax savings are not discounted to their net present value and therefore could be slightly inflated.

39 Drucker, supra note 8, at A3.

40 Id.

41 Matthew Scott, How IRS Breaks Could Boost Bank Bailout Tab, Fin. Wk., Nov. 2, 2008, http://www.financialweek.com/apps/pbcs.dll/article?AID=/ 20081102/REG/311039969 (on file with the University of Michigan Journal of Law Reform).

42 Id. However, this argument may be weak due to some banks' increased profits after Notice 2008-83. See Ari Levy, Wells Fargo Profit Climbs 53 Percent on Mortgages, Bloomberg, Apr. 22, 2009, http:// www.bloomberg.com/apps/news?pid=20601208&sid=a6Ymum7TcA3Q (on file with the University of Michigan Journal of Law Reform).

43 Citizens for Tax Justice, New IRS Ruling on Bank Acquisitions Imposes Major Federal Corporate Tax Cuts--And Will Hurt States Too 2 (2008) (on file with the University of Michigan Journal of Law Reform), available at http://www.ctj.org/pdf/irsruling20081106.pdf.

44 Evan Halper, Banks' Tax Breaks Could Cost the State $2 Billion, L.A. Times, Nov. 11, 2008, at A1.

45 Bennett, supra note 33, at 2.

46 See Cal. Franchise Tax Bd., Request for Permission to Proceed with Formal Regulation Process on the Adoption of California Code of Regulations, Title 18, Section 24451, Relating to California Non-Conformity with IRS Notice 2008-83 (proposed Mar. 19, 2009) (on file with the University of Michigan Journal of Law Reform), available at http:// www.ftb.ca.gov/law/meetings/attachments/031909/5a.pdf.

47 Michael J. Cataldo, FTB Intends to Depart from IRS Treatment of Bad Loan Losses for Acquired Banks 2 (2008) (on file with the University of Michigan Journal of Law Reform), available at http:// www.pillsburylaw.com/content/portal/publications/2008/12/2008121617102796/Tax%20State%C20&%C20Local%C20Tax%C20Vol%C201900%C20No%C201923%1#2-16-08.pdf.

48 Halper, supra note 44, at A1.

49 The Treasury Department admitted it did not consider Notice 2008-83's impact on state governments, even though it had been working on Notice 2008-83's rule changes for weeks. Id.

50 Citizens for Tax Justice, supra note 43, at 1.

51 Paley, supra note 10.

52 Jonathan Stempel, Schumer Questions IRS Rule Aiding Wells-Wachovia, Reuters, Oct. 30, 2008, http:// www.reuters.com/article/mergersNews/idUSN3029875020081030 (on file with the University of Michigan Journal of Law Reform). It is not clear how many transactions were motivated by Notice 2008-83, due to its short life span. See infra Part III.A (discussing Notice 2008-83's repeal).

53 IRS action that provides favorable treatment to certain taxpayers may also be inappropriate when Treasury and IRS have potential conflicts of interest with those taxpayers. See Press Release, U.S. Senate Comm. on Fin., Grassley Seeks Inspector General Review of Treasury Bank Merger Move (Nov. 14, 2008) (on file with the University of Michigan Journal of Law Reform), available at http://finance.senate.gov/press/Gpress/2008/prg111408c.pdf. However, the role of conflicts of interest is beyond the scope of this Note.

54 I.R.C. §382(a) (2006). The amount of the limitation is defined in §382(b).

55 §382(d)(1).

56 §382(h)(1)(B).

57 §382(d)(1)(A) ("[T]he taxable year ending with the ownership change or [the year] in which the change date occur[ed].").

58 §382(d)(1)(B) (emphasis added).

59 I.R.S. Notice 2008-83, 2008-42 I.R.B. 905 ("For purposes of section 382(h), any deduction properly allowed after an ownership change ... shall not be treated as a built-in loss or a deduction that is attributable to periods before the change date.").

60 Id. Notice 2008-83 refers to banks as they are defined under §581. Id.

61 See supra Part II.B.

62 I.R.C. §382(a) (2006) (emphasis added).

63 §382(k)(1) (emphasis added).

64 Id. ("Except to the extent provided in the regulations, such term includes any corporation with a net unrealized built-in loss.").

65 Compare §382(k)(1) (defining loss corporation), §382(k)(2) (defining old loss corporation), and §382(k)(3) (defining new loss corporation), with Treas. Reg. §1.382-2(a)(1) (2008) (defining loss corporation), Temp. Treas. Reg. §1.382-2T(f)(2) (2007) (defining old loss corporation), and Temp. Treas. Reg. §1.382-2T(f)(3) (defining new loss corporation).

66 Kahn & Lehman, supra note 11, at 1000.

67 See §382(a), (b).

68 Geithner Promises Congress to Review IRS Ruling 2008-83, Fin. Crisis News Ctr., Jan. 27, 2009 (on file with the University of Michigan Journal of Law Reform), available at http:// www.financialcrisisupdate.com/2009/01/geithner-promises-congress-to-review-irs-ruling-200883.html ("Senator Grassley noted that Section 382 was not enacted lightly by Congress, but rather after extensive scholarly reflection by the staffs of the Senate and House tax-writing committees and the Joint Committee on Taxation. It has been an established part of the law ever since 1986.").

69 See, e.g., Drucker, supra note 8, at A3 (Robert Willens, an independent corporate tax analyst, said, "It doesn't seem possible that they have this authority."); Paley, supra note 10, at A6 ("More than a dozen tax lawyers interviewed for this story--including several representing banks that stand to reap billions from the change--said the Treasury had no authority to issue the notice."); id. at A1 (George K. Yin, the former chief of staff of the Joint Committee on Taxation, stated, "Did the Treasury Department have the authority to do this? I think almost every tax expert would agree that the answer is no.").

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70 I.R.C. §382(m) (2006). In fact, the Treasury Department itself, along with tax lawyers that represent banks, has turned to §382(m) as a justification of its authority to issue Notice 2008-83. Paley, supra note 10, at A6 (Andrew C. DeSouza, a Treasury spokesperson, and others have said "the legal authority came from Section 382 itself, which says the secretary can write regulations to 'carry out the purposes of this section.'").

71 §382(m).

72 Kahn & Lehman, supra note 11, at 1001.

73 Joint Comm. on Taxation, Description of the Chairman's Modification to the Revenue Provisions of the "American Recovery and Reinvestment Tax Act of 2009" 12 (2009) (on file with the University of Michigan Journal of Law Reform), available at http://www.house.gov/jct/x-12-09.pdf.

74 Victor Fleischer, NOLs and the Rule of Law, TaxProf Blog, Nov. 23, 2008, http://taxprof.typepad.com/taxprof_blog/2008/11/nols-and-the-rule-of-law.html (on file with the University of Michigan Journal of Law Reform).

75 §382(m). The statute provides a non-exhaustive list of five types of potential regulations in §382(m)(1)-(5).

76 Joint Comm. on Taxation, supra note 73, at 12; see also Fleischer, supra note 74 (stating that it is unlikely that "Congress delegated lawmaking authority to the Treasury to make [a] new exception to the statutory language").

77 Fleischer, supra note 74 ("Administrative law principles do provide somewhat broader latitude for regulations that go through the notice and comment procedure, but that hasn't happened here.").

78 Emergency Economic Stabilization Act of 2008, tit. I, Pub. L. No. 110-343, 122 Stat. 3765 (2008) (to be codified at 12 U.S.C. §§5211-5241).

79 Fleischer, supra note 74.

80 Id.

81 Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, §301(a)-(b), 122 Stat. 3765, 3802 (2008) (to be codified at 12 U.S.C. §5261).

82 Jenks et al., supra note 34, at 2.

83 I.R.S. Notice 2003-65, 2003-40 I.R.B. 747.

84 Jenks et al., supra note 34, at 2.

85 Id.

86 Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1992) ("'When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted.'" (quoting Stark v. Wickard, 321 U.S. 288, 309-10 (1944))).

87 American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, §1261(a)(3), 123 Stat. 115, 343 (2009).

88 See Lawrence Zelenak, Can Obama's IRS Retroactively Revoke Massive Bank Giveaway?, 122 Tax Notes 889, 890 (2009) (noting that efforts to overturn Notice 2008-83 are unlikely to succeed because taxpayers lack incentive).

89 Paley, supra note 10, at A6.

90 American Recovery and Reinvestment Act §1261(b), 123 Stat. at 343.

91 See, e.g., Julie Strack, Democrats Control Congress, Gain 23 Seats, Daily Californian, Nov. 5, 2008, http:// www.dailycal.org/article/103423/democrats_control_congress_gain_23_seats (on file with the University of Michigan Journal of Law Reform).

92 See, e.g., Jon Hilsenrath et al., Worst Crisis Since '30s, With No End Yet in Sight, Wall St. J., Sept. 18, 2008, at A1.

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93 See, e.g., Paul Muolo & Mathew Padilla, Chain of Blame: How Wall Street Caused the Mortgage and Credit Crisis (2008).

94 See, e.g., Edmund L. Andrews & Peter Baker, At A.I.G., Huge Bonuses After $170 Billion Bailout, N.Y. Times, Mar. 14, 2009, at A1 ("The payment of so much money at a company at the heart of the financial collapse that sent the broader economy into a tailspin almost certainly will fuel a popular backlash against the government's efforts to prop up Wall Street."); David R. Francis, Should CEO Pay Restrictions Spread to All Corporations?, Christian Sci. Monitor, Mar. 9, 2009, http://www.csmonitor.com/2009/0309/p14s01-wmgn.html (on file with the University of Michigan Journal of Law Reform) ("The financial crisis has generated a huge amount of anger around the nation at the mismanagement and excesses of some big bankers ....").

95 American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, §1261(b)(1), 123 Stat. 115, 343 (2009).

96 See supra Part II.B.

97 American Recovery and Reinvestment Act §1261(a)(4), 123 Stat. at 343.

98 Zelenak, supra note 88, at 890.

99 Professor Zelenak persuasively argues that the IRS can retroactively revoke Notice 2008-83 but concedes that "[t]he issue is not free from doubt." Id. at 893.

100 I.R.C. §7623(a) (2006).

101 Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, §406, 120 Stat. 2922 (2006) (codified at I.R.C. §7623).

102 §7623(b).

103 The IRS's unwillingness to initiate the necessary litigation could be circumvented if private individuals could sue on behalf of the government to recover the lost tax revenue. Currently, suits of this sort are not permitted. However, Professor Ventry proposed an interesting reform that would permit such suits by "using the [False Claims Act] as a model for the tax whistleblower statute, and extending qui tam to tax." Dennis J. Ventry, Jr., Whistleblowers and Qui Tam for Tax, 61 Tax Law. 357, 359 (2008).

104 Warth v. Seldin, 422 U.S. 490, 498 (1975).

105 U.S. Const. art. III, §2, cl. 1.

106 Erwin Chemerinsky, Constitutional Law: Principles and Policies 62 (2d ed. 2002).

107 Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

108 Id. This requirement is typically referred to as the causation requirement.

109 Id. at 561. This requirement is typically referred to as the redressability requirement.

110 Id. at 560.

111 See Chemerinsky, supra note 106, at 69-73.

112 Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 154 (1970) (citation omitted).

113 At one point, the Supreme Court indicated that the bar on generalized grievances was prudential in nature; however, more recently, the Court has indicated that the requirement is constitutional. Compare Warth v. Seldin, 422 U.S. 490, 499 (1975) (noting that aside from the "minimum constitutional mandate," jurisdiction is still not warranted when a plaintiff claims a generalized grievance), with Lujan v. Defenders of Wildlife, 504 U.S. 555, 573-74 (1992) ("[A] plaintiff raising only a generally available grievance ... does not state an Article III case or controversy.").

114 Warth, 422 U.S. at 499.

115 Chemerinsky, supra note 106, at 89.

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116 Id. at 63.

117 Id.

118 Allen v. Wright, 468 U.S. 737, 751 (1984).

119 Id. (stating that the plaintiff's claim must "fall within the zone of interest protected by the law invoked" in the lawsuit); Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970) ("[T]he interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.").

120 Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 401 (1987) ("As Data Processing demonstrates, we are not limited to considering the statute under which respondents sued, but may consider any provision that helps us to understand Congress' overall purposes in the National Bank Act.").

121 Id. at 399. "[I]n particular, there need be no indication of congressional purpose to benefit the would-be plaintiff." Id. at 399-400.

122 Id. at 399.

123 392 U.S. 83, 102 (1968) ("First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked."); see also Chemerinsky, supra note 106, at 91.

124 Flast, 392 U.S. at 102 ("Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged."); Chemerinsky, supra note 106, at 92.

125 Chemerinsky, supra note 106, at 93 ("[T]he only situation in which taxpayer standing appears permissible is if the plaintiff challenges a government expenditure as violating the establishment clause.").

126 See Powell v. McCormack, 395 U.S. 486, 498-500 (1969) (finding that a legitimate monetary interest in recovering back pay was sufficient to grant standing to a Congressman who challenged his exclusion from Congress); Bond v. Floyd, 385 U.S. 116, 122-26 (1966) (finding that an interest in asserting First Amendment rights was sufficient to grant standing to a newly elected state representative who was excluded from his seat due to his anti-war rhetoric).

127 See Coleman v. Miller, 307 U.S. 433, 438 (1939) (stating that state senators have an "interest in maintaining the effectiveness of their votes" and therefore have standing to challenge an improper tie-breaking procedure that effectively nullified their votes).

128 See supra Part II.C.1 (discussing how Notice 2008-83 was inconsistent with existing federal law).

129 Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 472 (1982) (quoting Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91, 99 (1979)).

130 See Warth v. Seldin, 422 U.S. 490, 499 (1975).

131 See supra Part II.B.

132 The cost to acquire Wachovia jumped approximately $9 billion after the IRS issued Notice 2008-83. See Regulations Clear Wells Fargo-Wachovia Deal, MSNBC, Oct. 10, 2008, http://www.msnbc.msn.com/id/27117020/ [hereinafter Wells Fargo-Wachovia Deal] (on file with the University of Michigan Journal of Law Reform).

133 See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

134 Inv. Co. Inst. v. FDIC, 815 F.2d 1540, 1543-44 (D.C. Cir.), cert. denied, 484 U.S. 847 (1987) ("Competitive injury alone does not confer standing. Once we find such injury, we must turn to the 'prudential' or 'zone of interests' standing test ...." (citations omitted)).

135 See Kahn & Lehman, supra note 11, at 969 (stating that §382 aimed to prevent trafficking in tax attributes).

136 One statute that aims to check agency actions favoring regulated entities is the Administrative Procedures Act. The zone of interests test derives from the APA's own provision permitting suit by persons "aggrieved by agency action within the meaning of a relevant

statute." 5 U.S.C. §702 (2006). It seems unlikely that the APA itself would qualify as a "relevant statute" because in the Notice 2008-83 context, the plaintiff is aggrieved by the agency action relating to I.R.C. §382.

137 392 U.S. 83, 102 (1968).

138 Id.

139 See Chemerinsky, supra note 106, at 93.

140 Raines v. Byrd, 521 U.S. 811, 821 (1997).

141 Id. at 824.

142 Warth v. Seldin, 422 U.S. 490, 514 (1975) ("Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute.").

143 409 U.S. 205, 206 (1972).

144 Id. at 206 n.1 (citation omitted).

145 Id. at 209-10. Specifically, the plaintiffs stated "that (1) they had lost the social benefits of living in an integrated community; (2) they had missed business and professional advantages which would have accrued if they had lived with members of minority groups; (3) they had suffered embarrassment and economic damage in social, business, and professional activities from being 'stigmatized' as residents of a 'white ghetto.'" Id. at 208.

146 Id. at 211 (noting that the statute played an important role in the Civil Rights Act of 1968 and that the purpose of the law "was to replace the ghettos 'by truly integrated and balanced living patterns.'") (citations omitted).

147 See id. at 212 (White, J., concurring) (stating that without the statutory grant of standing in the Civil Rights Act of 1968, he was unlikely to conclude that plaintiffs had standing).

148 504 U.S. 555, 572 (1992).

149 Id. at 558.

150 Id. at 559.

151 Id.

152 Id. at 573.

153 520 U.S. 154, 159 (1997).

