rates, and (3) either (a) the school is located in an empowerment zone or enterprise community designated under the Code, or (b) it is reasonably expected that at least 35 percent of the students at the school will be eligible for free or reduced-cost lunches under the school lunch program established under the National School Lunch Act.

The arbitrage requirements which generally apply to interest-bearing tax-exempt bonds also generally apply to qualified zone academy bonds. In addition, an issuer of qualified zone academy bonds must reasonably expect to and actually spend 100 percent of the proceeds of such bonds on qualified zone academy property within the three years period that begins on the date of issuance. To the extent less than 100 percent of the proceeds are used to finance qualified zone academy property during the three years spending period, bonds will continue to qualify as qualified zone academy bonds if unspent proceeds are used within 90 days from the end of such three years period to redeem any nonqualified bonds. The three years spending period may be extended by the Secretary if the issuer establishes that the failure to meet the spending requirement is due to reasonable cause and the related purposes for issuing the bonds will continue to proceed with due diligence.

Two special arbitrage rules apply to qualified zone academy bonds. First, available project proceeds invested during the three-year period beginning on the date of issue are not subject to the arbitrage restrictions (i.e., yield restriction and rebate requirements). Available project proceeds are proceeds from the sale of an issue of qualified zone academy bonds, less issuance costs (not to exceed two percent) and any investment earnings on such proceeds. Thus, available project proceeds invested during the three-year spending period may be invested at unrestricted yields, but the earnings on such investments must be spent on qualified zone academy property. Second, amounts invested in a reserve fund are not subject to the arbitrage restrictions to the extent: (1) such fund is funded at a rate not more rapid than equal annual installments; (2) such fund is funded in a manner reasonably expected to result in an amount not greater than an amount necessary to repay the issue; and (3) the yield on such fund is not greater than the average annual interest rate of tax-exempt obligations having a term of 10 years or more that are issued during the month the qualified zone academy bonds are issued.

Issuers of qualified zone academy bonds are required to report issuance to the Internal Revenue Service in a manner similar to the information returns required for tax-exempt bonds.

HOUSE BILL

In general

The provision creates a new category of tax-credit bonds: qualified school construction bonds. Qualified school construction bonds must meet three requirements: (1) 100 percent of the available project proceeds of the bond issue is used for the construction, rehabilitation, or repair of a public school facility or for the acquisition of land on which such a bond-financed facility is to be constructed; (2) the bond is issued by a State or local government within which such school is located; and (3) the issuer designates such bonds as a qualified school construction bond.

National limitation

There is a national limitation on qualified school construction bonds of $11 billion for calendar years 2009 and 2010, respectively. Allocations of the national limitation of qualified school construction bonds are divided between the States and certain large school districts. The States receive 60 percent of the national limitation for a calendar year and the remaining 40 percent of the national limitation for a calendar year is allocated to certain of the largest school districts.

Allocation to the States

Generally allocations are made to the States under the 60 percent allocation according to their respective populations of children aged five through seventeen. However, the Secretary of the Treasury shall adjust the annual allocations among the States to ensure that for each State the sum of its allocations under the 60 percent allocation plus any allocations to large educational agencies within the States is not less than a minimum percentage. A State's minimum percentage for a calendar year is a product of 1.68 and the minimum percentage described in section 1124(d) of the Elementary and Secondary Education Act of 1965 for such State for the most recent fiscal year ending before such calendar year.

For allocation purposes, a State includes the District of Columbia and any possession of the United States. The provision provides a special allocation for possessions of the United States other than Puerto Rico under the 60 percent share of the national limitation for States. Under this special rule an allocation to a possession other than Puerto Rico is made on the basis of the respective populations of individuals below the poverty line (as defined by the Office of Management and Budget) rather than respective populations of children aged five through seventeen. This special allocation reduces the State allocation share of the national limitation otherwise available for allocation among the States. Under another special rule the Secretary of the Interior may allocate $200 million of school construction bonds for 2009 and 2010, respectively, to Indian schools. This special allocation for Indian schools is to be used for purposes of the construction, rehabilitation, and repair of schools funded by the Bureau of Indian Affairs. For purposes of such allocations Indian tribal governments are qualified issuers. The special allocation for Indian schools does not reduce the State allocation share of the national limitation otherwise available for allocation among the States.

If an amount allocated under this allocation to the States is unused for a calendar year it may be carried forward by the State to the next calendar year.

Allocation to lame school districts

The remaining 40 percent of the national limitation for a calendar year is allocated by the Secretary of the Treasury among local educational agencies which are large local educational agencies for such year. This allocation is made in proportion to the respective amounts each agency received for Basic Grants under subpart 2 of Part A of Title I of the Elementary and Secondary Education Act of 1965 for the most recent fiscal year ending before such calendar year. Any unused allocation of any agency within a State may be allocated by the agency to such State. With respect to a calendar year, the term large local educational agency means any local educational agency if such agency is: (1) among the 100 local educational agencies with the largest numbers of children aged 5 through 17 from families living below the poverty level, or (2) one of not more than 25 local educational agencies (other than in 1, immediately above) that the Secretary of Education determines are in particular need of assistance, based on a low level of resources for school construction, a high level of enrollment growth, or other such factors as the Secretary of Education deems appropriate. If any amount allocated to large local educational agency is unused for a calendar year the agency may reallocate such amount to the State in which the agency is located.

The provision makes qualified school construction bonds a type of qualified tax credit bond for purposes of section 54A. In addition, qualified school construction bonds may be issued by Indian tribal governments only to the extent such bonds are issued for purposes that satisfy the present law requirements for tax-exempt bonds issued by Indian tribal governments (i.e., essential governmental functions and certain manufacturing purposes).

The provision requires 100 percent of the available project proceeds of qualified school construction bonds to be used within the three-year period that begins on the date of issuance. Available project proceeds are proceeds from the sale of the issue less issuance costs (not to exceed two percent) and any investment earnings on such sale proceeds. To the extent less than 100 percent of the available project proceeds are used to finance qualified purposes during the three-year spending period, bonds will continue to qualify as qualified school construction bonds if unspent proceeds are used within 90 days from the end of such three-year period to redeem bonds. The three-year spending period may be extended by the Secretary upon the issuer's request demonstrating that the failure to satisfy the three-year requirement is due to reasonable cause and the projects will continue to proceed with due diligence:

Qualified school construction bonds generally are subject to the arbitrage requirements of section 148. However, available project proceeds invested during the three-year spending period are not subject to the arbitrage restrictions (i.e., yield restriction and rebate requirements). In addition, amounts invested in a reserve fund are not subject to the arbitrage restrictions to the extent: (I) such fund is funded at a rate not more rapid than equal annual installments; (2) such fund is funded in a manner reasonably expected to result in an amount not greater than an amount necessary to repay the issue; and (3) the yield on such fund is not greater than the average annual interest rate of tax-exempt obligations having a term of 10 years or more that are issued during the month the qualified school construction bonds are issued.

The maturity of qualified school construction bonds is the term that the Secretary estimates will result in the present value of the obligation to repay the principal on such bonds being equal to 50 percent of the face amount of such bonds, using as a discount rate the average annual interest rate of tax-exempt obligations having a term of 10 years or more that are issued during the month the qualified school construction bonds are issued.

As with present-law tax credit bonds, the taxpayer holding qualified school construction bonds on a credit allowance date is entitled to a tax credit. The credit rate on the bonds is set by the Secretary at a rate that is 100 percent of the rate that would permit issuance of such bonds without discount and interest cost to the issuer. The amount of the tax credit is determined by multiplying the bond's credit rate by the face amount on the holder's bond. The credit accrues quarterly, is includible in gross income (as if it were an interest payment on the bond), and can be claimed against regular income tax liability and alternative minimum tax liability. Unused credits may be carried forward to succeeding taxable years. In addition, credits may be separated from the ownership of the underlying bond in a manner similar to the manner in which interest coupons can be stripped from interest-bearing bonds.

Issuers of qualified school construction bonds are required to certify that the financial disclosure requirements and applicable State and local law requirements governing conflicts of interest are satisfied with respect to such issue, as well as any other additional conflict of interest rules prescribed by the Secretary with respect to any Federal, State, or local government official directly involved with the issuance of qualified school construction bonds.

Effective date

The provision is effective for bonds issued after December 31, 2008.

SENATE AMENDMENT

In general

The Senate amendment is the same as the House bill.

National limitation

There is a national limitation on qualified school construction bonds of $5 billion for Calendar years 2009 and 2010, respectively. Also, allocations of the national limitation of qualified school construction bonds are divided between the States with no special allocations to certain large school districts.

Allocation to the States

The allocations are made to the States according to their respective populations of children aged five through seventeen. However, the Secretary of the Treasury shall adjust the annual allocations among the States to ensure that for each State is not less than a minimum percentage. A State's minimum percentage for a calendar year is calculated by dividing (1) the amount the State is eligible to receive under section 1124(d) of the Elementary and Secondary Education Act of 1965 for such State for the most recent fiscal year ending before such calendar year by (2) the amount all States are eligible to received under section 1124(d) of the Elementary and Secondary Education Act of 1965 for such fiscal year, and then multiplying the result by 100.

Allocation to large school districts

No portion of the national limitation for a calendar year is allocated by the Secretary of the Treasury among local educational agencies which are large local educational agencies for such year.

Effective Date

The provision is effective for obligations issued after the date of enactment.

CONFERENCE AGREEMENT

In general

The provision creates a new category of tax-credit bonds: qualified school construction bonds. Qualified school construction bonds must meet three requirements: (1) 100 percent of the available project proceeds of the bond issue is used for the construction, rehabilitation, or repair of a public school facility or for the acquisition of land on which such a bond-financed facility is to be constructed; (2) the bond is issued by a State or local government within which such school is located; and (3) the issuer designates such bonds as a qualified school construction bond.

National limitation

There is a national limitation on qualified school construction bonds of $11 billion for calendar years 2009 and 2010, respectively.

Allocation to the States

The national limitation is tentatively allocated among the States in proportion to respective amounts each such State is eligible to receive under section 1124 of the Elementary and Secondary Education Act of 1965 for the most recent fiscal year ending before such calendar year. The amount each State is allocated under the above formula is then reduced by the amount received by any local large educational agency within the State.

For allocation purposes, a State includes the District of Columbia and any possession of the United States. The provision provides a special allocation for possessions of the United States other than Puerto Rico under the national limitation for States. Under this special rule an allocation to a possession other than Puerto Rico is made on the basis of the respective populations of individuals below the poverty line (as defined by the Office of Management and Budget) rather than respective populations of children aged five through seventeen. This special allocation reduces the State allocation share of the national limitation otherwise available for allocation among the States. Under another special rule the Secretary of the Interior may allocate $200 million of school construction bonds for 2009 and 2010, respectively, to Indian schools. This special allocation for Indian schools is to be used for purposes of the construction, rehabilitation, and repair of schools funded by the Bureau of Indian Affairs. For purposes of such allocations Indian tribal governments are qualified issuers. The special allocation for Indian schools does not reduce the State allocation share of the national limitation otherwise available for allocation among the States.

If an amount allocated under this allocation to the States is unused for a calendar year it may be carried forward by the State to the next calendar year.

Allocation to large school districts

Forty percent of the national limitation is allocated among large local educational agencies in proportion to the respective amounts each agency received under section 1124 of the Elementary and Secondary Education Act of 1965 for the most recent fiscal year ending before such calendar year. Any unused allocation of any agency within a State may be allocated by the agency to such State. With respect to a calendar year, the term large local educational agency means any local educational agency if such agency is: (1) among the 100 local educational agencies with the largest numbers of children aged 5 through 17 from families living below the poverty level, or (2) one of not more than 25 local educational agencies (other than in 1, immediately above) that the Secretary of Education determines are in particular need of assistance, based on a low level of resources for school construction, a high level of enrollment growth, or other such factors as the Secretary of Education deems appropriate. If any amount allocated to large local educational agency is unused for a calendar year the agency may reallocate such amount to the State in which the agency is located.

Application of qualified tax credit bond rules

The provision makes qualified school construction bonds a type of qualified tax credit bond for purposes of section 54A. In addition, qualified school construction bonds may be issued by Indian tribal governments only to the extent such bonds are issued for purposes that satisfy the present law requirements for tax-exempt bonds issued by Indian tribal governments (i.e., essential governmental functions and certain manufacturing purposes).

The provision requires 100 percent of the available project proceeds of qualified school construction bonds to be used within the three-year period that begins on the date of issuance. Available project proceeds are proceeds from the sale of the issue less issuance costs (not to exceed two percent) and any investment earnings on such sale proceeds. To the extent less than 100 percent of the available project proceeds are used to finance qualified purposes during the three-year spending period, bonds will continue to qualify as qualified school construction bonds if unspent proceeds are used within 90 days from the end of such three-year period to redeem bonds. The three-year spending period may be extended by the Secretary upon the issuer's request demonstrating that the failure to satisfy the three-year requirement is due to reasonable cause and the projects will continue to proceed with due diligence.

Qualified school construction bonds generally are subject to the arbitrage requirements of section 148. However, available project proceeds invested during the three-year spending period are not subject to the arbitrage restrictions (i.e., yield restriction and rebate requirements). In addition, amounts invested in a reserve fund are not subject to the arbitrage restrictions to the extent: (1) such fund is funded at a rate not more rapid than equal annual installments; (2) such fund is funded in a manner reasonably expected to result in an amount not greater than an amount necessary to repay the issue; and (3) the yield on such fund is not greater than the average annual interest rate of tax-exempt obligations having a term of 10 years or more that are issued during the month the qualified school construction bonds are issued.

The maturity of qualified school construction bonds is the term that the Secretary estimates will result in the present value of the obligation to repay the principal on such bonds being equal to 50 percent of the face amount of such bonds, using as a discount rate the average annual interest rate of tax-exempt obligations having a term of 10 years or more that are issued during the month the qualified school construction bonds are issued.

As with present-law tax credit bonds, the taxpayer holding qualified school construction bonds on a credit allowance date is entitled to a tax credit. The credit rate on the bonds is set by the Secretary at a rate that is 100 percent of the rate that would permit issuance of such bonds without discount and interest cost to the issuer. The amount of the tax credit is determined by multiplying the bond's credit rate by the face amount on the holder's bond. The credit accrues quarterly, is includible in gross income (as if it were an interest payment on the bond), and can be claimed against regular income tax liability and alternative minimum tax liability. Unused credits may be carried forward to succeeding taxable years. In addition, credits may be separated from the ownership of the underlying bond in a manner similar to the manner in which interest coupons can be stripped from interest-bearing bonds.

Issuers of qualified school construction bonds are required to certify that the financial disclosure requirements and applicable State and local law requirements governing conflicts of interest are satisfied with respect to such issue, as well as any other additional conflict of interest rules prescribed by the Secretary with respect to any Federal, State, or local government official directly involved with the issuance of qualified school construction bonds.

Effective date

The provision is effective for obligations issued after the date of enactment.

5. Extend and expand qualified zone academy bonds (sec. 1512 of the House bill, sec. 1522 of the Senate amendment, sec. 1522 of the conference agreement, and sec. 54E of the Code)

PRESENT LAW

Tax-exempt bonds

Interest on State and local governmental bonds generally is excluded from gross income for Federal income tax purposes if the proceeds of the bonds are used to finance direct activities of these governmental units or if the bonds are repaid with revenues of the governmental units. These can include tax-exempt bonds which finance public schools.[134] An issuer must file with the Internal Revenue Service certain information about the bonds issued in order for that bond issue to be tax-exempt.[135] Generally, this information return is required to be filed no later the 15th day of the second month after the close of the calendar quarter in which the bonds were issued.

The tax exemption for State and local bonds does not apply to any arbitrage bond.[136] An arbitrage bond is defined as any bond that is part of an issue if any proceeds of the issue are reasonably expected to be used (or intentionally are used) to acquire high fielding investments or to replace funds that are used to acquire higher yielding investments.[137] In general, arbitrage profits may be earned only during specified periods (e.g., defined ''temporary periods'') before funds are needed for the purpose of the borrowing or on specified types of investments (e.g., ''reasonably required reserve or replacement funds''). Subject to limited exceptions, investment profits that are earned during these periods or on such investments must be rebated to the Federal Government.

Qualified zone academy bonds

As an alternative to traditional tax-exempt bonds, State nd local governments were given the authority to issue ''qualified zone academy bonds.'' [138] total of $400 million of qualified zone academy bonds is authorized to be issued annually in calendar years 1998 through 2009. The $400 million aggregate bond cap is allocated each year to the States according to their respective populations of individuals below the poverty line. Each State, in turn, allocates the credit authority to qualified zone academies within such State.

A taxpayer holding a qualified zone academy bond on the credit allowance date is entitled to a credit. The credit is includible in gross income (as if it were a taxable interest payment on the bond), and may be claimed against regular income tax and alternative minimum tax liability.

The Treasury Department sets the credit rate at a rate estimated to allow issuance qualified zone academy bonds without discount and without interest cost to the issuer.[139] The Secretary determines credit rates for tax credit bonds based on general assumptions about credit quality of the class of potential eligible issuers and such other factors as the Secretary deems appropriate. The Secretary may determine credit rates based on general credit market yield indexes and credit ratings. The maximum term of the bond is determined by the Treasury Department, so that the present value of the obligation to repay the principal on the bond is 50 percent of the face value of the bond.

''Qualified zone academy bonds'' are defined as any bond issued by a State or local government, provided that (1) at least 95 percent of the proceeds are used for the purpose of renovating, providing equipment to, developing course materials for use at, or training teachers and other school personnel in a ''qualified zone academy'' and (2) private entities have promised to contribute to the qualified zone academy certain equipment, technical assistance or training, employee services, or other property or services with a value equal to at least 10 percent of the bond proceeds.

A school is a ''qualified zone academy'' if (1) the school is a public school that provides education and training below the college level, (2) the school operates a special academic program in cooperation with businesses to enhance the academic curriculum and increase graduation and employment rates, and (3) either (a) the school is located in an empowerment zone or enterprise community designated under the Code, or (b) it is reasonably expected that at least 35 percent of the students at the school will be eligible for free or reduced-cost lunches under the school lunch program established under the National School Lunch Act.

The arbitrage requirements which generally apply to interest-bearing tax-exempt bonds also generally apply to qualified zone academy bonds. In addition, an issuer of qualified zone academy bonds must reasonably expect to and actually spend 100 percent or more of the proceeds of such bonds on qualified zone academy property within the three-year period that begins on the date of issuance. To the extent less than 100 percent of the proceeds are used to finance qualified zone academy property during the three-year spending period, bonds will continue to qualify as qualified zone academy bonds if unspent proceeds are used within 90 days from the end of such three-year period to redeem any nonqualified bonds. The three-year spending period may be extended by the Secretary if the issuer establishes that the failure to meet the spending requirement is due to reasonable cause and the related purposes for issuing the bonds will continue to proceed with due diligence.

Two special arbitrage rules apply to qualified zone academy bonds. First, available project proceeds invested during the three-year period beginning on the date of issue are not subject to the arbitrage restrictions (i.e., yield restriction and rebate requirements). Available project proceeds are proceeds from the sale of an issue of qualified zone academy bonds, less issuance costs (not to exceed two percent) and any investment earnings on such proceeds. Thus, available project proceeds invested during the three-year spending period may be invested at unrestricted yields, but the earnings on such investments must be spent on qualified zone academy property. Second, amounts invested in a reserve fund are not subject to the arbitrage restrictions to the extent: (1) such fund is funded at a rate not more rapid than equal annual installments; (2) such fund is funded in a manner reasonably expected to result in an amount not greater than an amount necessary to repay the issue; and (3) the yield on such fund is not greater than the average annual interest rate of tax-exempt obligations having a term of 10 years or more that are issued during the month the qualified zone academy bonds are issued.

Issuers of qualified zone academy bonds are required to report issuance to the Internal Revenue Service in a manner similar to the information returns required for tax-exempt bonds.

HOUSE BILL

In general

The provision extends and expands the present-law qualified zone academy bond program. The provision authorizes issuance of up to $1.4 billion of qualified zone academy bonds annually for 2009 and 2010, respectively.

Effective date

The provision applies to obligations issued after December 31, 2008.

SENATE AMENDMENT

The Senate amendment is the same as the House bill.

CONFERENCE AGREEMENT

The conference agreement follows the House bill and the Senate amendment.

6. Build America bonds (sec. 1521 of the House bill, sec. 1531 of the Senate amendment, sec. 1531 of the conference agreement, and new secs. 54AA and 6431 of the Code)

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.

Private activity bonds

The Code defines a private activity bond as any bond that satisfies (1) the private business use test and the private security or payment test (''the private business test''); or (2) ''the private loan financing test.''[140]

Private business test

Under the private business test, a bond is a private activity bond if it is part of an issue in which:

1. More than 10 percent of the proceeds of the issue (including use of the bond-financed property) are to be used in the trade or business of any person other than a governmental unit (''private business use''); and

2. More than 10 percent of the payment of principal or interest on the issue is, directly or indirectly, secured by (a) property used or to be used for a private business use or (b) to be derived from payments in respect of property, or borrowed money, used or to be used for a private business use (''private payment test'').[141]

A bond is not a private activity bond unless both parts of the private business test (i.e., the private business use test and the private payment test) are met. Thus, a facility that is 100 percent privately used does not cause the bonds financing such facility to be private activity bonds if the bonds are not secured by or paid with private payments. For example, land improvements that benefit a privately-owned factory may be financed with governmental bonds if the debt service on such bonds is not paid by the factory owner or other private parties.

Private loan financing test

A bond issue satisfies the private loan financing test if proceeds exceeding the lesser of $5 million or five percent of such proceeds are used directly or indirectly to finance loans to one or more nongovernmental persons. Private loans include both business and other (e.g., personal) uses and payments by private persons; however, in the case of business uses and payments, all private loans also constitute private business uses and

[134] Sec. 103.
[135] Sec. 149(e).
[136] Sec. 103(a) and (b)(2).
[137] Sec. 148.
[138] See secs. 54E and 1397E.
[139] Given the differences in credit quality and other characteristics of individual issuers, the Secretary cannot set credit rates in a manner that will allow each issuer to issue tax credit bonds at par.
[140] Sec. 141.
[141] The 10 percent private business test is reduced to five percent in the case of private business uses (and payments with respect to such uses) that are unrelated to any governmental use being financed by the issue.

payments subject to the private business test.

Arbitrage restrictions

The exclusion from income for interest on State and local bonds does not apply to any arbitrage bond.[142] An arbitrage bond is defined as any bond that is part of an issue if any proceeds of the issue are reasonably expected to be used (or intentionally are used) to acquire higher yielding investments or to replace funds that are used to acquire higher yielding investments.[143] In general, arbitrage profits may be earned only during specified periods (e.g., defined ''temporary periods'') before funds are needed for the purpose of the borrowing or on specified types of investments (e.g., ''reasonably required reserve or replacement funds''). Subject to limited exceptions, investment profits that are earned during these periods or on such investments must be rebated to the Federal Government.

Qualified tax credit bonds

In lieu of interest, holders of qualified tax credit bonds receive a tax credit that accrues quarterly. The following bonds are qualified tax credit bonds: qualified forestry conservation bonds, new clean renewable energy bonds, qualified energy conservation bonds, and qualified zone academy bonds.[144]

Section 54A of the Code sets forth general rules applicable to qualified tax credit bonds. These rules include requirements regarding credit allowance dates, the expenditure of available project proceeds, reporting, arbitrage, maturity limitations, and financial conflicts of interest, among other special rules.

A taxpayer who holds a qualified tax credit bond on one or more credit allowance dates of the bond during the taxable year shall be allowed a credit against the taxpayer's income tax for the taxable year. In general, the credit amount for any credit allowance date is 25 percent of the annual credit determined with respect to the bond. The annual credit is determined by multiplying the applicable credit rate by the outstanding face amount of the bond. The applicable credit rate for the bond is the rate that the Secretary estimates will permit the issuance of the qualified tax credit bond with a specified maturiy or redemption date without discount and without interest cost to the qualified issuer.[145] The Secretary determines credit rates for tax credit bonds based on general assumptions about credit quality of the class of potential eligible issuers and such other factors as the Secretary deems appropriate. The Secretary may determine credit rates based on general credit market yield indexes and credit ratings.

The credit is included in gross income and, under regulations prescribed by the Secretary, may be stripped (a separation (including at issuance) of the ownership of a qualified tax credit bond and the entitlement to the credit with respect to such bond).

Section 54A of the Code requires that 100 percent of the available project proceeds of qualified tax credit bonds must be used within the three-year period that begins on the date of issuance. Available project proceeds are proceeds from the sale of the bond issue less issuance costs (not to exceed two percent) and any investment earnings on such sale proceeds. To the extent less than 100 percent of the available project proceeds are used to finance qualified projects during the three-year spending period, bonds will continue to qualify as qualified tax credit bonds if unspent proceeds are used within 90 days from the end of such three-year period to redeem bonds. The three-year spending period may be extended by the Secretary upon the issuer's request demonstrating that the failure to satisfy the three-year requirement is due to reasonable cause and the projects will continue to proceed with due diligence.

Qualified tax credit bonds generally are subject to the arbitrage requirements of section 148. However, available project proceeds invested during the three-year spending period are not subject to the arbitrage restrictions (i.e., yield restriction and rebate requirements). In addition, amounts invested in a reserve fund are not subject to the arbitrage restrictions to the extent: (1) such fund is funded at a rate not more rapid than equal annual installments; (2) such fund is funded in a manner reasonably expected to result in an amount not greater than an amount necessary to repay the issue; and (3) the yield on such fund is not greater than the average annual interest rate of tax-exempt obligations having a term of 10 years or more that are issued during the month the qualified tax credit bonds are issued.

The maturity of qualified tax credit bonds is the term that the Secretary estimates will result in the present value of the obligation to repay the principal on such bonds being equal to 50 percent of the face amount of such bonds, using as a discount rate the average annual interest rate of tax-exempt obligations having a term of 10 years or more that are issued during the month the qualified tax credit bonds are issued.

HOUSE BILL

In general

The provision permits an issuer to elect to have an otherwise tax-exempt bond treated as a ''taxable governmental bond.'' A ''taxable governmental bond'' is any obligation (other than a private activity bond) if the interest on such obligation would be (but for this provision) excludable from gross income under section 103 and the issuer makes an irrevocable election to have the provision apply. In determining if an obligation would be tax-exempt under section 103, the credit (or the payment discussed below for qualified bonds) is not treated as a Federal guarantee. Further, the yield on a taxable governmental bond is determined without regard to the credit. A taxable governmental bond does not include any bond if the issue price has more than a de minimis amount of premium over the stated principal amount of the bond.

The holder of a taxable governmental bond will accrue a tax credit in the amount of 35 percent of the interest paid on the interest payment dates of the bond during the calendar year.[146] The interest payment date is any date on which the holder of record of the taxable governmental bond is entitled to a payment of interest under such bond. The sum of the accrued credits is allowed against regular and alternative minimum tax. Unused credit may be carried forward to succeeding taxable years. The credit, as well as the interest paid by the issuer, is included in gross income and the credit may be stripped under rules similar to those provided in section 54A regarding qualified tax credit bonds. Rules similar to those that apply for S corporations, partnerships and regulated investment companies with respect to qualified tax credit bonds also apply to the credit.

Unlike the tax credit for bonds issued under section 54A, the credit rate would not be calculated by the Secretary, but rather would be set by law at 35 percent. The actual credit that a taxpayer may claim is determined by multiplying the interest payment that the taxpayer receives from the issuer (i.e., the bond coupon payment) by 35 percent. Because the credit that the taxpayer claims is also included in income, the Committee anticipates that State and local issuers will issue bonds paying interest at rates approximately equal to 74.1 percent of comparable taxable bonds. The Committee anticipates that if an issuer issues a taxable governmental bond with coupons at 74.1 percent of a comparable taxable bond's coupon that the issuer's bond should sell at par. For example, if a taxable bond of comparable risk pays a $1,000 coupon and sells at par, then if a State or local issuer issues an equal-sized bond with coupon of $741.00, such a bond should also sell at par. The taxpayer who acquires the latter bond will receive an interest payment of $741 and may claim a credit of $259 (35 percent of $741). The credit and the interest payment are both included in the taxpayer's income. Thus, the taxpayer's taxable income from this instrument would be $1,000. This is the same taxable income that the taxpayer would recognize from holding the comparable taxable bond. Consequently the issuer's bond should sell at the same price as would the taxable bond.

Special rule for qualified bonds issued during 2009 and 2010

A ''qualified bond'' is any taxable governmental bond issued as part of an issue if 100 percent of the available project proceeds of such issue are to be used for capital expenditures.[147] The bond must be issued after the date of enactment of the provision and before January 1, 2011. The issuer must make an irrevocable election to have the special rule for qualified bonds apply.

Under the special rule for qualified bonds, in lieu of the tax credit to the holder, theissuer is allowed a credit equal to 35 percent of each interest payment made under such bond.[148] If in 2009 or 2010, the issuer elects to receive the credit, in the example above, for the State or local issuer's bond to sell at par, the issuer would have to issue the bond with a $1,000 interest coupon. The taxpayer who holds such a bond would include $1,000 on interest in his or her income. From the taxpayer's perspective the bond is the same the taxable bond in the example above and the taxpayer would be willing to pay par for the bond. However, under the provision the State or local issuer would receive a payment of $350 for each $1,000 coupon paid to bondholders. (The net interest cost to the issuer would be $650.)

The payment by the Secretary is to be made contemporaneously with the interest payment made by the issuer, and may be made either in advance or as reimbursement. In lieu of payment to the issuer, the payment may be made to a person making interest payments on behalf of the issuer. For purposes of the arbitrage rules, the yield on a qualified bond is reduced by the amount of the credit/payment.

[142] Sec. 103(a) and (b)(2).

[143] Sec. 148.

[144] See secs. 54B, 54C, 54D, and 54E.

[145] Given the differences in credit quality and other characteristics of individual issuers, the Secretary cannot set credit rates in a manner that will allow each issuer to issue tax credit bonds at par.

[146] Original issue discount (OID) is not treated as a payment of interest for purposes of determining the credit under the provision. OID is the excess of an obligation's stated redemption price at maturity over the obligation's issue price (sec. 1273(a)).

[147] Under Treas. Reg. sec. 150–1(b), capital expenditure means any cost of a type that is properly chargeable to capital account (or would be so chargeable with a proper election or with the application of the definition of placed in service under Treas. Reg. sec. 1.150–2(c)) under general Federal income tax principles. For purposes of applying the ''general Federal income tax principles'' standard, an issuer should generally be treated as if it were a corporation subject to taxation under subchapter C of chapter 1 of the Code. An example of a capital expenditure would include expenditures made for the purchase of fiber-optic cable to provide municipal broadband service.

[148] Original issue discount (OID) is not treated as a payment of interest for purposes of calculating the refundable credit under the provision.

Transitional coordination with State law

As noted above, interest on a taxable governmental bond and the related credit are includible in gross income to the holder for Federal tax purposes. The provision provides that until a State provides otherwise, the interest on any taxable governmental bond and the amount of any credit, determined with respect to such bond shall be treated as being exempt from Federal income tax for purposes of State income tax laws.

Effective date

The provision is effective for obligations issued after the date of enactment.

SENATE AMENDMENT

In general

The Senate amendment is the same as the House bill except that it renames these bonds ''Build America Bonds.''

The Senate amendment also restricts these bonds to obligations issued before January 1, 2011.

For bonds issued by small issuers,[149] the credit rate is 40 percent instead of 35 percent.

Special rule for qualified bonds issued during 2009 and 2010

The Senate amendment is the same as the House bill, except for bonds issued by small issuers, the credit rate is 40 percent instead of 35 percent.

Transitional coordination with State law

The Senate amendment is the same as the House bill.

Effective date

The Senate amendment is the same as the House bill.

CONFERENCE AGREEMENT

In general

The conference agreement follows the House bill except that it renames these bonds ''Build America Bonds.''

The conference agreement restricts these bonds to obligations issued before January 1, 2011.

Special rule for qualified bonds issued during 2009 and 2010

The conference agreement follows the House bill, except that it allows for a reasonably required reserve fund to be funded from bond proceeds.[150]

Transitional coordination with State law

The conference agreement follows the House bill and the Senate amendment.

Effective date

The conference agreement follows the House bill and the Senate amendment.

7. Recovery zone bonds (sec. 1531 of the House bill, sec. 1401 of the Senate amendment, sec. 1401 of the conference agreement, and new secs. 1400U–1, 1400U–2, and 1400U–3 of the Code)

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.

Private activity bonds

The Code defines a private activity bond as any bond that satisfies (1) the private business use test and the private security or payment test (''the private business test''); or (2) ''the private loan financing test.''[151]

Private business test

Under the private business test, a bond is a private activity bond if it is part of an issue in which:

1. More than 10 percent of the proceeds of the issue (including use of the bond-financed property) are to be used in the trade or business of any person other than a governmental unit (''private business use''); and

2. More than 10 percent of the payment of principal or interest on the issue is, directly or indirectly, secured by (a) property used or to be used for a private business use or (b) to be derived from payments in respect of property, or borrowed money, used or to be used for a private business use (''private payment test'').[152]

A bond is not a private activity bond unless both parts of the private business test (i.e., the private business use test and the private payment test) are met. Thus, a facility that is 100 percent privately used does not cause the bonds financing such facility to be private activity bonds if the bonds are not secured by or paid with private payments. For example, land improvements that benefit a privately-owned factory may be financed with governmental bonds if the debt service on such bonds is not paid by the factory owner or other private parties and such bonds are not secured by the property.

Private loan financing test

A bond issue satisfies the private loan financing test if proceeds exceeding the lesser of $5 million or five percent of such proceeds are used directly or indirectly to finance loans to one or more nongovernmental persons. Private loans include both business and other (e.g., personal) uses and payments to private persons; however, in the case of business uses and payments, all private loans also constitute private business uses and payments subject to the private business test.

Arbitrage restrictions

The exclusion from income for interest on State and local bonds does not apply to any arbitrage bond.[153] An arbitrage bond is defined as any bond that is part of an issue if any proceeds of the issue are reasonably expected to be used (or intentionally are used) to acquire higher yielding investments or to replace funds that are used to acquire higher yielding investments.[154] In general, arbitrage profits may be earned only during specified periods (e.g., defined ''temporary periods'') before funds are needed for the purpose of the borrowing or on specified types of investments (e.g., ''reasonably required reserve or replacement funds''). Subject to limited exceptions, investment profits that are earned during these periods or on such investments must be rebated to the Federal Government.

Qualified private activity bonds

Qualified private activity bonds permit States or local governments to act as conduits providing tax-exempt financing for certain private activities. The definition of qualified private activity bonds includes an exempt facility bond, or qualified mortgage, veterans' mortgage, small issue, redevelopment, 501(c)(3), or student loan bond (sec. 141(e)).

The definition of an exempt facility bond includes bonds issued to finance certain transportation facilities (airports, ports, mass commuting, and high-speed intercity rail facilities); qualified residential rental projects; privately owned and/or operated utility facilities (sewage, water, solid waste disposal, and local district heating and cooling facilities, certain private electric and gas facilities, and hydroelectric dam enhancements); public/private educational facilities; qualified green building and sustainable design projects; and qualified highway or surface freight transfer facilities (sec. 142(a)).

In most cases, the aggregate volume of qualified private activity bonds is restricted by annual aggregate volume limits imposed on bonds issued by issuers within each State (''State volume cap''). For calendar year 2007, the State volume cap, which is indexed for inflation, equals $85 per resident of the State, or $256.24 million, if greater. Exceptions to the State volume cap are provided for bonds for certain governmentally owned facilities (e.g., airports, ports, high-speed intercity rail, and solid waste disposal) and bonds which are subject to separate local, State, or national volume limits (e.g., public/private educational facility bonds, enterprise zone facility bonds, qualified green building bonds, and qualified highway or surface freight transfer facility bonds).

Qualified private activity bonds generally are subject to restrictions on the use of proceeds for the acquisition of land and existing property. In addition, qualified private activity bonds generally are subject to restrictions on the use of proceeds to finance certain specified facilities (e.g., airplanes, skyboxes, other luxury boxes, health club facilities, gambling facilities, and liquor stores), and use of proceeds to pay costs of issuance (e.g., bond counsel and underwriter fees). Small issue and redevelopment bonds also are subject to additional restrictions on the use of proceeds for certain facilities (e.g., golf courses and massage parlors).

Moreover, the term of qualified private activity bonds generally may not exceed 120 percent of the economic life of the property being financed and certain public approval requirements (similar to requirements that typically apply under State law to issuance of governmental debt) apply under Federal law to issuance of private activity bonds.

Qualified tax credit bonds

In lieu of interest, holders of qualified tax credit bonds receive a tax credit that accrues quarterly. The following bonds are qualified tax credit bonds: qualified forestry conservation bonds, new clean renewable energy bonds, qualified energy conservation bonds, and qualified zone academy bonds.[155]

Section 54A of the Code sets forth general rules applicable to qualified tax credit bonds. These rules include requirements regarding the expenditure of available project proceeds, reporting, arbitrage, maturity limitations, and financial conflicts of interest, among other special rules.

A taxpayer who holds a qualified tax credit bond on one or more credit allowance dates

---

[149] Small issuer status is determined generally by reference to the rules of sec. 148(f)(4)(D)) and increasing the aggregate face amount of all tax-exempt governmental bonds reasonably expected to be issued during the calendar year from $5 million to $30 million.

[150] Under section 148(d)(2), a bond is an arbitrage bond if the amount of the proceeds from the sale of such issue that is part or any reserve or replacement fund exceeds 10 percent of the proceeds. As such the interest on such bond would not be tax-exempt under section 103 and thus would not be a qualified bond for purposes of the provision.

[151] Sec. 141.

[152] Sec. 103(a) and (b)(20.

[153] Sec. 103(a) and (b)(2).

[154] Sec. 148.

[155] See secs. 54B, 54C, 54DE, and 54E.

of the bond during the taxable year shall be allowed a credit against the taxpayer's income tax for the taxable year. In general, the credit amount for any credit allowance date is 25 percent of the annual credit determined with respect to the bond. The annual credit is determined by multiplying the applicable credit rate by the outstanding face amount of the bond. The applicable credit rate for the bond is the rate that the Secretary estimates will permit the issuance of the qualified tax credit bond with a specified maturity or redemption date without discount and without interest cost to the qualified issuer.[156] The Secretary determines credit rates for tax credit bonds based on general assumptions about credit quality of the class of potential eligible issuers and such other factors as the Secretary deems appropriate. The Secretary may determine credit rates based on general credit market yield indexes and credit ratings. The credit is included in gross income and, under regulations prescribed by the Secretary, may be stripped.

Section 54A of the Code requires that 100 percent of the available project proceeds of qualified tax credit bonds must be used within the three-year period that begins on the date of issuance. Available project proceeds are proceeds from the sale of the bond issue less issuance costs (not to exceed two percent) and any investment earnings on such sale proceeds. To the extent less than 100 percent of the available project proceeds are used to finance qualified projects during the three-year spending period, bonds will continue to qualify as qualified tax credit bonds if unspent proceeds are used within 90 days from the end of such three-year period to redeem bonds. The three-year spending period may be extended by the Secretary upon the issuer's request demonstrating that the failure to satisfy the three-year requirement is due to reasonable cause and the projects will continue to proceed with due diligence.

Qualified tax credit bonds generally are subject to the arbitrage requirements of section 148. However, available project proceeds invested during the three-year spending period are not subject to the arbitrage restrictions (i.e., yield restriction and rebate requirements). In addition, amounts invested in a reserve fund are not subject to the arbitrage restrictions to the extent: (1) such fund is funded at a rate not more rapid than equal annual installments; (2) such fund is funded in a manner reasonably expected to result in an amount not greater than an amount necessary to repay the issue; and (3) the yield on such fund is not greater than the average annual interest rate of tax-exempt obligations having a term of 10 years or more that are issued during the month the qualified tax credit bonds are issued.

The maturity of qualified tax credit bonds is the term that the Secretary estimates will result in the present value of the obligation to repay the principal on such bonds being equal to 50 percent of the face amount of such bonds, using as a discount rate the average annual interest rate of tax-exempt obligations having a term of 10 years or more that are issued during the month the qualified tax credit bonds are issued.

HOUSE BILL

In general

The provision permits an issuer to designate one or more areas as recovery zones. The area must have significant poverty, unemployment, general distress, or home foreclosures, or be any area for which a designation as an empowerment zone or renewal community is in effect. Issuers may issue recovery zone economic development bonds and recovery zone facility bonds with respect to these zones.

There is a national recovery zone economic development bond limitation of $10 billion. In addition, there is a separate national recovery zone facility bond limitation of $15 billion. The Secretary is to separately allocate the bond limitations among the States in the proportion that each State's employment decline bears to the national decline in employment (the aggregate 2008 State employment declines for all States). In turn each State is to reallocate its allocation among the counties (parishes) and large municipalities in such State in the proportion that each such county or municipality's 2008 employment decline bears to the aggregate employment declines for all counties and municipalities in such State. In calculating the local employment decline with respect to a county, the portion of such decline attributable to a large municipality is disregarded for purposes of determining the county's portion of the State employment decline and is attributable to the large municipality only.

For purposes of the provision ''2008 State employment decline'' means, with respect to any State, the excess (if any) of (i) the number of individuals employed in such State as determined for December 2007, over (ii) the number of individuals employed in such State as determined for December 2008. The term ''large municipality'' means a municipality with a population of more than 100,000.

Recovery Zone Economic Development Bonds

New section 54AA(h) of the House bill creates a special rule for qualified bonds (a type of taxable governmental bond) issued before January 1, 2011, that entitles the issuer of such bonds to receive an advance tax credit equal to 35 percent of the interest payable on an interest payment date. For taxable governmental bonds that are designated recovery zone economic development bonds, the applicable percentage is 55 percent.

A recovery zone economic development bond is a taxable governmental bond issued as part of an issue if 100 percent of the available project proceeds of such issue are to be used for one or more qualified economic development purposes and the issuer designates such bond for purposes of this section. A qualified economic development purpose means expenditures for purposes of promoting development or other economic activity in a recovery zone, including (1) capital expenditures paid or incurred with respect to property located in such zone, (2) expenditures for public infrastructure and construction of public facilities located in a recovery zone.

The aggregate face amount of bonds which may be designated by any issuer cannot exceed the amount of the recovery zone economic development bond limitation allocated to such issuer.

Recovery Zone Facility Bonds

The provision creates a new category of exempt facility bonds, ''recovery zone facility bonds.'' A recovery zone facility bond means any bond issued as part of an issue if: (1) 95 percent or more of the net proceeds of such issue are to be used for recovery zone property and (2) such bond is issued before January 1, 2011, and (3) the issuer designates such bond as a recovery zone facility bond. The aggregate face amount of bonds which may be designated by any issuer cannot exceed the amount of the recovery zone facility bond limitation allocated to such issuer.

Under the provision, the term ''recovery zone property'' means any property subject to depreciation to which section 168 applies (or would apply but for section 179) if (1) such property was acquired by the taxpayer by purchase after the date on which the designation of the recovery zone took effect; (2) the original use of such property in the recovery zone commences with the taxpayer; and (3) substantially all of the use of such property is in the recovery zone and is in the active conduct of a qualified business by the taxpayer in such zone. The term ''qualified business'' means any trade or business except that the rental to others of real property located in a recovery zone shall be treated as a qualified business only if the property is not residential rental property (as defined in section 168(e)(2)) and does not include any trade or business consisting of the operation of any facility described in section 144(c)(6)(B) (i.e., any private or commercial golf course, country club, massage parlor, hot tub facility, suntan facility, racetrack or other facility used for gambling, or any store the principal purpose of which is the sale of alcoholic beverages for consumption off premises).

Subject to the following exceptions and modifications, issuance of recovery zone facility bonds is subject to the general rules applicable to issuance of qualified private activity bonds:

1. Issuance of the bonds is not subject to the aggregate annual State private activity bond volume limits (sec. 146);

2. The restriction on acquisition of existing property does not apply (sec. 147(d));

Effective date

The provision is effective for obligations issued after the date of enactment.

SENATE AMENDMENT

In general

The Senate amendment is the same as the House bill with a modification for allocating t e bonds between the States. Under the Senate amendment each State receives a minimum allocation of one percent of the national recovery zone economic development bond limitation and one percent of the national recovery zone facility bond limitation. The remainder of each bond limitation is separately allocated among the States in the proportion that each State's employment decline bears to the national decline in employment (the aggregate 2008 State employment declines for all States).

Recovery Zone Economic Development Bonds

New section 54AA(g) of the Senate amendment creates a special rule for qualified bonds type of Build America Bond) issued before January 1, 2011, that entitles the issuer of such bonds to receive an advance tax credit equal to 35 percent of the interest payable on an interest payment date. For Build America Bonds that are designated recovery zone economic development bonds, the applicable percentage is 40 percent. In other respects the Senate amendment is the same as the House bill.

Recovery Zone Facility Bonds

The Senate amendment is the same as the House bill.

Effective date

The Senate amendment is the same as the House bill.

CONFERENCE AGREEMENT

In general

The conference agreement follows the House bill, with a modification for allocating the bond limitations among the States. Under the conference agreement the national recovery zone economic development bond limitation and national recovery zone facility bond limitation are allocated among the States in the proportion that each State's employment decline bears to the national decline in employment (the aggregate 2008

[156] Given the differences in credit quality and other characteristics of individual issuers, the Secretary cannot set credit rates in a manner that will allow each issuer to issue tax credit bonds at par.

State employment declines for all States).[157] The Secretary is to adjust each State's allocation for a calendar year such that no State receives less than 0.9 percent of the national recovery zone economic development bond limitation and no less than 0.9 percent of the national recovery zone facility bond limitation. The conference agreement also permits a county or large municipality to waive all or part of its allocation of the State bond limitations to allow further allocation within that State. With respect to all other aspects of the allocation of the bond limitations, the conference agreement follows the House bill.

The conference agreement also provides that a ''recovery zone'' includes any area designated by the issuer as economically distressed by reason of the closure or realignment of a military installation pursuant to the Defense Base Closure and Realignment Act of 1990.

Recovery Zone Economic Development Bonds

The conference agreement follows the House bill, except the issuer of recovery zone economic development bonds is entitled to receive an advance tax credit equal to 45 percent of the interest payable on an interest payment date and the conference agreement allows for a reasonably required reserve fund to be funded from the proceeds of a recovery zone economic development bond.

Recovery Zone Facility Bonds

The conference agreement follows the House bill, except ''recovery zone property'' is defined as any property subject to depreciation to which section 168 applies (or would apply but for section 179) if (1) such property was constructed, reconstructed, renovated, or acquired by purchase by the taxpayer after the date on which the designation of the recovery zone took effect; (2) the original use of such property in the recovery zone commences with the taxpayer; and (3) substantially all of the use of such property is in the recovery zone and is in the active conduct of a qualified business by the taxpayer in such zone.

Effective date

The conference agreement follows the House bill and the Senate amendment.

8. Tribal economic development bonds (sec. 1532 of the House bill, sec. 1402 of the Senate amendment, sec. 1402 of the conference agreement, and new sec. 7871(f) of the Code)

PRESENT LAW

Under present law, gross income does not include interest on State or local bonds.[158] 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 facilities or the debt is 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. For these purposes, the term ''nongovernmental person'' includes the Federal government and all other individuals and entities other than States or local governments.[159] Interest on private activity bonds is taxable, unless the bonds are issued for certain purposes permitted by the Code and other requirements are met.[160]

[157] The Bureau of Labor Statistics prepares data on regional and State employment and unemployment. See e.g., Bureau of Labor Statistics, USDL 09–0093, *Regional and State Employment and Unemployment: December 2008* (January 27, 2009) <http://www.bls.govnews.release/laus.nr0.htm>.

