



Whitehorse Executive Center
1255 Whitehorse-Mercerville Road
Building B - Suite 514
Trenton, New Jersey 08619
T 609.890.3185 F 609.581.8244

November 12, 2019

Kirsten Wielobob,
Deputy Commissioner for Services and Enforcement
Internal Revenue Service
Room 5203, Post Office Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Proposed Regulations under Section 382(h) Related to Built-in Gain and Loss (RIN: 1545-BP07)

Dear Deputy Commissioner Wielobob:

Thank you for the opportunity to comment on the Internal Revenue Service (IRS) proposed regulations related to net operating losses (NOL).

BioNJ represents New Jersey's life sciences ecosystem, from the largest biopharmaceutical firms to emerging companies, Patient advocacy organizations, academic research institutions, and those that support them. Delivering access to groundbreaking and lifesaving Patient therapies and cures is the mission of our Membership. We believe Patients should have access to the right treatments at the right time, and we support efforts to reduce unnecessary barriers between providers, Patients and critical, lifesaving medicines – Because Patients Can't Wait®.

As you may know, small and emerging biotech companies are at the forefront of researching tomorrow's cures. Cell and gene therapies developed by these entities are being approved to cure cancer and rare diseases such as Duchenne muscular dystrophy. For these emerging companies, early and up-front investment can keep the lights on long enough to move to the next phase of research or into clinical trials. New Jersey has worked to encourage these early investments, utilizing programs such as the New Jersey Economic Development Authority's Net Operating Losses (NOL) Program to attract investment in the State's innovation economy.

The IRS has also used its authority under existing guidance to help encourage investment in startup companies. And BioNJ believes the agency should continue using its authority to support innovation in the life sciences. Since 2003, IRS has allowed through Section 382 the use of a "Section 338" approach as it pertains to NOLs in the life sciences and biopharma space. Section 338 has been a benefit to organizations that spend significant up-front amounts in areas such as research under the concept that research is an asset that might generate future revenue. The section 338 approach has allowed life sciences companies to increase NOL utilization that could have otherwise gone unused or expired due to the time period prior to utilization.

Unfortunately, the proposed Section 382 regulations would eliminate the section 338 approach. We believe this change will drastically and negatively impact the New Jersey life sciences industry.

Life sciences companies are frequently active in both mergers and raising capital where ownership changes may occur. Section 382 was created to stop “loss trafficking.” Yet, in a merger, acquisition, or an investment infusion resulting in an ownership change, the company’s NOLs are not being “trafficked.” Instead, these NOLs represent investments in research and development activities of the company that could be directly tied to possible future income. Without the section 338 approach, these financial activities may be curtailed as companies look to avoid future tax liabilities on NOLs. As raising capital is paramount to the success of a life sciences company, the removal of this approach could result in reduced investment in the sector.

BioNJ believes we should be supporting public policies that encourage investment in the life sciences and other technology industries. The rule as proposed could serve to negatively impact the availability of investment in the sector where early investment could lead to the cure for cancer, diabetes, or a rare disease. The IRS has since 2003 kept policies in place to ensure the biopharma industry can appropriately use NOLs in mergers and acquisition. We humbly ask that IRS consider withdrawing this proposal and allow the continued use of the section 338 approach.

Thank you for the opportunity to comment on these proposed regulations. Please do not hesitate to contact me at DHart@BioNJ.org or 609.890.3185 should you have any questions.

Sincerely,



Debbie Hart
President and CEO