

2008 Tax Update

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Worker, Retiree, and Employer Recovery Act of 2008

Penalties for Failure to File Partnership and S Corporation Returns

- The Act increases the penalty for failure to file partnership or S corporation returns from \$85 per partner or shareholder per month to \$89 per partner or shareholder per month.
- The penalty is imposed for a maximum of 12 months.
- The increased penalty applies to returns required to be filed after December 31, 2008.
- The Mortgage Forgiveness Debt Relief Act of 2007 added a new entity-level penalty for failure to timely file S corporation return or failure to include information required under §6037 (new IRC §6699)
 - Penalty is \$85 per month times the number of persons who were shareholders at any time during the taxable year
 - Penalty is limited to 12 months
 - Penalty may be abated for reasonable cause.
 - Penalty applies to tax returns required to be filed after December 20, 2007.

Worker, Retiree, and Employer Recovery Act of 2008

Temporary Waiver of Required Minimum Distributions

- The Act temporarily suspends the required distribution requirements for retirement plans, including IRAs.
- The provision applies is only effective for 2009.

Emergency Economic Stabilization Act of 2008 – Effect on Individuals

Alternative Minimum Tax

Alternative Minimum Tax Exemption

- Alternative minimum tax exemption rate increased to:
 - \$69,950 for married individuals filing a joint return and surviving spouses;
 - \$46,200 for unmarried individuals; and
 - \$34,975 for married individuals filing separate returns.
- Applies to years beginning in 2008.
- Threshold levels for phase-out of the AMT exemption remain unchanged.
- \$40,000 exemption for corporations and \$22,500 exemption for trusts remains unchanged.

Nonrefundable Personal Credits

- Nonrefundable personal credits are allowed to offset an individual taxpayer's regular tax and alternative minimum tax liability for 2008.
- Regular tax liability is first reduced by the foreign tax credit.

Emergency Economic Stabilization Act of 2008 – Effect on Individuals

Alternative Minimum Tax

Relief for Long-Term Unused Credits

- For any tax year after December 31, 2007 and before January 1, 2013, if an individual has a long-term unused minimum tax credit, the minimum tax credit allowable for that year will not be less than the greater of:
 1. The amount (if any) of the AMT refundable credit amount for the taxpayer's preceding tax year (determined without regard to the phase-out rules and without regard to the relief provided under §53(f)(2) for certain interest and penalties), or
 2. 50 percent of the unused long-term minimum tax credit for such year.
- Under prior law, the AMT refundable credit was the greater of:
 1. \$5,000
 2. 20 percent of the taxpayer's long-term unused minimum tax credit for the tax year,
 3. The amount (if any) of the taxpayer's AMT refundable credit determined for the taxpayer's preceding tax year (before any phase-out of the credit because of the AGI limitations).
 - The phase-out rules have been eliminated for tax years beginning after December 31, 2007.
- Long-term unused minimum tax credit for a tax year is the portion of the minimum tax credit attributable to the adjusted net minimum tax for tax years before the third tax year immediately preceding such tax year.
 - Credits are allowed on a FIFO basis.

Emergency Economic Stabilization Act of 2008 – Effect on Individuals

Income and Gains

- Exclusion from gross income for discharges of qualified principal indebtedness is extended for three years through the calendar year 2012.
- The exclusion from gross income for qualified charitable distributions of up to \$100,000 from to individuals who are age 70 ½ from traditional, Roth, deemed IRAs is extended to distributions made in 2008 and 2009.
- New qualified transportation fringe benefit added for bicycle commuters.
 - Employees may exclude reimbursements of up to \$20 per month from their gross income.
 - Exclusion applies to tax years beginning after December 31, 2008.

Emergency Economic Stabilization Act of 2008 – Effect on Individuals

Deductions

- Taxpayers who do not itemize may claim an additional standard deduction for state and local property taxes.
 - Additional deduction is limited to \$500.
 - Provision applies to tax years beginning in 2008 and 2009.
- The election to deduct state and local general sales taxes in lieu of state and local income taxes has been extended through December 31, 2009.
- The deduction for qualified tuition and related expenses has been extended for two years, through December 31, 2009.
- The above-the-line deduction of up to \$250 for eligible educator expenses has been extended through December 31, 2009.

