

**DESCRIPTION OF THE CHAIRMAN'S MODIFICATION
TO THE REVENUE PROVISIONS OF THE
"AMERICAN RECOVERY AND REINVESTMENT
TAX ACT OF 2009"**

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By the
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INTRODUCTION

The Senate Committee on Finance has scheduled a markup of the “American Recovery and Reinvestment Tax Act of 2009.” This document,¹ prepared by the staff of the Joint Committee on Taxation, provides a description of the Chairman’s modification to the revenue provisions of the Chairman’s mark and certain modifications to the provision providing economic recovery payments.

¹ This document may be cited as follows: Joint Committee on Taxation, *Description of the Chairman’s Modification to the Revenue Provisions of the “American Recovery and Reinvestment Tax Act of 2009”* (JCX-12-09), January 27, 2009. This document can also be found on our website at www.jct.gov.

A. Modifications to Certain Provisions of the Chairman's Mark

1. Modification to making work pay credit

The Chairman's modification modifies the making work pay credit to provide that an individual is only eligible for the making work pay credit if the individual satisfies identical taxpayer identification number requirements as those applicable to the earned income tax credit.

2. Modification to waiver of recapture of first-time homebuyer credit

The Chairman's modification modifies the first-time homebuyer credit by extending the date for qualifying purchases and waiver of recapture of the credit to home purchases after December 31, 2008 and before September 1, 2009.

3. Modification of the election of investment credit in lieu of production tax credits

The Chairman's modification changes the election of an investment credit in lieu of the production credit to provide that the election is available with respect to any electricity production facility that would be eligible for a credit under section 45 if placed in service before the termination date applicable to such facility under section 45 (generally, through 2013; through 2012 for wind).

4. Modification to proposal providing an energy research credit

The Chairman's modification clarifies that research related to renewable fuels is eligible for the energy research credit.

5. Modification to proposal providing five-year carryback of operating losses

The Chairman's modification provides an election to increase the present-law net operating loss ("NOL") carryback period from two to any whole number of years which is less than six in the case of an NOL for either (1) any taxable year ending during 2008 or 2009, or (2) any taxable year beginning during 2008 or 2009. The 90-percent limitation on the use of any alternative tax NOL deduction is suspended for carrybacks of losses from taxable years ending during 2008 or 2009 and carryovers of losses to such taxable years (this rule applies to taxable years beginning during 2008 or 2009 if the taxpayer elects the extended carryback period for such years).

The Chairman's modification also increases the carryback period of a loss from operations of a life insurance company from three years to any whole number of years which is less than six in the case of a loss from operations for either (1) any taxable year ending during 2008 or 2009, or (2) any taxable year beginning during 2008 or 2009.

6. Modification to proposal deferring certain income from discharge of indebtedness

The Chairman's modification provides that certain income from the cancellation of indebtedness recognized by the taxpayer as a result of a repurchase in 2009 or 2010 by (1) the taxpayer or (2) a related person of a "debt instrument" that was issued by the taxpayer is deferred

and recognized in later years. Such cancellation of indebtedness income realized in 2009 is deferred and included ratably in income in each of the eight taxable years beginning two years after the year of realization, and such cancellation of indebtedness income realized in 2010 is deferred and included ratably in income in each of the eight taxable years beginning one year after the year of realization.

7. Modification to proposal providing a credit for investment in advanced energy property

The Chairman's modification provides that a qualified advanced energy manufacturing project includes, in addition to the projects listed in the original proposal, projects that re-equip, expand, or establish a manufacturing facility for the production of property designed to refine or blend renewable fuels (but not fossil fuels), to produce renewable energy, or to produce energy conservation technologies (including energy conserving lighting technologies and smart grid technologies). The modification also modifies the limitation on property designed to manufacture equipment for use in the refining or blending of any transportation fuel to permit the renewable fuel property described above to be credit-eligible.

8. Modification to Recovery Zone Bonds

The Chairman's modification provides that each State is guaranteed a one percent allocation of the national recovery zone economic development bond limitation, and of the national recovery zone facility bond limitation. The remainder of each national bond limitation is to be allocated based on employment decline as described in the Chairman's mark.

9. Modification to Tribal Economic Development Bonds

The Chairman's modification redefines a tribal economic development bond as any bond issued by an Indian tribal government that (1) notwithstanding section 7871(c), the interest on which would be tax-exempt if issued by a State or local government, and (2) that is designated by the Indian tribal government as a tribal economic development bond. The Chairman's modification also provides that for purposes of section 141 of the Code, an Indian tribe, and any instrumentality of such tribe, is treated as a State.

