



## INSTITUTE OF INTERNATIONAL BANKERS

299 Park Avenue, 17th Floor  
New York, N.Y. 10171  
Telephone: (212) 421-1611  
Facsimile: (212) 421-1119  
www.iib.org

**LAWRENCE R. UHLICK**  
Chief Executive Officer  
E-mail: luhlick@iib.org

November 10, 2008

The Honorable Henry M. Paulson, Jr.  
Secretary of the Treasury  
Department of the Treasury  
1500 Pennsylvania Avenue, N.W.  
Washington, DC 20220

Re: Extending the Relief from the Tax Loss Limitation Rules to Foreign  
Government Stabilization Investments in Non-U.S. Financial Institutions

Dear Secretary Paulson:

We applaud the proactive role that the Treasury Department and the Internal Revenue Service (the “IRS”) have been taking in providing guidance regarding tax issues arising from the current economic crisis. Among the important guidance recently issued is Notice 2008-100, which in effect disregards the acquisition of shares and warrants of U.S. banks by the Treasury Department under the Capital Purchase Program (“CPP”) that was established under the Emergency Economic Stabilization Act of 2008 (“EESA”) – as well as certain dispositions of such securities – in determining whether the bank has undergone an ownership change that would trigger the Section 382 limitation on its ability to use net operating losses and built-in losses.

We respectfully request that the Treasury Department and the IRS extend the principles of Notice 2008-100 to non-U.S. headquartered financial institutions that receive financial assistance from their home country governments under their respective financial stabilization programs.

We believe that such an extension of the principles of Notice 2008-100 is appropriate in light of the following considerations:

1. The Administration as well as Congress has recognized that this global financial crisis of unprecedented dimension requires a concerted and coordinated global effort by governments around the world to shore up financial institutions, and the United States has pledged to work closely with other countries in this regard.<sup>1</sup>

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<sup>1</sup> See section 112 of EESA (“The Secretary shall coordinate, as appropriate, with foreign financial authorities and central banks to work toward the establishment of similar programs by such authorities and central banks.”); U.S. Department of the Treasury, *G-7 Finance Ministers and*



- a. In furtherance of this objective, a number of European governments (including Belgium, France, Germany, Italy, the Netherlands, Spain, Switzerland and the United Kingdom) are providing capital infusions to their financial institutions under programs that are similar in purpose to the CPP.
2. Internationally headquartered financial institutions represent a significant portion of the U.S. financial markets and play an important role in those markets. For example, data compiled by the Federal Reserve indicate that in the aggregate these institutions have over \$5.7 trillion of assets in their U.S. operations, of which more than \$2.4 trillion are banking assets, representing more than 22% of the U.S. banking market. In addition, a recent Institute economic study showed that the U.S. operations of international banks (bank subsidiaries, direct branches, securities affiliates, etc.) have over 250,000 U.S. employees and spend more than \$60 billion a year in connection with their payroll, rent and other direct expenditures.
3. Notice 2008-100 implicitly recognizes that (i) the government's investment in troubled financial institutions pursuant to the CPP does not implicate the purpose of Section 382 to prevent trafficking in losses; (ii) subjecting such government investments to Section 382 would undermine EESA's stabilization efforts because the Section 382 limitation would significantly reduce both the value of the institution's deferred tax assets on their financial statements and its net income going forward, and thus would necessitate additional government cash infusions; and (iii) Treasury and the IRS have the authority to redress this problem by waiving the application of Section 382 to these investments.
4. The same policy considerations that led to the issuance of Notice 2008-100 apply to investments by foreign governments in non-U.S. headquartered financial institutions. Clearly such investments do not entail any trafficking in losses, and if the losses of U.S. branches and subsidiaries of these financial institutions were to be subject to the Section 382 limitation, the value of the institution's deferred tax assets on their financial statements would be impaired and their net income going forward would be significantly reduced, thus requiring government cash infusions.

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*Central Bank Governors Plan of Action* (Press Release HP-1195, October 10, 2008); U.S. Department of the Treasury, *Statement by Secretary Henry M. Paulson, Jr. Following Meeting of the G7 Finance Ministers and Central Bank Governors* (Press Release HP-1194, October 10, 2008).