Emergency Economic Stabilization Act of 2008 – Effect on Individuals

Qualifying Children

- Threshold amount for refundable child credit is reduced for 2008.
 - Child tax credit is refundable in 2008 if the taxpayer's allowable child credit exceeds the taxpayer's total tax liability (regular and AMT) less nonrefundable credits.
 - Refundable credit is limited to the lesser of 15 percent of the taxpayer's earned income in excess of \$8,500 or the allowable per child credit amount.
 - For 2008, the inflation adjusted earned income base amount would have been \$12,050.
 - The provision is effective for tax years beginning after December 31, 2007.
 - The 15 percent of earned income refundable child credit will not apply to tax years beginning after December 31, 2010.
 - Taxpayers with three or more children may calculate the refundable child credit using the excess of their social security taxes over their earned income credit instead of the 15-percent method if it results in a greater refundable credit.

Emergency Economic Stabilization Act of 2008 – Effect on Individuals

Qualifying Children

- Two new elements are added to the definition of a “qualifying child”.
 - The qualifying child must be younger than the taxpayer.
 - A qualifying child cannot file a joint return with a spouse for any tax year beginning during the calendar year in which the taxpayer’s tax year begins.
 - This test does not apply if the qualifying child files a joint return only to obtain a refund.
- Modification of the tiebreaker rules
 - The tiebreaker rules apply whenever two or more taxpayers can claim the same individual as a qualifying child, regardless of whether they actually do.
 - If the parents can claim an individual as a qualifying child but neither parent does so, another taxpayer may claim the individual as a qualifying child only if that taxpayer’s AGI is higher than the highest of the AGI of any of the individual’s parents.
- Child credit
 - A qualifying child must be a dependent of the taxpayer.
- The new provisions apply to taxable years beginning after December 31, 2008.

Emergency Economic Stabilization Act of 2008 – Effect on Individuals

Individual Energy Tax Credits

- Residential Energy Property Credit
 - The residential energy property credit has been reinstated for qualified energy property placed in service only during 2009.
 - The credit has been expanded to include certain stoves that use renewable plant-derived fuel and asphalt roofs with cooling granules .
 - The provision for asphalt roofs applies to property placed in service after October 3, 2008.
 - The new law clarifies the energy standards applicable to water heaters.
 - Geothermal heat pump property is removed as qualified property for purposes of this credit.
- Residential Alternative Energy Property Credit
 - The credit has been extended for eight years, through 2016.
 - Credit has been expanded to include expenditures for qualified small wind energy property and qualified geothermal heat pump property placed in service in 2008 through 2016.
 - The \$2,000 maximum annual credit limit for solar electric property expenditures is eliminated for property placed in service after 2008.
 - The credit may offset both the taxpayer's regular and AMT liability for 2008.

Emergency Economic Stabilization Act of 2008 – Effect on Individuals

Individual Energy Tax Credits

- Plug-in Electric Drive Motor Vehicle Credit
 - Credit equals \$2,500 plus an additional \$417 for each kilowatt hour of traction battery capacity in excess of four kilowatt hours.
 - Maximum limits apply depending upon the weight of the vehicle.
 - The credit is treated as part of the general business credit to the extent the qualified vehicle is used in a trade or business.
 - Basis reduction rules apply to prevent double tax benefit.
 - Credit applies to qualified plug-in elective drive motor vehicles placed in service during 2009 through 2014.
- Alternative Fuel Vehicle Refueling Property Credit
 - Credit is extended to apply to refueling property (other than property relating to hydrogen) placed in service through December 31, 2010.
 - The credit applies to refueling hydrogen property placed in service through December 31, 2014.
 - Definition of clean-burning fuel is modified to include electricity.
 - Provision applies to property placed in service after October 3, 2008, in tax years ending after October 3, 2008.

Emergency Economic Stabilization Act of 2008 – Effect on Individuals

Disaster Relief

- Personal casualty losses attributable to a federally declared disaster area (“net disaster losses”) occurring in 2008 and 2009 are deductible without regard to whether the losses exceed the 10 percent of AGI limitation.
- The \$100 per casualty loss limitation is temporarily increased to \$500 for tax years beginning in 2009.
- For tax years beginning after 2007, the standard deduction is increased by the taxpayer’s disaster loss deduction.
 - Unlike the basic standard deduction, the portion of the standard deduction amount attributable to the disaster loss deduction is deductible in computing the alternative minimum tax.
- The waiver of AGI limitation and the increase in the standard deduction by the disaster loss deduction do not apply to certain disaster losses occurring in the Midwest after May 19, 2008 and before August 1, 2008.
- Tax-exempt bond rules and increase in the low-income housing cap in existence for the GoZone area are extended to victims of Hurricane Ike in 2008.
- Many of the tax benefits extended to the victims of Hurricanes Katrina, Wilma, and Rita are modified and extended to victims of the storms that hit the Midwest during 2008.

