

## **STAFF DRAFT**

110TH CONGRESS  
2D SESSION

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To amend the Internal Revenue Code of 1986 to provide the same tax treatment for both commercial and noncommercial investors in oil and natural gas and related commodities, and for other purposes.

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### IN THE SENATE OF THE UNITED STATES

Mr. WYDEN (for himself and Mr. GRASSLEY) introduced the following bill; which was read twice and referred to the Committee on

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## **A BILL**

To amend the Internal Revenue Code of 1986 to provide the same tax treatment for both commercial and non-commercial investors in oil and natural gas and related commodities, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. CAPITAL GAIN OR LOSS FROM SALE OR EX-**  
4 **CHANGE OF OIL OR NATURAL GAS AND RE-**  
5 **LATED COMMODITIES TREATED AS SHORT-**  
6 **TERM CAPITAL GAIN OR LOSS.**

7 (a) GAIN OR LOSS ON APPLICABLE COMMODITIES.—

1           (1) IN GENERAL.—Part IV of subchapter P of  
2           chapter 1 of the Internal Revenue Code of 1986 (re-  
3           lating to special rules for determining capital gains  
4           and losses) is amended by adding at the end the fol-  
5           lowing new section:

6   **“SEC. 1261. CAPITAL GAIN OR LOSS FROM SALE OR EX-**  
7                   **CHANGE OF OIL OR NATURAL GAS AND RE-**  
8                   **LATED COMMODITIES TREATED AS SHORT-**  
9                   **TERM CAPITAL GAIN OR LOSS.**

10          “(a) GENERAL RULE.—If a taxpayer has gain or loss  
11          from the sale or exchange of any applicable commodity  
12          which, without regard to this section, would be treated as  
13          long-term capital gain or loss, such gain or loss shall, not-  
14          withstanding any other provision of this title, be treated  
15          as short-term capital gain or loss.

16          “(b) APPLICABLE COMMODITY.—For purposes of  
17          this section—

18                  “(1) IN GENERAL.—The term ‘applicable com-  
19                  modity’ means—

20                          “(A) oil or natural gas (or any primary  
21                          product of oil or natural gas) which is actively  
22                          traded (within the meaning of section  
23                          1092(d)(1)),

24                          “(B) a specified index (within the meaning  
25                          of section 1221(b)(1)(B)(ii)) a substantial por-

1           tion of which is, as of the date the taxpayer ac-  
2           quires its position with respect to such specified  
3           index, based on 1 or more commodities de-  
4           scribed in subparagraph (A),

5           “(C) any notional principal contract with  
6           respect to any commodity described in subpara-  
7           graph (A) or (B), and

8           “(D) any evidence of an interest in, or a  
9           derivative instrument in, any commodity de-  
10          scribed in subparagraph (A), (B), or (C), in-  
11          cluding any option, forward contract, futures  
12          contract, short position, and any similar instru-  
13          ment in such a commodity.

14          “(2) EXCEPTION FOR CERTAIN SECTION 1256  
15          CONTRACTS.—Such term shall not include a section  
16          1256 contract (as defined in section 1256(b)) which  
17          is required to be marked to market under section  
18          1256(a).

19          “(c) SPECIAL RULE FOR CERTAIN PARTNERSHIP IN-  
20          TERESTS.—For purposes of this section, if a taxpayer rec-  
21          ognizes gain or loss on the sale or exchange of any interest  
22          in a partnership, the portion of such gain or loss which  
23          is attributable to unrecognized gain or loss with respect  
24          to 1 or more applicable commodities shall be treated as  
25          short-term capital gain or loss. The preceding sentence

1 shall not apply if the taxpayer is otherwise required to  
2 treat such portion of gain or loss as ordinary income or  
3 loss.

4 “(d) APPLICATION.—This section shall apply to any  
5 applicable commodity acquired on or after July 31, 2008,  
6 and before January 1, 2013.”.

7 (2) CONFORMING AMENDMENTS.—

8 (A) Section 1222 of such Code is amended  
9 by striking the last sentence thereof.

10 (B) The table of sections for part IV of  
11 subchapter P of chapter 1 of such Code is  
12 amended by adding at the end the following  
13 new item:

“Sec. 1261. Capital gain or loss from sale or exchange of oil or natural gas and  
related commodities treated as short-term capital gain or  
loss.”.

