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111TH CONGRESS, 1st Session | HOUSE OF REPRESENTATIVES | REPT. 111–8 Part 2

TO PROVIDE FOR A PORTION OF THE ECONOMIC RECOVERY PACKAGE RELATING TO REVENUE MEASURES, UNEMPLOYMENT, AND HEALTH

JANUARY 28, 2009.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. RANGEL, from the Committee on Ways and Means, submitted the following

SUPPLEMENTAL REPORT

together with

DISSENTING VIEWS

[To accompany H.R. 598]

The Committee on Ways and Means, to whom was referred the bill (H.R. 598) to provide for a portion of the economic recovery package relating to revenue measures, unemployment, and health, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

TITLE I—TAX PROVISIONS

SECTION 1000. SHORT TITLE, ETC.

(a) SHORT TITLE.—This title may be cited as the "American Recovery and Reinvestment Tax Act of 2009".

(b) REFERENCE.—Except as otherwise expressly provided, whenever in this title an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Internal Revenue Code of 1986.

(c) TABLE OF CONTENTS.—The table of contents for this title is as follows:

Sec. 1000. Short title, etc.

Subtitle A—Making Work Pay

Sec. 1001. Making work pay credit.

Subtitle B—Additional Tax Relief for Families With Children

Sec. 1101. Increase in earned income tax credit.
Sec. 1102. Increase of refundable portion of child credit.

Subtitle C—American Opportunity Tax Credit

Sec. 1201. American opportunity tax credit.

Subtitle D—Housing Incentives

Sec. 1301. Waiver of requirement to repay first-time homebuyer credit.
Sec. 1302. Coordination of low-income housing credit and low-income housing grants.

Subtitle E—Tax Incentives for Business

PART 1—TEMPORARY INVESTMENT INCENTIVES

Sec. 1401. Special allowance for certain property acquired during 2009.
Sec. 1402. Temporary increase in limitations on expensing of certain depreciable business assets.

PART 2—5-YEAR CARRYBACK OF OPERATING LOSSES

Sec. 1411. 5-year carryback of operating losses.
Sec. 1412. Exception for TARP recipients.

PART 3—INCENTIVES FOR NEW JOBS

Sec. 1421. Incentives to hire unemployed veterans and disconnected youth.

PART 4—CLARIFICATION OF REGULATIONS RELATED TO LIMITATIONS ON CERTAIN BUILT-IN LOSSES FOLLOWING AN OWNERSHIP CHANGE

Sec. 1431. Clarification of regulations related to limitations on certain built-in losses following an ownership change.

Subtitle F—Fiscal Relief for State and Local Governments

PART 1—IMPROVED MARKETABILITY FOR TAX-EXEMPT BONDS

Sec. 1501. De minimis safe harbor exception for tax-exempt interest expense of financial institutions.
Sec. 1502. Modification of small issuer exception to tax-exempt interest expense allocation rules for financial institutions.
Sec. 1503. Temporary modification of alternative minimum tax limitations on tax-exempt bonds.

PART 2—TAX CREDIT BONDS FOR SCHOOLS

Sec. 1511. Qualified school construction bonds.
Sec. 1512. Extension and expansion of qualified zone academy bonds.

PART 3—TAXABLE BOND OPTION FOR GOVERNMENTAL BONDS

Sec. 1521. Taxable bond option for governmental bonds.

PART 4—RECOVERY ZONE BONDS

Sec. 1531. Recovery zone bonds.
Sec. 1532. Tribal economic development bonds.

PART 5—REPEAL OF WITHHOLDING TAX ON GOVERNMENT CONTRACTORS

Sec. 1541. Repeal of withholding tax on government contractors.

Subtitle G—Energy Incentives

PART 1—RENEWABLE ENERGY INCENTIVES

Sec. 1601. Extension of credit for electricity produced from certain renewable resources.
Sec. 1602. Election of investment credit in lieu of production credit.
Sec. 1603. Repeal of certain limitations on credit for renewable energy property.
Sec. 1604. Coordination with renewable energy grants.

PART 2—INCREASED ALLOCATIONS OF NEW CLEAN RENEWABLE ENERGY BONDS AND QUALIFIED ENERGY CONSERVATION BONDS

Sec. 1611. Increased limitation on issuance of new clean renewable energy bonds.
Sec. 1612. Increased limitation and expansion of qualified energy conservation bonds.

PART 3—ENERGY CONSERVATION INCENTIVES

Sec. 1621. Extension and modification of credit for nonbusiness energy property.
Sec. 1622. Modification of credit for residential energy efficient property.
Sec. 1623. Temporary increase in credit for alternative fuel vehicle refueling property.

PART 4—ENERGY RESEARCH INCENTIVES

Sec. 1631. Increased research credit for energy research.

Subtitle H—Other Provisions

PART 1—APPLICATION OF CERTAIN LABOR STANDARDS TO PROJECTS FINANCED WITH CERTAIN TAX-FAVORED BONDS

Sec. 1701. Application of certain labor standards to projects financed with certain tax-favored bonds.

PART 2—GRANTS TO PROVIDE FINANCING FOR LOW-INCOME HOUSING

Sec. 1711. Grants to States for low-income housing projects in lieu of low-income housing credit allocations for 2009.

PART 3—GRANTS FOR SPECIFIED ENERGY PROPERTY IN LIEU OF TAX CREDITS

Sec. 1721. Grants for specified energy property in lieu of tax credits.

PART 4—STUDY OF ECONOMIC, EMPLOYMENT, AND RELATED EFFECTS OF THIS ACT

Sec. 1731. Study of economic, employment, and related effects of this Act.

Subtitle A—Making Work Pay

SEC. 1001. MAKING WORK PAY CREDIT.

(a) IN GENERAL.—Subpart C of part IV of subchapter A of chapter 1 is amended by inserting after section 36 the following new section:

"SEC. 36A. MAKING WORK PAY CREDIT.

"(a) ALLOWANCE OF CREDIT.—In the case of an eligible individual, there shall be allowed as a credit against the tax imposed by this subtitle for the taxable year an amount equal to the lesser of—

"(1) 6.2 percent of earned income of the taxpayer, or

"(2) $500 ($1,000 in the case of a joint return).

"(b) LIMITATION BASED ON MODIFIED ADJUSTED GROSS INCOME.—

"(1) IN GENERAL.—The amount allowable as a credit under subsection (a) (determined without regard to this paragraph) for the taxable year shall be reduced (but not below zero) by 2 percent of so much of the taxpayer's modified adjusted gross income as exceeds $75,000 ($150,000 in the case of a joint return).

"(2) MODIFIED ADJUSTED GROSS INCOME.—For purposes of subparagraph (A), the term 'modified adjusted gross income' means the adjusted gross income of the taxpayer for the taxable year increased by any amount excluded from gross income under section 911, 931, or 933.

"(c) DEFINITIONS.—For purposes of this section—

"(1) ELIGIBLE INDIVIDUAL.—The term 'eligible individual' means any individual other than—

"(A) any nonresident alien individual,

"(B) any individual with respect to whom a deduction under section 151 is allowable to another taxpayer for a taxable year beginning in the calendar year in which the individual's taxable year begins, and

"(C) an estate or trust.

Such term shall not include any individual unless the requirements of section 32(c)(1)(E) are met with respect to such individual.

"(2) EARNED INCOME.—The term 'earned income' has the meaning given such term by section 32(c)(2), except that such term shall not include net earnings from self-employment which are not taken into account in computing taxable income. For purposes of the preceding sentence, any amount excluded from gross income by reason of section 112 shall be treated as earned income which is taken into account in computing taxable income for the taxable year.

"(d) TERMINATION.—This section shall not apply to taxable years beginning after December 31, 2010.".

(b) TREATMENT OF POSSESSIONS.—

(1) PAYMENTS TO POSSESSIONS.—

(A) MIRROR CODE POSSESSION.—The Secretary of the Treasury shall pay to each possession of the United States with a mirror code tax system amounts equal to the loss to that possession by reason of the amendments made by this section with respect to taxable years beginning in 2009 and 2010. Such amounts shall be determined by the Secretary of the Treasury based on information provided by the government of the respective possession.

(B) OTHER POSSESSIONS.—The Secretary of the Treasury shall pay to each possession of the United States which does not have a mirror code tax system amounts estimated by the Secretary of the Treasury as being equal to the aggregate benefits that would have been provided to residents of such possession by reason of the amendments made by this section for taxable years beginning in 2009 and 2010 if a mirror code tax system had been in effect in such possession. The preceding sentence shall not apply with respect to any possession of the United States unless such possession has a plan, which has been approved by the Secretary of the Treasury, under which such possession will promptly distribute such payments to the residents of such possession.

(2) COORDINATION WITH CREDIT ALLOWED AGAINST UNITED STATES INCOME TAXES.—No credit shall be allowed against United States income taxes for any

taxable year under section 36A of the Internal Revenue Code of 1986 (as added by this section) to any person—

(A) to whom a credit is allowed against taxes imposed by the possession by reason of the amendments made by this section for such taxable year, or

(B) who is eligible for a payment under a plan described in paragraph (1)(B) with respect to such taxable year.

(3) DEFINITIONS AND SPECIAL RULES.—

(A) POSSESSION OF THE UNITED STATES.—For purposes of this subsection, the term "possession of the United States" includes the Commonwealth of Puerto Rico and the Commonwealth of the Northern Mariana Islands.

(B) MIRROR CODE TAX SYSTEM.—For purposes of this subsection, the term "mirror code tax system" means, with respect to any possession of the United States, the income tax system of such possession if the income tax liability of the residents of such possession under such system is determined by reference to the income tax laws of the United States as if such possession were the United States.

(C) TREATMENT OF PAYMENTS.—For purposes of section 1324(b)(2) of title 31, United States Code, the payments under this subsection shall be treated in the same manner as a refund due from the credit allowed under section 36A of the Internal Revenue Code of 1986 (as added by this section).

(c) REFUNDS DISREGARDED IN THE ADMINISTRATION OF FEDERAL PROGRAMS AND FEDERALLY ASSISTED PROGRAMS.—Any credit or refund allowed or made to any individual by reason of section 36A of the Internal Revenue Code of 1986 (as added by this section) or by reason of subsection (b) of this section 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 2 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.

(d) CONFORMING AMENDMENTS.—

(1) Section 6211(b)(4)(A) is amended by inserting "36A," after "36,".

(2) Section 1324(b)(2) of title 31, United States Code, is amended by inserting "36A," after "36,".

(3) The table of sections for subpart C of part IV of subchapter A of chapter 1 is amended by inserting after the item relating to section 36 the following new item:

"Sec. 36A. Making work pay credit.".

(e) EFFECTIVE DATE.—This section shall apply to taxable years beginning after December 31, 2008.

Subtitle B—Additional Tax Relief for Families With Children

SEC. 1101. INCREASE IN EARNED INCOME TAX CREDIT.

(a) IN GENERAL.—Subsection (b) of section 32 is amended by adding at the end the following new paragraph:

"(3) SPECIAL RULES FOR 2009 AND 2010.—In the case of any taxable year beginning in 2009 or 2010—

"(A) INCREASED CREDIT PERCENTAGE FOR 3 OR MORE QUALIFYING CHILDREN.—In the case of a taxpayer with 3 or more qualifying children, the credit percentage is 45 percent.

"(B) REDUCTION OF MARRIAGE PENALTY.—

"(i) IN GENERAL.—The dollar amount in effect under paragraph (2)(B) shall be $5,000.

"(ii) INFLATION ADJUSTMENT.—In the case of any taxable year beginning in 2010, the $5,000 amount in clause (i) shall be increased by an amount equal to—

"(I) such dollar amount, multiplied by

"(II) the cost of living adjustment determined under section 1(f)(3) for the calendar year in which the taxable year begins determined by substituting 'calendar year 2008' for 'calendar year 1992' in subparagraph (B) thereof.

"(iii) ROUNDING.—Subparagraph (A) of subsection (j)(2) shall apply after taking into account any increase under clause (ii).".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2008.

SEC. 1102. INCREASE OF REFUNDABLE PORTION OF CHILD CREDIT.

(a) IN GENERAL.—Paragraph (4) of section 24(d) is amended to read as follows:

"(4) SPECIAL RULE FOR 2009 AND 2010.—Notwithstanding paragraph (3), in the case of any taxable year beginning in 2009 or 2010, the dollar amount in effect for such taxable year under paragraph (1)(B)(i) shall be zero.".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2008.

Subtitle C—American Opportunity Tax Credit

SEC. 1201. AMERICAN OPPORTUNITY TAX CREDIT.

(a) IN GENERAL.—Section 25A (relating to Hope scholarship credit) is amended by redesignating subsection (i) as subsection (j) and by inserting after subsection (h) the following new subsection:

"(i) AMERICAN OPPORTUNITY TAX CREDIT.—In the case of any taxable year beginning in 2009 or 2010—

"(1) INCREASE IN CREDIT.—The Hope Scholarship Credit shall be an amount equal to the sum of—

"(A) 100 percent of so much of the qualified tuition and related expenses paid by the taxpayer during the taxable year (for education furnished to the eligible student during any academic period beginning in such taxable year) as does not exceed $2,000, plus

"(B) 25 percent of such expenses so paid as exceeds $2,000 but does not exceed $4,000.

"(2) CREDIT ALLOWED FOR FIRST 4 YEARS OF POST-SECONDARY EDUCATION.—Subparagraphs (A) and (C) of subsection (b)(2) shall be applied by substituting '4' for '2'.

"(3) QUALIFIED TUITION AND RELATED EXPENSES TO INCLUDE REQUIRED COURSE MATERIALS.—Subsection (f)(1)(A) shall be applied by substituting 'tuition, fees, and course materials' for 'tuition and fees'.

"(4) INCREASE IN AGI LIMITS FOR HOPE SCHOLARSHIP CREDIT.—In lieu of applying subsection (d) with respect to the Hope Scholarship Credit, such credit (determined without regard to this paragraph) shall be reduced (but not below zero) by the amount which bears the same ratio to such credit (as so determined) as—

"(A) the excess of—

"(i) the taxpayer's modified adjusted gross income (as defined in subsection (d)(3)) for such taxable year, over

"(ii) $80,000 ($160,000 in the case of a joint return), bears to

"(B) $10,000 ($20,000 in the case of a joint return).

"(5) CREDIT ALLOWED AGAINST ALTERNATIVE MINIMUM TAX.—In the case of a taxable year to which section 26(a)(2) does not apply, so much of the credit allowed under subsection (a) as is attributable to the Hope Scholarship Credit shall not exceed the excess of—

"(A) the sum of the regular tax liability (as defined in section 26(b)) plus the tax imposed by section 55, over

"(B) the sum of the credits allowable under this subpart (other than this subsection and sections 23, 25D, and 30D) and section 27 for the taxable year.

Any reference in this section or section 24, 25, 26, 25B, 904, or 1400C to a credit allowable under this subsection shall be treated as a reference to so much of the credit allowable under subsection (a) as is attributable to the Hope Scholarship Credit.

"(6) PORTION OF CREDIT MADE REFUNDABLE.—40 percent of so much of the credit allowed under subsection (a) as is attributable to the Hope Scholarship Credit (determined after application of paragraph (4) and without regard to this paragraph and section 26(a)(2) or paragraph (5), as the case may be) shall be treated as a credit allowable under subpart C (and not allowed under subsection (a)). The preceding sentence shall not apply to any taxpayer for any taxable year if such taxpayer is a child to whom subsection (g) of section 1 applies for such taxable year.

"(7) COORDINATION WITH MIDWESTERN DISASTER AREA BENEFITS.—In the case of a taxpayer with respect to whom section 702(a)(1)(B) of the Heartland Disaster Tax Relief Act of 2008 applies for any taxable year, such taxpayer may

elect to waive the application of this subsection to such taxpayer for such taxable year.".

(b) CONFORMING AMENDMENTS.—

(1) Section 24(b)(3)(B) is amended by inserting "25A(i)," after "23,".

(2) Section 25(e)(1)(C)(ii) is amended by inserting "25A(i)," after "24,".

(3) Section 26(a)(1) is amended by inserting "25A(i)," after "24,".

(4) Section 25B(g)(2) is amended by inserting "25A(i)," after "23,".

(5) Section 904(i) is amended by inserting "25A(i)," after "24,".

(6) Section 1400C(d)(2) is amended by inserting "25A(i)," after "24,".

(7) Section 1324(b)(2) of title 31, United States Code, is amended by inserting "25A," before "35".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2008.

(d) APPLICATION OF EGTRRA SUNSET.—The amendment made by subsection (b)(1) shall be subject to title IX of the Economic Growth and Tax Relief Reconciliation Act of 2001 in the same manner as the provision of such Act to which such amendment relates.

(e) TREASURY STUDIES REGARDING EDUCATION INCENTIVES.—

(1) STUDY REGARDING COORDINATION WITH NON-TAX EDUCATIONAL INCENTIVES.—The Secretary of the Treasury, or the Secretary's delegate, shall study how to coordinate the credit allowed under section 25A of the Internal Revenue Code of 1986 with the Federal Pell Grant program under section 401 of the Higher Education Act of 1965.

(2) STUDY REGARDING IMPOSITION OF COMMUNITY SERVICE REQUIREMENTS.—The Secretary of the Treasury, or the Secretary's delegate, shall study the feasibility of requiring students to perform community service as a condition of taking their tuition and related expenses into account under section 25A of the Internal Revenue Code of 1986.

(3) REPORT.—Not later than 1 year after the date of the enactment of this Act, the Secretary of the Treasury, or the Secretary's delegate, shall report to Congress on the results of the studies conducted under this paragraph.

Subtitle D—Housing Incentives

SEC. 1301. WAIVER OF REQUIREMENT TO REPAY FIRST-TIME HOMEBUYER CREDIT.

(a) IN GENERAL.—Paragraph (4) of section 36(f) is amended by adding at the end the following new subparagraph:

"(D) WAIVER OF RECAPTURE FOR PURCHASES IN 2009.—In the case of any credit allowed with respect to the purchase of a principal residence after December 31, 2008, and before July 1, 2009—

"(i) paragraph (1) shall not apply, and

"(ii) paragraph (2) shall apply only if the disposition or cessation described in paragraph (2) with respect to such residence occurs during the 36-month period beginning on the date of the purchase of such residence by the taxpayer.".

(b) CONFORMING AMENDMENT.—Subsection (g) of section 36 is amended by striking "subsection (c)" and inserting "subsections (c) and (f)(4)(D)".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to residences purchased after December 31, 2008.

SEC. 1302. COORDINATION OF LOW-INCOME HOUSING CREDIT AND LOW-INCOME HOUSING GRANTS.

Subsection (i) of section 42 of the Internal Revenue Code of 1986 is amended by adding at the end the following new paragraph:

"(9) COORDINATION WITH LOW-INCOME HOUSING GRANTS.—

"(A) REDUCTION IN STATE HOUSING CREDIT CEILING FOR LOW-INCOME HOUSING GRANTS RECEIVED IN 2009.—For purposes of this section, the amounts described in clauses (i) through (iv) of subsection (h)(3)(C) with respect to any State for 2009 shall each be reduced by so much of such amount as is taken into account in determining the amount of any grant to such State under section 1711 of the American Recovery and Reinvestment Tax Act of 2009.

"(B) SPECIAL RULE FOR BASIS.—Basis of a qualified low-income building shall not be reduced by the amount of any grant described in subparagraph (A).".

Subtitle E—Tax Incentives for Business

PART 1—TEMPORARY INVESTMENT INCENTIVES

SEC. 1401. SPECIAL ALLOWANCE FOR CERTAIN PROPERTY ACQUIRED DURING 2009.

(a) IN GENERAL.—Paragraph (2) of section 168(k) is amended—

(1) by striking "January 1, 2010" and inserting "January 1, 2011", and

(2) by striking "January 1, 2009" each place it appears and inserting "January 1, 2010".

(b) CONFORMING AMENDMENTS.—

(1) The heading for subsection (k) of section 168 is amended by striking "JANUARY 1, 2009" and inserting "JANUARY 1, 2010".

(2) The heading for clause (ii) of section 168(k)(2)(B) is amended by striking "PRE-JANUARY 1, 2009" and inserting "PRE-JANUARY 1, 2010".

(3) Subparagraph (D) of section 168(k)(4) is amended—

(A) by striking "and" at the end of clause (i),

(B) by redesignating clause (ii) as clause (v), and

(C) by inserting after clause (i) the following new clauses:

"(ii) 'April 1, 2008' shall be substituted for 'January 1, 2008' in subparagraph (A)(iii)(I) thereof,

"(iii) 'January 1, 2009' shall be substituted for 'January 1, 2010' each place it appears,

"(iv) 'January 1, 2010' shall be substituted for 'January 1, 2011' in subparagraph (A)(iv) thereof, and".

(4) Subparagraph (B) of section 168(l)(5) is amended by striking "January 1, 2009" and inserting "January 1, 2010".

(5) Clause (ii) of section 168(n)(2)(C) is amended by striking "January 1, 2009" and inserting "January 1, 2010".

(6) Subparagraph (B) of section 1400N(d)(3) is amended by striking "January 1, 2009" and inserting "January 1, 2010".

(c) EFFECTIVE DATES.—

(1) IN GENERAL.—Except as provided in paragraph (2), the amendments made by this section shall apply to property placed in service after December 31, 2008, in taxable years ending after such date.

(2) TECHNICAL AMENDMENT.—Section 168(k)(4)(D)(ii) of the Internal Revenue Code of 1986, as added by subsection (b)(3)(C), shall apply to taxable years ending after March 31, 2008.

SEC. 1402. TEMPORARY INCREASE IN LIMITATIONS ON EXPENSING OF CERTAIN DEPRECIABLE BUSINESS ASSETS.

(a) IN GENERAL.—Paragraph (7) of section 179(b) is amended—

(1) by striking "2008" and inserting "2008, or 2009", and

(2) by striking "2008" in the heading thereof and inserting "2008, AND 2009".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2008.

PART 2—5-YEAR CARRYBACK OF OPERATING LOSSES

SEC. 1411. 5-YEAR CARRYBACK OF OPERATING LOSSES.

(a) IN GENERAL.—Subparagraph (H) of section 172(b)(1) is amended to read as follows:

"(H) CARRYBACK FOR 2008 AND 2009 NET OPERATING LOSSES.—

"(i) IN GENERAL.—In the case of an applicable 2008 or 2009 net operating loss with respect to which the taxpayer has elected the application of this subparagraph—

"(I) such net operating loss shall be reduced by 10 percent of such loss (determined without regard to this subparagraph),

"(II) subparagraph (A)(i) shall be applied by substituting any whole number elected by the taxpayer which is more than 2 and less than 6 for '2',

"(III) subparagraph (E)(ii) shall be applied by substituting the whole number which is one less than the whole number substituted under subclause (II) for '2', and

"(IV) subparagraph (F) shall not apply.

"(ii) APPLICABLE 2008 OR 2009 NET OPERATING LOSS.—For purposes of this subparagraph, the term 'applicable 2008 or 2009 net operating loss' means—

"(I) the taxpayer's net operating loss for any taxable year ending in 2008 or 2009, or

"(II) if the taxpayer elects to have this subclause apply in lieu of subclause (I), the taxpayer's net operating loss for any taxable year beginning in 2008 or 2009.

"(iii) ELECTION.—Any election under this subparagraph shall be made in such manner as may be prescribed by the Secretary, and shall be made by the due date (including extension of time) for filing the taxpayer's return for the taxable year of the net operating loss. Any such election, once made, shall be irrevocable.

"(iv) COORDINATION WITH ALTERNATIVE TAX NET OPERATING LOSS DEDUCTION.—In the case of a taxpayer who elects to have clause (ii)(II) apply, section 56(d)(1)(A)(ii) shall be applied by substituting 'ending during 2001 or 2002 or beginning during 2008 or 2009' for 'ending during 2001, 2002, 2008, or 2009'.".

(b) ALTERNATIVE TAX NET OPERATING LOSS DEDUCTION.—Subclause (I) of section 56(d)(1)(A)(ii) is amended to read as follows:

"(I) the amount of such deduction attributable to the sum of carrybacks of net operating losses from taxable years ending during 2001, 2002, 2008, or 2009 and carryovers of net operating losses to such taxable years, or".

(c) LOSS FROM OPERATIONS OF LIFE INSURANCE COMPANIES.—Subsection (b) of section 810 is amended by adding at the end the following new paragraph:

"(4) CARRYBACK FOR 2008 AND 2009 LOSSES.—

"(A) IN GENERAL.—In the case of an applicable 2008 or 2009 loss from operations with respect to which the taxpayer has elected the application of this paragraph—

"(i) such loss from operations shall be reduced by 10 percent of such loss (determined without regard to this paragraph), and

"(ii) paragraph (1)(A) shall be applied, at the election of the taxpayer, by substituting '5' or '4' for '3'.

"(B) APPLICABLE 2008 OR 2009 LOSS FROM OPERATIONS.—For purposes of this paragraph, the term 'applicable 2008 or 2009 loss from operations' means—

"(i) the taxpayer's loss from operations for any taxable year ending in 2008 or 2009, or

"(ii) if the taxpayer elects to have this clause apply in lieu of clause (i), the taxpayer's loss from operations for any taxable year beginning in 2008 or 2009.

"(C) ELECTION.—Any election under this paragraph shall be made in such manner as may be prescribed by the Secretary, and shall be made by the due date (including extension of time) for filing the taxpayer's return for the taxable year of the loss from operations. Any such election, once made, shall be irrevocable.

"(D) COORDINATION WITH ALTERNATIVE TAX NET OPERATING LOSS DEDUCTION.—In the case of a taxpayer who elects to have subparagraph (B)(ii) apply, section 56(d)(1)(A)(ii) shall be applied by substituting 'ending during 2001 or 2002 or beginning during 2008 or 2009' for 'ending during 2001, 2002, 2008, or 2009'.".

(d) CONFORMING AMENDMENT.—Section 172 is amended by striking subsection (k).

(e) EFFECTIVE DATE.—

(1) IN GENERAL.—Except as otherwise provided in this subsection, the amendments made by this section shall apply to net operating losses arising in taxable years ending after December 31, 2007.

(2) ALTERNATIVE TAX NET OPERATING LOSS DEDUCTION.—The amendment made by subsection (b) shall apply to taxable years ending after 1997.

(3) LOSS FROM OPERATIONS OF LIFE INSURANCE COMPANIES.—The amendment made by subsection (d) shall apply to losses from operations arising in taxable years ending after December 31, 2007.

(4) TRANSITIONAL RULE.—In the case of a net operating loss (or, in the case of a life insurance company, a loss from operations) for a taxable year ending before the date of the enactment of this Act—

(A) any election made under section 172(b)(3) or 810(b)(3) of the Internal Revenue Code of 1986 with respect to such loss may (notwithstanding such section) be revoked before the applicable date,

(B) any election made under section 172(b)(1)(H) or 810(b)(4) of such Code with respect to such loss shall (notwithstanding such section) be treated as timely made if made before the applicable date, and

(C) any application under section 6411(a) of such Code with respect to such loss shall be treated as timely filed if filed before the applicable date.

For purposes of this paragraph, the term "applicable date" means the date which is 60 days after the date of the enactment of this Act.

SEC. 1412. EXCEPTION FOR TARP RECIPIENTS.

The amendments made by this part shall not apply to—

(1) any taxpayer if—

(A) the Federal Government acquires, at any time, an equity interest in the taxpayer pursuant to the Emergency Economic Stabilization Act of 2008, or

(B) the Federal Government acquires, at any time, any warrant (or other right) to acquire any equity interest with respect to the taxpayer pursuant to such Act,

(2) the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation, and

(3) any taxpayer which at any time in 2008 or 2009 is a member of the same affiliated group (as defined in section 1504 of the Internal Revenue Code of 1986, determined without regard to subsection (b) thereof) as a taxpayer described in paragraph (1) or (2).

PART 3—INCENTIVES FOR NEW JOBS

SEC. 1421. INCENTIVES TO HIRE UNEMPLOYED VETERANS AND DISCONNECTED YOUTH.

(a) IN GENERAL.—Subsection (d) of section 51 is amended by adding at the end the following new paragraph:

"(14) CREDIT ALLOWED FOR UNEMPLOYED VETERANS AND DISCONNECTED YOUTH HIRED IN 2009 OR 2010.—

"(A) IN GENERAL.—Any unemployed veteran or disconnected youth who begins work for the employer during 2009 or 2010 shall be treated as a member of a targeted group for purposes of this subpart.

"(B) DEFINITIONS.—For purposes of this paragraph—

"(i) UNEMPLOYED VETERAN.—The term 'unemployed veteran' means any veteran (as defined in paragraph (3)(B), determined without regard to clause (ii) thereof) who is certified by the designated local agency as—

"(I) having been discharged or released from active duty in the Armed Forces during 2008, 2009, or 2010, and

"(II) being in receipt of unemployment compensation under State or Federal law for not less than 4 weeks during the 1-year period ending on the hiring date.

"(ii) DISCONNECTED YOUTH.—The term 'disconnected youth' means any individual who is certified by the designated local agency—

"(I) as having attained age 16 but not age 25 on the hiring date,

"(II) as not regularly attending any secondary, technical, or post-secondary school during the 6-month period preceding the hiring date,

"(III) as not regularly employed during such 6-month period, and

"(IV) as not readily employable by reason of lacking a sufficient number of basic skills.".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to individuals who begin work for the employer after December 31, 2008.

PART 4—CLARIFICATION OF REGULATIONS RELATED TO LIMITATIONS ON CERTAIN BUILT-IN LOSSES FOLLOWING AN OWNERSHIP CHANGE

SEC. 1431. CLARIFICATION OF REGULATIONS RELATED TO LIMITATIONS ON CERTAIN BUILT-IN LOSSES FOLLOWING AN OWNERSHIP CHANGE.

(a) FINDINGS.—Congress finds as follows:

(1) The delegation of authority to the Secretary of the Treasury under section 382(m) of the Internal Revenue Code of 1986 does not authorize the Secretary to provide exemptions or special rules that are restricted to particular industries or classes of taxpayers.

(2) Internal Revenue Service Notice 2008–83 is inconsistent with the congressional intent in enacting such section 382(m).

(3) The legal authority to prescribe Internal Revenue Service Notice 2008–83 is doubtful.

(4) However, as taxpayers should generally be able to rely on guidance issued by the Secretary of the Treasury legislation is necessary to clarify the force and effect of Internal Revenue Service Notice 2008–83 and restore the proper application under the Internal Revenue Code of 1986 of the limitation on built-in losses following an ownership change of a bank.

(b) DETERMINATION OF FORCE AND EFFECT OF INTERNAL REVENUE SERVICE NOTICE 2008–83 EXEMPTING BANKS FROM LIMITATION ON CERTAIN BUILT–IN LOSSES FOLLOWING OWNERSHIP CHANGE.—

(1) IN GENERAL.—Internal Revenue Service Notice 2008–83—

(A) shall be deemed to have the force and effect of law with respect to any ownership change (as defined in section 382(g) of the Internal Revenue Code of 1986) occurring on or before January 16, 2009, and

(B) shall have no force or effect with respect to any ownership change after such date.

(2) BINDING CONTRACTS.—Notwithstanding paragraph (1), Internal Revenue Service Notice 2008–83 shall have the force and effect of law with respect to any ownership change (as so defined) which occurs after January 16, 2009 if such change—

(A) is pursuant to a written binding contract entered into on or before such date, or

(B) is pursuant to a written agreement entered into on or before such date and such agreement was described on or before such date in a public announcement or in a filing with the Securities and Exchange Commission required by reason of such ownership change.

Subtitle F—Fiscal Relief for State and Local Governments

PART 1—IMPROVED MARKETABILITY FOR TAX-EXEMPT BONDS

SEC. 1501. DE MINIMIS SAFE HARBOR EXCEPTION FOR TAX-EXEMPT INTEREST EXPENSE OF FINANCIAL INSTITUTIONS.

(a) IN GENERAL.—Subsection (b) of section 265 is amended by adding at the end the following new paragraph:

"(7) DE MINIMIS EXCEPTION FOR BONDS ISSUED DURING 2009 OR 2010.—

"(A) IN GENERAL.—In applying paragraph (2)(A), there shall not be taken into account tax-exempt obligations issued during 2009 or 2010.

"(B) LIMITATION.—The amount of tax-exempt obligations not taken into account by reason of subparagraph (A) shall not exceed 2 percent of the amount determined under paragraph (2)(B).

"(C) REFUNDINGS.—For purposes of this paragraph, a refunding bond (whether a current or advance refunding) shall be treated as issued on the date of the issuance of the refunded bond (or in the case of a series of refundings, the original bond).".

(b) TREATMENT AS FINANCIAL INSTITUTION PREFERENCE ITEM.—Clause (iv) of section 291(e)(1)(B) is amended by adding at the end the following: "That portion of any obligation not taken into account under paragraph (2)(A) of section 265(b) by reason of paragraph (7) of such section shall be treated for purposes of this section as having been acquired on August 7, 1986.".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to obligations issued after December 31, 2008.

SEC. 1502. MODIFICATION OF SMALL ISSUER EXCEPTION TO TAX-EXEMPT INTEREST EXPENSE ALLOCATION RULES FOR FINANCIAL INSTITUTIONS.

(a) IN GENERAL.—Paragraph (3) of section 265(b) (relating to exception for certain tax-exempt obligations) is amended by adding at the end the following new subparagraph:

"(G) SPECIAL RULES FOR OBLIGATIONS ISSUED DURING 2009 AND 2010.—

"(i) INCREASE IN LIMITATION.—In the case of obligations issued during 2009 or 2010, subparagraphs (C)(i), (D)(i), and (D)(iii)(II) shall each be applied by substituting '$30,000,000' for '$10,000,000'.

"(ii) QUALIFIED 501(C)(3) BONDS TREATED AS ISSUED BY EXEMPT ORGANIZATION.—In the case of a qualified 501(c)(3) bond (as defined in section 145) issued during 2009 or 2010, this paragraph shall be applied by

treating the 501(c)(3) organization for whose benefit such bond was issued as the issuer.

"(iii) SPECIAL RULE FOR QUALIFIED FINANCINGS.—In the case of a qualified financing issue issued during 2009 or 2010—

"(I) subparagraph (F) shall not apply, and

"(II) any obligation issued as a part of such issue shall be treated as a qualified tax-exempt obligation if the requirements of this paragraph are met with respect to each qualified portion of the issue (determined by treating each qualified portion as a separate issue issued by the qualified borrower with respect to which such portion relates).

"(iv) QUALIFIED FINANCING ISSUE.—For purposes of this subparagraph, the term 'qualified financing issue' means any composite, pooled, or other conduit financing issue the proceeds of which are used directly or indirectly to make or finance loans to one or more ultimate borrowers each of whom is a qualified borrower.

"(v) QUALIFIED PORTION.—For purposes of this subparagraph, the term 'qualified portion' means that portion of the proceeds which are used with respect to each qualified borrower under the issue.

"(vi) QUALIFIED BORROWER.—For purposes of this subparagraph, the term 'qualified borrower' means a borrower which is a State or political subdivision thereof or an organization described in section 501(c)(3) and exempt from taxation under section 501(a).".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to obligations issued after December 31, 2008.

SEC. 1503. TEMPORARY MODIFICATION OF ALTERNATIVE MINIMUM TAX LIMITATIONS ON TAX-EXEMPT BONDS.

(a) INTEREST ON PRIVATE ACTIVITY BONDS ISSUED DURING 2009 AND 2010 NOT TREATED AS TAX PREFERENCE ITEM.—Subparagraph (C) of section 57(a)(5) is amended by adding at the end a new clause:

"(vi) EXCEPTION FOR BONDS ISSUED IN 2009 AND 2010.—For purposes of clause (i), the term 'private activity bond' shall not include any bond issued after December 31, 2008, and before January 1, 2011. For purposes of the preceding sentence, a refunding bond (whether a current or advance refunding) shall be treated as issued on the date of the issuance of the refunded bond (or in the case of a series of refundings, the original bond).".

(b) NO ADJUSTMENT TO ADJUSTED CURRENT EARNINGS FOR INTEREST ON TAX-EXEMPT BONDS ISSUED AFTER 2008.—Subparagraph (B) of section 56(g)(4) is amended by adding at the end the following new clause:

"(iv) TAX EXEMPT INTEREST ON BONDS ISSUED IN 2009 AND 2010.—Clause (i) shall not apply in the case of any interest on a bond issued after December 31, 2008, and before January 1, 2011. For purposes of the preceding sentence, a refunding bond (whether a current or advance refunding) shall be treated as issued on the date of the issuance of the refunded bond (or in the case of a series of refundings, the original bond).".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to obligations issued after December 31, 2008.

PART 2—TAX CREDIT BONDS FOR SCHOOLS

SEC. 1511. QUALIFIED SCHOOL CONSTRUCTION BONDS.

(a) IN GENERAL.—Subpart I of part IV of subchapter A of chapter 1 is amended by adding at the end the following new section:

"SEC. 54F. QUALIFIED SCHOOL CONSTRUCTION BONDS.

"(a) QUALIFIED SCHOOL CONSTRUCTION BOND.—For purposes of this subchapter, the term 'qualified school construction bond' means any bond issued as part of an issue if—

"(1) 100 percent of the available project proceeds of such issue are to be used for the construction, rehabilitation, or repair of a public school facility or for the acquisition of land on which such a facility is to be constructed with part of the proceeds of such issue,

"(2) the bond is issued by a State or local government within the jurisdiction of which such school is located, and

"(3) the issuer designates such bond for purposes of this section.

"(b) LIMITATION ON AMOUNT OF BONDS DESIGNATED.—The maximum aggregate face amount of bonds issued during any calendar year which may be designated under subsection (a) by any issuer shall not exceed the sum of—

"(1) the limitation amount allocated under subsection (d) for such calendar year to such issuer, and

"(2) if such issuer is a large local educational agency (as defined in subsection (e)(4)) or is issuing on behalf of such an agency, the limitation amount allocated under subsection (e) for such calendar year to such agency.

"(c) NATIONAL LIMITATION ON AMOUNT OF BONDS DESIGNATED.—There is a national qualified school construction bond limitation for each calendar year. Such limitation is—

"(1) $11,000,000,000 for 2009,

"(2) $11,000,000,000 for 2010, and

"(3) except as provided in subsection (f), zero after 2010.

"(d) 60 PERCENT OF LIMITATION ALLOCATED AMONG STATES.—

"(1) IN GENERAL.—60 percent of the limitation applicable under subsection (c) for any calendar year shall be allocated by the Secretary among the States in proportion to the respective numbers of children in each State who have attained age 5 but not age 18 for the most recent fiscal year ending before such calendar year. The limitation amount allocated to a State under the preceding sentence shall be allocated by the State to issuers within such State.

"(2) MINIMUM ALLOCATIONS TO STATES.—

"(A) IN GENERAL.—The Secretary shall adjust the allocations under this subsection for any calendar year for each State to the extent necessary to ensure that the sum of—

"(i) the amount allocated to such State under this subsection for such year, and

"(ii) the aggregate amounts allocated under subsection (e) to large local educational agencies in such State for such year,

is not less than an amount equal to such State's adjusted minimum percentage of the amount to be allocated under paragraph (1) for the calendar year.

"(B) ADJUSTED MINIMUM PERCENTAGE.—A State's adjusted minimum percentage for any calendar year is the product of—

"(i) the minimum percentage described in section 1124(d) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 6334(d)) for such State for the most recent fiscal year ending before such calendar year, multiplied by

"(ii) 1.68.

"(3) ALLOCATIONS TO CERTAIN POSSESSIONS.—The amount to be allocated under paragraph (1) to any possession of the United States other than Puerto Rico shall be the amount which would have been allocated if all allocations under paragraph (1) were made on the basis of respective populations of individuals below the poverty line (as defined by the Office of Management and Budget). In making other allocations, the amount to be allocated under paragraph (1) shall be reduced by the aggregate amount allocated under this paragraph to possessions of the United States.

"(4) ALLOCATIONS FOR INDIAN SCHOOLS.—In addition to the amounts otherwise allocated under this subsection, $200,000,000 for calendar year 2009, and $200,000,000 for calendar year 2010, shall be allocated by the Secretary of the Interior for purposes of the construction, rehabilitation, and repair of schools funded by the Bureau of Indian Affairs. In the case of amounts allocated under the preceding sentence, Indian tribal governments (as defined in section 7701(a)(40)) shall be treated as qualified issuers for purposes of this subchapter.

"(e) 40 PERCENT OF LIMITATION ALLOCATED AMONG LARGEST SCHOOL DISTRICTS.—

"(1) IN GENERAL.—40 percent of the limitation applicable under subsection (c) for any calendar year shall be allocated under paragraph (2) by the Secretary among local educational agencies which are large local educational agencies for such year.

"(2) ALLOCATION FORMULA.—The amount to be allocated under paragraph (1) for any calendar year shall be allocated among large local educational agencies in proportion to the respective amounts each such agency received for Basic Grants under subpart 2 of part A of title I of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 6331 et seq.) for the most recent fiscal year ending before such calendar year.

"(3) ALLOCATION OF UNUSED LIMITATION TO STATE.—The amount allocated under this subsection to a large local educational agency for any calendar year may be reallocated by such agency to the State in which such agency is located

for such calendar year. Any amount reallocated to a State under the preceding sentence may be allocated as provided in subsection (d)(1).

"(4) LARGE LOCAL EDUCATIONAL AGENCY.—For purposes of this section, the term 'large local educational agency' means, with respect to a calendar year, any local educational agency if such agency is—

"(A) among the 100 local educational agencies with the largest numbers of children aged 5 through 17 from families living below the poverty level, as determined by the Secretary using the most recent data available from the Department of Commerce that are satisfactory to the Secretary, or

"(B) 1 of not more than 25 local educational agencies (other than those described in subparagraph (A)) that the Secretary of Education determines (based on the most recent data available satisfactory to the Secretary) are in particular need of assistance, based on a low level of resources for school construction, a high level of enrollment growth, or such other factors as the Secretary deems appropriate.

"(f) CARRYOVER OF UNUSED LIMITATION.—If for any calendar year—

"(1) the amount allocated under subsection (d) to any State, exceeds

"(2) the amount of bonds issued during such year which are designated under subsection (a) pursuant to such allocation,

the limitation amount under such subsection for such State for the following calendar year shall be increased by the amount of such excess. A similar rule shall apply to the amounts allocated under subsection (d)(4) or (e).".

(b) CONFORMING AMENDMENTS.—

(1) Paragraph (1) of section 54A(d) is amended by striking "or" at the end of subparagraph (C), by inserting "or" at the end of subparagraph (D), and by inserting after subparagraph (D) the following new subparagraph:

"(E) a qualified school construction bond,".

(2) Subparagraph (C) of section 54A(d)(2) is amended by striking "and" at the end of clause (iii), by striking the period at the end of clause (iv) and inserting ", and", and by adding at the end the following new clause:

"(v) in the case of a qualified school construction bond, a purpose specified in section 54F(a)(1).".

(3) The table of sections for subpart I of part IV of subchapter A of chapter 1 is amended by adding at the end the following new item:

"Sec. 54F. Qualified school construction bonds.".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to obligations issued after December 31, 2008.

SEC. 1512. EXTENSION AND EXPANSION OF QUALIFIED ZONE ACADEMY BONDS.

(a) IN GENERAL.—Section 54E(c)(1) is amended by striking "and 2009" and inserting "and $1,400,000,000 for 2009 and 2010".

(b) EFFECTIVE DATE.—The amendment made by this section shall apply to obligations issued after December 31, 2008.

PART 3—TAXABLE BOND OPTION FOR GOVERNMENTAL BONDS

SEC. 1521. TAXABLE BOND OPTION FOR GOVERNMENTAL BONDS.

(a) IN GENERAL.—Part IV of subchapter A of chapter 1 is amended by adding at the end the following new subpart:

"Subpart J—Taxable Bond Option for Governmental Bonds

"Sec. 54AA. Taxable bond option for governmental bonds.

"SEC. 54AA. TAXABLE BOND OPTION FOR GOVERNMENTAL BONDS.

"(a) IN GENERAL.—If a taxpayer holds a taxable governmental bond on one or more interest payment dates of the bond during any taxable year, there shall be allowed as a credit against the tax imposed by this chapter for the taxable year an amount equal to the sum of the credits determined under subsection (b) with respect to such dates.

"(b) AMOUNT OF CREDIT.—The amount of the credit determined under this subsection with respect to any interest payment date for a taxable governmental bond is 35 percent of the amount of interest payable by the issuer with respect to such date.

"(c) LIMITATION BASED ON AMOUNT OF TAX.—

"(1) IN GENERAL.—The credit allowed under subsection (a) for any taxable year shall not exceed the excess of—

"(A) the sum of the regular tax liability (as defined in section 26(b)) plus the tax imposed by section 55, over

"(B) the sum of the credits allowable under this part (other than subpart C and this subpart).

"(2) CARRYOVER OF UNUSED CREDIT.—If the credit allowable under subsection (a) exceeds the limitation imposed by paragraph (1) for such taxable year, such excess shall be carried to the succeeding taxable year and added to the credit allowable under subsection (a) for such taxable year (determined before the application of paragraph (1) for such succeeding taxable year).

"(d) TAXABLE GOVERNMENTAL BOND.—

"(1) IN GENERAL.—For purposes of this section, the term 'taxable governmental bond' means any obligation (other than a private activity bond) if—

"(A) the interest on such obligation would (but for this section) be excludable from gross income under section 103, and

"(B) the issuer makes an irrevocable election to have this section apply.

"(2) APPLICABLE RULES.—For purposes of applying paragraph (1)—

"(A) a taxable governmental bond shall not be treated as federally guaranteed by reason of the credit allowed under subsection (a) or section 6432,

"(B) the yield on a taxable governmental bond shall be determined without regard to the credit allowed under subsection (a), and

"(C) a bond shall not be treated as a taxable governmental bond if the issue price has more than a de minimis amount (determined under rules similar to the rules of section 1273(a)(3)) of premium over the stated principal amount of the bond.

"(e) INTEREST PAYMENT DATE.—For purposes of this section, the term 'interest payment date' means any date on which the holder of record of the taxable governmental bond is entitled to a payment of interest under such bond.

"(f) SPECIAL RULES.—

"(1) INTEREST ON TAXABLE GOVERNMENTAL BONDS INCLUDIBLE IN GROSS INCOME FOR FEDERAL INCOME TAX PURPOSES.—For purposes of this title, interest on any taxable governmental bond shall be includible in gross income.

"(2) APPLICATION OF CERTAIN RULES.—Rules similar to the rules of subsections (f), (g), (h), and (i) of section 54A shall apply for purposes of the credit allowed under subsection (a).

"(g) SPECIAL RULE FOR QUALIFIED BONDS ISSUED BEFORE 2011.—In the case of a qualified bond issued before January 1, 2011—

"(1) ISSUER ALLOWED REFUNDABLE CREDIT.—In lieu of any credit allowed under this section with respect to such bond, the issuer of such bond shall be allowed a credit as provided in section 6432.

"(2) QUALIFIED BOND.—For purposes of this subsection, the term 'qualified bond' means any taxable governmental bond issued as part of an issue if—

"(A) 100 percent of the available project proceeds (as defined in section 54A) of such issue are to be used for capital expenditures, and

"(B) the issuer makes an irrevocable election to have this subsection apply.

"(h) REGULATIONS.—The Secretary may prescribe such regulations and other guidance as may be necessary or appropriate to carry out this section and section 6432.".

(b) CREDIT FOR QUALIFIED BONDS ISSUED BEFORE 2011.—Subchapter B of chapter 65, as amended by this Act, is amended by adding at the end the following new section:

"SEC. 6432. CREDIT FOR QUALIFIED BONDS ALLOWED TO ISSUER.

"(a) IN GENERAL.—In the case of a qualified bond issued before January 1, 2011, the issuer of such bond shall be allowed a credit with respect to each interest payment under such bond which shall be payable by the Secretary as provided in subsection (b).

"(b) PAYMENT OF CREDIT.—The Secretary shall pay (contemporaneously with each interest payment date under such bond) to the issuer of such bond (or to any person who makes such interest payments on behalf of the issuer) 35 percent of the interest payable under such bond on such date.

"(c) APPLICATION OF ARBITRAGE RULES.—For purposes of section 148, the yield on a qualified bond shall be reduced by the credit allowed under this section.

"(d) INTEREST PAYMENT DATE.—For purposes of this subsection, the term 'interest payment date' means each date on which interest is payable by the issuer under the terms of the bond.

"(e) QUALIFIED BOND.—For purposes of this subsection, the term 'qualified bond' has the meaning given such term in section 54AA(g).".

(c) CONFORMING AMENDMENTS.—

(1) Section 1324(b)(2) of title 31, United States Code, is amended by striking "or 6428" and inserting "6428, or 6432,".

(2) Section 54A(c)(1)(B) is amended by striking "subpart C" and inserting "subparts C and J".

(3) Sections 54(c)(2), 1397E(c)(2), and 1400N(l)(3)(B) are each amended by striking "and I" and inserting ", I, and J".

(4) Section 6401(b)(1) is amended by striking "and I" and inserting "I, and J".

(5) The table of subparts for part IV of subchapter A of chapter 1 is amended by adding at the end the following new item:

"Subpart J. Taxable bond option for governmental bonds.".

(6) The table of sections for subchapter B of chapter 65, as amended by this Act, is amended by adding at the end the following new item:

"Sec. 6432. Credit for qualified bonds allowed to issuer.".

(d) TRANSITIONAL COORDINATION WITH STATE LAW.—Except as otherwise provided by a State after the date of the enactment of this Act, the interest on any taxable governmental bond (as defined in section 54AA of the Internal Revenue Code of 1986, as added by this section) and the amount of any credit determined under such section with respect to such bond shall be treated for purposes of the income tax laws of such State as being exempt from Federal income tax.

(e) EFFECTIVE DATE.—The amendments made by this section shall apply to obligations issued after the date of the enactment of this Act.

PART 4—RECOVERY ZONE BONDS

SEC. 1531. RECOVERY ZONE BONDS.

(a) IN GENERAL.—Subchapter Y of chapter 1 is amended by adding at the end the following new part:

"PART III—RECOVERY ZONE BONDS

"Sec. 1400U–1. Allocation of recovery zone bonds.
"Sec. 1400U–2. Recovery zone economic development bonds.
"Sec. 1400U–3. Recovery zone facility bonds.

"SEC. 1400U–1. ALLOCATION OF RECOVERY ZONE BONDS.

"(a) ALLOCATIONS.—

"(1) IN GENERAL.—The Secretary shall allocate the national recovery zone economic development bond limitation and the national recovery zone facility bond limitation among the States in the proportion that each such State's 2008 State employment decline bears to the aggregate of the 2008 State employment declines for all of the States.

"(2) 2008 STATE EMPLOYMENT DECLINE.—For purposes of this subsection, the term '2008 State employment decline' means, with respect to any State, the excess (if any) of—

"(A) the number of individuals employed in such State determined for December 2007, over

"(B) the number of individuals employed in such State determined for December 2008.

"(3) ALLOCATIONS BY STATES.—

"(A) IN GENERAL.—Each State with respect to which an allocation is made under paragraph (1) shall reallocate such allocation among the counties and large municipalities in such State in the proportion the each such county's or municipality's 2008 employment decline bears to the aggregate of the 2008 employment declines for all the counties and municipalities in such State.

"(B) LARGE MUNICIPALITIES.—For purposes of subparagraph (A), the term 'large municipality' means a municipality with a population of more than 100,000.

"(C) DETERMINATION OF LOCAL EMPLOYMENT DECLINES.—For purposes of this paragraph, the employment decline of any municipality or county shall be determined in the same manner as determining the State employment decline under paragraph (2), except that in the case of a municipality any portion of which is in a county, such portion shall be treated as part of such municipality and not part of such county.

"(4) NATIONAL LIMITATIONS.—

"(A) RECOVERY ZONE ECONOMIC DEVELOPMENT BONDS.—There is a national recovery zone economic development bond limitation of $10,000,000,000.

"(B) RECOVERY ZONE FACILITY BONDS.—There is a national recovery zone facility bond limitation of $15,000,000,000.

"(b) RECOVERY ZONE.—For purposes of this part, the term 'recovery zone' means—

"(1) any area designated by the issuer as having significant poverty, unemployment, home foreclosures, or general distress, and

"(2) any area for which a designation as an empowerment zone or renewal community is in effect.

"SEC. 1400U–2. RECOVERY ZONE ECONOMIC DEVELOPMENT BONDS.

"(a) IN GENERAL.—In the case of a recovery zone economic development bond—

"(1) such bond shall be treated as a qualified bond for purposes of section 6432, and

"(2) subsection (b) of such section shall be applied by substituting '55 percent' for '35 percent'.

"(b) RECOVERY ZONE ECONOMIC DEVELOPMENT BOND.—

"(1) IN GENERAL.—For purposes of this section, the term 'recovery zone economic development bond' means any taxable governmental bond (as defined in section 54AA(d)) issued before January 1, 2011, as part of issue if—

"(A) 100 percent of the available project proceeds (as defined in section 54A) of such issue are to be used for one or more qualified economic development purposes, and

"(B) the issuer designates such bond for purposes of this section.

"(2) LIMITATION ON AMOUNT OF BONDS DESIGNATED.—The maximum aggregate face amount of bonds which may be designated by any issuer under paragraph (1) shall not exceed the amount of the recovery zone economic development bond limitation allocated to such issuer under section 1400U–1.

"(c) QUALIFIED ECONOMIC DEVELOPMENT PURPOSE.—For purposes of this section, the term '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, and

"(3) expenditures for job training and educational programs.

"SEC. 1400U–3. RECOVERY ZONE FACILITY BONDS.

"(a) IN GENERAL.—For purposes of part IV of subchapter B (relating to tax exemption requirements for State and local bonds), the term 'exempt facility bond' includes any recovery zone facility bond.

"(b) RECOVERY ZONE FACILITY BOND.—

"(1) IN GENERAL.—For purposes of this section, the term 'recovery zone facility bond' means any bond issued as part of an issue if—

"(A) 95 percent or more of the net proceeds (as defined in section 150(a)(3)) of such issue are to be used for recovery zone property,

"(B) such bond is issued before January 1, 2011, and

"(C) the issuer designates such bond for purposes of this section.

"(2) LIMITATION ON AMOUNT OF BONDS DESIGNATED.—The maximum aggregate face amount of bonds which may be designated by any issuer under paragraph (1) shall not exceed the amount of recovery zone facility bond limitation allocated to such issuer under section 1400U–1.

"(c) RECOVERY ZONE PROPERTY.—For purposes of this section—

"(1) IN GENERAL.—The term 'recovery zone property' means any property to which section 168 applies (or would apply but for section 179) if—

"(A) such property was acquired by the taxpayer by purchase (as defined in section 179(d)(2)) after the date on which the designation of the recovery zone took effect,

"(B) the original use of which in the recovery zone commences with the taxpayer, and

"(C) substantially all of the use of which is in the recovery zone and is in the active conduct of a qualified business by the taxpayer in such zone.

"(2) QUALIFIED BUSINESS.—The term 'qualified business' means any trade or business except that—

"(A) 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

"(B) such term shall not include any trade or business consisting of the operation of any facility described in section 144(c)(6)(B).

"(3) SPECIAL RULES FOR SUBSTANTIAL RENOVATIONS AND SALE-LEASEBACK.—Rules similar to the rules of subsections (a)(2) and (b) of section 1397D shall apply for purposes of this subsection.

"(d) NONAPPLICATION OF CERTAIN RULES.—Sections 146 (relating to volume cap) and 147(d) (relating to acquisition of existing property not permitted) shall not apply to any recovery zone facility bond.".

(b) CLERICAL AMENDMENT.—The table of parts for subchapter Y of chapter 1 of such Code is amended by adding at the end the following new item:

"PART III. RECOVERY ZONE BONDS.".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to obligations issued after the date of the enactment of this Act.

SEC. 1532. TRIBAL ECONOMIC DEVELOPMENT BONDS.

(a) IN GENERAL.—Section 7871 is amended by adding at the end the following new subsection:

"(f) TRIBAL ECONOMIC DEVELOPMENT BONDS.—

"(1) ALLOCATION OF LIMITATION.—

"(A) IN GENERAL.—The Secretary shall allocate the national tribal economic development bond limitation among the Indian tribal governments in such manner as the Secretary, in consultation with the Secretary of the Interior, determines appropriate.

"(B) NATIONAL LIMITATION.—There is a national tribal economic development bond limitation of $2,000,000,000.

"(2) BONDS TREATED AS EXEMPT FROM TAX.—In the case of a tribal economic development bond—

"(A) notwithstanding subsection (c), such bond shall be treated for purposes of this title in the same manner as if such bond were issued by a State, and

"(B) section 146 shall not apply.

"(3) TRIBAL ECONOMIC DEVELOPMENT BOND.—

"(A) IN GENERAL.—For purposes of this section, the term 'tribal economic development bond' means any bond issued by an Indian tribal government—

"(i) the interest on which is not exempt from tax under section 103 by reason of subsection (c) (determined without regard to this subsection) but would be so exempt if issued by a State or local government, and

"(ii) which is designated by the Indian tribal government as a tribal economic development bond for purposes of this subsection.

"(B) EXCEPTIONS.—The term tribal economic development bond shall not include any bond issued as part of an issue if any portion of the proceeds of such issue are used to finance—

"(i) 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 actually used in the conduct of such gaming, or

"(ii) any facility located outside the Indian reservation (as defined in section 168(j)(6)).

"(C) LIMITATION ON AMOUNT OF BONDS DESIGNATED.—The maximum aggregate face amount of bonds which may be designated by any Indian tribal government under subparagraph (A) shall not exceed the amount of national tribal economic development bond limitation allocated to such government under paragraph (1).".

(b) STUDY.—The Secretary of the Treasury, or the Secretary's delegate, shall conduct a study of the effects of the amendment made by subsection (a). Not later than 1 year after the date of the enactment of this Act, the Secretary of the Treasury, or the Secretary's delegate, shall report to Congress on the results of the studies conducted under this paragraph, including the Secretary's recommendations regarding such amendment.

(c) EFFECTIVE DATE.—The amendment made by subsection (a) shall apply to obligations issued after the date of the enactment of this Act.

PART 5—REPEAL OF WITHHOLDING TAX ON GOVERNMENT CONTRACTORS

SEC. 1541. REPEAL OF WITHHOLDING TAX ON GOVERNMENT CONTRACTORS.

Section 3402 is amended by striking subsection (t).

Subtitle G—Energy Incentives

PART 1—RENEWABLE ENERGY INCENTIVES

SEC. 1601. EXTENSION OF CREDIT FOR ELECTRICITY PRODUCED FROM CERTAIN RENEWABLE RESOURCES.

(a) IN GENERAL.—Subsection (d) of section 45 is amended—

(1) by striking "2010" in paragraph (1) and inserting "2013",

(2) by striking "2011" each place it appears in paragraphs (2), (3), (4), (6), (7) and (9) and inserting "2014", and

(3) by striking "2012" in paragraph (11)(B) and inserting "2014".

(b) TECHNICAL AMENDMENT.—Paragraph (5) of section 45(d) is amended by striking "and before" and all that follows and inserting "and before October 3, 2008.".

(c) EFFECTIVE DATE.—

(1) IN GENERAL.—The amendments made by subsection (a) shall apply to property placed in service after the date of the enactment of this Act.

(2) TECHNICAL AMENDMENT.—The amendment made by subsection (b) shall take effect as if included in section 102 of the Energy Improvement and Extension Act of 2008.

SEC. 1602. ELECTION OF INVESTMENT CREDIT IN LIEU OF PRODUCTION CREDIT.

(a) IN GENERAL.—Subsection (a) of section 48 is amended by adding at the end the following new paragraph:

"(5) ELECTION TO TREAT QUALIFIED FACILITIES AS ENERGY PROPERTY.—

"(A) IN GENERAL.—In the case of any qualified investment credit facility placed in service in 2009 or 2010—

"(i) such facility shall be treated as energy property for purposes of this section, and

"(ii) the energy percentage with respect to such property shall be 30 percent.

"(B) DENIAL OF PRODUCTION CREDIT.—No credit shall be allowed under section 45 for any taxable year with respect to any qualified investment credit facility.

"(C) QUALIFIED INVESTMENT CREDIT FACILITY.—For purposes of this paragraph, the term 'qualified investment credit facility' means any facility described in paragraph (1), (2), (3), (4), (6), (7), (9), or (11) of section 45(d) if no credit has been allowed under section 45 with respect to such facility and the taxpayer makes an irrevocable election to have this paragraph apply to such facility.".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to facilities placed in service after December 31, 2008.

SEC. 1603. REPEAL OF CERTAIN LIMITATIONS ON CREDIT FOR RENEWABLE ENERGY PROPERTY.

(a) REPEAL OF LIMITATION ON CREDIT FOR QUALIFIED SMALL WIND ENERGY PROPERTY.—Paragraph (4) of section 48(c) is amended by striking subparagraph (B) and by redesignating subparagraphs (C) and (D) as subparagraphs (B) and (C).

(b) REPEAL OF LIMITATION ON PROPERTY FINANCED BY SUBSIDIZED ENERGY FINANCING.—

(1) IN GENERAL.—Subsection (a) of section 48, as amended by section 1602, is amended by striking paragraph (4) and by redesignating paragraph (5) as paragraph (4).

(2) CONFORMING AMENDMENTS.—

(A) Section 25C(e)(1) is amended by striking "(8), and (9)" and inserting "and (8)".

(B) Section 25D(e) is amended by striking paragraph (9).

(c) EFFECTIVE DATE.—

(1) IN GENERAL.—Except as provided in paragraph (2),the amendment made by this section shall apply to periods after December 31, 2008, under rules similar to the rules of section 48(m) of the Internal Revenue Code of 1986 (as in effect on the day before the date of the enactment of the Revenue Reconciliation Act of 1990).

(2) CONFORMING AMENDMENTS.—The amendments made by subsection (b)(2) shall apply to taxable years beginning after December 31, 2008.

SEC. 1604. COORDINATION WITH RENEWABLE ENERGY GRANTS.

Section 48 is amended by adding at the end the following new subsection:

"(d) COORDINATION WITH DEPARTMENT OF ENERGY GRANTS.—In the case of any property with respect to which the Secretary of Energy makes a grant under section 1721 of the American Recovery and Reinvestment Tax Act of 2009—

"(1) DENIAL OF PRODUCTION AND INVESTMENT CREDITS.—No credit shall be determined under this section or section 45 with respect to such property for the taxable year in which such grant is made or any subsequent taxable year.

"(2) RECAPTURE OF CREDITS FOR PROGRESS EXPENDITURES MADE BEFORE GRANT.—If a credit was determined under this section with respect to such property for any taxable year ending before such grant is made—

"(A) the tax imposed under subtitle A on the taxpayer for the taxable year in which such grant is made shall be increased by so much of such credit as was allowed under section 38,

"(B) the general business carryforwards under section 39 shall be adjusted so as to recapture the portion of such credit which was not so allowed, and

"(C) the amount of such grant shall be determined without regard to any reduction in the basis of such property by reason of such credit.

"(3) TREATMENT OF GRANTS.—Any such grant shall—

"(A) not be includible in the gross income of the taxpayer, but

"(B) shall be taken into account in determining the basis of the property to which such grant relates, except that the basis of such property shall be reduced under section 50(c) in the same manner as a credit allowed under subsection (a).".

PART 2—INCREASED ALLOCATIONS OF NEW CLEAN RENEWABLE ENERGY BONDS AND QUALIFIED ENERGY CONSERVATION BONDS

SEC. 1611. INCREASED LIMITATION ON ISSUANCE OF NEW CLEAN RENEWABLE ENERGY BONDS.

Subsection (c) of section 54C is amended by adding at the end the following new paragraph:

"(4) ADDITIONAL LIMITATION.—The national new clean renewable energy bond limitation shall be increased by $1,600,000,000. Such increase shall be allocated by the Secretary consistent with the rules of paragraphs (2) and (3).".

SEC. 1612. INCREASED LIMITATION AND EXPANSION OF QUALIFIED ENERGY CONSERVATION BONDS.

(a) INCREASED LIMITATION.—Subsection (e) of section 54D is amended by adding at the end the following new paragraph:

"(4) ADDITIONAL LIMITATION.—The national qualified energy conservation bond limitation shall be increased by $2,400,000,000. Such increase shall be allocated by the Secretary consistent with the rules of paragraphs (1), (2), and (3).".

(b) LOANS AND GRANTS TO IMPLEMENT GREEN COMMUNITY PROGRAMS.—

(1) IN GENERAL.—Subparagraph (A) of section 54D(f)(1) is amended by inserting "(or loans or grants for capital expenditures to implement any green community program)" after "Capital expenditures".

(2) BONDS TO IMPLEMENT GREEN COMMUNITY PROGRAMS NOT TREATED AS PRIVATE ACTIVITY BONDS FOR PURPOSES OF LIMITATIONS ON QUALIFIED ENERGY CONSERVATION BONDS.—Subsection (e) of section 54D, as amended by subsection (a), is amended by adding at the end the following new paragraph:

"(5) BONDS TO IMPLEMENT GREEN COMMUNITY PROGRAMS NOT TREATED AS PRIVATE ACTIVITY BONDS.—For purposes of paragraph (3) and subsection (f)(2), a bond shall not be treated as a private activity bond solely because proceeds of the issue of which such bond is a part are to be used for loans or grants for capital expenditures to implement any green community program.".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to obligations issued after the date of the enactment of this Act.

PART 3—ENERGY CONSERVATION INCENTIVES

SEC. 1621. EXTENSION AND MODIFICATION OF CREDIT FOR NONBUSINESS ENERGY PROPERTY.

(a) IN GENERAL.—Section 25C is amended by striking subsections (a) and (b) and inserting the following new subsections:

"(a) ALLOWANCE OF CREDIT.—In the case of an individual, there shall be allowed as a credit against the tax imposed by this chapter for the taxable year an amount equal to 30 percent of the sum of—

"(1) the amount paid or incurred by the taxpayer during such taxable year for qualified energy efficiency improvements, and

"(2) the amount of the residential energy property expenditures paid or incurred by the taxpayer during such taxable year.

"(b) LIMITATION.—The aggregate amount of the credits allowed under this section for taxable years beginning in 2009 and 2010 with respect to any taxpayer shall not exceed $1,500.".

(b) EXTENSION.—Section 25C(g)(2) is amended by striking "December 31, 2009" and inserting "December 31, 2010".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2008.

SEC. 1622. MODIFICATION OF CREDIT FOR RESIDENTIAL ENERGY EFFICIENT PROPERTY.

(a) REMOVAL OF CREDIT LIMITATION FOR PROPERTY PLACED IN SERVICE.—

(1) IN GENERAL.—Paragraph (1) of section 25D(b) is amended to read as follows:

"(1) MAXIMUM CREDIT FOR FUEL CELLS.—In the case of any qualified fuel cell property expenditure, the credit allowed under subsection (a) (determined without regard to subsection (c)) for any taxable year shall not exceed $500 with respect to each half kilowatt of capacity of the qualified fuel cell property (as defined in section 48(c)(1)) to which such expenditure relates.".

(2) CONFORMING AMENDMENT.—Paragraph (4) of section 25D(e) is amended—

(A) by striking all that precedes subparagraph (B) and inserting the following:

"(4) FUEL CELL EXPENDITURE LIMITATIONS IN CASE OF JOINT OCCUPANCY.—In the case of any dwelling unit with respect to which qualified fuel cell property expenditures are made and which is jointly occupied and used during any calendar year as a residence by two or more individuals the following rules shall apply:

"(A) MAXIMUM EXPENDITURES FOR FUEL CELLS.—The maximum amount of such expenditures which may be taken into account under subsection (a) by all such individuals with respect to such dwelling unit during such calendar year shall be $1,667 in the case of each half kilowatt of capacity of qualified fuel cell property (as defined in section 48(c)(1)) with respect to which such expenditures relate.", and

(B) by striking subparagraph (C).

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2008.

SEC. 1623. TEMPORARY INCREASE IN CREDIT FOR ALTERNATIVE FUEL VEHICLE REFUELING PROPERTY.

(a) IN GENERAL.—Section 30C(e) is amended by adding at the end the following new paragraph:

"(6) SPECIAL RULE FOR PROPERTY PLACED IN SERVICE DURING 2009 AND 2010.—In the case of property placed in service in taxable years beginning after December 31, 2008, and before January 1, 2011—

"(A) in the case of any such property which does not relate to hydrogen—

"(i) subsection (a) shall be applied by substituting '50 percent' for '30 percent',

"(ii) subsection (b)(1) shall be applied by substituting '$50,000' for '$30,000', and

"(iii) subsection (b)(2) shall be applied by substituting '$2,000' for '$1,000', and

"(B) in the case of any such property which relates to hydrogen, subsection (b) shall be applied by substituting '$200,000' for '$30,000'.".

(b) EFFECTIVE DATE.—The amendment made by this section shall apply to taxable years beginning after December 31, 2008.

PART 4—ENERGY RESEARCH INCENTIVES

SEC. 1631. INCREASED RESEARCH CREDIT FOR ENERGY RESEARCH.