Emergency Economic Stabilization Act of 2008 – Effect on Businesses

Disaster Relief

- Net operating losses attributable to Federally declared disasters
 - A special five-year carryback period has been created for qualified disaster losses.
 - Qualified disaster losses are the lesser of:
 1. Sum of §165 losses occurring within a Federally declared disaster area occurring after December 31, 2007, and before January 1, 2010, plus the deduction for qualified disaster expenses allowable under §198A(a) (or which would have been allowed if not otherwise treated as an expense); or
 2. The NOL for that year.
 - Qualified disaster losses may not include losses with respect to property used in connection with any private or commercial golf course, country club, massage parlor, hot tub facility, suntan facility, or any store the principal business of which is the sale of alcoholic beverages for consumption off premises, or any gambling or animal racing property.
 - Taxpayers may elect to not have the five year carryback period apply.
 - Taxpayers electing the five-year carryback will not be subject to the 90-percent of AMTI limitation.
 - Losses arising in the Midwestern disaster area on or after May 20, 2008, and before August 1, 2008 are not eligible for the five-year carryback.
 - The provision is effective for tax years ending after December 31, 2007 for disasters occurring after that date.

Emergency Economic Stabilization Act of 2008 – Effect on Businesses

Disaster Relief

- Expensing of qualified disaster costs
 - A taxpayer can elect to expense qualified disaster costs under §198A rather than capitalizing them.
 - Qualified disaster expenses include any expenditure that is:
 - Paid or incurred in connection with a trade, business, or business-related property;
 - Otherwise chargeable to capital account; and
 - Made for:
 - The abatement or control of hazardous substances that were released on account of a federally declared disaster;
 - The removal of debris from, or the demolition of structures on, business-related real property that is damaged or destroyed as a result of a federally declared disaster; or
 - The repair of business-related property damaged as a result of a federally declared disaster.
 - Deduction allowed under this provision is treated as a depreciation deduction under §1245.
 - The provision applies to amounts paid or incurred after December 31, 2007, for disasters occurring after that date.
 - The qualified disaster expense rules do not apply to disasters that occur after December 31, 2009.

Emergency Economic Stabilization Act of 2008 – Effect on Businesses

Disaster Relief

- Bonus depreciation for qualified disaster assistance property
 - 50-percent bonus depreciation is allowed for real and personal business property that is purchased to rehabilitate or replace similar property that is destroyed or condemned as a result of a presidentially declared disaster.
 - Provision applies to property placed in service after December 31, 2007, with respect to disasters occurring after December 31, 2007, and before January 1, 2010.
- Increased expensing for qualified disaster assistance property
 - §179 expense deduction (\$250,000 for 2008) is increased by the lesser of \$100,000 or the cost of qualified disaster assistance property placed in service during the tax year.
 - §179 investment limitation (\$800,000 for 2008) is increased by the lesser of \$600,000 or the cost of §179 disaster assistance property placed in service during the tax year.
 - Qualified §179 disaster assistance property cannot be treated as:
 - Qualified zone property for purposes of the empowerment zones rules under §1397A; or
 - Qualified renewal property for purposes of the renewal community rules in §1400J unless the taxpayer elects not to take advance of the increased deduction or increased investment limitation under §179,
 - Provision applies to property placed in service after December 31, 2007, with respect to disasters occurring after December 31, 2007, and before January 1, 2010.

Emergency Economic Stabilization Act of 2008 – Effect on Businesses

Disaster Relief

- Work Opportunity Tax Credit for Hurricane Katrina employees
 - The hiring period for eligibility for the Work Opportunity Tax Credit applicable to Hurricane Katrina employees is extended to four years or until August 25, 2009.
 - The employee's principal place of employment must be in the core disaster area.
- GoZone Rehabilitation Credit for qualifying expenditures
 - The increased percentages of 13 and 26 percent for claiming the rehabilitation credit on qualified rehabilitated buildings and certified historic structures, respectively, in the GOZone have been extended for one year or until December 31, 2009.