14 (b) APPLICATION TO SECTION 1256 CONTRACTS.—

15 (1) IN GENERAL.—Section 1256(f) of the Inter-  
16 nal Revenue Code of 1986 (relating to special rules)  
17 is amended by adding at the end the following new  
18 paragraph:

19 “(6) SPECIAL RULES FOR CERTAIN COMMODITY  
20 CONTRACTS.—

21 “(A) ALL GAIN OR LOSS FROM COMMODITY  
22 CONTRACTS TREATED AS SHORT-TERM GAIN OR  
23 LOSS.—In the case of a section 1256 contract  
24 which is an applicable commodity, subsection

1 (a)(3) shall be applied to any gain or loss with  
2 respect to such contract—

3 “(i) by substituting ‘100 percent’ for  
4 ‘40 percent’ in subparagraph (A) thereof,  
5 and

6 “(ii) without regard to subparagraph  
7 (B) thereof.

8 “(B) **TREATMENT OF MIXED STRAD-**  
9 **DLES.**—A taxpayer may not make an election  
10 under subsection (d), or an election under the  
11 regulations prescribed pursuant to section  
12 1092(b)(2), with respect to any mixed straddle  
13 if any position forming a part of such straddle  
14 is a section 1256 contract which is an applica-  
15 ble commodity. For purposes of this subpara-  
16 graph, if any section 1256 contract which is  
17 part of a straddle is an applicable commodity,  
18 any other section 1256 contract which is part  
19 of such straddle shall be treated as an applica-  
20 ble commodity.

21 “(C) **APPLICABLE COMMODITY.**—For pur-  
22 poses of this paragraph, the term ‘applicable  
23 commodity’ has the meaning given such term by  
24 section 1261(b), except that such section shall

1           be applied without regard to paragraph (2)  
2           thereof.

3                   “(D) APPLICATION.—This paragraph shall  
4           apply to any applicable commodity acquired on  
5           or after July 31, 2008, and before January 1,  
6           2013.”.

7           (2) SPECIAL RULE FOR LOSS CARRYBACKS.—  
8           Section 1212(c) of such Code (relating to carryback  
9           of losses from section 1256 contracts to offset prior  
10          gains from such contracts) is amended by redesignig-  
11          nating paragraph (7) as paragraph (8) and by in-  
12          serting after paragraph (6) the following new para-  
13          graph:

14                   “(7) SPECIAL RULE FOR LOSSES ALL OF WHICH  
15          ARE TREATED AS SHORT-TERM.—If any portion of  
16          the net section 1256 contracts loss for any taxable  
17          year is attributable to a net loss from contracts to  
18          which section 1256(f)(6) applies—

19                           “(A) this subsection shall be applied first  
20          to such portion of such net section 1256 con-  
21          tracts loss and then to the remainder of such  
22          loss, and

23                           “(B) in applying this subsection to such  
24          portion—

1                   “(i) notwithstanding paragraph  
2                   (1)(B), all of the loss attributable to such  
3                   portion and allowed as a carryback shall be  
4                   treated as a short-term capital loss, and

5                   “(ii) notwithstanding paragraph  
6                   (6)(A), all of the loss attributable to such  
7                   portion and allowed as a carryback shall be  
8                   treated for purposes of applying paragraph  
9                   (6) as a short-term capital gain for the  
10                  loss year.”.

11           (c) **EFFECTIVE DATE.**—The amendments made by  
12 this section shall apply to applicable commodities acquired  
13 on or after July 31, 2008, in taxable years ending after  
14 such date.

15 **SEC. 2. GAINS AND LOSSES FROM OIL AND NATURAL GAS**  
16 **AND RELATED COMMODITIES TREATED AS**  
17 **UNRELATED BUSINESS TAXABLE INCOME.**

18           (a) **IN GENERAL.**—Section 512(b) of the Internal  
19 Revenue Code of 1986 (relating to modifications to unre-  
20 lated business taxable income) is amended by adding at  
21 the end the following new paragraph:

22                   “(20) **TREATMENT OF GAINS OR LOSSES FROM**  
23 **COMMODITIES.**—

24                   “(A) **IN GENERAL.**—Notwithstanding para-  
25 graph (5) or any other provision of this part—

1                   “(i) income, gain, or loss of an organi-  
2                   zation with respect to any applicable com-  
3                   modity shall not be excluded but shall be  
4                   taken into account as income, gain, or loss  
5                   from an unrelated trade or business, and

6                   “(ii) all deductions directly connected  
7                   with such income or gain shall be allowed.

8                   “(B) EXCEPTION FOR ORDINARY INCOME  
9                   AND LOSSES.—Subparagraph (A) shall not  
10                  apply to any income, gain, or loss of an organi-  
11                  zation which, if not excluded under this title  
12                  and without regard to subparagraph (A), would  
13                  be treated as ordinary income or loss.