[158] Sec. 103.

[159] Sec. 141(b)(6); Treas. Reg. sec. 1.151–1(b).

[160] Secs. 103(b)(1) and 141.

Although not States or subdivisions of States, Indian tribal governments are provided with a tax status similar to State and local governments for specified purposes under the Code.[161] Among the purposes for which a tribal government is treated as a State is the issuance of tax-exempt bonds. Under section 7871(c), tribal governments are authorized to issue tax-exempt bonds only if substantially all of the proceeds are used for essential governmental functions.[162]

The term essential governmental function does not include any function that is not customarily performed by State and local governments with general taxing powers. Section 7871(c) further prohibits Indian tribal governments from issuing tax-exempt private activity bonds (as defined in section 141(a) of the Code) with the exception of certain bonds for manufacturing facilities.

HOUSE BILL

Tribal Economic Development Bonds

The provision allows Indian tribal governments to issue ''tribal economic development bonds.'' There is a national bond limitation of $2 billion, to be allocated as the Secretary determines appropriate, in consultation with the Secretary of the Interior. Tribal economic development bonds issued by an Indian tribal government are treated as if such bond were issued by a State except that section 146 (relating to State volume limitations) does not apply.

A tribal economic development bond is any bond issued by an Indian tribal government (I) the interest on which would be tax-exempt if issued by a State or local government but would be taxable under section 7871(c), and (2) that is designated by the Indian tribal government as a tribal economic development bond. The aggregate face amount of bonds that may be designated by any Indian tribal government cannot exceed the amount of national tribal economic development bond limitation allocated to such government.

Tribal economic development bonds cannot be used to finance any portion of a building in which class II or class III gaming (as defined in section 4 of the Indian Gaming Regulatory Act) is conducted, or housed, or any other property used in the conduct of such gaming. Nor can tribal economic development bonds be used to finance any facility located outside of the Indian reservation.

Treasury study

The provision requires that the Treasury Department study the effects of tribal economic development bonds. One year after the date of enactment, a report is to be submitted to Congress providing the results of such study along with any recommendations, including whether the restrictions of section 7871(c) should be eliminated or otherwise modified.

Effective date

The provision applies to obligations issued after the date of enactment.

SENATE AMENDMENT

The Senate amendment is the same as the House bill except the Senate amendment defines a tribal economic development bond as any bond issued by an Indian tribal government (1) 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 Senate amendment also clarifies that for purposes of section 141 of the Code, use of bond proceeds by an Indian tribe, or instrumentality thereof, is treated as use by a State.

[161] Sec. 7871.

[162] Sec. 7871(c).

CONFERENCE AGREEMENT

The conference agreement follows the Senate amendment.

9. Pass-through of credits on tax credit bonds held by regulated investment companies (sec. 1541 of the conference agreement and new section 853A of the Code)

PRESENT LAW

In lieu of interest, holders of qualified tax credit bonds receive a tax credit that accrues quarterly. The credit is treated as interest that is includible in gross income. The following bonds are qualified tax credit bonds: qualified forestry conservation bonds, new clean renewable energy bonds, qualified energy conservation bonds, and qualified zone academy bonds.[163] The Code provides that in the case of a qualified tax credit bond held by a regulated investment company, the credit is allowed to shareholders of such company (and any gross income included with respect to such credit shall be treated as distributed to such shareholders) under procedures prescribed by the Secretary.[164] The Secretary has not prescribed procedures for the pass through of the credit to regulated investment company shareholders.

HOUSE BILL

No provision.

SENATE AMENDMENT

No provision.

CONFERENCE AGREEMENT

The conference agreement provides procedures for passing though credits on ''tax credit bonds'' to the shareholders of an electing regulated investment company. In general, an electing regulated investment company is not allowed any credits with respect to any tax credit bonds it holds during any year for which an election is in effect. The company is treated as having an amount of interest included in its gross income in an amount equal that which would have been included if no election were in effect, and a dividends paid deduction in the same amount is allowed to the company. Each shareholder of the electing regulated investment company is (1) required to include in gross income an amount equal to the shareholder's proportional share of the interest attributable to its credits and (2) allowed such proportional share as a credit against such shareholder's Federal income tax. In order to pass through tax credits to a shareholder, a regulated investment company is required to mail a written notice to such shareholder not later than 60 days after the close of the regulated investment company's taxable year, designating the shareholder's proportionate share of passed-through credits and the shareholder's gross income in respect of such credits.

A tax credit bond means a qualified tax credit bond as defined in section 54A(d), a build America bond (as defined in section 54AA(d)), and any other bond for which a credit is allowable under subpart H of part IV of subchapter A of the Code.

The provision gives the Secretary authority to prescribe the time and manner in which a regulated investment company makes the election to pass through credits on tax credit bonds. In addition, the provision requires the Secretary to prescribe such guidance as may be necessary to carry out the provision, including prescribing methods for determining a shareholder's proportionate share of tax credits.

Effective date.—The provision is applicable to taxable years ending after the date of enactment.

[163] See secs. 54B, 54C, 54D, and 54E.

[164] See sec. 54A(h), which also covers real estate investment trusts.

10. Delay in implementation of withholding tax on government contractors (sec. 1541 of the House bill, sec. 1511 of the Senate amendment, sec. 1511 of the conference agreement, and sec. 3402(t) of the Code)

PRESENT LAW

For payments made after December 31, 2010, the Code imposes a withholding requirement at a three-percent rate on certain payments to persons providing property or services made by the Government of the United States, every State, every political subdivision thereof, and every instrumentality of the foregoing (including multi-State agencies). The withholding requirement applies regardless of whether the government entity making such payment is the recipient of the property or services. Political subdivisions of States (or any instrumentality thereof) with less than $100 million of annual expenditures for property or services that would otherwise be subject to withholding are exempt from the withholding requirement.

Payments subject to the three-percent withholding requirement include any payment made in connection with a government voucher or certificate program which functions as a payment for property or services. For example, payments to a commodity producer under a government commodity support program are subject to the withholding requirement. Present law also imposes information reporting requirements on the payments that are subject to withholding requirement.

The three-percent withholding requirement does not apply to any payments made through a Federal, State, or local government public assistance or public welfare program for which eligibility is determined by a needs or income test. The three-percent withholding requirement also does not apply to payments of wages or to any other payment with respect to which mandatory (e.g., U.S.-source income of foreign taxpayers) or voluntary (e.g., unemployment benefits) withholding applies under present law. Although the withholding requirement applies to payments that are potentially subject to backup withholding under section 3406, it does not apply to those payments from which amounts are actually being withheld under backup withholding rules.

The three-percent withholding requirement also does not apply to the following: payments of interest; payments for real property; payments to tax-exempt entities or foreign governments; intra-governmental payments; payments made pursuant to a classified or confidential contract (as defined in section 6050M(e)(3)), and payments to government employees that are not otherwise excludable from the new withholding proposal with respect to the employees' services as employees.

HOUSE BILL

The provision repeals the three-percent withholding requirement on government payments.

Effective date.—The provision is effective on the date of enactment.

SENATE AMENDMENT

The provision delays the implementation of the three percent withholding requirement by one year to apply to payments after December 31, 2011.

Effective date.—The provision is effective on the date of enactment.

CONFERENCE AGREEMENT

The conference agreement follows the Senate amendment.

11. Extend and modify the new markets tax credit (sec. 1403 of the Senate amendment, sec. 1403 of the conference agreement, and sec. 45D of the Code)

PRESENT LAW

Section 45D provides a new markets tax credit for qualified equity investments made to acquire stock in a corporation, or a capital interest in a partnership, that is a qualified community development entity (''CDE'').[165] The amount of the credit allowable to the investor (either the original purchaser or a subsequent holder) is (1) a five-percent credit for the year in which the equity interest is purchased from the CDE and for each of the following two years, and (2) a six-percent credit for each of the following four years. The credit is determined by applying the applicable percentage (five or six percent) to the amount paid to the CDE for the investment at its original issue, and is available for a taxable year to the taxpayer who holds the qualified equity investment on the date of the initial investment or on the respective anniversary date that occurs during the taxable year. The credit is recaptured if, at any time during the seven-year period that begins on the date of the original issue of the qualified equity investment, the issuing entity ceases to be a qualified CDE, the proceeds of the investment cease to be used as required, or the equity investment is redeemed.

A qualified CDE is any domestic corporation or partnership: (1) whose primary mission is serving or providing investment capital for low-income communities or low-income persons; (2) that maintains accountability to residents of low-income communities by providing them with representation on any governing board of or any advisory board to the CDE; and (3) that is certified by the Secretary as being a qualified CDE. A qualified equity investment means stock (other than nonqualified preferred stock) in a corporation or a capital interest in a partnership that is acquired directly from a CDE for cash, and includes an investment of a subsequent purchaser if such investment was a qualified equity investment in the hands of the prior holder. Substantially all of the investment proceeds must be used by the CDE to make qualified low-income community investments. For this purpose, qualified low-income community investments include: (1) capital or equity investments in, or loans to, qualified active low-income community businesses; (2) certain financial counseling and other services to businesses and residents in low-income communities; (3) the purchase from another CDE of any loan made by such entity that is a qualified low-income community investment; or (4) an equity investment in, or loan to, another CDE.

A ''low-income community'' is a population census tract with 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 non-metropolitan census tract, does not exceed 80 percent of statewide median family income). In the case of a population census tract located within a high migration rural county, low-income is defined by reference to 85 percent (rather than 80 percent) of statewide median family income. For this purpose, a high migration rural county is any county that, during the 20-year period ending with the year in which the most recent census was conducted, has a net out-migration of inhabitants from the county of at least 10 percent of the population of the county at the beginning of such period.

The Secretary has the authority to designate ''targeted populations'' as low-income communities for purposes of the new markets tax credit. For this purpose, a ''targeted population'' is defined by reference to section 103(20) of the Riegle Community Development and Regulatory Improvement Act of 1994 (12 U.S.C. 4702(20)) to mean individuals, or an identifiable group of individuals, including an Indian tribe, who (A) are low-income persons; or (B) otherwise lack adequate access to loans or equity investments. Under such Act, ''low-income'' means (1) for a targeted population within a metropolitan area, less than 80 percent of the area median family income; and (2) for a targeted population within a non-metropolitan area, less than the greater of 80 percent of the area median family income or 80 percent of the statewide non-metropolitan area median family income.[166] Under such Act, a targeted population is not required to be within any census tract. In addition, a population census tract with a population of less than 2,000 is treated as a low-income community for purposes of the credit if such tract is within an empowerment zone, the designation of which is in effect under section 1391, and is contiguous to one or more low-income communities.

A qualified active low-income community business is defined as a business that satisfies, with respect to a taxable year, the following requirements: (1) at least 50 percent of the total gross income of the business is derived from the active conduct of trade or business activities in any low-income community; (2) a substantial portion of the tangible property of such business is used in a low-income community; (3) a substantial portion of the services performed for such business by its employees is performed in a low-income community; and (4) less than five percent of the average of the aggregate unadjusted bases of the property of such business is attributable to certain financial property or to certain collectibles.

The maximum annual amount of qualified equity investments is capped at $3.5 billion per year for calendar years 2006 through 2009. Lower caps applied for calendar years 2001 through 2005.

HOUSE BILL

No provision.

SENATE AMENDMENT

For calendar years 2008 and 2009, the Senate amendment increases the maximum amount of qualified equity investments by $1.5 billion (to $5 billion for each year). The Senate amendment requires that the additional amount for 2008 be allocated to qualified CDEs that submitted an allocation application with respect to calendar year 2008 and either (1) did not receive an allocation for such calendar year, or (2) received an allocation for such calendar year in an amount less than the amount requested in the allocation application. The Senate amendment also provides alternative minimum tax relief for equity investment allocations subject to the 2009 annual limitation.

Effective date.—The provision is effective on the date of enactment.

CONFERENCE AGREEMENT

The conference agreement generally follows the Senate amendment but does not provide for any alternative minimum tax relief.

[165] Section 45D was added by section 121(a) of the Community Renewal Tax Relief Act of 2000, Pub. L. No. 106–554 (2000).

[166] 12 U.S.C. sec. 4702(17) (defines ''low-income'' for purposes of 12 U.S.C. sec. 4702(20)).

D. ENERGY INCENTIVES

1. Extension of the renewable electricity production credit (sec. 1601 of the House bill, sec. 1101 of the Senate amendment, sec. 1101 of the conference agreement, and sec. 45 of the Code)

PRESENT LAW

In general

An income tax credit is allowed for the production of electricity from qualified energy resources at qualified facilities (the ''renewable electricity production credit'').[167] Qualified energy resources comprise wind, closed-loop biomass, open-loop biomass, geothermal energy, solar energy, small irrigation power, municipal solid waste, qualified hydropower production, and marine and hydrokinetic renewable energy. Qualified facilities are, generally, facilities that generate electricity using qualified energy resources. To be eligible for the credit, electricity produced from qualified energy resources at qualified facilities must be sold by the taxpayer to an unrelated person.

Credit amounts and credit period

In general

The base amount of the electricity production credit is 1.5 cents per kilowatt-hour (indexed annually for inflation) of electricity produced. The amount of the credit was 2.1 cents per kilowatt-hour for 2008. A taxpayer may generally claim a credit during the 10–year period commencing with the date the qualified facility is placed in service. The credit is reduced for grants, tax-exempt bonds, subsidized energy financing, and other credits.

Credit phaseout

The amount of credit a taxpayer may claim is phased out as the market price of electricity exceeds certain threshold levels. The electricity production credit is reduced over a 3–cent phaseout range to the extent the annual average contract price per kilowatt-hour of electricity sold in the prior year from the same qualified energy resource exceeds 8 cents (adjusted for inflation; 11.8 cents for 2008).

Reduced credit periods and credit amounts

Generally, in the case of open-loop biomass facilities (including agricultural livestock waste nutrient facilities), geothermal energy facilities, solar energy facilities, small irrigation power facilities, landfill gas facilities, and trash combustion facilities placed in service before August 8, 2005, the 10-year credit period is reduced to five years, commencing on the date the facility was originally placed in service. However, for qualified open-loop biomass facilities (other than a facility described in section 45(d)(3)(A)(i) that uses agricultural livestock waste nutrients) placed in service before October 22, 2004, the five-year period commences on January 1, 2005. In the case of a closed-loop biomass facility modified to co-fire with coal, to co-fire with other biomass, or to co-fire with coal and other biomass, the credit period begins no earlier than October 22, 2004.

In the case of open-loop biomass facilities (including agricultural livestock waste nutrient facilities), small irrigation power facilities, landfill gas facilities, trash combustion facilities, and qualified hydropower facilities the otherwise allowable credit amount is 0.75 cent per kilowatt-hour, indexed for inflation measured after 1992 (1 cent per kilowatt-hour for 2008).

[167] Sec. 45. In addition to the renewable electricity production credit, section 45 also provides income tax credits for the production of Indian coal and refined coal at qualified facilities.

Other limitations on credit claimants and credit amounts

In general, in order to claim the credit, a taxpayer must own the qualified facility and sell the electricity produced by the facility to an unrelated party. A lessee or operator may claim the credit in lieu of the owner of the qualifying facility in the case of qualifying open-loop biomass facilities and in the case of closed-loop biomass facilities modified to co-fire with coal, to co-fire with other biomass, or to co-fire with coal and other biomass. In the case of a poultry waste facility, the taxpayer may claim the credit as a lessee or operator of a facility owned by a governmental unit.

For all qualifying facilities, other than closed-loop biomass facilities modified to co-fire with coal, to co-fire with other biomass, or to co-fire with coal and other biomass, the amount of credit a taxpayer may claim is reduced by reason of grants, tax-exempt bonds, subsidized energy financing, and other credits, but the reduction cannot exceed 50 percent of the otherwise allowable credit. In the case of closed-loop biomass facilities modified to co-fire with coal, to co-fire with other biomass, or to co-fire with coal and other biomass, there is no reduction in credit by reason of grants, tax-exempt bonds, subsidized energy financing, and other credits.

The credit for elecnicity produced from renewable resources is a component of the general business credit.[168] Generally, the general business credit for any taxable year may not exceed the amount by which the taxpayer's net income tax exceeds the greater of the tentative minimum tax or 25 percent of so much of the net regular tax liability as exceeds $25,000. However, this limitation does not apply to section 45 credits for electricity or refined coal produced from a facility (placed in service after October 22, 2004) during the first four years of production beginning on the date the facility is placed in service.[169] excess credits may be carried back one year and forward up to 20 years.

Qualified facilities

Wind energy facility

A wind energy facility is a facility that uses wind to produce electricity. To be a qualified facility, a wind energy facility must be placed in service after December 31, 1993, and before January 1, 2010.

Closed-loop biomass facility

A closed-loop biomass facility is a facility that uses any organic material from a plant which is planted exclusively for the purpose of being used at a qualifying facility to produce electricity. In addition, a facility can be a closed-loop biomass facility if it is a facility that is modified to use closed-loop biomass to co-fire with coal, with other biomass, or with both coal and other biomass, but only if the modification is approved under the Biomass Power for Rural Development Programs or is part of a pilot project of the Commodity Credit Corporation.

To be a qualified facility, a closed-loop biomass facility must be placed in service after December 31, 1992, and before January 1, 2011. In the case of a facility using closed-loop biomass but also co-firing the closed-loop biomass with coal, other biomass, or coal and other biomass, a qualified facility must be originally placed in service and modified to co-fire the closed-loop biomass at any time before January 1, 2011.

A qualified facility includes a new power generation unit placed in service after October 3, 2008, at an existing closed-loop biomass facility, but only to the extent of the increased amount of electricity produced at the existing facility by reason of such new unit.

[168] Sec. 38(b)(8).

[169] Sec. 38(c)(4)(B)(ii).

Open-loop biomass (including agricultural livestock waste nutrients) facility

An open-loop biomass facility is a facility that uses open-loop biomass to produce electricity. For purposes of the credit, open-loop biomass is defined as (1) any agricultural livestock waste nutrients or (2) any solid, nonhazardous, cellulosic waste material or any lignin material that is segregated from other waste materials and which is derived from:

- forest-related resources, including mill and harvesting residues, precommercial thinnings, slash, and brush;
- solid wood waste materials, including waste pallets, crates, dunnage, manufacturing and construction wood wastes, and landscape or right-of-way tree trimmings; or
- agricultural sources, including orchard tree crops, vineyard, grain, legumes, sugar, and other crop by-products or residues.

Agricultural livestock waste nutrients are defined as agricultural livestock manure and litter, including bedding material for the disposition of manure. Wood waste materials do not qualify as open-loop biomass to the extent they are pressure treated, chemically treated, or painted. In addition, municipal solid waste, gas derived from the biodegradation of solid waste, and paper which is commonly recycled do not qualify as open-loop biomass. Open-loop biomass does not include closed-loop biomass or any biomass burned in conjunction with fossil fuel (co-firing) beyond such fossil fuel required for start up and flame stabilization.

In the case of an open-loop biomass facility that uses agricultural livestock waste nutrients, a qualified facility is one that was originally placed in service after October 22, 2004, and before January 1, 2009, and has a nameplate capacity rating which is not less than 150 kilowatts. In the case of any other open-loop biomass facility, a qualified facility is one that was originally placed in service before January 1, 2011. A qualified facility includes a new power generation unit placed in service after October 3, 2008, at an existing open-loop biomass facility, but only to the extent of the increased amount of electricity produced at the existing facility by reason of such new unit.

Geothermal facility

A geothermal facility is a facility that uses geothermal energy to produce electricity. Geothermal energy is energy derived from a geothermal deposit that is a geothermal reservoir consisting of natural heat that is stored in rocks or in an aqueous liquid or vapor (whether or not under pressure). To be a qualified facility, a geothermal facility must be placed in service after October 22, 2004, and before January 1, 2011.

Solar facility

A solar facility is a facility that uses solar energy to produce electricity. To be a qualified facility, a solar facility must be placed in service after October 22, 2004, and before January 1, 2006.

Small irrigation facility

A small irrigation power facility is a facility that generates electric power through an irrigation system canal or ditch without any dam or impoundment of water. The installed capacity of a qualified facility must be at least 150 kilowatts but less than five megawatts. To be a qualified facility, a small irrigation facility must be originally placed in service after October 22, 2004, and before October 3, 2008. Marine and hydrokinetic renewable energy facilities, described below, subsume small irrigation power facilities after October 2, 2008.

Landfill gas facility

A landfill gas facility is a facility that uses landfill gas to produce electricity. Landfill gas is defined as methane gas derived from the biodegradation of municipal solid waste. To be a qualified facility, a landfill gas facility must be placed in service after October 22, 2004, and before January 1, 2011.

Trash combustion facility

Trash combustion facilities are facilities that use municipal solid waste (garbage) to produce steam to drive a turbine for the production of electricity. To be a qualified facility, a trash combustion facility must be placed in service after October 22, 2004, and before January 1, 2011. A qualified trash combustion facility includes a new unit, placed in service after October 22, 2004, that increases electricity production capacity at an existing trash combustion facility. A new unit generally would include a new burner/boiler and turbine. The new unit may share certain common equipment, such as trash handling equipment, with other pre-existing units at the same facility. Electricity produced at a new unit of an existing facility qualifies for the production credit only to the extent of the increased amount of electricity produced at the entire facility.

Hydropower facility

A qualifying hydropower facility is (1) a facility that produced hydroelectric power (a hydroelectric dam) prior to August 8, 2005, at which efficiency improvements or additions to capacity have been made after such date and before January 1, 2011, that enable the taxpayer to produce incremental hydropower or (2) a facility placed in service before August 8, 2005, that did not produce hydroelectric power (a nonhydroelectric dam) on such date, and to which turbines or other electricity generating equipment have been added after such date and before January 1, 2011.

At an existing hydroelectric facility, the taxpayer may claim credit only for the production of incremental hydroelectric power. Incremental hydroelectric power for any taxable year is equal to the percentage of average annual hydroelectric power produced at the facility attributable to the efficiency improvement or additions of capacity determined by using the same water flow information used to determine an historic average annual hydroelectric power production baseline for that facility. The Federal Energy Regulatory Commission will certify the baseline power production of the facility and the percentage increase due to the efficiency and capacity improvements.

Nonhydroelectric dams converted to produce electricity must be licensed by the Federal Energy Regulatory Commission and meet all other applicable environmental, licensing, and regulatory requirements.

For a nonhydroelectric dam converted to produce electric power before January 1, 2009, there must not be any enlargement of the diversion structure, construction or enlargement of a bypass channel, or the impoundment or any withholding of additional water from the natural stream channel.

For a nonhydroelectric dam converted to produce electric power after December 31, 2008, the nonhydroelectric dam must have been (1) placed in service before October 3, 2008, (2) operated for flood control, navigation, or water supply purposes and (3) did not produce hydroelectric power on October 3, 2008. In addition, the hydroelectric project must be operated so that the water surface elevation at any given location and time that would have occurred in the absence of the hydroelectric project is maintained, subject to any license requirements imposed under applicable law that change the water surface elevation for the purpose of improving environmental quality of the affected waterway. The Secretary, in consultation with the Federal Energy Regulatory Commission, shall certify if a hydroelectric project licensed at a nonhydroelectric dam meets this criteria.

Marine and hydrokinetic renewable energy facility

A qualified marine and hydrokinetic renewable energy facility is any facility that produces electric power from marine and hydrokinetic renewable energy, has a nameplate capacity rating of at least 150 kilowatts, and is placed in service after October 2, 2008, and before January 1, 2012. Marine and hydrokinetic renewable energy is defined as energy derived from (1) waves, tides, and currents in oceans, estuaries, and tidal areas; (2) free flowing water in rivers, lakes, and streams; (3) free flowing water in an irrigation system, canal, or other manmade channel, including projects that utilize nonmechanical structures to accelerate the flow of water for electric power production purposes; or (4) differentials in ocean temperature (ocean thermal energy conversion). The term does not include energy derived from any source that uses a dam, diversionary structure (except for irrigation systems, canals, and other man-made channels), or impoundment for electric power production.

Summary of credit rate and credit period by facility type

TABLE 1.—SUMMARY OF SECTION 45 CREDIT FOR ELECTRICITY PRODUCED FROM CERTAIN RENEWABLE RESOURCES

Eligible electricity production activity	Credit amount for 2008 (cents per kilowatt-hour)	Credit period for facilities placed in service on or before August 8, 2005 (years from placed-in-service date)	Credit period for facilities placed in service after August 8, 2005 (years from placed-in-service date)
Wind	2.1	10	10
Closed-loop biomass	2.1	[1] 10	10
Open-loop biomass (including agricultural livestock waste nutrient facilities)	1.0	[2] 5	10
Geothermal	2.1	5	10
Solar (pre-2006 facilities only)	2.1	5	10
Small irrigation power	1.0	5	10
Municipal solid waste (including landfill gas facilities and trash combustion facilities)	1.0	5	10
Qualified hydropower	1.0	N/A	10
Marine and hydrokinetic	1.0	N/A	10

[1] In the case of certain co-firing closed-loop facilities, the credit period begins no earlier than October 22, 2004.
[2] For certain facilities placed in service before October 22, 2004, the five-year credit period commences on January 1, 2005.

Taxation of cooperatives and their patrons

For Federal income tax purposes, a cooperative generally computes its income as if it were a taxable corporation, with one exception: the cooperative may exclude from its taxable income distributions of patronage dividends. Generally, a cooperative that is subject to the cooperative tax rules of subchapter T of the Code[170] permitted a deduction for patronage dividends paid only to the extent of net income that is derived from transactions with patrons who are members of the cooperative.[171] The availability of such deductions from taxable income has the effect of allowing the cooperative to be treated like a conduit with respect to profits derived from transactions with patrons who are members of the cooperative.

Eligible cooperatives may elect to pass any portion of the credit through to their patrons. An eligible cooperative is defined as a cooperative organization that is owned more than 50 percent by agricultural producers or entities owned by agricultural producers. The credit may be apportioned among patrons eligible to share in patronage dividends on the basis of the quantity or value of business done with or for such patrons for the taxable year. The election must be made on a timely filed return for the taxable year and, once made, is irrevocable for such taxable year.

[170] Secs. 1381–1383.
[171] Sec. 1382.

HOUSE BILL

The provision extends for three years (generally, through 2013; through 2012 for wind facilities) the period during which qualified facilities producing electricity from wind, closed-loop biomass, open-loop biomass, geothermal energy, municipal solid waste, and qualified hydropower may be placed in service for purposes of the electricity production credit. The provision extends for two years (through 2013) the placed-in-service period for marine and hydrokinetic renewable energy resources.

The provision also makes a technical amendment to the definition of small irrigation power facility to clarify its integration into the definition of marine and hydrokinetic renewable energy facility.

Effective date.—The extension of the electricity production credit is effective for property placed in service after the date of enactment. The technical amendment is effective as if included in section 102 of the Energy Improvement and Extension Act of 2008.

SENATE AMENDMENT

The Senate amendment is the same as the House bill.

CONFERENCE AGREEMENT

The conference agreement follows the House bill and the Senate amendment.

2. Election of investment credit in lieu of production tax credits (sec. 1602 of the House bill, sec. 1102 of the Senate amendment, sec. 1102 of the conference agreement, and secs. 45 and 48 of the Code)

PRESENT LAW

Renewable electricity credit

An income tax credit is allowed for the production of electricity from qualified energy resources at qualified facilities.[172]

[172] Sec. 45. In addition to the electricity production credit, section 45 also provides income tax credits

Continued

Qualified energy resources comprise wind, closed-loop biomass, open-loop biomass, geothermal energy, solar energy, small irrigation power, municipal solid waste, qualified hydropower production, and marine and hydrokinetic renewable energy. Qualified facilities are, generally, facilities that generate electricity using qualified energy resources. To be eligible for the credit, electricity produced from qualified energy resources at qualified facilities must be sold by the taxpayer to an unrelated person. The credit amounts, credit periods, definitions of qualified facilities, and other rules governing this credit are described more fully in section D.1 of this document.

Energy credit

An income tax credit is also allowed for certain energy property placed in service. Qualifying property includes certain fuel cell property, solar property, geothermal power production property, small wind energy property, combined heat and power system property, and geothermal heat pump property.[173] The amounts of credit, definitions of qualifying property, and other rules governing this credit are described more fully in section D.3 of this document.

HOUSE BILL

The House bill allows the taxpayer to make an irrevocable election to have certain qualified facilities placed in service in 2009 and 2010 be treated as energy property eligible for a 30 percent investment credit under section 48. For this purpose, qualified facilities are facilities otherwise eligible for the section 45 production tax credit (other than refined coal, Indian coal, and solar facilities) with respect to which no credit under section 45 has been allowed. A taxpayer electing to treat a facility as energy property may not claim the production credit under section 45.

Effective date.—The provision applies to facilities placed in service after December 31, 2008.

SENATE AMENDMENT

The Senate amendment is similar to the House bill, but with a modification with respect to the placed in service period that determines eligibility for the election. Under the Senate amendment, facilities are eligible if placed in service during the extension period of section 45 as provided in the Senate amendment (generally, through 2013; through 2012 for wind facilities), and with respect to which no credit under section 45 has been allowed.

CONFERENCE AGREEMENT

The conference agreement generally follows the Senate amendment. Property eligible for the credit is tangible personal or other tangible property (not including a building or its structural components), and with respect to which depreciation or amortization is allowable but only if such property is used as an integral part of the qualified facility. For example, in the case of a wind facility, the conferees intend that only property eligible for five-year depreciation under section 168(e)(3)(b)(vi) is treated as credit-eligible energy property under the election.

for the production of Indian coal and refined coal at qualified facilities.

[173] Sec. 48.

3. Modification of energy credit[174] (sec. 1603 of the House bill, sec. 1103 of the Senate amendment, sec. 1103 of the conference agreement, and sec. 48 of the Code)

PRESENT LAW

In general

A nonrefundable, 10-percent business energy credit[175] is allowed for the cost of new property that is equipment that either (1) uses solar energy to generate electricity, to heat or cool a structure, or to provide solar process heat, or (2) is used to produce, distribute, or use energy derived from a geothermal deposit, but only, in the case of electricity generated by geothermal power, up to the electric transmission stage. Property used to generate energy for the purposes of heating a swimming pool is not eligible solar energy property.

The energy credit is a component of the general business credit.[176] An unused general business credit generally may be carried back one year and carried forward 20 years.[177] The taxpayer's basis in the property is reduced by one-half of the amount of the credit claimed. For projects whose construction time is expected to equal or exceed two years, the credit may be claimed as progress expenditures are made on the project, rather than during the year the property is placed in service. The credit is allowed against the alternative minimum tax for credits determined in taxable years beginning after October 3, 2008.

Property financed by subsidized energy financing or with proceeds from private activity bonds is subject to a reduction in basis for purposes of claiming the credit. The basis reduction is proportional to the share of the basis of the property that is financed by the subsidized financing or proceeds. The term ''subsidized energy financing'' means financing provided under a Federal, State, or local program a principal purpose of which is to provide subsidized financing for projects designed to conserve or produce energy.

Special rules for solar energy property

The credit for solar energy property is increased to 30 percent in the case of periods prior to January 1, 2017. Additionally, equipment that uses fiber-optic distributed sunlight to illuminate the inside of a structure is solar energy property eligible for the 30–percent credit.

Fuel cells and microturbines

The energy credit applies to qualified fuel cell power plants, but only for periods prior to January 1, 2017. The credit rate is 30 percent.

A qualified fuel cell power plant is an integrated system composed of a fuel cell stack assembly and associated balance of plant components that (1) converts a fuel into electricity using electrochemical means, and (2) has an electricity-only generation efficiency of greater than 30 percent and a capacity of at least one-half kilowatt. The credit may not exceed $1,500 for each 0.5 kilowatt of capacity.

The energy credit applies to qualifying stationary microturbine power plants for periods prior to January 1, 2017. The credit is limited to the lesser of 10 percent of the basis of the property or $200 for each kilowatt of capacity.

A qualified stationary microturbine power plant is an integrated system comprised of a gas turbine engine, a combustor, a recuperator or regenerator, a generator or alternator, and associated balance of plant components that converts a fuel into electricity and thermal energy. Such system also includes all secondary components located between the existing infrastructure for fuel delivery and the existing infrastructure for power distribution, including equipment and controls for meeting relevant power standards, such as voltage, frequency and power factors. Such system must have an electricity-only generation efficiency of not less than 26 percent at International Standard Organization conditions and a capacity of less than 2,000 kilowatts.

Geothermal heat pump property

The energy credit applies to qualified geothermal heat pump property placed in service prior to January 1, 2017. The credit rate is 10 percent. Qualified geothermal heat pump property is equipment that uses the ground or ground water as a thermal energy source to heat a structure or as a thermal energy sink to cool a structure.

Small wind property

The energy credit applies to qualified small wind energy property placed in service prior to January 1, 2017. The credit rate is 30 percent. The credit is limited to $4,000 per year with respect to all wind energy property of any taxpayer. Qualified small wind energy property is property that uses a qualified wind turbine to generate electricity. A qualifying wind turbine means a wind turbine of 100 kilowatts of rated capacity or less.

Combined heat and power property

The energy credit applies to combined heat and power (''CHP'') property placed in service prior to January 1, 2017. The credit rate is 10 percent.

CHP property is property: (1) that uses the same energy source for the simultaneous or sequential generation of electrical power, mechanical shaft power, or both, in combination with the generation of steam or other forms of useful thermal energy (including heating and cooling applications); (2) that has an electrical capacity of not more than 50 megawatts or a mechanical energy capacity of no more than 67,000 horsepower or an equivalent combination of electrical and mechanical energy capacities; (3) that produces at least 20 percent of its total useful energy in the form of thermal energy that is not used to produce electrical or mechanical power, and produces at least 20 percent of its total useful energy in the form of electrical or mechanical power (or a combination thereof); and (4) the energy efficiency percentage of which exceeds 60 percent. CHP property does not include property used to transport the energy source to the generating facility or to distribute energy produced by the facility.

The otherwise allowable credit with respect to CHP property is reduced to the extent the property has an electrical capacity or mechanical capacity in excess of any applicable limits. Property in excess of the applicable limit (15 megawatts or a mechanical energy capacity of more than 20,000 horsepower or an equivalent combination of electrical and mechanical energy capacities) is permitted to claim a fraction of the otherwise allowable credit. The fraction is equal to the applicable limit divided by the capacity of the property. For example, a 45 megawatt property would be eligible to claim 15/45ths, or one third, of the otherwise allowable credit. Again, no credit is allowed if the property exceeds the 50 megawatt or 67,000 horsepower limitations described above.

Additionally, the provision provides that systems whose fuel source is at least 90 percent open-loop biomass and that would qualify for the credit but for the failure to meet

[174] Additional provisions that (1) allow section 45 facilities to elect to be treated as section 48 energy property, and (2) allow section 45 and 48 facilities to elect to receive a grant from the Department of the Treasury rather than the section 45 production credit or the section 48 energy credit, are described in sections D.2 and D.4 of this document.

[175] Sec. 48.

[176] Sec. 38(b)(1).

[177] Sec. 39.

the efficiency standard are eligible for a credit that is reduced in proportion to the degree to which the system fails to meet the efficiency standard. For example, a system that would otherwise be required to meet the 60–percent efficiency standard, but which only achieves 30–percent efficiency, would be permitted a credit equal to one-half of the otherwise allowable credit (i.e., a 5–percent credit).

HOUSE BILL

The House bill eliminates the credit cap applicable to qualified small wind energy property. The House bill also removes the rule that reduces the basis of the property for purposes of claiming the credit if the property is financed in whole or in part by subsidized energy financing or with proceeds from private activity bonds.

Effective date..—The provision applies to periods after December 31, 2008, under rules similar to the rules of section 48(m) of the Code (as in effect on the day before the enactment of the Revenue Reconciliation Act of 1990).

SENATE AMENDMENT

The Senate amendment is the same as the House bill.

CONFERENCE AGREEMENT

The conference agreement follows the House bill and the Senate amendment.

4. Grants for specified energy property in lieu of tax credits (secs. 1604 and 1721 of the House bill, secs. 1104 and 1603 of the conference agreement, and secs. 45 and 48 of the Code)

PRESENT LAW

Renewable electricity production credit

An income tax credit is allowed for the production of electricity from qualified energy resources at qualified facilities (the ''renewable electricity production credit'').[178] Qualified energy resources comprise wind, closed-loop biomass, open-loop biomass, geothermal energy, solar energy, small irrigation power, municipal solid waste, qualified hydropower production, and marine and hydrokinetic renewable energy. Qualified facilities are, generally, facilities that generate electricity using qualified energy resources. To be eligible for the credit, electricity produced from qualified energy resources at qualified facilities must be sold by the taxpayer to an unrelated person. The credit amounts, credit periods, definitions of qualified facilities, and other rules governing this credit are described more fully in section D.1 of this document.

Energy credit

An income tax credit is also allowed for certain energy property placed in service. Qualifying property includes certain fuel cell property, solar property, geothermal power production property, small wind mew property, combined heat and power system property, and geothermal heat pump property.[179] The amounts of credit, definitions of qualifying property, and other rules governing this credit are described more fully in section D.3 of this document.

HOUSE BILL

The provision authorizes the Secretary of Energy to provide a grant to each person who places in service during 2009 or 2010 energy property that is either (1) an electricity production facility otherwise eligible for the renewable electricity production credit or (2) qualifying property otherwise eligible for the energy credit. In general, the grant amount is 30 percent of the basis of the property that would (1) be eligible for credit under section 48 or (2) comprise a section 45 credit-eligible facility. For qualified microturbine, combined heat and power system, and geothermal heat pump property, the amount is 10 percent of the basis of the property.

It is intended that the grant provision mimic the operation of the credit under section 48. For example, the amount of the grant is not includable in gross income. However, the basis of the property is reduced by fifty percent of the amount of the grant. In addition, some or all of each grant is subject to recapture if the grant eligible property is disposed of by the grant recipient within five years of being placed in service.[180]

Nonbusiness property and property that would not otherwise be eligible for credit under section 48 or part of a facility that would be eligible for credit under section 45 is not eligible for a grant under the provision. The grant may be paid to whichever party would have been entitled to a credit under section 48 or section 45, as the case may be.

Under the provision, if a grant is paid, no renewable electricity credit or energy credit may be claimed with respect to the grant eligible property. In addition, no grant may be awarded to any Federal, State, or local government (or any political subdivision, agency, or instrumentality thereof) or any section 501(c) tax-exempt entity.

The provision appropriates to the Secretary of Energy the funds necessary to make the grants. No grant may be made unless the application for the grant has been received before October 1, 2011.

Effective date.—The provision is effective on date of enactment.

SENATE AMENDMENT

No provision.

CONFERENCE AGREEMENT

The conference agreement generally follows the House bill with the following modifications. The conference agreement clarifies that qualifying property must be depreciable or amortizable to be eligible for a grant. The conference agreement also permits taxpayers to claim the credit with respect to otherwise eligible property that is not placed in service in 2009 and 2010 so long as construction begins in either of those years and is completed prior to 2013 (in the case of wind facility property), 2014 (in the case of other renewable power facility property eligible for credit under section 45), or 2017 (in the case of any specified energy property described in section 48). The conference agreement also provides that the grant program be administered by the Secretary of the Treasury.

5. Expand new clean renewable energy bonds (sec. 1611 of the House bill, sec. 1111 of the Senate amendment, sec. 1111 of the conference agreement, and sec. 54C of the Code)

PRESENT LAW

New Clean Renewable Enemy Bonds

New clean renewable energy bonds (''New CREBs'') may be issued by qualified issuers to finance qualified renewable energy facilities.[181] Qualified renewable energy facilities are facilities that: (1) qualify for the tax credit under section 45 (other than Indian coal and refined coal production facilities), without regard to the placed-in-service date requirements of that section; and (2) are owned by a public power provider, governmental body, or cooperative electric company.

The term ''qualified issuers'' includes: (1) public power providers; (2) a governmental body; (3) cooperative electric companies; (4) a not-for-profit electric utility that has received a loan or guarantee under the Rural Electrification Act; and (5) clean renewable energy bond lenders. The term ''public power provider'' means a State utility with a service obligation, as such terms are defined in section 217 of the Federal Power Act (as in effect on the date of the enactment of this paragraph). A ''governmental body'' means any State or Indian tribal government, or any political subdivision thereof. The term ''cooperative electric company'' means a mutual or cooperative electric company (described in section 501(c)(12) or section 1381(a)(2)(C)). A clean renewable energy bond lender means a cooperative that is owned by, or has outstanding loans to, 100 or more cooperative electric companies and is in existence on February 1, 2002 (including any affiliated entity which is controlled by such lender).

There is a national limitation for New CREBs of $800 million. No more than one third of the national limit may be allocated to projects of public power providers, governmental bodies, or cooperative electric companies. Allocations to governmental bodies and cooperative electric companies may be made in the manner the Secretary determines appropriate. Allocations to projects of public power providers shall be made, to the extent practicable, in such manner that the amount allocated to each such project bears the same ratio to the cost of such project as the maximum allocation limitation to projects of public power providers bears to the cost of all such projects.

New CREBs are a type of qualified tax credit bond for purposes of section 54A of the Code. As such, 100 percent of the available project proceeds of New CREBs must be used within the three-year period that begins on the date of issuance. Available project proceeds are proceeds from the sale of the bond issue less issuance costs (not to exceed two percent) and any investment earnings on such sale proceeds. To the extent less than 100 percent of the available project proceeds are used to finance qualified projects during the three-year spending period, bonds will continue to qualify as New CREBs if unspent proceeds are used within 90 days from the end of such three-year period to redeem bonds. The three-year spending period may be extended by the Secretary upon the qualified issuer's request demonstrating that the failure to satisfy the three-year requirement is due to reasonable cause and the projects will continue to proceed with due diligence.

New CREBs generally are subject to the arbitrage requirements of section 148. However, available project proceeds invested during the three-year spending period are not subject to the arbitrage restrictions (i.e., yield restriction and rebate requirements). In addition, amounts invested in a reserve fund are not subject to the arbitrage restrictions to the extent: (1) such fund is funded at a rate not more rapid than equal annual installments; (2) such fund is funded in a manner reasonably expected to result in an amount not greater than an amount necessary to repay the issue; and (3) the yield on such fund is not greater than the average annual interest rate of tax-exempt obligations having a term of 10 years or more that are issued during the month the New CREBs are issued.

As with other tax credit bonds, a taxpayer holding New CREBs on a credit allowance date is entitled to a tax credit. However, the credit rate on New CREBs is set by the Secretary at a rate that is 70 percent of the rate that would permit issuance of such bonds without discount and interest cost to the

[178] Sec. 45. In addition to the renewable electricity production credit, section 45 also provides income tax credits for the production of Indian coal and refined coal at qualified facilities.

[179] Sec. 48.

[180] Section 1604 of the House bill.

[181] Sec. 54C.

issuer.[182] The Secretary determines credit rates for tax credit bonds based on general assumptions about credit quality of the class of potential eligible issuers and such other factors as the Secretary deems appropriate. The Secretary may determine credit rates based on general credit market yield indexes and credit ratings.[183]

The amount of the tax credit is determined by multiplying the bond's credit rate by the face amount of the holder's bond. The credit accrues quarterly, is includible in gross income (as if it were an interest payment on the bond), and can be claimed against regular income tax liability and alternative minimum tax liability. Unused credits may be carried forward to succeeding taxable years. In addition, credits may be separated from the ownership of the underlying bond similar to how interest coupons can be stripped for interest-bearing bonds.

An issuer of New CREBs is treated as meeting the ''prohibition on financial conflicts of interest'' requirement in section 54A(d)(6) if it certifies that it satisfies (i) applicable State and local law requirements governing conflicts of interest and (ii) any additional conflict of interest rules prescribed by the Secretary with respect to any Federal, State, or local government official directly involved with the issuance of New CREBs.

HOUSE BILL

In general

The provision expands the New CREBs program. The provision authorizes issuance of up to an additional $1.6 billion of New CREBs.

Effective date

The provision applies to obligations issued after the date of enactment.

SENATE AMENDMENT

The Senate amendment is the same as the House bill.

CONFERENCE AGREEMENT

The conference agreement follows the House bill and the Senate amendment.

6. Expand qualified energy conservation bonds (sec. 1612 of the House bill, sec. 1112 of the Senate amendment, sec. 1112 of the conference agreement, and sec. 54D of the Code)

PRESENT LAW

Qualified energy conservation bonds may be used to finance qualified conservation purposes.

The term ''qualified conservation purpose'' means:

1. Capital expenditures incurred for purposes of reducing energy consumption in publicly owned buildings by at least 20 percent; implementing green community programs; rural development involving the production of electricity from renewable energy resources; or any facility eligible for the production tax credit under section 45 (other than Indian coal and refined coal production facilities);

2. Expenditures with respect to facilities or grants that support research in: (a) development of cellulosic ethanol or other nonfossil fuels; (b) technologies for the capture and sequestration of carbon dioxide produced through the use of fossil fuels; (c) increasing the efficiency of existing technologies for producing nonfossil fuels; (d) automobile battery technologies and other technologies to reduce fossil fuel consumption in transportation; and (E) technologies to reduce energy use in buildings;

3. Mass commuting facilities and related facilities that reduce the consumption of energy, including expenditures to reduce pollution from vehicles used for mass commuting;

4. Demonstration projects designed to promote the commercialization of: (a) green building technology; (b) conversion of agricultural waste for use in the production of fuel or otherwise; (c) advanced battery manufacturing technologies; (D) technologies to reduce peak-use of electricity; and (d) technologies for the capture and sequestration of carbon dioxide emitted from combusting fossil fuels in order to produce electricity; and

5. Public education campaigns to promote energy efficiency (other than movies, concerts, and other events held primarily for entertainment purposes).

There is a national limitation on qualified energy conservation bonds of $800 million. Allocations of qualified energy conservation bonds are made to the States with sub-allocations to large local governments. Allocations are made to the States according to their respective populations, reduced by any sub-allocations to large local governments (defined below) within the States. Sub-allocations to large local governments shall be an amount of the national qualified energy conservation bond limitation that bears the same ratio to the amount of such limitation that otherwise would be allocated to the State in which such large local government is located as the population of such large local government bears to the population of such State. The term ''large local government'' means: any municipality or county if such municipality or county has a population of 100,000 or more. Indian tribal governments also are treated as large local governments for these purposes (without regard to population).

Each State or large local government receiving an allocation of qualified energy conservation bonds may further allocate issuance authority to issuers within such State or large local government. However, any allocations to issuers within the State or large local government shall be made in a manner that results in not less than 70 percent of the allocation of qualified energy conservation bonds to such State or large local government being used to designate bonds that are not private activity bonds (i.e., the bond cannot meet the private business tests or the private loan test of section 141).

Qualified energy conservations bonds are a type of qualified tax credit bond for purposes of section 54A of the Code. As a result, 100 percent of the available project proceeds of qualified energy conservation bonds must be used for qualified conservation purposes. In the case of qualified conservation bonds issued as private activity bonds, 100 percent of the available project proceeds must be used for capital expenditures. In addition, qualified energy conservation bonds only maybe issued by Indian tribal governments to the extent such bonds are issued for purposes that satisfy the present law requirements for tax-exempt bonds issued by Indian tribal governments (i.e., essential governmental functions and certain manufacturing purposes).