(a) IN GENERAL.—Section 41 is amended by redesignating subsection (h) as subsection (i) and by inserting after subsection (g) the following new subsection:

"(h) ENERGY RESEARCH CREDIT.—In the case of any taxable year beginning in 2009 or 2010—

"(1) IN GENERAL.—The credit determined under subsection (a)(1) shall be increased by 20 percent of the qualified energy research expenses for the taxable year.

"(2) QUALIFIED ENERGY RESEARCH EXPENSES.—For purposes of this subsection, the term 'qualified energy research expenses' means so much of the taxpayer's qualified research expenses as are 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.

"(3) COORDINATION WITH OTHER RESEARCH CREDITS.—

"(A) INCREMENTAL CREDIT.—The amount of qualified energy research expenses taken into account under subsection (a)(1)(A) shall not exceed the base amount.

"(B) ALTERNATIVE SIMPLIFIED CREDIT.—For purposes of subsection (c)(5), the amount of qualified energy research expenses taken into account for the taxable year for which the credit is being determined shall not exceed—

"(i) in the case of subsection (c)(5)(A), 50 percent of the average qualified research expenses for the 3 taxable years preceding the taxable year for which the credit is being determined, and

"(ii) in the case of subsection (c)(5)(B)(ii), zero.

"(C) BASIC RESEARCH AND ENERGY RESEARCH CONSORTIUM PAYMENTS.—Any amount taken into account under paragraph (1) shall not be taken into account under paragraph (2) or (3) of subsection (a).".

(b) CONFORMING AMENDMENT.—Subparagraph (B) of section 41(i)(1), as redesignated by subsection (a), is amended by inserting "(in the case of the increase in the credit determined under subsection (h), December 31, 2010)" after "December 31, 2009".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2008.

Subtitle H—Other Provisions

PART 1—APPLICATION OF CERTAIN LABOR STANDARDS TO PROJECTS FINANCED WITH CERTAIN TAX-FAVORED BONDS

SEC. 1701. APPLICATION OF CERTAIN LABOR STANDARDS TO PROJECTS FINANCED WITH CERTAIN TAX-FAVORED BONDS.

Subchapter IV of chapter 31 of the title 40, United States Code, shall apply to projects financed with the proceeds of—

(1) any qualified clean renewable energy bond (as defined in section 54C of the Internal Revenue Code of 1986) issued after the date of the enactment of this Act,

(2) any qualified energy conservation bond (as defined in section 54D of the Internal Revenue Code of 1986) issued after the date of the enactment of this Act,

(3) any qualified zone academy bond (as defined in section 54E of the Internal Revenue Code of 1986) issued after the date of the enactment of this Act,

(4) any qualified school construction bond (as defined in section 54F of the Internal Revenue Code of 1986), and

(5) any recovery zone economic development bond (as defined in section 1400U–2 of the Internal Revenue Code of 1986).

PART 2—GRANTS TO PROVIDE FINANCING FOR LOW-INCOME HOUSING

SEC. 1711. GRANTS TO STATES FOR LOW-INCOME HOUSING PROJECTS IN LIEU OF LOW-INCOME HOUSING CREDIT ALLOCATIONS FOR 2009.

(a) IN GENERAL.—The Secretary of the Treasury shall make a grant to the housing credit agency of each State in an amount equal to such State's low-income housing grant election amount.

(b) LOW-INCOME HOUSING GRANT ELECTION AMOUNT.—For purposes of this section, the term "low-income housing grant election amount" means, with respect to any State, such amount as the State may elect which does not exceed 85 percent of the product of—

(1) the sum of—

(A) 100 percent of the State housing credit ceiling for 2009 which is attributable to amounts described in clauses (i) and (iii) of section 42(h)(3)(C) of the Internal Revenue Code of 1986, and

(B) 40 percent of the State housing credit ceiling for 2009 which is attributable to amounts described in clauses (ii) and (iv) of such section, multiplied by

(2) 10.

(c) SUBAWARDS FOR LOW-INCOME BUILDINGS.—

(1) IN GENERAL.—A State housing credit agency receiving a grant under this section shall use such grant to make subawards to finance the construction or acquisition and rehabilitation of qualified low-income buildings. A subaward under this section may be made to finance a qualified low-income building with or without an allocation under section 42 of the Internal Revenue Code of 1986, except that a State housing credit agency may make subawards to finance qualified low-income buildings without an allocation only if it makes a determination that such use will increase the total funds available to the State to build and rehabilitate affordable housing. In complying with such determination requirement, a State housing credit agency shall establish a process in which applicants that are allocated credits are required to demonstrate good faith efforts to obtain investment commitments for such credits before the agency makes such subawards.

(2) SUBAWARDS SUBJECT TO SAME REQUIREMENTS AS LOW-INCOME HOUSING CREDIT ALLOCATIONS.—Any such subaward with respect to any qualified low-income building shall be made in the same manner and shall be subject to the same limitations (including rent, income, and use restrictions on such building) as an allocation of housing credit dollar amount allocated by such State housing credit agency under section 42 of the Internal Revenue Code of 1986, except that such subawards shall not be limited by, or otherwise affect (except as provided in subsection (h)(3)(J) of such section), the State housing credit ceiling applicable to such agency.

(3) COMPLIANCE AND ASSET MANAGEMENT.—The State housing credit agency shall perform asset management functions to ensure compliance with section 42 of the Internal Revenue Code of 1986 and the long-term viability of buildings funded by any subaward under this section. The State housing credit agency may collect reasonable fees from a subaward recipient to cover expenses associated with the performance of its duties under this paragraph. The State housing credit agency may retain an agent or other private contractor to satisfy the requirements of this paragraph.

(4) RECAPTURE.—The State housing credit agency shall impose conditions or restrictions, including a requirement providing for recapture, on any subaward under this section so as to assure that the building with respect to which such subaward is made remains a qualified low-income building during the compliance period. Any such recapture shall be payable to the Secretary of the Treasury for deposit in the general fund of the Treasury and may be enforced by means of liens or such other methods as the Secretary of the Treasury determines appropriate.

(d) RETURN OF UNUSED GRANT FUNDS.—Any grant funds not used to make subawards under this section before January 1, 2011, shall be returned to the Secretary of the Treasury on such date. Any subawards returned to the State housing credit agency on or after such date shall be promptly returned to the Secretary of the Treasury. Any amounts returned to the Secretary of the Treasury under this subsection shall be deposited in the general fund of the Treasury.

(e) DEFINITIONS.—Any term used in this section which is also used in section 42 of the Internal Revenue Code of 1986 shall have the same meaning for purposes of this section as when used in such section 42. Any reference in this section to the Secretary of the Treasury shall be treated as including the Secretary's delegate.

(f) APPROPRIATIONS.—There is hereby appropriated to the Secretary of the Treasury such sums as may be necessary to carry out this section.

PART 3—GRANTS FOR SPECIFIED ENERGY PROPERTY IN LIEU OF TAX CREDITS

SEC. 1721. GRANTS FOR SPECIFIED ENERGY PROPERTY IN LIEU OF TAX CREDITS.

(a) IN GENERAL.—Upon application, the Secretary of Energy shall, within 60 days of the application and subject to the requirements of this section, provide a grant to each person who places in service specified energy property during 2009 or 2010 to reimburse such person for a portion of the expense of such facility as provided in subsection (b).

(b) GRANT AMOUNT.—

(1) IN GENERAL.—The amount of the grant under subsection (a) with respect to any specified energy property shall be the applicable percentage of the basis of such facility.

(2) APPLICABLE PERCENTAGE.—For purposes of paragraph (1), the term "applicable percentage" means—

(A) 30 percent in the case of any property described in paragraphs (1) through (4) of subsection (c), and

(B) 10 percent in the case of any other property.

(3) DOLLAR LIMITATIONS.—In the case of property described in paragraph (2), (6), or (7) of subsection (c), the amount of any grant under this section with respect to such property shall not exceed the limitation described in section 48(c)(1)(B), 48(c)(2)(B), or 48(c)(3)(B) of the Internal Revenue Code of 1986, respectively, with respect to such property.

(c) SPECIFIED ENERGY PROPERTY.—For purposes of this section, the term "specified energy property" means any of the following:

(1) QUALIFIED FACILITIES.—Any facility described in paragraph (1), (2), (3), (4), (6), (7), (9), or (11) of section 45(d) of the Internal Revenue Code of 1986.

(2) QUALIFIED FUEL CELL PROPERTY.—Any qualified fuel cell property (as defined in section 48(c)(1) of such Code).

(3) SOLAR PROPERTY.—Any property described in clause (i) or (ii) of section 48(a)(3)(A) of such Code.

(4) QUALIFIED SMALL WIND ENERGY PROPERTY.—Any qualified small wind energy property (as defined in section 48(c)(4) of such Code).

(5) GEOTHERMAL PROPERTY.—Any property described in clause (iii) of section 48(a)(3)(A) of such Code.

(6) QUALIFIED MICROTURBINE PROPERTY.—Any qualified microturbine property (as defined in section 48(c)(2) of such Code).

(7) COMBINED HEAT AND POWER SYSTEM PROPERTY.—Any combined heat and power system property (as defined in section 48(c)(3) of such Code).

(8) GEOTHERMAL HEATPUMP PROPERTY.—Any property described in clause (vii) of section 48(a)(3)(A) of such Code.

(d) APPLICATION OF CERTAIN RULES.—In making grants under this section, the Secretary of Energy shall apply rules similar to the rules of section 50 of the Internal Revenue Code of 1986. In applying such rules, if the facility is disposed of, or otherwise ceases to be a qualified renewable energy facility, the Secretary of Energy shall provide for the recapture of the appropriate percentage of the grant amount in such manner as the Secretary of Energy determines appropriate.

(e) EXCEPTION FOR CERTAIN NON-TAXPAYERS.—The Secretary of Energy shall not make any grant under this section to any Federal, State, or local government (or any political subdivision, agency, or instrumentality thereof) or any organization described in section 501(c) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code.

(f) DEFINITIONS.—Terms used in this section which are also used in section 45 or 48 of the Internal Revenue Code of 1986 shall have the same meaning for purposes of this section as when used in such section 45 or 48. Any reference in this section to the Secretary of the Treasury shall be treated as including the Secretary's delegate.

(g) COORDINATION BETWEEN DEPARTMENTS OF TREASURY AND ENERGY.—The Secretary of the Treasury shall provide the Secretary of Energy with such technical assistance as the Secretary of Energy may require in carrying out this section. The Secretary of Energy shall provide the Secretary of the Treasury with such information as the Secretary of the Treasury may require in carrying out the amendment made by section 1604.

(h) APPROPRIATIONS.—There is hereby appropriated to the Secretary of Energy such sums as may be necessary to carry out this section.

(i) TERMINATION.—The Secretary of Energy shall not make any grant to any person under this section unless the application of such person for such grant is received before October 1, 2011.

PART 4—STUDY OF ECONOMIC, EMPLOYMENT, AND RELATED EFFECTS OF THIS ACT

SEC. 1731. STUDY OF ECONOMIC, EMPLOYMENT, AND RELATED EFFECTS OF THIS ACT.

On February 1, 2010, and every 3 months thereafter in calendar year 2010, the Comptroller General of the United States shall submit to the Committee on Ways and Means a written report on the most recent national (and, where available, State-by-State) information on—

(1) the economic effects of this Act;
(2) the employment effects of this Act, including—
(A) a comparison of the number of jobs preserved and the number of jobs created as a result of this Act; and
(B) a comparison of the numbers of jobs preserved and the number of jobs created in each of the public and private sectors;
(3) the share of tax and non-tax expenditures provided under this Act that were spent or saved, by group and income class;
(4) how the funds provided to States under this Act have been spent, including a breakdown of—
(A) funds used for services provided to citizens; and
(B) wages and other compensation for public employees; and
(5) a description of any funds made available under this Act that remain unspent, and the reasons why.

TITLE II—ASSISTANCE FOR UNEMPLOYED WORKERS AND STRUGGLING FAMILIES

SEC. 2000. SHORT TITLE.

This title may be cited as the "Assistance for Unemployed Workers and Struggling Families Act".

Subtitle A—Unemployment Insurance

SEC. 2001. EXTENSION OF EMERGENCY UNEMPLOYMENT COMPENSATION PROGRAM.

(a) IN GENERAL.—Section 4007 of the Supplemental Appropriations Act, 2008 (Public Law 110–252; 26 U.S.C. 3304 note), as amended by section 4 of the Unemployment Compensation Extension Act of 2008 (Public Law 110–449; 122 Stat. 5015), is amended—
(1) by striking "March 31, 2009" each place it appears and inserting "December 31, 2009";
(2) in the heading for subsection (b)(2), by striking "MARCH 31, 2009" and inserting "DECEMBER 31, 2009"; and
(3) in subsection (b)(3), by striking "August 27, 2009" and inserting "May 31, 2010".

(b) FINANCING PROVISIONS.—Section 4004 of such Act is amended by adding at the end the following:

"(e) TRANSFER OF FUNDS.—Notwithstanding any other provision of law, the Secretary of the Treasury shall transfer from the general fund of the Treasury (from funds not otherwise appropriated)—
"(1) to the extended unemployment compensation account (as established by section 905 of the Social Security Act) such sums as the Secretary of Labor estimates to be necessary to make payments to States under this title by reason of the amendments made by section 2001(a) of the Assistance for Unemployed Workers and Struggling Families Act; and
"(2) to the employment security administration account (as established by section 901 of the Social Security Act) such sums as the Secretary of Labor estimates to be necessary for purposes of assisting States in meeting administrative costs by reason of the amendments referred to in paragraph (1).

There are appropriated from the general fund of the Treasury, without fiscal year limitation, the sums referred to in the preceding sentence and such sums shall not be required to be repaid.".

SEC. 2002. INCREASE IN UNEMPLOYMENT COMPENSATION BENEFITS.

(a) FEDERAL-STATE AGREEMENTS.—Any State which desires to do so may enter into and participate in an agreement under this section with the Secretary of Labor (hereinafter in this section referred to as the "Secretary"). Any State which is a party to an agreement under this section may, upon providing 30 days' written notice to the Secretary, terminate such agreement.

(b) PROVISIONS OF AGREEMENT.—
(1) ADDITIONAL COMPENSATION.—Any agreement under this section shall provide that the State agency of the State will make payments of regular compensation to individuals in amounts and to the extent that they would be determined if the State law of the State were applied, with respect to any week for which the individual is (disregarding this section) otherwise entitled under the State law to receive regular compensation, as if such State law had been modi-

fied in a manner such that the amount of regular compensation (including dependents' allowances) payable for any week shall be equal to the amount determined under the State law (before the application of this paragraph) plus an additional $25.

(2) ALLOWABLE METHODS OF PAYMENT.—Any additional compensation provided for in accordance with paragraph (1) shall be payable either—

(A) as an amount which is paid at the same time and in the same manner as any regular compensation otherwise payable for the week involved; or

(B) at the option of the State, by payments which are made separately from, but on the same weekly basis as, any regular compensation otherwise payable.

(c) NONREDUCTION RULE.—An agreement under this section shall not apply (or shall cease to apply) with respect to a State upon a determination by the Secretary that the method governing the computation of regular compensation under the State law of that State has been modified in a manner such that—

(1) the average weekly benefit amount of regular compensation which will be payable during the period of the agreement (determined disregarding any additional amounts attributable to the modification described in subsection (b)(1)) will be less than

(2) the average weekly benefit amount of regular compensation which would otherwise have been payable during such period under the State law, as in effect on December 31, 2008.

(d) PAYMENTS TO STATES.—

(1) IN GENERAL.—

(A) FULL REIMBURSEMENT.—There shall be paid to each State which has entered into an agreement under this section an amount equal to 100 percent of—

(i) the total amount of additional compensation (as described in subsection (b)(1)) paid to individuals by the State pursuant to such agreement; and

(ii) any additional administrative expenses incurred by the State by reason of such agreement (as determined by the Secretary).

(B) TERMS OF PAYMENTS.—Sums payable to any State by reason of such State's having an agreement under this section shall be payable, either in advance or by way of reimbursement (as determined by the Secretary), in such amounts as the Secretary estimates the State will be entitled to receive under this section for each calendar month, reduced or increased, as the case may be, by any amount by which the Secretary finds that his estimates for any prior calendar month were greater or less than the amounts which should have been paid to the State. Such estimates may be made on the basis of such statistical, sampling, or other method as may be agreed upon by the Secretary and the State agency of the State involved.

(2) CERTIFICATIONS.—The Secretary shall from time to time certify to the Secretary of the Treasury for payment to each State the sums payable to such State under this section.

(3) APPROPRIATION.—There are appropriated from the general fund of the Treasury, without fiscal year limitation, such sums as may be necessary for purposes of this subsection.

(e) APPLICABILITY.—

(1) IN GENERAL.—An agreement entered into under this section shall apply to weeks of unemployment—

(A) beginning after the date on which such agreement is entered into; and

(B) ending before January 1, 2010.

(2) TRANSITION RULE FOR INDIVIDUALS REMAINING ENTITLED TO REGULAR COMPENSATION AS OF JANUARY 1, 2010.—In the case of any individual who, as of the date specified in paragraph (1)(B), has not yet exhausted all rights to regular compensation under the State law of a State with respect to a benefit year that began before such date, additional compensation (as described in subsection (b)(1)) shall continue to be payable to such individual for any week beginning on or after such date for which the individual is otherwise eligible for regular compensation with respect to such benefit year.

(3) TERMINATION.—Notwithstanding any other provision of this subsection, no additional compensation (as described in subsection (b)(1)) shall be payable for any week beginning after June 30, 2010.

(f) FRAUD AND OVERPAYMENTS.—The provisions of section 4005 of the Supplemental Appropriations Act, 2008 (Public Law 110–252; 122 Stat. 2356) shall apply with respect to additional compensation (as described in subsection (b)(1)) to the

same extent and in the same manner as in the case of emergency unemployment compensation.

(g) APPLICATION TO OTHER UNEMPLOYMENT BENEFITS.—

(1) IN GENERAL.—Each agreement under this section shall include provisions to provide that the purposes of the preceding provisions of this section shall be applied with respect to unemployment benefits described in subsection (h)(3) to the same extent and in the same manner as if those benefits were regular compensation.

(2) ELIGIBILITY AND TERMINATION RULES.— Additional compensation (as described in subsection (b)(1))—

(A) shall not be payable, pursuant to this subsection, with respect to any unemployment benefits described in subsection (h)(3) for any week beginning on or after the date specified in subsection (e)(1)(B), except in the case of an individual who was eligible to receive additional compensation (as so described) in connection with any regular compensation or any unemployment benefits described in subsection (h)(3) for any period of unemployment ending before such date; and

(B) shall in no event be payable for any week beginning after the date specified in subsection (e)(3).

(h) DEFINITIONS.—For purposes of this section—

(1) the terms "compensation", "regular compensation", "benefit year", "State", "State agency", "State law", and "week" have the respective meanings given such terms under section 205 of the Federal-State Extended Unemployment Compensation Act of 1970 (26 U.S.C. 3304 note);

(2) the term "emergency unemployment compensation" means emergency unemployment compensation under title IV of the Supplemental Appropriations Act, 2008 (Public Law 110–252; 122 Stat. 2353); and

(3) any reference to unemployment benefits described in this paragraph shall be considered to refer to—

(A) extended compensation (as defined by section 205 of the Federal-State Extended Unemployment Compensation Act of 1970); and

(B) unemployment compensation (as defined by section 85(b) of the Internal Revenue Code of 1986) provided under any program administered by a State under an agreement with the Secretary.

SEC. 2003. SPECIAL TRANSFERS FOR UNEMPLOYMENT COMPENSATION MODERNIZATION.

(a) IN GENERAL.—Section 903 of the Social Security Act (42 U.S.C. 1103) is amended by adding at the end the following:

"Special Transfers in Fiscal Years 2009, 2010, and 2011 for Modernization

"(f)(1)(A) In addition to any other amounts, the Secretary of Labor shall provide for the making of unemployment compensation modernization incentive payments (hereinafter 'incentive payments') to the accounts of the States in the Unemployment Trust Fund, by transfer from amounts reserved for that purpose in the Federal unemployment account, in accordance with succeeding provisions of this subsection.

"(B) The maximum incentive payment allowable under this subsection with respect to any State shall, as determined by the Secretary of Labor, be equal to the amount obtained by multiplying $7,000,000,000 by the same ratio as would apply under subsection (a)(2)(B) for purposes of determining such State's share of any excess amount (as described in subsection (a)(1)) that would have been subject to transfer to State accounts, as of October 1, 2008, under the provisions of subsection (a).

"(C) Of the maximum incentive payment determined under subparagraph (B) with respect to a State—

"(i) one-third shall be transferred to the account of such State upon a certification under paragraph (4)(B) that the State law of such State meets the requirements of paragraph (2); and

"(ii) the remainder shall be transferred to the account of such State upon a certification under paragraph (4)(B) that the State law of such State meets the requirements of paragraph (3).

"(2) The State law of a State meets the requirements of this paragraph if such State law—

"(A) uses a base period that includes the most recently completed calendar quarter before the start of the benefit year for purposes of determining eligibility for unemployment compensation; or

"(B) provides that, in the case of an individual who would not otherwise be eligible for unemployment compensation under the State law because of the use of a base period that does not include the most recently completed calendar

quarter before the start of the benefit year, eligibility shall be determined using a base period that includes such calendar quarter.

"(3) The State law of a State meets the requirements of this paragraph if such State law includes provisions to carry out at least 2 of the following subparagraphs:

"(A) An individual shall not be denied regular unemployment compensation under any State law provisions relating to availability for work, active search for work, or refusal to accept work, solely because such individual is seeking only part-time work (as defined by the Secretary of Labor), except that the State law provisions carrying out this subparagraph may exclude an individual if a majority of the weeks of work in such individual's base period do not include part-time work (as so defined).

"(B) An individual shall not be disqualified from regular unemployment compensation for separating from employment if that separation is for any compelling family reason. For purposes of this subparagraph, the term 'compelling family reason' means the following:

"(i) Domestic violence, verified by such reasonable and confidential documentation as the State law may require, which causes the individual reasonably to believe that such individual's continued employment would jeopardize the safety of the individual or of any member of the individual's immediate family (as defined by the Secretary of Labor).

"(ii) The illness or disability of a member of the individual's immediate family (as those terms are defined by the Secretary of Labor).

"(iii) The need for the individual to accompany such individual's spouse—

"(I) to a place from which it is impractical for such individual to commute; and

"(II) due to a change in location of the spouse's employment.

"(C) Weekly unemployment compensation is payable under this subparagraph to any individual who is unemployed (as determined under the State unemployment compensation law), has exhausted all rights to regular unemployment compensation under the State law, and is 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. Such programs shall prepare individuals who have been separated from a declining occupation, or who have been involuntarily and indefinitely separated from employment as a result of a permanent reduction of operations at the individual's place of employment, for entry into a high-demand occupation. The amount of unemployment compensation payable under this subparagraph to an individual for a week of unemployment shall be equal to the individual's average weekly benefit amount (including dependents' allowances) for the most recent benefit year, and the total amount of unemployment compensation payable under this subparagraph to any individual shall be equal to at least 26 times the individual's average weekly benefit amount (including dependents' allowances) for the most recent benefit year.

"(D) Dependents' allowances are provided, in the case of any individual who is entitled to receive regular unemployment compensation and who has any dependents (as defined by State law), in an amount equal to at least $15 per dependent per week, subject to any aggregate limitation on such allowances which the State law may establish (but which aggregate limitation on the total allowance for dependents paid to an individual may not be less than $50 for each week of unemployment or 50 percent of the individual's weekly benefit amount for the benefit year, whichever is less).

"(4)(A) Any State seeking an incentive payment under this subsection shall submit an application therefor at such time, in such manner, and complete with such information as the Secretary of Labor may within 60 days after the date of the enactment of this subsection prescribe (whether by regulation or otherwise), including information relating to compliance with the requirements of paragraph (2) or (3), as well as how the State intends to use the incentive payment to improve or strengthen the State's unemployment compensation program. The Secretary of Labor shall, within 30 days after receiving a complete application, notify the State agency of the State of the Secretary's findings with respect to the requirements of paragraph (2) or (3) (or both).

"(B)(i) If the Secretary of Labor finds that the State law provisions (disregarding any State law provisions which are not then currently in effect as permanent law or which are subject to discontinuation) meet the requirements of paragraph (2) or (3), as the case may be, the Secretary of Labor shall thereupon make a certification to that effect to the Secretary of the Treasury, together with a certification as to the amount of the incentive payment to be transferred to the State account pursuant to that finding. The Secretary of the Treasury shall make the appropriate transfer within 7 days after receiving such certification.

"(ii) For purposes of clause (i), State law provisions which are to take effect within 12 months after the date of their certification under this subparagraph shall be considered to be in effect as of the date of such certification.

"(C)(i) No certification of compliance with the requirements of paragraph (2) or (3) may be made with respect to any State whose State law is not otherwise eligible for certification under section 303 or approvable under section 3304 of the Federal Unemployment Tax Act.

"(ii) No certification of compliance with the requirements of paragraph (3) may be made with respect to any State whose State law is not in compliance with the requirements of paragraph (2).

"(iii) No application under subparagraph (A) may be considered if submitted before the date of the enactment of this subsection or after the latest date necessary (as specified by the Secretary of Labor) to ensure that all incentive payments under this subsection are made before October 1, 2011.

"(5)(A) Except as provided in subparagraph (B), any amount transferred to the account of a State under this subsection may be used by such State only in the payment of cash benefits to individuals with respect to their unemployment (including for dependents' allowances and for unemployment compensation under paragraph (3)(C)), exclusive of expenses of administration.

"(B) A State may, subject to the same conditions as set forth in subsection (c)(2) (excluding subparagraph (B) thereof, and deeming the reference to 'subsections (a) and (b)' in subparagraph (D) thereof to include this subsection), use any amount transferred to the account of such State under this subsection for the administration of its unemployment compensation law and public employment offices.

"(6) Out of any money in the Federal unemployment account not otherwise appropriated, the Secretary of the Treasury shall reserve $7,000,000,000 for incentive payments under this subsection. Any amount so reserved shall not be taken into account for purposes of any determination under section 902, 910, or 1203 of the amount in the Federal unemployment account as of any given time. Any amount so reserved for which the Secretary of the Treasury has not received a certification under paragraph (4)(B) by the deadline described in paragraph (4)(C)(iii) shall, upon the close of fiscal year 2011, become unrestricted as to use as part of the Federal unemployment account.

"(7) For purposes of this subsection, the terms 'benefit year', 'base period', and 'week' have the respective meanings given such terms under section 205 of the Federal-State Extended Unemployment Compensation Act of 1970 (26 U.S.C. 3304 note).

"Special Transfer in Fiscal Year 2009 for Administration

"(g)(1) In addition to any other amounts, the Secretary of the Treasury shall transfer from the employment security administration account to the account of each State in the Unemployment Trust Fund, within 30 days after the date of the enactment of this subsection, the amount determined with respect to such State under paragraph (2).

"(2) The amount to be transferred under this subsection to a State account shall (as determined by the Secretary of Labor and certified by such Secretary to the Secretary of the Treasury) be equal to the amount obtained by multiplying $500,000,000 by the same ratio as determined under subsection (f)(1)(B) with respect to such State.

"(3) Any amount transferred to the account of a State as a result of the enactment of this subsection may be used by the State agency of such State only in the payment of expenses incurred by it for—

"(A) the administration of the provisions of its State law carrying out the purposes of subsection (f)(2) or any subparagraph of subsection (f)(3);

"(B) improved outreach to individuals who might be eligible for regular unemployment compensation by virtue of any provisions of the State law which are described in subparagraph (A);

"(C) the improvement of unemployment benefit and unemployment tax operations, including responding to increased demand for unemployment compensation; and

"(D) staff-assisted reemployment services for unemployment compensation claimants.".

(b) REGULATIONS.—The Secretary of Labor may prescribe any regulations, operating instructions, or other guidance necessary to carry out the amendment made by subsection (a).

Subtitle B—Assistance for Vulnerable Individuals

SEC. 2101. EMERGENCY FUND FOR TANF PROGRAM.

(a) IN GENERAL.—Section 403 of the Social Security Act (42 U.S.C. 603) is amended by adding at the end the following:

"(c) EMERGENCY FUND.—

"(1) ESTABLISHMENT.—There is established in the Treasury of the United States a fund which shall be known as the 'Emergency Contingency Fund for State Temporary Assistance for Needy Families Programs' (in this subsection referred to as the 'Emergency Fund').

"(2) DEPOSITS INTO FUND.—Out of any money in the Treasury of the United States not otherwise appropriated, there are appropriated such sums as are necessary for payment to the Emergency Fund.

"(3) GRANTS.—

"(A) GRANT RELATED TO CASELOAD INCREASES.—

"(i) IN GENERAL.—For each calendar quarter in fiscal year 2009 or 2010, the Secretary shall make a grant from the Emergency Fund to each State that—

"(I) requests a grant under this subparagraph for the quarter; and

"(II) meets the requirement of clause (ii) for the quarter.

"(ii) CASELOAD INCREASE REQUIREMENT.—A State meets the requirement of this clause for a quarter if the average monthly assistance caseload of the State for the quarter exceeds the average monthly assistance caseload of the State for the corresponding quarter in the emergency fund base year of the State.

"(iii) AMOUNT OF GRANT.—Subject to paragraph (5), the amount of the grant to be made to a State under this subparagraph for a quarter shall be 80 percent of the amount (if any) by which the total expenditures of the State for basic assistance (as defined by the Secretary) in the quarter, whether under the State program funded under this part or as qualified State expenditures, exceeds the total expenditures of the State for such assistance for the corresponding quarter in the emergency fund base year of the State.

"(B) GRANT RELATED TO INCREASED EXPENDITURES FOR NON-RECURRENT SHORT TERM BENEFITS.—

"(i) IN GENERAL.—For each calendar quarter in fiscal year 2009 or 2010, the Secretary shall make a grant from the Emergency Fund to each State that—

"(I) requests a grant under this subparagraph for the quarter; and

"(II) meets the requirement of clause (ii) for the quarter.

"(ii) NON-RECURRENT SHORT TERM EXPENDITURE REQUIREMENT.—A State meets the requirement of this clause for a quarter if the total expenditures of the State for non-recurrent short term benefits in the quarter, whether under the State program funded under this part or as qualified State expenditures, exceeds the total such expenditures of the State for non-recurrent short term benefits in the corresponding quarter in the emergency fund base year of the State.

"(iii) AMOUNT OF GRANT.—Subject to paragraph (5), the amount of the grant to be made to a State under this subparagraph for a quarter shall be an amount equal to 80 percent of the excess described in clause (ii).

"(C) GRANT RELATED TO INCREASED EXPENDITURES FOR SUBSIDIZED EMPLOYMENT.—

"(i) IN GENERAL.—For each calendar quarter in fiscal year 2009 or 2010, the Secretary shall make a grant from the Emergency Fund to each State that—

"(I) requests a grant under this subparagraph for the quarter; and

"(II) meets the requirement of clause (ii) for the quarter.

"(ii) SUBSIDIZED EMPLOYMENT EXPENDITURE REQUIREMENT.—A State meets the requirement of this clause for a quarter if the total expenditures of the State for subsidized employment in the quarter, whether under the State program funded under this part or as qualified State expenditures, exceeds the total of such expenditures of the State in the corresponding quarter in the emergency fund base year of the State.

"(iii) AMOUNT OF GRANT.—Subject to paragraph (5), the amount of the grant to be made to a State under this subparagraph for a quarter shall be an amount equal to 80 percent of the excess described in clause (ii).

"(4) AUTHORITY TO MAKE NECESSARY ADJUSTMENTS TO DATA AND COLLECT NEEDED DATA.—In determining the size of the caseload of a State and the expenditures of a State for basic assistance, non-recurrent short-term benefits, and subsidized employment, during any period for which the State requests funds under this subsection, and during the emergency fund base year of the State, the Secretary may make appropriate adjustments to the data to ensure that the data reflect expenditures under the State program funded under this part and qualified State expenditures. The Secretary may develop a mechanism for collecting expenditure data, including procedures which allow States to make reasonable estimates, and may set deadlines for making revisions to the data.

"(5) LIMITATION.—The total amount payable to a single State under subsection (b) and this subsection for a fiscal year shall not exceed 25 percent of the State family assistance grant.

"(6) LIMITATIONS ON USE OF FUNDS.—A State to which an amount is paid under this subsection may use the amount only as authorized by section 404.

"(7) TIMING OF IMPLEMENTATION.—The Secretary shall implement this subsection as quickly as reasonably possible, pursuant to appropriate guidance to States.

"(8) DEFINITIONS.—In this subsection:

"(A) AVERAGE MONTHLY ASSISTANCE CASELOAD.—The term 'average monthly assistance caseload' means, with respect to a State and a quarter, the number of families receiving assistance during the quarter under the State program funded under this part or as qualified State expenditures, subject to adjustment under paragraph (4).

"(B) EMERGENCY FUND BASE YEAR.—

"(i) IN GENERAL.—The term 'emergency fund base year' means, with respect to a State and a category described in clause (ii), whichever of fiscal year 2007 or 2008 is the fiscal year in which the amount described by the category with respect to the State is the lesser.

"(ii) CATEGORIES DESCRIBED.—The categories described in this clause are the following:

"(I) The average monthly assistance caseload of the State.

"(II) The total expenditures of the State for non-recurrent short term benefits, whether under the State program funded under this part or as qualified State expenditures.

"(III) The total expenditures of the State for subsidized employment, whether under the State program funded under this part or as qualified State expenditures.

"(C) QUALIFIED STATE EXPENDITURES.—The term 'qualified State expenditures' has the meaning given the term in section 409(a)(7).".

(b) TEMPORARY MODIFICATION OF CASELOAD REDUCTION CREDIT.—Section 407(b)(3)(A)(i) of such Act (42 U.S.C. 607(b)(3)(A)(i)) is amended by inserting "(or if the immediately preceding fiscal year is fiscal year 2009 or 2010, then, at State option, during the emergency fund base year of the State with respect to the average monthly assistance caseload of the State (within the meaning of section 403(c)(8)(B)))" before "under the State".

(c) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of the enactment of this Act.

SEC. 2102. ONE-TIME EMERGENCY PAYMENT TO SSI RECIPIENTS.

(a) PAYMENT AUTHORITY.—

(1) IN GENERAL.—At the earliest practicable date in calendar year 2009 but not later than 120 days after the date of the enactment of this section, the Commissioner of Social Security shall make a one-time payment to each individual who is determined by the Commissioner in calendar year 2009 to be an individual who—

(A) is entitled to a cash benefit under the supplemental security income program under title XVI of the Social Security Act (other than pursuant to section 1611(e)(1)(B) of such Act) for at least 1 day in the calendar month in which the first payment under this section is to be made; or

(B)(i) was entitled to such a cash benefit (other than pursuant to section 1611(e)(1)(B) of such Act) for at least 1 day in the 2-month period preceding that calendar month; and

(ii) whose entitlement to that benefit ceased in that 2-month period solely because the income of the individual (and the income of the spouse, if any, of the individual) exceeded the applicable income limit described in paragraph (1)(A) or (2)(A) of section 1611(a) of such Act.

(2) AMOUNT OF PAYMENT.—Subject to subsection (b)(1) of this section, the amount of the payment shall be—

(A) in the case of an individual eligible for a payment under this section who does not have a spouse eligible for such a payment, an amount equal to the average of the cash benefits payable in the aggregate under section 1611 or 1619(a) of the Social Security Act to eligible individuals who do not have an eligible spouse, for the most recent month for which data on payment of the benefits are available, as determined by the Commissioner of Social Security; or

(B) in the case of an individual eligible for a payment under this section who has a spouse eligible for such a payment, an amount equal to the average of the cash benefits payable in the aggregate under section 1611 or 1619(a) of the Social Security Act to eligible individuals who have an eligible spouse, for the most recent month for which data on payment of the benefits are available, as so determined.

(b) ADMINISTRATIVE PROVISIONS.—

(1) AUTHORITY TO WITHHOLD PAYMENT TO RECOVER PRIOR OVERPAYMENT OF SSI BENEFITS.—The Commissioner of Social Security may withhold part or all of a payment otherwise required to be made under subsection (a) of this section to an individual, in order to recover a prior overpayment of benefits to the individual under the supplemental security income program under title XVI of the Social Security Act, subject to the limitations of section 1631(b) of such Act.

(2) PAYMENT TO BE DISREGARDED IN DETERMINING UNDERPAYMENTS UNDER THE SSI PROGRAM.—A payment under subsection (a) shall be disregarded in determining whether there has been an underpayment of benefits under the supplemental security income program under title XVI of the Social Security Act.

(3) NONASSIGNMENT.—The provisions of section 1631(d) of the Social Security Act shall apply with respect to payments under this section to the same extent as they apply in the case of title XVI of such Act.

(c) PAYMENTS TO BE DISREGARDED FOR PURPOSES OF ALL FEDERAL AND FEDERALLY ASSISTED PROGRAMS.—A payment under subsection (a) shall not be regarded as income to the recipient, and shall not be regarded as a resource of the recipient for the month of receipt and the following 6 months, for purposes of determining the eligibility of any 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.

(d) APPROPRIATION.—Out of any sums in the Treasury of the United States not otherwise appropriated, there are appropriated such sums as may be necessary to carry out this section.

SEC. 2103. TEMPORARY RESUMPTION OF PRIOR CHILD SUPPORT LAW.

During the period that begins with October 1, 2008, and ends with September 30, 2010, section 455(a)(1) of the Social Security Act shall be applied and administered as if the phrase "from amounts paid to the State under section 458 or" did not appear in such section.

TITLE III—HEALTH INSURANCE ASSISTANCE FOR THE UNEMPLOYED

SEC. 3001. SHORT TITLE AND TABLE OF CONTENTS OF TITLE.

(a) SHORT TITLE OF TITLE.—This title may be cited as the "Health Insurance Assistance for the Unemployed Act of 2009".

(b) TABLE OF CONTENTS OF TITLE.—The table of contents of this title is as follows:

Sec. 3001. Short title and table of contents of title.
Sec. 3002. Premium assistance for COBRA benefits and extension of COBRA benefits for older or long-term employees.
Sec. 3003. Temporary optional Medicaid coverage for the unemployed.

SEC. 3002. PREMIUM ASSISTANCE FOR COBRA BENEFITS AND EXTENSION OF COBRA BENEFITS FOR OLDER OR LONG-TERM EMPLOYEES.

(a) PREMIUM ASSISTANCE FOR COBRA CONTINUATION COVERAGE FOR INDIVIDUALS AND THEIR FAMILIES.—

(1) PROVISION OF PREMIUM ASSISTANCE.—

(A) REDUCTION OF PREMIUMS PAYABLE.—In the case of any premium for a period of coverage beginning on or after the date of the enactment of this Act for COBRA continuation coverage with respect to any assistance eligible individual, such individual shall be treated for purposes of any COBRA continuation provision as having paid the amount of such premium if such individual pays 35 percent of the amount of such premium (as determined without regard to this subsection).

(B) PREMIUM REIMBURSEMENT.—For provisions providing the balance of such premium, see section 6431 of the Internal Revenue Code of 1986, as added by paragraph (12).

(2) LIMITATION OF PERIOD OF PREMIUM ASSISTANCE.—

(A) IN GENERAL.—Paragraph (1)(A) shall not apply with respect to any assistance eligible individual for months of coverage beginning on or after the earlier of—

(i) the first date that such individual is eligible for coverage under any other group health plan (other than coverage consisting of only dental, vision, counseling, or referral services (or a combination thereof), coverage under a health reimbursement arrangement or a health flexible spending arrangement, or coverage of 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 thereof)) or is eligible for benefits under title XVIII of the Social Security Act, or

(ii) the earliest of—

(I) the date which is 12 months after the first day of the first month that paragraph (1)(A) applies with respect to such individual,

(II) the date following the expiration of the maximum period of continuation coverage required under the applicable COBRA continuation coverage provision, or

(III) the date following the expiration of the period of continuation coverage allowed under paragraph (4)(B)(ii).

(B) TIMING OF ELIGIBILITY FOR ADDITIONAL COVERAGE.—For purposes of subparagraph (A)(i), an individual shall not be treated as eligible for coverage under a group health plan before the first date on which such individual could be covered under such plan.

(C) NOTIFICATION REQUIREMENT.—An assistance eligible individual shall notify in writing the group health plan with respect to which paragraph (1)(A) applies if such paragraph ceases to apply by reason of subparagraph (A)(i). Such notice shall be provided to the group health plan in such time and manner as may be specified by the Secretary of Labor.

(3) ASSISTANCE ELIGIBLE INDIVIDUAL.—For purposes of this section, the term "assistance eligible individual" means any qualified beneficiary if—

(A) at any time during the period that begins with September 1, 2008, and ends with December 31, 2009, such qualified beneficiary is eligible for COBRA continuation coverage,

(B) such qualified beneficiary elects such coverage, and

(C) the qualifying event with respect to the COBRA continuation coverage consists of the involuntary termination of the covered employee's employment and occurred during such period.

(4) EXTENSION OF ELECTION PERIOD AND EFFECT ON COVERAGE.—

(A) IN GENERAL.—Notwithstanding section 605(a) of the Employee Retirement Income Security Act of 1974, section 4980B(f)(5)(A) of the Internal Revenue Code of 1986, section 2205(a) of the Public Health Service Act, and section 8905a(c)(2) of title 5, United States Code, in the case of an individual who is a qualified beneficiary described in paragraph (3)(A) as of the date of the enactment of this Act and has not made the election referred to in paragraph (3)(B) as of such date, such individual may elect the COBRA continuation coverage under the COBRA continuation coverage provisions containing such sections during the 60-day period commencing with the date on which the notification required under paragraph (7)(C) is provided to such individual.

(B) COMMENCEMENT OF COVERAGE; NO REACH-BACK.—Any COBRA continuation coverage elected by a qualified beneficiary during an extended election period under subparagraph (A)—

(i) shall commence on the date of the enactment of this Act, and

(ii) shall not extend beyond the period of COBRA continuation coverage that would have been required under the applicable COBRA con-

tinuation coverage provision if the coverage had been elected as required under such provision.

(C) PREEXISTING CONDITIONS.—With respect to a qualified beneficiary who elects COBRA continuation coverage pursuant to subparagraph (A), the period—

(i) beginning on the date of the qualifying event, and

(ii) ending with the day before the date of the enactment of this Act, shall be disregarded for purposes of determining the 63-day periods referred to in section 701)(2) of the Employee Retirement Income Security Act of 1974, section 9801(c)(2) of the Internal Revenue Code of 1986, and section 2701(c)(2) of the Public Health Service Act.

(5) EXPEDITED REVIEW OF DENIALS OF PREMIUM ASSISTANCE.—In any case in which an individual requests treatment as an assistance eligible individual and is denied such treatment by the group health plan by reason of such individual's ineligibility for COBRA continuation coverage, the Secretary of Labor (or the Secretary of Health and Human services in connection with COBRA continuation coverage which is provided other than pursuant to part 6 of subtitle B of title I of the Employee Retirement Income Security Act of 1974), in consultation with the Secretary of the Treasury, shall provide for expedited review of such denial. An individual shall be entitled to such review upon application to such Secretary in such form and manner as shall be provided by such Secretary. Such Secretary shall make a determination regarding such individual's eligibility within 10 business days after receipt of such individual's application for review under this paragraph.

(6) DISREGARD OF SUBSIDIES FOR PURPOSES OF FEDERAL AND STATE PROGRAMS.—Notwithstanding any other provision of law, any premium reduction with respect to an assistance eligible individual under this subsection shall not be considered income or resources in determining eligibility for, or the amount of assistance or benefits provided under, any other public benefit provided under Federal law or the law of any State or political subdivision thereof.

(7) NOTICES TO INDIVIDUALS.—

(A) GENERAL NOTICE.—

(i) IN GENERAL.—In the case of notices provided under section 606(4) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1166(4)), section 4980B(f)(6)(D) of the Internal Revenue Code of 1986, section 2206(4) of the Public Health Service Act (42 U.S.C. 300bb-6(4)), or section 8905a(f)(2)(A) of title 5, United States Code, with respect to individuals who, during the period described in paragraph (3)(A), become entitled to elect COBRA continuation coverage, such notices shall include an additional notification to the recipient of the availability of premium reduction with respect to such coverage under this subsection.

(ii) ALTERNATIVE NOTICE.—In the case of COBRA continuation coverage to which the notice provision under such sections does not apply, the Secretary of Labor, in consultation with the Secretary of the Treasury and the Secretary of Health and Human Services, shall, in coordination with administrators of the group health plans (or other entities) that provide or administer the COBRA continuation coverage involved, provide rules requiring the provision of such notice.

(iii) FORM.—The requirement of the additional notification under this subparagraph may be met by amendment of existing notice forms or by inclusion of a separate document with the notice otherwise required.

(B) SPECIFIC REQUIREMENTS.—Each additional notification under subparagraph (A) shall include—

(i) the forms necessary for establishing eligibility for premium reduction under this subsection,

(ii) the name, address, and telephone number necessary to contact the plan administrator and any other person maintaining relevant information in connection with such premium reduction,

(iii) a description of the extended election period provided for in paragraph (4)(A),

(iv) a description of the obligation of the qualified beneficiary under paragraph (2)(C) to notify the plan providing continuation coverage of eligibility for subsequent coverage under another group health plan or eligibility for benefits under title XVIII of the Social Security Act and the penalty provided for failure to so notify the plan, and

(v) a description, displayed in a prominent manner, of the qualified beneficiary's right to a reduced premium and any conditions on entitlement to the reduced premium.

(C) NOTICE RELATING TO RETROACTIVE COVERAGE.—In the case of an individual described in paragraph (3)(A) who has elected COBRA continuation coverage as of the date of enactment of this Act or an individual described in paragraph (4)(A), the administrator of the group health plan (or other entity) involved shall provide (within 60 days after the date of enactment of this Act) for the additional notification required to be provided under subparagraph (A).

(D) MODEL NOTICES.—Not later than 30 days after the date of enactment of this Act, the Secretary of the Labor, in consultation with the Secretary of the Treasury and the Secretary of Health and Human Services, shall prescribe models for the additional notification required under this paragraph.

(8) SAFEGUARDS.—The Secretary of the Treasury shall provide such rules, procedures, regulations, and other guidance as may be necessary and appropriate to prevent fraud and abuse under this subsection.

(9) OUTREACH.—The Secretary of Labor, in consultation with the Secretary of the Treasury and the Secretary of Health and Human Services, shall provide outreach consisting of public education and enrollment assistance relating to premium reduction provided under this subsection. Such outreach shall target employers, group health plan administrators, public assistance programs, States, insurers, and other entities as determined appropriate by such Secretaries. Such outreach shall include an initial focus on those individuals electing continuation coverage who are referred to in paragraph (7)(C). Information on such premium reduction, including enrollment, shall also be made available on website of the Departments of Labor, Treasury, and Health and Human Services.

(10) DEFINITIONS.—For purposes of this subsection—

(A) ADMINISTRATOR.—The term "administrator" has the meaning given such term in section 3(16) of the Employee Retirement Income Security Act of 1974.

(B) COBRA CONTINUATION COVERAGE.—The term "COBRA continuation coverage" means continuation coverage provided pursuant to part 6 of subtitle B of title I of the Employee Retirement Income Security Act of 1974 (other than under section 609), title XXII of the Public Health Service Act, section 4980B of the Internal Revenue Code of 1986 (other than subsection (f)(1) of such section insofar as it relates to pediatric vaccines), or section 8905a of title 5, United States Code, or under a State program that provides continuation coverage comparable to such continuation coverage. Such term does not include coverage under a health flexible spending arrangement.

(C) COBRA CONTINUATION PROVISION.—The term "COBRA continuation provision" means the provisions of law described in subparagraph (B).

(D) COVERED EMPLOYEE.—The term "covered employee" has the meaning given such term in section 607(2) of the Employee Retirement Income Security Act of 1974.

(E) QUALIFIED BENEFICIARY.—The term "qualified beneficiary" has the meaning given such term in section 607(3) of the Employee Retirement Income Security Act of 1974.

(F) GROUP HEALTH PLAN.—The term "group health plan" has the meaning given such term in section 607(1) of the Employee Retirement Income Security Act of 1974.

(G) STATE.—The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(11) REPORTS.—

(A) INTERIM REPORT.—The Secretary of the Treasury shall submit an interim report to the Committee on Education and Labor, the Committee on Ways and Means, and the Committee on Energy and Commerce of the House of Representatives and the Committee on Health, Education, Labor, and Pensions and the Committee on Finance of the Senate regarding the premium reduction provided under this subsection that includes—

(i) the number of individuals provided such assistance as of the date of the report; and

(ii) the total amount of expenditures incurred (with administrative expenditures noted separately) in connection with such assistance as of the date of the report.

(B) FINAL REPORT.—As soon as practicable after the last period of COBRA continuation coverage for which premium reduction is provided under this section, the Secretary of the Treasury shall submit a final report to each Committee referred to in subparagraph (A) that includes—

(i) the number of individuals provided premium reduction under this section;

(ii) the average dollar amount (monthly and annually) of premium reductions provided to such individuals; and

(iii) the total amount of expenditures incurred (with administrative expenditures noted separately) in connection with premium reduction under this section.

(12) COBRA PREMIUM ASSISTANCE.—

(A) IN GENERAL.—Subchapter B of chapter 65 of the Internal Revenue Code of 1986 is amended by adding at the end the following new section:

"SEC. 6431. COBRA PREMIUM ASSISTANCE.

"(a) IN GENERAL.—The entity to whom premiums are payable under COBRA continuation coverage shall be reimbursed for the amount of premiums not paid by plan beneficiaries by reason of section 3002(a) of the Health Insurance Assistance for the Unemployed Act of 2009. Such amount shall be treated as a credit against the requirement of such entity to make deposits of payroll taxes and the liability of such entity for payroll taxes. To the extent that such amount exceeds the amount of such taxes, the Secretary shall pay to such entity the amount of such excess. No payment may be made under this subsection to an entity with respect to any assistance eligible individual until after such entity has received the reduced premium from such individual required under section 3002(a)(1)(A) of such Act.

"(b) PAYROLL TAXES.—For purposes of this section, the term 'payroll taxes' means—

"(1) amounts required to be deducted and withheld for the payroll period under section 3401 (relating to wage withholding),

"(2) amounts required to be deducted for the payroll period under section 3102 (relating to FICA employee taxes), and

"(3) amounts of the taxes imposed for the payroll period under section 3111 (relating to FICA employer taxes).

"(c) TREATMENT OF CREDIT.—Except as otherwise provided by the Secretary, the credit described in subsection (a) shall be applied as though the employer had paid to the Secretary, on the day that the qualified beneficiary's premium payment is received, an amount equal to such credit.

"(d) TREATMENT OF PAYMENT.—For purposes of section 1324(b)(2) of title 31, United States Code, any payment under this section shall be treated in the same manner as a refund of the credit under section 35.

"(e) REPORTING.—

"(1) IN GENERAL.—Each entity entitled to reimbursement under subsection (a) for any period shall submit such reports as the Secretary may require, including—

"(A) an attestation of involuntary termination of employment for each covered employee on the basis of whose termination entitlement to reimbursement is claimed under subsection (a), and

"(B) a report of the amount of payroll taxes offset under subsection (a) for the reporting period and the estimated offsets of such taxes for the subsequent reporting period in connection with reimbursements under subsection (a).

"(2) TIMING OF REPORTS RELATING TO AMOUNT OF PAYROLL TAXES.—Reports required under paragraph (1)(B) shall be submitted at the same time as deposits of taxes imposed by chapters 21, 22, and 24 or at such time as is specified by the Secretary.

"(f) REGULATIONS.—The Secretary may issue such regulations or other guidance as may be necessary or appropriate to carry out this section, including the requirement to report information or the establishment of other methods for verifying the correct amounts of payments and credits under this section. The Secretary shall issue such regulations or guidance with respect to the application of this section to group health plans that are multiemployer plans.".

(B) SOCIAL SECURITY TRUST FUNDS HELD HARMLESS.—In determining any amount transferred or appropriated to any fund under the Social Security Act, section 6431 of the Internal Revenue Code of 1986 shall not be taken into account.

(C) CLERICAL AMENDMENT.—The table of sections for subchapter B of chapter 65 of the Internal Revenue Code of 1986 is amended by adding at the end the following new item:

"Sec. 6431. COBRA premium assistance.".

(D) EFFECTIVE DATE.—The amendments made by this paragraph shall apply to premiums to which subsection (a)(1)(A) applies.

(13) PENALTY FOR FAILURE TO NOTIFY HEALTH PLAN OF CESSATION OF ELIGIBILITY FOR PREMIUM ASSISTANCE.—

(A) IN GENERAL.—Part I of subchapter B of chapter 68 of the Internal Revenue Code of 1986 is amended by adding at the end the following new section:

"SEC. 6720C. PENALTY FOR FAILURE TO NOTIFY HEALTH PLAN OF CESSATION OF ELIGIBILITY FOR COBRA PREMIUM ASSISTANCE.

"(a) IN GENERAL.—Any person required to notify a group health plan under section 3002(a)(2)(C)) of the Health Insurance Assistance for the Unemployed Act of 2009 who fails to make such a notification at such time and in such manner as the Secretary of Labor may require shall pay a penalty of 110 percent of the premium reduction provided under such section after termination of eligibility under such subsection.

"(b) REASONABLE CAUSE EXCEPTION.—No penalty shall be imposed under subsection (a) with respect to any failure if it is shown that such failure is due to reasonable cause and not to willful neglect.".

(B) CLERICAL AMENDMENT.—The table of sections of part I of subchapter B of chapter 68 of such Code is amended by adding at the end the following new item:

"Sec. 6720C. Penalty for failure to notify health plan of cessation of eligibility for COBRA premium assistance.".

(C) EFFECTIVE DATE.—The amendments made by this paragraph shall apply to failures occurring after the date of the enactment of this Act.

(14) COORDINATION WITH HCTC.—

(A) IN GENERAL.—Subsection (g) of section 35 of the Internal Revenue Code of 1986 is amended by redesignating paragraph (9) as paragraph (10) and inserting after paragraph (8) the following new paragraph:

"(9) COBRA PREMIUM ASSISTANCE.—In the case of an assistance eligible individual who receives premium reduction for COBRA continuation coverage under section 3002(a) of the Health Insurance Assistance for the Unemployed Act of 2009 for any month during the taxable year, such individual shall not be treated as an eligible individual, a certified individual, or a qualifying family member for purposes of this section or section 7527 with respect to such month.".

(B) EFFECTIVE DATE.—The amendment made by subparagraph (A) shall apply to taxable years ending after the date of the enactment of this Act.

(15) EXCLUSION OF COBRA PREMIUM ASSISTANCE FROM GROSS INCOME.—

(A) IN GENERAL.—Part III of subchapter B of chapter 1 of the Internal Revenue Code of 1986 is amended by inserting after section 139B the following new section:

"SEC. 139C. COBRA PREMIUM ASSISTANCE.

"In the case of an assistance eligible individual (as defined in section 3002 of the Health Insurance Assistance for the Unemployed Act of 2009), gross income does not include any premium reduction provided under subsection (a) of such section.".

(B) CLERICAL AMENDMENT.—The table of sections for part III of subchapter B of chapter 1 of such Code is amended by inserting after the item relating to section 139B the following new item:

"Sec. 139C. COBRA premium assistance.".

(C) EFFECTIVE DATE.—The amendments made by this paragraph shall apply to taxable years ending after the date of the enactment of this Act.

(b) EXTENSION OF COBRA BENEFITS FOR OLDER OR LONG-TERM EMPLOYEES.—

(1) ERISA AMENDMENT.—Section 602(2)(A) of the Employee Retirement Income Security Act of 1974 is amended by adding at the end the following new clauses:

"(x) SPECIAL RULE FOR OLDER OR LONG-TERM EMPLOYEES GENERALLY.—In the case of a qualifying event described in section 603(2) with respect to a covered employee who (as of such qualifying event) has attained age 55 or has completed 10 or more years of service with the entity that is the employer at the time of the qualifying event, clauses (i) and (ii) shall not apply.

"(xi) YEAR OF SERVICE.— For purposes of this subparagraph, the term 'year of service' shall have the meaning provided in section 202(a)(3).".

(2) IRC AMENDMENT.—Clause (i) of section 4980B(f)(2)(B) of the Internal Revenue Code of 1986 is amended by adding at the end the following new subclauses:

"(X) SPECIAL RULE FOR OLDER OR LONG-TERM EMPLOYEES GENERALLY.—In the case of a qualifying event described in paragraph (3)(B) with respect to a covered employee who (as of such quali-

fying event) has attained age 55 or has completed 10 or more years of service with the entity that is the employer at the time of the qualifying event, subclauses (I) and (II) shall not apply.

"(XI) YEAR OF SERVICE.— For purposes of this clause, the term 'year of service' shall have the meaning provided in section 202(a)(3) of the Employee Retirement Income Security Act of 1974.".

(3) PHSA AMENDMENT.—Section 2202(2)(A) of the Public Health Service Act is amended by adding at the end the following new clauses:

"(viii) SPECIAL RULE FOR OLDER OR LONG-TERM EMPLOYEES GENERALLY.—In the case of a qualifying event described in section 2203(2) with respect to a covered employee who (as of such qualifying event) has attained age 55 or has completed 10 or more years of service with the entity that is the employer at the time of the qualifying event, clauses (i) and (ii) shall not apply.

"(ix) YEAR OF SERVICE.— For purposes of this subparagraph, the term 'year of service' shall have the meaning provided in section 202(a)(3) of the Employee Retirement Income Security Act of 1974.".

(4) EFFECTIVE DATE OF AMENDMENTS.—The amendments made by this subsection shall apply to periods of coverage which would (without regard to the amendments made by this section) end on or after the date of the enactment of this Act.

SEC. 3003. TEMPORARY OPTIONAL MEDICAID COVERAGE FOR THE UNEMPLOYED.

(a) IN GENERAL.—Section 1902 of the Social Security Act (42 U.S.C. 1396b) is amended—

(1) in subsection (a)(10)(A)(ii)—

(A) by striking "or" at the end of subclause (XVIII);

(B) by adding "or" at the end of subclause (XIX); and

(C) by adding at the end the following new subclause

"(XX) who are described in subsection (dd)(1) (relating to certain unemployed individuals and their families);"; and

(2) by adding at the end the following new subsection:

"(dd)(1) Individuals described in this paragraph are—

"(A) individuals who—

"(i) are within one or more of the categories described in paragraph (2), as elected under the State plan; and

"(ii) meet the applicable requirements of paragraph (3); and

"(B) individuals who—

"(i) are the spouse, or dependent child under 19 years of age, of an individual described in subparagraph (A); and

"(ii) meet the requirement of paragraph (3)(B).

"(2) The categories of individuals described in this paragraph are each of the following:

"(A) Individuals who are receiving unemployment compensation benefits.

"(B) Individuals who were receiving, but have exhausted, unemployment compensation benefits on or after July 1, 2008.

"(C) Individuals who are involuntarily unemployed and were involuntarily separated from employment on or after September 1, 2008, and before January 1, 2011, whose family gross income does not exceed a percentage specified by the State (not to exceed 200 percent) of the income official poverty line (as defined by the Office of Management and Budget, and revised annually in accordance with section 673(2) of the Omnibus Budget Reconciliation Act of 1981) applicable to a family of the size involved, and who, but for subsection (a)(10)(A)(ii)(XX), are not eligible for medical assistance under this title or health assistance under title XXI.

"(D) Individuals who are involuntarily unemployed and were involuntarily separated from employment on or after September 1, 2008, and before January 1, 2011, who are members of households participating in the supplemental nutrition assistance program established under the Food and Nutrition Act of 2008 (7 U.S.C. 2011 et seq), and who, but for subsection (a)(10)(A)(ii)(XX), are not eligible for medical assistance under this title or health assistance under title XXI.

A State plan may elect one or more of the categories described in this paragraph but may not elect the category described in subparagraph (B) unless the State plan also elects the category described in subparagraph (A).

"(3) The requirements of this paragraph with respect to an individual are the following:

"(A) In the case of individuals within a category described in subparagraph (A) or (B) of paragraph (2), the individual was involuntarily separated from employment on or after September 1, 2008, and before January 1, 2011, or meets such comparable requirement as the Secretary specifies through rule, guidance, or otherwise in the case of an individual who was an independent contractor.

"(B) The individual is not otherwise covered under creditable coverage, as defined in section 2701(c) of the Public Health Service Act (42 U.S.C. 300gg(c)), but applied without regard to paragraph (1)(F) of such section and without regard to coverage provided by reason of the application of subsection (a)(10)(A)(ii)(XX).

"(4)(A) No income or resources test shall be applied with respect to any category of individuals described in subparagraph (A), (B), or (D) of paragraph (2) who are eligible for medical assistance only by reason of the application of subsection (a)(10)(A)(ii)(XX).

"(B) Nothing in this subsection shall be construed to prevent a State from imposing a resource test for the category of individuals described in paragraph (2)(C)).

"(C) In the case of individuals provided medical assistance by reason of the application of subsection (a)(10)(A)(ii)(XX), the requirements of subsections (i)(22) and (x) shall not apply.".

(b) 100 PERCENT FEDERAL MATCHING RATE.—

(1) FMAP FOR TIME-LIMITED PERIOD.—The third sentence of section 1905(b) of such Act (42 U.S.C. 1396d(b)) is amended by inserting before the period at the end the following: "and for items and services furnished on or after the date of enactment of this Act and before January 1, 2011, to individuals who are eligible for medical assistance only by reason of the application of section 1902(a)(10)(A)(ii)(XX)".

(2) CERTAIN ENROLLMENT-RELATED ADMINISTRATIVE COSTS.—Notwithstanding any other provision of law, for purposes of applying section 1903(a) of the Social Security Act (42 U.S.C. 1396b(a)), with respect to expenditures incurred on or after the date of the enactment of this Act and before January 1, 2011, for costs of administration (including outreach and the modification and operation of eligibility information systems) attributable to eligibility determination and enrollment of individuals who are eligible for medical assistance only by reason of the application of section 1902(a)(10)(A)(ii)(XX) of such Act, as added by subsection (a)(1), the Federal matching percentage shall be 100 percent instead of the matching percentage otherwise applicable.

(c) CONFORMING AMENDMENTS.—(1) Section 1903(f)(4) of such Act (42 U.S.C. 1396c(f)(4)) is amended by inserting "1902(a)(10)(A)(ii)(XX), or" after "1902(a)(10)(A)(ii)(XIX),".

(2) Section 1905(a) of such Act (42 U.S.C. 1396d(a)) is amended, in the matter preceding paragraph (1)—

(A) by striking "or" at the end of clause (xii);

(B) by adding "or" at the end of clause (xiii); and

(C) by inserting after clause (xiii) the following new clause:

"(xiv) individuals described in section 1902(dd)(1),".

TITLE IV—HEALTH INFORMATION TECHNOLOGY

SEC. 4001. SHORT TITLE; TABLE OF CONTENTS OF TITLE.

(a) SHORT TITLE.—This title may be cited as the "Health Information Technology for Economic and Clinical Health Act" or the "HITECH Act".

(b) TABLE OF CONTENTS OF TITLE.—The table of contents of this title is as follows:

Sec. 4001. Short title; table of contents of title.

Subtitle A—Promotion of Health Information Technology

PART 1—IMPROVING HEALTH CARE QUALITY, SAFETY, AND EFFICIENCY

Sec. 4101. ONCHIT; standards development and adoption.

"TITLE XXX—HEALTH INFORMATION TECHNOLOGY AND QUALITY

"Sec. 3000. Definitions.

"Subtitle A—Promotion of Health Information Technology

"Sec. 3001. Office of the National Coordinator for Health Information Technology.
"Sec. 3002. HIT Policy Committee.
"Sec. 3003. HIT Standards Committee.
"Sec. 3004. Process for adoption of endorsed recommendations; adoption of initial set of standards, implementation specifications, and certification criteria.

"Sec. 3005. Application and use of adopted standards and implementation specifications by Federal agencies.
"Sec. 3006. Voluntary application and use of adopted standards and implementation specifications by private entities.
"Sec. 3007. Federal health information technology.
"Sec. 3008. Transitions.
"Sec. 3009. Relation to HIPAA privacy and security law.
"Sec. 3010. Authorization for appropriations.
Sec. 4102. Technical amendment.

PART 2—APPLICATION AND USE OF ADOPTED HEALTH INFORMATION TECHNOLOGY STANDARDS; REPORTS

Sec. 4111. Coordination of Federal activities with adopted standards and implementation specifications.
Sec. 4112. Application to private entities.
Sec. 4113. Study and reports.

Subtitle B—Testing of Health Information Technology

Sec. 4201. National Institute for Standards and Technology testing.
Sec. 4202. Research and development programs.

Subtitle C—Incentives for the Use of Health Information Technology

PART I—GRANTS AND LOANS FUNDING

Sec. 4301. Grant, loan, and demonstration programs.

"Subtitle B—Incentives for the Use of Health Information Technology

"Sec. 3011. Immediate funding to strengthen the health information technology infrastructure.
"Sec. 3012. Health information technology implementation assistance.
"Sec. 3013. State grants to promote health information technology.
"Sec. 3014. Competitive grants to States and Indian tribes for the development of loan programs to facilitate the widespread adoption of certified EHR technology.
"Sec. 3015. Demonstration program to integrate information technology into clinical education.
"Sec. 3016. Information technology professionals on health care.
"Sec. 3017. General grant and loan provisions.
"Sec. 3018. Authorization for appropriations.

PART II—MEDICARE PROGRAM

Sec. 4311. Incentives for eligible professionals.
Sec. 4312. Incentives for hospitals.
Sec. 4313. Treatment of payments and savings; implementation funding.
Sec. 4314. Study on application of EHR payment incentives for providers not receiving other incentive payments.

PART III—MEDICAID FUNDING

Sec. 4321. Medicaid provider HIT adoption and operation payments; implementation funding.

Subtitle D—Privacy

Sec. 4400. Definitions.

PART I—IMPROVED PRIVACY PROVISIONS AND SECURITY PROVISIONS

Sec. 4401. Application of security provisions and penalties to business associates of covered entities; annual guidance on security provisions.
Sec. 4402. Notification in the case of breach.
Sec. 4403. Education on Health Information Privacy.
Sec. 4404. Application of privacy provisions and penalties to business associates of covered entities.
Sec. 4405. Restrictions on certain disclosures and sales of health information; accounting of certain protected health information disclosures; access to certain information in electronic format.
Sec. 4406. Conditions on certain contacts as part of health care operations.
Sec. 4407. Temporary breach notification requirement for vendors of personal health records and other non-HIPAA covered entities.
Sec. 4408. Business associate contracts required for certain entities.
Sec. 4409. Clarification of application of wrongful disclosures criminal penalties.
Sec. 4410. Improved enforcement.
Sec. 4411. Audits.

PART II—RELATIONSHIP TO OTHER LAWS; REGULATORY REFERENCES; EFFECTIVE DATE; REPORTS

Sec. 4421. Relationship to other laws.
Sec. 4422. Regulatory references.
Sec. 4423. Effective date.
Sec. 4424. Studies, reports, guidance.

Subtitle E—Miscellaneous Medicare Provisions

Sec. 4501. Moratoria on certain Medicare regulations.
Sec. 4502. Long-term care hospital technical corrections.

Subtitle A—Promotion of Health Information Technology

PART 1—IMPROVING HEALTH CARE QUALITY, SAFETY, AND EFFICIENCY

SEC. 4101. ONCHIT; STANDARDS DEVELOPMENT AND ADOPTION.

The Public Health Service Act (42 U.S.C. 201 et seq.) is amended by adding at the end the following:

"TITLE XXX—HEALTH INFORMATION TECHNOLOGY AND QUALITY

"SEC. 3000. DEFINITIONS.

"In this title:

"(1) CERTIFIED EHR TECHNOLOGY.—The term 'certified EHR technology' means a qualified electronic health record that is certified pursuant to section 3001(c)(5) as meeting standards adopted under section 3004 that are applicable to the type of record involved (as determined by the Secretary, such as an ambulatory electronic health record for office-based physicians or an inpatient hospital electronic health record for hospitals).

"(2) ENTERPRISE INTEGRATION.—The term 'enterprise integration' means the electronic linkage of health care providers, health plans, the government, and other interested parties, to enable the electronic exchange and use of health information among all the components in the health care infrastructure in accordance with applicable law, and such term includes related application protocols and other related standards.

"(3) HEALTH CARE PROVIDER.—The term 'health care provider' means a hospital, skilled nursing facility, nursing facility, home health entity or other long term care facility, health care clinic, Federally qualified health center, group practice (as defined in section 1877(h)(4) of the Social Security Act), a pharmacist, a pharmacy, a laboratory, a physician (as defined in section 1861(r) of the Social Security Act), a practitioner (as described in section 1842(b)(18)(C) of the Social Security Act), a provider operated by, or under contract with, the Indian Health Service or by an Indian tribe (as defined in the Indian Self-Determination and Education Assistance Act), tribal organization, or urban Indian organization (as defined in section 4 of the Indian Health Care Improvement Act), a rural health clinic, a covered entity under section 340B, and any other category of facility or clinician determined appropriate by the Secretary.

