

motions, including motions to remove the matter to Federal court, to quash, or to obtain a protective order.

(d) If a demand fails to follow the requirements of these regulations, MCC will not allow the testimony or produce the documents.

(e) MCC will process demands in the order in which they are received. Absent unusual circumstances, MCC will respond within 45 days of the date that the demand was received. The time for response will depend upon the scope of the demand.

(f) The General Counsel may grant a waiver of any procedure described by this subpart where a waiver is considered necessary to promote a significant interest of MCC or the United States or for other good cause.

#### § 1305.7 Final determination.

The General Counsel makes the final determination on demands to employees for production of official documents and information or testimony. All final determinations are within the sole discretion of the General Counsel. The General Counsel will notify the requester and the Court or other authority of the final determination, the reasons for the grant or denial of the demand, and any conditions that the General Counsel may impose on the release of documents, or on the testimony of an employee. When in doubt about the propriety of granting or denying a demand for testimony or documents, the General Counsel should consult with the Department of Justice.

#### § 1305.8 Restrictions that apply to testimony.

(a) The General Counsel may impose conditions or restrictions on the testimony of MCC employees including, for example, limiting the areas of testimony or requiring the requester and other parties to the legal proceeding to agree that the transcript of the testimony will be kept under seal or will only be used or made available in the particular legal proceeding for which testimony was requested. The General Counsel may also require a copy of the transcript of testimony at the requester's expense.

(b) MCC may offer the employee's declaration in lieu of testimony, in whatever form the court finds acceptable.

(c) If authorized to testify pursuant to this part, an employee may testify to relevant unclassified materials or information within his or her personal knowledge, but, unless specifically authorized to do so by the General Counsel, the employee shall not:

(1) Disclose confidential or privileged information; or

(2) For a current MCC employee, testify as an expert or opinion witness with regard to any matter arising out of the employee's official duties or the functions of MCC, unless testimony is being given on behalf of the United States.

#### § 1305.9 Restrictions that apply to released documents.

(a) The General Counsel may impose conditions or restrictions on the release of official documents and information, including the requirement that parties to the proceeding obtain a protective order or execute a confidentiality agreement to limit access and any further disclosure. The terms of the protective order or of the confidentiality agreement must be acceptable to the General Counsel. In cases where protective orders or confidentiality agreements have already been executed, MCC may condition the release of official documents and information on an amendment to the existing protective order or confidentiality agreement.

(b) If the General Counsel so determines, original MCC documents may be presented in response to a demand, but they are not to be presented as evidence or otherwise used in a manner by which they could lose their identity as official MCC documents nor are they to be marked or altered. In lieu of original records, certified copies will be presented for evidentiary purposes. (See 28 U.S.C. 1733).

#### § 1305.10 Procedure when a decision is not made prior to the time a response is required.

If a response to a demand is required before the General Counsel can make the determination referred to above, the General Counsel, when necessary, will provide the court or other competent authority with a copy of this part, inform the court or other competent authority that the demand is being reviewed, and respectfully seek a stay of the demand pending a final determination.

#### § 1305.11 Procedure in the event of an adverse ruling.

If the court or other competent authority declines to stay the demand in response to a request made in accordance with § 1305.10, or if the court or other competent authority rules that the demand must be complied with irrespective of the instructions from the General Counsel not to produce the material or disclose the information sought, the employee or former employee upon whom the demand has been made shall respectfully decline to

comply with the demand (*United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951)).

#### § 1305.12 No private right of action.

This part is intended only to provide guidance for the internal operations of MCC, and is not intended to, and does not, and may not be relied upon, to create a right or benefit, substantive or procedural, enforceable at law by a party against the United States.

Dated: July 11, 2014.

**John Mantini,**

*Assistant General Counsel, Millennium Challenge Corporation.*

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## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Part 1

[TD 9685]

RIN 1545-BM18

#### Segregation Rule Effective Date

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Final and temporary regulations.

**SUMMARY:** This document contains temporary regulations under section 382 of the Internal Revenue Code (Code) that modify the effective date provision of recently published regulations. These regulations affect corporations whose stock is or was acquired by the Department of the Treasury (Treasury) pursuant to certain programs under the Emergency Economic Stabilization Act of 2008 (EESA). The text of these temporary regulations also serves as the text of the proposed regulations set forth in the notice of proposed rulemaking on this subject in the Proposed Rules section in this issue of the **Federal Register**. This document also modifies the existing regulations to provide a cross-reference to this temporary regulation.

**DATES:** *Effective Date:* These regulations are effective on July 31, 2014.

*Applicability Date:* For dates of applicability, see section 1.382-3T(j)(17).

**FOR FURTHER INFORMATION CONTACT:** Stephen R. Cleary, (202) 317-5353 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:**

## Background

### Section 382

Section 382 of the 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.

