Internal Revenue bulletin

Bulletin No. 2009-16
April 20, 2009

HIGHLIGHTS OF THIS ISSUE

These synopses are intended only as aids to the reader in identifying the subject matter covered. They may not be relied upon as authoritative interpretations.

INCOME TAX

Notice 2009–23, page 802.

Qualifying gasification project program. This notice updates the procedures for the allocation of credits for the qualifying gasification project program of section 48B of the Code and announces a beginning of an allocation round of credits for qualifying gasification projects. Notice 2007–53 clarified, modified, and amplified.

Notice 2009–24, page 817.

Qualifying advanced coal project program. This notice updates the procedures for the allocation of credits for the qualifying advanced coal project program under section 48A of the Code. The notice also announces the beginning of an allocation round of credits in the amount of $1.25 billion for qualifying advanced coal-based generation technology projects under Phase II of the qualifying advanced coal project program. Notice 2007–52 clarified, modified, and amplified.

Notice 2009–26, page 833.

This notice provides guidance on the new Build America Bonds under § 54AA of the Code and the modified Build America Bond program for Recovery Zone Economic Development Bonds under § 1400U–2 of the Code. The notice also includes guidance on the initial refundable credit payment procedures, required elections, and information reporting for these bonds. The notice also solicits public comments on the refundable credit payment procedures.

Notice 2009–29, page 849.

This notice sets forth the maximum face amount of qualified energy conservation bonds ("QECBs") that may be issued by each state and large local government under section 54D(e)(1) of the Code. The notice also provides limited regulatory guidance for QECBs.

Notice 2009–30, page 852.

This notice sets forth the maximum face amount of Qualified Zone Academy Bonds ("QZABs") that may be issued for each state for each of the calendar years 2008 and 2009 under section 54E(c)(2) of the Code. This notice also provides certain interim guidance for QZABs issued after October 3, 2008.

Rev. Proc. 2009–21, page 860.

Changes to cost-of-living adjustments for 2008 and 2009. This procedure reflects statutory amendments made by the Tax Extenders and Alternative Minimum Tax Relief Act of 2008 and the American Recovery and Reinvestment Tax Act of 2009. The Acts establish amounts that are to be used in certain sections of the Code in lieu of amounts that are adjusted annually for inflation. Parts of Rev. Procs. 2007–66 and 2008–66 modified and superseded.

Rev. Proc. 2009–22, page 862.

This procedure provides guidance to individuals who fail to meet the eligibility requirements of section 911(d)(1) of the Code because adverse conditions in a foreign country preclude the individual from meeting those requirements. A current list of countries for tax year 2008 and the dates those countries are subject to the section 911(d)(4) waiver is provided.

(Continued on the next page)

Finding Lists begin on page ii.

Department of the Treasury
Internal Revenue Service

EMPLOYEE PLANS

Notice 2009–27, page 838.

This notice provides guidance under section 3001 of the American Recovery and Reinvestment Act of 2009 relating to the premium reduction for individuals who were involuntarily terminated and are electing COBRA continuation coverage under the group health plan of their former employer.

Notice 2009–31, page 856.

Election and notice procedures for multiemployer plans under sections 204 and 205 of WRERA. This notice provides guidance for sponsors of multiemployer defined benefit plans relating to the elections described in sections 204 and 205 of the Worker, Retiree, and Employer Recovery Act of 2008, P.L. 110–458 (WRERA), and on the notice required to be provided if a plan sponsor makes an election under section 204.

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Provide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and by applying the tax law with integrity and fairness to all.

Introduction

The Internal Revenue Bulletin is the authoritative instrument of the Commissioner of Internal Revenue for announcing official rulings and procedures of the Internal Revenue Service and for publishing Treasury Decisions, Executive Orders, Tax Conventions, legislation, court decisions, and other items of general interest. It is published weekly and may be obtained from the Superintendent of Documents on a subscription basis. Bulletin contents are compiled semiannually into Cumulative Bulletins, which are sold on a single-copy basis.

It is the policy of the Service to publish in the Bulletin all substantive rulings necessary to promote a uniform application of the tax laws, including all rulings that supersede, revoke, modify, or amend any of those previously published in the Bulletin. All published rulings apply retroactively unless otherwise indicated. Procedures relating solely to matters of internal management are not published; however, statements of internal practices and procedures that affect the rights and duties of taxpayers are published.

Revenue rulings represent the conclusions of the Service on the application of the law to the pivotal facts stated in the revenue ruling. In those based on positions taken in rulings to taxpayers or technical advice to Service field offices, identifying details and information of a confidential nature are deleted to prevent unwarranted invasions of privacy and to comply with statutory requirements.

Rulings and procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations, but they may be used as precedents. Unpublished rulings will not be relied on, used, or cited as precedents by Service personnel in the disposition of other cases. In applying published rulings and procedures, the effect of subsequent legislation, regulations, court decisions, rulings, and procedures must be considered, and Service personnel and others concerned are cautioned against reaching the same conclusions in other cases unless the facts and circumstances are substantially the same.

The Bulletin is divided into four parts as follows:

Part I.—1986 Code.
This part includes rulings and decisions based on provisions of the Internal Revenue Code of 1986.

Part II.—Treaties and Tax Legislation.
This part is divided into two subparts as follows: Subpart A, Tax Conventions and Other Related Items, and Subpart B, Legislation and Related Committee Reports.

Part III.—Administrative, Procedural, and Miscellaneous.
To the extent practicable, pertinent cross references to these subjects are contained in the other Parts and Subparts. Also included in this part are Bank Secrecy Act Administrative Rulings. Bank Secrecy Act Administrative Rulings are issued by the Department of the Treasury's Office of the Assistant Secretary (Enforcement).

Part IV.—Items of General Interest.
This part includes notices of proposed rulemakings, disbarment and suspension lists, and announcements.

The last Bulletin for each month includes a cumulative index for the matters published during the preceding months. These monthly indexes are cumulated on a semiannual basis, and are published in the last Bulletin of each semiannual period.

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Part I. Rulings and Decisions Under the Internal Revenue Code of 1986

Section 24.—Child Tax Credit

The Service provides statutory changes to the inflation adjustments for the value used in determining the amount of the credit that may be refundable for taxable years beginning in 2008 and 2009. See Rev. Proc. 2009-21, page 860.

Section 25A.—Hope and Lifetime Learning Credits

For taxable years beginning in 2009, the Service provides statutory changes to the inflation adjustments for the amounts of qualified tuition and related expenses that are taken into account in determining the amount of the Hope Scholarship Credit, and for the amount of a taxpayer's modified adjusted gross income that is taken into account in determining the reduction in the amount of the Hope Scholarship Credit otherwise available. See Rev. Proc. 2009-21, page 860.

Section 32.—Earned Income

The Service provides statutory changes to the inflation adjustments to the limitations on the earned income credit for taxable years beginning in 2009. See Rev. Proc. 2009-21, page 860.

Section 132.—Certain Fringe Benefits

The Service provides statutory changes to the inflation adjustments to the limitations on the exclusion of income for certain qualified transportation fringe benefits for taxable years beginning in 2009. See Rev. Proc. 2009-21, page 860.

Section 179.—Election to Expense Certain Depreciable Business Assets

The Service provides statutory changes to the inflation adjustments to the aggregate cost of section 179 property that a taxpayer may elect to treat as an expense for taxable years beginning in 2009. See Rev. Proc. 2009-21, page 860.

Part III. Administrative, Procedural, and Miscellaneous

Qualifying Gasification Project Program

Notice 2009–23

SECTION 1. PURPOSE

This notice provides additional procedures for the allocation of credits under the qualifying gasification project program of § 48B of the Internal Revenue Code. The procedures in this notice apply only to the credits authorized under the amendments made to § 48B by section 112 of the Energy Improvement and Extension Act of 2008, Pub. L. 110–343, 122 Stat. 3765 (October 3, 2008) ("the Act"). Section 112 of the Act amended § 48B to provide for a second phase of the qualifying gasification project program in which $250 million of additional credits are authorized ("the Phase II gasification program" and "the Phase II gasification credit"). To be considered in the first allocation round under the Phase II gasification program, applications must be submitted to the Department of Energy ("DOE") on or before November 2, 2009, and to the Internal Revenue Service ("Service") before March 2, 2010. See section 5 of this notice for additional rules regarding these applications.

Section 48B, as originally enacted, provided for the first phase of the qualifying gasification project program and authorized $350 million of credits ("the Phase I gasification program" and "the Phase I gasification credit"). The Service intends to issue guidance in the future regarding any Phase I gasification credits that are subsequently forfeited.

SECTION 2. BACKGROUND AND CHANGES

.01 Section 46 provides that the amount of the investment credit for any taxable year is the sum of the credits listed in § 46. That list includes the qualifying gasification project credit.

.02 The qualifying gasification project credit is provided under § 48B, which was expanded and modified by section 112 of the Act.

.03 Section 48B(a) provides that the qualifying gasification project credit for a taxable year is an amount equal to (1) 20 percent of the qualified investment (as defined in § 48B(b)) for that taxable year in qualifying gasification projects (as defined in § 48B(c)(1)) for which the credit is allocated under § 48B(d)(1)(A), and (2) 30 percent of the qualified investment for that taxable year in qualifying gasification projects for which the credit is allocated under § 48B(d)(1)(B).

.04 The term "qualifying gasification project" is defined in § 48B(c)(1) as meaning any project that (A) employs gasification technology, (B) will be carried out by an eligible entity (as defined in section 3.02 of this notice), and (C) includes a qualified investment of which an amount not to exceed $650 million is certified under the qualifying gasification program as eligible for credit under § 48B. Pursuant to § 48B(c)(2), gasification technology is any process that converts a solid or liquid product from coal (as defined in section 3.01 of this notice), petroleum residue (as defined in § 48B(c)(8)), biomass (as defined in § 48B(c)(4)), or other materials that are recovered for their energy or feedstock value into a synthesis gas composed primarily of carbon monoxide and hydrogen for direct use or subsequent chemical or physical conversion.

.05 Section 48B(d)(1) provides that (1) $350 million of credits are to be allocated to qualifying projects ("Phase I gasification projects"), and (2) an additional $250 million of credits are to be allocated to qualifying projects that include equipment that separates and sequesters at least 75 percent of such project's total CO_2 emissions ("Phase II gasification projects").

.06 Section 48B(d)(4) provides that (i) highest priority is given to projects with the greatest separation and sequestration percentage of total CO_2 emissions, and (ii) high priority is given to applicant participants who have a research partnership with an eligible educational institution (as defined in § 529(e)(5)). The effective date of section 112 of the Act provides that this rule applies only to Phase II gasification projects.

.07 The at-risk rules in § 49 and the recapture and other special rules in § 50 apply to the qualifying gasification project credit. Further, the qualifying gasification project credit generally is allowed in the taxable year in which the eligible property (as defined in § 48B(c)(3)) is placed in service (as defined in section 3.05 of this notice) by the taxpayer.

.08 Section 48B(f) provides that the Secretary shall provide for recapturing the benefit of any credit allowable under § 48B(a) with respect to any project that fails to attain or maintain the separation and sequestration requirements of § 48B(d)(1).

.09 Section 48A(h) directs the Secretary to modify the terms of any competitive certification award and any associated closing agreement where such modification (i) is consistent with the objectives of § 48B, (ii) is requested by the recipient, and (iii) involves moving the project site to improve the potential to capture and sequester CO_2 emissions, reduce costs of transporting feedstock, and serve a broader customer base. This directive does not apply if the Secretary determines that the dollar amount of tax credits available to the taxpayer under § 48B would increase as a result of the modification or such modification would result in such project not being originally certified. In addition, the Secretary is required to consult with other relevant Federal agencies, including the Department of Energy, in considering any modification under § 48A(h).

.10 Section 48A(d)(5) provides that the Secretary shall, upon making a certification under § 48B(d), publicly disclose the identity of the applicant and the amount of the credit certified with respect to such applicant.

.11 Section 48B(d)(1) provides that the Secretary, in consultation with the Secretary of Energy, shall establish a qualifying gasification project program to consider and award certifications for qualified investment eligible for credit under § 48B to qualifying gasification project sponsors. The Treasury Department and the Service established this program in Notice 2006–25, 2006–1 C.B. 609, as modified and updated by Notice 2007–53, 2007–26 I.R.B. 1474. Pursuant to § 48B(d)(2), certificates of eligibility may be issued under the program only during the 10-year period beginning on October 1, 2005.

.12 Notice 2007–53 provides that the Service will consider a project under the

qualifying gasification project program only if the DOE provides a certification of feasibility ("DOE certification") and ranking (if any) for the project. Under the qualifying gasification project program, a taxpayer must submit, for each qualifying gasification project: (1) an application for certification by DOE ("application for DOE certification"), and (2) an application for certification under § 48B(d)(1) by the Service ("application for § 48B certification"). Certifications will be issued and the credit will be allocated by the Service to projects in annual allocation rounds.

.13 The Phase I gasification program under Notice 2006–25 and Notice 2007–53 provided for annual allocation rounds. The initial allocation round was conducted in 2006. An additional allocation round was conducted in 2007–08. The entire Phase I gasification credit amount of $350 million was allocated in these two allocation rounds.

.14 This notice provides procedures for the Phase II gasification program. The guidance in this notice differs from the guidance provided in Notices 2006–25 and 2007–53 for the Phase I gasification program in a number of respects. The significant differences include the following:

(1) Section 3.02 of this notice provides that the definition of the term "eligible entity" under § 48B(c)(7) includes any person whose application for certification is principally intended for use in a domestic project that employs domestic gasification applications related to transportation grade liquid fuels.

(2) Section 3.06 provides a definition of the term "separation and sequestration" for purposes of § 48B.

(3) Section 4.02(3) provides that a taxpayer who was allocated a credit under the Phase I gasification program may re-submit an application for the same project if the project is enhanced to meet the additional requirements for a qualifying project under the Phase II gasification program.

(4) Section 4.02(8) provides that the period for submitting the application for § 48B certification under Phase II gasification program for the 2009–10 allocation round begins on March 13, 2009, and ends on March 1, 2010.

(5) Section 4.02(10) provides that the deadline for taxpayers to submit applications for DOE certification for the 2009–10 allocation round is November 2, 2009, that the DOE will rank certified projects, and that the due date for the DOE to provide the Service with the certification and ranking of these projects is March 1, 2010.

(6) The information required to be included in the application for DOE certification is modified. Section 5.02 requires submission of additional information regarding CO_2 separation and sequestration. In addition, the program policy factors listed in Appendix B have been modified.

(7) Section 5.03 modifies the information required to be included in the application for § 48B certification.

(8) Section 6.04 provides for recapturing the benefit of any credit allowable under the Phase II gasification program with respect to any project that fails to attain or maintain the separation and sequestration requirements of § 48B(d)(1)(B).

(9) Section 9.01 provides that the Service will announce the results of each allocation round as required by § 48A(d)(5). Accordingly, the notice does not include a request that taxpayers submit with the application for § 48B certification a declaration consenting to the disclosure by the Service of certain return information if the taxpayer is awarded an allocation of qualifying gasification project credit or provide the form of the declaration, as set forth in Appendix C of Notice 2007–53.

SECTION 3. DEFINITIONS

The following definitions apply for purposes of § 48B and this notice:

.01 *Coal*. Section 48B(c)(6) defines the term "coal" as meaning anthracite, bituminous coal, subbituminous coal, lignite, and peat. Coal includes waste coal (that is, usable material that is a byproduct of the previous processing of anthracite, bituminous coal, subbituminous coal, lignite, or peat). Examples of waste coal include fine coal of any of the listed ranks, coal of any of the listed ranks obtained from a refuse bank or slurry dam, anthracite culm, bituminous gob, and lignite waste.

.02 *Eligible entity*. Section 48B(c)(7) defines "eligible entity" as meaning any person whose application for certification is principally intended for use in a domestic project that employs domestic gasification applications related to chemicals, fertilizers, glass, steel, petroleum residues, forest products, agriculture (including feedlots and dairy operations), and transportation grade liquid fuels. For purposes of § 48B, a qualifying gasification project is carried out by an eligible entity if the project supplies more than 50 percent of the thermal output in British thermal units ("Btu") from the gasification process in the form of synthesis gas for direct use or subsequent chemical or physical conversion in an application related to one or more of the industries listed in § 48B(c)(7) or if more than 50 percent of the fuel input in Btu to the gasification process is supplied from one or more of the industries listed in § 48B(c)(7).

.03 *Total synthesis gas capacity*. The total synthesis gas capacity of a project is the total MMBtu (one million Btu) per hour of the synthesis gas (higher heating value (HHV)) at the gasifier outlet of the project. The synthesis gas must be composed primarily of carbon monoxide and hydrogen for direct use or subsequent chemical or physical conversion.

.04 *Fuel Input*.

(1) *In general*. The term "fuel input" means, with respect to any type of fuel, the amount of such fuel used during normal plant operations. The amounts of the fuel used are measured (i) in Btu on an energy input basis and (ii) pursuant to applicable standards prescribed by the American Society for Testing and Materials ("ASTM"). For example, § 48B(d)(3)(D) provides that the fuels identified in § 48B(c)(2) will at all times cumulatively comprise at least 90 percent of the total fuels (fuels identified in § 48B(c)(2) and any other fuel input) required by the project. This requirement is satisfied if, after completion and during normal plant operations, the fuels identified in § 48B(c)(2) will cumulatively comprise at least 90 percent of the project's total fuels measured in Btu on an energy input basis and pursuant to applicable ASTM standards.

(2) *Only normal plant operations taken into account*. Only fuel used during normal plant operations is taken into account for purposes of § 48B. Normal plant operations are operations other than during periods of initial plant certification, plant startup, plant shutdown, interconnected gasifier(s) shutdown for gasification system maintenance, or interruptions of the supply of fuels identified in § 48B(c)(2) to the project resulting from an event of

force majeure (including an act of God, war, strike, or other similar event beyond the control of the taxpayer). For example, the fuel input during the initial plant certification may consist entirely of natural gas or other fuels not identified in § 48B(c)(2) because fuel used during initial plant certification is disregarded in determining whether the requirement of § 48B(d)(3)(D) to use 90 percent of the fuels identified in § 48B(c)(2) is satisfied.

.05 *Placed In Service*. For purposes of § 48B, property is placed in service in the taxable year in which the property is placed in a condition or state of readiness and availability for a specifically assigned function. *See* § 1.46–3(d)(1)(ii) of the Income Tax Regulations. Thus, a qualifying gasification project or eligible property (as defined in § 48B(c)(3)) that is a part of the project is placed in service in the taxable year in which the project is placed in a condition or state of readiness and availability for producing synthesis gas from the feedstocks identified in § 48B(c)(2).

.06 *Separation and Sequestration*. The term "separation and sequestration" refers to the separation and capture of a project's CO_2 emissions, and the placement of the captured CO_2 into a repository in which the CO_2 will remain permanently sequestered.

SECTION 4. QUALIFYING GASIFICATION PROJECT PROGRAM

.01 *In General*. The Service will consider a project under the Phase II gasification program only if the DOE provides a certification ("DOE certification") and ranking (if any) for the project. Accordingly, a taxpayer must submit, for each Phase II gasification project: (1) an application for certification by DOE that the project is technically and economically feasible ("application for DOE certification"), and (2) an application for certification under § 48B(d)(1) by the Service ("application for § 48B certification"). Both applications may be submitted only during the Phase II application period beginning on March 13, 2009 and ending on March 12, 2012. The Service will issue certifications and allocate credits to projects in annual allocation rounds. The first allocation round for Phase II gasification program will be conducted in 2009–10. If necessary, additional allocation rounds will be conducted in 2010–11, and 2011–12.

.02 *Program Specifications*.

(1) The Service determines the amount of the Phase II gasification credits allocated to a qualifying gasification project at the time the Service accepts the application for § 48B certification for that project in accordance with section 4.02(12) of this notice (see section 5 of this notice for the requirements applicable to the application for DOE certification and the application for § 48B certification).

(2) The aggregate amount of the Phase II gasification credit is $250 million, and the certification for a Phase II gasification project cannot apply to more than $650 million of the qualified investment in the project. Thus, the maximum amount of the Phase II gasification credit that will be allocated to a project is $195 million. This limitation applies to a qualifying project, and rather than to the taxpayer holding interests in the project. Therefore, the number or type of entities holding ownership interests in a project does not change the maximum amount of the Phase II gasification credit that may be allocated to that project. Conversely, a taxpayer holding interests in multiple projects may be allocated more than the maximum Phase II gasification credit that may be allocated to a single project.

(3) A taxpayer who was allocated a Phase I gasification credit for a project may submit an application for a Phase II gasification credit for the same project if the project meets the additional requirements for a qualifying project under the Phase II gasification program. Thus, the project must separate and sequester at least 75 percent of the project's total CO_2 emissions.

(a) The Phase II gasification credit will be allowed with respect to the taxpayer's qualified investment in the project only to the extent such investment exceeds the qualified investment with respect to which the Phase I gasification credit is allowable but does not exceed $650 million. Thus, if the qualified investment in a project is $700 million and the Phase I gasification credit was allowable with respect to $500 million of the qualified investment, the Phase II gasification credit will be allowed with respect to only $150 million ($650 million - $500 million) of the qualified investment. The Phase I gasification credit allocated to a project is not allowable for purposes of this section 4.02(3) to the extent the right to claim such credit has been irrevocably waived in such manner as the Commissioner may require.

(b) The Phase II gasification credit allocated to a project will be forfeited if the taxpayer fails to place the project in service by the taxpayer within 7 years of the date of acceptance of application under section 4.02(11) of this notice. The allocation of a Phase II gasification credit does not delay the taxpayer's placed-in-service obligations with respect to any Phase I gasification credit previously allocated to the project. Accordingly, the Phase I gasification credit allocate to the project will be forfeited if the taxpayer fails to place the project in service by the taxpayer within 7 years of the date of acceptance of application under the Phase I gasification program.

(4) DOE will rank the certified projects in descending order (that is, first, second, third, etc.) and the amount available for allocation will be allocated as follows in the 2009–2010 allocation round:

(a) If the requested allocation of credit for projects that DOE has certified does not exceed the amount available for allocation, each certified project will be allocated the full amount of credit requested.

(b) If the requested allocation of credit for projects that DOE has certified exceeds the amount available for allocation, the amount available for allocation will be allocated as follows:

(i) The project receiving the highest ranking (that is, first) will be allocated the full amount of credit requested (but not exceeding the amount available for allocation) before any credit is allocated to a lower-ranked project. The amount available for allocation is reduced by the amount of credit so allocated and only the remainder is available for allocation to a lower-ranked project.

(ii) Second and lower-ranked projects will be entitled to similar priority in the allocation of credit and allocations to such projects will similarly reduce the remainder of the amount available for allocation until the amount available for allocation is exhausted.

(5) If the amount available for allocation is not fully allocated in the 2009–10 allocation round, similar allocation rounds will be conducted in 2010–11 and 2011–12

until the available amount is fully allocated. The results of each allocation round will be announced. See section 9.01 of this notice for further information about this announcement.

(6) If the same project would otherwise be allocated credit under both the qualifying gasification project program of § 48B and the qualifying advanced coal project program of § 48A, the following rules apply:

(a) The qualifying gasification project credit may not be allocated to the project with respect to any qualified investment under § 48B for which a qualifying advanced coal project credit is allowed under § 48A; and

(b) The qualifying gasification project credit may be allocated to the project with respect to the qualified investment under § 48B for which a qualifying advanced coal project credit is not allowed under § 48A.

(7) For each allocation round, there will be an annual application period during which a taxpayer may file its application for § 48B certification. The Service will consider a project in an allocation round only if the application for § 48B certification for the project is submitted during the application period for that round and the DOE provides the DOE certification and the DOE ranking (if any) for the project before the end of that application period.

(8) For the 2009–10 allocation round, the application period for § 48B certification begins on March 13, 2009, and ends on March 1, 2010, and any completed application for § 48B certification received by the Service after March 12, 2009, and before March 2, 2010, will be deemed to be submitted by the taxpayer on March 1, 2010. For the 2010–11 allocation round (if necessary), the application period for § 48B certification begins on March 2, 2010, and ends on March 1, 2011, and any completed application for § 48A certification received by the Service after March 1, 2010, and before March 2, 2011, will be deemed to be submitted by the taxpayer on March 1, 2011. For the 2011–12 allocation round (if necessary), the application period for § 48A certification begins on March 2, 2011, and ends on March 1, 2012, and any completed application for § 48A certification received by the Service after March 1, 2011, and before March 2, 2012, will be deemed to be submitted by the taxpayer on March 1, 2012.

(9) For purposes of this notice, an application that is submitted by U.S. mail will be treated as received by the Service on the date of the postmark and an application submitted by a private delivery service will be treated as received by the Service on the date recorded or the date marked in accordance with § 7502(f)(2)(C).

(10) See section 5.02 of this notice and Appendix B to this notice for the information to be submitted to the DOE in an application for DOE certification. Appendix B to this notice also provides the instructions and address for filing the application for DOE certification. The DOE will determine the technical and economic feasibility of the project and, if the project is determined to be feasible, will provide a DOE certification for the project to the Service. If the DOE certifies two or more projects, the DOE will rank each of the projects it certifies (for example, first, second, third, etc.) relative to other certified projects. If an application for DOE certification is postmarked on or before October 31 of a calendar year, the DOE will determine the feasibility of the project and (for projects determined to be feasible) provide the DOE certification and the DOE ranking (if any) to the Service by March 1 of the following calendar year. Thus, after application of § 7503, relating to the time for performance of acts when the last day falls on a Saturday, Sunday, or legal holiday, applications for DOE certification must be postmarked on or before November 2, 2009, to be considered in the 2009–10 allocation round, on or before November 1, 2010, to be considered in the 2010–11 allocation round, and on or before November 1, 2011, to be considered in the 2011–12 allocation round.

(11) By April 30 of the calendar year in which an application for § 48B certification is deemed to be submitted (as determined under section 4.02(9) of this notice), the Service will accept or reject the taxpayer's application for § 48B certification and will notify the taxpayer, by letter, of its decision.

(12) A taxpayer that receives an acceptance letter under section 4.02(11) of this notice has 7 years from the date of the acceptance letter to place the project in service and if the project is not placed in service by the end of that period then the acceptance letter is void.

(13) If the taxpayer's application for § 48B certification is accepted, the acceptance letter will state the amount of credit allocated to the project and the amount of qualified investment that is certified as eligible for the credit. If a credit is allocated to a taxpayer's project, the taxpayer will be required to execute a closing agreement in the form set forth in Appendix A to this notice. By June 30 of the calendar year in which an application for § 48B certification is accepted (July 2 after application of § 7503 for applications accepted in 2012), the taxpayer must execute and return the closing agreement to the Service at the appropriate address listed in section 5.04 of this notice or listed in later guidance published in the Internal Revenue Bulletin. The Service will execute and return the closing agreement to the taxpayer by August 31 of such calendar year. The executed closing agreement applies only to the accepted taxpayer. Accordingly, any successor in interest must execute a new closing agreement with the Service no later than the due date (including extensions) of the successor in interest's Federal income tax return for the taxable year in which the transfer occurs. If the successor in interest does not execute a new closing agreement, the following rules apply:

(a) In the case of an interest acquired at or before the time the qualifying gasification project is placed in service, any credit allocated to the project (including any credit allocated under the Phase I gasification program) will be fully forfeited (and rules similar to the recapture rules of § 50(a) apply with respect to qualified progress expenditures); and

(b) In the case of an interest acquired after the qualifying gasification project is placed in service, the project ceases to be investment credit property and the recapture rules of § 50(a) (and similar rules with respect to qualified progress expenditures) apply.

(14) The closing agreement relating to a credit allocation may be modified only if the modification is consistent with the objectives of the qualifying gasification program, is requested by the taxpayer that received the credit allocation, involves moving the project site to improve the potential to capture and sequester CO_2 emissions, reduce costs of transporting feedstock, and

serve a broader customer base. The Service will not modify a closing agreement if the dollar amount of tax credit available to the taxpayer under § 48B would increase as a result of the modification or if the project would not have been originally certified had such modification been included in the taxpayer's application. In considering such modification, the Service will consult with the DOE.

SECTION 5. APPLICATIONS FOR CERTIFICATIONS

.01 *In General*. An application for § 48B certification and a separate application for DOE certification must be submitted for each qualifying gasification project. If an application for DOE certification does not include all of the information required by section 5.02 of this notice and meet the requirements in sections 6.01 and 6.02 of this notice, the DOE may decline to accept the application. If an application for § 48B certification does not include all of the information listed in section 5.03 of this notice and meet the requirements in sections 6.01 and 6.02 of this notice, the application will not be accepted by the Service.

.02 *Information Required in the Application for DOE Certification*. An application for DOE certification must include all of the information requested in Appendix B to this notice and all of the following:

(1) The name, address, and taxpayer identification number of the taxpayer. If the taxpayer is a member of an affiliated group filing consolidated returns, also provide the name, address, and taxpayer identification number of the common parent of the group.

(2) The name and telephone number of a contact person.

(3) The name and address (or other unique identifying designation) of the qualifying gasification project.

(4) A statement specifying the projected placed-in-service date of the qualifying gasification project.

(5) The estimated total cost of the project and the estimated total qualified investment in the eligible property that will be part of the project.

(6) The amount of the qualifying gasification project credit requested for the project. The amount requested must not exceed $195 million (the amount permitted under § 48B(a) and (c)(1)(C)).

(7) If the taxpayer is or will be requesting an amount of the qualifying gasification project credit under § 48A for the same project, a statement specifying the amount of credit the taxpayer is or will be requesting under § 48A.

(8) The exact total synthesis gas capacity (as defined in section 3.03 of this notice) of the project.

(9) A statement specifying whether the project is entitled to priority for separation and sequestration of more than 75% of such project's total CO_2 emissions or having a research partnership with an eligible educational institution (as defined in § 529(e)(5)) and, if entitled to priority, a statement identifying which of these priorities apply to the project.

(10) Documentation or other evidence establishing that the taxpayer is financially viable without the receipt of additional federal funding associated with the qualifying gasification project.

.03 *Information To Be Included in the Application for § 48B Certification*. An application for § 48B certification must include all of the following:

(1) The name, address, and taxpayer identification number of the taxpayer. If the taxpayer is a member of an affiliated group filing consolidated returns, also provide the name, address, and taxpayer identification number of the common parent of the group.

(2) The name, telephone number, and fax number of a contact person. For such person, attach a properly executed power of attorney, preferably on Form 2848, *Power of Attorney and Declaration of Representative*.

(3) One paper copy and one electronic version on a floppy disc or a CD of the completed application for DOE certification submitted with respect to the project in accordance with section 5.02 of this notice.

(4) If the Phase I gasification credit was allocated to the project, the estimated total cost of the Phase I project and the estimated total qualifying investment in the eligible property (as represented in the application for the Phase I gasification credit), and the amount of the allocated Phase I gasification credit.

.04 *Instructions and Address for Filing § 48B Application*. One paper copy and one electronic version on a floppy disc or a CD of the application for § 48B certification must be submitted. Applications for § 48B certification should be marked: SECTION 48B APPLICATION FOR CERTIFICATION. There is no user fee for these applications.

(1) Applications submitted by U.S. mail must be sent to:

Internal Revenue Service
Industry Director, Natural Resources and Construction
Attn: Executive Assistant
1919 Smith Street
Stop HOU 1000
Houston, TX 77002

Applications submitted by a private delivery service must be sent to:

Internal Revenue Service
Industry Director, Natural Resources and Construction
Attn: Executive Assistant
1919 Smith Street, Floor P2
Stop HOU 1000
Houston, TX 77002

(2) Applications may also be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. Central time to:

Internal Revenue Service
Industry Director, Natural Resources and Construction
Attn: Executive Assistant
1919 Smith Street, Floor P2
Stop HOU 1000
Houston, TX 77002

SECTION 6. OTHER REQUIREMENTS

.01 *Signature*. Each submission under section 5 of this notice must be signed and dated by the taxpayer. A stamped signature or faxed signature is not permitted.

.02 *Penalties of Perjury Statement*.

(1) Each submission under section 5 of this notice must be accompanied by the following declaration: "Under penalties of perjury, I declare that I have examined this submission, including accompanying documents, and, to the best of my knowledge and belief, all of the facts contained herein are true, correct, and complete."

(2) The declaration must be signed and dated by the taxpayer. The person sign-

ing for the taxpayer must have personal knowledge of the facts. Further, the declaration must be signed by an officer on behalf of a corporation, a general partner on behalf of a state-law partnership, a member-manager on behalf of a limited liability company, a trustee on behalf of a trust, and the proprietor in the case a sole proprietorship. If the taxpayer is a member of an affiliated group filing consolidated returns, the declaration also must be signed by a duly authorized officer of the common parent of the group. A stamped signature or faxed signature is not permitted.

