

**DESCRIPTION OF THE TAX TECHNICAL CORRECTIONS
ACT OF 2009**

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of the
JOINT COMMITTEE ON TAXATION



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INTRODUCTION

This document,¹ prepared by the staff of the Joint Committee on Taxation, provides a description of the Tax Technical Corrections Act of 2009, as introduced on December 2, 2009, in the House of Representatives as H.R. 4169.

¹ This document may be cited as follows: Joint Committee on Taxation, *Description of the Tax Technical Corrections Act of 2009* (JCX-56-09), December 2, 2009. This document is available on the internet at www.jct.gov.

DESCRIPTION OF TAX TECHNICAL CORRECTIONS

Amendments to the American Recovery and Reinvestment Act of 2009 (Pub. L. No. 111-5), Division B

American Opportunity Tax Credit (Act sec. 1004).—The Act includes a reference to “tuition, fees, and course materials.” The reference to course materials was intended to apply to the Hope credit, but not to the Lifetime learning credit. The bill corrects this reference to the inclusion of course materials so that it applies only to the Hope credit and not to the Lifetime learning credit.

Deduction for State sales tax and excise tax on the purchase of certain motor vehicles (Act sec. 1008).—The Act provides an itemized deduction and increased standard deduction for qualified motor vehicle taxes. The bill strikes Code section 164(b)(6)(E) (which refers to the last sentence of section 164(a)) as inoperative, because the taxes referred to in that last sentence do not include qualified motor vehicle taxes. As in the case of the deduction for the general sales tax, it is intended that the deduction for qualified motor vehicle taxes not apply to tax on items used in a trade or business, although the tax may be deductible under another provision of the Code.

Election to claim the section 48 investment credit in lieu of the section 45 production credit (Act sec. 1102).—An election under Code section 48(a)(5), added by the Act, is available only with respect to property that is part of a facility that would otherwise be eligible for credit under section 45 (in addition to any other requirements in section 48(a)(5)). The bill clarifies that the limitation in present-law section 48(a)(5)(D)(i)(II), which is intended to require that property be used as an integral part of the qualified investment credit facility, applies to any tangible property (whether tangible personal property or other tangible property described in the provision).

So as to carry out the legislative intent to prevent churning of credit property, the bill clarifies that the definition of energy property for purposes of section 48 requires that the original use of purchased property commence with the taxpayer.

Coordination with renewable energy grants (Act sec. 1104).—The bill provides that grants in lieu of energy credits under section 1603 of the Act are not includible in alternative minimum taxable income (including adjusted current earnings of a corporation). This treatment is consistent with the treatment of energy credits.

Extension and modification of credit for nonbusiness energy property (Act sec. 1121).—The bill updates the reference in Code section 25C(c)(1) to the 2000 International Energy Conservation Code so that it refers to the 2009 International Energy Conservation Code.

Credits for certain vehicles and refueling property (Act secs. 1141 and 1142, and secs. 1341 and 1342 of the Energy Incentives Act of 2005).—The provisions of the bill conform the rules relating to the amount of basis reduction, as well as the reduction of other credits and deductions, on account of the credits for certain vehicles and refueling property under sections 30, 30B, 30C, and 30D.

Temporary reduction in recognition period for built-in gains tax (Act sec. 1251).—The bill clarifies that seven calendar years (not seven taxable years) in the 10-year recognition period must have elapsed prior to any taxable year beginning in 2009 or 2010 for an S corporation to be eligible for the built-in gains tax relief under the Act.

Qualified school construction bond allocations to large local education agencies (Act sec. 1521).—The bill provides that large local education agencies receiving an allocation from the national pool of qualified school construction bonds may carry forward any portion of the allocation that is unused at the end of the calendar year.

Regulated investment companies allowed to pass through tax credit bond credits (Act sec. 1541).—The bill clarifies that a regulated investment company electing to pass through credits on tax credit bonds, and its shareholders, are treated in a manner similar to that which would occur if the company distributed to its shareholders an amount of money equal to the amount of the credits passed through.

Grants in lieu of section 45 and 48 credits (Act sec. 1603).—So as to carry out the legislative intent to prevent churning of grant property, the bill clarifies that eligible property placed in service during 2009 or 2010 must be originally placed in service by the taxpayer, or that the original use of the property must commence with the taxpayer. This provision of the bill also clarifies that a facility for which the section 45 credit or section 48 credit has been claimed in prior years is not eligible for a renewable energy grant.