Under present law, 100 percent of the available project proceeds of qualified energy conservation bonds to be used within the three-year period that begins on the date of issuance. Available project proceeds are proceeds from the sale of the issue less issuance costs (not to exceed two percent) and any investment earnings on such sale proceeds. To the extent less than 100 percent of the available project proceeds are used to finance qualified conservation purposes during the three-year spending period, bonds will continue to qualify as qualified energy conservation bonds if unspent proceeds are used within 90 days from the end of such three-year period to redeem bonds. The three-year spending period may be extended by the Secretary upon the issuer's request demonstrating that the failure to satisfy the three-year requirement is due to reasonable cause and the projects will continue to proceed with due diligence.

Qualified energy conservation bonds generally are subject to the arbitrage requirements of section 148. However, available project proceeds invested during the three-year spending period are not subject to the arbitrage restrictions (i.e., yield restriction and rebate requirements). In addition, amounts invested in a reserve fund are not subject to the arbitrage restrictions to the extent: (1) such fund is funded at a rate not more rapid than equal annual installments; (2) such fund is funded in a manner reasonably expected to result in an amount not greater than an amount necessary to repay the issue; and (3) the yield on such fund is not greater than the average annual interest rate of tax-exempt obligations having a term of 10 years or more that are issued during the month the qualified energy conservation bonds are issued.

The maturity of qualified energy conservation bonds is the term that the Secretary estimates will result in the present value of the obligation to repay the principal on such bonds being equal to 50 percent of the face amount of such bonds, using as a discount rate the average annual interest rate of tax-exempt obligations having a term of 10 years or more that are issued during the month the qualified energy conservation bonds are issued.

As with other tax credit bonds, the taxpayer holding qualified energy conservation bonds on a credit allowance date is entitled to a tax credit. The credit rate on the bonds is set by the Secretary at a rate that is 70 percent of the rate that would permit issuance of such bonds without discount and interest cost to the issuer.[184] The Secretary determines credit rates for tax credit bonds based on general assumptions about credit quality of the class of potential eligible issuers and such other factors as the Secretary deems appropriate. The Secretary may determine credit rates based on general credit market yield indexes and credit ratings.[185] The amount of the tax credit is determined by multiplying the bond's credit rate by the face amount on the holder's bond. The credit accrues quarterly, is includible in gross income (as if it were an interest payment on the bond), and can be claimed against regular income tax liability and alternative minimum tax liability. Unused credits may be carried forward to succeeding taxable years. In addition, credits may be separated from the ownership of the underlying bond similar to how interest coupons can be stripped for interest-bearing bonds.

Issuers of qualified energy conservation bonds are required to certify that the financial disclosure requirements that applicable State and local law requirements governing conflicts of interest are satisfied with respect to such issue, as well as any other additional conflict of interest rules prescribed by the Secretary with respect to any Federal, State, or local government official directly involved with the issuance of qualified energy conservation bonds.

[182] Given the differences in credit quality and other characteristics of individual issuers, the Secretary cannot set credit rates in a manner that will allow each issuer to issue tax credit bonds at par.

[183] See Internal Revenue Service, Notice 2009–15, Credit Rates on Tax Credit Bonds, 2009–6 I.R.B. 1 (January 22, 2009).

[184] Given the difference in credit quality and other characteristics of individual issuers, the Secretary cannot set credit rates in a manner that will allow each issuer to issue tax credit bonds at par.

[185] See Internal Revenue Services, Notice 2009—15, Credit Rates on Tax Credit Bonds 2009—6 I.R.B. 1 (January 22, 2009).

HOUSE BILL

In general

The provision expands the present-law qualified energy conservation bond program. The provision authorizes issuance of an additional $2.4 billion of qualified energy conservation bonds. The provision expands eligibility for these tax credit bonds to include loans and grants for capital expenditures as part of green community programs. For example, this expansion will enable States to issue these tax credit bonds to finance loans and/or grants to individual homeowners to retrofit existing housing. The use of bond proceeds for such loans and grants will not cause such bond to be treated as a private activity bond for purposes of the private activity bond restrictions contained in the qualified energy conservation bond provisions.

Effective date

The provision is effective for bonds issued after the date of enactment.

SENATE AMENDMENT

In general

The provision expands the present-law qualified energy conservation bond program. The provision authorizes issuance of an additional $2.4 billion of qualified energy conservation bonds. The provision clarifies that capital expenditures to implement green community programs, includes grants, loans and other repayment mechanisms for capital expenditures to implement such programs.

Effective date

The provision is effective for bonds issued after the date of enactment.

CONFERENCE AGREEMENT

In general

The provision expands the present-law qualified energy conservation bond program. The provision authorizes issuance of an additional $2.4 billion of qualified energy conservation bonds. Also, the provision clarifies that capital expenditures to implement green community programs includes grants, loans and other repayment mechanisms to implement such programs. For example, this expansion will enable States to issue these tax credit bonds to finance retrofits of existing private buildings through loans and/or grants to individual homeowners or businesses, or through other repayment mechanisms. Other repayment mechanisms can include periodic fees assessed on a government bill or utility bill that approximates the energy savings of energy efficiency or conservation retrofits. Retrofits can include heating, cooling, lighting, water-saving, storm water-reducing, or other efficiency measures.

Finally, the provision clarifies that any bond used for the purpose of providing grants, loans or other repayment mechanisms for capital expenditures to implement green community programs is not treated as a private activity bond for purposes of determining whether the requirement that not less than 70 percent of allocations within a State or large local government be used to designate bonds that are not private activity bonds (sec. 54D(e)(3)) has been satisfied.

Effective date

The conference agreement follows the House bill and the Senate amendment.

7. Modification to high-speed intercity rail facility bonds (sec. 1504 of the Senate amendment, sec. 1504 of the conference agreement, and sec. 142(i) of the Code)

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.

HOUSE BILL

No provision.

SENATE AMENDMENT

In general

The provision 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.

Effective date

The provision is effective for obligations issued after the date of enactment.

CONFERENCE AGREEMENT

The conference agreement follows the Senate amendment.

8. Extension and modification of credit for nonbusiness energy property (sec. 1621 of the House bill, sec. 1121 of the Senate amendment, sec. 1121 of the conference agreement, and sec. 25C of the Code)

PRESENT LAW

Section 25C provides a 10-percent credit for the purchase of qualified energy efficiency improvements to existing homes. A qualified energy efficiency improvement is any energy efficiency building envelope component (1) that meets or exceeds the prescriptive criteria for such a component established by the 2000 International Energy Conservation Code as supplemented and as in effect on August 8, 2005 (or, in the case of metal roofs with appropriate pigmented coatings, meets the Energy Star program requirements); (2) that is installed in or on a dwelling located in the United States and owned and used by the taxpayer as the taxpayer's principal residence; (3) the original use of which commences with the taxpayer; and (4) that reasonably can be expected to remain in use for at least five years. The credit is nonrefundable.

Building envelope components are: (1) insulation materials or systems which are specifically and primarily designed to reduce the heat loss or gain for a dwelling; (2) exterior windows (including skylights) and doors; and (3) metal or asphalt roofs with appropriate pigmented coatings or cooling granules that are specifically and primarily designed to reduce the heat gain for a dwelling.

Additionally, section 25C provides specified credits for the purchase of specific energy efficient property. The allowable credit for the purchase of certain property is (1) $50 for each advanced main air circulating fan, (2) $150 for each qualified natural gas, propane, or oil furnace or hot water boiler, and (3) $300 for each item of qualified energy efficient property.

An advanced main air circulating fan is a fan used in a natural gas, propane, or oil furnace originally placed in service by the taxpayer during the taxable year, and which has an annual electricity use of no more than two percent of the total annual energy use of the furnace (as determined in the standard Department of Energy test procedures).

A qualified natural gas, propane, or oil furnace or hot water boiler is a natural gas, propane, or oil furnace or hot water boiler with an annual fuel utilization efficiency rate of at least 95.

Qualified energy-efficient property is: (1) an electric heat pump water heater which yields energy factor of at least 2.0 in the standard Department of Energy test procedure, (2) an electric heat pump which has a heating seasonal performance factor (HSPF) of at least 9, a seasonal energy efficiency ratio (SEER) of at least 15, and an energy efficiency ratio (EER) of at least 13, (3) a central air conditioner with energy efficiency of at least the highest efficiency tier established by the Consortium for Energy Efficiency as in effect on Jan. 1, 2006,[186] (4) a natural gas, propane, or oil water heater which has an energy factor of at least 0.80 or thermal efficiency of at least 90 percent, and (5) biomass fuel property.

Biomass fuel property is a stove that bums biomass fuel to heat a dwelling unit located in the United States and used as a principal residence by the taxpayer, or to heat water for such dwelling unit, and that has a thermal efficiency rating of at least 75 percent. Biomass fuel is any plant-derived fuel available on a renewable or recurring basis, including agricultural crops and trees, wood and wood waste and residues (including wood pellets), plants (including aquatic plants, grasses, residues, and fibers.

Under section 25C, the maximum credit for a taxpayer with respect to the same dwelling for all taxable years is $500, and no more than $200 of such credit may be attributable to expenditures on windows.

The taxpayer's basis in the property is reduced by the amount of the credit. Special proration rules apply in the case of jointly owned property, condominiums, and tenant-stockholders in cooperative housing corporations. If less than 80 percent of the property is used for nonbusiness purposes, only that portion of expenditures that is used for nonbusiness purposes is taken into account.

For purposes of determining the amount of expenditures made by any individual with respect to any dwelling unit, there shall not be

[186] The highest tier in effect at this time was tier 2, requiring SEER of at least 15 and EER of at least 12.5 for split central air conditioning systems and SEER of at least 14 and EER of at least 12 for packaged central air conditioning systems.

taken into account expenditures which are made from subsidized energy financing. The term ''subsidized energy financing'' means financing provided under a Federal, State, or local program a principal purpose of which is to provide subsidized financing for projects designed to conserve or produce energy.

The credit applies to expenditures made after December 31, 2008 for property placed in service after December 31, 2008, and prior to January 1, 2010.

HOUSE BILL

The House bill raises the 10 percent credit rate to 30 percent. Additionally, all energy property otherwise eligible for the $50, $100, or $150 credits is instead eligible for a 30 percent credit on expenditures for such property.

The House bill additionally extends the provision for one year, through December 31, 2010. Finally, the $500 lifetime cap (and the $200 lifetime cap with respect to windows) is eliminated and replaced with an aggregate cap of $1,500 in the case of property placed in service after December 31, 2008 and prior to January 1, 2011.

The present law rule related to subsidized energy financing is eliminated.

Effective date.—The provision is effective for taxable years beginning after December 31, 2008.

SENATE AMENDMENT

The Senate amendment is similar to the House bill, but modifies the efficiency standards for qualifying property.

Specifically, the Senate amendment updates the building insulation requirements to follow the prescriptive criteria of the 2009 International Energy Conservation Code. Additionally, qualifying exterior windows, doors, and skylights must have a U-factor at or below 0.30 and a seasonal heat gain coefficient (''SHGC'') at or below 0.30.

Electric heat pumps must achieve the highest efficiency tier of Consortium for Energy Efficiency, as in effect on January 1, 2009. These standards are a SEER greater than or equal to 15, EER greater than or equal to 12.5, and HSPF greater than or equal to 8.5 for split heat pumps, and SEER greater than or equal to 14, EER greater than or equal to 12, and HSPF greater than or equal to 8.0 for packaged heat pumps.

Central air conditioners must achieve the highest efficiency tier of Consortium for Energy Efficiency, as in effect on January 1, 2009. These standards are a SEER greater than or equal to 16 and EER greater than or equal to 13 for split systems, and SEER greater than or equal to 14 and EER greater than or equal to 12 for packaged systems.

Natural gas, propane, or oil water heaters must have an energy factor greater than or equal to 0.82 or a thermal efficiency of greater than or equal to 90 percent. Natural gas, propane, or oil water boilers must achieve an annual fuel utilization efficiency rate of at least 90. Qualified oil furnaces must achieve an annual fuel utilization efficiency rate of at least 90.

Lastly, the requirement that biomass fuel property have a thermal efficiency rating of at least 75 percent is modified to be a thermal efficiency rating of at least 75 percent as measured using a lower heating value.

Effective date.—The provision is generally effective for taxable years beginning after December 31, 2008. The provisions that alter the efficiency standards of qualifying property, other than biomass fuel property, apply to property placed in service after December 31, 2009. The modification with respect to biomass fuel property is effective for taxable years beginning after December 31, 2008.

CONFERENCE AGREEMENT

The conference agreement follows the Senate amendment, with the exception that the new efficiency standards for qualifying property, other than those for biomass fuel property, apply to property placed in service after the date of enactment.

9. Credit for residential energy efficient property (sec. 1622 of the House bill, sec. 1122 of the Senate amendment, sec. 1122 of the conference agreement, and sec. 25D of the Code)

PRESENT LAW

Section 25D provides a personal tax credit for the purchase of qualified solar electric property and qualified solar water heating property that is used exclusively for purposes other than heating swimming pools and hot tubs. The credit is equal to 30 percent of qualifying expenditures, with a maximum credit of $2,000 with respect to qualified solar water heating property. There is no cap with respect to qualified solar electric property.

Section 25D also provides a 30 percent credit for the purchase of qualified geothermal heat pump property, qualified small wind energy property, and qualified fuel cell power plants. The credit for geothermal heat pump property is capped at $2,000, the credit for qualified small wind energy property is limited to $500 with respect to each half kilowatt of capacity, not to exceed $4,000, and the credit for any fuel cell may not exceed $500 for each 0.5 kilowatt of capacity.

The credit with respect to all qualifying property may be claimed against the alternative minimum tax.

Qualified solar electric property is property that uses solar energy to generate electricity for use in a dwelling unit. Qualifying solar water heating property is property used to heat water for use in a dwelling unit located in the United States and used as a residence if at least half of the energy used by such property for such purpose is derived from the sun.

A qualified fuel cell power plant is an integrated system comprised of a fuel cell stack assembly and associated balance of plant components that (1) converts a fuel into electricity using electrochemical means, (2) has an electricity-only generation efficiency of greater than 30 percent. The qualified fuel cell power plant must be installed on or in connection with a dwelling unit located in the United States and used by the taxpayer as a principal residence.

Qualified small wind energy property is property that uses a wind turbine to generate electricity for use in a dwelling unit located in the U.S. and used as a residence by the taxpayer.

Qualified geothermal heat pump property means any equipment which (1) uses the ground or ground water as a thermal energy source to heat the dwelling unit or as a thermal energy sink to cool such dwelling unit, (2) meets the requirements of the Energy Star program which are in effect at the time that the expenditure for such equipment is made, and (3) is installed on or in connection with a dwelling unit located in the United States and used as a residence by the taxpayer.

The credit is nonrefundable, and the depreciable basis of the property is reduced by the amount of the credit. Expenditures for labor costs allocable to onsite preparation, assembly, or original installation of property eligible for the credit are eligible expenditures.

Special proration rules apply in the case of jointly owned property, condominiums, and tenant-stockholders in cooperative housing corporations. If less than 80 percent of the property is used for nonbusiness purposes, only that portion of expenditures that is used for nonbusiness purposes is taken into account.

For purposes of determining the amount of expenditures made by any individual with respect to any dwelling unit, there shall not be taken into account expenditures which are made from subsidized energy financing. The term ''subsidized energy financing'' means financing provided under a Federal, State, or local program a principal purpose of which is to provide subsidized financing for projects designed to conserve or produce energy.

The credit applies to property placed in service prior to January 1, 2017.

HOUSE BILL

The House bill eliminates the credit caps for solar hot water, geothermal, and wind property and eliminates the reduction in credits for property using subsidized energy financing.

Effective date.—The provision applies to taxable years beginning after December 31, 2008.

SENATE AMENDMENT

The Senate amendment is the same as the House bill.

CONFERENCE AGREEMENT

The conference agreement follows the House bill and the Senate amendment.

10. Temporary increase in credit for alternative fuel vehicle refueling property (sec. 1623 of the House bill, sec. 1123 of the Senate amendment, sec. 1123 of the conference agreement, and sec. 30C of the Code)

PRESENT LAW

Taxpayers may claim a 30-percent credit for the cost of installing qualified clean-fuel vehicle refueling property to be used in a trade or business of the taxpayer or installed at the principal residence of the taxpayer.[187] The credit may not exceed $30,000 per taxable year per location, in the case of qualified refueling property used in a trade or business and $1,000 per taxable year per location, in the case of qualified refueling property installed on property which is used as a principal residence.

Qualified refueling property is property (not including a building or its structural components) for the storage or dispensing of a clean-burning fuel or electricity into the fuel tank or battery of a motor vehicle propelled by such fuel or electricity, but only if the storage or dispensing of the fuel or electricity is at the point of delivery into the fuel tank or battery of the motor vehicle. The use of such property must begin with the taxpayer.

Clean-burning fuels are any fuel at least 85 percent of the volume of which consists of ethanol, natural gas, compressed natural gas, liquefied natural gas, liquefied petroleum gas, or hydrogen. In addition, any mixture of biodiesel and diesel fuel, determined without regard to any use of kerosene and containing at least 20 percent biodiesel, qualifies as a clean fuel.

Credits for qualified refueling property used in a trade or business are part of the general business credit and may be carried back for one year and forward for 20 years. Credits for residential qualified refueling property cannot exceed for any taxable year the difference between the taxpayer's regular tax (reduced by certain other credits) and the taxpayer's tentative minimum tax. Generally, in the case of qualified refueling property sold to a tax-exempt entity, the taxpayer selling the property may claim the credit.

A taxpayer's basis in qualified refueling property is reduced by the amount of the credit. In addition, no credit is available for property used outside the United States or for which an election to expense has been made under section 179.

[187] Sec. 30C.

The credit is available for property placed in service after December 31, 2005, and (except in the case of hydrogen refueling property) before January 1, 2011. In the case of hydrogen refueling property, the property must be placed in service before January 1, 2015.

HOUSE BILL

For property placed in service in 2009 or 2010, the provision increases the maximum credit available for business property to $200,000 for qualified hydrogen refueling property and to $50,000 for other qualified refueling property. For nonbusiness property, the maximum credit is increased to $2,000. In addition, the credit rate is increased from 30 percent to 50 percent, except in the case of hydrogen refueling property.

Effective date.—The provision is effective for taxable years beginning after December 31, 2008.

SENATE AMENDMENT

The Senate amendment is the same as the House bill, except that it adds interoperability, public access, and other standards to qualified refueling property that is used for recharging electric or hybrid-electric motor vehicles.

CONFERENCE AGREEMENT

The conference agreement follows the House bill.

11. Recovery period for depreciation of smart meters (sec. 1124 of the Senate amendment)

PRESENT LAW

A taxpayer generally must capitalize the cost of property used in a trade or business and recover such cost over time through annual deductions for depreciation or amortization. Tangible property generally is depreciated under the modified accelerated cost recovery system (''MACRS''), which determines depreciation by applying specific recovery periods, placed-in-service conventions, and depreciation methods to the cost of various types of depreciable property.[188] The class lives of assets placed in service after 1986 are generally set forth in Revenue Procedure 87–56.[189] Present law provides a 10-year recovery period[190] and the 150-percent declining balance method[191] be used for smart meters.

A qualified smart electric meter means any time-based meter and related communication equipment which is placed in service by a taxpayer who is a supplier of electric energy or a provider of electric energy services and which is capable of being used by the taxpayer as part of a system that (1) measures and records electricity usage data on a time-differentiated basis in at least 24 separate time segments per day; (2) provides for the exchange of information between the supplier or provider and the customer's smart electric meter in support of time-based rates or other forms of demand response; and (3) provides data to such supplier or provider so that the supplier or provider can provide energy usage information to customers electronically; and (4) provides all commercial and residential customers of such supplier or provider with net metering.[192] The term ''net metering'' means allowing a customer a credit, if any, as complies with applicable Federal and State laws and regulations, for providing electricity to the supplier or provider.

HOUSE BILL

No provision.

SENATE AMENDMENT

The provision provides a 5-year recovery period and 200 percent declining balance method for any qualified smart electric meter placed in service before January 1, 2011.

Effective date.—The provision is effective for property placed in service after the date of enactment.

CONFERENCE AGREEMENT

The conference agreement does not include the Senate amendment provision.

12. Energy research credit (sec. 1631 of the House bill and sec. 1131 of the Senate amendment)

PRESENT LAW

General rule

A taxpayer may claim a research credit equal to 20 percent of the amount by which the taxpayer's qualified research expenses for a taxable year exceed its base amount for that year.[193] Thus, the research credit is generally available with respect to incremental increases in qualified research.

A 20-percent research tax credit is also available with respect to the excess of (1) 100 percent of corporate cash expenses (including grants or contributions) paid for basic research conducted by universities (and certain nonprofit scientific research organizations) over (2) the sum of (a) the greater of two minimum basic research floors plus (b) an amount reflecting any decrease in nonresearch giving to universities by the corporation as compared to such giving during a fixed-base period, as adjusted for inflation. This separate credit computation is commonly referred to as the university basic research credit.[194]

Finally, a research credit is available for a taxpayer's expenditures on research undertaken by an energy research consortium. This separate credit computation is commonly referred to as the energy research credit. Unlike the other research credits, the energy research credit applies to all qualified expenditures, not just those in excess of a base amount.

The research credit, including the university basic research credit and the energy research credit, expires for amounts paid or incurred after December 31, 2009.[195]

Computation of allowable credit

Except for energy research payments and certain university basic research payments made by corporations, the research tax credit applies only to the extent that the taxpayer's qualified research expenses for the current taxable year exceed its base amount. The base amount for the current year generally is computed by multiplying the taxpayer's fixed-base percentage by the average amount of the taxpayer's gross receipts for the four preceding years. If a taxpayer both incurred qualified research expenses and had gross receipts during each of at least three years from 1984 through 1988, then its fixed-base percentage is the ratio that its total qualified research expenses for the 1984–1988 period bears to its total gross receipts for that period (subject to a maximum fixed-base percentage of 16 percent). All other taxpayers (so-called start-up firms) are assigned a fixed-base percentage of three percent.[196]

In computing the credit, a taxpayer's base amount cannot be less than 50 percent of its current-year qualified research expenses.

To prevent artificial increases in research expenditures by shifting expenditures among commonly controlled or otherwise related entities, a special aggregation rule provides that all members of the same controlled group of corporations are treated as a single taxpayer.[197] Under regulations prescribed by the Secretary, special rules apply for computing the credit when a major portion of a trade or business (or unit thereof) changes hands, under which qualified research expenses and gross receipts for periods prior to the change of ownership of a trade or business are treated as transferred with the trade or business that gave rise to those expenses and receipts for purposes of recomputing a taxpayer's fixed-based percentage.[198]

Alternative incremental research credit regime

Taxpayers are allowed to elect an alternative incremental research credit regime.[199] If a taxpayer elects to be subject to this alternative regime, the taxpayer is assigned a three-tiered fixed-base percentage (that is lower than the fixed-base percentage otherwise applicable under present law) and the credit rate likewise is reduced.

Generally, for amounts paid or incurred prior to 2007, under the alternative incremental credit regime, a credit rate of 2.65 percent applies to the extent that a taxpayer's current-year research expenses exceed a base amount computed by using a fixed-base percentage of one percent (i.e., the base amount equals one percent of the taxpayer's average gross receipts for the four preceding years) but do not exceed a base amount computed by using a fixed-base percentage of 1.5 percent. A credit rate of 3.2 percent applies to the extent that a taxpayer's current-year research expenses exceed a base amount computed by using a fixed-base percentage of 1.5 percent but do not exceed a base amount computed by using a fixed-base percentage of two percent. A credit rate of 3.75 percent applies to the extent that a taxpayer's current-year research expenses exceed a base amount computed by using a fixed-base percentage of two percent. Generally, for amounts paid or incurred after 2006, the credit rat listed above are increased to three percent, four percent, and five percent, respectively.[200]

An election to be subject to this alternative incremental credit regime can be made for any taxable year beginning after June 30, 1996, and such an election applies to that taxable year and all subsequent years unless revoked with the consent of the Secretary of the Treasury. The alternative incremental credit regime terminates for taxable years beginning after December 31, 2008.

---

188 Sec. 168.

189 1987–2 C.B. 674 (as clarified and modified by Rev. Proc. 88–22, 1988–1 C.B. 785). Assets included in class 49.14, describing assets used in the transmission and distribution of electricity for sale and related land improvements, are assigned a class life of 30 years and a recovery period of 20 years.

190 Sec. 168(e)(3)(D)(iii).

191 Sec. 168(b)(2)(C).

192 Sec. 168(i)(18).

193 Sec. 41.

194 Sec. 41(e).

195 Sec. 41(h).

196 The Small Business Job Protection Act of 1996 expanded the definition of start-up firms under section 41(c)(3)(B)(i) to include any firm if the first taxable year in which such firm had both gross receipts and qualified research expenses began after 1983. A special rule (enacted in 1993) is designed to gradually recompute a start-up firm's fixed-base percentage based on its actual research experience. Under this special rule, a start-up firm is assigned a fixed-base percentage of three percent for each of its first five taxable years after 1993 in which it incurs qualified research expenses. A start-up firm's fixed-base percentage for its sixth through tenth taxable years after 1993 in which it incurs qualified research expenses is a phased-in ratio based on the firm's actual research experience. For all subsequent taxable years, the taxpayer's fixed-base percentage is its actual ratio of qualified research expenses to gross receipts for any five years selected by the taxpayer from its fifth through tenth taxable years after 1993. Sec. 41(c)(3)(B).

197 Sec. 41(f)(1).

198 Sec. 41(f)(3).

199 Sec. 41(c)(4).

200 A special transition rule applies for fiscal year 2006–2007 taxpayers.

Alternative simplified credit

Generally, for amounts paid or incurred after 2006, taxpayers may elect to claim an alternative simplified credit for qualified research expenses.[201] The alternative simplified research credit is equal to 12 percent (14 percent for taxable years beginning after December 31, 2008) of qualified research expenses that exceed 50 percent of the average qualified research expenses for the three preceding taxable years. The rate is reduced to six percent if a taxpayer has no qualified research expenses in any one of the three preceding taxable years.

An election to use the alternative simplified credit applies to all succeeding taxable years unless revoked with the consent of the Secretary. An election to use the alternative simplified credit may not be made for any taxable year for which an election to use the alternative incremental credit is in effect. A transition rule applies which permits a taxpayer to elect to use the alternative simplified credit in lieu of the alternative incremental credit if such election is made during the taxable year which includes January 1, 2007. The transition rule applies only to the taxable year which includes that date.

Eligible expenses

Qualified research expenses eligible for the research tax credit consist of: (1) in-house expenses of the taxpayer for wages and supplies attributable to qualified research; (2) certain time-sharing costs for computer use in qualified research; and (3) 65 percent of amounts paid or incurred by the taxpayer to certain other persons for qualified research conducted on the taxpayer's behalf (so-called contract research expenses).[202] Notwithstanding the limitation for contract research expenses, qualified research expenses include 100 percent of amounts paid or incurred by the taxpayer to an eligible small business, university, or Federal laboratory for qualified energy research.

To be eligible for the credit, the research not only has to satisfy the requirements of present-law section 174 (described below) but also must be undertaken for the purpose of discovering information that is technological in nature, the application of which is intended to be useful in the development of a new or improved business component of the taxpayer, and substantially all of the activities of which constitute elements of a process of experimentation for functional aspects, performance, reliability, or quality of a business component. Research does not qualify for the credit if substantially all of the activities relate to style, taste, cosmetic, or seasonal design factors.[203] In addition, research does not qualify for the credit: (1) if conducted after the beginning of commercial production of the business component; (2) if related to the adaptation of an existing business component to a particular customer's requirements; (3) if related to the duplication of an existing business component from a physical examination of the component itself or certain other information; or (4) if related to certain efficiency surveys, management function or technique, market researcNimarket testing, or market development, routine data collection or routine quality control.[204] Research does not qualify for the credit if it is conducted outside the United States, Puerto Rico, or any U.S. possession.

Relation to deduction

Under section 174, taxpayers may elect to deduct currently the amount of certain research or experimental expenditures paid or incurred in connection with a trade or business, notwithstanding the general rule that business expenses to develop create an asset that has a useful life extending beyond the current year must be capitalized.[205] However, deductions allowed to a taxpayer under section 174 (or any other section) are reduced by an amount equal to 100 percent of the taxpayer's research tax credit determined for the taxable year.[206] Taxpayers may alternatively elect to claim a reduced research tax credit amount under section 41 in lieu of reducing deductions otherwise allowed.[207]

HOUSE BILL

The House bill creates a new 20 percent credit for all qualified energy research expenses paid or incurred in 2009 or 2010. Qualified energy research expenses are qualified research expenses related to the fields of fuel cells and battery technology, renewable energy, energy conservation technology, efficient transmission and distribution of electricity, and carbon capture and sequestration.

Effective date.—The provision is effective for taxable years beginning after December 31, 2008.

SENATE AMENDMENT

The Senate amendment is the same as the House bill, except that it adds expenses related to renewable fuels research to the list of qualified energy research expenses.

CONFERENCE AGREEMENT

The conference agreement does not include either the House bill or the Senate amendment provision.

13. Modification of credit for carbon dioxide sequestration (sec. 1141 of the Senate amendment, sec. 1131 of the conference agreement, and sec. 45Q of the Code)

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).[208] In addition, a credit of $10 per metric ton is available for 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 States[209] or one of its possessions.[210]

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.

HOUSE BILL

No provision.

SENATE AMENDMENT

The provision requires that carbon dioxide used as a tertiary injectant and otherwise eligible for a $10 per metric ton credit must be sequestered by the taxpayer in permanent geological storage in order to qualify for such credit. The Senate amendment also clarifies that the term permanent geological storage includes oil and gas reservoirs in addition to unminable coal seams and deep saline formations. In addition, the Senate amendment requires that the Secretary of the Treasury consult with the Secretary of Energy and the Secretary of the Interior, in addition to the Administrator of the Environmental Protection Agency, in promulgating regulations relating to the permanent geological storage of carbon dioxide.

Effective date.—The provision is effective for carbon dioxide captured after the date of enactment.

CONFERENCE AGREEMENT

The conference agreement follows the Senate amendment.

14. Modification of the plug-in electric drive motor vehicle credit (secs. 1151 and 1152 of the Senate amendment, secs. 1141 through 1144 of the conference agreement, and secs. 30B and 30D of the Code)

PRESENT LAW

Alternative motor vehicle credit

A credit is available for each new qualified fuel cell vehicle, hybrid vehicle, advanced lean burn technology vehicle, and alternative fuel vehicle placed in service by the taxpayer during the taxable year.[211] In general, the credit amount varies depending upon the type of technology used, the weight class of the vehicle, the amount by which the vehicle exceeds certain fuel economy standards, and, for some vehicles, the estimated

[201] A special transition rule applies for fiscal year 2006–2007 taxpayers.

[202] Under a special rule, 75 percent of amounts paid to a research consortium for qualified research are treated as qualified research expenses eligible for the research credit (rather than 65 percent under the general rule under section 41(b)(3) governing contract research expenses) if (1) such research consortium is a tax-exempt organization that is described in section 501(c)(3) (other than a private foundation) or section 501(c)(6) and is organized and operated primarily to conduct scientific research, and (2) such qualified research is conducted by the consortium on behalf of the taxpayer and one or more persons not related to the taxpayer. Sec. 41(b)(3)(C).

[203] Sec. 41(d)(3).

[204] Sec. 41(d)(4).

[205] Taxpayers may elect 10-year amortization of certain research expenditures allowable as a deduction under section 174(a). Secs. 174(f)(2) and 59(e).

[206] Sec. 280C(c).

[207] Sec. 280C(c)(3).

[208] Sec. 45Q.

[209] Sec. 638(1).

[210] Sec. 638(2).

[211] Sec. 30B.

lifetime fuel savings. The credit generally is available for vehicles purchased after 2005. The credit terminates after 2009, 2010, or 2014, depending on the type of vehicle. The alternative motor vehicle credit is not allowed against the alternative minimum tax.

Plug-in electric drive motor vehicle credit

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

HOUSE BILL

No provision.

SENATE AMENDMENT

Credit for electric drive low-speed vehicles, motorcycles, and three-wheeled vehicles

The Senate amendment creates a new 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 provision. The new credit is part of the general business credit. The new credit is not available for vehicles sold after December 31, 2011.

Credit for converting a vehicle into a plug-in electric drive motor vehicle

The Senate amendment also creates a new 10–percent credit, up to $4,000, for the cost of converting any motor vehicle into a qualified plug-in electric drive motor vehicle. To be eligible for the credit, a qualified plug-in traction battery module must have a capacity of at least 2.5 kilowatt-hours. In the case of a leased traction battery module, the credit may be claimed by the lessor but not the lessee. The credit is not available for conversions made after December 31, 2012.

Modification of plug-in electric drive motor vehicle credit

The Senate amendment 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.

Effective date.—The Senate amendment is generally effective for vehicles sold after December 31, 2009. The credit for plug-in vehicle conversion is effective for property placed in service after December 31, 2008, in taxable years beginning after such date.

CONFERENCE AGREEMENT

The conference agreement follows the Senate amendment with substantial modifications.

Credit for electric drive low-speed vehicles, motorcycles, and three-wheeled vehicles

With respect to electric drive low-speed vehicles, motorcycles, and three-wheeled vehicles, the conference agreement follows the Senate amendment with the following modifications. Under the conference agreement, the maximum credit available is $2,500. The conference agreement also makes other technical changes.

Credit for converting a vehicle into a plug-in electric drive motor vehicle

With respect to plug-in vehicle conversions, the conference agreement follows the Senate amendment but increases the minimum capacity of a qualified battery module to four kilowatt-hours, changes the effective date to property placed in service after the date of enactment, and eliminates the credit for plug-in conversions made after December 31, 2011. The conference agreement also removes the rule permitting lessors of battery modules to claim the plug-in conversion credit.

Modification of the plug-in electric drive motor vehicle credit

The conference agreement modifies the plug-in electric drive motor vehicle credit by limiting the maximum credit to $7,500 regardless of vehicle weight. The conference agreement also eliminates the credit for low speed plug-in vehicles and for plug-in vehicles weighing 14,000 pounds or more.

The conference agreement replaces the 250,000 total plug-in vehicle limitation with a 200,000 plug-in vehicles per manufacturer limitation. The credit phases out over four calendar quarters beginning in the second calendar quarter following the quarter in which the manufacturer limit is reached. The conference agreement also makes other technical changes.

The changes to the plug-in electric drive motor vehicle credit are effective for vehicles acquired after December 31, 2009.

Treatment of alternative motor vehicle credit as a personal credit allowed against the alternative minimum tax

The conference agreement provides that the alternative motor vehicle credit is a personal credit allowed against the alternative minimum tax. The provision is effective for taxable years beginning after December 31, 2008.

15. Parity for qualified transportation fringe benefits (sec. 1251 of the Senate amendment, sec. 1151 of the conference agreement, and sec. 132 of the Code)

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.[212] 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.

HOUSE BILL

No provision.

SENATE AMENDMENT

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

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

CONFERENCE AGREEMENT

The conference agreement follows the Senate amendment.

16. Credit for investment in advanced energy property (sec. 1302 of the Senate amendment, sec. 1302 of the conference agreement, and new sec. 48C of the Code)

PRESENT LAW

An income tax credit is all wed for the production of electricity from qualified energy resources at qualified facilities.[213] Qualified energy resources comprise wind, closed-loop biomass, open-loop biomass, geothermal energy, solar energy, small irrigation power, municipal solid waste, qualified hydropower production, and marine and hydrokinetic renewable energy. Qualified facilities are, generally, facilities that generate electricity using qualified energy resources.

An income tax credit is also allowed for certain energy property placed in service. Qualifying property includes certain fuel cell property, solar property, geothermal power production property, small wind energy property, combined heat and power system property, and geothermal heat pump property.[214]

In addition to these, numerous other credits are available to taxpayers to encourage renewable energy production and energy conservation, including, among others, credits

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

[213] Sec. 45. In addition to the electricity production credit, section 45 also provides income tax credits for the production of Indian coal and refined coal at qualified facilities.

[214] Sec. 48.

for certain biofuels, plug-in electric vehicles, and energy efficient appliances, and for improvements to heating, air conditioning, and insulation.

No credit is specifically designed under present law to encourage the development of a domestic manufacturing base to support the industries described above.

HOUSE BILL

No provision.

SENATE AMENDMENT

The Senate amendment establishes a 30 percent credit for investment in qualified property used in a qualified advanced energy manufacturing project. A qualified advanced energy project is a project that re-equips, expands, or establishes a manufacturing facility for the production: (1) property designed to be used to produce energy from the sun, wind, or geothermal deposits (within the meaning of section 613(e)(2)), or other renewable resources; (2) fuel cells, microturbines, or an energy storage system for use with electric or hybrid-electric motor vehicles; (3) electric grids to support the transmission of intermittent sources of renewable energy, including storage of such energy; (4) property designed to capture and sequester carbon dioxide; (5) property designed to refine or blend renewable fuels (but not fossil fuels) or to produce energy conservation technologies (including energy-conserving lighting technologies and smart grid technologies; or (6) other advanced energy property designed to reduce greenhouse gas emissions as may be determined by the Secretary.

Qualified property must be depreciable (or amortizable) property used in a qualified advanced energy project. Qualified property does not include property designed to manufacture equipment for use in the refining or blending of any transportation fuel other than renewable fuels. The basis of qualified property must be reduced by the amount of credit received.

Credits are available only for projects certified by the Secretary of Treasury, in consultation with the Secretary of Energy. The Secretary of Treasury must establish a certification program no later than 180 days after date of enactment, and may allocate up to $2 billion in credits.

In selecting projects, the Secretary may consider only those projects where there is a reasonable expectation of commercial viability. In addition, the Secretary must consider other selection criteria, including which projects (1) will provide the greatest domestic job creation; (2) will provide the greatest net impact in avoiding or reducing air pollutants or anthropogenic emissions of greenhouse gases; (3) have the greatest readiness for commercial employment, replication, and further commercial use in the United States, (4) will provide the greatest benefit in terms of newness in the commercial market; (5) have the lowest levelized cost of generated or stored energy, or of measured reduction in energy consumption or greenhouse gas emission; and (6) have the shortest project time from certification to completion.

Each project application must be submitted during the three-year period beginning on the date such certification program is established. An applicant for certification has two years from the date the Secretary accepts the application to provide the Secretary with evidence that the requirements for certification have been met. Upon certification, the applicant has five years from the date of issuance of the certification to place the project in service. Not later than six years after the date of enactment of the credit, the Secretary is required to review the credit allocations and redistribute any credits that were not used either because of a revoked certification or because of an insufficient quantity of credit applications.

Effective date.—The provision is effective on the date of enactment.

CONFERENCE AGREEMENT

The conference agreement follows the Senate amendment with the following modifications. The conference agreement increases by $300 million (to $2.3 billion) the amount of credits that may be allocated by the Secretary. The conference agreement expands the list of qualifying advance energy projects to include projects designed to manufacture any new qualified plug-in electric drive motor vehicle (as defined by section 30D(c)), any specified vehicle (as defined by section 30D(f)(2)), or any component which is designed specifically for use with such vehicles, including any electric motor, generator, or power control unit. The conference agreement also replaces the third and fourth project selection criteria with a requirement that the Secretary, in addition to the remaining criteria, consider projects that have the greatest potential for technological innovation and commercial deployment.

In addition, the conference agreement shortens to two years the period during which project applications may be submitted, shortens to one year the period during which the project applicants must provide evidence that the certification requirements have been met, and shortens to three years the period during which certified projects must be placed in service. The conference agreement also shortens the period after which the Secretary must review the credit allocations from six to four years. Finally, the conference agreement clarifies that only tangible personal property and other tangible property (not including a building or its structural components) is credit-eligible.

17. Incentives for manufacturing facilities producing plug-in electric drive motor vehicles and components (sec. 1303 of the Senate amendment)

PRESENT LAW DEPRECIATION RULES

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''). Under MACRS, different types of property generally are assigned applicable recovery periods and depreciation methods. The recovery periods applicable to most tangible personal 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 taxpayer's depreciation deduction would be maximized.

Bonus depreciation

For property placed in service in calendar year 2009, an additional first-year depreciation deduction is available equal to 50 percent of the adjusted basis of qualified property.[215] The additional first-year depreciation deduction is allowed for both regular tax and alternative minimum tax (''AMT'') purposes.[216] Certain other rules and limitations apply.

Election to claim additional research or minimum tax credits in lieu of claiming bonus depreciation

Corporations otherwise eligible for bonus depreciation under section 168(k) may elect to claim additional research or minimum tax credits in lieu of claiming depreciation under section 168(k) for ''eligible qualified property'' placed in service after March 31, 2008.[217] A corporation making the election forgoes the depreciation deductions allowable under section 168(k) and instead increases the limitation under section 38(c) on the use of research credits or section 53(c) on the use of minimum tax credits.[218] The increases in the allowable credits are treated as refundable for purposes of this provision. The depreciation for qualified property is calculated for both regular tax and AMT purposes using the straight-line method in place of the method that would otherwise be used absent the election under this provision.

The research credit or minimum tax credit limitation is increased by the bonus depreciation amount, which is equal to 20 percent of bonus depreciation[219] for certain eligible qualified property that could be claimed absent an election under this provision. Generally, eligible qualified property included in the calculation is bonus depreciation property that meets the following requirements: (1) the original use of the property must commence with the taxpayer after March 31, 2008; (2) the taxpayer must purchase the property either (a) after March 31, 2008, and before January 1, 2009, only if no binding written contract for the acquisition is in effect before April 1, 2008,[220] or (b) pursuant to a binding written contract which was entered into after March 31, 2008, and before January 1, 2009;[221] and (3) the property must be placed in service after March 31, 2008, and before January 1, 2009 (January 1, 2010 for certain longer-lived and transportation property).

The bonus depreciation amount is limited to the lesser of: (1) $30 million, or (2) six percent of the sum of research credit carryforwards from taxable years beginning before January 1, 2006 and minimum tax credits allocable to the adjusted minimum tax imposed for taxable years beginning before January 1, 2006. All corporations treated as a single employer under section 52(a) are treated as one taxpayer for purposes of the limitation, as well as for electing the application of this provision.

Credit for plug-in vehicles

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),

[215] Sec. 168(k). The additional first-year depreciation deduction is subject to the general rules regarding whether an item is deductible under section 162 or instead is subject to capitalization under section 263 or section 263A.

[216] However, the additional first-year depreciation deduction is not allowed for purposes of computing earnings and profits.

[217] Sec. 168(k)(4). In the case of an electing corporation that is a partner in a partnership, the corporate partner's distributive share of partnership items is determined as if section 168(k) does not apply to any eligible qualified property and the straight line method is used to calculate depreciation of such property.

[218] Special rules apply to an applicable partnership.

[219] For this purpose, bonus depreciation is the difference between (i) the aggregate amount of depreciation for all eligible qualified property determined if section 168(k)(1) applied using the most accelerated depreciation method (determined without regard to this provision), and shortest life allowable for each property, and (ii) the amount of depreciation that would be determined if section 168(k)(1) did not apply using the same method and life for each property.

[220] In the case of passenger aircraft, the written binding contract limitation does not apply.

[221] Special rules apply to property manufactured, constructed, or produced by the taxpayer for use by the taxpayer.

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 over the AMT (reduced by certain other credits) for the taxable year.

HOUSE BILL

No provision.

SENATE AMENDMENT

The Senate amendment permits taxpayers to elect to expense one hundred percent of the cost of any electric drive motor vehicle manufacturing facility property placed in service before 2012 and fifty percent of the cost of such property placed in service after 2011 and before 2015. For purposes of this election, qualified property is property which is a facility or a portion of a facility used for the production of any new qualified plug-in electric drive motor vehicle[222] or any eligible component. Eligible components are any battery, any electric motor or generator, or any power control unit which is designed specifically for use with a new qualified plug-in electric drive motor vehicle.

The original use of any qualified property must begin with the taxpayer. In the case of dual use property, the amount of cost eligible to be expensed is reduced by the total cost of the facility multiplied by the percentage of property expected to be produced that is not qualified property.

The Senate amendment permits taxpayers to waive this election in favor of a loan equal to thirty-five percent of the amount eligible to be expensed under the general provision. The loan is in the form of a senior note, with a 20-year term and an interest rate payable at the applicable Federal rate, issued by the taxpayer to the Secretary of Treasury and secured by the qualified manufacturing property. Upon repayment of the loan, the taxpayer's tax liability a limitations are increased for the research credit[223] and the alternative minimum tax credit[224] by the amount of the loan.

Effective date.—The provision is effective for taxable years beginning after the date of enactment.

CONFERENCE AGREEMENT

The conference agreement does not include the Senate amendment provision.

E. OTHER PROVISIONS

1. Application of certain labor standards to projects financed with certain tax-favored bonds (sec. 1701 of the House bill, sec. 1901 of the Senate amendment, and sec. 1601 of the conference agreement)

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.

HOUSE BILL

The provision 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); and

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

Effective date.—The provision is effective on the date of enactment.

SENATE AMENDMENT

The Senate amendment is the same as the House bill except it makes a technical correction to change ''qualified clean renewable energy bond'' to ''new clean renewable energy bond.''

CONFERENCE AGREEMENT

The conference agreement follows the Senate amendment.

2. Increase in the public debt limit (sec. 1902 of the Senate amendment and sec. 1604 of the conference agreement)

PRESENT LAW

The statutory limit on the public debt is $11,315,000,000,000.

HOUSE BILL

No provision.

SENATE AMENDMENT

The Senate amendment increases the statutory limit on the public debt by $825,000,000,000 to $12,140,000,000,000.

Effective date.—The provision is effective on the date of enactment.

CONFERENCE AGREEMENT

The conference agreement increases the statutory limit on the public debt by $789,000,000,000 to $12,104,000,000,000.

Effective date. The provision is effective on the date of enactment.

3. Failure to redeem certain securities from the United States (sec. 6021 of the Senate amendment)

PRESENT LAW

An employer generally may deduct reasonable compensation for personal services as an ordinary and necessary business expense. Section 162(m) (relating to remuneration expenses for certain executives that are in excess of $1 million) and section 280G (relating to excess parachute payments) provide explicit limitations on the deductibility of certain compensation expenses in the case of corporate employers, and section 4999 imposes an additional tax of 20 percent on the recipient of an excess parachute payment. The Emergency Economic Stabilization Act of 2008 (''EESA'') limits the amount of payments that may be deducted as reasonable compensation by certain financial institutions that receive financial assistance from the United States pursuant to the troubled asset relief program (''TARP'') established under EESA by modifying the section 162(m) and section 280G limits. EESA also provided non-tax rules relating to the compensation that is payable by such a financial institution (the ''TARP executive compensation rules'').

HOUSE BILL

No provision.

SENATE AMENDMENT

In general

The provision amends the TARP executive compensation rules to limit payment of ''excessive bonuses'' to ''covered individuals'' by financial institutions whose preferred stock was purchased by the United States using funds provided under TARP. Excessive bonuses are defined as the portion of an ''applicable bonus payment'' made to a covered individual in excess of $100,000.

An applicable bonus payment is any bonus payment that is (1) paid, or payable, for services performed by a covered individual in a tax year of the financial institution ending in 2008, and (2) the amount of which was communicated to the covered individual at some time between January 1, 2008, and January 31, 2009, or was based on a resolution of the financial institution's board of directors and adopted before the end of the financial institution's 2008 taxable year. For purposes of determining an applicable bonus, any bonus payments that relate to a taxable year prior to 2008, but which are wholly or partially contingent on the performance of services in the 2008 taxable year, are disregarded. In addition, any conditions on 2008 bonuses that require the covered individual to perform services in a subsequent taxable year are also disregarded (e.g., if a 2008 bonus is dependent on the performance of services in 2009, the bonus is still considered to be an applicable bonus if it meets all of the other requirements for such status).

