



**Feedback for REG-125710-18 (Regulations under §382(h)<sup>1</sup> Related to Built-in Gain and Loss)**

<b>PROPOSED REGS SECTION NUMBER</b>	<b>SECTION TITLE</b>	<b>ISSUE</b>	<b>RECOMMENDATION</b>	<b>ADDITIONAL EXPLANATION /QUERIES</b>
<b>Prop. Regs. §1.382–2(b)</b>	<b>Effective dates</b>	Transition rule	<p>Transition rules should be issued quickly, in advance of the later issuance of final regulations. Those transition rules should provide for broader grandfathering relief for certain transactions that may close after the date the Proposed Regulations are finalized. Any such grandfathering should take into account whether the transactions have been publicly announced prior to finalization of the Proposed Regulations. This would preserve the economics of deals that were negotiated and priced based on the existing rules of Notice 2003-65.</p> <p>Transaction agreements are frequently amended or modified between signing and closing. Accordingly, a transition rule solely focused on whether the transaction closes pursuant to a binding agreement that was in place prior to finalization of the Proposed Regulations is not by itself sufficient in that it could still create uncertainty regarding which rules apply (i.e., did an agreement amendment cause grandfathering status to be lost). To</p>	<p>The Proposed Regulations would by their terms apply to any ownership change occurring after the date of publication of the Treasury decision adopting the Proposed Regulations as final regulations in the Federal Register. The impact of this proposed effective date is that pending transactions that were in progress long before the Proposed Regulations were issued may be disrupted as a result of uncertainty over whether such transactions will close before or after finalization of the Proposed Regulations. Uncertainty regarding potential application of the Proposed Regulations to pending transactions will also affect decision-making regarding tax elections required to be made in the interim (for example, to claim or forego bonus depreciation).</p> <p>There are precedents for this type of effective date provision from the world of Section 355 and the “active trade or business” requirement regulations [<i>Prop. Reg. § 1.355-9(e)(2); 81 Fed. Reg. 46004, 46018–19.</i>] This transition rule provided that pending transactions that had been described in public announcements and/or filings with the SEC would not be disturbed by the finalization of the proposed regulations even if such transactions</p>

<sup>1</sup> Unless otherwise noted, all section references are to the Internal Revenue Code of 1986, as amended,



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			create clarity around these issues, the effective date provisions should make it clear that any deals publicly announced prior to finalization of the Proposed Regulations are grandfathered under the prior rules of Notice 2003-65.	were not complete as of the date the proposed rules were finalized.
<b>Prop. Regs. §1.382-7</b>	<b>Built-in gains and losses</b>	Transition rules for Prop Regs. §1.382-7(g) applicability	See discussion in Prop. Regs. §1.382-2(b), above.	
<b>Prop. Regs. §1.382-7(d)</b>	<b>Recognized built-in gain and loss</b>	Wasting assets	<p>To preserve the “neutrality principle” a proxy for the recognized built-in gain from wasting assets must be added to the proposed regulations.</p> <p>The current rules of Notice 2003-65 are not overly complicated for taxpayers and provide a reasonable approach to ensuring that some portion of built-in-gains existing as of an ownership change are being considered. If changes are deemed necessary, consideration should be given to modifying or simplifying the assumed cost recovery periods for wasting assets rather than complete abandonment of the §338 approach to counting wasting assets.</p>	<p>Prop. Regs. §1.382-7(d)(2)(i) provides that recognized built-in gain should only include an item that would have been properly included in gross income before the change date by an accrual method taxpayer. “As a result, for example, cost recovery deductions on an appreciated asset claimed during the recognition period are not treated as generating recognized built-in gain.”</p> <p>The removal of recognized built-in gain on wasting assets (under §338 approach) goes against the “neutrality principle” underlying the statute. Built-in gain assets generate income in subsequent years, and, in the absence of an acquisition, such income would have been freely offset by the old loss corporation’s NOLs.</p> <p>The proposed approach discriminates against capital-intensive taxpayers who have a change in ownership.</p>