Emergency Economic Stabilization Act of 2008 – Effect on Businesses

Depreciation

- 15-year MACRS recovery period for qualified leasehold improvements extended for property placed in service in 2008 and 2009.
- 15-year recovery period for qualified restaurant improvements is extended to apply to improvements placed in service in 2008 and 2009.
 - Definition of qualified restaurant property is expanded to include a building placed in service after December 31 2008, and before January 1, 2010, if more than 50 percent of the building's square footage is devoted to the preparation of, and seating for on-premises consumption of, prepared meals.
 - No binding contract exception is provided in the law.
 - Property placed in service during 2008 is eligible for bonus depreciation.
- New category of property eligible for 15-year MACRS depreciation added for qualified improvement to a building used for a retail business.
 - Qualified property must be placed in service during 2009.
 - Building must be at least three years old when the improvement is placed in service.
 - Qualified property is depreciated using the straight-line method and either the mid-year or mid-quarter convention.

Emergency Economic Stabilization Act of 2008 – Effect on Businesses

Depreciation

- Qualified machinery or equipment (other than a grain bin, cotton ginning asset, fence or land improvement) that is used in a farming business is treated as 5-year MACRS recovery property.
 - Original use must commence with the taxpayer during 2009.
 - Property must be placed in service during 2009..
 - New provision does not change the rule that property used in a farming business must generally be depreciated using the 150-percent declining balance method.
- 50-percent bonus depreciation is allowed for qualified facilities that produce cellulosic biofuel in addition to cellulosic ethanol if the facilities are placed in service after October 3, 2008 and before January 1, 2013.
 - Bonus depreciation is allowed for both regular tax and AMT purposes.
 - No depreciation adjustment I required for qualifying property.
- Accelerated depreciation allowed for qualified Indian reservation property has been extended to qualified property placed in service through December 31, 2009.

Emergency Economic Stabilization Act of 2008 – Effect on Businesses

Expensing and Deductions

- The election to deduct environmental remediation costs is extended for two years to cover expenditures paid or incurred in 2008 and 2009.
 - The expenditure must be incurred in connection with the abatement or control of hazardous substances at a qualified contaminated site (a “brownfield”).
- The election to expense qualifying film or television productions has been extended to qualified film and television productions commencing prior to January 1, 2010.
 - Election has been expanded to apply to the first \$15 million expended for any and all qualified productions. Previously, the election only applied to qualified productions where the aggregate cost for the production was \$15 million or less.
- The placed in service and construction requirements for the §179C election to expense 50 percent of eligible qualified refinery property have been extended for two years to property placed in service in 2013 and 2014.
 - Qualified refinery has been expanded to include refineries that process liquid fuel directly from shale or tar sands for property placed in service after October 3, 2008.

Emergency Economic Stabilization Act of 2008 – Effect on Businesses

Expensing and Deductions

- Suspension of the percentage of depletion for oil and gas produced from marginal properties is extended to include tax years beginning in 2009.
 - Thus, percentage of depletion for oil and gas produced from a marginal property will not be limited to 100 percent of the taxable income produced from the property for tax years beginning in 2009. The limitation will apply for tax years beginning in 2008, however.
- 50-percent bonus depreciation extended for advanced mine safety equipment extended for one year to new property placed in service before January 1, 2010.
- The District of Columbia enterprise zone provisions and the D.C. homebuyer credit have been extended to apply through December 31, 2009.
 - The zero capital gains rate provisions are extended to apply to investment in D.C. property acquired by December 31, 2009 for gains recognized through December 31, 2014.

Emergency Economic Stabilization Act of 2008 – Effect on Businesses

Expensing and Deductions

- Modification of Sec. 199 deduction for film and television productions
 - The §199 deduction is modified for film and television production to include copyrights, trademarks, and other intangibles with respect to a qualified film produced by the taxpayer.
 - The §199 deduction is not affected by the methods and means of distributing the film (e.g., via DVD or over the internet). Suspension of the percentage of depletion for oil and gas produced from marginal properties is extended to include tax years beginning in 2009.
 - The W-2 wage limitation is expanded to include any compensation for services performed in the U.S. by actors, production personnel, directors and producers..
 - The rules for pass-through entities are modified so that each partner or S corporation shareholder with at least a 20-percent direct or indirect capital/shareholder interest in the partnership/S corporation is deemed to have engaged in any film produced by the entity. Similarly, a partnership or S corporation is deemed to have engaged directly in any film produced by a partner or shareholder owning, directly or indirectly, at least a 20-percent ownership interest in the partnership or S corporation.
 - Provision applies to tax years beginning after December 31, 2007.