154 Id. at 160.

155 Id. at 168.

156 2 U.S.C. §§431-442 (2006).

157 2 U.S.C. §437g (2006).

158 524 U.S. 11, 18 (1998).

159 Id. at 16 ("They asked the FEC to find that AIPAC had violated the Act, and, among other things, to order AIPAC to make public the information that FECA demands of a 'political committee.'").

160 Id. at 21. The Court noted that in two past cases, an injury in fact occurred "when the plaintiff fail[ed] to obtain information which must be publicly disclosed pursuant to a statute." Id. (citing cases involving information disclosure relating to housing availability and disclosure requirements under Federal Advisory Committee Act).

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161 See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992) ("Congress[] elevat[ed] to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law."); id. ("Nothing in this contradicts the principle that '[t]he... injury required by Art. III may exist solely by virtue of "statutes creating legal rights, the invasion of which creates standing."" ' (citation omitted)); see also Chemerinsky, supra note 106, at 73 ("So long as the plaintiff meets Article III's injury requirement, and infringement of a statutory right is sufficient in this regard, standing is permitted under a federal statute permitting citizen suits."); Richard H. Fallon, Jr. et al., Hart & Wechsler's The Federal Courts and the Federal System 153 (5th ed. 2003) (citing Lujan's approval that an Article III injury may be satisfied by the invasion of a statutory right and also stating that Akins stands as a "now-settled example" of Congress's ability to create a right).

162 521 U.S. 811, 814 (1997).

163 Id. at 815.

164 Id. at 817 (citation omitted).

165 Id. at 821.

166 2 U.S.C. §692(a)(1) (2006); see Raines, 521 U.S. at 829 (leaving open the possibility of a suit challenging the Line Item Veto Act "by someone who suffers judicially cognizable injury as a result of the Act").

167 See supra note 161.

168 Compare Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972) (noting the statute's role in improving civil rights and social conditions), with Raines, 521 U.S. at 815 (authorizing legal relief for those adversely affected by the Line Item Veto Act).

169 Raines, 521 U.S. at 821.

170 Merriam-Webster's Collegiate Dictionary 114 (11th ed. 2003).

171 Id. at 18.

172 For simplicity, this Note focuses on two people who have the same initial status. Of course, in practice there are likely numerous permutations of the starting positions of X and Y. However, discussing the effects of a given action on X and Y's relative starting position only serves to distract from the main point, which is that a favorable action creates a change in relative position between two parties.

173 Congress can create a statutory right, the violation of which would create an injury in fact that forms the basis for standing. See supra note 161.

174 This clause encapsulates the first two scenarios in Table 1.

175 This clause encapsulates the last two scenarios in Table 1.

176 Since the estimated dollar impact is likely based on the tax benefits of the favorable IRS action, a reasonable basis for the estimated impact of the IRS action could be ascertained by researching a potential defendant's financial statements or other publicly available information.

177 The IRS already uses monetary thresholds in some enforcement situations. See, e.g., I.R.C. §7623(b)(5) (2006) (limiting applicability of the tax whistleblowing statute to those taxpayers with gross income over $200,000 in a given year and a tax liability of $2 million or more).

178 See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, §1261(a)(4), 123 Stat. 115, 343; Zelenak, supra note 88, at 890.

179 Paley, supra note 10, at A1.

180 David Enrich & Dan Fitzpatrick, Wachovia Chooses Wells Fargo, Spurns Citi, Wall St. J., Oct. 4, 2008, at A1.

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181 Press Release, Wells Fargo, Wells Fargo and Wachovia Merger Completed (Jan. 1, 2009) (on file with the University of Michigan Journal of Law Reform), available at https://www.wellsfargo.com/press/2009/20090101_ Wachovia_Merger.

182 This scenario assumes that any suit filed prior to the deal's closing would seek a preliminary injunction to prevent the deal from closing pending resolution of the case.

183 The IRS is quite familiar with balancing policy concerns and enforcement. See, e.g., Ventry, supra note 103, at 385 ("[T]he Service has said it wants the Whistleblower Office to concentrate on large-dollar cases.").

184 The specific court or circuit is not integral to the proposed reform, however, it is important to note that Congress has utilized such a tactic for other subjects. See, e.g., 38 U.S.C. §7252(a) (2006) (granting the Court of Veterans Appeals "exclusive jurisdiction to review decisions of the Board of Veterans' Appeals."); 42 U.S.C. §7607(b)(1) (2006) (granting exclusive jurisdiction to the Court of Appeals for the District of Columbia over matters concerning the Clean Air Act); Detainee Treatment Act of 2005, Pub. L. No. 109-148, §1005, 119 Stat. 2739, 2742 (2005) (granting exclusive jurisdiction to the United States Court of Appeals for the District of Columbia to hear claims regarding enemy combatants).

185 See, e.g., 7 U.S.C. §2305(c) (2006) (allowing "[a]ny person injured in his business" to sue those who violate the Agricultural Fair Practices Act); 12 U.S.C. §1850 (2006) (permitting suit by competitors of subsidiaries that may be acquired under the Bank Holding Company Act); 15 U.S.C. §15 (2006) (permitting suit by competitors of those who violate antitrust laws); 15 U.S.C. §298(b) (2006) (permitting suit by "[a]ny competitor, customer, or competitor of a customer" against those who violate the Jewelers Liability Act).

186 See, e.g., Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 488 (1998) (the Federal Credit Union Act); Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 403 (1987) (the National Bank Act); Inv. Co. Inst. v. Camp, 401 U.S. 617, 621 (1971) (the Glass-Steagall Banking Act); Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 157 (1970) (the Bank Service Corporation Act).

187 See, e.g., 33 U.S.C. §1365(a) (1994) (requiring assessment of whether the defendant's action violated the comprehensive provisions of the Clean Water Act); Fed. Election Comm'n v. Akins, 524 U.S. 11, 16-18 (1998) (the plaintiffs sued because the FEC's decision that a group was not a "political committee," and therefore not subject to reporting requirements under the FECA, violated the plaintiff's right to information).

188 Restatement (Second) of Contracts §90 & cmts. a, b (1981).

189 See Inv. Co. Inst. v. Camp, 401 U.S. 617, 620 (1971) (recognizing that increased competition to a plaintiff from an agency regulation can be a valid injury in fact); Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 152 (1970) (emphasizing that the injury in fact test is satisfied when a plaintiff "allege[s] that competition ... might entail some future loss of profits"); FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 477 (1940) (noting that Congress may confer standing on a person that is "financially injured by the issue of a license" under the Communications Act).

190 See Associated Gas Distribs. v. FERC, 899 F.2d 1250, 1259 (D.C. Cir. 1990) (noting that an injury in fact occurs when agency action authorizes "transactions that have the clear and immediate potential to compete with the [plaintiff's] own sales" so the plaintiff "need not wait for specific ... transactions to hurt them competitively"); Inv. Co. Inst. v. FDIC, 815 F.2d 1540, 1543 (D.C. Cir.), cert. denied, 484 U.S. 847 (1987) ("The FDIC will deal petitioners competitive injury by allowing insured nonmember banks to enter the securities field indirectly through subsidiaries and affiliates.").

191 Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993) (noting that a city ordinance preferring minorities in the contract bidding process created an injury in fact because of the plaintiff's "inability to compete on an equal footing"); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 281 n.14 (1978) (noting that a medical school's decision to reserve sixteen places for minorities caused an injury in fact to a medical school applicant because he was not able to compete for all one hundred places in the class).

192 See supra Part IV.B.

193 Wells Fargo-Wachovia Deal, supra note 132.

194 Id. See supra Part II.B for a discussion of the artificial competitive advantage resulting from Notice 2008-83. See also supra Table 1, scenario 1.

195 See Matthias Rieker & Damian Paletta, Banks Get Boost From Wells Fargo, Wall St. J., Apr. 10, 2009, at C3. But see Jonathan Weil, Wells Fargo's Profit Looks Too Good to Be True, Bloomberg, Apr. 16, 2009, http:// www.bloomberg.com/apps/news?pid=20601039&sid=a6sv0hG.nW7g (on file with the University of Michigan Journal of Law Reform) (attributing much of the gain to accounting gimmicks).

196 Drucker, supra note 8, at A3.

197 A court could say that overruling Notice 2008-83 would not guarantee that Wachovia would return to its pre-Notice 2008-83 value. See, e.g., Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 45-46 (1976) ("[T]he complaint suggests no substantial likelihood that victory in this suit would result in respondents' receiving the hospital treatment they desire."). However, the fact that Wachovia's $9 billion increase in value occurred within a couple days of Notice 2008-83's issuance suggests that in the absence of Notice 2008-83, the market value would return to its pre-Notice 2008-83 value.

198 Judicial relief under the proposed statute is subject to a "reliance threshold." See supra Part IV.B.

199 Congress can negate the zone of interest test by using broader language to authorize suits than it normally uses. Bennett v. Spear, 520 U.S. 154, 164-65 (1997). However, language restricting suits to "competitors" is not likely to negate prudential standing. Id. at 165. Thus, the issue is not applicable to this Note's analysis of standing.

200 Inv. Co. Inst. v. Camp, 401 U.S. 617, 621 (1971) (finding that when Congress "legislate[s] against the competition that the [plaintiffs] challenge," the plaintiffs have standing).

201 Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 488 (1998); see also Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 403 (1987); Inv. Co. Inst., 401 U.S. at 621; Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 157 (1970); Arnold Tours, Inc. v. Camp, 400 U.S. 45, 46 (1970) (per curiam).

202 Notice 2008-83's waiver of §382 of the Internal Revenue Code could be considered a "relaxing" of the tax laws.

203 Fed. Election Comm'n v. Akins, 524 U.S. 11, 23 (1998) ("[W]here large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance.").

204 Allen v. Wright, 468 U.S. 737, 752 (1984).

205 Raines v. Byrd, 521 U.S. 811, 819-20 (1997).

206 Lujan v. Defenders of Wildlife, 504 U.S. 555, 576 (1992).

207 Warth v. Seldin, 422 U.S. 490, 499 (1975).

208 Administrative Procedure Act, 5 U.S.C. §§701-706 (2006).

209 United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 687 (1973) ("[S]tanding is not to be denied simply because many people suffer the same injury.").

210 Fed. Election Comm'n v. Akins, 524 U.S. 11, 25 (1998).

211 Chemerinsky, supra note 106, at 61 ("[S]tanding is said to serve judicial efficiency by preventing a flood of lawsuits by those who have only an ideological stake in the outcome.").

212 See supra Part IV.B.

213 I.R.C. §7623(b)(5) (2006) (permitting suit only when monetary thresholds have been exceeded).

214 See Ventry, supra note 103, at 385 (noting that the whistleblowing statute's "dollar limitations shrink considerably the potential universe of [frivolous] actions").

215 See supra Part IV.B (discussing the exclusive jurisdiction requirement).

216 409 U.S. 205, 212 (1972).

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217 Id. at 209.

218 Id. at 211 (citation omitted).

219 See supra Part III.A.

220 See, e.g., Jane Sasseen & Theo Francis, As AIG Bonus Fury Grows, Lawmakers Target Pay & Geithner Explains, BusinessWeek, Mar. 17, 2009, http:// www.businessweek.com/blogs/money_politics/archives/2009/03/congress_ propos.html (on file with the University of Michigan Journal of Law Reform).

43 UMIJLR 531

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Exhibit 22

Can the Treasury Exempt Its Own Companies from Tax? The $45 Billion GM NOL Carryforward

J. Mark Ramseyer
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ABSTRACT

To discourage firms from buying and selling tax deductions, Section 382 of the tax code limits the ability of one firm to use the ''net operating losses'' (NOLs) of another firm that it acquires. Under the Troubled Asset Relief Program, the U.S. Treasury lent a large amount of money to General Motors. In bankruptcy, it then transformed the debt into stock. GM did not make many cars anyone wanted to buy, but it did have $45 billion in NOLs. Unfortunately for the Treasury, if it now sold the stock it acquired in bankruptcy, it would trigger Sec. 382. Foreseeing this, the market would pay much less for its stock in GM.

Treasury solved this problem by issuing a series of notices in which it announced that the law did not apply to itself. Sec. 382 says that the NOL limits apply when a firm's ownership changes. That rule would not apply to any firm bought with TARP funds, declared Treasury. Notwithstanding the straightforward and all-inclusive statutory language, GM could use its NOLs in full after Treasury sold out. The Treasury issued similar notices about Citigroup and AIG.

Treasury had no legal or economic justification for any of these notices, but the press did not notice. Precisely because they involved such arcane provisions of the corporate tax code, they largely escaped public attention. The losses to the public fisc were not minor—they cost the country billions of dollars in tax revenue. That the effect could be so large and yet so hidden illustrates the risk involved in this kind of tax manipulation. The more difficult the tax rule, the more easily the government can use it to hide the cost of its policies and subsidize favored groups. We suggest that Congress give its members standing to challenge unlegislated tax law changes in court.

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Can the Treasury Exempt Its Own Companies from Tax? The $45 Billion GM NOL Carryforward

''Dona clandestina sunt semper suspiciosa.''[1]

1. INTRODUCTION

Year after year, General Motors lost money—enormous sums of money. It designed cars. It built cars. But no one wanted to buy the cars. Over time, it accumulated huge operating losses (''net operating losses,'' or NOLs). The tax code let GM carry forward these NOLs into the future. It let the firm save the losses for that day in the future when it would once again sell cars that people wanted.

The day never came. Instead, in June 2009 GM (call it ''Old GM'') declared bankruptcy. It filed under Chapter 11 of the Bankruptcy Code and sold its assets to a new shell (''New GM'') in a transaction governed by Section 363 of the Code. Old GM's shareholders lost

[1] ''Secret gifts are often suspicious.'' From Sir Edward Coke, *Twyne's Case*, 3 Coke, 80 b (Star Chamber, 1602), in *Cases on the Law of Bankruptcy: Including the Law of Fraudulent Conveyances*, ed. E. Holbrook and R. W. Aigler, 153–157 (Chicago: Callaghan, 1915). *Twyne's Case* was about a fraudulent conveyance by an insolvent debtor to a friendly creditor.

Another passage from the case will be apt when we consider the relationship between statute and regulation:

> To one who marvelled what should be the reason that Acts and statutes are continually made at every Parliament without intermission, and without end; a wise man made a good and short answer, both of which are well composed in verse.
>
> *Quaeritur, ut crescitunt tot magna volumina legis?*
>
> *In promptu causa est, orescit in orbe dolu.*
>
> [In our inexpert translation: ''It might be asked why such a large amount of law grows? The basic reason is that the world's evil has grown.'']
>
> And because fraud and deceit abound in these days more than in former times, it was resolved in this case by the whole Court, that all statutes made against fraud should be liberally and beneficially expounded to suppress the fraud.

their investment. They did not receive stock in New GM. Instead, Old GM's creditors became New GM's stockholders: the U.S. Treasury (with 61 percent), the auto unions, and Canada swapped debt claims against Old GM for equity stakes in New GM. Other Old GM creditors acquired a 10 percent stake in New GM as well. In the fall of 2010, the Treasury re-sold a large amount of its New GM shares to the public, cutting its share to 26 percent.

New GM has the factories, offices, designs, and some of the workers that Old GM had. It also acquired some $18 billion worth of Old GM's NOLs.[2] New GM could not use them to reduce its tax liability immediately, since it was losing money. But in 2010, New GM did turn a profit and presumably will use its NOLs to avoid corporate income tax on that profit (Bunkley 2011).

Ordinarily, when one company buys another's assets, it does not acquire its tax losses too. But the sale from Old GM to New GM qualified as a tax-free ''reorganization'' under Sec. 368 of the tax code: neither Old GM nor New GM incurred a tax liability, New GM entered Old GM's assets on its books with Old GM's ''adjusted basis,'' and New GM acquired Old GM's NOLs.

The problem involved Treasury's plans to sell the shares it took in New GM. If the combined equity stake of any group of shareholders in a ''loss corporation'' like New GM climbs by more than 50 percentage points, Sec. 382 of the tax code limits the firm's ability to use those accumulated NOLs. Given Treasury's large stake in New GM, if it sold its entire stake to the public, those new owners would raise their combined interest by 50 points. New GM would then lose its ability to avoid taxes on future income.