.03 *Significant Change in Plans*. The Service must be informed if the plans for the project change in any significant respect from the plans set forth in the applications for § 48B or DOE certification. Except as otherwise provided under § 48A(h), any significant change to the plans set forth in the applications will have the following effects:

(1) If the Service is informed of the change after the date on which the applications for DOE certification were due for the allocation round under section 4.02(10) of this notice and before the Service accepts or rejects the taxpayer's application for § 48B certification under section 4.02(11) of this notice, the Service will not consider the project during the allocation round; and

(2) Any acceptance provided by the Service and any allocation or certification based on that acceptance will be void unless the Service is informed of the change before the date on which the acceptance is provided under section 4.02(11) of this notice.

.04 *Failure to Capture and Sequester CO_2 Emissions*. The Phase II gasification credit allocated to a project will be recaptured if, at any time during the applicable recovery period (as defined in § 168(c)) for such project, the project fails to attain or maintain the separation and sequestration requirements for such project under §48B(d)(1)(B).

.05 *Effect of an Acceptance or Allocation*. An acceptance or allocation by the Service under this notice is not a determination that a project qualifies for the qualifying gasification project credit under § 48B. The Service may, upon examination (and after any appropriate consultation with DOE), determine that the project does not qualify for this credit.

.06 *No Right to a Conference or Appeal*. A taxpayer does not have a right to a conference relating to any matters under this notice. Further, a taxpayer does not have a right to appeal the decisions made under this notice (including the acceptance or rejection of the application for DOE or § 48B certification or the amount of credit allocated to the project) to an Associate Chief Counsel or any other official of the Service.

.07 *DOE Debriefings*. Although a taxpayer does not have a right to a conference relating to any matters under this notice, the DOE will offer debriefings to all applicants that submitted an application for DOE certification. The debriefing will be held by the DOE after the Service has accepted the applications for § 48B certification (as determined under section 4.02(11) of this notice). The sole purpose of the debriefing is to enable applicants to develop better proposals in future allocation rounds by providing DOE's review of the strengths and weaknesses of their application for DOE certification. All requests for debriefings must be submitted to the DOE within 30 days of receipt of the Service's decision to accept or reject the application.

SECTION 7. REDUCTION OR FORFEITURE OF ALLOCATED CREDITS

.01 Under the closing agreement set forth in Appendix A to this notice, the qualifying gasification project credit allocated under section 4 of this notice will be reduced or forfeited in certain situations. A taxpayer must notify the Service of the amount of any reduction or forfeiture required under the closing agreement. This notification must be sent to the appropriate address listed in section 5.04 of this notice or listed in later guidance published in the Internal Revenue Bulletin.

.02 The amount of any reduction or forfeiture of the allocated credit will be returned and included in the aggregate credit remaining to be allocated in the allocation round following the reduction or forfeiture. If the reduction or forfeiture occurs after the 2011–12 allocation round, future guidance will prescribe procedures applicable to applications for certification with respect to the amount of returned credit.

SECTION 8. QUALIFIED PROGRESS EXPENDITURES

.01 Section 48B(b)(3) provides that rules similar to the rules of § 46(c)(4) and (d) (as in effect on the day before the enactment of the Revenue Reconciliation Act of 1990) shall apply for purposes of § 48B. Former §§ 46(c)(4) and 46(d) provided the rules for claiming the investment credit on qualified progress expenditures (as defined in former § 46(d)(3)) made by a taxpayer during the taxable year for the construction of progress expenditure property (as defined in former § 46(d)(2)).

.02 In the case of self-constructed property (as defined in former § 46(d)(5)(A)), former § 46(d)(3)(A) defined qualified progress expenditures to mean the amount that is properly chargeable (during the taxable year) to capital account with respect to that property. With respect to a qualifying gasification project that is self-constructed property, amounts paid or incurred are chargeable to capital account at the time and to the extent they are properly includible in computing basis under the taxpayer's method of accounting (for example, after applying the requirements of § 461, including the economic performance requirement of § 461(h)).

.03 To claim the qualifying gasification project credit on the qualified progress expenditures paid or incurred by a taxpayer during the taxable year for construction of a qualifying gasification project, the taxpayer must make an election under the rules set forth in § 1.46–5(o) of the Income Tax Regulations. The taxpayer may not make the qualified progress expenditures election for a qualifying gasification project until the taxpayer has received an acceptance letter for the project under section 4.02(11) of this notice.

.04 If a taxpayer makes the qualified progress expenditures election pursuant to section 8.03 of this notice, rules similar to the recapture rules in § 50(a)(2)(A)–(D) apply. In addition to the cessation events listed in § 50(a)(2)(A), examples of other events that will cause the project to cease being a qualifying gasification project are:

(1) Failure to place the project in service within 7 years from the date of the acceptance letter under section 4.02(11) of this notice;

(2) A significant change to the plans for the project as set forth in the applications

for § 48B and DOE certification if, under section 6.03 of this notice, the Service's acceptance of the project is void as a result of the change; or

(3) Failure of the project, at any time during the applicable recovery period (as defined in § 168(c)) for such project, to attain or maintain the separation and sequestration of CO_2 emissions required by § 48B(d)(1)(B).

SECTION 9. DISCLOSURE OF INFORMATION

.01 *Announcement*. Section 48A(d)(5) provides that the Secretary shall, upon making a certification under § 48A(d) and § 48B(d), publicly disclose the identity of the applicant and the amount of the credit certified with respect to such applicant. Accordingly, the Service intends to publish the results of the allocation process, and disclose the following return information in the event a qualifying gasification project credit is allocated to the taxpayer's project: (a) the name of the taxpayer and (b) the amount of the qualifying gasification project credit allocated to the project.

.02 *In general*. An application for DOE certification, an application for § 48B certification, any other documentation submitted by the taxpayer pursuant to section 5.02 of this notice, and any documentation generated by the Service or the DOE as part of this process are return information subject to § 6103. Except for the items of information that § 48A(d)(5) authorizes the Service to make available to the public, the other material remains the applicant's confidential return information, which is exempt from disclosure under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(3), in conjunction with § 6103. Other FOIA exemptions may also apply. For example, FOIA includes exemptions for trade secrets and commercial or financial information (5 U.S.C. 552(b)(4)), as well as personal information (5 U.S.C. 552(b)(6)).

.03 *FOIA requests*. Anyone interested in submitting a request for records under the FOIA with respect to the qualifying gasification project program under § 48B should direct a request that conforms to the Service's FOIA regulations, found at 26 C.F.R. § 601.702, to the following address:

IRS FOIA Request
Baltimore Disclosure Office
Room 940
31 Hopkins Plaza
Baltimore, MD 21201

SECTION 10. EFFECT ON OTHER DOCUMENTS

Notice 2007–53 is clarified, modified, and amplified.

SECTION 11. EFFECTIVE DATE

This notice is effective March 13, 2009.

SECTION 12. PAPERWORK REDUCTION ACT

The collection of information contained in this notice has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. § 3507) under control number 1545–2002.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

The collections of information in this notice are in sections 5, 6, 8, and Appendix B of this notice. This information is required to obtain an allocation of qualifying gasification project credit. This information will be used by the Service to verify that the taxpayer is eligible for the qualifying gasification project credit. The collection of information is required to obtain a benefit. The likely respondents are business or other for-profit institutions.

The estimated total annual reporting burden is 1,700 hours.

The estimated annual burden per respondent varies from 50 to 125 hours, depending on individual circumstances, with an estimated average of 85 hours. The estimated number of respondents is 20.

The estimated annual frequency of responses is on occasion.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. § 6103.

SECTION 13. DRAFTING INFORMATION

The principal author of this notice is Jennifer C. Bernardini of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this notice, contact Jennifer C. Bernardini at (202) 622–3110 (not a toll-free call). For further information regarding the application for § 48B certification, contact Tina Meaux, Executive Assistant, Office of the Industry Director, Natural Resources and Construction, at (713) 209–4074 (not a toll-free number).

APPENDIX A

CLOSING AGREEMENT

Under § 7121 of the Internal Revenue Code, [insert taxpayer's name, address, and identifying number] ("Taxpayer") and the Commissioner of Internal Revenue ("Commissioner") make the following closing agreement:

WHEREAS:

1. On or before March [insert date and year], Taxpayer submitted to the Internal Revenue Service ("Service"), an application for certification under the Phase II gasification program described in Notice 2009–23 ("Application for § 48B Certification");

2. Taxpayer's Application for § 48B Certification is for the qualifying gasification project (the "Project") described below—

(1) The Project will be located at [insert address or other identifying designation];

(2) The Project will have a total synthesis gas capacity (as defined in section 3.03 of Notice 2009–23) of at least [insert number] total MMBtu per hour of synthesis gas. The synthesis gas is composed primarily of carbon monoxide and hydrogen for direct use or subsequent chemical or physical conversion;

(3) The fuels identified in § 48B(c)(2) will at all times cumulatively comprise at least 90 percent of the total fuel input (as defined in section 3.04(1) of Notice 2009–23 and including fuels identified in § 48B(c)(2) and any other fuel input) required by the Project for normal plant operations (as defined in section 3.04(2) of Notice 2009–23) for the production of chemical feedstocks, liquid transportation fuels, or co-production of electricity; and

3. On [insert date of acceptance letter issued under section 4.02(11) of Notice 2009–23], the Service accepted Taxpayer's Application for § 48B Certification for the Project and allocated a qualifying gasification project credit under § 48B in the amount of $[insert number] to the Project.

NOW IT IS HEREBY DETERMINED AND AGREED FOR FEDERAL INCOME TAX PURPOSES THAT:

1. The total amount of the qualifying gasification project credit to be claimed for the Project under § 48B(a) must not exceed $[insert the number in WHEREAS clause #3].

2. If the Project is not placed in service by Taxpayer within 7 years of [insert the date in WHEREAS clause #3], the qualifying gasification project credit in the amount of $[insert the number in WHEREAS clause #3] allocated to the Project is fully forfeited.

3. If the Project fails, at any time during the applicable recovery period (as defined in § 168(c)) for such project, to attain or maintain the separation and sequestration of CO_2 emissions required by § 48B(d)(1)(B), the qualifying gasification project credit in the amount of $[insert the number in WHEREAS clause #3] allocated to the Project is fully forfeited.

4. If the plans for the Project change in any significant respect from the plans set forth in the application for DOE certification (as defined in section 5.02 of Notice 2009–23) and the Application for § 48B Certification (as defined in section 5.03 of Notice 2009–23) and, under section 6.03 of Notice 2009–23, the acceptance of Taxpayer's Application for § 48B Certification on [insert the date in WHEREAS clause #3] is void, the qualifying gasification project credit in the amount of $[insert the number in WHEREAS clause #3] allocated to the Project is fully forfeited.

5. (1) If the Project fails to use gasification technology as defined in § 48B(c)(2) or is not carried out by an eligible entity (as defined in section 3.02 of Notice 2009–23), the qualifying gasification project credit in the amount of $[insert the number in WHEREAS clause #3] allocated to the Project is fully forfeited.

(2) If, at any time, the fuels identified in § 48B(c)(2) with respect to the gasification technology for the Project do not cumulatively comprise at least 90 percent of the total fuel input (as defined in section 3.04(1) of Notice 2009–23 and including fuels identified in § 48B(c)(2) and any other fuel input) required by the Project for normal plant operations (as defined in section 3.04(2) of Notice 2009–23) for the production of chemical feedstocks, liquid transportation fuels, or co-production of electricity, the Project ceases to be investment credit property and the recapture rules of § 50(a) apply.

6. Taxpayer will not claim the qualifying advanced coal project credit under § 48A for any qualified investment for which the qualifying gasification project credit is allowed under § 48B.

7. If Taxpayer elects to claim the qualifying gasification project credit on the qualified progress expenditures paid or incurred by Taxpayer during the taxable year(s) during which the Project is under construction and the Project ceases to be a qualifying gasification project (whether before, at the time, or after the Project is placed in service), rules similar to the recapture rules in § 50(a)(2)(A) through (D) apply.

8. This agreement applies only to Taxpayer. Any successor in interest must execute a new closing agreement with the Service. If the interest is acquired at or before the time the Project is placed in service and the successor in interest fails to execute a new closing agreement, the qualifying gasification project credit in the amount of $[insert the number in WHEREAS clause #3] allocated to the Project is fully forfeited. If the interest is acquired after the time the Project is placed in service and the successor in interest fails to execute a new closing agreement, the Project ceases to be investment credit property and the recapture rules of § 50(a) apply.

THIS AGREEMENT IS FINAL AND CONCLUSIVE EXCEPT:

1. The matter it relates to may be reopened in the event of fraud, malfeasance, or misrepresentation of a material fact;

2. It is subject to the Internal Revenue Code sections that expressly provide that effect be given to their provisions (including any stated exception for § 7122) notwithstanding any law or rule of law; and

3. If it relates to a tax period ending after the date of this Closing Agreement, it is subject to any law enacted after such date, which applies to the tax period.

By signing, the parties certify that they have read and agreed to the terms of this Closing Agreement.

Taxpayer: [insert name and identifying number]

By: ______________________________ **Date Signed:** ______________
[insert name]

Title: [insert title]
[insert taxpayer's name]

Commissioner of Internal Revenue

By: ______________________________ **Date Signed:** ______________
[insert name]

Title: [insert title]

I have examined the specific matters involved and recommend the acceptance of the proposed agreement.

(Receiving Officer) ....
(Title) ....
Date Signed ....

I have reviewed the specific matters involved and recommend the acceptance of the proposed agreement.

(Receiving Officer) ....
(Title) ....
Date Signed ....

APPENDIX B

APPLICATION FOR DOE CERTIFICATION

REQUEST FOR SUPPLEMENTAL APPLICATION INFORMATION FOR DOE

The Internal Revenue Service ("Service") and the Department of Energy ("DOE") seek to certify applications that demonstrate a high likelihood of being successfully implemented by the applicants. To qualify, projects must be technically and economically feasible and use the appropriate gasification technology.

This request for submission of supplemental application information:

- Describes the information to be provided by the applicant seeking a certification of feasibility from DOE, and
- Lists the evaluation criteria and Program Policy Factors to be used by DOE in the evaluation of applications.

If, after review by the DOE a project is determined to be feasible, DOE will provide a DOE certificate of feasibility to the Service. The Service will then accept or reject the taxpayer's application for certification of the tax credits.

In conducting this evaluation, the DOE may utilize assistance and advice from qualified personnel from other Federal agencies and/or non-conflicted contractors. DOE will obtain assurances in advance from all evaluators that application information shall be kept confidential and used only for evaluation purposes. DOE reserves the right to request clarifications and/or supplemental information from some or all applicants through written submissions and/or oral presentations.

Notice is given that DOE may determine whether or not to provide a certification to the Service at any time after the application has been received, without further exchanges or discussions. Therefore, all applicants are advised to submit their most complete and responsive application.

Applications will not be returned.

INFORMATION TO BE SUBMITTED FOR DOE CERTIFICATION APPLICATION

A. General

This request, together with the information in sections 5.02, 6.01, and 6.02 of Notice 2009–23 includes all the information needed to complete an application for DOE certification. All applications shall be prepared in accordance with this request in order to provide a standard basis for evaluation and to ensure that each application will be uniform as to format and sequence.

Each application should clearly demonstrate the applicant's capability, knowledge, and experience in regard to the requirements described herein.

Applicants should fully address the requirements of Notice 2009–23 and this request and ***not*** rely on the presumed background knowledge of reviewers. DOE may reject an application that does not follow the instructions regarding the organization and content of the application when the nature of the deviation and/or omission precludes meaningful review of the application.

B. Unnecessarily Elaborate Applications

Unnecessarily elaborate brochures or other presentations beyond those sufficient to present a complete and effective application are not desired. Elaborate art work, graphics and pictures are neither required nor encouraged.

C. Application Submission for DOE Certification

The application submission to DOE must include the information and documentation required by sections 5.02, 6.01, and 6.02 of Notice 2009–23.

An application will not be considered in the allocation round conducted in 2009–10 unless it is postmarked by November 2, 2009. (If allocation rounds are conducted in 2010–11 and 2011–12, applications must be postmarked by November 1 of the year in which the allocation round begins.) One paper copy and one electronic version on a floppy disc or a CD of the Application must be submitted to:

Melissa Robe
National Energy Technology Laboratory
3610 Collins Ferry Road
Morgantown, WV 26507

Note that under section 5.03(3) of Notice 2009–23, one paper copy and one electronic version must be sent to the Service as part of the application for § 48B certification. The application for § 48B certification will not be considered in the allocation round conducted in 2009–10 unless it is submitted to the Service by March 1, 2010. (If allocation rounds are conducted in 2010–11 and 2011–12, applications must be postmarked by March 1 of the year in which the allocation round ends.)

THE INFORMATION REQUIRED BY THIS REQUEST MUST BE SUBMITTED USING THE FORMAT AND THE HEADINGS OF THE PROJECT INFORMATION MEMORANDUM AS DESCRIBED BELOW.

To aid in evaluation, applications shall be clearly and concisely written and logically assembled. All pages of each part shall be appropriately numbered and identified with the name of the applicant and the date.

The application, including the Project Information Memorandum, MUST be formatted in one of the following software applications:

- Microsoft Word^{tm} 2002 or later edition
- Microsoft Excel^{tm} 2002 or later edition
- Adobe Acrobat^{tm} PDF 6.0 or later edition

Financial models should be submitted using the Excel^{tm} spreadsheet and must include calculation formulas and assumptions.

The applicant is responsible for the integrity and structure of the electronic files. The DOE will not be responsible for reformatting, restructuring or converting any files submitted under this announcement.

The Project Information Memorandum, *excluding Appendices*, shall not exceed seventy-five (75) pages. Pages in excess of the page limitation will not be considered for evaluation. All text shall be typed, single spaced, using 12 point font, 1 inch margins, and unreduced 8–1/2-inch by 11-inch pages. Illustrations and charts shall be legible with all text in legible font. Pages shall be sequentially numbered. Except as otherwise noted herein the page guidelines previously set forth constitute a limitation on the total amount of material that may be submitted for evaluation. No material may be incorporated in any application by reference as a means to circumvent the page limitation.

D. Project Information Memorandum

1. Summary and Introduction

a. Description of the Project
b. Financing and Ownership Structure
c. Description of the main parties to the project, including background, ownership and related experience
d. Current Project Status and Schedule to Beginning of Construction

2. Technology and Technical Information

Provide a description of the proposed technology, including sufficient supporting information (such as vendor guarantees, process flow diagrams, equipment descriptions, information on each major process unit and the total plant, compositions of major streams, and the technical plan for achieving the goals proposed for the project) as would be needed to allow DOE to confirm that the technical requirements of § 48B are met. Specifically, the applicant should:

- Provide evidence sufficient to demonstrate that the proposed technology will employ gasification technology as defined in § 48B(c)(2).
- Present information sufficient to justify the total amount of synthesis gas (as defined in § 48B(c)(2)) to be produced by the project (synthesis gas capacity).
- Provide the total MMBtu/hr of the synthesis gas (HHV) at the gasifier outlet.
- Provide evidence sufficient to ensure that fuels identified in § 48B(c)(2) will comprise 90 percent of the total fuel input (fuels identified in § 48B(c)(2) and any other fuel input) for the project. Provide the total quantities of CO, H2, CH4, CO_2, and water in the synthesis gas.
- Identify the domestic industry for which the proposed project is intended to be used.
- Identify the specific products and quantities produced by the proposed project, providing sufficient evidence to support claims.
- Provide evidence that indicates, for projects using nonrenewable fuels, the gasification technology design reflects reasonable consideration for, and is capable of, accommodating equipment necessary to capture CO_2 for later use or sequestration. Include the project status and relevant information from ongoing engineering activities. Also include in an appendix any engineering report or reports used by the applicant to develop the project and to estimate costs and operating performance.
- Provide evidence sufficient to demonstrate that the project includes equipment which separates and sequesters at least 75 percent of such project's total carbon dioxide (CO_2) emissions. The CO_2 separation, capture, sequestration, and emission values shall be reported on metric tons per hour and metric tons per year basis under normal plant operating conditions. The CO_2 separation and sequestration percentages shall be calculated based on the total CO_2 which would otherwise be released into the atmosphere as industrial emission of greenhouse gas.

3. Applicant's Capability to Accomplish the Technical Objectives

Provide a narrative supporting the applicant's capability to accomplish the technical objectives of the proposed project, including supporting documentation demonstrating that the applicant has assembled a team that is formally committed to participate in the proposed project.

Provide information to support that the applicant has assembled a team with the skills and resources needed to implement the project as proposed.

Provide signed agreements or letters from team members demonstrating that the proposed team members are fully committed to the project.

Provide information, including examples of prior similar projects completed by applicant, engineering-procurement-construction (EPC) contractor, and suppliers of major subsystems or equipment, which support the capabilities of the applicant and its team members to design, construct, permit, and operate the facility. The applicant should demonstrate that the team members have a corporate history of successful completion of similar projects.

Provide information to support that key personnel of the applicant and its team members have knowledge, experience, and adequate degree of involvement to successfully implement the project.

Include the project status and relevant information from ongoing engineering activities. Also include in an appendix any engineering report or reports used by the applicant to develop the project and to estimate costs and operating performance. Include copies of any signed agreements to support project status claims regarding preliminary design studies, front-end engineering design (FEED), and EPC-type agreements.

4. Site Control and Ownership

Provide evidence that the applicant owns or controls a site in the United States of sufficient size to allow the proposed project to be constructed and operated on a long-term basis. Documentation such as a deed demonstrating the applicant owns the project site, a signed option to purchase the site from the site owner, or a letter of intent signed by the site owner and stating the site owner's intent to sell the site to the applicant should be provided.

Describe the current infrastructure at the site available to meet the needs of the project.

Provide documentation supporting applicant's conclusion that the proposed site can fully meet all environmental, feedstock supply, water supply, transportation and public policy requirements. Such documentation may include signed agreements, letters of intent, or term sheets relating to feedstock supply, water supply, and product (*e.g.* CO_2) transportation etc., and regulatory approvals supporting the key claims.

Provide detailed plans, schedules and status updates, particularly for sites with pre-existing conditions that could impact the proposed project. Pre-existing conditions may include, but are not limited to, sites with mandated environmental remediation efforts; brown-field sites that will require building demolition; or sites requiring substantial rerouting of existing roads, railroads, or pipelines prior to the start of the project.

Applicants must select one "proposed site." However, projects with key physical or logistical elements that require close integration with another system for the project to succeed should provide information on all integrated systems regardless of where they are located. Example 1: a gasification plant designed to operate exclusively on coal from a to-be-opened mine should provide supporting documentation for the new mine. Example 2: an oxygen-blown gasification plant planning to purchase oxygen from a third party who will construct a plant exclusively for this project should provide documentation for the oxygen supplier. Example 3: an industrial gasification plant planning to sell CO_2 for enhanced oil recovery (EOR) should provide an agreement for such a transaction indicating the annual CO_2 purchase quantity, expected project lifetime sales, CO_2 capacity of the site for EOR, and EOR site ownership.

5. Utilization of Project Output

Provide evidence that a market exists for the products of the proposed project as evidenced by contracts or written statements of intent from potential customers. Such documentation should be signed by authorizing officials of both the buyer and seller, and may include: Sales Agreements, Letters of Intent, Memoranda of Understanding, and Option Agreements.

Describe any sales arrangements that exist or that may be contemplated and summaries of their key terms and conditions.

Include as an appendix any independent Market Study that has been done in connection with this project, or if no independent market study has been completed, provide a copy of the applicant-prepared market study.

6. Project Economics

Describe the project economics and provide satisfactory evidence of economic feasibility as demonstrated through the financial forecast and the underlying project assumptions. The project economic and financial assumptions should be clearly stated and explained.

Discuss the market potential for the proposed technology beyond the project proposed by the applicant.

Show calculation for the amount of tax credits applied for based on allowable cost.

7. Project Development and Financial Plan

Provide the total project budget and major plant costs (*e.g.*, development, operating, capital, construction, and financing costs). Provide the estimated annual budget for and source of project development costs from the time of the application until the beginning of construction, including legal, engineering, financial, environmental, overhead, and other development costs. Describe the overall approach to project development and financing sufficient to demonstrate project viability. Provide a complete explanation of the source and amount of project equity. Provide a complete explanation of the source and amount of project debt. Provide the audited financial statements for the applicant for the most recently ended three fiscal years, and the unaudited quarterly interim financial statements for the current fiscal year for (a) the applicant, (b) for any of the project parties providing funding, and (c) for any third party funding source. If the applicant or another party does not have audited financial statements, the applicant or the party should provide equivalent financial statements prepared by the applicant or the party, in accordance with Generally Accepted Accounting Principles, and certified as to accuracy and completeness by the Chief Financial Officer of the party providing the statements. Applicant should demonstrate that the award recipient is financially viable without the receipt of additional federal funding associated with the proposed project.

For internally financed projects, provide evidence that the applicant has sufficient assets to fund the project with its own resources. Identify any internal approvals required to commit such assets. Include in an appendix copies of any board resolution or other approval authorizing the applicant to commit funds and proceed with the project.

For projects financed through debt instruments either unsecured or secured by assets other than the project, provide evidence that the applicant has sufficient creditworthiness to obtain such financing along with a discussion of the status of such instruments. Identify any internal approvals required to commit the applicant to pursue such financing. Include in an appendix, copies of any board resolution or other approval authorizing the applicant to commit to such financing.

For projects financed through investor equity contributions, discuss the source and status of each contribution. Discuss each investor's financial capability to meet its commitments. Include in an appendix, copies of any executed investment agreements.

If financing through a public offering or private placement of either debt or equity is planned for the project, provide the expected debt rating for the issue and an explanation of applicant's justification for the rating. Describe the status of any discussions with prospective investment bankers or other financial advisors.

For projects employing nonrecourse debt financing, provide a complete discussion of the approach to, and status of, such financing. In an appendix: (1) provide an Excel based financial model of the project, with formulas, so that review of the model calculations and assumptions may be facilitated; (2) provide pro-forma project financial, economic, capital cost, and operating assumptions, including detail of all project capital costs, development costs, interest during construction, other operating expenses, and all other costs and expenses.

8. Project Contract Structure

Describe the current status of each of the agreements set forth below. Include as an appendix copies of the contracts or summaries of the key provisions of each of the following agreements:

- Raw Material Input Supply: describe the source and price of raw material inputs for the project. Include as an appendix any studies of price and amount of raw materials that have been prepared. Include a summary of any supply contracts and a signed copy of the contracts.
- Transportation: explain the arrangements for transporting project inputs and outputs, including costs.
- Operations & Maintenance Agreement: include a summary of the terms and conditions of the contract and a copy of the contract.
- Shareholders Agreement: summarize key terms and include the agreement as an appendix.
- Engineering, Procurement and Construction Agreement: describe the key terms of the existing or expected EPC contract arrangement, including firm price, liquidated damages, hold-backs, performance guarantees, etc.
- Water Supply Agreement: confirm the amount, source, and cost of water supply.

- If CO_2 is to be sold a third party for sequestration, provide a Sales Agreement and provide specifics, such as CO_2 sales (metric tons per year), expected project lifetime sales (metric tons), potential CO_2 capacity of the site for sequestration (metric tons), technology and site suitability for sequestration, and sequestration site ownership and operation.

9. Permits Including Environmental Authorizations

Provide a complete list of all federal, state, and local permits, including environmental authorizations or reviews, necessary to commence construction of the project.

Explain what actions have been taken to date to satisfy the required authorizations and reviews, and the status of each.

Provide a description of the applicant's plan to obtain and complete all necessary permits, and environmental authorizations and reviews.

Existing permits and permit applications must be specific to the project proposed. If existing permits are not specific for the proposed project (*i.e.* permits for oil-fired or natural gas based systems), specific plans, procedures and schedules for reapplying, modifying and/or renegotiating permits should be provided.

10. Project Schedule

Provide an overall project schedule which includes technical, business, financial, permitting and other factors to substantiate that the project will meet the 7 year placed-in-service requirement.

The project schedule should be comprehensive and provide sufficient detail to demonstrate how applicant will meet the placed-in-service requirement. The schedule should demonstrate that the applicant understands the required tasks, and has allowed realistic times for accomplishing the technical and financial tasks. The schedule should include the milestone accomplishments needed to obtain the financing for the project.

11. Appendices

a. Copy of internal or external engineering reports.
b. Copy of site plan, together with evidence that applicant owns or controls a site. Examples of evidence would include a deed, or an executed contract to purchase or lease the site.
c. Information supporting applicant's conclusion that the site is fully acceptable as the project site with respect to environment, raw material supply, water supply, and public policy reasons.
d. Project Market Study.
e. Financial Model of project.
f. Financial statements for the applicant and other project funding sources for the most recently ended three fiscal years, and the unaudited quarterly interim financial statements for the current fiscal year.
g. Expressions of interest or commitment letters from funding sources.
h. For each project contract, if no contract currently exists, provide a summary of the expected terms and conditions.
i. List of all federal, state, and local permits, including environmental authorizations or reviews, necessary to commence construction.
j. Copies of any contract or written statements from customers of intent to purchase project products.

E. Evaluation Criteria

Gasification projects will be evaluated on whether they meet all the requirements of § 48B.

Technical: will be evaluated on whether the applicant has demonstrated the capability to accomplish the technical objectives.

Site: will be evaluated on the basis that the site requirement for ownership or control has been met, and that the site is suitable for the proposed project.

Economic: will be evaluated on whether the project has demonstrated economic feasibility, taking into consideration the submitted financial and project development and structural information and financial plan.

Schedule: will be evaluated on the applicant's ability to meet the 7 year placed-in-service requirement.

F. Program Policy Factors To Be Used by DOE in the Evaluation of Applications

Section 48B identifies minimum requirements for consideration for the qualifying gasification project credit, including the project's technical feasibility, cost, and applicant's ability. In the event that there are more qualified (certifiable) applications than the available tax credits, the DOE will apply additional factors to rank eligible projects based on their ability to advance the deployment of industrial gasification technology beyond its current state.

If there are more certified applications than available credits, DOE will rank the certified projects based on evaluation of the following Program Policy Factors. In ranking certified projects, highest priority will be given to the Primary Ranking Factor. Secondary and Tertiary Ranking Factors will be taken into account to rank projects that are not clearly differentiated on the basis of the Primary Ranking Factor, with higher priority given to the Secondary Ranking Factor than to Tertiary Ranking Factors.

Primary Ranking Factor:

- Capture and sequestration of more than 75 percent CO_2 emissions. Only projects that capture and sequester 75 percent or more of the plant's CO_2 emissions will be considered for DOE certification. Among the certified projects, highest rankings will be given to projects with the greatest separation and sequestration percentages of total CO_2 emissions.

Secondary Ranking Factor:

- Research partnership with an eligible educational institution as defined in §48B(d)(4)(B).

Tertiary Ranking Factors:

- Presentation of other environmental, economic, or performance benefits Higher plant efficiency.
- Geographic distribution of potential markets.
- The ratio of total synthesis gas capacity (as defined in section 3.03 of Notice 2009–23) to requested tax credit.
- Diversity of technology approaches and methods.

G. Supplemental Technical and Financial Guidance for Project Information Memorandum

Technology and Technical Information

It is important that the applicant select a specific gasification system for the project. Without that decision, it is difficult to provide the necessary specific design information needed for DOE to evaluate the project feasibility with respect to performance, emissions, outputs of major streams as well as capital and operating costs.

Project Economics

Applicants should demonstrate the project's economic feasibility and financial viability by providing a clear statement and explanation of the economic and financial assumptions made by the applicant, and a financial forecast for the project. The financial forecast should flow logically from the applicant's assumptions and be consistent with them. Applicants should include assumptions regarding financial and economic issues that may not be included in the project costs but have a direct impact on the project. The examples given in the "Site Control and Ownership" section are relevant here and their impact on the project economics should be discussed here.

Project Development and Financial Plan

The information provided by the applicant in this section should demonstrate that the applicant's financial plan for developing the project is feasible and that the applicant will have access to necessary financing. The applicant should explain the source and timing for obtaining all financing, including the project development costs. It is important that the applicant explain and provide evidence that it has the capacity to fund the pre-construction project development costs, together with a budget for and description of those costs. Note that financial information is required for the applicant and for any other funding source.

Project Contract Structure

This section requires that the applicant demonstrate an understanding of the commercial contracting process and show progress in establishing the framework of contracts and agreements that a project typically requires. Applicants should show that their intended contract structure is reasonable and that their assumptions relative to price, terms, and conditions are consistent with current market conditions. Evidence of final agreements, agreements in principle, or summaries of terms and conditions between the applicant and contract counterparties should be provided, if available.

