

Stock That is Considered Readily Tradable on an Established Securities Market in the United States for Purposes of Section 1(h)(11)(C)(ii)

Notice 2003-71

SUMMARY

The Jobs and Growth Tax Relief Reconciliation Act of 2003 (P.L. 108-27, 117

Stat. 752) (the "2003 Act") was enacted on May 28, 2003. Subject to certain limitations, the 2003 Act generally provides that a dividend paid to an individual shareholder from either a domestic corporation or a "qualified foreign corporation" is subject to tax at the reduced rates applicable to certain capital gains. A qualified foreign corporation includes certain foreign corporations that are eligible for benefits of a comprehensive income tax treaty with the United States which the Secretary determines is satisfactory for purposes of this provision and which includes an exchange of information program. In addition, a foreign corporation not otherwise treated as a qualified foreign corporation is so treated with respect to any dividend it pays if the stock with respect to which it pays such dividend is readily tradable on an established securities market in the United States. This notice defines, for taxable years beginning on or after January 1, 2003, what it means to be readily tradable on an established securities market in the United States. Treasury and the IRS intend to issue regulations under section 1(h) incorporating the principles outlined in this notice. This notice also requests comment on possible expansion of this definition for future taxable years.

ANALYSIS

Section 1(h)(1) of the Code generally provides that a taxpayer's "net capital gain" for any taxable year will be subject to a maximum tax rate of 15 percent (or 5 percent in the case of certain taxpayers). The 2003 Act added section 1(h)(11), which provides that net capital gain for purposes of section 1(h) means net capital gain (determined without regard to section 1(h)(11)) increased by "qualified dividend income". Qualified dividend income means dividends received during the taxable year from domestic corporations and "qualified foreign corporations". Section 1(h)(11)(B)(i). Subject to certain exceptions, a qualified foreign corporation is any foreign corporation that is either (i) incorporated in a possession of the United States, or (ii) eligible for benefits of a comprehensive income tax treaty with the United States which the Secretary determines is satisfactory for purposes of

this provision and which includes an exchange of information program.¹ Section 1(h)(11)(C)(i). Subject to the same exceptions, a foreign corporation that does not satisfy either of these two tests is treated as a qualified foreign corporation with respect to any dividend paid by such corporation if the stock with respect to which such dividend is paid is readily tradable on an established securities market in the United States. Section 1(h)(11)(C)(ii). A qualified foreign corporation does not include any foreign corporation which for the taxable year of the corporation in which the dividend was paid, or the preceding taxable year, is a foreign personal holding company (as defined in section 552), a foreign investment company (as defined in section 1246(b)), or a passive foreign investment company (as defined in section 1297).² Section 1(h)(11)(C)(iii).

For purposes of applying section 1(h)(11)(C)(ii) to taxable years beginning on or after January 1, 2003, common or ordinary stock, or an American depositary receipt in respect of such stock, is considered readily tradable on an established securities market in the United States if it is listed on a national securities exchange that is registered under section 6 of the Securities Exchange Act of 1934 (15 U.S.C. 78f) or on the Nasdaq Stock Market. As stated in the SEC's Annual Report for 2002, registered national exchanges as of September 30, 2002, include the American Stock Exchange, the Boston Stock Exchange, the Cincinnati Stock Exchange, the Chicago Stock Exchange, the NYSE, the Philadelphia Stock Exchange, and the Pacific Exchange, Inc.

Treasury and the IRS are continuing to consider, for future years, the treatment of dividends with respect to stock listed only in a manner that does not meet this definition, such as on the OTC Bulletin Board or on the electronic pink sheets. In particular, Treasury and the IRS are considering whether or to what extent treatment of stock that is listed only in such manner as "readily tradable on an established securities market in the United States" should

be conditioned on the satisfaction of parameters regarding minimum trading volume, minimum number of market makers, maintenance and publication of historical trade or quotation data, issuer reporting requirements under SEC or exchange rules, or issuer disclosure or determinations regarding passive foreign investment company, foreign investment company, or foreign personal holding company status. Treasury and the IRS request comments on the treatment of such stock and on the use of these parameters or any other factors that commentators believe should be considered.

EFFECTIVE DATE

This notice is effective for taxable years beginning on or after January 1, 2003.

COMMENTS

Treasury and the IRS invite interested persons to comment on the issues raised in this notice with regard to future years. Written comments may be submitted to CC:ITA:RU (Notice 2003-71), room 5226, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 am and 5 pm to: CC:ITA:RU (Notice 2003-71), Courier's desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC 20044. Alternatively, taxpayers may submit comments electronically via the following e-mail address: *Notice.Comments@irs.counsel.treas.gov*. Please include "Notice 2003-71" in the subject line of any electronic communications.

CONTACT INFORMATION

The principal author of this notice is Karen Rennie-Quarrie of the Office of Associate Chief Counsel (International). Ms. Rennie-Quarrie may be contacted at (202) 622-3880 (not a toll-free number).

¹ Notice 2003-69 contains the current list of the U.S. tax treaties that meet these requirements.

² A dividend from a qualified foreign corporation also is subject to the other limitations in section 1(h)(11). For example, a shareholder receiving a dividend from a qualified foreign corporation must satisfy the holding period requirements of section 1(h)(11)(B)(iii).