10. Modification to Qualified School Construction Bonds

The Chairman's modification strikes the requirement that 40 percent of the national limitation be reserved for large school districts. The Chairman's modification strikes the 1.68 multiplier used in calculating a State's minimum percentage allocation.

11. Modification to economic recovery payments

The Chairman's modification clarifies that, in accordance with the substance of the provision, the heading of the provision is "Economic recovery payments to recipients of Social Security, supplement security income, railroad retirement, and veterans disability compensation or pension benefits."

The Chairman's modification also clarifies that the payments called for by the provision will be subject to the Treasury Offset Program.

B. Additions to the Chairman's Mark

1. Modification of credit for carbon dioxide sequestration

Present Law

A credit of \$20 per metric ton is available for qualified carbon dioxide captured by a taxpayer at a qualified facility and disposed of by such taxpayer in secure geological storage (including storage at deep saline formations and unminable coal seams under such conditions as the Secretary may determine).² In addition, the provision allows a credit of \$10 per metric ton of qualified carbon dioxide that is captured by the taxpayer at a qualified facility and used by such taxpayer as a tertiary injectant (including carbon dioxide augmented waterflooding and immiscible carbon dioxide displacement) in a qualified enhanced oil or natural gas recovery project. Both credit amounts are adjusted for inflation after 2009.

Qualified carbon dioxide is defined as carbon dioxide captured from an industrial source that (1) would otherwise be released into the atmosphere as an industrial emission of greenhouse gas, and (2) is measured at the source of capture and verified at the point or points of injection. Qualified carbon dioxide includes the initial deposit of captured carbon dioxide used as a tertiary injectant but does not include carbon dioxide that is recaptured, recycled, and re-injected as part of an enhanced oil or natural gas recovery project process. A qualified enhanced oil or natural gas recovery project is a project that would otherwise meet the definition of an enhanced oil recovery project under section 43, if natural gas projects were included within that definition.

A qualified facility means any industrial facility (1) which is owned by the taxpayer, (2) at which carbon capture equipment is placed in service, and (3) which captures not less than 500,000 metric tons of carbon dioxide during the taxable year. The credit applies only with respect to qualified carbon dioxide captured and sequestered or injected in the United States³ or one of its possessions.⁴

Except as provided in regulations, credits are attributable to the person that captures and physically or contractually ensures the disposal, or use as a tertiary injectant, of the qualified carbon dioxide. Credits are subject to recapture, as provided by regulation, with respect to any qualified carbon dioxide that ceases to be recaptured, disposed of, or used as a tertiary injectant in a manner consistent with the rules of the provision.

The credit is part of the general business credit. The credit sunsets at the end of the calendar year in which the Secretary, in consultation with the Administrator of the Environmental Protection Agency, certifies that 75 million metric tons of qualified carbon dioxide have been captured and disposed of or used as a tertiary injectant.

² Sec. 45Q.

³ Sec. 638(1).

⁴ Sec. 638(2).

Description of Proposal

The proposal provides that carbon dioxide used as a tertiary injectant and otherwise eligible for a \$10 per metric ton credit must be sequestered in permanent geologic storage in order to qualify for such credit.

Effective Date

The proposal is effective for carbon dioxide captured after the date of enactment.

2. Modification of the alternative motor vehicle credit and the plug-in electric drive motor vehicle credit

Present Law

A credit is available for each qualified plug-in electric drive motor vehicle placed in service. A qualified plug-in electric drive motor vehicle is a motor vehicle that has at least four wheels, is manufactured for use on public roads, meets certain emissions standards (except for certain heavy vehicles), draws propulsion using a traction battery with at least four kilowatt-hours of capacity, and is capable of being recharged from an external source of electricity.

The base amount of the plug-in electric drive motor vehicle credit is \$2,500, plus another \$417 for each kilowatt-hour of battery capacity in excess of four kilowatt-hours. The maximum credit for qualified vehicles weighing 10,000 pounds or less is \$7,500. This maximum amount increases to \$10,000 for vehicles weighing more than 10,000 pounds but not more than 14,000 pounds, to \$12,500 for vehicles weighing more than 14,000 pounds but not more than 26,000 pounds, and to \$15,000 for vehicle weighing more than 26,000 pounds.

In general, the credit is available to the vehicle owner, including the lessor of a vehicle subject to lease. If the qualified vehicle is used by certain tax-exempt organizations, governments, or foreign persons and is not subject to a lease, the seller of the vehicle may claim the credit so long as the seller clearly discloses to the user in a document the amount that is allowable as a credit. A vehicle must be used predominantly in the United States to qualify for the credit.