Qualifying Advanced Coal Project Program

Notice 2009–24

SECTION 1. PURPOSE

This notice provides additional procedures for the allocation of credits under the qualifying advanced coal project program of § 48A of the Internal Revenue Code. The procedures in this notice apply only to the credits authorized under the amendments made to § 48A by section 111 of the Energy Improvement and Extension Act of 2008, Pub. L. 110–343, 122 Stat. 3765 (October 3, 2008) ("the Act"). Section 111 of the Act amended § 48A to provide for a second phase of the qualifying advanced coal project program in which $1.25 billion of additional credits are authorized ("the Phase II advanced coal program" and "the Phase II advanced coal credit"). To be considered in the first allocation round under the Phase II advanced coal program, applications must be submitted to the Department of Energy ("DOE") on or before November 2, 2009, and to the Internal Revenue Service ("Service") before March 2, 2010. See section 5 of this notice for additional rules regarding these applications.

Section 48A, as originally enacted, provided for the first phase of the qualifying advanced coal project program and authorized $1.3 billion of credits ("the Phase I advanced coal program" and "the Phase I advanced coal credit"). The Service intends to issue guidance in the future regarding any Phase I advanced coal credits that remain unallocated after the 2008–2009 allocation round or that are subsequently forfeited.

SECTION 2. BACKGROUND AND CHANGES

.01 Section 46 provides that the amount of the investment credit for any taxable year is the sum of the credits listed in § 46. That list includes the qualifying advanced coal project credit.

.02 The qualifying advanced coal project credit is provided under § 48A, which was expanded and modified by section 111 of the Act.

.03 Section 48A(a) provides that the qualifying advanced coal project credit for a taxable year is an amount equal to (1) 20 percent of the qualified investment (as defined in § 48A(b)) for that taxable year in qualifying advanced coal projects (as defined in § 48A(c)(1) and (e)) described in § 48A(d)(3)(b)(i), (2) 15 percent of the qualified investment for that taxable year in qualified advanced coal projects described in § 48A(d)(3)(b)(ii), and (3) 30 percent of the qualified investment for that taxable year in qualifying advanced coal projects described in § 48A(d)(3)(B)(iii). Section 48A(d)(3)(b)(i) describes integrated gasification combined cycle ("IGCC") projects (as defined in § 48A(c)(7)) for which applications were submitted during the Phase I application period ("Phase I IGCC projects"). Section 48A(d)(3)(b)(ii) describes projects that use other advanced coal-based generation technologies (as defined in § 48A(c)(2) and (f)) and for which applications were submitted during the Phase I application period ("other Phase I advanced coal projects"). Section 48A(d)(3)(b)(iii) describes projects that use advanced coal-based generation technologies and for which applications are submitted during the Phase II application period ("Phase II advanced coal projects"). Phase II advanced coal projects include both IGCC projects and projects that use other advanced coal-based technologies. For this purpose, the Phase I application period is the 3-year period following the establishment of the qualifying advanced coal program on March 13, 2006, and the Phase II application period is the 3-year period beginning on March 13, 2009.

.04 Section 48A(d)(3)(A) provides that the aggregate credits allowed under § 48A(a) may not exceed $2.55 billion. Section 48A(d)(3)(B) provides that (1) $800 million of credits are to be allocated to Phase I IGCC projects, (2) $500 million of credits are to be allocated to other Phase I advanced coal projects, and (3) $1.25 billion of credits are to be allocated to Phase II advanced coal projects.

.05 Section 48A(d)(2)(A) provides that (i) applications for the credits allocated to Phase I IGCC projects and other Phase I advanced coal projects may be submitted only during the Phase I application period, and (ii) applications for the credits allocated to Phase II advanced coal projects may be submitted only during the Phase II application period.

.06 Section 48A(d)(5) provides that the Secretary shall, upon making a certification under § 48A(d), publicly disclose the identity of the applicant and the amount of the credit certified with respect to such applicant.

.07 Section 48A(e)(1)(G) provides that any project the application for which is submitted during the Phase II application period must include equipment that separates and sequesters—

(1) At least 65 percent of such project's total carbon dioxide ("CO_2") emissions in the case of an application other than an application for reallocated credits under § 48A(d)(4); and

(2) At least 70 percent of such project's total CO_2 emissions in the case of an application for reallocated credits under § 48A(d)(4).

.08 Section 48A(e)(3) provides the following rules for determining the projects to which credits are allocated:

(1) Section 48A(e)(3)(A) provides that the credits must be allocated in accordance with the procedures set forth in § 48A(d) and in relatively equal amounts to (i) projects using bituminous coal as a primary feedstock, (ii) projects using subbituminous coal as a primary feedstock, and (iii) projects using lignite as a primary feedstock.

(2) Section 48A(e)(3)(B) provides that high priority must be given to projects that include (i) greenhouse gas capture capability (as defined in § 48A(c)(5)), (ii) increased by-product utilization, (iii) applicant participants who have a research partnership with an eligible educational institution (as defined in section 529(e)(5)), and (iv) other benefits.

(3) Section 48A(e)(3)(C) provides that the highest priority is given to projects with the greatest separation and sequestration percentage of total CO_2 emissions.

.09 Section 48A(f) prescribes the requirements that must be satisfied to qualify as an advanced coal-based generation technology. These include requirements that the unit be designed to attain specified standards for emissions or removal of certain pollutants.

.10 Section 48A(h) directs the Secretary to modify the terms of any competitive certification award and any associated closing agreement where such modification (i) is consistent with the objectives of § 48A, (ii) is requested by the recipi-

ent, and (iii) involves moving the project site to improve the potential to capture and sequester CO_2 emissions, reduce costs of transporting feedstock, and serve a broader customer base. This directive does not apply if the Secretary determines that the dollar amount of tax credits available to the taxpayer under § 48A would increase as a result of the modification or such modification would result in such project not being originally certified. In addition, the Secretary is required to consult with other relevant Federal agencies, including the Department of Energy, in considering any modification under § 48A(h).

.11 Section 48A(i) provides that the Secretary shall provide for recapturing the benefit of any credit allowable under § 48A(a) with respect to any project that fails to attain or maintain the separation and sequestration requirements of § 48A(e)(1)(G).

.12 The at-risk rules in § 49 and the recapture and other special rules in § 50 apply to the qualifying advanced coal project credit. Further, the qualifying advanced coal project credit generally is allowed in the taxable year in which the eligible property (as defined in § 48A(c)(3)) is placed in service (as defined in section 3.04 of this notice) by the taxpayer. Pursuant to § 48A(d)(2)(E), a taxpayer that receives a certification under § 48A(d)(2)(D) has 5 years from the date of issuance of the certification to place the qualifying advanced coal project in service.

.13 Section 48A(d)(1) provides that the Secretary, in consultation with the Secretary of Energy, shall establish a qualifying advanced coal project program for the deployment of advanced coal-based generation technologies. The Treasury Department and the Service established this program in Notice 2006–24, 2006–1 C.B. 595, as modified and updated by Notice 2007–52, 2007–26 I.R.B. 1456.

.14 Notice 2007–52 provides that the Service will consider a project under the qualifying advanced coal project program only if the DOE provides a certification of feasibility ("DOE certification") and ranking (if any) for the project. Under the qualifying advanced coal project program, a taxpayer must submit, for each qualifying advanced coal project: (1) an application for certification by DOE ("application for DOE certification"), and (2) an application for certification under § 48A(d)(2) by the Service ("application for § 48A certification"). Certifications will be issued and credits will be allocated by the Service to projects in annual allocation rounds.

.15 The Phase I advanced coal program under Notice 2006–24 and Notice 2007–52 provided for three annual allocation rounds. An initial allocation round was conducted in 2006. A second allocation round was conducted in 2007–08, and a special allocation round was conducted in 2008. A third allocation round was conducted in 2008–09.

.16 This notice provides procedures for the Phase II advanced coal program. The guidance in this notice differs from the guidance provided in Notices 2006–24 and 2007–52 for the Phase I advanced coal program in a number of respects. The significant differences include the following:

(1) Section 3.05 provides a definition of the term "separation and sequestration" for purposes of § 48A.

(2) Section 4.02(2) provides that the qualifying advanced coal project credits of $1.25 billion and the applications for certification are separated into three pools based on the feedstock coal used. There are no separate pools for IGCC projects and projects that use other advanced coal-based generation technologies.

(3) Section 4.02(7) provides that the period for submitting the application for § 48A certification under Phase II advanced coal program for the 2009–10 allocation round begins on March 13, 2009, and ends on March 1, 2010.

(4) Section 4.02(3) provides that a taxpayer who was allocated a credit under the Phase I advanced coal program may re-submit an application for the same project if the project is enhanced to meet the additional requirements for a qualifying project under the Phase II advanced coal program.

(5) Section 4.02(10) provides that the deadline for taxpayers to submit applications for DOE certification for the 2009–10 allocation round is November 2, 2009, that the DOE will rank certified projects, and that the due date for the DOE to provide the Service with the certification and ranking of these projects is March 1, 2010.

(6) Section 10.01 provides that the Service will announce the results of each allocation round as required by § 48A(d)(5). Accordingly, the notice does not include a request that taxpayers submit with the application for § 48A certification a declaration consenting to the disclosure by the Service of certain return information if the taxpayer is awarded an allocation of qualifying advanced coal project credit or provide the form of the declaration, as set forth in Appendix C of Notice 2007–52.

(7) Section 7.04 provides for recapturing the benefit of any credit allowable under the Phase II advanced coal program with respect to any project that fails to attain or maintain the separation and sequestration requirements of § 48A(e)(1)(G).

(8) The information required to be included in the application for DOE certification is modified. Section 5.02 requires submission of additional information regarding CO_2 separation and sequestration. In addition, the program policy factors listed in Appendix B have been modified.

SECTION 3. DEFINITIONS

The following definitions apply for purposes of § 48A and this notice:

.01 *Coal.* Section 48A(c)(4) defines the term "coal" as meaning anthracite, bituminous coal, subbituminous coal, lignite, and peat. Coal includes waste coal (that is, usable material that is a byproduct of the previous processing of anthracite, bituminous coal, subbituminous coal, lignite, or peat). Examples of waste coal include fine coal of any of the listed ranks, coal of any of the listed ranks obtained from a refuse bank or slurry dam, anthracite culm, bituminous gob, and lignite waste.

.02 *Total Nameplate Generating Capacity.*

(1) Except as provided in section 3.02(2) of this notice, the total nameplate generating capacity of a project is the aggregate of the numbers (in megawatts) stamped on the nameplate of each generator to be used in the project.

(2) If the number stamped on the nameplate of a generator is not determined at the International Standard Organization (ISO) optimal conditions of 59 degrees Fahrenheit, 60% relative humidity, and 14.7 psia at sea level, the number stamped on the nameplate is disregarded and the generator's capacity (in megawatts) determined at such optimal conditions is used in its place.

.03 *Fuel Input.*

(1) *In general*. The term "fuel input" means, with respect to any type of fuel, the amount of such fuel used during normal plant operations. The amounts of the fuel used are measured (i) in British thermal units (Btus) on an energy input basis and (ii) pursuant to applicable standards prescribed by the American Society for Testing and Materials (ASTM). For example, § 48A(e)(1)(B) provides that the fuel input for the project, when completed, must be at least 75 percent coal. This requirement is satisfied if, after completion and during normal plant operations, coal provides 75 percent of the project's fuel measured in Btus on an energy input basis and pursuant to applicable ASTM standards.

(2) *Only normal plant operations taken into account*. Only fuel used during normal plant operations is taken into account for purposes of § 48A and sections 5.02(5) and 5.02(13) of this notice. Normal plant operations are operations other than during periods of initial plant certification, plant startup, plant shutdown, integrated gasifier shutdown for gasification system maintenance, or interruption of the coal supply to the project resulting from an event of force majeure (including an act of God, war, strike, or other similar event beyond the control of the taxpayer). For example, the fuel input during the initial plant certification may consist entirely of natural gas or other non-coal fuels because fuel used during initial plant certification is disregarded in determining whether the 75-percent coal usage requirement of § 48A(e)(1)(B) is satisfied.

.04 *Placed In Service*. For purposes of § 48A, property is placed in service in the taxable year in which the property is placed in a condition or state of readiness and availability for a specifically assigned function. *See* § 1.46–3(d)(1)(ii) of the Income Tax Regulations. Thus, a qualifying advanced coal project or eligible property (as defined in § 48A(c)(3)) that is a part of the project is placed in service in the taxable year in which the project is placed in a condition or state of readiness and availability for producing electricity from coal.

.05 *Separation and Sequestration* The term "separation and sequestration" refers to the separation and capture of a project's CO_2 emissions and the placement of the captured CO_2 into a repository in which the CO_2 will remain permanently sequestered.

SECTION 4. PHASE II QUALIFYING ADVANCED COAL PROJECT PROGRAM

.01 *In General*. The Service will consider a project under the Phase II advanced coal program only if the DOE provides a certification ("DOE certification") and ranking (if any) for the project. Accordingly, a taxpayer must submit, for each Phase II advanced coal project: (1) an application for certification by DOE that the project is technically and economically feasible ("application for DOE certification"), and (2) an application for certification under § 48A(d)(2) by the Service ("application for § 48A certification"). Both applications may be submitted only during the Phase II application period beginning on March 13, 2009, and ending on March 12, 2012. The Service will issue certifications and allocate credits to projects in annual allocation rounds. The first allocation round for Phase II advanced coal program will be conducted in 2009–10. If necessary, additional allocation rounds will be conducted in 2010–11 and 2011–12.

.02 *Program Specifications*.

(1) The Service determines the amount of the Phase II advanced coal credits allocated to a Phase II advanced coal project at the time the Service accepts the application for § 48A certification for that project in accordance with section 4.02(11) of this notice (see section 5 of this notice for the requirements applicable to the application for DOE certification and the application for § 48A certification).

(2) The Phase II advanced coal credits of $1.25 billion and the applications for Phase II certifications will be separated into the following three pools:

(a) Projects using an advanced coal-based generation technology and using bituminous coal as a primary feedstock. For the 2009–10 allocation round, the aggregate amount of the Phase II advanced coal credit for this pool is $417 million.

(b) Projects using an advanced coal-based generation technology and using subbituminous coal as a primary feedstock. For the 2009–10 allocation round, the aggregate amount of the Phase II qualifying advanced coal project credit for this pool is $417 million.

(c) Projects using an advanced coal-based generation technology and using lignite as a primary feedstock. For the 2009–10 allocation round, the aggregate amount of the Phase II advanced coal credit for this pool is $416 million.

(3) A taxpayer who was allocated a Phase I advanced coal credit for a project may submit an application for a Phase II advanced coal credit for the same project if the project meets the additional requirements for a qualifying project under the Phase II advanced coal program. Thus, the project must separate and sequester at least 65 percent of the project's total CO_2 emissions.

(a) The Phase II advanced coal credit will be allowed with respect to the taxpayer's qualified investment in the project only to the extent such investment exceeds the qualified investment with respect to which the Phase I advanced coal credit is allowable. Thus, if a Phase I advanced coal credit of $133.5 billion has been allocated to an IGCC project, the Phase II advanced coal credit will be allowed only to the extent the taxpayer's qualified investment in the project exceeds $667.5 billion (the amount that results in a $133.5 billion credit when multiplied by the 20-percent credit rate applicable to IGCC projects under Phase I). The Phase I advanced coal credit allocated to a project is not allowable for purposes of this section 4.02(3) to the extent the right to claim such credit has been irrevocably waived in such manner as the Commissioner may require.

(b) The Phase II advanced coal credit allocated to a project will be forfeited if the taxpayer fails to satisfy the certification requirements in § 48A(e)(2) within two years from the date of acceptance of the application under section 4.02(11) of this notice, or fails to place the project in service within 5 years of the date of issuance of the certification (as determined under section 6.03 of this notice). The allocation of a Phase II advanced coal credit to a project does not delay the taxpayer's certification and placed-in-service obligations with respect to any Phase I advanced coal credit previously allocated to the project. Accordingly, the Phase I advanced coal credit allocated to the project will be forfeited if the taxpayer fails to satisfy the certification requirements within two years from the date of acceptance under the Phase I advanced coal program, or fails to place the project in service within 5 years of the date of issuance of the certification under the Phase I advanced coal program.

(4) For each pool described in section 4.02(2) of this notice, DOE will rank the certified projects in descending order (that is, first, second, third, etc.). The amount available for allocation from the pool will be allocated as follows in the 2009–10 allocation round:

(a) If the requested allocation of credits for projects that DOE has certified for a pool described in section 4.02(2) of this notice does not exceed the amount available for allocation from that pool, each certified project will be allocated the full amount of credit requested.

(b) If the requested allocation of credits for projects that DOE has certified for a pool described in section 4.02(2) of this notice exceeds the amount available for allocation from that pool, the amount available for allocation will be allocated as follows:

(i) The project receiving the highest ranking (that is, first) will be allocated the full amount of credit requested (but not exceeding the amount available for allocation from the pool) before any credit is allocated to a lower-ranked project. The amount available for allocation from the pool is reduced by the amount of credit so allocated and only the remainder is available for allocation to a lower-ranked project.

(ii) Second and lower-ranked projects will be entitled to similar priority in the allocation of credits and allocations to such projects will similarly reduce the remainder of the amount available for allocation from the pool until the amount available for allocation from the pool is exhausted.

(5) If the amount available for allocation from a pool is not fully allocated in the 2009–10 allocation round, similar allocation rounds will be conducted in 2010–11 and 2011–12 until the available amount is fully allocated. The results of each allocation round will be announced. See section 10.01 of this notice for further information about this announcement.

(6) For each allocation round there will be an annual application period during which a taxpayer may file its application for § 48A certification. The Service will consider a project in an allocation round only if the application for § 48A certification for the project is submitted during the application period for that round and the DOE provides the DOE certification and the DOE ranking (if any) for the project before the end of the application period.

(7) For the 2009–10 allocation round, the application period for § 48A certification begins on March 13, 2009, and ends on March 1, 2010, and any completed application for § 48A certification received by the Service after March 12, 2009, and before March 2, 2010, will be deemed to be submitted by the taxpayer on March 1, 2010. For the 2010–11 allocation round (if necessary), the application period for § 48A certification begins on March 2, 2010, and ends on March 1, 2011, and any completed application for § 48A certification received by the Service after March 1, 2010, and before March 2, 2011, will be deemed to be submitted by the taxpayer on March 1, 2011. For the 2011–12 allocation round (if necessary), the application period for § 48A certification begins on March 2, 2011, and ends on March 1, 2012, and any completed application for § 48A certification received by the Service after March 1, 2011, and before March 2, 2012, will be deemed to be submitted by the taxpayer on March 1, 2012.

(8) If the same project would otherwise be allocated credits under both the qualifying advanced coal project program of § 48A and the qualifying gasification project program of § 48B, the following rules apply:

(a) The qualifying gasification project credit may not be allocated to the project with respect to any qualified investment under § 48B for which a qualifying advanced coal project credit is allowed under § 48A; and

(b) The qualifying gasification project credit may be allocated to the project with respect to the qualified investment under § 48B for which a qualifying advanced coal project credit is not allowed under § 48A.

(9) For purposes of this notice, an application that is submitted by U.S. mail will be treated as received by the Service on the date of the postmark and an application submitted by a private delivery service will be treated as received by the Service on the date recorded or the date marked in accordance with § 7502(f)(2)(C).

(10) See section 5.02 of this notice and Appendix B to this notice for the information to be submitted to the DOE in an application for DOE certification. Appendix B to this notice also provides the instructions and address for filing the application for DOE certification. The DOE will determine the technical and economic feasibility of the project and, if the project is determined to be feasible, will provide a DOE certification for the project to the Service. If the DOE certifies two or more projects in a pool described in section 4.02(2) of this notice, the DOE also will rank each of the projects it certifies (for example, first, second, third, etc.) relative to other certified projects in the same pool and credits will be allocated to projects based on the DOE ranking. If an application for DOE certification is postmarked on or before October 31 of a calendar year, the DOE will determine the feasibility of the project and (for projects determined to be feasible) provide the DOE certification and the DOE ranking (if any) to the Service by March 1 of the following calendar year. Thus, after application of § 7503, relating to the time for performance of acts when the last day falls on a Saturday, Sunday, or legal holiday, applications for DOE certification must be postmarked on or before November 2, 2009, to be considered in the 2009–10 allocation round, on or before November 1, 2010, to be considered in the 2010–11 allocation round, and on or before November 1, 2011, to be considered in the 2011–12 allocation round.

(11) By April 30 of the calendar year in which an application for § 48A certification is deemed to be submitted (as determined under section 4.02(7) of this notice), the Service will accept or reject the taxpayer's application for § 48A certification and will notify the taxpayer, by letter, of its decision.

(12) If the taxpayer's application for § 48A certification is accepted, the acceptance letter will state the amount of the credit allocated to the project. If a credit is allocated to a taxpayer's project, the taxpayer will be required to execute a closing agreement in the form set forth in Appendix A to this notice. By June 30 of the calendar year in which an application for § 48A certification is accepted (July 2 after application of § 7503 for applications accepted in 2012), the taxpayer must execute and return the closing agreement to the Service at the appropriate address listed in section 5.04 of this notice or listed in later guidance published in the Internal Revenue Bulletin. The Service will execute and return the closing agreement to

the taxpayer by August 31 of such calendar year. The executed closing agreement applies only to the accepted taxpayer. Accordingly, any successor in interest must execute a new closing agreement with the Service no later than the due date (including extensions) of the successor in interest's Federal income tax return for the taxable year in which the transfer occurs. If the successor in interest does not execute a new closing agreement, the following rules apply:

(a) In the case of an interest acquired at or before the time the qualifying advanced coal project is placed in service, any credit allocated to the project (including any credit allocated under the Phase I advanced coal program) will be fully forfeited (and rules similar to the recapture rules of § 50(a) apply with respect to qualified progress expenditures); and

(b) In the case of an interest acquired after the qualifying advanced coal project is placed in service, the project ceases to be investment credit property and the recapture rules of § 50(a) (and similar rules with respect to qualified progress expenditures) apply.

(13) The closing agreement relating to a credit allocation may be modified only if the modification is consistent with the objectives of the qualifying advanced coal project program, is requested by the taxpayer that received the credit allocation, involves moving the project site to improve the potential to capture and sequester CO_2 emissions, reduce costs of transporting feedstock, and serve a broader customer base. The Service will not modify a closing agreement if the dollar amount of tax credits available to the taxpayer under § 48A would increase as a result of the modification or if the project would not have been originally certified had such modification been included in the taxpayer's application. In considering such modification, the Service will consult with the DOE.

SECTION 5. APPLICATIONS FOR CERTIFICATIONS

.01 *In General*. An application for § 48A certification and a separate application for DOE certification must be submitted for each qualifying advanced coal project. If an application for DOE certification does not include all of the information required by section 5.02 of this notice and meet the requirements in sections 7.01 and 7.02 of this notice, the DOE may decline to accept the application. If an application for § 48A certification does not include all of the information listed in section 5.03 of this notice and meet the requirements in sections 7.01 and 7.02 of this notice, the application will not be accepted by the Service.

.02 *Information Required in the Application for DOE Certification*. An application for DOE certification must include all of the information requested in Appendix B to this notice and all of the following:

(1) The name, address, and taxpayer identification number of the taxpayer. If the taxpayer is a member of an affiliated group filing consolidated returns, also provide the name, address, and taxpayer identification number of the common parent of the group.

(2) The name and telephone number of a contact person.

(3) The name and address (or other unique identifying designation) of the qualifying advanced coal project.

(4) A statement specifying whether the project is an IGCC project or a qualifying advanced coal project that uses another advanced coal-based technology.

(5) A statement specifying the type of coal (bituminous coal, subbituminous coal, or lignite) that will be the primary feedstock. An application for DOE certification with respect to a project will not be considered unless one of these types of coal is the primary feedstock. For purposes of § 48A(e)(3)(A), a type of coal is the primary feedstock only if at all times more than 50 percent of the cumulative total fuel input (coal and any other fuel input) used in normal plant operations (as defined in section 3.03(2) of this notice) of the project will consist of that type of coal.

(6) The estimated total cost of the project and the estimated total qualified investment in the eligible property that will be part of the project.

(7) The amount of the qualifying advanced coal project credit requested for the project.

(8) If the taxpayer is or will be requesting an amount of the qualifying gasification project credit under § 48B for the same project, a statement specifying the amount of credit the taxpayer is or will be requesting under § 48B.

(9) A statement specifying whether the project is a new electric generation unit (as defined in § 48A(c)(6)), a retrofit of an existing electric generation unit, or a repower of an existing electric generation unit.

(10) A statement specifying whether the project is entitled to priority for greenhouse gas capture capability (as defined in § 48A(c)(5)), increased by-product utilization, or a research partnership with an eligible educational institution (as defined in § 529(e)(5)) and, if entitled to priority, a statement identifying which of these priorities apply to the project.

(11) A statement specifying the number and types of generators to be used in the project (for example, two combustion turbine generators and one steam turbine generator).

(12) The exact total nameplate generating capacity (as defined in section 3.02 of this notice) of the project.

(13) In the case of a project that will not achieve 99-percent removal of sulfur dioxide, a statement that the project is designed for the use of a feedstock substantially all of which is subbituminous coal and will achieve an emission level of not more than 0.04 pounds of sulfur dioxide per million Btu, determined on a 30-day average. For this purpose, a project is designed for the use of feedstock substantially all of which is subbituminous coal if at all times 80 percent or more of the cumulative total fuel input (coal and any other fuel input) used in normal plant operations (as defined in section 3.03(2) of this notice) of the project will be subbituminous coal. Such a project meets the requirements in § 48A(f)(1) by achieving either 99-percent removal of sulfur dioxide or an emission level of not more than 0.04 pounds of sulfur dioxide per million Btu, determined on a 30-day average. All other qualifying advanced coal projects must achieve 99-percent removal of sulfur dioxide.

.03 *Information To Be Included in the Application for § 48A Certification*. Pursuant to § 48A(d)(2)(B), an application for § 48A certification must include all of the following:

(1) The name, address, and taxpayer identification number of the taxpayer. If the taxpayer is a member of an affiliated group filing consolidated returns, also provide the name, address, and taxpayer iden-

tification number of the common parent of the group.

(2) The name, telephone number, and fax number of a contact person. For such person, attach a properly executed power of attorney, preferably on Form 2848, *Power of Attorney and Declaration of Representative*.

(3) One paper copy and one electronic version on a floppy disc or a CD of the completed application for DOE certification submitted with respect to the project in accordance with section 5.02 of this notice.

(4) If the Phase I advanced coal credit was allocated to the project, the estimated total cost and estimated total qualified investment of the Phase I advanced coal project (as represented in the application for the Phase I advanced coal credit), and the amount of the allocated Phase I advanced coal project credit.

.04 *Instructions and Address for Filing § 48A Application*. One paper copy and one electronic version on a floppy disc or a CD of the application for § 48A certification must be submitted. Applications for § 48A certification should be marked: SECTION 48A APPLICATION FOR CERTIFICATION. There is no user fee for these applications.

(1) Applications submitted by U.S. mail must be sent to:

Internal Revenue Service
Industry Director, Natural Resources and Construction
Attn: Executive Assistant
1919 Smith Street
Stop HOU 1000
Houston, TX 77002

Applications submitted by a private delivery service must be sent to:

Internal Revenue Service
Industry Director, Natural Resources and Construction
Attn: Executive Assistant
1919 Smith Street, Floor P2
Stop HOU 1000
Houston, TX 77002

(2) Applications may also be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. Central time to:

Internal Revenue Service
Industry Director, Natural Resources and Construction
Attn: Executive Assistant
1919 Smith Street, Floor P2
Stop HOU 1000
Houston, TX 77002

SECTION 6. ISSUANCE OF CERTIFICATION

.01 *In General*. Section 48A(d)(2)(D) provides that a taxpayer shall have 2 years from the date of acceptance of the § 48A application during which to provide evidence that the criteria set forth in § 48A(e)(2) have been met. Pursuant to § 48A(e)(2), a project shall be eligible for certification only if (A) the taxpayer has received all federal and state environmental authorizations or reviews necessary to commence construction of the project, and (B) the taxpayer, except in the case of a retrofit or repower of an existing generation unit, has purchased or entered into a binding contract for the purchase of the main steam turbine or turbines for the project, except that this contract may be contingent upon receipt of a certification under § 48A(d)(2). Section 48A(d)(2)(E) provides that a taxpayer that receives a certification has 5 years from the date of issuance of the certification to place the project in service and that the certification is void if the project is not placed in service by the end of that five-year period.

.02 *Requirements for Certification*. Within 2 years from the date that the Service accepts the taxpayer's application for § 48A certification under section 4.02(11) of this notice, the taxpayer must submit to the Service both a paper copy and an electronic version on a floppy disc or a CD of the documentation establishing that the requirements of § 48A(e)(2) are satisfied. The electronic version of the documentation must be formatted in one of the following software applications: Microsoft Word™ 2002 or later edition; Microsoft Excel™ 2002 or later edition; or Adobe Acrobat™ PDF 6.0 or later edition. See also sections 7.01 and 7.02 of this notice for other requirements that must be satisfied. The taxpayer should mark the package "SECTION 48A CERTIFICATION REQUIREMENTS" and send it to the appropriate address listed in section 5.04 of this notice or listed in later guidance published in the Internal Revenue Bulletin.

.03 *Service's Action on Certification*. After receiving the material described in section 6.02 of this notice, the Service will decide whether or not to certify the project and will notify the taxpayer, by letter, of that decision. If the Service certifies the project, the date of this letter is the date of issuance of the certification.

SECTION 7. OTHER REQUIREMENTS

.01 *Signature*. Each submission under sections 5 and 6 of this notice must be signed and dated by the taxpayer. A stamped signature or faxed signature is not permitted.

.02 *Penalties of Perjury Statement*.

(1) Each submission under sections 5 and 6 of this notice must be accompanied by the following declaration: "Under penalties of perjury, I declare that I have examined this submission, including accompanying documents, and, to the best of my knowledge and belief, all of the facts contained herein are true, correct, and complete."

(2) The declaration must be signed and dated by the taxpayer. The person signing for the taxpayer must have personal knowledge of the facts. Further, the declaration must be signed by an officer on behalf of a corporation, a general partner on behalf of a state-law partnership, a member-manager on behalf of a limited liability company, a trustee on behalf of a trust, and the proprietor in the case of a sole proprietorship. If the taxpayer is a member of an affiliated group filing consolidated returns, the declaration also must be signed by a duly authorized officer of the common parent of the group. A stamped signature or faxed signature is not permitted.

.03 *Significant Change in Plans*. The Service must be informed if the plans for the project change in any significant respect from the plans set forth in the applications for § 48A and DOE certification. Except as otherwise provided under § 48A(h), any significant change to the plans set forth in the applications will have the following effects:

(1) If the Service is informed of the change after the date on which the applications for DOE certification were due for the allocation round under section 4.02(10) of this notice and before the

Service accepts or rejects the taxpayer's application for § 48A certification under section 4.02(11) of this notice, the Service will not consider the project during the allocation round; and

(2) Any acceptance provided by the Service and any allocation or certification based on that acceptance will be void unless the Service is informed of the change before the date on which the acceptance is provided under section 4.02(11) of this notice.

.04 *Failure to Capture and Sequester CO_2 Emissions*. The Phase II advanced coal credit allocated to a project will be recaptured if, at any time during the applicable recovery period (as defined in § 168(c)) for such project, the project fails to attain or maintain the separation and sequestration requirements for such project under §48A(e)(1)(g).

.05 *Effect of an Acceptance, Allocation, or Certification*. An acceptance, allocation, or certification by the Service under this notice is not a determination that a project qualifies for the qualifying advanced coal project credit under § 48A. The Service may, upon examination (and after any appropriate consultation with DOE), determine that the project does not qualify for this credit.

.06 *No Right to a Conference or Appeal*. A taxpayer does not have a right to a conference relating to any matters under this notice. Further, a taxpayer does not have a right to appeal the decisions made under this notice (including the acceptance or rejection of the application for DOE or § 48A certification, the amount of credit allocated to the project, or whether or not to certify the project) to an Associate Chief Counsel or any other official of the Service.

.07 *DOE Debriefings*. Although a taxpayer does not have a right to a conference relating to any matters under this notice, the DOE will offer debriefings to all applicants that submitted an application for DOE certification. This debriefing will be held by the DOE after the Service has accepted the applications for § 48A certification (as determined under section 4.02(11) of this notice). The sole purpose of the debriefing is to enable applicants to develop better proposals in future allocation rounds by providing DOE's review of the strengths and weaknesses of their application for DOE certification. All requests for debriefings must be submitted to DOE within 30 days of receipt of the Service's decision to accept or reject the application.

SECTION 8. REDUCTION OR FORFEITURE OF ALLOCATED CREDITS

.01 Under the closing agreement set forth in Appendix A to this notice, the qualifying advanced coal project credit allocated under section 4 of this notice will be reduced or forfeited in certain situations. A taxpayer must notify the Service of the amount of any reduction or forfeiture required under the closing agreement. This notification must be sent to the appropriate address listed in section 5.04 of this notice or listed in later guidance published in the Internal Revenue Bulletin.