[2] The losses themselves were $45 billion; their book value as an asset is listed as $18 billion. We will use the figure $18 billion even though it is too high because standard accounting rules for tax assets are absurdly inaccurate.

They are inaccurate for two reasons: First, Generally Accepted Accounting Principles require companies to not discount for the time value of money. If a company expects to save $1 million in taxes in 16 years using deferred tax losses, it records that as a current tax asset worth $1 million, even though the present discounted value (at 5 percent interest) is only $458,000. Second, even if there is a good chance that the company will never make a profit again, it records the full amount if ''it is more likely than not'' that the company will someday make enough profit. Thus, if the company just mentioned estimated that its chances of failure before 16 years from now are a mere 49 percent, it would still record the $1 million as $1 million, not $510,000 or $233,580. For a critical view of this rule, see J. E. Ketz, ''Deferred Income Taxes Should Be Put to Rest,'' *SmartPros*, March 2010.

To solve this problem, the Treasury issued a series of notices. The Sec. 382 rules, it declared, would not apply to itself. When it sold its shares in New GM, the new owners might increase their ownership stake by 50 percentage points, but they would not trigger the Sec. 382 limits. The tax code offered no exception for government-owned shares, and the Treasury did not purport to find one. Instead, it just declared that the law did not apply.[3]

The notices also apply to two other companies, AIG and Citigroup. Both of these companies had ownership changes over 50 percent as a result of the Troubled Asset Relief Program and would ordinarily, as in bankruptcy, lose their NOLs. If they retain them, that reduces the apparent (but not real) cost of the bailout because the government can resell its shares at a higher price.

Through these notices, Treasury accomplished two highly political goals:

- It disguised (by billions of dollars) the true cost of the bailouts of GM and other firms.
- It routed funds (again, several billion dollars) to the administration's supporters at the UAW.

Ordinarily, if an administration wildly misstates the cost of its policies or routes public funds to its friends, the press notices and complains. In this case, it did not. The press missed the manipulation precisely because it involved such a complex and highly arcane provision of the tax code. The more obscure the law, in other words, the greater the risk of political manipulation: precisely because its strategy involved such an *abstruse* corner of the law, the administration was able to hide its politicized policies from the public.

We do not address the wisdom of the bailouts themselves. Neither do we ask whether firms should be able to carry forward operating losses, whether they should be able to reorganize tax-free, or why the United States has a corporate income tax at all.[4] These are all

[3] The last of the notices was Internal Revenue Service Notice 2010-2, ''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,'' *Internal Revenue Bulletin* 251.

[4] Two recent articles on the incidence and distortions due to the corporate income tax are Harberger (2008) and Kotlikoff and Miao (2010). Auerbach, Devereux, and Simpson (2010) survey the pros and cons of corporate income taxes and the various ways to structure them. Their unavoidable complexity, of which the present paper's subject is just one example, is one strong argument against corporate income taxes.

interesting questions, but we have quite enough to do addressing the topic of selective tax relief through executive decree. Rather than explore these larger questions, we focus on the propriety of the Treasury's manufacturing a tax break to distribute and hide government largesse. More generally, we focus on the wisdom of giving a president the ability to invent a tax deduction for his political supporters without a need to answer to the courts or Congress.

1.1 The Bad Man and the Law

Recall Justice Holmes's description of the law as being the prediction of the ''Bad Man'' about whether a judge would stop him:

> If you want to know the law and nothing else, you must look at it as a bad man . . . who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience. . . . If we take the view of our friend the bad man, we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of this mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law. (Holmes 1897)

If a president is Holmes's Good Man, he will obey the Constitution because it is the Constitution. The Treasury gave General Motors an illegal tax break. As a Good Man, he will read our article, feel remorse, and fire everyone involved.

If a president is Holmes's Bad Man, on the other hand—and public choice theory suggests that it is Bad Men who have the best chance of being elected—he will obey the Constitution only when a court can make him obey it.[5] If he hears of our article, he will ignore it. As a lawyer, he knows that nobody has standing to challenge someone else's tax benefits in court. Thus, his ''prophecy about what a court will do'' is easy: nothing. The courts will reject any challenge for lack of standing, whatever the merits of a claim might be.

[5] A politician who upholds his personal principles and resists the will of the median voter or leaves untouched the less honorable tools of political competition will, *ceteris paribus*, lose votes and lose elections. For more explanation, see Ramseyer (1995).

Only potential bad publicity would worry a Bad Man president. But publicity he can skirt by giving the funds through opaque provisions of the tax code. Publicity he can skirt by (take a deep breath) declaring an exemption from the application of Sec. 382 of the tax code to limits on carryforwards of NOLs following a sale under Sec. 363 of the Bankruptcy Code that uses preferred stock, credit bidding, and warrants by one company named GM to a different company also named GM. If the administration gave a billion dollars in cash to its supporters, the press would notice. If it gives it through the obscure details of the corporate tax code, the press will fall asleep.

In the article that follows, we explain the intricacies of the tax break (Section 2). We discuss the law involved (Section 3). If you think all presidents are Good Men, you may stop reading at that point. After all, following the Constitution is just a matter of understanding it. We explain it, you understand it, end of story. Lest some presidents be Bad Men, however, we conclude by exploring procedural reforms Congress might adopt to prevent a recurrence of what happened with GM.

2. WHAT HAPPENED

General Motors was a public corporation with much unsecured debt, including $21 billion owed to the UAW Trust on behalf of retired workers and $27 billion owed to bondholders. None of these stakeholders was senior enough to see much return if the company liquidated in pieces. Probably, none would see much return even if the firm found a buyer for the whole company.

The senior creditors were a diverse lot. The U.S. Treasury had a secured interest in $19.4 billion from TARP loans and $30.1 billion in other loans. The Canadian government held secured claims of $9.2 billion. Government senior debt thus totaled $58.7 billion. Private creditors held another $5.9 billion in secured loans.

GM filed for bankruptcy under Chapter 11 of the Bankruptcy Code. To restructure its finances, it then negotiated a sale under Sec. 363 of the Code. For this transaction, it formed a new shell, New GM. Old GM then sold its assets to New GM. In exchange for its $21 billion *un*secured debt to Old GM, the UAW Trust received 17.5 percent of the common stock of New GM, $6.5 billion in preferred stock, and $2.5 billion in debt. In exchange for their $27 billion of unsecured debt, the other junior creditors received 10 percent of the

common stock of New GM and warrants for another 15 percent. The private secured creditors (the $5.9 billion claim) were paid in full. The Canadian government received 12 percent of the New GM common stock, and the U.S. Treasury received interests detailed shortly below.

To consider the stakes involved, note that in December 2010, New GM had stock worth $54.4 billion and liabilities of $12.9 billion (Ceraso, Moffatt, and Pati 2010), for a total asset value of $67.3 billion. In effect, the sale price in the 363 offer was:

- $58.7 billion in senior credit claims,
- $5.9 billion paid to private secured creditors,
- $5.4 billion in stock (10 percent of $54.4 billion), and
- a portfolio of harder-to-value warrants.

This yields a total of $67 billion plus warrants (Warburton 2010, p. 536).

Apparently, the 363-sale buyers paid $67 billion plus the warrant value for assets worth $67.3 billion. That seems a remarkably high price considering that no other bidder loomed on the horizon. The bankruptcy judge deserves praise for extracting so much value for Old GM's creditors.

This $67.3 billion in asset value is not the net benefit to the 363-sale buyers or the senior creditors, however. That benefit depends on who owns the New GM equity and debt. Old GM's private secured creditors received $5.9 billion in cash for their $5.9 billion in debt. The Canadian government gave up its $9.2 billion in Old GM debt but took a 12 percent stake in the common stock (worth 0.12 × $54.4 billion = $6.5 billion) plus $0.4 billion in preferred stock and $1.3 billion in debt in New GM—for a total value of $8.2 billion.

The most glaring anomaly involved the UAW. The union's trust gave up *un*secured claims of $21 billion and received:

- 17.5 percent of the stock of New GM worth (0.175 × $54.4 billion =) $9.5 billion,
- $6.5 billion in preferred stock, and
- $2.5 billion in debt,

for a total of $18.5 billion. Given that the UAW Trust had been a junior creditor, this was a very good deal. By contrast, the other

unsecured creditors gave up claims of $27 billion and received only 10 percent of the common stock and warrants.

Recall that the U.S. Treasury held secured debt totaling $49.5 billion. In exchange for its claims, it took 61 percent of the stock in New GM (stock worth 0.61 × $54.4 billion = $33.2 billion), $2.1 billion in preferred stock, and a $6.7 billion debt claim against New GM. All told, it received compensation of $42 billion.

Focus on the U.S. government. Through the Sec. 363 sale, it—apparently—lost ($49.5 billion − $42 billion =) $7.5 billion. Anyone who loses only ($7.5 billion ÷ $49.5 billion =) 15 percent on a $49.5 billion loan to a failing firm does well indeed. Yet appearances deceive. The government also gave GM investors $45 billion in NOLs. If the 363 sale had not gone through or the sale had been made to some outside buyer, these NOLs would have disappeared. The book value of these NOLs is $18 billion.

To be sure, Treasury was giving tax breaks partly to itself, and the book value of the NOLs exceeds their market value since it would take some years before GM could exhaust them. If the market value of the NOLs were, say, $12 billion (a little under the estimate of the stock analysts that we cite in Section 2.1 below), then that $12 billion was incorporated into the $54.4 billion equity value of the New GM, and we have overestimated the overall value of the deal for the Treasury. Of its $33.2 billion in stock, $7.32 billion (= 0.61 × $12 billion) was a tax gift to itself.

More simply, consider the $12 billion worth of NOLs an additional loss to the Treasury. In effect, the Treasury lent GM $49.5 billion and lost ([$7.5 billion + $12 billion] ÷ $49.5 billion =) 39 percent. If only Treasury could have inserted a further secret $20 billion of assets into New GM, New GM's stock price would have been so high that Treasury would have appeared to make a profit from the entire affair.

2.1 As GM Told It

Here is how GM describes its tax situation:

> We recorded valuation allowances against certain of our deferred tax assets, which under ASC 852 also resulted in goodwill. (General Motors 2010, p. 82)
>
> In July 2009 with U.S. parent company liquidity concerns resolved in connection with the Chapter 11 Proceedings and

> the 363 Sale, to the extent there was no other significant negative evidence, we concluded that it is more likely than not that we would realize the deferred tax assets in jurisdictions not in three-year adjusted cumulative loss positions.
>
> Refer to Note 22 to our audited consolidated financial statements for additional information on the recording of valuation allowances. (General Motors 2010, p. 138)

Table 1 from New GM's securities filings (p. F-121 of its Form 8-K) shows that New GM claimed to inherit over $18 billion in tax carryforwards from Old GM.[6] Stock analysts wrote:

> We calculate an NPV of GM's deferred tax assets at $17.2bn of which $4bn is related to pension contributions and more than $13bn related to accumulated NOLs and tax credits including R&D credits. (Morgan Stanley 2010)

and

> Via a special regulation, GM's highly valuable US tax assets (worth $18.9B in the US at 09-end) were left intact. . . . Our Dec-2011 price target assumes a present value of $12.4B of (2011-ending) non-European global tax assets. . . . Present-valuing the $18.6B face value figure using a 12 percent discount rate (Ford is 8 percent; we use 12 percent for GM to reflect the lower mix of debt in its cap structure), we arrive at a PV for global economic tax assets ex. Europe of $12.4B at 2011-end. (J. P. Morgan 2010)

Thus, stock analysts were well aware of the existence and value of the NOLs, though they estimated their economic value at lower than their accounting value. This is an important element of the political economy of the situation. It was crucial both that the general public not realize that New GM's value was inflated by the taxes that the Treasury had agreed in advance to forgive, and that stock analysts did understand it. If the analysts missed the point, then when the government sold its GM stock, it would have received a much lower price. It would have given away government revenue,

[6] Not all these tax carryforwards were necessarily NOLs, strictly speaking. They may also include "built-in losses" on assets that declined in value and unused tax credits.

Table 1

Components of GM's Temporary Differences and Carryforwards That Give Rise to Deferred Tax Assets and Liabilities

	Successor		**Predecessor**	
	December 31, 2009 Deferred Tax		December 31, 2008 Deferred Tax	
	Assets	Liabilities	Assets	Liabilities
Postretirement Benefits Other Than Pensions	$4,194	—	$11,610	—
Pensions and Other Employee Benefit Plans	$8,876	$406	$16,171	$8,648
Warranties, Dealer and Customer Allowances, Claims and Discounts	$3,940	$75	$6,682	$90
Property, Plants, and Equipment	$7,709	$278	$7,429	$3,197
Intangible Assets	$1,650	$4,984	$780	—
Tax Carryforwards	$18,880	—	$18,080	—
Miscellaneous U.S.	$5,844	$1,269	$8,122	$288
Miscellaneous non-U.S.	$3,306	$1,944	$3,485	$773
Subtotal	$54,399	$8,956	$72,359	$12,996
Valuation Allowances	$(45,281)	—	$(59,777)	—
Total Deferred Taxes	$9,118	$8,956	$12,582	$12,996
Net Deferred Tax Assets (liabilities)	$162		$(414)	

Source: General Motors Form 8-K (2010), p. F-121.

but without disguising the cost of its bailout—approximately halving it from $24 billion to $12 billion (Terlap 2011).

2.2 Other Firms

Although we focus on GM, Treasury gave legally unauthorized NOLs to two other firms as well. As with GM, it did this by issuing TARP-specific notices about the availability of NOLs. Citigroup, for example, claimed ''tax assets'' of $46.1 billion at the end of 2009. In June 2009, Citigroup and the Treasury agreed to exchange the government's preferred stock for common stock. The government acquired a 33.6 percent ownership stake. In December 2009, Citigroup raised $20.3 billion by issuing about 24 percent new common stock, so Citigroup had passed the threshold for a 50 percent ownership change. In 2010, Treasury sold all of its 7.7 billion shares of common stock for $31.85 billion, a gain of $6.85 billion. According to Citigroup:

> The common stock issued pursuant to the exchange offers in July 2009, and the common stock and tangible equity units issued in December 2009 as part of Citigroup's TARP repayment, did not result in an ownership change under the Code. (Murphy 2010)

By ''ownership change,'' it referred to the Sec. 382 rule detailed in Section 3 below. It based its claim that the section did not apply to it on the Treasury's notices.

For Citigroup, the NOLs had additional importance because of its status as a bank. Banks must worry about regulatory capital requirements. As Davidson (2011) explains:

> Banks hold NOLs as deferred tax assets (DTA's). DTA's, in turn, constitute a portion of a bank's tier 1 capital. Were Citigroup to have lost its ability to use its NOLs, it might have had to write down its tier 1 capital.

A footnote adds:

> 12 C.F.R. sec. 225 at appendix A.II.A.1. 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 revenue for that year.''

After many travails, in January 2011 AIG completed a reorganization that gave Treasury 92.1 percent of its common stock. AIG claimed ''Deferred tax assets: Losses and tax credit carryforwards'' of $26.2 billion at the end of 2009. It claimed other valuable tax attributes as well,[7] including ''Unrealized loss on investments'' of $8.7 billion (AIG 2009, p. 334). These, too, hinged on notices exempting the firm from the coverage of Sec. 382. AIG acted on the assumption that it had not yet had an ''ownership change'' for tax purposes. It was worried enough about a private-market 50 percent ownership change that would trigger Sec. 382, however, that it installed a poison pill to prevent large share purchases.

3. THE LAW

In fact, the law—arcane in the extreme—does not grant New GM the NOLs it claims if the government sells its shares. Neither does it grant Citigroup and AIG any right to the tax assets they claimed. To be sure, the law lets the GM NOLs survive the Sec. 363 sale in bankruptcy, as we will show. To that extent, New GM did inherit the NOLs. It can continue to use them, however, only so long as the Treasury holds its stock. Once Treasury sells its shares to the public, New GM should by statute lose its access to most if not all of the loss carryforwards.