"(4) HEALTH INFORMATION.—The term 'health information' has the meaning given such term in section 1171(4) of the Social Security Act.

"(5) HEALTH INFORMATION TECHNOLOGY.—The term 'health information technology' means hardware, software, integrated technologies and related licenses, intellectual property, upgrades, and packaged solutions sold as services that are specifically designed for use by health care entities for the electronic creation, maintenance, or exchange of health information.

"(6) HEALTH PLAN.—The term 'health plan' has the meaning given such term in section 1171(5) of the Social Security Act.

"(7) HIT POLICY COMMITTEE.—The term 'HIT Policy Committee' means such Committee established under section 3002(a).

"(8) HIT STANDARDS COMMITTEE.—The term 'HIT Standards Committee' means such Committee established under section 3003(a).

"(9) INDIVIDUALLY IDENTIFIABLE HEALTH INFORMATION.—The term 'individually identifiable health information' has the meaning given such term in section 1171(6) of the Social Security Act.

"(10) LABORATORY.—The term 'laboratory' has the meaning given such term in section 353(a).

"(11) NATIONAL COORDINATOR.—The term 'National Coordinator' means the head of the Office of the National Coordinator for Health Information Technology established under section 3001(a).

"(12) PHARMACIST.—The term 'pharmacist' has the meaning given such term in section 804(2) of the Federal Food, Drug, and Cosmetic Act.

"(13) QUALIFIED ELECTRONIC HEALTH RECORD.—The term 'qualified electronic health record' means an electronic record of health-related information on an individual that—

"(A) includes patient demographic and clinical health information, such as medical history and problem lists; and

"(B) has the capacity—

"(i) to provide clinical decision support;

"(ii) to support physician order entry;

"(iii) to capture and query information relevant to health care quality; and

"(iv) to exchange electronic health information with, and integrate such information from other sources.

"(14) STATE.—The term 'State' means each of the several States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands.

"Subtitle A—Promotion of Health Information Technology

"SEC. 3001. OFFICE OF THE NATIONAL COORDINATOR FOR HEALTH INFORMATION TECHNOLOGY.

"(a) ESTABLISHMENT.—There is established within the Department of Health and Human Services an Office of the National Coordinator for Health Information Technology (referred to in this section as the 'Office'). The Office shall be headed by a National Coordinator who shall be appointed by the Secretary and shall report directly to the Secretary.

"(b) PURPOSE.—The National Coordinator shall perform the duties under subsection (c) in a manner consistent with the development of a nationwide health information technology infrastructure that allows for the electronic use and exchange of information and that—

"(1) ensures that each patient's health information is secure and protected, in accordance with applicable law;

"(2) improves health care quality, reduces medical errors, and advances the delivery of patient-centered medical care;

"(3) reduces health care costs resulting from inefficiency, medical errors, inappropriate care, duplicative care, and incomplete information;

"(4) provides appropriate information to help guide medical decisions at the time and place of care;

"(5) ensures the inclusion of meaningful public input in such development of such infrastructure;

"(6) improves the coordination of care and information among hospitals, laboratories, physician offices, and other entities through an effective infrastructure for the secure and authorized exchange of health care information;

"(7) improves public health activities and facilitates the early identification and rapid response to public health threats and emergencies, including bioterror events and infectious disease outbreaks;

"(8) facilitates health and clinical research and health care quality;

"(9) promotes prevention of chronic diseases;

"(10) promotes a more effective marketplace, greater competition, greater systems analysis, increased consumer choice, and improved outcomes in health care services; and

"(11) improves efforts to reduce health disparities.

"(c) DUTIES OF THE NATIONAL COORDINATOR.—

"(1) STANDARDS.—The National Coordinator shall review and determine whether to endorse each standard, implementation specification, and certification criterion for the electronic exchange and use of health information that is recommended by the HIT Standards Committee under section 3003 for purposes of adoption under section 3004. The Coordinator shall make such determination, and report to the Secretary such determination, not later than 45 days after the date the recommendation is received by the Coordinator.

"(2) HIT POLICY COORDINATION.—

"(A) IN GENERAL.—The National Coordinator shall coordinate health information technology policy and programs of the Department with those of other relevant executive branch agencies with a goal of avoiding duplication of efforts and of helping to ensure that each agency undertakes health information technology activities primarily within the areas of its greatest expertise and technical capability and in a manner towards a coordinated national goal.

"(B) HIT POLICY AND STANDARDS COMMITTEES.—The National Coordinator shall be a leading member in the establishment and operations of the HIT

Policy Committee and the HIT Standards Committee and shall serve as a liaison among those two Committees and the Federal Government.

"(3) STRATEGIC PLAN.—

"(A) IN GENERAL.—The National Coordinator shall, in consultation with other appropriate Federal agencies (including the National Institute of Standards and Technology), update the Federal Health IT Strategic Plan (developed as of June 3, 2008) to include specific objectives, milestones, and metrics with respect to the following:

"(i) The electronic exchange and use of health information and the enterprise integration of such information.

"(ii) The utilization of an electronic health record for each person in the United States by 2014.

"(iii) The incorporation of privacy and security protections for the electronic exchange of an individual's individually identifiable health information.

"(iv) Ensuring security methods to ensure appropriate authorization and electronic authentication of health information and specifying technologies or methodologies for rendering health information unusable, unreadable, or indecipherable.

"(v) Specifying a framework for coordination and flow of recommendations and policies under this subtitle among the Secretary, the National Coordinator, the HIT Policy Committee, the HIT Standards Committee, and other health information exchanges and other relevant entities.

"(vi) Methods to foster the public understanding of health information technology.

"(vii) Strategies to enhance the use of health information technology in improving the quality of health care, reducing medical errors, reducing health disparities, improving public health, and improving the continuity of care among health care settings.

"(B) COLLABORATION.—The strategic plan shall be updated through collaboration of public and private entities.

"(C) MEASURABLE OUTCOME GOALS.—The strategic plan update shall include measurable outcome goals.

"(D) PUBLICATION.—The National Coordinator shall republish the strategic plan, including all updates.

"(4) WEBSITE.—The National Coordinator shall maintain and frequently update an Internet website on which there is posted information on the work, schedules, reports, recommendations, and other information to ensure transparency in promotion of a nationwide health information technology infrastructure.

"(5) CERTIFICATION.—

"(A) IN GENERAL.—The National Coordinator, in consultation with the Director of the National Institute of Standards and Technology, shall develop a program (either directly or by contract) for the voluntary certification of health information technology as being in compliance with applicable certification criteria adopted under this subtitle. Such program shall include testing of the technology in accordance with section 4201(b) of the HITECH Act.

"(B) CERTIFICATION CRITERIA DESCRIBED.—In this title, the term 'certification criteria' means, with respect to standards and implementation specifications for health information technology, criteria to establish that the technology meets such standards and implementation specifications.

"(6) REPORTS AND PUBLICATIONS.—

"(A) REPORT ON ADDITIONAL FUNDING OR AUTHORITY NEEDED.—Not later than 12 months after the date of the enactment of this title, the National Coordinator shall submit to the appropriate committees of jurisdiction of the House of Representatives and the Senate a report on any additional funding or authority the Coordinator or the HIT Policy Committee or HIT Standards Committee requires to evaluate and develop standards, implementation specifications, and certification criteria, or to achieve full participation of stakeholders in the adoption of a nationwide health information technology infrastructure that allows for the electronic use and exchange of health information.

"(B) IMPLEMENTATION REPORT.—The National Coordinator shall prepare a report that identifies lessons learned from major public and private health care systems in their implementation of health information technology, including information on whether the technologies and practices developed by such systems may be applicable to and usable in whole or in part by other health care providers.

"(C) ASSESSMENT OF IMPACT OF HIT ON COMMUNITIES WITH HEALTH DISPARITIES AND UNINSURED, UNDERINSURED, AND MEDICALLY UNDERSERVED AREAS.—The National Coordinator shall assess and publish the impact of health information technology in communities with health disparities and in areas with a high proportion of individuals who are uninsured, underinsured, and medically underserved individuals (including urban and rural areas) and identify practices to increase the adoption of such technology by health care providers in such communities.

"(D) EVALUATION OF BENEFITS AND COSTS OF THE ELECTRONIC USE AND EXCHANGE OF HEALTH INFORMATION.—The National Coordinator shall evaluate and publish evidence on the benefits and costs of the electronic use and exchange of health information and assess to whom these benefits and costs accrue.

"(E) RESOURCE REQUIREMENTS.—The National Coordinator shall estimate and publish resources required annually to reach the goal of utilization of an electronic health record for each person in the United States by 2014, including the required level of Federal funding, expectations for regional, State, and private investment, and the expected contributions by volunteers to activities for the utilization of such records.

"(7) ASSISTANCE.—The National Coordinator may provide financial assistance to consumer advocacy groups and not-for-profit entities that work in the public interest for purposes of defraying the cost to such groups and entities to participate under, whether in whole or in part, the National Technology Transfer Act of 1995 (15 U.S.C. 272 note).

"(8) GOVERNANCE FOR NATIONWIDE HEALTH INFORMATION NETWORK.—The National Coordinator shall establish a governance mechanism for the nationwide health information network.

"(d) DETAIL OF FEDERAL EMPLOYEES.—

"(1) IN GENERAL.—Upon the request of the National Coordinator, the head of any Federal agency is authorized to detail, with or without reimbursement from the Office, any of the personnel of such agency to the Office to assist it in carrying out its duties under this section.

"(2) EFFECT OF DETAIL.—Any detail of personnel under paragraph (1) shall—

"(A) not interrupt or otherwise affect the civil service status or privileges of the Federal employee; and

"(B) be in addition to any other staff of the Department employed by the National Coordinator.

"(3) ACCEPTANCE OF DETAILEES.—Notwithstanding any other provision of law, the Office may accept detailed personnel from other Federal agencies without regard to whether the agency described under paragraph (1) is reimbursed.

"(e) CHIEF PRIVACY OFFICER OF THE OFFICE OF THE NATIONAL COORDINATOR.—Not later than 12 months after the date of the enactment of this title, the Secretary shall appoint a Chief Privacy Officer of the Office of the National Coordinator, whose duty it shall be to advise the National Coordinator on privacy, security, and data stewardship of electronic health information and to coordinate with other Federal agencies (and similar privacy officers in such agencies), with State and regional efforts, and with foreign countries with regard to the privacy, security, and data stewardship of electronic individually identifiable health information.

"SEC. 3002. HIT POLICY COMMITTEE.

"(a) ESTABLISHMENT.—There is established a HIT Policy Committee to make policy recommendations to the National Coordinator relating to the implementation of a nationwide health information technology infrastructure, including implementation of the strategic plan described in section 3001(c)(3).

"(b) DUTIES.—

"(1) RECOMMENDATIONS ON HEALTH INFORMATION TECHNOLOGY INFRASTRUCTURE.—The HIT Policy Committee shall recommend a policy framework for the development and adoption of a nationwide health information technology infrastructure that permits the electronic exchange and use of health information as is consistent with the strategic plan under section 3001(c)(3) and that includes the recommendations under paragraph (2). The Committee shall update such recommendations and make new recommendations as appropriate.

"(2) SPECIFIC AREAS OF STANDARD DEVELOPMENT.—

"(A) IN GENERAL.—The HIT Policy Committee shall recommend the areas in which standards, implementation specifications, and certification criteria are needed for the electronic exchange and use of health information for purposes of adoption under section 3004 and shall recommend an order of priority for the development, harmonization, and recognition of such standards, specifications, and certification criteria among the areas so rec-

ommended. Such standards and implementation specifications shall include named standards, architectures, and software schemes for the authentication and security of individually identifiable health information and other information as needed to ensure the reproducible development of common solutions across disparate entities.

"(B) AREAS REQUIRED FOR CONSIDERATION.—For purposes of subparagraph (A), the HIT Policy Committee shall make recommendations for at least the following areas:

"(i) Technologies that protect the privacy of health information and promote security in a qualified electronic health record, including for the segmentation and protection from disclosure of specific and sensitive individually identifiable health information with the goal of minimizing the reluctance of patients to seek care (or disclose information about a condition) because of privacy concerns, in accordance with applicable law, and for the use and disclosure of limited data sets of such information.

"(ii) A nationwide health information technology infrastructure that allows for the electronic use and accurate exchange of health information.

"(iii) The utilization of a certified electronic health record for each person in the United States by 2014.

"(iv) Technologies that as a part of a qualified electronic health record allow for an accounting of disclosures made by a covered entity (as defined for purposes of regulations promulgated under section 264(c) of the Health Insurance Portability and Accountability Act of 1996) for purposes of treatment, payment, and health care operations (as such terms are defined for purposes of such regulations).

"(v) The use of certified electronic health records to improve the quality of health care, such as by promoting the coordination of health care and improving continuity of health care among health care providers, by reducing medical errors, by improving population health, and by advancing research and education.

"(C) OTHER AREAS FOR CONSIDERATION.—In making recommendations under subparagraph (A), the HIT Policy Committee may consider the following additional areas:

"(i) The appropriate uses of a nationwide health information infrastructure, including for purposes of—

"(I) the collection of quality data and public reporting;

"(II) biosurveillance and public health;

"(III) medical and clinical research; and

"(IV) drug safety.

"(ii) Self-service technologies that facilitate the use and exchange of patient information and reduce wait times.

"(iii) Telemedicine technologies, in order to reduce travel requirements for patients in remote areas.

"(iv) Technologies that facilitate home health care and the monitoring of patients recuperating at home.

"(v) Technologies that help reduce medical errors.

"(vi) Technologies that facilitate the continuity of care among health settings.

"(vii) Technologies that meet the needs of diverse populations.

"(viii) Any other technology that the HIT Policy Committee finds to be among the technologies with the greatest potential to improve the quality and efficiency of health care.

"(3) FORUM.—The HIT Policy Committee shall serve as a forum for broad stakeholder input with specific expertise in policies relating to the matters described in paragraphs (1) and (2).

"(c) MEMBERSHIP AND OPERATIONS.—

"(1) IN GENERAL.—The National Coordinator shall provide leadership in the establishment and operations of the HIT Policy Committee.

"(2) MEMBERSHIP.—The membership of the HIT Policy Committee shall at least reflect providers, ancillary healthcare workers, consumers, purchasers, health plans, technology vendors, researchers, relevant Federal agencies, and individuals with technical expertise on health care quality, privacy and security, and on the electronic exchange and use of health information.

"(3) CONSIDERATION.—The National Coordinator shall ensure that the relevant recommendations and comments from the National Committee on Vital and Health Statistics are considered in the development of policies.

"(d) APPLICATION OF FACA.—The Federal Advisory Committee Act (5 U.S.C. App.), other than section 14 of such Act, shall apply to the HIT Policy Committee.

"(e) PUBLICATION.—The Secretary shall provide for publication in the Federal Register and the posting on the Internet website of the Office of the National Coordinator for Health Information Technology of all policy recommendations made by the HIT Policy Committee under this section.

"SEC. 3003. HIT STANDARDS COMMITTEE.

"(a) ESTABLISHMENT.—There is established a committee to be known as the HIT Standards Committee to recommend to the National Coordinator standards, implementation specifications, and certification criteria for the electronic exchange and use of health information for purposes of adoption under section 3004, consistent with the implementation of the strategic plan described in section 3001(c)(3) and beginning with the areas listed in section 3002(b)(2)(B) in accordance with policies developed by the HIT Policy Committee.

"(b) DUTIES.—

"(1) STANDARD DEVELOPMENT.—

"(A) IN GENERAL.—The HIT Standards Committee shall recommend to the National Coordinator standards, implementation specifications, and certification criteria described in subsection (a) that have been developed, harmonized, or recognized by the HIT Standards Committee. The HIT Standards Committee shall update such recommendations and make new recommendations as appropriate, including in response to a notification sent under section 3004(b)(2). Such recommendations shall be consistent with the latest recommendations made by the HIT Policy Committee.

"(B) PILOT TESTING OF STANDARDS AND IMPLEMENTATION SPECIFICATIONS.—In the development, harmonization, or recognition of standards and implementation specifications, the HIT Standards Committee shall, as appropriate, provide for the testing of such standards and specifications by the National Institute for Standards and Technology under section 4201 of the HITECH Act.

"(C) CONSISTENCY.—The standards, implementation specifications, and certification criteria recommended under this subsection shall be consistent with the standards for information transactions and data elements adopted pursuant to section 1173 of the Social Security Act.

"(2) FORUM.—The HIT Standards Committee shall serve as a forum for the participation of a broad range of stakeholders to provide input on the development, harmonization, and recognition of standards, implementation specifications, and certification criteria necessary for the development and adoption of a nationwide health information technology infrastructure that allows for the electronic use and exchange of health information.

"(3) SCHEDULE.—Not later than 90 days after the date of the enactment of this title, the HIT Standards Committee shall develop a schedule for the assessment of policy recommendations developed by the HIT Policy Committee under section 3002. The HIT Standards Committee shall update such schedule annually. The Secretary shall publish such schedule in the Federal Register.

"(4) PUBLIC INPUT.—The HIT Standards Committee shall conduct open public meetings and develop a process to allow for public comment on the schedule described in paragraph (3) and recommendations described in this subsection. Under such process comments shall be submitted in a timely manner after the date of publication of a recommendation under this subsection.

"(c) MEMBERSHIP AND OPERATIONS.—

"(1) IN GENERAL.—The National Coordinator shall provide leadership in the establishment and operations of the HIT Standards Committee.

"(2) MEMBERSHIP.—The membership of the HIT Standards Committee shall at least reflect providers, ancillary healthcare workers, consumers, purchasers, health plans, technology vendors, researchers, relevant Federal agencies, and individuals with technical expertise on health care quality, privacy and security, and on the electronic exchange and use of health information.

"(3) CONSIDERATION.—The National Coordinator shall ensure that the relevant recommendations and comments from the National Committee on Vital and Health Statistics are considered in the development of standards.

"(4) ASSISTANCE.—For the purposes of carrying out this section, the Secretary may provide or ensure that financial assistance is provided by the HIT Standards Committee to defray in whole or in part any membership fees or dues charged by such Committee to those consumer advocacy groups and not for profit entities that work in the public interest as a part of their mission.

"(d) APPLICATION OF FACA.—The Federal Advisory Committee Act (5 U.S.C. App.), other than section 14, shall apply to the HIT Standards Committee.

"(e) PUBLICATION.—The Secretary shall provide for publication in the Federal Register and the posting on the Internet website of the Office of the National Coordinator for Health Information Technology of all recommendations made by the HIT Standards Committee under this section.

"SEC. 3004. PROCESS FOR ADOPTION OF ENDORSED RECOMMENDATIONS; ADOPTION OF INITIAL SET OF STANDARDS, IMPLEMENTATION SPECIFICATIONS, AND CERTIFICATION CRITERIA.

"(a) PROCESS FOR ADOPTION OF ENDORSED RECOMMENDATIONS.—

"(1) REVIEW OF ENDORSED STANDARDS, IMPLEMENTATION SPECIFICATIONS, AND CERTIFICATION CRITERIA.—Not later than 90 days after the date of receipt of standards, implementation specifications, or certification criteria endorsed under section 3001(c), the Secretary, in consultation with representatives of other relevant Federal agencies, shall jointly review such standards, implementation specifications, or certification criteria and shall determine whether or not to propose adoption of such standards, implementation specifications, or certification criteria.

"(2) DETERMINATION TO ADOPT STANDARDS, IMPLEMENTATION SPECIFICATIONS, AND CERTIFICATION CRITERIA.—If the Secretary determines—

"(A) to propose adoption of any grouping of such standards, implementation specifications, or certification criteria, the Secretary shall, by regulation, determine whether or not to adopt such grouping of standards, implementation specifications, or certification criteria; or

"(B) not to propose adoption of any grouping of standards, implementation specifications, or certification criteria, the Secretary shall notify the National Coordinator and the HIT Standards Committee in writing of such determination and the reasons for not proposing the adoption of such recommendation.

"(3) PUBLICATION.—The Secretary shall provide for publication in the Federal Register of all determinations made by the Secretary under paragraph (1).

"(b) ADOPTION OF INITIAL SET OF STANDARDS, IMPLEMENTATION SPECIFICATIONS, AND CERTIFICATION CRITERIA.—

"(1) IN GENERAL.—Not later than December 31, 2009, the Secretary shall, through the rulemaking process described in section 3003, adopt an initial set of standards, implementation specifications, and certification criteria for the areas required for consideration under section 3002(b)(2)(B).

"(2) APPLICATION OF CURRENT STANDARDS, IMPLEMENTATION SPECIFICATIONS, AND CERTIFICATION CRITERIA.—The standards, implementation specifications, and certification criteria adopted before the date of the enactment of this title through the process existing through the Office of the National Coordinator for Health Information Technology may be applied towards meeting the requirement of paragraph (1).

"SEC. 3005. APPLICATION AND USE OF ADOPTED STANDARDS AND IMPLEMENTATION SPECIFICATIONS BY FEDERAL AGENCIES.

"For requirements relating to the application and use by Federal agencies of the standards and implementation specifications adopted under section 3004, see section 4111 of the HITECH Act.

"SEC. 3006. VOLUNTARY APPLICATION AND USE OF ADOPTED STANDARDS AND IMPLEMENTATION SPECIFICATIONS BY PRIVATE ENTITIES.

"(a) IN GENERAL.—Except as provided under section 4112 of the HITECH Act, any standard or implementation specification adopted under section 3004 shall be voluntary with respect to private entities.

"(b) RULE OF CONSTRUCTION.—Nothing in this subtitle shall be construed to require that a private entity that enters into a contract with the Federal Government apply or use the standards and implementation specifications adopted under section 3004 with respect to activities not related to the contract.

"SEC. 3007. FEDERAL HEALTH INFORMATION TECHNOLOGY.

"(a) IN GENERAL.—The National Coordinator shall support the development, routine updating and provision of qualified EHR technology (as defined in section 3000) consistent with subsections (b) and (c) unless the Secretary determines that the needs and demands of providers are being substantially and adequately met through the marketplace.

"(b) CERTIFICATION.—In making such EHR technology publicly available, the National Coordinator shall ensure that the qualified EHR technology described in subsection (a) is certified under the program developed under section 3001(c)(3) to be in compliance with applicable standards adopted under section 3003(a).

"(c) AUTHORIZATION TO CHARGE A NOMINAL FEE.—The National Coordinator may impose a nominal fee for the adoption by a health care provider of the health infor-

mation technology system developed or approved under subsection (a) and (b). Such fee shall take into account the financial circumstances of smaller providers, low income providers, and providers located in rural or other medically underserved areas.

"(d) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to require that a private or government entity adopt or use the technology provided under this section.

"SEC. 3008. TRANSITIONS.

"(a) ONCHIT.—To the extent consistent with section 3001, all functions, personnel, assets, liabilities, and administrative actions applicable to the National Coordinator for Health Information Technology appointed under Executive Order 13335 or the Office of such National Coordinator on the date before the date of the enactment of this title shall be transferred to the National Coordinator appointed under section 3001(a) and the Office of such National Coordinator as of the date of the enactment of this title.

"(b) AHIC.—

"(1) To the extent consistent with sections 3002 and 3003, all functions, personnel, assets, and liabilities applicable to the AHIC Successor, Inc. doing business as the National eHealth Collaborative as of the day before the date of the enactment of this title shall be transferred to the HIT Policy Committee or the HIT Standards Committee, established under section 3002(a) or 3003(a), as appropriate, as of the date of the enactment of this title.

"(2) In carrying out section 3003(b)(1)(A), until recommendations are made by the HIT Policy Committee, recommendations of the HIT Standards Committee shall be consistent with the most recent recommendations made by such AHIC Successor, Inc.

"(c) RULES OF CONSTRUCTION.—

"(1) ONCHIT.—Nothing in section 3001 or subsection (a) shall be construed as requiring the creation of a new entity to the extent that the Office of the National Coordinator for Health Information Technology established pursuant to Executive Order 13335 is consistent with the provisions of section 3001.

"(2) AHIC.—Nothing in sections 3002 or 3003 or subsection (b) shall be construed as prohibiting the AHIC Successor, Inc. doing business as the National eHealth Collaborative from modifying its charter, duties, membership, and any other structure or function required to be consistent with section 3002 and 3003 in a manner that would permit the Secretary to choose to recognize such Community as the HIT Policy Committee or the HIT Standards Committee.

"SEC. 3009. RELATION TO HIPAA PRIVACY AND SECURITY LAW.

"(a) IN GENERAL.—With respect to the relation of this title to HIPAA privacy and security law:

"(1) This title may not be construed as having any effect on the authorities of the Secretary under HIPAA privacy and security law.

"(2) The purposes of this title include ensuring that the health information technology standards and implementation specifications adopted under section 3004 take into account the requirements of HIPAA privacy and security law.

"(b) DEFINITION.—For purposes of this section, the term 'HIPAA privacy and security law' means—

"(1) the provisions of part C of title XI of the Social Security Act, section 264 of the Health Insurance Portability and Accountability Act of 1996, and subtitle D of title IV of the HITECH Act; and

"(2) regulations under such provisions.

"SEC. 3010. AUTHORIZATION FOR APPROPRIATIONS.

"There is authorized to be appropriated to the Office of the National Coordinator for Health Information Technology to carry out this subtitle $250,000,000 for fiscal year 2009.".

SEC. 4102. TECHNICAL AMENDMENT.

Section 1171(5) of the Social Security Act (42 U.S.C. 1320d) is amended by striking "or C" and inserting "C, or D".

PART 2—APPLICATION AND USE OF ADOPTED HEALTH INFORMATION TECHNOLOGY STANDARDS; REPORTS

SEC. 4111. COORDINATION OF FEDERAL ACTIVITIES WITH ADOPTED STANDARDS AND IMPLEMENTATION SPECIFICATIONS.

(a) SPENDING ON HEALTH INFORMATION TECHNOLOGY SYSTEMS.—As each agency (as defined in the Executive Order issued on August 22, 2006, relating to promoting

quality and efficient health care in Federal government administered or sponsored health care programs) implements, acquires, or upgrades health information technology systems used for the direct exchange of individually identifiable health information between agencies and with non-Federal entities, it shall utilize, where available, health information technology systems and products that meet standards and implementation specifications adopted under section 3004(b) of the Public Health Service Act, as added by section 4101.

(b) FEDERAL INFORMATION COLLECTION ACTIVITIES.—With respect to a standard or implementation specification adopted under section 3004(b) of the Public Health Service Act, as added by section 4101, the President shall take measures to ensure that Federal activities involving the broad collection and submission of health information are consistent with such standard or implementation specification, respectively, within three years after the date of such adoption.

(c) APPLICATION OF DEFINITIONS.—The definitions contained in section 3000 of the Public Health Service Act, as added by section 4101, shall apply for purposes of this part.

SEC. 4112. APPLICATION TO PRIVATE ENTITIES.

Each agency (as defined in such Executive Order issued on August 22, 2006, relating to promoting quality and efficient health care in Federal government administered or sponsored health care programs) shall require in contracts or agreements with health care providers, health plans, or health insurance issuers that as each provider, plan, or issuer implements, acquires, or upgrades health information technology systems, it shall utilize, where available, health information technology systems and products that meet standards and implementation specifications adopted under section 3004(b) of the Public Health Service Act, as added by section 4101.

SEC. 4113. STUDY AND REPORTS.

(a) REPORT ON ADOPTION OF NATIONWIDE SYSTEM.—Not later than 2 years after the date of the enactment of this Act and annually thereafter, the Secretary of Health and Human Services shall submit to the appropriate committees of jurisdiction of the House of Representatives and the Senate a report that—

(1) describes the specific actions that have been taken by the Federal Government and private entities to facilitate the adoption of a nationwide system for the electronic use and exchange of health information;

(2) describes barriers to the adoption of such a nationwide system; and

(3) contains recommendations to achieve full implementation of such a nationwide system.

(b) REIMBURSEMENT INCENTIVE STUDY AND REPORT.—

(1) STUDY.—The Secretary of Health and Human Services shall carry out, or contract with a private entity to carry out, a study that examines methods to create efficient reimbursement incentives for improving health care quality in Federally qualified health centers, rural health clinics, and free clinics.

(2) REPORT.—Not later than 2 years after the date of the enactment of this Act, the Secretary of Health and Human Services shall submit to the appropriate committees of jurisdiction of the House of Representatives and the Senate a report on the study carried out under paragraph (1).

(c) AGING SERVICES TECHNOLOGY STUDY AND REPORT.—

(1) IN GENERAL.—The Secretary of Health and Human Services shall carry out, or contract with a private entity to carry out, a study of matters relating to the potential use of new aging services technology to assist seniors, individuals with disabilities, and their caregivers throughout the aging process.

(2) MATTERS TO BE STUDIED.—The study under paragraph (1) shall include—

(A) an evaluation of—

(i) methods for identifying current, emerging, and future health technology that can be used to meet the needs of seniors and individuals with disabilities and their caregivers across all aging services settings, as specified by the Secretary;

(ii) methods for fostering scientific innovation with respect to aging services technology within the business and academic communities; and

(iii) developments in aging services technology in other countries that may be applied in the United States; and

(B) identification of—

(i) barriers to innovation in aging services technology and devising strategies for removing such barriers; and

(ii) barriers to the adoption of aging services technology by health care providers and consumers and devising strategies to removing such barriers.

(3) REPORT.—Not later than 24 months after the date of the enactment of this Act, the Secretary shall submit to the appropriate committees of jurisdiction of

the House of Representatives and of the Senate a report on the study carried out under paragraph (1).

(4) DEFINITIONS.—For purposes of this subsection:

(A) AGING SERVICES TECHNOLOGY.—The term "aging services technology" means health technology that meets the health care needs of seniors, individuals with disabilities, and the caregivers of such seniors and individuals.

(B) SENIOR.—The term "senior" has such meaning as specified by the Secretary.

Subtitle B—Testing of Health Information Technology

SEC. 4201. NATIONAL INSTITUTE FOR STANDARDS AND TECHNOLOGY TESTING.

(a) PILOT TESTING OF STANDARDS AND IMPLEMENTATION SPECIFICATIONS.—In coordination with the HIT Standards Committee established under section 3003 of the Public Health Service Act, as added by section 4101, with respect to the development of standards and implementation specifications under such section, the Director of the National Institute for Standards and Technology shall test such standards and implementation specifications, as appropriate, in order to assure the efficient implementation and use of such standards and implementation specifications.

(b) VOLUNTARY TESTING PROGRAM.—In coordination with the HIT Standards Committee established under section 3003 of the Public Health Service Act, as added by section 4101, with respect to the development of standards and implementation specifications under such section, the Director of the National Institute of Standards and Technology shall support the establishment of a conformance testing infrastructure, including the development of technical test beds. The development of this conformance testing infrastructure may include a program to accredit independent, non-Federal laboratories to perform testing.

SEC. 4202. RESEARCH AND DEVELOPMENT PROGRAMS.

(a) HEALTH CARE INFORMATION ENTERPRISE INTEGRATION RESEARCH CENTERS.—

(1) IN GENERAL.—The Director of the National Institute of Standards and Technology, in consultation with the Director of the National Science Foundation and other appropriate Federal agencies, shall establish a program of assistance to institutions of higher education (or consortia thereof which may include nonprofit entities and Federal Government laboratories) to establish multidisciplinary Centers for Health Care Information Enterprise Integration.

(2) REVIEW; COMPETITION.—Grants shall be awarded under this subsection on a merit-reviewed, competitive basis.

(3) PURPOSE.—The purposes of the Centers described in paragraph (1) shall be—

(A) to generate innovative approaches to health care information enterprise integration by conducting cutting-edge, multidisciplinary research on the systems challenges to health care delivery; and

(B) the development and use of health information technologies and other complementary fields.

(4) RESEARCH AREAS.—Research areas may include—

(A) interfaces between human information and communications technology systems;

(B) voice-recognition systems;

(C) software that improves interoperability and connectivity among health information systems;

(D) software dependability in systems critical to health care delivery;

(E) measurement of the impact of information technologies on the quality and productivity of health care;

(F) health information enterprise management;

(G) health information technology security and integrity; and

(H) relevant health information technology to reduce medical errors.

(5) APPLICATIONS.—An institution of higher education (or a consortium thereof) seeking funding under this subsection shall submit an application to the Director of the National Institute of Standards and Technology at such time, in such manner, and containing such information as the Director may require. The application shall include, at a minimum, a description of—

(A) the research projects that will be undertaken by the Center established pursuant to assistance under paragraph (1) and the respective contributions of the participating entities;

(B) how the Center will promote active collaboration among scientists and engineers from different disciplines, such as information technology, biologic sciences, management, social sciences, and other appropriate disciplines;

(C) technology transfer activities to demonstrate and diffuse the research results, technologies, and knowledge; and

(D) how the Center will contribute to the education and training of researchers and other professionals in fields relevant to health information enterprise integration.

(b) NATIONAL INFORMATION TECHNOLOGY RESEARCH AND DEVELOPMENT PROGRAM.—The National High-Performance Computing Program established by section 101 of the High-Performance Computing Act of 1991 (15 U.S.C. 5511) shall coordinate Federal research and development programs related to the development and deployment of health information technology, including activities related to—

(1) computer infrastructure;

(2) data security;

(3) development of large-scale, distributed, reliable computing systems;

(4) wired, wireless, and hybrid high-speed networking;

(5) development of software and software-intensive systems;

(6) human-computer interaction and information management technologies; and

(7) the social and economic implications of information technology.

Subtitle C—Incentives for the Use of Health Information Technology

PART I—GRANTS AND LOANS FUNDING

SEC. 4301. GRANT, LOAN, AND DEMONSTRATION PROGRAMS.

Title XXX of the Public Health Service Act, as added by section 4101, is amended by adding at the end the following new subtitle:

"Subtitle B—Incentives for the Use of Health Information Technology

"SEC. 3011. IMMEDIATE FUNDING TO STRENGTHEN THE HEALTH INFORMATION TECHNOLOGY INFRASTRUCTURE.

"(a) IN GENERAL.—The Secretary of Health and Human Services shall, using amounts appropriated under section 3018, invest in the infrastructure necessary to allow for and promote the electronic exchange and use of health information for each individual in the United States consistent with the goals outlined in the strategic plan developed by the National Coordinator (and as available) under section 3001. To the greatest extent practicable, the Secretary shall ensure that any funds so appropriated shall be used for the acquisition of health information technology that meets standards and certification criteria adopted before the date of the enactment of this title until such date as the standards are adopted under section 3004. The Secretary shall invest funds through the different agencies with expertise in such goals, such as the Office of the National Coordinator for Health Information Technology, the Health Resources and Services Administration, the Agency for Healthcare Research and Quality, the Centers of Medicare & Medicaid Services, the Centers for Disease Control and Prevention, and the Indian Health Service to support the following:

"(1) Health information technology architecture that will support the nationwide electronic exchange and use of health information in a secure, private, and accurate manner, including connecting health information exchanges, and which may include updating and implementing the infrastructure necessary within different agencies of the Department of Health and Human Services to support the electronic use and exchange of health information.

"(2) Development and adoption of appropriate certified electronic health records for categories of providers not eligible for support under title XVIII or XIX of the Social Security Act for the adoption of such records.

"(3) Training on and dissemination of information on best practices to integrate health information technology, including electronic health records, into a provider's delivery of care, consistent with best practices learned from the Health Information Technology Research Center developed under section 302,

including community health centers receiving assistance under section 330 of the Public Health Service Act, covered entities under section 340B of such Act, and providers participating in one or more of the programs under titles XVIII, XIX, and XXI of the Social Security Act (relating to Medicare, Medicaid, and the State Children's Health Insurance Program).

"(4) Infrastructure and tools for the promotion of telemedicine, including coordination among Federal agencies in the promotion of telemedicine.

"(5) Promotion of the interoperability of clinical data repositories or registries.

"(6) Promotion of technologies and best practices that enhance the protection of health information by all holders of individually identifiable health information.

"(7) Improve and expand the use of health information technology by public health departments.

"(8) Provide $300 million to support regional or sub-national efforts towards health information exchange.

"(b) COORDINATION.—The Secretary shall ensure funds under this section are used in a coordinated manner with other health information promotion activities.

"(c) ADDITIONAL USE OF FUNDS.—In addition to using funds as provided in subsection (a), the Secretary may use amounts appropriated under section 3018 to carry out activities that are provided for under laws in effect on the date of the enactment of this title.

"SEC. 3012. HEALTH INFORMATION TECHNOLOGY IMPLEMENTATION ASSISTANCE.

"(a) HEALTH INFORMATION TECHNOLOGY EXTENSION PROGRAM.—To assist health care providers to adopt, implement, and effectively use certified EHR technology that allows for the electronic exchange and use of health information, the Secretary, acting through the Office of the National Coordinator, shall establish a health information technology extension program to provide health information technology assistance services to be carried out through the Department of Health and Human Services. The National Coordinator shall consult with other Federal agencies with demonstrated experience and expertise in information technology services, such as the National Institute of Standards and Technology, in developing and implementing this program.

"(b) HEALTH INFORMATION TECHNOLOGY RESEARCH CENTER.—

"(1) IN GENERAL.—The Secretary shall create a Health Information Technology Research Center (in this section referred to as the 'Center') to provide technical assistance and develop or recognize best practices to support and accelerate efforts to adopt, implement, and effectively utilize health information technology that allows for the electronic exchange and use of information in compliance with standards, implementation specifications, and certification criteria adopted under section 3004(b).

"(2) INPUT.—The Center shall incorporate input from—

"(A) other Federal agencies with demonstrated experience and expertise in information technology services such as the National Institute of Standards and Technology;

"(B) users of health information technology, such as providers and their support and clerical staff and others involved in the care and care coordination of patients, from the health care and health information technology industry; and

"(C) others as appropriate.

"(3) PURPOSES.—The purposes of the Center are to—

"(A) provide a forum for the exchange of knowledge and experience;

"(B) accelerate the transfer of lessons learned from existing public and private sector initiatives, including those currently receiving Federal financial support;

"(C) assemble, analyze, and widely disseminate evidence and experience related to the adoption, implementation, and effective use of health information technology that allows for the electronic exchange and use of information including through the regional centers described in subsection (c);

"(D) provide technical assistance for the establishment and evaluation of regional and local health information networks to facilitate the electronic exchange of information across health care settings and improve the quality of health care;

"(E) provide technical assistance for the development and dissemination of solutions to barriers to the exchange of electronic health information; and

"(F) learn about effective strategies to adopt and utilize health information technology in medically underserved communities.

"(c) HEALTH INFORMATION TECHNOLOGY REGIONAL EXTENSION CENTERS.—

"(1) IN GENERAL.—The Secretary shall provide assistance for the creation and support of regional centers (in this subsection referred to as 'regional centers') to provide technical assistance and disseminate best practices and other information learned from the Center to support and accelerate efforts to adopt, implement, and effectively utilize health information technology that allows for the electronic exchange and use of information in compliance with standards, implementation specifications, and certification criteria adopted under section 3004. Activities conducted under this subsection shall be consistent with the strategic plan developed by the National Coordinator, (and, as available) under section 3001.

"(2) AFFILIATION.—Regional centers shall be affiliated with any US-based nonprofit institution or organization, or group thereof, that applies and is awarded financial assistance under this section. Individual awards shall be decided on the basis of merit.

"(3) OBJECTIVE.—The objective of the regional centers is to enhance and promote the adoption of health information technology through—

"(A) assistance with the implementation, effective use, upgrading, and ongoing maintenance of health information technology, including electronic health records, to healthcare providers nationwide;

"(B) broad participation of individuals from industry, universities, and State governments;

"(C) active dissemination of best practices and research on the implementation, effective use, upgrading, and ongoing maintenance of health information technology, including electronic health records, to health care providers in order to improve the quality of healthcare and protect the privacy and security of health information;

"(D) participation, to the extent practicable, in health information exchanges; and

"(E) utilization, when appropriate, of the expertise and capability that exists in federal agencies other than the Department; and

"(F) integration of health information technology, including electronic health records, into the initial and ongoing training of health professionals and others in the healthcare industry that would be instrumental to improving the quality of healthcare through the smooth and accurate electronic use and exchange of health information.

"(4) REGIONAL ASSISTANCE.—Each regional center shall aim to provide assistance and education to all providers in a region, but shall prioritize any direct assistance first to the following:

"(A) Public or not-for-profit hospitals or critical access hospitals.

"(B) Federally qualified health centers (as defined in section 1861(aa)(4) of the Social Security Act).

"(C) Entities that are located in rural and other areas that serve uninsured, underinsured, and medically underserved individuals (regardless of whether such area is urban or rural).

"(D) Individual or small group practices (or a consortium thereof) that are primarily focused on primary care.

"(5) FINANCIAL SUPPORT.—The Secretary may provide financial support to any regional center created under this subsection for a period not to exceed four years. The Secretary may not provide more than 50 percent of the capital and annual operating and maintenance funds required to create and maintain such a center, except in an instance of national economic conditions which would render this cost-share requirement detrimental to the program and upon notification to Congress as to the justification to waive the cost-share requirement.

"(6) NOTICE OF PROGRAM DESCRIPTION AND AVAILABILITY OF FUNDS.—The Secretary shall publish in the Federal Register, not later than 90 days after the date of the enactment of this Act, a draft description of the program for establishing regional centers under this subsection. Such description shall include the following:

"(A) A detailed explanation of the program and the programs goals.

"(B) Procedures to be followed by the applicants.

"(C) Criteria for determining qualified applicants.

"(D) Maximum support levels expected to be available to centers under the program.

"(7) APPLICATION REVIEW.—The Secretary shall subject each application under this subsection to merit review. In making a decision whether to approve such application and provide financial support, the Secretary shall consider at a minimum the merits of the application, including those portions of the application regarding—

"(A) the ability of the applicant to provide assistance under this subsection and utilization of health information technology appropriate to the needs of particular categories of health care providers;

"(B) the types of service to be provided to health care providers;

"(C) geographical diversity and extent of service area; and

"(D) the percentage of funding and amount of in-kind commitment from other sources.

"(8) BIENNIAL EVALUATION.—Each regional center which receives financial assistance under this subsection shall be evaluated biennially by an evaluation panel appointed by the Secretary. Each evaluation panel shall be composed of private experts, none of whom shall be connected with the center involved, and of Federal officials. Each evaluation panel shall measure the involved center's performance against the objective specified in paragraph (3). The Secretary shall not continue to provide funding to a regional center unless its evaluation is overall positive.

"(9) CONTINUING SUPPORT.—After the second year of assistance under this subsection a regional center may receive additional support under this subsection if it has received positive evaluations and a finding by the Secretary that continuation of Federal funding to the center was in the best interest of provision of health information technology extension services.

"SEC. 3013. STATE GRANTS TO PROMOTE HEALTH INFORMATION TECHNOLOGY.

"(a) IN GENERAL.—The Secretary, acting through the National Coordinator, shall establish a program in accordance with this section to facilitate and expand the electronic movement and use of health information among organizations according to nationally recognized standards.

"(b) PLANNING GRANTS.—The Secretary may award a grant to a State or qualified State-designated entity (as described in subsection (d)) that submits an application to the Secretary at such time, in such manner, and containing such information as the Secretary may specify, for the purpose of planning activities described in subsection (b).

"(c) IMPLEMENTATION GRANTS.—The Secretary may award a grant to a State or qualified State designated entity that—

"(1) has submitted, and the Secretary has approved, a plan described in subsection (c) (regardless of whether such plan was prepared using amounts awarded under paragraph (1)); and

"(2) submits an application at such time, in such manner, and containing such information as the Secretary may specify.

"(d) USE OF FUNDS.—Amounts received under a grant under subsection (a)(3) shall be used to conduct activities to facilitate and expand the electronic movement and use of health information among organizations according to nationally recognized standards through activities that include—

"(1) enhancing broad and varied participation in the authorized and secure nationwide electronic use and exchange of health information;

"(2) identifying State or local resources available towards a nationwide effort to promote health information technology;

"(3) complementing other Federal grants, programs, and efforts towards the promotion of health information technology;

"(4) providing technical assistance for the development and dissemination of solutions to barriers to the exchange of electronic health information;

"(5) promoting effective strategies to adopt and utilize health information technology in medically underserved communities;

"(6) assisting patients in utilizing health information technology;

"(7) encouraging clinicians to work with Health Information Technology Regional Extension Centers as described in section 3012, to the extent they are available and valuable;

"(8) supporting public health agencies' authorized use of and access to electronic health information;

"(9) promoting the use of electronic health records for quality improvement including through quality measures reporting; and

"(10) such other activities as the Secretary may specify.

"(e) PLAN.—

"(1) IN GENERAL.—A plan described in this subsection is a plan that describes the activities to be carried out by a State or by the qualified State-designated entity within such State to facilitate and expand the electronic movement and use of health information among organizations according to nationally recognized standards and implementation specifications.

"(2) REQUIRED ELEMENTS.—A plan described in paragraph (1) shall—

"(A) be pursued in the public interest;

"(B) be consistent with the strategic plan developed by the National Coordinator, (and, as available) under section 3001;

"(C) include a description of the ways the State or qualified State-designated entity will carry out the activities described in subsection (b); and

"(D) contain such elements as the Secretary may require.

"(f) QUALIFIED STATE-DESIGNATED ENTITY.—For purposes of this section, to be a qualified State-designated entity, with respect to a State, an entity shall—

"(1) be designated by the State as eligible to receive awards under this section;

"(2) be a not-for-profit entity with broad stakeholder representation on its governing board;

"(3) demonstrate that one of its principal goals is to use information technology to improve health care quality and efficiency through the authorized and secure electronic exchange and use of health information;

"(4) adopt nondiscrimination and conflict of interest policies that demonstrate a commitment to open, fair, and nondiscriminatory participation by stakeholders; and

"(5) conform to such other requirements as the Secretary may establish.

"(g) REQUIRED CONSULTATION.—In carrying out activities described in subsections (a)(2) and (a)(3), a State or qualified State-designated entity shall consult with and consider the recommendations of—

"(1) health care providers (including providers that provide services to low income and underserved populations);

"(2) health plans;

"(3) patient or consumer organizations that represent the population to be served;

"(4) health information technology vendors;

"(5) health care purchasers and employers;

"(6) public health agencies;

"(7) health professions schools, universities and colleges;

"(8) clinical researchers;

"(9) other users of health information technology such as the support and clerical staff of providers and others involved in the care and care coordination of patients; and

"(10) such other entities, as may be determined appropriate by the Secretary.

"(h) CONTINUOUS IMPROVEMENT.—The Secretary shall annually evaluate the activities conducted under this section and shall, in awarding grants under this section, implement the lessons learned from such evaluation in a manner so that awards made subsequent to each such evaluation are made in a manner that, in the determination of the Secretary, will lead towards the greatest improvement in quality of care, decrease in costs, and the most effective authorized and secure electronic exchange of health information.

"(i) REQUIRED MATCH.—

"(1) IN GENERAL.—For a fiscal year (beginning with fiscal year 2011), the Secretary may not make a grant under subsection (a) to a State unless the State agrees to make available non-Federal contributions (which may include in-kind contributions) toward the costs of a grant awarded under subsection (a)(3) in an amount equal to—

"(A) for fiscal year 2011, not less than $1 for each $10 of Federal funds provided under the grant;

"(B) for fiscal year 2012, not less than $1 for each $7 of Federal funds provided under the grant; and

"(C) for fiscal year 2013 and each subsequent fiscal year, not less than $1 for each $3 of Federal funds provided under the grant.

"(2) AUTHORITY TO REQUIRE STATE MATCH FOR FISCAL YEARS BEFORE FISCAL YEAR 2011.—For any fiscal year during the grant program under this section before fiscal year 2011, the Secretary may determine the extent to which there shall be required a non-Federal contribution from a State receiving a grant under this section.

"SEC. 3014. COMPETITIVE GRANTS TO STATES AND INDIAN TRIBES FOR THE DEVELOPMENT OF LOAN PROGRAMS TO FACILITATE THE WIDESPREAD ADOPTION OF CERTIFIED EHR TECHNOLOGY.

"(a) IN GENERAL.—The National Coordinator may award competitive grants to eligible entities for the establishment of programs for loans to health care providers to conduct the activities described in subsection (e).

"(b) ELIGIBLE ENTITY DEFINED.—For purposes of this subsection, the term 'eligible entity' means a State or Indian tribe (as defined in the Indian Self-Determination and Education Assistance Act) that—

"(1) submits to the National Coordinator an application at such time, in such manner, and containing such information as the National Coordinator may require;

"(2) submits to the National Coordinator a strategic plan in accordance with subsection (d) and provides to the National Coordinator assurances that the entity will update such plan annually in accordance with such subsection;

"(3) provides assurances to the National Coordinator that the entity will establish a Loan Fund in accordance with subsection (c);

"(4) provides assurances to the National Coordinator that the entity will not provide a loan from the Loan Fund to a health care provider unless the provider agrees to—

"(A) submit reports on quality measures adopted by the Federal Government (by not later than 90 days after the date on which such measures are adopted), to—

"(i) the Director of the Centers for Medicare & Medicaid Services (or his or her designee), in the case of an entity participating in the Medicare program under title XVIII of the Social Security Act or the Medicaid program under title XIX of such Act; or

"(ii) the Secretary in the case of other entities;

"(B) demonstrate to the satisfaction of the Secretary (through criteria established by the Secretary) that any certified EHR technology purchased, improved, or otherwise financially supported under a loan under this section is used to exchange health information in a manner that, in accordance with law and standards (as adopted under section 3005) applicable to the exchange of information, improves the quality of health care, such as promoting care coordination; and

"(C) comply with such other requirements as the entity or the Secretary may require;

"(D) include a plan on how health care providers involved intend to maintain and support the certified EHR technology over time;

"(E) include a plan on how the health care providers involved intend to maintain and support the certified EHR technology that would be purchased with such loan, including the type of resources expected to be involved and any such other information as the State or Indian Tribe, respectively, may require; and

"(5) agrees to provide matching funds in accordance with subsection (i).

"(c) ESTABLISHMENT OF FUND.—For purposes of subsection (b)(3), an eligible entity shall establish a certified EHR technology loan fund (referred to in this subsection as a 'Loan Fund') and comply with the other requirements contained in this section. A grant to an eligible entity under this section shall be deposited in the Loan Fund established by the eligible entity. No funds authorized by other provisions of this title to be used for other purposes specified in this title shall be deposited in any Loan Fund.

"(d) STRATEGIC PLAN.—

"(1) IN GENERAL.—For purposes of subsection (b)(2), a strategic plan of an eligible entity under this subsection shall identify the intended uses of amounts available to the Loan Fund of such entity.

"(2) CONTENTS.—A strategic plan under paragraph (1), with respect to a Loan Fund of an eligible entity, shall include for a year the following:

"(A) A list of the projects to be assisted through the Loan Fund during such year.

"(B) A description of the criteria and methods established for the distribution of funds from the Loan Fund during the year.

"(C) A description of the financial status of the Loan Fund as of the date of submission of the plan.

"(D) The short-term and long-term goals of the Loan Fund.

"(e) USE OF FUNDS.—Amounts deposited in a Loan Fund, including loan repayments and interest earned on such amounts, shall be used only for awarding loans or loan guarantees, making reimbursements described in subsection (g)(4)(A), or as a source of reserve and security for leveraged loans, the proceeds of which are deposited in the Loan Fund established under subsection (a). Loans under this section may be used by a health care provider to—

"(1) facilitate the purchase of certified EHR technology;

"(2) enhance the utilization of certified EHR technology;

"(3) train personnel in the use of such technology; or

"(4) improve the secure electronic exchange of health information.

"(f) TYPES OF ASSISTANCE.—Except as otherwise limited by applicable State law, amounts deposited into a Loan Fund under this subsection may only be used for the following:

"(1) To award loans that comply with the following:

"(A) The interest rate for each loan shall not exceed the market interest rate.

"(B) The principal and interest payments on each loan shall commence not later than 1 year after the date the loan was awarded, and each loan shall be fully amortized not later than 10 years after the date of the loan.

"(C) The Loan Fund shall be credited with all payments of principal and interest on each loan awarded from the Loan Fund.

"(2) To guarantee, or purchase insurance for, a local obligation (all of the proceeds of which finance a project eligible for assistance under this subsection) if the guarantee or purchase would improve credit market access or reduce the interest rate applicable to the obligation involved.

"(3) As a source of revenue or security for the payment of principal and interest on revenue or general obligation bonds issued by the eligible entity if the proceeds of the sale of the bonds will be deposited into the Loan Fund.

"(4) To earn interest on the amounts deposited into the Loan Fund.

"(5) To make reimbursements described in subsection (g)(4)(A).

"(g) ADMINISTRATION OF LOAN FUNDS.—

"(1) COMBINED FINANCIAL ADMINISTRATION.—An eligible entity may (as a convenience and to avoid unnecessary administrative costs) combine, in accordance with applicable State law, the financial administration of a Loan Fund established under this subsection with the financial administration of any other revolving fund established by the entity if otherwise not prohibited by the law under which the Loan Fund was established.

"(2) COST OF ADMINISTERING FUND.—Each eligible entity may annually use not to exceed 4 percent of the funds provided to the entity under a grant under this subsection to pay the reasonable costs of the administration of the programs under this section, including the recovery of reasonable costs expended to establish a Loan Fund which are incurred after the date of the enactment of this title.

"(3) GUIDANCE AND REGULATIONS.—The National Coordinator shall publish guidance and promulgate regulations as may be necessary to carry out the provisions of this section, including—

"(A) provisions to ensure that each eligible entity commits and expends funds allotted to the entity under this subsection as efficiently as possible in accordance with this title and applicable State laws; and

"(B) guidance to prevent waste, fraud, and abuse.

"(4) PRIVATE SECTOR CONTRIBUTIONS.—

"(A) IN GENERAL.—A Loan Fund established under this subsection may accept contributions from private sector entities, except that such entities may not specify the recipient or recipients of any loan issued under this subsection. An eligible entity may agree to reimburse a private sector entity for any contribution made under this subparagraph, except that the amount of such reimbursement may not be greater than the principal amount of the contribution made.

"(B) AVAILABILITY OF INFORMATION.—An eligible entity shall make publicly available the identity of, and amount contributed by, any private sector entity under subparagraph (A) and may issue letters of commendation or make other awards (that have no financial value) to any such entity.

"(h) MATCHING REQUIREMENTS.—

"(1) IN GENERAL.—The National Coordinator may not make a grant under subsection (a) to an eligible entity unless the entity agrees to make available (directly or through donations from public or private entities) non-Federal contributions in cash to the costs of carrying out the activities for which the grant is awarded in an amount equal to not less than $1 for each $5 of Federal funds provided under the grant.

"(2) DETERMINATION OF AMOUNT OF NON-FEDERAL CONTRIBUTION.—In determining the amount of non-Federal contributions that an eligible entity has provided pursuant to subparagraph (A), the National Coordinator may not include any amounts provided to the entity by the Federal Government.

"(i) EFFECTIVE DATE.—The Secretary may not make an award under this section prior to January 1, 2010.

"SEC. 3015. DEMONSTRATION PROGRAM TO INTEGRATE INFORMATION TECHNOLOGY INTO CLINICAL EDUCATION.

"(a) IN GENERAL.—The Secretary may award grants under this section to carry out demonstration projects to develop academic curricula integrating certified EHR technology in the clinical education of health professionals. Such awards shall be made on a competitive basis and pursuant to peer review.

"(b) ELIGIBILITY.—To be eligible to receive a grant under subsection (a), an entity shall—

"(1) submit to the Secretary an application at such time, in such manner, and containing such information as the Secretary may require;

"(2) submit to the Secretary a strategic plan for integrating certified EHR technology in the clinical education of health professionals to reduce medical errors and enhance health care quality;

"(3) be—

"(A) a school of medicine, osteopathic medicine, dentistry, or pharmacy, a graduate program in behavioral or mental health, or any other graduate health professions school;

"(B) a graduate school of nursing or physician assistant studies;

"(C) a consortium of two or more schools described in subparagraph (A) or (B); or

"(D) an institution with a graduate medical education program in medicine, osteopathic medicine, dentistry, pharmacy, nursing, or physician assistance studies.

"(4) provide for the collection of data regarding the effectiveness of the demonstration project to be funded under the grant in improving the safety of patients, the efficiency of health care delivery, and in increasing the likelihood that graduates of the grantee will adopt and incorporate certified EHR technology, in the delivery of health care services; and

"(5) provide matching funds in accordance with subsection (d).

"(c) USE OF FUNDS.—

"(1) IN GENERAL.—With respect to a grant under subsection (a), an eligible entity shall—

"(A) use grant funds in collaboration with 2 or more disciplines; and

"(B) use grant funds to integrate certified EHR technology into community-based clinical education.

"(2) LIMITATION.—An eligible entity shall not use amounts received under a grant under subsection (a) to purchase hardware, software, or services.

"(d) FINANCIAL SUPPORT.—The Secretary may not provide more than 50 percent of the costs of any activity for which assistance is provided under subsection (a), except in an instance of national economic conditions which would render the cost-share requirement under this subsection detrimental to the program and upon notification to Congress as to the justification to waive the cost-share requirement.

"(e) EVALUATION.—The Secretary shall take such action as may be necessary to evaluate the projects funded under this section and publish, make available, and disseminate the results of such evaluations on as wide a basis as is practicable.

"(f) REPORTS.—Not later than 1 year after the date of enactment of this title, and annually thereafter, the Secretary shall submit to the Committee on Health, Education, Labor, and Pensions and the Committee on Finance of the Senate, and the Committee on Energy and Commerce of the House of Representatives a report that—

"(1) describes the specific projects established under this section; and

"(2) contains recommendations for Congress based on the evaluation conducted under subsection (e).

"SEC. 3016. INFORMATION TECHNOLOGY PROFESSIONALS ON HEALTH CARE.

"(a) IN GENERAL.—The Secretary, in consultation with the Director of the National Science Foundation, shall provide assistance to institutions of higher education (or consortia thereof) to establish or expand medical health informatics education programs, including certification, undergraduate, and masters degree programs, for both health care and information technology students to ensure the rapid and effective utilization and development of health information technologies (in the United States health care infrastructure).

"(b) ACTIVITIES.—Activities for which assistance may be provided under subsection (a) may include the following:

"(1) Developing and revising curricula in medical health informatics and related disciplines.

"(2) Recruiting and retaining students to the program involved.

"(3) Acquiring equipment necessary for student instruction in these programs, including the installation of testbed networks for student use.

"(4) Establishing or enhancing bridge programs in the health informatics fields between community colleges and universities.

"(c) PRIORITY.—In providing assistance under subsection (a), the Secretary shall give preference to the following:

"(1) Existing education and training programs.

"(2) Programs designed to be completed in less than six months.

"(d) FINANCIAL SUPPORT.—The Secretary may not provide more than 50 percent of the costs of any activity for which assistance is provided under subsection (a), except in an instance of national economic conditions which would render the cost-share requirement under this subsection detrimental to the program and upon notification to Congress as to the justification to waive the cost-share requirement.

"SEC. 3017. GENERAL GRANT AND LOAN PROVISIONS.

"(a) REPORTS.—The Secretary may require that an entity receiving assistance under this title shall submit to the Secretary, not later than the date that is 1 year after the date of receipt of such assistance, a report that includes—

"(1) an analysis of the effectiveness of the activities for which the entity receives such assistance, as compared to the goals for such activities; and

"(2) an analysis of the impact of the project on health care quality and safety.

"(b) REQUIREMENT TO IMPROVE QUALITY OF CARE AND DECREASE IN COSTS.—The National Coordinator shall annually evaluate the activities conducted under this title and shall, in awarding grants, implement the lessons learned from such evaluation in a manner so that awards made subsequent to each such evaluation are made in a manner that, in the determination of the National Coordinator, will result in the greatest improvement in the quality and efficiency of health care.

"SEC. 3018. AUTHORIZATION FOR APPROPRIATIONS.

"For the purposes of carrying out this subtitle, there is authorized to be appropriated such sums as may be necessary for each of the fiscal years 2009 through 2013. Amounts so appropriated shall remain available until expended.".

PART II—MEDICARE PROGRAM

SEC. 4311. INCENTIVES FOR ELIGIBLE PROFESSIONALS.

(a) INCENTIVE PAYMENTS.—Section 1848 of the Social Security Act (42 U.S.C. 1395w–4) is amended by adding at the end the following new subsection:

"(o) INCENTIVES FOR ADOPTION AND MEANINGFUL USE OF CERTIFIED EHR TECHNOLOGY.—

"(1) INCENTIVE PAYMENTS.—

"(A) IN GENERAL.—Subject to the succeeding subparagraphs of this paragraph, with respect to covered professional services furnished by an eligible professional during a payment year (as defined in subparagraph (E)), if the eligible professional is a meaningful EHR user (as determined under paragraph (2)) for the reporting period with respect to such year, in addition to the amount otherwise paid under this part, there also shall be paid to the eligible professional (or to an employer or facility in the cases described in clause (A) of section 1842(b)(6)), from the Federal Supplementary Medical Insurance Trust Fund established under section 1841 an amount equal to 75 percent of the Secretary's estimate (based on claims submitted not later than 2 months after the end of the payment year) of the allowed charges under this part for all such covered professional services furnished by the eligible professional during such year.

"(B) LIMITATIONS ON AMOUNTS OF INCENTIVE PAYMENTS.—

"(i) IN GENERAL.—In no case shall the amount of the incentive payment provided under this paragraph for an eligible professional for a payment year exceed the applicable amount specified under this subparagraph with respect to such eligible professional and such year.

"(ii) AMOUNT.—Subject to clause (iii), the applicable amount specified in this subparagraph for an eligible professional is as follows:

"(I) For the first payment year for such professional, $15,000.

"(II) For the second payment year for such professional, $12,000.

"(III) For the third payment year for such professional, $8,000.

"(IV) For the fourth payment year for such professional, $4,000.

"(V) For the fifth payment year for such professional, $2,000.

"(VI) For any succeeding payment year for such professional, $0.

"(iii) PHASE DOWN FOR ELIGIBLE PROFESSIONALS FIRST ADOPTING EHR AFTER 2013.—If the first payment year for an eligible professional is after 2013, then the amount specified in this subparagraph for a payment year for such professional is the same as the amount specified in clause (ii) for such payment year for an eligible professional whose first payment year is 2013. If the first payment year for an eligible professional is after 2015 then the applicable amount specified in this subparagraph for such professional for such year and any subsequent year shall be $0.

"(C) NON-APPLICATION TO HOSPITAL-BASED ELIGIBLE PROFESSIONALS.—

"(i) IN GENERAL.—No incentive payment may be made under this paragraph in the case of a hospital-based eligible professional.

"(ii) HOSPITAL-BASED ELIGIBLE PROFESSIONAL.—For purposes of clause (i), the term 'hospital-based eligible professional' means, with respect to covered professional services furnished by an eligible professional during the reporting period for a payment year, an eligible professional, such as a pathologist, anesthesiologist, or emergency physician, who furnishes substantially all of such services in a hospital setting (whether inpatient or outpatient) and through the use of the facilities and equipment, including computer equipment, of the hospital.

"(D) PAYMENT.—

"(i) FORM OF PAYMENT.—The payment under this paragraph may be in the form of a single consolidated payment or in the form of such periodic installments as the Secretary may specify.

"(ii) COORDINATION OF APPLICATION OF LIMITATION FOR PROFESSIONALS IN DIFFERENT PRACTICES.—In the case of an eligible professional furnishing covered professional services in more than one practice (as specified by the Secretary), the Secretary shall establish rules to coordinate the incentive payments, including the application of the limitation on amounts of such incentive payments under this paragraph, among such practices.

"(iii) COORDINATION WITH MEDICAID.—The Secretary shall seek, to the maximum extent practicable, to avoid duplicative requirements from Federal and State Governments to demonstrate meaningful use of certified EHR technology under this title and title XIX. In doing so, the Secretary may deem satisfaction of State requirements for such meaningful use for a payment year under title XIX to be sufficient to qualify as meaningful use under this subsection and subsection (a)(7) and vice versa. The Secretary may also adjust the reporting periods under such title and such subsections in order to carry out this clause.

"(E) PAYMENT YEAR DEFINED.—

"(i) IN GENERAL.—For purposes of this subsection, the term 'payment year' means a year beginning with 2011.

"(ii) FIRST, SECOND, ETC. PAYMENT YEAR.—The term 'first payment year' means, with respect to covered professional services furnished by an eligible professional, the first year for which an incentive payment is made for such services under this subsection. The terms 'second payment year', 'third payment year', 'fourth payment year', and 'fifth payment year' mean, with respect to covered professional services furnished by such eligible professional, each successive year immediately following the first payment year for such professional.

"(2) MEANINGFUL EHR USER.—

"(A) IN GENERAL.—For purposes of paragraph (1), an eligible professional shall be treated as a meaningful EHR user for a reporting period for a payment year (or, for purposes of subsection (a)(7), for a reporting period under such subsection for a year) if each of the following requirements is met:

"(i) MEANINGFUL USE OF CERTIFIED EHR TECHNOLOGY.—The eligible professional demonstrates to the satisfaction of the Secretary, in accordance with subparagraph (C)(i), that during such period the professional is using certified EHR technology in a meaningful manner, which shall include the use of electronic prescribing as determined to be appropriate by the Secretary.

"(ii) INFORMATION EXCHANGE.—The eligible professional demonstrates to the satisfaction of the Secretary, in accordance with subparagraph (C)(i), 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.

"(iii) REPORTING ON MEASURES USING EHR.—Subject to subparagraph (B)(ii) and using such certified EHR technology, the eligible professional submits information for such period, in a form and manner specified by the Secretary, on such clinical quality measures and such other measures as selected by the Secretary under subparagraph (B)(i).

The Secretary may provide for the use of alternative means for meeting the requirements of clauses (i), (ii), and (iii) in the case of an eligible professional furnishing covered professional services in a group practice (as defined by the Secretary). The Secretary shall seek to improve the use of elec-

tronic health records and health care quality over time by requiring more stringent measures of meaningful use selected under this paragraph.

"(B) REPORTING ON MEASURES.—

"(i) SELECTION.—The Secretary shall select measures for purposes of subparagraph (A)(iii) but only consistent with the following:

"(I) The Secretary shall provide preference to clinical quality measures that have been endorsed by the entity with a contract with the Secretary under section 1890(a).

"(II) Prior to any measure being selected under this subparagraph, the Secretary shall publish in the Federal Register such measure and provide for a period of public comment on such measure.

"(ii) LIMITATION.—The Secretary may not require the electronic reporting of information on clinical quality measures under subparagraph (A)(iii) unless the Secretary has the capacity to accept the information electronically, which may be on a pilot basis.

"(iii) COORDINATION OF REPORTING OF INFORMATION.—In selecting such measures, and in establishing the form and manner for reporting measures under subparagraph (A)(iii), the Secretary shall seek to avoid redundant or duplicative reporting otherwise required, including reporting under subsection (k)(2)(C).

"(C) DEMONSTRATION OF MEANINGFUL USE OF CERTIFIED EHR TECHNOLOGY AND INFORMATION EXCHANGE.—

"(i) IN GENERAL.—A professional may satisfy the demonstration requirement of clauses (i) and (ii) of subparagraph (A) through means specified by the Secretary, which may include—

"(I) an attestation;

"(II) the submission of claims with appropriate coding (such as a code indicating that a patient encounter was documented using certified EHR technology);

"(III) a survey response;

"(IV) reporting under subparagraph (A)(iii); and

"(V) other means specified by the Secretary.

"(ii) USE OF PART D DATA.—Notwithstanding sections 1860D–15(d)(2)(B) and 1860D–15(f)(2), the Secretary may use data regarding drug claims submitted for purposes of section 1860D–15 that are necessary for purposes of subparagraph (A).

"(3) APPLICATION.—

"(A) PHYSICIAN REPORTING SYSTEM RULES.—Paragraphs (5), (6), and (8) of subsection (k) shall apply for purposes of this subsection in the same manner as they apply for purposes of such subsection.

"(B) COORDINATION WITH OTHER PAYMENTS.—The provisions of this subsection shall not be taken into account in applying the provisions of subsection (m) of this section and of section 1833(m) and any payment under such provisions shall not be taken into account in computing allowable charges under this subsection.

"(C) LIMITATIONS ON REVIEW.—There shall be no administrative or judicial review under section 1869, section 1878, or otherwise of the determination of any incentive payment under this subsection and the payment adjustment under subsection (a)(7), including the determination of a meaningful EHR user under paragraph (2), a limitation under paragraph (1)(B), and the exception under subsection (a)(7)(B).

"(D) POSTING ON WEBSITE.—The Secretary shall post on the Internet website of the Centers for Medicare & Medicaid Services, in an easily understandable format, a list of the names, business addresses, and business phone numbers of the eligible professionals who are meaningful EHR users and, as determined appropriate by the Secretary, of group practices receiving incentive payments under paragraph (1).

"(4) CERTIFIED EHR TECHNOLOGY DEFINED.—For purposes of this section, the term 'certified EHR technology' means a qualified electronic health record (as defined in 3000(13) of the Public Health Service Act) that is certified pursuant to section 3001(c)(5) of such Act as meeting standards adopted under section 3004 of such Act that are applicable to the type of record involved (as determined by the Secretary, such as an ambulatory electronic health record for office-based physicians or an inpatient hospital electronic health record for hospitals).