Once a total of 250,000 credit-eligible vehicles have been sold for use in the United States, the credit phases out over four calendar quarters. The phaseout period begins in the second calendar quarter following the quarter during which the vehicle cap has been reached. Taxpayers may claim one-half of the otherwise allowable credit during the first two calendar quarters of the phaseout period and twenty-five percent of the otherwise allowable credit during the next two quarters. After this, no credit is available. Regardless of the phase-out limitation, no credit is available for vehicles purchased after 2014.

The basis of any qualified vehicle is reduced by the amount of the credit. To the extent a vehicle is eligible for credit as a qualified plug-in electric drive motor vehicle, it is not eligible for credit as a qualified hybrid vehicle under section 30B. The portion of the credit attributable to vehicles of a character subject to an allowance for depreciation is treated as part of the general business credit; the nonbusiness portion of the credit is allowable to the extent of the excess of

the regular tax and the alternative minimum tax (reduced by certain other credits) for the taxable year.

Description of Proposal

The proposal modifies the plug-in electric drive motor vehicle credit by increasing the 250,000 vehicle limitation to 500,000. It also modifies the definition of qualified plug-in electric drive motor vehicle to exclude low-speed vehicles.

The proposal creates a new credit 10-percent credit for low-speed vehicles, motorcycles, and three-wheeled vehicles that would otherwise meet the criteria of a qualified plug-in electric drive motor vehicle but for the fact that they are low-speed vehicles or do not have at least four wheels. The maximum credit for such vehicles is \$4,000. Basis reduction and other rules similar to those found in section 30 apply under the proposal. The new credit is part of the general business credit. The new credit is not available for vehicles sold after December 31, 2011.

Effective Date

The proposal is effective for vehicles sold after December 31, 2009.

3. Parity for qualified transportation fringe benefits

Present Law

Qualified transportation fringe benefits provided by an employer are excluded from an employee's gross income for income tax purposes and from an employee's wages for payroll tax purposes.⁵ Qualified transportation fringe benefits include parking, transit passes, vanpool benefits, and qualified bicycle commuting reimbursements. Up to \$230 (for 2009) per month of employer-provided parking is excludable from income. Up to \$120 (for 2009) per month of employer-provided transit and vanpool benefits are excludable from gross income. These amounts are indexed annually for inflation, rounded to the nearest multiple of \$5. No amount is includible in the income of an employee merely because the employer offers the employee a choice between cash and qualified transportation fringe benefits. Qualified transportation fringe benefits also include a cash reimbursement by an employer to an employee. However, in the case of transit passes, a cash reimbursement is considered a qualified transportation fringe benefit only if a voucher or similar item which may be exchanged only for a transit pass is not readily available for direct distribution by the employer to the employee.

Description of Proposal

The proposal increases the monthly exclusion for employer-provided transit and vanpool benefits to the same level as the exclusion for employer-provided parking.

⁵ Code secs. 132(f), 3121(b)(2), and 3306(b)(16), and 3401(a)(19).

Effective Date

The proposal is effective for months beginning on or after date of enactment. The proposal does not apply to tax years beginning after December 31, 2010.

4. Reduce temporarily the S corporation built-in gains holding period

Present Law

A “small business corporation” (as defined in section 1361(b)) can elect under section 1362 to be taxed as an S corporation. Unlike C corporations, S corporations generally pay no corporate-level tax. Instead, income of an S corporation generally passes through to its shareholders, who pay tax on their pro-rata shares of such income.⁶ Where a corporation that was formed as a C corporation elects to become an S corporation, the S corporation is taxed on all gains that were built-in at the time of the election if such gains are recognized during the first 10 S corporation years (the “built-in gains holding period”).⁷ Gains are not built-in gains to the extent they are shown to have arisen while the S election was in effect or are offset by losses. The built-in gains tax also applies to gains with respect to property received by an S corporation from a C corporation in a carryover basis transaction. The tax on built-in gains is imposed at the highest corporate rate (currently, 35 percent).

Description of Proposal

The proposal would reduce temporarily the S corporation built-in gains holding period from the current 10 year period to a seven-year period for taxable years that begin in 2009 and 2010.

Effective Date

The proposal is effective for taxable years beginning in 2009.

5. Clarification of regulations related to limitations on certain built in losses following an ownership change

Present Law

Section 382 limits the extent to which a “loss corporation” that experiences an “ownership change” may offset taxable income in any post-change taxable year by pre-change net operating losses, certain built-in losses, and deductions attributable to the pre-change period.⁸

⁶ Sec. 1366.