New GM did claim the NOLs and the Treasury concurred. For 2010, New GM had access to the losses because the government had not yet sold enough of its stock. But once it sells, New GM will be able to claim the losses only because the Treasury told New GM it could. Through a series of notices, it declared that the statutory limitations on the use of NOLs after a defined ''ownership change'' did not apply if the Treasury owned the stock. The statute itself did not differentiate between government and nongovernment owners. Nonetheless, as we will explain in detail later, Treasury wrote that New GM could continue to claim the NOLs after it sold its stock, and New GM happily deferred.

First, however, we must go into how New GM could possibly acquire the NOLs in the first place. The law is massively opaque,

[7] According to AIG (2009), ''The application of U.S. GAAP requires AIG to evaluate the recoverability of deferred tax assets and establish a valuation allowance, if necessary, to reduce the deferred tax asset to an amount that is more likely than not to be realized (a likelihood of more than 50 percent).''

but that is the point. Precisely because the corporate tax rules are as complex as they are, the administration could successfully deflect attention from what it did.

3.1 Cancellation of Indebtedness and Net Operating Losses

Consider the tax treatment of cancelled debt, relevant here because of the cancellation of Old GM's debt to the Treasury. Suppose a firm has debt outstanding. It negotiates with its creditors and they agree to trade their debt claims for stock. The firm will have cancellation of indebtedness (COD) income equal to the difference between the face amount of the cancelled debt and the market value of the stock distributed (I.R.C. Secs. 61, 108(e)(8); *U.S. v. Kirby Lumber Co.*, 284 U.S. 1 (1931)).

Now suppose the firm is insolvent. If its creditors swap their claims for stock, under general tax principles it will have COD income. In fact, however, the Internal Revenue Code provides that what would otherwise be COD income will not constitute taxable income. Instead, under Sec. 108 of the code, the firm will need to reduce the amount of its other ''tax attributes'' by the amount of the COD income excluded. Most relevant here, it will need to reduce the amount of its NOLs by the amount of the excluded income. Given that $1 of NOL would reduce net taxable income by $1, this obviously leaves the firm (in many cases) in much the same position as if it had included the COD income all along (I.R.C. Sec. 108(a)(1)(B), (b)(2)(A)).

Finally, suppose the firm is solvent but files for reorganization under bankruptcy. If, as part of its bankruptcy reorganization, the creditors swap their claims for stock, the result (for purposes here) is the same as if the firm were insolvent. Under Sec. 108, it can exclude the COD from income, but it must offset the excluded amount against its NOLs (I.R.C. Sec. 108(a)(1)(A), (b)(2)(A)).

3.1.1 Tax Reorganizations

Many reorganizations under the bankruptcy code also constitute ''reorganizations'' under the tax code. If, but only if, a transaction qualifies as a ''reorganization'' under the tax code, a firm that takes the assets of another firm may also take its NOLs. Note that although both the bankruptcy and the tax codes use the term ''reorganization,'' the word refers to different concepts in each. Those concepts are not interchangeable.

In general, reorganizations in bankruptcy are ''G reorganizations'' under the tax code, meaning that they fall under Sec. 368(a)(1)(G) of the Internal Revenue Code:

> [A] transfer by a corporation of all or part of its assets to another corporation in a title 11 or similar case; but only if . . . stock or securities of the corporation to which the assets are transferred are distributed in a transaction which qualifies under section 354, 355, or 356.

Note two points relevant here: First, ''Section 363 sales'' occur in a ''title 11 or similar case.'' ''Title 11'' (not ''Chapter 11'') refers to the Bankruptcy Code, and ''section 363'' refers not to Sec. 363 of the tax code but to Sec. 363 of the Bankruptcy Code. As a result, if a ''debtor in possession'' (a bankruptcy concept) sells its assets under Sec. 363, it sells its assets in a Title 11 case. The court of *In re Motors Liquidation Co.*, 430 B.R. 65 (S.D.N.Y. 2010) explicitly indicated that a Sec. 363 sale (indeed, exactly the GM sale at issue here) could constitute a qualifying G reorganization. This is the position the Treasury has long taken as well (e.g., in Ltr. 8503064 (Oct. 24, 1984); Ltr. 8521083 (Feb. 27, 1985)).

Second, Sec. 354 of the tax code requires merely that *some* security holders (not *only* security holders) of the old firm receive ''stock or securities'' of the new firm. I.R.C. Sec. 354(a) provides:

> No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization . . . are . . . exchanged solely for stock or securities in . . . another corporation a party to the reorganization.

Suppose the creditors to the old firm include both long-term bond holders and trade creditors. Suppose both receive stock in the new firm. The former held ''securities'' in the old firm, but the latter did not (i.e., bonds are securities, trade credit is not). For at least three decades, the Treasury has taken the position that the transaction qualifies under Sec. 354 even though some of the stock goes to creditors who did not hold securities. Instead, it has argued that a transaction qualifies under Sec. 354 if at least one of the old firm

creditors who received stock in the transaction held a security of the old firm.[8]

3.1.2 Net Operating Losses

Only in a qualifying tax reorganization will a firm that acquires the assets of another also acquire its NOLs. Suppose again that a firm induces its creditors to swap their claims for stock. Suppose further that some NOLs remain after the Sec. 108 adjustments detailed earlier.

Generally, if a debt-for-stock swap occurs as part of a transaction in which a firm sells its assets to another firm, the acquiring firm will not obtain its NOLs, too. After all, the losses are specific to the selling firm. The acquiring firm buys the seller's assets, but it does not—indeed, legally cannot—buy its ''tax losses.'' Conceptually, these tax attributes describe the financial characteristics of a firm; they are not ''things'' that firms can buy and sell.

Under Sec. 381 of the tax code, however, if one firm buys the assets of another firm in a qualifying tax ''reorganization,'' it also acquires its NOLs. More specifically, Sec. 381(a) provides:

> In the case of the acquisition of assets of a corporation by another corporation . . . in a transfer to which section 361 . . . applies, but only if the transfer is in connection with a reorganization described in subparagraph . . . (G) of Section 368(a)(1), the acquiring corporation shall succeed to . . . the items described in subsection (c) of the . . . transferor corporation.

Note two observations. First, if a firm exchanges its assets for stock as part of a G reorganization, Sec. 361 will apply to the exchange. In turn, that section specifies that the two firms recognize no gain or loss on the transaction. Second, Sec. 381(c)(1) lists ''net operating losses.'' Provided the debt-for-stock swap occurs in a G reorganization, an acquirer takes the seller's NOLs along with its assets.

[8] For examples, see ''Bankruptcy Tax Act of 1980: Report of the Committee on Ways and Means, U.S. House of Representatives on H.R. 5043'' (Washington: Government Printing Office, 1980); Ltr. 8503064 (Oct. 24, 1984); Ltr. 8521083 (Feb. 27, 1985); and see generally Pickerill (2009).

3.1.3 The Law Applied to GM

Now turn to the reorganization of GM. Insolvent, GM filed for reorganization in bankruptcy court in the Southern District of New York. It sold its assets to a newly formed corporation (New GM) in a Sec. 363 sale. In exchange, it received stock in the new firm that it distributed to its bond holders and other creditors.

Absent Sec. 108, GM would have had COD income equal to the difference between the amount of its debt and the value of the stock it distributed. We will see next, however, that in bankruptcy the rule may be different.

3.2 Change in Control

A firm that buys another firm's assets in a G reorganization cannot necessarily use the transferor's NOLs immediately. To limit ''trafficking'' in tax losses, Sec. 382 of the tax code limits a firm's ability to use the NOLs of a ''loss corporation'' that it buys (defined at Sec. 382(k)). The limits apply whenever one set of the loss corporation's shareholders sells over 50 percent ownership to another set within a three-year period.[9] And these limits then restrict the amount of the NOLs that the firm can use to a ''section 382 limitation'' amount:

> The section 382 limitation for any post-change year is an amount equal to-
>
> (A) the value of the old loss corporation, multiplied by
>
> (B) the long-term tax-exempt rate.

[9] I.R.C. Sec. 382(g)(l). The statute says an ownership change is triggered by an increase of 50 percentage points by a 5-percent shareholder. The statute lumps all small shareholders together as a single fictitious 5 percent shareholder. Thus, if a 100 percent owner sells out entirely to small shareholders, that counts as an increase of over 50 percentage points by a 5 percent shareholder. If, however, the new small owners then trade 60 percent among themselves without anybody reaching 5 percent, that does not count.

The regulations clarify using examples. CFR Sec. 1.382-2T(j)(2)(iii)(B)(2), Example (3) says:

> L is entirely owed by Public L. L commences and completes a public offering of common stock on January 22, 1988, with the result that its outstanding stock increases from 100,000 shares to 300,000 shares. No person owns as much as five percent of L stock following the public offering. . . .
>
> New Public L is a 5-percent shareholder that has increased its ownership interest in L by more than 50 percentage points during the testing period (by 66 2/3 percentage points). Thus, there is an ownership change with respect to L.

Consider how this 382 scheme works. Suppose, first, that a *solvent* firm *not* in bankruptcy convinces its creditors to swap their debt claims for stock. It will recognize COD income. It will apply its NOLs against that income. And if any NOLs remain, then if one set of shareholders sells over 50 percent ownership to another, the firm will be able to use only the product of its earlier value and the long-term tax-exempt rate (I.R.C. Sec. 382(b)(1)).

Suppose, second, that a firm convinces its creditors to swap their claims for stock in a bankruptcy proceeding. As noted earlier, under Sec. 108 it will not recognize its COD as income but will reduce the amount of its NOLs by the amount of that excluded COD. Importantly, under some circumstances Sec. 382 will *not* thereafter limit its ability to use its NOLs *even if* there has been a Sec. 382 change in control. Instead, Sec. 382(l)(5) states that the limits do not apply if

- the transaction occurs in a Title 11 case, and
- "the shareholders and creditors of the old loss corporation . . . own . . . stock of the new loss corporation" equal to at least 50 percent (I.R.C. Sec. 382(l)(5)).

Potentially, NOLs could (only "could"—even under (l)(5) the NOLs do not necessarily live) survive bankruptcy proceedings in full.

Suppose, third, that an insolvent firm does not file for bankruptcy but still induces its creditors to swap their debt claims for stock. Absent more, according to Sec. 382, its NOLs will disappear. They will disappear because the firm can thereafter only use a portion of its earlier value ("the value of the old loss corporation"), and Sec. 382 defines that earlier value as "the value of the stock" of the insolvent corporation (I.R.C. Sec. 382(e)(1)). Because the firm was insolvent, its stock was worth nothing (or nearly nothing). The product of the "value of the old loss corporation" and the "long-term tax-exempt rate" will fall to zero, and the NOLs will disappear.

Finally, suppose an insolvent firm does not meet Sec. 382(l)(5)'s 50 percent test. Provided it negotiates its debt-for-stock swap within a bankruptcy filing, under Sec. 382(l)(6) it may add to the value of the firm used to calculate the amount of annual useable NOLs the value created by canceling the creditors' claims. It can use each year, in other words, a proportional share not just of the value of the pre-reorganization firm but of that value plus any value attributable to the debt cancellation (I.R.C. Sec. 382(l)(6)).

3.2.1 The Law Applied to GM

After its Sec. 363 sale, the creditors of Old GM owned 100 percent of the stock of New GM. Under Sec. 382(l)(5), all of its NOLs may have survived. If the old creditors obtained less than 50 percent of the stock of New GM, then under Sec. 382(l)(6) New GM would have been able to use only an amount of NOLs calculated by adding the value of the canceled debt to the value of Old GM.

3.3 Later Control Shifts

Even for New GM, however, Sec. 382 created a risk. First, suppose that New GM tried to avoid the limits on its NOLs through Sec. 382(1)(5). If within two years of the reorganization, the stock owned by any set of 5 percent shareholders increased by 50 percentage points, then the NOLs disappeared. Subsec. (l)(5) couples its apparent generosity with a draconian penalty: if a firm meets the terms of (l)(5), it potentially enjoys the NOLs without the standard Sec. 382 reduction; but if it then shifts ownership within two years, it loses those NOLs entirely.

Second, even if New GM does not claim the Subsec. (l)(5) benefit, it still jeopardizes much of its NOLs if ownership changes. Suppose New GM claimed the benefit of Subsec. (1)(6) instead. If within three years one set of shareholders sells over 50 percent ownership to another, then the firm will be able to use only the ''section 382 limitation'' amount.

The problem for New GM lay in the fact that it exited its G reorganization with the U.S. government holding 61 percent of its stock. If the government recovers its investment by selling all of that stock within two years (for Subsec. (l)(5)), or three years (for Subsec. (l)(6)), it will probably cause an ownership change under the terms of Sec. 382. We say ''probably'' because we do not know how many other shareholders will trade during the same period. If it does trigger an ''ownership change,'' it will either face the Sec. 382 limits to its NOLs under Subsec. (l)(6) or lose its NOLs entirely under Subsec. (l)(5).

In November 2010, the Treasury did reduce its stake in GM from 61 percent to 33 percent. If Treasury, or any other large shareholder, transfers an additional 22 percent of the stock, GM will face the Sec. 382 limits on its net operating losses.

The cases of AIG and Citigroup are even clearer. Already, the government has triggered an ownership change in both companies. The Treasury acquired a majority of AIG's stock, and it acquired enough of Citigroup's stock that, combined with Citigroup's new

capital issue, it caused a 50 percent ownership change. Thus, by law, both firms should lose their NOLs.

3.3.1 The IRS Notices

If the Treasury lets a firm claim a NOL to which the law does not entitle it, Treasury merely gives the firm a gift. TARP does authorize Treasury to give gifts. As a result, the superficial choice would seem to be, if Treasury wants to enrich a firm, it can either give it money under TARP or let it take an extra NOL. Either way, it transfers funds from the public fisc to the firm.

To give funds under TARP, however, Treasury must follow statutory guidelines. It must give its gifts in amounts and to firms and for purposes described by Congress in the legislation. When it unilaterally authorizes NOLs, by contrast, it escapes all those congressional constraints.

And that is exactly what the Treasury did. From 2008 to 2010, it issued a series of notices exempting firms in specified industries from the statutory restrictions under Sec. 382 on the use of NOLs. The statute establishing TARP authorized Treasury to issue ''regulations and other guidance'' to implement it,[10] and Sec. 382(m) authorized Treasury to issue the regulations necessary to implement Sec. 382.

Treasury issued the first of these notices in mid-2008. Notice 2008-76 exempted from Sec. 382 the acquisition of stock of a loss corporation by the United States under the Housing and Economic Recovery Act of 2008. The notice covered Fannie Mae and Freddie Mac. Notice 2008-83 authorized banks to take certain deductions under 382(h). Commonly called the ''Wells Fargo Ruling,'' it was predicted to cost the government between $105 to $110 billion (Paley 2008). The Jones Day law firm estimated its cost at $140 billion.[11] (As we will see, this notice was terminated, so the actual costs were much smaller.)

[10] *Emergency Economic Stabilization Act of 2008*, P.L. 11-0343, 122 Stat. 3765, Sec. 101(c)(5).

[11] The law firm backtracked some months later to defend the notice strongly and say that it was ''quite modest'' and ''not a significant tax subsidy.'' See *Revisiting Notice 2008-83*, Jones Day, December 2008. Jones Day had estimated the Wells Fargo merger alone to have benefited by some $25 billion. The original Jones Day article was taken down from the web, but it is quoted in Paley (2008). Just one other merger, PNC's acquisition of National City, benefited by an estimated $5.1 billion. See J. Drucker, ''PNC Stands to Gain From Tax Ruling; Acquisition of National City Will Bring Billions in Deductions, Experts Say,'' *Wall Street Journal*, October 30, 2008.

In Notice 2008-84, the Treasury announced that it would not test for ownership changes on days when the United States owned a 50 percent interest in a loss firm.

Notice 2008-100 declared that an acquisition by Treasury of acquired stock in a loss corporation would not trigger the 382 limitations. Since Treasury acquired New GM's stock in a G reorganization qualifying under Sec. 382(l)(5), GM may have escaped the Sec. 382 limitations in its initial reorganization anyway. By contrast, firms like Citigroup and AIG were not G reorganizations.