.02 The amount of any reduction or forfeiture of the allocated credit will be returned to the appropriate allocation pool and included in the aggregate credit remaining to be allocated in the allocation round following the reduction or forfeiture. If the reduction or forfeiture occurs after the 2011–12 allocation round, future guidance will prescribe procedures applicable to applications for certification with respect to the amount of returned credit.

SECTION 9. QUALIFIED PROGRESS EXPENDITURES

.01 Section 48A(b)(3) provides that rules similar to the rules of § 46(c)(4) and (d) (as in effect on the day before the enactment of the Revenue Reconciliation Act of 1990) shall apply for purposes of § 48A. Former §§ 46(c)(4) and 46(d) provided the rules for claiming the investment credit on qualified progress expenditures (as defined in former § 46(d)(3)) made by a taxpayer during the taxable year for the construction of progress expenditure property (as defined in former § 46(d)(2)).

.02 In the case of self-constructed property (as defined in former § 46(d)(5)(A)), former § 46(d)(3)(A) defined qualified progress expenditures to mean the amount that is properly chargeable (during the taxable year) to capital account with respect to that property. With respect to a qualifying advanced coal project that is self-constructed property, amounts paid or incurred are chargeable to capital account at the time and to the extent they are properly includible in computing basis under the taxpayer's method of accounting (for example, after applying the requirements of § 461, including the economic performance requirement of § 461(h)).

.03 To claim the qualifying advanced coal project credit on the qualified progress expenditures paid or incurred by a taxpayer during the taxable year for construction of a qualifying advanced coal project, the taxpayer must make an election under the rules set forth in § 1.46–5(o) of the Income Tax Regulations. A taxpayer may not make the qualified progress expenditures election for a qualifying advanced coal project until the taxpayer has received an acceptance letter for the project under section 4.02(11) of this notice.

.04 If a taxpayer makes the qualified progress expenditures election pursuant to section 9.03 of this notice, rules similar to the recapture rules in § 50(a)(2)(A)–(D) apply. In addition to the cessation events listed in § 50(a)(2)(A), examples of other events that will cause the project to cease being a qualifying advanced coal project are:

(1) Failure to satisfy any of the certification requirements in § 48A(e)(2) within 2 years from the date that the Service accepted the taxpayer's application for § 48A certification for the project under section 4.02(11) of this notice;

(2) Failure to receive a certification for the project in accordance with section 6.03 of this notice;

(3) Failure to place the project in service within 5 years from the date of issuance of the certification under section 6.03 of this notice;

(4) A significant change to the plans for the project as set forth in the applications for § 48A and DOE certification if, under section 7.03 of this notice, the Service's acceptance of the project is void as a result of the change; or

(5) Failure of the project, at any time during the applicable recovery period (as defined in § 168(c)) for such project, to attain or maintain the separation and sequestration of CO_2 emissions required by § 48A(e)(1)(G).

SECTION 10. DISCLOSURE OF INFORMATION

.01 *Announcement*. Section 48A(d)(5) provides that the Secretary shall, upon making a certification under § 48A(d) or

§ 48B(d), publicly disclose the identity of the applicant and the amount of the credit certified with respect to such applicant. Accordingly, the Service intends to publish the results of the allocation process, and disclose the following information in the event a qualifying advanced coal project credit is allocated to the taxpayer's project: (a) the name of the taxpayer and (b) the amount of the qualifying advanced coal project credit allocated to the project.

.02 *In general*. An application for DOE certification, an application for § 48A certification, any other documentation submitted by the taxpayer pursuant to section 6.02 of this notice, and any documentation generated by the Service or DOE as part of this process are return information subject to § 6103. Except for the items of information that § 48A(d)(5) requires the Service to make available to the public, the other material remains the applicant's confidential return information, which is exempt from disclosure under the Freedom of Information Act ("FOIA"), 5 USC § 552(b)(3), in conjunction with § 6103. Other FOIA exemptions may also apply. For example, FOIA includes exemptions for trade secrets and commercial or financial information (5 USC § 552. (b)(4)), as well as personal information (5 USC § 552(b)(6)).

.03 *FOIA requests*. Anyone interested in submitting a request for records under the FOIA with respect to the qualifying advanced coal project program under § 48A should direct a request that conforms to the Service's FOIA regulations, found at 26 C.F.R. § 601.702, to the following address:

IRS FOIA Request
Baltimore Disclosure Office
Room 940
31 Hopkins Plaza
Baltimore, MD 21201

SECTION 11. EFFECT ON OTHER DOCUMENTS

Notice 2007–52 is clarified, modified, and amplified.

SECTION 12. EFFECTIVE DATE

This notice is effective March 13, 2009.

SECTION 13. PAPERWORK REDUCTION ACT

The collection of information contained in this notice has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. § 3507) under control number 1545–2003.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

The collections of information in this notice are in sections 4, 5, 6, 7, 8, and Appendix B of this notice. This information is required to obtain an allocation of qualifying advanced coal project credits. This information will be used by the Service to verify that the taxpayer is eligible for the qualifying advanced coal project credits. The collection of information is required to obtain a benefit. The likely respondents are business or other for-profit institutions.

The estimated total annual reporting burden is 4,950 hours.

The estimated annual burden per respondent varies from 70 to 150 hours, depending on individual circumstances, with an estimated average of 110 hours. The estimated number of respondents is 45.

The estimated annual frequency of responses is on occasion.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. § 6103.

SECTION 14. DRAFTING INFORMATION

The principal author of this notice is Julie V. Skeen of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this notice, contact Jennifer Bernardini at (202) 622–3110 (not a toll-free call). For further information regarding the application for § 48A certification, the documentation to be submitted to the Service establishing that the requirements of § 48A(e)(2) are satisfied, and the issuance of the certification that the requirements of § 48A(e)(2) are satisfied, contact Tina Meaux, Executive Assistant, Office of the Industry Director, Natural Resources and Construction, at (713) 209–4074 (not a toll-free number).

APPENDIX A

CLOSING AGREEMENT

Under § 7121 of the Internal Revenue Code, [insert taxpayer's name, address, and identifying number] ("Taxpayer") and the Commissioner of Internal Revenue ("Commissioner") make the following closing agreement:

WHEREAS:

1. On or before March [insert date and year], Taxpayer submitted to the Internal Revenue Service ("Service"), an application for certification under the Phase II advanced coal program described in Notice 2009–24 ("Application for § 48A Certification");

2. Taxpayer's Application for § 48A Certification is for the qualifying advanced coal project (the "Project") described below—

(1) The Project will use an advanced coal-based generation technology (as defined in § 48A(c)(2) and (f));

(2) The Project will be located at [insert address or other identifying designation];

(3) The Project is [insert either: "a new electric generation unit (as defined in § 48A(c)(6))"; "a retrofit of an existing electric generation unit (as defined in § 48A(c)(6))"; or "a repower of an existing electric generation unit (as defined in § 48A(c)(6))";

(4) The Project will have a total nameplate generating capacity (as defined in section 3.02 of Notice 2009–24) of at least [insert number] megawatts;

(5) At all times more than 50 percent of the cumulative total fuel input (as defined in section 3.03(1) of Notice 2009–24 and including coal and any other fuel input) used during normal plant operations (as defined in section 3.03(2) of Notice 2009–24) for the Project will be [insert either: "bituminous coal"; "subbituminous coal"; or "lignite"]; and

3. On [insert date of acceptance letter issued under section 4.02(11) of Notice 2009–24], the Service accepted Taxpayer's Application for § 48A Certification for the Project and allocated a qualifying advanced coal project credit under § 48A in the amount of $[insert number] to the Project.

NOW IT IS HEREBY DETERMINED AND AGREED FOR FEDERAL INCOME TAX PURPOSES THAT:

1. The total amount of the qualifying advanced coal project credit to be claimed for the Project under § 48A(a) must not exceed $[insert the number in WHEREAS clause #3].

2. If Taxpayer fails to satisfy any of the certification requirements in § 48A(e)(2) within the time specified in § 48A(d)(2)(D) (2 years from [insert the date in WHEREAS clause #3]), or if the Service does not issue a certification for the Project under Notice 2009–24, the qualifying advanced coal project credit in the amount of $[insert the number in WHEREAS clause #3] allocated to the Project is fully forfeited.

3. If the Project fails, at any time during the applicable recovery period (as defined in § 168(c)) for such project, to attain or maintain the separation and sequestration of CO_2 emissions required by § 48A(e)(1)(G), the qualifying advanced coal project credit in the amount of $[insert the number in WHEREAS clause #3] allocated to the Project is fully forfeited.

4. If the Project is not placed in service by Taxpayer within 5 years of the date of issuance of the certification as determined under section 6.03 of Notice 2009–24, the qualifying advanced coal project credit in the amount of $[insert the number in WHEREAS clause #3] allocated to the Project is fully forfeited.

5. If the plans for the Project change in any significant respect from the plans set forth in the application for DOE certification (as defined in section 4.01 of Notice 2009–24) and the Application for § 48A Certification (as defined in section 4.01 of Notice 2009–24) and, under section 7.03 of Notice 2009–24, the acceptance of Taxpayer's Application for § 48A Certification on [insert the date in WHEREAS clause #3] is void, the qualifying advanced coal project credit in the amount of $[insert the number in WHEREAS clause #3] allocated to the Project is fully forfeited.

6. (1) If the Project fails to satisfy any of the requirements in § 48A(e)(1)(A), (C), (D), (E), and (F) for a qualifying advanced coal project or, during normal plant operations (as defined in section 3.03(2) of Notice 2009–24), fails to satisfy the requirement in § 48A(e)(1)(B) for a qualifying advanced coal project—

(a) at the time the Project is placed in service, the qualifying advanced coal project credit in the amount of $[insert the number in WHEREAS clause #3] allocated to the Project is fully forfeited; and

(b) after the Project is placed in service (and after satisfying all such requirements at the time the Project is placed in service), the Project ceases to be investment credit property and the recapture rules of § 50(a) apply.

(2) If at any time more than 50 percent of the cumulative total fuel input (as defined in section 3.03(1) of Notice 2009–24 and including coal and any other fuel input) used during normal plant operations (as defined in section 3.03(2) of Notice 2009–24) is not [insert the primary feedstock in WHEREAS clause #2(e)], the Project ceases to be investment credit property and the recapture rules of § 50(a) apply.

7. Taxpayer will not claim the qualifying gasification project credit under § 48B for any qualified investment for which the qualifying advanced coal project credit is allowed under § 48A.

8. If Taxpayer elects to claim the qualifying advanced coal project credit on the qualified progress expenditures paid or incurred by Taxpayer during the taxable year(s) during which the Project is under construction and the Project ceases to be a qualifying advanced coal project (whether before, at the time, or after the Project is placed in service), rules similar to the recapture rules in § 50(a)(2)(A) through (D) apply.

9. This agreement applies only to Taxpayer. Any successor in interest must execute a new closing agreement with the Service. If the interest is acquired at or before the time the Project is placed in service and the successor in interest fails to execute a new closing agreement, the qualifying advanced coal project credit in the amount of $[insert the number in WHEREAS clause #3] allocated to the Project is fully forfeited. If the interest is acquired after the time the Project is placed in service and the successor in interest fails to execute a new closing agreement, the Project ceases to be investment credit property and the recapture rules of § 50(a) apply.

THIS AGREEMENT IS FINAL AND CONCLUSIVE EXCEPT:

1. The matter it relates to may be reopened in the event of fraud, malfeasance, or misrepresentation of a material fact;

2. It is subject to the Internal Revenue Code sections that expressly provide that effect be given to their provisions (including any stated exception for § 7122) notwithstanding any law or rule of law; and

3. If it relates to a tax period ending after the date of this Closing Agreement, it is subject to any law enacted after such date, which applies to the tax period.

By signing, the parties certify that they have read and agreed to the terms of this Closing Agreement.

Taxpayer: [insert name and identifying number]

By: ________________________________ **Date Signed:** ______________
[insert name]

Title: [insert title]
[insert taxpayer's name]

Commissioner of Internal Revenue

By: ________________________________ **Date Signed:** ______________
[insert name]

Title: [insert title]

I have examined the specific matters involved and recommend the acceptance of the proposed agreement.

(Receiving Officer) ....
(Title) ....
Date Signed ....

I have reviewed the specific matters involved and recommend the acceptance of the proposed agreement.

(Receiving Officer) ....
(Title) ....
Date Signed ....

APPENDIX B

APPLICATION FOR DOE CERTIFICATION

REQUEST FOR SUPPLEMENTAL APPLICATION INFORMATION FOR DOE

The Internal Revenue Service ("Service") and the Department of Energy ("DOE") seek to certify applications that demonstrate a high likelihood of being successfully implemented by the applicants. To qualify, projects must be technically and economically feasible and use the appropriate clean coal technology.

This request for submission of supplemental application information:

- Describes the information to be provided by the applicant seeking a certification of feasibility from DOE, and
- Lists the evaluation criteria and Program Policy Factors to be used by DOE in the evaluation of applications.

If after review by the DOE a project is determined to be feasible, DOE will provide a DOE certification of feasibility to the Service. The Service will then accept or reject the taxpayer's application for certification of tax credit.

In conducting this evaluation the DOE may utilize assistance and advice from qualified personnel from other Federal agencies and/or non-conflicted contractors. DOE will obtain assurances in advance from all evaluators that application information shall be kept confidential and used only for evaluation purposes. DOE reserves the right to request clarifications and/or supplemental information from some or all applicants through written submissions and/or oral presentations.

Notice is given that DOE may determine whether or not to provide a certification to the Service at any time after the application has been received, without further exchanges or discussions. Therefore, all applicants are advised to submit their most complete and responsive application.

Applications will not be returned.

INFORMATION TO BE SUBMITTED FOR DOE CERTIFICATION APPLICATION

A. General

This request, together with the information in relevant sections of Notice 2009–24 includes all the information needed to complete an application for DOE certification. All applications shall be prepared in accordance with this request in order to provide a standard basis for evaluation and to ensure that each application will be uniform as to format and sequence.

Each application should clearly demonstrate the applicant's capability, knowledge, and experience in regard to the requirements described herein.

Applicants should fully address the requirements of Notice 2009–24 and this request and **not** rely on the presumed background knowledge of reviewers. DOE may reject an application that does not follow the instructions regarding the organization and content of the application when the nature of the deviation and/or omission precludes meaningful review of the application.

B. Unnecessarily Elaborate Applications

Unnecessarily elaborate brochures or other presentations beyond those sufficient to present a complete and effective application are not desired. Elaborate art work, graphics and pictures are neither required nor encouraged.

C. Application Submission for DOE Certification

The application submission to DOE must include the information and documentation required by relevant sections of Notice 2009–24.

An application to DOE will not be considered in the allocation round conducted in 2009–10 unless it is postmarked by November 2, 2009. (If allocation rounds are conducted in 2010–11 and 2011–12, applications must be postmarked by November 1 of the year in which the allocation round begins.) One paper copy and one electronic version on a floppy disc or a CD of the application must be submitted to:

Melissa Robe
National Energy Technology Laboratory
3610 Collins Ferry Road
Morgantown, WV 26507

Note that under section 5.03(1) of Notice 2009–24, one paper copy and one electronic version of the application for DOE certification must be sent to the Service as part of the application for §48A certification. The application for §48A certification will not be considered in the allocation round conducted in 2009–10 unless it is submitted to the Service by March 1, 2010. (If allocation rounds are conducted in 2010–11 and 2011–12, applications must be postmarked by March 1 of the year in which the allocation round ends.)

THE INFORMATION REQUIRED BY THIS REQUEST MUST BE SUBMITTED USING THE FORMAT AND THE HEADINGS OF THE "PROJECT INFORMATION MEMORANDUM" AS DESCRIBED BELOW.

To aid in evaluation, applications shall be clearly and concisely written and logically assembled. All pages of each part shall be appropriately numbered and identified with the name of the applicant and the date.

The application, including the Project Information Memorandum, MUST be formatted in one of the following software applications:

- Microsoft Word^{tm} 2002 or later edition
- Microsoft Excel^{tm} 2002 or later edition
- Adobe Acrobat^{tm} PDF 6.0 or later edition

Financial models should be submitted using the Excel^{tm} spreadsheet and must include calculation formulas and assumptions.

The applicant is responsible for the integrity and structure of the electronic files. The DOE will not be responsible for reformatting, restructuring or converting any files submitted under this announcement.

The Project Information Memorandum, *excluding Appendices*, shall not exceed seventy-five (75) pages. Pages in excess of the page limitation will not be considered for evaluation. All text shall be typed, single spaced, using 12 point font, 1 inch margins, and unreduced 8–1/2-inch by 11-inch pages. Illustrations and charts shall be legible with all text in legible font. Pages shall be sequentially numbered. Except as otherwise noted herein the page guidelines previously set forth constitute a limitation on the total amount of material that may be submitted for evaluation. No material may be incorporated in any application by reference as a means to circumvent the page limitation.

D. Project Information Memorandum

1. Summary and Introduction

a. Description of the Project
b. Financing and Ownership Structure
c. Description of the main parties to the project, including background, ownership and related experience
d. Current Project Status and Schedule to Beginning of Construction

2. Technology and Technical Information

Provide a description of the proposed technology, including sufficient supporting information (such as vendor guarantees, process flow diagrams, equipment descriptions, information on each major process unit and the total plant, compositions of major streams, and the technical plan for achieving the goals proposed for the project) as would be needed to allow DOE to confirm that the technical requirements of § 48A are met. Specifically the applicant should:

- Provide evidence sufficient to demonstrate that the proposed technology meets the definition of "Advanced Coal-Based Generation Technology," either as integrated gasification combined cycle ("IGCC") technology, or other advanced coal-based electric generation technology meeting the heat rate requirement of 8530 Btu/kWh.

- For advanced coal-based electric generation:
  - The applicant must provide evidence sufficient to justify the actual heat rate and heat rate corrected to conditions specified in § 48A(f)(2).
  - For projects including existing units, the applicant must provide evidence sufficient to justify that the proposed technology meets heat rate requirements specified in § 48A(f)(3).

- Provide evidence sufficient to justify that the proposed project is designed to meet the following performance requirements:
  - SO_2 (subbituminous coal is 80 percent or more of fuel input)........99 percent removal or emissions not more than 0.04 lbs/MMBTU
  - SO_2 (subbituminous coal is not more than 80 percent of fuel input)..........99 percent removal
  - SO_2 (for all projects other than subbituminous coal projects)..........99 percent removal
  - NOx emissions..............0.07 lbs / MMBTU
  - PM emissions................0.015 lbs / MMBTU

- Hg percent removal..........90 percent

- Provide evidence sufficient to demonstrate that the project meets the requirements for qualifying advanced coal projects as specified under § 48A(e)(1) including:
  - The project will power a new electric generation unit or retrofit/repower an existing electric generation unit. At least 50% of the useful output of the project is electrical power.
  - The fuel for the project is at least 75% coal (as defined in § 48A(c)(4) and section 3.01 of Notice 2009–24), on an energy input basis.
  - The project is located at one site and has a total nameplate electric power generating capacity (as defined in section 3.02 of Notice 2009–24) of at least 400 MW.
  - The project includes equipment which separates and sequesters at least 65 percent of such project's total carbon dioxide ("CO_2") emissions. The CO_2 separation, capture, sequestration, and emission values shall be reported on metric tons per hour and metric tons per year basis under normal plant operating conditions. The CO_2 separation and sequestration percentages shall be calculated based on the total CO_2 which would otherwise be released into the atmosphere as industrial emission of greenhouse gas.

3. Applicant's Capability to Accomplish the Technical Objectives

Provide a narrative supporting the Applicant's capability to accomplish the technical objectives of the proposed project, including supporting documentation demonstrating that the applicant has assembled a team that is formally committed to participate in the proposed project.

Provide information to support that the applicant has assembled a team with the skills and resources needed to implement the project as proposed. Provide signed agreements or letters from team members demonstrating that the proposed team members are fully committed to the project.

Provide information, including examples of prior similar projects completed by applicant, engineering-procurement-construction ("EPC") contractor, and suppliers of major subsystems or equipment, which support the capabilities of the applicant and its team members to design, construct, permit, and operate the facility. The applicant should demonstrate that the team members have a corporate history of successful completion of similar projects.

Provide information to support that key personnel of the applicant and its team members have knowledge, experience, and adequate degree of involvement to successfully implement the project.

Include the project status and relevant information from ongoing engineering activities. Also include in an appendix any engineering report or reports used by the applicant to develop the project and to estimate costs and operating performance. Include copies of any signed agreements to support project status claims regarding preliminary design studies, front-end engineering design ("FEED"), and EPC-type agreements.

4. Priority for Qualifying Advanced Coal Projects

The applicant must submit information sufficient for categorization and prioritization of projects for certification, including documentation pertaining to the following:

- Identification of the primary feedstock (as defined in section 5.02(5) of Notice 2009–24), and all other feedstocks.
- High priority project factors:
  - Greenhouse gas capture capability.
  - Increased by-product utilization, if applicable.
  - Research partnership with an eligible educational institution as defined in §48A(e)(3)(B)(iii), if applicable.
- Highest priority factor: Separation and sequestration percentage of total CO_2 emissions.

5. Site Control and Ownership

Provide evidence that demonstrates the overall feasibility of implementing the project at the proposed site.

Provide evidence that the applicant owns or controls a site in the United States of sufficient size to allow the proposed project to be constructed and operated on a long-term basis. Documentation such as a deed demonstrating the applicant owns the project site, a signed option to purchase the site from the site owner, or a letter of intent signed by the site owner and stating the site owner's intent to sell the site to the applicant should be provided.

Describe the current infrastructure at the site available to meet the needs of the project.

Provide documentation supporting applicant's conclusion that the proposed site can fully meet all environmental, coal supply, water supply, transmission interconnect, and public policy requirements. Such documentation may include signed agreements, letters of intent, or term sheets relating to coal supply, water supply, and product (*e.g.* CO_2) transportation etc., and regulatory approvals supporting the key claims.

Provide detailed plans, schedules and status updates, particularly for sites with pre-existing conditions that could impact the proposed project. Pre-existing conditions may include, but are not limited to, sites with mandated environmental remediation efforts; brown-field sites that will require building demolition; or sites requiring substantial rerouting of existing roads, railroads, transmission lines or pipelines prior to the start of the project.

Applicants must select one "proposed site." However, projects with key physical or logistical elements that require close integration with another system for the project to succeed should provide information on all integrated systems regardless of where they are located. Example 1: a power plant designed to operate exclusively on coal from a to-be-opened mine should provide supporting documentation for the new mine. Example 2: an oxygen-blown IGCC plant planning to purchase oxygen from a third party who will construct a plant exclusively for this project should provide documentation for the oxygen supplier. Example 3: an IGCC plant planning to sell CO_2 for enhanced oil recovery ("EOR") should provide an agreement for such a transaction indicating the annual CO_2 purchase quantity, expected project lifetime sales, CO_2 capacity of the site for EOR, and EOR site ownership.

6. Utilization of Project Output

Provide evidence that demonstrates that a majority of the project output is reasonably expected to be acquired or utilized.

Provide a projection of the anticipated costs of electricity and other marketable by-products produced by the plant.

Provide documentation establishing that a majority of the output of the plant is reasonably expected to be acquired or utilized. Such documentation should be signed by authorizing officials of both the buyer and seller, and may include: Sales Agreements, Letters of Intent, Memoranda of Understanding, Option Agreements, and Power Purchase Agreements.

Describe any energy sales arrangements that exist or that may be contemplated (*e.g.*, a Power Purchase Agreement or Energy Sales Agreement) and summarize their key terms and conditions.

Include as an appendix any independent Energy Price Market Study that has been done in connection with this project, or if no independent market study has been completed, provide a copy of the applicant-prepared market study.

Identify and describe any firm arrangements to sell non-power output, such as CO_2, and provide any evidence of such arrangements. If the project produces a product in addition to power, include as an appendix any related market study of price and volume of sales expected for that product.

7. Project Economics

Describe the project economics and provide satisfactory evidence of economic feasibility as demonstrated through the financial forecast and the underlying project assumptions. The project economic and financial assumptions should be clearly stated and explained.

Show calculation of the amount of tax credit applied for based on allowable cost.

8. Project Development and Financial Plan

Provide the total project budget and major plant costs (*e.g.*, development, operating, capital, construction, and financing costs). Provide the estimated annual budget for and source of project development costs from the time of the application until the beginning of construction, including legal, engineering, financial, environmental, overhead, and other development costs. Describe the overall approach to project development and financing sufficient to demonstrate project viability. Provide a complete explanation of the source and amount of project equity. Provide a complete explanation of the source and amount of project debt. Provide the audited financial statements for the most recently ended three fiscal years and quarterly interim financial statements for the current fiscal year for (a) the applicant, (b) for any of the project parties providing funding, and (c) for any third party funding source. If the applicant or another party does not have audited financial statements, the applicant or the party should provide equivalent financial statements prepared by the applicant or the party, in accordance with Generally Accepted Accounting Principles, and certified as to accuracy and completeness by the Chief Financial Officer of the party providing the statements.

For internally financed projects, provide evidence that the applicant has sufficient assets to fund the project with its own resources. Identify any internal approvals required to commit such assets. Include in an appendix copies of any board resolution or other approval authorizing the applicant to commit funds and proceed with the project.

For projects financed through debt instruments either unsecured or secured by assets other than the project, provide evidence that the applicant has sufficient creditworthiness to obtain such financing along with a discussion of the status of such instruments. Identify any internal approvals required to commit the applicant to pursue such financing. Include in an appendix copies of any board resolution or other approval authorizing the applicant to commit to such financing.

For projects financed through investor equity contributions, describe the source and status of each contribution. Discuss each investor's financial capability to meet its commitments. Include in an appendix, copies of any executed investment agreements.

If financing through a public offering or private placement of either debt or equity is planned for the project, provide the expected debt rating for the issue and an explanation of applicant's justification for the rating. Describe the status of any discussions with prospective investment bankers or other financial advisors.

Include as an appendix copies of any existing funding commitments or expressions of interest from funding sources for the project.

For projects employing non-recourse or limited recourse debt financing, provide a complete discussion of the approach to, and status of, such financing. In an appendix: (1) provide an Excel based financial model of the project, with formulas, so that review of the model calculations and assumptions may be facilitated; and (2) provide pro-forma project financial, economic, capital cost, and operating assumptions, including detail of all project capital costs, development costs, interest during construction, transmission interconnection costs, other operating expenses, and all other costs and expenses.

9. Project Contract Structure

Describe the current status of each of the agreements set forth below. Include as an appendix copies of the contracts or summaries of the key provisions of each of the following agreements:

- Power Purchase Agreement (if not fully explained in section 5 above)
- Coal Supply: describe the source and price of coal supply for the project. Include as an appendix any studies of coal supply price and amount that have been prepared. Include a summary of the coal supply contract and a signed copy of the contract.
- Coal Transportation: explain the arrangements for transporting coal, including costs.
- Operations & Maintenance Agreement: include a summary of the terms and conditions of the contract and a copy of the contract.
- Shareholders Agreement: summarize key terms and include the agreement as an appendix.
- Engineering, Procurement and Construction Agreement: describe the key terms of the existing or expected EPC contract arrangement, including firm price, liquidated damages, hold-backs, performance guarantees, etc.
- Water Supply Agreement: confirm the amount, source, and cost of water supply.
- Transmission Interconnection Agreement: explain the requirements to connect to the system and the current status of negotiations in this respect.
- If CO_2 is to be sold a third party for sequestration, provide a Sales Agreement and provide specifics, such as CO_2 sales (metric tons per year), expected project lifetime sales (metric tons), potential CO_2 capacity of the site for sequestration (metric tons), technology and site suitability for sequestration, and sequestration site ownership and operation.

10. Permits Including Environmental Authorizations

Provide a complete list of all federal, state, and local permits, including environmental authorizations or reviews, necessary to commence construction of the project.

Explain what actions have been taken to date to satisfy the required authorizations and reviews, and the status of each.

Provide a description of the applicant's plan to obtain and complete all necessary permits, and environmental authorizations and reviews.

11. Steam Turbine Purchase

If applicant plans to purchase a steam turbine or turbines for the project, indicate the prospective vendors for the turbine and explain the current status of purchase negotiations, and provide a timeline for negotiation and purchase with expected purchase date.

12. Project Schedule

Provide an overall project schedule which includes technical, business, financial, permitting and other factors to substantiate that the project will meet the 2 year project certification and 5 year placed-in-service requirement.

The project schedule should be comprehensive and provide sufficient detail to demonstrate how applicant will meet the certification and placed-in-service requirements. The schedule should demonstrate that the applicant understands the required tasks, and has allowed realistic times for accomplishing the technical and financial tasks. The schedule should include the milestone accomplishments needed to obtain the financing for the project.

Applicants should document their progress toward meeting the 2 year completion of permitting deadline. Existing permits and permit applications must be specific to the project proposed. If existing permits are not specific for the proposed coal-based project (*e.g.* the permits are for oil-fired or natural gas based units), specific plans, procedures and schedules for reapplying, modifying and/or renegotiating permits should be provided. Any local, state or federal permitting schedules which may impact the overall project schedule should be included.

Applicant should document their progress toward obtaining engineering design information (*i.e.*, FEED) to initiate permitting activities and to finalize the turbine generator purchase specification within the 2 year window. Most often, this requires final site, technology, process selection. Signed FEED and/or EPC-type agreements, if available, should be provided.

13. Appendices

a. Copy of internal or external engineering reports.
b. Copy of site plan, together with evidence that applicant owns or controls a site. Examples of evidence would include a deed, or an executed contract to purchase or lease the site.
c. Information supporting applicant's conclusion that the site is fully acceptable as the project site with respect to environment, coal supply, water supply, transmission interconnect, and public policy reasons.
d. Power Purchase or Energy Sales Agreement.
e. Energy Market Study.
f. Market Study for non-power output.
g. Financial Model of project.
h. Financial statements for the applicant and other project funding sources for the most recently ended three fiscal years, and the unaudited quarterly interim financial statements for the current fiscal year.
i. Expressions of interest or commitment letters from funding sources.
j. For each project contract, if no contract currently exists, provide a summary of the expected terms and conditions.
k. List of all federal, state, and local permits, including environmental authorizations or reviews, necessary to commence construction.

E. Evaluation Criteria

Advanced coal projects will be evaluated on whether they meet all the requirements of § 48A.

Technical: will be evaluated on whether the applicant has demonstrated the capability to accomplish the technical objectives.

Site: will be evaluated on the basis that the site requirement for ownership or control has been met, and that the site is suitable for the proposed project.

Economic: will be evaluated on whether the project has demonstrated economic feasibility, taking into consideration the submitted financial and project development and structural information and financial plan.

Schedule: will be evaluated on the applicant's ability to meet the 2 year project certification and the 5 year placed-in-service requirement.

F. Program Policy Factors To Be Used by DOE in the Evaluation of Applications

Section 48A identifies minimum requirements for consideration for the qualifying advanced coal project credit, including the project's technical feasibility, cost, and applicant's ability. In the event that there are more qualified (certifiable) applications than there are available amount of tax credit, the DOE will apply additional factors to rank eligible Advanced Coal Projects based on their ability to advance coal technology beyond its current state.

If there are more certified applications than available amount of credit for a pool described in section 4.02(2) of Notice 2009–24, DOE will rank the certified projects based on evaluation of the following Program Policy Factors. In ranking certified projects, highest priority will be given to the Primary Ranking Factor. Secondary and Tertiary Ranking Factors will be taken into account to rank projects that are not clearly differentiated on the basis of the Primary Ranking Factor, with higher priority given to Secondary Ranking Factors than to Tertiary Ranking Factors.

Primary Ranking Factor:

- Capture and sequestration of more than 65 percent CO_2 emissions. Only projects that capture and sequester 65 percent or more of the plant's CO_2 emissions will be considered for DOE certification. Among the certified projects, highest rankings will be given to projects with the greatest separation and sequestration percentages of total CO_2 emissions.

Secondary Ranking Factors:

- Greenhouse gas capture capability.
- Increased by-product utilization.
- Research partnership with an eligible educational institution as defined in §48A(e)(3)(B)(iii).

Tertiary Ranking Factors:

- Presentation of other environmental, economic, or performance benefits
- Higher plant efficiency.
- Geographic distribution of potential markets.
- The ratio of total nameplate generating capacity (as defined in section 3.02 of Notice 2009–24) to requested tax credit.
- Diversity of technology approaches and methods.

G. Supplemental Technical and Financial Guidance for Project Information Memorandum

Technology and Technical Information

It is important that the applicant select a specific gasification system for the project. Without that decision, it is difficult to provide the necessary specific design information needed for DOE to evaluate the project feasibility with respect to performance, emissions, outputs of major streams as well as capital and operating costs.

The Applicant's capability to meet the legislated heat rate and/or environmental targets should be supported with design information, and or vendor guarantees which are project, site and coal specific.