⁷ See sec. 1374.

⁸ Section 383 imposes similar limitations, under regulations, on the use of carryforwards of general business credits, alternative minimum tax credits, foreign tax credits, and net capital loss carryforwards. Section 383 generally refers to section 382 for the meanings of its terms, but requires appropriate adjustments to take account of its application to credits and net capital losses.

In general, the amount of income in any post-change year that may be offset by such net operating losses, built-in losses and deductions is limited to an amount (referred to as the “section 382 limitation”) determined by multiplying the value of the loss corporation immediately before the ownership change by the long-term tax-exempt interest rate.⁹

A “loss corporation” is defined as a corporation entitled to use a net operating loss carryover or having a net operating loss carryover for the taxable year in which the ownership change occurs. Except to the extent provided in regulations, such term includes any corporation with a “net unrealized built-in loss” (or NUBIL),¹⁰ defined as the amount by which the fair market value of the assets of the corporation immediately before an ownership change is less than the aggregate adjusted basis of such assets at such time. However, if the amount of the NUBIL does not exceed the lesser of (i) 15 percent of the fair market value of the corporation’s assets or (ii) \$10,000,000, then the amount of the NUBIL is treated as zero.¹¹

An ownership change is defined generally as an increase by more than 50 percentage points in the percentage of stock of a loss corporation that is owned by any one or more five-percent (or greater) shareholders (as defined) within a three year period.¹² Treasury regulations provide generally that this measurement is to be made as of any “testing date,” which is any date on which the ownership of one or more persons who were or who become five-percent shareholders increases.¹³

⁹ If the loss corporation had a “net unrealized built in gain” (or NUBIG) at the time of the ownership change, then the section 382 limitation for any taxable year may be increased by the amount of the “recognized built-in gains” (discussed further below) for that year. A NUBIG is defined as the amount by which the fair market value of the assets of the corporation immediately before an ownership change exceeds the aggregate adjusted basis of such assets at such time. However, if the amount of the NUBIG does not exceed the lesser of (i) 15 percent of the fair market value of the corporation’s assets or (ii) \$10,000,000, then the amount of the NUBIG is treated as zero. Sec. 382(h)(1).

¹⁰ Sec. 382(k)(1).

¹¹ Sec. 382(h)(3).

¹² Determinations of the percentage of stock of any corporation held by any person are made on the basis of value. Sec. 382(k)(6)(C).

¹³ See Treas. Reg. sec. 1.382-2(a)(4) (providing that “a loss corporation is required to determine whether an ownership change has occurred immediately after any owner shift, or issuance or transfer (including an issuance or transfer described in Treas. Reg. sec. 1.382-4(d)(8)(i) or (ii)) of an option with respect to stock of the loss corporation that is treated as exercised under Treas. Reg. sec. 1.382-4(d)(2)” and defining a “testing date” as “each date on which a loss corporation is required to make a determination of whether an ownership change has occurred”) and Temp. Treas. Reg. sec. 1.382-2T(e)(1) (defining an “owner shift” as “any change in the ownership of the stock of a loss corporation that affects the percentage of such stock owned by any 5-percent shareholder”). Treasury regulations under section 382 provide that, in computing stock ownership on specified testing dates, certain unexercised options must be treated as exercised if certain ownership, control, or income tests are met. These tests are met only if “a principal purpose of the issuance, transfer, or structuring of the option (alone or in combination

Section 382(h) governs the treatment of certain built-in losses and built-in gains recognized with respect to assets held by the loss corporation at the time of the ownership change. In the case of a loss corporation that has a NUBIL (measured immediately before an ownership change), section 382(h)(1) provides that any “recognized built-in loss” (or RBIL) for any taxable year during a “recognition period” (consisting of the five years beginning on the ownership change date) is subject to the section 382 limitation in the same manner as if it were a pre-change net operating loss.¹⁴ An RBIL is defined for this purpose as any loss recognized during the recognition period on the disposition of any asset held by the loss corporation immediately before the ownership change date, to the extent that such loss is attributable to an excess of the adjusted basis of the asset on the change date over its fair market value on that date.¹⁵ An RBIL also includes any amount allowable as depreciation, amortization or depletion during the recognition period, to the extent that such amount is attributable to the excess of the adjusted basis of the asset over its fair market value on the ownership change date.¹⁶ In addition, any amount that is allowable as a deduction during the recognition period (determined without regard to any carryover) but which is attributable to periods before the ownership change date is treated as an RBIL for the taxable year in which it is allowable as a deduction.¹⁷