Notice 2009-14 of February 17, 2009, purported to ''amplify'' 2008-100. In fact, it explicitly covered the auto industry and provided that the Treasury's initial acquisition would not trigger the Sec. 382 limitations (again, given that GM used a G reorganization, ultimately it would not need the assurance 2009-14 offered). Notice 2009-38 continued in much the same vein.

Only in January 2010, half a year after GM's Sec. 363 sale, would the Treasury tackle the firm's real Sec. 382 problem: What happens when Treasury sells its stock? To resolve this question, January 11th's Notice 2010-2 changes the law in two crucial ways.

First:

> 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. . ., the stock so redeemed shall be treated as if it had never been outstanding.

Picture the problem. Rather than sell its shares to other investors, the Treasury might sell its shares back to the firm. If it did so, the percentage held by the other investors would—necessarily—rise. In Notice 2010-2, the Treasury declared that the increase would not trigger Sec. 382.

Second:

> If Treasury sells stock that was issued to it pursuant to the Programs . . . 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.

Even if the Treasury sells its shares to the public, the sale will not trigger Sec. 382. Thus, in Notice 2010-2, the Treasury finally addressed New GM's Sec. 382 problem.

3.3.2 *The Statutory Amendment*

But could the Treasury legally issue Notice 2010-2? Could it legally issue any of these Sec. 382 notices?

Congress in its legislation objected to some of what Treasury did, validated some, and left most notices unaddressed. The issues of the Treasury's TARP-related Sec. 382 notices came up in the American Recovery and Reinvestment Tax Act of 2009 (better known as the 2009 stimulus bill).

First, the Conference Committee added a provision to the tax code, Sec. 382(n)(1), to exempt from Sec. 382 advances of TARP funds that had an explicit requirement for a restructuring plan (neither the original House nor the original Senate version had anything like this). From the conference report (U.S. Congress 2009, pp. 560–61):

> The limitation contained in subsection (a) shall not apply in the case of an ownership change which is pursuant to a restructuring plan of a taxpayer which-
>
> (A) is required under a loan agreement or a commitment for a line of credit entered into with the Department of the Treasury under the Emergency Economic Stabilization Act of 2008, and
>
> (B) is intended to result in a rationalization of the costs, capitalization, and capacity with respect to the manufacturing workforce of, and suppliers to, the taxpayer and its subsidiaries.
>
> (2) SUBSEQUENT ACQUISITIONS.-Paragraph (1) shall not apply in the case of any subsequent ownership change unless such ownership change is described in such paragraph.

The same auto-industry Sec. 382 exemption (but explicitly for auto companies) had been proposed in December 2008 in a bailout bill that passed the House and was supported by Republican President George W. Bush, but was killed by Senate Republicans.[12]

[12] See: J. Puzzangherra, "Auto Bailout Dies in Senate: Big 3 Could Opt for Bankruptcy after a Late Compromise Attempt Fails to Satisfy GOP Opponents." *Los Angeles Times*, December 12, 2008; M. Leone, "Grab Coveted Losses, Buy a Car Company," *CFO.com*, December 12, 2008.

Second, the act authorized the Wells Fargo notice as far as bank mergers that happened before January 16, 2010, but not afterward. The drafters explained that Congress did this because it found Treasury's various TARP notices outrageous but thought it should save taxpayers who relied on them anyway. The drafters continued:[13]

> Congress finds as follows:
> (1) The delegation of authority to the Secretary of the Treasury, or his delegate, under section 382(m) 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);
> (3) the legal authority to prescribe Notice 2008-83 is doubtful;
> (4) however, as taxpayers should generally be able to rely on guidance issued by the Secretary of the Treasury, legislation is necessary to clarify the force and effect of Notice 2008-83.

3.3.3 Notice 2010-2

Now return to Notice 2010-2 and ask the obvious question: Given Sec. 382(n), why did Treasury issue the notice? It did so because Subsec. (n) did not cover a sale by the Treasury to the public. Subsec. (n)(1)(A) may have covered the Treasury's initial stock acquisition. After all, the Treasury took its equity interest as part of its TARP investment, so perhaps it ''required'' the stock ''under a loan agreement.'' Ironically, however, Treasury did not need Sec. 382(n) for GM since GM restructured itself as a tax-free G reorganization. And Sec. 382(n) was not applicable to the purchases of equity in Citigroup and AIG because they were financial firms, not manufacturers.

Subsec. 382(n)(1) did not protect GM from Treasury's re-sale of the stock it acquired. When Treasury lent GM the money, it did not ''require'' its own re-sale under the loan agreement. It would be an odd agreement that required the lender to sell any stock it obtained. And if it did not require the re-sale, then Sec. 382(n)(1) did not

[13] P.L. 111-5, American Recovery and Reinvestment Act of 2009, section 1261 (paragraph indentation added).

exempt Treasury's sale of its shares to the public from the Sec. 382 limitations.

This put Treasury in a bind. Congress claimed not to like the way the Treasury helped the financial institutions. It declared that it had not authorized Treasury to issue the notices it did.[14] But absent a notice, Treasury would trigger the Sec. 382 limitations at GM when it sold its stock.

Apparently Treasury responded, ''Congress won't mind.'' To move $18 billion to New GM, it needed to be able to assure the firm and its investors that GM would continue to have access to the accumulated losses after Treasury sold its stock. Sec. 382(n) did not offer that assurance. Through Notice 2010-2, Treasury offered it anyway.

4. RATIONALE, DEFERENCE, AND RELIANCE

Treasury does not explain why the notices promote the policy behind Sec. 382. Davidson (2011) nicely lays out the case Treasury might have made (without endorsing it; she later gives the counterargument, too):

> Section 382(m) gives the Secretary authority to issue regulations ''necessary or appropriate to carry out the purposes of'' section 382, so one must look to the purpose of section 382.
>
> As a broad matter, section 382 is meant to prevent the trafficking in losses and to preserve ''the integrity of the carryover provisions,'' which perform an ''averaging function by reducing the distortions caused by the annual accounting system.'' More specifically, Congress was concerned with matching items of income and loss.
>
> The TARP Guidance did not violate these principles by trafficking in losses, in the generally understood meaning of the phrase. The government did not acquire shares in these banks in order to use their loss carryforwards; it did so to stabilize the financial sector. Looking beyond the acquirer's motives, because the government does not pay taxes, it is not even

[14] Although Congress spoke sternly in the 2009 stimulus bill of how the Wells Fargo notice infringed on its authority as legislature, it made no comment on the other dubious notices that Treasury had issued by February 2009. A footnote on p. 560 of the stimulus bill conference report (U.S. Congress 2009) mentions the Treasury notices 2008-39, 2008-100, and 2009-14 without commenting on their validity.

> capable of trafficking in losses in the traditional sense. The TARP Guidance also did not violate the integrity of the carryover provisions. Losses created by TARP banks remain with the bank–they will only be used to offset income of that bank. When shares are sold to the public, the guidance was careful to limit its application to buyers in the public group. This prevents another corporation from acquiring the bank to use its NOLs. Losses of a TARP bank will not be able to be used by any other institution by means of a TARP-related acquisition. From the perspective of avoiding the trafficking in losses and maintaining the integrity of the carryover provisions, the TARP Guidance were ''appropriate to carry out the purposes of'' section 382. [Footnotes omitted.]

This is unsatisfactory. The Treasury does not pay taxes, but the other investors in New GM do. For them, the ability to invest in a company that earns its income tax-free for the indefinite future is a major advantage.

What is more, the purpose behind a section does not matter when its language is clear. Sec. 382 routinely covers transactions not motivated by tax avoidance, and the Treasury does not exempt them from the section by appealing to ''purpose.'' Sec. 382 covers nonabusive transactions because it is, at root, a ''prophylactic rule.'' By their very nature, prophylactic rules cover transactions one would not necessarily cover if ''purpose'' were all that mattered.

That the government buys stock does not itself imply that different ownership change rules should apply. The United Kingdom, for example, imposes a rule similar to Sec. 382. It does not make special allowance for government-owned stock. As KPMG explained:

> The UK tax code contains similar provisions preventing the carry forward of losses following a 50 percent or more ownership change, but only when there is a ''major change in the nature or conduct of the trade'' within three years of the change of ownership. But, in contrast to the position in the US, the acquisition of shares by the UK government does count in measuring whether there has been an ownership change. (KPMG 2010)

The U.S. statute does not exempt government-owned stock and neither does the UK's.

Ultimately, tax benefits did play a major role in these transactions. By letting New GM keep NOLs to which it was not legally entitled, Treasury gave the firm (and its owners, including the UAW) $18 billion more in assets. Had the administration tried to give GM $18 billion forthrightly, voters might have complained. By hiding the gift in an obscure tax section, it reduced that electoral scrutiny. But the investors who bought New GM shares noticed. They paid a higher price than they otherwise would have paid.[15] And necessarily, the UAW, the government of Canada, and the former bondholders also noticed.

4.1 Court Deference

The executive branch continually interprets statutes as it issues regulations. Courts do too, and often make interpretations that outsiders such as ourselves consider ridiculous. It is generally accepted that courts should be allowed to have the final word in interpretation nonetheless. Could it be that the executive branch, in interpreting tax law, similarly has the final word? In fact, courts have ruled it does not—a sensible rule. Courts do defer to executive branch interpretations of statutes in many circumstances, but not in those like the TARP notices.

On January 11, 2011, the U.S. Supreme Court made clear in *Mayo Foundation v. U.S.*, 131 S. Ct. 704 (2011), that courts should treat tax regulations just like any other regulations. The case concerned a statute that exempted students from Social Security and Medicare taxes withholding. In 2004, the Treasury promulgated regulations under which medical residents were not students. The Mayo Clinic challenged the regulation, and the Court held it valid. Courts should treat tax regulations like any other, it explained.

Under the well-known ''*Chevron*'' rule by which it sometimes defers to executive agencies (*Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)), explained the Supreme Court, courts should first ask whether Congress had ''directly addressed the precise question at issue.'' If not, then they should defer to the agency unless the rule was ''arbitrary or capricious in substance, or manifestly contrary to the statute'' (*Mayo* 2011, p. 711). It would not, the Court explained, ''carve out an approach to administrative

[15] Note that this reduces the net cost to the government of the notice, since the Treasury will be able to re-sell its shares at a higher price.

review good for tax law only. . . . The principles underlying our decision in *Chevron* apply with full force in the tax context'' (p. 713).

Nonetheless, this deferential standard applies only when Congress intended to delegate to the agency and the agency followed standard rulemaking procedures. Continued the Court (p. 714):

> We have explained that ''the ultimate question is whether Congress would have intended, and expected, courts to treat [the regulation] as within, or outside, its delegation to the agency of 'gap-filling' authority.'' [*Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 157, 173 (2007)]. In the *Long Island Care* case, we found that *Chevron* provided the appropriate standard of review ''[w]here an agency rule sets forth important individual rights and duties, where the agency focuses fully and directly upon the issue, where the agency uses full notice-and-comment procedures to promulgate a rule, [and] where the resulting rule falls within the statutory grant of authority.''

Notice 2010-2 fails both of those requirements. First, Congress expressly declared that it did not intend to delegate this authority to Treasury. Notice 2010-2 applied only to financial institutions, automobile companies, and other specific TARP recipients. Yet, Congress announced in its committee report, ''section 382(m) does not authorize the Secretary to provide'' ''special rules that are restricted to particular industries or classes of taxpayers.'' As a result, the earlier TARP Notice 2008-83 was ''inconsistent with the congressional intent'' and of only ''doubtful'' ''legal authority.'' Notice 2010-2 is precisely such an industry-specific rule.

Second, Notice 2010-2 is not a regulation. It is a ''notice.'' The *Mayo* Court declared *Chevron* appropriate where an agency uses ''full notice-and-comment procedures to promulgate a rule.''[16] By contrast, the Supreme Court explained in *Christiansen v. Harris County*, 529 U.S. 576 (2000):

[16] The Treasury is notorious for its cavalier attitude toward the Administrative Procedure Act. In *Intermountain Insurance Service of Vail v. Commissioner of Internal Revenue Service*, No. 10-1204 (June 21, 2011), p. 32 (D.C. Circuit, 2011), the Commissioner ''simultaneously issued immediately effective temporary regulations and a notice of proposed rulemaking for identical final regulations and then held a 90-day comment period [receiving just one comment] before finalizing the regulations.'' The opinion goes on to say that this procedure is ''typical of the Commissioner's practice.''

> Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference. Instead, interpretations contained in formats such as opinion letters are [governed by *Skidmore*].

Turning now to *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the Supreme Court considered the agency's logic, but made its own decision (p. 140):

> We consider that the rulings, interpretations and opinions of the Administrator . . . constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

In *United States v. Mead Corp.*, 533 U.S. 218 (2001), the Court went further and declared that as a general rule an agency interpretation would have to go through notice and comment to receive *Chevron* deference. In Notice 2010-2, Treasury did not try to reason or persuade. It simply declared the rule so. As Smith (2011, pp. 1260, 1261) puts it:

> *Mayo* benefits taxpayers by clarifying that the *Mead* principles apply in tax. When the *Mead* test is applied to revenue rulings, revenue procedures, and notices, the conclusion is that they are not among the types of agency guidance that receive *Chevron*'s high level of deference.
>
> . . . Any pre-*Mayo* case law on the status of revenue rulings, revenue procedures, and notices should generally be considered obsolete unless the opinion reflects *Mead* analysis. The clear conclusion that those forms of guidance do not qualify for the level of deference described in *Chevron* is another benefit to taxpayers from *Mayo*.

Because the Treasury did not follow notice-and-comment procedures, the GM notices would not qualify for *Chevron* deference, even if the statutes they purport to interpret were indeed ambiguous.[17]

4.2 Taxpayer Reliance

Suppose the TARP notices were invalid. Should taxpayers be able to rely on them anyway, since it is the fault of Treasury and not the taxpayer?[18] Notice 2010-2 provides:

> 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.

This is profoundly self-serving, of course. The Treasury cannot change the law by fiat. A bureaucrat cannot give his friend funds illegally and then protect that friend by declaring his friend's reliance protected. If a court held Notice 2010-2 illegal, GM could not cite the notice as authority for deducting $45 billion in NOLs anyway.

The relevant question goes to penalties: May a taxpayer who relies on the notices avoid civil and criminal penalties? As Rogovin and Korb (2008, p. 341) explain:

> As with revenue rulings and revenue procedures, announcements and notices can provide substantial authority sufficient to relieve taxpayers from the negligence and substantial understatement penalties and, consequently, may be relevant to whether certain penalty provisions apply.

[17] We should mention a caveat. In *Intermountain Insurance,* cited earlier, the court gave *Chevron* deference to Treasury regulations in Treasury's appeal, even though those regulations were written after Treasury had already lost in Tax Court. Perhaps Treasury could re-issue the GM regulations with a pretence of notice and comment. The tax provision at issue in *Intermountain*, however, is important and has resulted in split circuits (3–2), and so is likely to go to the Supreme Court. See K. B. Friske and D. Pulliam, ''Circuit Split Deepens on Six-Year Period for Basis Overstatements,'' *Journal of Accountancy*, May 2011.

[18] Before the Treasury and other owners (including the 10 percent given to Old GM) sell enough stock to trigger the 50 percent threshold, use of the NOLs would be legal even without Notice 2010-2. GM is now, however, a publicly traded company and has told the public that the NOLs are part of its assets, though without 2010-2 they will not be if the Treasury sells its stake. Thus, the immediate question would be whether GM has thereby violated federal securities laws.

Sec. 6662 of the code imposes a penalty for any ''substantial understatement of income tax.'' Subsec. (d)(2)(B) protects a taxpayer who relies on ''substantial authority.'' According to the Treasury, its own notices are ''substantial authority'' (Rogovin and Korb 2008, Reg. 1.6662-4(d)(3)(iii)), though it also explains that the ''weight accorded an authority depends on its relevance and persuasiveness'' (Reg. 1.6662-4(d)(3)(ii)).