Project Economics

Applicants should demonstrate the project's economic feasibility and financial viability by providing a clear statement and explanation of the economic and financial assumptions made by the applicant, and a financial forecast for the project. The financial forecast should flow logically from the applicant's assumptions and be consistent with them. Applicants should include assumptions regarding financial and economic issues that may not be included in the project costs but have a direct impact on the project. The examples given in the "Site Control and Ownership" section are relevant here and their impact on the project economics should be discussed here.

Project Development and Financial Plan

The information provided by the applicant in this section should demonstrate that the applicant's financial plan for developing the project is feasible and that the applicant will have access to necessary financing. The applicant should explain the source and timing for obtaining all financing, including the project development costs. It is important that the applicant explain and provide evidence that it has the capacity to fund the pre-construction project development costs, together with a budget for and description of those costs. Note that financial information is required for the applicant and for any other funding source.

Project Contract Structure

This section requires that the applicant demonstrate an understanding of the commercial contracting process and show progress in establishing the framework of contracts and agreements that a project typically requires. Applicants should show that their intended contract structure is reasonable and that their assumptions relative to price, terms, and conditions are consistent with current market conditions. Evidence of final agreements, agreements in principle, or summaries of terms and conditions between the applicant and contract counterparties should be provided, if available.

Build America Bonds and Direct Payment Subsidy Implementation

Notice 2009–26

SECTION 1. PURPOSE

This notice provides guidance on the new Build America Bonds under § 54AA of the Internal Revenue Code ("Code") and the implementation plans for the refundable credit payment procedures for these bonds. This notice includes guidance on the modified Build America Bond program for Recovery Zone Economic Development Bonds under § 1400U–2 of the Code. This notice provides guidance on the initial refundable credit payment procedures, required elections, and information reporting. This notice solicits public comments on the refundable credit payment procedures for these bonds. This notice is intended to facilitate prompt implementation of the Build America Bond program and to enable state and local governments to begin issuing these bonds for authorized purposes to promote economic recovery and job creation.

SECTION 2. RELEVANT PROVISIONS

2.1 *Introduction*.

Section 1531 of Title I of Division B of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111–5, 123 Stat. 115 (2009) (enacted February 17, 2009) ("ARRA"), added § 54AA to the Code, authorizing state and local govern-

ments, at their option, to issue two general types of Build America Bonds as taxable governmental bonds with Federal subsidies for a portion of their borrowing costs. The subsidies take the form of either tax credits provided to holders of the bonds or refundable tax credits paid to state and local governmental issuers of the bonds. Build America Bonds have different levels of Federal subsidies and program requirements depending on the particular type of bond.

The first type of Build America Bond provides a Federal subsidy through Federal tax credits to investors in the bonds in an amount equal to 35 percent of the total coupon interest payable by the issuer on taxable governmental bonds (net of the tax credit), which represents a Federal subsidy to the state or local governmental issuer equal to approximately 25 percent of the total return to the investor (including the coupon interest paid by the issuer and the tax credit). This type of Build America Bond will be referred to in this notice as "Build America Bonds (Tax Credit)."

The second type of Build America Bond provides a Federal subsidy through a refundable tax credit paid to state or local governmental issuers by the Treasury Department and the Internal Revenue Service ("IRS") in an amount equal to 35 percent of the total coupon interest payable to investors in these taxable bonds. This type of Build America Bond will be referred to in this notice as "Build America Bonds (Direct Payment)." The level of the 35 percent Federal interest subsidy on Build America Bonds (Direct Payment) is deeper than the corresponding approximately 25 percent Federal interest subsidy on Build America Bonds (Tax Credit).

In addition, § 1401 of ARRA, which added § 1400U–2 of the Code, provides for a third type of Build America Bond (Direct Payment) known as "Recovery Zone Economic Development Bonds," which provides for a deeper Federal subsidy through a refundable tax credit paid to state or local governmental issuers in an amount equal to 45 percent of the total coupon interest payable to investors in these taxable bonds. This type of Build America Bond will be referred to in this notice as "Recovery Zone Economic Development Bonds (Direct Payment)."

2.2 *Build America Bonds (Tax Credit).*

Section 54AA(d) defines the term Build America Bond to mean any taxable state or local governmental bond (excluding a private activity bond under § 141) that meets the following requirements: (1) the interest on such bond would (but for § 54AA) be excludable from gross income under § 103; (2) the bond is issued before January 1, 2011; and (3) the issuer makes an irrevocable election to have § 54AA apply.

In general, Build America Bonds (Tax Credit) may be issued to finance any governmental purpose for which tax-exempt governmental bonds (excluding private activity bonds under § 141) could be issued under § 103 ("tax-exempt governmental bonds") and must comply with all requirements applicable to the issuance of tax-exempt governmental bonds. Accordingly, Build America Bonds (Tax Credit) may be issued to finance the same kinds of expenditures (*e.g.*, capital expenditures and working capital expenditures) and may involve the same kinds of financings (*e.g.*, original new money financings, current refundings, and one advance refunding) as tax-exempt governmental bonds. Similarly, Build America Bonds (Tax Credit) may not be issued for any purposes for which tax-exempt governmental bonds could not be issued under § 103 (*e.g.*, prohibited second advance refunding issues or pension annuity issues).

Section 54AA(a) provides that if a taxpayer holds a Build America 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 chapter 1 for the taxable year an amount equal to the sum of the credits determined under § 54AA(b) with respect to such dates. Section 54AA(b) provides that the amount of the credit determined with respect to any interest payment date for a Build America Bond is 35 percent of the amount of interest payable by the issuer with respect to such date. Section 54AA(e) provides that the term "interest payment date" means any date on which the holder of record of the Build America Bond is entitled to a payment of interest under such bond. Accordingly, the tax credit that a taxpayer may claim with respect to a Build America Bond (Tax Credit) is determined by multiplying the interest payment that a bondholder is entitled to receive from the issuer (*i.e.*, the bond coupon interest payment) by 35 percent. See H. R. Conf. Rep. 111–16, 111th Cong., 1st Sess. (February 12, 2009) ("ARRA Conference Report") at 594; see also *id.* at 593, n. 146 (original issue discount is not treated as a payment of interest for purposes of determining the credit).

Section 54AA(c)(1) provides that the credit allowed under § 54AA(a) for any taxable year shall not exceed the excess of (1) the sum of the regular tax liability (as defined in § 26(b)) plus the tax imposed by § 55, over (2) the sum of the credits allowable under part IV of subchapter A of chapter 1 (other than subpart C and subpart J). Section 54AA(c)(2) provides that if the credit allowable under § 54AA(a) exceeds the limitation imposed by § 54AA(c)(1) for such taxable year, such excess shall be carried to the succeeding taxable year and added to the credit allowable under § 54AA(a) for such taxable year (determined before the application of § 54AA(c)(1) for such succeeding taxable year). Unused credit may be carried forward to succeeding taxable years. See ARRA Conference Report at 593.

Section 54AA(d)(2)(A) provides that, for purposes of the restrictions against Federal guarantees of tax-exempt bonds under § 149(b), a Build America Bond is not treated as Federally guaranteed by reason of the credit under §§ 54AA(a) or § 6431.

Section 54AA(d)(2)(B) provides that, for purposes of applying the arbitrage restrictions under § 148, the yield on a Build America Bond shall be determined without regard to the credit allowed under § 54AA(a). Accordingly, issuers should calculate the yield on Build America Bonds (Tax Credit) for purposes of the arbitrage rules by applying the rules contained in § 148 and the regulations thereunder without an adjustment for the tax credit taken by bondholders. See ARRA Conference Report at 593.

Section 54AA(d)(2)(C) provides that a bond shall not be treated as a Build America Bond if the issue price has more than a *de minimis* amount (determined under rules similar to the rules of § 1273(a)(3)) of premium over the stated principal amount of the bond. See ARRA Conference Report at 593. This restriction applies to both Build America Bonds (Tax Credit)

and Build America Bonds (Direct Payment).

Section 54AA(f)(1) provides that, for purposes of the Code, interest on any Build America Bond shall be includible in gross income. Under § 54AA(f)(2), rules similar to the rules of § 54A(f), (g), (h), and (i) shall apply for purposes of the credit allowed under § 54AA(a). Briefly, the referenced provisions under § 54A treat credits as interest includable in gross income, provide special rules for S corporations and partnerships, provide special rules for regulated investment companies and real estate investment trusts, and authorize the Department of the Treasury to promulgate regulations to allow for "stripping" (which is the separation of the ownership of these bonds and the associated tax credits under principles based on § 1286).

Section 54AA(h) grants to the Department of the Treasury broad regulatory authority to prescribe such regulations and other guidance as may be necessary or appropriate to carry out the provisions for Build America Bonds under § 54AA and the refundable credit provisions for these bonds under § 6431.

2.3 *Build America Bonds (Direct Payment).*

Section 54AA(g) authorizes Build America Bonds (Direct Payment) that meet the definition of "qualified bonds" to receive a refundable credit under § 6431 in lieu of tax credits under § 54AA and imposes different program requirements. Section 54AA(g)(2) defines the term "qualified bond" to mean a bond that is issued as part of an issue that meets the following requirements: (1) the bond is a Build America Bond; (2) the bond is issued before January 1, 2011; (3) 100 percent of the excess of (i) the available project proceeds (as defined in § 54A to mean sale proceeds of such issue less not more than two percent of such proceeds used to pay issuance costs plus investment proceeds thereon), over (ii) the amounts in a reasonably required reserve fund (within the meaning of § 150(a)(3)) with respect to such issue, are to be used for capital expenditures; and (4) the issuer makes an irrevocable election to have this subsection apply.

In determining a reasonably required reserve fund for purposes of this provision, the rules under § 148(d)(2) apply. Accordingly, a Build America Bond (Direct Payment) will be an arbitrage bond if the amount of the sale proceeds of such an issue that is part of any reserve or replacement fund exceeds 10 percent of the proceeds. As such, the interest on such bond would not be tax-exempt under § 103 and thus would not be a qualified bond for purposes of this provision. ARRA Conference Report at 596, n. 150.

The eligible uses of proceeds and types of financing for Build America Bonds (Direct Payment) are more limited than for Build America Bonds (Tax Credit). In general, Build America Bonds (Direct Payment) may be issued to finance governmental purposes for which tax-exempt governmental bonds (excluding private activity bonds under § 141) could be issued under § 103, but — pursuant to § 54AA(g)(2)(A) — the excess of available project proceeds over amounts in a reasonably required reserve fund may be used to finance only capital expenditures (as defined in Treas. Reg. § 1.150–1(b)), as contrasted with working capital expenditures. *See* ARRA Conference Report at 594, n. 147. For this purpose, an eligible financing of capital expenditures includes a reimbursement of capital expenditures under the reimbursement rules contained in Treas. Reg. § 1.150–2. By contrast, Build America Bonds (Direct Payment) generally may not be issued to refinance capital expenditures in "refunding issues" (as defined in Treas. Reg. § 1.150–1). Further, for this purpose, Build America Bonds (Direct Payment) may be used to reimburse otherwise-eligible capital expenditures under Treas. Reg. § 1.150–2 that were paid or incurred after the effective date of ARRA and that were financed originally with temporary short-term financing issued after the effective date of ARRA, and such reimbursement will not be treated as a refunding issue under Treas. Reg. §§ 1.150–1(d) or 1.150–2(g).

Section 6431(a) provides that, for Build America Bonds (Direct Payment) 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. Section § 6431(b) provides that the Department of the Treasury 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. Section 6431(d) provides that the term "interest payment date" means each date on which interest is payable by the issuer under the terms of bonds. The ARRA Conference Report indicates that the payment by the Secretary is to be made either in advance or as reimbursement. ARRA Conference Report at 595.

The amount of refundable credit that a state or local governmental issuer may claim with respect to a Build America Bond (Direct Payment) is determined by multiplying the interest payment that is payable by the issuer on an interest payment date (*i.e.*, the bond coupon interest payment) by 35 percent (or 45 percent in the case of Recovery Zone Economic Development Bonds (Direct Payment)). See ARRA Conference Report at 594 and n. 148 (original issue discount is not treated as a payment of interest for purposes of calculating the refundable credit under this provision).

Section 6431(c) states that for purposes of the arbitrage investment restrictions under § 148, the yield on Build America Bonds (Direct Payment) is reduced by the credit allowed under this section. Accordingly, issuers should calculate the yield on Build America Bonds (Direct Payment) for purposes of the arbitrage rules by applying the rules contained in § 148 and the regulations thereunder, but by reducing the amount of interest paid on the bond by the amount of credit payments received pursuant to § 6431. See ARRA Conference Report at 595.

2.4 *Recovery Zone Economic Development Bonds (Direct Payment).*

Section 1401 of ARRA added § 1400U–2 to the Code to authorize state and local governments to issue Recovery Zone Economic Development Bonds (Direct Payment). These bonds are treated as qualified bonds for purposes of § 6431 and they have a deeper refundable credit subsidy than Build America Bonds (Direct Payment) equal to 45 percent of the total coupon interest payable to investors in these taxable bonds.

In particular, § 1400U–2(b) defines the term "recovery zone economic develop-

ment bond" to mean a bond that is issued as part of an issue that meets the following requirements: (1) the bond is a Build America Bond; (2) the bond is issued before January 1, 2011; (3) 100 percent of the excess of (i) the available project proceeds (as defined in § 54A to mean sale proceeds of such issue less not more than two percent of such proceeds used to pay issuance costs plus investment proceeds thereon), over (ii) the amounts in a reasonably required reserve fund (within the meaning of § 150(a)(3)) with respect to such issue, are to be used for one or more "qualified economic development purposes" (as defined in § 1400U–2(c)); and (4) the issuer designates such bond for this purpose.

The Treasury Department and the IRS expect to issue separate guidance on Recovery Zone Economic Development Bonds (Direct Payment), including guidance on the allocation of the $10 billion national bond volume cap for these bonds under § 1400U–1.

SECTION 3. SCOPE AND APPLICATION OF REFUNDABLE CREDIT PROCEDURES FOR BUILD AMERICA BONDS

3.1 *Refundable Credit Implementation Plans for 2009.*

(a) *In General.* The IRS and the Treasury Department plan to implement the initial refundable credit payment procedures for 2009 for Build America Bonds (Direct Payment) and Recovery Zone Economic Development Bonds (Direct Payment) as promptly as possible to enable state and local governments to begin issuing these bonds for authorized purposes to promote economic recovery and job creation. The IRS and the Treasury Department expect that an IRS form for requesting the Federal share of interest on these bonds, new IRS "Form 8038–CP, *Return for Credit Payments to Issuers of Qualified Bonds*," will be available on the IRS website on or about the date of release of this notice. The IRS will be prepared to accept such forms for processing by May 1, 2009, and the IRS and Treasury Department will be prepared to make timely payments with respect to interest payment dates beginning on or after July 1, 2009, as further described below.

In particular, the initial refundable credit procedures will require an issuer to submit a Form 8038–CP to request payment of the amount of the credit within a prescribed time before or after each applicable interest payment date, depending on whether the bonds are fixed rate bonds or variable rate bonds, as described below. Issuers should expect to receive requested payments within 45 days of the date that a processible Form 8038–CP is filed with the IRS. See § 6611(g).

When credit payments are made, the IRS will send the payments to the requested recipient's "last known address," as that phrase is defined and determined under Treas. Reg. § 301.6212–2 and Rev. Proc. 2001–18, 2001–1 C.B. 722, or any successor guidance. In the case of credit payments sent to a person other than the issuer, the last known address may not be the address the issuer provided on the Form 8038–CP. The instructions to the Form 8038–CP will provide instructions on how an issuer or trustee can verify and update the address of record.

(b) *Fixed Rate Bonds.* In general, for fixed rate bonds, upon receipt of a timely filed Form 8038–CP requesting payment of the credit, such amount will be paid on a contemporaneous basis by the applicable interest payment date. For fixed rate bonds, the due date for an issuer to file a Form 8038–CP, *Return for Credit Payments to Issuers of Qualified Bonds*, is the 45th day before the applicable interest payment date with respect to the bonds. This return, however, may not be filed earlier than the 90th day before the relevant interest payment date.

(c) *Variable Rate Bonds.* In general, for variable rate bonds, upon receipt of a timely filed Form 8038–CP requesting payment of the credit, such amount will be paid quarterly on a reimbursement basis for interest paid by the issuer during the quarter, including the interest payment date with respect to which the return requesting payment relates. For variable rate bonds, the due date for an issuer to file a Form 8038–CP, *Return for Credit Payments to Issuers of Qualified Bonds*, is the 45th day after the last interest payment date within the quarterly period for which reimbursement is requested.

3.2 *Future Development and Refinement of Refundable Credit Payment Procedures.*

The IRS and the Treasury Department plan to actively pursue refining the refundable credit payment procedures for Build America Bonds (Direct Payment) and Recovery Zone Economic Development Bonds (Direct Payment) for 2010 and thereafter to achieve as workable and efficient a system as possible that is consistent with all necessary and appropriate compliance safeguards. In this regard, the IRS and the Treasury Department plan to study the feasibility of moving these direct payment procedures to an electronic platform similar to that used by the Bureau of Public Debt to make recurring electronic payments on U.S. Treasury securities, such as U.S. Treasury Securities of the State and Local Government Series ("SLGs") with which state and local governments are familiar. The IRS and the Treasury Department expect that any development or usage of an electronic platform for these direct payment procedures will include ongoing compliance safeguards that involve periodic information returns on these bonds at least annually.

3.3 *Tax Character and Procedural Framework for the Refundable Credit.*

In general, the refundable credits for Build America Bonds under § 6431 are payments that are treated as overpayments of tax. In this regard, § 1531(c)(5) of ARRA adds a reference to Build America Bond provisions under § 6431 as a conforming amendment to § 6401(b)(1) regarding amounts treated as overpayments. Similarly, § 1531(c)(4) of ARRA adds a reference to the provisions under § 6431 to § 6211(b)(4)(A) regarding treatment of erroneous payments of credits as negative amounts of tax or deficiencies. Accordingly, rules relating to overpayments of tax, such as credits against liabilities in respect of an internal revenue tax and offsets under § 6402, interest on overpayments of tax under § 6611, and limitations on credits or refunds of overpayments of tax under § 6511 *also* apply to credit payments with respect to Build America Bonds under § 6431. Pursuant to the broad legislative regulatory authority under § 54AA(h) to prescribe such regulations and other guidance as may be necessary or appropriate

to carry out the Build America Bond provisions under § 54AA and the refundable credit provisions under § 6431, the IRS and the Treasury Department will consider the potential need to develop any special rules to adapt or tailor the procedural framework implementing these provisions.

SECTION 4. ELECTIONS TO ISSUE BUILD AMERICA BONDS

Subject to updated IRS reporting forms or procedures, an issuer of Build America Bonds (Tax Credit), Build America Bonds (Direct Payment), and Recovery Zone Economic Development Bonds (Direct Payment) should make the elections required by §§ 54AA(d) or (g) to issue the applicable bonds on its books and records on or before the issue date of such bonds.

SECTION 5. INFORMATION REPORTING FOR BUILD AMERICA BONDS

5.1 *Build America Bonds (Tax Credit).*

Subject to updated IRS information reporting forms or procedures, an issuer of Build America Bonds (Tax Credit) must report the issuance of the bonds on IRS Form 8038–G, *Information Return for Tax-Exempt Governmental Obligations*. Issuers of these bonds with an issue price of less than $100,000 should file a Form 8038–G in accordance with the instructions contained in this notice instead of filing an IRS Form 8038–GC, *Information Return for Small Tax-Exempt Governmental Bond Issues, Leases, and Installment Sales*. Issuers should check Line 18, "Other", on the form and insert "Build America Bond (tax credit)" on the line provided. Issuers must attach a separate schedule that indicates the type of bond issue that would normally be entered on Lines 11 to 18, *i.e.*, education, health and hospital, transportation, public safety, environment (including sewage bonds), housing, utilities or other (with description for "other" category).

5.2 *Build America Bonds (Direct Payment) and Recovery Zone Economic Development Bonds (Direct Payment).*

Subject to updated IRS information reporting forms or procedures, an issuer of Build America Bonds (Direct Payment) or Recovery Zone Economic Development Bonds (Direct Payment) must report the issuance of the bonds on IRS Form 8038–G, *Information Return for Tax-Exempt Governmental Obligations*. The Form 8038–G with respect to an issue must be filed with the IRS at least 30 days before the first Form 8038–CP is filed to request payment with respect to an interest payment date for that issue, except that, for bonds issued before July 1, 2009 only, such Form 8038–G may be filed less than 30 days before the filing of the first Form 8038–CP provided the form 8038–G is filed separately from and prior to the filing of Form 8038–CP. Issuers should not attach a Form 8038–G to a Form 8038–CP. Issuers of these bonds with an issue price of less than $100,000 should file a Form 8038–G in accordance with the instructions contained in this notice instead of filing a Form 8038–GC, *Information Return for Small Tax-Exempt Governmental Bond Issues, Leases, and Installment Sales*.

An issuer of Build America Bonds (Direct Payment) must check Line 18, "Other", on the form and insert "Build America Bond (payment option)" on the line provided. An issuer of Recovery Zone Economic Development Bonds (Direct Payment) must check Line 18, "Other", on the form and insert "Recovery Zone Economic Development Bond (payment option)" on the line provided. Issuers must attach a separate schedule that indicates the type of bond issue that would normally be entered on Lines 11 to 18, *i.e.*, education, health and hospital, transportation, public safety, environment (including sewage bonds), housing, utilities or other (with description for "other" category).

In addition, issuers of these bonds must attach a schedule to the Form 8038–G which contains the information described below for the bond issue.

(1) For fixed-rate bonds, attach a complete debt service schedule, titled "Fixed Rate Bond — Debt Service Schedule," that provides a list of each interest payment date, the total interest payable on such date, the total principal amount of bonds expected to be outstanding on such date, the credit payment expected to be requested from the IRS on such date, and the earliest date that bonds can be called.

(2) For variable rate bonds, attach a debt service schedule, titled "Variable Rate Bond — Debt Service Schedule," that provides a list of each interest payment date, the total principal amount of bonds expected to be outstanding on such date, and a description of how interest on the bonds is computed.

SECTION 6. REQUEST FOR COMMENTS

The IRS and the Treasury Department solicit public comment on all aspects of the direct payment procedures for Build America Bonds, including, without limitation, comments regarding efficient methods to make such direct payments, workability and ease of usage for state and local governments, ongoing compliance safeguards, and the tax procedural framework for these payments. The IRS and the Treasury Department solicit specific public comment on the following aspects of these direct payment procedures: (1) whether consideration should be given to employing an electronic platform to make these payments similar to that used for SLGs and what particular features would be important to making such a platform workable; (2) whether consideration should be given to a different frequency or approach to the payment of variable rate bonds; (3) whether consideration should be given to making these direct payments solely to issuers, rather than including third parties designated by issuers, to simplify the process; and (4) whether consideration should be given to imposing uniform interest payment dates (*e.g.*, quarterly on January 1, April 1, July 1, and October 1) to improve the efficiency of the program.

Comments should be submitted in writing and can be emailed to *notice.comments@irscounsel.treas.gov* (include "Notice 2009–26" in the subject line) or mailed to Office of Associate Chief Counsel (Financial Institutions and Products), Re: Notice 2009–26, CC:FIP:B5, Room 3547, 1111 Constitution Avenue, NW, Washington DC 20224. Comments that are submitted will be made available to the public.

SECTION 7. EFFECTIVE DATE

The effective date of this notice is April 3, 2009. This notice provides interim guid-

ance. This notice applies to Build America Bonds, including Recovery Zone Economic Development Bonds, issued after February 17, 2009.

SECTION 8. PAPERWORK REDUCTION ACT

The information collection contained in this notice has been approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act (44 U.S.C. chapter 35) under control number 1545–2143. Under the Paperwork Reduction Act, an agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a valid OMB control number.

The collections of information in this notice are in Section 5. The information is required in order to inform the Treasury Department and the IRS of expected future direct payments on Build America Bonds. This information will be used to determine the expected amount of future direct payments on Build America Bonds. The collections of information are mandatory. The likely respondents are state or local governmental issuers of Build America Bonds.

We estimate the total number of respondents to be 1,000 and the total annual responses to be 5,000. We estimate it will take 3 hours to comply. Estimates of the annualized cost to respondents for the hour burdens shown are not available at this time.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and return information are confidential, as required by 26 U.S.C. 6103.

SECTION 9. DRAFTING INFORMATION

The principal authors of this notice are Carla Young and Timothy Jones of the Office of Associate Chief Counsel (Financial Institutions and Products). For further information regarding this notice, contact Ms. Young or Mr. Jones at (202) 622–3980.

Premium Assistance for COBRA Benefits

Notice 2009–27

This notice provides guidance relating to section 3001 of the American Recovery and Reinvestment Act of 2009 (ARRA), Public Law 111–5, enacted February 17, 2009, relating to premium assistance for COBRA continuation coverage.

BACKGROUND

Section 3001 of ARRA provides for a 65 percent reduction in the premium otherwise payable by certain involuntarily terminated individuals and their families who elect COBRA continuation health coverage under the provisions of the Internal Revenue Code (Code), the Employee Retirement Income Security Act of 1974 (ERISA), and the Public Health Service Act (PHS Act). (COBRA continuation coverage under the Code, ERISA, and the PHS Act is also referred to in this notice as "Federal COBRA.") The premium reduction also applies to temporary continuation coverage elected under the Federal Employees Health Benefits Program (FEHBP) and to continuation health coverage under State programs that provide for coverage comparable to COBRA continuation coverage. For purposes of ARRA, continuation health coverage under all of these provisions is referred to as "COBRA continuation coverage."

Under the new provision, an assistance eligible individual is generally an individual (1) who is a qualified beneficiary as the result of an involuntary termination during the period from September 1, 2008, through December 31, 2009, (2) who is eligible for COBRA continuation coverage at any time during that period, and (3) who elects the coverage. Group health plans must generally treat assistance eligible individuals who pay 35 percent of the premium otherwise payable for COBRA continuation coverage as having paid the full amount of the premium. The employer (or, in certain circumstances, the multiemployer health plan or the insurer) is reimbursed for the other 65 percent of the premium that is not paid by the assistance eligible individual through a credit against its payroll taxes.

The premium reduction applies as of the first period of coverage beginning on or after February 17, 2009 (the date of enactment of ARRA). An assistance eligible individual is eligible for the premium reduction for up to nine months from the first month the premium reduction provisions of section 3001 of ARRA apply to the individual. The premium reduction period ends if the individual becomes eligible for coverage under any other group health plan[1] or for Medicare benefits.

The premium reduction does not extend beyond the period of COBRA continuation coverage. An individual receiving the premium reduction who becomes eligible for coverage under any other group health plan or Medicare is required to notify the group health plan of eligibility for that other coverage. If the individual fails to notify the group health plan, the individual is subject to a tax penalty of 110 percent of the premium reduction improperly received after eligibility for the other coverage.

Under ARRA, an employer may allow an assistance eligible individual to elect coverage different from the coverage under the plan in which such individual was enrolled prior to the involuntary termination, and the premium reduction will apply with respect to such different coverage. (This does not change the basic requirement under Federal COBRA that a group health plan must allow a qualified beneficiary to elect to continue the coverage in which the individual is enrolled as of the qualifying event.) If offered, the assistance eligible individual has 90 days after receiving notice of the option to elect the other coverage. The premium for coverage offered under this option cannot exceed the premium for the coverage the individual had prior to the involuntary termination. In addition, the coverage offered under this option must be coverage offered to active employees and cannot be

[1] Eligibility for coverage under any other group health plan does not terminate eligibility for the premium reduction if the other group health plan provides only dental, vision, counseling, or referral services (or a combination of these), is a health flexible spending arrangement 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). This exception is implicit throughout this notice whenever reference is made to the end of eligibility for the premium reduction due to eligibility for coverage under any other group health plan.

coverage that provides only dental, vision, counseling (or some combination), a flexible spending arrangement under section 106(c) of the Code, or coverage that provides coverage through an on-site medical facility maintained by the employer that consists primarily of first-aid, prevention and wellness care, or similar care, or a combination of such care.

ARRA provides an extended election period for certain individuals who did not have an election of COBRA continuation coverage in effect on February 17, 2009 (the date of enactment). The election is available for individuals who would be assistance eligible individuals if they had a COBRA continuation coverage election in effect (that is, as the result of an involuntary termination on or after September 1, 2008). This extended election period is for 60 days after the qualified beneficiaries are provided notice of the extended election period. The resulting COBRA continuation coverage extends no longer than the original maximum period required (as measured with respect to the qualifying event) and begins with the first period of coverage beginning on or after February 17, 2009. The extended election period applies to a group health plan subject to the Federal COBRA requirements and to temporary continuation coverage under the FEHBP, but not to State continuation coverage requirements.

For purposes of section 3001 of ARRA, 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. H.R. Rep. No. 111–16, at 716 (2009) (Conf. Rep.).

For individuals electing Federal COBRA or temporary continuation coverage under the FEHBP during the extended election period, the period between the loss of coverage and beginning of coverage under the election is disregarded for purposes of the rules that would otherwise permit a group health plan to impose a preexisting condition limitation with respect to the individual's coverage. The Health Insurance Portability and Accountability Act of 1996 (HIPAA) generally limits to 12 months the period that a group health plan can exclude health benefits relating to a preexisting condition of a new enrollee. The period is generally reduced by an individual's creditable coverage (health coverage under a group health plan or certain other types of health coverage, including individual health insurance) prior to enrollment. Generally, a plan is not required to take into account creditable coverage prior to a significant break in coverage (*i.e.*, 63 days without creditable coverage). For an individual who becomes covered pursuant to an election under the ARRA extended election period, the individual is treated as not having a significant break in coverage because ARRA provides that the period between the loss of coverage and the beginning of coverage is disregarded. Thus, the individual's creditable coverage accumulated prior to the involuntary termination remains available to reduce any future preexisting condition exclusion. The period between the loss of coverage and the beginning of coverage, however, would not be treated as creditable coverage. For example, an individual with seven months of creditable coverage before being involuntarily terminated as of November 1, 2008, who, pursuant to the extended election period, elects COBRA continuation coverage that begins on March 1, 2009, is treated as having seven months of creditable coverage on March 1, 2009, notwithstanding the period of more than 63 days between November 1, 2008, and March 1, 2009, without creditable coverage.

The amount of any premium reduction is excluded from an individual's gross income under new section 139C. 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. H.R. Rep. No. 111–16, at 716 (2009) (Conf. Rep.).

If the premium reduction is provided with respect to COBRA continuation coverage for an individual, the individual's spouse, or the individual's dependent, and the individual's modified adjusted gross income (adjusted gross income plus amounts excluded under section 911, 931, or 933) exceeds $145,000 ($290,000 for married filing jointly), the amount of the premium reduction is recaptured as an increase in the individual's Federal income tax liability. The recapture is phased in for individuals with modified adjusted gross income in excess of $125,000 ($250,000 for married filing jointly). An individual may elect to permanently waive the right to the premium reduction (for example, to avoid receiving and then repaying the premium reduction). In addition, an individual who receives the premium reduction under ARRA for a month is disqualified from receiving the Health Coverage Tax Credit under section 35 for that month.

ARRA amends the Code to add new section 6432, which provides that the "person to whom premiums are payable" is entitled to reimbursement for the amount of premiums not paid by assistance eligible individuals by reason of ARRA[2] in the form of a credit against payroll tax liabilities. For this purpose, payroll taxes are defined as Federal income tax withholding under section 3402, the employee share of Federal Insurance Contributions Act (FICA) tax under section 3102, and the employer share of FICA tax under section 3111. The credit is claimed on the person's payroll tax return, in most cases Form 941, filed quarterly.[3] If the amount of the credit to which the person is entitled exceeds the person's payroll tax liabilities on the return, the person is entitled to a refund of such excess as if it were a payment of payroll taxes.

Under ARRA, the "person to whom premiums are payable" is based on the nature of the plan and which COBRA continuation coverage provisions apply. In the case of a group health plan that is a multiemployer plan, the multiemployer plan is allowed the credit. In the case of

[2] As enacted, the statute refers to section 3002(a) of the Health Insurance Assistance for the Unemployed Act of 2009, whereas the provision permitting an assistance eligible individual to pay reduced premiums is section 3001(a) of ARRA. A technical correction is expected to correct this cross reference.

[3] More information about the payroll tax credit is available on the IRS website at *www.irs.gov/newsroom/article/0,,id=204505,00.html*.

a group health plan subject to the Federal COBRA requirements or the temporary continuation coverage requirements under the FEHBP, or a group health plan under which some or all of the coverage is not provided by insurance, the employer maintaining the plan is allowed the credit. For any other group health plan subject to ARRA (generally, fully insured coverage subject to State continuation coverage requirements), the insurer providing coverage under the group health plan is allowed the credit. These are the exclusive rules for who may take the credit unless the Secretary provides otherwise pursuant to the authority in section 6432(b).