As indicated above, section 382(h)(1) provides in the case of a loss corporation that has a NUBIG that the section 382 limitation may be increased for any taxable year during the recognition period by the amount of recognized built-in gains (or RBIGs) for such taxable year.¹⁸

with other arrangements) is to avoid or ameliorate the impact of an ownership change of the loss corporation.” Treas. Reg. sec. 1.382-4(d). Compare prior temporary regulations, Temp. Reg. sec. 1.382-2T(h)(4) (“Solely for the purpose of determining whether there is an ownership change on any testing date, stock of the loss corporation that is subject to an option shall be treated as acquired on any such date, pursuant to an exercise of the option by its owner on that date, if such deemed exercise would result in an ownership change.”). Internal Revenue Service Notice 2008-76, I.R.B. 2008-39 (September 29, 2008), released September 7, 2008, provides that the Treasury Department intends to issue regulations modifying the term “testing date” under section 382 to exclude any date on or after which the United States acquires stock or options to acquire stock in certain corporations with respect to which there is a “Housing Act Acquisition” pursuant to the Housing and Economic Recovery Act of 2008 (P.L. 110-289). The Notice states that the regulations will apply on and after September 7, 2008, unless and until there is additional guidance. Internal Revenue Service Notice 2008-84, I.R.B. 2008-41 (October 14, 2008), provides that the Treasury Department intends to issue regulations modifying the term “testing date” under section 382 to exclude any date as of the close of which the United States owns, directly or indirectly, a more than 50 percent interest in a loss corporation, which regulations will apply unless and until there is additional guidance.

¹⁴ Sec. 382(h)(2). The total amount of the loss corporation’s RBILs that are subject to the section 382 limitation cannot exceed the amount of the corporation’s NUBIL.

¹⁵ Sec. 382(h)(2)(B).

¹⁶ Sec. 382(h)(2)(B).

¹⁷ Sec. 382(h)(6)(B).

¹⁸ The total amount of such increases cannot exceed the amount of the corporation’s NUBIG.

An RBIG is defined for this purpose as any gain recognized during the recognition period on the disposition of any asset held by the loss corporation immediately before the ownership change date, to the extent that such gain is attributable to an excess of the fair market value of the asset on the change date over its adjusted basis on that date.¹⁹ In addition, any item of income that is properly taken into account during the recognition period but which is attributable to periods before the ownership change date is treated as an RBIG for the taxable year in which it is properly taken into account.²⁰

Internal Revenue Service Notice 2003-65²¹ provides two alternative safe harbor approaches for the identification of built-in items for purposes of section 382(h): the “1374 approach” and the “338 approach.”

Under the 1374 approach,²² NUBIG or NUBIL is the net amount of gain or loss that would be recognized in a hypothetical sale of the assets of the loss corporation immediately before the ownership change.²³ The amount of gain or loss recognized during the recognition period on the sale or exchange of an asset held at the time of the ownership change is RBIG or RBIL, respectively, to the extent it is attributable to a difference between the adjusted basis and the fair market value of the asset on the change date, as described above. However, the 1374 approach generally relies on the accrual method of accounting to identify items of income or deduction as RBIG or RBIL, respectively. Generally, items of income or deduction properly included in income or allowed as a deduction during the recognition period are considered attributable to period before the change date (and thus are treated as RBIG or RBIL, respectively), if a taxpayer using an accrual method of accounting would have included the item in income or been allowed a deduction for the item before the change date. However, the 1374 approach includes a number of exceptions to this general rule, including a special rule dealing with bad debt deductions under section 166. Under this special rule, any deduction item properly taken into account during the first 12 months of the recognition period as a bad debt deduction under section 166 is treated as RBIL if the item arises from a debt owed to the loss corporation at

¹⁹ Sec. 382(h)(2)(A).

²⁰ Sec. 382(h)(6)(A).

²¹ 2003-2 C.B. 747.

²² The 1374 approach generally incorporates rules similar to those of section 1374(d) and the Treasury regulations thereunder in calculating NUBIG and NUBIL and identifying RBIG and RBIL.