"(5) DEFINITIONS.—For purposes of this subsection:

"(A) COVERED PROFESSIONAL SERVICES.—The term 'covered professional services' has the meaning given such term in subsection (k)(3).

"(B) ELIGIBLE PROFESSIONAL.—The term 'eligible professional' means a physician, as defined in section 1861(r).

"(C) REPORTING PERIOD.—The term 'reporting period' means any period (or periods), with respect to a payment year, as specified by the Secretary.".

(b) INCENTIVE PAYMENT ADJUSTMENT.—Section 1848(a) of the Social Security Act (42 U.S.C. 1395w–4(a)) is amended by adding at the end the following new paragraph:

"(7) INCENTIVES FOR MEANINGFUL USE OF CERTIFIED EHR TECHNOLOGY.—

"(A) ADJUSTMENT.—

"(i) IN GENERAL.—Subject to subparagraphs (B) and (D), with respect to covered professional services furnished by an eligible professional during 2016 or any subsequent payment year, if the eligible professional is not a meaningful EHR user (as determined under subsection (o)(2)) for a reporting period for the year, the fee schedule amount for such services furnished by such professional during the year (including the fee schedule amount for purposes of determining a payment based on such amount) shall be equal to the applicable percent of the fee schedule amount that would otherwise apply to such services under this subsection (determined after application of paragraph (3) but without regard to this paragraph).

"(ii) APPLICABLE PERCENT.—Subject to clause (iii), for purposes of clause (i), the term 'applicable percent' means—

"(I) for 2016, 99 percent;

"(II) for 2017, 98 percent; and

"(III) for 2018 and each subsequent year, 97 percent.

"(iii) AUTHORITY TO DECREASE APPLICABLE PERCENTAGE FOR 2019 AND SUBSEQUENT YEARS.—For 2019 and each subsequent year, if the Secretary finds that the proportion of eligible professionals who are meaningful EHR users (as determined under subsection (o)(2)) is less than 75 percent, the applicable percent shall be decreased by 1 percentage point from the applicable percent in the preceding year, but in no case shall the applicable percent be less than 95 percent.

"(B) SIGNIFICANT HARDSHIP EXCEPTION.—The Secretary may, on a case-by-case basis, exempt an eligible professional from the application of the payment adjustment under subparagraph (A) if the Secretary determines, subject to annual renewal, that compliance with the requirement for 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 may an eligible professional be granted an exemption under this subparagraph for more than 5 years.

"(C) APPLICATION OF PHYSICIAN REPORTING SYSTEM RULES.—Paragraphs (5), (6), and (8) of subsection (k) shall apply for purposes of this paragraph in the same manner as they apply for purposes of such subsection.

"(D) NON-APPLICATION TO HOSPITAL-BASED ELIGIBLE PROFESSIONALS.—No payment adjustment may be made under subparagraph (A) in the case of hospital-based eligible professionals (as defined in subsection (o)(1)(C)(ii)).

"(E) DEFINITIONS.—For purposes of this paragraph:

"(i) COVERED PROFESSIONAL SERVICES.—The term 'covered professional services' has the meaning given such term in subsection (k)(3).

"(ii) ELIGIBLE PROFESSIONAL.—The term 'eligible professional' means a physician, as defined in section 1861(r).

"(iii) REPORTING PERIOD.—The term 'reporting period' means, with respect to a year, a period specified by the Secretary.".

(c) APPLICATION TO CERTAIN HMO-AFFILIATED ELIGIBLE PROFESSIONALS.—Section 1853 of the Social Security Act (42 U.S.C. 1395w–23) is amended by adding at the end the following new subsection:

"(l) APPLICATION OF ELIGIBLE PROFESSIONAL INCENTIVES FOR CERTAIN MA ORGANIZATIONS FOR ADOPTION AND MEANINGFUL USE OF CERTIFIED EHR TECHNOLOGY.—

"(1) IN GENERAL.—Subject to paragraphs (3) and (4), in the case of a qualifying MA organization, the provisions of sections 1848(o) and 1848(a)(7) shall apply with respect to eligible professionals described in paragraph (2) of the organization who the organization attests under paragraph (6) to be meaningful EHR users in a similar manner as they apply to eligible professionals under such sections. Incentive payments under paragraph (3) shall be made to and payment adjustments under paragraph (4) shall apply to such qualifying organizations.

"(2) ELIGIBLE PROFESSIONAL DESCRIBED.—With respect to a qualifying MA organization, an eligible professional described in this paragraph is an eligible professional (as defined for purposes of section 1848(o)) who—

"(A)(i) is employed by the organization; or

"(ii)(I) is employed by, or is a partner of, an entity that through contract with the organization furnishes at least 80 percent of the entity's patient care services to enrollees of such organization; and

"(II) furnishes at least 75 percent of the professional services of the eligible professional to enrollees of the organization; and

"(B) furnishes, on average, at least 20 hours per week of patient care services.

"(3) ELIGIBLE PROFESSIONAL INCENTIVE PAYMENTS.—

"(A) IN GENERAL.—In applying section 1848(o) under paragraph (1), instead of the additional payment amount under section 1848(o)(1)(A) and subject to subparagraph (B), the Secretary may substitute an amount determined by the Secretary to the extent feasible and practical to be similar to the estimated amount in the aggregate that would be payable if payment for services furnished by such professionals was payable under part B instead of this part.

"(B) AVOIDING DUPLICATION OF PAYMENTS.—

"(i) IN GENERAL.—If an eligible professional described in paragraph (2) is eligible for the maximum incentive payment under section 1848(o)(1)(A) for the same payment period, the payment incentive shall be made only under such section and not under this subsection.

"(ii) METHODS.—In the case of an eligible professional described in paragraph (2) who is eligible for an incentive payment under section 1848(o)(1)(A) but is not described in clause (i) for the same payment period, the Secretary shall develop a process—

"(I) to ensure that duplicate payments are not made with respect to an eligible professional both under this subsection and under section 1848(o)(1)(A); and

"(II) to collect data from Medicare Advantage organizations to ensure against such duplicate payments.

"(C) FIXED SCHEDULE FOR APPLICATION OF LIMITATION ON INCENTIVE PAYMENTS FOR ALL ELIGIBLE PROFESSIONALS.—In applying section 1848(o)(1)(B)(ii) under subparagraph (A), in accordance with rules specified by the Secretary, a qualifying MA organization shall specify a year (not earlier than 2011) that shall be treated as the first payment year for all eligible professionals with respect to such organization.

"(4) PAYMENT ADJUSTMENT.—

"(A) IN GENERAL.—In applying section 1848(a)(7) under paragraph (1), instead of the payment adjustment being an applicable percent of the fee schedule amount for a year under such section, subject to subparagraph (D), the payment adjustment under paragraph (1) shall be equal to the percent specified in subparagraph (B) for such year of the payment amount otherwise provided under this section for such year.

"(B) SPECIFIED PERCENT.—The percent specified under this subparagraph for a year is 100 percent minus a number of percentage points equal to the product of—

"(i) the number of percentage points by which the applicable percent (under section 1848(a)(7)(A)(ii)) for the year is less than 100 percent; and

"(ii) the Medicare physician expenditure proportion specified in subparagraph (C) for the year.

"(C) MEDICARE PHYSICIAN EXPENDITURE PROPORTION.—The Medicare physician expenditure proportion under this subparagraph for a year is the Secretary's estimate of the proportion, of the expenditures under parts A and B that are not attributable to this part, that are attributable to expenditures for physicians' services.

"(D) APPLICATION OF PAYMENT ADJUSTMENT.—In the case that a qualifying MA organization attests that not all eligible professionals are meaningful EHR users with respect to a year, the Secretary shall apply the payment adjustment under this paragraph based on the proportion of such eligible professionals that are not meaningful EHR users for such year.

"(5) QUALIFYING MA ORGANIZATION DEFINED.—In this subsection and subsection (m), the term 'qualifying MA organization' means a Medicare Advantage organization that is organized as a health maintenance organization (as defined in section 2791(b)(3) of the Public Health Service Act).

"(6) MEANINGFUL EHR USER ATTESTATION.—For purposes of this subsection and subsection (m), a qualifying MA organization shall submit an attestation, in a form and manner specified by the Secretary which may include the submis-

sion of such attestation as part of submission of the initial bid under section 1854(a)(1)(A)(iv), identifying—

"(A) whether each eligible professional described in paragraph (2), with respect to such organization is a meaningful EHR user (as defined in section 1848(o)(2)) for a year specified by the Secretary; and

"(B) whether each eligible hospital described in subsection (m)(1), with respect to such organization, is a meaningful EHR user (as defined in section 1886(n)(3)) for an applicable period specified by the Secretary.".

(d) CONFORMING AMENDMENTS.—Section 1853 of the Social Security Act (42 U.S.C. 1395w–23) is amended—

(1) in subsection (a)(1)(A), by striking "and (i)" and inserting "(i), and (l)";

(2) in subsection (c)—

(A) in paragraph (1)(D)(i), by striking "section 1886(h)" and inserting "sections 1848(o) and 1886(h)"; and

(B) in paragraph (6)(A), by inserting after "under part B," the following: "excluding expenditures attributable to subsections (a)(7) and (o) of section 1848,"; and

(3) in subsection (f), by inserting "and for payments under subsection (l)" after "with the organization".

(e) CONFORMING AMENDMENTS TO E-PRESCRIBING.—

(1) Section 1848(a)(5)(A) of the Social Security Act (42 U.S.C. 1395w–4(a)(5)(A)) is amended—

(A) in clause (i), by striking "or any subsequent year" and inserting ", 2013, 2014, or 2015"; and

(B) in clause (ii), by striking "and each subsequent year" and inserting "and 2015".

(2) Section 1848(m)(2) of such Act (42 U.S.C. 1395w–4(m)(2)) is amended—

(A) in subparagraph (A), by striking "For 2009" and inserting "Subject to subparagraph (D), for 2009"; and

(B) by adding at the end the following new subparagraph:

"(D) LIMITATION WITH RESPECT TO EHR INCENTIVE PAYMENTS.—The provisions of this paragraph shall not apply to an eligible professional (or, in the case of a group practice under paragraph (3)(C), to the group practice) if, for the reporting period the eligible professional (or group practice) receives an incentive payment under subsection (o)(1)(A) with respect to a certified EHR technology (as defined in subsection (o)(4)) that has the capability of electronic prescribing.".

SEC. 4312. INCENTIVES FOR HOSPITALS.

(a) INCENTIVE PAYMENT.—Section 1886 of the Social Security Act (42 U.S.C. 1395ww) is amended by adding at the end the following new subsection:

"(n) INCENTIVES FOR ADOPTION AND MEANINGFUL USE OF CERTIFIED EHR TECHNOLOGY.—

"(1) IN GENERAL.—Subject to the succeeding provisions of this subsection, with respect to inpatient hospital services furnished by an eligible hospital during a payment year (as defined in paragraph (2)(G)), if the eligible hospital is a meaningful EHR user (as determined under paragraph (3)) for the reporting period with respect to such year, in addition to the amount otherwise paid under this section, there also shall be paid to the eligible hospital, from the Federal Hospital Insurance Trust Fund established under section 1817, an amount equal to the applicable amount specified in paragraph (2)(A) for the hospital for such payment year.

"(2) PAYMENT AMOUNT.—

"(A) IN GENERAL.—Subject to the succeeding subparagraphs of this paragraph, the applicable amount specified in this subparagraph for an eligible hospital for a payment year is equal to the product of the following:

"(i) INITIAL AMOUNT.—The sum of—

"(I) the base amount specified in subparagraph (B); plus

"(II) the discharge related amount specified in subparagraph (C) for a 12-month period selected by the Secretary with respect to such payment year.

"(ii) MEDICARE SHARE.—The Medicare share as specified in subparagraph (D) for the hospital for a period selected by the Secretary with respect to such payment year.

"(iii) TRANSITION FACTOR.—The transition factor specified in subparagraph (E) for the hospital for the payment year.

"(B) BASE AMOUNT.—The base amount specified in this subparagraph is $2,000,000.

"(C) DISCHARGE RELATED AMOUNT.—The discharge related amount specified in this subparagraph for a 12-month period selected by the Secretary shall be determined as the sum of the amount, based upon total discharges (regardless of any source of payment) for the period, for each discharge up to the 23,000th discharge as follows:

"(i) For the 1,150th through the 9,200nd discharge, $200.

"(ii) For the 9,201st through the 13,800th discharge, 50 percent of the amount specified in clause (i).

"(iii) For the 13,801st through the 23,000th discharge, 30 percent of the amount specified in clause (i).

"(D) MEDICARE SHARE.—The Medicare share specified under this subparagraph for a hospital for a period selected by the Secretary for a payment year is equal to the fraction—

"(i) the numerator of which is the sum (for such period and with respect to the hospital) of—

"(I) the number of inpatient-bed-days (as established by the Secretary) which are attributable to individuals with respect to whom payment may be made under part A; and

"(II) the number of inpatient-bed-days (as so established) which are attributable to individuals who are enrolled with a Medicare Advantage organization under part C; and

"(ii) the denominator of which is the product of—

"(I) the total number of inpatient-bed-days with respect to the hospital during such period; and

"(II) the total amount of the hospital's charges during such period, not including any charges that are attributable to charity care (as such term is used for purposes of hospital cost reporting under this title), divided by the total amount of the hospital's charges during such period.

Insofar as the Secretary determines that data are not available on charity care necessary to calculate the portion of the formula specified in clause (ii)(II), the Secretary shall use data on uncompensated care and may adjust such data so as to be an appropriate proxy for charity care including a downward adjustment to eliminate bad debt data from uncompensated care data. In the absence of the data necessary, with respect to a hospital, for the Secretary to compute the amount described in clause (ii)(II), the amount under such clause shall be deemed to be 1. In the absence of data, with respect to a hospital, necessary to compute the amount described in clause (i)(II), the amount under such clause shall be deemed to be 0.

"(E) TRANSITION FACTOR SPECIFIED.—

"(i) IN GENERAL.—Subject to clause (ii), the transition factor specified in this subparagraph for an eligible hospital for a payment year is as follows:

"(I) For the first payment year for such hospital, 1.

"(II) For the second payment year for such hospital, ¾.

"(III) For the third payment year for such hospital, ½.

"(IV) For the fourth payment year for such hospital, ¼.

"(V) For any succeeding payment year for such hospital, 0.

"(ii) PHASE DOWN FOR ELIGIBLE HOSPITALS FIRST ADOPTING EHR AFTER 2013.—If the first payment year for an eligible hospital is after 2013, then the transition factor specified in this subparagraph for a payment year for such hospital is the same as the amount specified in clause (i) for such payment year for an eligible hospital for which the first payment year is 2013. If the first payment year for an eligible hospital is after 2015 then the transition factor specified in this subparagraph for such hospital and for such year and any subsequent year shall be 0.

"(F) FORM OF PAYMENT.—The payment under this subsection for a payment year may be in the form of a single consolidated payment or in the form of such periodic installments as the Secretary may specify.

"(G) PAYMENT YEAR DEFINED.—

"(i) IN GENERAL.—For purposes of this subsection, the term 'payment year' means a fiscal year beginning with fiscal year 2011.

"(ii) FIRST, SECOND, ETC. PAYMENT YEAR.—The term 'first payment year' means, with respect to inpatient hospital services furnished by an eligible hospital, the first fiscal year for which an incentive payment is made for such services under this subsection. The terms 'second payment year', 'third payment year', and 'fourth payment year' mean, with respect to an eligible hospital, each successive year immediately following the first payment year for that hospital.

"(3) MEANINGFUL EHR USER.—

"(A) IN GENERAL.—For purposes of paragraph (1), an eligible hospital shall be treated as a meaningful EHR user for a reporting period for a payment year (or, for purposes of subsection (b)(3)(B)(ix), for a reporting period under such subsection for a fiscal year) if each of the following requirements are met:

"(i) MEANINGFUL USE OF CERTIFIED EHR TECHNOLOGY.—The eligible hospital demonstrates to the satisfaction of the Secretary, in accordance with subparagraph (C)(i), that during such period the hospital is using certified EHR technology in a meaningful manner.

"(ii) INFORMATION EXCHANGE.—The eligible hospital demonstrates to the satisfaction of the Secretary, in accordance with subparagraph (C)(i), 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.

"(iii) REPORTING ON MEASURES USING EHR.—Subject to subparagraph (B)(ii) and using such certified EHR technology, the eligible hospital submits information for such period, in a form and manner specified by the Secretary, on such clinical quality measures and such other measures as selected by the Secretary under subparagraph (B)(i).

The Secretary shall seek to improve the use of electronic health records and health care quality over time by requiring more stringent measures of meaningful use selected under this paragraph.

"(B) REPORTING ON MEASURES.—

"(i) SELECTION.—The Secretary shall select measures for purposes of subparagraph (A)(iii) but only consistent with the following:

"(I) The Secretary shall provide preference to clinical quality measures that have been selected for purposes of applying subsection (b)(3)(B)(viii) or that have been endorsed by the entity with a contract with the Secretary under section 1890(a).

"(II) Prior to any measure (other than a clinical quality measure that has been selected for purposes of applying subsection (b)(3)(B)(viii)) being selected under this subparagraph, the Secretary shall publish in the Federal Register such measure and provide for a period of public comment on such measure.

"(ii) LIMITATIONS.—The Secretary may not require the electronic reporting of information on clinical quality measures under subparagraph (A)(iii) unless the Secretary has the capacity to accept the information electronically, which may be on a pilot basis.

"(iii) COORDINATION OF REPORTING OF INFORMATION.—In selecting such measures, and in establishing the form and manner for reporting measures under subparagraph (A)(iii), the Secretary shall seek to avoid redundant or duplicative reporting with reporting otherwise required, including reporting under subsection (b)(3)(B)(viii).

"(C) DEMONSTRATION OF MEANINGFUL USE OF CERTIFIED EHR TECHNOLOGY AND INFORMATION EXCHANGE.—

"(i) IN GENERAL.—A hospital may satisfy the demonstration requirement of clauses (i) and (ii) of subparagraph (A) through means specified by the Secretary, which may include—

"(I) an attestation;

"(II) the submission of claims with appropriate coding (such as a code indicating that inpatient care was documented using certified EHR technology);

"(III) a survey response;

"(IV) reporting under subparagraph (A)(iii); and

"(V) other means specified by the Secretary.

"(ii) USE OF PART D DATA.—Notwithstanding sections 1860D–15(d)(2)(B) and 1860D–15(f)(2), the Secretary may use data regarding drug claims submitted for purposes of section 1860D–15 that are necessary for purposes of subparagraph (A).

"(4) APPLICATION.—

"(A) LIMITATIONS ON REVIEW.—There shall be no administrative or judicial review under section 1869, section 1878, or otherwise of the determination of any incentive payment under this subsection and the payment adjustment under subsection (b)(3)(B)(ix), including the determination of a meaningful EHR user under paragraph (3), determination of measures ap-

plicable to services furnished by eligible hospitals under this subsection, and the exception under subsection (b)(3)(B)(ix)(II).

"(B) POSTING ON WEBSITE.—The Secretary shall post on the Internet website of the Centers for Medicare & Medicaid Services, in an easily understandable format, a list of the names of the eligible hospitals that are meaningful EHR users under this subsection or subsection (b)(3)(B)(ix) and other relevant data as determined appropriate by the Secretary. The Secretary shall ensure that a hospital has the opportunity to review the other relevant data that are to be made public with respect to the hospital prior to such data being made public.

"(5) CERTIFIED EHR TECHNOLOGY DEFINED.—The term 'certified EHR technology' has the meaning given such term in section 1848(o)(4).

"(6) DEFINITIONS.—For purposes of this subsection:

"(A) ELIGIBLE HOSPITAL.—The term 'eligible hospital' means a subsection (d) hospital.

"(B) REPORTING PERIOD.—The term 'reporting period' means any period (or periods), with respect to a payment year, as specified by the Secretary.".

(b) INCENTIVE MARKET BASKET ADJUSTMENT.—Section 1886(b)(3)(B) of the Social Security Act (42 U.S.C. 1395ww(b)(3)(B)) is amended—

(1) in clause (viii)(I), by inserting "(or, beginning with fiscal year 2016, by one-quarter)" after "2.0 percentage points"; and

(2) by adding at the end the following new clause:

"(ix)(I) For purposes of clause (i) for fiscal year 2016 and each subsequent fiscal year, in the case of an eligible hospital (as defined in subsection (n)(6)(A)) that is not a meaningful EHR user (as defined in subsection (n)(3)) for the reporting period for such fiscal year, three-quarters of the applicable percentage increase otherwise applicable under clause (i) for such fiscal year shall be reduced by 33⅓ percent for fiscal year 2016, 66⅔ percent for fiscal year 2017, and 100 percent for fiscal year 2018 and each subsequent fiscal year. Such reduction shall apply only with respect to the fiscal year involved and the Secretary shall not take into account such reduction in computing the applicable percentage increase under clause (i) for a subsequent fiscal year.

"(II) The Secretary may, on a case-by-case basis, exempt a subsection (d) hospital from the application of subclause (I) with respect to a fiscal year if the Secretary determines, subject to annual renewal, that requiring such hospital to be a meaningful EHR user during such fiscal year would result in a significant hardship, such as in the case of a hospital in a rural area without sufficient Internet access. In no case may a hospital be granted an exemption under this subclause for more than 5 years.

"(III) For fiscal year 2016 and each subsequent fiscal year, a State in which hospitals are paid for services under section 1814(b)(3) shall adjust the payments to each subsection (d) hospital in the State that is not a meaningful EHR user (as defined in subsection (n)(3)) in a manner that is designed to result in an aggregate reduction in payments to hospitals in the State that is equivalent to the aggregate reduction that would have occurred if payments had been reduced to each subsection (d) hospital in the State in a manner comparable to the reduction under the previous provisions of this clause. The State shall report to the Secretary the methodology it will use to make the payment adjustment under the previous sentence.

"(IV) For purposes of this clause, the term 'reporting period' means, with respect to a fiscal year, any period (or periods), with respect to the fiscal year, as specified by the Secretary.".

(c) APPLICATION TO CERTAIN HMO-AFFILIATED ELIGIBLE HOSPITALS.—Section 1853 of the Social Security Act (42 U.S.C. 1395w-23), as amended by section 4311(c), is further amended by adding at the end the following new subsection:

"(m) APPLICATION OF ELIGIBLE HOSPITAL INCENTIVES FOR CERTAIN MA ORGANIZATIONS FOR ADOPTION AND MEANINGFUL USE OF CERTIFIED EHR TECHNOLOGY.—

"(1) APPLICATION.—Subject to paragraphs (3) and (4), in the case of a qualifying MA organization, the provisions of sections 1886(n) and 1886(b)(3)(B)(ix) shall apply with respect to eligible hospitals described in paragraph (2) of the organization which the organization attests under subsection (l)(6) to be meaningful EHR users in a similar manner as they apply to eligible hospitals under such sections. Incentive payments under paragraph (3) shall be made to and payment adjustments under paragraph (4) shall apply to such qualifying organizations.

"(2) ELIGIBLE HOSPITAL DESCRIBED.—With respect to a qualifying MA organization, an eligible hospital described in this paragraph is an eligible hospital that is under common corporate governance with such organization and serves individuals enrolled under an MA plan offered by such organization.

"(3) ELIGIBLE HOSPITAL INCENTIVE PAYMENTS.—

"(A) IN GENERAL.—In applying section 1886(n)(2) under paragraph (1), instead of the additional payment amount under section 1886(n)(2), there shall be substituted an amount determined by the Secretary to be similar to the estimated amount in the aggregate that would be payable if payment for services furnished by such hospitals was payable under part A instead of this part. In implementing the previous sentence, the Secretary—

"(i) shall, insofar as data to determine the discharge related amount under section 1886(n)(2)(C) for an eligible hospital are not available to the Secretary, use such alternative data and methodology to estimate such discharge related amount as the Secretary determines appropriate; and

"(ii) shall, insofar as data to determine the medicare share described in section 1886(n)(2)(D) for an eligible hospital are not available to the Secretary, use such alternative data and methodology to estimate such share, which data and methodology may include use of the inpatient bed days (or discharges) with respect to an eligible hospital during the appropriate period which are attributable to both individuals for whom payment may be made under part A or individuals enrolled in an MA plan under a Medicare Advantage organization under this part as a proportion of the total number of patient-bed-days (or discharges) with respect to such hospital during such period.

"(B) AVOIDING DUPLICATION OF PAYMENTS.—

"(i) IN GENERAL.—In the case of a hospital that for a payment year is an eligible hospital described in paragraph (2), is an eligible hospital under section 1886(n), and for which at least one-third of their discharges (or bed-days) of Medicare patients for the year are covered under part A, payment for the payment year shall be made only under section 1886(n) and not under this subsection.

"(ii) METHODS.—In the case of a hospital that is an eligible hospital described in paragraph (2) and also is eligible for an incentive payment under section 1886(n) but is not described in clause (i) for the same payment period, the Secretary shall develop a process—

"(I) to ensure that duplicate payments are not made with respect to an eligible hospital both under this subsection and under section 1886(n); and

"(II) to collect data from Medicare Advantage organizations to ensure against such duplicate payments.

"(4) PAYMENT ADJUSTMENT.—

"(A) Subject to paragraph (3), in the case of a qualifying MA organization (as defined in section 1853(l)(5)), if, according to the attestation of the organization submitted under subsection (l)(6) for an applicable period, one or more eligible hospitals (as defined in section 1886(n)(6)(A)) that are under common corporate governance with such organization and that serve individuals enrolled under a plan offered by such organization are not meaningful EHR users (as defined in section 1886(n)(3)) with respect to a period, the payment amount payable under this section for such organization for such period shall be the percent specified in subparagraph (B) for such period of the payment amount otherwise provided under this section for such period.

"(B) SPECIFIED PERCENT.—The percent specified under this subparagraph for a year is 100 percent minus a number of percentage points equal to the product of—

"(i) the number of the percentage point reduction effected under section 1886(b)(3)(B)(ix)(I) for the period; and

"(ii) the Medicare hospital expenditure proportion specified in subparagraph (C) for the year.

"(C) MEDICARE HOSPITAL EXPENDITURE PROPORTION.—The Medicare hospital expenditure proportion under this subparagraph for a year is the Secretary's estimate of the proportion, of the expenditures under parts A and B that are not attributable to this part, that are attributable to expenditures for inpatient hospital services.

"(D) APPLICATION OF PAYMENT ADJUSTMENT.—In the case that a qualifying MA organization attests that not all eligible hospitals are meaningful EHR users with respect to an applicable period, the Secretary shall apply the payment adjustment under this paragraph based on a methodology specified by the Secretary, taking into account the proportion of such eligible hospitals, or discharges from such hospitals, that are not meaningful EHR users for such period.".

(d) CONFORMING AMENDMENTS.—

(1) Section 1814(b) of the Social Security Act (42 U.S.C. 1395f(b)) is amended—

(A) in paragraph (3), in the matter preceding subparagraph (A), by inserting ", subject to section 1886(d)(3)(B)(ix)(III)," after "then"; and

(B) by adding at the end the following: "For purposes of applying paragraph (3), there shall be taken into account incentive payments, and payment adjustments under subsection (b)(3)(B)(ix) or (n) of section 1886.".

(2) Section 1851(i)(1) of the Social Security Act (42 U.S.C. 1395w–21(i)(1)) is amended by striking "and 1886(h)(3)(D)" and inserting "1886(h)(3)(D), and 1853(m)".

(3) Section 1853 of the Social Security Act (42 U.S.C. 1395w–23), as amended by section 4311(d)(1), is amended—

(A) in subsection (c)—

(i) in paragraph (1)(D)(i), by striking "1848(o)" and inserting ", 1848(o), and 1886(n)"; and

(ii) in paragraph (6)(A), by inserting "and subsections (b)(3)(B)(ix) and (n) of section 1886" after "section 1848"; and

(B) in subsection (f), by inserting "and subsection (m)" after "under subsection (l)".

SEC. 4313. TREATMENT OF PAYMENTS AND SAVINGS; IMPLEMENTATION FUNDING.

(a) PREMIUM HOLD HARMLESS.—

(1) IN GENERAL.—Section 1839(a)(1) of the Social Security Act (42 U.S.C. 1395r(a)(1)) is amended by adding at the end the following: "In applying this paragraph there shall not be taken into account additional payments under section 1848(o) and section 1853(l)(3) and the Government contribution under section 1844(a)(3).".

(2) PAYMENT.—Section 1844(a) of such Act (42 U.S.C. 1395w(a)) is amended—

(A) in paragraph (2), by striking the period at the end and inserting "; plus"; and

(B) by adding at the end the following new paragraph:

"(3) a Government contribution equal to the amount of payment incentives payable under sections 1848(o) and 1853(l)(3).".

(b) MEDICARE IMPROVEMENT FUND.—Section 1898 of the Social Security Act (42 U.S.C. 1395iii), as added by section 7002(a) of the Supplemental Appropriations Act, 2008 (Public Law 110–252) and as amended by section 188(a)(2) of the Medicare Improvements for Patients and Providers Act of 2008 (Public Law 110–275; 122 Stat. 2589) and by section 6 of the QI Program Supplemental Funding Act of 2008, is amended—

(1) in subsection (a)—

(A) by inserting "medicare" before "fee-for-service"; and

(B) by inserting before the period at the end the following: "including, but not limited to, an increase in the conversion factor under section 1848(d) to address, in whole or in part, any projected shortfall in the conversion factor for 2014 relative to the conversion factor for 2008 and adjustments to payments for items and services furnished by providers of services and suppliers under such original medicare fee-for-service program"; and

(2) in subsection (b)—

(A) in paragraph (1), by striking "during fiscal year 2014," and all that follows and inserting the following: "during—

"(A) fiscal year 2014, $22,290,000,000; and

"(B) fiscal year 2020 and each subsequent fiscal year, the Secretary's estimate, as of July 1 of the fiscal year, of the aggregate reduction in expenditures under this title during the preceding fiscal year directly resulting from the reduction in payment amounts under sections 1848(a)(7), 1853(l)(4), 1853(m)(4), and 1886(b)(3)(B)(ix).."; and

(B) by adding at the end the following new paragraph:

"(4) NO EFFECT ON PAYMENTS IN SUBSEQUENT YEARS.—In the case that expenditures from the Fund are applied to, or otherwise affect, a payment rate for an item or service under this title for a year, the payment rate for such item or service shall be computed for a subsequent year as if such application or effect had never occurred.".

(c) IMPLEMENTATION FUNDING.—In addition to funds otherwise available, out of any funds in the Treasury not otherwise appropriated, there are appropriated to the Secretary of Health and Human Services for the Center for Medicare & Medicaid Services Program Management Account, $60,000,000 for each of fiscal years 2009 through 2015 and $30,000,000 for each succeeding fiscal year through fiscal year 2019, which shall be available for purposes of carrying out the provisions of (and

amendments made by) this part. Amounts appropriated under this subsection for a fiscal year shall be available until expended.

SEC. 4314. STUDY ON APPLICATION OF EHR PAYMENT INCENTIVES FOR PROVIDERS NOT RECEIVING OTHER INCENTIVE PAYMENTS.

(a) STUDY.—

(1) IN GENERAL.—The Secretary of Health and Human Services shall conduct a study to determine the extent to which and manner in which payment incentives (such as under title XVIII or XIX of the Social Security Act) and other funding for purposes of implementing and using certified EHR technology (as defined in section 3000 of the Public Health Service Act) should be made available to health care providers who are receiving minimal or no payment incentives or other funding under this Act, under title XVIII or XIX of the Social Security Act, or otherwise, for such purposes.

(2) DETAILS OF STUDY.—Such study shall include an examination of—

(A) the adoption rates of certified EHR technology by such health care providers;

(B) the clinical utility of such technology by such health care providers;

(C) whether the services furnished by such health care providers are appropriate for or would benefit from the use of such technology;

(D) the extent to which such health care providers work in settings that might otherwise receive an incentive payment or other funding under this Act, title XVIII or XIX of the Social Security Act, or otherwise;

(E) the potential costs and the potential benefits of making payment incentives and other funding available to such health care providers; and

(F) any other issues the Secretary deems to be appropriate.

(b) REPORT.—Not later than June 30, 2010, the Secretary shall submit to Congress a report on the findings and conclusions of the study conducted under subsection (a).

PART III—MEDICAID FUNDING

SEC. 4321. MEDICAID PROVIDER HIT ADOPTION AND OPERATION PAYMENTS; IMPLEMENTATION FUNDING.

(a) IN GENERAL.—Section 1903 of the Social Security Act (42 U.S.C. 1396b) is amended—

(1) in subsection (a)(3)—

(A) by striking "and" at the end of subparagraph (D);

(B) by striking "plus" at the end of subparagraph (E) and inserting "and"; and

(C) by adding at the end the following new subparagraph:

"(F)(i) 100 percent of so much of the sums expended during such quarter as are attributable to payments for certified EHR technology (and support services including maintenance and training that is for, or is necessary for the adoption and operation of, such technology) by Medicaid providers described in subsection (t)(1); and

"(ii) 90 percent of so much of the sums expended during such quarter as are attributable to payments for reasonable administrative expenses related to the administration of payments described in clause (i) if the State meets the condition described in subsection (t)(9); plus"; and

(2) by inserting after subsection (s) the following new subsection:

"(t)(1) For purposes of subsection (a)(3)(F), the payments for certified EHR technology (and support services including maintenance that is for, or is necessary for the operation of, such technology) by Medicaid providers described in this paragraph are payments made by the State in accordance with this subsection of 85 percent of the net allowable costs of Medicaid providers (as defined in paragraph (2)) for such technology (and support services).

"(2) In this subsection and subsection (a)(3)(F), the term 'Medicaid provider' means—

"(A) an eligible professional (as defined in paragraph (3)(B)) who is not hospital-based and has at least 30 percent of the professional's patient volume (as estimated in accordance with standards established by the Secretary) attributable to individuals who are receiving medical assistance under this title; and

"(B)(i) a children's hospital, (ii) an acute-care hospital that is not described in clause (i) and that has at least 10 percent of the hospital's patient volume (as estimated in accordance with standards established by the Secretary) attributable to individuals who are receiving medical assistance under this title, or (iii) a Federally-qualified health center or rural health clinic that has at least 30 percent of the center's or clinic's patient volume (as estimated in accordance

with standards established by the Secretary) attributable to individuals who are receiving medical assistance under this title.

A professional shall not qualify as a Medicaid provider under this subsection unless the professional has waived, in a manner specified by the Secretary, any right to payment under section 1848(o) with respect to the adoption or support of certified EHR technology by the professional. In applying clauses (ii) and (iii) of subparagraph (B), the standards established by the Secretary for patient volume shall include individuals enrolled in a Medicaid managed care plan (under section 1903(m) or section 1932).

"(3) In this subsection and subsection (a)(3)(F):

"(A) The term 'certified EHR technology' means a qualified electronic health record (as defined in 3000(13) of the Public Health Service Act) that is certified pursuant to section 3001(c)(5) of such Act as meeting standards adopted under section 3004 of such Act that are applicable to the type of record involved (as determined by the Secretary, such as an ambulatory electronic health record for office-based physicians or an inpatient hospital electronic health record for hospitals).

"(B) The term 'eligible professional' means a physician as defined in paragraphs (1) and (2) of section 1861(r), and includes a nurse mid-wife and a nurse practitioner.

"(C) The term 'hospital-based' means, with respect to an eligible professional, a professional (such as a pathologist, anesthesiologist, or emergency physician) who furnishes substantially all of the individual's professional services in a hospital setting (whether inpatient or outpatient) and through the use of the facilities and equipment, including computer equipment, of the hospital.

"(4)(A) The term 'allowable costs' means, with respect to certified EHR technology of a Medicaid provider, costs of such technology (and support services including maintenance and training that is for, or is necessary for the adoption and operation of, such technology) as determined by the Secretary to be reasonable.

"(B) The term 'net allowable costs' means allowable costs reduced by any payment that is made to the provider involved from any other source that is directly attributable to payment for certified EHR technology or services described in subparagraph (A).

"(C) In no case shall—

"(i) the aggregate allowable costs under this subsection (covering one or more years) with respect to a Medicaid provider described in paragraph (2)(A) for purchase and initial implementation of certified EHR technology (and services described in subparagraph (A)) exceed $25,000 or include costs over a period of longer than 5 years;

"(ii) for costs not described in clause (i) relating to the operation, maintenance, or use of certified EHR technology, the annual allowable costs under this subsection with respect to such a Medicaid provider for costs not described in clause (i) for any year exceed $10,000;

"(iii) payment described in paragraph (1) for costs described in clause (ii) be made with respect to such a Medicaid provider over a period of more than 5 years;

"(iv) the aggregate allowable costs under this subsection with respect to such a Medicaid provider for all costs exceed $75,000; or

"(v) the allowable costs, whether for purchase and initial implementation, maintenance, or otherwise, for a Medicaid provider described in paragraph (2)(B) exceed such aggregate or annual limitation as the Secretary shall establish, based on an amount determined by the Secretary as being adequate to adopt and maintain certified EHR technology, consistent with paragraph (6).

"(5) Payments described in paragraph (1) are not in accordance with this subsection unless the following requirements are met:

"(A) The State provides assurances satisfactory to the Secretary that amounts received under subsection (a)(3)(F) with respect to costs of a Medicaid provider are paid directly to such provider without any deduction or rebate.

"(B) Such Medicaid provider is responsible for payment of the costs described in such paragraph that are not provided under this title.

"(C) With respect to payments to such Medicaid provider for costs other than costs related to the initial adoption of certified EHR technology, the Medicaid provider demonstrates meaningful use of certified EHR technology through a means that is approved by the State and acceptable to the Secretary, and that may be based upon the methodologies applied under section 1848(o) or 1886(n).

"(D) To the extent specified by the Secretary, the certified EHR technology is compatible with State or Federal administrative management systems.

"(6)(A) In no case shall the payments described in paragraph (1), with respect to a hospital, exceed in the aggregate the product of—

"(i) the overall hospital HIT amount for the hospital computed under subparagraph (B); and

"(ii) the Medicaid share for such hospital computed under subparagraph (C).

"(B) For purposes of this paragraph, the overall hospital HIT amount, with respect to a hospital, is the sum of the applicable amounts specified in section 1886(n)(2)(A) for such hospital for the first 4 payment years (as estimated by the Secretary) determined as if the Medicare share specified in clause (ii) of such section were 1. The Secretary shall publish in the Federal Register the overall hospital HIT amount for each hospital eligible for payments under this subsection. In computing amounts under clause (ii) for payment years after the first payment year, the Secretary shall assume that in subsequent payment years discharges increase at an annual rate of 2 percent per year.

"(C) The Medicaid share computed under this subparagraph, for a hospital for a period specified by the Secretary, shall be calculated in the same manner as the Medicare share under section 1886(n)(2)(D) for such a hospital and period, except that there shall be substituted for the numerator under clause (i) of such section the amount that is equal to the number of inpatient-bed-days (as established by the Secretary) which are attributable to individuals who are receiving medical assistance under this title and who are not described in section 1886(n)(2)(D)(i). In computing inpatient-bed-days under the previous sentence, the Secretary shall take into account inpatient-bed-days attributable to inpatient-bed-days that are paid for individuals enrolled in a Medicaid managed care plan (under section 1903(m) or section 1932).

"(7) With respect to health care providers other than hospitals, the Secretary shall ensure coordination of the different programs for payment of such health care providers for adoption or use of health information technology (including certified EHR technology), as well as payments for such health care providers provided under this title or title XVIII, to assure no duplication of funding.

"(8) In carrying out paragraph (5)(C), the State and Secretary shall seek, to the maximum extent practicable, to avoid duplicative requirements from Federal and State Governments to demonstrate meaningful use of certified EHR technology under this title and title XVIII. In doing so, the Secretary may deem satisfaction of requirements for such meaningful use for a payment year under title XVIII to be sufficient to qualify as meaningful use under this subsection. The Secretary may also specify the reporting periods under this subsection in order to carry out this paragraph.

"(9) In order to be provided Federal financial participation under subsection (a)(3)(F)(ii), a State must demonstrate to the satisfaction of the Secretary, that the State—

"(A) is using the funds provided for the purposes of administering payments under this subsection, including tracking of meaningful use by Medicaid providers;

"(B) conducting adequate oversight of the program under this subsection, including routine tracking of meaningful use attestations and reporting mechanisms; and

"(C) be pursuing initiatives to encourage the adoption of certified EHR technology to promote health care quality and the exchange of health care information under this title, subject to applicable laws and regulations governing such exchange.

"(10) The Secretary shall periodically submit reports to the Committee on Energy and Commerce of the House of Representatives and the Committee on Finance of the Senate on status, progress, and oversight of payments under paragraph (1).".

(b) IMPLEMENTATION FUNDING.—In addition to funds otherwise available, out of any funds in the Treasury not otherwise appropriated, there are appropriated to the Secretary of Health and Human Services for the Center for Medicare & Medicaid Services Program Management Account, $40,000,000 for each of fiscal years 2009 through 2015 and $20,000,000 for each succeeding fiscal year through fiscal year 2019, which shall be available for purposes of carrying out the provisions of (and the amendments made by) this part. Amounts appropriated under this subsection for a fiscal year shall be available until expended.

Subtitle D—Privacy

SEC. 4400. DEFINITIONS.

In this subtitle, except as specified otherwise:

(1) BREACH.—The term "breach" means the unauthorized acquisition, access, use, or disclosure of protected health information which compromises the security, privacy, or integrity of protected health information maintained by or on

behalf of a person. Such term does not include any unintentional acquisition, access, use, or disclosure of such information by an employee or agent of the covered entity or business associate involved if such acquisition, access, use, or disclosure, respectively, was made in good faith and within the course and scope of the employment or other contractual relationship of such employee or agent, respectively, with the covered entity or business associate and if such information is not further acquired, accessed, used, or disclosed by such employee or agent.

(2) BUSINESS ASSOCIATE.—The term "business associate" has the meaning given such term in section 160.103 of title 45, Code of Federal Regulations.

(3) COVERED ENTITY.—The term "covered entity" has the meaning given such term in section 160.103 of title 45, Code of Federal Regulations.

(4) DISCLOSE.—The terms "disclose" and "disclosure" have the meaning given the term "disclosure" in section 160.103 of title 45, Code of Federal Regulations.

(5) ELECTRONIC HEALTH RECORD.—The term "electronic health record" means an electronic record of health-related information on an individual that is created, gathered, managed, and consulted by authorized health care clinicians and staff.

(6) HEALTH CARE OPERATIONS.—The term "health care operation" has the meaning given such term in section 164.501 of title 45, Code of Federal Regulations.

(7) HEALTH CARE PROVIDER.—The term "health care provider" has the meaning given such term in section 160.103 of title 45, Code of Federal Regulations.

(8) HEALTH PLAN.—The term "health plan" has the meaning given such term in section 1171(5) of the Social Security Act.

(9) NATIONAL COORDINATOR.—The term "National Coordinator" means the head of the Office of the National Coordinator for Health Information Technology established under section 3001(a) of the Public Health Service Act, as added by section 4101.

(10) PAYMENT.—The term "payment" has the meaning given such term in section 164.501 of title 45, Code of Federal Regulations.

(11) PERSONAL HEALTH RECORD.—The term "personal health record" means an electronic record of individually identifiable health information on an individual that can be drawn from multiple sources and that is managed, shared, and controlled by or for the individual.

(12) PROTECTED HEALTH INFORMATION.—The term "protected health information" has the meaning given such term in section 160.103 of title 45, Code of Federal Regulations.

(13) SECRETARY.—The term "Secretary" means the Secretary of Health and Human Services.

(14) SECURITY.—The term "security" has the meaning given such term in section 164.304 of title 45, Code of Federal Regulations.

(15) STATE.—The term "State" means each of the several States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands.

(16) TREATMENT.—The term "treatment" has the meaning given such term in section 164.501 of title 45, Code of Federal Regulations.

(17) USE.—The term "use" has the meaning given such term in section 160.103 of title 45, Code of Federal Regulations.

(18) VENDOR OF PERSONAL HEALTH RECORDS.—The term "vendor of personal health records" means an entity, other than a covered entity (as defined in paragraph (3)), that offers or maintains a personal health record.

PART I—IMPROVED PRIVACY PROVISIONS AND SECURITY PROVISIONS

SEC. 4401. APPLICATION OF SECURITY PROVISIONS AND PENALTIES TO BUSINESS ASSOCIATES OF COVERED ENTITIES; ANNUAL GUIDANCE ON SECURITY PROVISIONS.

(a) APPLICATION OF SECURITY PROVISIONS.—Sections 164.308, 164.310, 164.312, and 164.316 of title 45, Code of Federal Regulations, shall apply to a business associate of a covered entity in the same manner that such sections apply to the covered entity. The additional requirements of this title that relate to security and that are made applicable with respect to covered entities shall also be applicable to such a business associate and shall be incorporated into the business associate agreement between the business associate and the covered entity.

(b) APPLICATION OF CIVIL AND CRIMINAL PENALTIES.—In the case of a business associate that violates any security provision specified in subsection (a), sections 1176 and 1177 of the Social Security Act (42 U.S.C. 1320d-5, 1320d-6) shall apply to the

business associate with respect to such violation in the same manner such sections apply to a covered entity that violates such security provision.

(c) ANNUAL GUIDANCE.—For the first year beginning after the date of the enactment of this Act and annually thereafter, the Secretary of Health and Human Services shall, in consultation with industry stakeholders, annually issue guidance on the most effective and appropriate technical safeguards for use in carrying out the sections referred to in subsection (a) and the security standards in subpart C of part 164 of title 45, Code of Federal Regulations, as such provisions are in effect as of the date before the enactment of this Act.

SEC. 4402. NOTIFICATION IN THE CASE OF BREACH.

(a) IN GENERAL.—A covered entity that accesses, maintains, retains, modifies, records, stores, destroys, or otherwise holds, uses, or discloses unsecured protected health information (as defined in subsection (h)(1)) shall, in the case of a breach of such information that is discovered by the covered entity, notify each individual whose unsecured protected health information has been, or is reasonably believed by the covered entity to have been, accessed, acquired, or disclosed as a result of such breach.

(b) NOTIFICATION OF COVERED ENTITY BY BUSINESS ASSOCIATE.—A business associate of a covered entity that accesses, maintains, retains, modifies, records, stores, destroys, or otherwise holds, uses, or discloses unsecured protected health information shall, following the discovery of a breach of such information, notify the covered entity of such breach. Such notice shall include the identification of each individual whose unsecured protected health information has been, or is reasonably believed by the business associate to have been, accessed, acquired, or disclosed during such breach.

(c) BREACHES TREATED AS DISCOVERED.—For purposes of this section, a breach shall be treated as discovered by a covered entity or by a business associate as of the first day on which such breach is known to such entity or associate, respectively, (including any person, other than the individual committing the breach, that is an employee, officer, or other agent of such entity or associate, respectively) or should reasonably have been known to such entity or associate (or person) to have occurred.

(d) TIMELINESS OF NOTIFICATION.—

(1) IN GENERAL.—Subject to subsection (g), all notifications required under this section shall be made without unreasonable delay and in no case later than 60 calendar days after the discovery of a breach by the covered entity involved (or business associate involved in the case of a notification required under subsection (b)).

(2) BURDEN OF PROOF.—The covered entity involved (or business associate involved in the case of a notification required under subsection (b)), shall have the burden of demonstrating that all notifications were made as required under this part, including evidence demonstrating the necessity of any delay.

(e) METHODS OF NOTICE.—

(1) INDIVIDUAL NOTICE.—Notice required under this section to be provided to an individual, with respect to a breach, shall be provided promptly and in the following form:

(A) Written notification by first-class mail to the individual (or the next of kin of the individual if the individual is deceased) at the last known address of the individual or the next of kin, respectively, or, if specified as a preference by the individual, by electronic mail. The notification may be provided in one or more mailings as information is available.

(B) In the case in which there is insufficient, or out-of-date contact information (including a phone number, email address, or any other form of appropriate communication) that precludes direct written (or, if specified by the individual under subparagraph (A), electronic) notification to the individual, a substitute form of notice shall be provided, including, in the case that there are 10 or more individuals for which there is insufficient or out-of-date contact information, a conspicuous posting for a period determined by the Secretary on the home page of the Web site of the covered entity involved or notice in major print or broadcast media, including major media in geographic areas where the individuals affected by the breach likely reside. Such a notice in media or web posting will include a toll-free phone number where an individual can learn whether or not the individual's unsecured protected health information is possibly included in the breach.

(C) In any case deemed by the covered entity involved to require urgency because of possible imminent misuse of unsecured protected health information, the covered entity, in addition to notice provided under subparagraph (A), may provide information to individuals by telephone or other means, as appropriate.

(2) MEDIA NOTICE.—Notice shall be provided to prominent media outlets serving a State or jurisdiction, following the discovery of a breach described in subsection (a), if the unsecured protected health information of more than 500 residents of such State or jurisdiction is, or is reasonably believed to have been, accessed, acquired, or disclosed during such breach.

(3) NOTICE TO SECRETARY.—Notice shall be provided to the Secretary by covered entities of unsecured protected health information that has been acquired or disclosed in a breach. If the breach was with respect to 500 or more individuals than such notice must be provided immediately. If the breach was with respect to less than 500 individuals, the covered entity involved may maintain a log of any such breach occurring and annually submit such a log to the Secretary documenting such breaches occuring during the year involved.

(4) POSTING ON HHS PUBLIC WEBSITE.—The Secretary shall make available to the public on the Internet website of the Department of Health and Human Services a list that identifies each covered entity involved in a breach described in subsection (a) in which the unsecured protected health information of more than 500 individuals is acquired or disclosed.

(f) CONTENT OF NOTIFICATION.—Regardless of the method by which notice is provided to individuals under this section, notice of a breach shall include, to the extent possible, the following:

(1) A brief description of what happened, including the date of the breach and the date of the discovery of the breach, if known.

(2) A description of the types of unsecured protected health information that were involved in the breach (such as full name, Social Security number, date of birth, home address, account number, or disability code).

(3) The steps individuals should take to protect themselves from potential harm resulting from the breach.

(4) A brief description of what the covered entity involved is doing to investigate the breach, to mitigate losses, and to protect against any further breaches.

(5) Contact procedures for individuals to ask questions or learn additional information, which shall include a toll-free telephone number, an e-mail address, Web site, or postal address.

(g) DELAY OF NOTIFICATION AUTHORIZED FOR LAW ENFORCEMENT PURPOSES.—If a law enforcement official determines that a notification, notice, or posting required under this section would impede a criminal investigation or cause damage to national security, such notification, notice, or posting shall be delayed in the same manner as provided under section 164.528(a)(2) of title 45, Code of Federal Regulations, in the case of a disclosure covered under such section.

(h) UNSECURED PROTECTED HEALTH INFORMATION.—

(1) DEFINITION.—

(A) IN GENERAL.—Subject to subparagraph (B), for purposes of this section, the term "unsecured protected health information" means protected health information that is not secured through the use of a technology or methodology specified by the Secretary in the guidance issued under paragraph (2).

(B) EXCEPTION IN CASE TIMELY GUIDANCE NOT ISSUED.—In the case that the Secretary does not issue guidance under paragraph (2) by the date specified in such paragraph, for purposes of this section, the term "unsecured protected health information" shall mean protected health information that is not secured by a technology standard that renders protected health information unusable, unreadable, or indecipherable to unauthorized individuals and is developed or endorsed by a standards developing organization that is accredited by the American National Standards Institute.

(2) GUIDANCE.—For purposes of paragraph (1) and section 407(f)(3), not later than the date that is 60 days after the date of the enactment of this Act, the Secretary shall, after consultation with stakeholders, issue (and annually update) guidance specifying the technologies and methodologies that render protected health information unusable, unreadable, or indecipherable to unauthorized individuals.

(i) REPORT TO CONGRESS ON BREACHES.—

(1) IN GENERAL.—Not later than 12 months after the date of the enactment of this Act and annually thereafter, the Secretary shall prepare and submit 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 Energy and Commerce of the House of Representatives a report containing the information described in paragraph (2) regarding breaches for which notice was provided to the Secretary under subsection (e)(3).

(2) INFORMATION.—The information described in this paragraph regarding breaches specified in paragraph (1) shall include—

(A) the number and nature of such breaches; and

(B) actions taken in response to such breaches.

(j) REGULATIONS; EFFECTIVE DATE.—To carry out this section, the Secretary of Health and Human Services shall promulgate interim final regulations by not later than the date that is 180 days after the date of the enactment of this title. The provisions of this section shall apply to breaches that are discovered on or after the date that is 30 days after the date of publication of such interim final regulations.

SEC. 4403. EDUCATION ON HEALTH INFORMATION PRIVACY.

(a) REGIONAL OFFICE PRIVACY ADVISORS.—Not later than 6 months after the date of the enactment of this Act, the Secretary shall designate an individual in each regional office of the Department of Health and Human Services to offer guidance and education to covered entities, business associates, and individuals on their rights and responsibilities related to Federal privacy and security requirements for protected health information.

(b) EDUCATION INITIATIVE ON USES OF HEALTH INFORMATION.—Not later than 12 months after the date of the enactment of this Act, the Office for Civil Rights within the Department of Health and Human Services shall develop and maintain a multifaceted national education initiative to enhance public transparency regarding the uses of protected health information, including programs to educate individuals about the potential uses of their protected health information, the effects of such uses, and the rights of individuals with respect to such uses. Such programs shall be conducted in a variety of languages and present information in a clear and understandable manner.

SEC. 4404. APPLICATION OF PRIVACY PROVISIONS AND PENALTIES TO BUSINESS ASSOCIATES OF COVERED ENTITIES.

(a) APPLICATION OF CONTRACT REQUIREMENTS.—In the case of a business associate of a covered entity that obtains or creates protected health information pursuant to a written contract (or other written arrangement) described in section 164.502(e)(2) of title 45, Code of Federal Regulations, with such covered entity, the business associate may use and disclose such protected health information only if such use or disclosure, respectively, is in compliance with each applicable requirement of section 164.504(e) of such title. The additional requirements of this subtitle that relate to privacy and that are made applicable with respect to covered entities shall also be applicable to such a business associate and shall be incorporated into the business associate agreement between the business associate and the covered entity.

(b) APPLICATION OF KNOWLEDGE ELEMENTS ASSOCIATED WITH CONTRACTS.—Section 164.504(e)(1)(ii) of title 45, Code of Federal Regulations, shall apply to a business associate described in subsection (a), with respect to compliance with such subsection, in the same manner that such section applies to a covered entity, with respect to compliance with the standards in sections 164.502(e) and 164.504(e) of such title, except that in applying such section 164.504(e)(1)(ii) each reference to the business associate, with respect to a contract, shall be treated as a reference to the covered entity involved in such contract.

(c) APPLICATION OF CIVIL AND CRIMINAL PENALTIES.—In the case of a business associate that violates any provision of subsection (a) or (b), the provisions of sections 1176 and 1177 of the Social Security Act (42 U.S.C. 1320d-5, 1320d-6) shall apply to the business associate with respect to such violation in the same manner as such provisions apply to a person who violates a provision of part C of title XI of such Act.

SEC. 4405. RESTRICTIONS ON CERTAIN DISCLOSURES AND SALES OF HEALTH INFORMATION; ACCOUNTING OF CERTAIN PROTECTED HEALTH INFORMATION DISCLOSURES; ACCESS TO CERTAIN INFORMATION IN ELECTRONIC FORMAT.

(a) REQUESTED RESTRICTIONS ON CERTAIN DISCLOSURES OF HEALTH INFORMATION.—In the case that an individual requests under paragraph (a)(1)(i)(A) of section 164.522 of title 45, Code of Federal Regulations, that a covered entity restrict the disclosure of the protected health information of the individual, notwithstanding paragraph (a)(1)(ii) of such section, the covered entity must comply with the requested restriction if—

(1) except as otherwise required by law, the disclosure is to a health plan for purposes of carrying out payment or health care operations (and is not for purposes of carrying out treatment); and

(2) the protected health information pertains solely to a health care item or service for which the health care provider involved has been paid out of pocket in full.

(b) DISCLOSURES REQUIRED TO BE LIMITED TO THE LIMITED DATA SET OR THE MINIMUM NECESSARY.—

(1) IN GENERAL.—

(A) IN GENERAL.—Subject to subparagraph (B), a covered entity shall be treated as being in compliance with section 164.502(b)(1) of title 45, Code of Federal Regulations, with respect to the use, disclosure, or request of protected health information described in such section, only if the covered entity limits such protected health information, to the extent practicable, to the limited data set (as defined in section 164.514(e)(2) of such title) or, if needed by such entity, to the minimum necessary to accomplish the intended purpose of such use, disclosure, or request, respectively.

(B) GUIDANCE.—Not later than 18 months after the date of the enactment of this section, the Secretary shall issue guidance on what constitutes "minimum necessary" for purposes of subpart E of part 164 of title 45, Code of Federal Regulation. In issuing such guidance the Secretary shall take into consideration the guidance under section 4424(c).

(C) SUNSET.—Subparagraph (A) shall not apply on and after the effective date on which the Secretary issues the guidance under subparagraph (B).

(2) DETERMINATION OF MINIMUM NECESSARY.—For purposes of paragraph (1), in the case of the disclosure of protected health information, the covered entity or business associate disclosing such information shall determine what constitutes the minimum necessary to accomplish the intended purpose of such disclosure.

(3) APPLICATION OF EXCEPTIONS.—The exceptions described in section 164.502(b)(2) of title 45, Code of Federal Regulations, shall apply to the requirement under paragraph (1) as of the effective date described in section 4423 in the same manner that such exceptions apply to section 164.502(b)(1) of such title before such date.

(4) RULE OF CONSTRUCTION.—Nothing in this subsection shall be construed as affecting the use, disclosure, or request of protected health information that has been de-identified.

(c) ACCOUNTING OF CERTAIN PROTECTED HEALTH INFORMATION DISCLOSURES REQUIRED IF COVERED ENTITY USES ELECTRONIC HEALTH RECORD.—

(1) IN GENERAL.—In applying section 164.528 of title 45, Code of Federal Regulations, in the case that a covered entity uses or maintains an electronic health record with respect to protected health information—

(A) the exception under paragraph (a)(1)(i) of such section shall not apply to disclosures through an electronic health record made by such entity of such information; and

(B) an individual shall have a right to receive an accounting of disclosures described in such paragraph of such information made by such covered entity during only the three years prior to the date on which the accounting is requested.

(2) REGULATIONS.—The Secretary shall promulgate regulations on what information shall be collected about each disclosure referred to in paragraph (1)(A) not later than 18 months after the date on which the Secretary adopts standards on accounting for disclosure described in the section 3002(b)(2)(B)(iv) of the Public Health Service Act, as added by section 4101. Such regulations shall only require such information to be collected through an electronic health record in a manner that takes into account the interests of individuals in learning the circumstances under which their protected health information is being disclosed and takes into account the administrative burden of accounting for such disclosures.

(3) CONSTRUCTION.—Nothing in this subsection shall be construed as requiring a covered entity to account for disclosures of protected health information that are not made by such covered entity or by a business associate acting on behalf of the covered entity.

(4) EFFECTIVE DATE.—

(A) CURRENT USERS OF ELECTRONIC RECORDS.—In the case of a covered entity insofar as it acquired an electronic health record as of January 1, 2009, paragraph (1) shall apply to disclosures, with respect to protected health information, made by the covered entity from such a record on and after January 1, 2014.

(B) OTHERS.—In the case of a covered entity insofar as it acquires an electronic health record after January 1, 2009, paragraph (1) shall apply to disclosures, with respect to protected health information, made by the covered entity from such record on and after the later of the following:

(i) January 1, 2011; or

(ii) the date that it acquires an electronic health record.

(d) REVIEW OF HEALTH CARE OPERATIONS.—Not later than 18 months after the date of the enactment of this title, the Secretary shall promulgate regulations to eliminate from the definition of health care operations under section 164.501 of title 45, Code of Federal Regulations, those activities that can reasonably and efficiently be conducted through the use of information that is de-identified (in accordance with the requirements of section 164.514(b) of such title) or that should require a valid authorization for use or disclosure. In promulgating such regulations, the Secretary may choose to narrow or clarify activities that the Secretary chooses to retain in the definition of health care operations and the Secretary shall take into account the report under section 424(d). In such regulations the Secretary shall specify the date on which such regulations shall apply to disclosures made by a covered entity, but in no case would such date be sooner than the date that is 24 months after the date of the enactment of this section.

(e) PROHIBITION ON SALE OF ELECTRONIC HEALTH RECORDS OR PROTECTED HEALTH INFORMATION OBTAINED FROM ELECTRONIC HEALTH RECORDS.—

(1) IN GENERAL.—Except as provided in paragraph (2), a covered entity or business associate shall not directly or indirectly receive remuneration in exchange for any protected health information of an individual unless the covered entity obtained from the individual, in accordance with section 164.508 of title 45, Code of Federal Regulations, a valid authorization that includes, in accordance with such section, a specification of whether the protected health information can be further exchanged for remuneration by the entity receiving protected health information of that individual.

(2) EXCEPTIONS.—Paragraph (1) shall not apply in the following cases:

(A) The purpose of the exchange is for research or public health activities (as described in sections 164.501, 164.512(i), and 164.512(b) of title 45, Code of Federal Regulations) and the price charged reflects the costs of preparation and transmittal of the data for such purpose.

(B) The purpose of the exchange is for the treatment of the individual and the price charges reflects not more than the costs of preparation and transmittal of the data for such purpose.

(C) The purpose of the exchange is the health care operation specifically described in subparagraph (iv) of paragraph (6) of the definition of health care operations in section 164.501 of title 45, Code of Federal Regulations.

(D) The purpose of the exchange is for remuneration that is provided by a covered entity to a business associate for activities involving the exchange of protected health information that the business associate undertakes on behalf of and at the specific request of the covered entity pursuant to a business associate agreement.

(E) The purpose of the exchange is to provide an individual with a copy of the individual's protected health information pursuant to section 164.524 of title 45, Code of Federal Regulations.

(F) The purpose of the exchange is otherwise determined by the Secretary in regulations to be similarly necessary and appropriate as the exceptions provided in subparagraphs (A) through (E).

(3) REGULATIONS.—The Secretary shall promulgate regulations to carry out paragraph (this subsection, including exceptions described in paragraph (2), not later than 18 months after the date of the enactment of this title.

(4) EFFECTIVE DATE.—Paragraph (1) shall apply to exchanges occurring on or after the date that is 6 months after the date of the promulgation of final regulations implementing this subsection.

(f) ACCESS TO CERTAIN INFORMATION IN ELECTRONIC FORMAT.—In applying section 164.524 of title 45, Code of Federal Regulations, in the case that a covered entity uses or maintains an electronic health record with respect to protected health information of an individual—

(1) the individual shall have a right to obtain from such covered entity a copy of such information in an electronic format; and

(2) notwithstanding paragraph (c)(4) of such section, any fee that the covered entity may impose for providing such individual with a copy of such information (or a summary or explanation of such information) if such copy (or summary or explanation) is in an electronic form shall not be greater than the entity's labor costs in responding to the request for the copy (or summary or explanation).

SEC. 4406. CONDITIONS ON CERTAIN CONTACTS AS PART OF HEALTH CARE OPERATIONS.

(a) MARKETING.—

(1) IN GENERAL.—A communication by a covered entity or business associate that is about a product or service and that encourages recipients of the communication to purchase or use the product or service shall not be considered a

health care operation for purposes of subpart E of part 164 of title 45, Code of Federal Regulations, unless the communication is made as described in subparagraph (i), (ii), or (iii) of paragraph (1) of the definition of marketing in section 164.501 of such title.

(2) PAYMENT FOR CERTAIN COMMUNICATIONS.—A covered entity or business associate may not receive direct or indirect payment in exchange for making any communication described in subparagraph (i), (ii), or (iii) of paragraph (1) of the definition of marketing in section 164.501 of title 45, Code of Federal Regulations, except—

(A) a business associate of a covered entity may receive payment from the covered entity for making any such communication on behalf of the covered entity that is consistent with the written contract (or other written arrangement) described in section 164.502(e)(2) of such title between such business associate and covered entity; and

(B) a covered entity may receive payment in exchange for making any such communication if the entity obtains from the recipient of the communication, in accordance with section 164.508 of title 45, Code of Federal Regulations, a valid authorization (as described in paragraph (b) of such section) with respect to such communication.

(b) FUNDRAISING.—Fundraising for the benefit of a covered entity shall not be considered a health care operation for purposes of section 164.501 of title 45, Code of Federal Regulations.

(c) EFFECTIVE DATE.—This section shall apply to contracting occurring on or after the effective date specified under section 4423.

SEC. 4407. TEMPORARY BREACH NOTIFICATION REQUIREMENT FOR VENDORS OF PERSONAL HEALTH RECORDS AND OTHER NON-HIPAA COVERED ENTITIES.

(a) IN GENERAL.—In accordance with subsection (c), each vendor of personal health records, following the discovery of a breach of security of unsecured PHR identifiable health information that is in a personal health record maintained or offered by such vendor, and each entity described in clause (ii) or (iii) of section 4424(b)(1)(A), following the discovery of a breach of security of such information that is obtained through a product or service provided by such entity, shall—

(1) notify each individual who is a citizen or resident of the United States whose unsecured PHR identifiable health information was acquired by an unauthorized person as a result of such a breach of security; and

(2) notify the Federal Trade Commission.

(b) NOTIFICATION BY THIRD PARTY SERVICE PROVIDERS.—A third party service provider that provides services to a vendor of personal health records or to an entity described in clause (ii) or (iii) of section 4424(b)(1)(A) in connection with the offering or maintenance of a personal health record or a related product or service and that accesses, maintains, retains, modifies, records, stores, destroys, or otherwise holds, uses, or discloses unsecured PHR identifiable health information in such a record as a result of such services shall, following the discovery of a breach of security of such information, notify such vendor or entity, respectively, of such breach. Such notice shall include the identification of each individual whose unsecured PHR identifiable health information has been, or is reasonably believed to have been, accessed, acquired, or disclosed during such breach.

(c) APPLICATION OF REQUIREMENTS FOR TIMELINESS, METHOD, AND CONTENT OF NOTIFICATIONS.—Subsections (c), (d), (e), and (f) of section 402 shall apply to a notification required under subsection (a) and a vendor of personal health records, an entity described in subsection (a) and a third party service provider described in subsection (b), with respect to a breach of security under subsection (a) of unsecured PHR identifiable health information in such records maintained or offered by such vendor, in a manner specified by the Federal Trade Commission.

(d) NOTIFICATION OF THE SECRETARY.—Upon receipt of a notification of a breach of security under subsection (a)(2), the Federal Trade Commission shall notify the Secretary of such breach.

(e) ENFORCEMENT.—A violation of subsection (a) or (b) shall be treated as an unfair and deceptive act or practice in violation of a regulation under section 18(a)(1)(B) of the Federal Trade Commission Act (15 U.S.C. 57*a*(a)(1)(B)) regarding unfair or deceptive acts or practices.

(f) DEFINITIONS.—For purposes of this section:

(1) BREACH OF SECURITY.—The term "breach of security" means, with respect to unsecured PHR identifiable health information of an individual in a personal health record, acquisition of such information without the authorization of the individual.

(2) PHR IDENTIFIABLE HEALTH INFORMATION.—The term "PHR identifiable health information" means individually identifiable health information, as de-

fined in section 1171(6) of the Social Security Act (42 U.S.C. 1320d(6)), and includes, with respect to an individual, information—

(A) that is provided by or on behalf of the individual; and

(B) that identifies the individual or with respect to which there is a reasonable basis to believe that the information can be used to identify the individual.

(3) UNSECURED PHR IDENTIFIABLE HEALTH INFORMATION.—

(A) IN GENERAL.—Subject to subparagraph (B), the term "unsecured PHR identifiable health information" means PHR identifiable health information that is not protected through the use of a technology or methodology specified by the Secretary in the guidance issued under section 4402(h)(2).

(B) EXCEPTION IN CASE TIMELY GUIDANCE NOT ISSUED.—In the case that the Secretary does not issue guidance under section 4402(h)(2) by the date specified in such section, for purposes of this section, the term "unsecured PHR identifiable health information" shall mean PHR identifiable health information that is not secured by a technology standard that renders protected health information unusable, unreadable, or indecipherable to unauthorized individuals and that is developed or endorsed by a standards developing organization that is accredited by the American National Standards Institute.

(g) REGULATIONS; EFFECTIVE DATE; SUNSET.—

(1) REGULATIONS; EFFECTIVE DATE.—To carry out this section, the Secretary of Health and Human Services shall promulgate interim final regulations by not later than the date that is 180 days after the date of the enactment of this section. The provisions of this section shall apply to breaches of security that are discovered on or after the date that is 30 days after the date of publication of such interim final regulations.

(2) SUNSET.—The provisions of this section shall not apply to breaches of security occurring on or after the earlier of the following the dates:

(A) The date on which a standard relating to requirements for entities that are not covered entities that includes requirements relating to breach notification has been promulgated by the Secretary.

