

Part III

Administrative, Procedural, and Miscellaneous

26 CFR 601.601: Rules and regulations.
(Also Part I, §§ 582, 702, 1221)

Rev. Proc. 2008–64

SECTION 1. PURPOSE

This revenue procedure provides guidance under section 301 of the Emergency Economic Stabilization Act of 2008, Pub. L. No. 110–343, Division A § 301, 122 Stat. 3765 (EESA¹). EESA § 301 treats as ordinary income or loss certain gain or loss recognized by banks and certain other financial institutions on the sale or exchange of preferred stock of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac). EESA § 301 also grants the Secretary of the Treasury authority to issue guidance as necessary to carry out the purposes of that section.

¹ Only the first of the statute's three divisions is the Emergency Economic Stabilization Act of 2008. Each of the other two divisions has its own section 301, both of which are unrelated to EESA § 301.

SECTION 2. BACKGROUND

.01 Before September 2008, many banks and bank holding companies invested in the preferred stock of Fannie Mae and Freddie Mac. Many institutions invested directly in the preferred stock. Others invested indirectly—for example, through corporate subsidiaries that are not banks or through adjustable rate preferred interests in certain trusts designed to be treated as partnerships for federal income tax purposes.

.02 Generally, under section 582(c)(1) of the Internal Revenue Code, the sale or exchange of a bond, debenture, note, and other evidence of indebtedness by banks and certain other financial institutions is not considered a sale or exchange of a capital asset. Common stock and preferred stock are not evidences of indebtedness for federal income tax purposes and, therefore, banks and these other financial institutions generally treat gain or loss from these instruments as capital.

.03 Under section 702(a) and (b) of the Code, gain and loss from sales of capital assets are separately stated by a partnership, and the character of gain or loss included in a partner's distributive share is determined as if the item were realized directly from the source from which realized by the partnership, or incurred in the same manner as incurred by the partnership. The partnership tax rules, however, do not generally treat partners as holding the assets held by their partnerships.

.04 EESA § 301(a) provides, “[G]ain or loss from the sale or exchange of any *applicable preferred stock* by any *applicable financial institution* shall be treated as ordinary income or loss” (emphasis added). Applicable preferred stock and applicable financial institution are defined in EESA § 301(b) and (c).

.05 EESA § 301(b) defines “applicable preferred stock” as—

any stock—

(1) which is preferred stock in—

(A) the Federal National Mortgage Association, established pursuant to the Federal National Mortgage Association Charter Act (12 U.S.C. 1716 et seq.), or

(B) the Federal Home Loan Mortgage Corporation, established pursuant to the Federal Home Loan Mortgage Corporation Act (12 U.S.C. 1451 et seq.), and

(2) which—

(A) was held by the applicable financial institution on September 6, 2008, or

(B) was sold or exchanged by the applicable financial institution on or after January 1, 2008, and before September 7, 2008.

.06 For purposes of this revenue procedure, the term “qualified preferred stock” (QPS) means any stock that is described in EESA § 301(b)(1), regardless of whether the stock satisfies EESA § 301(b)(2).

.07 EESA § 301(c) provides—

For purposes of [EESA § 301]:

(1) IN GENERAL.—Except as provided in [EESA § 301(c)(2)], the term “applicable financial institution” means—

(A) a financial institution referred to in section 582(c)(2) of the Internal Revenue Code of 1986, or

(B) a depository institution holding company (as defined in section 3(w)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(w)(1))).

(2) SPECIAL RULES FOR CERTAIN SALES.—In the case of—

(A) a sale or exchange described in [EESA § 301(b)(2)(B)], an entity shall be treated as an applicable financial institution only if it was an entity described in [EESA § 301(c)(1)(A) or (B)] at the time of the sale or exchange, and

(B) a sale or exchange after September 6, 2008, of preferred stock described in [EESA § 301(b)(2)(A)], an entity shall be treated as an applicable financial institution only if it was an entity

described in [EESA § 301(c)(1)(A) or (B)] at all times during the period beginning on September 6, 2008, and ending on the date of the sale or exchange of the preferred stock.

.08 EESA § 301(d) authorizes administrative extension of the application of EESA § 301 to all, or a portion, of the gain or loss from certain transactions. In addition, under EESA § 301(e), “The Secretary of the Treasury or the Secretary’s delegate may prescribe such guidance, rules, or regulations as are necessary to carry out the purposes of [EESA § 301].” Sections 3 through 7 of this revenue procedure exercise the authority that is granted by EESA § 301(d) and (e).