²³ More specifically, NUBIG or NUBIL is calculated by determining the amount that would be realized if immediately before the ownership change the loss corporation had sold all of its assets, including goodwill, at fair market value to a third party that assumed all of its liabilities, decreased by the sum of any deductible liabilities of the loss corporation that would be included in the amount realized on the hypothetical sale and the loss corporation’s aggregate adjusted basis in all of its assets, increased or decreased by the corporation’s section 481 adjustments that would be taken into account on a hypothetical sale, and increased by any RBIL that would not be allowed as a deduction under section 382, 383 or 384 on the hypothetical sale.

the beginning of the recognition period (and deductions for such items properly taken into account after the first 12 months of the recognition period are not RBILs).²⁴

The 338 approach identifies items of RBIG and RBIL generally by comparing the loss corporation's actual items of income, gain, deduction and loss with those that would have resulted if a section 338 election had been made with respect to a hypothetical purchase of all of the outstanding stock of the loss corporation on the change date. Under the 338 approach, NUBIG or NUBIL is calculated in the same manner as it is under the 1374 approach.²⁵ The 338 approach identifies RBIG or RBIL by comparing the loss corporation's actual items of income, gain, deduction and loss with the items of income, gain, deduction and loss that would result if a section 338 election had been made for the hypothetical purchase. The loss corporation is treated for this purpose as using those accounting methods that the loss corporation actually uses. The 338 approach does not include any special rule with regard to bad debt deductions under section 166.

Section 166 generally allows a deduction in respect of any debt that becomes worthless, in whole or in part, during the taxable year.²⁶ The determination of whether a debt is worthless, in whole or in part, is a question of fact. However, in the case of a bank or other corporation that is subject to supervision by Federal authorities, or by State authorities maintaining substantially equivalent standards, the Treasury regulations under section 166 provide a presumption of worthlessness to the extent that a debt is charged off during the taxable year pursuant to a specific order of such an authority or in accordance with established policies of such an authority (and in the latter case, the authority confirms in writing upon the first subsequent audit of the bank or other corporation that the charge-off would have been required if the audit had been made at the time of the charge-off). The presumption does not apply if the taxpayer does not claim the amount so charged off as a deduction for the taxable year in which the charge-off takes place. In that case, the charge-off is treated as having been involuntary; however, in order to claim the section 166 deduction in a later taxable year, the taxpayer must produce sufficient evidence to show that the debt became partially worthless in the later year or became recoverable only in part subsequent to the taxable year of the charge-off, as the case may be, and to the extent that the deduction claimed in the later year for a partially worthless debt was not involuntarily charged off in prior taxable years, it was charged off in the later taxable year.²⁷

²⁴ Notice 2003-65, section III.B.2.b.

²⁵ Accordingly, unlike the case in which a section 338 election is actually made, contingent consideration (including a contingent liability) is taken into account in the initial calculation of NUBIG or NUBIL, and no further adjustments are made to reflect subsequent changes in deemed consideration.

²⁶ Section 166 does not apply, however, to a debt which is evidenced by a security, defined for this purpose (by cross-reference to section 165(g)(2)(C)) as a bond, debenture, note or certificate or other evidence of indebtedness issued by a corporation or by a government or political subdivision thereof, with interest coupons or in registered form. Sec. 166(e).

²⁷ See Treas. Reg. sec. 1.166-2(d)(1) and (2).

The Treasury regulations also permit a bank (generally as defined for purposes of section 581, with certain modifications) that is subject to supervision by Federal authorities, or State authorities maintaining substantially equivalent standards, to make a “conformity election” under which debts charged off for regulatory purposes during a taxable year are conclusively presumed to be worthless for tax purposes to the same extent, provided that the charge-off results from a specific order of the regulatory authority or corresponds to the institution’s classification of the debt as a “loss asset” pursuant to loan loss classification standards that are consistent with those of certain specified bank regulatory authorities. The conformity election is treated as the adoption of a method of accounting.²⁸

Internal Revenue Service Notice 2008-83,²⁹ released on October 1, 2008, provides that “[f]or purposes of section 382(h), any deduction properly allowed after an ownership change (as defined in section 382(g)) to a bank with respect to losses on loans or bad debts (including any deduction for a reasonable addition to a reserve for bad debts) shall not be treated as a built-in loss or a deduction that is attributable to periods before the change date.”³⁰ The Notice further states that the Internal Revenue Service and the Treasury Department are studying the proper treatment under section 382(h) of certain items of deduction or loss allowed after an ownership change to a corporation that is a bank (as defined in section 581) both immediately before and after the change date, and that any such corporation may rely on the treatment set forth in Notice 2008-83 unless and until there is additional guidance.

Description of Proposal

The provision states that Congress finds as follows: (1) The delegation of authority to the Secretary of the Treasury, or his delegate, under section 382(m) does not authorize the Secretary to provide exemptions or special rules that are restricted to particular industries or classes of taxpayers, (2) Internal Revenue Service Notice 2008-83 is inconsistent with the congressional intent in enacting such section 382(m), (3) the legal authority to prescribe Notice 2008-83 is doubtful, (4) however, as taxpayers should generally be able to rely on guidance issued by the Secretary of the Treasury, legislation is necessary to clarify the force and effect of Notice 2008-83 and restore the proper application under the Internal Revenue Code of the limitation on built-in losses following an ownership change of a bank.