(B) The date on which a standard relating to requirements for entities that are not covered entities that includes requirements relating to breach notification has been promulgated by the Federal Trade Commission and has taken effect.

SEC. 4408. BUSINESS ASSOCIATE CONTRACTS REQUIRED FOR CERTAIN ENTITIES.

Each organization, with respect to a covered entity, that provides data transmission of protected health information to such entity (or its business associate) and that requires access on a routine basis to such protected health information, such as a Health Information Exchange Organization, Regional Health Information Organization, E-prescribing Gateway, or each vendor that contracts with a covered entity to allow that covered entity to offer a personal health record to patients as part of its electronic health record, is required to enter into a written contract (or other written arrangement) described in section 164.502(e)(2) of title 45, Code of Federal Regulations and a written contract (or other arrangement) described in section 164.308(b) of such title, with such entity and shall be treated as a business associate of the covered entity for purposes of the provisions of this subtitle and subparts C and E of part 164 of title 45, Code of Federal Regulations, as such provisions are in effect as of the date of enactment of this title.

SEC. 4409. CLARIFICATION OF APPLICATION OF WRONGFUL DISCLOSURES CRIMINAL PENALTIES.

Section 1177(a) of the Social Security Act (42 U.S.C. 1320d–6(a)) is amended by adding at the end the following new sentence: "For purposes of the previous sentence, a person (including an employee or other individual) shall be considered to have obtained or disclosed individually identifiable health information in violation of this part if the information is maintained by a covered entity (as defined in the HIPAA privacy regulation described in section 1180(b)(3)) and the individual obtained or disclosed such information without authorization.".

SEC. 4410. IMPROVED ENFORCEMENT.

(a) IN GENERAL.—Section 1176 of the Social Security Act (42 U.S.C. 1320d-5) is amended—

(1) in subsection (b)(1), by striking "the act constitutes an offense punishable under section 1177" and inserting "a penalty has been imposed under section 1177 with respect to such act"; and

(2) by adding at the end the following new subsection:

"(c) NONCOMPLIANCE DUE TO WILLFUL NEGLECT.—

"(1) IN GENERAL.—A violation of a provision of this part due to willful neglect is a violation for which the Secretary is required to impose a penalty under subsection (a)(1).

"(2) REQUIRED INVESTIGATION.—For purposes of paragraph (1), the Secretary shall formally investigate any complaint of a violation of a provision of this part if a preliminary investigation of the facts of the complaint indicate such a possible violation due to willful neglect.".

(b) EFFECTIVE DATE; REGULATIONS.—

(1) The amendments made by subsection (a) shall apply to penalties imposed on or after the date that is 24 months after the date of the enactment of this title.

(2) Not later than 18 months after the date of the enactment of this title, the Secretary of Health and Human Services shall promulgate regulations to implement such amendments.

(c) DISTRIBUTION OF CERTAIN CIVIL MONETARY PENALTIES COLLECTED.—

(1) IN GENERAL.—Subject to the regulation promulgated pursuant to paragraph (3), any civil monetary penalty or monetary settlement collected with respect to an offense punishable under this subtitle or section 1176 of the Social Security Act (42 U.S.C. 1320d-5) insofar as such section relates to privacy or security shall be transferred to the Office of Civil Rights of the Department of Health and Human Services to be used for purposes of enforcing the provisions of this subtitle and subparts C and E of part 164 of title 45, Code of Federal Regulations, as such provisions are in effect as of the date of enactment of this Act.

(2) GAO REPORT.—Not later than 18 months after the date of the enactment of this title, the Comptroller General shall submit to the Secretary a report including recommendations for a methodology under which an individual who is harmed by an act that constitutes an offense referred to in paragraph (1) may receive a percentage of any civil monetary penalty or monetary settlement collected with respect to such offense.

(3) ESTABLISHMENT OF METHODOLOGY TO DISTRIBUTE PERCENTAGE OF CMPS COLLECTED TO HARMED INDIVIDUALS.—Not later than 3 years after the date of the enactment of this title, the Secretary shall establish by regulation and based on the recommendations submitted under paragraph (2), a methodology under which an individual who is harmed by an act that constitutes an offense referred to in paragraph (1) may receive a percentage of any civil monetary penalty or monetary settlement collected with respect to such offense.

(4) APPLICATION OF METHODOLOGY.—The methodology under paragraph (3) shall be applied with respect to civil monetary penalties or monetary settlements imposed on or after the effective date of the regulation.

(d) TIERED INCREASE IN AMOUNT OF CIVIL MONETARY PENALTIES.—

(1) IN GENERAL.—Section 1176(a)(1) of the Social Security Act (42 U.S.C. 1320d-5(a)(1)) is amended by striking "who violates a provision of this part a penalty of not more than" and all that follows and inserting the following: "who violates a provision of this part—

"(A) in the case of a violation of such provision in which it is established that the person did not know (and by exercising reasonable diligence would not have known) that such person violated such provision, a penalty for each such violation of an amount that is at least the amount described in paragraph (3)(A) but not to exceed the amount described in paragraph (3)(D);

"(B) in the case of a violation of such provision in which it is established that the violation was due to reasonable cause and not to willful neglect, a penalty for each such violation of an amount that is at least the amount described in paragraph (3)(B) but not to exceed the amount described in paragraph (3)(D); and

"(C) in the case of a violation of such provision in which it is established that the violation was due to willful neglect—

"(i) if the violation is corrected as described in subsection (b)(3)(A), a penalty in an amount that is at least the amount described in paragraph (3)(C) but not to exceed the amount described in paragraph (3)(D); and

"(ii) if the violation is not corrected as described in such subsection, a penalty in an amount that is at least the amount described in paragraph (3)(D).

In determining the amount of a penalty under this section for a violation, the Secretary shall base such determination on the nature and extent of the violation and the nature and extent of the harm resulting from such violation.".

(2) TIERS OF PENALTIES DESCRIBED.—Section 1176(a) of such Act (42 U.S.C. 1320d-5(a)) is further amended by adding at the end the following new paragraph:

"(3) TIERS OF PENALTIES DESCRIBED.—For purposes of paragraph (1), with respect to a violation by a person of a provision of this part—

"(A) the amount described in this subparagraph is $100 for each such violation, except that the total amount imposed on the person for all such violations of an identical requirement or prohibition during a calendar year may not exceed $25,000;

"(B) the amount described in this subparagraph is $1,000 for each such violation, except that the total amount imposed on the person for all such violations of an identical requirement or prohibition during a calendar year may not exceed $100,000;

"(C) the amount described in this subparagraph is $10,000 for each such violation, except that the total amount imposed on the person for all such violations of an identical requirement or prohibition during a calendar year may not exceed $250,000; and

"(D) the amount described in this subparagraph is $50,000 for each such violation, except that the total amount imposed on the person for all such violations of an identical requirement or prohibition during a calendar year may not exceed $1,500,000.".

(3) CONFORMING AMENDMENTS.—Section 1176(b) of such Act (42 U.S.C. 1320d-5(b)) is amended—

(A) by striking paragraph (2) and redesignating paragraphs (3) and (4) as paragraphs (2) and (3), respectively; and

(B) in paragraph (2), as so redesignated—

(i) in subparagraph (A), by striking "in subparagraph (B), a penalty may not be imposed under subsection (a) if" and all that follows through "the failure to comply is corrected" and inserting "in subparagraph (B) or subsection (a)(1)(C), a penalty may not be imposed under subsection (a) if the failure to comply is corrected"; and

(ii) in subparagraph (B), by striking "(A)(ii)" and inserting "(A)" each place it appears.

(4) EFFECTIVE DATE.—The amendments made by this subsection shall apply to violations occurring after the date of the enactment of this title.

(e) ENFORCEMENT THROUGH STATE ATTORNEYS GENERAL.—

(1) IN GENERAL.—Section 1176 of the Social Security Act (42 U.S.C. 1320d–5) is amended by adding at the end the following new subsection:

"(c) ENFORCEMENT BY STATE ATTORNEYS GENERAL.—

"(1) CIVIL ACTION.—Except as provided in subsection (b), in any case in which the attorney general of a State has reason to believe that an interest of one or more of the residents of that State has been or is threatened or adversely affected by any person who violates a provision of this part, the attorney general of the State, as parens patriae, may bring a civil action on behalf of such residents of the State in a district court of the United States of appropriate jurisdiction—

"(A) to enjoin further such violation by the defendant; or

"(B) to obtain damages on behalf of such residents of the State, in an amount equal to the amount determined under paragraph (2).

"(2) STATUTORY DAMAGES.—

"(A) IN GENERAL.—For purposes of paragraph (1)(B), the amount determined under this paragraph is the amount calculated by multiplying the number of violations by up to $100. For purposes of the preceding sentence, in the case of a continuing violation, the number of violations shall be determined consistent with the HIPAA privacy regulations (as defined in section 1180(b)(3)) for violations of subsection (a).

"(B) LIMITATION.—The total amount of damages imposed on the person for all violations of an identical requirement or prohibition during a calendar year may not exceed $25,000.

"(C) REDUCTION OF DAMAGES.—In assessing damages under subparagraph (A), the court may consider the factors the Secretary may consider in determining the amount of a civil money penalty under subsection (a) under the HIPAA privacy regulations.

"(3) ATTORNEY FEES.—In the case of any successful action under paragraph (1), the court, in its discretion, may award the costs of the action and reasonable attorney fees to the State.

"(4) NOTICE TO SECRETARY.—The State shall serve prior written notice of any action under paragraph (1) upon the Secretary and provide the Secretary with a copy of its complaint, except in any case in which such prior notice is not fea-

sible, in which case the State shall serve such notice immediately upon instituting such action. The Secretary shall have the right—

"(A) to intervene in the action;

"(B) upon so intervening, to be heard on all matters arising therein; and

"(C) to file petitions for appeal.

"(5) CONSTRUCTION.—For purposes of bringing any civil action under paragraph (1), nothing in this section shall be construed to prevent an attorney general of a State from exercising the powers conferred on the attorney general by the laws of that State.

"(6) VENUE; SERVICE OF PROCESS.—

"(A) VENUE.—Any action brought under paragraph (1) may be brought in the district court of the United States that meets applicable requirements relating to venue under section 1391 of title 28, United States Code.

"(B) SERVICE OF PROCESS.—In an action brought under paragraph (1), process may be served in any district in which the defendant—

"(i) is an inhabitant; or

"(ii) maintains a physical place of business.

"(7) LIMITATION ON STATE ACTION WHILE FEDERAL ACTION IS PENDING.—If the Secretary has instituted an action against a person under subsection (a) with respect to a specific violation of this part, no State attorney general may bring an action under this subsection against the person with respect to such violation during the pendency of that action.

"(8) APPLICATION OF CMP STATUTE OF LIMITATION.—A civil action may not be instituted with respect to a violation of this part unless an action to impose a civil money penalty may be instituted under subsection (a) with respect to such violation consistent with the second sentence of section 1128A(c)(1).".

(2) CONFORMING AMENDMENTS.—Subsection (b) of such section, as amended by subsection (d)(3), is amended—

(A) in paragraph (1), by striking "A penalty may not be imposed under subsection (a)" and inserting "No penalty may be imposed under subsection (a) and no damages obtained under subsection (c)";

(B) in paragraph (2)(A)—

(i) in the matter before clause (i), by striking "a penalty may not be imposed under subsection (a)" and inserting "no penalty may be imposed under subsection (a) and no damages obtained under subsection (c)"; and

(ii) in clause (ii), by inserting "or damages" after "the penalty";

(C) in paragraph (2)(B)(i), by striking "The period" and inserting "With respect to the imposition of a penalty by the Secretary under subsection (a), the period"; and

(D) in paragraph (3), by inserting "and any damages under subsection (c)" after "any penalty under subsection (a)".

(3) EFFECTIVE DATE.—The amendments made by this subsection shall apply to violations occurring after the date of the enactment of this Act.

(f) ALLOWING CONTINUED USE OF CORRECTIVE ACTION.—Such section is further amended by adding at the end the following new subsection:

"(d) ALLOWING CONTINUED USE OF CORRECTIVE ACTION.—Nothing in this section shall be construed as preventing the Office of Civil Rights of the Department of Health and Human Services from continuing, in its discretion, to use corrective action without a penalty in cases where the person did not know (and by exercising reasonable diligence would not have known) of the violation involved.".

SEC. 4411. AUDITS.

The Secretary shall provide for periodic audits to ensure that covered entities and business associates that are subject to the requirements of this subtitle and subparts C and E of part 164 of title 45, Code of Federal Regulations, as such provisions are in effect as of the date of enactment of this Act, comply with such requirements.

PART II—RELATIONSHIP TO OTHER LAWS; REGULATORY REFERENCES; EFFECTIVE DATE; REPORTS

SEC. 4421. RELATIONSHIP TO OTHER LAWS.

(a) APPLICATION OF HIPAA STATE PREEMPTION.—Section 1178 of the Social Security Act (42 U.S.C. 1320d–7) shall apply to a provision or requirement under this subtitle in the same manner that such section applies to a provision or requirement under part C of title XI of such Act or a standard or implementation specification adopted or established under sections 1172 through 1174 of such Act.

(b) HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT.—The standards governing the privacy and security of individually identifiable health information promulgated by the Secretary under sections 262(a) and 264 of the Health Insurance Portability and Accountability Act of 1996 shall remain in effect to the extent that they are consistent with this subtitle. The Secretary shall by rule amend such Federal regulations as required to make such regulations consistent with this subtitle.

SEC. 4422. REGULATORY REFERENCES.

Each reference in this subtitle to a provision of the Code of Federal Regulations refers to such provision as in effect on the date of the enactment of this title (or to the most recent update of such provision).

SEC. 4423. EFFECTIVE DATE.

Except as otherwise specifically provided, the provisions of part I shall take effect on the date that is 12 months after the date of the enactment of this title.

SEC. 4424. STUDIES, REPORTS, GUIDANCE.

(a) REPORT ON COMPLIANCE.—

(1) IN GENERAL.—For the first year beginning after the date of the enactment of this Act and annually thereafter, the Secretary shall prepare and submit to the Committee on Health, Education, Labor, and Pensions of the Senate and the Committee on Ways and Means and the Committee on Energy and Commerce of the House of Representatives a report concerning complaints of alleged violations of law, including the provisions of this subtitle as well as the provisions of subparts C and E of part 164 of title 45, Code of Federal Regulations, (as such provisions are in effect as of the date of enactment of this Act) relating to privacy and security of health information that are received by the Secretary during the year for which the report is being prepared. Each such report shall include, with respect to such complaints received during the year—

(A) the number of such complaints;

(B) the number of such complaints resolved informally, a summary of the types of such complaints so resolved, and the number of covered entities that received technical assistance from the Secretary during such year in order to achieve compliance with such provisions and the types of such technical assistance provided;

(C) the number of such complaints that have resulted in the imposition of civil monetary penalties or have been resolved through monetary settlements, including the nature of the complaints involved and the amount paid in each penalty or settlement;

(D) the number of compliance reviews conducted and the outcome of each such review;

(E) the number of subpoenas or inquiries issued;

(F) the Secretary's plan for improving compliance with and enforcement of such provisions for the following year; and

(G) the number of audits performed and a summary of audit findings pursuant to section 4411.

(2) AVAILABILITY TO PUBLIC.—Each report under paragraph (1) shall be made available to the public on the Internet website of the Department of Health and Human Services.

(b) STUDY AND REPORT ON APPLICATION OF PRIVACY AND SECURITY REQUIREMENTS TO NON-HIPAA COVERED ENTITIES.—

(1) STUDY.—Not later than one year after the date of the enactment of this title, the Secretary, in consultation with the Federal Trade Commission, shall conduct a study, and submit a report under paragraph (2), on privacy and security requirements for entities that are not covered entities or business associates as of the date of the enactment of this title, including—

(A) requirements relating to security, privacy, and notification in the case of a breach of security or privacy (including the applicability of an exemption to notification in the case of individually identifiable health information that has been rendered unusable, unreadable, or indecipherable through technologies or methodologies recognized by appropriate professional organization or standard setting bodies to provide effective security for the information) that should be applied to—

(i) vendors of personal health records;

(ii) entities that offer products or services through the website of a vendor of personal health records;

(iii) entities that are not covered entities and that offer products or services through the websites of covered entities that offer individuals personal health records;

(iv) entities that are not covered entities and that access information in a personal health record or send information to a personal health record; and

(v) third party service providers used by a vendor or entity described in clause (i), (ii), (iii), or (iv) to assist in providing personal health record products or services;

(B) a determination of which Federal government agency is best equipped to enforce such requirements recommended to be applied to such vendors, entities, and service providers under subparagraph (A); and

(C) a timeframe for implementing regulations based on such findings.

(2) REPORT.—The Secretary shall submit to the Committee on Finance, the Committee on Health, Education, Labor, and Pensions, and the Committee on Commerce of the Senate and the Committee on Ways and Means and the Committee on Energy and Commerce of the House of Representatives a report on the findings of the study under paragraph (1) and shall include in such report recommendations on the privacy and security requirements described in such paragraph.

(c) GUIDANCE ON IMPLEMENTATION SPECIFICATION TO DE-IDENTIFY PROTECTED HEALTH INFORMATION.—Not later than 12 months after the date of the enactment of this title, the Secretary shall, in consultation with stakeholders, issue guidance on how best to implement the requirements for the de-identification of protected health information under section 164.514(b) of title 45, Code of Federal Regulations.

(d) GAO REPORT ON TREATMENT DISCLOSURES.—Not later than one year after the date of the enactment of this title, the Comptroller General of the United States shall submit to the Committee on Health, Education, Labor, and Pensions of the Senate and the Committee on Ways and Means and the Committee on Energy and Commerce of the House of Representatives a report on the best practices related to the disclosure among health care providers of protected health information of an individual for purposes of treatment of such individual. Such report shall include an examination of the best practices implemented by States and by other entities, such as health information exchanges and regional health information organizations, an examination of the extent to which such best practices are successful with respect to the quality of the resulting health care provided to the individual and with respect to the ability of the health care provider to manage such best practices, and an examination of the use of electronic informed consent for disclosing protected health information for treatment, payment, and health care operations.

Subtitle E—Miscellaneous Medicare Provisions

SEC. 4501. MORATORIA ON CERTAIN MEDICARE REGULATIONS.

(a) DELAY IN PHASE OUT OF MEDICARE HOSPICE BUDGET NEUTRALITY ADJUSTMENT FACTOR DURING FISCAL YEAR 2009.—Notwithstanding any other provision of law, including the final rule published on August 8, 2008, 73 Federal Register 46464 et seq., relating to Medicare Program; Hospice Wage Index for Fiscal Year 2009, the Secretary of Health and Human Services shall not phase out or eliminate the budget neutrality adjustment factor in the Medicare hospice wage index before October 1, 2009, and the Secretary shall recompute and apply the final Medicare hospice wage index for fiscal year 2009 as if there had been no reduction in the budget neutrality adjustment factor.

(b) NON-APPLICATION OF PHASED-OUT INDIRECT MEDICAL EDUCATION (IME) ADJUSTMENT FACTOR FOR FISCAL YEAR 2009.—

(1) IN GENERAL.—Section 412.322 of title 42, Code of Federal Regulations, shall be applied without regard to paragraph (c) of such section, and the Secretary of Health and Human Services shall recompute payments for discharges occurring on or after October 1, 2008, as if such paragraph had never been in effect.

(2) NO EFFECT ON SUBSEQUENT YEARS.—Nothing in paragraph (1) shall be construed as having any effect on the application of paragraph (d) of section 412.322 of title 42, Code of Federal Regulations.

(c) FUNDING FOR IMPLEMENTATION.—In addition to funds otherwise available, for purposes of implementing the provisions of subsections (a) and (b), including costs incurred in reprocessing claims in carrying out such provisions, the Secretary of Health and Human Services shall provide for the transfer from the Federal Hospital Insurance Trust Fund established under section 1817 of the Social Security Act (42 U.S.C. 1395i) to the Centers for Medicare & Medicaid Services Program Management Account of $2,000,000 for fiscal year 2009.

SEC. 4502. LONG-TERM CARE HOSPITAL TECHNICAL CORRECTIONS.

(a) PAYMENT.—Subsection (c) of section 114 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (Public Law 110–173) is amended—

(1) in paragraph (1)—

(A) by amending the heading to read as follows: "DELAY IN APPLICATION OF 25 PERCENT PATIENT THRESHOLD PAYMENT ADJUSTMENT";

(B) by striking "the date of the enactment of this Act" and inserting "July 1, 2007,"; and

(C) in subparagraph (A), by inserting "or to a long-term care hospital, or satellite facility, that as of December 29, 2007, was co-located with an entity that is a provider-based, off-campus location of a subsection (d) hospital which did not provide services payable under section 1886(d) of the Social Security Act at the off-campus location" after "freestanding long-term care hospitals"; and

(2) in paragraph (2)—

(A) in subparagraph (B)(ii), by inserting "or that is described in section 412.22(h)(3)(i) of such title" before the period; and

(B) in subparagraph (C), by striking "the date of the enactment of this Act" and inserting "October 1, 2007 (or July 1, 2007, in the case of a satellite facility described in section 412.22(h)(3)(i) of title 42, Code of Federal Regulations)".

(b) MORATORIUM.—Subsection (d)(3)(A) of such section is amended by striking "if the hospital or facility" and inserting "if the hospital or facility obtained a certificate of need for an increase in beds that is in a State for which such certificate of need is required and that was issued on or after April 1, 2005, and before December 29, 2007, or if the hospital or facility".

(c) EFFECTIVE DATE.—The amendments made by this section shall be effective and apply as if included in the enactment of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (Public Law 110–173).

I. SUMMARY AND BACKGROUND

A. PURPOSE AND SUMMARY

The bill, H.R. 598, as amended, provides economic growth incentives and makes other necessary changes to the tax laws.

The bill provides net tax reductions of $277.5 billion over fiscal years 2009–2014.

B. BACKGROUND AND NEED FOR LEGISLATION

The provisions of the bill reflect a need for economic stimulus and investment in order to improve the economy. The tax incentives included in the bill are intended to stem the economic downturn and return the economy to a path of growth and prosperity.

C. LEGISLATIVE HISTORY

The Committee on Ways and Means marked up the provisions of the bill on January 22, 2009, and reported the provisions, as amended, on January 22, 2009, by a roll call vote, with a quorum present.

II. EXPLANATION OF THE BILL

TITLE I—TAX PROVISIONS

A. MAKING WORK PAY CREDIT (SEC. 1001 OF THE BILL AND NEW SEC. 36A OF THE CODE)

PRESENT LAW

Earned income tax credit

Low- and moderate-income workers may be eligible for the refundable earned income tax credit ("EITC"). Eligibility for the EITC is based on earned income, adjusted gross income, investment income, filing status, and immigration and work status in the United States. The amount of the EITC is based on the presence and number of qualifying children in the worker's family, as well as on adjusted gross income and earned income.

The EITC generally equals a specified percentage of earned income [1] up to a maximum dollar amount. The maximum amount applies over a certain income range and then diminishes to zero over a specified phaseout range. For taxpayers with earned income (or adjusted gross income ("AGI"), if greater) in excess of the beginning of the phaseout range, the maximum EITC amount is reduced by the phaseout rate multiplied by the amount of earned income (or AGI, if greater) in excess of the beginning of the phaseout range. For taxpayers with earned income (or AGI, if greater) in excess of the end of the phaseout range, no credit is allowed.

The EITC is a refundable credit, meaning that if the amount of the credit exceeds the taxpayer's Federal income tax liability, the excess is payable to the taxpayer as a direct transfer payment. Under an advance payment system, eligible taxpayers may elect to receive the credit in their paychecks, rather than waiting to claim a refund on their tax returns filed by April 15 of the following year.

Child credit

An individual may claim a tax credit for each qualifying child under the age of 17. The amount of the credit per child is $1,000 through 2010 and $500 thereafter. A child who is not a citizen, national, or resident of the United States cannot be a qualifying child.

The credit is phased out for individuals with income over certain threshold amounts. Specifically, the otherwise allowable child tax credit is reduced by $50 for each $1,000 (or fraction thereof) of modified adjusted gross income over $75,000 for single individuals or heads of households, $110,000 for married individuals filing joint returns, and $55,000 for married individuals filing separate returns. For purposes of this limitation, modified adjusted gross income includes certain otherwise excludable income earned by U.S. citizens or residents living abroad or in certain U.S. territories.

The credit is allowable against the regular tax and the alternative minimum tax. To the extent the child credit exceeds the taxpayer's tax liability, the taxpayer is eligible for a refundable credit (the additional child tax credit) equal to 15 percent of earned income in excess of a threshold dollar amount (the "earned income"

[1] Earned income is defined as (1) wages, salaries, tips, and other employee compensation, but only if such amounts are includible in gross income, plus (2) the amount of the individual's net self-employment earnings.

formula). The threshold dollar amount is $12,550 (for 2009), and is indexed for inflation.

Families with three or more children may determine the additional child tax credit using the "alternative formula," if this results in a larger credit than determined under the earned income formula. Under the alternative formula, the additional child tax credit equals the amount by which the taxpayer's social security taxes exceed the taxpayer's earned income tax credit.

Earned income is defined as the sum of wages, salaries, tips, and other taxable employee compensation plus net self-employment earnings. Unlike the EITC, which also includes the preceding items in its definition of earned income, the additional child tax credit is based only on earned income to the extent it is included in computing taxable income. For example, some ministers' parsonage allowances are considered self-employment income, and thus are considered earned income for purposes of computing the EITC, but the allowances are excluded from gross income for individual income tax purposes, and thus are not considered earned income for purposes of the additional child tax credit.

REASONS FOR CHANGE

The Committee believes that tax relief for working families is necessary to help the economy recover. By increasing after-tax disposable income, this credit will permit taxpayers to purchase additional goods and services, make additional investments, or pay down debt more efficiently.

EXPLANATION OF PROVISION

In general

The provision provides eligible individuals a refundable income tax credit for two years (taxable years beginning in 2009 and 2010).

The credit is the lesser of (1) 6.2 percent of an individual's earned income or (2) $500 ($1,000 in the case of a joint return). For these purposes, the earned income definition is the same as for the earned income tax credit with two modifications. First, earned income for these purposes does not include net earnings from self-employment which are not taken into account in computing taxable income. Second, earned income for these purposes includes combat pay excluded from gross income under section 112.[2]

The credit is phased out at a rate of two percent of the eligible individual's modified adjusted gross income above $75,000 ($150,000 in the case of a joint return). For these purposes an eligible individual's modified adjusted gross income is the eligible individual's adjusted gross income increased by any amount excluded from gross income under sections 911,931, or 933. An eligible individual means any individual other than: (1) a nonresident alien; (2) an individual with respect to whom another individual may claim a dependency deduction for a taxable year beginning in a calendar year in which the eligible individual's taxable year begins; and (3) an estate or trust. Each eligible individual must satisfy identical taxpayer identification number requirements to those applicable to the earned income tax credit.

[2] Unless otherwise stated, all section references are to the Internal Revenue Code of 1986, as amended (the "Code").

Treatment of the U.S. possessions

Mirror code possessions[3]

The U.S. Treasury will make two payments (for 2009 and 2010, respectively) to each mirror code possession in an amount equal to the aggregate amount of the credits allowable by reason of the provision to that possession's residents against its income tax. This amount will he determined by the Treasury Secretary based on information provided by the government of the respective possession. For purposes of this payment, a possession is a mirror code possession if the income tax liability of residents of the possession under that possession's income tax system is determined by reference to the U.S. income tax laws as if the possession were the United States.

Non-mirror code possessions[4]

To each possession that does not have a mirror code tax system, the U.S. Treasury will make two payments (for 2009 and 2010, respectively) in an amount estimated by the Secretary as being equal to the aggregate credits that would have been allowed to residents of that possession if a mirror code tax system had been in effect in that possession. Accordingly, the amount of each payment to a non-mirror Code possession will be an estimate of the aggregate amount of the credits that would be allowed to the possession's residents if the credit provided by the provision to U.S. residents were provided by the possession to its residents. This payment will not be made to any U.S. possession unless that possession has a plan that has been approved by the Secretary under which the possession will promptly distribute the payment to its residents.

General rules

No credit against U.S. income tax is permitted under the provision for any person to whom a credit is allowed against possession income taxes as a result of the provision (for example, under that possession's mirror income tax). Similarly, no credit against U.S. income tax is permitted for any person who is eligible for a payment under a non-mirror code possession's plan for distributing to its residents the payment described above from the U.S. Treasury.

For purposes of the payments to the possessions, the Commonwealth of Puerto Rico and the Commonwealth of the Northern Mariana Islands are considered possessions of the United States.

For purposes of the rule permitting the Treasury Secretary to disburse appropriated amounts for refunds due from certain credit provisions of the Internal Revenue Code of 1986, the payments required to be made to possessions under the provision are treated in the same manner as a refund due from the credit allowed under the provision.

Federal programs or Federally-assisted programs

Any credit or refund allowed or made to an individual under this provision (including to any resident of a U.S. possession) is not taken into account as income and shall not be taken into account

[3] Possessions with mirror code tax systems are the United States Virgin Islands, Guam, and the Commonwealth of the Northern Mariana Islands.

[4] Possessions that do not have mirror code tax systems are Puerto Rico and American Samoa.

as resources for the month of receipt and the following two months for purposes of determining 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.

Income tax withholding

It is anticipated that taxpayers' reduced tax liability under the provision shall be expeditiously implemented through revised income tax withholding schedules produced by the Internal Revenue Service. These revised income tax withholding schedules should be designed to reduce taxpayers' income tax withheld for each remaining pay period in the remainder of 2009 by an amount equal to the amount that withholding would have been reduced had the provision been reflected in the income tax withholding schedules for the entire taxable year.

EFFECTIVE DATE

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

B. Additional Tax Relief for Families With Children

1. Increase in the earned income tax credit (sec. 1101 of the bill and sec. 32 of the Code)

PRESENT LAW

Overview

Low- and moderate-income workers may be eligible for the refundable earned income tax credit ("EITC"). Eligibility for the EITC is based on earned income, adjusted gross income, investment income, filing status, and immigration and work status in the United States. The amount of the EITC is based on the presence and number of qualifying children in the worker's family, as well as on adjusted gross income and earned income.

The EITC generally equals a specified percentage of earned income[5] up to a maximum dollar amount. The maximum amount applies over a certain income range and then diminishes to zero over a specified phaseout range. For taxpayers with earned income (or adjusted gross income (AGI), if greater) in excess of the beginning of the phaseout range, the maximum EITC amount is reduced by the phaseout rate multiplied by the amount of earned income (or AGI, if greater) in excess of the beginning of the phaseout range. For taxpayers with earned income (or AGI, if greater) in excess of the end of the phaseout range, no credit is allowed.

An individual is not eligible for the EITC if the aggregate amount of disqualified income of the taxpayer for the taxable year exceeds $3,100 (for 2009). This threshold is indexed for inflation. Disqualified income is the sum of: (1) interest (taxable and tax exempt); (2) dividends; (3) net rent and royalty income (if greater

[5] Earned income is defined as (1) wages, salaries, tips, and other employee compensation, but only if such amouns are includible in gross income, plus (2) the amount of the individual's net self-employment earnings.

than zero); (4) capital gains net income; and (5) net passive income (if greater than zero) that is not self-employment income.

The EITC is a refundable credit, meaning that if the amount of the credit exceeds the taxpayer's Federal income tax liability, the excess is payable to the taxpayer as a direct transfer payment. Under an advance payment system, eligible taxpayers may elect to receive the credit in their paychecks, rather than waiting to claim a refund on their tax returns filed by April 15 of the following year.

Filing status

An unmarried individual may claim the EITC if he or she files as a single filer or as a head of household. Married individuals generally may not claim the EITC unless they file jointly. An exception to the joint return filing requirement applies to certain spouses who are separated. Under this exception, a married taxpayer who is separated from his or her spouse for the last six months of the taxable year shall not be considered as married (and, accordingly, may file a return as head of household and claim the EITC), provided that the taxpayer maintains a household that constitutes the principal place of abode for a dependent child (including a son, stepson, daughter, stepdaughter, adopted child, or a foster child) for over half the taxable year,[6] and pays over half the cost of maintaining the household in which he or she resides with the child during the year.

Presence of qualifying children and amount of the earned income credit

Three separate credit schedules apply: one schedule for taxpayers with no qualifying children, one schedule for taxpayers with one qualifying child, and one schedule for taxpayers with more than one qualifying child.[7]

Taxpayers with no qualifying children may claim a credit if they are over age 24 and below age 65. The credit is 7.65 percent of earnings up to $5,970, resulting in a maximum credit of $457 for 2009. The maximum is available for those with incomes between $5,970 and $7,470 ($10,590 if married filing jointly). The credit begins to phase down at a rate of 7.65 percent of earnings above $7,470 ($10,590 if married filing jointly) resulting in a $0 credit at $13,440 of earnings ($16,560 if married filing jointly).

Taxpayers with one qualifying child may claim a credit in 2009 of 34 percent of their earnings up to $8,950, resulting in a maximum credit of $3,043. The maximum credit is available for those with earnings between $8,950 and $16,420 ($19,540 if married filing jointly). The credit begins to phase down at a rate of 15.98 percent of earnings above $16,420 ($19,540 if married filing jointly). The credit is phased down to $0 at $35,463 of earnings ($38,583 if married filing jointly).

Taxpayers with more than one qualifying child may claim a credit in 2009 of 40 percent of earnings up to $12,570, resulting in a maximum credit of $5,028. The maximum credit is available for those with earnings between $12,570 and $16,420 ($19,540 if married filing jointly). The credit begins to phase down at a rate of

[6] A foster child must reside with the taxpayer for the entire taxable year.
[7] All income thresholds are indexed for inflation annually.

21.06 percent of earnings above $16,420 ($19,540 if married filing jointly). The credit is phased down to $0 at $40,295 of earnings ($43,415 if married filing jointly).

If more than one taxpayer lives with a qualifying child, only one of these taxpayers may claim the child for purposes of the EITC. If multiple eligible taxpayers actually claim the same qualifying child, then a tiebreaker rule determines which taxpayer is entitled to the EITC with respect to the qualifying child. Any eligible taxpayer with at least one qualifying child who does not claim the EITC with respect to qualifying children due to failure to meet certain identification requirements with respect to such children (i.e., providing the name, age and taxpayer identification number of each of such children) may not claim the EITC for taxpayers without qualifying children.

REASONS FOR CHANGE

The Committee recognizes the importance of the EITC as a means of providing tax relief to low- and middle-income families with children. The Committee also recognizes that larger families need additional tax relief. The Committee therefore believes that the EITC should be expanded to provide additional tax relief to families with three or more qualifying children.

EXPLANATION OF PROVISION

Three or more qualifying children

The provision increases the EITC credit percentage for families with three or more qualifying children to 45 percent for 2009 and 2010. For example, in 2009 taxpayers with three or more qualifying children may claim a credit of 45 percent of earnings up to $12,570, resulting in a maximum credit of $5,656.50.

Provide additional marriage penalty relief through higher threshold phase-out amounts for married couples filing joint returns

The provision increases the threshold phase-out amounts for married couples filing joint returns to $5,000[8] above the threshold phase-out amounts for singles, surviving spouses, and heads of households) for 2009 and 2010. For example, in 2009 the maximum credit of $3,043 for one qualifying child is available for those with earnings between $8,950 and $16,420 ($21,420 if married filing jointly). The credit begins to phase down at a rate of 15.98 percent of earnings above $16,420 ($21,420 if married filing jointly). The credit is phased down to $0 at $35,463 of earnings ($40,463 if married filing jointly).

EFFECTIVE DATE

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

[8] The $5,000 is indexed for inflation in the case of taxable years beginning in 2010.

2. Increase of refundable portion of the child credit (sec. 1102 of the bill and see. 24 of the Code)

PRESENT LAW

An individual may claim a tax credit for each qualifying child under the age of 17. The amount of the credit per child is $1,000 through 2010, and $500 thereafter. A child who is not a citizen, national, or resident of the United States cannot be a qualifying child.

The credit is phased out for individuals with income over certain threshold amounts. Specifically, the otherwise allowable child tax credit is reduced by $50 for each $1,000 (or, fraction thereof) of modified adjusted gross income over $75,000 for single individuals or heads of households, $110,000 for married individuals filing joint returns, and $55,000 for married individuals filing separate returns. For purposes of this limitation, modified adjusted gross income includes certain otherwise excludable income earned by U.S. citizens or residents living abroad or in certain U.S. territories.

The credit is allowable against the regular tax and the alternative minimum tax. To the extent the child credit exceeds the taxpayer's tax liability, the taxpayer is eligible for a refundable credit (the additional child tax credit) equal to 15 percent of earned income in excess of a threshold dollar amount (the "earned income" formula). The threshold dollar amount is $12,550 (for 2009), and is indexed for inflation.

Families with three or more children may determine the additional child tax credit using the "alternative formula," if this results in a larger credit than determined under the earned income formula. Under the alternative formula, the additional child tax credit equals the amount by which the taxpayer's social security taxes exceed the taxpayer's earned income tax credit ("EITC").

Earned income is defined as the sum of wages, salaries, tips, and other taxable employee compensation plus net self-employment earnings. Unlike the EITC, which also includes the preceding items in its definition of earned income, the additional child tax credit is based only on earned income to the extent it is included in computing taxable income. For example, some ministers' parsonage allowances are considered self-employment income and thus, are considered earned income for purposes of computing the EITC, but the allowances are excluded from gross income for individual income tax purposes and thus, are not considered earned income for purposes of the additional child tax credit.

Any credit or refund allowed or made to an individual under this provision (including to any resident of a U.S. possession) is not 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 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.

REASONS FOR CHANGE

The Committee believes that it is necessary to extend the benefit of the child credit to families that currently do not benefit by virtue of the earned income threshold in the formula for determining the

refundable child credit. The Committee therefore believes that this earned income threshold should be eliminated

EXPLANATION OF PROVISION

The provision modifies the earned income formula for the determination of the refundable child credit to apply to 15 percent of earned income in excess of $0 for taxable years beginning in 2009 and 2010.

EFFECTIVE DATE

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

C. American Opportunity Tax Credit (Sec. 1201 of the Bill and Sec. 25A of the Code)

PRESENT LAW

Individual taxpayers are allowed to claim a nonrefundable credit, the Hope credit, against Federal income taxes of up to $1,800 (for 2009) per eligible student per year for qualified tuition and related expenses paid for the first two years of the student's post-secondary education in a degree or certificate program.[9] The Hope credit rate is 100 percent on the first $1,200 of qualified tuition and related expenses, and 50 percent on the next $1,200 of qualified tuition and related expenses; these dollar amounts are indexed for inflation, with the amount rounded down to the next lowest multiple of $100. Thus, for example, a taxpayer who incurs $1,200 of qualified tuition and related expenses for an eligible student is eligible (subject to the adjusted gross income phaseout described below) for a $1,200 Hope credit. If a taxpayer incurs $2,400 of qualified tuition and related expenses for an eligible student, then he or she is eligible for a $1,800 Hope credit.

The Hope credit that a taxpayer may otherwise claim is phased out ratably for taxpayers with modified adjusted gross income between $50,000 and $60,000 ($100,000 and $120,000 for married taxpayers filing a joint return) for 2009. The adjusted gross income phaseout ranges are indexed for inflation, with the amount rounded down to the next lowest multiple of $1,000.

The qualified tuition and related expenses must be incurred on behalf of the taxpayer, the taxpayer's spouse, or a dependent of the taxpayer. The Hope credit is available with respect to an individual student for two taxable years, provided that the student has not completed the first two years of post-secondary education before the beginning of the second taxable year.

The Hope credit is available in the taxable year the expenses are paid, subject to the requirement that the education is furnished to the student during that year or during an academic period beginning during the first three months of the next taxable year. Qualified tuition and related expenses paid with the proceeds of a loan generally are eligible for the Hope credit. The repayment of a loan itself is not a qualified tuition or related expense.

[9] Sec. 25A. The Hope credit generally may not be claimed against a taxpayer's alternative minimum tax liability. However, the credit may be claimed against a taxpayer's alternative minimum tax liability for taxable years beginning prior to January 1, 2009.

A taxpayer may claim the Hope credit with respect to an eligible student who is not the taxpayer or the taxpayer's spouse (e.g., in cases in which the student is the taxpayer's child) only if the taxpayer claims the student as a dependent for the taxable year for which the credit is claimed. If a student is claimed as a dependent, the student is not entitled to claim a Hope credit for that taxable year on the student's own tax return. If a parent (or other taxpayer) claims a student as a dependent, any qualified tuition and related expenses paid by the student are treated as paid by the parent (or other taxpayer) for purposes of determining the amount of qualified tuition and related expenses paid by such parent (or other taxpayer) under the provision. In addition, for each taxable year, a taxpayer may elect either the Hope credit, the Lifetime Learning credit, or an above-the-line deduction for qualified tuition and related expenses with respect to an eligible student.

The Hope credit is available for "qualified tuition and related expenses," which include tuition and fees (excluding nonacademic fees) required to be paid to an eligible educational institution as a condition of enrollment or attendance of an eligible student at the institution. Charges and fees associated with meals, lodging, insurance, transportation, and similar personal, living, or family expenses are not eligible for the credit. The expenses of education involving sports, games, or hobbies are not qualified tuition and related expenses unless this education is part of the student's degree program.

Qualified tuition and related expenses generally include only out-of-pocket expenses. Qualified tuition and related expenses do not include expenses covered by employer-provided educational assistance and scholarships that are not required to be included in the gross income of either the student or the taxpayer claiming the credit. Thus, total qualified tuition and related expenses are reduced by any scholarship or fellowship grants excludable from gross income under section 117 and any other tax-free educational benefits received by the student (or the taxpayer claiming the credit) during the taxable year. The Hope credit is not allowed with respect to any education expense for which a deduction is claimed under section 162 or any other section of the Code.

An eligible student for purposes of the Hope credit is an individual who is enrolled in a degree, certificate, or other program (including a program of study abroad approved for credit by the institution at which such student is enrolled) leading to a recognized educational credential at an eligible educational institution. The student must pursue a course of study on at least a half-time basis. A student is considered to pursue a course of study on at least a half-time basis if the student carries at least one half the normal full-time work load for the course of study the student is pursuing for at least one academic period that begins during the taxable year. To be eligible for the Hope credit, a student must not have been convicted of a Federal or State felony consisting of the possession or distribution of a controlled substance.

Eligible educational institutions generally are accredited post-secondary educational institutions offering credit toward a bachelor's degree, an associate's degree, or another recognized post-secondary credential. Certain proprietary institutions and post-secondary vocational institutions also are eligible educational institu-

tions. To qualify as an eligible educational institution, an institution must be eligible to participate in Department of Education student aid programs.

Effective for taxable years beginning after December 31, 2010, the changes to the Hope credit made by the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA") no longer apply. The principal EGTRRA change scheduled to expire is the change that permitted a taxpayer to claim a Hope credit in the same year that he or she claimed an exclusion from a Coverdell education savings account. Thus, after 2010, a taxpayer cannot claim a Hope credit in the same year he or she claims an exclusion from a Coverdell education savings account.

REASONS FOR CHANGE

The Committee observes that the cost of a college education continues to rise, and thus believes that a modification of the Hope credit is appropriate to mitigate the impact of rising tuition costs on students and their families. The Committee further believes that making a portion of the credit refundable will deliver an incentive to attend college to those who do not currently benefit from the present-law credit.

EXPLANATION OF PROVISION

The provision modifies the Hope credit for taxable years beginning in 2009 or 2010. The modified credit is referred to as the American Opportunity Tax credit. The allowable modified credit is up to $2,500 per eligible student per year for qualified tuition and related expenses paid for each of the first four years of the student's post-secondary education in a degree or certificate program. The modified credit rate is 100 percent on the first $2,000 of qualified tuition and related expenses, and 25 percent on the next $2,000 of qualified tuition and related expenses. For purposes of the modified credit, the definition of qualified tuition and related expenses is expanded to include course materials.

Under the provision, the modified credit is available with respect to an individual student for four years, provided that the student has not completed the first four years of post-secondary education before the beginning of the fourth taxable year. Thus, the modified credit, in addition to other modifications, extends the application of the Hope credit to two more years of post-secondary education.

The modified credit that a taxpayer may otherwise claim is phased out ratably for taxpayers with modified adjusted gross income between $80,000 and $90,000 ($160,000 and $180,000 for married taxpayers filing a joint return). The modified credit may be claimed against a taxpayer's alternative minimum tax liability.

Forty percent of a taxpayer's otherwise allowable modified credit is refundable. However, no portion of the modified credit is refundable if the taxpayer claiming the credit is a child to whom section 1(g) applies for such taxable year (generally, any child under age 18 or any child under age 24 who is a student providing less than one-half of his or her own support, who has at least one living parent and does not file a joint return).

In addition, the provision requires the Secretary of the Treasury to conduct two studies and submit a report to Congress on the results of those studies within one year after the date of enactment.

The first study shall examine how to coordinate the Hope and Lifetime Learning credits with the Pell grant program. The second study shall examine requiring students to perform community service as a condition of taking their tuition and related expenses into account for purposes of the Hope and Lifetime Learning credits.

EFFECTIVE DATE

The provision is effective with respect to taxable years beginning after December 31, 2008.

D. HOUSING INCENTIVES

1. Waiver of requirement to repay first-time homebuyer credit (sec. 1301 of the bill and sec. 36 of the Code)

PRESENT LAW

A taxpayer who is a first-time homebuyer is allowed a refundable tax credit equal to the lesser of $7,500 ($3,750 for a married individual filing separately) or 10 percent of the purchase price of a principal residence. The credit is allowed for the tax year in which the taxpayer purchases the home unless the taxpayer makes an election as described below. The credit is allowed for qualifying home purchases on or after April 9, 2008 and before July l, 2009 (without regard to whether there was a binding contract to purchase prior to April 9, 2008).

The credit phases out for individual taxpayers with modified adjusted gross income between $75,000 and $95,000 ($150,000 and $170,000 for joint filers) for the year of purchase.

A taxpayer is considered a first-time homebuyer if such individual had no ownership interest in a principal residence in the United States during the 3-year period prior to the purchase of the home to which the credit applies.

No credit is allowed if the D.C. homebuyer credit is allowable for the taxable year the residence is purchased or a prior taxable year. A taxpayer is not permitted to claim the credit if the taxpayer's financing is from tax-exempt mortgage revenue bonds, if the taxpayer is a nonresident alien, or if the taxpayer disposes of the residence (or it ceases to be a principal residence) before the close of a taxable year for which a credit otherwise would be allowable.

The credit is recaptured ratably over fifteen years with no interest charge beginning in the second taxable year after the taxable year in which the home is purchased. For example, if the taxpayer purchases a home in 2008, the credit is allowed on the 2008 tax return, and repayments commence with the 2010 tax return. If the taxpayer sells the home (or the home ceases to be used as the principal residence of the taxpayer or the taxpayer's spouse) prior to complete repayment of the credit, any remaining credit repayment amount is due on the tax return for the year in which the home is sold (or ceases to be used as the principal residence). However, the credit repayment amount may not exceed the amount of gain from the sale of the residence to an unrelated person. For this purpose, gain is determined by reducing the basis of the residence by the amount of the credit to the extent not previously recaptured. No amount is recaptured after the death of a taxpayer. In the case of an involuntary conversion of the home, recapture is not acceler-

ated if a new principal residence is acquired within a two year period. In the case of a transfer of the residence to a spouse or to a former spouse incident to divorce, the transferee spouse (and not the transferor spouse) will be responsible for any future recapture.

An election is provided to treat a home purchased in the eligible period in 2009 as if purchased on December 31, 2008 for purposes of claiming the credit on the 2008 tax return and for establishing the beginning of the recapture period. Taxpayers may amend their returns for this purpose.

REASONS FOR CHANGE

The Committee believes that additional support for the housing sector is warranted. To encourage purchases of homes, the Committee wishes to increase the benefit of the existing temporary provision to assist first-time homebuyers by waiving the recapture of the credit. This change transforms the credit from the equivalent of an interest-free loan (under present law) into direct financial support for qualifying home purchases. To prevent artificial sales for the purpose of garnering the refundable credit, the waiver of the credit recapture is available only if taxpayers retain the home and use it as a principal residence for at least 36 months.

EXPLANATION OF PROVISION

The provision waives the recapture of the credit for qualifying home purchases after December 31, 2008, and before July 1, 2009. This waiver of recapture applies without regard to whether the taxpayer elects to treat the purchase in 2009 as occurring on December 31, 2008. If the taxpayer disposes of the home or the home otherwise ceases to be the principal residence of the taxpayer within 36 months from the date of purchase, the present law rules for recapture of the credit will still apply.

EFFECTIVE DATE

The provision applies to residences purchased after December 31, 2008.

2. Election to substitute grants to states for low-income housing projects in lieu of low-income housing credit allocation for 2009 (see. 1302 of the bill and sec. 42 of the Code)

PRESENT LAW

In general

The low-income housing credit may be claimed over a 10-year period by owners of certain residential rental property for the cost of rental housing occupied by tenants having incomes below specified levels.[10] The amount of the credit for any taxable year in the credit period is the applicable percentage of the qualified basis of each qualified low-income building. The qualified basis of any qualified low-income building for any taxable year equals the applicable fraction of the eligible basis of the building.

[10] Sec. 42.

Volume limits

A low-income housing credit is allowable only if the owner of a qualified building receives a housing credit allocation from the State or local housing credit agency. Generally, the aggregate credit authority provided annually to each State for calendar year 2009 is $2.30 per resident, with a minimum annual cap of $2,665,000 for certain small population States.[11] These amounts are indexed for inflation. Projects that also receive financing with proceeds of tax-exempt bonds issued subject to the private activity bond volume limit do not require an allocation of the low-income housing credit.

REASONS FOR CHANGE

The current economic downturn has reduced the attractiveness of low-income housing tax credits to potential investors, in part, because some potential investors have reduced or no taxable income to offset with these tax credits. The Committee believes that this provision gives State allocating agencies added flexibility and will encourage the building of more low-income housing in the short term until investors can again use these tax credits.

EXPLANATION OF PROVISION

Low-income housing grant election amount

The Secretary of the Treasury shall make a grant to the State housing credit agency of each State in an amount equal to the low-income housing grant election amount.

The low-income housing grant election amount for a State is an amount elected by the State subject to certain limits. The maximum low-income housing grant election amount for a State may not exceed 85 percent of the product of ten and the sum of the State's: (1) unused housing credit ceiling for 2008; (2) any returns to the State during 2009 of credit allocations previously made by the State; (3) 40 percent of the State's 2009 credit allocation; and (4) 40 percent of the State's share of the national pool allocated in 2009, if any).

Grants under this provision are not taxable income to recipients.

Subawards to low-income housing credit buildings

A State receiving a grant under this provision is to use these monies to make subawards to finance the construction, or acquisition and rehabilitation of qualified low-income buildings as defined under the low-income housing credit. A subaward may be made to finance a qualified low-income building regardless of whether the building has an allocation of low-income housing credit. However, in the case of qualified low-income buildings without allocations of the low-income housing credit, the State housing credit agency must make a determination that the subaward with respect to such building will increase the total funds available to the State to build and rehabilitate affordable housing. In conjunction with this determination the State housing credit agency must establish a process in which applicants for the subawards must demonstrate good faith efforts to obtain investment commitments before the agency makes such subawards.

[11] Rev. Proc. 2008–66

Any building receiving grant money from a subaward is required to satisfy the low-income housing credit rules. The State housing credit agency shall perform asset management functions to ensure compliance with the low-income housing credit rules and the long-term viability of buildings financed with these subawards.[12] Failure to satisfy the low-income housing credit rules will result in recapture enforced by means of liens or other methods that the Secretary of the Treasury (or delegate) deems appropriate. Any such recapture will be payable to the Secretary of the Treasury for deposit in the general fund of the Treasury.

Any grant funds not used to make subawards before January 1, 2011 and any grant monies from subawards returned on or after January 1, 2011 must be returned to the Secretary of the Treasury.

Reduction in low-income housing credit volume limit for 2009

The otherwise applicable volume limit for any State for 2009 is reduced by the amount taken into account in determining the low-income housing grant election amount.

Appropriations

The provision appropriates to the Secretary of the Treasury such sums as may be necessary to carry out this provision.

EFFECTIVE DATE

The provision is effective on the date of enactment.

E. TAX INCENTIVES FOR BUSINESS

1. Special allowance for certain property acquired during 2009 (sec. 1401 of the bill and sec. 168(k) of the Code)

PRESENT LAW

Present law permits an additional first-year depreciation deduction equal to 50 percent of the adjusted basis of qualified property.[13] The additional first-year depreciation deduction is allowed for both regular tax and alternative minimum tax purposes for the taxable year in which the property is placed in service.[14] The basis of the property and the depreciation allowances in the year of purchase and later years are appropriately adjusted to reflect the additional first-year depreciation deduction. In addition, there are no adjustments to the allowable amount of depreciation for purposes of computing a taxpayer's alternative minimum taxable income with respect to property to which the provision applies. The amount of the additional first-year depreciation deduction is not affected by a short taxable year. The taxpayer may elect out of additional first-year depreciation for any class of property for any taxable year.

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[12] The State housing credit agency may collect reasonable fees from subaward recipients to cover the expenses of the agency's asset management duties. Alternatively, the State housing credit agency may retain a third party to perform these asset management duties.

[13] 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.

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

The interaction of the additional first-year depreciation allowance with the otherwise applicable depreciation allowance may be illustrated as follows. Assume that in 2008, a taxpayer purchases new depreciable property and places it in service.[15] The property's cost is $1,000, and it is 5-year property subject to the half-year convention. The amount of additional first-year depreciation allowed is $500. The remaining $500 of the cost of the property is deductible under the rules applicable to 5-year property. Thus, 20 percent, or $100, is also allowed as a depreciation deduction in 2008. The total depreciation deduction with respect to the property for 2008 is $600. The remaining $400 cost of the property is recovered under otherwise applicable rules for computing depreciation.

In order for property to qualify for the additional first-year depreciation deduction it must meet all of the following requirements. First, the property must be (1) property to which the modified accelerated cost recovery system ("MACRS") applies with an applicable recovery period of 20 years or less, (2) water utility property (as defined in section 168(e)(5)), (3) computer software other than computer software covered by section 197, or (4) qualified leasehold improvement property (as defined in section 168(k)(3)).[16] Second, the original use[17] of the property must commence with the taxpayer after December 31, 2007.[18] Third, the taxpayer must purchase the property within the applicable time period. Finally, the property must be placed in service after December 31, 2007, and before January 1, 2009. An extension of the placed in service date of one year (i.e., to January 1, 2010) is provided for certain property with a recovery period of ten years or longer and certain transportation property.[19] Transportation property is defined as tangible personal property used in the trade or business of transporting persons or property.

The applicable time period for acquired property is (1) after December 31, 2007, and before January 1, 2009, but only if no binding written contract for the acquisition is in effect before January 1, 2008, or (2) pursuant to a binding written contract which was entered into after December 31, 2007, and before January 1, 2009.[20] With respect to property that is manufactured, constructed, or produced by the taxpayer for use by the taxpayer, the taxpayer must

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[15] Assume that the cost of the property is not eligible for expensing under section 179.

[16] A special rule precludes the additional first-year depreciation deduction for any property that is required to be depreciated under the alternative depreciation system of MACRS.

[17] The term "original use" means the first use to which the property is put, whether or not such use corresponds to the use of such property by the taxpayer.

If in the normal course of its business a taxpayer sells fractional interests in property to unrelated third parties, then the original use of such property begins with the first user of each fractional interest (i.e., each fractional owner is considered the original user of its proportionate share of the property).

[18] A special rule applies in the case of certain leased property. In the case of any property that is originally placed in service by a person and that is sold to the taxpayer and leased back to such person by the taxpayer within three months after the date that the property was placed in service, the property would be treated as originally placed in service by the taxpayer not earlier than the date that the property is used under the leaseback.

If property is originally placed in service by a lessor (including by operation of section 168(K)(2)(D)(i)), such property is sold within three months after the date that the property was placed in service, and the user of such property does not change, then the property is treated as originally placed in service by the taxpayer not earlier than the date of such sale.

[19] In order for property to qualify for the extended placed in service date, the property is required to have an estimated production period exceeding one year and a cost exceeding $1 million.

[20] Property does not fail to qualify for the additional first-year depreciation merely because a binding written contract to acquire a component of the property is in effect prior to January 1, 2008.

begin the manufacture, construction, or production of the property after December 31, 2007, and before January 1, 2009. Property that is manufactured, constructed, or produced for the taxpayer by another person under a contract that is entered into prior to the manufacture, construction, or production of the property is considered to be manufactured, constructed, or produced by the taxpayer. For property eligible for the extended placed in service date, a special rule limits the amount of costs eligible for the additional first-year depreciation. With respect to such property, only the portion of the basis that is properly attributable to the costs incurred before January 1, 2009 ("progress expenditures") is eligible for the additional first-year depreciation.[21]

Property does not qualify for the additional first-year depreciation deduction when the user of such property (or a related party) would not have been eligible for the additional first- year depreciation deduction if the user (or a related party) were treated as the owner. For example, if a taxpayer sells to a related party property that was under construction prior to January 1, 2008, the property does not qualify for the additional first-year depreciation deduction. Similarly, if a taxpayer sells to a related party property that was subject to a binding written contract prior to January 1, 2008, the property does not qualify for the additional first-year depreciation deduction. As a further example, if a taxpayer (the lessee) sells property in a sale-leaseback arrangement, and the property otherwise would not have qualified for the additional first-year depreciation deduction if it were owned by the taxpayer-lessee, then the lessor is not entitled to the additional first-year depreciation deduction.

The limitation on the amount of depreciation deductions allowed with respect to certain passenger automobiles (sec. 280F) is increased in the first year by $8,000 for automobiles that qualify (and do not elect out of the increased first year deduction). The $8,000 increase is not indexed for inflation.

REASONS FOR CHANGE

The Committee believes that allowing additional first-year depreciation will accelerate purchases of equipment and other assets, and promote capital investment, modernization, and growth.

EXPLANATION OF PROVISION

The provision extends the additional first-year depreciation deduction for one year, generally through 2009 (through 2010 for certain longer-lived and transportation property).[22]

EFFECTIVE DATE

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

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[21] For purposes of determining the amount of eligible progress expenditures, it is intended that rules similar to sec. 46(d)(3) as in effect prior to the Tax Reform Act of 1986 shall apply.

[22] The provision does not modify the property eligible for the election to accelerate AMT and research credits in lieu of bonus depreciation under section 168(k)(4). However, the provision includes a technical amendment to section 168(k)(4)(D) providing that no written binding contract for the acquisition of eligible qualified property may be in effect before April 1, 2008 (effective for taxable years ending after March 31, 2008).

2. Temporary increase in limitations on expensing of certain depreciable business assets (sec. 1402 of the bill and sec. 179 of the Code)

PRESENT LAW

In lieu of depreciation, a taxpayer with a sufficiently small amount of annual investment may elect to deduct (or "expense") such costs under section 179. Present law provides that the maximum amount a taxpayer may expense for taxable years beginning in 2008 is $250,000 of the cost of qualifying property placed in service for the taxable year.[23] For taxable years beginning in 2009 and 2010, the limitation is $125,000. In general, qualifying property is defined as depreciable tangible personal property that is purchased for use in the active conduct of a trade or business. Off-the-shelf computer software placed in service in taxable years beginning before 2011 is treated as qualifying property. For taxable years beginning in 2008, the $250,000 amount is reduced (but not below zero) by the amount by which the cost of qualifying property placed in service during the taxable year exceeds $800,000. For taxable years beginning in 2009 and 2010, the $125,000 amount is reduced (but not below zero) by the amount by which the cost of qualifying property placed in service during the taxable year exceeds $500,000. The $125,000 and $500,000 amounts are indexed for inflation in taxable years beginning in 2009 and 2010.

The amount eligible to be expensed for a taxable year may not exceed the taxable income for a taxable year that is derived from the active conduct of a trade or business (determined without regard to this provision). Any amount that is not allowed as a deduction because of the taxable income limitation may be carried forward to succeeding taxable years (subject to similar limitations). No general business credit under section 38 is allowed with respect to any amount for which a deduction is allowed under section 179. An expensing election is made under rules prescribed by the Secretary.[24]

For taxable years beginning in 2011 and thereafter (or before 2003), the following rules apply. A taxpayer with a sufficiently small amount of annual investment may elect to deduct up to $25,000 of the cost of qualifying property placed in service for the taxable year. The $25,000 amount is reduced (but not below zero) by the amount by which the cost of qualifying property placed in service during the taxable year exceeds $200,000. The $25,000 and $200,000 amounts are not indexed for inflation. In general, qualifying property is defined as depreciable tangible personal property that is purchased for use in the active conduct of a trade or business (not including off-the-shelf computer software). An expensing election may be revoked only with consent of the Commissioner.[25]

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[23] Additional section 179 incentives are provided with respect to qualified property meeting applicable requirements that is used by a business in an empowerment zone (sec. 1397A) or a renewal community (sec. 1400J), qualified section 179 Gulf Opportunity Zone property (sec. 1400N(e)), qualified Recovery Assistance property placed in service in the Kansas disaster area (Pub. L. No. 110–234, sec. 15345 (2008)), and qualified disaster assistance property (sec. 179(e)).

[24] Sec. 179(c)(1). Under Treas. Reg. sec. 1.179–5, applicable to property placed in service in taxable years beginning after 2002 and before 2008, a taxpayer is permitted to make or revoke an election under section 179 without the consent of the Commissioner on an amended Federal tax return for that taxable year. This amended return must be filed within the time prescribed by law for filing an amended return for the taxable year. T.D. 9209, July 12, 2005.

[25] Sec. 179(c)(2).

REASONS FOR CHANGE

The Committee believes that section 179 expensing provides two important benefits. First, it lowers the cost of capital for property used in a trade or business. With a lower cost of capital, the Committee believes businesses will invest in more equipment and employ more workers. Second, expensing eliminates depreciation recordkeeping requirements with respect to expensed property. The Committee believes that the higher limitation amounts available during 2008 will continue to provide important benefits if extended, and the bill therefore extends the higher limitation amounts for an additional year. Furthermore, the Committee believes that the higher dollar limits on expensing further lower the cost of capital, and make this benefit available for a greater number of taxpayers.

EXPLANATION OF PROVISION

The provision extends the $250,000 and $800,000 amounts to taxable years beginning in 2009.

EFFECTIVE DATE

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

3. Five-year carryback of operating losses (secs. 1411 and 1412 of the bill and sec. 172 of the Code)

PRESENT LAW

Under present law, a net operating loss ("NOL") generally means the amount by which a taxpayer's business deductions exceed its gross income. In general, an NOL may be carried back two years and carried over 20 years to offset taxable income in such years.[26] NOLs offset taxable income in the order of the taxable years to which the NOL may be carried.[27]

The alternative minimum tax rules provide that a taxpayer's NOL deduction cannot reduce the taxpayer's alternative minimum taxable income ("AMTI") by more than 90 percent of the AMTI.

Different rules apply with respect to NOLs arising in certain circumstances. A three-year carryback applies with respect to NOLs (1) arising from casualty or theft losses of individuals, or (2) attributable to Presidentially declared disasters for taxpayers engaged in a farming business or a small business. A five-year carryback applies to NOLs (1) arising from a farming loss (regardless of whether the loss was incurred in a Presidentially declared disaster area), (2) certain amounts related to Hurricane Katrina, Gulf Opportunity Zone, and Midwestern Disaster Area, or (3) qualified disaster losses.[28] Special rules also apply to real estate investment trusts (no carryback), specified liability losses (10-year carryback), and excess interest losses (no carryback to any year preceding a corporate equity reduction transaction). Additionally, a special rule applies to certain electric utility companies.

In the case of a life insurance company, present law allows a deduction for the taxable year for operations loss carryovers and

[26] Sec. 172(b)(1)(A).
[27] Sec. 172(b)(2).
[28] Sec. 172(b)(1)(J).

carrybacks, in lieu of the deduction for net operating losses allowed to other corporations.[29] A life insurance company is permitted to treat a loss from operations (as defined under section 810(c)) for any taxable year as an operations loss carryback to each of the three taxable years preceding the loss year and an operations loss carryover to each of the 15 taxable years following the loss year.[30] Special rules apply to new life insurance companies.

REASONS FOR CHANCE

The NOL carryback and carryover rules are designed to allow taxpayers to smooth out swings in business income (and Federal income taxes thereon) that result from business cycle fluctuations. The recent economic conditions have resulted in many taxpayers incurring significant financial losses. The Committee is concerned about the severity of the current economic downturn. A temporary extension of the NOL carryback period provides taxpayers in all sectors of the economy that experience such losses with the ability to obtain refunds of income taxes paid in prior years. These refunds can be used to fund capital investment or other expenses.

EXPLANATION OF PROVISION

The provision provides an election[31] to increase the present-law carryback period for an applicable 2008 or 2009 NOL from two years to any whole number of years elected by the taxpayer which is more than two and less than six. An applicable NOL is the taxpayer's NOL for any taxable year ending in 2008 or 2009, or if elected by the taxpayer, the NOL for any taxable year beginning in 2008 or 2009. If an election is made to increase the carryback period, the applicable NOL is permanently reduced by 10 percent.

These provisions may be illustrated by the following example. Taxpayer incurs a $100 NOL for its taxable year ended January 31, 2008 and elects to carryback the NOL five years to its taxable year ended January 31, 2003. Under the provision, Taxpayer must first permanently reduce the NOL by 10 percent, or $10, and then may carryback the $90 NOL to its taxable year ended January 31, 2003.

The provision also suspends the 90-percent limitation on the use of any alternative tax NOL deduction attributable to carrybacks of losses from taxable years ending during 2008 or 2009, and carryovers of losses to such taxable years (this rule applies to taxable years beginning in 2008 or 2009 if an election is in place to use such years as applicable NOLs).

For life insurance companies, the provision provides an election to increase the present-law carryback period for an applicable loss from operations from three years to four or five years. An applicable loss from operations is the taxpayer's loss from operations for any taxable year ending in 2008 or 2009, or if elected by the taxpayer, the loss from operations for any taxable year beginning in 2008 or 2009. If an election is made to increase the carryback pe-

[29] Secs. 810, 805(a)(5).

[30] Sec. 810(b)(1).

[31] For all elections under this provision, the common parent of a group of corporations filing a consolidated return makes the election, which is binding on all such corporations taxable year beginning in 2008 or 2009. If an election is made to increase the carryback period, the applicable NOL is permanently reduced by 10 percent.

riod, the applicable loss from operations is permanently reduced by 10 percent.

The provision does not apply to: (1) any taxpayer if (a) the Federal Government acquires, at any time,[32] an equity interest in the taxpayer pursuant to the Emergency Economic Stabilization Act of 2008, or (b) the Federal Government acquires, at any time, any warrant (or other right) to acquire any equity interest with respect to the taxpayer pursuant to such Act; (2) the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation; and (3) any taxpayer that in 2008 or 2009[33] is a member of the same affiliated group (as defined in section 1504 without regard to subsection (b) thereof) as a taxpayer to which the provision does not otherwise apply.

EFFECTIVE DATE

The provision is generally effective for net operating losses arising in taxable years ending after December 31, 2007. The modification to the alternative tax NOL deduction applies to taxable years ending after 1997.[34] The modification with respect to operating loss deductions of life insurance companies applies to losses from operations arising in taxable years ending after December 31, 2007.

For an NOL or loss from operations for a taxable year ending before the enactment of the provision, the provision includes the following transition rules: (1) any election to waive the carryback period under either sections 172(b)(3) or 810(b)(3) with respect to such loss may be revoked before the applicable date; (2) any election to increase the carryback period under this provision is treated as timely made if made before the applicable date; and (3) any application for a tentative carryback adjustment under section 641 1(a) with respect to such loss is treated as timely filed if filed before the applicable date. For purposes of the transition rules, the applicable date is the date which is 60 days after the date of the enactment of the provision.

4. Modification of work opportunity tax credit (sec. 1421 of the bill and sec. 51 of the Code)

PRESENT LAW

In general

The work opportunity tax credit is available on an elective basis for employers hiring individuals from one or more of nine targeted groups. The amount of the credit available to an employer is determined by the amount of qualified wages paid by the employer. Generally, qualified wages consist of wages attributable to service rendered by a member of a targeted group during the one-year period

[32] For example, if the Federal Government acquires an equity interest in the taxpayer during 2010, or in later years, the taxpayer is not entitled to the extended carryback rules under this provision. If the carryback has previously been claimed, amended filings may be necessary to reflect this disallowance.

[33] For example, a taxpayer with an NOL in 2008 that in 2010 joins an affiliated group with a member in which the Federal Government has an equity interest pursuant to the Emergency Economic Stabilization Act of 2008 may not utilize the extended carryback rules under this provision with regard to the 2008 NOL. The taxpayer is required to amend prior filings to reflect the permitted carryback period.

[34] NOL deductions from as early as taxable years ending after 1997 may be carried forward to 2008 and utilize the provision suspending the 90 percent limitation on alternative tax NOL deductions.

beginning with the day the individual begins work for the employer (two years in the case of an individual in the long-term family assistance recipient category).