Emergency Economic Stabilization Act of 2008 – Effect on Businesses

Expensing and Deductions

- The rule that allows Puerto Rico to be considered part of the U.S. for purposes of the §199 deduction is extended for two years to apply to tax years beginning before January 1, 2010.
- The §199 deduction for taxpayers having oil related qualified production activities income for tax years beginning after 2008 must be reduced by three percent of the least of:
 1. The taxpayer's oil-related qualified production activities income for the tax year;
 2. The taxpayer's qualified production activities income for the tax year; or
 3. Taxable income computed without regard to the §199 deduction.
 - Oil related qualified production activities income means qualified production activities income of the taxpayer that is attributable to the production, refining, processing, transportation or distribution of oil, gas, or any of their primary products.
 - Modified AGI is substituted for taxable income if the taxpayer entitled to the §199 deduction is an individual.
- Certain financial institutions that sell troubled assets to the Treasury Department via public auction are temporarily restricted from deducting more than \$500,000 for executive compensation.
 - The excess payments are treated as golden parachute payments.
 - Other restrictions apply.

Emergency Economic Stabilization Act of 2008 – Effect on Businesses

Expensing and Deductions

- Certain financial institutions that sell troubled assets to the Treasury Department via public auction are temporarily restricted from deducting more than \$500,000 for executive compensation.
 - The excess payments are treated as golden parachute payments.
- A financial institution that sells troubled assets directly to the Treasury Department, must:
 - Exclude incentives for senior executive officers to take unnecessary and excessive risks that threaten the value of the company during the period that the Treasury holds an equity or debt position in the company;
 - Provide for the recovery of any bonus or incentive compensation paid to a senior executive officer that is based on statements of earnings, gains or other criteria that are later proven to be materially inaccurate (a “clawback” provision); and
 - Prohibit any golden parachute payment to senior executive officers during the period that the Treasury holds an equity or debt position in the financial institution.
- The provisions are generally applicable to tax years ending on or after October 3, 2008.

Emergency Economic Stabilization Act of 2008 – Effect on Businesses

Energy-Related Deductions

- Energy efficient commercial buildings deduction
 - A taxpayer may deduct the cost of certain energy efficiency improvements installed on or in a depreciable building located in the U.S. under §179D.
 - Deduction is limited to the product of \$1.80 and the total square footage of the building, reduced by the aggregate amount deducted in any prior year.
 - Notice 2006-52 allows a taxpayer to claim a partial deduction by substituting \$0.60 for \$1.80 for costs of property that meet the energy savings targets specified in the Notice.
 - Deduction is generally claimed by the building's owner.
 - In the case of a public building, the person primarily responsible for designing the building may claim the deduction.
 - Deduction has been extended to apply to property placed in service after December 31, 2005, and before January 1, 2014.
- Accelerated depreciation for smart electric meters and smart grid systems
 - Qualified smart electric meters and smart electric grid systems may be depreciated using a 10-year life and the 150-percent declining balance method.
 - Applies to property placed in service after October 3, 2008.

Emergency Economic Stabilization Act of 2008 – Effect on Businesses

Energy-Related Deductions

- Bonus depreciation for certain reuse and recycling property
 - 50-percent bonus depreciation is allowed for qualified reuse and recycling property .
 - Qualified reuse and recycling property is reuse and recycling property is machinery and equipment (not including buildings, real estate, rolling stock or equipment used to transport reuse and recyclable materials.
 - Property must have a useful life of at least five years.
 - No AMT depreciation adjustment is required for qualified property.
 - Original use of the property must commence with the taxpayer after August 31, 2008.
 - Property must be purchased by the taxpayer after August 31, 2008.
 - Property does not qualify for the bonus depreciation if a written binding contract for the acquisition is in effect before September 1, 2008.
 - Purchase requirement does not currently exist for acquisitions made pursuant to a written binding contract entered into after August 31, 2008. A technical correction may be needed.