The definition of bonus includes discretionary payments for services provided that are in addition to amounts payable for regular services performed and is payable are cash or property other than (1) the stock of the financial institution or (2) an interest in a troubled asset (within the meaning of EESA) held directly or indirectly by the financial institution. Bonuses do not include commissions, welfare and fringe benefits, or expense reimbursements.

A covered individual is any directoA, officer, or other employee of a financial institution or its controlled group of corporations.[225]

[222] As defined by section 30D(c).

[223] Sec. 38(c).

[224] Sec. 53(c).

[225] Members of a controlled group of corporations are determined as provided under section 52(a).

Stock redemption

If a financial institution pays one or more excessive bonuses to one or more covered individuals, the financial institution must redeem from the government an amount of preferred stock equal to the aggregate amount of all excessive bonuses paid or payable to such covered individual or individuals. The redemption obligation exists notwithstanding any otherwise applicable restrictions on the redeemability of the preferred stock. The preferred stock must be redeemed by the later of: 120 days after date of enactment (for excessive bonuses that had already been paid) or the day before the excessive bonus (or a portion thereof) is paid.

Excise tax

An excise tax is imposed on any financial institution that pays one or more excessive bonuses but does not redeem its preferred stock from the government in a timely manner. The tax is equal to 35 percent of the amount of preferred stock that the financial institution should have redeemed from the government (i.e., the amount of the excessive bonus). For example, if a financial institution granted a 2008 bonus of $1 million to its chief executive officer, and the financial institution did not redeem $900,000 worth of preferred stock from the United States, it must pay a tax of $315,000 ($1 million minus $100,000 times 35 percent). Once a financial institution pays the 35 percent tax, the institution is no longer required to redeem from the government an amount of preferred stock equal to the amount of the excessive bonus. That is, a financial institution that pays an excessive bonus must either redeem stock or pay an excise tax on that bonus but it will not be required to do both for any single bonus.

Payment of the excise tax does not have any effect on otherwise applicable agreements to redeem preferred stock purchased by the Federal Government using funds provided by TARP.

Effective Date

The provision applies to a failure to redeem preferred stock that occurs after the date of enactment.

CONFERENCE AGREEMENT

The conference agreement does not include the Senate amendment provision.

F. TRADE RELATED PROVISIONS

1. TRADE ADJUSTMENT ASSISTANCE [226]

I. OVERVIEW

The conference report amends the Trade Act of 1974 (''the Trade Act'') to reauthorize trade adjustment assistance (''TAA''), to extend trade adjustment assistance to service workers, communities, firms, and farmers, and for other purposes.

II. HOUSE BILL

No provision.

III. SENATE BILL

First, the Senate bill amends section 245(a) of the Trade Act of 1974 to extend the authorization for the TAA for Workers program until December 31, 2010. Second, the proposal amends section 246(b)(1) of the Trade Act of 1974 to extend the authorization for Alternative Trade Adjustment Assistance program by two years. Third, the proposal amends section 256(b) of the Trade Act of 1974 to extend the authorization for the TAA for Firms program until December 31, 2010. Fourth, the proposal amends section 298(a) of the Trade Act of 1974 to extend the TAA for Farmers program until December 31, 2010. Fifth, the proposal amends section 285 of the Trade Act of 1974 to extend the overall termination date of the TAA programs until December 31, 2010. Sixth, the proposal provides that these amendments shall have an effective date of January 1, 2008. Seventh, the proposal includes a Sense of the Senate that a TAA for Communities program should be revived.

IV. CONFERENCE REPORT

A. PART I—TRADE ADJUSTMENT ASSISTANCE FOR WORKERS

1. SUBPART A—TRADE ADJUSTMENT ASSISTANCE FOR SERVICE SECTOR WORKERS

Extension of Trade Adjustment Assistance to Service Sector and Public Agency Workers; Shifts in Production (Section 1701 (amending Sections 221, 222, 231, 244, and 247 of the Trade Act of 1974))

Present Law

Section 222 of the Trade Act provides trade adjustment assistance to workers in a firm or an appropriate subdivision of a firm if (1) a significant number or proportion of the workers in the firm or subdivision have become (or are threatened to become) totally or partially separated; (2) the firm produces an article; and (3) the separation or threat of same is due to trade with foreign countries.

There are three ways to demonstrate the connection between job separation and trade. The Secretary of Labor (''the Secretary'') must determine either (1) that increased imports of articles ''like or directly competitive'' with articles produced by the firm have contributed importantly to the separation and to an absolute decrease in the firm's sales or production, or both; (2) that the workers' firm has shifted its production of articles ''like or directly competitive'' with articles produced by the firm to a trade agreement partner of the United States or a beneficiary country under the Andean Trade Preference Act, the African Growth and Opportunity Act, or the Caribbean Basin Economic Recovery Act; or (3) that the firm has shifted production of such articles to another country and there has been or is likely to be an increase in imports of like or directly competitive articles.

Section 222 of the Trade Act also provides TAA to adversely affected secondary workers. Eligible secondary workers include (1) secondary workers that supply directly to another firm component parts for articles that were the basis for a certification of eligibility for TAA benefits; and (2) downstream workers that were affected by trade with Mexico or Canada.

When the Department investigates workers' petitions, it requires firms and customers to certify the questionnaires that the workers' firm and the firm's customers submit. Present law also authorizes the Secretary to use subpoenas to obtain information in the course of its investigation of a petition. The law provides for the imposition of criminal and civil penalties for providing false information and failing to disclose material information, but the penalties apply only to petitioners.

Explanation of Provision

The provision would amend section 222 of the Trade Act to expand the availability of TAA to include workers in firms in the services sector. Like workers in firms that produce articles, workers in firms that supply services would be eligible for TAA if a significant number or proportion of the workers have become (or are threatened to become) totally or partially separated, and if increased imports of services ''contributed importantly'' to the workers'' separation or threat of separation.

As with articles, there would be three ways for service sector workers to demonstrate that they are eligible for TAA. First, TAA would be available if increased imports of services like or directly competitive with services supplied by the firm have contributed importantly to the separation and to an absolute decrease in the firm's sales or production, or both. Second, TAA would be available in ''shift in supply'' (''service relocation'') scenarios, if the workers'' firm or subdivision established a facility in a foreign country to supply services like or directly competitive with the services supplied by the trade-impacted workers. Third, TAA would be available in ''foreign contracting'' scenarios, if the workers'' firm or subdivision acquired from a service supplier in a foreign country services like or directly competitive with the services that the trade-impacted workers had supplied. In each scenario, the relevant activity would need to have contributed importantly to the workers' separation or threat of separation.

The provision also expands the ''shift in production'' prong of present law by eliminating the requirement in section 222 that the shift be to a trade agreement partner of the United States or a country that benefits from a unilateral preference program. Under the modified provision, if workers are separated because their firm shifts production from a domestic facility to any foreign country, the separated workers would potentially be eligible for TAA. Additionally, there would be no requirement to demonstrate separately that the shift was accompanied by an increase of imports of products like or directly competitive with those produced by the workers' firm or subdivision.

The provision also amends section 222 to make workers at public agencies eligible for TAA. Under the modified provision, if a public agency acquires services from a foreign country that are like or directly competitive with the services that the public agency supplies, and if the acquisition contributed importantly to the workers' separation or threat thereof, the workers would be able to seek TAA benefits.

The provision also amends section 222 to expand the universe of adversely affected secondary workers that could be eligible for TAA. First, the provision adds firms that supply testing, packaging, maintenance, and transportation services to the list of downstream producers whose workers potentially are eligible for TAA. Second, workers at firms that supply services used in the production of articles or in the supply of services would also become potentially eligible for benefits. Third, the provision permits downstream producers to be eligible for TAA if the primary firm's certification is linked to trade with any country, not just Canada or Mexico. The provision requires the Secretary to obtain information that the Secretary determines necessary to make certifications from workers' firms or customers of workers' firms through questionnaires and in such other manner as the Secretary considers appropriate. The provision also permits the Secretary to seek additional information from other sources, including (1) officials or employees of the workers' firm; (2) officials of customers of the firm; (3) officials of unions or other duly recognized representatives of the petitioning workers; and (4) one-stop operators. The provision states that the Secretary shall require a firm or customer to certify all information obtained through questionnaires, as well as other information that the Secretary relies upon in making a determination under section 223, unless the Secretary has a reasonable basis for determining that the information is accurate and complete.

The provision states that the Secretary shall require a worker's firm or a customer of a worker's firm to provide information by subpoena if the firm or customer fails to provide the information within 20 days after the

[226] Descriptions prepared by the majority staffs of the House Committee on Ways and Means and the Senate Committee on Finance.

date of the Secretary's request, unless the firm or customer demonstrates to the Secretary's satisfaction that the firm or customer will provide the information in a reasonable period of time. The Secretary retains the discretion to issue a subpoena sooner than 20 days if necessary. The provision also establishes standards for the protection of confidential business information submitted in response to a request made by the Secretary.

The provision amends the penalties provision in section 244 of the Trade Act to cover persons, including persons who are employed by firms and customers, who provide information during an investigation of a worker's petition.

Finally, the provision amends section 247 of the Trade Act to add definitions for certain key terms and makes various conforming changes to sections 221 and 222.

Reasons for Change

Most service sector workers presently are ineligible for TAA benefits because of a statutory requirement that the workers must have been employed by a firm that produces an ''article.'' Of the 800 TAA petitions denied in FY2006, almost half were denied for this reason. Most of the denied service-related petitions came from two service industries: business services (primarily computer-related) and airport-related services (e.g., aircraft maintenance). In April 2006, the Department of Labor issued a regulation expanding TAA eligibility to software workers that partially, but not fully, addresses the service worker coverage issue. See GAO Report 07–702. The provision fully addresses the issue by making service sector workers eligible for TAA on equivalent terms to workers at firms that produce articles.

The provision expands the ''shift in production'' prong of present law for similar reasons. Under present law, a worker whose firm relocates to China is not necessarily eligible for TAA; such worker must also show that the relocation to China will result in increased imports into the United States. In contrast, a worker whose firm relocates to a country with which the United States has a trade agreement (e.g., Mexico, Israel, Chile) does not need to show increased imports. The provision eliminates this disparate treatment by making TAA benefits available in both scenarios on the same terms.

Present law also fails to cover foreign contracting scenarios, where a company closes a domestic operation and contracts with a company in a foreign country for the goods or services that had been produced in the United States. For example, if a U.S. airline lays off a number of its U.S.-based maintenance personnel and contracts with an independent aircraft maintenance company in a foreign country, the laid off personnel are not covered under present law, even if they lost their jobs because of foreign competition. The Conferees believe such workers should be potentially eligible for TAA benefits.

Similarly, the Conferees believe that workers who supply services at public agencies should be treated the same as their private-sector counterparts: if such workers are laid off because their employer contracts with a supplier in a foreign country for the services that the workers had supplied, the workers should be able to seek TAA benefits.

The provision provides that in cases involving production or service relocation or foreign contracting, a group of workers (including workers in a public agency) may be certified as eligible for adjustment assistance if the shift ''contributed importantly'' to such workers' separation or threat of separation. This requirement is identical to the existing causal link requirement in section 222(a)(2)(A)(iii), which establishes the criteria for certifying workers on the basis of ''increased imports.''

The Conferees understand that the Department of Labor has interpreted the ''contributed importantly'' requirement in section 222(a)(2)(A)(iii) to mean that imports must have been a factor in the layoffs or threat thereof. Or, in other words, under present law the Secretary of Labor will certify a group of workers as eligible for assistance if the facts demonstrate a causal 153 2502 1,29, nexus between increased imports and the workers' separation or threat thereof. The Conferees approve of the Department's interpretation of the ''contributed importantly'' requirement and expect that the Department will continue to apply it in future cases involving increased imports. Similarly, the Conferees also understand that the existing language in section 222(a)(2)(B) addressing production relocation contains an implicit causation requirement. Thus, the Department has required production relocation under section 222(a)(2)(B) to be a factor in the workers' separation or threat thereof. The provision makes the requirement explicit. The Conferees emphasize that by making the ''contributed importantly'' requirement in section 222(a)(2)(B) explicit, no change in the Department's administration of cases involving production relocation is intended. The Conferees expect that this change in section 222 would not affect the outcomes that the Department has been reaching under present law in such cases, and will not alter outcomes in future cases. Thus, as has been the case, if the Department finds that production relocation was a factor in the layoff (or threat thereof) of a group of workers in the United States, the Conferees expect that the Secretary will certify such workers as eligible for adjustment assistance.

Finally, with respect to certifications involving production or service relocations or foreign contracting, the Conferees recognize that there may be delays in time between when the domestic layoffs (or threat of layoffs) occur, and when the production or service relocation or foreign contracting occurs. The Conferees intend that the Department of Labor certify petitions where there is credible evidence that production or service relocation or foreign contracting will occur, and when the other requirements of the statute are met. Such evidence could include the conclusion of a contract relating to foreign production of the article, supply of services, or acquisition of the article or service at issue; the construction, purchase, or renting of foreign facilities for the production of the article, supply of the service, or acquisition of the article or service at issue; or certified statements by a duly authorized representative at the workers' firm that the firm intends to engage in production or service relocation or foreign contracting. The Conferees are aware of concerns that the Secretary may rely on inaccurate information in making its determinations, including when denying certification of petitions. The provision addresses these concerns by requiring the Secretary to obtain certifications of all information obtained from a firm or customer through questionnaires as well as other information from a firm or customer that the Secretary relies upon in making a determination under section 223, unless the Secretary has a reasonable basis for determining that the information is accurate and complete.

The Conferees are also aware of concerns that some firms and customers fail to respond to the Secretary's requests for information or provide inaccurate or incomplete information. The subpoena, confidentiality of information, and penalty language included in this provision are designed to address these problems.

The provision would also apply if the Secretary needs to obtain information from a customer's customer, such as in an investigation involving component part suppliers.

Effective Date

The provision goes into effect upon expiration of the 90-day period beginning on the date of enactment of this Act, and applies to petitions filed on or after that date.

Group Eligibility—Component Parts (Section 1701 (amending Section 222 of the Trade Act of 1974))

Present Law

Under present law, U.S. suppliers of inputs (i.e., component parts) may be certified for TAA benefits only pursuant to the secondary workers provision of section 222(b), which requires that the downstream producer have employed a group of workers that received TAA certification. Thus, for example, domestic producers of taconite have been unable to obtain certification for TAA benefits when downstream producers of steel slab have not obtained certification. Additionally, U.S. suppliers of inputs have been unable to obtain certification for TAA benefits in situations in which there is a shift in imports from articles incorporating their inputs to articles incorporating inputs produced outside the United States.

Explanation of Provision

The provision allows for the certification of workers in a firm when imports of the finished article incorporating inputs produced outside the United States that are like or directly competitive with imports of the finished article produced using U.S. inputs have increased and the firm has met the other criteria for certification, including a significant number of workers being totally or partially separated, a decrease in sales or production, and the increase in imports has contributed importantly to the workers' separation.

For example, under the new provision, workers in a U.S. fabric plant may be certified if the U.S. firm sold fabric to a Honduran apparel manufacturer for production of apparel subsequently imported into the United States and (1) the Honduran apparel manufacturer ceased purchasing, or decreased its purchasing, of fabric from the U.S. producer and, instead, used fabric from another country; or (2) imports of apparel from another country using non-U.S. fabric that are like or directly competitive with imports of Honduran apparel using U.S. fabric have increased.

Prior to certification, the Department of Labor would also have to determine that the firm met the other statutory requirements for certification, including that a significant number of workers had been totally or partially separated, or are threatened to become totally or partially separated, the sales or production of the petitioning fabric firm had decreased, and the increased imports of apparel using non-U.S. fabric had contributed importantly to that decrease and to the workers' separation or threat thereof.

Likewise, workers in a U.S. picture tube manufacturing plant that sells picture tubes to a Mexican television manufacturer for production of televisions subsequently imported into the United States would be certified under section 222 if the U.S. manufacturer's sales or production of picture tubes decreased and (1) the manufacturer of televisions located in Mexico switched to picture tubes produced in another country; or (2) imports of televisions from another country using non-U.S. picture tubes that are like or directly competitive with imports of Mexican televisions using U.S. picture tubes have increased.

As in the apparel example above, prior to certification, the Department of Labor would also have to determine that the picture tube firm met the other statutory requirements for certification, including that a significant number of workers had been totally or partially separated, or are threatened to become totally or partially separated, the sales or production of the petitioning picture tube firm had decreased, and the increased imports of televisions using non-U.S. picture tubes had contributed importantly to that decrease and to the workers' separation or threat thereof.

Reasons for Change

Section 222(a) is being amended to provide improved TAA coverage for U.S. suppliers of inputs, and to address situations where suppliers of component parts have been unable to obtain certification for TAA benefits because of gaps in coverage under present law.

The amended language is broad enough to encompass both the situation in which the input producer's customer switches to inputs produced outside the United States, and the situation in which the input producer's customer is displaced by a third country producer, because both situations may equally impact the sales or production of the domestic input producer.

Additionally, for purposes of section 222(a)(2)(A)(ii)(III), as in other instances, when company-specific data is unavailable, the Secretary may reasonably rely on such aggregate data or such other information as the Secretary deems appropriate.

As reflected in the examples above, the Conferees intend that the Secretary of Labor should interpret the term component parts, as used in section 222(a)(2)(A)(ii)(III), flexibly. For example, the Conferees intend that uncut fabric would be considered to be a component part of apparel for purposes of this provision, even though, for purposes of other trade laws, U.S. Customs and Border Protection might not consider such fabric to be a component part.

Effective Date

The provision goes into effect upon expiration of the 90-day period beginning on the date of enactment of this Act, and applies to petitions filed on or after that date.

Separate Basis for Certification (Section 1702 (amending Section 222 of the Trade Act of 1974))

Present Law

There is no provision in present law.

Explanation of Provision

The provision amends section 222(c) of the Trade Act by providing that a petition filed under section 221 of the Trade Act on behalf of a group of workers in a firm, or appropriate subdivision of a firm, meets the requirements of subsection 222(a) of the Trade Act if the firm is publicly identified by name by the U.S. International Trade Commission (''ITC'') as a member of a domestic industry in (1) an affirmative determination of serious injury or threat thereof in a global safeguard investigation under section 202(b)(1) of the Trade Act; (2) an affirmative determination of market disruption or threat thereof in a China safeguard investigation under section 421(b)(1) of the Trade Act; or (3) an affirmative final determination of material injury or threat thereof in an antidumping or countervailing duty investigation under section 705(b)(1)(A) or 735(b)(1)(A) of the Tariff Act of 1930 (19 U.S.C. 1671d(b)(1)(A) and 1673d(b)(1)(A)), but only if the petition is filed within 1 year of the date that notice of the affirmative ITC determination is published in the Federal Register (or, in the case of a global safeguard investigation under section 202(b)(1), a summary of the report submitted to the President by the ITC under section 202(f)(1) is published in the Federal Register under section 202(f)(3)) and the workers on whose behalf such petition was filed have become totally or partially separated from such workers' firm within either that 1-year period or the 1-year period preceding the date of such publication.

Reasons for Change

The Conferees note that the provision allows workers in firms publicly identified by name in certain ITC investigations to be eligible for adjustment assistance on the basis of an affirmative injury determination by the ITC under certain circumstances, and without an additional determination by the Secretary of Labor that either increased imports of a like or directly competitive article contributed importantly to such workers' separation or threat of separation (and to an absolute decline in the sales or production, or both, of such workers' firm or subdivision), or that a shift in production of articles contributed importantly to such workers' separation or threat of separation.

In order for workers to avail themselves of this provision, the petition must be filed with the Secretary (and with the Governor of the State in which such workers' firm or subdivision is located) within 1 year of the date of publication in the Federal Register of the applicable notice from the ITC and the workers on whose behalf such petition was filed must have become totally or partially separated from such workers' firm within either that 1-year period or the 1-year period preceding such date of publication.

If a petition is filed on behalf of such workers more than 1 year after the date that the applicable notice from the ITC is published in the Federal Register, it will remain necessary for the Secretary of Labor to investigate the petition and determine that the statutory criteria for certifying such workers in section 222 are satisfied.

Effective Date

The provision goes into effect upon expiration of the 90-day period beginning on the date of enactment of this Act, and applies to petitions filed on or after that date.

Determinations by the Secretary of Labor (Section 1703 (amending Section 223 of the Trade Act of 1974))

Present Law

The Secretary is required to investigate petitions filed by workers and determine whether such workers are eligible for TAA benefits. A summary of such group eligibility determination, together with the Secretary's reasons for making the determination, must be promptly published in the Federal Register. Similarly, a termination of a certification, together with the Secretary's reasons for the termination, must be promptly published in the Federal Register.

Explanation of Provision

This section requires the Secretary to publish (1) a summary of a group eligibility determination, together with the Secretary's reasons for the determination; and (2) a certification termination, together with the Secretary's reasons for the termination, promptly on the Department's website (as well as in the Federal Register). The section also requires the Secretary to establish standards for investigating petitions, and criteria for making determinations. Moreover, the Secretary is required to consult with the Senate Committee on Finance (''Senate Finance Committee'') and the Committee on Ways and Means of the House of Representatives (''House Committee on Ways and Means'') 90 days prior to issuing a final rule on the standards.

Reasons for Chance

To improve accountability, transparency, and public access to this information, the Secretary should be required to post (1) a summary of a group eligibility determination, together with the Secretary's reasons for the determination; and (2) a certification termination, together with the Secretary's reasons for the termination, promptly on the Department's website (as well as in the Federal Register). The Secretary also should have objective and transparent standards for investigating petitions, and criteria for the basis on which an eligibility determination is made. The Secretary should consult with Senate Finance and House Ways and Means to ensure the intent of Congress is accurately reflected in such standards.

Effective Date

The provision goes into effect upon expiration of the 90-day period beginning on the date of enactment of this Act, and applies to petitions filed on or after that date.

Monitoring and Reporting Relating to Service Sector (Section 1704 (amending Section 282 of the Trade Act of 1974))

Present Law

Present law requires the Secretaries of Commerce and Labor to establish and maintain a program to monitor imports of articles into the United States, including (1) information concerning changes in import volume; (2) impacts on domestic production; and (3) impacts on domestic employment in industries producing like or competitive products. Summaries must be provided to the Adjustment Assistance Coordinating Committee, the ITC, and Congress.

Explanation of Provision

The provision is renamed ''Trade Monitoring and Data Collection.'' The provision requires the Secretaries of Commerce and Labor to monitor imports of services (in addition to articles). To address data limitations, the provision requires the Secretary of Labor, not later than 90 days after enactment, to collect data on impacted service workers (by State, industry, and cause).

Finally, it requires the Secretary of Commerce, in consultation with the Secretary of Labor, to report to Congress, not later than one year after enactment, on ways to improve the timeliness and coverage of data regarding trade in services.

Reasons for Change

Existing data on trade in services are sparse. Because of the increases in trade in services, the Conferees believe that it is critical that the government collect data on imports of services and the impact of these imports on U.S. workers. Such information will be useful when considering any further refinement of TAA that Congress may contemplate. More generally, the additional data will give U.S. businesses and workers insight into trade in services, helping them better compete in the global marketplace.

Effective Date

The provision goes into effect on the date of enactment of this Act.

2. SUBPART B—INDUSTRY NOTIFICATIONS FOLLOWING CERTAIN AFFIRMATIVE DETERMINATIONS

Notifications following certain affirmative determinations (Section 1711 (amending Section 224 of the Trade Act of 1974))

Present Law

Present law includes a provision requiring the ITC to notify the Secretary of Labor when it begins a section 201 global safeguard investigation. The Secretary must then begin an investigation of (1) the number of workers in the relevant domestic industry; and (2) whether TAA will help such workers adjust to import competition. The Secretary of Labor must submit a report to the President within 15 days of the ITC's section 201 determination. The Secretary's report must be made public and a summary printed in the Federal Register.

Explanation of Provision

The provision expands the notification requirement to instruct the ITC to notify the Secretary of Labor and the Secretary of Commerce, or the Secretary of Agriculture when dealing with agricultural commodities, when it issues an affirmative determination of injury or threat thereof under sections 202 or 421 of the Trade Act, an affirmative safeguard determination under a U.S. trade agreement, or an affirmative determination in a countervailing duty or dumping investigation under sections 705 or 735 of the Tariff Act of 1930. Additionally, the provision requires the President to notify the Secretaries of Labor and Commerce upon making an affirmative determination in a safeguard investigation relating to textile and apparel articles. Whenever an injury determination is made, the Secretary of Labor must notify employers, workers, and unions of firms covered by the determination of the workers' potential eligibility for TAA benefits and provide them with assistance in filing petitions. Similarly, the Secretary of Commerce must notify firms covered by the determination of their potential eligibility for TAA for Firms and provide them with assistance in filing petitions, and the Secretary of Agriculture must do the same for investigations involving agricultural commodities.

Reasons for Change

A significant hurdle to ensuring that workers and firms avail themselves of TAA benefits is the lack of awareness about the program. In situations like these, where the ITC has made a determination that a domestic industry has been injured as a result of trade, giving notice to the workers and firms in that industry of TAA's potential benefits is warranted.

Effective Date

The provision goes into effect upon expiration of the 90-day period beginning on the date of enactment of this Act, and applies to petitions filed on or after that date.

Notification to Secretary of Commerce (Section 1712 (amending Section 225 of the Trade Act of 1974))

Present Law

Under present law, the Secretary of Labor must provide workers with information about TAA and provide whatever assistance is necessary to help petitioners apply for TAA. The Secretary must also reach out to State Vocational Education Boards and their equivalent agencies, as well as other public and private institutions, about affirmative group certification determinations and projections of training needs.

The Secretary must also notify each worker who the State has reason to believe is covered by a group certification in writing via U.S. Mail of the benefits available under TAA. If the worker lost his job before group certification, then the notice occurs at the time of certification. If the worker lost her job after group certification, then the notice occurs at the time the worker loses her job. The Secretary must also publish notice in the newspapers circulating in the area where the workers reside.

Explanation of Provision

The provision requires the Secretary of Labor, upon issuing a certification, to notify the Secretary of Commerce of the identity of the firms covered by a certification.

Reasons for Change

Firms employing workers certified as eligible for TAA benefits may not be aware that they may be eligible for assistance under the TAA for Firms program. Requiring the Secretary of Labor to notify the Secretary of Commerce when workers at a firm are certified as TAA eligible will help put these firms on notice of their potential TAA for Firms eligibility.

Effective Date

The provision goes into effect upon expiration of the 90-day period beginning on the date of enactment of this Act, and applies to petitions filed on or after that date.

3. SUBPART C—PROGRAM BENEFITS

Qualifying requirements for workers (Section 1721 (amending Section 231 of the Trade Act of 1974))

Present Law

Present law authorizes a worker to receive TAA income support (known as ''Trade Readjustment Allowance'' or ''TRA'') for weeks of unemployment that begin 60 days after the date of filing the petition on which certification was granted.

To qualify for TAA benefits, a worker must have (1) lost his job on or after the trade impact date identified in the certification, and within two years of the date of the certification determination; (2) been employed by the TAA certified firm for at least 26 of the 52 weeks preceding the layoff; and (3) earned at least $30 or more a week in that employment. A worker must qualify for, and exhaust, his State unemployment compensation (''UC'') benefits before receiving a weekly TRA.

Further, to receive TRA, a worker must be enrolled in an approved training program by the later of 8 weeks after the TAA petition was certified, or 16 weeks after job loss (the ''8/16'' deadline). The 8/16 deadline can be extended in certain limited circumstances. Workers may also receive limited waivers of the 8/16 training enrollment deadline.

Present law provides for waivers in the following circumstances: (1) the worker has been or will be recalled by the firm; (2) the worker possesses marketable skills; (3) the worker is within 2 years of retirement; (4) the worker cannot participate in training because of health reasons; (5) training enrollment is unavailable; or (6) training is not reasonably available to the worker (nothing suitable, no reasonable cost, no training funds).

Waivers last 6 months, unless the Secretary determines otherwise, and will be revoked if the basis for the waiver no longer exists. States have the authority to issue waivers. By regulation, State and local agencies must ''review'' the waivers every thirty days.

If a worker fails to begin training or has stopped participating in training without justifiable cause or if the worker's waiver is revoked, the worker will receive no income support until the worker begins or resumes training.

Explanation of Provision

The provision amends existing law to change the date on which a worker can receive TAA income support from 60 days from the date of the petition to the date of certification. The provision strikes the 8/16 rule and extends the deadline for trade-impacted workers. If a worker lost his job before the certification, then the worker has 26 weeks from the date of certification to enroll in training. If the worker lost his job after certification, he has 26 weeks from the date he lost his job to enroll in training.

The provision also gives the Secretary the authority to waive the new 26 week training enrollment deadline if a worker was not given timely notice of the deadline.

The provision clarifies that the ''marketable skills'' training waiver may apply to workers who have post-graduate degrees from accredited institutions of higher education. The provision requires the State to review training waivers 3 months after such waiver is issued, and every month thereafter.

Reasons for Change

The Conferees believe that the 60-day rule makes little sense and leads to the following scenario: a worker laid off well before certification could exhaust his unemployment insurance and yet have to wait to receive the trade readjustment assistance to which the worker was otherwise entitled.

The Government Accountability Office, the Department of Labor, the states, and workers' advocacy groups have criticized the 8/16 deadline as being too short. First, these deadlines often occur while the worker is still on traditional UI (most workers receive up to 26 weeks of State UI compensation). During those 26 weeks, most workers are actively engaged in a job search and are not focused on retraining. Forcing workers to enroll in training at such an early stage can discourage active job search. Second, typically, a worker decides to consider training only after an extended period of unsuccessful job searching. Under present law, workers are only beginning to consider training options close to the 8/16 deadline, and often make hurried decisions about training merely to preserve their TAA eligibility. Third, when large numbers of certified workers are laid off all at once, it can be difficult for TAA administrators to perform adequate training assessments and meet the 8/16 deadline. See GAO Report 04–1012. Therefore, extending the enrollment deadlines to the later of 26 weeks after layoff or certification would provide a reasonable period for a worker to search for employment and consider training options, as well as for the State to assess workers and meet the enrollment deadlines.

While recognizing the necessity of waivers in certain circumstances, states have identified the monthly review of waivers to be burdensome. Many states have complained that processing the sheer volume of waivers requires significant administrative time and cost. For example, according to GAO, 59,375 waivers were issued in 2005 (and 60,948 in 2004). The new requirement that waivers be reviewed initially three months rather than one month after they are issued reduces the administrative burden while continuing to provide for appropriate review, thus allowing the State to ensure the worker continues to qualify for the waiver. The provision does not require a review of waivers issued on the basis that an adversely affected worker is within two years of being eligible for Social Security benefits or a private pension. The status of such workers is unlikely to change and thus, automatic review of their waivers is a waste of resources. States still retain the discretion to review such waivers if circumstances warrant. When a worker has failed to meet the training enrollment deadline through no fault of his own, the Conferees believe that there should be redress. Under present law, there is none. The Department of Labor has acknowledged that this is a problem.

Effective Date

The provision goes into effect upon expiration of the 90–day period beginning on the date of enactment of this Act, and applies to petitions filed on or after that date.

Weekly amounts (Section 1722 (amending Section 232 of the Trade Act of 1974))

Present Law

TRA is the income support that workers receive weekly. It is equal to the worker's weekly UI benefit. TRA is divided into two main periods: ''Basic TRA'' and ''Additional TRA.'' Under present law, because of the operation of State UI laws, workers who are in training and working part-time run the risk of resetting their UI benefits (and their TRA benefit) at the lower part-time level which would leave them with insufficient income support to continue with training.

Explanation of Provision

The provision amends existing law to (1) disregard, for purposes of determining a worker's weekly TRA amount, earnings from a week of work equal to or less than the worker's most recent unemployment insurance benefits where the worker is working part-time and participating in full-time training; and (2) ensure that workers will retain the amount of income support provided initially under TRA even if a new UI benefit period (with a lower weekly amount) is established due to the worker obtaining part-time or short-term full-time employment.

Reasons for Change

The Conferees believe that the disincentive to combining full-time training and part-time work needs to be removed so that workers who might not otherwise be in training, but for the additional income they earn working part-time, are not excluded from the program.

Effective Date

The provision goes into effect upon expiration of the 90–day period beginning on the date of enactment of this Act, and applies to petitions filed on or after that date.

Limitations on Trade Readjustment Allowances; Allowances for Extended Training and Breaks in Training (Section 1723 (amending Section 233(a) of the Trade Act of 1974))

Present Law

Basic TRA is available for 52 weeks minus the number of weeks of unemployment insurance for which the worker was eligible (usually 26 weeks). Basic TRA must be used within 104 weeks after the worker lost his job (130 weeks for workers requiring remedial training). Any Basic TRA not used in that period is foregone.

Additional TRA is available for up to 52 more weeks if the worker is enrolled in and participating in training. The worker receives Additional TRA only for weeks in training. A worker on an approved break in training of 30 days or less is considered to be participating in training and therefore eligible for TRA during that period. Additional TRA must otherwise be used over a consecutive period (e.g., 52 consecutive weeks).

Participation in remedial training makes a worker eligible for up to 26 more weeks of TRA.

Explanation of Provision

The provision increases the number of weeks for which a worker can receive Additional TRA from 52 to 78 and expands the time within which a worker can receive such Additional TRA from 52 weeks to 91 weeks.

Reasons for Change

The Conferees believe that the program must provide incentives for eligible workers to participate in long term training, such as a two-year Associate's degree, a nursing certification, or completion of a four-year degree (if that four-year degree was previously initiated or if the worker will complete it using non-TAA funds).

Typically, workers cannot participate in a training program without TAA income support. Thus, because many workers exhaust at least some of their basic TRA while they seek another job instead of beginning training, they are limited to shorter-term training options, both practically and because training approvals are usually tied to the period of TRA eligibility. The purpose of the additional 26 weeks of income support, for a total of 78 weeks of additional TRA, is to provide an opportunity for workers to engage in long term training that might not have otherwise been a viable option.

The Conferees note that the Department of Labor's practice is to approve, before training begins, a training program consisting of a course or related group of courses designed for an individual to meet a specific occupational goal. 20 CFR 617.22(f)(3)(i). Nothing in this section is intended to change current Department of Labor practice. The additional 26 weeks of income support are intended to provide more options for long term training at the time when this individual training program is designed and approved.

In short, the new, additional income support is available only for workers in long term training.

The Conferees note that, at the same time, it is not their intent to limit the Secretary's ability, i certain, limited circumstances, to modify a worker's training program where the Secretary determines that the current training program is no longer appropriate for the individual.

Effective Date

The provision goes into effect upon expiration of the 90–day period beginning on the date of enactment of this Act, and applies to petitions filed on or after that date.

Special Rules for Calculation of Eligibility Period (Section 1724 (amending Section 233 of the Trade Act of 1974))

Present Law

There is no provision in present law.

Explanation of Provision

The provision states that periods during which an administrative or judicial appeal of a negative determination is pending will not be counted when calculating a worker's eligibility for TRA. Moreover, the provision also grants justifiable cause authority to the Secretary to extend certain applicable deadlines concerning receipt of Basic and Additional TRA. Further, the provision allows workers called up for active duty military or full-time National Guard service to restart the TAA enrollment process after completion of such service.

The provision also strikes the 210 day rule, which mandates that a worker is not eligible for additional TRA payments if the worker has not applied for training 210 days from certification or job loss, whichever is later.

Reasons for Change

The Conferees believe that tolling of deadlines is necessary; otherwise judicial relief obtained from a successful court challenge would be meaningless, as the decision of the court will inevitably take place after the TAA program eligibility deadlines have passed. The Department of Labor provides for similar tolling in its present and proposed regulations.

Similarly, the Conferees believe that affording the Secretary flexibility in instances where a worker is ineligible through no fault of her own is consistent with the spirit of the program and will help ensure that workers get the retraining they need. The amendment permits the Secretary to extend the periods during which trade readjustment allowances may be paid to an individual if there is justifiable cause. The provision does not increase the amount of such allowances that are payable. The Conferees intend that the justifiable cause extension should allow the Secretary equitable authority to address unforeseen circumstances, such as a health emergency. The 210 day deadline is superseded by the 8/16 deadline in current law, the new 26/26 enrollment deadlines under these amendments, and the requirement that a worker be in training to receive additional TRA.

Effective Date

The provision goes into effect upon expiration of the 90–day period beginning on the date of enactment of this Act, and applies to petitions filed on or after that date.

Application of State Laws and Regulations on Good Cause for Waiver of Time Limits or Late Filing of Claims (Section 1725 (amending Section 234 of the Trade Act of 1974))

Present Law

A State's unemployment insurance laws apply to a worker's claims for TRA.

Explanation of Provision

The provision makes a State's ''good cause'' law, regulations, policies, and practices applicable when the State is making determinations concerning a worker's claim for TRA or other adjustment assistance.

Reasons for Change

Most States have ''good cause'' laws allowing the waiver of a statutory deadline when the deadline was missed because of agency error or for other reasons where the claimant was not at fault. These good cause laws apply to administration of State UI laws. The Department of Labor, by regulation, has precluded application of State good cause laws to TAA. This prohibition unjustifiably penalizes workers who miss a deadline through no fault of their own.

Effective Date

The provision goes into effect upon expiration of the 90-day period beginning on the date of enactment of this Act, and applies to petitions filed on or after that date.

Employment and Case Management Services; Administrative Expenses and Employment and Case Management Services (Sections 1726 and 1727 (amending Section 235 of the Trade Act of 1974))

Present Law

Present law requires the Secretary of Labor to make ''every reasonable effort'' to secure services for affected workers covered by a certification including ''counseling, testing, and placement services'' and ''[s]upportive and other services provided for under any other Federal law,'' including WIA one-stop services. Typically, the Secretary provides these services through agreements with the States.

Explanation of Provision

The provisions require the Secretary and the States to, among other things (1) perform comprehensive and specialized assessments of enrollees' skill levels and needs; (2) develop individual employment plans for each impacted worker; and (3) provide enrollees with (a) information on available training and how to apply for such training, (b) information on how to apply for financial aid, (c) information on how to apply for such training, (d) short-term prevocational services, (e) individual career counseling, (f) employment statistics information, and (g) information on the availability of supportive services.

The provision requires the Secretary, either directly or through the States (through cooperating agreements), to make the employment and case management services described in section 235 available to TAA eligible workers. TAA eligible workers are not required to accept or participate in such services, however, if they choose not to do so.

These provisions provide for each State to receive funds equal to 15 percent of its training funding allocation on top of its training fund allocation. Not more than two-thirds of these additional funds may be used to cover administrative expenses, and not less than one-third of such funds may be used for the purpose of providing employment and case management services, as defined under section 235. Finally, the section provides for an additional $350,000 to be provided to each State annually for the purpose of providing employment and case management services.

With respect to these latter funds, States may decline or otherwise return such funds to the Secretary.

Reasons for Change

States incur costs to administer the TAA program, including for processing applications and providing employment and case management services. While appropriators customarily provide the Department of Labor with administrative funds equal to 15 percent of the total training funds for disbursement to the States, the Conferees believe that this practice should be codified, with the changes discussed above.

The Conferees believe that the employment services and case management funding provided for in this section should be in addition to, and not offset, any funds that the State would otherwise receive under WIA or any other program.

Effective Date

The provision goes into effect upon expiration of the 90-day period beginning on the date of enactment of this Act, and applies to petitions filed on or after that date.

Training Funding (Section 1728 (amending Section 236 of the Trade Act of 1974))

Present Law

The total amount of annual training funding provided for under present law is $220,000,000. During the year, if the Secretary determines that there is inadequate funding to meet the demand for training, the Secretary has the authority to decide how to apportion the remaining funds to the States.

Based on internal department policy, at the beginning of each fiscal year, the Department of Labor allocates 75 percent of the training funds to States based on each State's training expenditures and the average number of training participants over the previous 2 1/2 years. The previous year's allocation serves as a floor. The Department of Labor also has a ''hold harmless'' policy that ensures that each State's initial allocation can be no less than 85 percent of its initial allocation in the previous year. The Department of Labor holds the remaining 25 percent in reserve to distribute to States throughout the year according to need; most of the remaining funds are disbursed at the end of the fiscal year. States have 3 years to spend their federal funds. If the funds are not spent, the money reverts back to the General Treasury.

Under present law, the Secretary shall approve training if (1) there is no suitable employment; (2) the worker would benefit from appropriate training; (3) there is a reasonable expectation of employment following training (although not necessarily immediately available employment); (4) the approved training is reasonably available to the worker; (5) the worker is qualified for the training; and (6) training is suitable and available at a reasonable cost. ''Insofar as possible,'' the Secretary is supposed to ensure the provision of training on the job. Training will be paid for directly by the Secretary or using vouchers.

One of the statutory criteria for approval of training is that the worker be qualified to undertake and complete such training. The statute doesn't specifically address how the income support available to a worker is to be considered in determining the length of training the worker is qualified to undertake. Another of the statutory training approval criteria is that the training is available at a reasonable cost. The statute doesn't specifically address if funds other than those available under TAA may be considered in making this determination.

Explanation of Provision

The provision strikes the obsolete requirement that the Secretary of Labor shall ''assure the provision'' of training on the job.

This provision increases the training cap from $220,000,000 to $575,000,000 in FY2009 and FY2010, prorated for the period beginning October 1, 2010 and ending December 31, 2010. The provision requires the Secretary to make an initial distribution of training funds to the States as soon as practicable after the beginning of the fiscal year based on the following criteria: (1) the trend in numbers of certified workers; (2) the trend in numbers of workers participating in training; (3) the number of workers enrolled in training; (4) the estimated amount of funding needed to provide approved training; and (5) other factors the Secretary determines are appropriate. The provision specifies that initial distribution of training funds to a State may not be less than 25 percent of the initial distribution to that State in the previous fiscal year.

The provision requires the Secretary to establish procedures for the distribution of the funds held in reserve, which may include the distribution of such funds in response to requests made by States in need of additional training funds. The provision also requires the Secretary to distribute 65 percent of the training funds in the initial distribution, and to distribute at least 90 percent of training funds for a particular fiscal year by July 15 of that fiscal year.

The provision directs the Secretary to decide how to distribute funds if training costs will exceed available funds.

The provision would specify that in determining if a worker is qualified to undertake and complete training, the training may be approved for a period that is longer than the period for which TRA is available if the worker demonstrates the financial ability to complete the training after TRA is exhausted. It is intended that financial ability means the ability to pay living expenses while in TAA-funded training after the period of TRA eligibility.

The provision would specify that in determining whether the costs of training are reasonable, the Secretary may consider whether other public or private funds are available to the worker, but may not require the worker to obtain such funds as a condition for approval of training. This means, for example, that if a training program would be determined not to have a reasonable cost if only the use of TAA training funds were considered, the Secretary may consider the availability of other public and private funds to the worker. If the worker voluntarily commits to using such funds to supplement the TAA training funds to pay for the training program, the training program may be approved. However, the Secretary may not require the worker to use the other public or private funds where the costs of the training program would be reasonable using only TAA training funds.

Finally, the provision requires the Secretary to issue regulations in consultation with the Senate Finance Committee and the House Committee on Ways and Means.

Reasons for Change

The Conferees believe that the training cap needs to be increased for two reasons. First, more funding is needed to cover the expanded group of TAA eligible workers because of changes made elsewhere in the bill (*e.g.*, coverage of service workers, expanded coverage of manufacturing workers). Second, during high periods of TAA usage, the existing training funding has proved to be insufficient. Some states have run out of training funds, resulting in some States freezing enrollment of eligible workers in training. See GAO–04–1012.

As the GAO has documented, there are significant problems with the Department's method of allocating training funds. The primary problem is that the Department of Labor's method of allocation appears to result in insufficient funds for some States. This appears to be occurring because of the Department's reliance on historical usage and a ''hold harmless'' policy. In particular, States that were experiencing heavy layoffs at the time the initial allocation formula was implemented may no longer be experiencing layoffs at the same rate, but still receive significant allocations from the Department. In contrast, a State experiencing relatively few layoffs several years ago may now have far greater numbers of layoffs, but still receives a limited amount in its distribution. In short, the allocation that States receive at the beginning of the fiscal year may not reflect their present demand for training services. The provision addresses these problems by lowering the ''hold harmless'' provision to 25 percent, requiring initial and subsequent distributions to be based on need, and by requiring that 90 percent of the funds be allocated by July 15 of each fiscal year. Additionally, the Conferees expect the Secretary to distribute the remaining funds as soon as possible after that date.

In order to facilitate the approval of longer-term training, the Conferees intend to ensure that the period of approved training is not necessarily limited to the duration of TRA. Where the worker demonstrates the ability to pay living expenses while in TAA funded training after TRA is exhausted, such training should be approved if the other training approval criteria are also met.

The Conferees intend to ensure that training programs that would otherwise not be approved under TAA due to costs may be approved if a worker voluntarily commits to using supplemental public or private funds to pay a portion of the costs.

It is also the intent that, together, these amendments to the training approval criteria allow training to be approved for a period that is longer than the period for which TRA and TAA-funded training is available if the worker demonstrates the financial ability to pay living expenses and pay for the additional training costs using other funds after TRA and the TAA-funded training are exhausted.

Effective Date

The provision increasing the training cap goes into effect upon the date of enactment of this Act. The provisions relating to training fund distribution procedures go into effect October 1, 2009. The other provisions in this section go into effect upon expiration of the 90–day period beginning on the date of enactment of this Act, and apply to petitions filed on or after that date.

Prerequisite Education, Approved Training Programs (Section 1729 (amending Section 236 of the Trade Act of 1974))

Present Law

Under present law, approvable training includes employer-based training (on-the-job training/customized training), training approved under the Workforce Investment Act of 1998, training approved by a private industry council, any remedial education program, any training program whose costs are paid by another federal or State program, and any other program approved by the Secretary. Additionally, remedial training is approvable and participation in such training makes a worker eligible for up to 26 more weeks of TAA-related income support.

Explanation of Provision

The provision clarifies that existing law allows training funds to be used to pay for apprenticeship programs, any prerequisite education required to enroll in training, and training at an accredited institution of higher education (such as those covered by 102 of the Higher Education Act), including training to obtain or complete a degree or certification program (where completion of the degree or certification can be reasonably expected to result in employment). The provision also prohibits the Secretary from limiting training approval to programs provided pursuant to the Workforce Investment Act of 1998.

The provision offers up to an additional 26 weeks of income support while workers take prerequisite training or remedial training necessary to enter a training program. A worker may enroll in remedial training or prerequisite training, or both, but may not receive more than 26 weeks of additional income support.

Reasons for Change

Present law does not explicitly state whether TAA training funds may be used to obtain a college or advanced degree. Some States have interpreted this silence to preclude enrollment in a two-year community college or four-year college or university as a training option, even where a TAA participant was working towards completion of a degree prior to being laid off. The Conferees believe that States should be encouraged to approve the use of training funds by TAA enrollees to obtain training or a college or advanced degree, including degrees offered at two-year community colleges and four-year colleges or universities.

While a worker can obtain additional income support while participating in remedial training, there is no corollary support for workers participating in prerequisite training (e.g., individuals enrolling in nursing usually need basic science prerequisites, which are not considered qualifying remedial training). States have requested additional income support for workers who participate in prerequisite training.