Consider the weight appropriate to Notice 2010-2. First, the Treasury itself declares it ''substantial authority.'' This is, of course, again self-serving. Acting on behalf of the administration, the Treasury has manipulated tax procedure to route $18 billion to its supporters' car company. In essence, it also argues that its manipulation insulates those favored taxpayers from ''substantial underpayment'' penalties.

Second, Notice 2010-2 does not try to persuade. It simply declares. But if an IRS notice were to announce that Microsoft did not have to pay taxes because Bill Gates paid the Treasury secretary $1 million in bribes, the announcement would hardly give Microsoft substantial authority. Here, the Democratic administration has given a massive tax benefit to one of the party's biggest supporters. Like other labor unions, the UAW provided the Obama campaign with elaborate assistance. Some of the help came in person, and some came as money. From 1989 to 2010, the UAW spent over $27 million on political campaigns, 98 percent of it on behalf of the Democratic Party.[19] In 2008 alone, it spent $2,119,937 on political campaigns, $2,101,187 of that for Democrats.[20]

Suppose that Notice 2010-2 had said:

> The President is grateful to the UAW for the assistance it provided his party. In gratitude for that political support, the Treasury announces that, should it sell the stock that was issued to it pursuant to the Programs . . . and should the sale create 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.

The only difference between this hypothetical notice and the real Notice 2010-2 is the explicit character of the reason for the largesse.

[19] ''Top All-Time Donors, 1989–2010,'' OpenSecrets.org.

[20] ''United Auto Workers,'' OpenSecrets.org.

It is an odd approach to statutory interpretation that would make a notice illegal if it articulates its reason, but legal if it leaves the reason unsaid.

5. LEGISLATIVE RESOLUTION

Return to the problem at stake: the manipulation of the highly arcane minutiae of the corporate tax rules to route huge sums to favored groups. The question is what anyone can do about it.

Political remedies are unlikely to work. Voters do not understand transactions like this well enough to punish a candidate in the next election. Much less will they impeach anyone for a transaction like this. Voters understand politicians who take briefcases stuffed with cash; they do not understand G reorganizations and NOL carryforwards. Congress has complained, asking TARP's inspector general to investigate the validity of the notices and their motivation.[21] Sen. Jim Bunning (R-KY) even introduced a bill with the sole purpose of repealing Notice 2010-2.[22] Unless Congress can override the notices by a veto-proof two-thirds majority, however, it can do little more than badger the administration with its oversight authority and complain to the public.

5.1 The Standing Problem

All this leaves a lacuna in the law. As the GM notices illustrate, it leaves an $18 billion lacuna.

To explore how Congress might try to address the problem, consider the following fantasy IRS notice:

> Internal Revenue Bulletin: 2010-999
> February 24, 2011
> Notice 2011-999
>
> Application of Title 26 to Certain Persons Pursuant to the Emergency Economic Stabilization Act of 2008
>
> I. BACKGROUND
>
> Section 7805(a) of the Internal Revenue Code (''the Code'') provides that except where such authority is expressly given

[21] Office of the Special Inspector General for the Troubled Asset Relief Program, ''Engagement Memo–Review of the Section 382 Limitation Waiver for Financial Instruments Held by Treasury,'' Aug. 10, 2010.

[22] S. 2916 [111th]. The bill was sent to committee and never returned.

> 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.
>
> II. GUIDANCE REGARDING CERTAIN PERSONS
>
> Any funds received by J. Mark Ramseyer or Eric B. Rasmusen shall not constitute ''income'' under Sec. 61 of the I.R.C., and shall be entirely exempt from taxation.
>
> DRAFTING INFORMATION
>
> The principal author of this notice is John B. Doe of the Office of Associate Chief Counsel (Individual). For further information regarding this notice, contact Robert B. Roe at (202) 999-9999 (not a toll-free call).

Few readers would dispute the notion that Notice 2011-999 straightforwardly violates the Code. It does not even try to argue that sparing us from the income tax furthers the purposes of the 2008 stimulus bill. If it did, you, our readers, would laugh. But you could not laugh in court. You would not have standing.

Under current law, voters cannot challenge these transactions in court (see Hickman 2008 for discussion). If a rule benefits some people but does not harm others, nobody will have ''standing'' to challenge it. Justice Powell articulated the point most famously:

> I cannot now imagine a case, at least outside the First Amendment area, where a person whose own tax liability was not affected ever could have standing to litigate the federal tax liability of someone else. (*Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 46 (1975) (Powell, J., concurring))

A more recent example appeared in a Chrysler case in which Justice Roberts held that taxpayers lacked standing to challenge other people's tax benefits. The plaintiffs argued that Chrysler's tax breaks hurt them:

> Plaintiffs principally claim standing by virtue of their status as Ohio taxpayers, alleging that the franchise tax credit

> "depletes the funds of the State of Ohio to which the Plaintiffs contribute through their tax payments" and thus "diminishes the total funds available for lawful uses and imposes disproportionate burdens on them." (*DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332,342 (2006))

Justice Roberts said "No."

> As an initial matter, it is unclear that tax breaks of the sort at issue here do in fact deplete the treasury: The very point of the tax benefits is to spur economic activity, which in turn increases government revenues.
>
> Plaintiffs' alleged injury is also "conjectural or hypothetical" in that it depends on how legislators respond to a reduction in revenue, if that is the consequence of the credit. Establishing injury requires speculating that elected officials will increase a taxpayer-plaintiff's tax bill to make up a deficit; establishing redressability requires speculating that abolishing the challenged credit will redound to the benefit of the taxpayer because legislators will pass along the supposed increased revenue in the form of tax reductions. Neither sort of speculation suffices to support standing. (*DaimlerChrysler*, 547 U.S. at 344)

Various authors have proposed reforms to the standing rules (e.g., Rosenburg 1996). Unfortunately, their proposals simultaneously increase the incidence of frivolous suits, venue shopping, and collusive litigation, as Stearns (1995) points out. In the name of policing frivolous litigation, GM (and Ramseyer and Rasmusen) keep their special deals. Although Treasury cannot get away with arbitrary interpretations of the statutes that increase someone's taxes (since that person would have standing to object in court), it can get away with equally unreasonable interpretations that reduce someone's taxes.[23]

One might also think that giving away tax breaks was criminal. In fact, the Anti-Deficiency Act, 31 U.S.C. Sec. 1341, makes it a criminal offense for a government officer or employee to give away government money that Congress did not appropriate (he may not

[23] For examples of how Treasury gets around Supreme Court decisions using taxpayer-favorable (and hence unreviewable) regulations, see Polsky (2004).

''make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation,'' 31 U.S.C. Sec. 1341(a)(1)(A)). If he does, 31 U.S.C. Sec. 1350 provides that he may be fined up to $5,000 or imprisoned for up to two years, and 31 U.S.C. Sec. 3528 requires him to repay the improper expenditure.

Should the Treasury secretary fear the possibility of spending two years in jail and having to repay $12 billion (perhaps splitting the amount with his predecessor, Henry Paulson)? Treasury secretaries have thought about this before; in a November 2008 speech, Paulson said that because of the Anti-Deficiency Act, Treasury could not have bailed out Lehman Brothers.

There are several reasons why the secretary need not fear at the present time. To start, the Anti-Deficiency Act speaks of ''expenditures.'' A ''tax expenditure,'' no matter how big or unlawful, might reasonably be excluded from its scope. Whether it is excluded probably does not really matter, though. Under 31 U.S.C. Sec. 3528(b)(1)(B), the comptroller general may relieve the spendthrift official from liability for repayment if the expenditure was made in good faith or not specifically prohibited by law (see also 31 U.S.C. Sec. 3527). What is more, criminal charges would have to be brought by the attorney general or his subordinates, and they are part of the administration. We do not allow private prosecutions for federal crimes.[24]

Thus, U.S. law must be changed if we are to be able to deal with unlawful tax expenditures in any way other than trying to explain them to voters so as to unseat the offending official at the next election.

5.2 Three Alternatives

There are three possible changes in law that could discourage such tax expenditures in the future. Below, we consider each one.

[24] Another obstacle to unlawful tax rules, in principle, might be the ethical code of the Bar. What would a Good Man IRS attorney do if asked to authorize an unlawful notice? What would a Bad Man IRS attorney do out of fear of the Bar? We do not know what the Good Man would do, but we are sure the Bad Man need not fear disbarment. See Kwon (2010) for a discussion of the ethical obligations of IRS attorneys generally.

5.2.1 The Canadian Rules

In Canada, a taxpayer does have standing. Public-interest standing was extended to taxpayers in *Harris v. Canada (Minister of National Revenue),* [2001] 4 F.C. 37 (Ct. of App.).

George Harris alleged that the minister of national revenue acted in bad faith and violated his fiduciary duty when he overruled his professional staff and made a favorable tax ruling (an ''advance ruling'') at the request of influential taxpayers, the billionaire Bronfman family.[25] Harris asked the court for a declaration that the minister of national revenue was obliged to try to collect the taxes from a particular transaction.

An appellate court ruled that Harris did have standing, saying:

> In *Borowski*, Martland J. for the majority held that to obtain public interest standing, a plaintiff must (1) demonstrate that there is a serious issue as to the invalidity of legislation, (2) that the plaintiff has a genuine interest, and (3) there is no other reasonable and effective manner to bring the issue before the court. (*Harris v. Canada (Minister of National Revenue),* [2001] 4 F.C. 37 (Ct. of App.), referring to *Minister of Justice of Canada et al. v. Borowski* [1981] 2 S.C.R. 575))

A few years after *Borowski* gave standing for constitutional law issues, *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, extended it to standing for statutory issues. Therefore, the *Harris* court gave standing to Harris to contest the application of the tax code. In *Harris v. Canada (Minister of National Revenue),* 2001 DTC 5322 (Trial Div.), the trial court even granted Harris's application for discovery of internal government documents relating to the Bronfmans' requests for an advance ruling.

Harris did lose his case in the end, but on the merits rather than on standing. In *Harris v. Canada (Minister of National Revenue),* [2002] 2 F.C. 484 (Trial Div.), the trial court ruled against Harris on the merits, finding no bad faith on the part of the government and no fiduciary duty violation. It even accepted his argument that he was entitled to be paid for out-of-pocket costs because he had benefited the public by arguing the case despite his loss (which in Canada

[25] K. Foss, ''Judge Scolds Tax Officials, but Crusader Loses Case,'' *Globe and Mail*, December 20, 2001.

would ordinarily mean he would pay the other side's costs, though in this case the government waived its claim against him).

English courts have also given people standing to contest tax policy, albeit only if a genuine public interest is at stake. See the 1978 R.S.C., Ord. 53 and *Inland Revenue Comrs v. National Federation of Self-Employed and Small Businesses Ltd*, [1981] 2 All ER 93 (House of Lords). In that case, the Federation challenged a tax amnesty given to casual employees in the printing industry. The Federation lost, but only because the Law Lords all agreed that the government clearly had the discretion to grant an amnesty in this particular case.

Thus, one policy change for the United States would be to adopt the Canadian or English law of standing. We are hesitant to propose this change, however, because of the problems the United States has had with frivolous litigation, forum shopping, and activist judges (on which see, e.g., the forthcoming book edited by F. Buckley).

5.2.2 Congressional Litigants

To limit Treasury's ability to offer special deals to political favorites, we offer two alternatives that might yet constrain frivolous suits. First, Congress could offer standing to members of Congress:

Tax Regulation Enforcement Bill

> Any two members of Congress shall have standing to challenge in court any interpretative or other notices, rules, regulations, or guidelines of the Internal Revenue Service as arbitrary and capricious. The members bringing the action need not be current members of Congress and need not have voted for or against the statute in question. Should they win, they shall each be entitled to liquidated damages of $1,000. The Declaratory Judgement Act (28 U.S.C. sec. 2201) shall not apply to this legal action.[26] As a remedy, the Court may issue injunctions as appropriate, but not temporary restraining orders or preliminary injunctions.

[26] The Tax Anti-Injunction Act of 1867, 26 U.S.C. Sec.7421(a), says, ''no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.'' This provision would continue to apply and would restrict our new statute to injunctions to collect more tax, but not less. We suspect that this would help prevent congressmen from filing frivolous suits to demonstrate sympathy with their constituents.

> Any number of these suits may be filed concurrently. They shall be filed in any District Court of the United States.

Limiting challenges to just the grounds of ''arbitrary and capricious'' Treasury rules would narrow the range of suits drastically. The court need only look at the second part of the *Chevron* test ruling for the Treasury unless the statute is unambiguously contrary to the Treasury position. Yet these challenges would narrow the range of unlawful actions Treasury could take even more. There are, at most, dozens of ways the ambiguities in a sentence can be construed, but there is an infinite number of ''interpretations'' that are totally unfounded. A congressman could not successfully challenge an IRS interpretation of ''after several years'' as being anywhere from 2 to 10 years, but he could challenge an interpretation as ''after 200 years'' or ''after the taxpayer has traveled to Kashmir.''[27]

Requiring two congressmen rather than one will help to reduce the number of frivolous suits, though we recognize that we will not eliminate them. We originally thought to require five congressmen rather than two but recalled how in 1940 Vichy, the resolution that France needed a new constitution passed by 395–3 in the Chamber of Deputies and 229–1 in the Senate.[28]

Allowing more than one suit and in different courts will prevent collusive suits that block review. If only the Tax Court had jurisdiction, for example, then a pro-Treasury plaintiff could bring suit there, ''take a dive,'' and refrain from appealing—thereby blocking a real plaintiff.[29]

5.2.3 A Qui Tam Statute

An alternative to allowing congressmen to challenge Treasury notices would be a *qui tam* statute. A short version, worded for

[27] ''After the taxpayer has traveled to Kashmir'' is ridiculous, of course. But we must keep in mind that the Bad Man asks not whether an interpretation is ridiculous but whether he can get away with it.

[28] W. Shirer, *The Collapse of the Third Republic* (New York: Simon and Schuster, 1969), p. 933. Two Socialist and one Radical deputy voted against; the only dissenting senator was the right-wing Marquis de Chambrun.

[29] Congress cannot completely delegate the executive power to enforce the laws. In *Unique Product Solutions, Ltd. v. Hy-Grade Valve, Inc.* (February 23, 2011, N.D. Ohio), the court held that the president could not give a private plaintiff complete authority to pursue a criminal case against someone who labeled a product as patented after the patent expired. To do so was, it explained, an unconstitutional delegation of the president's duty to ''take care'' that the laws be faithfully executed.

contrast to allow many more suits than our previous statute, might go as follows:

Qui Tam Tax Regulation Enforcement Bill

> It shall be illegal for any employee of the Treasury Department to misinterpret a federal statute. Any employee found willfully to have misinterpreted a statute shall pay a civil fine of $500. Any two members of Congress may bring a civil action against such violator in any District Court of the United States.

Conceptually, the *qui tam* statute performs much the same function as the standing rule. Unfortunately, it does present the same non-trivial risk of frivolous litigation. Either version enables two members of Congress to file suit to challenge any action by the Treasury to route funds to politically favored institutions.

It may seem imprudent to enlarge the power of the courts in a notoriously litigious United States already known for accusations that judges abuse their power by imposing their personal political views. The policy area we are opening up to judicial review, however, is not one known for judicial activism. Indeed, it is generally thought that judges dislike deciding tax cases. Even Justice Antonin Scalia, who made his name in administrative law in his academic career, said, ''The constitutional work can be dull, too, but it's not like the tax code. Philosopher-kings do not read the Internal Revenue Code, believe me.''[30] Justice William Douglas, famed for his expertise in business law and his activism, wrote to an ill Justice Black, ''Take good care, lie low, and forget about these dull tax cases—which are now droning on and on'' (Richards 2001). And Judge Learned Hand, known for his common-law decisions in private law, said in 1947:

> In my own case the words of such an act as the Income Tax, for example, merely dance before my eyes in a meaningless procession: cross-reference to cross-reference, exception

[30] ''A Look at the Hidden World of U.S. Associate Justice Antonin Scalia,'' *National Post*, June 12, 1992, as quoted in Richards (2001). Note, too, what former tax lawyer Justice Blackmun said: ''If one's in the doghouse with the Chief, he gets the crud. He gets the tax cases and some of the Indian cases, which I like, but I've had a lot of them.'' (R. Woodward and S. Armstrong, *The Brethren* [New York: Simon and Schuster, 2005].)