Pursuant to section 382(g)(4)(A), shareholders who own less than five percent of a loss corporation are aggregated and treated as a single 5-percent shareholder (a public group). In addition, new public groups may be created as a result of certain transactions under the segregation rules in the section 382 regulations. Any new public group is tracked separately from, and in addition to, the public group or groups that existed previously and is treated as a new 5-percent shareholder that increases its ownership interest in the loss corporation.

One particular segregation rule, which was imposed by § 1.382-2T(j)(3)(i) of the Temporary Income Tax Regulations until it was superseded, required segregation when an individual or entity that owned five percent or more of the loss corporation transferred an interest in the loss corporation to public shareholders. After the sale, stock owned by a public group that existed immediately before the sale was treated separately from the stock owned by the public group that acquired stock from the seller. This separate public group was treated as a new 5-percent shareholder. However, this rule was rendered inoperative by § 1.382-3(j)(13), part of a set of regulations published in TD 9638 [78 FR 62418] on October 22, 2013. Under the new regulation, no new public group is created on the transfer of stock to the public shareholders; instead, the transferred stock is treated as acquired proportionately by the public groups existing at the time of the transfer.

Notice 2010-2 (2010-2 IRB 251 (December 16, 2009)) (see § 1.601.601(d)(2)(ii)(B) of this chapter), provides 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 pursuant to EESA. Notice 2010-2 relates to instruments acquired by Treasury pursuant to the following EESA programs: (i) The Capital Purchase Program for publicly-traded issuers; (ii) the Capital Purchase Program for private issuers; (iii) the Capital Purchase Program for S corporations; (iv) the Targeted Investment Program; (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. (These programs are collectively referred to as “Programs” in that Notice and in this preamble.)

Under Section III(G) of Notice 2010-2, a “Covered Instrument” is an instrument that is acquired by Treasury in exchange for an instrument that was issued to Treasury under the Programs, or is acquired by Treasury in exchange for another Covered Instrument. For most purposes of that Notice, a Covered Instrument is treated as though it had been issued directly to Treasury under the Programs.

Section III(E) of Notice 2010-2 provides the following rule to govern the sale by Treasury of stock of a corporation to public shareholders:

*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 § 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.

This rule was created to prevent a loss corporation from experiencing an owner shift when Treasury sells stock to public shareholders. By its terms, the rule relies on the assumption that the stock sale “creates a public group.” As explained earlier in this preamble, § 1.382-2T(j)(3)(i), before it was superseded, required creation of a new public group when a 5-percent shareholder sold stock in a loss

corporation to public shareholders. However, under § 1.382-3(j)(13) as now in effect, such a transfer does not create a new public group.

### Explanation of Provision

The IRS and Treasury are concerned that the elimination of the segregation rule described earlier in this preamble may have unintentionally rendered inoperative the rule in Notice 2010-2 that protects a loss corporation from an owner shift when Treasury sells stock that it held pursuant to the Programs to public shareholders. To prevent this result, the temporary regulation modifies the effective date rule of TD 9638 to except from the changes to the segregation rules in that regulation the sale by the Treasury Department to public shareholders of any “Program Instrument” (an instrument issued pursuant to a Program or a Covered Instrument). As a result, a sale of stock by Treasury to the public will create a public group, and the rule of Section III(E) of Notice 2010-2 will continue to apply as intended. This provision will only affect the sale of a Program Instrument by the Treasury Department and will not affect the application of the segregation rule changes in TD 9638 to any other transactions involving stock of the corporations that participated in the Programs.

### Special Analyses

These regulations are necessary to provide corporations with immediate guidance regarding the continuing effect of Notice 2010-2 in light of the change to the segregation rules provided by TD 9638. Because of the need for immediate guidance, the IRS and the Treasury Department are issuing temporary regulations which are effective immediately.

It has also been determined that this temporary regulation is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required. For the application of the Regulatory Flexibility Act (5 U.S.C. chapter 6), refer to the Special Analysis section of the preamble of the cross-referenced notice of proposed rulemaking published in this issue of the **Federal Register**. Pursuant to section 7805(f) of the Code, these regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

### Drafting Information

The principal author of these regulations is Stephen R. Cleary of the

Office of Associate Chief Counsel (Corporate). However, other personnel from the IRS and the Treasury Department participated in their development.

#### List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

#### Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

### PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

**Authority:** 26 U.S.C. 7805 \* \* \*  
Section 1.382-3T also issued under 26 U.S.C. 382(g)(4)(C) and 26 U.S.C. 382(m). \* \* \*

■ **Par. 2.** Section 1.382-3 is amended by revising paragraph (j)(17) to read as follows:

#### § 1.382-3 Definitions and rules relating to a 5-percent shareholder.

\* \* \* \* \*

(j) \* \* \*

(17) *Effective/applicability date.*

[Reserved]. For further guidance, see § 1.382-3T(j)(17).