The Conferees believe that while WIA-approved training is an approvable TAA training option, it should not be the only one that TAA enrollees are authorized to pursue. The Conferees are concerned that some States have restricted training opportunities to those approved under WIA. According to the Congressional Research Service, many community colleges, for instance, do not get WIA certification because of its costly reporting requirements. To limit TAA training opportunities in this way unacceptably curbs the scope of training that TAA enrollees might elect to participate in and potentially impairs their ability to get retrained and reemployed.

Effective Date

The provision goes into effect upon expiration of the 90–day period beginning on the date of enactment of this Act, and applies to petitions filed on or after that date.

Pre-Layoff and Part-Time Training (Section 1730 (amending Section 236 of the Trade Act of 1974))

Present Law

Present law does not permit pre-layoff or part-time training.

Explanation of Provision

This provision specifies that the Secretary may approve training for a worker who (1) is a member of a group of workers that has been certified as eligible to apply for TAA benefits; (2) has not been totally or partially separated from employment; and (3) is determined to be individually threatened with total or partial separation. Such training may not include on-the-job training, or customized training unless such customized training is for a position other than the worker's current position.

Additionally, the provision permits the Secretary to approve part-time training, but clarifies that a worker enrolled in part-time training is not eligible for a TRA.

Reasons for Chance

This provision explicitly establishes Congress' intent that workers be eligible to receive pre-layoff and part-time training.

Effective Date

The provision goes into effect upon expiration of the 90–day period beginning on the date of enactment of this Act, and applies to petitions filed on or after that date.

On-the-Job Training (Section 1731 (amending Section 236 of the Trade Act of 1974))

Present Law

Current law provides that the Secretary may approve on-the-job training (''OJT''), but does not govern the content of acceptable OJT.

Explanation of Provision

This provision permits the Secretary to approve OJT for any adversely affected worker if the worker meets the training requirements, and the Secretary determines the OJT (1) can reasonably lead to employment with the OJT employer; (2) is compatible with the worker's skills; (3) will allow the worker to become proficient in the job for which the worker is being trained; and (4) the State determines the OJT meets necessary requirements. The Secretary may not enter into contracts with OJT employers that exhibit a pattern of failing to provide workers with continued long-term employment and adequate wages, benefits, and working conditions as regular employees.

Reasons for Change

The provision incorporates requirements to ensure OJT is effective. Specifically, OJT must be (1) reasonably expected to lead to suitable employment; (2)compatible with the workers' skills; and (2) include a State-approved benchmark-based curriculum. Moreover, the provision is intended to prevent employers from treating workers participating in OJT differently in terms of wages, benefits, and working conditions from regular employees who have worked a similar period of time and are doing the same type of work.

Effective Date

The provision goes into effect upon expiration of the 90–day period beginning on the date of enactment of this Act, and applies to petitions filed on or after that date.

Eligibility for Unemployment Insurance and Program Benefits While in Training (Section 1732 (amending Section 236 of the Trade Act of 1974))

Present Law

Current law states that a worker may not be deemed ineligible for UI (and thus, TAA) if they are in training or leave unsuitable work to enter training.

Explanation of Provision

The provision states that a worker will not be ineligible for UI or TAA if the worker (1) is in training, even if the worker does not meet the requirements of availability for work, active work search, or refusal to accept work under Federal and State UI law; (2) leaves work to participate in training, including temporary work during a break in training; or (3) leaves OJT that did not meet the requirements of this Act within 30 days of commencing such training.

Reasons for Change

The Conferees are concerned that confusion in present UI law surrounding a worker's decision to quit work to enter training and the ramifications of that decision from a UI eligibility perspective may preclude a worker from being able to participate in TAA training. The provision is meant to eliminate that confusion.

Effective Date

The provision goes into effect upon expiration of the 90-day period beginning on the date of enactment of this Act, and applies to petitions filed on or after that date.

Job Search and Relocation Allowances (Section 1733 (amending Section 237 of the Trade Act of 1974))

Present Law

The Secretary may grant an application for a job search allowance where (1) the allowance will help the totally separated worker find a job in the United States; (2) suitable employment is not available in the local area; and (3) the application is filed by the later of (a) 1 year from separation, (b) 1 year from certification, or (c) 6 months after completing training (unless the worker received a waiver, in which case the worker must file by the later of one year after separation or certification). A worker may be reimbursed for 90 percent of his job search costs, up to $1,250.

The Secretary may grant an application for a relocation allowance where: (1) the allowance will assist a totally separated worker relocate within the United States; (2) suitable employment is not available in the local area; (3) the affected worker has no job at the time of relocation; (4) the worker has found suitable employment that may reasonably be expected to be of long-term duration; (5) the worker has a bona fide offer of employment; and (6) the worker filed the application the later of (a) 425 days from separation, (b) 425 days from certification, or (c) 6 months after completing training (unless the worker received a waiver, in which case the worker must file by the later of 425 days after separation or certification). A worker may be reimbursed for 90 percent of his relocation costs plus a lump sum payment of three times the worker's weekly wage up to $1,250.

Explanation of Provision

The provision reimburses 100 percent of a worker's job search expenses, up to $1,500, and 100 percent of a worker's relocation expenses, and increases the additional lump sum payment for relocation to a maximum of $1,500. It also strikes the provision in existing law under which a worker who has completed training but who received a prior training waiver has a shorter period to apply for a job search allowance and relocation allowance than other workers who have completed training.

Reasons for Change

The Conferees believe that the job search and relocation allowances need to be increased to reflect the cost of inflation and the cost and difficulty a worker faces when looking for work and taking a job outside the worker's local community.

The Conferees believe that workers completing training should have the same periods after training to apply for job search and relocation allowances irrespective of whether a worker received a waiver from the enrollment in training requirements prior to undertaking and completing the training. This period allows workers a reasonable opportunity to obtain the same assistance as other workers needed to find and relocate to a new job after being trained.

Effective Date

The provision goes into effect upon expiration of the 90–day period beginning on the date of enactment of this Act, and applies to petitions filed on or after that date.

4. SUBPART D—REEMPLOYMENT TRADE ADJUSTMENT ASSISTANCE PROGRAM

Reemployment Trade Adjustment Assistance Program (Section 1741 (amending Section 246 of the Trade Act of 1974))

Present Law

The Trade Act of 2002 created a demonstration project for alternative trade adjustment assistance for older workers (ATAA or ''wage insurance''). Through this program, some workers who are eligible for TAA and reemployed at lower wages may receive a partial wage subsidy. Under the program, States use Federal funds provided under the Trade Act to pay eligible workers up to 50 percent of the difference between reemployment wages and wages at the time of separation. Eligible workers may not earn more than $50,000 in reemployment wages, and total payments to a worker may not exceed $10,000 during a maximum period of two years. In addition to having been certified for TAA, such workers must be at least 50 years of age, obtain full-time reemployment with a new firm within 26 weeks of separation from employment, and have been separated from a firm that is specifically certified for ATAA. When considering certification of a firm for ATAA, the Secretary of Labor considers whether a significant number of workers in the firm are 50 years of age or older and possess skills that are not easily transferable. ATAA beneficiaries may not receive TAA benefits other than the Health Coverage Tax Credit (HCTC).

Explanation of Provision

The provision renames ATAA ''reemployment TAA.'' The provision eliminates the requirement that a group of workers (in addition to individuals) be specifically certified for wage insurance in addition to TAA certification. The provision eliminates the current-law requirement that a worker must find employment within 26 weeks of being laid off to be eligible for the wage insurance benefit, and replaces it with a requirement that the clock on the two-year duration of the benefit begin at the sooner of exhaustion of regular unemployment benefits or reemployment, allowing initial receipt of the wage insurance benefit at any point during that two-year period. The provision allows workers to shift from receiving a TRA, while training, to receiving reemployment TAA, while employed, at any point during the two-year period. The provision increases the limit on wages in eligible reemployment from $50,000 a year to $55,000 a year. Similarly, it increases the maximum wage insurance benefit (over two years) from up to $10,000 to up to $12,000.

The provision lifts the restriction on wage insurance recipients' participation in TAA-funded training. It also permits workers reemployed less than full-time, but at least 20 hours a week, and in approved training, to receive the wage insurance benefit (which would be prorated if the worker is reemployed for fewer hours compared to previous employment).

Reasons for Change

The Conferees believe that the reemployment TAA, or wage insurance, program is a potentially beneficial option for many older workers, but it includes unnecessary barriers to participation. The Conferees believe that changes to section 246 of the Trade Act will make the wage insurance program a more viable option for many more potentially interested workers. Inflation has lessened the maximum value of the available benefit, and increasing personal, nominal, median income has lowered the share of workers eligible to participate in the program. Several other requirements make the program inaccessible and unattractive.

Findings from the Government Accountability Office (GAO) highlight the need to reform specific aspects of the program. First, the 26–week reemployment deadline was cited by the GAO as one of ''two key factors [that] limit participation.'' The GAO went on to note that ''[o]fficials in States [the GAO] visited said that one of the greatest obstacles to participation was the requirement for workers to find a new job within 26 weeks after being laid off. For example, according to officials in one State, 80 percent of participants who were seeking wage insurance but were unable to obtain it failed because they could not find a job within the 26–week period. The challenges of finding a job within this time frame may be compounded by the fact that workers may actually have less than 26 weeks to secure a job if they are laid off prior to becoming certified for TAA. For example, a local caseworker in one State [the GAO] visited said that the 26 weeks had passed completely before a worker was certified for the benefit.'' Additionally, the GAO found that automatically certifying workers for the wage insurance benefit would cut the Department of Labor's workload and promote program participation. Currently, workers opting for wage insurance must also surrender eligibility for TAA-funded training and be reemployed full-time. The provision eliminates these restrictions.

The Conferees believe that eliminating the 26–week deadline for reemployment, eliminating the need for firms to be certified for wage insurance, eliminating the prohibition on wage insurance beneficiaries receiving TAA-funded training, and allowing part-time workers and former TRA recipients access to the wage insurance benefit should make the wage insurance program more accessible and attractive.

Effective Date

The provision goes into effect upon expiration of the 90-day period beginning on the date of enactment of this Act, and applies to petitions filed on or after that date.

5. SUBPART E—OTHER MATTERS

Office of Trade Adjustment Assistance (Section 1751 (amending Subchapter C of chapter 2 of title II of the Trade Act of 1974))

Present Law

The TAA for Workers program is currently operated by the Employment and Training Administration at the Department of Labor.

Explanation of Provision

The provision creates an Office of Trade Adjustment Assistance headed by an administrator who shall report directly to the Deputy Assistant Secretary for Employment and Training Administration. Under the provision, the administrator will be responsible for overseeing and implementing the TAA for Workers program and carrying out functions delegated to the Secretary of Labor, including: making group certification determinations; providing TAA information and assisting workers and others assisting such workers prepare petitions or applications for program benefits (including health care benefits); ensuring covered workers receive Section 235 employment and case management services; ensuring States comply with the terms of their Section 239 agreements; advocating for workers applying for benefits; and operating a hotline that workers and employers may call with questions about TAA benefits, eligibility requirements, and application procedures.

The provision requires the administrator to designate an employee of the Department with appropriate experience and expertise to receive complaints and requests for assistance, resolve such complaints and requests, compile basic information concerning the same, and carry out other tasks that the Secretary specifies.

Reasons for Change

It is the view of the Conferees that creating an Office of Trade Adjustment Assistance in the Department of Labor with primary accountability for the management and performance of the TAA for Workers program will improve the program's operation.

The creation of the Office of Trade Adjustment Assistance should not interfere with the coordination of services provided by TAA, the National Emergency Grant program, and Department of Labor Rapid Response services.

Effective Date

The provision goes into effect upon expiration of the 90-day period beginning on the date of enactment of this Act.

Accountability of State Agencies; Collection and Publication of Program Data; Agreements with States (Section 1752 (amending Section 239 of the Trade Act of 1974))

Present Law

Present law gives the Secretary of Labor the authority to delegate to the States through agreements many aspects of TAA implementation, including responsibilities to (1) receive applications for TAA and provide payments; (2) make arrangements to provide certain employment services through other Federal programs; and (3) issue waivers. It also mandates that any agreement entered into shall include sections requiring that the provision of TAA services and training be coordinated with the provision of Workforce Investment Act (WIA) services and training. In carrying out its responsibilities, each State must notify workers who apply for UI about TAA, facilitate early filing for TAA benefits, advise workers to apply for training when they apply for TRA, and interview affected workers as soon as possible for purposes of getting them into training. States must also submit to the Department of Labor information like that provided under a WIA State plan.

Explanation of Provision

The provision requires the Secretary, either directly or through the States (through cooperating agreements), to make the employment and case management services described in the amended section 235 available to TAA eligible workers. TAA eligible workers are not required to accept or participate in such services, however, if they choose not to do so. The provision requires States and cooperating State agencies to implement effective control measures and to effectively oversee the operation and administration of the TAA program, including by monitoring the operation of control measures to improve the accuracy and timeliness of reported data. The provision also requires States and cooperating State agencies to report comprehensive performance accountability data to the Secretary, on a quarterly basis.

Reasons for Change

To ensure that the employment and case management services described in the amended section 235 are made available to TAA enrollees as required under that section, the Conferees believe that it is necessary to incorporate those obligations into the agreements that the Department of Labor enters into with each of the States concerning the administration of TAA.

Effective Date

The provision goes into effect upon expiration of the 90-day period beginning on the date of enactment of this Act, and applies to petitions filed on or after that date.

Verification of Eligibility for Program Benefits (Section 1753 (amending Section 239 of the Trade Act of 1974))

Present Law

There is no provision in present law.

Explanation of Provision

Section 1753 requires a State to re-verify the immigration status of a worker receiving TAA benefits using the Systematic Alien Verification for Entitlements (SAVE) Program (42 U.S.C. 1320b–7(d)) if the documentation provided during the worker's initial verification for the purposes of establishing the worker's eligibility for unemployment compensation would expire during the period in which that worker is potentially eligible to receive TAA benefits.

The section also requires the Secretary to establish procedures to ensure that the reverification process is implemented properly and uniformly from State to State.

Reasons for Change

This provision is intended to ensure that workers maintain a satisfactory immigration status while receiving benefits. This section was included for the purposes of the TAA program only and should not be extended to other programs.

Effective Date

The provision goes into effect upon expiration of the 90-day period beginning on the date of enactment of this Act, and applies to petitions filed on or after that date.

Collection of Data and Reports; Information to Workers (Section 1754 (amending Subchapter C of chapter 2 of title II of the Trade Act of 1974))

Present Law

Present law does not contain statutory language requiring the collection of data or performance goals and the TAA program has suffered a history of problems with its performance data that has undermined the data's credibility and limited their usefulness. Most of the outcome data reported in a given program year actually reflects participants who left the program up to 5 calendar quarters earlier. In addition, as of FY 2006, the Department of Labor does not consistently report TAA data by State or industry or by services or benefits received.

While the Department of Labor has take some steps aimed at improving performance data, the data remain suspect and fail to capture outcomes for some of the program's participants, and many participants are not included in the final outcomes at all.

Explanation of Provision

The provision would require the Secretary of Labor to implement a system for collecting data on all workers who apply for or receive TAA. The system must include the following data classified by State, industry, and nationwide totals: number of petitions; number of workers covered; average processing time for petitions; a breakdown of certified petitions by the cause of job loss (increased imports etc.); the number of workers receiving benefits under any aspect of TAA (broken down by type of benefit); the average time during which workers receive each type of benefit; the number of workers enrolled in training, classified by type of training; the average duration of training; the number and type of training waiver granted; the number of workers who complete and do not complete training; data on outcomes, including the sectors in which workers are employed after receiving benefits; and data on rapid response activities.

The provision would also require, by December 15 of each year, the Secretary to provide to the Senate Finance Committee and the House Committee on Ways and Means a report that includes a summary of the information above, information on distributions of training funds under section 236(a)(2), and any recommendations on whether changes to eligibility requirements, benefits, or training funding should be made based on the data collected. Those data must be made available to the public on the Department of Labor's website in a searchable format and must be updated quarterly.

Reasons for Change

The Conferees believe that valuable information on TAA and its impact is neither being collected nor being made publicly available. This, in turn, inhibits the ability of Congress to perform its oversight responsibilities and, if necessary, to refine and improve the program, its performance, and worker outcomes. Additionally, the Conferees believe that all of the data that the Department of Labor gathers should be made available and posted on its website in a searchable format. This will enhance the accountability of the TAA program and the Department of Labor, not just to Congress, but to the American people as well.

Effective Date

The provision goes into effect on the date of enactment of this Act.

Fraud and recovery of overpayments (Section 1755 (amending Section 243(a)(1) of the Trade Act of 1974))

Present Law

An overpayment of TAA benefits may be waived if, in accordance with the Secretary's guidelines, the payment was made without fault on the part of such individual, and requiring such repayment would be contrary to "equity and good conscience."

Explanation of Provision

The provision states that the Secretary shall waive repayment if the overpayment was made without fault on the part of such individual and if repayment "would cause a financial hardship for the individual (or the individual's household, if applicable) when taking into consideration the income and resources reasonably available to the individual or household and other ordinary living expenses of the individual or household."

Reasons for Change

The Conferees believe that the Department of Labor has adopted a very strict standard for issuing overpayment waivers. In particular, 20 CFR 617.55(a)(2)(ii)(C) defines equity and good conscience to require "extraordinary and lasting financial hardship" that would "result directly" in the "loss of or inability to obtain minimal necessities of food, medicine, and shelter for a substantial period of time" and "may be expected to endure for the foreseeable future." The Conferees understand that no worker has met this strict waiver standard. In including standard statutory waiver language in TAA, there is no indication that Congress intended to make waivers impossible to secure. To the contrary, the Conferees believe that Congress intended that overpaid individuals who are without fault and unable to repay their TAA overpayments should have a reasonable opportunity for waivers of the requirement to return those overpayments. The provision clarifies this intent.

Effective Date

The provision goes into effect upon expiration of the 90-day period beginning on the date of enactment of this Act, and applies to petitions filed on or after that date.

Sense of Congress on Application of Trade Adjustment Assistance (Section 1756 (amending Section Chapter 5 of title II of the Trade Act of 1974))

Present Law

There is no provision in present law.

Explanation of Provision

The provision expresses the Sense of Congress that the Secretaries of Labor, Commerce, and Agriculture should apply the provisions of their respective trade adjustment assistance programs with the utmost regard for the interests of workers, firms, communities, and farmers petitioning for benefits.

Reasons for Change

Courts reviewing determinations by the Department of Labor regarding certification for trade adjustment assistance have stated that the Department is obliged to conduct its investigations with "utmost regard for the interests of the petitioning workers." See, e.g., Former Employees of Komatsu Dresser v. United States Secretary of Labor, 16 C.I.T. 300, 303 (1992) (citations omitted). The courts have explained that such statements flow from the ex parte nature of the Department's certification process (as opposed to a judicial or quasi-judicial proceeding) and the remedial purpose of the trade adjustment assistance program. This section reflects such statements and extends them to the firms, farmers, and communities programs.

Effective Date

The provision goes into effect upon expiration of the 90-day period beginning on the date of enactment of this Act, and applies to petitions filed on or after that date.

Consultations in Promulgation of Regulations (Section 1757 (amending Section 248 of the Trade Act of 1974))

Present Law

The Secretary is required to prescribe necessary regulations.

Explanation of Provision

This provision requires the Secretary to consult with the Senate Finance Committee and the House Committee on Ways and Means 90 days prior to the issuance of a final rule or regulation.

Reasons for Change

Requiring that the Secretary consult with the relevant committees 90 days prior to the issuance of a final rule or regulations will help ensure that such rules and regulations reflect Congress' intent.

Effective Date

The provision goes into effect upon expiration of the 90-day period beginning on the date of enactment of this Act, and applies to petitions filed on or after that date.

B. PART II—TRADE ADJUSTMENT ASSISTANCE FOR FIRMS

Trade Adjustment Assistance for Firms (Section 1761–1767 (amending Sections 251, 254, 255, 256, 257, and 258 of the Trade Act of 1974))

Present Law

A firm may file a petition for certification with the Secretary of Commerce. Upon receipt of the petition, the Secretary shall publish a notice in the Federal Register that the petition has been received and is being investigated. The petitioner, or anyone else with a substantial interest, may request a public hearing concerning the petition.

To be certified to receive TAA benefits, a firm must show (1) a "significant" number of workers became or are threatened to become totally or partially separated; (2) sales or production of an article, or both, decreased absolutely, or sales or production, or both, of an article that accounted for not less than 25 percent of the total production or sales of the firm during the 12-month period preceding the most recent 12-month period for which data are available have decreased absolutely; and (3) increased imports of competing articles "contributed importantly" to the decline in sales, production, and/or workforce.

A firm certified under section 251 has two years in which to file an adjustment assistance application, which must include an economic adjustment proposal.

In deciding whether to approve an application, the Secretary of Commerce must determine that the proposal (1) is reasonably calculated "to materially contribute" to the economic adjustment of the firm; (2) gives adequate consideration to the interests of the firm's workers; and (3) demonstrates that the firm will use its own resources for adjustment.

Criminal and civil penalties are applicable for, among other things, making false statements or failing to disclose material facts. However, the penalties do not cover the acts and omissions of customers or others responding to queries made in the course of an investigation of a firm's petition.

The Secretary must make its decisions within 60 days.

Explanation of Provision

The provision makes service sector firms potentially eligible for benefits under the TAA for Firms program. It also expands the look back so that all firms can use the average of one, two, or three years of sales or production data, as opposed to one year, to show that the firm's sales, production, or both, have decreased absolutely or that the firm's sales, production, or both of an article or service that accounts for at least 25 percent of its total production, or sales have decreased absolutely.

In determining eligibility, the provision makes clear that the Secretary may use data from the preceding 36 months to determine an increase in imports, and may determine that increased imports exist if customers accounting for a significant percentage of the decline in a firm's sales or production certify that their purchases of imported articles or services have increased absolutely or relative to the acquisition of such articles or services from suppliers in the United States.

The provision requires the Secretary of Commerce, upon receiving information from the Secretary of Labor that the workers of a firm are TAA-covered, to notify the firm of its potential TAA eligibility.

The provision requires the Secretary of Commerce to provide grants to intermediary organizations to deliver TAA benefits. The provision requires the Secretary to endeavor to align the contracting schedules for all such grants by 2010, and to provide annual grants to the intermediary organizations thereafter. The provision requires the Secretary to develop a methodology to ensure prompt initial distribution of a portion of the funds to each of the intermediary organizations, and to determine how the remaining funds will be allocated and distributed to them. The Secretary must develop the methodology in consultation with the Senate Finance Committee and the House Committee on Ways and Means.

The provision amends the penalties provision in section 259 to cover entities, including customers, providing information during an investigation of a firm's petition. Additionally, the provision requires the Secretary of Commerce to submit an annual report demonstrating the operation, effectiveness, and outcomes of the TAA for Firms program to the Senate Finance Committee and the House Committee on Ways and Means, and to make the report available to the public. The methodology for the distribution of funds to the intermediary organizations shall include criteria based on the data in the report. The provision creates rules relating to the disclosure of confidential business information included in this annual report.

Reasons for Change

Most service sector firms are currently ineligible for the TAA for Firms program because of a statutory requirement that the workers must have been employed by a firm that produces an ''article.'' In an era when 80 percent of U.S. workers are employed in the service sector, the Conferees believe service sector firms should be eligible for TAA.

The Conferees also note that firms currently have a limited ''look back'' under existing law, which unfairly restricts their ability to show that increased imports are hurting their businesses.

Because data is not always readily available to demonstrate an increase in imports of articles or services, or to show how such increased imports compete with the articles or services of a particular firm, the Conferees believe that the Secretary should be able to utilize information from the customers of a firm that account for a significant percentage of the decline in the firm's sales or production to verify these customers have increased their imports of the relevant articles or services, either absolutely or relative to their purchases from domestic suppliers.

Since a firm may not know that it could be eligible for TAA benefits, despite the fact that workers at the firm have qualified for the TAA for workers program, the Conferees believe it is important to give these firms notice of their potential eligibility for TAA benefits.

The Conferees are concerned that at present, the Economic Development Administration (EDA) is entering into contracts with intermediary organizations that vary in length. Thus, the contracts begin and end at different times during the year. The provision requires the Secretary of Commerce to provide grants to intermediary organizations to deliver TAA benefits and, to the maximum extent practicable, that contracts with such organizations be for 12 month periods and have the same beginning and end dates. The Conferees will leave it to the discretion of the Secretary to determine the appropriate 12 month contract cycle.

The Conferees also believe that the methodology for distributing funds to intermediary organizations should be based in part on their performance, the number of firms they serve, and the outcomes of firms completing the program. The Secretary of Commerce should consult Congress before finalizing such methodology.

The Conferees understand that some customers provide inaccurate or incomplete information in response to questionnaires posed by the Secretary. The penalty language included in this provision is designed to address this problem.

Effective Date

The provision goes into effect upon expiration of the 90-day period beginning on the date of enactment of this Act, and applies to petitions filed on or after that date.

Extension of Authorization of Trade Adjustment Assistance for Firms (Section 1764)

Present Law

The authorization of the TAA for Firms program expired on December 31, 2007. The program is currently authorized at $16 million per year.

Explanation of Provision

The provision reauthorizes the program through December 31, 2010, and increases its funding to $50 million per year for fiscal years 2009 and 2010, and prorates such funding for the period beginning October 1, 2010 and ending December 31, 2010. Of that amount, $350,000 is set aside each year to fund full-time TAA for Firms positions at the Department of Commerce, including a director of the TAA for Firms program.

Reasons for Change

The Conferees believe that the TAA for Firms program has been underfunded, as at least $15 million in approved projects lack funding. Additionally, the Firms team at the Department of Commerce lacks adequate full-time staff to administer the program.

Effective Date

The provision goes into effect upon expiration of the 90-day period beginning on the date of enactment of this Act, and applies to petitions filed on or after that date.

C. PART III—TRADE ADJUSTMENT ASSISTANCE FOR COMMUNITIES

Trade Adjustment Assistance for Communities (Section 1771–1773)

Present Law

There is no provision in present law.

Explanation of Provision

The provision creates a Trade Adjustment Assistance for Communities program that will allow a community to apply for designation as a community affected by trade. A community may receive such designation from the Secretary of Commerce if the community demonstrates that (1) the Secretary of Labor has certified a group of workers in the community as eligible for TAA for Workers benefits, the Secretary of Commerce has certified a firm in the community as eligible for TAA for Firms benefits, or a group of agricultural producers in the community has been certified to receive benefits under the TAA for Farmers and Fishermen program; and (2) the Secretary determines that the community is significantly affected by the threat to, or the loss of, jobs associated with that certification. The Secretary of Commerce must notify the community and the Governor of the State in which the community is located upon making an affirmative determination that the community is affected by trade.

The Secretary of Commerce shall provide technical assistance to a community affected by trade to assist the community to (1) diversify and strengthen its economy; (2) identify impediments to economic development that result from the impact of trade; and (3) develop a community strategic plan to address economic adjustment and workforce dislocation in the community. The Secretary of Commerce shall also identify Federal, State and local resources available to assist the community, and ensure that Federal assistance is delivered in a targeted, integrated manner. The Secretary shall establish an Interagency Community Assistance Working Group to assist in coordinating the Federal response.

A community affected by trade may develop a strategic plan for the community's economic adjustment and submit the plan to the Secretary. The plan should be developed, to the extent possible, with participation from local, county, and State governments, local firms, local workforce investment boards, labor organizations, and educational institutions. The plan should include an analysis of the economic development challenges facing the community and the community's capacity to achieve economic adjustment to these challenges; an assessment of the community's long-term commitment to the plan and the participation of community members; a description of projects to be undertaken by the community; a description of educational opportunities and future employment needs in the community; and an assessment of the funding required to implement the strategic plan.

Of the funds appropriated, the Secretary of Commerce may award up to $25 million in grants to assist the community in developing a strategic plan.

The provision authorizes $150 million in discretionary grants to be awarded by the Secretary of Commerce. An eligible community may apply for a grant from the Secretary to implement a project or program included in the community's strategic plan. Grants may not exceed $5 million. The Federal share of the grant may not exceed 95 percent of the cost of the project and the community's share is an amount not less than 5 percent. Priority shall be given to grant applications submitted by small and medium-sized communities.

Educational institutions may also apply for Community College and Career Training grants from the Secretary of Labor. Grant proposals must include information regarding (1) the manner in which the grant will be used to develop or improve an education or training program suited to workers eligible for the TAA for Workers program; (2) the extent to which the program will meet the needs of the workers in the community; (3) the extent to which the proposal fits into a community's strategic plan or relates to a Sector Partnership Grant received by the community; and (4) any previous experience of the institution in providing programs to workers eligible for TAA. Educational institutions applying for a grant must also reach out to employers in the community to assess current deficiencies in training and the future employment opportunities in the community.

The provision authorizes $40 million in discretionary grants to be awarded by the Secretary of Labor for the Community College and Career Training Grant program. Priority shall be given to grant applications submitted by eligible institutions that serve communities that the Secretary of Commerce has certified under section 273.

The provision also establishes a Sector Partnership Grant program that allows the Secretary of Labor to award industry or sector partnership grants to facilitate efforts of the partnership to strengthen and revitalize industries. The partnerships shall consist of representatives of an industry sector; local county, or State government; multiple firms in the industry sector; local workforce investment boards established under section 117 of the Workforce Investment Act of 1998 (29 U.S.C. 2832); local labor organizations, including State labor federations and labor-management initiatives, representing workers in the community; and educational institutions.

The provision authorizes $40 million in discretionary grants to be awarded by the Secretary of Labor for the Sector Partnership Grant program. The Sector Partnership Grants may be used to help the partnerships identify the skill needs of the targeted industry or sector and any gaps in the available supply of skilled workers in the community impacted by trade; develop strategies for filling the gaps; assist firms, especially small- and medium-sized firms, in the targeted industry or sector increase their productivity and the productivity of their workers; and assist such firms to retain incumbent workers.

Reasons for Change

The TAA for Workers program provides assistance to individual workers who lose their jobs because of trade with foreign countries. The program does not, however, provide broader assistance when the closure or downsizing of a key industry, company, or plant creates severe economic challenges for an entire community impacted by trade. The Conferees believe there is a need for additional programs and incentives to assist such communities. Accordingly, the provision creates a TAA for Communities program to provide a coordinated Federal response to eligible communities by identifying Federal, State and local resources and helping such communities to access available Federal assistance.

The provision does not establish precise criteria for determining when a particular community is impacted by trade. In the view of the Conferees, this determination is better left to the discretion of the Secretary of Commerce, who can evaluate specific facts in specific cases. As a general matter, the Conferees believe the Secretary should review the underlying certification(s) that provide a basis for a community's application and evaluate the potential impact of the job losses (or threat thereof) associated with such certification(s) on the broader community, given the community's overall economic situation. The Conferees intend for the Secretary to focus grants on communities facing the most difficult hardships, to the extent practicable.

The Conferees believe small- and medium-sized communities, and in particular, those in rural areas where the manufacturing sector has historically been a significant employer, would benefit from the technical assistance and grants available through this program. Such communities have been disproportionately impacted by the adverse effects of trade, where some lumber mills, factories and call centers, for instance, have scaled back operations or closed entirely in response to increased trade and globalization.

The Conferees do not intend for the preference for such communities to result in all grants, or the majority of grants, going to such communities to the exclusion of other impacted communities.

Effective Date

The provision goes into effect upon expiration of the 90-day period beginning on the date of enactment of this Act.

Authorization of Appropriations for Trade Adjustment Assistance for Communities (Section 1772)

Present Law

There is no provision in present law.

Explanation of Provision

The provision authorizes $150,000,000 to the Secretary of Commerce for each of fiscal years 2009 and 2010, and $37,500,000 for the period beginning October 1, 2010 through December 31, 2010 to carry out the TAA for Communities program.

The provision authorizes $40,000,000 to the Secretary of Labor for each of fiscal years 2009 and 2010, and $10,000,000 for the period beginning October 1, 2010 through December 31, 2010 to carry out the Community College and Career Training Grant Program.

The provision authorizes $40,000,000 to the Secretary of Labor for each of fiscal years 2009 and 2010, and $10,000,000 for the period beginning October 1, 2010 through December 31, 2010 to carry out the Sector Partnership Grant Program.

Effective Date

The provision goes into effect on the date of enactment of this Act.

D. PART IV—TRADE ADJUSTMENT ASSISTANCE FOR FARMERS

Trade Adjustment Assistance for Farmers (Section 1781–1786 (amending sections 291, 292, 293, 296 and 297 of the Trade Act of 1974))

Present Law

A group of agricultural producers or their representative may file a petition for certification with the Secretary of Agriculture. Upon receipt of the petition, the Secretary shall publish a notice in the Federal Register that the petition has been received and is being investigated. The petitioner, or anyone else with a substantial interest, may request a public hearing concerning the petition.

To be certified to receive TAA benefits under this chapter, the group of producers must show (1) that the national average price of the agricultural commodity in the most recent marketing year is less than 80 percent of the national average price for the commodity for the 5 previous marketing years, and (2) that increased imports of articles like or directly competitive with the commodity contributed importantly to the decline in price.

A group of producers certified under Section 291 has one year to receive TAA benefits, but may apply to be re-certified for a second year of benefits if the group can show a further 20 percent price decline in the national average price of the commodity, and that imports continued to contribute importantly to that decline.

To qualify to receive benefits, individual agricultural producers that are covered by a certified petition must show (1) that the individual producer produced the qualified commodity; and (2) the net income of the producer has decreased. Producers meeting these criteria are eligible to participate in an initial technical assistance course, and to receive cash benefits, not to exceed $10,000, based on their production and the decline in price for the commodity. Where available, the producer may also attend more intensive technical assistance.

Explanation of Provision

The provision defines an agricultural commodity producer, for the purpose of the TAA for Farmers program, to include fishermen, as well as farmers.

The provision allows a group of producers to petition the Secretary based on a 15 percent decline in price, value of production, quantity of production, or cash receipts for the commodity, rather than a 20 percent decline in price. The provision shortens the look back period, from an average of 5 years to an average of the national average price for the previous three year period. Petitioning producers must also show that imports contributed importantly to the decline in price, production, value of production, or cash receipts.

Once the Secretary certifies a group of commodity producers for TAA, individual producers can qualify for benefits if the producer shows (1) that they are producers of the commodity; and (2) that the price received, quantity of production, or value of production for the commodity has decreased.

Producers deemed eligible to receive benefits by the Secretary are eligible to receive initial technical assistance, and may opt to receive intensive technical assistance, which consists of a series of courses designed for producers of the certified commodity. Upon completion of the series of courses, the producer develops an initial business plan which (1) reflects the skills gained by the producer during the courses; and (2) demonstrates how the producer intends to apply these skills to the producer's farming or fishing operation. Upon approval by the Secretary of the business plan described above, the producer is entitled to receive up to $4,000 to implement the business plan or to assist in the development of a long-term business plan.

Producers who complete an initial business plan may choose to receive assistance to develop a long-term business adjustment plan. The Secretary must review the plan to ensure that it (1) will contribute to the economic adjustment of the producer; (2) considers the interests of the producer's employees, if any; and (3) demonstrates that the producer has sufficient resources to implement the plan. If the Secretary approves the plan, the producer is eligible to receive up to $8,000 to implement the long-term business plan.

Once a petition is certified for the group of producers, qualifying producers are eligible for benefits for a 36-month period. A producer may not receive more than $12,000 in any 36-month period to develop and implement business plans under the program.

The provision allows fishermen and aquaculture producers who are otherwise eligible to receive TAA benefits to demonstrate increased imports based on imports of farm-raised or wild-caught fish or seafood, or both.

Reasons for Change

The Conferees believe that the 20 percent price decline currently required for a group of producers to be certified under the TAA for Farmers program is too high, and creates an unnecessary barrier for producers to qualify for TAA benefits. Further, producers and the Department of Agriculture were concerned that the current five-year look back period was too long and burdensome for producers.

Additionally, since net farm income is a function of many factors, it has proven very difficult for producers to show the required decline in net income, even when the price for specific commodities had declined significantly. Several disputes regarding whether producers met the net income test were taken to the U.S. Court of International Trade, resulting in significant administrative expense for both the producers and the Department of Agriculture.

The Conferees believe that demonstrating a decline in the production or price of the commodity facing import competition is a better measure of the impact of trade on the individual producer, rather than net income. The provision would allow farmers to demonstrate that either their production decisions or price received for the qualified commodity were affected.

The Conferees also believe that the focus of the TAA for Farmers program should be adjustment assistance, rather than cash benefits. Under the current program, most producers received only initial technical assistance, with little opportunity for additional curricula. The Conferees believe that all producers eligible for TAA benefits should receive more thorough technical assistance and the opportunity for individualized business planning, with financial assistance provided to help the producer implement the business plans.

Further, technical assistance should be provided by the Department of Agriculture through the National Institute on Food and Agriculture (''NIFA''), which may choose to make grants to land grant universities and other outside organizations to assist in the development and delivery of technical assistance. NIFA (formerly the Cooperative State Research, Education, and Extension Service) delivers technical assistance under the current Farmers program, and had successfully developed curricula to respond to producers' adjustment needs.

The Conferees believe that the current one-year limit to obtain TAA benefits unnecessarily limits producers' ability to access technical assistance, particularly when farmers and fishermen must spend significant portions of each year in the fields or at sea. Extending the eligibility period to 36 months will allow producers to take advantage of all the benefits offered, and will eliminate the need for the current burdensome recertification process.

The Conferees believe that fishermen and aquaculture producers who are otherwise eligible for TAA should be able to demonstrate an increase in imports of like or directly competitive products without regard to whether those imported products were wild-caught or farm-raised. Current law allows these producers to apply for benefits based on imports of farm raised fish and seafood only.

The Conferees expect that the Department of Agriculture will fully fund and operate the TAA for Farmers and Fishermen program for the full duration of each fiscal year for which it is authorized.

Effective Date

The provision goes into effect upon expiration of the 90-day period beginning on the date of enactment of this Act, and applies to petitions filed on or after that date.

Extension of Authorization and Appropriation for Trade Adjustment Assistance for Farmers (Section 1787 (amending Section 298 of the Trade Act of 1974))

Present Law

The authorization and appropriation for the TAA for Farmers program expired on December 31, 2007. The program is currently authorized at $90 million per year.

Explanation of Provision

This provision reauthorizes the program through December 30, 2010, and maintains its funding at $90 million per year for fiscal years 2009 and 2010. The provision further provides funding on a prorated basis for the period beginning October 1, 2010, and ending December 31, 2010.

Effective Date

The provision goes into effect on the date of enactment of this Act.

E. PART V—GENERAL PROVISION

Government Accountability Office Report (Section 1793)

Present Law

There is no provision in present law.

Explanation of Provision

The provision requires the Comptroller General of the United States to prepare and submit a report to the Senate Finance Committee and the House Committee on Ways and Means on the operation and effectiveness of these amendments to chapters 2, 3, 4, and 6 of the Trade Act no later than September 30, 2012.

Reasons for Change

It is critical that GAO review and evaluate the TAA program to assess the changes made by this legislation to ensure that they have improved the effectiveness, operation, and performance of the program.

Effective Date

The provision goes into effect on the date of enactment of this Act.

2. CUSTOMS AND BORDER PROTECTION COLLECTIONS [237]

I. OVERVIEW

The conference report prevents U.S. Customs and Border Protection (''CBP'') from collecting over $92 million in antidumping and countervailing duties that CBP collected on imports from Canada and Mexico between 2001 and 2005, and later distributed to U.S. companies that petitioned the U.S. Government for relief.

I. HOUSE BILL

No provision

III. SENATE AMENDMENT

Section 1801 of the American Recovery and Reinvestment Act of 2009, as passed by the Senate, has four sections. First, it prohibits the Secretary of Homeland Security, or any other person, from requiring repayment of, or in any other way recouping, duties that were (1) distributed pursuant to the Continued Dumping and Subsidy Offset Act of 2000 (''CDSOA''); (2) assessed and paid on imports of goods from Canada and Mexico; and (3) distributed on or after January 1, 2001, and before January 1, 2006. Second, it prohibits CBP from offsetting any current or future duty distributions on goods from countries other than Canada and Mexico in an attempt to recoup duties described above. Third, the provision requires CBP to refund any such duty repayments or recoupments it has already received. Further, it requires CBP to fully distribute any duties it is withholding as an offset against current or future duty distributions. Fourth, the provision clarifies that CBP is not prohibited from collecting payments resulting from (1) false statements or other misconduct by a recipient of a duty payment or (2) re-liquidation of entries with respect to which duty payments were made.

IV. CONFERENCE REPORT

The conferees adopted the Senate provision. The conferees do not intend this provision to amend the antidumping or countervailing duty laws of the United States.

[237] Description prepared by the majority staffs of the House Committee on Ways and Means and the Senate Committee on Finance.

TITLE II OF DIVISION B

ASSISTANCE FOR UNEMPLOYED WORKERS AND STRUGGLING FAMILIES

CONFERENCE DOCUMENT

H.R. 1

TABLE OF CONTENTS

ASSISTANCE FOR UNEMPLOYED WORKERS AND STRUGGLING FAMILIES

Short Title (House bill Section 2000; Senate bill Section 2000; Conference agreement Section 2000)

Current Law

No provision.

House Bill

The ''Assistance for Unemployed Workers and Struggling Families Act.''

Senate Bill

Same as the House bill.

Conference Agreement

The conference agreement is the same as the House and Senate bills.

SUBTITLE A—UNEMPLOYMENT INSURANCE

Extension of Emergency Unemployment Compensation Program Benefits (House bill Sec. 2001; Senate bill Sec. 2001; Conference agreement Sec. 2001)

Current Law

Title IV, Emergency Unemployment Compensation, of the Supplemental Appropriations Act, 2008 (Public Law 110–252; 26 U.S.C.3304 note) as amended by the Unemployment Compensation Act of 2008 (Public Law 110–449) created a temporary emergency unemployment compensation program (EUC08). The program ends on the week ending on or before March 31, 2009. No compensation under the program is payable for any week beginning after August 27, 2009. Funds in the extended unemployment compensation account (EUCA) of the unemployment trust fund (UTF) are used for financing EUC08 payments. State administration funds are made from the employment security administration account (ESAA). Compensation for EUC08 payments to former employees of non-profits and governments are from the general fund of the Treasury.

House Bill

The duration of the EUC08 program would extend through the week ending on or before December 31, 2009. No benefits would be payable for any week beginning after May 31, 2010. The extension would be financed through the general fund of the Treasury. The funds would not need to be repaid.

Senate Bill

Same provision.

Conference Agreement

The conference agreement includes the identical provisions of the House and Senate bills.

Increase in Unemployment Compensation Benefits (House bill Sec. 2002; Senate bill Sec. 2002; Conference agreement Sec. 2002)

Current Law

No such provision. Federal law does not provide formulas, floors, or ceilings of regular weekly State unemployment compensation amounts. In general, the States set weekly benefit amounts as a fraction of the individual's average weekly wage up to some State-determined maximum. Some States include dependents' allowances in addition to the underlying benefit.

House Bill

The provision would create an additional, federally-funded $25 weekly benefit that would be available to all individuals receiving regular unemployment compensation (UC) benefits. All the provisions of section 2002 would also apply to regular UC, extended benefits (EB), and EUC08 benefits. It would require States to not take the additional compensation into consideration when determining regular UC benefits (including any dependants' allowances). The additional benefit would be payable either at the same time and in the same manner as any regular UC payable for the week involved or payable separately but on the same weekly basis as any regular compensation otherwise payable. States would not be allowed to alter the method governing the computation of UC under State law in such a manner that the weekly benefit amount would be less than the benefit amount that would have been payable under State law as of December 31, 2008. Funding for the additional benefit would be appropriated from the general fund of the Treasury, without fiscal year limitation. The funds would not be required to be repaid.

States would pay the additional compensation to individuals once the State entered into an agreement with the Labor Secretary and ending before January 1, 2010. The additional compensation would be ''grandfathered'' for individuals who had not exhausted the right to regular compensation as of January 1, 2010. No additional compensation would be payable for any week beginning after June 30, 2010.

The additional benefit would be disregarded in considering the amount of income of any individual for any purposes under Medicaid and SCHIP.

Senate Bill

Same provision.

Conference Agreement

The conference agreement includes the identical provisions of the House and Senate bills.

Special Transfers for Unemployment Compensation Modernization (House bill Sec. 2003; Senate bill Sec. 2003; Conference agreement Sec. 2003)

Current Law

Section 903 of the Social Security Act (SSA) describes the set of conditions under which funds are transferred to eligible State unemployment accounts from the federal accounts in the Unemployment Trust Fund (UTF) when those federal account balances exceed certain levels. Transfers of excess funds in the UTF to State accounts are called Reed Act distributions. No Reed Act distributions are expected in the next 5 years.

Section 903(a)(2)(B) of the SSA describes the manner in which the distribution of Reed Act funds occurs. Funds are distributed to the State UTF accounts based on the State's share of estimated federal unemployment taxes (excluding reduced credit payments) made by the State's employers.

Unemployment Insurance Policy Letter 44–97, which interpreted section 5401 of P.L. 105–33, the Balanced Budget Act of 1997, says that States are not required to offer an alternative base period (ABP) in determining eligibility for UC benefits.

While federal laws and regulations provide broad guidelines on UC coverage, eligibility, and benefit determination, the specifics of regular UC benefits are determined by each State through State laws and regulations.

House Bill

The House bill would provide a special transfer of UTF funds from the federal unemployment account (FUA) of up to $7 billion to the State accounts within the UTF as ''incentive payments'' for changing or already having in place certain State UC laws. The maximum incentive payment allowable for a State would be calculated using the methods required by the Reed Act if a distribution were to have occurred on October 1, 2008.

One-third of the maximum payment would be contingent on State law calculating the base period by either:

(A) allowing use of a base period that includes the most recently completed calendar quarter before the start of the benefit year for the purpose of determining UC eligibility; or

(B) providing that, in the case of an individual who would not otherwise be UC-eligible under State law, eligibility shall be determined using a base period that includes the most recently completed calendar quarter.

The remaining 2/3 of the incentive payment would be contingent on qualifying for the first 1/3 payment and the applicable State law containing at least two of the following four provisions:

(A) No denial of UC under State law provisions relating to availability for work, active search for work, or refusal to accept work solely because the individual is seeking only part-time work. States may exclude an individual if the majority of the weeks of work in the individual's base period do not include part-time work. The Labor Secretary would define part-time.

(B) No UC disqualification for separation from employment if it is for compelling family reasons. These reasons must include (i) domestic violence, (ii) illness or disability of an immediate family member, and (iii) the need to accompany a spouse to a place from where it is impractical to commute and due to a change in location of the spouse's employment. The Labor Secretary would define immediate family member.

(C) Weekly UC continues for individuals who have exhausted all rights to regular benefits but are enrolled and making satisfactory progress in a State-approved training program or in a job training program authorized under the Workforce Investment Act of 1998. The benefit must be for at least an additional 26 weeks and be equivalent to the previously calculated UC benefit (including dependents' allowances) for the most recent benefit year. The training program must prepare the individual for entry into a ''high-demand'' occupation.

(D) UC Dependents' allowances are provided to all individuals with a dependent (as defined by State law) at a level equal to at least $15 per dependent per week. The aggregate limit on dependents' allowances must be not less than the lesser of $50 or 50% of the weekly benefit amount for the benefit year.