Targeted groups eligible for the credit

Generally an employer is eligible for the credit only for qualified wages paid to members of a targeted group.

(1) Families receiving TANF.

An eligible recipient is an individual certified by a designated local employment agency (e.g., a State employment agency) as being a member of a family eligible to receive benefits under the Temporary Assistance for Needy Families Program ("TANF") for a period of at least nine months part of which is during the 18-month period ending on the hiring date. For these purposes, members of the family are defined to include only those individuals taken into account for purposes of determining eligibility for the TANF.

(2) Qualified veteran

There are two subcategories of qualified veterans related to eligibility for Food stamps and compensation for a service-connected disability.

Food stamps

A qualified veteran is a veteran who is certified by the designated local agency as a member of a family receiving assistance under a food stamp program under the Food Stamp Act of 1977 for a period of at least three months part of which is during the 12-month period ending on the hiring date. For these purposes, members of a family are defined to include only those individuals taken into account for purposes of determining eligibility for a food stamp program under the Food Stamp Act of 1977.

Entitled to compensation for a service-connected disability

A qualified veteran also includes an individual who is certified as entitled to compensation for a service-connected disability and: (1) having a hiring date which is not more than one year after having been discharged or released from active duty in the Armed Forces of the United States, or (2) having been unemployed for six months or more (whether or not consecutive) during the one-year period ending on the date of hiring.

Definitions

For these purposes, being entitled to compensation for a service-connected disability is defined with reference to section 101 of Title 38, U.S. Code, which means having a disability rating of 10-percent or higher for service-connected injuries.

For these purposes, a veteran is an individual who has served on active duty (other than for training) in the Armed Forces for more than 180 days or who has been discharged or released from active duty in the Armed Forces for a service-connected disability. However, any individual who has served for a period of more than 90 days during which the individual was on active duty (other than for training) is not a qualified veteran if any of this active duty occurred during the 60-day period ending on the date the individual

was hired by the employer. This latter rule is intended to prevent employers who hire current members of the armed services (or those departed from service within the last 60 days) from receiving the credit.

(3) Qualified ex-felon

A qualified ex-felon is an individual certified as: (1) having been convicted of a felony under any State or Federal law, and (2) having a hiring date within one year of release from prison or the date of conviction.

(4) Designated community residents

A designated community resident is an individual certified as being at least age 18 but not yet age 40 on the hiring date and as having a principal place of abode within an empowerment zone, enterprise community, renewal community or a rural renewal community. For these purposes, a rural renewal county is a county outside a metropolitan statistical area (as defined by the Office of Management and Budget) which had a net population loss during the five-year periods 1990–1994 and 1995–1999. Qualified wages do not include wages paid or incurred for services performed after the individual moves outside an empowerment zone, enterprise community, renewal community or a rural renewal community.

(5) Vocational rehabilitation referral

A vocational rehabilitation referral is an individual who is certified by a designated local agency as an individual who has a physical or mental disability that constitutes a substantial handicap to employment and who has been referred to the employer while receiving, or after completing: (a) vocational rehabilitation services under an individualized, written plan for employment under a State plan approved under the Rehabilitation Act of 1973; (b) under a rehabilitation plan for veterans carried out under Chapter 31 of Title 38, U.S. Code; or (c) an individual work plan developed and implemented by an employment network pursuant to subsection (g) of section 1148 of the Social Security Act. Certification will be provided by the designated local employment agency upon assurances from the vocational rehabilitation agency that the employee has met the above conditions.

(6) Qualified summer youth employee

A qualified summer youth employee is an individual: (a) who performs services during any 90-day period between May 1 and September 15, (b) who is certified by the designated local agency as being 16 or 17 years of age on the hiring date, (c) who has not been an employee of that employer before, and (d) who is certified by the designated local agency as having a principal place of abode within an empowerment zone, enterprise community, or renewal community (as defined under Subchapter U of Subtitle A, Chapter 1 of the Internal Revenue Code). As with designated community residents, no credit is available on wages paid or incurred for service performed after the qualified summer youth moves outside of an empowerment zone, enterprise community, or renewal community. If, after the end of the 90-day period, the employer continues to employ a youth who was certified during the 90-day period as a mem-

ber of another targeted group, the limit on qualified first year wages will take into account wages paid to the youth while a qualified summer youth employee.

(7) Qualified food stamp recipient

A qualified food stamp recipient is an individual at least age 18 but not yet age 40 certified by a designated local employment agency as being a member of a family receiving assistance under a food stamp program under the Food Stamp Act of 1977 for a period of at least six months ending on the hiring date. In the case of families that cease to be eligible for food stamps under section 6(o) of the Food Stamp Act of 1977, the six-month requirement is replaced with a requirement that the family has been receiving food stamps for at least three of the five months ending on the date of hire. For these purposes, members of the family are defined to include only those individuals taken into account for purposes of determining eligibility for a food stamp program under the Food Stamp Act of 1977.

(8) Qualified SSI recipient

A qualified SSI recipient is an individual designated by a local agency as receiving supplemental security income ("SSI") benefits under Title XVI of the Social Security Act for any month ending within the 60-day period ending on the hiring date.

(9) Long-term family assistance recipients

A qualified long-term family assistance recipient is an individual certified by a designated local agency as being: (a) a member of a family that has received family assistance for at least 18 consecutive months ending on the hiring date; (b) a member of a family that has received such family assistance for a total of at least 18 months (whether or not consecutive) after August 5, 1997 (the date of enactment of the welfare-to-work tax credit)[35] if the individual is hired within two years after the date that the 18-month total is reached; or (c) a member of a family who is no longer eligible for family assistance because of either Federal or State time limits, if the individual is hired within two years after the Federal or State time limits made the family ineligible for family assistance.

Qualified wages

Generally, qualified wages are defined as cash wages paid by the employer to a member of a targeted group. The employer's deduction for wages is reduced by the amount of the credit.

For purposes of the credit, generally, wages are defined by reference to the FUTA definition of wages contained in sec. 3306(b) (without regard to the dollar limitation therein contained). Special rules apply in the case of certain agricultural labor and certain railroad labor.

Calculation of the credit

The credit available to an employer for qualified wages paid to members of all targeted groups except for long-term family assist-

[35] The welfare-to-work tax credit was consolidated into the work opportunity tax credit in the Tax Relief and Health Care Act of 2006, for qualified individuals who begin to work for an employer after December 31, 2006.

ance recipients equals 40 percent (25 percent for employment of 400 hours or less) of qualified first-year wages. Generally, qualified first-year wages are qualified wages (not in excess of $6,000) attributable to service rendered by a member of a targeted group during the one-year period beginning with the day the individual began work for the employer. Therefore, the maximum credit per employee is $2,400 (40 percent of the first $6,000 of qualified first-year wages). With respect to qualified summer youth employees, the maximum credit is $1,200 (40 percent of the first $3,000 of qualified first-year wages). Except for long-term family assistance recipients, no credit is allowed for second-year wages.

In the case of long-term family assistance recipients, the credit equals 40 percent (25 percent for employment of 400 hours or less) of $10,000 for qualified first-year wages and 50 percent of the first $10,000 of qualified second-year wages. Generally, qualified second-year wages are qualified wages (not in excess of $10,000) attributable to service rendered by a member of the long-term family assistance category during the one-year period beginning on the day after the one-year period beginning with the day the individual began work for the employer. Therefore, the maximum credit per employee is $9,000 (40 percent of the first $10,000 of qualified first-year wages plus 50 percent of the first $10,000 of qualified second-year wages).

In the case of a qualified veteran who is entitled to compensation for a service connected disability, the credit equals 40 percent of $12,000 of qualified first-year wages. This expanded definition of qualified first-year wages does not apply to the veterans qualified with reference to a food stamp program, as defined under present law.

Certification rules

An individual is not treated as a member of a targeted group unless: (1) on or before the day on which an individual begins work for an employer, the employer has received a certification from a designated local agency that such individual is a member of a targeted group; or (2) on or before the day an individual is offered employment with the employer, a pre-screening notice is completed by the employer with respect to such individual, and not later than the 28th day after the individual begins work for the employer, the employer submits such notice, signed by the employer and the individual under penalties of perjury, to the designated local agency as part of a written request for certification. For these purposes, a pre-screening notice is a document (in such form as the Secretary may prescribe) which contains information provided by the individual on the basis of which the employer believes that the individual is a member of a targeted group.

Minimum employment period

No credit is allowed for qualified wages paid to employees who work less than 120 hours in the first year of employment.

Other rules

The work opportunity tax credit is not allowed for wages paid to a relative or dependent of the taxpayer. No credit is allowed for wages paid to an individual who is a more than fifty-percent owner

of the entity. Similarly, wages paid to replacement workers during a strike or lockout are not eligible for the work opportunity tax credit. Wages paid to any employee during any period for which the employer received on-the-job training program payments with respect to that employee are not eligible for the work opportunity tax credit. The work opportunity tax credit generally is not allowed for wages paid to individuals who had previously been employed by the employer. In addition, many other technical rules apply.

Expiration

The work opportunity tax credit is not available for individuals who begin work for an employer after August 31, 2011.

REASONS FOR CHANGE

The Committee believes that the work opportunity tax credit can be used to improve employment opportunities for broader categories of qualified veterans and young people whose employment opportunities may have been significantly eroded by the present economic downturn.

EXPLANATION OF PROVISION

The provision creates a new targeted group for the work opportunity tax credit. That new category is unemployed veterans and disconnected youth who begin work for the employer in 2009 or 2010.

An unemployed veteran is defined as an individual certified by the designated local agency as someone who: (1) has served on active duty (other than for training) in the Armed Forces for more than 180 days or who has been discharged or released from active duty in the Armed Forces for a service-connected disability; (2) has been discharged or released from active duty in the Armed Forces during 2008, 2009, or 2010; and (3) has received unemployment compensation under State or Federal law for not less than four weeks during the one-year period ending on the hiring date.

A disconnected youth is defined as an individual certified by the designated local agency as someone: (1) at least age 16 but not yet age 25 on the hiring date; (2) not regularly attending any secondary, technical, or post-secondary school during the six-month period preceding the hiring date; (3) not regularly employed during the six-month period preceding the hiring date; and (4) not readily employable by reason of lacking a sufficient number of skills.

EFFECTIVE DATE

The provisions are effective for individuals who begin work for an employer after December 31, 2008.

5. Clarification of regulations related to limitations on certain built in losses following an ownership change (sec. 1431 of the bill and sec. 382 of the Code)

PRESENT LAW

Section 382 limits the extent to which a "loss corporation" that experiences an "ownership change" may offset taxable income in any post-change taxable year by pre-change net operating losses,

certain built-in losses, and deductions attributable to the pre-change period.[36] In general, the amount of income in any post-change year that may be offset by such net operating losses, built-in losses and deductions is limited to an amount (referred to as the "section 382 limitation") determined by multiplying the value of the loss corporation immediately before the ownership change by the long-term tax-exempt interest rate.[37]

A "loss corporation" is defined as a corporation entitled to use a net operating loss carryover or having a net operating loss carryover for the taxable year in which the ownership change occurs. Except to the extent provided in regulations, such term includes any corporation with a "net unrealized built-in loss" (or NUBIL),[38] defined as the amount by which the fair market value of the assets of the corporation immediately before an ownership change is less than the aggregate adjusted basis of such assets at such time. However, if the amount of the NUBIL does not exceed the lesser of (i) 15 percent of the fair market value of the corporation's assets or (ii) $10,000,000, then the amount of the NUBIL is treated as zero.[39]

An ownership change is defined generally as an increase by more than 50 percentage points in the percentage of stock of a loss corporation that is owned by any one or more five-percent (or greater) shareholders (as defined) within a three year period.[40] Treasury regulations provide generally that this measurement is to be made as of any "testing date," which is any date on which the ownership of one or more persons who were or who become five-percent shareholders increases.[41]

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

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

[38] Sec. 382(k)(1).

[39] Sec. 382(h)(3).

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

[41] See Treas. Reg. sec. 1.382–2(a)(4) (providing that "a loss corporation is required to determine whether an ownership change has occurred immediately after any owner shift, or issuance or transfer (including an issuance or transfer described in Treas. Reg. sec. 1.382–4(d)(8)(i) or (ii)) of an option with respect to stock of the loss corporation that is treated as exercised under Treas. Reg. sec. 1.382–4(d)(2)" and defining a "testing date" as "each date on which a loss corporation is required to make a determination of whether an ownership change has occurred") and Temp. Treas. Reg. sec. 1.382–2T(e)(1) (defining an "owner shift" as "any change in the ownership of the stock of a loss corporation that affects the percentage of such stock owned by any 5-percent shareholder"). Treasury regulations under section 382 provide that, in computing stock ownership on specified testing dates, certain unexercised options must be treated as exercised if certain ownership, control, or income tests are met. These tests are met only if "a principal purpose of the issuance, transfer, or structuring of the option (alone or in combination with other arrangements) is to avoid or ameliorate the impact of an ownership change of the loss corporation." Treas. Reg. sec. 1.382–4(d). Compare prior temporary regulations, Temp. Reg. sec. 1.382–2T(h)(4) ("Solely for the purpose of determining whether there is an ownership change on any testing date, stock of the loss corporation that is subject to an option shall be treated as acquired on any such date, pursuant to an exercise of the option by its owner on that date, if such deemed exercise would result in an ownership change."). Internal Revenue Service Notice 2008–76, I.R.B. 2008–39 (September 29, 2008), released September 7, 2008, provides that the Treasury Department intends to issue regulations modifying the term "testing date" under sec-

Continued

Section 382(h) governs the treatment of certain built-in losses and built-in gains recognized with respect to assets held by the loss corporation at the time of the ownership change. In the case of a loss corporation that has a NUBIL (measured immediately before an ownership change), section 382(h)(1) provides that any "recognized built-in loss" (or RBIL) for any taxable year during a "recognition period" (consisting of the five years beginning on the ownership change date) is subject to the section 382 limitation in the same manner as if it were a pre-change net operating loss.[42] An RBIL is defined for this purpose as any loss recognized during the recognition period on the disposition of any asset held by the loss corporation immediately before the ownership change date, to the extent that such loss is attributable to an excess of the adjusted basis of the asset on the change date over its fair market value on that date.[43] An RBIL also includes any amount allowable as depreciation, amortization or depletion during the recognition period, to the extent that such amount is attributable to the excess of the adjusted basis of the asset over its fair market value on the ownership change date.[44] In addition, any amount that is allowable as a deduction during the recognition period (determined without regard to any carryover) but which is attributable to periods before the ownership change date is treated as an RBIL for the taxable year in which it is allowable as a deduction.[45]

As indicated above, section 382(h)(1) provides in the case of a loss corporation that has a NUBIG that the section 382 limitation may be increased for any taxable year during the recognition period by the amount of recognized built-in gains (or RBIGs) for such taxable year.[46] An RBIG is defined for this purpose as any gain recognized during the recognition period on the disposition of any asset held by the loss corporation immediately before the ownership change date, to the extent that such gain is attributable to an excess of the fair market value of the asset on the change date over its adjusted basis on that date.[47] In addition, any item of income that is properly taken into account during the recognition period but which is attributable to periods before the ownership change date is treated as an RBIG for the taxable year in which it is properly taken into account.[48]

Internal Revenue Service Notice 2003–65[49] provides two alternative safe harbor approaches for the identification of built-in items for purposes of section 382(h): the "1374 approach" and the "338 approach."

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tion 382 to exclude any date on or after which the United States acquires stock or options to acquire stock in certain corporations with respect to which there is a "Housing Act Acquisition" pursuant to the Housing and Economic Recovery Act of 2008 (P.L. 110–289). The Notice states that the regulations will apply on and after September 7, 2008, unless and until there is additional guidance. Internal Revenue Service Notice 2008–84, I.R.B. 2008–41 (October 14, 2008), provides that the Treasury Department intends to issue regulations modifying the term "testing date" under section 382 to exclude any date as of the close of which the United States owns, directly or indirectly, a more than 50 percent interest in a loss corporation, which regulations will apply unless and until there is additional guidance.

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

[43] Sec. 382(h)(2)(B).

[44] Sec. 382(h)(2)(B).

[45] Sec. 382(h)(6)(B).

[46] The total amount of such increases cannot exceed the amount of the corporation's NUBIG.

[47] Sec. 382(h)(2)(A).

[48] Sec. 382(h)(6)(A).

[49] 2003–2 C.B. 747.

Under the 1374 approach,[50] NUBIG or NUBL is the net amount of gain or loss that would be recognized in a hypothetical sale of the assets of the loss corporation immediately before the ownership change.[51] The amount of gain or loss recognized during the recognition period on the sale or exchange of an asset held at the time of the ownership change is RBIG or RBIL, respectively, to the extent it is attributable to a difference between the adjusted basis and the fair market value of the asset on the change date, as described above. However, the 1374 approach generally relies on the accrual method of accounting to identify items of income or deduction as RBIG or NIL, respectively. Generally, items of income or deduction properly included in income or allowed as a deduction during the recognition period are considered attributable to period before the change date (and thus are treated as RBIG or MIL, respectively), if a taxpayer using an accrual method of accounting would have included the item in income or been allowed a deduction for the item before the change date. However, the 1374 approach includes a number of exceptions to this general rule, including a special rule dealing with bad debt deductions under section 166. Under this special rule, any deduction item properly taken into account during the first 12 months of the recognition period as a bad debt deduction under section 166 is treated as RBIL if the item arises from a debt owed to the loss corporation at the beginning of the recognition period (and deductions for such items properly taken into account after the first 12 months of the recognition period are not RBILs).[52]

The 338 approach identifies items of RBIG and RBIL generally by comparing the loss corporation's actual items of income, gain, deduction and loss with those that would have resulted if a section 338 election had been made with respect to a hypothetical purchase of all of the outstanding stock of the loss corporation on the change date. Under the 338 approach, NUBIG or NUBIL is calculated in the same manner as it is under the 1374 approach[53] The 338 approach identifies RBIG or RBIL by comparing the loss corporation's actual items of income, gain, deduction and loss with the items of income, gain, deduction and loss that would result if a section 338 election had been made for the hypothetical purchase. The loss corporation is treated for this purpose as using those accounting methods that the loss corporation actually uses. The 338 approach does not include any special rule with regard to bad debt deductions under section 166.

Section 166 generally allows a deduction in respect of any debt that becomes worthless, in whole or in part, during the taxable

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

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

[52] Notice 2003–65, section III.B.2.b

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

year.[54] The determination of whether a debt is worthless, in whole or in part, is a question of fact. However, in the case of a bank or other corporation that is subject to supervision by Federal authorities, or by State authorities maintaining substantially equivalent standards, the Treasury regulations under section 166 provide a presumption of worthlessness to the extent that a debt is charged off during the taxable year pursuant to a specific order of such an authority or in accordance with established policies of such an authority (and in the latter case, the authority confirms in writing upon the first subsequent audit of the bank or other corporation that the charge-off would have been required if the audit had been made at the time of the charge-off). The presumption does not apply if the taxpayer does not claim the amount so charged off as a deduction for the taxable year in which the charge-off takes place. In that case, the charge-off is treated as having been involuntary; however, in order to claim the section 166 deduction in a later taxable year, the taxpayer must produce sufficient evidence to show that the debt became partially worthless in the later year or became recoverable only in part subsequent to the taxable year of the charge-off, as the case may be, and to the extent that the deduction claimed in the later year for a partially worthless debt was not involuntarily charged off in prior taxable years, it was charged off in the later taxable year.[55]

The Treasury regulations also permit a bank (generally as defined for purposes of section 581, with certain modifications) that is subject to supervision by Federal authorities, or State authorities maintaining substantially equivalent standards, to make a "conformity election" under which debts charged off for regulatory purposes during a taxable year are conclusively presumed to be worthless for tax purposes to the same extent, provided that the charge-off results from a specific order of the regulatory authority or corresponds to the institution's classification of the debt as a "loss asset" pursuant to loan loss classification standards that are consistent with those of certain specified bank regulatory authorities. The conformity election is treated as the adoption of a method of accounting.[56]

Internal Revenue Service Notice 2008–83,[57] released on October 1, 2008, provides that "[f]or purposes of section 3820, any deduction properly allowed after an ownership change (as defined in section 382(g)) to a bank with respect to losses on loans or bad debts (including any deduction for a reasonable addition to a reserve for bad debts) shall not be treated as a built-in loss or a deduction that is attributable to periods before the change date."[58] The Notice further states that the Internal Revenue Service and the Treasury Department are studying the proper treatment under section 382(h) of certain items of deduction or loss allowed after an ownership change to a corporation that is a bank (as defined in section 581) both immediately before and after the change date, and that any

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

[55] See Treas. Reg. sec. 1.166–2(d)(1) and (2).

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

[57] 2008–42 I.R.B. 2008–42 (Oct. 20, 2008).

[58] Notice 2008–83, section 2.

such corporation may rely on the treatment set forth in Notice 2008–83 unless and until there is additional guidance.

REASONS FOR CHANGE

The Committee believes that: (1) the delegation of authority to the Secretary of the Treasury, or his delegate, under section 382(m)[59] does not authorize the Secretary to provide exemptions or special rules that are restricted to particular industries or classes of taxpayers, (2) Internal Revenue Service Notice 2008–83 is inconsistent with the congressional intent in enacting section 382(m), and (3) the legal authority to prescribe Notice 2008–83 is doubtful, but that (4) as taxpayers should generally be able to rely on guidance issued by the Secretary of the Treasury, legislation is necessary to clarify the force and effect of Notice 2008–83 and restore the proper application under the Internal Revenue Code of the limitation on built-in losses following an ownership change of a bank.

EXPLANATION OF PROVISION

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

Under the provision, Treasury Notice 2008–83 shall be deemed to have the force and effect of law with respect to any ownership change (as defined in section 382(g)) occurring on or before January 16, 2009, and with respect to any ownership change (as so defined) which occurs after January 16, 2009, if such change (1) is pursuant to a written binding contract entered in to on or before such date or (2) is pursuant to a written agreement entered into on or before such date and such agreement was described on or before such date in a public announcement or in a filing with the Securities and Exchange Commission required by reason of such ownership change, but shall otherwise have no force or effect with respect to any ownership change after such date.

EFFECTIVE DATE

The provision is effective on the date of enactment.

[59] Section 382(m) authorizes the Secretary to prescribe such regulations as may be necessary or appropriate to carry out the purposes of sections 382 and 383.

F. Fiscal Relief for State and Local Governments

1. De minimis safe harbor exception for tax-exempt interest expense of financial institutions and modification of small issuer exception to tax-exempt interest expense allocation rules for financial institutions (secs. 1501 and 1502 of the bill and sec. 265 of the Code)

PRESENT LAW

Present law disallows a deduction for interest on indebtedness incurred or continued to purchase or carry obligations the interest on which is exempt from tax.[60] In general, an interest deduction is disallowed only if the taxpayer has a purpose of using borrowed funds to purchase or carry tax-exempt obligations; a determination of the taxpayer's purpose in borrowing funds is made based on all of the facts and circumstances.[61]

Two-percent rule for individuals and certain nonfinancial corporations

In the absence of direct evidence linking an individual taxpayer's indebtedness with the purchase or carrying of tax-exempt obligations, the Internal Revenue Service takes the position that it ordinarily will not infer that a taxpayer's purpose in borrowing money was to purchase or carry tax-exempt obligations if the taxpayer's investment in tax-exempt obligations is "insubstantial."[62] An individual's holdings of tax-exempt obligations are presumed to be insubstantial if during the taxable year the average adjusted basis of the individual's tax-exempt obligations is two or less of the average adjusted basis of the individual's portfolio investments and assets held by the individual in the active conduct of a trade or business.

Similarly, in the case of a corporation that is not a financial institution or a dealer in tax-exempt obligations, where there is no direct evidence of a purpose to purchase or carry tax-exempt obligations, the corporation's holdings of tax-exempt obligations are presumed to be insubstantial if the average adjusted basis of the corporation's tax-exempt obligations is two percent or less of the average adjusted basis of all assets held by the corporation in the active conduct of its trade or business.

Financial institutions

In the case of a financial institution, the Code generally disallows that portion of the taxpayer's interest expense that is allocable to tax-exempt interest.[63] The amount of interest that is disallowed is an amount which bears the same ratio to such interest expense as the taxpayer's average adjusted bases of tax-exempt obligations acquired after August 7, 1986, bears to the average adjusted bases for all assets of the taxpayer.

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[60] Sec. 265(a).
[61] See Rev. Proc. 72–18, 1972–1 C.B. 740.
[62] Id.
[63] Sec. 265(b)(1). A "financial institution" is any person that (1) accepts deposits from the public in the ordinary course of such person's trade or business and is subject to Federal or State supervision as a financial institution or (2) is a corporation described in section 585(a)(2). Sec. 265(b)(5).

Exception for certain obligations of qualified small issuers

The general rule in section 265(b), denying financial institutions' interest expense deductions allocable to tax-exempt obligations, does not apply to "qualified tax-exempt obligations."[64] Instead, as discussed in the next section, only 20 percent of the interest expense allocable to "qualified tax-exempt obligations" is disallowed.[65] A "qualified tax-exempt obligation" is a tax-exempt obligation that (1) is issued after August 7, 1986, by a qualified small issuer, (2) is not a private activity bond, and (3) is designated by the issuer as qualifying for the exception from the general rule of section 265(b).

A "qualified small issuer" is an issuer that reasonably anticipates that the amount of tax-exempt obligations that it will issue during the calendar year will be $10 million or less.[66] The Code specifies the circumstances under which an issuer and all subordinate entities are aggregated.[67] For purposes of the $10 million limitation, an issuer and all entities that issue obligations on behalf of such issuer are treated as one issuer. All obligations issued by a subordinate entity are treated as being issued by the entity to which it is subordinate. An entity formed (or availed of) to avoid the $10 million limitation and all entities benefiting from the device are treated as one issuer.

Composite issues (i.e., combined issues of bonds for different entities) qualify for the "qualified tax-exempt obligation" exception only if the requirements of the exception are met with respect to (1) the composite issue as a whole (determined by treating the composite issue as a single issue) and (2) each separate lot of obligations that is part of the issue (determined by treating each separate lot of obligations as a separate issue).[68] Thus a composite issue may qualify for the exception only if the composite issue itself does not exceed $10 million, and if each issuer benefitting from the composite issue reasonably anticipates that it will not issue more than $10 million of tax-exempt obligations during the calendar year, including through the composite arrangement.

Treatment of financial institution preference items

Section 291(a)(3) reduces by 20 percent the amount allowable as a deduction with respect to any financial institution preference item. Financial institution preference items include interest on debt to carry tax-exempt obligations acquired after December 31, 1982, and before August 8, 1986.[69] Section 265(b)(3) treats qualified tax-exempt obligations as if they were acquired on August 7, 1986. As a result, the amount allowable as a deduction by a financial institution with respect to interest incurred to carry a qualified tax-exempt obligation is reduced by 20 percent.

REASONS FOR CHANGE

The Committee believes that the creation of a de minimis safe harbor to permit financial institutions to hold a limited amount of

[64] Sec. 265(b)(3).
[65] Secs. 265(b)(3)(A), 291(a)(3) and 291(e)(l).
[66] Sec. 265(b)(3)(C).
[67] Sec. 265(b)(3)(E).
[68] Sec. 265(b)(3)(F).
[69] Sec. 291(e)(1).

tax-exempt obligations issued in 2009 and 2010 without full reduction of their attributable interest expense deductions will stimulate demand for tax-exempt obligations issued by State and local governments in 2009 and 2010. This additional demand should increase the volume of tax-exempt bond issuances by State and local governments in 2009 and 2010 while reducing the interest costs with respect to such issuances. In addition, the Committee believes that it is appropriate to increase temporarily the volume limitation for qualified small issuers, from $10 million to $30 million, and make other modifications to allow additional issuers to qualify under the provision.

EXPLANATION OF PROVISIONS

Two-percent safe harbor for financial institutions

The provision provides that tax-exempt obligations issued during 2009 or 2010 and held by a financial institution, in an amount not to exceed two percent of the adjusted basis of the financial institution's assets, are not taken into account for the purpose of determining the portion of the financial institution's interest expense subject to the pro rata interest disallowance rule of section 265(b). For purposes of this rule, a refunding bond (whether a current or advance refunding) is treated as issued on the date of the issuance of the refunded bond (or in the case of a series of refundings, the original bond).

The provision also amends section 291(e) to provide that tax-exempt obligations issued during 2009 and 2010, and not taken into account for purposes of the calculation of a financial institution's interest expense subject to the pro rata interest disallowance rule, are treated as having been acquired on August 7, 1986. As a result, such obligations are financial institution preference items, and the amount allowable as a deduction by a financial institution with respect to interest incurred to carry such obligations is reduced by 20 percent.

Modifications to qualified small issuer exception

With respect to tax-exempt obligations issued during 2009 and 2010, the provision increases from $10 million to $30 million the annual limit for qualified small issuers.

In addition, in the case of "qualified financing issue" issued in 2009 or 2010, the provision applies the $30 million annual volume limitation at the borrower level (rather than at the level of the pooled financing issuer). Thus, for the purpose of applying the requirements of the section 265(b)(3) qualified smalI issuer exception, the portion of the proceeds of a qualified financing issue that are loaned to a "qualified borrower" that participates in the issue are treated as a separate issue with respect to which the qualified borrower is deemed to be the issuer.

A "qualified financing issue" is any composite, pooled or other conduit financing issue the proceeds of which are used directly or indirectly to make or finance loans to one or more ultimate borrowers all of whom are qualified borrowers. A "qualified borrower" means (1) a State or political subdivision of a State or (2) an organization described in section 501(c)(3) and exempt from tax under section 501(a). Thus, for example, a $100 million pooled financing

issue that was issued in 2009 could qualify for the section 265(b)(3) exception if the proceeds of such issue were used to make four equal loans of $25 million to four qualified borrowers. However, if (1) more than $30 million were loaned to any qualified borrower, (2) any borrower were not a qualified borrower, or (3) any borrower would, if it were the issuer of a separate issue in an amount equal to the amount loaned to such borrower, fail to meet any of the other requirements of section 265(b)(3), the entire $100 million pooled financing issue would fail to qualify for the exception.

For purposes of determining whether an issuer meets the requirements of the small issuer exception, qualified 501(c)(3) bonds issued in 2009 or 2010 are treated as if they were issued by the 501(c)(3) organization for whose benefit they were issued (and not by the actual issuer of such bonds). In addition, in the case of an organization described in section 501(c)(3) and exempt from taxation under section 501(a), requirements for "qualified financing issues" shall be applied as if the section 501(c)(3) organization were the issuer. Thus, in any event, an organization described in section 501(c)(3) and exempt from taxation under section 501(a) shall be limited to the $30 million per issuer cap for qualified tax exempt obligations described in section 265(b)(3).

EFFECTIVE DATE

The provisions are effective for obligations issued after December 31, 2008.

2. Temporary modification of alternative minimum tax limitations on tax-exempt bonds (sec. 1503 of the bill and secs. 56 and 57 of the Code)

PRESENT LAW

Present law imposes an alternative minimum tax ("AMT") on individuals and corporations. AMT is the amount by which the tentative minimum tax exceeds the regular income tax. The tentative minimum tax is computed based upon a taxpayer's alternative minimum taxable income ("AMTI"). AMTI is the taxpayer's taxable income modified to take into account certain preferences and adjustments. One of the preference items is tax-exempt interest on certain tax-exempt bonds issued for private activities (sec. 57(a)(5)). Also, in the case of a corporation, an adjustment based on current earnings is determined, in part, by taking into account 75 percent of items, including tax-exempt interest, that are excluded from taxable income but included in the corporation's earnings and profits (sec. 56(g)(4)(B)).

REASONS FOR CHANGE

The Committee believes that the AMT treatment of interest on tax-exempt bonds restricts the number of persons willing to hold tax-exempt bonds, resulting in higher financing costs. This problem has become more acute as a result of the current economic downturn. Accordingly, in light of current economic circumstances, the bill eliminates the AMT adjustments for interest on tax-exempt bonds issued in 2009 and 2010.

EXPLANATION OF PROVISION

The provision provides that tax-exempt interest on private activity bonds issued in 2009 and 2010 is not an item of tax preference for purposes of the alternative minimum tax and interest on tax exempt bonds issued in 2009 and 2010 is not included in the corporate adjustment based on current earnings. For these purposes, a refunding bond is treated as issued on the date of the issuance of the refunded bond (or in the case of a series of refundings, the original bond).

EFFECTIVE DATE

The provision applies to interest on bonds issued after December 31, 2008.

3. Qualified school construction bonds (sec. 1511 of the bill and sec. 54F 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.[70] 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.[71] Generally, this information return is required to be filed no later than 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.[72] 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 investment.[73] 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, States and local governments were given the authority to issue "qualified zone academy bonds."[74] A 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 allo-

[70] Sec. 103.
[71] Sec. 149(e).
[72] Sec. 103(a) and (b)(2).
[73] Sec. 148.
[74] Sec. 1397E.

cated 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 of qualified zone academy bonds without discount and without interest cost to the issuer.[75] 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 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

[75] 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 issue to issue tax credit bonds at par.

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 bespent 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.

REASONS FOR CHANGE

The Committee believes that this new category of tax credit bonds will provide an efficient mechanism to encourage the construction, rehabilitation, or repair of public school facilities and the acquisition of land on which such bond-financed facilities are to be constructed.

EXPLANATION OF PROVISION

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-fmanced 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 large 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 appro-

priate. 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: (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 ad-

dition, 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.

4. Extend and expand qualified zone academy bonds (sec. 1512 of the bill 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.[76] 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.[77] Generally, this information return is required to be filed no later than 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.[78] 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.[79] 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, States and local governments were given the authority to issue "qualified zone academy bonds."[80] A 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 allo-

[76] Sec. 103.
[77] Sec. 149(e).
[78] Sec. 103(a) and (b)(2).
[79] Sec. 148.
[80] See secs. 54E and 1397E.

cated 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 of qualified zone academy bonds without discount and without interest cost to the issuer.[81] 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 spend-

[81] 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.

ing 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.

REASONS FOR CHANGE

The Committee wishes to expand and extend the qualified zone academy bond program. The Committee believes that this category of tax credit bonds will continue to provide an efficient mechanism for renovating, providing equipment to, developing course materials for use at, or training teachers and other school personnel in a "qualified zone academy."

EXPLANATION OF PROVISION

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 bonds issued after December 31, 2008.

5. Taxable bond option for governmental bonds (sec. 1521 of the bill and new secs. 54AA and 6432 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."[82]

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").[83]

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 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.[84] An arbitrage bond is defined as any bond that is part of an issue if any proceeds of the

[82] Sec. 141.
[83] 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.
[84] Sec. 103(a) and (b)(2).

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.[85] 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.[86]

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 maturity or redemption date without discount and without interest cost to the qualified issuer.[87] 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

[85] Sec. 148.
[86] See secs. 54B, 54C, 54D, and 54E.
[87] 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.

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.

REASONS FOR CHANGE

The Committee notes that borrowing by State and local governments is critically important to financing the nation's infrastructure. The Committee has observed that over the past several years, yield spreads between tax-exempt debt issued by State and local governments and approximately comparable taxable debt issued by corporations has narrowed, so that tax-exempt yields are now generally less than 25 percent below taxable yields.[88] The Committee further observes that not all of the benefit of the tax-exemption of interest on State and local bonds redounds to the issuing government because the exclusion of qualifying interest income is more valuable to bondholders in the highest tax brackets than to those bondholders in the lower tax brackets. The Committee, therefore, believes that the provision offers a more revenue efficient financing tool and lower net interest costs to State and local issuers.

In addition, the Committee recognizes that many States are suffering from declines in revenues and tight budgets while the need for infrastructure is great. Therefore the Committee believes it is appropriate to offer to issuers, on a temporary basis, the ability to receive a refundable credit for bonds used to fund capital expenditures in lieu of providing a tax credit to bondholders.

EXPLANATION OF PROVISION

In general

The provision permits an issuer to elect to have an otherwise tax-exempt bond treated as a "taxable governmental bond." A "tax-

[88] Joint Committee on Taxation, *Present Law and Issues Related to Infrastructure Finance* (JCX 83–08, October 24, 2008) at 23–28.

able 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.[89] 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

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

[89] 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)). 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

such issue are to be used for capital expenditures.[90] 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, the issuer is allowed a credit equal to 35 percent of each interest payment made under such bond.[91] 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 as 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.

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.

6. Recovery Zone Bonds (sec. 1531 of the bill 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. Govern-

[90] 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.

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

mental 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."[92]

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").[93]

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.

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[92] Sec. 141.

[93] 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.

Arbitrage restrictions

The exclusion from income for interest on State and local bonds does not apply to any arbitrage bond.[94] 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.[95] 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 sub-

[94] Sec. 103(a) and (b)(2).
[95] Sec. 148.

ject 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.[96]

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 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.[97] 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 fail-

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

[97] 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.

ure 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.

REASONS FOR CHANGE

Many communities have seen a significant decline in the number of individuals employed and are struggling with high concentrations of poverty and foreclosed homes. The Committee believes that additional incentives are needed to assist those communities most affected by the current economic crisis. The Committee also believes that State and local governments often are in the best position to assess economic development needs. Thus, the Committee believes it is appropriate to provide State and local governments with access to subsidized financing in order to promote economic development in communities affected by job losses and to provide needed infrastructure.

EXPLANATION OF PROVISION

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 municipal-

ity'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 provision 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.[98] 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;

[98] See "Taxable Bond Option for Governmental Bonds" discussed above.

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.

7. Tribal economic development bonds (sec. 1532 of the bill and new sec. 7871(f) of the Code)

PRESENT LAW

Under present law, gross income does not include interest on State or local bonds.[99] 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.[100] Interest on private activity bonds is taxable, unless the bonds are issued for certain purposes permitted by the Code and other requirements are met.[101]

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.[102] 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.[103] The term essential governmental function does not include

[99] Sec. 103.
[100] Sec. 141(b)(6); Treas. Reg. sec. 1.141–1(b).
[101] Secs. 103(b)(1) and 141.
[102] Sec. 7871.
[103] Sec. 7871(c).

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.

REASONS FOR CHANCE

State and local governments use tax-exempt financing for both public purposes and qualified private activities. Indian tribes, however, are restricted to issuing tax-exempt bonds for essential governmental functions. In general, Indian tribes cannot issue tax-exempt private activity bonds, except for certain manufacturing facilities. The Committee believes that in the current economic crisis, tribes should be afforded flexibility in using tax-exempt financing for economic development. Therefore, the provision permits Indian tribes to issue tax-exempt bonds for purposes not currently permitted by present law, if the bonds would have been tax-exempt if issued by a State.

EXPLANATION OF PROVISION

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 (1) 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.

8. Repeal of withholding on government contractors (sec. 1541 of the bill and sec. 3402(t) of the Code)

PRESENT LAW

For payments made after December 31, 2010, the Code requires withholding of income tax 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 under this provision 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. The provision imposes information reporting requirements on the payments that are subject to withholding under the provision.

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 provision 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 provision with respect to the employees' services as employees.

REASONS FOR CHANGE

The Committee believes that the three-percent withholding requirement was not appropriately targeted to the noncompliant taxpayers for whom it was originally intended and has imposed significant and costly administrative burdens on State and local governments.

EXPLANATION OF PROVISION

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

EFFECTIVE DATE

The provision is effective on the date of enactment.

G. ENERGY INCENTIVES

1. Extension of the renewable electricity production credit (sec. 1601 of the bill 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").[104] 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

[104] 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.

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).

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 electricity produced from renewable resources is a component of the general business credit.[105] 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.[106] 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

[105] Sec. 38(b)(8).
[106] Sec. 38(c)(4)(B)(ii).

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.

Open-loop biomass (including a 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 burn 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 man-made 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, 2.004, 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 [107] is 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.[108] 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.

[107] Secs. 1381–1383.
[108] Sec. 1382.

REASONS FOR CHANGE

The Committee believes that additional incentives for the production of electricity from renewable resources will help limit the environmental consequences of continued reliance on power generated using fossil fuels. The Committee also believes that a multi-year extension of the present-law electricity production credit will encourage the development of renewable energy projects that will create new jobs for workers.

EXPLANATION OF PROVISION

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.

2. Election of investment credit in lieu of production tax credits (sec. 1602 of the bill 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.[109] 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 II.G.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 prop-

[109] 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.

erty, and geothermal heat pump property.[110] The amounts of credit, definitions of qualifying property, and other rules governing this credit are described more fully in section II.G.3. of this document.

REASONS FOR CHANGE

The Committee believes that current economic circumstances are constraining investments in facilities that ordinarily would utilize the production tax credit, and wishes to give maximum flexibility to taxpayers to choose the tax incentive that will deliver the greatest benefit to them.

EXPLANATION OF PROVISION

The provision 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. The eligible basis for the investment credit for taxpayers making this election is the basis of the depreciable (or amortizable) property that would comprise a section 45 credit-eligible facility. 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.

3. Modification of energy credit[111] (sec. 1603 of the bill and sec. 48 of the Code)

PRESENT LAW

In general

A nonrefundable, 10-percent business energy credit[112] 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.[113] An unused general business credit generally may be carried back one year and carried forward 20 years.[114] The taxpayer's basis in the property is reduced by one-half of the amount of the

[110] Sec. 48.
[111] Additional provisions that (1) allow section 45 facilities to elect to be treated as section 48 energy property, and (2) allow section 48 facilities to elect to receive a grant from the Department of Energy rather than the section 48 energy credit, are described in sections II.G.2. and II.H.2. of this document.
[112] Sec. 48.
[113] Sec. 38(b)(1).
[114] Sec. 39.

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 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).

REASONS FOR CHANGE

The Committee believes the cap on the availability of the investment credit with respect to wind energy property is inconsistent with the objective of stimulating greater investment in such property. Therefore, the Committee believes it is appropriate to remove the cap on the amount of credit that may be claimed for wind energy property.

In order to protect the efficacy of both the energy credit and subsidized financing as means of stimulating investment in renewable technologies, the Committee believes taxpayers utilizing subsidized energy financing should not be required to reduce their otherwise allowable credit.

EXPLANATION OF PROVISION

The provision eliminates the credit cap applicable to qualified small wind energy property. The provision 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).

4. Expand new clean renewable energy bonds (sec. 1611 of the bill and sec. 54C of the Code)

PRESENT LAW

New Clean Renewable Energy Bonds

New clean renewable energy bonds ("New CREBs") may be issued by qualified issuers to finance qualified renewable energy facilities.[115] 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

[115] Sec. 54C.

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. 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 issuer.[116] 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.

[116] 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.

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.

REASONS FOR CHANGE

The Committee believes that the NEW CREBs program provides an efficient mechanism to finance qualified renewable energy facilities. Therefore, the Committee wishes, to expand the New CREBs program by increasing the amount of the national bond volume limitation.

EXPLANATION OF PROVISION

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 bonds issued after date of enactment.

5. Expand qualified energy conservation bonds (sec. 1612 of the bill 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 trans-

portation; 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 may be 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 77 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 fond 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.[117] 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 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 simi-

[117] 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.

lar 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.

REASONS FOR CHANGE

The Committee believes that an increase in the volume limitation for qualified energy conservation bonds is needed to help move the nation toward more energy-efficient policies. The Committee is aware that a number of communities have initiated low-interest loan and grant programs to encourage the adoption of energy conserving products as part of their green community programs. The Committee believes that incentives for the purchase and installation of energy-efficient property and energy-efficient improvements to residences are desirable to help reduce energy consumption in the household sector. Therefore, the Committee believes it is appropriate to allow the proceeds of qualified energy conservation bonds to be used for loans and grants to implement green community programs.

EXPLANATION OF PROVISION

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 bonds issued after the date of enactment.

6. Extension and modification of credit for nonbusiness energy property (sec. 1621 of the bill 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 re-

quirements); (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 an 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,[118] (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 burns 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

[118] 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.

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

REASONS FOR CHANGE

The Committee believes that an immediate increase in the credit rate and the amount of the maximum credit that may be claimed is warranted to encourage additional investments that will help reduce reliance on fossil fuels.

EXPLANATION OF PROVISION

The provision 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 provision 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.

7. Credit for residential energy efficient property (sec. 1622 of the bill 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 re-

spect 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.

REASONS FOR CHANGE

The Committee believes that an increase in the maximum credit that may be claimed for solar hot water, geothermal, and wind property is warranted to encourage additional investments that will help reduce reliance on fossil fuels. For the same reasons, the Committee believes it is appropriate to eliminate the rules that re-

duce available credits for property using subsidized energy financing.

EXPLANATION OF PROVISION

The provision 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.

8. Temporary increase in credit for alternative fuel vehicle refueling property (sec. 1623 of the bill 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.[119] 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.

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

[119] Sec. 30C.

property, the property must be placed in service before January 1, 2015.

REASONS FOR CHANGE

The Committee believes that widespread adoption of advanced technology and alternative-fuel vehicles is necessary to transform automotive transportation in the United States to be cleaner, more fuel efficient, and less reliant on petroleum fuels. The Committee further believes that one important method to encourage this trend is to provide additional tax incentives for the development and installation of the infrastructure necessary to deliver clean fuels to drivers of clean-fuel vehicles.

EXPLANATION OF PROVISION

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.

9. Energy research credit (sec. 1631 of the bill and sec. 41 of the Code)

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).[120] 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.[121]

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 en-

[120] Sec. 41.
[121] Sec. 41(e).

ergy 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.[122]

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.[123]

In computing the credit, a taxpayer's base amount cannot be less than 5.0 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.[124] 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-base percentage.[125]

Alternative incremental research credit regime

Taxpayers are allowed to elect an alternative incremental research credit regime.[126] 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

[122] Sec. 41(h).

[123] 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).

[124] Sec. 41(f)(1).

[125] Sec. 41(f)(3).

[126] Sec. 41(c)(4).

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 rates listed above are increased to three percent, four percent, and five percent, respectively.[127]

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.

Alternative simplified credit

Generally, for amounts paid or incurred after 2006, taxpayers may elect to claim an alternative simplified credit for qualified research expenses.[128] 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

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

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).[129] 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.[130] 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 research, market testing, or market development, routine data collection or routine quality control.[131] 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 or create an asset that has a useful life extending beyond the current year must be capitalized.[132] 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.[133] Taxpayers may alternatively elect to claim a reduced research tax credit amount under section 41 in lieu of reducing deductions otherwise allowed.[134]

REASONS FOR CHANGE

The Committee is concerned about the United States' dependence on foreign sources of energy and about the environmental con-

[129] 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).

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

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

[132] 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).

[133] Sec. 280C(c).

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

sequences of increased domestic energy production and consumption. The Committee believes that technological advances can address both of these concerns. The Committee therefore seeks to encourage expenditures on research related to the fields of fuel cells and battery technology, renewable energy, energy conservation technology, electricity transmission technology, and carbon capture and sequestration.

EXPLANATION OF PROVISION

The provision 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.

H. Other Provisions

1. Application of certain labor standards to projects financed with certain tax-favored bonds (sec. 1701 of the bill)

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.

REASONS FOR CHANGE

The Committee believes that it is appropriate to apply the prevailing wage requirement to a broader class of contracts including those financed with tax-favored bonds.

EXPLANATION OF PROVISION

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) issued; 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.

2. Grants for specified energy property in lieu of tax credits (secs. 160.4 and 1721 of the bill 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").[135] 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 II.G.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.[136] The amounts of credit, definitions of qualifying property, and other rules governing this credit are described more fully in section II.G.3. of this document.

REASONS FOR CHANGE

The Committee believes that incentives for the production of electricity from renewable resources will help limit the environmental consequences of continued reliance on power generated using fossil fuels. The Committee understands that some investors in renewable energy projects have suffered economic losses that prevent them from benefiting from the renewable electricity production credit and the energy credit. The Committee further believes that this situation, combined with current economic conditions, has the potential to jeopardize investment in renewable energy facilities. The Committee therefore believes that, in the short term, allowing renewable energy developers to elect to receive direct grants in lieu of the renewable electricity production credit and the energy credit is necessary for continued growth in this important industry.

EXPLANATION OF PROVISION

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 depreciable

[135] 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.
[136] Sec. 48.

(or amortizable) 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.[137]

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.

3. Study of the economic, employment and related effects (sec. 1731 of the bill)

PRESENT LAW

Present law requires no studies of this bill.

REASONS FOR CHANGE

The Committee believes that it is important to assess the efficacy of the policies enacted in the present legislation in promoting the recovery of the economy.

EXPLANATION OF PROVISION

The provision requires the Comptroller General of the United States to submit a series of written reports to the Committee on Ways and Means reporting the most recent national information and data (and where available comparable information and data for the individual States) related to the economic effects of this Act. In particular the reports should assess the employment effects of this Act, including a comparison of the number of jobs preserved and the number of jobs creates as a result of Act. The reports should delineate jobs preserved and created between those in the public sector and those in the private sector. The reports should further

[137] Section 1604 of the bill.

calculate the share of tax expenditures and non-tax expenditures provided under this Act that were spent or saved by various groups of citizens and by income class. The reports should detail how the funds provided to the States under this Act have been spent, including decomposing the expenditures into funds used for services provided to citizens and wages and other compensation for public sector employees. Lastly, the reports should describe any funds made available by the Act that remain unspent and the reasons why such funds are unspent.

The required reports are due on February 1, 2010, May 1, 2010, August 1, 2010, and November 1, 2010.

EFFECTIVE DATE

The provision is effective on date of enactment.

TITLE II—ASSISTANCE FOR UNEMPLOYED WORKERS AND STRUGGLING FAMILIES

SUBTITLE A—UNEMPLOYMENT INSURANCE

A. EXTENSION OF EMERGENCY UNEMPLOYMENT COMPENSATION PROGRAM (SEC. 2001 OF THE BILL)

PRESENT LAW

Title IV, Emergency Unemployment Compensation, of the Supplemental Appropriations Act, 2008 (Public Law 110–252) as amended by the Unemployment Compensation Act of 2008 (Public Law 110–449) created a temporary emergency unemployment compensation program (EUC08).

This temporary unemployment insurance program provides up to an additional 20 weeks of unemployment benefits to certain workers who have exhausted their rights to regular unemployment compensation (UC) benefits. A second tier of benefits exists in States with a three-month seasonally adjusted average unemployment rate of at least 6 percent and provides up to an additional 13 weeks of EUC08 benefits (for a total of up to 33 weeks of EUC08 benefits).

Section 4007 of Title IV, as amended, begins to phase-out the program 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.

Section 4004 of Title IV, as amended, establishes that funds in the extended unemployment compensation account (EUCA) of the unemployment trust fiend (UTF) shall be used for financing EUC08 payments. Funds to the States for administering the EUC08 program shall be from the employment security administration account (ESAA). Compensation for EUC08 payments to former employees of non-profits and governmental entities are from the general fund of the Treasury.

EXPLANATION OF PROVISION

Section 2001(a) of the proposal would amend Section 4007 by extending the duration of the temporary EUC program. The EUC program would begin to phase-out the program on the week ending on or before December 31, 2009. Under this proposal no compensa-

tion under the program would be payable for any week beginning after May 31, 2010.

Section 2001(b) of the proposal would alter the funding of all EUC benefits covered under Section 4004 as well as all State administration costs of the EUC benefit. The benefits and administration costs would be funded through the general fund of the Treasury rather than the EUCA and ESAA accounts within the UTF. The funds used from the general fund would not be required to be repaid.

REASON FOR CHANGE

The current Extended Benefits (EB) program rarely triggers on in States with high and/or rising unemployment given the program's stringent requirements. Congress has therefore routinely established and extended when necessary temporary Federal extended benefits programs in response to economic weakness and growing unemployment.

The Committee believes that the current deterioration in the labor market is nearly unprecedented. With 11.2 million unemployed workers—the most since February 1983—the 7.2 percent December 2008 unemployment rate was the highest it has been since January 1993. Since this recession began in December 2007, the economy has lost 2.6 million jobs—the most in one year since 1945, with the highest one year percentage point increase in the unemployment rate since 1982. The decline in jobs between October and November 2008 was the worst one-month job loss since 1974. The October through December job loss represents the most rapid rate of job loss since the first three months of 1975. As of December 2008, there were more involuntarily unemployed workers (6.5 million) than at any point in the past 25 years (June 1983). The share of the U.S. population with a job (61 percent) is at its lowest since 1986. In 2008, the number of people who could find only part-time work has jumped from 4.6 million to 8 million during the past year. The December share of unemployed, marginally attached and involuntary part-time workers, 13.5 percent, is up almost six percentage points from a year earlier.

The Committee also believes that the job market is expected to remain bleak at least through 2009. There are now approximately 3.8 job seekers for every job opening, and with the most recent 4 months accounting for 1.9 million of the 2.6 million jobs lost in 2008, the recession appears to be accelerating. Experts uniformly forecast higher unemployment rates through 2009. CBO predicts that the unemployment rate will rise to 9.1 percent in Fiscal Year 2010. The Wall Street Journal survey of economists forecasts an unemployment rate rising to 8.1 percent by December 2009, and then continuing to rise in 2010. Wachovia predicts an unemployment rate rising through next year to 9.0 percent. An Economic Policy Institute economist has argued that historical evidence suggests a labor market recovery around mid-2010 or later.

The Committee knows that federally-funded temporary extended benefits help millions of workers. State-funded unemployment benefits often expire at or before 6 months of receipt, but more than one (23.2 percent) in five unemployed workers have been unemployed for more than 6 months. The number of long-term unemployed, workers who have been unemployed for more than 6

months, is at its highest level (2.4 million) since October 1983. About 1.7 million workers received emergency unemployment benefits under the temporary Federal program between July and September 2008. In one week in mid-December 2008, about 1.9 million workers claimed these benefits. If the temporary Federal unemployment benefits program is extended to begin to phase-out upon the end of 2009, rather than the end of March as currently scheduled, about 6.7 million workers in total will receive benefits under this program, including 5 million beneficiaries since September 2008.

The Federal Unemployment Trust Fund has been inadequately financed to fund an extension of the EUC program. The Federal Unemployment Accounts have approximately $29 billion in reserves, and an extension of the EUC program enacted before the end of March 2009 would likely eventually consume more than the remaining balances. Funding unemployment insurance benefit extensions through general revenues is common practice. The 1972–1973 Emergency Unemployment Compensation (Magnuson Act) extension program, the 1975–1978. Federal Supplemental Benefits (FSB) extension program, the 1982–1985 Federal Supplemental Compensation (FSC) extension program, and the 1991–1994 Emergency Unemployment Compensation (EUC) extension program were partially funded through general revenues.

EFFECTIVE DATE

The provision is effective upon enactment.

B. Increase in Unemployment Compensation Benefits (Sec. 2002 of the Bill)

PRESENT LAW

Federal-State Agreements

The joint Federal-State Unemployment Compensation (UC) program may provide income support through the payment of UC benefits to unemployed individuals. The program's two main objectives are to provide temporary and partial wage replacement to involuntarily unemployed workers and to stabilize the economy during recessions. The Federal Unemployment Tax Act (FUTA) of 1939 (Public Law 76–379) and titles III, IX, and XII of the Social Security Act of 1935 (Public Law 74–271) form the framework of the UC system. UC benefits are financed through employer taxes. The Federal taxes on employers are under the authority of the Federal Unemployment Tax Act (FUTA), and the State taxes are under the authority given by the State Unemployment Tax Acts (SUTA). The Federal unemployment tax on employers, among other uses, pays the Federal share (50 percent) of the Extended Benefit (EB) program and 100 percent of Federal and State administrative costs. State unemployment taxes on employers pay for 100 percent of the regular UC benefit and 50 percent of the EB benefit.

Federal law does not provide formulas, floors, or ceilings on the calculation of regular weekly State unemployment benefit 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.

The Extended Benefit (EB) program, established by the Federal-State Unemployment Compensation Act, Public Law 91–373 (26 U.S.C. 3304, note), may extend UC benefits at the State level if certain economic situations within the State exist.

Section 202(a)(2) of the Federal-State Unemployment Compensation Act sets the extended benefit (EB) amount to be equivalent to the regular UC benefit.

Section 4001(d)(1) of Title W, Emergency Unemployment Compensation, of the Supplemental Appropriations Act, Public Law 110–252, also requires that the EUC08 benefit be equivalent to the regular UC benefit.

Fraud and overpayments

All State laws provide for recovering UC benefits paid to workers who later are found not to be entitled to them. In addition to direct repayment, States use several tools to recoup these funds. States may, at the discretion of the agency, recover overpayments by deducting from future benefits payable (benefit offset). They also may offset overpayments with State tax refunds due to the worker. They also can compel repayment by pursuing civil action in State court. Finally, some States may assess interest on outstanding overpayment balances. Some States provide that if the overpayment is not the fault of the individual, the individual is not liable to repay the amount overpaid.

Section 4005 of Public Law 110–252 requires that if an individual knowingly has falsely received an amount of EUC08 compensation the individual is ineligible for further EUC08 compensation and shall be subject to prosecution under section 1100 of title 18 of the United States Code (Chapter 47—Fraud and False Statements). If an individual wrongly received amounts of EUC08 benefits to which they were not entitled, the State requires such an individual to repay the amounts of EUC08 benefits to the State agency except that the State agency may waive such repayment if the individual was without fault and such repayment would be contrary to equity and good conscience. States are required to recover erroneous payments through deductions from any EUC08 benefits payable to such individual or from any State or Federal unemployment benefit with respect to any week of unemployment, during the three-year period after the date such individual received the erroneous emergency UC benefit payment. No single deduction may exceed 50 percent of the weekly benefit amount from which such deduction is made. In addition to regular UC and EB benefits, the Trade Readjustment Allowance and the Federal Disaster Unemployment Assistance benefit (among other similar benefits) also qualify to have such a deduction. No repayment shall be required until a determination has been made and an opportunity for a fair hearing has been given to the individual and the determination has become final.

EXPLANATION OF PROVISION

Federal-State agreements

Section 2002(a) of the proposal would create an additional, federally funded, ($25) weekly benefit that would be available to all individuals receiving Trade Readjustment Allowances, Disaster Unemployment Benefits, regular UC, EB, or EUC08 benefits. These $25 additional weekly benefits would be available in States that enter into an agreement with the Labor Secretary. States would have the option to terminate such an agreement after providing 30 days' written notice.

Provisions of agreement

Section 2002(b) of the proposal would require the agreement between the Labor Secretary and the States to require that the States would not take the additional compensation (the $25 additional benefit) into consideration while determining regular UC benefit (including any dependents' allowances). The $25 additional benefit would be payable either at the same time and in the same manner as any regular compensation payable for the week involved, or at the option of the State, the payments may be separate from but on the same weekly basis as any regular compensation otherwise payable.

Nonreduction rule

Section 2002(c) of the proposal requires that the agreement would not apply or would cease to apply if the Labor Secretary determines a State had altered the method governing the computation of regular compensation under the State law in such a manner that the weekly benefit amount would be less than the benefit amount that would have been payable during such a period under the State law as of December 31, 2008.

Payment to States

Section 2002(d) of the proposal would require that States be paid 100 percent of the additional benefit cost as well as any addition administrative expenses incurred by the State by reason of such agreement as determined by the Labor Secretary. The Federal payments to the States would be made on a monthly basis.

The Federal payments to the States for the $25 additional benefit and associated administrative expenses would be appropriated from the general fund of the Treasury, without fiscal year limitation. These funds would not be required to be repaid.

Applicability

Section 2002(e) of the proposal would begin the additional benefits for weeks of unemployment beginning after the date of enactment. The additional benefit would terminate for weeks of unemployment ending on or after January 1, 2010.

After such termination, in the case of individuals who have not exhausted the right to regular unemployment benefits and have been receiving the $25 additional benefit, the $25 additional benefit would continue to be payable until regular unemployment compensation exhaustion. That is, there would be a "grandfathering" of the additional benefit for individuals who were already receiving

the $25 additional benefit. No additional $25 benefit would be payable for any week of unemployment beginning after June 30, 2010.

Fraud and overpayments

Section 2002(f) of the proposal would apply Section 4005 (Fraud and Overpayments) of the Supplemental Appropriations Act, 2008, with respect to additional compensation to the same extent and in the same manner as in the case of EUC08 benefits.

Application to other unemployment benefits

Section 2002(g) of the proposal would apply all the provisions of the proposal to all unemployment benefits described in subsection 2(h)(3) of the proposal (including Trade Readjustment Allowances, Disaster Unemployment Benefits, EB, and EUC08 benefits) to the same extent and in the same manner as if those benefits were regular unemployment compensation. Additionally, eligibility and termination rules shall be applied in the same manner.

For example, if an individual were receiving a tier I EUC08 benefit (and the $25 additional benefit) in the week ending before January 1, 2010, the additional benefit would continue to be payable while an individual continued to receive the tier I EUC08 until the exhaustion of the tier I EUC08 benefit. However, that individual would not receive the $25 additional benefit if the individual then began to receive the EB benefit. No $25 additional benefit would be payable for any week of unemployment beginning after June 30, 2010.

Definitions

Section 2(h) of the proposal would apply the definitions given such terms under section 205 of the Federal-State Extended Unemployment Compensation Act of 1970 (26 U.S.C. 3304, note) for "compensation," "regular compensation," "benefit year," "State," "State agency," "State law," and "week".

REASON FOR CHANGES

Unemployment insurance is the front line of defense against poverty for unemployed working families, and boosting benefits would keep many workers and their families out of poverty. The average unemployment benefit nationwide is under $300 a week—only 91 percent of the poverty line for a worker with two children. On average, unemployment benefits replace less than half (47 percent) of a worker's prior wages and the average unemployment benefit is only 35 percent of the average wage. These low levels are a particular problem during times when people are unemployed for long periods of time because the economy fails to produce jobs.

The Committee believes that workers will stimulate and stabilize the economy by spending increased benefits on basic needs, such as food and job search expenses, health care and housing. A 1996 report funded in part by the Advisory Council on Unemployment Compensation found that unemployment benefits reduced by nearly 50 percent the chances that a worker will be forced to sell the family home. One survey has found that over 40 percent of expenditures paid for with unemployment benefits were directed to housing costs, making unemployment benefits essential to preventing home loss and homelessness.

Research confirms the stimulative and anti-poverty impact of unemployment insurance benefits. The Congressional Budget Office has noted that "it seems likely that recipients would quickly spend most of [their additional] benefits. For example, an examination of the experiences of long-term UI recipients in 2001 and early 2002 * * * indicated that their average family income was about half of what it had been when they were working. Moreover, more than one-third of the former recipients who had not returned to work had a family income below the poverty line (measured on a monthly basis), and about 40 percent lacked health insurance." Department of Labor-sponsored simulations of all recessions from 1969 through 1992 found that "each UI benefit dollar going to a claimant ultimately expands overall GDP by between $1.54 and $3.07. The average growth in overall GDP generated by a dollar of UI benefits is $2.15."

EFFECTIVE DATE

The provision is effective upon enactment.

C. Special Transfers for Unemployment Compensation Modernization (Sec. 2003 of the Bill)

PRESENT 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.[1]

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 unemployment taxes (excluding reduced credit payments) made by the State's employers.

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.

Description of State base period determination

Monetary eligibility for UC benefits is determined by insured wages earned by claimants while they were employed during a specified period of time—referred to as the base period (BP). The BP spans four continuous calendar quarters. In most States the BP is the first four of the last five completed calendar quarters immediately preceding the filing of a claim. Many unemployed workers do not meet the requirements for monetary eligibility because their BP earnings are not sufficient in terms of either quarters worked or level of earnings earned in the "high" quarter. Some of these un-

[1] Legislatively, the most recent Reed Act distribution was a special transfer in 2002 through the Job Creation and Worker Assistance Act of 2002, P.L. 107–147. This provided for a one-time special Reed Act distribution of up to $8 billion to State accounts. It required that the transferred funds first be used to pay outstanding State loans from the UTF. The remaining funds could be used for unemployment compensation (UC) benefits. States were also able to use the funds for UC and Employment Service (ES) administration; these required a State appropriation.

employed workers might qualify for UC benefits if their State allows workers to use more recent wage credits based on an Alternative Base Period (ABP). Depending on the State, the ABP allows wage credits earned during the last completed calendar quarter (lag quarter) or the quarter in which the claim is filed (current quarter) to help determine UC eligibility and benefit amounts. Unemployment Insurance Policy Letter 44–97 (which interpreted section 5401 of P.L. 105–33, the Balanced Budget Act of 1997) allows States to not offer an alternative base period (ABP) in determining eligibility for UC benefits.

Description of State treatments of part-time work

In most States' UC systems, workers who have had their hours reduced or who are working short-term in part-time jobs while looking for a permanent full-time job may receive some (although generally greatly offset) UC benefits. All States disregard some earnings as an inducement to take part-time work. The worker's UC benefit will generally equal the difference between the weekly benefit amount and earnings plus a small disregard. However, if the worker restricts his or her job search to only positions that are part-time in hours, some States may rule that the worker is ineligible for UC benefits. Some States allow workers to restrict job searches to part-time only positions if the worker has a history of part-time work or if the worker has a disability.

Description of State non-monetary requirements "Quitting for Good Cause"

Along with monetary requirements, each State's UC law requires workers to meet non-monetary requirements. Federal law mandates some of these requirements. Generally, workers must have lost their jobs through no fault of their own and must be able, available, and actively seeking work. Since the UC program is designed to compensate wage loss due to lack of work, voluntarily leaving work without good cause is an obvious reason for disqualification from benefits. All States have such provisions.

There is often a distinction between issues that result in disqualification and issues that result in weeks of ineligibility. A disqualified worker has no right to benefits until the worker re-qualifies, usually by obtaining new work or by waiting out a set disqualification period. In some disqualifying cases, benefits and wage credits may be reduced for a period. In comparison, an ineligible worker does not receive benefits only as long as the condition that causes ineligibility exists.

A worker who leaves work for good cause may not be disqualified but is not necessarily eligible to receive benefits. For example, if the worker left because of illness or to take care of illness in the family, the worker may not be able to work or be available for work. This ineligibility would generally last until the individual was ready and able to work.

Among many different considerations, some States consider quitting a job to be leaving for "good cause" if the quit may be attributed to:

- escaping domestic violence,
- caring for a disabled family member, and/or
- following a spouse whose job has been relocated.

Description of State determination of benefit duration

When States compute a worker's monetary eligibility for benefits, in addition to calculating the weekly benefit amount, they determine the duration of benefits—how long benefits can be collected. There are no Federal standards for the duration of regular benefits. The duration is usually measured as a number of weeks of total unemployment. Maximum weeks of benefits vary from 26 to 30 weeks, most frequently 26 weeks. A few States' laws establish uniform durations of 26 weeks for all workers who meet the qualifying-wage requirements, whereas the rest of the States have variable durations.

Description of State benefits: dependents' allowances

Although the primary factor in determining the weekly UC benefit a claimant receives each week is wages earned during the base period, some States' laws provide for dependents' allowances above and beyond the basic benefit amount payable. The definition of dependent varies from State to State as does the allowance granted. In general, a dependent must be wholly or mainly supported by the worker or living with or receiving regular support from the worker. All States with dependents' allowances include children under a specified age. The intent is to include all children whom the worker is morally obligated to support. In most of these States, allowances may be paid on behalf of older children who are unable to work because of physical or mental disability. In some States, children are not the only dependents recognized—spouses, parents, or siblings are also included in the definition. As with the definition of dependents, there is much variation among States concerning the amount of weekly dependents' allowances payable. However, there are some commonalities. For example, the allowance is ordinarily a fixed sum. In addition, all States have a limit on the total amount of the dependents' allowances payable in any week: in terms of dollar amount, number of dependents, percentage of basic benefits, or of high-quarter wages or of average weekly wage.

EXPLANATION OF PROVISION

Section 2003(a) of the proposal would amend section 903 of the Social Security Act to include new subsections 903(f) and 903(g).

Proposed subsection 903(f)(1) 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 certain State UC laws. The maximum incentive payment allowable for a State would be calculated using the methods detailed in section 903(a)(2) [of the Social Security Act]. That is, funds would be 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.

Under proposed subsection 903(f)(1)(C)(i), 1/3 of the maximum payment would be contingent on State UC law calculating the base period by either:

- 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

- 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.

Under proposed subsection 903(f)(1)(C)(ii), the remaining ⅔ of the incentive payment would be contingent on State law containing two of the following four provisions[2] described in proposed 903(f)(3):[3]

(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 provision also permits the Department of Labor to provide a reasonable definition of part-time employment.

(B) No UC disqualification for separation 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.

(C) Weekly UC continues for individuals who have exhausted all rights to regular and extended 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.

(D) UC Dependent's 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 dependent's allowances must be not less than $50 or 50 percent of the weekly benefit amount for the benefit year.

Proposed subsection 903(f)(4)(A) would require States to submit proof of compliance in the requirements for UC modernization (including information as to how the State intends to use the incentive payment to improve or strengthen the State's UC program). The Labor Secretary, within 60 days after the date of enactment, 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.

Proposed subsection 903(f)(4)(B) would require the Secretary of Labor, while determining if State law meets the requirements for an incentive payment, to disregard any State law provisions that are not currently effective as permanent law or are subject to a discontinuation under certain circumstances. Once the Labor Secretary notifies the Treasury Secretary of the certification of the incentive payment, the appropriate transfer to the State account would occur within seven days. State law provisions that are to

[2] Through regulation and program letters, the States currently have the option of electing or declining each of the "modernization" options listed in the proposal.