SECTION 3. SALE OR EXCHANGE OF QUALIFIED PREFERRED STOCK BY A PARTNERSHIP IN WHICH AN APPLICABLE FINANCIAL INSTITUTION IS A PARTNER

.01 *Scope.* This section applies if either all of the requirements in Paragraph (1) of this Subsection, or all of the requirements in Paragraph (2) of this Subsection, are satisfied.

(1) *Sale or exchange on or after January 1, 2008, and before September 7, 2008.*

(a) A partnership sold or exchanged QPS on or after January 1, 2008, and before September 7, 2008 (the Transaction);

(b) The taxpayer was a partner in the partnership on the date of the Transaction; and

(c) The taxpayer was an applicable financial institution (or a Subsidiary described in Section 6.01(1)(b)-(d) of this revenue procedure) on the date of the Transaction and at all times thereafter through the earlier of—

(i) The closing of the partnership's tax year in which the Transaction occurred; or

(ii) The date on which the partnership's tax year in which the Transaction occurred closed with respect to the taxpayer.

(2) Sale or exchange after September 6, 2008.

(a) A partnership sold or exchanged QPS after September 6, 2008 (the Transaction);

(b) The partnership held the QPS on September 6, 2008, and at all times thereafter until the Transaction;

(c) The taxpayer was a partner in the partnership on September 6, 2008, and at all times thereafter through the date of the Transaction; and

(d) The taxpayer was an applicable financial institution (or a Subsidiary described in Section 6.01(2)(b)-(e) of this revenue procedure) on September 6, 2008, and at all times thereafter through the earlier of—

(i) The closing of the partnership's tax year in which the Transaction occurred; or

(ii) The date on which the partnership's tax year in which the Transaction occurred closed with respect to the taxpayer.

.02 Application.

(1) The taxpayer's distributive share of the gain or loss on the Transaction is treated by EESA § 301 as ordinary income or loss.

(2) Section 3.02(1) of this revenue procedure does not apply to the extent that the taxpayer's interest in gain or loss on the sale or exchange of the QPS that was sold or exchanged in the Transaction increased after September 6, 2008, including as a result of—

- (a) The taxpayer's acquisition of additional partnership interests;
- (b) Changes in the manner in which partners share in such gains and losses; or
- (c) Disproportionate distributions of cash or other property to other partners by the partnership.

(3) The limitation in Section 3.02(2)(a) of this revenue procedure does not apply to the extent the taxpayer acquired an additional partnership interest as transferred basis property within the meaning of section 7701(a)(43) of the Code from a person that—

- (a) Held the partnership interest on September 6, 2008, and at all times thereafter until the transfer of the partnership interest to the taxpayer; and
- (b) Was an applicable financial institution for this entire period.

.03 Reporting Requirements. In accordance with existing requirements, the partnership must separately state on its information returns gain or loss attributable to the sale or exchange of QPS. See § 1.702–1(a)(8)(ii) of the Income Tax Regulations.

SECTION 4. SALE OR EXCHANGE BY AN APPLICABLE FINANCIAL INSTITUTION OF AN INTEREST IN CERTAIN PARTNERSHIPS

.01 *Scope.* This section applies if either all of the requirements in Paragraph (1) of this Subsection, or all of the requirements in Paragraph (2) of this Subsection, are satisfied.

(1) *Sale or exchange on or after January 1, 2008, and before September 7, 2008.*

(a) A partner (the taxpayer) sold or exchanged a partnership interest on or after January 1, 2008, and before September 7, 2008 (the Transaction);

(b) The taxpayer was an applicable financial institution (or a Subsidiary described in Section 6.01(1)(b)-(d) of this revenue procedure) on the date of the Transaction; and

(c) At the time of the Transaction, at least 95 percent in value of the partnership's assets consisted of QPS and cash or cash equivalents.

(2) *Sale or exchange after September 6, 2008.*

(a) A partner (the taxpayer) sold or exchanged a partnership interest after September 6, 2008 (the Transaction);

(b) On September 6, 2008, and at all times thereafter through the date of the Transaction, the taxpayer was an applicable financial institution (or a Subsidiary described in Section 6.01(2)(b)-(e) of this revenue procedure) and a partner in the partnership; and

(c) On September 6, 2008, and at all times thereafter through the date of the Transaction, at least 95 percent in value of the partnership's assets consisted of QPS and cash or cash equivalents.