Within 60 days after enactment, the Labor Secretary may prescribe (by regulation or otherwise) information required in relation to the compliance of the modernization requirements. The Labor Secretary would have 30 days after receiving a complete application to determine if modernization incentives are payable to the State.

The Labor Secretary, while determining if State law meets the requirements for an incentive payment, would disregard any State law provisions that are not currently effective as permanent law or are subject to a discontinuation under certain circumstances. Once the Treasury Secretary has been notified of the certification of the incentive payment, the appropriate transfer to the State account would occur within seven days. State law provisions which are to take effect within 12 months after the date of their certification would be considered to be in effect for the purposes of certification. States must be eligible for certification under section 303 [of the Social Security Act] and under section 3304 of the Federal Unemployment Tax Act (FUTA) [section 3304 of the Internal Revenue Code of 1986].

Applications submitted before enactment or after the latest date necessary (as determined by the Labor Secretary) will not be considered in order to ensure that all incentive payments are made before October 1, 2011. Incentive payments may be used only for the payment of UC benefits and dependents' allowances. An exception is made if the State appropriates the funds for administrative expenses. Funds that satisfy this exception may be used for the administration of UC law and for public employment offices.

The Treasury Secretary would be required reserve $7 billion for incentive payments in the Federal Unemployment Account (FUA) of the UTF. Any amount so reserved for which the Secretary of the Treasury has not received a certification under the proposed paragraph (4)(B) of the bill by the deadline determined by the Secretary of Labor shall become unrestricted regarding its use as part of the FUA upon the close of fiscal year 2011.

The bill would transfer a total of $500 million from the federal employment security administration account (ESAA) to the States' accounts in the UTF within 30 days of enactment. Each State's transfers would be calculated using the methods required by the Reed Act if a distribution were to have occurred on October 1, 2008. Any amount transferred to a State account as a result of this $500 million transfer would be required to be used by the State agency of such State only in (A) payment of expenses incurred through carrying out of the purposes in State law required to receive the incentive payments, (B) improved outreach to individuals who might be eligible for regular UC by virtue of the changes in State law, (C) improvement of unemployment benefit and unemployment tax operations, including responding to increased demand for unemployment compensation, and (D) staff-assisted reemployment services for UC claimants.

Senate Bill

Same as the House bill, except that the Senate bill does not explicitly give the Secretary of Labor the ability to define part-time work.

The Senate bill would require that all payments be made before October 1, 2010 (rather than October 1, 2011) except in those States where the first day of the first regularly scheduled session of the State legislature following enactment begins after December 31, 2010. Those States' payments would be made before October 1, 2011.

Conference Agreement

The conference agreement follows the House bill with two exceptions.

If in a training program (option C under the qualifying conditions of the remaining 2/3 incentive payment), the agreement would allow States to not pay UC benefit if the individual is receiving stipends or other training allowances. Under the same training program option, the agreement would also allow States to opt to take any deductible income (as determined under State law) into account and offset the UC payment.

Temporary Assistance for States with Advances (House bill n.a.; Senate bill Sec. 2004; Conference agreement Sec. 2004)

Current Law

Section 1202(b) of the Social Security Act (42 U.S.C. 1322(b)) requires that States are charged interest on new loans that are not repaid by the end of the fiscal year in which they were obtained. The interest rate on the loans is the same rate as that paid by the federal government on State reserves in the UTF for the quarter ending December 31 of the preceding year, but not higher than 10% per annum. States may not pay the interest directly or indirectly from funds in their State account with the UTF.

Section 1202(b)(2) allows a State to borrow funds without interest from the FUA during the year if the State repays the loans by September 30 of the calendar year in which the advances were made. No loans may be made in October, November, or December of the calendar year of such an interest-free loan. Otherwise, the ''interest-free'' loan will accrue interest charges.

House Bill

No provision.

Senate Bill

The Senate bill would temporarily waive interest payments and the accrual of interest on advances to State unemployment funds by amending section 1202(b) of the Social Security Act. The interest payments that come due from the time of enactment of the proposal until December 31, 2010 would be deemed to have been made by the State. No interest on advances accrue during the period.

Conference Agreement

The conference agreement follows the Senate bill.

Full Federal Funding of Extended Unemployment Compensation for a Limited Period (House bill n.a.; Senate bill n.a.; Conference agreement Sec. 2005)

Current Law

The Extended Benefit (EB) program, established by the Federal-State Extended Unemployment Compensation Act of 1970 (EUCA), P.L. 91–373 (26 U.S.C. 3304, note), may extend receipt of unemployment benefits (extended benefits) at the State level if certain economic situations exist within the State.

Extended benefits (EB) are funded half (50%) by the federal government through its account for that purpose in the UTF; States fund the other half (50%) through their State accounts in the UTF.

Individual eligibility for EB payments, among other matters, requires that the worker has exhausted all rights to regular UC benefits and be within the State-determined benefit year (generally within 52 weeks of first claiming regular UC eligibility) when a State's EB program becomes active on account of economic conditions.

States that do not require a one-week UC waiting period, or have an exception for any reason to the waiting period, must pay 100% of the first week of EB (rather than 50%). P.L. 110–449, the Unemployment Compensation Extension Act of 2008, suspended this waiting week requirement from the time of its enactment until the week ending on or before December 8, 2009.

House Bill

No provision.

Senate Bill

No provision.

Conference Agreement

The conference agreement would temporarily alter Federal-State funding ratios. Extended benefits would be 100% federally financed from the date of enactment through January 1, 2010.

The agreement also would temporarily allow States to ignore benefit year calculations but instead base EB eligibility upon having qualified for and exhausted EUC08 benefits, disregarding benefit year calculations as long as the EB period fell between the date of enactment and before January 1, 2010.

The agreement would allow States to opt to grandfather those workers who received EUC08 payments and exhausted them on or after January 1, 2010. Those workers would be eligible to receive EB payments based on EUC08 exhaustion and disregarding benefit year determinations until the week ending on or before June 1, 2010.

The agreement would continue the temporary suspension of the waiting week requirement for federal funding until the week ending before May 30, 2010.

Temporary Increase in Extended Unemployment Benefits under the Railroad Unemployment Insurance Act. (House bill n.a.; Senate bill n.a.; Conference agreement Sec. 2006)

Current Law

The Railroad Unemployment Insurance Act (45 U.S.C. 351–369) provides up to 26 weeks of normal unemployment benefits for railroad employees. It also provides up to 13 weeks of extended benefits for railroad employees with 10 or more years of service.

House Bill

No provision.

Senate Bill

No provision.

Conference Agreement

The conference agreement would temporarily increase the duration of extended unemployment benefits for railroad workers. The agreement would add an additional 13 weeks to the maximum amount of time railroad workers may receive extended unemployment benefits, allowing for up to 26 weeks of extended benefits in addition to the 26 weeks of normal benefits provided under current law.

The agreement would apply to all qualifying railroad employees, regardless of their years of service (i.e., it would apply to those with fewer than 10 years of service, who do not qualify for extended benefits under current law). The provision would apply to employees who received normal unemployment benefits during the benefit year beginning July 1, 2008 and ending June 30, 2009. No extended benefits under this bill would begin after December 31, 2009.

The agreement would appropriate $20 million from the general fund of the Treasury to cover the cost of the additional extended unemployment benefits. Subsection 2006(b) would provide an additional $80,000 for administering the additional benefits. If the additional extended benefits were to reach $20 million in cost before December 31,2009, the additional benefits would terminate.

SUBTITLE B—ASSISTANCE FOR VULNERABLE INDIVIDUALS

Emergency Fund for TANF Program (House bill Section 2101; Senate bill Sec. 2101; Conference agreement Sec. 2101)

Current Law

TANF Recession-Related Funds. The 1996 welfare reform established a contingency fund under the Temporary Assistance for Needy Families (TANF) block grant. To qualify for contingency dollars, States must spend under the TANF program a sum of their own dollars equal to their pre-TANF FY1994 spending and meet a test of economic need. Economic need is established by either:

(1) Supplemental Nutrition Assistance Program (SNAP, formerly known as food stamps) participation for the most recent three months for which data are available that is at least 10% higher than it was during the corresponding three-month period in either FY1994 or FY1995; or (2) a three-month average unemployment rate of at least 6.5% and that equals or exceeds 110% of the rate measured in the corresponding three month period in either the of previous two years. Eligible expenditures above the pre-TANF level are matched at the Medicaid (Federal Medical Assistance Percentage or FMAP) rate. A state's annual contingency fund grant is capped at 20% of its basic TANF block grant. The 1996 welfare law appropriated $2 billion to the contingency fund. At the beginning of FY2009, about $1.3 billion remained in the contingency fund. The contingency fund is available to the 50 States and the District of Columbia. The commonwealth of Puerto Rico, Guam, the Virgin Islands, and tribes operating tribal TANF programs are not eligible for contingency funds.

TANF Caseload Reduction Credit. TANF established federal work participation standards, which are numerical performance standards that States must meet or be subject to a financial penalty. A State must meet two standards the all family standard of 50% and the two-parent standard of 90%. These standards may be met either by engaging participants in creditable activities or through reductions in the cash welfare caseload. States are given a caseload reduction credit toward the standards of one percentage point for each percent decline in the caseload from FY2005 to the preceding fiscal year. Under current law, the caseload reduction credit for FY2009 is based on caseload change from FY2005 to FY2008; the credit for FY2010 will be based on caseload change from FY2005 to FY2009; the caseload reduction credit for Fiscal Year 2011 will be based on caseload change from Fiscal Year 2005 to FY2010.

House Bill

TANF Recession Funds. The House bill retains the current TANF contingency fund and creates a new, temporary emergency contingency fund for FY2009 and FY2010. States with increased cash welfare caseloads under TANF or separate State programs funded with TANF State maintenance of effort dollars are eligible for capped grants from the fund. Also eligible are States with increased short-term non-recurrent benefit expenditures or increased subsidized employment expenditures under TANF and separate State programs. The fund reimburses States for 80% of the increased expenditures on basic assistance (cash welfare), short-term non-recurrent benefits, or subsidized employment in TANF and separate State programs, up to a cap. Increased caseloads and expenditures are measured on a quarterly basis, comparing each quarter in FY2009 and FY2010 to the corresponding quarter in the base years of FY2007 and FY2008. The applicable base period for a State varies depending on whichever results in the greatest increase for each State for the cash assistance caseload and by expenditure category.

Total combined State grants from the current law contingency fund and the emergency contingency fund are limited to 25% of a State's basic block grant. The emergency fund is appropriated such sums as necessary (no national funding cap, but total funding is limited by individual State caps discussed above). Puerto Rico, Guam, and the Virgin Islands are eligible for emergency contingency funds.

Caseload Reduction Credit. The House bill gives States an optional measuring period for the caseload reduction credit that would apply to the FY2010 and FY2011 standards. States would have the option to measure caseload reduction from FY2005 to either FY2007 or FY2008 when determining the caseload reduction credit toward the TANF work participation standards for those two years.

Senate Bill

The Senate bill includes all the provisions of the House bill, with modifications. The Senate bill caps the appropriation to the TANF emergency contingency fund at $3 billion. For the Commonwealth of Puerto Rico, Guam, and the Virgin Islands, any payments from the emergency contingency fund are excluded from the overall limit on federal funding for public assistance programs, including TANF, that applies to these jurisdictions. The Senate bill also gives States an optional measuring period for the caseload reduction credit for the FY2009 standards, allowing States to measure caseload reduction from FY2005 to FY2007 for that year.

Conference Agreement

The conference agreement follows the House and Senate bills, with some modifications. It sets the appropriation for the emergency contingency fund at $5 billion. The cap on each State's grant is modified, from a cap on each year's grant, to a cap on cumulative grants over the two years that the emergency fund will operate. Cumulative, combined grants from the existing contingency fund and the emergency fund are limited to 50% of a state's annual basic block grant for FY2009 and FY2010.

The agreement also makes tribes that operate tribal TANF programs eligible for the emergency fund. Tribes will be able to access the fund in the same manner as the States, and are similarly limited to cumulative emergency fund grants equal to 50% of its annual tribal family assistance grant.

The agreement follows the Senate bill for the temporary modifications to the caseload reduction credit. It also clarifies that all temporary provisions will be repealed. The emergency fund is repealed as of October 1, 2010. The change to the caseload reduction credit is repealed as of October 1, 2011.

Extension of Supplemental Grants (House bill n.a.; Senate bill Sec. 2102; Conference Agreement Sec. 2102).

Current Law

TANF provides supplemental grants to 17 States that met historical criteria of low federal grants for welfare per poor person and/or high population growth. Supplemental grants total $319 million, but are set to expire at the end of FY2009.

House Bill

No provision.

Senate Bill

The Senate bill extends supplemental grants through FY2010.

Conference Agreement

The conference agreement includes the Senate provision, extending supplemental grants through FY2010.

Clarification of Authority of States to Use TANF Funds Carried Over From Prior Years To Provide TANF Benefits and Services (House bill n.a.; Senate bill Sec. 2103; Conference Agreement Sec. 2103)

Current Law

States and tribes may reserve unused TANF funds without fiscal year limit. However, the use of these reserves is restricted to providing assistance (essentially cash welfare).

House Bill

No provision.

Senate Bill

Allows States to use reserve TANF funds for any TANF benefit, service, or activity.

Conference Agreement

The conference agreement includes the Senate provision.

Temporary Resumption of Prior Child Support Law (House bill Sec. 2103; Senate bill Sec. 2104; Conference agreement Sec. 2104)

Current Law

The federal government reimburses each State 66% of its expenditures on Child Support Enforcement (CSE) activities. The federal government also provides States with an incentive payment to encourage them to operate effective CSE programs. Federal law requires States to reinvest CSE incentive payments back into the CSE program or related activities. P.L. 109–171 (the Deficit Reduction Act of 2005) prohibited federal matching/reimbursement of CSE incentive payments that are reinvested in the CSE program.

House Bill

The House bill requires HHS to temporarily provide federal matching funds on CSE incentive payments that States reinvest back into the CSE program. This means that CSE incentive payments that are/were received by States and reinvested in the CSE program can be used to draw down federal funds. Federal matching funds for CSE incentive payments are to be provided for FY2009 and FY2010 (i.e., from October 1, 2008 through September 30, 2010).

Senate Bill

Same as the House bill, except that federal matching funds for CSE incentive payments are to be provided for the period October 1, 2008 through December 31, 2010 (i.e., from October 1, 2008 through December 31, 2010).

Conference Agreement

The conference agreement follows the House bill.

One-Time Emergency Payments to Certain Social Security, Supplemental Security Income, Railroad Retirement, Veterans Beneficiaries, and Certain Government Retirees (House bill Sec. 2102; Senate bill Sec. 1601; Conference agreement sections 2201 and 2202).

Section 2201. Economic Recovery Payments to Recipients of Social Security, Supplement Security Income, Railroad Retirement Benefits, and Veterans Disability Compensation or Pension benefits.

Current Law

Title II of the Social Security Act authorizes cash benefits for retired and disabled workers and their dependents and survivors under the Old Age and Survivors Insurance (OASI) and Disability Insurance (DI) programs. Title XVI of the Social Security Act authorizes monthly cash benefits for blind and disabled persons and persons age 65 or over who have limited income and resources under the Supplemental Security Income (SSI) program.

The Railroad Retirement Act of 1974 authorizes cash benefits for retired and disabled railroad workers and their dependents and survivors.

Title 38 of the United States Code authorizes cash benefits for certain veterans and their dependents and survivors.

Current law does not authorize any one-time emergency payments for any of these programs.

Under Title II of the Social Security Act, a person is eligible for Social Security benefits only if he or she has insured status as the result of sufficient employment that was covered by the Social Security system and for which Social Security payroll taxes were paid. Federal employees hired before 1983 were covered by the Civil Service Retirement System (CSRS) and, unless they were eligible for the CSRS-Offset or elected to enroll in the Federal Employees Retirement System (FERS), they are not eligible for Social Security benefits on the basis of their federal service. In addition, some state and local government employees are not covered by the Social Security system and thus are not eligible for Social Security benefits on the basis of their public service.

Current law does not authorize any one-time tax credit for government retirees who are not eligible for Social Security benefits.

House Bill

The House bill authorizes a one-time emergency payment to be made to SSI recipients. This payment must be made by the Social Security Administration (SSA) at the earliest practical date and no more than 120 days after enactment of the law. The amount of this one-time emergency payment would be equal to the average monthly amount of federal SSI benefits paid to an individual (approximately $456) or a married couple (approximately $637) in the most recent month for which data are available.

To be eligible for the one-time emergency payment, a person must be eligible for an SSI benefit, other than a personal needs allowance, for at least one day during the month of the payment. A person who was eligible for an SSI benefit, other than a personal needs allowance, for at least one day during the two-month period preceding the month of the emergency payment and their SSI eligibility ended during the two-month period solely because their income exceeded the SSI income guidelines is also eligible for the one-time emergency payment.

Only persons who are determined by the Commissioner of Social Security in calendar year 2009 to fall into one of the categories described above are eligible for the emergency payment. Thus, a person who is awarded SSI benefits anytime after 2009 would not be eligible for the emergency payment, even if he or she is awarded benefits retroactive to a date before the date of the emergency payment.

The one-time emergency payment would be protected from garnishment and assignment and would not be considered income in the month of receipt and the following 6 months for the purposes of determining eligibility of the recipient (or the recipient's spouse or family) for any means-tested program funded entirely or in part with federal funds.

The House bill provides an appropriation of such sums as may be necessary to carry out this section, including any administrative costs associated with the payment.

Senate Bill

The Senate bill provides for a one-time economic recovery payment of $300 to adult Social Security (Old Age and Survivors Insurance and Disability Insurance) and Railroad Retirement beneficiaries, Supplemental Security Income (SSI) recipients, and veterans receiving compensation or pension benefits from the Department of Veterans Affairs.

The economic recovery payment would be made by the Secretary of the Treasury after eligible beneficiaries are identified by the Social Security Administration (SSA), the Railroad Retirement Board, and the Department of Veterans Affairs. Payments are to be made at the earliest practicable date and in no event later than 120 days after enactment.

To be eligible for the economic recovery payment, a person must have been during the three-month period prior to the month of the enactment: an adult Social Security Old Age and Survivors Insurance (OASI) or Disability Insurance (DI) beneficiary (including adults eligible for child's benefits on the basis of as disability that began before the age of 22, persons eligible under transitional insured status, and persons eligible under special rules for uninsured persons over the age of 72), an adult Railroad Retirement or disability beneficiary (including dependents, survivors, and disabled adult children), a veterans pension or compensation beneficiary, or an SSI recipient (excluding persons who only receive a personal needs allowance).

The Senate bill requires that economic recovery payment recipients live in the United States or its territories. The Senate bill prohibits any person from receiving more than one economic recovery payment regardless of whether the individual is entitled to, or eligible for, more than one benefit or cash payment under this section.

The Senate bill prohibits the payment of an economic recovery payment to any Social Security beneficiary or person eligible for Social Security benefits paid by the Railroad Retirement Board, or SSI recipient, if, for the most recent month of the three-month period prior to enactment the person's benefits were not payable due to his or her status as a prisoner, inmate in a public institute, illegal alien, or fugitive felon.

The bill prohibits an economic recovery payment to any veterans compensation or pension beneficiary if, for the most recent month of the three-month period prior to enactment, the person's benefits were not payable due to his or her status as a prisoner or fugitive felon. It also prohibits the payment of an economic recovery payment to any person who dies before the date he or she is certified as eligible to receive a payment.

The bill limits the applicability of the economic recovery payments to retroactive beneficiaries by providing that no payment may be made for any reason after December 31, 2010.

The economic recovery payment would not be considered income in the month of receipt and the following 9 months for the purposes of determining eligibility of the recipient (or the recipient's spouse or family) for any means-tested program funded entirely or in part with federal funds. The payment would not be considered income for the purposes of taxation and would be protected from garnishment and assignment. However, the payment could be used to collect debts owed to the federal government. Electronic payments and payments to representative payees and fiduciaries would be authorized.

The Senate bill provides additional appropriations for the period from fiscal year 2009 through fiscal year 2011 in the amounts of: $57,000,000 to the Department of the Treasury; $90,000,000 to the SSA; $1,000,000 to the Railroad Retirement Board; and $7,200,000 to the Department of Veterans Affairs for administrative expenses associated with the one-time economic recovery payment. Of the money appropriated to the Department of Veterans Affairs, $100,000 shall be for the Information Systems Technology Account and $7,100,000 for general expenses related to the administration of the economic recovery payment. It also appropriates to the Department of the Treasury such sums as may be necessary for making economic recovery payments.

The Senate bill provides that the amount of a person's Making Work Pay tax credit authorized by Section 1001 of Division A of the Senate bill would be offset by the amount of any economic recovery payment that person receives.

Conference Agreement

The conference agreement follows the Senate bill, with some modifications. The conference agreement directs the Secretary of the Treasury to disburse a onetime Economic Recovery Payment of $250 to adults who were eligible for Social Security benefits, Railroad Retirement benefits, or veteran's compensation or pension benefits; or individuals who were eligible for Supplemental Security Income (SSI) benefits (excluding individuals who receive SSI while in a Medicaid institution). Only individuals who were eligible for one of the four programs for any of the three months prior to the month of enactment shall receive an Economic Recovery Payment.

The provision stipulates that Economic Recovery Payments will only be made to individuals whose address of record is in 1 of the 50 states, the District of Columbia, Puerto Rico, Guam, the United States Virgin Islands, American Samoa, or the Northern Mariana Islands.

An individual shall only receive one $250 Economic Recovery Payment under this section regardless of whether the individual is eligible for a benefit from more than one of the four federal programs.µ If the individual is also eligible for the ''Making Work Pay'' credit from Section 1001, that credit shall be reduced by the Economic Recovery Payment made under this section.

Individuals who are otherwise eligible for an Economic Recovery Payment will not receive a payment if their federal program benefits have been suspended because they are in prison, a fugitive, a probation or parole violator, have committed fraud, or are no longer lawfully present in the United States.

The provision directs the Commissioner of Social Security, the Railroad Retirement Board, and the Secretary of Veterans Affairs to provide the Secretary of the Treasury with information and data to send the payments to eligible individuals and to disburse the payments.

The provision provides that the Economic Recovery Payments shall not be taken into account as income, or taken into account as resources for the month of receipt and the following 9 months, for purposes of determining the eligibility of such individual or any other individual for benefits or assistance, or the amount or extent of benefits or assistance, under any Federal program or under any State or local program financed in whole or in part with Federal funds.

The provision provides that Economic Recovery Payments shall not be considered gross income for income tax purposes and that the payments are protected by the assignment and garnishment provisions of the four federal benefit programs.µ The payments will be subject to the Treasury Offset Program.

The provision stipulates that if an individual who is eligible for an Economic Recovery Payment has a representative payee, the payment shall be made to the representative payee and the entire payment shall only be used for the benefit of the individual who is entitled to the Economic Recovery Payment.

The provision appropriates the following amounts for FY2009 through FY2011: to the Secretary of the Treasury, $131 million for administrative costs to carry out the provisions of this section and the new Section 36A (the Making Work Pay credit); to the Commissioner of Social Security, such funds as are necessary to make the payments and $90 million to carry out the provisions of this section; to the Railroad Retirement Board, such funds as are necessary to make the payments and $1.4 million to carry out the provisions of this section; and to the Secretary of Veterans Affairs, such funds as are necessary to make the payments, $100,000 for the Information Systems Technology account and $7,100,000 to the General Operating Expenses account.

The Secretary of the Treasury shall commence making payments as soon as possible, but no later than 120 days after the date of enactment. No Economic Recovery Payments shall be made after December 31, 2010.

SECTION 2202. SPECIAL CREDIT FOR CERTAIN GOVERNMENT RETIREES.

Current Law

No provision.

House Bill

No provision.

Senate Bill

No provision.

Conference Agreement

The conference agreement creates a $250 credit ($500 for a joint return where both spouses are eligible) against income taxes owed for tax year 2009 for individuals who receive a government pension or annuity from work not covered by Social Security, and were not eligible to receive a payment under section 2201. If the individual is also eligible for the ''Making Work Pay'' credit from Section 1001, that credit shall be reduced by the credit made under this section.µ Each tax return on which this credit is claimed must include the social security number of the taxpayer (in the case of a joint return, the social security number of at least one spouse).µ The provision states that the credit under this section shall be a refundable credit.

The provision provides that any credit or refund allowed or made by this provision shall not be taken into account as income and shall not be taken into account as resources for the month of receipt and the following two months for purposes of determining the eligibility of such individual or any other individual for benefits or assistance, or the amount or extent of benefits or assistance, under any Federal program or under any State or local program financed in whole or in part with Federal funds.

The provision is effective on the date of enactment.

TITLE III—HEALTH INSURANCE ASSISTANCE

A. ASSISTANCE FOR COBRA CONTINUATION COVERAGE (SEC. 3002(A) OF THE HOUSE BILL, SEC. 3001 OF THE SENATE AMENDMENT, SEC. 3001 OF THE CONFERENCE AGREEMENT, AND SEC. 4980B AND NEW SECS. 139C, 6432, AND 6720C OF THE CODE)

PRESENT LAW

In general

The Code contains rules that require certain group health plans to offer certain individuals (''qualified beneficiaries'') the opportunity to continue to participate for a specified period of time in the group health plan (''continuation coverage'') after the occurrence of certain events that otherwise would have terminated such participation (''qualifying events'').[228] These continuation coverage rules are often referred to as ''COBRA continuation coverage'' or ''COBRA,'' which is a reference to the acronym for the law that added the continuation coverage rules to the Code.[229]

The Code imposes an excise tax on a group health plan if it fails to comply with the COBRA continuation coverage rules with respect to a qualified beneficiary. The excise tax with respect to a qualified beneficiary generally is equal to $100 for each day in the noncompliance period with respect to the failure. A plan's noncompliance period generally begins on the date the failure first occurs and ends when the failure is corrected. Special rules apply that limit the amount of the excise tax if the failure would not have been discovered despite the exercise of reasonable diligence or if the failure is due to reasonable cause and not willful neglect.

In the case of a multiemployer plan, the excise tax generally is imposed on the group health plan. A multiemployer plan is a plan to which more than one employer is required to contribute, that is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and that satisfies such other requirements as the Secretary of Labor may prescribe by regulation. In the case of a plan other than a multiemployer plan (a ''single employer plan''), the excise tax generally is imposed on the employer.

Plans subject to COBRA

A group health plan is defined as a plan of, or contributed to by, an employer (including a self-employed person) or employee organization to provide health care (directly or otherwise) to the employees, former employees, the employer, and others associated or formerly associated with the employer in a business relationship, or their families. A group health plan includes a self-insured plan. The term group health plan does not, however, include a plan under which substantially all of the coverage is for qualified long-term care services.

The following types of group health plans are not subject to the Code's COBRA rules: (1) a plan established and maintained for its employees by a church or by a convention or association of churches which is exempt from tax under section 501 (a ''church plan''); (2) a plan established and maintained for its employees by the Federal government, the government of any State or political subdivision thereof, or by any instrumentality of the foregoing (a ''governmental plan'')[230] and (3) a plan maintained by an employer that normally employed fewer than 20 employees on a typical business day during the preceding calendar year[231] (a ''small employer plan'').

Qualifying events and qualified beneficiaries

A qualifying event that gives rise to COBRA continuation coverage includes, with respect to any covered employee, the following events which would result in a loss of coverage of a qualified beneficiary under a group health plan (but for COBRA continuation coverage): (1) death of the covered employee; (2) the termination (other than by reason of such employee's gross misconduct), or a reduction in hours, of the covered employee's employment; (3) divorce or legal separation of the covered employee; (4) the covered employee becoming entitled to Medicare benefits under title XVIII of the Social Security Act; (5) a dependent child ceasing to be a dependent child under the generally applicable requirements of the plan; and (6) a proceeding in a case under the U.S. Bankruptcy Code commencing on or after July 1, 1986, with respect to the employer from whose employment the covered employee retired at any time.

A ''covered employee'' is an individual who is (or was) provided coverage under the group health plan on account of the performance of services by the individual for one or more persons maintaining the plan and includes a self-employed individual. A ''qualified beneficiary'' means, with respect to a covered employee, any individual who on the day before the qualifying event for the employee is a beneficiary under the group health plan as the spouse or dependent child of the employee. The term qualified beneficiary also includes the covered employee in the case of a qualifying event that is a termination of employment or reduction in hours.

Continuation coverage requirements

Continuation coverage that must be offered to qualified beneficiaries pursuant to COBRA must consist of coverage which, as of the time coverage is being provided, is identical to the coverage provided under the plan to similarly situated non-COBRA beneficiaries under the plan with respect to whom a qualifying event has not occurred. If coverage under a plan is modified for any group of similarly situated non-COBRA beneficiaries, the coverage must also be modified in the same manner for qualified beneficiaries. Similarly situated non-COBRA beneficiaries means the group of covered employees, spouses of covered employees, or dependent children of covered employees who (i) are receiving coverage under the group health plan for a reason other than pursuant to COBRA, and (ii) are the most similarly situated to the situation of the qualified beneficiary immediately before the qualifying event, based on all of the facts and circumstances.

The maximum required period of continuation coverage for a qualified beneficiary (i.e., the minimum period for which continuation coverage must be offered) depends upon a number of factors, including the specific qualifying event that gives rise to a qualified beneficiary's right to elect continuation coverage. In the case of a qualifying event that is the termination, or reduction of hours, of a covered employee's employment, the minimum period of coverage that must be offered to the qualified beneficiary is coverage for the period beginning with the loss of coverage on account of the qualifying event and ending on the date that is 18 months[232] after the date of the qualifying event. If coverage under a plan is lost on account of a qualifying event but the loss of coverage actually occurs at a later date, the minimum coverage period may be extended by the plan so that it is measured from the date when coverage is actually lost.

The minimum coverage period for a qualified beneficiary generally ends upon the earliest to occur of the following events: (1) the date on which the employer ceases to provide any group health plan to any employee, (2) the date on which coverage ceases under the plan by reason of a failure to make timely payment of any premium required with respect to the qualified beneficiary, and (3) the date on which the qualified beneficiary first becomes (after the date of election of continuation coverage) either (i) covered under any other group health plan (as an employee or otherwise) which does not include any exclusion or limitation with respect to any preexisting condition of such beneficiary or (ii) entitled to Medicare benefits under title XVIII of the Social Security Act. Mere eligibility for another group health plan or Medicare benefits is not sufficient to terminate the minimum coverage period. Instead, the qualified beneficiary must be actually covered by the other group health plan or enrolled in Medicare. Coverage under another group health plan or enrollment in Medicare

[228] Sec. 4980B

[229] The COBRA rules were added to the Code by the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99–272. The rules were originally added as Code sections 162(i) and (k). The rules were later restated as Code section 4980B, pursuant to the Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100–647.

[230] A governmental plan also includes certain plans established by an Indian tribal government.

[231] If the plan is a multiemployer plan, then each of the employers contributing to the plan for a calendar year must normally employ fewer than 20 employees during the preceding calendar year.

[232] In the case of a qualified beneficiary who is determined, under Title II or XVI of the Social Security Act, to have been disabled during the first 60 days of continuation coverage, the 18 month minimum coverage period is extended to 29 months with respect to all qualified beneficiaries if notice is given before the end of the initial 18 month continuation coverage period.

does not terminate the minimum coverage period if such other coverage or Medicare enrollment begins on or before the date that continuation coverage is elected.

Election of continuation coverage

The COBRA rules specify a minimum election period under which a qualified beneficiary is entitled to elect continuation coverage. The election period begins not later than the date on which coverage under the plan terminates on account of the qualifying event, and ends not earlier than the later of 60 days or 60 days after notice is given to the qualified beneficiary of the qualifying event and the beneficiary's election rights.

Notice requirements

A group health plan is required to give a general notice of COBRA continuation coverage rights to employees and their spouses at the time of enrollment in the group health plan.

An employer is required to give notice to the plan administrator of certain qualifying events (including a loss of coverage on account of a termination of employment or reduction in hours) generally within 30 days of the qualifying event. A covered employee or qualified beneficiary is required to give notice to the plan administrator of certain qualifying events within 60 days after the event. The qualifying events giving rise to an employee or beneficiary notification requirement are the divorce or legal separation of the covered employee or a dependent child ceasing to be a dependent child under the terms of the plan. Upon receiving notice of a qualifying event from the employer, covered employee, or qualified beneficiary, the plan administrator is then required to give notice of COBRA continuation coverage rights within 14 days to all qualified beneficiaries with respect to the event.

Premiums

A plan may require payment of a premium for any period of continuation coverage. The amount of such premium generally may not exceed 102 percent[233] of the ''applicable premium'' for such period and the premium must be payable, at the election of the payor, in monthly installments.

The applicable premium for any period of continuation coverage means the cost to the plan for such period of coverage for similarly situated non-COBRA beneficiaries with respect to whom a qualifying event has not occurred, and is determined without regard to whether the cost is paid by the employer or employee. The determination of any applicable premium is made for a period of 12 months (the ''determination period'') and is required to be made before the beginning of such 12 month period.

In the case of a self-insured plan, the applicable premium for any period of continuation coverage of qualified beneficiaries is equal to a reasonable estimate of the cost of providing coverage during such period for similarly situated non-COBRA beneficiaries which is determined on an actuarial basis and takes into account such factors as the Secretary of Treasury prescribes in regulations. A self-insured plan may elect to determine the applicable premium on the basis of an adjusted cost to the plan for similarly situated non-COBRA beneficiaries during the preceding determination period.

A plan may not require payment of any premium before the day which is 45 days after the date on which the qualified beneficiary made the initial election for continuation coverage. A plan is required to treat any required premium payment as timely if it is made within 30 days after the date the premium is due or within such longer period as applies to, or under, the plan.

Other continuation coverage rules

Continuation coverage rules which are parallel to the Code's continuation coverage rules apply to group health plans under the Employee Retirement Income Security Act of 1974 (ERISA).[234] ERISA generally permits the Secretary of Labor and plan participants to bring a civil action to obtain appropriate equitable relief to enforce the continuation coverage rules of ERISA, and in the case of a plan administrator who fails to give timely notice to a participant or beneficiary with respect to COBRA continuation coverage, a court may hold the plan administrator liable to the participant or beneficiary in the amount of up to $110 a day from the date of such failure.

Although the Federal government and State and local governments are not subject to the Code and ERISA's continuation coverage rules, other laws impose similar continua ion coverage requirements with respect to plans maintained by such governmental employers.[235] In addition, many States have enacted laws or promulgated regulations that provide continuation coverage rights that are similar to COBRA continuation coverage rights in the case of a loss of group health coverage. Such State laws, for example, may apply in the case of a loss of coverage under a group health plan maintained by a small employer.

HOUSE BILL

Reduced COBRA premium

The provision provides that, for a period not exceeding 12 months, an assistance eligible individual is treated as having paid any premium required for COBRA continuation coverage under a group health plan if the individual pays 35 percent of the premium.[236] Thus, if the assistance eligible individual pays 35 percent of the premium, the group health plan must treat the individual as having paid the full premium required for COBRA continuation coverage, and the individual is entitled to a subsidy for 65 percent of the premium. An assistance eligible individual is any qualified beneficiary who elects COBRA continuation coverage and satisfies two additional requirements. First, the qualifying event with respect to the covered employee for that qualified beneficiary must be a loss of group health plan coverage on account of an involuntary termination of the covered employee's employment. However, a termination of employment for gross misconduct does not qualify (since such a termination under present law does not qualify for COBRA continuation coverage). Second, the qualifying event must occur during the period beginning September 1, 2008 and ending with December 31, 2009 and the qualified beneficiary must be eligible for COBRA continuation coverage during that period and elect such coverage.

An assistance eligible individual can be any qualified beneficiary associated with the relevant covered employee (e.g., a dependent of an employee who is covered immediately prior to a qualifying event), and such qualified beneficiary can independently elect COBRA (as provided under present law COBRA rules) and independently receive a subsidy. Thus, the subsidy for an assistance eligible individual continues after an intervening death of the covered employee.

Under the provision, any subsidy provided is excludible from the gross income of the covered employee and any assistance eligible individuals. However, for purposes of determining the gross income of the employer and any welfare benefit plan of which the group health plan is a part, the amount of the premium reduction is intended to be treated as an employee contribution to the group health plan. Finally, under the provision, notwithstanding any other provision of law, the subsidy is not permitted to be considered as income or resources in determining eligibility for, or the amount of assistance or benefits under, any public benefit provided under Federal or State law (including the law of any political subdivision).

Eligible COBRA continuation coverage

Under the provision, continuation coverage that qualifies for the subsidy is not limited to coverage required to be offered under the Code's COBRA rules but also includes continuation coverage required under State law that requires continuation coverage comparable to the continuation coverage required under the Code's COBRA rules for group health plans not subject to those rules (e.g., a small employer plan) and includes continuation coverage requirements that apply to health plans maintained by the Federal government or a State government. Comparable continuation coverage under State law does not include every State law right to continue health coverage, such as a right to continue coverage with no rules that limit the maximum premium that can be charged with respect to such coverage. To be comparable, the right generally must be to continue substantially similar coverage as was provided under the group health plan (or substantially similar coverage as is provided to similarly situated beneficiaries) at a monthly cost that is based on a specified percentage of the group health plan's cost of providing such coverage.

The cost of coverage under any group health plan that is subject to the Code's COBRA rules (or comparable State requirements or continuation coverage requirement under health plans maintained by the Federal government or any State government) is eligible for the subsidy, except contributions to a health flexible spending account.

Termination of eligibility for reduced premiums

The assistance eligible individual's eligibility for the subsidy terminates with the first month beginning on or after the earlier of (1) the date which is 12 months after the first day of the first month for which the subsidy applies, (2) the end of the maximum required period of continuation coverage for the qualified beneficiary under the Code's COBRA rules or the relevant State or Federal law (or regulation), or (3) the date that the assistance eligible individual becomes eligible for Medicare benefits under title XVIII of the Social Security Act or health coverage under another group health plan (including,

---

[233] In the case of a qualified beneficiary whose minimum coverage period is extended to 29 months on account of a disability determination, the premium for the period of the disability extension may not exceed 150 percent of the applicable premium for the period.

[234] Secs. 601 to 608 of ERISA.

[235] Continuation coverage rights similar to COBRA continuation coverage rights are provided to individuals covered by health plans maintained by the Federal government. 5 U.S.C. sec. 8905a. Group health plans maintained by a State that receives funds under Chapter 6A of Title 42 of the United States Code (the Public Health Service Act) are required to provide continuation coverage rights similar to COBRA continuation coverage rights for individuals covered by plans maintained by such State (and plans maintained by political subdivisions of such State and agencies and instrumentalities of such State or political subdivision of such State). 42 U.S.C. sec. 300bb–1.

[236] For this purpose, payment by an assistance eligible individual includes payment by another individual paying on behalf of the individual, such as a parent or guardian, or an entity paying on behalf of the individual, such as a State agency or charity. Further, the amount of the premium used to calculate the reduced premium is the premium amount that the employee would be required to pay for COBRA continuation coverage absent this premium reduction (e.g. 102 percent of the ''applicable premium'' for such period).

for example, a group health plan maintained by the new employer of the individual or a plan maintained by the employer of the individual's spouse). However, eligibility for coverage under another group health plan does not terminate eligibility for the subsidy if the other group health plan provides only dental, vision, counseling, or referral services (or a combination of the foregoing), is a health flexible spending account or health reimbursement arrangement, or is coverage for treatment that is furnished in an on-site medical facility maintained by the employer and that consists primarily of first-aid services, prevention and wellness care, or similar care (or a combination of such care).

If a qualified beneficiary paying a reduced premium for COBRA continuation coverage under this provision becomes eligible for coverage under another group health plan or Medicare, the provision requires the qualified beneficiary to notify, in writing, the group health plan providing the COBRA continuation coverage with the reduced premium of such eligibility under the other plan or Medicare. The notification by the assistance eligible individual must be provided to the group health plan in the time and manner as is specified by the Secretary of Labor. If an assistance eligible individual fails to provide this notification at the required time and in the required manner, and as a result the individual's COBRA continuation coverage continues to be subsidized after the termination of the individual's eligibility for such subsidy, a penalty is imposed on the individual equal to 110 percent of the subsidy provided after termination of eligibility.

This penalty only applies if the subsidy in the form of the premium reduction is actually provided to a qualified beneficiary for a month that the beneficiary is not eligible for the reduction. Thus, for example, if a qualified beneficiary becomes eligible for coverage under another group health plan and stops paying the reduced COBRA continuation premium, the penalty generally will not apply. As discussed below, under the provision, the group health plan is reimbursed for the subsidy for a month (65 percent of the amount of the premium for the month) only after receipt of the qualified beneficiary's portion (35 percent of the premium amount). Thus, the penalty generally will only arise when the qualified beneficiary continues to pay the reduced premium and does not notify the group health plan providing COBRA continuation coverage of the beneficiary's eligibility under another group health plan or Medicare.

Special COBRA election opportunity

The provision provides a special 60 day election period for a qualified beneficiary who is eligible for a reduced premium and who has not elected COBRA continuation coverage as of the date of enactment. The 60 day election period begins on the date that notice is provided to the qualified beneficiary of the special election period. However, this special election period does not extend the period of COBRA continuation coverage beyond the original maximum required period (generally 18 months after the qualifying event) and any COBRA continuation coverage elected pursuant to this special election period begins on the date of enactment and does not include any period prior to that date. Thus, for example, if a covered employee involuntarily terminated employment on September 10, 2008, but did not elect COBRA continuation coverage and was not eligible for coverage under another group health plan, the employee would have 60 days after date of notification of this new election right to elect the coverage and receive the subsidy. If the employee made the election, the coverage would begin with the date of enactment and would not include any period prior to that date. However, the coverage would not be required to last for 18 months. Instead the maximum required COBRA continuation coverage period would end not later than 18 months after September 10, 2008.

The special enrollment provision applies to a group health plan that is subject to the COBRA continuation coverage requirements of the Code, ERISA, Title 5 of the United States Code (relating to plans maintained by the Federal government), or the Public Health Service Act (''PHSA'').

With respect to an assistance eligible individual who elects coverage pursuant to the special election period, the period beginning on the date of the qualifying event and ending with the day before the date of enactment is disregarded for purposes of the rules that limit the group health plan from imposing pre-existing condition limitations with respect to the individual's coverage.[237]

Reimbursement of group health plans

The provision provides that the entity to which premiums are payable (determined under the applicable COBRA continuation coverage requirement)[238] shall be reimbursed by the amount of the premium for COBRA continuation coverage that is no aid by an assistance eligible individual on account of the premium reduction. An entity is not eligible for subsidy reimbursement, however, until the entity has received the reduced premium payment from the assistance eligible individual. To the extent that such entity has liability for income tax withholding from wages[239] or FICA taxes[240] with respect to its employees, the entity is reimbursed by treating the amount that is reimbursable to the entity as a credit against its liability for these payroll taxes.[241] To the extent that such amount exceeds the amount of the entity's liability for these payroll taxes, the Secretary shall reimburse the entity for the excess directly. The provision requires any entity entitled to such reimbursement to submit such reports as the Secretary of Treasury may require, including an attestation of the involuntary termination of employment of each covered employee on the basis of whose termination entitlement to reimbursement of premiums is claimed, and a report of the amount of payroll taxes offset for a reporting period and the estimated offsets of such taxes for the next reporting period. This report is required to be provided at the same time as the deposits of the payroll taxes would have been required, absent the offset, or such times as the Secretary specifies.

Notice requirements

The notice of COBRA continuation coverage that a plan administrator is required to provide to qualified beneficiaries with respect to a qualifying event under present law must contain, under the provision, additional information including, for example, information about the qualified beneficiary's right to the premium reduction (and subsidy) and the conditions on the subsidy, and a description of the obligation of the qualified beneficiary to notify the group health plan of eligibility under another group health plan or eligibility for Medicare benefits under title XVIII of the Social Security Act, and the penalty for failure to provide this notification. The provision also requires a new notice to be given to qualified beneficiaries entitled to a special election period after enactment. In the case of group health plans that are not subject to the COBRA continuation coverage requirements of the Code, ERISA, Title 5 of the United States Code (relating to plans maintained by the Federal government), or PHSA, the provision requires that notice be given to the relevant employees and beneficiaries as well, as specified by the Secretary of Labor. Within 30 days after enactment, the Secretary of Labor is directed to provide model language for the additional notification required under the provision. The provision also provides an expedited 10–day review process by the Department of Labor, under which an individual may request review of a denial of treatment as an assistance eligible individual by a group health plan.

Regulatory authority

The provision provides authority to the Secretary of the Treasury to issue regulations or other guidance as may be necessary or appropriate to carry out the provision, including any reporting requirements or the establishment of other methods for verifying the correct amounts of payments and credits under the provision. For example, the Secretary of the Treasury might require verification on the return of an assistance eligible individual who is the covered employee that the individual's termination of employment was involuntary. The provision directs the Secretary of the Treasury to issue guidance or regulations addressing the reimbursement of the subsidy in the case of a multiemployer group health plan. The provision also provides authority to the Secretary of the Treasury to promulgate rules, procedures, regulations, and other guidance as is necessary and appropriate to prevent fraud and abuse in the subsidy program, including the employment tax offset mechanism.

Reports

The provision requires the Secretary of the Treasury to submit an interim and a final report regarding the implementation of the premium reduction provision. The interim report is to include information about the number of individuals receiving assistance, and the total amount of expenditures incurred, as of the date of the report. The final report, to be issued as soon as practicable after the last period of COBRA continuation coverage for which premiums are provided, is to include similar information as provided in the interim report, with the addition of information about the average dollar amount (monthly and annually) of premium reductions provided to such individuals. The reports are to be given to the Committee on Ways and Means, the Committee on Energy and Commerce, the Committee on Health

[237] Section 9801 provides that a group health plan may impose a pre-existing condition exclusion for no more than 12 months after a participant or beneficiary's enrollment date. Such 12–month period must be reduced by the aggregate period of creditable coverage (which includes periods of coverage under another group health plan). A period of creditable coverage can be disregarded if, after the coverage period and before the enrollment date, there was a 63-day period during which the individual was not covered under any creditable coverage. Similar rules are provided under ERISA and PHSA.

[238] Applicable continuation coverage that qualifies for the subsidy and thus for reimbursement is not limited to coverage required to be offered under the Code's COBRA rules but also includes continuation coverage required under State law that requires continuation coverage comparable to the continuation coverage required under the Code's COBRA rules for group health plans not subject to those rules (e.g., a small employer plan) and includes continuation coverage requirements that apply to health plans maintained by the Federal government or a State government.

[239] Sec. 3401.

[240] Sec. 3102 (relating to FICA taxes applicable to employees) and sec. 3111 (relating to FICA taxes applicable to employers).

[241] In determining any amount transferred or appropriated to any fund under the Social Security Act, amounts credited against an employer's payroll tax obligations pursuant to the provision shall not be taken into account.

Education, Labor and Pensions and the Committee on Finance.

Effective date

The provision is effective for premiums for months of coverage beginning on or after the date of enactment. However, it is intended that a group health plan will not fail to satisfy the requirements for COBRA continuation coverage merely because the plan accepts payment of 100 percent of the premium from an assistance eligible employee during the first two months beginning on or after the date of enactment while the premium reduction is being implemented, provided the amount of the resulting premium overpayment is credited against the individual's premium (35 percent of the premium) for future months or the overpayment is otherwise repaid to the employee as soon as practical.

SENATE AMENDMENT

The Senate amendment is the same as the House bill with certain modifications. The amount of the COBRA the premium reduction (or subsidy) is 50 percent of the required premium under the Senate amendment (rather than 65 percent as provided under the House bill).