ARRA provides an individual who requests and is denied treatment as an assistance eligible individual with the right to a review of the denial, within 15 business days after the receipt of the application for review, by the Department of Labor (or the Department of Health and Human Services in connection with COBRA continuation coverage that is provided other than pursuant to ERISA). ARRA also includes new notification requirements, administered by the Department of Labor, regarding the premium assistance and new elections provided under ARRA. For further information on the notice requirements, see *http://www.dol.gov/COBRA*.

An assistance eligible individual who pays the reduced premium pursuant to ARRA must be treated by the plan as having paid the full premium. If the plan does not treat the assistance eligible individual as having paid the full premium, it is a failure to meet the requirements of the underlying statute. Thus, in the case of a plan subject to the COBRA continuation coverage requirements under section 4980B, the failure to treat the assistance eligible individual making the reduced payment as having made the full payment would be a failure to satisfy the requirements of section 4980B and may result in the imposition of the excise tax under section 4980B(b).

QUESTIONS AND ANSWERS

The following questions and answers address a number of issues that have arisen with respect to the premium reduction for COBRA continuation coverage under ARRA. In general, the questions and answers apply for purposes of all COBRA continuation coverage requirements under ARRA, *i.e.*, Federal COBRA, the temporary continuation coverage requirements of the FEHBP, and comparable State health care continuation coverage requirements. However, certain questions and answers or certain portions of certain questions and answers may apply only for purposes of Federal COBRA and not for purposes of the temporary continuation coverage requirements of the FEHBP and comparable State health care continuation coverage requirements; those provisions are introduced with the phrase "for purposes of Federal COBRA."

INVOLUNTARY TERMINATION

Q&A–1 through Q&A–9 apply solely for purposes of determining whether there is an involuntary termination under section 3001 of ARRA (including new Code sections added by section 3001 of ARRA), but not for any other purposes under the Code or any other law.

Q–1. What circumstances constitute an involuntary termination for purposes of the definition of an assistance eligible individual?

A–1. An involuntary termination means a severance from employment due to the independent exercise of the unilateral authority of the employer to terminate the employment, other than due to the employee's implicit or explicit request, where the employee was willing and able to continue performing services. An involuntary termination may include the employer's failure to renew a contract at the time the contract expires, if the employee was willing and able to execute a new contract providing terms and conditions similar to those in the expiring contract and to continue providing the services. In addition, an employee-initiated termination from employment constitutes an involuntary termination from employment for purposes of the premium reduction if the termination from employment constitutes a termination for good reason due to employer action that causes a material negative change in the employment relationship for the employee.

Involuntary termination is the involuntary termination of employment, not the involuntary termination of health coverage. Thus, qualifying events other than an involuntary termination, such as divorce or a dependent child ceasing to be a dependent child under the generally applicable requirements of the plan (such as loss of dependent status due to aging out of eligibility), are not involuntary terminations qualifying an individual for the premium reduction. In addition, involuntary termination does not include the death of an employee or absence from work due to illness or disability.

The determination of whether a termination is involuntary is based on all the facts and circumstances. For example, if a termination is designated as voluntary or as a resignation, but the facts and circumstances indicate that, absent such voluntary termination, the employer would have terminated the employee's services, and that the employee had knowledge that the employee would be terminated, the termination is involuntary.

Q–2. Does an involuntary termination include a lay-off period with a right of recall or a temporary furlough period?

A–2. Yes. An involuntary reduction to zero hours, such as a lay-off, furlough, or other suspension of employment, resulting in a loss of health coverage is an involuntary termination for purposes of the premium reduction.

Q–3. Does an involuntary termination include a reduction in hours?

A–3. Generally no. If the reduction in hours is not a reduction to zero, the mere reduction in hours is not an involuntary termination. However, an employee's voluntary termination in response to an employer-imposed reduction in hours may be an involuntary termination if the reduction in hours is a material negative change in the employment relationship for the employee.

Q–4. Does involuntary termination include an employer's action to end an individual's employment while the individual is absent from work due to illness or disability?

A–4. Yes. Involuntary termination occurs when the employer takes action to end the individual's employment status (but mere absence from work due to illness or disability before the employer has taken action to end the individual's employment status is not an involuntary termination).

Q–5. Does an involuntary termination include retirement?

A–5. If the facts and circumstances indicate that, absent retirement, the employer would have terminated the employee's services, and the employee had knowledge that the employee would be terminated, the retirement is an involuntary termination.

Q–6. Does involuntary termination include involuntary termination for cause?

A–6. Yes. However, for purposes of Federal COBRA, if the termination of employment is due to gross misconduct of the employee, the termination is not a qualifying event and the employee and other family members losing health coverage by reason of the employee's termination of employment are not eligible for COBRA continuation coverage.

Q–7. Does an involuntary termination include a resignation as the result of a material change in the geographic location of employment for the employee?

A–7. Yes.

Q–8. Does an involuntary termination include a work stoppage as the result of a strike initiated by employees or their representatives?

A–8. No. However, a lockout initiated by the employer is an involuntary termination.

Q–9. Does an involuntary termination include a termination elected by the employee in return for a severance package (a "buy-out") where the employer indicates that after the offer period for the severance package, a certain number of remaining employees in the employee's group will be terminated?

A–9. Yes.

ASSISTANCE ELIGIBLE INDIVIDUAL

Q–10. Who qualifies as an assistance eligible individual?

A–10. An individual must be an assistance eligible individual to be eligible for the premium reduction. Under ARRA, an assistance eligible individual is a qualified beneficiary as the result of an involuntary termination that occurred during the period from September 1, 2008, through December 31, 2009, is eligible for COBRA continuation coverage at any time during that period, and elects the COBRA continuation coverage. In order to be a qualified beneficiary, the individual must be covered under the group health plan on the day before the involuntary termination (except in the case of a child born to or adopted by a covered employee during a period of COBRA continuation coverage or in certain circumstances where coverage was wrongfully denied the individual (see section 54.4980B–3, Q&A–1)). For purposes of Federal COBRA, an individual who loses group health coverage in connection with the termination of a covered employee's employment by reason of the employee's gross misconduct is not a qualified beneficiary and thus cannot be an assistance eligible individual.

Q–11. If the involuntary termination and loss of coverage resulting in eligibility for COBRA continuation coverage occur before September 1, 2008, can the individual become an assistance eligible individual?

A–11. No. The involuntary termination resulting in COBRA continuation coverage must occur during the period from September 1, 2008, through December 31, 2009, even if the individual is still on COBRA continuation coverage after February 17, 2009.

Q–12. If the involuntary termination occurs before September 1, 2008, but the loss of coverage resulting in eligibility for COBRA continuation coverage occurs after September 1, 2008 (but no later than December 31, 2009), can the individual become an assistance eligible individual?

A–12. No. The involuntary termination resulting in COBRA continuation coverage must occur during the period from September 1, 2008, through December 31, 2009. Although section 4980B(f)(8) allows a plan to provide that the COBRA continuation coverage does not begin until the loss of coverage, that does not change the date of the involuntary termination.

Q–13. If an individual's involuntary termination occurs no later than December 31, 2009, but the loss of coverage resulting in eligibility for COBRA continuation coverage occurs after December 31, 2009, is the individual an assistance eligible individual?

A–13. No. Both the involuntary termination and eligibility for COBRA continuation coverage must occur during the period from September 1, 2008, through December 31, 2009. If the loss of coverage is after December 31, 2009, the individual cannot become an assistance eligible individual.

Q–14. For purposes of Federal COBRA, if an employer provides health coverage for an involuntarily terminated employee after the involuntary termination on the same terms as for similarly situated active employees, when is a loss of coverage under the group health plan considered to occur (and, consequently, when does COBRA continuation coverage begin)?

A–14. For purposes of Federal COBRA, the effect on when a loss of coverage under a group health plan is considered to occur if an employer provides health coverage for an involuntarily terminated employee after the involuntary termination on the same terms as for similarly situated active employees depends on how the employer treats the provision of health coverage for the involuntarily terminated employee. If the employer treats the provision of health coverage as deferring the loss of coverage, then for purposes of the ARRA premium reduction the loss of coverage (and eligibility for Federal COBRA) will be considered to occur when the employer's provision of health coverage on the same terms as for similarly situated active employees ends. However, if the employer treats the provision of health coverage after the involuntary termination as part of its obligation to provide COBRA continuation coverage for the involuntarily terminated employee, then the loss of coverage will be considered to have occurred as of the date for which the employer begins making the provision of such COBRA continuation coverage.

Example. An individual is involuntarily terminated from employment on November 15, 2009. Health coverage in connection with the November 15, 2009, termination of employment would normally end on November 30, 2009. However, the individual is provided with severance benefits that include six months of health coverage for which no premium is required, running from December 1, 2009, through May 31, 2010. The employer considers no loss of coverage to have occurred until the six months of severance benefits have been exhausted. Under these facts, for purposes of Federal COBRA, the loss of coverage does not occur until May 31, 2010, which is after December 31, 2009. Although the individual's involuntary termination occurs during the required time period, the beginning of eligibility for COBRA continuation coverage does not. Consequently, the individual cannot become an assistance eligible individual. However, if the employer considered the payment of health coverage during the severance benefits period to be the provision of COBRA continuation coverage on behalf of the involuntarily terminated individual, for purposes of Federal COBRA the loss of coverage would be

considered to have occurred on November 30, 2009, and thus the individual could become an assistance eligible individual.

For purposes of Federal COBRA, if the plan does not provide for the optional extension of required periods under section 4980B(f)(8) to apply, the end of the 18-month maximum required period of COBRA continuation coverage is measured from the date of the individual's involuntary termination, November 15, 2009. If the plan does provide for the optional extension of required periods under section 4980B(f)(8) to apply, the end of the 18-month maximum required period of COBRA continuation coverage is measured from the date of the loss of coverage, May 31, 2009.

Q–15. Does an involuntary termination of an employee following another qualifying event, such as a divorce, satisfy the requirements for the qualified beneficiary from the first qualifying event to be an assistance eligible individual?

A–15. No. Generally, if COBRA continuation coverage is based on a qualifying event before the involuntary termination, the later involuntary termination does not cause the qualified beneficiary to become an assistance eligible individual. However, if, in anticipation of an involuntary termination that would otherwise qualify an individual as an assistance eligible individual, the employer takes action other than the involuntary termination of the individual that results in a loss of coverage for the individual (for example, a reduction in hours for the employee in anticipation of involuntarily terminating the employee), the action causing the loss of coverage prior to the involuntary termination is disregarded in determining whether involuntary termination is the qualifying event that results in the COBRA continuation coverage for the individual.

Example 1. An employee is divorced after September 1, 2008, and before December 31, 2009. The divorce results in a loss of health coverage for the spouse of the employee. The spouse is eligible for and timely elects COBRA continuation coverage. After the divorce, and before December 31, 2009, the employee is involuntarily terminated and loses health coverage. The employee elects COBRA continuation coverage that begins before December 31, 2009. The spouse is not an assistance eligible individual because the qualifying event with respect to the spouse's COBRA continuation coverage is not an involuntary termination. The employee is an assistance eligible individual.

Example 2. An employee experiences a reduction in hours in March 2009 that does not constitute (and is not in anticipation of) an involuntary termination. The reduction in hours results in a loss of coverage for the employee. The employee is eligible for and timely elects COBRA continuation coverage that begins as of April 1, 2009. In November 2009, the employee is involuntarily terminated from employment. The employee cannot become an assistance eligible individual in connection with the November 2009 involuntary termination because the qualifying event with respect to the COBRA continuation coverage is not involuntary termination.

Q–16. If, as the result of an involuntary termination that occurred during the period from September 1, 2008, through December 31, 2009, an individual loses coverage under a health plan that is not subject to the COBRA continuation coverage requirements (as defined under ARRA) and the individual is offered and elects continuation coverage provided voluntarily by an employer, is the premium reduction applicable and the related payroll tax credit for the employer (or other entity) available with respect to the continuation health coverage?

A–16. No. In order for the COBRA continuation coverage premium reduction and the related payroll tax credit to apply, the plan must be subject to the COBRA continuation coverage requirements as defined in ARRA.

Example. A group health plan maintained by an employer that is not subject to COBRA continuation coverage requirements under Federal COBRA, under the FEHBP, or under State law nevertheless provides continuation health coverage to involuntarily terminated employees. Because the terminated employees are not eligible for COBRA continuation coverage (as defined under ARRA), they are not assistance eligible individuals and the premium reduction does not apply.

Q–17. Can an individual become an assistance eligible individual more than once?

A–17. Yes. An individual who becomes a qualified beneficiary as the result of an involuntary termination and who otherwise meets the requirements to be an assistance eligible individual is treated as an assistance eligible individual even if previously treated as an assistance eligible individual. See Q&A–43 regarding the period of premium reduction in such situations.

Q–18. If an individual has a loss of coverage and becomes a qualified beneficiary eligible for COBRA continuation coverage as the result of an involuntary termination no later than December 31, 2009, and timely elects COBRA continuation coverage after December 31, 2009 (with the COBRA continuation coverage beginning retroactively back to the loss of coverage), is the individual an assistance eligible individual eligible for the premium reduction?

A–18. Yes. The election of COBRA continuation coverage is not required to occur during the period from September 1, 2008, through December 31, 2009, as long as the resulting COBRA continuation coverage begins during that period.

Q–19. Is the death of an employee an involuntary termination of employment that would make qualified beneficiaries such as the spouse and dependent children of the employee assistance eligible individuals?

A–19. No. The death of an employee is not an involuntary termination of employment.

CALCULATION OF PREMIUM REDUCTION

Q–20. What premium amount is used to determine the 35 percent share that must be paid by (or on behalf of) an assistance eligible individual?

A–20. The premium used to determine the 35 percent share that must be paid by (or on behalf of) an assistance eligible individual is the cost that would be charged to the assistance eligible individual for COBRA continuation coverage if the individual were not an assistance eligible individual. If, without regard to the subsidy, the assistance eligible individual is required to pay 102 percent of the "applicable premium" for continuation coverage, *i.e.*, generally the maximum permitted under the Federal COBRA rules, the assistance eligible individual is required to pay only 35 percent of the 102 percent of the applicable premium. However, if the premium that would be charged the assistance eligible individual is less than the maximum COBRA premium, for example if the employer subsidizes the coverage by paying all or part of the cost, the amount actually charged the assistance eligible individual is used to determine the assistance eligible individual's 35 percent share.

In determining whether an assistance eligible individual has paid 35 percent of the premium, payments on behalf of the individual by another person (other than the employer with respect to which the involuntary termination occurred) are taken into account. For example, some or all of the 35 percent share of the premium could be paid on behalf of the individual by a parent, guardian, State agency, or charity.

The following examples illustrate this Q&A–20. For all examples, 102 percent of the applicable premium for the

COBRA continuation coverage is $1,000 per month, and the person to whom premiums are payable is the employer maintaining the plan.

Example 1. The employer requires individuals electing COBRA continuation coverage to pay $500 per month. An assistance eligible individual is entitled to COBRA continuation coverage upon the timely payment of $175 (35 percent of $500). The employer's resulting payroll tax credit is $325 (65 percent of $500).

Example 2. The employer requires active employees to pay $200 per month for health coverage. For involuntarily terminated employees, the severance benefits include continued health coverage at the cost of $200 per month for six months after termination. After the six-month severance period, the terminated employee must pay $1,000 per month for the remainder of the COBRA continuation coverage. The employer considers the loss of coverage to occur on the last day coverage is in effect before the severance benefits begin to take effect; that is, the employer considers the six-month severance period to be part of the terminated employee's COBRA continuation coverage period, during which the employer pays $800 toward the cost of the terminated employee's COBRA continuation coverage.

For the first six months, an assistance eligible individual is entitled to COBRA continuation coverage upon the timely payment of $70 (35 percent of $200); for the next three months, the individual is entitled to COBRA continuation coverage upon the timely payment of $350 (35 percent of $1,000). The employer's resulting payroll tax credit is $130 (65 percent of $200) for the first six months and $650 (65 percent of $1,000) for the next three months.

Example 3. Same facts as Example 2, except that the employer considers the loss of health coverage and the beginning of the terminated employee's COBRA continuation coverage period to occur at the end of the six-month severance period. For the first six months after termination of employment, the terminated employee is not eligible for COBRA continuation coverage and is not an assistance eligible individual. The employee therefore pays $200 for coverage, and no subsidy applies. The employee elects COBRA continuation coverage at the end of the six-month period and is an assistance eligible individual. For the next nine months, the individual is entitled to COBRA continuation coverage upon the timely payment of $350 (35 percent of $1,000). The employer's resulting payroll tax credit is $650 (65 percent of $1,000).

For purposes of Federal COBRA, if the plan does not provide for the optional extension of required periods under section 4980B(f)(8) to apply, the end of the 18-month maximum required period of COBRA continuation coverage is measured from the date of the individual's involuntary termination (that is, 12 months after the end of the six-month severance period). If the plan does provide for the optional extension of required periods under section 4980B(f)(8) to apply, the end of the 18-month maximum required period of COBRA continuation coverage is measured from the date of the loss of coverage (*i.e.*, 24 months after the involuntary termination).

Example 4. The employer requires active employees to pay $200 per month for health coverage. For involuntarily terminated employees, the severance benefits include continued health coverage for six months after termination at no cost. The employer considers that COBRA continuation coverage begins on the date of the involuntary termination. After the six-month severance period, the terminated employee would be required to pay $1,000 per month (but for the ARRA premium reduction) for the remainder of the COBRA continuation coverage. Because the premium during the first six months is zero, the premium reduction is not available and no payroll tax credit is available to the employer. For the next three months after the severance period, the terminated employee is entitled to COBRA continuation coverage upon the timely payment of $350 (35 percent of $1,000) for coverage. The employer's resulting payroll tax credit is $650 (65 percent of $1,000). After the first nine months, no subsidy applies, so the terminated employee can be required to pay $1,000 per month for any later month of COBRA continuation coverage.

Example 5. Same facts as Example 4, except the employer considers no loss of coverage to have occurred until the end of the severance period, *i.e.*, six months after termination of employment. For the first six months, the terminated employee is not eligible for COBRA continuation coverage and is not an assistance eligible individual. The employee pays nothing for the coverage, and no payroll tax credit is available to the employer. The employee elects COBRA continuation coverage at the end of the six-month period and is an assistance eligible individual. For the next nine months, the individual is entitled to COBRA continuation coverage upon the timely payment of $350 (35 percent of $1,000). The employer's resulting payroll tax credit is $650 (65 percent of $1,000).

For purposes of Federal COBRA, if the plan does not provide for the optional extension of required periods under section 4980B(f)(8) to apply, the end of the 18-month maximum required period of COBRA continuation coverage is measured from the date of the individual's involuntary termination (that is, 12 months after the end of the six-month severance period). If the plan does provide for the optional extension of required periods under section 4980B(f)(8) to apply, the end of the 18-month maximum required period of COBRA continuation coverage is measured from the date of the loss of coverage (*i.e.*, 24 months after the involuntary termination).

Q–21. If a plan that previously charged less than the maximum premium allowed under the COBRA continuation provisions increases the premium pursuant to section 54.4980B–8, Q&A–2(b)(1) (or similar authority under comparable State law or other Federal law), does the ARRA premium reduction apply to the increased premium amount?

A–21. Yes.

Example. Under the plan, 102 percent of the applicable premium for COBRA continuation coverage is $1,000 per month. Prior to February 17, 2009, the plan charged $500 per month for COBRA continuation coverage. Pursuant to section 54.4980B–8, Q&A–2(b)(1) and the applicable notice requirements, beginning March 1, 2009, the plan charges $1,000 per month for COBRA continuation coverage. The premium reduction and the payroll tax credit are based on $1,000 for the coverage beginning March 1, 2009.

Q–22. If a plan that previously charged less than the maximum premium allowed under the COBRA continuation provisions increases the premium pursuant to section 54.4980B–8, Q&A–2(b)(1), and the employer provides a separate taxable payment to the assistance eligible individual, does the premium reduction apply to the increased premium amount?

A–22. Yes.

Example 1. Under a group health plan, 102 percent of the applicable premium for COBRA continuation coverage is $1,000 per month. Prior to February 17, 2009, the plan charged $400 per month for COBRA continuation coverage. Pursuant to section 54.4980B–8, Q&A–2(b)(1) and the applicable notice requirements, the plan charges $1,000 per month for COBRA continuation coverage for periods of coverage beginning March 1, 2009. In addition, beginning March 1, 2009, the employer provides a taxable severance benefit of $600 per month to employees who are assistance eligible individuals. The premium reduction is based on $1,000 for the coverage beginning March 1, 2009, and thus the individual is entitled to COBRA continuation coverage upon the timely payment of $350 (35 percent of $1,000).

Example 2. Same facts as Example 1, except that, beginning March 1, 2009, instead of providing a taxable severance benefit, the employer reimburses employees who are assistance eligible individuals for the $350 the employees pay for the coverage, and the employer excludes that amount from the employees' gross income under section 106. Consequently, the $350 is treated as paid by the employer, and, because there is no non-employer payment, the premium reduction is not available, and no payroll tax credit is available to the employer.

Q–23. Does the premium reduction apply to portions of the premium attributable to COBRA continuation coverage for individuals who are not qualified beneficiaries?

A–23. No. The premium reduction is limited to premiums attributable to COBRA continuation coverage for assistance eligible individuals, defined as qualified beneficiaries who elect COBRA continuation coverage and whose qualifying event with respect to the coverage is the involuntary termination of employment of a covered employee during the period from September 1, 2008, through December 31, 2009. A qualified beneficiary with respect to a covered employee under a group health plan is the spouse of the employee under Federal law or a dependent child of the employee under Federal law if, generally, the spouse or dependent child was a beneficiary under the plan on the day before the qualifying

event. Qualified beneficiary also includes a child who is born to or adopted by the covered employee during the period of COBRA continuation coverage. Subject to the preceding sentence, qualified beneficiary does not include a spouse or dependent child not covered before the qualifying event and added to the coverage during a later enrollment period. In addition, if an individual does not meet the definition of a qualified beneficiary under Federal COBRA, the individual's coverage is not eligible for the premium reduction under ARRA, even though such an individual may be covered under a plan by its terms, or as required by State law.

Q–24. If COBRA continuation coverage is provided under a State program that provides comparable continuation coverage does the premium reduction apply to portions of the premium attributable to COBRA continuation coverage for individuals who would not be qualified beneficiaries under Federal COBRA if the coverage were provided under Federal COBRA?

A–24. No. While section 3001(a)(10)(B) of ARRA defines COBRA continuation coverage eligible for the premium reduction to include comparable State continuation coverage, qualified beneficiary is defined under section 3001(a)(10)(E) by cross-reference to ERISA. Thus, the premium reduction is limited to the premium attributable to the coverage of the involuntarily terminated employee and the employee's spouse or dependent children who are qualified beneficiaries under Federal COBRA, even if the State law requires a group health plan to provide continuation coverage to a broader group.

Q–25. If the COBRA continuation coverage of one or more assistance eligible individuals also covers one or more individuals who are not assistance eligible individuals, how is the premium paid by the assistance eligible individual for COBRA continuation coverage allocated between the assistance eligible individuals and the other individuals?

A–25. Amounts paid by an assistance eligible individual for COBRA continuation coverage covering one or more individuals who are assistance eligible individuals and one or more individuals who are not assistance eligible individuals are allocated first to the cost of covering assistance eligible individuals and then to the cost of covering non-assistance eligible individuals. Thus, if the cost of covering a non-assistance eligible individual does not add to the cost of covering the assistance eligible individuals, then the cost of covering the non-assistance eligible individual is zero, and the premium reduction applies to the full amount paid for the COBRA continuation coverage. If the cost of covering a non-assistance eligible individual adds to the cost of covering the assistance eligible individuals, it is the incremental cost that is ineligible for the premium reduction.

Example 1. An individual and the individual's two dependent children are assistance eligible individuals and have COBRA continuation coverage. The COBRA continuation coverage also covers an individual who is not an assistance eligible individual. The amount the plan requires to be paid for COBRA continuation coverage for self-plus-two-or-more-dependents for non-assistance eligible individuals is $1,000 per month.

The amount the individual would pay (but for the ARRA premium reduction) for covering the individual and the two children (the assistance eligible individuals) under the COBRA continuation coverage is $1,000 per month. The additional premium amount for coverage of the individual who is not an assistance eligible individual is $0 per month. The individual is entitled to apply the premium reduction to the $1,000, and is entitled to COBRA continuation coverage upon the timely payment of $350 (35 percent of $1,000) for the coverage. The employer's resulting payroll tax credit is $650 (65 percent of $1,000).

Example 2. Same facts as Example 1, except the individual has only one dependent child, and the plan charges $800 per month for self-plus-one-dependent COBRA continuation coverage. Although the individual's premium (but for the ARRA premium reduction) would be $1,000 per month for self-plus-two-or-more-dependents COBRA continuation coverage, the portion of the premium attributable to coverage for the individual and the individual's dependent child (both assistance eligible individuals) is $800.

The individual is entitled to apply the premium reduction to the $800 and is entitled to COBRA continuation coverage upon the timely payment of $280 (35 percent of $800) for that portion of the coverage. The amount the individual pays for the non-assistance eligible individual is $200. The individual's total premium payment is $480 ($280 plus $200). The employer's resulting payroll tax credit is $520 (65 percent of $800).

Example 3. An individual is an assistance eligible individual and has COBRA continuation coverage. The individual has self-only coverage and pays $157.50 (35 percent of the $450 per month charged non-assistance eligible individuals for self-only COBRA continuation coverage). During the premium reduction period, the plan has an open enrollment period during which it allows active employees and qualified beneficiaries to add spouses and dependents to the health coverage. The individual adds the individual's spouse and dependent child, who were not covered prior to the involuntary termination, to the COBRA continuation coverage. Without regard to the ARRA premium reduction, COBRA continuation coverage for self-plus-two-or-more-dependents is $1,000 per month.

The spouse and the dependent child are not assistance eligible individuals because they were not covered by the plan on the day before the involuntary termination. The amount the individual pays for the spouse and the dependent child is $550 per month ($1,000 less $450). The individual is entitled to the premium reduction with respect to $450 per month. Thus, the individual is entitled to COBRA continuation coverage upon the timely payment of $707.50 ($550 + $157.50 [35 percent of $450 = $157.50]). The employer's resulting payroll tax credit is $292.50 (65 percent of $450).

Q–26. Does the premium reduction apply to the increased premium if the plan, in compliance with section 54.4980B–8, Q&A–2(c), allows the assistance eligible individual to change coverage from the benefit package that covered the individual prior to termination to a different benefit package with a higher applicable premium that allows an increase in the amount charged the assistance eligible individual?

A–26. Yes.

COVERAGE ELIGIBLE FOR PREMIUM REDUCTION

Q–27. Is the premium reduction available for COBRA continuation coverage under a vision-only or dental-only plan?

A–27. Yes. The premium reduction is available for COBRA continuation coverage of any group health plan, except a flexible spending arrangement (FSA) under section 106(c) offered under a section 125 cafeteria plan. This includes vision-only or dental-only plans and "mini-med plans," whether or not the employer pays for a portion of the costs for active employees. The premium reduction is not available for continuation coverage offered by employers for non-health benefits that are not subject to COBRA continuation coverage, such as group life insurance.

Q–28. Can retiree health coverage be treated as COBRA continuation coverage for which the premium reduction is available?

A–28. Yes, but only if the retiree coverage does not differ from the coverage made available to similarly situated active employees (though the amount charged for the coverage may be higher than that charged to active employees and the retiree coverage may still be eligible for

the ARRA premium reduction as long as the charge to retirees does not exceed the maximum amount allowed under Federal COBRA).

Q–29. Is the premium reduction available for COBRA continuation coverage under a health reimbursement arrangement (HRA)?

A–29. Yes. While an HRA may qualify as an FSA under section 106(c), the exclusion of FSAs from the premium reduction is limited to FSAs provided through a section 125 cafeteria plan, which would not include an HRA.

BEGINNING OF PREMIUM REDUCTION PERIOD

Q–30. When does the premium reduction first apply to an assistance eligible individual?

A–30. The premium reduction applies as of the first period of coverage beginning on or after February 17, 2009 (the date of enactment of ARRA), for which the assistance eligible individual is eligible to pay only 35 percent of the premium (as determined without regard to the premium reduction) and be treated as having made full payment. For this purpose, a period of coverage is a monthly or shorter period with respect to which premiums are charged by the plan with respect to such coverage. Therefore, the exact date when the first period of coverage beginning on or after February 17, 2009, begins depends on the period with respect to which premiums are charged by the plan.

Q–31. If a plan requires that COBRA continuation coverage be paid for based on a calendar month and an assistance eligible individual has COBRA continuation coverage for the entire month of February, can the plan pro-rate the premium for February in order to apply the ARRA premium reduction to the portion of February that begins on February 17, 2009?

A–31. No. If a plan requires that COBRA continuation coverage be paid for based on a calendar month and an assistance eligible individual has COBRA continuation coverage for the entire month of February, the first period of coverage beginning on or after February 17, 2009, is the month beginning March 1, and the premium reduction only applies to the premiums for COBRA continuation coverage for March and the following months.

Q–32. If a plan requires that COBRA continuation coverage be paid for based on a calendar month and requires an individual who loses coverage other than on the last day of the month and who wishes to enroll in COBRA continuation coverage to pay a *pro-rata* portion of the monthly premium for the first partial month of coverage, what is the first period of coverage to which the premium reduction applies for an assistance eligible individual who loses coverage after February 17, 2009?

A–32. If a plan requires an individual who loses coverage other than on the last day of the month and who wishes to enroll in COBRA continuation coverage to pay a *pro-rata* portion of the monthly premium, the first period of coverage to which the premium reduction applies for an assistance eligible individual who loses coverage after February 17, 2009, is the individual's first partial month of coverage. But see Q&A–48 for a different rule in the case of an individual electing COBRA continuation coverage under the ARRA extended election period.

END OF PREMIUM REDUCTION PERIOD

Q–33. For how long does the premium reduction apply to an assistance eligible individual?

A–33. The premium reduction applies until the earliest of (1) the first date the assistance eligible individual becomes eligible for other group health plan coverage (with certain exceptions) or Medicare coverage, (2) the date that is nine months after the first day of the first month for which the ARRA premium reduction provisions apply to the individual, or (3) the date the individual ceases to be eligible for COBRA continuation coverage.

Q–34. If an assistance eligible individual is eligible for other group health plan coverage but does not enroll in the other group health plan coverage, is the premium reduction available for the individual's COBRA continuation coverage after the date the individual is first eligible for the other coverage?

A–34. No.

Example 1. An assistance eligible individual begins employment with a new employer and is eligible to enroll in the employer's group health plan, with coverage effective the first day of the next month. The assistance eligible individual declines the coverage and continues COBRA continuation coverage. Although eligibility for other group health coverage does not end the individual's eligibility for Federal COBRA, the premium reduction is no longer available as of the first day of the next month.

Example 2. Same facts as Example 1, except that the new employer's group health plan imposes a 2-month waiting period. The premium reduction stops being available as of the first day after the end of the waiting period, even though the employee declined coverage under the plan. It is the same result if the employee had enrolled for coverage; the premium reduction would apply until the first day after the end of the waiting period.

Example 3. The spouse of an assistance eligible individual (who is also an assistance eligible individual) begins employment with a new employer and is eligible to enroll in the employer's group health plan with self-only or family coverage, with coverage effective the first day of the next month. The spouse enrolls in self-only coverage, and the assistance eligible individual continues COBRA continuation coverage. Although the individual is allowed to continue Federal COBRA, the premium reduction is no longer available for the COBRA continuation coverage as of the first day of the next month because the assistance eligible individual is eligible for coverage under the group health plan of the spouse's employer.

Q–35. Is an assistance eligible individual who otherwise meets the eligibility requirements for coverage under a group health plan, but who cannot enroll and have coverage take effect immediately, considered eligible for coverage under the group health plan for purposes of ending the period of premium reduction?

A–35. No. An individual who is eligible to enroll for coverage under a group health plan is considered to be eligible for coverage under the group health plan for purposes of ending the period of premium reduction only from the first date that coverage can take effect. For example, if, as of February 17, 2009, an assistance eligible individual meets the eligibility requirements for coverage under a group health plan maintained by the individual's spouse, but cannot enroll and have coverage take effect immediately, the individual may receive the premium reduction for periods of coverage until the first date that coverage can take effect under the plan maintained by the spouse's employer.

Q–36. What is the effect on eligibility for the premium reduction if retiree health coverage that is not COBRA continuation coverage is offered at the same time that COBRA continuation coverage is offered?

A–36. The effect on eligibility for the premium reduction of an offer of retiree coverage that is not COBRA continuation

coverage at the same time that COBRA continuation coverage is offered depends on whether the retiree coverage is offered under the same group health plan as the COBRA continuation coverage or under a different group health plan. If offered under the same group health plan, the offer of the retiree coverage has no effect on an individual's eligibility for the ARRA premium reduction.