Emergency Economic Stabilization Act of 2008 – Effect on Businesses

Credits

- R&D credit
 - The R&D credit is extended for two years through December 31, 2009.
 - The election to use the alternative incremental credit can no longer be made for tax years beginning after December 31, 2008.
 - The percentage to be used in calculating the alternative simplified method is increased from 12 percent to 14 percent for tax years beginning after December 31, 2007.
 - A technical correction is made for calculating the R&D credit in the year that the credit terminates.
- New markets credit
 - The new markets credit is extended through 2009.
 - Result is that up to \$3.5 billion in qualified equity investments may be allocated among qualified community development entities (CDEs) for the 2009 calendar year.
- Indian employment tax credit
 - The Indian employment tax credit is extended for two years through December 31, 2009.
 - The election to deduct environmental remediation costs is extended for two years to cover expenditures paid or incurred in 2008 and 2009.

Emergency Economic Stabilization Act of 2008 – Effect on Businesses

Credits

- Railroad track maintenance credit
 - The railroad track maintenance credit is extended for two years to apply to expenditures incurred before January 1, 2010.
 - The credit can be used to offset the AMT for years beginning after December 31, 2007.
- Mine rescue team training credit
 - The mine rescue team training credit is extended through 2009.
- America Samoa Economic Development Credit
 - The economic development credit for a U.S. corporation that is an existing credit claimant with respect to America Samoa, and that elected the application of §936 for its last tax year beginning before January 1, 2006, has been extended for two more years.
 - Thus, the temporary credit now applies to the first four years of a qualifying corporation that begin after December 31, 2005, and before January 1, 2010.

Emergency Economic Stabilization Act of 2008 – Effect on Businesses

Energy Credits

- Renewal electricity production credit
 - The placed in service date for purposes of the renewable electricity production credit in the case of qualified wind and coal production facilities is extended through December 31, 2009.
 - The placed in service date in the case of facilities producing electricity from closed-loop biomass, open-loop biomass, geothermal or solar energy, small irrigation power, municipal solid waste, and from qualified hydropower is extended through December e1, 2010.
- Credit for new energy-efficient homes
 - Credit for construction or manufacture of new energy-efficient homes is extended through December 31, 2009.
- Energy Efficient Appliance Production Credit
 - Credit allowed for the manufacture of energy efficient dishwashers, clothes washers, and refrigerators is extended through 2010.
 - The standards required for manufacturers to qualify for the energy-efficient appliance credit have been substantially modified for years after 2007.

Emergency Economic Stabilization Act of 2008 – Effect on Businesses

Energy Credits.

- Energy investment credit
 - The 30-percent investment tax credit for solar energy property and qualified fuel cell property and the 10-percent investment tax credit for microturbines are extended through 2016.
 - A new 10-percent investment tax credit applies to combined heat and power systems and geothermal heat pumps for property acquired after October 3, 2008, in tax years ending after October 3, 2008, and before January 1, 2017.
 - A new 30-percent credit applies for qualified small wind energy property expenses made after October 3, 2008. The credit is limited to \$4,000 and applies to tax years ending after October 3, 2008, and before January 1, 2017.
 - Public utility property is now eligible for the credit for periods after February 13, 2008, in taxable years ending after February 13, 2008, and before January 1, 2017.
 - The \$500 per half kilowatt of capacity cap for qualified fuel cells is increased to \$1,500 per half kilowatt of capacity for periods after October 3, 2008, in tax years ending after October 3, 2008 and before January 1, 2017.
 - The energy investment credit is now allowed against the AMT for tax years ending after October 3, 2008, and to carrybacks of such credits.

Emergency Economic Stabilization Act of 2008 – Effect on Businesses

Energy Credits.