.02 Application.

(1) Gain or loss on the Transaction is treated by EESA § 301 as ordinary income or loss. (Neither EESA § 301 nor this revenue procedure causes QPS to be described in section 751(c) or (d) of the Code.)

(2) Section 4.02(1) of this revenue procedure does not apply to the extent that there was an increase after September 6, 2008, in the taxpayer's indirect interest in QPS, including as a result of —

- (a) The taxpayer's acquisition of additional partnership interests;
- (b) Changes in the taxpayer's interest in partnership income, loss or capital;
- (c) The acquisition by the partnership of additional QPS; or
- (d) Disproportionate distributions of other property or cash to other partners by the partnership.

(3) The limitation in Section 4.02(2)(a) of this revenue procedure does not apply to the extent the taxpayer acquired an additional partnership interest as transferred basis property within the meaning of section 7701(a)(43) of the Code from a person that—

- (a) Held the partnership interest on September 6, 2008, and at all times thereafter until the transfer of the partnership interest to the taxpayer; and

(b) Was an applicable financial institution for this entire period.

SECTION 5. DISTRIBUTION OF QUALIFIED PREFERRED STOCK BY CERTAIN PARTNERSHIPS TO A PARTNER THAT IS AN APPLICABLE FINANCIAL INSTITUTION

.01 *Scope.* This section applies if all of the following are satisfied:

(1) After September 6, 2008, a partner (the taxpayer) acquired QPS as a result of a distribution from a partnership (the Acquisition);

(2) The partnership held the QPS on September 6, 2008, and at all times thereafter until the distribution to the taxpayer;

(3) On September 6, 2008, and at all times thereafter until the partnership made the distribution to the taxpayer, at least 95 percent in value of the partnership's assets consisted of QPS and cash or cash equivalents; and

(4) On September 6, 2008, and at all times thereafter until the Acquisition, the taxpayer was an applicable financial institution (or a Subsidiary described in Section 6.01(2)(b)-(e) of this revenue procedure) and was a partner of the partnership.

.02 *Application.*

(1) Solely for purposes of EESA § 301, the taxpayer is treated as having held on September 6, 2008, the QPS described in Section 5.01(1) of this revenue procedure. (Neither EESA § 301 nor this revenue procedure causes QPS to be described in section 751(c) or (d) of the Code.)

(2) Section 5.02(1) of this revenue procedure does not apply to QPS that is received by the taxpayer from the partnership after September 6, 2008, to the extent

that receipt of the QPS is as a result of a change or increase after September 6, 2008, in the taxpayer's partnership interest, including as a result of—

- (a) The taxpayer's acquisition of additional partnership interests;
- (b) Changes in the manner in which partners share in rights to distributions of QPS; or
- (c) Disproportionate distributions to other partners by the partnership of other property or cash.

(3) The limitation in Section 5.02(2)(a) of this revenue procedure does not apply to the extent the taxpayer acquired additional partnership interests as transferred basis property within the meaning of section 7701(a)(43) of the Code from a person that—

- (a) Held the partnership interest on September 6, 2008, and at all times thereafter until the transfer of the partnership interest to the taxpayer and
- (b) Was an applicable financial institution for this entire period.

SECTION 6. SALE OR EXCHANGE OF QUALIFIED PREFERRED STOCK BY CERTAIN SUBSIDIARIES OF APPLICABLE FINANCIAL INSTITUTIONS

.01 *Scope.* This section applies if either all of the requirements in Paragraph (1) of this Subsection, or all of the requirements in Paragraph (2) of this Subsection, are satisfied.

(1) *Sale or exchange on or after January 1, 2008, and before September 7, 2008.*

(a) A corporation for state law or federal tax law purposes (the Subsidiary) sold or exchanged QPS on or after January 1, 2008, and before September 7, 2008 (the Transaction);

(b) At the time of the Transaction, the Subsidiary was owned (in whole or in part, directly or indirectly) by another corporation that was a financial institution referred to in section 582(c)(2)(A)(i) or (ii) (Financial Institution);

(c) In the calendar quarter in which the Transaction occurred, the assets of the Subsidiary were consolidated with the assets of the Financial Institution on a line-by-line basis on the Consolidated Reports of Condition and Income and their supporting schedules (the call report) that the Financial Institution filed with its federal bank supervisory authorities; and

(d) The Subsidiary and the Financial Institution joined in the filing of a federal income tax return on which gain or loss from the Transaction was reported.