If offered under a different group health plan, the offer can affect the individual's eligibility for the premium reduction. If offered to an individual whose eligibility for COBRA continuation coverage arises in connection with an involuntary termination on or after February 17, 2009, the offer of retiree coverage that is not COBRA continuation coverage under a different group health plan than the one under which COBRA continuation coverage is being offered will render the individual ineligible for the ARRA premium reduction. If offered to someone whose eligibility for COBRA continuation coverage arose on or after September 1, 2008, but before February 17, 2009, the offer will render the individual ineligible for the premium reduction only if the period the individual is given for enrolling in the retiree coverage extends to at least February 17, 2009.

Q&A–6 of section 54.4980B–2 provides rules for determining whether health benefits provided by an employer or employee organization constitute one or more group health plans for purposes of Federal COBRA. Under those rules, all health benefits provided by an organization constitute a single group health plan unless it is clear from the instruments governing the arrangement or arrangements that the benefits are being provided under separate plans and the arrangement or arrangements are operated pursuant to such instruments as separate plans.

Q–37. Does eligibility for coverage under an HRA end the period of premium reduction under ARRA as eligibility for coverage under any other group health plan?

A–37. Not if the HRA qualifies as an FSA under section 106(c), but otherwise yes. Under section 106(c), an FSA is health coverage under which the maximum amount of reimbursement which is reasonably available to a participant of the coverage is less than 500 percent of the value of the coverage. For this purpose, the maximum amount of reimbursement which is reasonably available is generally the balance of the HRA and the value of the HRA coverage would generally be the applicable premium for COBRA continuation of the HRA coverage.

Q–38. Is the premium reduction available after December 31, 2009?

A–38. Yes, the premium reduction may be available after December 31, 2009, for individuals who qualify as assistance eligible individuals on or before December 31, 2009. For example, an assistance eligible individual with respect to whom the period of COBRA continuation coverage for which the premium reduction first applies begins on December 1, 2009, could receive the premium reduction until August 31, 2010, assuming the individual does not become eligible for other group health plan coverage or Medicare or lose eligibility for COBRA continuation coverage before that date.

Q–39. Does the death of an involuntarily terminated employee end the eligibility of the qualified beneficiary spouse and dependent children for the premium reduction?

A–39. No.

Q–40. Does a failure to timely pay the required premium for COBRA continuation coverage end the premium reduction?

A–40. Yes. Failure to timely pay the required premium for COBRA continuation coverage ends the period of COBRA continuation coverage, at which time the individual no longer qualifies for the premium reduction. For this purpose, payment is considered timely if it is made by the end of any applicable grace period for making the payment.

Q–41. Is an individual currently enrolled in Medicare who is a qualified beneficiary as the result of an involuntary termination of employment that occurred during the period from September 1, 2008, through December 31, 2009, able to elect COBRA continuation coverage and receive the premium reduction?

A–41. No. An individual currently enrolled in Medicare who becomes a qualified beneficiary as the result of an involuntary termination that occurred during the period from September 1, 2008, through December 31, 2009, may be eligible to elect COBRA continuation coverage but is not eligible for the premium reduction.

Q–42. If an assistance eligible individual receiving a premium reduction from an employer fails to provide notice of the individual's eligibility for coverage under any other group health plan or Medicare and continues receiving the premium reduction, is the employer required to refund to the IRS the payroll tax credit relating to the premium reduction provided with respect to the period after the individual's eligibility for the premium reduction ended due to eligibility for coverage under the other group health plan or Medicare?

A–42. No. If the employer has claimed a payroll tax credit for the premium reduction, the employer is not required to refund to the IRS the excess premium reduction received as a credit merely because the assistance eligible individual failed to provide notice that the individual is no longer eligible for the premium reduction due to eligibility for coverage under any other group health plan or Medicare unless the employer otherwise knew of the eligibility for such coverage. The assistance eligible individual who failed to provide notice may be subject to a Federal tax penalty of 110 percent of the premium reduction improperly received. The penalty will not apply if it is shown that individual's failure to provide notice was due to reasonable cause and not to willful neglect. The employer who received the credit against payroll taxes in the amount of the excess premium reduction has no rights to the penalty payment.

Q–43. How long is the period of premium reduction for an individual who becomes an assistance eligible individual a second time?

A–43. An assistance eligible individual is eligible for up to nine months of premium reduction for each involuntary termination.

Example. An individual is involuntarily terminated and loses coverage as of April 1, 2009. The individual otherwise meets the requirements for an assistance eligible individual and is allowed the premium reduction for COBRA continuation coverage beginning April 1, 2009. On July 1, 2009, the individual ceases to be an assistance eligible individual because of coverage under a group health plan provided by the employer of the individual's spouse. Subsequently, the individual's spouse is involuntarily terminated, the individual loses coverage as of November 1, 2009, and, at that time, otherwise meets the requirements for being an assistance eligible individual. The individual is allowed up to nine months of premium reduction with respect to the involuntary termination of the individual's spouse.

Q–44. Is the period for which premium assistance is available extended by a second qualifying event, such as a divorce, following an involuntary termination based on which a qualified beneficiary is an assistance eligible individual?

A–44. No.

RECAPTURE OF PREMIUM ASSISTANCE

Q–45. Can a plan refuse to provide the premium reduction to an individual because of the individual's income?

A–45. No. Even if an assistance eligible individual's income is high enough that the recapture of the premium reduction would apply, COBRA continuation coverage must be provided upon payment of 35 percent of the premium unless the individual has notified the plan that the individual has elected the permanent waiver of the premium reduction (or the period for the premium reduction has ended).

Q–46. How does an assistance eligible individual make a permanent election to waive the right to the premium reduction?

A–46. An assistance eligible individual who wants to make a permanent election to waive the right to the premium reduction makes the election by providing a signed and dated notification (including a reference to "permanent waiver") to the person who is reimbursed for the premium reduction under section 6432. There is no separate additional notification to any government agency. If an assistance eligible individual makes the permanent election to waive the right to the premium reduction, the individual may not later reverse the election and may not receive the premium reduction for any future period of COBRA continuation coverage in 2009 or 2010, regardless of modified adjusted gross income in those years.

EXTENDED ELECTION PERIOD

Q&A–47 through Q&A–50 and Q&A–52 through Q&A–55 apply only for purposes of Federal COBRA and temporary continuation coverage under FEHBP.

Q–47. If an employee was involuntarily terminated during the period from September 1, 2008, through February 17, 2009, and elected self-only COBRA continuation coverage, are a spouse and dependent children who are qualified beneficiaries in connection with the involuntary termination allowed to elect COBRA continuation coverage and receive the premium reduction under the extended election period?

A–47. Yes. An individual who does not have an election of COBRA continuation coverage in effect on February 17, 2009, but who would have been an assistance eligible individual if the election were in effect is allowed a second opportunity to elect COBRA continuation coverage under the extension of election period under section 3001(a)(4)(A) of ARRA. The resulting coverage begins with the first period of COBRA continuation coverage beginning on or after February 17, 2009. A spouse or dependent child who is a beneficiary under a group health plan that covers an employee on the day before the involuntary termination of the employee (whose termination was on or after September 1, 2008) would have been an assistance eligible individual if the spouse or dependent child timely elected COBRA continuation coverage and thus qualifies for the second election, notwithstanding the prior election of self-only COBRA continuation coverage by the employee.

Q–48. If a plan requires that COBRA continuation coverage be paid for based on a calendar month, what is the first period of coverage for an assistance eligible individual who becomes eligible for COBRA continuation coverage as a result of the extended election period provided under ARRA?

A–48. If, as a result of the extended election period provided under ARRA, an assistance eligible individual becomes eligible for COBRA continuation coverage under a plan that requires that COBRA continuation coverage be paid for based on a calendar month, the individual's first period of coverage beginning on or after February 17, 2009, is the month beginning March 1, and the premium reduction only applies to the premiums for COBRA continuation coverage for March and the following months. This does not change even if the plan otherwise requires individuals who lose coverage before the last day of the month and who wish to enroll in COBRA continuation coverage to pay a pro-rata portion of the monthly premium for the first partial month of coverage.

Q–49. If a plan requires that COBRA continuation coverage be paid for based on a monthly period computed from the date of the loss of coverage, what is the first period of coverage beginning on or after February 17, 2009, for an assistance eligible individual who becomes eligible for COBRA continuation coverage as a result of the extended election period provided under ARRA?

A–49. The first period of coverage is the monthly period corresponding to the day after the loss of coverage to the day of the following month corresponding to the day of the loss of coverage. For example, if the last day of coverage was October 3, 2008, the period of coverage runs from the fourth of the month to the third of the following month, and thus the first period of coverage on or after February 17, 2009, is the period March 4, 2009, through April 3, 2009.

Q–50. May an individual involuntarily terminated during the period from September 1, 2008, through February 17, 2009, who still has an open COBRA continuation coverage election period independent of ARRA elect coverage under the extended election period and receive and only pay for coverage that starts on the first period of coverage beginning on or after February 17, 2009?

A–50. Yes. The extended election period for electing COBRA continuation coverage is available for all individuals who are qualified beneficiaries as the result of an involuntary termination during the period from September 1, 2008, through February 17, 2009, even if they still have an open COBRA election period as of February 17, 2009. If these individuals elect COBRA under their original COBRA election period, under Federal COBRA the coverage is retroactive to their loss of coverage and the premium reduction does not apply to the periods of coverage prior to the first period of coverage beginning on or after February 17, 2009 (generally, periods of coverage before March 2009 for plans with monthly coverage periods).

Example. An individual is involuntarily terminated in December 2008 and received the COBRA election notice in January 2009. As of February 17, 2009, the individual has not elected COBRA continuation coverage. The individual should receive a notice about the extended election period for COBRA continuation coverage and the individual may decline to elect COBRA continuation coverage under the original COBRA election period and instead elect and pay for COBRA continuation coverage only for coverage periods on or after February 17, 2009, under the extended election period.

Q–51. Is the extended election period available to involuntarily terminated employees whose continuation coverage is provided pursuant to State law only?

A–51. Generally, no. The extended election period under section 3001(a)(4)(A) of ARRA applies to a group health plan that is subject to Federal COBRA or the temporary continuation coverage requirements of the FEHBP. It does not apply to plans subject to COBRA continuation coverage requirements under a State program that provides comparable continuation coverage. However, if a State program provides for a similar special election and an individual otherwise satisfies the requirements to be an assistance eligible individual, the premium reduction is available for any resulting continuation coverage.

Q–52. When does COBRA continuation coverage begin for individuals making the election during the extended election period provided under section 3001(a)(4) of ARRA?

A–52. As provided in section 3001(a)(4)(B) of ARRA, COBRA continuation coverage elected during the extended election period begins with the first period of coverage beginning on or after February 17, 2009. Thus, expenses incurred after the loss of coverage and before the first day of the first period of coverage beginning on or after February 17, 2009, are not covered under the resulting COBRA continuation coverage.

Q–53. How does the COBRA continuation coverage election under the extended election period apply in the case of an HRA?

A–53. Generally, qualified beneficiaries electing COBRA continuation coverage with respect to HRA coverage have access to the same level of reimbursements during COBRA continuation coverage as was available immediately before the qualifying event. Thus, a qualified beneficiary electing COBRA continuation coverage with respect to an HRA under the extended election period would have access to the same level of reimbursements as they had immediately before the qualifying event. The amount available would be reduced for any reimbursements made after the qualifying event; for example, reimbursements for expenses incurred before the event submitted and reimbursed after the event. Upon election of COBRA continuation coverage with respect to the HRA under the extended election period, the HRA would not be required to reimburse expenses incurred after the loss of coverage and before the first day of the first period of coverage beginning on or after February 17, 2009.

Q–54. If an assistance eligible individual was eligible for other group health plan coverage prior to February 17, 2009, but has been unable to enroll in the other group health plan coverage on and after February 17, 2009, is the premium reduction available to the individual's COBRA continuation coverage?

A–54. Yes, the assistance eligible individual is allowed the premium reduction until the individual is eligible to enroll in coverage under any other group health plan.

Example 1. An assistance eligible individual was involuntarily terminated and lost health coverage on or after September 1, 2008, and before February 17, 2009. At the time of, and because of, the loss of coverage, the assistance eligible individual was eligible for a special enrollment period in the group health plan provided by the employer of the individual's spouse. The special enrollment period ended before February 17, 2009. The assistance eligible individual elected COBRA continuation coverage and has not been eligible to enroll in coverage under the spouse's group health plan at any time on or after February 17, 2009. Under these facts, the assistance eligible individual is not considered eligible for coverage under the plan of the spouse's employer until the effective date of coverage for the first enrollment opportunity that occurs on or after February 17, 2009. Therefore, the assistance eligible individual may receive the premium reduction beginning with the first period of coverage beginning on or after February 17, 2009, and until becoming eligible for coverage under the plan of the spouse's employer.

Example 2. Same facts as Example 1, except that the spouse's group health plan has an open enrollment period from June 1, 2009, to June 21, 2009, with coverage elected during the open enrollment period beginning July 1, 2009. The individual's spouse may elect coverage for the individual under the group health plan at that time. The spouse does not elect coverage for the individual, who continues COBRA continuation coverage. The premium reduction is no longer available for the individual's COBRA continuation coverage for periods beginning on or after July 1, 2009.

Q–55. Under Federal COBRA, what is timely payment of the initial premium for COBRA continuation coverage for an individual electing the coverage under the extended election period of section 3001(a)(4) of ARRA?

A–55. Pursuant to section 54.4980B–8, Q&A–5(b), a plan cannot require payment for any period of Federal COBRA for a qualified beneficiary earlier than 45 days after the date on which the election of COBRA continuation coverage is made for that qualified beneficiary. Thus, for purposes of Federal COBRA in the case of COBRA continuation coverage elected under the extended election period of section 3001(a)(4) of ARRA, the plan cannot require payment of the first premium earlier than 45 days after the date on which the election of Federal COBRA under the extended election period is made for that qualified beneficiary.

PAYMENTS TO INSURERS UNDER FEDERAL COBRA

Q–56. In the case of an insured plan that is not a multiemployer plan and that is subject to the COBRA continuation provisions contained in the Code, if the insurer and the employer have agreed that the insurer will collect the premiums directly from the qualified beneficiaries, is the insurer required to treat an assistance eligible individual paying 35 percent of the premium as having paid the full premium, even before the employer pays the insurer the remaining 65 percent?

A–56. Yes. If the insurer fails to treat a 35 percent payment by an assistance eligible individual as a payment of the full premium, the insurer may be liable for the excise tax under section 4980B(e)(1)(B), which applies to each person responsible (other than in a capacity as an employee) for administering or providing benefits under the plan and whose act or failure to act caused (in whole or in part) the failure, if the person assumed responsibility for the performance of the act to which the failure relates.

COMPARABLE STATE CONTINUATION COVERAGE

Q–57. Does a State continuation coverage program provide comparable coverage qualifying for the premium reduction under ARRA if the maximum period of continuation coverage under the program differs from the maximum period under Federal COBRA?

A–57. Yes. A different period of continuation coverage under State continuation coverage programs does not disqualify the State program from being comparable. Thus, for example, the mere fact that a State continuation coverage program only

provides for six months of continuation coverage (instead of 18 months) would not result in the State program failing to be comparable. Similarly, State programs providing for different qualifying events, different qualified beneficiaries, or different maximum premiums generally do not fail to be comparable solely for those reasons.

Q–58. In the case of an insured plan subject solely to State law requiring the insurer to provide continuation coverage, if the employer collects the reduced premiums from assistance eligible individuals and pays the full premium to the insurer, is the employer eligible to take the payroll credit directly?

A–58. No. Under section 6432(b)(3), in the case of an insured plan subject solely to State law with respect to the requirement to provide continuation coverage, the only person entitled to be reimbursed for the premium reduction through the payroll credit (unless and until provided otherwise in future guidance) is the insurer providing the coverage under the group health plan.

ADDITIONAL ISSUES

The IRS and Treasury are aware of various issues relating to the premium reduction provision that are not addressed in this notice, including issues affecting particular arrangements. Although this notice does not address these issues, the IRS and Treasury continue to consider these and other issues and possible guidance with respect to them.

DRAFTING INFORMATION

The principal author of this notice is Leslie R. Paul of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). For further information regarding this notice, contact Ms. Paul at (202) 622–6080 (not a toll-free call).

Qualified Energy Conservation Bond Allocations for 2009

Notice 2009–29

SECTION 1. PURPOSE

This notice sets forth the maximum face amount of qualified energy conservation bonds ("QECBs") that may be issued by each State and large local government under § 54D(e)(1) of the Internal Revenue Code. For this purpose, § 54A(e)(3) provides that the term "State" includes the District of Columbia and any possession of the United States. This notice also provides certain interim guidance for QECBs.

SECTION 2. BACKGROUND

.01 INTRODUCTION

Section 301(a) of Tax Extenders and Alternative Minimum Tax Relief Act of 2008, Division C of Pub. L. 110–343. 122 Stat. 1365 (2008) ("Act") added new § 54D to provide program provisions for QECBs. The Act amended § 54A(d)(1) to provide that the term "qualified tax credit bond" means, in part, a qualified energy conservation bond that is part of an issue that meets the requirements of § 54A(d)(2), (3), (4), (5), and (6) regarding expenditures of bond proceeds, information reporting, arbitrage, maturity limitations, and prohibitions against financial conflicts of interest. The Act also amended § 54A(d)(2) to provide that, for purposes of § 54A(d)(2)(C), the term "qualified purpose" for a QECB means a purpose specified in § 54D(a)(1) described below.

The Act added § 54D(d) to provide a national bond limitation ("national bond volume cap") authorization for QECBs of $800 million. Section 1112 of Title 1 of Division B of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111–5, 123 Stat. 115 (2009) ("2009 Act") amended §54D(d) to increase the national bond volume cap authorization for QECBs from $800 million to $3.2 billion.

.02 QUALIFIED ENERGY CONSERVATION BONDS UNDER § 54D

Section 54D(a) defines a "qualified energy conservation bond" to mean 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 one or more qualified conservation purposes,

(2) the bond is issued by a State or local government, and

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

Section 54D(b) provides that the annual credit determined under § 54A(b) with respect to any qualified energy conservation bond shall be 70 percent of the amount so determined without regard to § 54D(b).

Section 54D(c) provides that the maximum face amount of bonds which may be designated under § 54D(a) by any issuer shall not exceed the portion of the volume cap allocated to such issuer under § 54D(e).

Section 54D(e)(1) provides that the $3.2 billion in total national bond volume cap shall be allocated by the Department of the Treasury among the States in proportion to the population of the States. Section 54D(e)(2)(A) provides that in the case of any State where there is a "large local government," as defined § 54D(e)(2)(C), each large local government shall be allocated a portion of the State's allocation that bears the same ratio to the State's allocation (determined without regard to this subparagraph) as the population of the large local government bears to the population of the State. Section 54D(e)(2)(B) provides that the amount allocated under this subsection to a large local government may be reallocated by the large local government to the State where the large local government is located. Section 54D(e)(2)(C) provides that for purposes of § 54D, the term "large local government" means any municipality or county that has a population of 100,000 or more.

Under § 54D(e)(3), any allocation to a State or large local government shall be allocated in turn by the State or large local government to issuers within the State in a manner that results in the use of not less than 70 percent of the allocation to such State or large local government to designate bonds that are not private activity bonds.

Section 54D(f) defines the term "qualified conservation purpose" to mean any of the following:

(A) Capital expenditures incurred for purposes of (i) reducing energy consumption in publicly-owned buildings by at least 20 percent, (ii) implementing green community programs (including the use of loans, grants, or other repayment mechanisms to implement such programs), (iii) rural development involving the production of electricity from renewable energy resources, or (iv) any qualified facility (as determined under section 45(d) without

regard to paragraphs (8) and (10) thereof and without regard to any placed in service date).

(B) Expenditures with respect to research facilities, and research grants, to support research in (i) development of cellulosic ethanol or other nonfossil fuels, (ii) technologies for the capture and sequestration of carbon dioxide produced through the use of fossil fuels, (iii) increasing the efficiency of existing technologies for producing nonfossil fuels, (iv) automobile battery technologies and other technologies to reduce fossil fuel consumption in transportation, or (v) technologies to reduce energy use in buildings.

(C) Mass commuting facilities and related facilities that reduce consumption of energy, including expenditures to reduce pollution from vehicles used for mass commuting.

(D) Demonstration projects designed to promote the commercialization of (i) green building technology, (ii) conversion of agricultural waste for use in the production of fuel or otherwise, (iii) advanced battery manufacturing technologies, (iv) technologies to reduce peak use of electricity, or (v) technologies for the capture and sequestration of carbon dioxide emitted from combusting fossil fuels in order to produce electricity.

(E) Public education campaigns to promote energy efficiency.

Section 54D(f)(2) provides that, in the case of any private activity bond, the term "qualified conservation purposes" shall not include any expenditure that is not a capital expenditure. New § 54D(e)(4) added by the 2009 Act provides a special rule for bonds to finance green community programs, stating that bonds issued for the purpose of providing loans, grants, or other repayment mechanisms for capital expenditures to implement green community programs are not treated as private activity bonds for purposes of § 54D(e)(3).

Section 54D(g)(1) provides that the population of any State or local government shall be determined for purposes of this section as provided in § 146(j) for 2008. Section 54D(g)(2) provides, in determining the population of any county for purposes of § 54D, for the exclusion of that portion of the county population taken into account in determining the population of any municipality that is a large local government.

Under § 54D(h), an Indian tribal government shall be treated as a large local government, except that (1) an Indian tribal government shall be treated as located within a State to the extent of so much of the population of such government as resides within the State, and (2) any bond issued by an Indian tribal government shall be treated as a qualified energy conservation bond only if issued as part of an issue the available project proceeds of which are used for purposes for which such Indian tribal government could issue bonds to which § 103(a) applies.

SECTION 3. INTERIM GUIDANCE AND RELIANCE

.01 GENERALLY

Pending the promulgation and effective date of future administrative or regulatory guidance, taxpayers may rely on the interim guidance provided in this notice.

.02 CREDIT RATE

For QECBs issued under §§ 54A and 54D, the maximum maturity and the credit rate are determined as of the date that there is a binding, written contract for the sale or exchange of the bond. The applicable maximum maturity, the discount rate for determining the maturity, and QCEB credit rate are published for that date by the Bureau of Public Debt on its Internet site for State and Local Government Series securities at: *https://www.treasurydirect.gov*. For further information regarding the methodology and procedures that the Treasury Department uses to determine these credit rates, see Notice 2009–15, 2009–6 I.R.B. 449 (February 9, 2009).

.03 SINKING FUND YIELD

Section 54A(d)(4)(C) provides that an issue shall not be treated as failing to meet the requirements of § 148 by reason of any fund which is expected to be used to repay the issue if: (i) the fund is funded at a rate not more rapid than equal annual installments; (ii) the fund is funded in a manner reasonably expected to result in an amount not greater than an amount necessary to repay the issue; and (iii) the yield on such fund is not greater than the discount rate determined under § 54A(d)(5)(B)(the "permitted sinking fund yield").

The permitted sinking fund yield is determined under § 54A(d)(5)(B) by using a rate equal to 110 percent of the long-term adjusted, applicable federal rate ("AFR"), compounded semiannually, for the month in which the bond is sold. The IRS publishes the long-term adjusted AFR, compounded semiannually, each month in a revenue ruling that is published in the Internal Revenue Bulletin. The Bureau of Public Debt publishes the permitted sinking fund yield for each month on its Internet site for State and Local Government Series securities at: *https://www.treasurydirect.gov*.

.04 INFORMATION REPORTING

Section 54A(d)(3) requires issuers of QECBs to submit information reporting returns to the IRS similar to those required to be submitted under § 149(e) for tax-exempt State or local governmental bonds. These information reporting returns are required to be submitted at the same time and in the same manner as those under § 149(e) on such forms as shall be prescribed by the IRS for such purpose. Pending further guidance from the IRS regarding the applicable forms to be used for such information reporting for QECBs, in the case of an issue of QECBs, the issuer must submit to the IRS an information return on Form 8038, at the same time and in the same manner as required under § 149(e), with modifications as described below. Issuers of QECBs should complete Part II of Form 8038 by checking Line 20c (Other), writing "QECBs" in the space provided for the bond description, and entering the issue price of the QECBs in the Issue Price column on Line 20c. For purposes of this notice, the term "issue" has the meaning used for tax-exempt bond purposes in § 1.150–1(c) of the Income Tax Regulations.

.05 ELIGIBLE ISSUERS

Eligible issuers of QECBs include States, political subdivisions as defined for purposes of § 103, and entities empowered to issue bonds on behalf of any such entity under rules similar to those for determining whether a bond issued on behalf of a State or political subdivision constitutes an obligation of that State or political

subdivision for purposes of § 103 and § 1.103–1(b) of the regulations. Further, eligible issuers include otherwise-eligible issuers in conduit financing issues (as defined in § 1.150–1(b) of the regulations). An eligible issuer may issue QECBs based on a volume cap allocation received by the eligible issuer itself or by a conduit borrower or other ultimate beneficiary of the issue of QECBs. In all events, the eligible costs for qualified conservation purposes financed with the proceeds of an issue of QECBs under § 54D(f) must relate to qualified conservation purposes that are located within or attributable to both the jurisdiction of the issuer of the QECBs and the jurisdiction of the entity authorized to allocate volume cap to an issue of QECBs for the financing of those qualified conservation purposes. Entities authorized to allocate volume cap consist of States and large local governments that receive volume cap allocations under § 54D(e). Thus, for example, a large local government that has received a volume cap allocation under § 54D(e)(2) either may issue bonds and designate them as QECBs with respect to that volume cap itself or it may be a beneficiary of proceeds of an issue of bonds issued and designated as QECBs by another eligible issuer with respect to that volume cap, provided that, in either event, the proceeds of the issue are used to finance qualified conservation purposes located within or attributable to both the jurisdiction of the issuer of the QECBs and the jurisdiction of the large local government authorized to allocate volume cap to the issue of QECBs for the financing of those qualified conservation purposes.

SECTION 4. NATIONAL BOND VOLUME CAP FOR QECBs

The national bond volume cap for QECBs is $3.2 billion. Each State must allocate a portion of its allocation of the national bond volume cap to each large local government in the State in an amount that bears the same ratio to the State's allocation as the population of such large local government bears to the population of such State. For this purpose, § 54D(h), described above, is applicable.

The allocations set forth below were based on the most recent available state population information released by the by the United States Census Bureau before the beginning of 2009 (which consists of state population information as of July 1, 2008), which can be found at the following web site: *http://www.census.gov/popest/states/tables/NST-EST2008–01.xls*.

In making the required reallocations of applicable portions of State allocations to large local governments, States must use population figures for large local governments within the States based on available data from the United States Census Bureau for the period that is closest in time to that used for the State and released by the Census before 2009 which consists of information as of July 1, 2007. City and county population figures are located generally at *http://www.census.gov/popest/*.

In making the required allocations to large local governments, a State shall make the required adjustments under § 54D(g)(2), described above. Further, in making the required allocations to large local governments, in the case of a State that has local political subdivisions that are not referred to as counties or cities (*e.g.*, townships, boroughs, or parishes), the determination of whether such political subdivisions are eligible to be treated as large local governments is based on whether, in substance, such political subdivisions are most closely analogous to counties or cities and whether they constitute uncontrolled general purpose governmental entities under §1.150–1(e)(3)(providing that an entity is not a controlled entity if the entity possesses substantial taxing, eminent domain, and police powers).

Allocations to States of the National Bond Volume Cap for Qualified Energy Conservation Bonds

State or Territory	QECB Allocation (in dollars)
Alabama	48,364,000
Alaska	7,120,000
Arizona	67,436,000
Arkansas	29,623,000
California	381,329,000
Colorado	51,244,000
Connecticut	36,323,000
Delaware	9,058,000
District of Columbia	6,140,000
Florida	190,146,000
Georgia	100,484,000
Hawaii	13,364,000
Idaho	15,809,000
Illinois	133,846,000
Indiana	66,155,000
Iowa	31,150,000
Kansas	29,070,000
Kentucky	44,291,000
Louisiana	45,759,000
Maine	13,657,000

Allocations to States of the National Bond Volume Cap for Qualified Energy Conservation Bonds

State or Territory	QECB Allocation (in dollars)
Maryland	58,445,000
Massachusetts	67,413,000
Michigan	103,780,000
Minnesota	54,159,000
Mississippi	30,486,000
Missouri	61,329,000
Montana	10,037,000
Nebraska	18,502,000
Nevada	26,975,000
New Hampshire	13,651,000
New Jersey	90,078,000
New Mexico	20,587,000
New York	202,200,000
North Carolina	95,677,000
North Dakota	6,655,000
Ohio	119,160,000
Oklahoma	37,787,000
Oregon	39,320,000
Pennsylvania	129,144,000
Rhode Island	10,901,000
South Carolina	46,475,000
South Dakota	8,343,000
Tennessee	64,476,000
Texas	252,378,000
Utah	28,389,000
Vermont	6,445,000
Virginia	80,600,000
Washington	67,944,000
West Virginia	18,824,000
Wisconsin	58,387,000
Wyoming	5,526,000
American Samoa	673,000
Guam	1,826,000
Northern Marianas	899,000
Puerto Rico	41,021,000
US Virgin Islands	1,140,000
Total Allocation	3,200,000,000

SECTION 5. EFFECTIVE DATE OF VOLUME CAP LIMITATIONS

The limitations for QECBs in Section 4 are effective for QECBs issued pursuant to the national bond volume cap after October 3, 2008.

SECTION 6. DRAFTING INFORMATION

The principal authors of this notice are Timothy L. Jones and David E. White of the Office of Associate Chief Counsel (Financial Institutions & Products). For further information regarding this notice, contact Timothy L. Jones or David E. White at (202) 622–3980 (not a toll-free call).

Qualified Zone Academy Bond Allocations for 2008 and 2009

Notice 2009–30

SECTION 1. PURPOSE

This notice sets forth the maximum face amount of Qualified Zone Academy Bonds ("QZABs") that may be issued for each State for each of the calendar years 2008 and 2009 under § 54E(c)(2) of the Internal Revenue Code. Under § 54A(e)(3), the term State includes the District of Columbia and any possession of the United States. This notice also provides certain interim guidance for QZABs issued after October 3, 2008.

SECTION 2. BACKGROUND

.01 INTRODUCTION

Section 313 of the Tax Extenders and Alternative Minimum Tax Relief Act of 2008, Div. C of Pub. L. No. 110–343, 122 Stat. 3765 (2008) ("Act") added new § 54E, which provides revised program provisions for QZABs in lieu of the existing provisions under § 1397E, effec-

tive for obligations issued after October 3, 2008. The Act amended § 54A(d)(1) to provide that the term qualified tax credit bond ("QTCB") means, in part, a qualified zone academy bond which is part of an issue that meets the requirements of §§ 54A(d)(2), (3), (4), (5), and (6) regarding expenditures of bond proceeds, information reporting, arbitrage, maturity limitations, and prohibitions against financial conflicts of interest. The Act also amended § 54A(d)(2)(C) to provide that, for purposes of § 54A(d)(2), the term "qualified purpose" for a QZAB means a purpose specified in § 54E(a)(1), described below.

The Act added § 54E(c)(1) to provide a national zone academy bond limitation authorization for QZABs of $400 million for each of calendar years 2008 and 2009. In addition, section 1522 of Title I of Division B of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111–5, 123 Stat. 115 (2009) ("2009 Act") further amended § 54E(c)(1) to provide an increased national zone academy bond limitation authorization for QZABs of $1.4 billion for each of calendar years 2009 and 2010.

.02 QUALIFIED ZONE ACADEMY BOND UNDER § 54E

Section 54E(d) defines "qualified zone academy" as any public school (or academic program within a public school) which is established by and operated under the supervision of an eligible local education agency to provide education or training below the postsecondary level provided: (A) the public school or program is designed in cooperation with business to enhance the academic curriculum, increase graduation and employment rates and prepare students for college and the workforce; (B) students will be subject to the same academic standards and assessments as other students educated by the eligible local education agency; (C) the comprehensive education plan is approved by the eligible local education agency; and (D)(i) such public school is located in an empowerment zone or enterprise community including such designated after October 3, 2008; or (ii) there is a reasonable expectation (as of the date of bond issuance) that at least 35 percent of the students will be eligible for free or reduced cost lunches under the school lunch program established under the National School Lunch Act.

Section 54E(a) provides that a "qualified zone academy bond" or QZAB 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 a qualified purpose with respect to a qualified zone academy established by an eligible local education agency; (2) the bond is issued by a State or local government within the jurisdiction of which such academy is located, and (3) the issuer: (A) designates such bond for purposes of this section; (B) certifies that it has written assurances that the private business contribution requirement of § 54E(b) will be met; and, (C) certifies that it has the written approval of the eligible local education agency for such bond issuance.