In addition, a group health plan is permitted to provide a special enrollment right to assistance-eligible individuals to allow them to change coverage options under the plan in conjunction with electing COBRA continuation coverage. Under this special enrollment right, the assistance eligible individual must only be offered the option to change to any coverage option offered to employed workers that provides the same or lower health insurance premiums than the individual's group health plan coverage as of the date of the covered employee's qualifying event. If the individual elects a different coverage option under this special enrollment right in conjunction with electing COBRA continuation coverage, this is the coverage that must be provided for purposes of satisfying the COBRA continuation coverage requirement. However the coverage plan option into which the individual must be given the opportunity to enroll under this special enrollment right does not include the following: a coverage option providing only dental, vision, counseling, or referral services (or a combination of the foregoing); a health flexible spending account or health reimbursement arrangement; or coverage for treatment that is furnished in an on-site medical facility maintained by the employer and that consists primarily of first-aid services, prevention and wellness care, or similar care (or a combination of such care).

Effective date.—The provision is effective for months of coverage beginning after the date of enactment. In addition, the Senate amendment specifically provides rules for reimbursement of an assistance eligible individual if such individual pays 100 percent of the premium required for COBRA continuation coverage for any month during the 60-day period beginning on the first day of the first month after the date of enactment. The person who receives the premium overpayment is permitted to provide a credit to the assistance eligible individual for the amount overpaid against one or more subsequent premiums (subject to the 50 percent payment rule) for COBRA continuation coverage, but only if it is reasonable to believe that the credit for the excess will be used by the assistance eligible individual within 180 days of the individual's overpayment. Otherwise, the person must make a reimbursement payment to the individual for the amount of the premium overpayment within 60 days of receiving the overpayment. Further, if as of any day during the 180-day period it is no longer reasonable to believe that the credit will be used during that period by the assistance eligible individual (e.g., the individual ceases to be eligible for COBRA continuation coverage), payment equal to the remainder of the credit outstanding must be made to the individual within 60 days of such day.

CONFERENCE AGREEMENT

In general

The conference agreement generally follows the House bill. Thus, as under the House bill, the rate of the premium subsidy is 65 percent of the premium for a period of coverage. However, the period of the premium subsidy is limited to a maximum of 9 months of coverage (instead of a maximum of 12 months). As under the House bill and Senate amendment, the premium subsidy is only provided with respect to involuntary terminations that occur on or after September 1, 2008, and before January 1, 2010.

The conference agreement includes the provision in the Senate amendment that permits a group health plan to provide a special enrollment right to assistance eligible individuals to allow them to change coverage options under the plan in conjunction with electing COBRA continuation coverage.[242] This provision only allows a group health plan to offer additional coverage options to assistance eligible individuals and does not change the basic requirement under Federal COBRA continuation coverage requirements that a group health plan must allow an assistance eligible individual to choose to continue with the coverage in which the individual is enrolled as of the qualifying event.[243] However, once the election of the other coverage is made, it becomes COBRA continuation coverage under the applicable COBRA continuation provisions. Thus, for example, under the Federal COBRA continuation coverage provisions, if a covered employee chooses different coverage pursuant to being provided this option, the different coverage elected must generally be permitted to be continued for the applicable required period (generally 18 months or 36 months, absent an event that permits coverage to be terminated under the Federal COBRA continuation provisions) even though the premium subsidy is only for nine months.

The conference agreement adds an income threshold as an additional condition on an individual's entitlement to the premium subsidy during any taxable year. The income threshold applies based on the modified adjusted gross income for an individual income tax return for the taxable year in which the subsidy is received (i.e., either 2009 or 2010) with respect to which the assistance eligible individual is the taxpayer, the taxpayer's spouse or a dependent of the taxpayer (within the meaning of section 152 of the Code, determined without regard to sections 152(b)(1), (b)(2) and (d)(1)(B)). Modified adjusted gross income for this purpose means adjusted gross income as defined in section 62 of the Code increased by any amount excluded from gross income under section 911, 931, or 933 of the Code. Under this income threshold, if the premium subsidy is provided with respect to any COBRA continuation coverage which covers the taxpayer, the taxpayer's spouse, or any dependent of the taxpayer during a taxable year and the taxpayer's modified adjusted gross income exceeds $145,000 (or $290,000 for joint filers), then the amount of the premium subsidy for all months during the taxable year must be repaid. The mechanism for repayment is an increase in the taxpayer's income tax liability for the year equal to such amount. For taxpayers with adjusted gross income between $125,000 and $145,000 (or $250,000 and $290,000 for joint filers), the amount of the premium subsidy for the taxable year that must be repaid is reduced proportionately.

Under this income threshold, for example, an assistance eligible individual who is eligible for Federal COBRA continuation coverage based on the involuntary termination of a covered employee in August 2009 but who is not entitled to the premium subsidy for the periods of coverage during 2009 due to having income above the threshold, may nevertheless be entitled to the premium subsidy for any periods of coverage in the remaining period (e.g. 5 months of coverage) during 2010 to which the subsidy applies if the modified adjusted gross income for 2010 of the relevant taxpayer is not above the income threshold.

The conference report allows an individual to make a permanent election (at such time and in such form as the Secretary of Treasury may prescribe) to waive the right to the premium subsidy for all periods of coverage. For the election to take effect, the individual must notify the entity (to which premiums are reimbursed under section 6432(a) of the Code) of the election. This waiver provision allows an assistance eligible individual who is certain that the modified adjusted gross income limit prevents the individual from being entitled to any premium subsidy for any coverage period to decline the subsidy for all coverage periods and avoid being subject to the recapture tax. However, this waiver applies to all periods of coverage (regardless of the tax year of the coverage) for which the individual might be entitled to the subsidy. The premium subsidy for any period of coverage cannot later be claimed as a tax credit or otherwise be recovered, even if the individual later determines that the income threshold was not exceeded for a relevant tax year. This waiver is made separately by each qualified beneficiary (who could be an assistance eligible individual) with respect to a covered employee.

Technical chances

The conference agreement makes a number of technical changes to the COBRA premium subsidy provisions in the House bill. The conference agreement clarifies that a reference to a period of coverage in the provision is a reference to the monthly or shorter period of coverage with respect to which premiums are charged with respect to such coverage. For example, the provision is effective for a period of coverage beginning after the date of enactment. In the case of a plan that provides and charges for COBRA continuation coverage on a calendar month basis, the provision is effective for the first calendar month following date of enactment.

The conference agreement specifically provides that if a person other than the individual's employer pays on the individual's behalf then the individual is treated as paying 35 percent of the premium, as required to be entitled to the premium subsidy. Thus, the conference agreement makes clear that, for this purpose, payment by an assistance eligible individual includes payment by another individual paying on behalf of the individual, such as a parent or guardian, or an entity paying on behalf of the individual, such as a State agency or charity.

The conference agreement clarifies that, for the special 60 day election period for a qualified beneficiary who is eligible for a reduced premium and who has not elected COBRA continuation coverage as of the date of enactment provided in the House bill, the election period begins on the date of enactment and ends 60 days after the notice is provided to the qualified beneficiary of the special election period. In addition, the conference agreement clarifies that coverage

[242] An employer can make this option available to covered employees under current law.

[243] All references to "Federal COBRA continuation coverage" mean the COBRA continuation coverage provisions of the Code, ERISA, and PHSA.

elected under this special election right begins with the first period of coverage beginning on or after the date of enactment. The conference agreement also extends this special COBRA election opportunity to a qualified beneficiary who elected COBRA coverage but who is no longer enrolled on the date of enactment, for example, because the beneficiary was unable to continue paying the premium.

The conference agreement clarifies that a violation of the new notice requirements is also a violation of the notice requirements of the underlying COBRA provision. As under the House bill, a notice must be provided to all individuals who terminated employment during the applicable time period, and not just to individuals who were involuntarily terminated.

As under the House bill, coverage under a flexible spending account (''FSA'') is not eligible for the subsidy. The conference agreement clarifies that a FSA is defined as a health flexible spending account offered under a cafeteria plan within the meaning of section 125 of the Code.[244]

As under the House bill, there is a provision for expedited review, by the Secretary of Labor or Health and Human Services (in consultation with the Secretary of the Treasury), of denials of the premium subsidy. Under the conference agreement, such reviews must be completed within 15 business days (rather than 10 business days as provided in the House bill) after receipt of the individual's application for review. The conference agreement is intended to give the Secretaries the flexibility necessary to make determinations within 15 business days based upon evidence they believe, in their discretion, to be appropriate. Additionally, the conference agreement intends that, if an individual is denied treatment as an assistance eligible individual and also submits a claim for benefits to the plan that would be denied by reason of not being eligible for Federal COBRA continuation coverage (or failure to pay full premiums), the individual would be eligible to proceed with expedited review irrespective of any claims for benefits that may be pending or subject to review under the provisions of ERISA 503. Under the conference agreement, either Secretary's determination upon review is de novo and is the final determination of such Secretary.

The conference agreement clarifies the reimbursement mechanism for the premium subsidy in several respects. First, it clarifies that the person to whom the reimbursement is payable is either (1) the multiemployer group health plan, (2) the employer maintaining the group health plan subject to Federal COBRA continuation coverage requirements, and (3) the insurer providing coverage under an insured plan. Thus, this is the person who is eligible to offset its payroll taxes for purposes of reimbursement. It also clarifies that the credit for the reimbursement is treated as a payment of payroll taxes. Thus, it clarifies that any reimbursement for an amount in excess of the payroll taxes owed is treated in the same manner as a tax refund. Similarly, it clarifies that overstatement of reimbursement is a payroll tax violation. For example, IRS can assert appropriate penalties for failing to truthfully account for the reimbursement. However, it is not intended that any portion of the reimbursement is taken into account when determining the amount of any penalty to be imposed against any person, required to collect, truthfully account for, and pay over any tax under section 6672 of the Code.

It is intended that reimbursement not be mirrored in the U.S. possessions that have mirror income tax codes (the Commonwealth of the Northern Mariana Islands, Guam, and the Virgin Islands). Rather, the intent of Congress is that reimbursement will have direct application to persons in those possessions. Moreover, it is intended that income tax withholding payable to the government of any possession (American Samoa, the Commonwealth of the Northern Mariana Islands, the Commonwealth of Puerto Rico, Guam, or the Virgin Islands) (in contrast with FICA withholding payable to the U.S. Treasury) will not be reduced as a result of the application of this provision. A person liable for both FICA withholding payable to the U.S. Treasury and income tax withholding payable to a possession government will be credited or refunded any excess of (1) the amount of FICA taxes treated as paid under the reimbursement rule of the provision over (2) the amount of the person's liability for those FICA taxes.

Effective date

The provision is effective for periods of coverage beginning after the date of enactment. In addition, specific rules are provided in the case of an assistance eligible individual who pays 100 percent of the premium required for COBRA continuation coverage for any coverage period during the 60-day period beginning on the first day of the first coverage period after the date of enactment. Such rules follow the Senate amendment.

B. EXTENSION OF MINIMUM COBRA CONTINUATION COVERAGE (SEC. 3002(B) OF THE HOUSE BILL)

PRESENT LAW

A covered employee's termination of employment (other than for gross misconduct), whether voluntary or involuntary, is a COBRA qualifying [245] A covered employee's reduction in hours of employment, whether voluntary or involuntary, is also a COBRA qualifying event if the reduction results in a loss of employer sponsored group health plan coverage.[246]

The minimum length of coverage continuation that must be offered to a qualified beneficiary depends upon a number of factors, including the specific qualifying event that gives rise to a qualified beneficiary's right to elect coverage continuation. In the case of a qualifying event that is the termination, or reduction of hours, of a covered employee's employment, the minimum period of coverage that must be offered to each qualified beneficiary generally must extend until 18 months after the date of the qualifying event.[247] Under certain circumstances, however, the coverage continuation period can be extended up to a maximum total of 36 months. For example, if a second qualifying event occurs within the initial 18 month continuation period the initial period will be extended up to an additional 18 months (for a total of 36 months) for qualified beneficiaries other than the covered employee. Similarly, if a qualified beneficiary is determined to be disabled for purposes of Social Security during the first 60 days of the initial 18 month continuation coverage period, the initial 18 month period may be extended up to an additional 11 months (for a total of 29 months) for the disabled beneficiary and all of his or her covered family members. If a second qualifying event then occurs during the additional 11 month coverage period, the continuation period may be extended for another seven months, for a total of 36 months of continuation coverage.

HOUSE BILL

The provision amends section 4980B(f)(2)(B) to provide extended COBRA coverage periods for covered employees who qualify for COBRA continuation coverage due to termination of employment or reduction in hours and who (a) are age 55 or older, or (b) have 10 or more years of service with the employer, at the time of the qualifying event. Such individuals would be permitted to continue their COBRA coverage until the earlier of enrollment for Medicare benefits under title XVIII of the Social Security Act, becomes covered under another group health plan. (described in section 4980B(f)(2)(B)(iv)), or termination of all health plans sponsored by the employer offering the COBRA coverage. The extended coverage period would apply to all qualified beneficiaries of the covered employee.

(3) The provision makes parallel changes to ERISA and PHSA.

Effective date.—The provision is effective for periods of coverage which would (without regard to any amendments made by the provision) end on or after the date of enactment.

SENATE AMENDMENT

No provision.

CONFERENCE AGREEMENT

The conference agreement does not include the House bill provision.

MODIFY THE HEALTH COVERAGE TAX CREDIT (SECS. 1899 TO 1899L OF THE CONFERENCE AGREEMENT AND SECS. 35, 4980B, 7527, AND 9801 OF THE CODE)

PRESENT LAW

In general

Under the Trade Act of 2002,[248] in the case of taxpayers who are eligible individuals, a refundable tax credit is provided for 6 percent of the taxpayer's premiums for qualified health insurance of the taxpayer and qualifying family members for each eligible coverage month beginning in the taxable year. The credit is commonly referred to as the health coverage tax credit (''HCTC''). The credit is available only with respect to amounts paid by the taxpayer. The credit is available on an advance basis.[249]

Qualifying family members are the taxpayer's spouse and any dependent of the taxpayer with respect to whom the taxpayer is entitled to claim a dependency exemption. Any individual who has other specified coverage is not a qualifying family member.

Persons eligible for the credit

Eligibility for the credit is determined on a monthly basis. In general, an eligible coverage month is any month if, as of the first day of the month, the taxpayer (1) is an eligible individual, (2) is covered by qualified health insurance, (3) does not have other specified coverage, and (4) is not imprisoned under Federal, State, or local authority.[250] In the case of a joint return, the eligibility

[244] Other FSA coverage does not terminate eligibility for coverage. Coverage under another group Health Reimbursement Account (''HRA'') will not terminate an individual's eligibility for the subsidy as long as the HRA is properly classified as an FSA under relevant IRS guidance. See Notice 2002–45, 2002–2 CB 93.

[245] Sec. 4980B(f)(3)(B); Treas. Reg. 54.4980B–4.

[246] Sec. 4980(f)(3)(B).

[247] Sec. 4980B((f)(2)(B)(i)(I). If coverage under a plan is lost on account of a qualifying event but the loss of coverage actually occurs at a later date, the minimum coverage period may be extended by the plan so that it is measured from the date when coverage is actually lost.

[248] Pub. L. No. 107–210 (2002).

[249] An individual is eligible for the advance payment of the credit once a qualified health insurance costs credit eligibility certificate is in effect. Sec. 7527. Unless otherwise indicated, all ''section'' references are to the Internal Revenue Code of 1986, as amended.

[250] An eligible month must begin after November 4, 2002. This date is 90 days after the date of enactment of the Trade Act of 2002, which was August 6, 2002.

requirements are met if at least one spouse satisfies the requirements.

An eligible individual is an individual who is (1) an eligible TAA recipient, (2) an eligible alternative Trade Adjustment Assistance (''TAA'') recipient, or (3) an eligible Pension Benefit Guaranty Corporation (''PBGC'') pension recipient.

An individual is an eligible TAA recipient during any month the individual (1) is receiving for any day of such month a trade readjustment allowance[251] or who would be eligible to receive such an allowance but for the requirement that the individual exhaust unemployment benefits before being eligible to receive an allowance and (2) with respect to such allowance, is covered under a certification issued under subchapter A or D of chapter 2 of title II of the Trade Act of 1974. An individual is treated as an eligible TAA recipient during the first month that such individual would otherwise cease to be an eligible TAA recipient.

An individual is an eligible alternative TAA recipient during any month if the individual (1) is a worker described in section 246(a)(3)(B) of the Trade Act of 1974 who is participating in the program established under section 246(a)(1) of such Act, and (2) is receiving a benefit for such month under section 246(a)(2) of such Act. An individual is treated as an eligible alternative TAA recipient during the first month that such individual would otherwise cease to be an eligible TAA recipient.

An individual is a PBGC pension recipient for any month if he or she (1) is age 55 or over as of the first day of the month, and (2) is receiving a benefit any portion of which is paid by the PBGC. The IRS has interpreted the definition of PBGC pension recipient to also include certain alternative recipients and recipients who have received certain lump-sum payments on or after August 6, 2002. A person is not an eligible individual if he or she may be claimed as a dependent on another person's tax return.

An otherwise eligible taxpayer is not eligible for the credit for a month if, as of the first day of the month, the individual has other specified coverage. Other specified coverage is (1) coverage under any insurance which constitutes medical care (except for insurance substantially all of the coverage of which is for excepted benefits)[252] maintained by an employer (or former employer) if at least 50 percent of the cost of the coverage is paid by an employer[253] (or former employer) of the individual or his or her spouse or (2) coverage under certain governmental health programs. Specifically, an individual is not eligible for the credit if, as of the first day of the month, the individual is (1) entitled to benefits under Medicare Part A, enrolled in Medicare Part B, or enrolled in Medicaid or SCHIP, (2) enrolled in a health benefits plan under the Federal Employees Health Benefit Plan, or (3) entitled to receive benefits under chapter 55 of title 10 of the United States Code (relating to military personnel). An individual is not considered to be enrolled in Medicaid solely by reason of receiving immunizations.

A special rule applies with respect to alternative TAA recipients. For eligible alternative TAA recipients, an individual has other specified coverage if the individual is (1) eligible for coverage under any qualified health insurance (other than coverage under a COBRA continuation provision, State-based continuation coverage, or coverage through certain State arrangements) under which at least 50 percent of the cost of coverage is paid or incurred by an employer of the taxpayer or the taxpayer's spouse or (2) covered under any such qualified health insurance under which any portion of the cost of coverage is paid or incurred by an employer of the taxpayer or the taxpayer's spouse.

Qualified health insurance

Qualified health insurance eligible for the credit is: (1) COBRA continuation[254] coverage; (2) State-based continuation coverage provided by the State under a State law that requires such coverage; (3) coverage offered through a qualified State high risk pool; (4) coverage under a health insurance program offered to State employees or a comparable program; (5) coverage through an arrangement entered into by a State and a group health plan, an issuer of health insurance coverage, an administrator, or an employer; (6) coverage offered through a State arrangement with a private sector health care coverage purchasing pool; (7) coverage under a State-operated health plan that does not receive any Federal financial participation; (8) coverage under a group health plan that is available through the employment of the eligible individual's spouse; and (9) coverage under individual health insurance if the eligible individual was covered under individual health insurance during the entire 30-day period that ends on the date the individual became separated from the employment which qualified the individual for the TAA allowance, the benefit for an eligible alternative TAA recipient, or a pension benefit from the PBGC, whichever applies.[255]

Qualified health insurance does not include any State-based coverage (i.e., coverage described in (2)-(7) in the preceding paragraph), unless the State has elected to have such coverage treated as qualified health insurance and such coverage meets certain requirements.[256] Such State coverage must provide that each qualifying individual is guaranteed enrollment if the individual pays the premium for enrollment or provides a qualified health insurance costs eligibility certificate and pays the remainder of the premium. In addition, the State-based coverage cannot impose any pre-existing condition limitation with respect to qualifying individuals. State-based coverage cannot require a qualifying individual to pay a premium or contribution that is greater than the premium or contribution for a similarly situated individual who is not a qualified individual. Finally, benefits under the State-based coverage must be the same as (or substantially similar to) benefits provided to similarly situated individuals who are not qualifying individuals.

A qualifying individual is an eligible individual who seeks to enroll in the State-based coverage and who has aggregate periods of creditable coverage[257] of three months or longer, does not have other specified coverage, and who is not imprisoned. In general terms, creditable coverage includes health care coverage without a gap of more than 63 days. Therefore, if an individual's qualifying coverage were terminated more than 63 days before the individual enrolled in the State-based coverage, the individual would not be a qualifying individual and would not be entitled to the State-based protections. A qualifying individual also includes qualified family members of such an eligible individual.

Qualified health insurance does not include coverage under a flexible spending or similar arrangement or any insurance if substantially all of the coverage is for excepted benefits.

Other rules

Amounts taken into account in determining the credit may not be taken into account in determining the amount allowable under the itemized deduction for medical expenses or the deduction for health insurance expenses of self-employed individuals. Amounts distributed from a medical savings account or health savings accounts are not eligible for the credit. The amount of the credit available through filing a tax return is reduced by any credit received on an advance basis. Married taxpayers filing separate returns are eligible for the credit; however, if both spouses are eligible individuals and the spouses file separate returns, then the spouse of the taxpayer is not a qualifying family member.

The Secretary of the Treasury is authorized to prescribe such regulations and other guidance as may be necessary or appropriate to carry out the credit provision.

COBRA

The Consolidated Omnibus Reconciliation Act of 1985 (''COBRA'') requires that a group health plan must offer continuation coverage to qualified beneficiaries in the case of a qualifying event. An excise tax under the Code applies on the failure of a group health plan to meet the requirement.[258] Qualifying events include the death of the covered employee, termination of the covered employee's employment, divorce or legal separation of the covered employee, and certain bankruptcy proceedings of the employer. In the case of termination from employment, the coverage must be extended for a period of not less than 18 months. In certain other cases, coverage must be extended for a period of not less than 36 months. Under such period of continuation coverage, the plan may require payment of a premium by the beneficiary of up to 102 percent of the applicable premium for the period.

HOUSE BILL

No provision.

[251] The eligibility rules and conditions for such an allowance are specified in chapter 2 of title II of the Trade Act of 1974. Among other requirements, payment of a trade readjustment allowance is conditioned upon the individual enrolling in certain training programs or receiving a waiver of training requirements.

[252] Excepted benefits are: (1) coverage only for accident or disability income or any combination thereof; (2) coverage issued as a supplement to liability insurance; (3) liability insurance, including general liability insurance and automobile liability insurance; (4) worker's compensation or similar insurance; (5) automobile medical payment insurance; (6) credit-only insurance; (7) coverage for on-site medical clinics; (8) other insurance coverage similar to the coverages in (1)–(7) specified in regulations under which benefits for medical care are secondary or incidental to other insurance benefits; (9) limited scope dental or vision benefits; (10) benefits for long-term care, nursing home care, home health care, community-based care, or any combination thereof; and (11) other benefits similar to those in (9) and (10) as specified in regulations; (12) coverage only for a specified disease or illness; (13) hospital indemnity or other fixed indemnity insurance; and (14) Medicare supplemental insurance.

[253] An amount is considered paid by the employer if it is excludable from income. Thus, for example, amounts paid for health coverage on a salary reduction basis under an employer plan are considered paid by the employer. A rule aggregating plans of the same employer applies in determining whether the employer pays at least 50 percent of the cost of coverage.

[254] COBRA continuation is defined in section 9832(d)(1).

[255] For this purpose, ''individual health insurance'' means any insurance which constitutes medical care offered to individuals other than in connection with a group health plan. Such term does not include Federal- or State-based health insurance coverage.

[256] For guidance on how a State elects a health program to be qualified health insurance for purposes of the credit, see Rev. Proc. 2004–12, 2004–1 C.B. 528.

[257] Creditable coverage is determined under the Health Insurance Portability and Accountability Act. Sec. 9801(c).

[258] Sec. 4980B.

SENATE AMENDMENT

No provision.[259]

CONFERENCE AGREEMENT

Increase in credit percentage amount

The provision increases the amount of the HCTC to 80 percent of the taxpayer's premiums for qualified health insurance of the taxpayer and qualifying family members.

Effective date.—The provision is effective for coverage months beginning on or after the first day of the first month beginning 60 days after date of enactment. The increased credit rate does not apply to months beginning after December 31, 2010.

Payment for monthly premiums paid prior to commencement of advance payment of credit

The provision provides that the Secretary of Treasury shall make one or more retroactive payments on behalf of certified individuals equal to 80 percent of the premiums for coverage of the taxpayer and qualifying family members for qualified health insurance for eligible coverage months occurring prior to the first month for which an advance payment is made on behalf of such individual. The amount of the payment must be reduced by the amount of any payment made to the taxpayer under a national emergency grant pursuant to section 173(f) of the Workforce Investment Act of 1998 for a taxable year including such eligible coverage months.

Effective date.—The provision is effective for eligible coverage months beginning after December 31, 2008. The Secretary of the Treasury, however, is not required to make any payments under the provision until after the date that is six months after the date of enactment. The provision does not apply to months beginning after December 31, 2010.

TAA recipients not enrolled in training programs eligible for credit

The provision modifies the definition of an eligible TAA recipient to eliminate the requirement that an individual be enrolled in training in the case of an individual receiving unemployment compensation. In addition, the provision clarifies that the definition of an eligible TAA recipient includes an individual who would be eligible to receive a trade readjustment allowance except that the individual is in a break in training that exceeds the period specified in section 233(e) of the Trade Act of 1974, but is within the period for receiving the allowance.

Effective date.—The provision is effective for months beginning after the date of enactment in taxable years ending after such date. The provision does not apply to months beginning after December 31, 2010.

TAA pre-certification period rule for purposes of determining whether there is a 63-day lapse in creditable coverage

Under the provision, in determining if there has been a 63-day lapse in coverage (which determines, in part, if the State-based consumer protections apply), in the case of a TAA-eligible individual, the period beginning on the date the individual has a TAA-related loss of coverage and ending on the date which is seven days after the date of issuance by the Secretary (or by any person or entity designated by the Secretary) of a qualified health insurance costs credit eligibility certificate (under section 7527) for such individual is not taken into account.

Effective date.—The provision is effective for plan years beginning after the date of enactment. The provision does not apply to plan years beginning after December 31, 2010.

[259] The Senate amendment did not amend the HCTC, but section 1701 of the Senate amendment provided for a temporary extension of the Trade Adjustment Assistance Program (generally until December 31, 2010). Certain beneficiaries of this program are eligible for the HCTC.

Continued qualification of family members after certain events

The provision provides continued eligibility for the credit for family members after certain events. The rule applies in the case of (1) the eligible individual becoming entitled to Medicare, (2) divorce and (3) death.

In the case of a month which would be an eligible coverage month with respect to an eligible individual except that the individual is entitled to benefits under Medicare Part A or enrolled in Medicare Part B, the month is treated as an eligible coverage month with respect to the individual solely for purposes of determining the amount of the credit with respect to qualifying family members (i.e., the credit is allowed for expenses paid for qualifying family members after the eligible individual is eligible for Medicare). Such treatment applies only with respect to the first 24 months after the eligible individual is first entitled to benefits under Medicare Part A or enrolled in Medicare Part B.

In the case of the finalization of a divorce between an eligible individual and the individual's spouse, the spouse is treated as an eligible individual for a period of 24 months beginning with the date of the finalization of the divorce. Under such rule, the only family members that may be taken into account with respect to the spouse as qualifying family members are those individuals who were qualifying family members immediately before such divorce finalization.

In the case of the death of an eligible individual, the spouse of such individual (determined at the time of death) is treated as an eligible individual for a period of 24 months beginning with the date of death. Under such rule, the only qualifying family members that may be taken into account with respect to the spouse are those individuals who were qualifying family members immediately before such death. In addition, any individual who was a qualifying family member of the decedent immediately before such death[260] treated as an eligible individual for a period of 24 months beginning with the date of death, except that in determining the amount of the HCTC only such qualifying family member may be taken into account.

Effective date.—The provision is effective for months beginning after December 31, 2009. The provision does not apply to months that begin after December 31, 2010.

Alignment of COBRA coverage

The maximum required COBRA continuation coverage period is modified by the provision with respect to certain individuals whose qualifying event is a termination of employment or a reduction in hours. First, in the case of such a qualifying event with respect to a covered employee who has a nonforfeitable right to a benefit any portion of which is paid by the PBGC, the maximum coverage period must end not earlier than the date of death of the covered employee (or in the case of the surviving spouse or dependent children of the covered employee, not earlier than 24 months after the date of death of the covered employee). Second, in the case of such a qualifying event where the covered employee is a TAA eligible individual as of the date that the maximum coverage period would otherwise terminate, the maximum coverage period must extend during the period that the individual is a TAA eligible individual.

Effective date.—The provision is effective for periods of coverage that would, without regard to the provision, end on or after the date of enactment, provided that the provision does not extend any periods of coverage beyond December 31, 2010.

[260] In the case of a dependent, the rule applies to the taxpayer to whom the personal exemption deduction under section 151 is allowable.

Addition of coverage through voluntary employees' beneficiary associations

The provision expands the definition of qualified health insurance by including coverage under an employee benefit plan funded by a voluntary employees' beneficiary association (''VEBA'', as defined in section 501(c)(9)) established pursuant to an order of a bankruptcy court, or by agreement with an authorized representative, as provided in section 1114 of title 11, United States Code.

Effective date.—The provision is effective on the date of enactment. The provision does not apply with respect to certificates of eligibility issued after December 31, 2010.

Notice requirements

The provision requires that the qualified health insurance costs credit eligibility certificate provided in connection with the advance payment of the HCTC must include (1) the name, address, and telephone number of the State office or offices responsible for providing the individual with assistance with enrollment in qualified health insurance, (2) a list of coverage options that are treated as qualified health insurance by the State in which the individual resides, (3) in the case of a TAA-eligible individual, a statement informing the individual that the individual has 63 days from the date that is seven days after the issuance of such certificate to enroll in such insurance without a lapse in creditable coverage, and (4) such other information as the Secretary may provide.

Effective date.—The provision is effective for certificates issued after the date that is six months after the date of enactment. The provision does not apply to months beginning after December 31, 2010.

Survey and report on enhanced health coverage tax credit program

Survey

The provision requires that the Secretary of the Treasury must conduct a biennial survey of eligible individuals containing the following information:

1. In the case of eligible individuals receiving the HCTC (including those participating in the advance payment program (the ''HCTC program'')) (A) demographic information of such individuals, including income and education levels, (B). satisfaction of such individuals with the enrollment process in the HCTC program, (C) satisfaction of such individuals with available health coverage options under the credit, including level of premiums, benefits, deductibles, cost-sharing requirements, and the adequacy of provider networks, and (D) any other information that the Secretary determines is appropriate.

2. In the case of eligible individuals not receiving the HCTC (A) demographic information on each individual, including income and education levels, (B) whether the individual was aware of the HCTC or the HCTC program, (C) the reasons the individual has not enrolled in the HCTC program, including whether such reasons include the burden of process of enrollment and the affordability of coverage, (D) whether the individual has health insurance coverage, and, if so, the source of such coverage, and (E) any other information that the Secretary determines is appropriate.

Not later than December 31 of each year in which a survey described above is conducted (beginning in 2010), the Secretary of Treasury must report to the Committee on Finance and the Committee on Health, Education, Labor, and Pensions of the Senate and the Committee on Ways and Means and the Committee on Education and Labor of the House of Representatives the findings of the most recent survey.

Report

Not later than October 1 of each year (beginning in 2010), the Secretary of Treasury must report to the Committee on Finance and the Committee on Health, Education, Labor, and Pensions of the Senate and the Committee on Ways and Means and the Committee on Education and Labor of the House of Representatives the following information with respect to the most recent taxable year ending before such date:

1. In each State and nationally (A) the total number of eligible individuals and the number of eligible individuals receiving the HCTC, (B) the total number of such eligible individuals who receive an advance payment of the HCTC through the HCTC program, (C) the average length of the time period of participation of eligible individuals in the HCTC program, and (D) the total number of participating eligible individuals in the HCTC program who are enrolled in each category of qualified health insurance with respect to each category of eligible individuals.

2. In each State and nationality, an analysis of (A) the range of monthly health insurance premiums, for self-only coverage and for family coverage, for individuals receiving the benefit of the HCTC and (B) the average and median monthly health insurance premiums, for self-only coverage and for family coverage, for individuals receiving the HCTC with respect to each category of qualified health insurance.

3. In each State and nationally, an analysis of the following information with respect to the health insurance coverage of individuals receiving the HCTC who are enrolled in State-based coverage: (A) deductible amounts, (B) other out-of-pocket cost-sharing amounts, and (C) a description of any annual or lifetime limits on coverage or any other significant limits on coverage services or benefits. The information must be reported with respect to each category of coverage.

4. In each State and nationally, the gender and average age of eligible individuals who receive the HCTC in each category of qualified health insurance with respect to each category of eligible individuals.

5. The steps taken by the Secretary of the Treasury to increase the participation rates in the HCTC program among eligible individuals, including outreach and enrollment activities.

6. The cost of administering the HCTC program by function, including the cost of subcontractors, and recommendations on ways to reduce the administrative costs, including recommended statutory changes.

7. After consultation with the Secretary of Labor, the number of States applying for and receiving national emergency grants under section 173(f) of the Workforce Investment Act of 1998, the activities funded by such grants on a State-by-State basis, and the time necessary for application approval of such grants.

Other non-revenue provisions

The provision also authorizes appropriations for implementation of the revenue provisions of the provision and provides grants under the Workforce Investment Act of 1998 for purposes related to the HCTC.

GAO study

The provision requires the Comptroller General of the United States to conduct a study regarding the HCTC to be submitted to Congress no later than March 31, 2010. The study is to include an analysis of (1) the administrative costs of the Federal government with respect to the credit and the advance payment of the credit and of providers of qualified health insurance with respect to providing such insurance to eligible individuals and their families, (2) the health status and relative risk status of eligible individuals and qualified family members covered under such insurance, (3) participation in the credit and the advance payment of the credit by eligible individuals and their qualifying family members, including the reasons why such individuals did or did not participate and the effects of the provision on participation, and (4) the extent to which eligible individuals and their qualifying family members obtained health insurance other than qualifying insurance or went without insurance coverage. The provision provides the Comptroller General access to the records within the possession or control of providers of qualified health insurance if determined relevant to the study. The Comptroller General may not disclose the identity of any provider of qualified health insurance or eligible individual in making information available to the public.

EFFECTIVE DATE

The provision is generally effective upon the date of enactment, excepted as otherwise noted above.

TITLE IV—HEALTH INFORMATION TECHNOLOGY

Subtitle C—Incentives for the Use of Health Information Technology

Part II—Medicare Program

INCENTIVES FOR ELIGIBLE PROFESSIONALS. (HOUSE BILL SEC. 4311; SENATE BILL SEC. 4201; CONFERENCE AGREEMENT SEC. 4101)

CURRENT LAW

There are several current legislative and administrative initiatives to promote the use of Health Information Technology (HIT) and Electronic Health Records (EHR's) in the Medicare program. The Medicare Modernization Act of 2003 (MMA; P.L. 108–173) established a timetable for the Centers for Medicare and Medicaid Services (CMS) to develop e-prescribing standards, which provide for the transmittal of such information as eligibility and benefits (including formulary drugs), information on the drug being prescribed and other drugs listed in the patient's medication history (including drug-drug interactions), and information on the availability of lower-cost, therapeutically appropriate alternative drugs. CMS issued a set of foundation standards in 2005, then piloted and tested additional standards in 2006, several of which were part of a 2008 final rule. The final Medicare e-prescribing standards, which become effective on April 1, 2009, apply to all Part D sponsors, as well as to prescribers and dispensers that electronically transmit prescriptions and prescription-related information about Part D drugs prescribed for Part D eligible individuals. The MMA did not require Part D drug prescribers and dispensers to e-prescribe. Under its provisions, only those who choose to e-prescribe must comply with the new standards. However, the Medicare Improvement for Patients and Providers Act of 2008 (MIPPA; P.L. 110–275) included an e-prescribing mandate and authorized incentive bonus payments for e-prescribers between 2009 and 2013. Beginning in 2012, payments will be reduced for those who fail to e-prescribe.

CMS is administering a number of additional programs to promote EHR adoption. The MMA mandated a three-year pay-for-performance demonstration in four states (AR, CA, MA, UT) to encourage physicians to adopt and use EHR to improve care for chronically ill Medicare patients. Physicians participating in the Medicare Care Management Performance (MCMP) demonstration receive bonus payments for reporting clinical quality data and meeting clinical performance standards for treating patients with certain chronic conditions. They are eligible for an additional incentive payment for using a certified EHR and reporting the clinical performance data electronically.

CMS has developed a second demonstration to promote EHR adoption using its Medicare waiver authority. The five-year Medicare EHR demonstration is intended to build on the foundation created by the MCMP program. It will provide financial incentives to as many as 1,200 small- to medium-sized physician practices in 12 communities across the country for using certified EHRs to improve quality, as measured by their performance on specific clinical quality measures. Additional bonus payments will be made based on the number of EHR functionalities a physician group has incorporated into its practice.

The Tax Relief and Health Care Act of 2006 (P.L. 109–432) established a voluntary physician quality reporting system, including an incentive payment for Medicare providers who report data on quality measures. The Medicare Physician Quality Reporting Initiative (PQRI) was expanded by the Medicare, Medicaid, and SCHIP Extension Act of 2007 (P.L. 110–173) and by MIPPA, which authorized the program indefinitely and increased the incentive that eligible physicians can receive for satisfactorily reporting quality measures. In 2009, eligible physicians may earn a bonus payment equivalent to 2.0% of their total allowed charges for covered Medicare physician fee schedule services. The PQRI quality measures include a structural measure that conveys whether a physician has and uses an EHR.

HOUSE BILL

The House bill would add an incentive payment to certain eligible professionals for the adoption and ''meaningful use,'' defined below, of a certified EHR system. Professionals eligible for the incentive payments are those who participate in Medicare and who are defined under Sec. 1861(r) of the Social Security Act.

Incentive payments. The amount of EHR incentive payments that eligible providers could receive would be capped, based on the amount of Medicare-covered professional services furnished during the year in question, and the total possible amount of the incentive payment would decrease over time. The bill permits a rolling implementation period, with cohorts starting in 2011, 2012, and 2013, respectively, being eligible for the entire five years of incentives. For example, incentives that start in 2011 would continue through 2015, while those that begin in 2012 would run through 2016 and those starting in 2013 would run through 2017.

For the first calendar year of the designated period described above, the limit would be $15,000. Over the next four calendar years, the total possible amount would decrease respectively by year to $12,000, $8,000, $4,000, and $2,000. The phase-down is different for eligible professionals first adopting EHR after 2013. For these eligible providers, the limit on the amount of the incentive payment would equal the limit in the first payment year for someone whose first payment year is 2013. For example, if the first payment year is after 2014 then the limit on the incentive payments for that year would be $12,000 rather than $15,000. The EHR incentive payments for professionals would not be available to a hospital-based eligible physician, such as a pathologist, anesthesiologist or emergency physician who furnishes substantially all such services in a hospital setting using the hospital's facilities and equipment, including computer equipment. However, health IT incentive payments are made available to hospitals in Sec. 4312.

The payments could be in the form of a single consolidated payment or in periodic installments, as determined by the Secretary. The Secretary would establish rules to coordinate the limits on the incentive payments for eligible professionals who provide covered professional services in more than one practice. The Secretary would seek to avoid duplicative requirements from federal and state governments to demonstrate meaningful use of certified EHR technology under the Medicare and Medicaid programs. The Secretary would be allowed to adjust the reporting periods in order to carry out this clause.

Meaningful use. For purposes of the EHR incentive payment, an eligible professional would be treated as a "meaningful user" of EHR technology if the eligible professional meets the following three criteria: (1) the eligible professional demonstrates to the satisfaction of the Secretary that during the period the professional is using a certified EHR technology in a meaningful manner, which would include the use of electronic prescribing as determined to be appropriate by the Secretary; (2) the eligible professional demonstrates to the satisfaction of the Secretary that during such period such certified EHR technology is connected in a manner that provides, in accordance with law and standards applicable to the exchange of information, for the electronic exchange of health information to improve the quality of health care, such as promoting care coordination; and (3) the eligible professional submits information on clinical quality measures.

The Secretary could provide for the use of alternative means for meeting the above requirements in the case of an eligible professional furnishing covered professional services in a group practice (as defined by the Secretary). The Secretary would seek to improve the use of electronic health records and health care quality by requiring more stringent measures of meaningful use over time.

Clinical quality measures. The Secretary would select the clinical quality measures and other measures but must be consistent with the following: (1) the Secretary would provide preference to clinical quality measures that have been endorsed by the consensus-based entity regarding performance measurement with which the Secretary has a contract under Sec. 1890(a) of the Social Security Act; and (2) prior to any measure being selected for the purposes of this provision, the Secretary would publish the measure in the Federal Register and provide for a period of public comment. The Secretary could not require the electronic reporting of information on clinical quality measures unless the Secretary has the capacity to accept the information electronically, which may be on a pilot basis. In selecting the measures and in establishing the form and manner for reporting these measures, the Secretary would seek to avoid redundant or duplicative reporting otherwise required, including reporting under the physician quality reporting initiative.

A professional could satisfy the demonstration requirement above through means specified by the Secretary, which may include the following: (1) an attestation; (2) the submission of claims with appropriate coding (such as a code indicating that a patient encounter was documented using certified EHR technology); (3) a survey response; (4) reporting the clinical quality and other measures mentioned above; and (5) other means specified by the Secretary. Notwithstanding other provisions of law that place restrictions on the use of Part D data, the Secretary could use data regarding drug claims submitted for purposes of determining payment under Part D for purposes of determining the EHR incentive payments under this legislation.

Payment adjustments. Fee schedule payments to eligible professionals would be adjusted under certain conditions. For covered professional services furnished by an eligible professional during 2016 or any subsequent payment year, if the professional is not a meaningful EHR user during the previous year's reporting period, the fee schedule amount would be reduced to 99% in 2016, 98% in 2017, and 97% in 2018 and in each subsequent year.

For 2019 and each subsequent year, if the Secretary finds that the proportion of eligible professionals who are meaningful EHR users is less than 75%, the applicable fee schedule amount would be decreased by 1 percentage point from the applicable percent in the preceding year, but in no case would the applicable percent be less than 95%.

Hardship exemption. The Secretary could, on a case-by-case basis, exempt an eligible professional from the application of the payment adjustment above if the Secretary determines, subject to annual renewal, that being a meaningful EHR user would result in a significant hardship, such as in the case of an eligible professional who practices in a rural area without sufficient Internet access. In no case would an eligible professional be granted such an exemption for more than five years.

Medicare Advantage. In general, Medicare incentives created under this section are not available to Medicare Advantage (MA) plans, and both the payments and penalties made under this section are exempt from the MA benchmark determinations. However, the legislation establishes conditions under which the EHR bonus payments and penalties for the adoption and meaningful use of certified EHR technology would apply to certain HMO-affiliated eligible professionals. In general, with respect to eligible professionals in a qualifying MA organization for whom the organization attests to the Secretary as meaningful users of EHR, the incentive payments and adjustments would apply in a similar manner as they apply to other eligible professionals. Incentive payments would be made to, and payment adjustments would apply to, the qualifying organizations. With respect to a qualifying MA organization, an eligible professional would be an eligible professional who (i) is employed by the organization or is employed by or is a partner of an entity that through contract furnishes at least 80% of the entity's patient care services to enrollees of the organization; and furnishes at least 80% of the professional services of the eligible professional to enrollees of the organization; and (ii) furnishes, on average, at least 20 hours per week of patient care services. For these MA-affiliated eligible professionals, the Secretary would determine the incentive payments which should be similar to the payments that would have been available to the professionals under FFS.

To avoid duplication of payments, if an eligible professional is both an MA-affiliated professional and eligible for the maximum payment under the fee-for-service program (FFS), the payment incentive would be made only under FFS. Otherwise, the incentive payment would be made to the plan. The Secretary would develop a process to ensure that duplicate payments are not made. A qualifying MA organization would specify a year (not earlier than 2011) that would be treated as the first payment year for all eligible professionals with respect to the MA organization.

In applying the applicable percentage payment adjustment to MA-affiliated eligible professionals, instead of the payment adjustment being an applicable percent of the fee schedule amount for a year, the payment adjustment to the payment to the MA organization would be a proportional amount based on the payment adjustment applicable to FFS providers and the fraction of the organization's eligible professionals who are not meaningfully using EHRs.

SENATE BILL

The Senate bill is mostly the same as the House bill, but with the following exceptions. The Senate bill does not provide for any incentive payments to eligible professionals who first adopt EHR in 2014 or in subsequent years but does provide a greater incentive for early adoption of EHR, with payments of $18,000 if the first payment year under the EHR incentive program is 2011 or 2012.

Certain rural eligible providers would receive larger incentive payments in the Senate bill. The incentive payment would be increased by 25% if the provider predominantly serves beneficiaries in a rural area designated as a health professional shortage area.

Under the Senate bill, the Secretary would also be given the authority to deem providers who satisfy state requirements for demonstrating meaningful use of EHR technology as meeting the criteria for meaningful use under the Medicare EHR incentive program. No similar authority or provision is included in the House bill.

The incentive adjustment (penalty) would begin a year earlier in 2015 under the Senate bill as opposed to 2016 in the House bill. The schedule of reductions over time in the applicable percentage also reflects this difference, so that the applicable percent under the Senate bill would be 99% in 2015, 98% in 2016, and 97% in 2017.

With respect to the application of the incentive payment program to managed care organizations, the Senate bill differs from the House bill in two areas. First, the Senate bill applies a slightly different requirement to determine an eligible professional. Under the Senate bill, a professional who furnishes at least 75% (vs. 80% in the House bill) of his or her professional services to enrollees of the managed care organization and who also met the additional criteria noted above would be eligible for this incentive program. Second, the Senate bill includes a cap on large managed care organizations that limits incentive payments to no more than 5,000 eligible professionals of the organization in recognition of economies of scale in such organizations. This difference is also reflected in the payment adjustment penalty calculation in the Senate bill.

The Senate bill would require that the names, business addresses, and business phone numbers of each qualifying managed care organization and the associated eligible professionals receiving EHR incentive payments be posted on the CMS website in an easily understandable format.

Finally, the Senate bill would require the HHS Secretary to provide assistance to eligible professionals, Medicaid providers, and eligible hospitals located in rural or other medically underserved areas to successfully choose, implement, and use certified EHR technology. To the extent practicable, the assistance would be through entities that have expertise in this area.

CONFERENCE AGREEMENT

With regard to eligible professionals, the conference agreement includes provisions from the House and Senate bills.

The conference agreement provides eligible professionals who show meaningful use of an EHR in 2011 or 2012 with incentive payments of $18,000 in the first year; provides no payment incentives after 2016; and does not provide incentive payments to eligible professionals who first adopt an EHR in 2015 or subsequent years.

Incentive payments would be increased by 10% if the provider predominately serves beneficiaries in any area designated as a health professional shortage area. The conference agreement mirrors the Senate bill in that payment adjustments for eligible professionals not demonstrating meaningful use of an EHR would begin in 2015.

The conference agreement, like the House and Senate-passed bills, prohibits payments to hospital-based professionals (because such professionals are generally expected to use the EHR system of that hospital). This policy does not disqualify otherwise eligible professionals merely on the basis of some association or business relationship with a hospital. Common examples of such arrangements include professionals who are employed by a hospital to work in an ambulatory care clinic or billing arrangements in which physicians submit claims to Medicare together with hospitals or other entities. The change in the conference agreement clarifies that this test will be based on the setting in which a provider furnishes services rather than any billing or employment arrangement between a provider and hospital or other provider entity.

