

STAFF DRAFT

110TH CONGRESS
2D SESSION

S.

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

IN THE SENATE OF THE UNITED STATES

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

A BILL

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 (2) CONFORMING AMENDMENTS.—

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

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

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

14 (b) APPLICATION TO SECTION 1256 CONTRACTS.—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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