[3] Proposed subsection 903(f)(4), described later, limits these distributions only to States that have qualified for the ABP distribution as described in proposed subsection 903(f)(1)(C)(i).

take effect within 12 months after the date of their certification would be considered to be in effect for the purposes of certification.

Proposed subsection 903(f)(4)(C) would require that:

- 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];
- States may not be considered in compliance with paragraph 903(f)(3) without first satisfying the conditions of paragraph 903(f)(2); that is, no State may receive the 2/3 share without also having a certified alternative base period; and,
- 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.

Proposed subsection 903(f)(5) would require States to use the incentive payments only for the payment of UC benefits and dependents' allowances. An exception is made for those funds subject to conditions set forth in subsection (c)(2) [of section 903 of the Social Security Act], excluding the conditions in subparagraph (B) of section 903 [of the Social Security Act]. That is, the States would have to appropriate the funds for administrative expenses. Funds that satisfy this exception may be used for the administration of UC law and for public employment offices.

Proposed subsection 903(f)(6) would require the Secretary of the Treasury to reserve $7 billion for incentive payments in the Unemployment Account (FUA) of the UTF. These reserved funds should not be taken into account for purposes of any determination under sections 902, 910, or 1203 [of the Social Security Act] of the amount in the FUA as of any given time. 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.

Proposed subsection 903(f)(7) would define "benefit year," "base period," and "week" to be the same meanings as found in section 205 of the Federal-State Extended Unemployment Compensation Act of 1970 (26 U.S.C. 3304, note).

Proposed subsection 903(g)(1) of the Social Security Act would transfer a total of $500 million from the Federal employment security administration account (ESAA) to the State's accounts in the UTF within 30 days of enactment.

Proposed subsection 903(g)(2) of the Social Security Act would distribute the $500 million to the State accounts in the UTF based upon ratios calculated by methods detailed in section 903(a)(2) [of the Social Security Act]. That is, funds would be 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. Any advances made to the State account would first be credited against, and operate to reduce, any additional amount transferred to the State account as part of the transfer. These distributions would be made regardless of whether the State qualified for any incentive payments in proposed subsection 903(f).

Proposed subsection 903(g)(3) would require that any amount transferred to a State account as a result of this $500 million transfer would be used by the State agency of such State only in (i) the payment of expenses incurred through carrying out of the purposes in State law required to receive the incentive payments, (ii) improved outreach to individuals who might be eligible for regular UC by virtue of the changes in State law, (iii) the improvement of unemployment benefit and unemployment tax operations, and (iv) staff-assisted reemployment services for UC claimants.

Section 2003(b) of the proposal would allow the Labor Secretary to prescribe any regulations, operating instructions, or other guidance necessary to carry out the amendments made in section 2(a) of the proposal.

REASON FOR CHANGES

The Committee believes that the Unemployment Insurance (UI) system provides critical support that helps unemployed workers and their families avoid dire economic circumstances. The decrease in the share of unemployed workers receiving UI benefits, from 50 percent in the 1950s to approximately 40 percent today has weakened both its ability to smooth income and consumption for unemployed workers and its ability to act as an effective macroeconomic stabilizer during weaker economic conditions.

The Government Accountability Office (GAO) has found that low-wage workers (those earning roughly less than $9 an hour) were only about one-third as likely to receive unemployment benefits compared to higher wage workers even though they were much more likely to be unemployed. The GAO found this inequity was at least partly due to Unemployment Insurance (UI) eligibility rules, "particularly rules in many States that do not count workers' most recent earnings toward their minimum earnings required for eligibility."

Additionally, the GAO found low levels of UI receipt among part-time workers, despite the fact that UI taxes are paid on their behalf. Again, the GAO pointed to UI eligibility rules in certain States as limiting access to benefits. Finally, GAO reviewed changes in the labor market since the unemployment insurance program was established over 70 years ago, most notably the significant increase in the number of women in the workforce.

In response to these findings, as well as to the recommendations made in the mid-1990s by the bipartisan Advisory Council on Unemployment Compensation, the bill would reward and encourage States for implementing specific policies designed to remove barriers to jobless workers accessing needed benefits. There are no new Federal mandates on States contained in the legislation; only financial incentives. All of the reforms proposed by the bill have already been successfully implemented in at least a few and in some cases many States.

The Committee notes that many of the reforms supported by the new incentive payments would particularly help women, who are more likely to be employed in part-time and/or low-wage jobs, as well as more likely to need to leave work for compelling family reasons, such as domestic violence, taking care of a sick or disabled child, and following a spouse whose job has moved. Increasing the share of the unemployed receiving UI would simultaneously in-

crease UI's effectiveness in helping workers and families involuntarily and temporarily unemployed and enhance UI's macroeconomic counter cyclical stabilizing role.

Finally, the Committee believes that increased UI administrative funding for States will help more dislocated workers efficiently access benefits and prevent staffing cutbacks at State UI offices. Funds for administering unemployment insurance at the State and Federal level are not mandatory and they no longer account adequately for the cost of program operations, including collecting taxes, paying benefits, and adjudicating claims. Former Secretary of Labor Elaine Chao has noted that "the States have a strong case that administrative funding has been inadequate". Additional money to all States for maintenance and investment in their administrative system for delivering unemployment benefits will help States make program improvements and cover the rising administrative costs associated with serving a growing number of unemployed. With the four-week average of continued claims for unemployment benefits at a 26-year high at the beginning of December 2008, improvements in the delivery system will ensure that more unemployed workers are quickly provided relief—expediting the stimulative impact of UI benefits.

EFFECTIVE DATE

The provision is effective upon enactment.

SUBTITLE B—ASSISTANCE FOR VULNERABLE INDIVIDUALS

A. EMERGENCY FUND FOR THE TANF PROGRAM (SEC. 2101 OF THE BILL)

PRESENT LAW

TANF recession-related funds

The 1996 welfare reform law established a contingency fund under the Temporary Assistance for Needy Families (TANF) block grant. It appropriated $2 billion to the fund for capped matching grants. (As of the beginning of FY2009, about $1.3 billion remained in the fund.) The maximum contingency fund grant a State could receive in a fiscal year equals 20 percent of its basic 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 Fiscal Year 1994 spending and meet a test of economic need. Economic need is established by either: (1) increased participation in the Supplemental Nutrition Assistance Program (SNAP, formerly known as food stamps) for the most recent three months for which data are available of at least 10 percent compared with the corresponding three-month period in either Fiscal Year 1994 or Fiscal Year 1995; or (2) a three-month average unemployment rate of at least 6.5 percent and at least 110 percent of the unemployment rate in the corresponding three month period in either the previous two years. Eligible expenditures above the pre-TANF level are matched—at the Medicaid (Federal Medical Assistance Percentage or FMAP) rate.

Contingency fund grants are available to the 50 States and the District of Columbia. Neither the Commonwealth of Puerto Rico,

the territories of Guam and the Virgin Islands, nor tribes that run their own TANF programs are 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 percent and the two-parent standard of 90 percent. 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 Fiscal Year 2005 to the preceding fiscal year. Under current law, the caseload reduction credit for Fiscal Year 2010 is based on caseload change from Fiscal Year 2005 to Fiscal Year 2009; the caseload reduction credit for Fiscal Year 2011 will be based on caseload change from Fiscal Year 2005 to Fiscal Year 2010.

EXPLANATION OF PROVISION

TANF emergency fund

The proposal retains the current TANF contingency fund and creates a new, temporary emergency contingency fund for Fiscal Years 2009 and 2010. 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 percent 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, from each quarter in Fiscal Year 2009 and Fiscal year 2010 to the corresponding quarter in the base years of Fiscal Year 2007 and Fiscal Year 2008. 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 (basic assistance, short-term non-recurrent benefit, and subsidized employment).

The proposal appropriates such sums as needed for emergency fund grants, but caps individual State grants. Total State grants from both the current law contingency fund and the proposed emergency contingency fund are limited to 25 percent of a State's basic block grant. Emergency contingency fund grants are available to the 50 States, the District of Columbia, the Commonwealth of Puerto Rico and the territories of Guam and the Virgin Islands.

Temporary modification of the caseload reduction credit

The proposal gives States an optional measuring period for the caseload reduction credit that would apply to Fiscal Year 2009 and Fiscal Year 2010. States would have the option to measure caseload reduction from Fiscal Year 2005 to either Fiscal Year 2007 or

Fiscal Year 2008 when determining the caseload reduction credit toward the TANF work participation standards for those two years.

REASON FOR CHANGES

The TANF program includes a limited contingency fund that can be used by States during recessionary periods if certain conditions are met. However, some States face difficulty in accessing the current contingency fund because of high State spending requirements, the current balance of the fund, and because the fund is not targeted to States with caseload increases.

The economic downturn has increased the need for TANF assistance. The recession is now in its 13th month and unemployment has risen from 4.9 percent to 72 percent and 2.6 million jobs have disappeared over the past year. This severe slump in the economy will increase hardship and ultimately the need for assistance from the TANF program. States already confronted with TANF caseload increases compared to recent years would receive immediate help from this new emergency contingency fund. Many other States could be eligible for assistance as caseloads begin to rise there as well.

In addition to providing emergency contingency funds, the Committee also believes that it is important to provide a hold-harmless for a State's caseload reduction credit under the TANF program in order to prevent work requirements from rising because States are providing assistance to more families during a recession.

EFFECTIVE DATE

The provisions shall take effect on the date of the enactment of this legislation.

B. One-Time Emergency Payment to SSI Recipients (Sec. 2102 of the Bill)

PRESENT LAW

Under Title XVI of the Social Security Act a person who meets the Social Security definition of disability or blindness, or who is aged 65 or older, may qualify for the Supplemental Security Income (SSI) program if he or she has limited income and resources. The amount of a person's monthly SSI payment is based on a Federal payment standard set by law, and is reduced by any countable earned or unearned income received in a given month. Most States add a supplement to the monthly SSI payment for recipients who meet certain conditions. For 2009, the SSI Federal payment standards are $674 per month for an eligible individual and $1,011 per month for an eligible married couple. In November 2008, the average Federal SSI payment was $446.50. Generally, an SSI recipient is also eligible for his or her State's Medicaid program.

EXPLANATION OF PROVISION

Emergency payment to SSI recipients

The proposal authorizes a one-time emergency payment to SSI recipients and appropriates such money as may be necessary to provide such a payment. This payment will be made by the Social Security Administration (SSA) at the "earliest practical date" in

2009, but not more than 120 days after enactment of the legislation.

Eligibility for one-time emergency payment

In order to be eligible for the proposed emergency SSI payment, a person must fall into one of the following two categories:

The person must be entitled to a cash benefit, other than a personal needs allowance, under the SSI program for at least one day during the month in which the emergency payment is made; or

The person must have been entitled to a cash benefit, other than a personal needs allowance, under the SSI program for at least one day in the two-month period prior to the month in which the emergency payment is made; and the person's eligibility for SSI must have ended during that two-month period solely because he or she exceeded the SSI income limits.

The proposal limits the eligibility of SSI recipients who are awarded benefits after the date of the emergency payment but who are eligible for benefits retroactive to the month of the 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 SSI payment, even if he is or she is awarded benefits retroactive to a date. before the date of the emergency payment.

Amount of one-time emergency payment

For an individual eligible for SSI benefits, the amount of the one-time emergency payment will be equal to the average amount of Federal SSI benefits paid in the aggregate to individuals in the most recent month in which data are available.

For an individual eligible for SSI benefits who has an eligible spouse, the amount of the one-time emergency payment will be equal to the average amount of Federal SSI benefits paid in the aggregate to individuals with eligible spouses in the most recent month in which data are available.

Withholding of overpayments

The Commissioner of Social Security may withhold some or all of the one-time emergency payment to recover any SSI overpayment.

Payment disregarded for underpayments

The one-time emergency payment will be disregarded for the purposes of determining if a person has received an underpayment of SSI benefits.

Non-assignment for one-time emergency payment to SSI recipients

The non-assignment clause of the Social Security Act will apply to emergency SSI payments.

Treatment of one-time emergency payments to SSI recipients

The amount of the one-time emergency payment to SSI recipients may not be treated as income, or for the month of receipt and the

following six months as a resource, for the purposes of determining an individual's eligibility for or the amount of benefits or assistance from any Federal program or any State or local government program funded entirely or in part with Federal funds.

REASON FOR CHANGES

SSI recipients are generally considered the poorest of the poor and their age and disabilities serve as barriers to their full participation in the workforce. Federal statute requires that prospective SSI recipients apply for all other Federal benefits for which they may be eligible. As a result, it is considered "the program of last resort."

Since 1989, SSI eligibility has been restricted to qualified persons who have resources of not more than $2,000, or $3,000 in the case of a couple. This effectively requires a recipient to have extremely limited assets and a very low-income to be eligible for the program. As a result, these recipients have higher rates of poverty compared to other elderly and disabled populations, such as those receiving retirement and disability benefits under the Social Security program. Over one-half of all SSI recipients have no other income outside of their SSI benefits. SSI benefits alone only get a recipient to 76 percent of the Federal poverty level. Recipients who have other forms of income in addition to their SSI payment have an average income (excluding SSI) of $438 a month or $5,256 a year. On average, these recipients' total income (including SSI) allows them to just meet the Federal poverty level (on average, this total income is 102 percent of the poverty line).

The one-time emergency payments will immediately stimulate the economy and will help SSI recipients make modest improvements to their overall quality of life. These recipients will have little choice but to immediately put these payments back into the economy to purchase food, certain health-related expenses, and transportation.

In addition to stimulating the economy, these payments also will assist those who were left out of the first economic stimulus package. Social Security beneficiaries were made eligible for the tax rebate in 2008, but SSI recipients were excluded.

EFFECTIVE DATE

The provision is effective at the "earliest practical date" in 2009, but not more than 120 days after enactment of the legislation.

C. Temporary Resumption of Prior Child Support Law (Sec. 2103 of the Bill)

PRESENT LAW

The Federal government pays States an incentive payment to encourage them to operate effective Child Support Enforcement (CSE) programs. The incentive payment is based on several factors including the State's performance in five program areas. Federal law capped the amount of incentive payments to the States (in aggregate) at $483 million for Fiscal Year 2008. For Fiscal Years after Fiscal Year 2008, the aggregate incentive payment amount is to be increased to account for inflation. Federal law requires States to reinvest CSE incentive payments back into the CSE program or re-

lated activities. The Deficit Reduction Act of 2005 (P.L. 109–171) prohibits Federal matching/reimbursement of CSE incentive payments that are reinvested in the CSE program.

EXPLANATION OF PROVISION

The proposal requires the Department of Health and Human Services (HHS) to temporarily provide Federal matching funds on CSE incentive payments that States reinvest back into the CSE program. Thus, CSE incentive payments that were received by States and reinvested in their CSE program can be used to draw down Federal funds for Fiscal Years 2009 and 2010 (i.e., the period October 1, 2008 through September 30, 2010).

REASON FOR CHANGES

The Committee believes that restoring full Federal funding for child support enforcement activities will provide a critical source of income to children and families during the economic downturn. Child support disproportionately reaches lower-income families with children who are more likely to put the money back into the economy as they make purchases to meet their basic needs. Moreover, families who receive child support income spend it quickly. According to data collected by States and banking institutions, 97 percent of child support funds that are dispensed to family debit cards are spent by the end of the month.

Child support is 30 percent of family income for poor families that receive it. The average child support payment received by low-wage families is nearly $4,000 per year. When families do not receive this money, they are more likely to need public assistance. Twenty-four Governors sent a letter to Congress last summer asking that the child support cut be repealed and warned that the financial loss of Federal funding to the child support enforcement program could result in greater financial pressure on other social assistance programs including the Temporary Assistance for Needy Families (TANF), Medicaid, and Food Stamps.

The proposal would suspend the Federal funding cuts in the child support enforcement program in fiscal years 2009 and 2010, thereby restoring full Federal funding for collecting support owed to families for two years.

EFFECTIVE DATE

The provisions shall take effect on the date of the enactment of this legislation.

TITLE III—HEALTH INSURANCE ASSISTANCE FOR THE UNEMPLOYED

A. Premium Assistance for COBRA Continuation Coverage (Sec. 3002(s) of the Bill and Sec. 4980B and New Secs. 139C, 6431, 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 oppor-

tunity 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").[138] 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.[139]

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");[140] and (3) a plan maintained by an employer that normally employed fewer than 20 employees on a typical business

[138] Sec. 4980B.

[139] 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.

[140] A governmental plan also includes certain plans established by an Indian tribal government.

day during the preceding calendar year[141] (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

[141] 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.

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[142] 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 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

[142] 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.

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 [143] 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. [144] 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).[145] 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 bene-

[143] 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.

[144] While some data has been cited to the effect that COBRA premiums cost employers more than 102% of the premiums of similarly situated active employees, GAO has reported on the lack of quantitative data to support such claims. U.S. General Accounting Office, Private Health Insurance: Declining Employer Coverage May Affect Access for 55- to 64-Year-Olds, Pub. No. GAO/HEHS–98–133, Washington: GAO, 1998.

[145] Secs. 601 to 608 of ERISA.

ficiary 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 continuation coverage requirements with respect to plans maintained by such governmental employers.[146] 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.

REASONS FOR CHANGE

The Committee is aware that the majority of Americans with health insurance coverage obtain such coverage heavily subsidized through their employers. As a result of the current economic crisis, a significant number of Americans have been, and are expected to be, involuntarily terminated from their employment and thus will lose their income and their subsidy toward health insurance coverage. While present law permits a terminated employee to continue to participate in his or her former employer's group health coverage at a rate of 102% of the premium for current employees, the Committee is concerned that such coverage is particularly unaffordable in the case of an individual who has been involuntarily terminated from employment. The Committee believes that a temporary subsidy should be made available to make COBRA continuation coverage more affordable for employees who involuntarily lose their jobs on account of the current economic crisis. The subsidy provided under the Committee's provision is estimated to benefit approximately 7 million people for some portion of 2009.[147]

EXPLANATION OF PROVISION

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.[148] 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

[146] 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–l.

[147] Joint Committee on Taxation, "Estimated Budget Effects of the Revenue Provisions contained in Title I and Title III of H.R. 598, the "American Recovery and Reinvestment Tax Act of 2009," scheduled for markup by the Committee on Ways and Means on January 22, 2009," JCX–7–09 (January 21, 2009), footnote 9.

[148] 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).

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, 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.[149]

Reimbursement of group health plans

The provision provides that the entity to which premiums are payable (determined under the applicable COBRA continuation coverage requirement)[150] shall be reimbursed by the amount of the premium for COBRA continuation coverage that is not paid by an assistance eligible individual on account of the premium reduction.

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[149] 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.

[150] 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.

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[151] or FICA taxes[152] 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.[153] 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 re-

[151] Sec. 3401.

[152] Sec. 3102 (relating to FICA taxes applicable to employees) and sec. 3111 (relating to FICA taxes applicable to employers).

[153] 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.

quirements 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 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.

B. Extension of Minimum COBRA Continuation Coverage (Sec. 3002(b) of the Bill and Sec. 4980B of the Code)

PRESENT LAW

In general

A covered employee's termination of employment (other than for gross misconduct), whether voluntary or involuntary, is a COBRA qualifying event.[154] A covered employee's reduction in hours of employment, whether voluntary or involuntary, is also a COBRA

[154] Sec. 4980B(f)(3)(B); Treas. Reg. 54.4980B–4.

qualifying event if the reduction results in a loss of employer sponsored group health plan coverage.[155]

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.[156] 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.

REASONS FOR CHANGE

The Committee is aware that the majority of Americans with health insurance coverage obtain such coverage through their employers. Current law permits terminated employees (and employees who lose coverage on account of a reduction in their hours) to continue to participate in their former employers' group health plan for a limited period of time, generally not to exceed 18 months in duration. The Committee is concerned that due to the current economic crisis many Americans will be terminated from their employment (or lose coverage on account of a reduction in hours) and thus lose their employer-provided health coverage. The Committee is concerned that the cost of premiums in the individual insurance market will effectively deny many of these individuals health insurance coverage, particularly in the case of older workers. The Committee is also concerned about the ability of longer-service employees to readily find reemployment and thus have access to employer-provided coverage in the event of a job loss or reduction in hours. Thus, the Committee believes that it is appropriate to expand the maximum required coverage for present law continuation coverage rules for terminated employees who are age 55 or older or have 10 or more years of service with their former employer, until such individuals' enrollment in Medicare.

[155] Sec. 4980(f)(3)(B).

[156] 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.

EXPLANATION OF PROVISION

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 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.

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.

TITLE IV—HEALTH INFORMATION TECHNOLOGY

PART II—MEDICARE PROGRAM

SEC. 4311. INCENTIVES FOR ELIGIBLE PROFESSIONALS.

CURRENT LAW

There are several current legislative and administrative initiatives to promote HIT and EHR 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 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; payments would be reduced for those who fail to e-prescribe after 2012.

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 Medi-

care 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 SCRIP 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 percent 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.

EXPLANATION OF PROVISIONS

The provision would add an incentive payment to certain doctors for the adoption and "meaningful use," defined below, of a certified electronic health record (EHR) system. Doctors eligible for the incentive payments are those who participate in Medicare and who are defined under 1861(r).

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, despite that it is the first year. 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 section 4312.

The payment(s) 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 (as specified by the Secretary). 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 for the period, in a form and manner specified by the Secretary, on clinical quality measures and other measures as selected by the Secretary.

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 over time by requiring more stringent measures of meaningful use within the categories specified in this paragraph.

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 section 1890(a) of the Social Security Act; (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; and (3) the Secretary would, to the extent practicable, select the same measures for purposes of the EHR incentive payment as are selected for quality purposes under the Medicaid program. The Secretary could not require the electronic reporting of information on clinical quality measures unless the Secretary has the capacity to accept the in-

formation 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.

Miscellaneous. There would be no administrative or judicial review of any EHR incentive payment and the payment, including the determination of a meaningful EHR user or the cap on EHR incentive payments as described above. The Secretary would post a list of the names, business addresses, and business phone numbers of the eligible professionals who are meaningful EHR users and, as determined appropriate by the Secretary, of group practices receiving incentive payments in an easily understandable format on the Internet website of the Centers for Medicare & Medicaid Services.

Definitions. For purposes of the EHR incentive payment, the following definitions would apply. The term 'certified EHR technology' would mean health information technology (as defined in section 3000(13) of the Public Health Service Act as amended by this legislation) that is certified pursuant to 3001(c)(5) of such Act as meeting standards adopted under section 3004 of such Act that are applicable to the type of record involved (such as an ambulatory electronic health record for office-based physicians or an inpatient hospital electronic health record for hospitals). Incentive payments will not be made for EHR technology that is not certified as meeting standards adopted by HHS to ensure systems are interoperable, secure and clinically useful. The term 'covered professional services' would have the meaning given such term under current law. The term 'eligible professional' would mean a physician, also as defined under current law. The term 'reporting period' would mean any period (or periods), with respect to a payment year, as specified by the Secretary.

Penalties. The EHR incentive payment would be adjusted under certain conditions as follows. For covered professional services furnished by an eligible professional during 2016 or any subsequent payment year, if the eligible professional is not a meaningful EHR user during the previous year's reporting period, the fee schedule amount would reduced to 99 percent in 2016, 98 percent in 2017, and 97 percent in 2018 and in each subsequent year.

For 2018 and each subsequent year, if the Secretary finds that the proportion of eligible professionals who are meaningful EHR users is less than 75 percent, the applicable fee schedule amount would be decreased by 1 percentage point from the applicable per-

cent in the preceding year, but in no case would the applicable percent be less than 95 percent.

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 selected HMO—affiliated eligible professionals. In general, with respect to eligible professionals in a qualifying MA organization who the organization attests to the Secretary are meaningful EHR users, the incentive payments and adjustments would apply in a similar manner as they apply to eligible non-MA 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 percent of the entity's patient care services to enrollees of the organization; and furnishes at least 80 percent 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 shall 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), then the payment incentive would be made only under the 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 would be 100 percent of the fee schedule amount minus the product of the physician penalties; the Secretary's estimate of the Medicare FFS physician expenditure as a proportion of total Medicare FFS expenditures for the year; and the proportion of such eligible professionals that are not meaningful EHR users for such year.

REASON FOR CHANGE

Studies indicate that widespread adoption and use of comprehensive health information technology (IT) can markedly improve the quality of health care and help reduce costs at the same time. Health IT has enormous potential to improve disease management and coordination of care among health care providers, reduce both medical errors and redundant services, and enable public health research activities. Studies by the RAND Corporation and the Center for Information Technology Leadership each estimate that widespread meaningful use of health IT could potentially reduce health care costs by about $80 billion annually by enabling the health delivery system to become more efficient. In testifying before the Ways and Means Health Subcommittee in July 2008, then Director of the Congressional Budget Office, Peter Orszag, said that spurring widespread use of health IT was a critical component of efforts to reform the health delivery system in ways that could reduce health care spending by up to $700 billion per year.

Despite its enormous promise, health care providers have been slow to adopt and utilize comprehensive health IT systems. Among physicians the adoption rate is estimated to be as low as five percent, and among hospitals the rate is estimated to be as low as 10 percent. There are many reasons behind these low adoption rates, but perhaps the two most important reasons are the cost of adopting and maintaining such systems and the lack of standards that enable interoperability among different systems.

In a letter sent to the Committee on January 21, 2009, the nonpartisan Congressional Budget Office (CBO) stated that the various financial incentives provided by the legislation, coupled with actions to establish standards for health IT, would increase adoption rates among both physicians and hospitals (Appendix A). Specifically, as a result of this legislation, CBO estimates that ultimately adoption of comprehensive EHR technology among physicians would reach 90 percent and that the hospital adoption rate would reach 70 percent. In addition, CEO estimates that increased adoption of health IT would reduce federal spending on health care programs such as Medicare and Medicaid by about $12 billion over the budget window, and lead to a net reduction of more than $1 billion annually in private health care spending. Furthermore, according to CBO, premiums in the private insurance market will decrease as a result of this legislation. The savings from these provisions arise from systemic improvements, including reduced duplication of services, reduced medical errors, and improved coordination of care. (A copy of the CBO letter is in Appendix A)

Although not technically under the jurisdiction of the Ways and Means Committee, subtitles A and B of this title are integral to understanding the incentive and privacy provisions that are within the Committee's jurisdiction. These subtitles clarify the Federal government's leadership role in promoting the use of health IT and ensure development of a strategic plan and standards to achieve widespread adoption of health IT. Subtitle A codifies the Office of the National Coordinator for Health Information Technology, which was created by an Executive Order in 2004. It establishes two advisory committees to help the National Coordinator develop policy goals and standards for health IT. It requires the Secretary of HHS

to promulgate through regulation the first generation of health IT standards no later than December 31, 2009, and puts in place a process to certify products and technologies as being in compliance with those standards. It directs the Secretary to support the development of and make available to providers a certified EHR system at a nominal cost. This provision is critical to assure the availability of a low-cost certified systems to all interested providers, given limited funds. And it would place the Office of the National Coordinator at the center of efforts to develop a National Health Information Exchange and promote its use by the Federal government, private health care providers, and other stakeholders throughout the health care sector. Subtitle B outlines the role for the National Institute for Standards and Technology.

The Medicare program is in a particularly good position to help catalyze the widespread adoption and use comprehensive health IT. More than 95 percent of practicing physicians in the United States participate in the Medicare program, and many of those physicians receive a substantial portion of their revenue from Medicare. Medicare also has experience with programs aimed at promoting the use of health information technologies. More than two decades ago, Medicare pioneered the use of electronic billing technology and now receives, about 95 percent of claims electronically. More recently, the program started incentivizing the use of electronic-prescribing technology by making bonus payments available to providers who submit prescriptions via such systems.

Using Medicare payments to encourage providers to use comprehensive EHRs will increase adoption rates and substantially increase the speed with which adoption occurs. Incentive payments will only be made available to providers who demonstrate that they are engaging in meaningful use of an EHR system that has been certified as meeting approved standards for interoperability, clinical functionality, and security. The standards for meaningful use involve having providers use their EHR system to report on quality measures, as well as a 'technology neutral' requirement that such systems be able to exchange health information electronically. The meaningful use criteria are designed to provide CMS with flexibility in making the determination about whether a provider has met the requirement, but the Committee expects that the criteria will continue to evolve as technology and quality reporting measures improve over time.

Having both incentive payments phase-out over time and penalties will encourage early adoption of EHR technology. At the same time, the Committee recognizes that some providers may require additional time to implement certified EHR systems. This is why the legislation provides a 'rolling start' that gives providers a three-year window during which they can begin using such systems and still be eligible for the full incentive payments. Medicare reimbursement payments will eventually be reduced for providers who do not demonstrate use of a certified system.

Incentive payments are designed to reach physicians across the spectrum of care. Payments are made available to physicians who bill Medicare directly, as well as for those who bill through a group practice. Staff-model Medicare Advantage plans that use certified EHR technology are also eligible to receive incentive payments for physicians that meet certain criteria.

In order to avoid making' double payments to physicians and hospitals for essentially the same health IT technology, the legislation prevents incentive payments from-going to "hospital based" providers. This provision is based on the knowledge that certain providers will furnish the vast majority of their services within a hospital that is eligible for separate incentive payments under section 4312. Since those providers will presumably be using the hospital's enterprise-wide health IT system, they are ineligible for separate incentive payments under this section. This policy is not intended to prevent incentive payments from going to providers who would otherwise qualify simply because they are employed by a hospital or work in a hospital-owned facility.

SEC. 4312. INCENTIVES FOR HOSPITALS.

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 FY 2007, 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 percent of their Medicare costs. These reimbursements include payments for Medicare's share of CAH expenditures on health IT, plus an additional one percent.

EXPLANATION OF PROVISIONS

The bill would establish incentives, starting in FY 2011, 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 FY 2016, 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 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 percent of the amount in its second payment year; 50 percent of the amount in its third payment year; and finally 25 percent of the amount in its fourth payment year. The first payment year for 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 FY 2013 Would receive incentive payment on the transition schedule as if their first payment year is FY 2013. Hospitals that become meaningful ERR after FY 2015 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 section 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 deter-

mination of a meaningful ERR 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 FY 2016, eligible IPPS hospitals that do not submit the required quality data would be subject to a 25 percent 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 2016, one-quarter of the update will be at risk for quality reporting and one-quarter at risk for meaningful use of ERR. In 2017, 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 2018 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 FY 2016, 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 subject be 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 ERR 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 percent 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 percent 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 percent 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.

REASON FOR CHANGE

As stated previously, studies indicate that widespread adoption and use of comprehensive health IT can markedly improve the quality of health care and help reduce costs. Yet despite the potential benefits, the adoption rate of comprehensive health IT at hospitals is estimated to be as low as 10 percent.

Using Medicare payments to encourage hospitals to use comprehensive EHRs will increase adoption rates and substantially increase the speed with which adoption occurs. Incentive payments will only be made available to hospitals who demonstrate that they are engaging in meaningful use of an EHR system that has been certified as meeting approved standards for interoperability, clinical functionality, and security. The standards for meaningful use involve having hospitals use their EHR system to report on quality measures, as well as a 'technology neutral' requirement that such systems be able to exchange health information electronically. The meaningful use criteria are designed to provide CMS with flexibility in making the determination about whether a hospital has met the requirement, but the Committee expects that the criteria will continue to evolve as technology and quality reporting measures improve over time.

Having both incentive payments phase out over time and penalties will encourage early adoption of EHR technology. At the same time, the Committee recognizes that some hospitals may require additional time to implement certified ERR systems. This is why the legislation provides a 'rolling start' that gives hospitals a three-year window during which they can begin using such systems and still be eligible for the full incentive payments. Medicare reimbursement payments will eventually be reduced for hospitals who do not demonstrate use of a certified system.

Incentive payments are designed to reach acute care hospitals of all sizes, and to reward early and new adopters, while not penalizing those who have paved the way. Medicare incentives to acute care hospitals are not intended to cover the full cost of an EHR system, but rather are set at a level sufficient to encourage hospitals

to affirmatively make the business decision to invest in an EHR system. The payment is structured such that Medicare pays its share of this incentive amount. The Committee believes that Medicare must be a responsible payer, which includes covering the Medicare share of any charity care EHR costs. However, Medicare should not subsidize the portion of EHR costs attributable to other payers. While not within the jurisdiction of the Ways and Means Committee, Section 4321 of H.R. 598 provides for Medicaid reimbursement for Medicaid's share of this incentive level, including reimbursement for Medicaid's share of any charity care EHR costs. This section also provides incentive payments and a penalty formula for hospitals that are under common corporate governance with a Medicare Advantage plan in order to ensure that acute care hospitals receiving minimal or no funding under Part A are encouraged to adopt EHR systems and to enable policymakers to obtain data on care provided at these hospitals.

Critical access hospitals (CAHs) are one of the few categories of hospitals already reimbursed for the EHR costs under Medicare via cost-plus reimbursement. For this reason they are not eligible for the new incentive payments contained in this legislation. Providing incentive payments to CAHs, in addition to their current cost-based payment structure, would result in a double payment to CAHs; once over the initial four-year period when the CAH is eligible for the new incentive payments and again during that period when the CAH seeks its cost-based reimbursement for EHR-related outlays. While CAHs are not eligible for the new incentive payments, the Committee recognizes the merits of including CAHs in the incentives and penalty system so that they face similar incentives to adopt certified EHR systems and use them in a meaningful manner. Doing so will encourage interoperability of EHR systems between CAHs and the tertiary care centers to which they refer patients, and it will enable policymakers to obtain data on care provided at CAHs.

The Committee is interested in pursuing a policy that will allow CAHs to participate in the incentive and penalty system as long as such policy does not allow for a double payment of EHR technology. The Committee also recognizes the concern that cost-based reimbursement is provided after the initial investment, and thus CAHs may face a cash flow situation because they would be required to pay the initial cost up front. The Committee notes that the same scenario holds true for acute care hospitals eligible for the incentive payment system, as the incentives are paid after a hospital purchases a certified EHR system and meets the Secretary's standards for using that system in a meaningful way. The Committee further notes that CAHs are eligible for loans under section 3017 of this legislation, which can assist in covering this upfront investment, and that they would be eligible for Medicaid hospital payments provided at least 10 percent of their patient volume is attributable to Medicaid patients.

SEC. 4313. TREATMENT OF PAYMENTS AND SAVINGS; IMPLEMENTATION FUNDING.

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 percent 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 percent 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, available to the Secretary to make improvements under the original fee-for-service program under parts A and B for Medicare beneficiaries.

For fiscal years 2009 through 2013, 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.

EXPLANATION OF PROVISIONS

The legislation exempts 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 provision authorizes 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 provision modifies 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 fiscal year 2014, after taking into account the transfer directed by this section, is modified to be $22.29 billion. For fiscal year 2020 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 health IT in a meaningful fashion.

To implement the provisions in and amendments made by this section, $60 million for each of FY 2009 through FY 2015 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.

REASON FOR CHANGE

The adoption and use of health IT will help improve care for Medicare beneficiaries and result in overall savings for Medicare and the entire health care system, but incentive payments are not directly related to items and services furnished to them. Therefore, the effects on Part B spending are excluded from beneficiary premiums.

In addition, the legislation makes a technical adjustment to the timing of payments required from the Medicare Improvement Fund and provides CMS with the funds necessary to administer the Medicare health a incentive program.

SEC. 4314. STUDY ON APPLICATION OF HIT PAYMENT INCENTIVES FOR PROVIDERS NOT RECEIVING OTHER INCENTIVE PAYMENTS.

CURRENT LAW

No current law.

EXPLANATION OF PROVISIONS

This provision would require the Secretary of Health and Human Services to conduct a study to determine whether payment incentives to implement and use qualified health information technology 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: (A) the adoption rates of qualified health information technology by such health care providers; (B) the clinical utility of HIT by such health care providers; (C) whether the services furnished by such health care providers are appropriate for or would benefit from the use of such technology; (D) 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; (E) the potential costs and the potential benefits of making payment incentives and other funding available to such health care providers; and (F) any other issues the Secretary deems to be appropriate. The Secretary would submit a report to Congress on the findings and conclusions of the study by June 30, 2010.

REASON FOR CHANGE

In order to realize the full benefits of health IT, adoption and use of the technology must be as widespread as possible throughout the health care sector. Making Medicare incentive payments available to hospitals and physicians is the first step in that process. This study will provide policymakers with guidance when designing future initiatives to promote the use of the health IT among a broader group of providers.

SEC. 4400. DEFINITIONS.

CURRENT LAW

Under the Administrative Simplification provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA; P.L. 104–191), Congress set itself a three-year deadline to enact health information privacy legislation. If, as turned out to be the case, lawmakers were unable to pass such legislation before the deadline, the HHS Secretary was instructed to promulgate regulations containing standards to protect the privacy of individually identifiable health information. The HIPAA privacy rule (45 CFR Parts 160, 164) established a set of patient rights, including the right of access to one's medical information, and placed certain limitations on when and how health plans, health care providers and health care clearinghouses may use and disclose such protected health information (PHI). Generally, plans and providers may use and disclose health information for the purpose of treatment, payment, and other health care operations without the individual's authorization and with few restrictions. In certain other circumstances (e.g., disclosures to family members and friends), the rule requires plans and providers to give the individual the opportunity to object to the disclosure. The rule also permits the use and disclosure of health information without the individual's permission for various specified activities (e.g., public health oversight, law enforcement) that are not directly connected to the treatment of the individual. For all uses and disclosures of health information that are not otherwise required or permitted by the rule, plans and providers must obtain a patient's written authorization.

The HIPAA privacy rule also permits health plans, health care providers and health care clearinghouses—referred to as HIPAA "covered entities"—to share health information with their "business associates" who may provide a wide variety of functions for them, including legal, actuarial, accounting, data aggregation, management, administrative, accreditation, and financial services. A covered entity is permitted to disclose health information to a business associate or to allow a business associate to create or receive protected health information on its behalf, provided the covered entity receives satisfactory assurance in the form of a written contract that the business associate will appropriately safeguard the information.

In addition to health information privacy standards, HIPAA's Administrative Simplification provisions instructed the Secretary to issue security standards to safeguard PHI in electronic form against unauthorized access, use, and disclosure. The security rule (45 CFR Parts 160, 164) specifies a series of administrative, technical, and physical security procedures for providers and plans to use to ensure the confidentiality of electronic health information.

EXPLANATION OF PROVISIONS

The bill defines the following key privacy and security terms, in most cases by reference to definitions in the HIPAA Administrative Simplification standards: breach, business associate, covered entity, disclose, electronic health record, electronic medical record, health care operations, health care provider, health plan, National Coordinator, payment, personal health record, protected health informa-

tion, Secretary, security, state, treatment, use, and vendor of personal health records.

REASON FOR CHANGE

To ensure a common understanding of the terms used in the law.

PART I—IMPROVED PRIVACY PROVISIONS AND SECURITY PROVISIONS

SEC. 4401. APPLICATION OF SECURITY PROVISIONS AND PENALTIES TO BUSINESS ASSOCIATES OF COVERED ENTITIES; ANNUAL GUIDANCE ON SECURITY PROVISIONS.

CURRENT LAW

As under the privacy rule, the security rule permits business associates to create, receive, maintain or transmit electronic health information on behalf of a covered entity, provided the covered entity receives satisfactory assurance in the form of a written contract that the business associate will implement administrative, technical, and physical safeguards that reasonably and appropriately protect the information. Covered entities are not liable for, or required to monitor, the actions of their business associates. If a covered entity finds out about a material breach or violation of the contract by a business associate, it must take reasonable steps to remedy the situation, and, if unsuccessful, terminate the contract. If termination is not feasible, the covered entity must notify HRS.

HIPAA authorized the Secretary to impose civil monetary penalties on any *person* failing to comply with the privacy and security standards. The maximum civil penalty is $100 per violation and up to $25,000 for all violations of an identical requirement or prohibition during a calendar year. The HHS Office of Civil Rights (OCR) is responsible for enforcing the privacy rule. For certain wrongful disclosures of PHI, OCR may refer the case to the Department of Justice for criminal prosecution. HIPAA's criminal penalties include fines of up to $250,000 and up to 10 years in prison for disclosing or obtaining health information with the intent to sell, transfer or use it for commercial advantage, personal gain, or malicious harm. In July 2005, the Justice Department's Office of Legal Counsel (OLC) addressed which *persons* may be prosecuted under HIPAA and concluded that only a *covered entity* could be criminally liable.

EXPLANATION OF PROVISIONS

The bill would apply the HIPAA security standards and the civil and criminal penalties for violating those standards to business associates in the same manner as they apply to covered entities. It also would require the Secretary, in consultation with industry stakeholders, to issue annual guidance on the most effective and appropriate technical safeguards for protecting electronic health information.

REASON FOR CHANGE

The failure to apply the HIPAA security rule directly to business associates is a major gap in the current HIPAA structure. Holding business associates and covered entities to the same standards will

help to close that gap and promote the secure and seamless handling of protected health information.

SEC. 4402. NOTIFICATION IN THE CASE OF BREACH.

CURRENT LAW

The HIPAA privacy and security rules do not require covered entities to notify HHS or others of a breach of the privacy, security, or integrity of PHI. However, business associate contracts must include a provision requiring business associates to report to covered entities if they become aware of any security incident or any use or disclosure of PHI that is not provided for by the contract.

The security standards include three sets of safeguards: administrative, physical, and technical. Administrative safeguards include such functions as assigning or delegating security responsibilities to employees, as well as security training requirements. Physical safeguards are intended to protect electronic systems and data from threats, environmental hazards, and unauthorized access. They include restricting access to computers and off-site backups. Technical safeguards are primarily IT functions used to protect and control access to data. They include using authentication and password controls, and encrypting data for storage and transmission.

The security standards are flexible and scalable, allowing covered entities to take into account their size, capabilities, and the costs of specific security measures. The standards are also technology neutral. They do not prescribe the use of specific technologies, so that covered entities will not be bound by particular systems and/or software.

EXPLANATION OF PROVISIONS

In the event of a breach of unsecured PHI that is discovered by a covered entity, the bill would require the covered entity to notify each individual whose information has been, or is reasonably believed to have been, accessed, acquired, or disclosed as a result of such breach. For a breach of unsecured PHI under the control of a business associate, the business associate upon discovery of the breach would be required to notify the covered entity. All breach notifications would have to be made without unreasonable delay and no later than 60 days after their discovery. Notification could be delayed, in the same manner as provided in Section 164.528(a)(2) of the HIPAA privacy rule, if it would impede criminal investigation or damage national security. The provision specifies the methods by which individuals would be notified and the contents of the notification. Notice of the breach would have to be provided to prominent media outlets serving a particular area if more than 500 individuals in that area were impacted. Covered entities also would have to immediately notify the Secretary of breaches of unsecured PHI involving 500 or more individuals. If the breach impacted fewer than 500 individuals, the covered entity involved would have to maintain a log of such breaches and annually submit it to the Secretary. The Secretary would be required to list on the HHS website each covered entity involved in a breach that impacted more than 500 individuals.

The bill would define unsecured PHI as information that is not secured through the use of a technology or methodology identified

by the Secretary as rendering the information unusable, unreadable, and undecipherable to unauthorized individuals. Within 60 days, and annually thereafter, the Secretary would be required to issue guidelines specifying such technologies and methodologies. If the Secretary failed to meet those deadlines, PHI would be considered unsecure if not secured by a technology standard rendering it unusable, unreadable, or indecipherable to unauthorized individuals that was developed or endorsed by a standards development organization accredited by the American National Standards Institute (ANSI).

The bill would require the Secretary to report annually to the Committees on Ways and Means and Energy and Commerce in the House and to the Committees on Finance and HELP in the Senate on the number and type of breaches, actions taken in response, and recommendations made by the National Coordinator on how to reduce the number of breaches. Within 180 days of enactment, the Secretary would be required to issue interim final regulations to implement this section. The provisions in the section would apply to breaches discovered at least 30 days after the regulations were published.

REASON FOR CHANGE

The unauthorized release of unsecured personal health information by a covered entity or business associate can put patients at risk financially, as well as in ways that are not immediately tangible, detectable or easily quantifiable. As such, patients should be promptly notified if their health information has been accessed or released to an unauthorized party. It is the Committee's intent that in providing guidance on securing personal health information, efforts should be made to ensure that such guidance is achieves the goal of ensuring compliance and accountability, but is not overly onerous and takes into consideration the variation in size and technological capabilities of covered entities and business associates. The Committee hopes that public disclosure of major breaches will increase accountability and incentives to maintain security measures and protect patient privacy.

SEC. 4403. EDUCATION ON HEALTH INFORMATION PRIVACY.

CURRENT LAW

The HIPAA privacy rule requires each covered entity to designate a privacy official for the development and implementation of its policies and procedures.

EXPLANATION OF PROVISIONS

Within six months of enactment, the bill would require the Secretary to designate a privacy advisor in each HIS regional office to offer education and guidance to covered entities, business associates and individuals on their federal health information privacy and security rights and responsibilities. Within 12 months of enactment, OCR would be required to develop and maintain a national education program to educate the public about their privacy rights and the potential uses of their PHI.

REASON FOR CHANGE

The HIPAA rules are complex and some covered entities and business associates may experience difficulty in correctly interpreting the rules. Having OCR take a proactive role in assisting covered entities and business associates understand the rules will help to promote proper compliance and avoid violations. In addition, public outreach will help individuals understand their rights and responsibilities.

SEC. 4404. APPLICATION OF PRIVACY PROVISIONS AND PENALTIES TO BUSINESS ASSOCIATES OF COVERED ENTITIES.

CURRENT LAW

Under the privacy rule, a covered entity is permitted to disclose health information to a business associate or to allow a business associate to create or receive health information on its behalf, provided the covered entity receives satisfactory assurance in the form of a written contract that the business associate will appropriately safeguard the information. Covered entities are not liable for, or required to monitor, the actions of their business associates. If a covered entity finds out about a material breach or violations of the contract by a business associate, it must take reasonable steps to remedy the situation, and, if unsuccessful, terminate the contract. If termination is not feasible, the covered entity must notify HHS.

EXPLANATION OF PROVISIONS

Business associates would only be permitted to use or disclose PHI if such action was in compliance with the contract. The current provisions regarding a covered entity acting on its knowledge of a. material breach or violation by a business associate would apply equally to a business associate gaining such knowledge. In the case of a business associate violating the privacy contract requirements in this section, the bill would apply the civil and criminal penalties to that business associate in the same manner as they apply to covered entities. Any additional privacy requirements under this subtitle that were made applicable to covered entities also would apply to business associates and would have to be incorporated into the contract.

REASON FOR CHANGE

As with the security rule, the failure to extend many of the privacy requirements that apply to covered entities to business associates is a major gap in the current HIPAA law. Holding business associates and covered entities to the same standards will help to close that gap and promote patient privacy.

SEC. 4405. RESTRICTIONS ON CERTAIN DISCLOSURES AND SALES OF HEALTH INFORMATION; ACCOUNTING OF CERTAIN PROTECTED HEALTH INFORMATION DISCLOSURES; ACCESS TO CERTAIN INFORMATION IN ELECTRONIC FORMAT.

CURRENT LAW

The privacy rule established several individual privacy rights. First, it established a new federal legal right for individuals to see and obtain a copy of their own PHI in the form or format requested by the individual, if it is readily producible in such form or format.

If not, then the information must, be provided in hard copy or such form or format as agreed to by the covered entity and the individual. The covered entity can impose reasonable, cost based fees for providing the information. Second, the rule gives individuals the right to amend or supplement their own PHI. The covered entity must act on an individual's request for amendment within 60 days of receiving the request. That deadline may be extended up to 30 days. Third, individuals have the right to request that a covered entity restrict the use and disclosure of their PHI for the purposes of treatment, payment, or health care operations. However, the covered entity is not required to agree to such a restriction unless it has entered into an agreement to restrict, in which case it must abide by the agreement. Finally, individuals have the right to an accounting of disclosures of their PHI by a covered entity during the previous six years, with certain exceptions. For example, a covered entity is not required to provide an accounting of disclosures that have been made to carry out treatment, payment, and health care operations.

The privacy rule incorporates a "minimum necessary" standard, which is not clearly defined. Whenever a covered entity uses or discloses PHI or requests such information from another covered entity, it must make reasonable efforts to limit the information to the minimum necessary to accomplish the intended purpose of the use or disclosure. There are a number of circumstances in which the minimum necessary standard does not apply; for example, disclosures to or requests by a health care provider for treatment purposes. The rule also permits the requestor of the information to determine what is the minimum information necessary to accomplish the task. And the rule permits the disclosure of a "limited data set" for certain specified purposes (e.g., research), pursuant to a data use agreement with the recipient. A limited data set, while not meeting the rule's definition of de-identified information (see below), has most direct identifiers removed and is considered by HHS to pose a low privacy risk.

EXPLANATION OF PROVISIONS

The bill would give individuals the right to receive an electronic copy of their PHI, if it is maintained in an electronic health record. Any associated fee charged by the covered entity could only cover its labor costs for providing the electronic copy. The bill would require a health care provider to honor a patient's request that the PHI regarding a specific health care item or service not be disclosed to a health plan for purposes of payment or health care operations, if the patient paid out-of-pocket in full for that item or service. The bill also would give an individual the right to receive an accounting of PHI disclosures made by covered entities or their business associates for treatment, payment, and health care operations during the previous three years, if the disclosures were through an electronic health record. Within 18 months of adopting standards on accounting of disclosures (as required under PHSA Section 3002, as added by Section 4101 of this Act), the Secretary would be required to issue regulations on what information shall be collected about each disclosure. For current users of electronic health records, the accounting requirements would apply to disclosures made on or after January 1, 2014. For covered entities yet

to acquire electronic health records, the accounting requirements would apply to disclosures on or after January 1, 2011, or the date of electronic health record acquisition, whichever is later.

The bill would require covered entities to limit the use, disclosure, or request of PHI, to the extent practicable, to a limited data set or, if needed, to the minimum necessary to accomplish the intended purpose of such use, disclosure, or request. This requirement would hold until such time as the Secretary issued guidance on what constitutes minimum necessary. The Secretary would have 18 months to issue such guidance. In addition, the bill would clarify that the entity disclosing the PHI, and not the requestor, makes the minimum necessary determination. The HIPAA privacy rule's exceptions to the minimum necessary standard would continue to apply.

Within 18 months of enactment, the Secretary would be required to issue regulations to eliminate from the definition of health care operations those activities that can reasonably and efficiently be conducted with de-identified information or that should require authorization for the use or disclosure of PHI.

Finally, the bill would prohibit the sale of PHI by a covered entity or business associate without patient authorization. In certain specified circumstances, remuneration would be permitted to recoup the costs of preparing and transmitting data for public health or research activities (as defined in the HIPAA privacy rule), or to provide an individual with a copy of his or her PHI. Within 18 months of enactment, the Secretary would be required to issue regulations governing the sale of PHI.

REASON FOR CHANGE

Greater use of electronic health records and other forms of health IT presents an opportunity to enhance transparency and accountability within the health care system in terms of how information is used. If a patient's health care information is stored in an electronic record, he or she should have the right to receive a copy of that record electronically rather than a paper format. Furthermore, if a patient's information is shared or disclosed electronically, he or she should have the right to see what information was disclosed and to whom. The ability to track both sanctioned and permissible access to EHRs creates an environment that is potentially even more protective of personal health information than is available with paper records.

However, increased use of health IT also presents an opportunity for personal health information to be misused or fall into the hands of unauthorized users. Taking steps to encourage the use of more limited amounts of personal health information where possible, looking at which activities involving the use of identifiable health information should require patient authorization, and prohibiting the sale of health care information with very limited exceptions will go a long way toward protecting patients against potential abuses.

SEC. 4406. CONDITIONS OF CERTAIN CONTRACTS AS PART OF HEALTH CARE OPERATIONS.

CURRENT LAW

Generally, covered entities may use and disclose health information for the purpose of treatment, payment, and other health care operations without the individual's authorization and with few restrictions. Health care operations are broadly defined to include quality assessment and improvement activities, case management and care coordination, evaluation of health care professionals, underwriting, legal services, business planning, customer services, grievance resolution, and fundraising.

Under the privacy rule, a covered entity may not disclose health information to a third party (e.g., pharmaceutical company), in exchange for direct or indirect remuneration, for the marketing activities of the third party without first obtaining a patient's authorization. Similarly, a covered entity may not use or disclose health information for its own marketing activities without authorization. Marketing is defined as a communication about a product or service that encourages the recipient to purchase or use the product or service. However, communications made by a covered entity (or its business associate) to encourage a patient to purchase or use a health care-related product or service on behalf of either the covered entity or a third party are excluded from this definition and, therefore, do not require the patient's authorization, even if the covered entity is paid by a third party to engage in such activities.

EXPLANATION OF PROVISIONS

The bill would clarify what constitutes a marketing communication by a covered entity or business associate under the HIPAA definition of health care operations. Further, it would prohibit a covered entity or business associate from receiving direct or indirect payment for marketing a health care-related product or service without first obtaining the recipient's authorization. Business associates would be permitted to receive payment from a covered entity for using PHI to make such communication on behalf of the covered entity that is consistent with the contract. Fundraising for the benefit of the covered entity also would not be considered a health care operation.

REASON FOR CHANGE

Certain health care providers receive substantial sums of money to engage in marketing activities that target patients using their own personal health information. So long as personal health information is not provided to a third party, such marketing activities can be conducted under current law without the patient's consent or authorization. This type of marketing can take many forms, ranging from direct-to-consumer marketing for higher priced drugs to prescription refill reminders. Patients should have the ability to decide whether they wish to have their personal health information used to conduct marketing activities when a third party is paying their provider to engage in that activity. The Committee is concerned that some have misinterpreted the new protections or requirements as inhibiting the ability of providers to communicate with their patients to improve care. To clarify; this provision does

not affect a pharmacy or other provider's ability to communicate with patients about disease management programs, refill reminders, or other types health care products and services otherwise allowable under HIPAA, so long as they are not paid by a third party to use PHI to engage in such activities. Alternatively, a provider could receive third party remuneration for these activities if the provider obtained authorization from the patient to do so.

SEC. 4407. TEMPORARY BREACH NOTIFICATION REQUIREMENT FOR VENDORS OF PERSONAL HEALTH RECORDS AND OTHER NON-HIPAA COVERED ENTITIES.

CURRENT LAW

As already noted, the HIPAA privacy and security rules do not require covered entities to notify HHS or others of a breach of the privacy, security, or integrity of PHI. However, business associate contracts must include a provision requiring them to report to covered entities if they become aware of any security incident or any use or disclosure of PHI that is not provided for by the contract.

EXPLANATION OF PROVISIONS

The bill would require personal health record (PHR) vendors and entities offering products and services through a PHR vendor's website, upon discovery of a breach of security of unsecured PHR health information, to notify the individuals impacted and the Federal Trade Commission (FTC). Further, third party service providers that provide services to PHR vendors and to other entities offering products and services through a PHR vendor's website and, as a result, that handle unsecured PHR health information would, following the discovery of a breach of security of such information, be required to notify the vendor or other entity. The requirements in Section 4402 for the content and timeliness of notifications also would apply to this section. Unsecured PHR health information means PHR health information that is not protected through the use of a technology or methodology specified by the Secretary in guidance issued pursuant to Section 4402. If the Secretary failed to issue guidance by the date specified in Section 4402, then PHR health information would be considered unsecure if not secured by a technology standard rendering it unusable, unreadable, or indecipherable to unauthorized individuals that was developed or endorsed by a standards development organization accredited by ANSI.

The FTC would be required to notify HHS of any breach notices it received and would be given enforcement authority regarding such breaches of unsecured PHR health information. Within 180 days, the Secretary would be required to issue interim final regulations to implement this section. The provisions in the section would apply to breaches discovered no sooner than 30 days after the regulations are published. The provisions in this section would no longer apply to breaches occurring after HHS or FTC had adopted new privacy and security standards for non-HIPAA covered entities, including requirements relating to breach notification.

REASON FOR CHANGE

In most cases, vendors that provide personal health records are not currently covered by the privacy or security provisions of the

HIPAA statute. Nonetheless, individuals who have personal health records should be promptly notified in the event that their health information is shared with or attained by an unauthorized party.

SEC. 4408. BUSINESS ASSOCIATE CONTRACTS REQUIRED FOR CERTAIN ENTITIES; OTHER PROVISIONS RELATED TO BUSINESS ASSOCIATE CONTRACTS.

CURRENT LAW

As previously noted, a covered entity is permitted to disclose health information to a business associate or to allow a business associate to create or receive health information on its behalf, provided the covered entity receives satisfactory assurance in the form of a written contract that the business associate will appropriately safeguard the information. Covered entities are not liable for, or required to monitor, the actions of their business associates. If a covered entity finds out about a material breach or violation of the contract by a business associate, it must take reasonable steps to remedy the situation, and, if unsuccessful, terminate the contract. If termination is not feasible, the covered entity must notify HHS.

EXPLANATION OF PROVISIONS

The bill would require organizations that contract with covered entities for the purpose of exchanging electronic PHI, for example, Health Information Exchanges, Regional Health Information Organizations (RHIOs), and AIR vendors, to have business associate contracts with those entities.

REASON FOR CHANGE

This provision enhances accountability and closes a gap in the current HIPAA law that allows covered entities to share personal health information with certain organizations without having a valid business contract.

SEC. 4409. CLARIFICATION OF APPLICATION OF WRONGFUL DISCLOSURES CRIMINAL PENALTIES.

CURRENT LAW

The HIPAA criminal penalties include fines of up to $250,000 and up to 10 years in prison for disclosing or obtaining health information with the intent to sell, transfer or use it for commercial advantage, personal gain, or malicious harm. In July 2005, the Justice Department Office of Legal Counsel (OLC) addressed which persons may be prosecuted under HIPAA and concluded that only a covered entity could be criminally liable.

EXPLANATION OF PROVISIONS

The bill would amend HIPAA to clarify that criminal penalties for wrongful disclosure of PHI apply to individuals who without authorization obtain or disclose such information maintained by a covered entity, whether they are employees or not.

REASON FOR CHANGE

This provisions corrects a faulty and misguided ruling by the Department of Justice that created a major loophole in the enforcement of HIPAA by asserting that only facilities or businesses could

be held liable for unauthorized use or disclosure, rather than "persons" as stipulated by the HIPAA statute.

SEC. 4410. IMPROVED ENFORCEMENT.

CURRENT LAW

As noted above, HIPAA authorized the Secretary to impose civil monetary penalties on any person failing to comply with the privacy and security standards. The maximum civil fine is $100 per violation and up to $25,000 for all violations of an identical requirement or prohibition during a calendar year. Civil monetary penalties may not be imposed if (1) the violation is a criminal offense under HIPAA's criminal penalty provisions (see below); (2) the person did not have actual or constructive knowledge of the violation; or (3) the failure to comply was due to reasonable cause and not to willful neglect, and the failure to comply was corrected during a 30-day period beginning on the first date the person liable for the penalty knew, or by exercising reasonable diligence would have known, that the failure to comply occurred. For certain wrongful disclosures of PHI, OCR may refer the case to the Department of Justice for criminal prosecution. HIPAA's criminal penalties include fines of up to $250,000 and up to 10 years in prison for disclosing or obtaining health information with the intent to sell, transfer or use it for commercial advantage, personal gain, or malicious harm.

Privacy advocates have been critical of HHS's lack of enforcement of the privacy rule. The OCR has not levied a single penalty against a HIPAA-covered entity, even though it has found numerous violations of the rule. Instead, OCR has focused on working with covered entities to encourage voluntary compliance through corrective action.

EXPLANATION OF PROVISIONS

The bill would amend HIPAA to permit OCR to pursue an investigation and the imposition of civil monetary penalties against any individual for an alleged criminal violation of the HIPAA standards if the Justice Department had not prosecuted the individual. In addition, the bill would amend HIPAA to require a formal investigation of complaints and the imposition of civil monetary penalties for violations due to willful neglect. The Secretary would be required to issue regulations within 18 months to implement those amendments. The bill also would require that any civil monetary penalties collected be transferred to OCR to be used for enforcing the HIPAA privacy and security standards. Within 18 months of enactment, GAO would be required to submit recommendations for giving a percentage of any civil monetary penalties collected to the individuals harmed. Based on those recommendations, the Secretary, within three years of enactment, would be required to establish by regulation a methodology to distribute a percentage of any collected penalties to harmed individuals.

The bill would further amend HIPAA by replacing the existing civil monetary penalties with mandatory sanctions according to violation, and four tiers of penalties, the highest of which would impose a fine of $50,000 per violation and up to $1,500,000 for all such violations of an identical requirement or prohibition during a

calendar year. It would, however, preserve the current requirement that a civil fine not be imposed if the violation was due to reasonable cause and was corrected within 30 days.

Finally, the bill would authorize state Attorneys General to bring a civil action in federal district court against individuals who violate the HIPAA privacy and security standards, in order to enjoin further such violation and seek damages of up to $100 per violation, capped at $25,000 for all violations of an identical requirement or prohibition in any calendar year. In the event of a successful action, the court would be permitted to award the costs of the action and reasonable attorneys fees to the state. The state would have to notify the Secretary of its intended action, and the Secretary would have the right to intervene and be heard and to file petitions for appeal. State action against a person would not be permitted if a federal civil action against that same individual was pending. Nothing in this section would prevent OCR from continuing to use corrective action without a penalty in cases where the person did not know, and by exercising reasonable diligence would not have known, about the violation.

REASON FOR CHANGE

Meaningful enforcement of HIPAA privacy and security rules has been noticeably lacking. To ensure that personal health information is not improperly disclosed or used, more emphasis must be placed on enforcing statutory and regulatory protections. Providing more resources to OCR, allowing state Attorneys General to bring enforcement action, increasing the civil monetary penalties and creating procedural improvements for levying such penalties will dramatically improve compliance and enforcement. In addition, the legislation establishes a process to ensure redress for individuals who are harmed by the improper use or disclosure of their protected health information, by permitting them to share in whatever penalties are levied, much as is done with monetary penalties assessed for violations of other laws.

SEC. 4411. AUDITS.

CURRENT LAW

The Secretary is authorized to conduct compliance reviews to determine whether covered entities are complying with HIPAA standards.

EXPLANATION OF PROVISION

The bill would require the Secretary to perform periodic audits to ensure compliance with the HIPAA privacy and security standards and the requirements of this subtitle.

REASON FOR CHANGE

Investigations of HIPAA violations are only triggered when a complaint is lodged with OCR. Authorizing OCR to conduct periodic audits of covered entities and business associates will help promote more widespread compliance with the HIPAA rules.

SEC. 4501. MORATORIA ON CERTAIN MEDICARE REGULATIONS.

(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 adjusts payments to hospices to make overall payments budget neutral to the levels hospices would have received had the BLS based wage adjustment data been used. On August 8, 2008, the Centers for Medicare and Medicaid Services finalized a regulation that would phase-out the BNAF over three years, beginning with a 25 percent reduction in FY 2009, an additional 50 percent reduction (totaling 75 percent in FY 2010, and a final 100 percent, or elimination, in FY 2011). The phase-out of the BNAF began on October 1, 2008.

EXPLANATION OF PROVISIONS

The Chairman's Mark 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 FY 2009 would be recomputed as if there had been no reduction in the budget neutrality factor.

REASON FOR CHANGE

Hospice programs served 850,000 Medicare beneficiaries and their families in 2005, providing compassionate end of life care. A one-year moratorium on the Medicare regulation for fiscal year 2009 would ensure that hospices continue to receive the same reimbursement rate for wages. The Committee does not anticipate extending this provision as it expects the hospice community to seek a permanent fix in the annual rulemaking cycle for Medicare hospice payments. Fifty members of the House of Representatives and 37 Senators wrote to the Administration last year to ask that this

policy not be implemented, but the Administration ignored these requests.

(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 reimburse for capital costs 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.

EXPLANATION OF PROVISIONS

The FY2009 adjustment to 50 percent 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 and the hospice provision, $2 million would be transferred from Medicare's Federal Hospital Insurance Trust Fund into the CMS Program Management Account for FY2009 for reprocessing of claims.

REASON FOR CHANGE

When the IPPS and the adjustment for indirect medical education were created, CMS (then the Health Care Financing Administration) appropriately considered operating and capital costs in combination. In phasing-out the capital IME adjustment in the rule governing payments this year, CMS undertook a flawed analysis that looked solely at Medicare capital margins for teaching hospitals. Looking at the two systems in isolation is flawed, as the overall philosophy of Medicare prospective payment systems is to encourage providers to make efficient decisions across their overall payments. When looking at overall Medicare margins, which is the appropriate analysis in assessing payment adequacy, the Medicare Payment Advisory Commission found that teaching hospitals faced low, single digit margins of 2.8 percent in 2006. Elimination of capital IME payments is not appropriate in light of this overall margin analysis and given the current turmoil in the capital markets. The Committee does not anticipate extending this provision as it expects the hospital community to seek a permanent fix in the annual IPPS rulemaking cycle. More than 200 members of Congress and a majority of Senators wrote to the Administration last year during the comment period to ask that this policy not be implemented, but the Administration ignored these requests.

Administrative funds are provided to CMS to allow for reprocessing of claims so that hospice providers and hospitals may receive the appropriate wage and capital payments, respectively, for the portion of fiscal year 2009 that has already passed.

SEC. 4502. LONG-TERM CARE HOSPITAL TECHNICAL CORRECTIONS.

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 percent 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 percent threshold payment adjustment for discharges from co-located host hospitals to grandfathered HwHs and LTCH satellite facilities. CMS also extended the 25 percent 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 at 42 CFR 412.534. The regulatory policy setting forth the payment adjustment policy for referrals from non-co-located hospitals is at 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 percent 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 percent 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 percent to 50 percent for certain LTCH HwH and non-grandfathered satellite discharges admitted from a co-located hospital (CFR 412.534), and from 50 percent to 75 percent 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.

EXPLANATION OF PROVISIONS

This provision aligns the start date of the three-year delay in the implementation of the 25 percent 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. This provision also aligns the start date of the three-year delay in the implementation of the 25 percent 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. For grandfathered LTCH satellite facilities, the effective date is July 1, 2007.

This provision clarifies that the 3-year delay from the 25 percent 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. This provision clarifies that grandfathered satellite facilities receive the same relief as non-grandfathered satellites from 42 CFR 412.534 pertaining to applicable patient percentage thresholds.

This provision clarifies 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.

REASON FOR CHANGE

The regulatory relief provided in MMSEA took effect for cost reporting periods on or after the date of enactment. However, that effective date failed to take into account the fact that many LTCHs have cost reporting periods that begin between July 1 and December 1. Absent clarification, these facilities would face the next step of the phase-in of the 25 percent rule applicable to rate year 2008 prior to receiving regulatory relief, even though the clear intent of MMSEA was to provide such relief prior to the next phase-in of the 25 percent rule. These hospitals would face a more stringent requirement under the 25 percent rule for a whole cost reporting period prior to receiving their three years of regulatory relief. In contrast, LTCHs with cost reporting periods beginning on or after January 1 would receive three years of regulatory relief prior to facing the next step in the phase-in of the 25 percent rule for a full three years. This change ensures that all LTCHs eligible for regulatory relief receive it for a three year period prior to facing the next step in the phase-in of the 25 percent rule, as was originally intended in MMSEA.

MMSEA also intended to provide a three-year moratorium on the "25 percent threshold" payment adjustment for referrals from non-co-located hospitals for freestanding hospitals. The promulgating regulations implementing MMSEA were narrowly interpreted and written to exclude a category of LTCHs that were intended for relief. This provision ensures that regulatory relief is afforded to LTCHs or LTCH satellites that as of December 29, 2007 were co-located with an entity that is a provider-based, off campus location of a subsection (d) hospital which did not provide services payable under section 1886(d) of the Social Security Act, consistent with original Congressional intent under MMSEA.

The LTCH language in MMSEA originated in the Children's Health and Medicare Protection Act (H.R. 3162), which passed the House on August 1, 2007. One of the exceptions from the moratorium on new LTCHs in the CHAMP Act was for LTCHs with certificates of need for either a new facility or new beds in states that require one. During final drafting of MMSEA, the exception for certificates of need for bed expansions was inadvertently dropped. This provision remedies that drafting error.

The Committee notes that there are only approximately 400 LTCHs nationwide. The technical corrections provided here affect all LTCHs within the specific categories delineated. Due to the technical nature of the provisions, and the small universe of LTCHs, some of the provisions affect a small number of LTCHs. However, the Committee notes that the National Association of Long Term Hospitals supports these corrections and estimates that in its totality, Section 4502 affects nearly 75 percent of LTCHs nationwide.

APPENDIX A

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, January 21, 2009.