14                  “(C) LOOK-THRU IN THE CASE OF FOR-  
15                  EIGN CORPORATIONS.—

16                  “(i) IN GENERAL.—If an organization  
17                  owns directly or indirectly stock in a for-  
18                  eign corporation, the organization’s pro  
19                  rata share of any income, gain, or loss of  
20                  such corporation (and any deductions di-  
21                  rectly connected with such income or gain)  
22                  with respect to 1 or more applicable com-  
23                  modities shall be taken into account under  
24                  subparagraph (A) in the same manner as  
25                  if such commodities were held directly by



1 the organization. Any such item shall be  
2 taken into account for the taxable year of  
3 the organization in which the item arises  
4 without regard to whether there was an ac-  
5 tual distribution to the organization with  
6 respect to the item. For purposes of this  
7 clause, the rule under section 1261(c) shall  
8 apply in determining the income, gain, or  
9 loss of the foreign corporation with respect  
10 to applicable commodities.

11 “(ii) **SALE OF INTERESTS IN COR-**  
12 **PORATION.**—If a taxpayer recognizes gain  
13 or loss on the sale or exchange of any  
14 share of stock in a foreign corporation, the  
15 portion of such gain or loss which is attrib-  
16 utable to unrecognized gain or loss with re-  
17 spect to 1 or more applicable commodities  
18 shall be taken into account under subpara-  
19 graph (A) in the same manner as if such  
20 commodities were sold or exchanged di-  
21 rectly by the organization.

22 “(iii) **NO DOUBLE COUNTING.**—The  
23 Secretary shall prescribe such rules as are  
24 necessary to ensure that any item of in-  
25 come, gain, loss, or deduction described in

1 clause (i) or (ii) is taken into account only  
2 once for purposes of this paragraph.

3 “(D) **APPLICABLE COMMODITY.**—For pur-  
4 poses of this paragraph, the term ‘applicable  
5 commodity’ has the meaning given such term by  
6 section 1261(b), except that such section shall  
7 be applied without regard to paragraph (2)  
8 thereof.

9 “(E) **REGULATIONS.**—The Secretary shall  
10 prescribe such regulations as are necessary to  
11 carry out the provisions of this paragraph, in-  
12 cluding regulations—

13 “(i) to prevent the avoidance of the  
14 purposes of this paragraph through the use  
15 of pass-thru entities or tiered structures,  
16 and

17 “(ii) to provide that this paragraph  
18 shall not apply to ownership interests of  
19 organizations in foreign corporations in  
20 cases where the income or gain of the for-  
21 eign corporation from any applicable com-  
22 modity is otherwise subject to tax imposed  
23 by this chapter.

24 “(F) **APPLICATION.**—This paragraph shall  
25 apply to any applicable commodity acquired on

1           or after July 31, 2008, and before January 1,  
2           2013.”.

3           (b) **EFFECTIVE DATE.**—The amendment made by  
4 this section shall apply to applicable commodities acquired  
5 on or after July 31, 2008, in taxable years ending after  
6 such date.

7 **SEC. 3. STUDY OF TAX TREATMENT OF COMMODITIES AND**  
8 **SECTION 1256 CONTRACTS.**

9           (a) **STUDY.**—The Secretary of the Treasury, or the  
10 Secretary’s delegate, shall conduct a study of the Federal  
11 income tax treatment of section 1256 contracts under sec-  
12 tion 1256 of the Internal Revenue Code of 1986 and of  
13 applicable commodities under sections 1261, 1256(f)(6),  
14 and 512(b)(20) of such Code. Such study shall include an  
15 analysis of—

16           (1) the average annual number of sales or ex-  
17 changes of such contracts and commodities, includ-  
18 ing the number of sales and exchanges involving or-  
19 ganizations exempt from Federal income taxation  
20 under such Code,

21           (2) whether the amendments made by this Act  
22 have had any effect on the number or type of such  
23 sales and exchanges,

24           (3) the effect of tax policy on the operation of  
25 the commodities exchanges and on the demand for,

1 and price of, commodities, particularly with respect  
2 to oil and natural gas, and

3 (4) such other matters with respect to such tax  
4 treatment as the Secretary determines appropriate.

5 (b) REPORT.—The Secretary shall, not later than  
6 January 1, 2012, report the results of the study conducted  
7 under subsection (a) to the Committee on Finance of the  
8 Senate and the Committee on Ways and Means of the  
9 House of Representatives, together with such legislative  
10 recommendations as the Secretary determines appropriate  
11 with respect to the Federal income tax treatment of sec-  
12 tion 1256 contracts and applicable commodities.