- **Advanced coal project investment credit**
 - The advanced coal project investment credit is increased to 30 percent.
 - Taxpayers must apply for and receive advance certification in order to claim the credit.
 - IRS is authorized to allocate an additional \$1.25 billion to qualified projects that separate and sequester at least 65 percent of total carbon dioxide emissions.
 - Provision is effective for credits allocated or reallocated after October 3, 2008.
- **Coal gasification investment credit**
 - The coal gasification investment credit is increased to 30 percent.
 - Taxpayers must apply for and receive advance certification in order to claim the credit.
 - IRS is authorized to allocate an additional \$250 million in credits to qualified projects that separate and sequester at least 75 percent of total carbon dioxide emissions.
 - Provision is effective for credits allocated or reallocated after October 3, 2008.
- **Carbon dioxide capture credit**
 - A tax credit of \$10 per metric ton is provided for carbon dioxide that is captured and transported from an industrial source for use in enhanced oil recovery.
 - The credit is \$20 per metric ton in the case of carbon dioxide that is captured and transported from an industrial source for permanent storage in a geologic formation.
 - Provision applies to carbon dioxide captured after October 3, 2008.

Emergency Economic Stabilization Act of 2008 – Effect on Businesses

Charitable Contributions

- Basis adjustment to stock of S corporation making charitable contributions
 - Extends for two years the provision that limited the reduction of an S corporation shareholder's basis adjustment for an S corporation's charitable donation of appreciated property to the shareholder's share of the S corporation's adjusted basis in the donated property to apply to tax years beginning before January 1, 2010.
 - See Rev. Rul. 2008-16 for guidance on how to calculate the S corporation shareholder's charitable deduction.
- Charitable contributions of computers
 - The enhanced corporate deduction for charitable contributions of computers is extended for two years to apply to qualified donations made for tax years beginning before January 1, 2010.
- Charitable contributions of book inventory to public schools
 - The enhanced corporate deduction for charitable donations of book inventory to public schools is extended for two years to apply to donations made after December 31, 2007, and before January 1, 2010.

Emergency Economic Stabilization Act of 2008 – Effect on Businesses

Charitable Contributions

- Charitable contributions of food inventory
 - The enhanced deduction for charitable donations of food inventory by taxpayers (whether or not a C corporation) that are engaged in a trade or business is extended to apply to qualified donations made before January 1, 2010.
 - For taxpayers other than C corporations, the total deduction for donations of food inventory is limited to 10 percent of the taxpayer's net income from all sole proprietorships, S corporations, partnerships, or other non-C corporations making the food donations.
 - The 10-percent limitation is suspended for contributions made by qualified farmers and ranchers on or after October 3, 2008, and before January 1, 2009.
 - Such contributions are to be treated as if they were qualified conservation contributions.

Emergency Economic Stabilization Act of 2008 – Modification of the Tax Preparer Penalties

- The Small Business Work and Opportunity Act of 2007 adopted the controversial "more-likely-than-not standard" for tax return preparers.
 - The new standard expanded the tax preparer penalties imposed under §6694.
 - This standard replaced the "realistic possibility of success" standard that was previously used.
 - Under transition relief granted by the IRS, the new standard applied to tax returns filed after December 31, 2007.
- The EESA 2008 now imposes a penalty equal to the greater of \$1,000 or 50-percent of the income derived (or to be derived) on a tax preparer who takes an "unreasonable position."
- Three categories of unreasonable positions
 - General category – substantial authority needed to avoid the penalty
 - Disclosed positions category – disclosure will avoid the penalty provided there is a reasonable basis for the position and the position does not relate to a tax shelter or reportable transaction
 - Tax shelters and reportable transactions category – the only way to avoid the penalty is for the preparer to reasonably believe that the position is more likely than not to be sustained on its merits
- Penalty may be abated for reasonable cause.
- Retroactively effective for tax returns prepared after May 25, 2007, except for tax shelters and reportable transactions, in which case the new law applies to tax years ending after October 3, 2008.

Emergency Economic Stabilization Act of 2008 – Miscellaneous Provisions

- **Broker reporting of customer's basis in securities transactions**

- Starting in 2011, brokers required to file information returns on covered securities will be required to report the customer's adjusted basis in the security and whether any gain or loss is short-term or long-term.
- Broker must generally determine the adjusted basis using FIFO unless the customer adequately identifies the stock sold.
 - The broker may use the broker's default method for any stock for which the average basis method is allowed under §1012 (i.e., stock in a mutual fund, or stock acquired in connection with a dividend reinvestment plan) unless the customer notifies the broker that he elects another acceptable method under §1012.
 - The notification is made separately for each account in which average cost method stock is held, and once made, the notification applies to all stock in that account.
- Brokers must furnish a statement by February 15 of the year following the calendar year for which the return is made.
- Special rules are also provided for sales by S corporations, short sales, and options transactions.
- Starting in 2011, any broker (as well as any other person specified in regulations) that transfers a "covered security" to another broker will be required to provide the transferee broker with a written statement that will permit the transferee broker to satisfy the basis and holding period requirement.
- Starting in 2011, the issuer of a specified security will be required to file an information return describing any organizational action which affects the basis of the security and the quantitative effect on the basis of the security resulting from such action.
 - The issuer will also be required to furnish a written statement to the holder of the specified security or their nominee detailing the contents of the information return.