5. Differential treatment of foreign government assistance to non-U.S. headquartered financial institutions for purposes of Section 382 is imprudent for practical and policy reasons:
  - a. It would undermine EESA's mandate that the Treasury Department cooperate with foreign governments in the stabilization of financial institutions because it would increase the cost of foreign government interventions.
  - b. It would create economic distortions and may lead to affected financial institutions taking actions that are intended to prevent the application of Section 382 but that do not optimize stabilization efforts.
  - c. It would undermine the U.S. policy of according "national treatment" to the U.S. branches and subsidiaries of non-U.S. headquartered financial institutions, and may contravene the non-discrimination provisions of U.S. tax treaties.
  - d. To the best of our understanding, U.S. financial institutions that undergo an ownership change, whether as a result of funding under the CPP or otherwise, generally would not suffer a limitation on the use of their losses for tax purposes in most of the various European countries identified above, so as a matter of comity it appears appropriate to extend the relief from the Section 382 limitation that is afforded under Notice 2008-100 to non-U.S. headquartered financial institutions receiving foreign government assistance.

We appreciate that the Treasury Department and the IRS may wish to study the details of the various stabilization programs established by foreign governments in order to determine how to craft appropriate relief. We are in the process of gathering and summarizing such information, and will be pleased to assist the Treasury and the IRS in this regard.

However, as you well know, the financial situation is very fluid, fast-changing and precarious. As in the case of Notice 2008-100 and the other crisis-related guidance issued by the Treasury and the IRS, there is a strong benefit from, and need for, issuing guidance in general terms even before all the details are worked out. Accordingly, we respectfully urge the Treasury Department and the IRS to announce as soon as possible that they intend to issue regulations that extend the rules of Notice 2008-100 to shares of stock and warrants acquired by non-U.S. governments pursuant to financial stabilization programs intended to address the current financial crisis, and to capital contributions made pursuant thereto. As in the case of Notice 2008-100, taxpayers should be entitled to rely on the rules set forth in any such announcement



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pending the issuance of further guidance. We believe that such an announcement can be crafted to closely track the provisions of Notice 2008-100.

As Treasury and the IRS consider issuing further detailed guidance regarding the scope of relief from the Section 382 limitation – both for U.S. financial institutions covered by Notice 2008-100 and for non-U.S. headquartered institutions in the event our request to expand the Notice to them is granted – an important question that we would like to discuss with Treasury and the IRS is the extent to which the waiver of the Section 382 limitation will apply to (i) dispositions of different forms of equity by the government to public investors, strategic purchasers (including the exercise of warrants by such transferees), or the issuer in a redemption, and (ii) direct investments by strategic purchasers or public issuances of stock in conjunction with, or for the purpose of redeeming, government stabilization-related investments and guarantees. It would appear that relief is appropriate in these circumstances in order to most fully enhance the value to the government of its stabilization payments and minimize the duration of the government's investment in circumstances that clearly do not involve trafficking in losses. Given the uncertainty regarding the application of Notice 2008-100 in these situations, we believe that early guidance on these questions is also desirable.

Please contact the undersigned (212-421-1611; [luhlick@iib.org](mailto:luhlick@iib.org)) or the Institute's tax counsel, Yaron Z. Reich at Cleary, Gottlieb (212-225-2540; [yreich@cgsh.com](mailto:yreich@cgsh.com)) if we can provide further assistance regarding this matter.

Very truly yours,

A handwritten signature in black ink that reads "Lawrence R. Uhlick". The signature is written in a cursive, slightly slanted style.

Lawrence R. Uhlick  
Chief Executive Officer

cc: Robert M. Kimmitt  
Deputy Secretary  
Department of the Treasury

David H. McCormick  
Under Secretary for International Affairs  
Department of the Treasury

Clay Lowery  
Assistant Secretary for International Financial Markets  
and Investment Policy  
Department of the Treasury



Eric Solomon  
Assistant Secretary (Tax Policy)  
Department of the Treasury

Karen Gilbreath Sowell  
Deputy Assistant Secretary (Tax Policy)  
Department of the Treasury

Michael Mundaca  
Deputy Assistant Secretary (International Affairs)  
Department of the Treasury

Jeffrey van Hove  
Deputy Tax Legislative Counsel – Regulatory Affairs  
Department of the Treasury

John Harrington  
International Tax Counsel  
Department of the Treasury

Donald Korb  
Chief Counsel  
Internal Revenue Service

Clarissa C. Potter  
Deputy Chief Counsel - Technical  
Internal Revenue Service

William D. Alexander  
Associate Chief Counsel (Corporate)  
Internal Revenue Service

Steven A. Musher  
Associate Chief Counsel (International)  
Internal Revenue Service