> upon exception—couched in abstract terms that offer no handle to seize hold of—leave in my mind only a confused sense of some vitally important, but successfully concealed, purport, which it is my duty to extract, but which is within my power, if at all, only after the most inordinate expenditure of time. I know that these monsters are the result of fabulous industry and ingenuity, plugging up this hole and casting out that net, against all possible evasion; yet at times I cannot help recalling a saying of William James about certain passages of Hegel: that they were no doubt written with a passion of rationality; but that one cannot help wondering whether to the reader they have any significance save that the words are strung together with syntactical correctness.

One can only imagine what the less economics-minded judges must think about tax cases. Yet it is perhaps in tax cases—particularly business tax cases—that even the limited intelligence of the courts most exceeds the intelligence of the voter, just as it is there that we can expect judges to face the least temptation to care enough about policy to impose their own preferences instead of trying to follow the law.[31] Legislatures, in contrast, while also having neutral ideological preferences, can use the opacity of tax law to transfer large sums of money to sophisticated supporters or to conceal extravagance with public funds. Criminal procedure presents the opposite combination of relative expertise and ideological conflict of interest. Judges seem to like deciding this kind of case, if we look at the willingness of the U.S. Supreme Court to accept cert, despite the fact, or perhaps because of the fact, that they involve situations that the average voter can understand and laws that politicians cannot use to transfer money from one interest group to another. (See Stuntz 1997, 2006, for close analysis of the pathological judicialization of the criminal justice process.)

6. CONCLUSIONS

Authority over tax administration is authority easy to abuse. I.R.S. Notice 2010-2 and its predecessors purported to exempt companies

[31] The incentives and expertise of Supreme Court clerks are perhaps just as important, since they customarily do the first cut of cert petitions in deciding which cases are worth consideration by the Court. How many clerks have taken a tax course? We have not found articles on the self-interest of clerks in cert petition triage, but on more measurable considerations in tax cases and cert, see Staudt (2004).

partly owned by the government from taxes they would have had to pay had their owners been entirely private. The case of GM is the clearest in terms of the bailout of a favored constituency because that transaction resulted in a large subsidy to a labor union that had strongly supported the administration's party. Yet all of the notices helped hide the real cost of the TARP bailouts from the public.

It is hard for Congress to overturn executive actions that have no basis in statute, requiring as it does the agreement of two-thirds of both the Senate and the House of Representatives to override a presidential veto. The natural place to check invalid interpretations of statutes is in the courts. Currently no one has standing to challenge tax interpretations that benefit a few at the expense of taxpayers in general. Toward that end, we propose giving standing to members of Congress.

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Comment

Efraim Benmelech

This provocative paper by Mark Ramseyer and Eric Rasmusen provides a useful overview of the restructuring of General Motors, and in particular highlights the political economy of the GM deal in which the U.S. Treasury wore two hats, being both an equity holder and a regulator. They focus on one of the main assets GM had on its balance sheets: its net operating losses (NOLs) valued at $45 billion. The reorganization of ''Old GM'' into ''New GM'' enabled New GM to retain the NOLs. Owning the NOLs increased the value of New GM and facilitated a restructuring deal that was favorable to the United Auto Workers (UAW) pension and health plans. However, as Ramseyer and Rasmusen argue, because of the 1986 Tax Reform Act, once the Treasury sells its holdings in New GM, the NOLs should be canceled and the value of New GM should decline dramatically.

THE GM BANKRUPTCY

Ramseyer and Rasmusen do an excellent job describing the details of the GM case, and the reader should refer to their article for the fine details. In my discussion, I provide only a brief summary of the facts.

GM filed for bankruptcy under Chapter 11 of the Bankruptcy Code. Under this reorganization, Old GM was sold under Section 363 of the Bankruptcy Code to a new company, New GM. Typically, when one company acquires another company's assets, it does not acquire its tax losses, but in this specific case, New GM attained the NOLs of Old GM.

However, given that the Treasury plans to sell the shares it acquired in New GM, a problem may arise in the future: Under the

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1986 Tax Reform Act, a corporation's ability to carry forward NOLs (and other tax credits) is limited when more than 50 percent of the stock changes hands over a three-year period (Ross, Westerfield, and Jaffe 2006). To solve this problem, the Treasury issued a series of notices declaring that Section 382 of the tax code does not apply to the Treasury. According to these notes, when the Treasury sells its shares in New GM, Section 382 will not be triggered even if more than 50 percent of ownership will change hands.

RAMSEYER AND RASMUSEN'S CRITIQUE

Ramseyer and Rasmusen make two points: First, Treasury had no *legal* justification to exempt GM NOLs from Section 382, hence the Treasury gave GM an illegal tax break. Second, the Treasury had no *economic* justification to exempt the NOLs from Section 382. In fact, Ramseyer and Rasmusen argue, there is a political economy explanation in which the exemption from Section 382 led to overvaluation of GM, which in turn made the government's position in GM look better and resulted in a transfer from the Treasury to other stakeholders—most notably the UAW, which held unsecured claims of $21 billion in GM.

THE ECONOMIC RATIONALE

In my discussion, I will focus on the second point, according to which the Treasury had no economic justification to exempt GM's NOLs from Section 382. In order to assess the economic rationale behind the decision to exempt the NOLs from taxes, we need to evaluate the cost to the Treasury if the NOLs were not allowed to be carried forward to New GM. Ramseyer and Rasmusen argue that the UAW, as a junior creditor, got a very good deal in the restructuring of GM and that crafting such a deal was possible because of the ''overvaluation'' of GM stemming from the exemptions of the NOLs from Section 382. However, what would have been the cost to the Treasury if it failed to reach an agreement with the UAW?

Consider, for example, the case of GM retirees' medical benefits. As part of the restructuring, GM's Voluntary Employees' Beneficiary Association (VEBA) received from GM $2.5 billion of new notes, $6.5 billion in preferred stock with a 9 percent cash dividend, 17.5 percent of New GM common stock, as well as warrants for an additional 2.5 percent of the common stock of New GM. Ramseyer

and Rasmusen argue that the Treasury actions led to a transfer to the UAW VEBA, which in turn is responsible for providing medical benefits to retirees.

Yet, had the restructuring of GM failed, VEBA's assets would have been depleted, and it would have been unable to pay benefits in 2009.[1] As a result, it is likely that many more of GM's retirees would have had to rely on federal health insurance programs such as Medicare, imposing additional costs on the Treasury.

What about GM's pension plans? The restructuring agreements of GM provided that New GM take over the responsibility for the GM UAW pension plan. However, had the restructuring of GM failed, those pension liabilities would not have been assumed by New GM but would have rather been reneged. Moreover, had GM dumped its pension, it could have triggered other companies with underfunded pension plans to make a similar play. For example, other automakers could have tried to rid themselves of their defined benefit plans.[2]

The wrinkle is, however, that GM's UAW pensions are insured by the Pension Benefit Guaranty Corporation (PBGC), which is a U.S. government agency. Had GM's pension plans collapsed, the PBGC would have picked up a large part of the tab. As Brown (2008) argues, since the PBGC receives no tax revenues, and given that it relies on premiums that are set by Congress, the PBGC's financial position has deteriorated, having in 2006 an $18.9 billion deficit. This is another example in which the Treasury could have ended up paying more had the restructuring of GM failed—and it is likely that GM would have failed to emerge from bankruptcy if its NOLs were not allowed to be carried forward.

SUMMARY

One can think about additional implications of a failure to restructure GM. Those include—but are not limited to—failures of auto-parts makers and suppliers, further increases in unemployment, and other forms of local economic activity, resulting in even higher costs for the federal government.

[1] See "A Message to UAW GM Retirees" available at http://bankrupt.com/misc/gm_uawretireeletter.pdf.

[2] See, for example, Benmelech, Bergman, and Enriquez (2011) for an analysis of pension dumping in the airline industry.

There is some rationale in having the Treasury structure a deal that leads to higher recovery by the UAW. An analysis of the transfer from Treasury to the UAW needs to take into account the different hats and pockets of the government. It is not clear that, on economic grounds, Treasury was not making the correct calculations.

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Comment

F. H. Buckley

Mark Ramseyer and Eric Rasmusen ask three questions in their paper. First, was the Treasury notice that allowed the reorganized ''New'' General Motors to take the benefit of ''Old'' GM's past operating losses inconsistent with American tax law? Second, if it was inconsistent, might this have been an abuse of executive power? Third, if it was an abuse, is there a remedy for this? What the answers to the first two questions might be, I do not know. The third question I think I can answer.

I shall assume that the Treasury notice was inconsistent with general principles of American law. If so, the Treasury Department's decision to waive compliance with the tax laws amounted to a gift to all of the debt- and equity-holders of New GM other than the United States, including the United Auto Workers ($18.5 billion) and the Canadian and Ontario governments ($8.2 billion). Ramseyer and Rasmusen suggest that this amounted to a sweetheart deal for a labor union that was a prominent political supporter of the Obama administration. The gift, moreover, was not easily detected, and this makes it all the more suspicious.

This is not to say that the Treasury notice was corrupt and devoid of reason. It is true that much of GM's trouble had resulted from an overly generous contract with the UAW; that the sale to New GM gave an unsecured creditor, the UAW, more than it would have received under the priority rules of a Chapter 11 bankruptcy; that the claims of equally senior creditors were disregarded; that rescue bids from third parties were not accepted unless they offered the same sweetheart deal for the UAW; that, since firms in Chapter 11 have the ability to reject union contracts, GM might have ripped up

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the UAW contract; that, given unemployment rates, one might have thought that an employer would be in the driver's seat; and that investors must now ask how strongly America is committed to the rule of law (see Skeel 2011). First, there was the GM bailout, then there was the UAW bailout. However, the propriety of the administration's decision is a deeply partisan issue, like every administration decision today, and it is not without its defenders who argue that it is prudent for a firm in reorganization to make a special accommodation for its employees, on whose loyalty the success of the firm depends. And so I suspend judgment on the second question.

One thing I do know: the gift to Canada was a splendid method of reaffirming the traditional friendship of the American and Canadian peoples.

A JUDICIAL REMEDY?

That leaves the third question. Assuming that the tax break was inconsistent with U.S. tax law and that this might have been an abuse of executive power, what is the remedy for it? Ramseyer and Rasmusen argue that political solutions, in which a misbehaving government is held accountable by voters, are not feasible. The separation of powers under the Constitution immunizes the executive, and in any event, voters are too ignorant to deal with matters as convoluted as this. In place of a political remedy, they propose a judicial one: let the matter be litigated before the courts.

If the courts are to confront this issue, two questions arise: First, should the executive *ever* have the discretion to waiver compliance with a law for the benefit of a single person or group? Second, if the executive does have such power, is it impracticable for a court to distinguish between a proper and improper exercise of that discretion? If the answer to both questions is yes, then the Ramseyer-Rasmusen proposal is a nonstarter.

At first glance, it might seem odd that the executive should ever have the power to dispense with a law of general application on behalf of anyone, for good reason or bad. The dispensing power would seem to invite abuse, and indeed was the subject of the first two articles of the 1689 English Bill of Rights:

> The Lords Spiritual and Temporal and Commons . . . do . . . (as their ancestors in like case have usually done) for the

> vindicating and asserting their ancient rights and liberties declare:
>
> > That the pretended power of suspending the laws or the execution of laws by regal authority without consent of Parliament is illegal;
> >
> > That the pretended power of dispensing with laws or the execution of laws by regal authority, as it hath been assumed of late, is illegal.

This would make the Ramseyer-Rasmusen proposal an easy matter for any judge. Every executive waiver would be null unless Parliament or Congress had specifically authorized it in the legislation in question. And there is indeed something to be said for a prophylactic measure of this sort. When the executive has the power to waive compliance with a law, Congress can be expected to take less care in drafting it, with the result that more bad laws are enacted. Moreover, the need to repeal the law is lessened, with the result that bad laws will stay on the books. There is, further, a concern that the executive will cut special deals for its friends, imposing the whole cost of a bad law on its enemies. For example, that concern has been voiced in the waivers for Obamacare that have been granted to labor unions (Hemingway 2011; are we seeing a pattern here?). Finally, giving the executive the power to dispense with compliance with a law might be thought to weaken the separation of powers by strengthening an already oversized executive branch (Posner and Vermeule 2011).

However, a flat prohibition of executive waivers would undoubtedly go too far. Think of waivers granted to states to come up with alternatives to federal welfare or educational mandates. Even Locke saw a value in the dispensing power. The legislature will inevitably enact overbroad laws, he said, which only the executive can easily remedy:

> The good of the society requires, that several things should be left to the discretion of him that has the executive power: for the legislators not being able to foresee, and provide by laws, for all that may be useful to the community, the executor of the laws having the power in his hands, has by the common law of nature a right to make use of it for the good of the society, in many cases, where the municipal law has

> given no direction, till the legislative can conveniently be assembled to provide for it. . . . Nay, it is fit that the laws themselves should in some cases give way to the executive power. (Locke 1689, at XIV)

For that matter, the dispensing power asserted by King James II, to which Parliament so strenuously objected, would have freed Catholic priests from the most sanguinary of punishments for the exercise of the religion they shared with their monarch. Even that good Whig, T. B. Macaulay, could find no fault with this exercise of the king's prerogative:

> For to place a Papist on the throne, and then to insist on his persecuting to the death the teachers of that faith in which alone, on his principles, salvation could be found, was monstrous. In mitigating by a lenient administration the severity of the bloody laws of Elizabeth, the King violated no constitutional principle. He only exerted a power which has always belonged to the crown. Nay, he only did what was afterwards done by a succession of sovereigns zealous for Protestantism, by William, by Anne, and by the princes of the House of Brunswick. (Macaulay 1849, Ch. 4)

Assume therefore that the executive has a dispensing power. Assume further that some waivers are benign and some corrupt, that (as Ramseyer and Rasmusen put it) the executive might be a Good Man or a Bad Man. The role of the courts, then, would be to distinguish between the two kinds of executives, between a proper and improper exercise of discretion in granting waivers.

The quite obvious problem here is that making such a distinction would necessarily involve political questions that courts wisely decline to answer. Would we want to turn over to unelected judges the question whether the bailout was needed and whether it amounted to a sweetheart deal to a loyal supporter of the Democratic Party? If we could do so, why would we need a legislature or an executive? This explains why, in a case cited by Ramseyer and Rasmusen, the Supreme Court wisely refrained from granting standing to taxpayers who claimed they had been prejudiced because another taxpayer benefited from a waiver.[1] In similar circumstances,

[1] *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006).

Canadian courts granted standing to a complaining taxpayer, but then rejected his claim because he had failed to show that the tax authorities had acted in bad faith. Same result; the American courts just got there faster.[2]

A POLITICAL SOLUTION?

If political problems should be kept from the courts, should we then look to the political process for a remedy and leave politics for the politicians? But Ramseyer and Rasmusen argue that this would not cure the UAW bailout. I think the authors are right, but for the wrong reason.

Ramseyer and Rasmusen first note that the separation of powers in the Constitution immunizes executive decisions, such as the GM reorganization, unless Congress is able to muster a supermajority to override a likely presidential veto. From this they conclude that corruption of this kind cannot be policed through the political process. There is something to this, but the paper nevertheless fails to account for the fact that parliamentary governments have been defeated for the same kinds of sweetheart deals, notwithstanding the dominance of the prime ministers in parliamentary systems.

In Canada, Prime Minister Pierre Trudeau famously described his backbenchers as ''nobodies,'' and their lack of power was recently underlined by another Liberal prime minister, Paul Martin:

> Over the last forty years or so, Canadians have seen the influence of individual members of parliament eroded as the power of the prime minister and the executive branch of government grew. . . . They vote according to the dictates of their party, and too often, when their party is in power, no one in the government cares particularly what they have to say. (Martin 2008, pp. 244–245)

The party, in turn, is dominated by the prime minister's office, which has no parallel in American politics.