The bill clarifies that an election to claim a grant in lieu of the section 45 credit is permitted only to the extent the property described in Act section 1603(d)(1) is part of a facility that would otherwise meet the section 45 credit eligibility requirements (other than the requirement that the electricity be sold by the taxpayer to an unrelated person during the taxable year).

The bill clarifies that excessive grants are recaptured as if they were underpayments of tax owed by the persons to whom the grants were made. The bill further clarifies that information related to such grants does not constitute return information for purposes of section 6103.

The bill clarifies the exception (prohibiting the making of a grant) under Act section 1603(g) for certain nontaxpayers by providing that the exception does not apply to the extent the grant is with respect to unrelated trade or business property. For this purpose, unrelated trade or business property is property with respect to which substantially all the income derived from which by an organization described in section 511(a)(2) (relating to organizations subject to unrelated business income tax) is subject to unrelated business income tax. Reporting rules apply under the provision in the case of a partnership or other passthrough entity, requiring partners or other holders of an equity or profits interest to provide to the partnership or entity any information required by the Treasury Department to carry out the purposes of the grant rules.

Special credit for certain government retirees (Act sec. 2202).—The bill clarifies the credit with respect to treatment of the U.S. possessions. The provision is intended to operate in a

manner similar to the operation of the Making Work Pay Credit with respect to the U.S. possessions (see H.R. Rep. 111-16, February 12, 2009, at 516-517).

Amendments to the Emergency Economic Stabilization Act of 2008 (Pub. L. No 110-343)

Division B, the Energy Improvement and Extension Act of 2008

Credit for steel industry fuel (Act Div. B sec. 108).—The bill clarifies that coke and coke gas produced using fuel qualifying for a steel industry fuel credit is not eligible for the credit under present-law section 45K(g).

Temporary increase in coal excise tax; funding of Black Lung Disability Trust Fund (Act Div. B sec. 113).—The bill clarifies that the term “trust fund” means the Black Lung Disability Trust Fund.

Accelerated recovery period for depreciation of smart meters and smart grid systems (Act Div. B. sec. 306).—The bill clarifies that the accelerated recovery period for smart meters and smart grid systems does not apply to property with a class life less than 16 years.

Special depreciation allowance for certain reuse and recycling property (Act Div. B sec. 308).—Consistent with the intent of the Act, the bill clarifies that a taxpayer does not qualify for the special depreciation allowance under this provision if it elects out of bonus depreciation under Code section 168(k)(4), which permits a taxpayer to accelerate the recognition of AMT and research credits in lieu of claiming bonus depreciation. This conforms to the parallel rule in section 168(n)(2)(B)(i)(1) (excluding such property from the definition of qualified disaster assistance property) under the national disaster provisions.

Special rules in case of foreign oil and gas income (Act Div. B sec. 402).—The Act expands the FOGEI rules to apply to all foreign income from production and other activity related to the sale of oil and gas product (the sum of prior-law FORI and FOGEI). A transition rule in the provision unintentionally fails to properly apply pre-effective date law to pre-2009 credit carryforwards. The bill clarifies that pre-2009 credits carried forward to post-2008 years continue to be governed by prior law for purposes of determining the amount of carryforward credits eligible to be claimed in a post-2008 year.

Broker reporting of customer’s basis in securities transactions (Act Div. B sec. 403).—The bill makes conforming changes necessitated by the deletion of the defined term “open-end fund,” so that the provision refers to regulated investment companies rather than open-end funds.

The Act provides a definition of a dividend reinvestment plan (“DRP”), and also permits use of average cost basis for stock acquired after December 31, 2010 in connection with a DRP. The Act further provides that stock acquired before 2012 for which an average basis method is permissible is treated as a separate account from any such stock acquired after 2011, and provides an election for a regulated investment company to treat as a single account all stock held by a customer without regard to the date of acquisition of the stock. For stock for which an average basis method is permissible, the Act’s basis reporting requirements apply to stock acquired after December 31, 2011. The bill conforms the effective date for the availability of an

average basis method for DRP stock to the effective date for the basis reporting requirement for stock for which an average basis method is permissible by making the former rule applicable to DRP stock acquired after December 31, 2011 (rather than December 31, 2010). The bill makes a conforming change to the effective date provision applicable to required basis reporting related to DRP stock. Under this change, unless a broker elects otherwise, basis reporting for DRP stock remains mandatory, as under the Act, only for stock acquired on or after January 1, 2012.

The bill also clarifies that if an election is made to treat as a single account all stock acquired in connection with a DRP, the average basis method is permissible with respect to all such stock without regard to the date of acquisition of the stock.