Under the provision, Treasury Notice 2008-83 shall be deemed to have the force and effect of law with respect to any ownership change (as defined in section 382(g)) occurring on or before January 16, 2009, and with respect to any ownership change (as so defined) which occurs after January 16, 2009, if such change (1) is pursuant to a written binding contract entered in to on or before such date or (2) is pursuant to a written agreement entered into on or before such date and such agreement was described on or before such date in a public announcement or in a

²⁸ See Treas. Reg. sec. 1.166-2(d)(3); cf. Priv. Let. Rul. 9248048 (July 7, 1992); Tech. Ad. Mem. 9122001 (Feb. 8, 1991).

²⁹ 2008-42 I.R.B. 2008-42 (Oct. 20, 2008).

³⁰ Notice 2008-83, section 2.

filing with the Securities and Exchange Commission required by reason of such ownership change, but shall otherwise have no force or effect with respect to any ownership change after such date.

Effective Date

The provision is effective on the date of enactment.

6. Exempt facility bonds for high-speed rail

Present Law

In general

Under present law, gross income does not include interest on State or local bonds. State and local bonds are classified generally as either governmental bonds or private activity bonds. Governmental bonds are bonds the proceeds of which are primarily used to finance governmental functions or which are repaid with governmental funds. Private activity bonds are bonds in which the State or local government serves as a conduit providing financing to nongovernmental persons (e.g., private businesses or individuals). The exclusion from income for State and local bonds does not apply to private activity bonds unless the bonds are issued for certain permitted purposes (“qualified private activity bonds”) and other Code requirements are met.

High-speed rail

An exempt facility bond is a type of qualified private activity bond. Exempt facility bonds can be issued for high-speed intercity rail facilities. A facility qualifies as a high-speed intercity rail facility if it is a facility (other than rolling stock) for fixed guideway rail transportation of passengers and their baggage between metropolitan statistical areas. The facilities must use vehicles that are reasonably expected to operate at speeds in excess of 150 miles per hour between scheduled stops and the facilities must be made available to members of the general public as passengers. If the bonds are to be issued for a nongovernmental owner of the facility, such owner must irrevocably elect not to claim depreciation or credits with respect to the property financed by the net proceeds of the issue.

The Code imposes a special redemption requirement for these types of bonds. Any proceeds not used within three years of the date of issuance of the bonds must be used within the following six months to redeem such bonds.

Seventy-five percent of the principal amount of the bonds issued for high-speed rail facilities is exempt from the volume limit. If all the property to be financed by the net proceeds of the issue is to be owned by a governmental unit, then such bonds are completely exempt from the volume limit.

Description of Proposal

The proposal modifies the requirement that high-speed intercity rail transportation facilities use vehicles that are reasonably expected to operate at speeds in excess of 150 miles per hour. Instead, under the proposal such facilities must use vehicles reasonably expected to attain a top speed in excess of 150 miles per hour.

Effective Date

The proposal is effective for bonds issued after date of enactment.

7. Broadband tax incentives

Present Law

A taxpayer is allowed to recover, through annual depreciation deductions, the cost of certain property used in a trade or business or for the production of income. The amount of the depreciation deduction allowed with respect to tangible property for a taxable year is determined under the modified accelerated cost recovery system (“MACRS”).³¹ Under MACRS, different types of property generally are assigned applicable recovery periods and depreciation methods. The recovery periods applicable to most tangible personal property (generally tangible property other than residential rental property and nonresidential real property) range from 3 to 25 years. The depreciation methods generally applicable to tangible personal property are the 200-percent and 150-percent declining balance methods, switching to the straight-line method for the taxable year in which the depreciation deduction would be maximized.

No credit is specifically designed under present law to encourage the development of qualified broadband expenditures.

Description of Proposal

The amendment provides an investment tax credit for “qualified broadband expenditures.” Qualified broadband expenditures comprise both “current-generation” and “next-generation” broadband. The provision establishes a 10 percent credit for investment in current-generation broadband in rural and underserved areas. The provision establishes a 20 percent credit for investment in current-generation broadband in unserved areas. The provision establishes a 20 percent credit for investment in next-generation broadband in rural, underserved, and unserved areas. The basis of qualified property must be reduced by the amount of credit received. To qualify for the credit, the qualified broadband equipment must be placed in service after December 31, 2008, and before January 1, 2011.