Hon. CHARLES B. RANGEL,
Chairman, Committee on Ways and Means,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: At your request, CBO has analyzed the effect on federal direct spending and revenues of the Health Information Technology for Economic and Clinical Health (HITECH) Act as posted on the Web site of the Committee on Ways and Means on January 16, 2009.[1]

The HITECH Act would establish payment incentives in the Medicare and Medicaid programs to encourage providers to adopt health information technology (health IT). Health IT refers to information technology applications specifically designed for the practice of clinical medicine, including electronic health records (EHR), personal health records, health information exchange, computerized physician order entry, clinical decision support systems, and electronic prescribing. To meet the requirements set forth in the bill, providers would have to purchase a "qualifying electronic health record" system with a standard package of functionalities. Although adoption would be encouraged through payment incentives in the Medicare and Medicaid programs, all health care spending—both public and private—would be affected by the increased use of health IT. CBO expects that its adoption on a nationwide basis would reduce total spending on health care by diminishing the number of inappropriate tests and procedures, reducing paperwork and administrative overhead, and decreasing the number of adverse events resulting from medical errors.

The bill also would accelerate spending from the Medicare Improvement Fund, provide funding for some costs incurred by the Centers for Medicare & Medicaid Services in administering the payment-incentive provisions, and make other changes to the Medicare program.

As a result of the HITECH Act's effects on direct spending and revenues, CBO estimates that enacting the bill would increase on-budget deficits by a total of $17.1 billion over the 2009–2019 period; it would increase the unified budget deficit over the same period by an estimated $15.8 billion (see attached table). The effects on direct spending and revenues over the 2009–2013 and 2009–2018 periods are relevant for enforcing pay-as-you-go rules under

[1] See *http://waysandmeans.house.gov/medial/pdf/110/sbill.pdf*. The HITECH Act is title IV.

the current budget resolution. CBO estimates that those effects would increase on-budget deficits by $15.5 billion over the 2009–2013 period and $19.8 billion over the 2009–2018 period.

This legislation also would authorize the appropriation of such sums as are necessary for the Office of the National Coordinator for Health Information Technology to develop a national infrastructure for health IT, as well as activities related to the promotion of IT adoption. The amount of such funding could vary greatly depending on what the Congress decides to appropriate for those purposes.

Direct spending

Bonus Payments and Penalties. The bill would establish a schedule of Medicare bonus payments, beginning in 2011, that would be paid to hospitals and physicians that adopt and use qualifying health IT. Beginning in 2016, Medicare would reduce payment rates to hospitals and physicians that are not using qualifying health IT. (Payment adjustments also would be applied to Medicare Advantage plans that operate hospitals or employ physicians.) Medicare's bonus payments and penalties would not affect the Part B premiums (which are set to cover one-quarter of that program's costs) or the benchmarks that are used in the calculation of payment rates for Medicare Advantage plans. CBO estimates that spending for the bonuses and payment reductions from the penalties would increase net Medicare spending by $17.7 billion over the 2011–2019 period.

The bill also would establish bonus payments (but not penalties) in the Medicaid program for providers that adopt and use qualifying health IT. The Medicaid bonus payments to providers would be paid entirely by the federal government; the federal government also would pay states 90 percent of certain administrative costs related to the bonus-payment program. CBO estimates that the direct effect on Medicaid spending from those provisions would be an increase of $12.4 billion over the 2011–2019 period. In combination, net Medicare and Medicaid spending for bonuses and penalties would total $30.0 billion over that period.

Under current law, CBO estimates that about 45 percent of hospitals and 65 percent of physicians will have adopted qualifying health IT in 2019.[2] CBO estimates the incentive mechanism would boost those adoption rates to about 70 percent for hospitals and about 90 percent for physicians.

Spending for Benefits. CBO anticipates that accelerating the adoption of health IT would result in reductions in health care spending. Those reductions would be realized by, among other things, reducing the number of inappropriate tests and procedures, reducing paperwork and administrative overhead, and decreasing the number of adverse events resulting from medical errors. Health IT could also improve the quality of care provided to patients by improving the information available to clinicians at the time of treatment, by encouraging the use of evidence-based medicine, and

[2] In Budget Options, Volume 1: Health Care (December, 2008), CBO stated that, by 2019, about 40 percent of physicians will adopt health IT that conforms to interoperability standards for that year. The higher adoption rate mentioned above reflects a less-stringent standard to qualify for bonus payments or avoid penalties under the HITECH Act.

by helping physicians manage patients with complex, chronic conditions. The use of health IT could also increase some costs because improved adherence to treatment protocols could increase the amount of care provided. On net, CBO estimates that the accelerated adoption of health IT that would result from implementing the HITECH Act would reduce costs in the health care system by about 0.3 percent during the 2011–2019 period.[3]

Under Medicare's current payment rules, the only savings in Medicare's expenditures from the adoption of health IT would be from reducing the utilization of some types of services—for example, by reducing the probability of hospital admissions resulting from preventable adverse medical events or reducing the utilization of unnecessary diagnostic services. Health IT also would help providers reduce their operating costs.

However, because Medicare's payment rates in the fee-for-service sector are not adjusted to reflect changes in such operating costs, those savings would not result in lower expenditures for the Medicare program. CBO estimates that the changes in utilization from accelerating the adoption of health IT would reduce Medicare spending by $4.4 billion over the 2011–2019 period.

By contrast, CBO expects that state Medicaid programs, plans in the Federal Employees Health Benefits (FEHB) program, and private insurance plans would negotiate payment rates with providers that would enable those payers to realize most of the savings from reductions in providers' operating costs (in addition to realizing the savings from reducing the utilization of some types of services). CBO estimates that the resulting federal savings in Medicaid would total $7.3 billion over the 2011–2019 period.

Federal payments of FEHB premiums for retired federal employees are considered direct spending. (Most contributions for retired employees of the U.S. Postal Service are considered off budget direct spending.) CBO estimates that enacting the HITECH Act would reduce on-budget direct spending for the FEHB program by $0.5 billion over the 2011–2019 period, and would reduce off-budget direct spending for the FEHB program by an additional $0.2 billion. Thus, the total reduction in direct spending for the FEHB program would amount to $0.7 billion over the 2011–2019 period.[4]

In total, CBO estimates that enacting the HITECH Act would reduce federal direct spending for benefits in the Medicare, Medicaid, and FEHB programs by about $12 billion over the 2011–2019 period.

Other Direct Spending. The HITECH Act would modify the timing of spending from the Medicare Improvement Fund, which the Secretary of Health and Human Services may use to make improvements in the fee-for-service program. The bill would accelerate that spending from 2016, 2017, and 2018 to 2014 and 2015;

[3] CBO anticipates near-universal adoption of health IT over the next quarter century even without legislative action. As a result, the 0.3 percent reduction in health care costs estimated to result in the near term from enactment of this bill would diminish in later years, when the use of health IT will be more pervasive in any event.

[4] CBO also estimates that enacting the HITECH Act would reduce the cost of health insurance for active federal workers by about $0.1 billion over the 2009–2014 period. Those costs are considered discretionary spending because the federal share of FEHB premiums for active workers is funded through appropriations to the agencies that employ those workers. Realizing the potential discretionary savings would require adjustments to the amounts appropriated to each agency.

that change would not affect total Medicare spending over the 2009–2013 or 2009–2018 periods. The bill also would provide about $0.9 billion to pay for some of the administrative costs that the Centers for Medicare & Medicaid Services would incur in implementing the new payment-incentive provisions. It also would modify certain payment rates and rules for hospices and certain hospitals. CBO estimates those changes would cost $0.3 billion over the 2009–2019 period (with most of that spending in 2009).

Federal revenues

Because accelerating the use of health IT would lower health care costs for private payers, it would result in lower health insurance premiums in the private sector. As a result, private employers would pay less of their workers' compensation in the form of tax-advantaged health insurance premiums and more in the form of taxable wages and salaries. Therefore, federal tax revenues would increase. CBO estimates that on-budget revenues (from income taxes and the Hospital Insurance payroll tax—for Medicare Part A) would increase by $2.0 billion over the 2011–2019 period. Higher receipts from Social Security payroll taxes, which are off-budget, would add another $1.1 billion, resulting in an estimated increase in total tax revenues of $3.1 billion over the 2011–2019 period.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Tom Bradley.

Sincerely,

ROBERT A. SUNSHINE,
Acting Director.

Attachment.

ESTIMATED EFFECT ON FEDERAL DIRECT SPENDING AND REVENUES OF THE HEALTH INFORMATION TECHNOLOGY FOR ECONOMIC AND CLINICAL HEALTH ACT OF 2009, AS POSTED ON THE WEB SITE OF THE COMMITTEE ON WAYS AND MEANS ON JANUARY 16, 2009

	By fiscal years; in billions of dollars—											
	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2009-2019
CHANGES IN DIRECT SPENDING (Outlays)												
Bonus Payments and Penalties:												
Medicare	0	0	2.7	4.6	5.0	4.0	2.5	0.9	−0.2	−0.9	−1.0	17.7
Medicaid	0	0	1.5	1.9	2.2	2.1	1.7	1.5	0.8	0.5	0.3	12.4
Subtotal	0	0	4.2	6.5	7.1	6.1	4.3	2.4	0.6	−0.4	−0.7	30.0
Changes in Spending for Benefits:												
Medicare	0	0	−0.1	−0.3	−0.5	−0.6	−0.6	−0.6	−0.6	−0.6	−0.6	−4.4
Medicaid	0	0	−0.4	−0.6	−0.8	−0.8	−0.9	−0.9	−0.9	−1.1	−1.1	−7.3
FEHB (on-budget)	0	0	*	*	−0.1	−0.1	−01	−0.1	−0.1	−0.1	−0.1	−0.5
Subtotal, On-budget	0	0	−0.5	−0.9	−1.3	−1.5	−1.5	−1.5	−1.6	−1.8	−1.7	−12.1
FEHB (off-budget)	0	0	*	*	*	*	*	*	*	*	*	−0.2
Subtotal, Changes in Spending for Benefits	0	0	−0.5	−0.9	−1.3	−1.5	−1.5	−1.6	−1.6	−1.8	−1.7	−12.3
Medicare Improvement Fund	0	0	0	0	0	9.2	1.2	−6.3	−3.5	−0.7	0	0
Mandatory Administrative Funding:												
Medicare	0.1	0.1	0.1	0.1	0.1	0.1	0.1	*	*	*	*	0.5
Medicaid	*	*	*	*	*	*	*	*	*	*	*	0.4
Subtotal	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.9
Other Provisions	0.3	*	*	0	0	0	0	0	0	0	0	0.3
Total Changes in Direct Spending	0.4	0.1	3.8	5.7	5.9	13.9	4.1	−5.4	−4.4	−2.8	−2.4	18.9
CHANGES IN REVENUES												
Income and HI Payroll Taxes (on-budget)	0	0	0.1	0.1	0.2	0.3	0.3	0.3	0.3	0.3	0.3	2.0
Social Security Payroll Taxes (off-budget)	0	0	0.0	0.1	0.1	0.1	0.1	0.1	0.1	0.2	0.1	1.1
Total Revenue Changes	0	0	0.1	0.2	0.3	0.4	0.4	0.4	0.4	0.4	0.4	3.1
CHANGES IN FEDERAL DEFICITS FROM DIRECT SPENDING AND REVENUES [1]												
On-budget Changes	0.4	0.1	3.8	5.6	5.7	13.7	3.8	−5.6	−4.7	−3.1	−2.6	17.1

Total Changes	0.4	0.1	3.7	5.5	5.6	13.5	3.7	−5.7	−4.8	−3.2	−2.8	15.8
Memorandum:												
Changes in Direct Spending, by Program:												
Medicare	0.3	0.1	2.7	4.4	4.5	12.6	3.2	−5.9	−4.2	−2.1	−1.5	14.2
Medicaid	*	*	1.2	1.4	1.5	1.4	0.9	0.6	−0.1	−0.6	−0.8	5.4
FEHB (Total)	0	0	0.0	−0.1	−0.1	−0.1	−0.1	−0.1	−0.1	−0.1	−0.1	−0.7

1. Positive numbers indicate an increase in the deficit; negative numbers indicate a reduction in the deficit. In addition to the direct spending and revenue effects shown in the table, the legislation would authorize increases in spending that is subject to appropriation action.

Notes:

* = between −$50 million and $50 million. Details may not add to totals because of rounding.

FEHB is the Federal Employees Health Benefits program (most FEHB spending for annuitants of the U.S. Postal Service is off-budget); HI is the Medicare Hospital insurance program (Part A).

III. VOTES OF THE COMMITTEE

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the following statements are made concerning the vote of the Committee on Ways and Means in its consideration of H.R. 598.

MOTION TO REPORT RECOMMENDATIONS

H.R. 598, as amended, was ordered favorably reported by a roll call vote of 24 yeas to 13 nays (with a quorum being present). The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
Mr. Rangel	X			Mr. Camp		X	
Mr. Stark	X			Mr. Herger		X	
Mr. Levin	X			Mr. Johnson		X	
Mr. McDermott	X			Mr. Brady		X	
Mr. Lewis (GA)	X			Mr. Ryan		X	
Mr. Neal	X			Mr. Cantor		X	
Mr. Tanner				Mr. Linder			
Mr. Becerra	X			Mr. Nunes		X	
Mr. Doggett	X			Mr. Tiberi			
Mr. Pomeroy	X			Ms. Brown-Waite		X	
Mr. Thompson	X			Mr. Davis (KY)		X	
Mr. Larson	X			Mr. Reichert		X	
Mr. Blumenauer	X			Mr. Boustany		X	
Mr. Kind	X			Mr. Heller		X	
Mr. Pascrell	X			Mr. Roskam		X	
Ms. Berkley	X						
Mr. Crowley	X						
Mr. Van Hollen	X						
Mr. Meek	X						
Ms. Schwartz	X						
Mr. Davis (AL)	X						
Mr. Davis (IL)	X						
Mr. Etheridge	X						
Ms. Sanchez							
Mr. Higgins	X						
Mr. Yarmuth	X						

VOTES ON AMENDMENTS

A roll call vote was conducted on the following amendments to the Chairman's Amendment in the Nature of a Substitute.

An amendment offered by Mr. Camp which would strike the Making Work Pay tax credit and lower the 10% and 15% marginal tax rates to 5% and 10% respectively for tax years 2009 and 2010 was defeated by a roll call vote of 14 yeas to 23 nays.

The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
Mr. Rangel		X		Mr. Camp	X		
Mr. Stark		X		Mr. Herger	X		
Mr. Levin		X		Mr. Johnson	X		
Mr. McDermott		X		Mr. Brady	X		
Mr. Lewis (GA)				Mr. Ryan	X		
Mr. Neal		X		Mr. Cantor	X		
Mr. Tanner				Mr. Linder	X		
Mr. Becerra		X		Mr. Nunes	X		
Mr. Doggett		X		Mr. Tiberi			
Mr. Pomeroy		X		Ms. Brown-Waite	X		
Mr. Thompson		X		Mr. Davis (KY)	X		

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
Mr. Larson		X		Mr. Reichert	X		
Mr. Blumenauer		X		Mr. Boustany	X		
Mr. Kind		X		Mr. Heller	X		
Mr. Pascrell		X		Mr. Roskam	X		
Ms. Berkley		X					
Mr. Crowley		X					
Mr. Van Hollen		X					
Mr. Meek		X					
Ms. Schwartz		X					
Mr. Davis (AL)		X					
Mr. Davis (IL)		X					
Mr. Etheridge		X					
Ms. Sanchez							
Mr. Higgins		X					
Mr. Yarmuth		X					

An amendment offered by Mr. Johnson which would exempt unemployment compensation from income taxation in 2008 and 2009 was defeated by a vote of 14 yeas and 24 nays.

The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
Mr. Rangel		X		Mr. Camp	X		
Mr. Stark		X		Mr. Herger	X		
Mr. Levin		X		Mr. Johnson	X		
Mr. McDermott		X		Mr. Brady	X		
Mr. Lewis (GA)		X		Mr. Ryan	X		
Mr. Neal		X		Mr. Cantor	X		
Mr. Tanner				Mr. Linder	X		
Mr. Becerra		X		Mr. Nunes	X		
Mr. Doggett		X		Mr. Tiberi			
Mr. Pomeroy		X		Ms. Brown-Waite	X		
Mr. Thompson		X		Mr. Davis (KY)	X		
Mr. Larson		X		Mr. Reichert	X		
Mr. Blumenauer		X		Mr. Boustany	X		
Mr. Kind		X		Mr. Heller	X		
Mr. Pascrell		X		Mr. Roskam	X		
Ms. Berkley		X					
Mr. Crowley		X					
Mr. Van Hollen		X					
Mr. Meek		X					
Ms. Schwartz		X					
Mr. Davis (AL)		X					
Mr. Davis (IL)		X					
Mr. Etheridge		X					
Ms. Sanchez							
Mr. Higgins		X					
Mr. Yarmuth		X					

An amendment offered by Mr. Brady which would raise the exemption amounts under the alternative minimum tax for tax year 2009 to $46,700 for individuals ($70,950 for married couples) and extend through 2009 the allowance of certain personal credits against the alternative minimum tax was defeated by a vote of 14 yeas and 24 nays.

The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
Mr. Rangel		X		Mr. Camp	X		
Mr. Stark		X		Mr. Herger	X		
Mr. Levin		X		Mr. Johnson	X		
Mr. McDermott		X		Mr. Brady	X		

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
Mr. Lewis (GA)		X		Mr. Ryan	X		
Mr. Neal		X		Mr. Cantor	X		
Mr. Tanner				Mr. Linder	X		
Mr. Becerra		X		Mr. Nunes	X		
Mr. Doggett		X		Mr. Tiberi			
Mr. Pomeroy		X		Ms. Brown-Waite	X		
Mr. Thompson		X		Mr. Davis (KY)	X		
Mr. Larson		X		Mr. Reichert	X		
Mr. Blumenauer		X		Mr. Boustany	X		
Mr. Kind		X		Mr. Heller	X		
Mr. Pascrell		X		Mr. Roskam	X		
Ms. Berkley		X					
Mr. Crowley		X					
Mr. Van Hollen		X					
Mr. Meek		X					
Ms. Schwartz		X					
Mr. Davis (AL)		X					
Mr. Davis (IL)		X					
Mr. Etheridge		X					
Ms. Sanchez							
Mr. Higgins		X					
Mr. Yarmuth		X					

An amendment offered by Ms. Brown-Waite on GAO health studies was defeated by a vote of 14 yeas and 23 nays.

The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
Mr. Rangel		X		Mr. Camp	X		
Mr. Stark			X	Mr. Herger	X		
Mr. Levin		X		Mr. Johnson	X		
Mr. McDermott		X		Mr. Brady	X		
Mr. Lewis (GA)		X		Mr. Ryan	X		
Mr. Neal		X		Mr. Cantor	X		
Mr. Tanner		X		Mr. Linder	X		
Mr. Becerra		X		Mr. Nunes	X		
Mr. Doggett		X		Mr. Tiberi			
Mr. Pomeroy		X		Ms. Brown-Waite	X		
Mr. Thompson		X		Mr. Davis (KY)	X		
Mr. Larson		X		Mr. Reichert	X		
Mr. Blumenauer		X		Mr. Boustany	X		
Mr. Kind		X		Mr. Heller	X		
Mr. Pascrell		X		Mr. Roskam	X		
Ms. Berkley		X					
Mr. Crowley		X					
Mr. Van Hollen		X					
Mr. Meek		X					
Ms. Schwartz		X					
Mr. Davis (AL)		X					
Mr. Davis (IL)		X					
Mr. Etheridge		X					
Ms. Sanchez							
Mr. Higgins		X					
Mr. Yarmuth		X					

An amendment offered by Mr. Heller which would modify the first-time homebuyer provision in the Chairman's mark by ending the tax credit through 2009; removing first-time homebuyer requirement; and adding an additional requirement that individuals claiming this credit make at least a 5% down payment was defeated by a vote of 14 yeas and 23 nays.

The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
Mr. Rangel		X		Mr. Camp	X		
Mr. Stark		X		Mr. Herger	X		
Mr. Levin		X		Mr. Johnson	X		
Mr. McDermott		X		Mr. Brady	X		
Mr. Lewis (GA)		X		Mr. Ryan	X		
Mr. Neal		X		Mr. Cantor	X		
Mr. Tanner				Mr. Linder			
Mr. Becerra		X		Mr. Nunes	X		
Mr. Doggett		X		Mr. Tiberi			
Mr. Pomeroy		X		Ms. Brown-Waite	X		
Mr. Thompson		X		Mr. Davis (KY)	X		
Mr. Larson		X		Mr. Reichert	X		
Mr. Blumenauer		X		Mr. Boustany	X		
Mr. Kind		X		Mr. Heller	X		
Mr. Pascrell		X		Mr. Roskam	X		
Ms. Berkley	X						
Mr. Crowley		X					
Mr. Van Hollen		X					
Mr. Meek		X					
Ms. Schwartz		X					
Mr. Davis (AL)		X					
Mr. Davis (IL)		X					
Mr. Etheridge		X					
Ms. Sanchez							
Mr. Higgins		X					
Mr. Yarmuth		X					

IV. BUDGET EFFECTS OF THE BILL

A. Committee Estimate of Budgetary Effects

In compliance with clause 3(d)(2) of the rule III of the Rules of the House of Representatives, the following statement is made concerning the effects on the budget of the revenue provisions of the bill, H.R. 598 as reported.

The bill is estimated to have the following effects on Federal budget receipts for fiscal years 2009–2019:

ESTIMATED BUDGET EFFECTS OF THE REVENUE PROVISIONS CONTAINED IN TITLES I AND III OF H.R. 598, THE "AMERICAN RECOVERY AND REINVESTMENT TAX ACT OF 2009," [1] AS REPORTED BY THE COMMITTEE ON WAYS AND MEANS

Fiscal Years 2009 - 2019

[Millions of Dollars]

Provision	Effective	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2009-13	2009-14	2009-18	2009-19
Revenue Provisions in Title I.																
A. Making Work Pay Credit - Credit of 6.2% of Earned Income up to a Maximum of $500 Single, $1,000 Joint for Tax Years 2009 and 2010; Phaseout for Taxpayers with Modified AGI in Excess of $75,000 ($150,000 Joint); and Treatment of the U.S. Possessions [2] [3]	tyba 12/31/08	-13,003	-94,562	-37,318	---	---	---	---	---	---	---	---	-144,883	-144,883	-144,883	-144,883
B. Additional Tax Relief for Families With Children																
1. Increase in earned income tax credit for taxable years 2009 and 2010 [3]	tyba 12/31/08	-23	-2,349	-2,291	---	---	---	---	---	---	---	---	-4,663	-4,663	-4,663	-4,663
2. Reduce the earnings threshold to zero for the refundable portion of the child tax credit for taxable years 2009 and 2010 [3]	tyba 12/31/08	[4]	-9,256	-9,016	---	---	---	---	---	---	---	---	-18,272	-18,272	-18,272	-18,272
C. American Opportunity Tax Credit																
1. Amend the HOPE scholarship credit for taxable years 2009 and 2010 so that it is available for four years at a rate of 100% of first $2,000 of expenses and 25% of next $2,000; phaseout for taxpayers with modified AGI between $80,000 - $90,000 ($160,000-$180,000 joint); make textbooks a qualifying expense; allow against the AMT [5]	tyba 12/31/08	-791	-4,425	-5,040	---	---	---	---	---	---	---	---	-10,256	-10,256	-10,256	-10,256
2. Make 40% of the allowable American Opportunity Tax Credit refundable [3] [5]	tyba 12/31/08	-313	-1,630	-1,508	---	---	---	---	---	---	---	---	-3,451	-3,451	-3,451	-3,451
D. Housing Incentives																
1. Waiver of requirement to repay first-time homebuyer credit unless home is sold within 36 months of purchase [3]	hpo/a 1/1/09	66	192	-98	-293	-334	-621	-539	-457	-328	-109	-40	-467	-1,088	-2,521	-2,562

Provision	Effective	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2009-13	2009-14	2009-18	2009-19
2. Grants to States for low-income housing projects in lieu of low-income housing credit allocations for 2009:																
a. Outlay effects [3] [8]	DOE	-3,009	---	---	---	---	---	---	---	---	---	---	-3,009	-3,009	-3,009	-3,009
b. Revenue effects	DOE	3	28	150	309	350	350	350	350	350	350	350	840	1,190	2,590	2,940
E. Tax Incentives for Business																
1. Special allowance for certain property acquired during 2009	ppisa 12/31/08	-23,503	-14,301	8,047	6,501	5,574	4,553	3,046	1,941	1,217	929	922	-17,682	-13,129	-5,996	-5,074
2. Temporary increase in limitation on expensing of certain depreciable business assets	tybi 2009	-642	-425	352	222	162	125	79	45	22	10	10	-331	-206	-50	-41
3. 5-year carryback with 10% cutback for 2008 and 2009 NOLs with exception for TARP recipients	[6]	-25,995	-28,022	9,329	8,789	6,792	4,819	3,374	2,332	1,626	1,118	797	-29,107	-24,287	-15,838	-15,041
4. Incentives to hire unemployed veterans and disconnected youth	[7]	-28	-73	-64	-25	-10	-5	-2	[4]	---	---	---	-200	-206	-207	-208
F. Fiscal Relief for State and Local Governments																
1. Modification of rules applicable to financial institutions for interest expense relating to tax-exempt income	oia 12/31/08 & before 1/1/11	-79	-239	-326	-340	-336	-331	-326	-321	-317	-312	-307	-1,320	-1,651	-2,927	-3,234
2. For bonds issued during 2009 and 2010, repeal of alternative minimum tax limitations on private-activity tax-exempt bonds and modify ACE to exclude interest from all tax-exempt bonds	oia 12/31/08 & before 1/1/11	-21	-60	-68	-41	-42	-42	-42	-42	-41	-41	-41	-232	-274	-440	-481
3. Qualified school construction bonds ($11 billion in 2009 and 2010)	oia 12/31/08	-19	-110	-315	-611	-918	-1,179	-1,345	-1,390	-1,362	-1,325	-1,303	-1,973	-3,152	-8,574	-9,877
4. Extension and expansion of qualified zone academy bonds ($1.4 billion in 2009 and 2010)	oia 12/31/08	-1	-10	-40	-90	-130	-140	-137	-131	-125	-121	-120	-271	-411	-925	-1,045
5. Taxable bond option for governmental bonds - general rule: 35% credit to bondholders; 35% refundable credit to issuers for bonds issued 2009 and 2010 [3]	oia DOE	-53	-323	-726	-1,016	-1,339	-1,661	-1,981	-2,301	-2,625	-2,955	-3,290	-3,457	-5,118	-14,980	-18,270
6. Recovery zone bonds ($15 billion private activity bond allocation; $10 billion allocation for refundable issuer credit bonds) [3]	oia DOE & before 1/1/11	-209	-359	-564	-626	-628	-621	-614	-605	-596	-587	-579	-2,386	-3,007	-5,409	-5,989
7. Tribal economic development bonds - create a national pool of tax-exempt bonds for use by Indian tribes for economic development ($2 billion allocation)	oia DOE	-1	-4	-15	-31	-39	-39	-39	-38	-37	-36	-36	-90	-129	-279	-315
8. Repeal 3% withholding on government contracts	DOE	---	---	-5,819	-575	-593	-585	-617	-644	-675	-704	-734	-6,987	-7,571	-10,212	-10,946

Provision	Effective	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2009-13	2009-14	2009-18	2009-19
G. Energy Incentives																
1. Extend by three years the placed-in-service date for each section 45 qualified facility, (two years for marine renewables), excluding coal and solar facilities	ppisa 12/31/09 & 12/31/10	---	-127	-440	-921	-1,365	-1,603	-1,649	-1,700	-1,743	-1,788	-1,806	-2,853	-4,456	-11,337	-13,143
2. Election of investment credit for section 45 facilities in lieu of production credit	ppisa 12/31/08	-96	-131	-29	16	11	8	4	---	---	---	---	-230	-221	-218	-218
3. Modify section 48 energy credit – remove cap for small wind systems, and remove reduction in credit for subsidized energy financing	pa 12/31/08	-31	-33	-42	-50	-59	-71	-87	-104	-66	-32	-26	-216	-287	-577	-604
4. Increased limitation on issuance of new clean renewable energy bonds ($1.6 billion additional allocation)	DOE	-1	-4	-15	-36	-59	-73	-78	-78	-78	-78	-78	-115	-188	-500	-578
5. Increased limitation on issuance of qualified energy conservation bonds ($2.4 billion additional allocation)	DOE	-1	-5	-17	-41	-69	-95	-111	-116	-116	-116	-116	-133	-228	-687	-803
6. Extension and modification of credit for nonbusiness energy property - extension and temporary increase to 30% ($1,500 per residence cap) credit for all section 25C nonbusiness energy property, and repeal reduction in 25C credits by reason of receipt of subsidized energy financing	ei tyba 12/31/08 & before 1/1/11	-370	-1,967	-1,938	---	---	---	---	---	---	---	---	-4,275	-4,275	-4,275	-4,275
7. Modification of credit for residential energy efficient property - remove credit cap for residential wind, geothermal property, and residential solar thermal property under section 25D, repeal reduction in all section 25D credits (residential solar, geothermal, wind, fuel cells) by reason of receipt of subsidized energy	tyba 12/31/08	-7	-29	-30	-32	-33	-34	-36	-37	-28	---	---	-131	-165	-268	-268
8. Temporarily increase credit rate for alternative fuel vehicle refueling property to 50%; increase max credit to $50,000 for business property ($200,000 in the case of hydrogen) and $2,000 for nonbusiness property (sunset 12/31/10)	tyba 12/31/08	-11	-21	-14	-6	-4	-2	1	1	1	1	1	-57	-59	-55	-54
9. Increase to 20% the research credit for qualified energy research (sunset 12/31/10)	tyba 12/31/08	-2	-6	-5	-2	-2	-1	---	---	---	---	---	-17	-18	-18	-18
H. Other Provisions																
1. Grants for specified energy property in lieu of tax credits:																
a. Outlay effects [3] [8]	DOE	-30	-88	-40	---	---	---	---	---	---	---	---	-158	-158	-158	-158
b. Revenue effects	DOE	3	11	22	41	41	27	8	---	---	---	---	118	145	153	153

Provision	Effective	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2009-13	2009-14	2009-18	2009-19
2. Study of economic, employment and related effects of this Act	DOE	*No Revenue Effect*														
Total of Revenue Provisions in Title I. [3]		**-68,167**	**-158,328**	**-47,878**	**11,142**	**6,970**	**2,779**	**-741**	**-3,295**	**-4,921**	**-5,796**	**-6,396**	**-256,264**	**-253,483**	**-268,242**	**-274,643**
Revenue Provision in Title III. - Premium Assistance for COBRA Continuation Coverage for Individuals and Their Families [3] [9] [10]	**mocbo/a DOE**	**-13,843**	**-11,833**	**-2,844**	**-135**	**---**	**---**	**---**	**---**	**---**	**---**	**---**	**-28,655**	**-28,655**	**-28,655**	**-28,655**
NET TOTAL OF STIMULUS PROVISIONS [3]		**-82,010**	**-170,161**	**-50,722**	**11,007**	**6,970**	**2,779**	**-741**	**-3,295**	**-4,921**	**-5,796**	**-6,396**	**-284,919**	**-282,138**	**-296,897**	**-303,298**
Clarification of Regulations Related to Limitations on Certain Built-in Losses Following an Ownership Change	**tstbc eia 1/16/09**	**1,437**	**1,775**	**646**	**261**	**225**	**304**	**419**	**457**	**470**	**484**	**499**	**4,344**	**4,647**	**6,478**	**6,977**

Joint Committee on Taxation

NOTE: Details may not add to totals due to rounding.

Legend for "Effective" column:

DOE = date of enactment
ei = expenditures in
eia = entered into after
hpo/a = houses purchased on or after
mocbo/a = months of coverage beginning on or after
oia = obligations issued after
pa = periods after
ppisa = property placed in service after
tstbc = transactions subject to binding contracts
tyba = taxable years beginning after
tybi = taxable years beginning in

[Footnotes for the Table appear on the following page]

Footnotes for the Table:

[1] Revenue estimates are prepared using our 2009 estimating models, which rely on the Congressional Budget Office's January 2009 macroeconomic forecasts. The Congressional Budget Office plans to prepare a March revision to its baseline macroeconomic assumptions. If large-scale stimulus legislation is enacted early in 2009, the Congressional Budget Office's March 2009 revised macroeconomic forecasts could be expected to differ, perhaps significantly, from their January 2009 counterparts. In that case, we anticipate that we would revise our 2009 estimating models to reflect the Congressional Budget Office's March 2009 macroeconomic forecasts: revenue estimates prepared using these revised March 2009 macroeconomic inputs again could differ, perhaps materially, from revenue estimates of the same request using our 2009 models with January 2009 macroeconomic forecasts.

[2] Estimated outlay effects as a result of U.S. possessions provision provided by the Joint Committee on Taxation in consultation with the Congressional Budget Office.

[3] Estimate includes an increase in outlays:	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2009-13	2009-14	2009-18	2009-19
Making work pay credit and treatment of U.S. Possessions	641	23,330	22,501	---	---	---	---	---	---	---	---	46,472	46,472	46,472	46,472
Earned income credit	---	2,157	2,125	---	---	---	---	---	---	---	---	4,282	4,282	4,282	4,282
Child tax credit	---	9,256	9,016	---	---	---	---	---	---	---	---	18,272	18,272	18,272	18,272
American Opportunity Credit	313	1,630	1,508	---	---	---	---	---	---	---	---	3,451	3,451	3,451	3,451
First-time homebuyer credit	-22	-65	---	---	---	---	---	---	---	---	---	-87	-87	-87	-87
Taxable bond option	51	292	368	327	320	314	308	302	296	290	284	1,358	1,672	2,868	3,152
Recovery zone bonds	189	252	336	336	334	332	330	327	324	321	317	1,447	1,779	3,081	3,398
Low-income housing credit grants	3,009	---	---	---	---	---	---	---	---	---	---	3,009	3,009	3,009	3,009
Section 48 grants	30	88	40	---	---	---	---	---	---	---	---	158	158	158	158
COBRA	---	820	280	135	---	---	---	---	---	---	---	1,235	1,235	1,235	1,235
Total increase in outlays	4,211	37,760	36,174	798	654	646	638	629	620	611	601	79,597	80,243	82,741	83,342

[4] Loss of less than $500,000.

[5] Estimate includes interaction with Making Work Pay Credit and Additional Tax Relief for Families With Children.

[6] Effective for net operating losses generated in either taxable years ending in 2008 and 2009 or taxable years beginning in 2008 and 2009.

[7] Effective for individuals who begin work for an employer after December 31, 2008.

[8] Estimated outlay effects provided by the Congressional Budget Office.

[9] Estimate does not include outlay effects of the related Medicaid provision which will be provided by the Congressional Budget Office.

[10] We estimate that approximately 7 million people, including COBRA policyholders and their dependents, would benefit from this credit for some portion of 2009.

B. Statement Regarding New Budget Authority and Tax Expenditures Budget Authority

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee states that the bill involves no new or increased budget authority. The Committee further states that the revenue-reducing tax provisions involve increased tax expenditures.

C. Macroeconomic Impact Analysis

In compliance with clause 3(h)(2) of rule XIII of the Rules of the House of Representatives, the staff of the Joint Committee on Taxation provides the following macroeconomic analysis of the tax provisions in H.R. 598, the "American Recovery and Reinvestment Tax Act of 2009," that amends the Internal Revenue Code of 1986.

Framework and summary

According to the National Bureau of Economic Research, the economy has been in a period of negative growth and growing unemployment, or recession, since December 2007. The Congressional Budget Office has projected that under present law, the economy (as measured by gross domestic product) will decline by 2.2 percent in 2009, and the unemployment rate would grow from an average of 5.7 percent in 2008 to 8.3 percent in 2009 and 9.0 percent in 2010.[157] In a recession, unemployment grows because consumers reduce their purchases of goods and services, and businesses respond by reducing their production.

Consistent with the current economic environment, the tax provisions in H.R. 598 were primarily designed to promote short-term stimulus, or increase in demand for goods and services. The bill includes a number of changes to the individual income tax, most of them temporary, and most of them changing average tax rates more than marginal tax rates. The largest of these is the "making work pay" tax credit of 6.2 percent of earnings up to $500 per single filer and $1,000 for joint filers. We estimate that the changes in the individual income tax would decrease the income-weighted average individual income tax rate by one percentage point (to approximately 10.9 percent in 2009 and 11.0 percent in 2010). The income-weighted average tax rate for individuals after 2010 is essentially unchanged from present law. In contrast, because of interactions with phase-outs of credits and deductions, H.R. 598 has small increases in average marginal rates for 2009 and 2010. For example, the income weighted average marginal tax rate on wage income increases from 23.5 percent to 23.9 percent in 2009.

These reductions in individual tax liability result in more disposable income for individuals, and thus may be expected to increase their consumption. The increase in consumption is expected to create an improved market for more goods and services, thus increasing firms' incentive to hire more workers, and generating additional output and employment. To the extent that the provisions increase the marginal tax rate on earnings, they may provide nega-

[157] Congressional Budget Office, the Budget and Economic Outlook, Fiscal Years 2009 to 2019, January 8, 2009, p. 3.

tive incentives for the individuals to work. As indicated by the rate changes enumerated above, H.R. 598 is expected to produce very little change in marginal tax rates. In the current economy with high unemployment, it is unlikely that this effect would be significant.

The bill also includes some temporary tax cuts for businesses designed to augment their ability to respond to this increased demand. The largest of these are the one-year bonus depreciation provision, a three year extension of production credits for certain renewable energy facilities, and the two year provision to allow a five-year carryback for the deduction of net operating losses. The combined effects of the changes to corporate and other business taxes is to temporarily reduce average tax rates on businesses by about 5 percentage points in 2009. Marginal tax rates are reduced by a considerably smaller amount, about 1 percentage point in 2009. In subsequent years, the effect is reversed. The reduction of average tax rates for businesses does not provide a direct incentive for a permanent increase in the business capital stock, but may provide businesses with needed liquidity in a time when investment capital is extremely expensive.

Finally, there are several provisions to provide various forms of tax-favored financing for the development of public and private infrastructure and housing. These provisions enter our analysis through their effects on average and marginal tax rates on capital for individual and businesses providing financing through these vehicles. The analysis does not incorporate the effects of these provisions on the activities financed by the instruments created.

Overall, the tax provisions in H.R. 598 have the potential to increase GDP by 0.3 to 0.8 percent and employment by 0.3 to 0.8 percent at their peak period of effectiveness in the fourth quarter of 2010. Effects decline rapidly after that. The range in estimated effects of these tax proposals on short-run growth derives primarily from uncertainty as to what portion of their increased disposable income consumers would spend. More details on these effects appear below in Tables 1–3. Each table corresponds to a different assumed tendency to spend, or "marginal propensity to consume" out of the disposable income generated by the tax cuts. The effects described above are only those attributable to the tax portions of H.R. 598; this analysis does not attempt to estimate the effects of government spending provisions on the economy. It is also important to note that these projected "increases" are relative to what GDP and employment would have been without the stimulus, not relative to their levels today. Because GDP and employment are projected to fall under present law, an increase in output and employment due to the stimulative effects of the tax title of H.R. 598 could still be associated with an overall decline in output and employment.

Modeling the stimulus proposal

In earlier analyses of the macroeconomic effects of various tax proposals, the Joint Committee staff has relied on several different models to simulate the short and long term growth effects of various tax proposals. These include the Joint Committee's Macroeconomic Equilibrium Growth model ("MEG"), an overlapping gen-

erations model,[158] and in one recent analysis, a dynamic stochastic general equilibrium model.[159]

Developmental work that Joint Committee staff has done with all of these models has been targeted at improving their ability to simulate the long-term growth effects of different types of tax policy. Long-term growth effects in these models are generated by incentives provided to individuals to supply labor and capital to the economy, and by willingness of firms to use the labor and capital to produce. During a recession, it is not clear how important these effects might be in promoting growth; they will depend in part on whether the stimulus creates a demand for the services of these workers. Because the overlapping generations and dynamic stochastic equilibrium models are constructed to simulate an economy that is always at full employment, these models are not helpful in analyzing the short-term effects of policies designed to provide stimulus to an economy that is in a recession.

In contrast, the MEG model is designed to allow simulations of policy in an economy with less than full employment in addition to simulating longer-run growth incentives, and therefore it is the model used for the purpose of this analysis.

JCT staff typically provides a range of possible macroeconomic outcomes, depending on variations in monetary and fiscal policy, and occasionally in the responsiveness of individuals to the incentives provided in the policy, particularly in the desire of potential workers to change the amount of labor they wish to supply in response to changes in marginal tax rates on labor compensation. In the current situation, there is little uncertainty about monetary policy response. The Federal Reserve Board is fully accommodating all stimulus policies. Joint Committee staff simulations assume fully accommodating monetary policy, both in the baseline simulations and policy alternative simulations. Nevertheless, private sector interest rates are assumed to be high through 2010, reflecting the current credit crunch in the economy. Since the perfect foresight general equilibrium models are not being used in this analysis, there is no need to make assumptions about future fiscal policy that would be necessary to bring the path of Government debt into a stable pattern. In addition, because changes in marginal tax rates generated by this policy are low, the responsiveness of individuals to labor incentives is also of small importance to the results. Consequently, the range of outcomes presented below is generated by assumed differences in the portion of the tax reduction consumers can be expected to spend.

Results

The three simulations below show the estimated effects of the tax policy in H.R. 598 on GDP, the capital stock, and employment under different assumptions about consumers' spending out of their

[158] Descriptions of the macroeconomic equilibrium growth model and the overlapping generations model may be found in Joint Committee on Taxation, Overview of the Work of the Staff of the Joint Committee on Taxation to Model the Macroeconomic Effects of Proposed Tax Legislation to Comply with House Rule XIII.3(h)(2), JCX–105–03, December 22, 2003, pp. 10–12.

[159] The dynamic stochastic general equilibrium model is described in Joint Committee on Taxation, Background Information about the Dynamic Stochastic General Equilibrium Model Used by the Staff of the Joint Committee on Taxation in the Macroeconomic Analysis of Tax Policy, JCX–52–06, December 14, 2006.

increased disposable income. The simulation shown on Table 1 assumes that consumers spend the additional income due to the tax reduction in roughly the same proportion that they typically spend disposable income. Table 2 shows the results of assuming that consumers would spend a lower portion of the tax reduction because the tax cuts are temporary, and individuals tend to spend a smaller portion of temporary tax cuts than of permanent tax cuts. And Table 3 shows the results of assuming that recipients of the tax reduction would spend 50 percent more of the proceeds of the tax reduction relative to consumption out of overall income—based on the premise that the tax cuts are concentrated among lower income earners, who tend to spend larger shares of their income.

TABLE 1.—EFFECTS OF TAX PROVISIONS OF H.R. 598 ON ECONOMY ASSUMING FULL CONSUMPTION RESPONSE

	Percent change relative to baseline	
	2009–2014	2010: Q4
GDP Change:		
Real	0.1%	0.5%
Nominal	0.7%	1.1%
Capital Stock, Real:		
Total capital	−0.2%	−0.0%
Producer's Capital	−0.2%	0.0%
Residential Capital	−0.1%	−0.1%
Real Consumption	0.2%	0.8%
Employment	0.1%	0.6%
Revenue Increase as Percent of Conventional Revenue Estimate	12%	

At the peak of the stimulus effect, in the fourth quarter of 2010, consumption is increased by .8 percent, real Gross Domestic Product ("GDP") is increased by 0.5 percent, and employment by .6 percent relative to what they would have been without the tax stimulus. The growth effects of the stimulus decline quickly once most of the tax changes have expired, so that on average during the period from 2009–2014, consumption increases by just 0.3 percent, real GDP by 0.1 percent, and employment by 0.2 percent. Producers' capital stock is increased by less than 0.1 percent at the peak, and reduced on average over the five-year period. This pattern is consistent with the theory that temporary bonus depreciation and other business tax cuts are more likely to change the timing of investment than the total level of investment. In addition, the decline in producers' capital stock indicates the beginnings of crowding out effects on private investment due to growing government debt. The growth during this period generates a revenue feedback of 12 percent, relative to the cost of the tax provisions as estimated using conventional revenue analysis. The MEG model simulation indicates that in the years beyond this period, the effects of growing Federal government debt start to reverse the effects of the stimulus. However, this result may not fully take into account the role of the stimulus in restoring the economy to a more stable growth path.

TABLE 2.—EFFECTS OF TAX PROVISIONS OF H.R. 598 ON ECONOMY ASSUMING REDUCED CONSUMPTION RESPONSE

	Percent change relative to baseline	
	2009–2014	2010: Q4
GDP Change:		
Real	0.0%	0.3%
Nominal	0.4%	0.7%
Capital Stock, Real:		
Total capital	−0.1%	0.0%
Producer's Capital	−0.1%	0.1%
Residential Capital	−0.1%	−0.1%
Real Consumption	0.1%	0.5%
Employment	0.1%	0.3%
Revenue Increase as Percent of Conventional Revenue Estimate	7%	

Assuming that consumers spend additional disposable income out of the tax cut at roughly half the rate they normally would, the stimulus effects are significantly reduced. At the peak of the stimulus effect, in the fourth quarter of 2010, consumption is increased by 0.5 percent, real Gross Domestic Product ("GDP") is increased by 0.3 percent, and employment by 0.3 percent relative to what they would have been without the tax stimulus. The growth effects of the stimulus decline quickly once most of the tax changes have expired, so that on average during the period from 2009–2014, consumption increases by just 0.1 percent, real GDP by less than 0.1 percent, and employment by 0.1 percent. Again, producers' capital stock is increased by less than 0.1 percent at the peak, and reduced on average over the five-year period. The growth during this period generates a revenue feedback of 7 percent, relative to the cost of the tax provisions as estimated using conventional revenue analysis. Again, the MEG model simulation indicates that in the years beyond this period, the effects of growing Federal government debt start to reverse the effects of the stimulus fairly quickly.

TABLE 3.—EFFECTS OF TAX PROVISIONS OF H.R. 598 ON ECONOMY ASSUMING INCREASED CONSUMPTION RESPONSE

	Percent change relative to baseline	
	2009–2014	2010: Q4
GDP Change:		
Real	0.1%	0.8%
Nominal	0.9%	1.5%
Capital Stock, Real:		
Total capital	−0.2%	−0.1%
Producer's Capital	−0.3%	−0.1%
Residential Capital	−0.1%	−0.1%
Real Consumption	0.3%	1.2%
Employment	0.2%	0.8%
Revenue Increase as Percent of Conventional Revenue Estimate	17%	

Assuming that spending out of the tax-induced increase in disposable income is 50 percent higher than average spending, the stimulus effects of the bill are increased. At the peak of the stimulus effect, in the fourth quarter of 2010, consumption is increased by 1.2 percent, real Gross Domestic Product ("GDP") is increased by .8 percent, and employment by 0.8 percent relative to what they

would have been without the tax stimulus. The growth effects of the stimulus decline quickly once most of the tax changes have expired, so that on average during the period from 2009–2014, consumption increases by just 0.3 percent, real GDP by 0.1 percent, and employment by .8 percent. This simulation illustrates the trade-off between short-term stimulus and investment. With the increased consumption out of disposable income, savings are reduced, and investment in producers' capital actually declines by 0.1 percent in the fourth quarter of 2010, and by 0.3 percent in the first five years. As with the other simulations, in later years, the growth in government debt leads to increasing crowding out of private activity. The growth during this period generates a revenue feedback of 17 percent, relative to the cost of the tax provisions as estimated using conventional revenue analysis.

Conclusion

The modeling of short- and long-run responses of the economy to fiscal stimulus in the current economic environment is subject to a substantial amount of uncertainty. The results are sensitive to assumptions about how much of their increased disposable income consumers choose to spend rather than save, as discussed above. In addition, most macroeconomic simulation models are not structured to account for the types of factors that led to our current economic condition; for example, it is difficult to ascertain how large an asset bubble is, how much leveraging is behind it, and when it will burst before the fact. Much judgment was required to create simulations in the MEG model that roughly approximate current economic conditions so that the impact of the policy could be analyzed. Subject to these considerations, the Joint Committee staff estimates that the tax provisions in H.R. 598 would result in a short-term increase in gross domestic product and employment ranging from approximately 0.3 to 0.8 percent (from 300,000 to 900,000 full-time equivalent jobs) at the tax stimulus peak of the fourth quarter of 2010, with five-year effects ranging from near zero to 0.1 percent increase in GDP, and 0.1 to 0.2 percent increase in employment, relative to what these variables would have been without the stimulus. Beyond the five year period, the effects of growing government debt on interest rates and the availability of private capital could be expected to reduce growth.

V. OTHER MATTERS TO BE DISCUSSED UNDER THE RULES OF THE HOUSE

A. Committee Oversight Findings and Recommendations

With respect to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives (relating to oversight findings), the Committee advises that it is appropriate and timely to enact the revenue provision included in the bill as reported.

B. Statement of General Performance Goals and Objectives

With respect to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee advises that the bill contains no measure that authorizes funding, so no statement of gen-

eral performance goals and objectives for which any measure authorizes funding is required.

C. Constitutional Authority Statement

With respect to clause 3(d)(1) of the rule XIII of the Rules of the House of Representatives (relating to Constitutional Authority), the Committee states that the Committee's action in reporting this bill is derived from Article I of the Constitution, Section. 8 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . ."), and from the 16th Amendment to the Constitution.

D. Information Relating to Unfunded Mandates

This information is provided in accordance with section 423 of the Unfunded Mandates Act of 1995 (Pub. L. No. 104–4).

The Committee has determined that the tax provisions of the bill contain one private sector mandate: Clarification of regulations related to limitations on certain built in losses following an ownership change. The costs required to comply with each Federal private sector mandate generally are no greater than the aggregate estimated budget effects of the provision. Benefits from the provisions include improved administration of the tax laws and a more accurate measurement of income for Federal income tax purposes.

The Committee has determined that the tax provisions of the reported bill contain no intergovernmental mandates within the meaning of Public Law 104–4, the Unfunded Mandates Reform Act of 1995.

E. Applicability of House Rule XXI 5(b)

Clause of rule XXI of the Rules of the House of Representatives provides, in part, that "A bill or joint resolution, amendment, or conference report carrying a Federal income tax rate increase may not be considered as passed or agreed to unless so determined by a vote of not less than three-fifths of the Members voting, a quorum being present." The Committee has carefully reviewed the provisions of the bill, and states that the provisions of the bill do not involve any Federal income tax rate increases within the meaning of the rule.

F. Tax Complexity Analysis

Section 4022(b) of the Internal Revenue Service Reform and Restructuring Act of 1998 (the "IRS Reform Act") requires the staff of the Joint Committee on Taxation (in consultation with the Internal Revenue Service and the Treasury Department) to provide a tax complexity analysis. The complexity analysis is required for all legislation reported by the Senate Committee on Finance, the House Committee on Ways and Means, or any committee of conference if the legislation includes a provision that directly or indirectly amends the Internal Revenue Code and has widespread applicability to individuals or small businesses. For each such provision identified by the staff of the Joint Committee on Taxation a summary description of the provision is provided along with an es-

timate of the number and type of affected taxpayers, and a discussion regarding the relevant complexity and administrative issues.

Following the analysis of the staff of the Joint Committee on Taxation are the comments of the IRS and Treasury regarding each of the provisions included in the complexity analysis.

1. Make work pay credit

Summary description of the provision

The provision creates a refundable tax credit for taxable years beginning in 2009 and 2010 equal to the lesser of (1) 6.2 percent of an individual's earned income or (2) $500 ($1,000 in the case of a joint return). The credit is phased out at a rate of four percent of the eligible individual's modified adjusted gross income above $75,000 ($150,000 in the case of a joint return).

Number of affected taxpayers

It is estimated that the provision will affect in excess of 100 million individual tax returns.

Discussion

The provision will require additional paperwork for taxpayers and additional processing burdens for IRS. It is expected that taxpayers will need to complete additional worksheets and or forms to compute the amount of the credit. Taxpayers may also wish to adjust their income tax withholding by filing the appropriate forms before the end of 2009. The IRS is anticipated to revise income tax withholding schedules and publish new schedules. These revised income tax withholding schedules should be designed to reduce taxpayers' income tax withheld for each remaining pay period in the remainder of 2009 so that the full benefit of the provision is reflected in the income tax withholding schedules during the balance of 2009.

2. Special allowance for certain property acquired during 2009

Summary description of the provision

The provision extends the additional first-year depreciation deduction under section 168(k) for one year, generally through 2009 (through 2010 for certain longer-lived and transportation property).

Number of affected taxpayers

It is estimated that more than 10 percent of small businesses will be affected by the provision.

Discussion

It is not anticipated that small businesses will have to keep additional records due to this provision, nor will additional regulatory guidance be necessary to implement this provision. It is not anticipated that the provision will result in an increase in disputes between small businesses and the IRS. However, small businesses will have to perform additional analysis to determine whether property qualifies for the provision. In addition, for qualified property, small businesses will be required to perform additional cal-

culations to determine the proper amount of allowable depreciation. Complexity may also be increased because the provision is temporary. For example, different tax treatment will apply for identical equipment based on the acquisition and placed in service date. Further, the Secretary of the Treasury is expected to have to make appropriate revisions to the applicable depreciation tax forms.

3. Premium assistance for COBRA benefits

Summary description of the provision

The provision reimburses employers providing COBRA continuation health coverage to employees to the extent of 65 percent of the premium amount and requires the eligible individual to pay 35 percent of the premium. The program is mandatory for employers required to offer COBRA continuation health coverage. Eligible individuals must have a qualifying event between September 1, 2008 and December 31, 2009, and must have been terminated involuntarily. Employers will reduce payroll taxes in the amount of 65 percent of the premium for all eligible individuals who opt into the provision, or will be reimbursed directly through a program established by the Department of Treasury. COBRA continuation health coverage for this purpose includes not only coverage that applies to private, nongovernmental employers with 20 or more employees (and the parallel ERISA rules) but also coverage rules that apply to Federal and State and local governmental employers pursuant to Federal law and to State law mandates that apply to small employers (employers with less than 20 employees) and other employers not covered by Federal law, provided that such State law mandates require an employer or other entity to offer comparable continuation health coverage. The social security trust fund is held harmless from payroll tax offsets that are permitted under the program.

Number of affected taxpayers

It is estimated that more than 10 percent of small businesses will be affected by the provision.

Discussion

This provision will require additional processing by the IRS in two areas; accounting and enforcement. First, for all firms with employees eligible, the firm must deduct that amount from their payroll taxes, so IRS must be aware of the number of employees eligible for the reimbursement and the average premium at the firm to properly assess the amount of the deduction from payroll taxes. The Department of Treasury must then transfer the appropriate amount of funds back into the social security trust fund. All employers bound by COBRA or COBRA-type legislation described above and who terminate individuals from employment between September 1, 2008 and December 31, 2009 are affected by this provision.

Second, the IRS must create rules and regulations to prevent fraud and abuse of this provision. For example, taxpayers may be required to provide evidence of eligibility for the subsidy including evidence of involuntary separation from work, which can include

attestation from the former employer or certification from state unemployment insurance agencies. If a premium assistance eligible individual becomes eligible for other group coverage while receiving premium assistance, that individual must forfeit the subsidy or face a penalty.

G. LIMITED TAX BENEFITS

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
Washington, DC, January 27, 2009.

Mr. EDWARD D. KLEINBARD,
Chief of Staff, Joint Committee on Taxation,
Washington, DC.

DEAR MR. KLEINBARD: Enclosed are the combined comments of the Internal Revenue Service and the Treasury Department for the Committee Report of the "American Recovery and Reinvestment Tax Act of 2009." Our complexity analysis is for inclusion in the complexity analysis in the report for the bill. Our analysis covers the three provisions that you preliminarily identified in your letter dated January 27, 2009: the making-work pay credit, the special allowance for certain property acquired during 2009, and premium assistance for COBRA benefits and extension of COBRA benefits for older or long-term employees.

Our comments are based on the description of the provision provided in your letter, and the statutory language and description of this provision in the "American Recovery and Reinvestment Tax Act of 2009" (H.R. 598). Due to the short turnaround time, our comments are provisional and subject to change upon a more complete and in-depth analysis of the provision.

Sincerely,

DOUGLAS SHULMAN,
Commissioner.

Enclosure.

COMPLEXITY ANALYSIS OF THE AMERICAN RECOVERY AND REINVESTMENT TAX ACT OF 2009 (H.R. 598)

1. MAKING WORK PAY CREDIT

Provision

The bill provides a refundable tax credit equal to the smaller of 6.2% of earned income or $500 ($1,000 in the case of a joint return), effective for tax years beginning after 2008 and before 2011. The credit is reduced (but not below zero) by 2% of the modified adjusted gross income in excess of $75,000 ($150,000 if married filing jointly).

IRS/Treasury comments

- New withholding rate schedules and tables would be required to permit employers to adjust withholding and assure that most of the benefits of the credit are provided to taxpayers on a current basis.

• For 2009, a new 9-line form would be developed to figure and claim the credit.

• The 2009 Form 1040, 1040A, and 1040EZ and their instructions would be revised to reflect the new credit form. A new line would be added to these forms to enter the amount of the credit.

• Programming changes would be required to reflect the new credit form.

• The 2009 Publications 505 and 919 would be revised to explain how taxpayers can use the credit to increase their 2009 withholding allowances and thereby decrease their 2009 withholding.

• Training of IRS employees would be necessary and the Internal Revenue Manual would require revisions.

2. Special Depreciation Allowance for Certain Property Acquired During 2009

Provision

The bill extends the additional first-year depreciation deduction equal to 50% of the adjusted basis of qualified property. Qualified property is defined in the same manner as provided by the Economic Stimulus Act of 2008 (P.L. 110–185, H.R. 5140), except that the applicable time period for acquisition (or self-construction) of the property is modified to include property acquired (or constructed) during 2009 (and in certain cases, 2010).

IRS/Treasury comments

• The extension of the time period for property eligible for additional first-year depreciation would have no significant impact on Form 4562 or any other tax forms. The Instructions for Form 4582, Publication 946, and other instructions and publications would be revised to reflect the extension.

• No programming changes would be required by this provision.

3. Premium Assistance for COBRA Benefits and Extension of COBRA Benefits for Older or Long-Term Employees

Provision

The bill reimburses employers providing COBRA continuation health coverage to employees to the extent of 65% of the premium amount and requires the eligible individual to pay 35% of the premium. The program is mandatory for employers required to offer COBRA continuation health coverage. Eligible individuals must have a qualifying event between September 1, 2008 and December 31, 2009, and must have been terminated involuntarily. Employers will reduce payroll taxes in the amount of 65% of the premium for all eligible individuals who opt into the provision, or will be reimbursed directly through a program established by the Department of Treasury. COBRA continuation health coverage for this purpose includes not only coverage that applies to private, nongovernmental employers with 20 or more employees (and the parallel ERISA rules) but also coverage rules that apply to Federal and State and local governmental employers pursuant to Federal law and to State law mandates that apply to small employers (employers with less than 20 employees) and other employers not covered by Federal

law, provided that such State law mandates require an employer or other entity to offer comparable continuation health coverage. The social security trust fund is held harmless from payroll tax offsets that are permitted under the program.

IRS/Treasury comments

- For the 2009 1st quarter Forms 941, 941–SS, and 941–PR, three lines would be added to enter the aggregate amount of employer payments, the number of individuals provided the premium assistance, and a total line.
- For the 2009 2nd quarter Forms 941–X and 941–X (PR) (new returns used to amend previously filed Forms 941 and 941–PR, respectively), three corresponding lines would also be added.
- The annual 2009 Forms 943, 944, 944–SS, 944–X, 944–PR, 944–X (PR), & 945 would be revised by adding lines to capture the aggregate amount of employer payments and the number of individuals provided the premium assistance, plus an additional total line if necessary.
- Substantial programming and processing changes would be required to allow for the new lines and to capture the aggregate amount of employer payments and number of individuals provided the premium assistance for reporting purposes. Given the substantive nature of the changes and the short time frame between introduction/passage of this legislation and the first available filing date for Form 941 (April 1, 2009), the IRS has already begun preparing for the necessary form, instruction, printing, mailing, programming, and processing changes.
- Training of IRS employees would be necessary and the Internal Revenue Manual would require revisions.

VI. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In the opinion of the committee, in order to expedite the business of the House of Representatives, it is necessary to dispense with the requirements of clause 3(e) of rule XIII of the Rules of the House of Representatives (relating to showing changes in existing law made by the bill as reported).

DISSENTING VIEWS

I. Overview

It is obvious that many American families and businesses are facing significant economic and financial challenges. The best way to help American employers through these rough times is to promote private sector job growth.

We were hopeful that we could work with our colleagues to craft, in the words of President Obama, "American Solutions" to these difficult challenges. Unfortunately, House Democrats were nearly monolithic in rejecting our suggestions and instead advanced a partisan proposal that relies heavily on expanding the government and "spreading the wealth."

II. Questions About Job Creation and Economic Growth

We were disappointed the Committee did not hold a hearing on this bill, as it would have provided us an opportunity to better understand the impact a bill of this size and shape would have on the economy.

A study by advisors to President Obama was mentioned by the Majority to support their view that the bill would result in substantial job creation. But even if all of that report's estimates turn out to be correct (and the authors noted they are "subject to significant margins of error"), the Democrats will spend roughly $210,000 for each job "saved or created."

We are not alone in our concerns about those claims; Senate Budget Committee Chairman Kent Conrad said he thought the bill could produce only half the number of jobs promised.

III. Missed Opportunities in the Tax Title

The bill does include a few business-related tax provisions that Republicans have long supported, such as an extension of the enhanced bonus depreciation and small business expensing rules that were originally enacted as part of last year's stimulus package. And even as modified by the Chairman's amendment at the mark-up, the expanded five-year carryback rules for net operating losses would provide many previously profitable companies the opportunity to seek immediate refunds of past taxes paid, giving them critical cash infusions that would help them weather the current economic storm.

Regrettably, however, these important incentives for the businesses that create good jobs for American workers represent a tiny fraction—only 7%—of the Majority's $275 billion tax title over the 2009–2019 period.

We are particularly troubled by the so-called "Making Work Pay" provision. Capped at $500 per individual and $1,000 per family, the

provision is advertised by the Majority as a means of offsetting a portion of workers' payroll taxes, because it allows people to receive a check back from the IRS in excess of their income taxes paid.

In reality, however, the Making Work Pay provision would increase the number of tax filers receiving more in checks from the IRS than they actually pay in income and payroll taxes *combined* from 15 million in current law to approximately 20 million. While Republicans have long supported efforts to provide tax relief to actual taxpayers at all income levels, it strains logic to call this aspect of the Making Work Pay provision "tax relief."

During the mark-up, Ranking Member Camp offered an amendment that would have replaced the Making Work Pay section with a reduction in the two lowest marginal income tax rates in 2009 and 2010, providing real tax relief to all American workers who pay income taxes. Regrettably, this amendment was defeated on a party-line vote.

Another Republican effort to provide additional middle-class tax relief—this time an amendment by Mr. Brady to add the AMT "patch"—fell short on a similar, party-line vote. We certainly hope the Majority's failure to include the patch is not a sign that Democrats are returning again to the discredited view that the AMT patch should only be enacted if it is paired with unnecessary, job-killing tax increases. Other Republican amendments would have meaningfully addressed the everyday economic challenges facing many Americans during these difficult times were also rejected on party-line votes, including one by Mr. Johnson to temporarily exclude from income the value of unemployment benefits.

IV. Assistance for the Unemployed

While the Majority would like to focus attention on the bill's extension of unemployment benefits, there are other provisions that would benefit from further examination.

For instance, the measure offers States a one-time payoff of up to $7 billion in Federal funds if they make permanent changes to their unemployment benefits laws. We raised concerns that the long-term effect would be to drain state unemployment funds, leading to future payroll tax increases.

In contrast with this flawed attempt at "modernization," Republicans offered two amendments that would have resulted in significant payroll tax relief, a fairer distribution of benefits among States, and a far better chance States might choose to cover more workers in need during the recession.

Mr. Linder, the Ranking Republican on the Income Security and Family Support Subcommittee, offered an amendment that would force States to ensure that unemployed individuals who have the most difficulty finding new jobs, including younger individuals without a high school diploma, use their time on unemployment to make progress toward a GED or getting retraining to help them find better jobs sooner. That amendment, too, was defeated by the Majority.

V. Health Provisions of Concern

A. COBRA

COBRA allows many unemployed workers to continue their health insurance coverage for up to 18 months, but only if they pay 102% of the cost of premiums. This bill would waive the 18 month COBRA coverage limit for those who have worked for an employer for 10 years or more or who are aged 55 and older.

While appearing relatively harmless on its face, the COBRA expansion could threaten the ability of employers to offer health insurance to their current employees. That is COBRA experiences adverse selection, meaning those who expect to use the benefits regularly are the ones who opt to pay the costly premiums. That is why employers report that COBRA participants actually cost 150% as much as the average employee.

Additionally, by allowing individuals to enroll in COBRA at age 55, this bill turns COBRA into a pre-Medicare health entitlement. Not surprisingly, given the age of these individuals, employers expect these enrollees would incur even higher health care costs than current employees or typical COBRA enrollees. Though paying 102% of premiums, near-retirees on COBRA actually cost employers, according to one examination, about 185% of premiums paid. Covering the difference will impose substantial financial burdens on employers, something we should do cautiously in such a rocky time for so many of them.

We were thus surprised the Majority defeated—on a party line basis—an amendment offered by Ms. Brown-Waite to have the GAO examine, among other things, the impact these changes would have on employers' health care costs.

B. HEALTH IT

The legislation funds substantial new spending on incentive payments to physicians and hospitals to purchase health information technology (HIT) equipment and software. We share the goal of wanting to bring health care into the 21st Century through the adoption of HIT and away from the inefficiencies associated with paper records.

However, we are concerned that such software is not yet ready to ensure electronic health information can be seamlessly transferred between physician offices and hospitals. The purchase of such non-interoperable equipment and software could turn this into truly wasted spending. To address that concern, Mr. Reichert offered an amendment to delay these payments until interoperability standards have been approved and certified. Despite the Majority's recognition of this risk, they summarily rejected this amendment.

Moreover, even if the necessary standards are promulgated quickly, the HIT spending will not occur until 2011, calling into question whether this will provide immediate stimulus to the economy.

C. ADMINISTRATIVE BURDENS

We have significant concerns about the expansion of HIPAA privacy rules in this bill and question how expanding what the Na-

tional Governors Association called "one of the largest unfunded federal mandates in recent history" is viewed as stimulative.

Even more troubling, the HIPAA expansions threaten access to high-quality coordinated care, as well as health care research that will lead to future improvements and innovation. We were therefore disappointed the Majority rejected an amendment by Mr. Boustany to study this issue before further extending the long tentacles of HIPAA.

D. COMPARATIVE EFFECTIVENESS RESEARCH

While not written into the jurisdiction of the Ways and Means Committee, a provision to fund comparative effectiveness research could substantially impact Medicare and its beneficiaries. While this research does hold real promise, we are concerned it could be used to deny seniors access to needed care on the basis of cost or a patient's age.

The Appropriations Committee report language clearly anticipates that, as a result of this data, treatments "that are found to be less effective and in some cases, more expensive, will no longer be prescribed." An amendment offered by Mr. Boustany to ensure that treatment decisions remain in the hands of seniors and their physicians, not in the hands of federal bureaucrats, was rejected by the Majority.

VI. CONCLUSION

While our ideas and suggestions were met with near universal opposition in Committee, we remain committed to identifying American Solutions that will restore America's economic health.

This bill fell short of what we believe is needed and therefore we cannot support it.

DAVE CAMP.
WALLY HERGER.
SAM JOHNSON.
KEVIN BRADY.
PAUL RYAN.
ERIC CANTOR.
JOHN LINDER.
DEVIN NUNES.
PAT TIBERI.
GINNY BROWN-WAITE.
GEOFF DAVIS.
DAVE REICHERT.
CHARLES BOUSTANY.
DEAN HELLER.
PETER ROSKAM.

ADDITIONAL DISSENTING VIEWS OF REP. SAM JOHNSON

HEALTH INFORMATION TECHNOLOGY

With regard to the health information technology (HIT) provisions, I have a number of concerns that differ from the views already expressed by the Minority.

As I stated in committee, I believe HIT has a very important role in transforming our healthcare delivery system. However, I believe how the federal government inserts itself into this industry has very real consequences. More doctors should be buying and using technology to revolutionize their offices and patient care. However, this provision spends too much money. The majority hopes if they just spend enough, it might make a difference.

The reality is that the average cost of an HIT system in this country is $35,000 per doctor. Under this legislation, physicians could receive over $60,000 from the federal government simply because they purchased an HIT system that cost half that amount. Unfortunately, the majority doesn't include any restrictions on how physicians can spend the extra money. I am committed to ensuring that every penny, or as is the case with this legislation, every billion dollars, is spent efficiently and effectively. That is why I offered an amendment in committee that would replace these incentives in the majority's legislation with a provision that extends small business tax breaks to healthcare providers that purchase HIT systems.

Our healthcare system needs providers purchasing technology today, technology they choose that will help them coordinate the care of their patients and work to increase the quality of the entire system. I have concerns that provisions in the majority's legislation would take away a provider's ability to choose the best system for them and insert a government, one-size-fits-all solution. This legislation gives providers too many incentives to wait on the sidelines until they can receive a government check or handout instead of investing in lifesaving technology that is ready and working today.

SAM JOHNSON.

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