For MA organizations, the conference agreement reflects the Senate bill with the following exceptions. The agreement requires MA-affiliated professionals to provide 80 percent of their Medicare services to the enrollees of the qualifying MA organization and removes the payment incentive cap on eligible professionals affiliated with health maintenance organizations. It also extends the language of limitations on review for eligible professionals to professionals eligible under the managed care section and makes several technical corrections.

In addition, the conference report requires the Secretary to report to Congress on methods of making payment incentives and adjustments with respect to eligible professionals who 1) contract with one or more MA organizations or with intermediary organizations that contracts with one or more MA organizations and 2) are not eligible for incentive payments under this legislation. The report is due to Congress within 120 days of enactment and shall include recommendations for legislation as appropriate. The agreement reflects the Congress's intent to provide payment incentives and adjustments towards the meaningful use of certified EHRs with respect to all physicians who treat Medicare patients without regard to practice organization.

INCENTIVES FOR HOSPITALS. (HOUSE BILL SEC. 4312; SENATE BILL SEC. 4202; CONFERENCE AGREEMENT SEC. 4102)

CURRENT LAW

Medicare pays acute care hospitals using a prospectively determined payment for each discharge. These payment rates are increased annually by an update factor that is established, in part, by the projected increase in the hospital market basket (MB) index. However, starting in FY2007, hospitals that do not submit required quality data will have the applicable MB percentage reduced by two percentage points. The reduction would apply for that year and would not be taken into account in subsequent years. Currently, Medicare's payments to acute care hospitals under the inpatient prospective payment system (IPPS) are not affected by the adoption of EHR technology. Critical access hospitals (CAHs) receive cost-plus reimbursement under Medicare. Under current law, Medicare reimburses CAHs at 101% of their Medicare costs. These reimbursements include payments for Medicare's share of CAH expenditures on health IT, plus an additional 1%.

HOUSE BILL

The bill would establish incentives, starting in FY2011, within Medicare's IPPS for eligible hospitals that are meaningful EHR users. Generally, these hospitals would receive diminishing additional payments over a four-year period. Starting in FY2016, eligible hospitals that do not become meaningful EHR users could receive lower payments because of reductions to their annual MB updates.

Incentive payments. Subject to certain limitations, each qualified hospital would receive an incentive payment calculated as the sum of a base amount ($2 million) added to its discharge related payment, which would then be multiplied by its Medicare's share. These payments would be reduced over a four-year transition period. A qualified hospital would receive $200 for each discharge paid under the inpatient prospective payment system (IPPS) starting with its 1,150th discharge through its 23,000th discharge.

A hospital's Medicare share would be calculated according to a specified formula. The numerator would equal inpatient bed days attributable to individuals for whom a Part A payment may be made, either under traditional Medicare or for those who are enrolled in Medicare Advantage (MA) organizations. The denominator would equal the total number of inpatient bed days in the hospital adjusted by a hospital's share of charges attributed to charity care. Specifically, the hospital's total days would be multiplied by a fraction calculated by dividing the hospital's total charges minus its charges attributed to charity care by its total charges. If a hospital's charge data on charity care is not available, the Secretary would be required to use the hospital's uncompensated care data which may be adjusted to eliminate bad debt. If hospital data to construct the charity care factor is unavailable, the fraction would be set at one. If hospital data necessary to include MA days is not available, that component of the formula would be set at zero.

The legislation establishes a four-year incentive payment transition schedule. A hospital that is a meaningful EHR user would receive the full amount of the incentive payment in its first payment year; 75% of the amount in its second payment year; 50% of the amount in its third payment year; and finally, 25% of the amount in its fourth payment year. The first payment year for a meaningful EHR user would be FY2011 or, alternatively, the first fiscal year for which an eligible hospital would qualify for an incentive payment. Hospitals that first qualify for the incentive payments after FY2013, would receive incentive payments on the transition schedule as if their first payment year is FY2013. Hospitals that become meaningful EHR users after FY2015 would not receive incentive payments. The incentive payments may be made as a single consolidated payment or may be made as periodic payments, as determined by the Secretary.

Meaningful use. An eligible hospital would be treated as a meaningful EHR user if it demonstrates that it uses certified EHR technology in a meaningful manner and provides for the electronic exchange of health information (in accordance with applicable legal standards) to improve the quality of care. A hospital would satisfy the demonstration requirements through an attestation; the submission of appropriately coded claims; a survey response; EHR reporting on certain measures; or other means specified by the Secretary.

Clinical quality measures. EHR measures would include clinical quality measures and other measures selected by the Secretary. Prior to implementation, the measures would be published in the Federal Register and subject to public comment. The electronic reporting of the clinical quality measures would not be required unless the Secretary has the capacity to accept the information electronically, which may be on a pilot basis. When establishing the measures, the Secretary shall provide preference to clinical quality measures that have been selected for the Reporting Hospital Quality Data for Annual Payment Update program (RHQDAPU) established at 1886(b)(3)(B)(viii) of the Social Security Act or that have been endorsed by the entity with a contract with the Secretary under Sec. 1890(a), which is currently the National Quality Forum. The Secretary shall seek to avoid redundant measures or duplicative reporting. Not withstanding restrictions placed on the use and disclosure of Medicare Part D information, the Secretary would be able to use data regarding drug claims.

Miscellaneous. There would be no administrative or judicial review of the determination of any incentive payment or payment update adjustment (described subsequently), including, the determination of a meaningful EHR user, the determination of the measures, or the determination of an exception to the payment update adjustment.

The Secretary would post listings of the eligible hospitals that are meaningful EHR users or that are subject to the penalty and other relevant data on the CMS website. Hospitals would have the opportunity to review the other relevant data prior to the data being made publicly available.

Penalties. Starting in FY2016, eligible IPPS hospitals that do not submit the required quality data would be subject to a 25% reduction in their annual update, rather than the 2 percentage point reduction under current law. Those hospitals that are not meaningful EHR users would be subject to a reduction in their annual MB update for the remaining three-quarters of the update. This reduction would be implemented over a three-year period. In FY2016, one-quarter of the update will be at risk for quality reporting and one-quarter at risk for meaningful use of EHR. In FY2017, one-quarter of the update will be at risk for quality reporting and one-half will be at risk for meaningful use of EHR. In FY2018 and subsequent years, one-quarter of the update will be at risk for quality reporting and three-quarters will be at risk for meaningful use of EHR. These reductions would apply only to the fiscal year involved and would not be taken into account in subsequent fiscal years. Starting in FY2016, payments to acute care hospitals that are not meaningful EHR users in a state operating under a Medicare waiver under section 1814(b)(3) of the Social Security Act would be subject to comparable aggregate reductions. The state would be required to report its payment adjustment methodology to the Secretary.

Hardship exemption. The Secretary would be able to exempt certain IPPS hospitals from these payment adjustments for a fiscal year if the Secretary determines that requiring a hospital to be a meaningful EHR user during that year would result in significant hardship, such as a hospital in a rural area without adequate Internet access. Such determinations would be subject to annual renewal. In no case would a hospital be granted an exemption for more than five years.

Medicare Advantage. In general, Medicare incentives created under this section are not available to Medicare Advantage (MA) plans and the payments made under this section are exempt from the benchmark determinations. However, payment incentives and penalties would be established for certain qualifying MA organizations to ensure maximum capture of relevant data relating to Medicare beneficiaries. An eligible hospital would be one that is under common corporate governance with a qualifying MA organization and serves enrollees in an MA plan offered by the organization. The Secretary would be required to determine incentive payment amounts similar to the estimated amount in the aggregate that would be paid if the hospital services had been payable under Part A as described above. The Secretary would be required to avoid duplicative EHR incentive payments to hospitals. If an eligible hospital under Medicare Part C was also eligible for EHR incentive payments under Medicare Part A, and for which at least 33% of hospital discharges (or bed days) were covered under Medicare Part A, the EHR incentive payment would only be made under Part A and not Part C. If fewer than 33% of discharges are covered under Part A, the Secretary would be required to develop a process to ensure that duplicative payments were not made and to collect data from MA organizations to ensure against duplicative payments.

If one or more eligible hospitals under a common corporate governance with a qualifying MA Health Maintenance Organization are not meaningful EHR users, the incentive payment to the organization would be reduced by a specified percentage. The percentage is defined as 100% minus the product of (a) the percentage point reduction to the payment update for the period described above and (b) the Medicare hospital expenditure proportion. This hospital expenditure proportion is defined as the Secretary's estimate of the portion of expenditures under Parts A and B that are not attributable to this part, that are attributable to expenditures for inpatient hospital services. The Secretary would be required to apply the payment adjustment based on a methodology specified by the Secretary, taking into account the proportion of eligible hospitals or discharges from eligible hospitals that are not meaningful EHR users for the period.

SENATE BILL

The Senate bill is largely the same as the House bill, but with the following differences. First, instead of a fixed amount per discharge, a qualified hospital would receive $200 per discharge for the 1,150th through the 9,200th discharge, $100 per discharge for the 9,201st through the 13,800th discharge, and $60 per discharge for the 13,801st through the 23,000th discharge. Second, the Senate bill would include CAHs as eligible hospitals, and limit the total amount of payments to a CAH for all payment years to $1.5 million. CAHs would continue to also receive their cost-plus reimbursement available under current law. Third, the penalties would begin a year earlier in FY2015; in the House bill the penalties begin in FY2016. Fourth, beginning in FY2015, a CAH that is not a meaningful EHR user would have its Medicare reimbursement rate as a percentage of its Medicare costs reduced to the following: FY2015, 100.66%; FY2016, 100.33%; FY2017 and each subsequent fiscal year, 100%. The Secretary would be permitted, on a case-by-case basis, to exempt a CAH from the penalties due to significant hardship. Finally, the Senate bill would require that the names, business addresses, and business phone numbers of each qualifying MA organization receiving EHR incentive payments be posted on the CMS website in an easily understandable format.

CONFERENCE AGREEMENT

The Conference Agreement follows the House bill, but with the following differences. First, the Conference agreement includes bonus payments for CAHs that are meaningful users of EHR technology. These bonus payments are capped at an enhanced Medicare share of 101 percent of those reasonable costs that are normally subject to depreciation and that are for the purchase of certified EHR. The enhanced Medicare share will equal the Medicare share calculated for 1886(d) hospitals, for EHR bonuses, including an adjustment for charity care, plus an additional 20 percentage points, except that the Medicare share may not exceed 100 percent. CAHs that are meaningful users of EHR technology will be able to expense these costs in a single payment year and receive prompt interim payments, rather than receiving reimbursement over a multi-year depreciation schedule. Beginning in 2011, if a CAH is a meaningful EHR user, they are eligible for four consecutive years of these bonuses, regardless of the year they meet the meaningful user standard, except that a CAH cannot get bonuses after 2015, similar to the bonus timeframe for a 1886(d) hospital. CAHs will continue to receive cost-plus reimbursement for their remaining costs, such as for ongoing maintenance or other costs that are not subject to depreciation. This cost-plus reimbursement continues beyond the bonus period, consistent with current law. Normal cost reporting rules would apply for the purchase of certified EHR technology until the CAH becomes a meaningful EHR user.µ CAHs are eligible for the same hardship exemption that is available to 1886(d) hospitals. Second, the conference agreement adopts the Senate's penalty schedule for both 1886(d) hospitals and CAHs. Third, the conference agreement includes the Senate provision requiring CMS to post information about qualifying MA hospitals on the website. Fourth, the conference agreement clarifies which provisions are subject to limitations on review for hospitals and extends appropriate limitations to CAHs and MA hospitals.

TREATMENT OF PAYMENTS AND SAVINGS; IMPLEMENTATION FUNDING. (HOUSE BILL SEC. 4313; SENATE BILL SEC. 4203; CONFERENCE AGREEMENT SEC. 4103)

CURRENT LAW

Physician and outpatient services provided under Medicare Part B are financed through a combination of beneficiary premiums, deductibles, and federal general revenues. In general, Part B beneficiary premiums are set to equal 25% of estimated program costs for the aged, with federal general revenues accounting for the remainder. The Part B premium fluctuates along with total Part B expenditures.

Absent specific legislation to exempt premiums from policy effects, the recent growth in expenditures for physician services, led by the increase in imaging and diagnostic services, generally results in premium increases to cover the beneficiaries 25% share of total expenditures. While an individual's Social Security payment cannot decrease from one year to the next as a result of an increase in the Part B premium (except for those subject to the income-related premium), current law does permit the entire cost-of-living (COLA) increase to be consumed by Medicare premium increases.

MIPPA established the Medicare Improvement Fund (MIF), available to the Secretary to make improvements under the original fee-for-service program under parts A and B for Medicare beneficiaries.

For FY2009 through FY2013, the Secretary of Health and Human Services would transfer $140 million from the Federal Hospital Insurance Trust Fund and the Federal Supplementary Medical Insurance Trust Fund to the CMS Program Management Account. The amounts drawn from the funds would be in the same proportion as for Medicare managed care payments (Medicare Advantage), that is, in a proportion that reflects the relative weight that benefits under part A and under part B represent of the actuarial value of the total benefits.

HOUSE BILL

The House bill would exempt spending under this title from the annual amount of Medicare physician expenditures used to calculate the Part B premium; beneficiaries would be held harmless from potential premium increases due to the increased Part B expenditures that result from this added payment. Further, the bill would authorize the transfer of funds from the Treasury to the Supplementary Medical Insurance (Part B) Trust Fund to cover the amount of EHR payment incentives that would otherwise be offset by Part B premiums.

The bill would modify the purposes of the Medicare Improvement Fund by allowing the monies to be used to adjust Medicare part B payments to protect against projected shortfalls due to any increase in the conversion factor used to calculate the Medicare Part B fee schedule.

The amount in the fund in FY2014, after taking into account the transfer directed by this section, would be modified to be $22.29 billion. For FY2020 and each subsequent fiscal year, the amount in the fund would be the Secretary's estimate, as of July 1 of the fiscal year, of the aggregate reduction in Medicare expenditures directly resulting from the penalties imposed as a result of various Medicare providers not using HIT in a meaningful fashion.

To implement the provisions in and amendments made by this section, $60 million for each of FY2009 through FY2015 and $30 million for each succeeding fiscal year through FY2019 would be appropriated to the Secretary for the CMS Program Management Account. The amounts appropriated would be available until expended.

SENATE BILL

The premium hold-harmless provisions in the Senate bill are identical to those in the House. However, the Senate bill does not include the provisions regarding the Medicare Improvement Fund including the transfers of aggregate reductions resulting from the penalties into the MIF. The two bills also differ in the funding amounts to CMS for implementation. Whereas the House bill would appropriate $60 million for each of FY2009–FY2015 and $30 million for FY2016 through FY2019, the Senate bill would appropriate $100 million for each of FY2009–FY2015 and $45 million for FY2016 through FY2018.

CONFERENCE AGREEMENT

The conference agreement includes the premium hold-harmless, as well as changes contained in the House bill to the Medicare Improvement Fund. The agreement also appropriates $100 million in FY2009–FY2015 and $45 million in FY 2016.

STUDY ON APPLICATION OF HIT PAYMENT INCENTIVES FOR PROVIDERS NOT RECEIVING OTHER INCENTIVE PAYMENTS. (HOUSE BILL SEC. 4314; SENATE BILL SEC. 4205; CONFERENCE AGREEMENT SEC. 4104)

CURRENT LAW

No current law.

HOUSE BILL

The House bill would require the Secretary to conduct a study to determine whether payment incentives to implement and use qualified HIT should be made available to health care providers who are receiving minimal or no payment incentives or other funding under this Act, including from Medicare or Medicaid, or any other funding. These health care providers could include skilled nursing facilities, home health agencies, hospice programs, laboratories, federally qualified health centers, and non-physician professionals.

The study would include an examination of the following: (1) the adoption rates of qualified HIT by such health care providers; (2) the clinical utility of HIT by such health care providers; (3) whether the services furnished by such health care providers are appropriate for or would benefit from the use of such technology; (4) the extent to which such health care providers work in settings that might otherwise receive an incentive payment or other funding under this Act, Medicare or Medicaid, or otherwise; (5) the potential costs and the potential benefits of making payment incentives and other funding available to such health care providers; and (6) any other issues the Secretary deems to be appropriate. The Secretary would be required to submit a report to Congress on the findings and conclusions of the study by June 30, 2010.

SENATE BILL

Same provision.

CONFERENCE AGREEMENT

The conference report includes the study contained in the House and Senate bills on providing incentive payments to encourage use of health IT to providers who are receiving minimal or no payment incentives or other funding under this Act. It also includes a study in Section 4206 of the Senate bill on the availability of open source health IT systems.

STUDY ON AVAILABILITY OF OPEN SOURCE HEALTH INFORMATION TECHNOLOGY SYSTEMS. (SENATE BILL SEC. 4206)

CURRENT LAW

No provision.

HOUSE BILL

No provision.

SENATE BILL

The Senate bill would the Secretary, in consultation with other federal agencies, to study and report to Congress by October 1, 2010, on the availability of open source HIT systems to safety net providers.

CONFERENCE AGREEMENT

This study is included in Section 4104 of the conference agreement.

Part III—Medicaid Funding

MEDICAID PROVIDER HIT ADOPTION AND OPERATION PAYMENTS; IMPLEMENTATION FUNDING. (HOUSE BILL SEC. 4321; SENATE BILL SEC. 4211; CONFERENCE AGREEMENT SEC. 4201)

CURRENT LAW

The federal government pays a share of every state's spending on Medicaid services and program administration. The federal match for administrative expenditures does not vary by state and is generally 50%, but certain functions receive a higher amount. Section 1903(a)(3) of the Social Security Act authorizes a 90% match for expenditures attributable to the design, development, or installation of mechanized claims processing and information retrieval systems—referred to as Medicaid Management Information Systems (MMISs)—and a 75% match for the operation of MMISs that are approved by the Secretary of Health and Human Services (HHS). A 50% match is available for non-approved MMISs under Section 1903(a)(7). In order to receive payments under Section 1903(a) for the use of automated data systems in the administration of their Medicaid programs, states are required under Section 1903(r) to have an MMIS that meets specified requirements and that the Secretary has found (among other things) is compatible with the claims processing and information retrieval systems used in the administration of the Medicare program.

State expenditures to encourage the purchase, adoption, and use of electronic health records do not receive federal financial participation, nor do State expenditures for the operation and maintenance of such systems.

HOUSE BILL

The House Bill would amend Title XIX of the Social Security Act to authorize a 100% Federal match for a portion of payments to encourage the adoption of EHR technology (including support services and maintenance) to certain Medicaid providers who meet certain requirements. The state must prove to the Secretary that allowable costs are paid directly to the provider without any deduction or rebate; that the provider is responsible for payment of the EHR technology costs not provided for; and, that for costs not associated with purchase and initial implementation, the provider certifies meaningful use of the EHR technology. Finally, the certified EHR technology should be compatible with state or Federal administrative management systems.

Eligible providers would include physicians, nurse mid-wives, and nurse practitioners who are not hospital-based, and who have patient volume of at least 30% attributable to Medicaid patients. In order to qualify as a Medicaid provider, the professional would have to waive any right to Medicare EHR incentive payments for professionals detailed in the bill. This group of providers would be eligible for a payment equal to 85% of their net allowable technology costs. However, the allowable costs for the purchase and initial implementation of EHR technology cannot exceed $25,000 or include costs over a period of more than 5 years. Annual allowable costs not associated with initial implementation or purchase of the EHR technology could not exceed $10,000 per year or be made over a period of more than 5 years. Aggregate allowable costs for these eligible professionals, after application of the 85% adjustment, could not exceed $63,750.

Acute care hospitals with at least 10% Medicaid patient volume would be eligible for payments, as would children's hospitals of any Medicaid patient volume. Payments to hospitals would be limited to amounts analogous to those specified for eligible hospitals in Medicare in Section 4312. The payment limit for such hospitals is calculated as a base amount plus an amount related to the total number of discharges for such a hospital. The hospital's patient share attributable to Medicaid is then multiplied by that amount to calculate the limit of the payment an eligible hospital can receive. Unlike the Medicare hospital amount, the Medicaid hospital amount in the House bill is available, subject to State administration, without restriction as to the schedule of payments over time. That amount may not exceed the total amount described above.

Rural health clinics and Federally-Qualified Health Centers with at least 30% patient volume attributable to Medicaid patients would also be eligible for a payment for the costs of adoption and use of certified EHR technology, limited to amounts to be determined by the Secretary.

In counting towards patient volume thresholds, patients in Medicaid managed care plans are to be counted equivalently to other individuals in Medicaid in all circumstances. Individuals enrolled in optional Medicaid expansion programs financed through title XXI of the Social Security Act also must be counted.

Because the payments to eligible professionals would be sufficient to cover most or all of the costs of acquiring and operating a certified EHR, providers eligible under for both Medicare and Medicaid payments are required to choose one. The Secretary would be required to ensure that eligible professionals do not receive payments from both Medicare and Medicaid. The Secretary would also be instructed to attempt to avoid duplicative requirements for Federal and state governments to demonstrate meaningful use of EHR technology under Medicaid and Medicare, and may deem demonstration of meaningful use of certified EHRs in Medicare to be sufficient for demonstration of meaningful use of such technology in Medicaid.

By contrast, hospital limitations for Medicare and Medicaid are assessed on a proportional basis depending upon a hospital's patient volume from each payer, so hospitals could receive funding from both sources.

The House bill would authorize a 90% Federal match for payment to the states for administrative expenses related to EHR technology payments. In order for a state to receive the match it must show that: it is using the funds provided for these purposes to administer these systems including tracking of meaningful use by providers; conducting adequate oversight of meaningful use of the systems; and pursuing initiatives to encourage the adoption of certified EHR technology to promote health care quality and the appropriate exchange of information.

The House bill would appropriate $40 million for each of FY2009 through FY2015 and $20 million for each succeeding fiscal year through FY2019 to the Centers for Medicare & Medicaid Services for the costs of administering the provisions of this section.

SENATE BILL

The Senate bill is very similar to the House bill, with the following differences. First, in measuring meaningful use, which may include the reporting of clinical quality measures, a State would be required to ensure that populations with unique needs, such as children, are appropriately addressed. Second, rural health clinics and Federally-Qualified Health Centers that have at least 30% of their patient volume attributable to Medicaid patients would face a somewhat higher required contribution to the costs of adoption and use of certified EHRs. Finally, the Senate bill would require that the Secretary submit a report to Congress no later than July 1, 2012, that details the process developed to ensure coordination of the different health information technology program payments.

CONFERENCE AGREEMENT

The Conference agreement mirrors both the House-passed and Senate-passed bills. Across all eligible provider categories, the conference agreement provides Medicaid incentives towards the use of certified EHR technology based on a provider's involvement in the Medicaid program or other care for the uninsured and low-income populations. In addition to payment incentives for eligible professionals and hospitals contained in both bills, the agreement also provides for expanded funding to pediatricians, federally qualified health clinics (FQHCs), rural health clinics (RHCs), and physician assistants in physician assistant-led rural health clinics.

Specifically, eligible pediatricians with 20 to 30 percent patient volume attributable to patients receiving assistance through Medicaid would be eligible to receive up to two-thirds of the amount of eligible professionals with 30 percent patient volume attributable to such individuals (approximately $42,500 over a period of six years).

Federally qualified health centers and rural health clinics would be able to count additional patients towards the 30 percent qualifying threshold for Medicaid payments, including Medicaid patients; individuals receiving assistance through the Children's Health Insurance Program; individuals receiving charity care; and individuals receiving care for which payment is made on a sliding scale basis according to a patient's ability to pay. In addition, FQHCs and RHCs would be paid an amount for the adoption and use of certified EHRs proportional to the number of eligible professionals practicing predominantly in such settings according to the payment amounts determined for other eligible professionals (typically, up to $63,750 in federal contributions over a period of six years).

Additionally, the conference agreement provides that physician assistants practicing in RHCs and FQHCs that are led by physician assistants may receive Medicaid payments related to certified EHRs, provided that the facility meets the 30% facility threshold described above.

Like both the House-passed and Senate-passed bills, the conference agreement provides for up to $63,750 in federal contributions towards the adoption, implementation, upgrade, maintenance, and operation of certified EHR technology for eligible professionals. Up to 85% of $25,000, or $21,250, subject to a cap on average allowable costs, would be provided to eligible professionals to aid in adopting, implementing, and upgrading certified EHR systems. And up to 85% of $10,000, or $8,500, would be provided to eligible professionals for purposes of operation and maintenance of such systems over a period of up to 5 years.

Payments to hospitals would be limited to amounts analogous to those specified for eligible hospitals in Medicare in Section 4102. The payment limit for such hospitals is calculated as a base amount plus an amount related to the total number of discharges for such a hospital. The hospital's patient share attributable to Medicaid is then multiplied by that amount to calculate the limit of the payment an eligible hospital can receive. Relative to both the House and Senate-passed bills, the conference agreement provides additional specificity on the spending limitations for eligible hospitals in Medicaid. States may not pay more than 50% of the aggregate amount to a hospital in any year, and must spread payments to hospitals out over at least three years (contingent on demonstration of meaningful use of certified electronic health records).

Like both the House-passed and Senate-passed bills, the conference agreement prohibits payments to hospital-based professionals (because such professionals are generally expected to use the EHR system of that hospital). This policy does not disqualify otherwise eligible professionals merely on the basis of some association or business relationship with a hospital. Common examples of such arrangements include professionals who are employed by a hospital to work in an ambulatory care clinic or billing arrangements in which physicians submit claims to Medicare together with hospitals or other entities. The conference agreement clarifies that this test will be based on the setting in which a provider furnishes services rather than any billing or employment arrangement between a provider and hospital or other provider entity.

The agreement requires coordination of payments to eligible professionals with Medicare payments under sections 1848(o) and 1853(l) in order to assure no duplication of funding. The provision requires that such coordination include, to the extent practicable, a data matching process between State Medicaid agencies and the CMS using national provider numbers. The Congress intends that such process be used to identify providers who have received funding from either Medicare or Medicaid so as to prevent such providers from accessing incentives in the other program.

MEDICAID NURSING HOME GRANT PROGRAM. (HOUSE BILL SEC. 4322)

CURRENT LAW

No provision.

HOUSE BILL

The House bill would authorize the appropriation of $600, to remain available until expended, for the Secretary to establish a Medicaid grant program for the purpose of making incentive payments, through States, to nursing facilities to encourage the meaningful use of certified EHR technology in nursing facilities. The program would require nursing facilities to engage in quality improvement programs in addition to demonstrating meaningful use of certified EHR technology. The Secretary would be authorized to award grants to not more than 10 states. Incentive payments would cover up to 90% of a facility's EHR adoption and operation costs.

SENATE BILL

No provision.

CONFERENCE AGREEMENT

No provision.

Subtitle E—Miscellaneous Medicare Provisions

MORATORIA ON CERTAIN MEDICARE REGULATIONS. (HOUSE BILL SEC. 4501; SENATE BILL SEC. 4204; CONFERENCE AGREEMENT SEC. 4301)

(a) Delay in phase out of Medicare hospice budget neutrality adjustment factor during Fiscal Year 2009

CURRENT LAW

The prospective payment methodology for hospice was established in 1983. This prospective payment system (PPS) pays hospices according to the general type of care provided to a beneficiary on a daily basis. This rate attempts to adjust for geographic differences through a wage index adjustment. The current hospice wage index methodology was implemented in 1997 through the rulemaking process. The hospice wage index is updated annually and based upon the most current hospital wage data and any changes to the Office of Management and Budget's (OMB) Metropolitan Statistical Areas (MSA) definitions. Prior to this date, the wage adjustment used a hospice wage index based upon 1981 hospital data collected by the Bureau of Labor Statistics (BLS). The change in 1997 was intended to improve the data used to account for disparities in geographic location and improve accuracy, reliability, and equity of Medicare payments to hospices across the country.

When the data source used to adjust hospice payments for differences in the cost of labor across geographic area was changed in 1997 from the BLS data to the hospital wage data, a budget neutrality adjustment factor (BNAF) was instituted as part of the payment system. The BNAF prevents participating hospices from experiencing reductions in total payments as a result of the wage data change. The BNAF increases payments to those hospices that would otherwise experience a payment reduction by boosting hospice payments to these providers by amounts that would make overall payments budget neutral to the levels they would have received had the BLS based wage adjustment data been used. On August 8, 2008, in a final rule, published by HHS, the BNAF would be phased-out over three years, beginning with a 25% reduction in FY2009, an additional 50% reduction (totaling 75%) in FY2010, and a final 100%, or elimination, in FY2011. The phase-out of the BNAF went into effect on October 1, 2008.

HOUSE BILL

The House bill would require that the Secretary not phase-out or eliminate the budget neutrality adjustment factor before October 1, 2009. The hospice wage index used for FY2009 would be recomputed as if there had been no reduction in the budget neutrality factor.

SENATE BILL

No provision.

CONFERENCE AGREEMENT

The Conference Agreement recedes to the House provision. The Conferees do not anticipate extending this provision as they expect the hospice community to seek a permanent fix in the annual rulemaking cycle for Medicare hospice payments.

(b) Non-application of phased-out Indirect Medical Education (IME) adjustment factor for Fiscal Year 2009

CURRENT LAW

Medicare sets separate per discharge payment rates to cover the costs for depreciation, interest, rent and other property-related expenses in acute care hospitals. Due to a regulatory change implemented by the Center for Medicare and Medicaid Services (CMS), Medicare's indirect medical education (IME) adjustment in its capital inpatient prospective payment system (IPPS) is scheduled to be phased out over a 2-year period starting in FY2009. In FY2009, teaching hospitals will receive half of the IME adjustment in Medicare's capital IPPS; in FY2010 and in subsequent years, the capital IME adjustment will be eliminated.

HOUSE BILL

The FY2009 adjustment to 50% of the capital IME adjustment would not be implemented. Medicare payments would be recomputed for discharges after October 1, 2008. The elimination of capital IME in FY2010 would not be affected. To implement this provision, $2 million would be transferred from Medicare's Federal Hospital Insurance Trust Fund into the CMS Program Management Account for FY2009.

SENATE BILL

The Senate bill includes the same IME adjustment provision, but without implementation funding.

CONFERENCE AGREEMENT

The Conference Agreement recedes to the House provision. The Conferees do not anticipate extending this provision as they expect the hospital community to seek a permanent fix in the annual IPPS rulemaking cycle.

LONG-TERM CARE HOSPITAL TECHNICAL CORRECTIONS. (HOUSE BILL SEC. 4502; CONFERENCE AGREEMENT SEC. 4302)

CURRENT LAW

Long-term care hospitals (LTCHs) are generally defined as hospitals that have an average Medicare inpatient length of stay greater than 25 days. LTCHs are designed to provide extended medical and rehabilitative care for patients who are clinically complex and have multiple acute or chronic conditions.

Starting October 1, 2004, CMS established limits on the number of discharged Medicare patients that an LTCH hospital-within-hospital (HwH) or satellite LTCH could admit from its co-located host hospital. In general, CMS applied a payment adjustment for discharges in excess of a 25% threshold that an LTCH HwH or satellite admitted from its co-located host hospital. After that threshold had been reached, generally, the LTCH would receive a lower payment for subsequent patient admissions that had been discharged from the host hospital. The adjustment was not applied to ''grandfathered'' HwHs or ''grandfathered'' LTCH satellites. Beginning in rate year 2008, CMS extended the 25% threshold payment adjustment for discharges from co-located host hospitals to grandfathered HwHs and LTCH satellite facilities. CMS also extended the 25% threshold payment adjustment to LTCH discharges admitted from hospitals with which the LTCH or satellite facility was not co-located, also referred to as freestanding LTCHs. The regulatory policy setting forth the payment adjustment policy for referrals from co-located hospitals is in 42 CFR 412.534. The regulatory policy setting forth the payment adjustment policy for referrals from non-co-located hospitals is in 42 CFR 412.536.

The Medicare, Medicaid and SCHIP Extension Act of 2007 (MMSEA) provided for a three-year delay for grandfathered LTCH HwHs of the 25% threshold for discharges admitted from a co-located host (42 CFR 412.534). MMSEA also provided for a three-year delay for grandfathered LTCH HwHs and freestanding LTCHs of the 25% threshold payment adjustment for referrals from non-co-located hospitals (42 CFR 412.536). These provisions in MMSEA became effective for cost reporting periods beginning on or after December 29, 2007.

MMSEA also increased the patient percentage thresholds from 25% to 50% for certain LTCH HwH and non-grandfathered satellite discharges admitted from a co-located hospital (CFR 412.534), and from 50% to 75% for certain LTCH HwH and satellite discharges admitted from a co-located rural, MSA-dominant, or urban single hospital for a three-year period. These provisions were effective for cost reporting periods beginning on or after December 29, 2007.

MMSEA provided a three-year moratorium on new LTCHs or satellite LTCHs, with exceptions for an LTCH that, as of the date of enactment: (1) began its qualifying payment period as an LTCH; (2) had binding written agreements and had expended a certain percent of estimated cost or dollar amount for the purpose of construction, renovation, lease or demolition; and, (3) had an approved certificate of need from a State where one is required.

HOUSE BILL

The House bill would align the start date of the three-year delay in the implementation of the 25% patient threshold adjustment for referrals from non-co-located facilities for freestanding LTCHs and grandfathered HwHs with the original effective date for the phase-in of this regulatory policy. This new effective date is July 1, 2007. The bill also would align the start date of the three-year delay in the implementation of the 25% patient threshold for referrals from co-located hospitals with the original effective date for the phase-in of this regulatory policy (at 42 CFR 412.534(g)). The new effective date is October 1, 2007. µFor grandfathered LTCH satellite facilities, the effective date is July 1, 2007.

The bill would clarify that the 3-year delay from the 25% threshold policy for referrals from non-co-located facilities applies to LTCH or LTCH satellites that are co-located with an entity that is a provider-based, off-campus location of a subsection (d) hospital which did not provide 1886(d) services at the off-campus location.µ It also clarifies that grandfathered satellite facilities receive the same relief as non-grandfathered satellites from 42 CFR 412.534 pertaining to applicable patient percentage thresholds.

The bill would clarify that the exception from the LTCH moratorium applies to LTCHs with certificates of need for bed expansions prior to date of enactment but no earlier than April 1, 2005.

SENATE BILL

No provision.

CONFERENCE AGREEMENT

The Conference Agreement recedes to the House provision.

TITLE V—STATE FISCAL RELIEF

SEC. 5000. PURPOSES (SEC. 5000 OF THE SENATE BILL)

CURRENT LAW

No provision.

HOUSE BILL

No provision.

SENATE BILL

The Senate bill sets forth the purposes of the State Fiscal Relief title as: (1) to provide fiscal relief to states in a period of economic downturn, and (2) to protect and maintain state Medicaid programs during a period of economic downturn, including by helping to avert cuts to provider payment rates and benefits or services, and to prevent constrictions of income eligibility requirements for such programs, but not to promote increases in such requirements.

CONFERENCE AGREEMENT

The conference agreement follows the Senate bill.

SEC. 5001. TEMPORARY INCREASE OF MEDICAID FMAP (SEC. 5001 OF THE HOUSE BILL; SEC. 5001 OF THE SENATE BILL)

CURRENT LAW

The federal medical assistance percentage (FMAP) is the rate at which states are reimbursed by the federal government for most Medicaid service expenditures. It is based on a formula that provides higher reimbursement to states with lower per capita incomes relative to the national average (and vice versa); it has a statutory minimum of 50% and maximum of 83%. Exceptions to the FMAP formula have been made for certain states and situations. For example, the District of Columbia's Medicaid FMAP is set in statute at 70%, and the territories have FMAPs set at 50% (they are also subject to federal spending caps). During the last economic downturn under the Jobs and Growth Tax Relief Reconciliation Act of 2003 (P.L. 108–27), all states received a temporary increase in Medicaid FMAPs for the last two quarters of FY2003 and the first three quarters of FY2004 as part of a fiscal relief package. In addition to Medicaid, the FMAP is used in determining the federal share of certain other programs (e.g., foster care and adoption assistance under Title IV–E of the Social Security Act) and serves as the basis for calculating an enhanced FMAP that applies to the Children's Health Insurance Program.

HOUSE BILL

The House bill provides a temporary adjustment FMAP during a recession adjustment period that begins with the first quarter of FY2009 and runs through the first quarter of FY2011, The House provision would hold all states harmless from any scheduled decline in their regular FMAPs, provide all states with an across-the-board increase of 4.9 percentage points, and provide high unemployment states with an additional increase. It would also allow each territory to choose between an FMAP increase of 4.9 percentage points along with a 10% increase in its spending cap, or its regular FMAP along with a 20% increase in its spending cap. It is estimated that the House provision would provide about half of its spending via the hold harmless and across-the-board increases, and about half via the unemployment-related increase which is targeted to the states hit hardest by job loss.

States would be evaluated on a quarterly basis for the additional unemployment-related FMAP increase, which would equal a percentage reduction in the state share. The percentage reduction would be applied to the state share after the hold harmless increase and before the 4.9 percentage point increase. For example, after applying the 4.9 point increase provided to all states, a state with a regular FMAP of 50% (state share of 50%) would have an FMAP of 54.90%. If the state share were further reduced by 6%, the state would receive an additional FMAP increase of 3 points (50 * 0.06 = 3). The state's total FMAP increase would be 7.9 points (4.9 + 3 = 7.9), providing an FMAP of 57.90%.

The additional unemployment-related FMAP increase would be based on a state's unemployment rate in the most recent 3-month period for which data are available (except for the first two and last two quarters of the recession adjustment period, for which the 3-month period would be specified) compared to its lowest unemployment rate in any 3-month period beginning on or after January 1, 2006. The criteria would be as follows:

- unemployment rate increase of at least 1.5 but less than 2.5 percentage points = 6% reduction in state share;
- unemployment rate increase of at least 2.5 but less than 3.5 percentage points = 12% reduction in state share; and
- unemployment rate increase of at least 3.5 percentage points = 14% reduction in state share.

If a state qualifies for the additional unemployment-related FMAP increase and later has a decrease in its unemployment rate, its percentage reduction in state share could not decrease until the fourth quarter of FY2010 (for most states, this corresponds with the first quarter of SFY2011). If a state qualifies for the additional unemployment-related FMAP increase and later has an increase in its unemployment rate, its percentage reduction in state share could increase.

The full amount of the temporary FMAP increase would only apply to Medicaid (excluding disproportionate share hospital payments). A portion of the temporary FMAP increase (hold harmless plus 4.9 percentage points) would apply to Title IV–E foster care and adoption assistance. States would be required to maintain their Medicaid eligibility standards, methodologies, and procedures as in effect on July 1, 2008, in order to be eligible for the increase. They would be prohibited from depositing or crediting the additional federal funds paid as a result of the temporary FMAP increase to any reserve or rainy day fund. States would also be required to ensure that local governments do not pay a larger percentage of the state's nonfederal Medicaid expenditures than otherwise would have been required on September 30, 2008.

SENATE BILL

Similar to the House provision, the Senate provision would hold all states harmless from any decline in their regular FMAPs. However, it would provide a larger across-the-board increase of 7.6 percentage points and a smaller unemployment-related increase. It would apply the 7.6 percentage point increase and raise the territories' spending caps in the territories by 15.2%. It is estimated that the Senate provision would provide about 80% of its spending via the hold harmless and across-the-board increases, and about 20% via the unemployment-related increase.

As in the House provision, the Senate provision would calculate the unemployment-related increase as a percentage reduction in the state share. However, the percentage reduction would be applied to the state share after both the hold harmless increase and the across-the-board increase of 7.6 percentage points. The Senate provision would evaluate states based on the same unemployment data, except that it would not specify the three-month period to be used for the first two and last two quarters of the temporary FMAP increase. The criteria would be as follows: unemployment rate increase of at least 1.5 but less than 2.5 percentage points = 2.5% reduction in state share; increase of at least 2.5 but less than 3.5 percentage points = 4.5% reduction; increase of at least 3.5 percentage points = 6.5% reduction. Like the House provision, a state's percentage reduction could increase over time as its unemployment rate increases, but it would not be allowed to decrease until the last quarter of FY2010.

Unlike the House provision, the Senate provision would not apply the temporary FMAP increase to expenditures for individuals who are eligible for Medicaid because of an increase in a state's income eligibility standards above what was in effect on July 1, 2008. It would also prohibit states from receiving the temporary increase if they are not in compliance with existing requirements for prompt payment of health care providers under Medicaid and would extend this requirement to nursing facilities. States would be required to report to the Secretary of HHS on their compliance with such requirements. Otherwise, the Senate provision is similar to the House provision.

CONFERENCE AGREEMENT

The conference agreement follows the Senate bill with modifications. The across-the-board increase in FMAP would be 6.2 percentage points. The reductions in state share for states with increases in unemployment rates would be 5.5%, 8.5%, and 11.5%. These percent reductions would be applied against the state share after the hold harmless reduction and after an across-the-board increase of 3.1 percentage points. Each territory would be allowed to choose between an FMAP increase of 6.2 percentage points along with a 15% increase in its spending cap, or its regular FMAP along with a 30% increase in its spending cap. It is estimated that the conference agreement would provide about 65% of its spending via the hold harmless and across-the-board increases, and about 35% via the unemployment-related increase.

The conference agreement would also prohibit states from receiving the temporary increase if they are not in compliance with existing requirements for prompt payment of practitioners under Medicaid and would extend this requirement to nursing facilities and hospitals. States would be required to report to the Secretary of HHS on their compliance with such requirements.

SEC. 5001(0(2). COMPLIANCE WITH PROMPT PAY REQUIREMENTS (SEC. 3304 OF THE SENATE BILL)

CURRENT LAW

Under SSA Sec. 1902(a)(37)(A) states are to reimburse providers for services within 30 days of the receipt of a reimbursement claim. State Medicaid programs are to reimburse providers for 90% of claims submitted for payment within 30 days of receipt of the claim. Medicaid also is to process and pay 99% of claims within 90 days from the date of receipt of such claims. These requirements allow states additional time to process claims that are inaccurate, incomplete, or otherwise can not be processed in a timely manner.

HOUSE BILL

No provision.

SENATE BILL

Under this provision, for states to qualify for the temporary enhanced FMAP funding under section 5001, states would have to meet current prompt payment requirements under section 1902(a)(37)(A), as well as a temporary extension of those requirements to nursing facilities, which are not currently subject to the prompt pay requirements in title XIX.

CONFERENCE AGREEMENT

The conference agreement follows the Senate bill with modifications to the reporting requirements, to temporarily extend application of the prompt pay requirements to hospitals, and to provide a grace period before states become ineligible for increased FMAP as a result of failure to comply with the requirements as relate to nursing facilities and hospitals.

SEC. 5002. TEMPORARY INCREASE IN DSH ALLOTMENTS DURING RECESSION (SEC. 5006 OF THE HOUSE BILL; SEC. 5002 OF THE SENATE BILL)

CURRENT LAW

Medicaid law requires that states make. Medicaid payment adjustments for hospitals that serve a disproportionate share of low-income patients with special needs. Payments to these hospitals known as disproportionate share hospital (DSH) payments, are specifically defined in Medicaid law. They are subject to aggregate annual state-specific limits on federal financial participation. States are required to provide an annual report to the Secretary describing the payment adjustments made to each DSH hospital.

HOUSE BILL

This provision would increase states' FY2009 annual Disproportionate Share Hospital (DSH) allotments by 2.5% above the allotment they would have received in FY2009 under current law. In addition, states' DSH allotments in FY2010 would be equal to the FY2009 DSH allotment (with the adjustment) increased by 2.5%. After FY2010, states' annual DSH allotments would be determined as under current law. If, under current law, states' annual DSH allotments are higher in either FY 2009 or FY 2010 than they would have been with the 2.5% adjustment, then states would receive the higher DSH allotments without the recession adjustment.

SENATE BILL

Under this provision, states that reported to the Health and Human Services Secretary, as of August 31, 2009, FY2006 total (federal and state) DSH allotments of less than 3% of the state's total state plan medical assistance expenditures would receive special DSH allotments established under the Medicare Modernization Act of 2003 (MMA, P.L. 108–391). This new provision may affect the number of states that are determined to be low-DSH states since the provision would rely on a different base year than that used under MMA. Under this provision, low-DSH states would receive the following revised DSH allotments:

- for FY2009, the DSH allotment would be the FY2008 DSH allotment increased by 16%;
- for FY2010, the DSH allotment would be the FY2009 DSH allotment increased by 16%;
- for the first quarter of FY2011(through December 31, 2010), the DSH allotment would be ¼ of the DSH allotment for FY2010 increased by 16%;
- for the remainder of FY2011 (January 1, 2011-September 30, 2011), the DSH allotment would be ¾ of the FY2010 DSH allotment for each qualified state without the changes contained in this provision;
- for FY2012, qualified states' DSH allotments would be FY2010 DSH allotment (as if this provision had not been enacted);
- for FY2013 and subsequent years, qualified states would receive the DSH allotment for the previous fiscal year with an inflation adjustment, as described in the Social Security Act (SSA), Section 1923(f)(5).

CONFERENCE AGREEMENT

The conference agreement follows the House provision.

SEC. 5003. MORATORIA ON CERTAIN MEDICAID FINAL REGULATIONS (SEC. 5002 OF THE HOUSE BILL; SEC. 5002 OF THE SENATE BILL)

CURRENT LAW

In 2007 and 2008, the Centers for Medicare and Medicaid Services (CMS) issued seven Medicaid regulations that generated controversy during the 110th Congress. To address concerns with the impact of the regulations, Congress passed a law that imposed moratoria on six of the Medicaid regulations until April 1, 2009 (excluding the rule on outpatient hospital facility and clinic services). The seven Medicaid regulations covered the following Medicaid areas:

- Graduate Medical Education,
- Cost Limit for Public Providers,
- Rehabilitation Services,
- Targeted Case Management,
- School-Based Services,
- Provider Taxes, and
- Outpatient Hospital Services.

HOUSE BILL

This provision would extend the moratoria on the first six regulations beyond April 1, 2009, when the current moratoria expire, to July 1, 2009. The regulations covered under the extension would include: (1) Graduate Medical Education, (2) Cost Limit for Public Providers, (3) Rehabilitative Services, (4) Targeted Case Management, (5) School-Based Services, and (6) Provider Taxes. In addition, this provision would specifically prohibit the Health and Human Services Secretary from taking any action until after June 30, 2009 (through regulation, regulatory guidance, use of federal payment audit procedures, or other administrative action, policy, or practice, including Medical Assistance Manual transmittal or state Medicaid director letter) to implement a final regulation covering Outpatient Hospital facility services.

SENATE BILL

No provision.

CONFERENCE AGREEMENT

The conference agreement follows the House bill with a modification limiting the application of the moratoria to the four regulations that have been published as final: (1) Targeted Case Management, (2) School-Based Services, (3) Provider Taxes, and (4) Outpatient Hospital Services. The conference agreement also states the sense of the Congress that the Secretary of HHS should not promulgate as final the proposed regulations relating to Graduate Medical Education, Cost Limit for Public Providers, and Rehabilitative Services.

SEC. 5004. EXTENSION OF TRANSITIONAL MEDICAL ASSISTANCE (TMA) (SEC. 5003 OF THE HOUSE BILL; SEC. 3101 OF THE SENATE BILL)

CURRENT LAW

States are required to continue Medicaid benefits for certain low-income families who would otherwise lose coverage because of changes in their income. This continuation