(2) Sale or exchange after September 6, 2008.

(a) A corporation for state law or federal tax law purposes (the Subsidiary) sold or exchanged QPS after September 6, 2008 (the Transaction);

(b) On September 6, 2008, and at all times thereafter until the Transaction, the Subsidiary held the QPS that was the subject of the Transaction;

(c) On September 6, 2008, and at all times thereafter until immediately after the Transaction, the Subsidiary was owned (in whole or in part, directly or indirectly) by another corporation that was a financial institution referred to in section 582(c)(2)(A)(i) or (ii) (Financial Institution);

(d) In every calendar quarter that both ends after September 6, 2008, and begins on or before the date of the Transaction, the assets of the Subsidiary were consolidated with the assets of the Financial Institution on a line-by-line basis on the

Consolidated Reports of Condition and Income and their supporting schedules (the call report) that the Financial Institution filed with its federal bank supervisory authorities; and

(e) The Subsidiary and the Financial Institution joined in filing the same federal income tax return(s) for each taxable year of the Subsidiary and the Financial Institution that included all, or any portion, of the period beginning on September 7, 2008, and extending through and including the date of the Transaction.

.02 Application. EESA § 301 treats the Subsidiary's gain or loss on the Transaction as ordinary income or loss.

SECTION 7. SALE OR EXCHANGE BY A TAXPAYER OF QUALIFIED PREFERRED STOCK THE BASIS OF WHICH IN THE TAXPAYER'S HANDS IS DETERMINED BY REFERENCE TO THE BASIS OF THAT STOCK IN THE HANDS OF THE PERSON THAT HAD TRANSFERRED IT TO THE TAXPAYER

.01 Scope. This section applies if all of the following are satisfied:

- (1) The taxpayer acquired QPS after September 6, 2008 (the Acquisition);
- (2) The Acquisition was a transaction in which the taxpayer's basis in the QPS was determined by reference to the basis of the QPS in the hands of the person (the Transferor) that transferred the QPS to the taxpayer (that is, the QPS is "transferred basis property" within the meaning of section 7701(a)(43) of the Code);
- (3) The Transferor held the QPS on September 6, 2008; and
- (4) On September 6, 2008, and at all times thereafter until the QPS was transferred to the taxpayer, if the Transferor had sold the QPS, the character of gain or

loss on the sale would have been governed by EESA § 301, either because the Transferor was an applicable financial institution for that entire time period or because the sale would have been described in Section 6.01(2) of this revenue procedure.

.02 Application. Solely for purposes of EESA § 301, the taxpayer is treated as having held on September 6, 2008, the QPS that it acquired in the Acquisition.

SECTION 8. EFFECTIVE DATE

.01 This revenue procedure is effective for Transactions (as defined in Sections 3, 4, and 6 of this revenue procedure), and Acquisitions (as defined in Sections 5 and 7 of this revenue procedure), that occur after October 29, 2008.

.02 In addition, a taxpayer may apply this revenue procedure to Transactions (as defined in Sections 3, 4, and 6 of this revenue procedure) that occur on or after January 1, 2008, and on or before October 29, 2008, and to Acquisitions (as defined in Sections 5 and 7 of this revenue procedure) that occur after September 6, 2008, and on or before October 29, 2008, but only if the taxpayer applies this revenue procedure consistently to all Transactions and Acquisitions described in this Section 8.02.

SECTION 9. CONTACT INFORMATION.

For further information regarding this revenue procedure, contact Ms. Stacy L. Short of the Office of the Associate Chief Counsel (Passthroughs and Special Industries) at (202) 622-3070 (not a toll-free call).

SECTION 10. REQUEST FOR COMMENTS

Comments should be submitted by December 15, 2008, to: Internal Revenue Service, CC:PA:LPD:PR (Revenue Procedure 2008-64), Room 5203, P.O. Box 7604,

Ben Franklin Station, Washington, DC 20224. Alternatively, comments may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: Internal Revenue Service, CC:PA:LPD:PR (Revenue Procedure 2008-64), Courier's Desk, 1111 Constitution Avenue, NW, Washington, DC, or sent electronically, via the following email address: Notice.Comments@irs.counsel.treas.gov. Please include "Revenue Procedure 2008-64" in the subject line of any electronic submissions. All comments received will be open to public inspection and copying.