“Current-generation” broadband services are defined as the transmission of signals at a rate of at least 5 million bits per second to the subscriber and at a rate of at least 1 million bits per second from the subscriber or wireless technology transmission of signals at a rate of at least 3

³¹ Sec. 168.

million bits per second to the subscriber and at a rate of at least 768 kilobits per second from the subscriber. “Next-generation” broadband services are defined as the transmission of signals at a rate of at least 100 million bits per second to the subscriber and at a rate of at least 20 million bits per second from the subscriber.

Qualified broadband expenditures means the direct or indirect costs properly taken into account for the taxable year for the purchase or installation of qualified equipment (including upgrades) and the connection of the equipment to a qualified subscriber. The term does not include costs of launching satellite equipment.

Qualified broadband expenditures include only the portion of the purchase price paid by the lessor, in the case of leased equipment, that is attributable to otherwise qualified broadband expenditures by the lessee. In the case of property that is originally placed in service by a person and that is sold to the taxpayer and leased back to such person by the taxpayer within three months after the date that the property was originally placed in service, the property is treated as originally placed in service by the taxpayer not earlier than the date that the property is used under the leaseback.

A qualified subscriber, with respect to current-generation broadband services, means any nonresidential subscriber maintaining a permanent place of business in a rural, underserved, or unserved area, or any residential subscriber residing in a rural, underserved, or unserved area that is not a saturated market. A qualified subscriber, with respect to next generation broadband services, means any nonresidential subscriber maintaining a permanent place of business in a rural, underserved, or unserved area, or any residential subscriber.

The term ‘rural area’ means any census tract which is not within 10 miles of any incorporated or census designated place containing more than 25, 000 people, and is not within a country or county equivalent which has and overall population density of more than 500 people per square mile of land.

An underserved area is a low-income community designed under section 45 D which is defined as a population census tract located in either (1) a poverty rate of at least 20 percent or (2) median family income which does not exceed 80 percent of the greater of metropolitan area median family income or statewide median family income (for a nonmetropolitan census tract, does not exceed 80 percent of statewide median family income).

An unserved area is a location, as certified by the State, that does not currently have a provider of current generation broadband services.

A saturated market, for this purpose, means any census tract in which, as of the date of enactment, current generation broadband services have been provided by a single provider to 85 percent or more of the total potential residential subscribers. The services must be usable at least a majority of the time during periods of maximum demand, and usable in a manner substantially the same as services provided through equipment not eligible for the credit under this provision.

If current- or next-generation broadband services can be provided through qualified equipment to both qualified subscribers and to other subscribers, the provision provides that the expenditures with respect to the equipment are allocated among subscribers to determine the

amount of qualified broad broadband expenditures that may be credit-eligible under the provision.

Qualified equipment means equipment that provides current- or next-generation broadband services at least a majority of the time during periods of maximum demand to each subscriber, and in a manner substantially the same as such services are provided by the provider to subscribers through equipment with respect to which no credit is allowed under the provision. Limitations are imposed under the provision on equipment depending on where it extends, and on certain packet switching equipment, and on certain multiplexing and demultiplexing equipment.

Expenditures generally are not taken into account for purposes of the credit under the provision with respect to property used predominantly outside the United States, used predominantly to furnish lodging, used by a tax-exempt organization (other than in a business whose income is subject to unrelated business income tax), or used by the United States or a political subdivision or by a possession, agency or instrumentality thereof or by a foreign person or entity. The basis of property is reduced by the cost of the property that is taken into account as a credit under the provision. Recapture rules are provided. The credit is a general business credit.

Effective Date

The provision is effective for property placed in service after December 31, 2008.

8. Application of certain labor standards to projects financed with certain tax-favored bonds

Present Law

The United States Code (Subchapter IV of Chapter 31 of Title 40) applies a prevailing wage requirement to certain contracts to which the Federal Government is a party.

Description of Proposal

The proposal provides that Subchapter IV of Chapter 31 of Title 40 of the U.S. Code shall apply to projects financed with the proceeds of:

1. any qualified clean renewable energy bond (as defined in sec. 54C of the Code) issued after the date of enactment;
2. any qualified energy conservation bond (as defined in sec. 54D of the Code) issued after the date of enactment; ;
3. any qualified zone academy bond (as defined in sec. 54E of the Code) issued after the date of enactment;
4. any qualified school construction bond (as defined in sec. 54F of the Code) issued; and

5. any recovery zone economic development bond (as defined in sec. 1400U-2 of the Code).

Effective Date

The proposal is effective on the date of enactment.