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January 23, 2009

The Honorable Douglas H. Shulman
Commissioner
Internal Revenue Service
Room 3000 IR
1111 Constitution Avenue, N.W.
Washington, DC 20224

Re: **Report on the Treatment of Capital Contributions
Under Code Section 382(l)(1)**

Dear Commissioner Shulman:

We write in response to Notice 2008-78, in which the Treasury Department and the Internal Revenue Service provided interim guidance under section 382(l)(1) of the Internal Revenue Code.

By way of background, section 382 limits the use of the operating loss carryforwards and certain recognized built-in losses of a "loss corporation" following an "ownership change." The annual limitation is generally equal to the product of (i) the value of the "old loss corporation" times (ii) the long-term tax-exempt rate.

Section 382(l)(1) generally provides that any capital contribution received by an old loss corporation as part of a plan a principal purpose of which is to avoid or increase any limitation under section 382 is not taken into account in determining the value of the old loss corporation for purposes of the annual limitation. Section 382(l)(1) also provides that,

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except as otherwise provided in regulations, any capital contribution made during the two-year period ending on the ownership change date of a loss corporation is treated as part of a plan a principal purpose of which is to avoid or increase the section 382 limitations.

Notice 2008-78 generally provides that a capital contribution is not presumed to be part of a plan a principal purpose of which is to avoid or increase a section 382 limitation solely as having been made during the two-year period ending on the change date. Instead, under the Notice, the determination whether a capital contribution is part of a prohibited plan is based on all facts and circumstances. Moreover, the Notice provides four “safe harbors” under which capital contributions are not treated as made pursuant to a prohibited plan. Two of the safe harbors are based on safe harbors contained in Treasury regulations section 1.355-7.

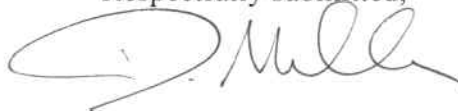
As a general matter, we support the approach adopted by the Treasury and the Internal Revenue Service in the Notice, including the elimination of the two-year presumption, the employment of a general facts and circumstances approach in determining whether a capital contribution is part of a prohibited plan, the use of safe harbors for particular circumstances, and the importation of the plan concepts and safe harbors from Treasury regulations section 1.355-7.

We do, however, recommend certain clarifications to the existing safe harbors, and propose three additional safe harbors. First, we recommend a safe harbor for capital contributions the proceeds of which are traceable to funding basic operating expenses of the corporation’s business that occur proximate in time to the contribution, as long as the corporation has a bona fide need for outside funding; second, we recommend a safe harbor for capital contributions that occur more than two years prior to an ownership change; and, third, we recommend a safe harbor for capital contributions that occur before a prior ownership change. In addition, we propose a number of factors for determining whether, under particular facts and circumstances, a capital contribution is part of a prohibited plan.

We also suggest that future regulations address other aspects of section 382(l)(1), including the meaning of the term “capital contribution,” the application of section 382(l)(1) to the determination of net unrealized built-in gains and losses, and the proper adjustments to the various section 382 limitations as a result of a “bad” capital contribution.

We appreciate your consideration of our comments and recommendations. We would be pleased to discuss these matters with you or provide any other assistance that you would find helpful.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. Miller". The signature is fluid and cursive, with a large initial "D" and a long, sweeping underline.

David S. Miller
Chair

Enclosure

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