Division C, Tax Extenders and Alternative Minimum Tax Relief Act of 2008

Qualified investment entities (Act Div. C sec. 208).—The Act generally extends the inclusion of a RIC within the definition of a “qualified investment entity” under the FIRPTA rules of section 897 through December 31, 2009. The Act imposes withholding tax on certain RIC distributions to foreign shareholders; however, distributions may have been made after the provision had expired on December 31, 2007. The bill clarifies that no withholding is required for distributions that were made on or before the date of enactment (October 4, 2008). The bill also clarifies that a RIC is not liable to a foreign shareholder to whom a distribution was made before October 4, 2008, for amounts that were withheld from such a distribution and paid over to the Secretary.

Extension of 15-year straight-line cost recovery for qualified leasehold improvements and qualified restaurant improvements; 15-year straight-line cost recovery for certain improvements to retail space (Act Div. C sec. 305).—The Act expands the application of the 15-year MACRS recovery period to restaurant property, for property placed in service after December 31, 2008, and to a new category of retail improvement property, also for property placed in service after December 31, 2008. Both provisions provide that bonus depreciation generally does not apply to eligible property. The bill clarifies that assets that qualify as both qualified leasehold improvement property and either qualified restaurant property or qualified retail improvement property qualify for bonus depreciation, consistent with the legislative intent with respect to assets that overlap in this manner.

Nonqualified deferred compensation from certain tax indifferent parties (Act Div. C. sec. 801).—The Act provides that any compensation that is deferred under a nonqualified deferred compensation plan of a nonqualified entity is includible in gross income by the service provider when there is no substantial risk of forfeiture of the service provider’s rights to the compensation. The bill clarifies the provision to reflect legislative intent as to whether a partnership is a nonqualified entity. In determining whether a partnership is considered a nonqualified entity, an organization that is a partner in the partnership is not considered exempt from U.S. income tax to the extent that the organization’s share of the partnership’s income is subject to U.S. tax as unrelated business taxable income. Similarly, a foreign person that is a partner in a partnership is not considered a foreign person with respect to whom partnership income is not subject to a comprehensive foreign income tax to the extent that such person’s share of partnership income is subject to U.S. income tax as income as income effectively connected with the conduct of a U.S. trade or business.

Entity aggregation rules similar to those that apply under section 409A apply for purposes of the provision. These bill clarifies these rules to reflect legislative intent. The bill clarifies that the aggregation rules do not treat every entity within an aggregated group as a nonqualified entity merely because one entity in the group is a nonqualified entity.

The bill clarifies that the rules of section 457A defining substantial risk of forfeiture, not the rules defining it in section 409A, apply for purposes of section 457A.

The bill clarifies that a service provider has the meaning given in the regulations under Code section 409A, determined without regard to method of accounting. Due to the definition of substantial risk of forfeiture under the provision, an accrual-basis taxpayer might be required to include compensation as income under the provision at a date earlier than the accrual accounting method rules would otherwise require.

Amendments to the Heroes Earnings Assistance and Relief Tax Act of 2008 (Pub. L. No. 110-245)

Special period of limitation when uniformed services retired pay is reduced as result of award of disability compensation (Act sec. 106).—The bill clarifies that the date June 17, 2008 (date of enactment), applies for purposes of the portion of the transition rule specifying what date should be substituted for the date of the determination.

Temporary credit for employer differential wage payments to employees who are active duty members of the uniformed services (Act sec. 111).—The bill clarifies that the definition of “differential wage payment” for purposes of the credit is effective from the effective date of the credit (the date of enactment, June 17, 2008). Thus, the credit is available in 2008 (for amounts paid after June 17, 2008), as well as 2009.

Disposition of unused health benefits in flexible spending accounts (Act sec. 114).—The Act provides that a plan does not fail to be treated as a cafeteria plan or health FSA merely because the plan provides for qualified reservist distributions. The bill clarifies that a plan does not fail to be treated as an accident or health plan under Code section 105 merely because it provides for qualified reservist distributions.

Amendments to the Economic Stimulus Act of 2008 (Pub. L. No. 110-185)

2008 recovery rebates for individuals (Act sec. 101).—The bill clarifies that summary assessment procedures can apply with respect to any taxpayer identification number under the provision (not just in the case of limited age errors).

Amendments to the Tax Technical Corrections Act of 2007 (Pub. L. No. 110-172)

Act section 4(c).—The bill reinstates a provision in Code section 911, relating to the netting of disallowed deductions against excluded income, that was inadvertently deleted by the Act.