Emergency Economic Stabilization Act of 2008 – Miscellaneous Provisions

- **FUTA Tax**
 - The temporary FUTA surtax of 0.20 percent of taxable wages is extended through December 31, 2009.

Final Regulations – S Corporation Open Account Indebtedness (TD 9428, 10/17/08)

- New final regulations provide rules regarding an S corporation shareholder's open account indebtedness
- The basis adjustment rules apply to both written and open account debt.
- Reg. §1.1367-2(a)(2) provides that for purposes of adjusting the basis of shareholder indebtedness, advances and repayments on shareholder open account debt are treated as a single indebtedness provided the aggregate outstanding principal of the open account debt does not exceed \$25,000 at the close of the S corporation's taxable year.
 - Open account debt is shareholder's advances that are not evidenced by separate written instruments.
- Proposed regulations applied a \$10,000 threshold to open account indebtedness tested on a daily basis.

Final Regulations – S Corporation Open Account Indebtedness – cont.

- The entire principal amount of debt would no longer constitute open account debt once the principal balance of shareholder open account debt exceeds \$25,000 at the close of the S corporation's taxable year.
 - Rather, it would be treated as indebtedness evidenced by a written instrument for that taxable year and all subsequent years.
- Whole or partial dispositions of open account debt or termination of the shareholder's interest
 - The determination of whether advances and repayments have exceeded the \$25,000 aggregate threshold must be made immediately before the disposition of the open account debt or termination of the shareholder's interest.
- The proposed regulations are meant to reduce to opportunity for permanent deferral allowed under *Brooks*, TC Memo 2005-204.
- Effective date – shareholder advances made on or after October 20, 2008, and repayments those advances by the S corporation.
 - Shareholders have the option to apply the new rules to advances made to an S corporation before October 20, 2008. See Reg. Sec. 1.1367-3.

Proposed Regulations – Reduction of Attributes Under IRC §108 (REG-102822-08, August 6, 2008)

- If an S corporation excludes COD under IRC §108(a), the amount excluded is applied to reduce the S corporation's tax attributes under §108(b)(2).
- IRC §108(d)(7)(A) provides, in part, that the reduction of tax attributes under §108 are applied at the corporate level, including by not taking into account under §1366(a) any amount excluded under §108(a).
- Under §108(b)(4)(A), the reduction of tax attributes occurs after the S corporation's items of income, loss, deduction and credit for the taxable year of the discharge pass through to its shareholders under §1366(a).
- Under §1366(d)(1), the aggregate amount of losses and deductions a shareholder can take into account cannot exceed the shareholder's basis in its stock and shareholder indebtedness.

Proposed Regulations – Indebtedness Satisfied by Partnership Interest Under IRC §108 (REG-164370-05, October 31, 2008)

- For purposes of determining COD income, if a debtor partnership transfers a capital or profits interest in the partnership to a creditor in satisfaction of its recourse or nonrecourse debt, the partnership is treated as having satisfied the debt with an amount of money equal to the FMV of the partnership interest.
- FMV of the partnership interest is treated as the liquidation value for this purpose if:
 - The debtor-partnership maintains the partners' capital accounts in accordance with Reg. §1.704-1(b)(2)(iv);
 - The creditor, debtor partnership, and its partners all treat the FMV of the debt as equaling the FMV of the partnership interest for purposes of determining the tax consequences of the debt-for-equity exchange;
 - The debt-for-equity exchange is an arm's-length transaction; and
 - Subsequent to the debt-for-equity exchange, neither the partnership redeems nor the any person related to the partnership purchases the debt-for-equity interest as part of a plan which has a principal purpose of avoiding COD income by the partnership at the time of the debt-for-equity exchange
- Fact and circumstances are used to value the partnership interest the exchange fails the above requirements.

Circular 230 Disclosure

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