\* \* \* \* \*

■ **Par. 3.** Section 1.382-3T is added to read as follows:

#### § 1.382-3T Definitions and rules relating to a 5-percent shareholder (temporary).

(a) through (j)(16) [Reserved]. For further guidance see § 1.382-3(a) through (j)(16).

(17) *Effective/applicability date.* This paragraph (j) generally applies to issuances or deemed issuances of stock in taxable years beginning on or after November 4, 1992. However, paragraphs (j)(11)(ii) and (j)(13) through (j)(15) of this section and *Examples 5 through 13* of paragraph (j)(16) of this section apply to testing dates occurring on or after October 22, 2013, other than with respect to the sale of a Program Instrument by the Treasury Department. For purposes of this paragraph (j)(17), a Program Instrument is an instrument issued pursuant to a Program, as defined in Internal Revenue Service Notice 2010-2 (2010-2 IRB 251 (December 16, 2009)) (see § 601.601(a)(2)(ii)(B) of this chapter), or a Covered Instrument, as defined in that Notice. Taxpayers may apply paragraphs (j)(11)(ii) and (j)(13) through (j)(15) of this section and *Examples 5 through 13* of paragraph (j)(16) of this section in their entirety (other than with respect to a sale of a Program Instrument by the Treasury

Department) to all testing dates that are included in a testing period beginning before and ending on or after October 22, 2013. However, the provisions described in the preceding sentence may not be applied to any date on or before the date of any ownership change that occurred before October 22, 2013, under the regulations in effect before October 22, 2013, and they may not be applied as described in the preceding sentence if such application would result in an ownership change occurring on a date before October 22, 2013, that did not occur under the regulations in effect before October 22, 2013. See § 1.382-3(j)(14)(ii) and (iii), as contained in 26 CFR part 1 revised as of April 1, 1994 for the application of paragraph (j)(10) to stock issued on the exercise of certain options exercised on or after November 4, 1992, and for an election to apply paragraphs (j)(1) through (12) retroactively to certain issuances and deemed issuances of stock occurring in taxable years prior to November 4, 1992.

(18) *Expiration date.* This section 1.382-3T expires on or before July 28, 2017.

**John Dalrymple,**

*Deputy Commissioner for Services and Enforcement.*

Approved: July 18, 2014.

**Mark J. Mazur,**

*Assistant Secretary of the Treasury (Tax Policy).*

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## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Part 301

[TD 9686]

RIN 1545-BF59

#### Material Advisor Penalty for Failure To Furnish Information Regarding Reportable Transactions

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Final regulations and removal of temporary regulations.

**SUMMARY:** This document contains final regulations relating to the assessment of penalties against material advisors who fail to timely file a true and complete return. The regulations implement amendments made by the American Jobs Creation Act of 2004. These regulations affect material advisors responsible for disclosing reportable transactions.

**DATES:** *Effective Date:* These regulations are effective on July 31, 2014.

*Applicability Date:* For dates of applicability, see § 301.6707-1(f).

**FOR FURTHER INFORMATION CONTACT:** James G. Hartford at (202) 317-6844 (not a toll-free number).

#### SUPPLEMENTARY INFORMATION:

##### Background

This document contains amendments to the Procedure and Administration Regulations (26 CFR Part 301) under section 6707. On December 22, 2008, a notice of proposed rulemaking (REG-160872-04) was published in the **Federal Register** (73 FR 78254) relating to the penalty under section 6707 of the Internal Revenue Code imposed on material advisors for failure to furnish information regarding reportable transactions (the proposed regulations). No comments were received from the public in response to the notice of proposed rulemaking. No public hearing was requested or held. The proposed regulations are adopted by this Treasury decision with revisions as discussed in this preamble.

Section 6707 was originally added to the Code by section 141(b) of the Tax Reform Act of 1984, Public Law 98-369, 98 Stat. 494 (July 18, 1984). At that time, section 6707 imposed a penalty for failing to timely register a tax shelter or for filing false or incomplete information with respect to the tax shelter registration. Section 301.6707-1T of the temporary regulations implementing the penalty was published shortly after section 6707 became law.

The American Jobs Creation Act of 2004, Public Law 108-357, 118 Stat. 1418 (AJCA), was enacted on October 22, 2004. As amended by AJCA, section 6707 imposes a penalty on a material advisor required to file a return under section 6111(a) with respect to a reportable transaction who fails to timely file such a return or who files the return with false or incomplete information. Section 6707, as amended, is effective for returns due after October 22, 2004.

In 2007, the Treasury Department and the IRS issued Rev. Proc. 2007-21, 2007-1 CB 613 (February 26, 2007), (see § 601.601(d)(2)(ii)(b)), of this chapter, to provide procedures for requesting rescission of a penalty assessed under section 6707 for failure by a material advisor to disclose a reportable transaction and under section 6707A for failure by a taxpayer to disclose a reportable transaction. For each penalty, the revenue procedure provides the deadline by which a person must