Like American presidents, then, Canadian prime ministers are largely immunized from legislative control. There is always a possibility of a backbencher revolt in Parliament, but these happen very rarely. Instead, a prime minister takes his government to the people

[2] *Harris v. Canada (Minister of National Revenue)*, [2002] 2 F.C. 484.

in an election, and, if defeated, steps down and is replaced as prime minister by the opposition and as party leader by his party. And that is just what happened after a scandal that in some ways resembles the UAW sweetheart deal. The ''sponsorship scandal,'' in which a Liberal government directed revenues to favored advertising firms from 1996 to 2004 to promote the image of Canada in Quebec, was a prominent reason for the government's defeat in the 2006 general election. The government gave out $2 million in no-bid contracts to its friends, and $1.5 million was awarded for work that was never done. Small potatoes compared to the New GM reorganization, but enough to topple a government.

The Canadian example shows the weakness of another Ramseyer-Rasmusen argument against political solutions to government misbehavior. They argue that voters are irredeemably ignorant about anything so convoluted as the GM reorganization (and, having read their paper, I see the force of this objection). If so, they ask, how could we expect voters to discipline their bad executive?

And yet, in 2006, Canadian voters turned out a government that engaged in an equally questionable and obscure payoff. What Ramseyer and Rasmusen forget is the role that informational intermediaries can play in reducing a complicated set of facts to a simple message: a government of rogues is giving away your money to its friends.[3] These intermediaries include political parties (which would not exist if they failed to cure an informational asymmetry), the media (new and old), and (in Canada at least) government watchdogs. The sponsorship scandal came to light because Auditor-General Shelia Fraser had a nose for corruption and a taste for digging up government shenanigans. She became a media figure in her own right, and in a CBC poll was ranked as 66th on a list of the ''Greatest Canadians'' (behind Pamela Anderson but ahead of Joni Mitchell).

That couldn't happen here. It's hard to imagine an American comptroller general becoming a media figure. In fact, when President Obama fired Inspector General Gerald Walpin after the latter had suspended an Obama supporter for financial misdealings (*Wall Street Journal* 2009), there was barely a ripple of protest. This sort of thing helps to explain

[3] Voters are regrettably ignorant about economics, as noted in Caplan (2007). However, they seem more than able to discipline a government that has been tarnished by scandal, as the Canadian example shows.

Table 1
Transparency International's Perception of Corruption Index

	Rank	Score
Denmark	1	9.3
Sweden	4	9.2
Canada	6	8.9
Australia	8	8.7
Switzerland	8	8.7
Hong Kong	13	8.4
Germany	15	7.9
Japan	17	7.8
United Kingdom	20	7.6
United States	**22**	**7.1**

Source: Transparency International Corruption Perception Index 2010, http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results.

why the United States does not come out particularly well on cross-country measures of corruption. Transparency International conducts surveys of business leaders on their perceptions about bribery, kick-backs, and public-sector anti-corruption efforts, and it ranks the United States behind many of its first-world competitors.[4]

This likely understates America's corruption problem, if corruption is understood to embrace wasteful congressional earmarks. One doesn't see legislative earmarks in Trudeau's Parliament of nobodies. Take Ruth Ellen Brosseau M.P., for example. In the 2011 Canadian election, the voters of Berthier-Maskinongé in Quebec elected the comely Brosseau, a 27-year-old barmaid. Brosseau did not visit the riding during the election campaign because she did not speak the language, and instead holidayed in Las Vegas. Her party's website notes that ''one of her passions is rescuing and rehabilitating injured animals. For many years Ruth Ellen has committed her time and energy to finding homes for stray animals in her community.'' Did I mention she is comely?

When members of Parliament are ''nobodies,'' voters don't expect them to bring any pork back to the riding. Instead, any pork comes from the national party, which has broader incentives than, say, a

[4] The Transparency International corruption rankings are quite similar to those of the World Bank. See ''Worldwide Governance Indicators,'' www.worldbank.org.

John Murtha does. Brosseau might not possess Murtha's legislative skills, but a parliament of Brosseaus more closely resembles the idealized assembly described by Edmund Burke in his Address to the Electors of Bristol, an assembly ''of *one* nation, with *one* interest, that of the whole; where, not local purposes, not local prejudices, ought to guide.''[5]

In sum, the Ramseyer-Rasmusen conclusion that the political process will not afford a remedy for the UAW bailout is likely correct. But it's not because the executive is too strong; and it's not because voters are too stupid to understand political corruption when it is pointed out to them. Rather, it's because the bailout is business as usual here.

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[5] This is not to say that pork barrel spending is unknown in parliamentary systems. On average, government spending in Canada is higher in constituencies represented by the party in power. See Milligan and Smart (2005).

Exhibit 23

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-07(2)C
Corporation Tax
March 19, 2007

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C060824B

On August 24, 2006, a Petition for Advisory Opinion was received from Deloitte Tax LLP, Two World Financial Center, New York, NY 10281.

The issues raised by Petitioner, Deloitte Tax LLP, are:

1. Whether, in determining the New York State net operating loss deduction for a group of corporations filing a combined franchise tax report under Article 9-A of the Tax Law, the provisions of Internal Revenue Code (IRC) section 382 and the separate return limitation year (SRLY) overlap provisions of U.S. Treasury Regulation section 1.1502-21(g) are to be applied.

2. Whether, in computing the limitation on the use of net operating losses under Article 9-A of the Tax Law, the SRLY limitation applies to Corporation A's acquisition of Corporation B or Corporation A's acquisitions of Corporation C, Corporation D, and Corporation E as described below.

3. Whether, in computing the limitation on the use of net operating losses under Article 9-A of the Tax Law, the IRC section 382 limitation applies to Corporation A's use of the net operating losses of Corporation B, Corporation C, Corporation D, and Corporation E as described below.

Petitioner submits the following facts as the basis for this Advisory Opinion.

On October 24, 2001, Corporation A acquired all of the outstanding stock of Corporation B in a transaction covered by IRC section 382.

For the taxable year 2002, Corporation B and its subsidiaries were included in Corporation A's federal consolidated return and its combined franchise tax report under Article 9-A of the Tax Law.

At the time of the acquisition of Corporation B by Corporation A, Corporation B and its subsidiaries had a total federal and New York State net operating loss (NOL) carry forward of $469 million and $316 million, respectively.

The IRC section 382 NOL deduction limitation applicable to the Corporation B NOL for the taxable year 2002 was $134 million. For federal income tax purposes pursuant to Treasury Regulation section 1.1502-21(g)(1), the SRLY rule pursuant to Treasury Regulation section 1.1502-21(c)(1)(i) did not apply since the provisions of IRC section 382 applied.

For the taxable year 2002, Corporation A deducted $90 million of Corporation B's NOLs on its combined franchise tax report under Article 9-A of the Tax Law.

On November 17, 1999, Corporation A acquired 57% of all outstanding shares of Corporation E (including its subsidiaries, Corporation C and Corporation D) to supplement the 43% of Corporation E that was already owned by Corporation A. This transaction was covered by IRC section 382. As a result of this transaction, Corporation E, Corporation C, and Corporation D were included in Corporation A's federal consolidated returns and New York State combined franchise tax reports for the taxable years 2000, 2001, and 2002.

As of November 17, 1999, Corporation E and its subsidiaries, Corporation C and Corporation D, had federal and New York NOLs of $219 million and $184 million ("Corporation E NOLs"), respectively. For the taxable year 2000, the IRC section 382 limitation on this NOL was $433 million.

As of November 17, 1999, in addition to the Corporation E NOLs, Corporation C and Corporation D had a federal and New York NOL carry forward of $55 million and $39 million ("Corporation C and D NOLs"), respectively. These NOLs were from taxable years prior to the year when Corporation E acquired ownership of Corporation C and its subsidiary Corporation D. (Corporation E acquired all of the stock of Corporation C on November 17, 1998.) For the taxable years 2000, 2001, and 2002, the IRC section 382 limitations relative to the Corporation C and Corporation D NOLs were $29 million, $16 million, and $16 million, respectively.

For taxable year 2000, since the IRC section 382 limitation amount on the Corporation E NOLs was in excess of the available New York NOLs, the entire New York NOL was deducted in computing combined entire net income for purposes of Article 9-A of the Tax Law. For federal income tax purposes pursuant to Treasury Regulation section 1.1502-21(g)(1), the SRLY rule pursuant to Treasury Regulation section 1.1502-21(c)(1)(i) did not apply since the provisions of IRC section 382 applied.

With respect to the Corporation C and Corporation D NOLs for the taxable year 2000, since the IRC section 382 limitation amount of $29 million was less than the available New York NOLs, the amount of NOL deducted in computing combined entire net income for purposes of Article 9-A of the Tax Law was limited to $29 million. For taxable year 2001, the IRC section 382 limitation was in excess of the available New York NOLs, and therefore, the remaining New York NOLs were deducted in computing combined entire net income for purposes of Article 9-A of the Tax Law. For federal income tax purposes pursuant to Treasury Regulation section 1.1502-21(g)(1), the SRLY rule pursuant to Treasury Regulation section 1.1502-21(c)(1)(i) did not apply since the provisions of IRC section 382 applied.

Applicable law and regulations

IRC section 172(a) allows a NOL deduction and provides:

Deduction allowed. — There shall be allowed as a deduction for the taxable year an amount equal to the aggregate of (1) the net operating loss carryovers to such year, plus (2) the net operating loss carrybacks to such year. For purposes of this subtitle, the term "net operating loss deduction" means the deduction allowed by this subsection.

IRC section 382 contains rules for a limitation on NOL carryforwards and provides, in part

(a) General rule. — The amount of the taxable income of any new loss corporation for any post-change year which may be offset by pre-change losses shall not exceed the section 382 limitation for such year.

(b) Section 382 limitation. — For purposes of this section —

(1) In general. — Except as otherwise provided in this section, the section 382 limitation for any post-change year is an amount equal to —

(A) the value of the old loss corporation, multiplied by

(B) the long-term tax-exempt rate.

Treasury Regulation section 1.1502-21 contains rules for the computation of consolidated NOL deduction and provides, in part:

(a) *Consolidated net operating loss deduction*. The consolidated net operating loss deduction (or CNOL deduction) for any consolidated return year is the aggregate of the net operating loss carryovers and carrybacks to the year. The net operating loss carryovers and carrybacks consist of—

(1) Any CNOLs (as defined in paragraph (e) of this section) of the consolidated group; and

(2) Any net operating losses of the members arising in separate return years.

(b) *Net operating loss carryovers and carrybacks to consolidated return and separate return years*. Net operating losses of members arising during a consolidated return year are taken into account in determining the group's CNOL under paragraph (e) of this section for that year. Losses taken into account in determining the CNOL may be

carried to other taxable years (whether consolidated or separate) only under this paragraph (b).

(1) *Carryovers and carrybacks generally*. The net operating loss carryovers and carrybacks to a taxable year are determined under the principles of section 172 and this section….

* * *

(c) *Limitations on net operating loss carryovers and carrybacks from separate return limitation years* — (1) *SRLY limitation* — (i) *General rule*. Except as provided in paragraph (g) of this section (relating to an overlap with section 382), the aggregate of the net operating loss carryovers and carrybacks of a member arising (or treated as arising) in SRLYs that are included in the CNOL deductions for all consolidated return years of the group under paragraph (a) of this section may not exceed the aggregate consolidated taxable income for all consolidated return years of the group determined by reference to only the member's items of income, gain, deduction, and loss….

* * *

(g) *Overlap with section 382* — (1) *General rule*. The limitation provided in paragraph (c) of this section does not apply to net operating loss carryovers … when the application of paragraph (c) of this section results in an overlap with the application of section 382….

Section 208.9(f) of the Tax Law provides, in part:

A net operating loss deduction shall be allowed which shall be presumably the same as the net operating loss deduction allowed under section one hundred seventy-two of the internal revenue code… except that in every instance where such deduction is allowed under this article:

(1) any net operating loss included in determining such deduction shall be adjusted to reflect the inclusions and exclusions from entire net income required by paragraphs (a), (b) and (g) hereof,

* * *

(3) such deduction shall not exceed the deduction for the taxable year allowed under section one hundred seventy-two of the internal revenue code, …

Section 211.4(a) of the Tax Law provides, in part:

> Combined reports permitted or required. In the discretion of the commissioner, any taxpayer, which owns or controls either directly or indirectly substantially all the capital stock of one or more other corporations, or substantially all the capital stock of which is owned or controlled either directly or indirectly by one or more other corporations or by interests which own or control either directly or indirectly substantially all the capital stock of one or more other corporations, may be required or permitted to make a report on a combined basis covering any such other corporations and setting forth such information as the commissioner may require, subject to the provisions of paragraphs one through five of this subdivision.

Section 3-8.7(a) of the Business Corporation Tax Regulations ("Article 9-A Regulations") provides for the computation of the net operating loss deduction on combined reports, in part, as follows:

> In the case of a corporation which reports for purposes of article 9-A on a combined basis with one or more related corporations, either in the taxable year in which a net operating loss is sustained or in the taxable year in which a deduction is claimed on account of such loss, the deduction is subject to the same limitations which apply for purposes of the Federal income tax as if such corporation had filed for such taxable year a consolidated Federal income tax return with the same related corporations….

Opinion

In this case, it is assumed that Corporation A and its subsidiaries are permitted or required to file a combined report pursuant to section 211.4 of the Tax Law.

Petitioner states that for federal income tax purposes for taxable year 2002, pursuant to Treasury Regulation section 1.1502-21(g)(1), the SRLY rule pursuant to Treasury Regulation section 1.1502-21(c)(1)(i) did not apply and the Corporation B NOL deducted by Corporation A in computing combined entire net income for purposes of Article 9-A of the Tax Law was limited due to the provisions of IRC section 382. In addition, for federal income tax purposes for taxable years 2000 and 2001, the Corporation E NOLs and the Corporation C and Corporation D NOLs were also subject to the IRC section 382 limitation on NOL carryforwards.

With respect to Issue 1, section 208.9(f) of the Tax Law provides that the NOL deduction allowed is presumably the same as the NOL deduction allowed under IRC section 172, except that such deduction shall not exceed the deduction for the taxable year allowed under IRC section 172 (and such deduction shall be subject to the New York modifications pursuant to section 208.9(f)(1)]. Section 3-8.7(a) of the Article 9-A Regulations provides that in the case of a corporation reporting on a combined basis, either in the taxable year in which an NOL is sustained or in the taxable year in which an NOL deduction is claimed, the deduction is subject to the same limitations that apply for purposes of the federal income tax as if such corporation had filed for such taxable year a consolidated federal income tax return.

Treasury Regulation section 1.1502-21(b)(1) provides that the consolidated NOL carryovers and carrybacks are determined under the principles of such section and IRC section 172. Treasury Regulation section 1.1502-21(g)(1) provides that the SRLY limitation provided in Treasury Regulation section 1.1502-21(c) does not apply to NOL carryovers when the application of such section 1.1502-21(c) results in an overlap with the application of IRC section 382.

Accordingly, with respect to Issue 1, pursuant to section 208.9(f) of the Tax Law and section 3-8.7 of the Article 9-A Regulations, in determining the New York State NOL deduction for a group of corporations filing a combined franchise tax report under Article 9-A of the Tax Law, the provisions of IRC section 382 and the SRLY overlap provisions of Treasury Regulation section 1.1502-21(g) are to be applied.

With respect to Issues 2 and 3, in light of the conclusions reached in Issue 1, in computing the limitation on the use of net operating losses under Article 9-A of the Tax Law, the provisions of IRC section 382 and the SRLY overlap provisions of Treasury Regulation section 1.1502-21(g) are to be applied. Therefore, if, for federal income tax purposes, the SRLY rule pursuant to Treasury Regulation section 1.1502-21(c)(1)(i) does not apply to the New York NOL for a taxable year since the provisions of IRC section 382 apply, the provisions of IRC section 382 will apply under Article 9-A for such taxable year.

It should be noted that it is not within the scope of an advisory opinion to verify the accuracy of the NOL dollar amounts for Corporation A and its subsidiaries. An advisory opinion merely sets forth the applicability of pertinent statutory and regulatory provisions to “a specified set of facts.” (Tax Law, §171.Twenty-fourth; 20 NYCRR 2376.1(a).)

DATED: March 19, 2007

/s/
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NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.