Section 54E(d)(3) provides that a qualified purpose with respect to each academy means: (A) rehabilitating or repairing the public school facility; (B) providing equipment; (C) developing course materials; and, (D) training teachers and other school personnel. The private business contribution requirement of § 54E(b) is met if the eligible local education agency that established the qualified zone academy has written commitments from private entities to make qualified contributions having a present value (as of the date of issuance of the issue) of not of less than 10 percent of the proceeds of the issue. Section 54E(d)(4) defines "qualified contributions" as any contribution (of a type and quality acceptable to the eligible local education agency) of: (A) equipment for use in the qualified zone academy (including state-of-the-art technology and vocational equipment); (B) technical assistance in developing curriculum or in training teachers to promote appropriate market driven technology in the classroom; (C) employees' services as volunteer mentors; (D) internships, field trips, or other educational opportunities outside the academy; or (E) any other property or service specified by the eligible education agency. Section 54E(d)(2) defines "eligible local education agency" as any local educational agency as defined in § 9101 of the Elementary and Secondary Education Act of 1965.

Section 54E(c)(2) provides that the Department of the Treasury shall allocate the national zone academy bond limitation among the States on the basis of their respective populations of individuals below the poverty line (as defined by the Office of Management and Budget). The limitation amount allocated to a State under the preceding sentence shall be allocated by the State education agency to qualified zone academies within such State.

Under § 54E(c)(3), the maximum aggregate face amount of bonds issued during any calendar year which may be designated as QZABs with respect to any qualified zone academy shall not exceed the limitation amount allocated to such academy for such calendar year. However, under § 54E(c)(4)(A), if for any calendar year the limitation amount for any State exceeds the amount of bonds issued during such year which are designated QZABs with respect to qualified zone academies within such State, the limitation amount for such State for the following calendar year shall be increased by the amount of such excess. Under § 54E(c)(4)(B), however, any carryforward of a limitation amount may be carried only to the first 2 years following the unused limitation year. For these purposes, the limitation amount shall be treated as used on a first-in first-out basis.

Section 54E(c)(4)(C) applies the rules under §§ 54E(c)(4)(A) and (B) to QZABs issued after October 3, 2008, under a carryforward of an unused limitation to calendar years 2008 or 2009 that initially arose in a prior year under § 1397E(e)(4). Any such carryforward is treated as though it were a carryforward that initially arose under § 54E in that prior year.

Sections 1.1397E–1 (the "Final Regulations") and 1.1397E–1T (the "Temporary Regulations") set forth regulations that were issued under § 1397E. Except as provided in this notice, or to the extent inconsistent with §§ 54A and 54E, the Final Regulations and the Temporary Regulations apply to QZABs issued under §§ 54A and 54E.

SECTION 3. INTERIM GUIDANCE AND RELIANCE

.01 GENERALLY

Pending the promulgation and effective date of future administrative or regulatory guidance, taxpayers may rely on the interim guidance provided in this notice and, to the extent not inconsistent with this

notice and the provisions of §§ 54A and 54E, the existing regulations issued under § 1397E.

.02. CREDIT RATE

For QZABs issued under §§ 54A and 54E, the maximum maturity and the credit rate are determined as of the date that there is a binding, written contract for the sale or exchange of the bond. The applicable maximum maturity and the QZAB credit rate are published for that date by the Bureau of Public Debt on its Internet site for State and Local Government Series securities at: *http://www.treasurydirect.gov*. For further information regarding the methodology and procedures that the Treasury Department uses to determine these credit rates, see Notice 2009–15, 2009–6 I.R.B. 449 (February 9, 2009).

.03 SINKING FUND YIELD

Section 54A(d)(4)(C) provides that an issue shall not be treated as failing to meet the requirements of § 148 by reason of any fund which is expected to be used to repay the issue if: (i) the fund is funded at a rate not more rapid than equal annual installments; (ii) the fund is funded in a manner reasonably expected to result in an amount not greater than an amount necessary to repay the issue; and (iii) the yield on such fund is not greater than the discount rate determined under § 54A(d)(5)(B) (the "permitted sinking fund yield").

The permitted sinking fund yield is determined under § 54A(d)(5)(B) by using a rate equal to 110 percent of the long-term adjusted, applicable federal rate ("AFR"), compounded semiannually, for the month in which the bond is sold. The IRS publishes the long-term adjusted AFR, compounded semiannually, each month in a revenue ruling that is published in the Internal Revenue Bulletin. The Bureau of Public Debt publishes the permitted sinking fund yield for each month on its Internet site for State and Local Government Series securities at *https://www.treasurydirect.gov*.

SECTION 4. NATIONAL ZONE ACADEMY BOND LIMITATION FOR 2008

The national limitation for QZABs issued under § 54E for calendar year 2008 is $400 million. This amount is allocated among the States as follows:

Qualified Zone Academy Bond Allocations by State or Territory, 2008.

State or Territory	QZAB Allocations (in dollars)
Alabama	7,606,000
Alaska	600,000
Arizona	8,817,000
Arkansas	4,924,000
California	44,364,000
Colorado	5,694,000
Connecticut	2,692,000
Delaware	881,000
District of Columbia	921,000
Florida	21,607,000
Georgia	13,250,000
Hawaii	1,001,000
Idaho	1,781,000
Illinois	14,972,000
Indiana	7,586,000
Iowa	3,182,000
Kansas	3,002,000
Kentucky	7,145,000
Louisiana	7,756,000
Maine	1,541,000
Maryland	4,543,000
Massachusetts	6,215,000
Michigan	13,781,000
Minnesota	4,824,000
Mississippi	5,824,000
Missouri	7,426,000
Montana	1,321,000
Nebraska	1,931,000
Nevada	2,702,000
New Hampshire	901,000
New Jersey	7,296,000
New Mexico	3,493,000
New York	25,720,000
North Carolina	12,600,000
North Dakota	741,000
Ohio	14,651,000

State or Territory	QZAB Allocations (in dollars)
Oklahoma	5,574,000
Oregon	4,744,000
Pennsylvania	13,941,000
Rhode Island	1,221,000
South Carolina	6,425,000
South Dakota	1,011,000
Tennessee	9,547,000
Texas	37,939,000
Utah	2,512,000
Vermont	610,000
Virginia	7,436,000
Washington	7,256,000
West Virginia	2,982,000
Wisconsin	5,885,000
Wyoming	440,000
American Samoa	391,000
Guam	399,000
Northern Mariana Islands	389,000
Puerto Rico	17,644,000
U.S. Virgin Islands	363,000
Total Allocation	400,000,000

SECTION 5. NATIONAL ZONE ACADEMY BOND LIMITATION FOR 2009

The national limitation for QZABs issued under § 54E for calendar year 2009 is $1.4 billion. This amount is allocated among the States as follows:

Qualified Zone Academy Bond Allocations by State or Territory, 2009.

State or Territory	QZAB Allocations (in dollars)
Alabama	26,621,000
Alaska	2,102,000
Arizona	30,859,000
Arkansas	17,233,000
California	155,275,000
Colorado	19,930,000
Connecticut	9,422,000
Delaware	3,082,000
DC	3,222,000
Florida	75,623,000
Georgia	46,376,000
Hawaii	3,503,000
Idaho	6,235,000
Illinois	52,401,000
Indiana	26,551,000
Iowa	11,139,000
Kansas	10,508,000
Kentucky	25,009,000
Louisiana	27,146,000
Maine	5,394,000
Maryland	15,902,000
Massachusetts	21,752,000
Michigan	48,232,000
Minnesota	16,883,000
Mississippi	20,386,000
Missouri	25,990,000
Montana	4,624,000

State or Territory	QZAB Allocations (in dollars)
Nebraska	6,760,000
Nevada	9,457,000
New Hampshire	3,152,000
New Jersey	25,535,000
New Mexico	12,224,000
New York	90,020,000
North Carolina	44,099,000
North Dakota	2,592,000
Ohio	51,280,000
Oklahoma	19,510,000
Oregon	16,603,000
Pennsylvania	48,793,000
Rhode Island	4,273,000
South Carolina	22,487,000
South Dakota	3,538,000
Tennessee	33,416,000
Texas	132,788,000
Utah	8,792,000
Vermont	2,137,000
Virginia	26,025,000
Washington	25,395,000
West Virginia	10,438,000
Wisconsin	20,596,000
Wyoming	1,541,000
American Samoa	1,368,000
Guam	1,397,000
Northern Mariana Islands	1,362,000
Puerto Rico	61,753,000
Virgin Islands	1,269,000
Total Allocation	1,400,000,000

SECTION 6. EFFECTIVE DATE OF NATIONAL ZONE ACADEMY BOND LIMITATIONS

The national limitation allocated in section 4 is effective for QZABs issued after October 3, 2008, and the national limitation allocated in section 5 is effective for QZABs issued on or after January 1, 2009.

SECTION 7. DRAFTING INFORMATION

The principal authors of this notice are Timothy Jones and Sandra H. Westin of the Office of Associate Chief Counsel (Financial Institutions and Products). For further information regarding this notice, contact Sandra H. Westin or Timothy L. Jones at (202) 622–3980 (not a toll-free call).

Election and Notice Procedures for Multiemployer Plans Under Sections 204 and 205 of WRERA

Notice 2009–31

I. PURPOSE

This notice provides guidance for sponsors of multiemployer defined benefit plans relating to the elections described in sections 204 and 205 of the Worker, Retiree, and Employer Recovery Act of 2008, P.L. 110–458 (WRERA), and on the notice required to be provided if a plan sponsor makes an election under section 204.

II. BACKGROUND

1. PPA provisions

Section 432 of the Internal Revenue Code (Code), which was added by the Pension Protection Act of 2006, P.L. 109–280 (PPA), provides rules for multiemployer defined benefit plans that are significantly underfunded. In particular, section 432(b)(3) provides that the plan actuary for any such multiemployer plan must, by the 90th day of each plan year, certify to the Secretary of the Treasury and to the plan sponsor as to the plan's "section 432 status" (*i.e.*, whether the plan is in endangered status, critical status, or neither status) for the plan year. If a plan is certified to be in endangered status (including seriously endangered status), the plan sponsor must adopt a funding improvement plan that is reasonably expected to enable the multiemployer plan to achieve certain funding improvements by the end of its 10-year funding improvement period (with a possible substitution of a 15-year funding improvement period for a plan in seriously endangered status). Similarly, the sponsor of a plan that has been certified to be in critical status must adopt a rehabilitation

plan that generally is reasonably expected to enable the multiemployer plan to emerge from critical status by the end of its 10-year rehabilitation period (with alternative approaches available if the plan sponsor determines, as described in section 432(e)(3)(A)(ii), that the plan cannot reasonably be expected to emerge from critical status by the end of the rehabilitation period using all reasonable measures). A funding improvement plan or rehabilitation plan must be updated each year after the initial endangered year (referred to in section 432(c)(2) as the initial determination year) or initial critical year.

Section 432(b)(3)(D) provides that the sponsor of a multiemployer plan in endangered or critical status must provide notice of the plan's certified status to participants and beneficiaries, the bargaining parties, the Pension Benefit Guaranty Corporation, and the Secretary of Labor, not later than 30 days after the date of the certification. If the plan is in critical status, the notice must explain that adjustable benefits, as defined in section 432(e)(8), may be reduced.

Section 4971(a) and (b) imposes an excise tax on an employer responsible for contributing to or under a plan if the plan has an accumulated funding deficiency. PPA added section 4971(g) to the Code, providing new excise tax rules for plans in endangered or critical status. In particular, section 4971(g) imposes new excise taxes with respect to plans in critical or endangered status, and section 4971(g)(1)(A) provides that no excise tax is imposed under section 4971(a) or (b) for a taxable year with respect to a plan in critical status for the plan year that ends with or within the taxable year.

Section 432 applies to plan years beginning on or after January 1, 2008. Section 4971(g) applies to tax years that include the last day of any plan year beginning on or after January 1, 2008.

2. Section 204 of WRERA

Section 204(a) of WRERA provides that a multiemployer plan sponsor may elect, notwithstanding the actuarial certification of the plan's section 432 status under section 432(b)(3) of the Code for the plan year for which the election is made ("election year"), to temporarily freeze the plan's section 432 status so that it is the same as the plan's section 432 status for the plan year immediately prior to the election year ("prior year"). Specifically, section 204(a)(1) of WRERA provides that a multiemployer plan sponsor may elect that the plan's section 432 status for the first plan year beginning on or after October 1, 2008 and not later than September 30, 2009 be the same as the plan's section 432 status for the prior year. If section 432 of the Code did not apply to the plan for the prior year (because the prior year began before January 1, 2008), the actuary must, in order to apply the election, make a certification of the plan's section 432 status for the prior year in the same manner as if section 432 had applied for the prior year.

Section 204(a)(2) of WRERA provides that the sponsor of a multiemployer plan that was in endangered or critical status for the prior year, and for which an election is made under section 204, is not required to update its funding improvement plan, rehabilitation plan, or schedules as otherwise required under section 432(c)(6) or 432(e)(3)(B) of the Code until the plan year following the election year.

Section 204(b) of WRERA provides a special rule for multiemployer plans that would, but for the election to freeze the plan's section 432 status, be in critical status for the election year. In particular, if the plan has, without regard to the election, been certified by the plan actuary to be in critical status for the election year, then the plan is treated as being in critical status for that year for purposes of applying the excise tax exception under section 4971(g)(1)(A) of the Code.

Section 204(c)(1) of WRERA provides that an election under section 204 must be made at the time and in the manner that the Secretary of the Treasury or the Secretary's delegate may prescribe and, once made, may be revoked only with the consent of the Secretary. If the election is made before the date the annual certification of the plan's section 432 status is submitted to the Secretary, then the election must be included with the certification that is submitted to the Secretary. If the election is made after the date the certification is submitted, then the election must be submitted to the Secretary not later than 30 days after the date of the election.

Section 204(c)(2) of WRERA provides special notice rules that apply when an election under section 204 is made to freeze a plan's section 432 status and that modify the otherwise applicable notice requirements under section 432(b)(3)(D) of the Code. If a plan is in neither endangered nor critical status as a result of the election, the plan sponsor must provide the notice described in section 204(c)(2)(A) of WRERA. This notice applies in lieu of the notice that is otherwise required under section 432(b)(3)(D) of the Code in the case of a plan that has been certified to be in endangered or critical status. The notice described in section 204(c)(2)(A)(ii) of WRERA must be provided to the participants and beneficiaries, the bargaining parties, the Pension Benefit Guaranty Corporation, and the Secretary of Labor and must contain such information about the election as the Secretary of the Treasury (in consultation with the Secretary of Labor) may require. Pursuant to section 204(c)(2)(A)(ii)(I) of WRERA, if the election is made before the date the annual certification of the plan's section 432 status is submitted to the Secretary of the Treasury, then notice must be provided not later than 30 days after the date of the certification. Under section 204(c)(2)(A)(ii)(II), if the election is made after the date the annual certification is submitted to the Secretary, then notice must be provided not later than 30 days after the date of the election.

Under section 204(c)(2)(B) of WRERA, if the plan is certified to be in critical status for the election year but is in endangered status by reason of an election made under section 204, the notice that must be provided is the notice that would have been provided under section 432(b)(3)(D) of the Code if the plan had been certified to be in endangered status for the election year.

3. Section 205 of WRERA

Section 205 of WRERA provides for an elective extension of the funding improvement period or rehabilitation period for multiemployer plans in endangered or critical status for a plan year beginning in 2008 or 2009.

If the sponsor of a multiemployer plan that is in endangered or critical status for a plan year beginning in 2008 or 2009 (determined after application of section 204 of WRERA) makes an election under section 205 of WRERA, then, for purposes of

section 432 of the Code, the plan's 10-year funding improvement period or rehabilitation period, whichever is applicable, is extended to 13 years. Similarly, if the sponsor of a multiemployer plan that is in seriously endangered status for a plan year beginning in 2008 or 2009 (determined after application of section 204 of WRERA) and that is eligible for a 15-year funding improvement period makes an election under section 205 of WRERA, then, for purposes of section 432 of the Code, the plan's funding improvement period is extended to 18 years. An election under section 205 of WRERA must be made at the time, and in the manner and form, as the Secretary of the Treasury or the Secretary's delegate may prescribe (in consultation with the Secretary of Labor).

III. EFFECT OF ELECTION

A multiemployer plan for which an election under section 204 of WRERA has been made must be operated in accordance with its section 432 status, as determined pursuant to the election, rather than the section 432 status to which the actuary certified for the election year. Thus, for example, the sponsor of a multiemployer plan that would have been in critical status for the election year, but for an election under section 204 to freeze the plan's section 432 status as endangered, could not assess employer surcharges under section 432(e)(7) of the Code, reduce adjustable benefits under section 432(e)(8), or restrict lump sum distributions under section 432(f)(2). Such a multiemployer plan would continue to be operated in accordance with its funding improvement plan (rather than a rehabilitation plan), but the funding improvement plan would not be required to be updated for the election year. If the plan's sponsor had not adopted a funding improvement plan based on its endangered status for the prior year (because section 432 did not apply to the plan for the prior year), then the sponsor would need to adopt a funding improvement plan in the election year (the first year for which section 432 applies to the multiemployer plan). However, pursuant to section 204(b) of WRERA, the excise tax exception under section 4971(g)(1)(A) of the Code for a plan in critical status would be available with respect to any accumulated funding deficiency of the plan for the election year, even though the plan, by reason of the election under section 204 of WRERA, is not treated as being in critical status.

A plan sponsor that wishes to take advantage of the rule under section 204(a)(2), under which no updates to a funding improvement plan or rehabilitation plan are required until the year following the election year, must make the election under section 204 even if the plan's section 432 status for the election year would be the same regardless of whether the election is made.

A plan sponsor should take into account the interaction between sections 204 and 205 of WRERA in choosing whether to elect the relief provided under either section. For example, a plan sponsor may elect under section 204 for the plan year beginning in 2009 to freeze the plan's section 432 status as neither endangered nor critical (rather than operate in accordance with an actuarial certification of endangered status or critical status for that year). If, however, the plan is subsequently certified as being in endangered or critical status for the plan year beginning in 2010, then the section 205 election to extend the funding improvement period or rehabilitation period to 13 years (or 18 years, if applicable) would no longer be available because the initial endangered year or initial critical year for the plan (the year when the plan first enters endangered or critical status) would not be until 2010 (a year as of which no election under section 205 is available). On the other hand, if the plan sponsor does not make an election under section 204 for a year so that it operates in accordance with the plan's endangered or critical status as certified for the year, and elects for that year to extend the funding improvement period or rehabilitation period under section 205, then the funding improvement period or rehabilitation period for the plan as determined in accordance with the 2009 election would continue to be 13 years (or 18 years, if applicable) for as long as the funding improvement plan or rehabilitation plan remains in effect. The same result would apply if the plan sponsor makes an election under section 204 where the plan's section 432 status is unchanged for the election year, in which case no update to the funding improvement plan or rehabilitation plan would be required for the election year.

As another example, a plan sponsor may elect for the plan year beginning in 2009 both to freeze the plan's section 432 status as endangered, as permitted under section 204 (rather than operate in accordance with an actuarial certification of critical status for that year), and to extend the funding improvement period to 13 years as permitted under section 205. If, however, the plan is subsequently certified as being in critical status for the plan year beginning in 2010, then the section 205 election to extend the funding improvement period to 13 years (or 18 years, if applicable) would no longer be applicable because the funding improvement plan would have to be replaced by a rehabilitation plan. Moreover, the sponsor could not then elect to extend the rehabilitation period to 13 years because the initial critical year for the plan would not be until 2010 (a year as of which no election under section 205 is available).

IV. ELECTION PROCEDURES

1. Timing of elections

Pursuant to the authority granted to the Secretary and his delegate under section 204(c)(1)(A) of WRERA to prescribe the time and manner for making an election, an election under section 204 must be made by the later of April 30, 2009 and the date that is 30 days after the due date of the annual certification of section 432 status for the election year. For example, the sponsor of a plan with a plan year beginning July 1 whose actuary certifies on September 23, 2009 as to the plan's status for the plan year beginning July 1, 2009, and who wishes to make an election under section 204, must do so by October 28, 2009 (the 30th day after September 28, 2009, the due date of the certification of section 432 status for the election year). As another example, the sponsor of a plan with a plan year beginning October 1, 2008 who wishes to make an election under section 204 must do so by April 30, 2009 (which is the later of the two dates for that plan).

Pursuant to the authority granted to the Secretary and his delegate under section 205(b)(1) to prescribe the time and manner for making an election under section 205, such an election must be made by the

last day of the plan year as of which the election is being made, or, if earlier, by the date a funding improvement plan, rehabilitation plan, or update is adopted that takes into account the election. However, in no event is the election required to be made earlier than April 30, 2009.

2. Submission of election to the Service

The sponsor must submit any election under section 204 or 205 to the Internal Revenue Service. If the election is made on or before the date the annual certification of section 432 status for the election year is submitted to the Secretary, the election must be included with the certification. If the election is made after the date the annual certification of section 432 status for the election year is submitted to the Secretary, the election must be submitted by the date that is 30 days following the date of the election.

Elections should be sent to the Employee Plans Compliance Unit (EPCU), which is the same office as to which annual certifications are submitted. Instructions for filing WRERA elections electronically with the EPCU may be found at *http://www.irs.gov/retirement/article/0,,id=171015,00.html.* Alternatively, WRERA elections may be mailed to the following address:

Internal Revenue Service
EPCU
Group 7602
SE:TEGE:EP
Room 1700 — 17th Floor
230 Dearborn Street
Chicago, IL 60604

3. Content of election

An election under section 204 or 205 of WRERA must be signed by an authorized trustee who is a current member of the board of trustees that is the plan sponsor and contain each of the following items of information, as applicable:

a. Name, address, telephone number, and EIN of the plan sponsor.
b. Name, plan EIN (if different from sponsor EIN), and plan number of the plan for which the election is being made.
c. A statement that the election is intended to be an election under section 204, section 205, or both sections 204 and 205.
d. If the election is under section 204 (or under both sections 204 and 205):
   i. A statement of the plan year for which the election (or elections) is being made.
   ii. The section 432 status of the plan for the election year taking the section 204 election into account (this is the same as the section 432 status of the plan for the prior year).
   iii. If section 432 of the Code did not apply to the plan for the prior year (because the prior year began before January 1, 2008), an attachment of an actuarial certification of what would have been the plan's section 432 status for the prior year had section 432 applied to the plan for the prior year.
e. If the election is under section 205 of WRERA, and no election under section 204 of WRERA applies for the year, a statement of the plan year as of which the section 205 election is being made.

V. SPECIAL NOTICE REQUIREMENT FOR PLANS IN NEITHER ENDANGERED NOR CRITICAL STATUS AS A RESULT OF FREEZE ELECTION

1. General notice requirements

As described above, if the plan sponsor elects to freeze the plan's section 432 status for the election year as neither endangered nor critical, despite an actuarial certification of endangered or critical status for the election year, then the sponsor must provide a special notice. The notice must be provided to participants and beneficiaries, the bargaining parties, the Pension Benefit Guaranty Corporation, and the Secretary of Labor.

As described in section 204(c)(2)(A)(ii) of WRERA, the notice must be provided no later than 30 days after the later of, 1) the actuarial certification for the election year, or 2) the date of the election. The notice must be provided either in the form of a paper document or in an electronic form that satisfies the requirements of § 1.401(a)–21 of the Treasury regulations.

2. Content of notice

The notice provided pursuant to section 204(c)(2)(A)(ii) of WRERA must be written in a manner calculated to be understood by the average employee to whom the notice applies, and must contain each of the following items of information, as applicable:

a. The name of the plan, the EIN of the plan sponsor, the EIN of the plan, and the plan number.
b. That an election has been made under section 204 of WRERA to treat the plan as being neither in endangered nor critical status for the plan year beginning on **[fill in the date that is the first day of the election year]**.
c. The plan's endangered or critical status for the election year as certified by the plan's actuary (that is, the plan's status if no section 204 election were made).
d. An explanation that: (i) the election applies only for the current plan year; and (ii) if the plan is certified to be in endangered or critical status for the year following the election year, the plan sponsor will provide notice of the plan's status (*i.e.*, endangered or critical) for that following year and steps will have to be taken to improve the plan's funded situation, which steps may include increases in contributions and reductions in future benefit accruals.
e. Solely in the case of a plan certified to be in critical status for the election year, an explanation that, if the plan is certified to be in critical status for the year following the election year, the steps that will have to be taken to improve the plan's funded situation will include a surcharge on employer contributions and the suspension of the payment of lump sums and similar accelerated distributions for individuals who commence receiving benefits after notice is provided of the plan's critical status, and may include amendments to reduce early retirement benefits or other adjustable benefits for such individuals.
f. Information on how to obtain additional information about the election from the plan administrator, includ-

ing a telephone number, address, and email address (if appropriate).

3. Submission of notice to PBGC and DOL

A notice provided pursuant to section 204(c)(2)(A)(ii) of WRERA must be submitted to the Pension Benefit Guaranty Corporation and the Department of Labor. The notice should be sent to the following addresses:

Pension Benefit Guaranty Corporation
Multiemployer Program Division
1200 K Street, N.W., Suite 930
Washington, D.C. 20005

U. S. Department of Labor
Employee Benefits Security Administration
Public Disclosure Room, N–1513
200 Constitution Ave., N.W.
Washington, DC 20210

Alternatively, the notice may be submitted electronically to *multiemployerprogram@pbgc.gov* and to *wreranotice@dol.gov*.

WRERA notices received by the Department of Labor will be available for public inspection at the Public Disclosure Room, and accessible electronically at *http://www.dol.gov/ebsa*.

VI. EFFECT OF WRERA ELECTION ON FORM 5500, SCHEDULE MB AND SCHEDULE R FILINGS

A Form 5500, *Annual Report/Return of Employee Benefit Plan*, that is filed for a multiemployer plan must be accompanied by Schedule MB, Multiemployer Defined Benefit Plan and Certain Money Purchase Plan Actuarial Information, and by Schedule R, Retirement Plan Information. Schedule MB requires the actuary for a multiemployer plan to report the plan's section 432 status. The instructions indicate that Schedule MB should be completed based on the actuary's certification of the status, and that the actuary should include supporting documentation for the certification. If a multiemployer plan is in endangered or critical status, the instructions indicate that the plan sponsor must submit with Schedule R a summary of the multiemployer plan's funding improvement or rehabilitation plan, or an update of the plan, as applicable.

As described above, an election under section 204 of WRERA affects whether a funding improvement or rehabilitation plan must be adopted or updated. Schedules MB and R and the related instructions for plan years beginning in 2008 have already been issued and do not address the effect of an election under section 204 of WRERA. However, such an election can be made with respect to a plan year beginning between October 1, 2008, and December 31, 2008. Therefore, the instructions for the 2008 Schedule MB and Schedule R must be revised to address the reporting for a multiemployer plan with a plan year beginning between October 1, 2008, and December 31, 2008, for which an election is made under section 204 of WRERA.

Under the revised instructions:

- The section 432 status of the plan that is reported on Schedule MB is the status of the multiemployer plan as certified by the plan actuary without taking into account an election under section 204 of WRERA.
- The plan sponsor must include an attachment to the Schedule R which provides information about the election under section 204 of WRERA, and its effect on the plan's section 432 status and on the requirement to adopt a funding improvement plan or rehabilitation plan.

VII. PAPERWORK REDUCTION ACT

The collections of information contained in this notice have been approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(c)).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. The OMB approval number for this notice is 1545–2141.

The collections of information in this notice are in sections IV, V, and VI. The information is required in order to implement an election under sections 204 and 205 or WRERA and to provide the required notice of the election. The collections of information are mandatory for those plan sponsors making an election. The likely respondents are sponsors of multiemployer defined benefit retirement plans.

We estimate the total number of respondents to be 1,600 for 2009.

We estimate it will take 1 hour to comply.

Estimates of the annualized cost to respondents for the hour burdens shown are not available at this time.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Drafting Information

The principal author of this notice is Diane S. Bloom of the Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this notice, please contact the Employee Plans taxpayer assistance answering service at 1–877–829–5500 (a toll-free number) or e-mail Ms. Bloom at *RetirementPlanQuestions@irs.gov*.

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26 CFR 601.602: Tax forms and instructions.
(Also: Part I, §§ 24, 25A, 32, 132, and 179.)

Rev. Proc. 2009–21

SECTION 1. PURPOSE

This revenue procedure modifies and supersedes section 3.04 of Rev. Proc. 2007–66, 2007–45 I.R.B. 970, to reflect a statutory amendment by the Tax Extenders and Alternative Minimum Tax Relief Act of 2008, Div. C of Pub. L. No. 110–343, 122 Stat. 3765 (2008) (TEAMTRA). This revenue procedure also modifies and supersedes sections 3.04, 3.05, 3.06(1), 3.12, and 3.20 of Rev. Proc. 2008–66, 2008–45 I.R.B. 1107, to reflect statutory amendments by the American Recovery and Reinvestment Tax Act of 2009, Tit. I of Div. B of Pub. L. No. 111–5, 123 Stat. 115 (2009) (ARRTA).

SECTION 2. BACKGROUND

.01 Section 501(a) of TEAMTRA added § 24(d)(4) of the Code to provide

a temporary increase in the refundable portion of the child tax credit for taxable years beginning in 2008. Under § 24(d)(1)(B)(i), the amount that may be refundable is determined using a value that is adjusted annually for inflation. For taxable years beginning in 2008, § 24(d)(4) provided that $8,500 is the value used in § 24(d)(1)(B)(i) instead of the inflation adjusted value.

.02 Section 1003 of ARRTA amended § 24(d)(4) of the Code to provide a temporary increase in the refundable portion of the child tax credit for taxable years beginning in 2009 or 2010. Under § 24(d)(1)(B)(i), the amount that may be refundable is determined using a value that is adjusted annually for inflation. For taxable years beginning in 2009 or 2010, § 24(d)(4) provides that $3,000 is the value used in § 24(d)(1)(B)(i) instead of the inflation adjusted value.

.03 Section 1004 of ARRTA added new § 25A(i) to the Code (the American Opportunity Tax Credit) to provide temporary increases in the amount of the Hope Scholarship Credit and the threshold phaseout amounts for the credit. Section 25A(i)(1) provides that, for taxable years beginning in 2009 or 2010, the Hope Scholarship Credit is equal to 100 percent of the amount of qualified tuition and related expenses not in excess of $2,000 plus 25 percent of those expenses in excess of $2,000, but not in excess of $4,000. Section 25A(i)(4) provides that, for taxable years beginning in 2009 or 2010, the amount of the Hope Scholarship Credit begins to phase out for taxpayers whose modified adjusted gross income exceeds $80,000 ($160,000 for married taxpayers filing a joint return). The credit is completely phased out at $90,000 ($180,000 for married taxpayers filing a joint return).

.04 Section 1002 of ARRTA added § 32(b)(3) to the Code to provide a temporary increase in the earned income credit for certain taxpayers. Under § 32(b)(3)(A), for taxable years beginning in 2009 or 2010, the maximum amount of the earned income credit for taxpayers with three or more qualifying children is 45 percent of the earned income amount for the taxable year. For taxable years beginning in 2009, under § 32(b)(3)(B)(i) the amount added to the threshold phaseout amounts and the completed phaseout amounts for married taxpayers filing a joint return is $5,000. For taxable years beginning in 2010, the $5,000 amount under § 32(b)(3)(B)(i) is adjusted for inflation.

.05 Section 1151 of ARRTA amended § 132(f)(2) of the Code to provide a temporary increase in the amount excludable from gross income for certain employer provided transportation fringe benefits. For months beginning after February 17, 2009, and before January 1, 2011, the monthly limitation under § 132(f)(2)(A) for transportation in a commuter highway vehicle and any transit pass is the same as the amount in effect under § 132(f)(2)(B) for qualified parking, which is $230 per month for 2009.

.06 Section 1202 of ARRTA amended § 179(b)(7) of the Code to extend the 2008 dollar limitations under §§ 179(b)(1) and (2) to 2009 taxable years. For taxable years beginning in 2009, § 179(b)(1) provides that a taxpayer may elect to expense up to $250,000 of § 179 property placed in service during that year. Under § 179(b)(2), the $250,000 amount in § 179(b)(1) is reduced by the amount by which the cost of § 179 property placed in service during that year exceeds $800,000.

SECTION 3. MODIFICATION OF REV. PROC. 2007–66

To reflect the statutory amendment made by TEAMTRA to § 24, section 3.04 of Rev. Proc. 2007–66 is modified to read as follows:

.04 *Child Tax Credit*. For taxable years beginning in 2008, the value used in § 24(d)(1)(B)(i) to determine the amount of credit under § 24 that may be refundable is $8,500.

SECTION 4. MODIFICATION OF REV. PROC. 2008–66

To reflect the statutory amendments made by ARRTA to §§ 24, 25A, 32, 132, and 179, sections 3.04, 3.05, 3.06(1), 3.12, and 3.20 of Rev. Proc. 2008–66 are modified to read as follows:

.04 *Child Tax Credit*.For taxable years beginning in 2009, the value used in § 24(d)(1)(B)(i) to determine the amount of credit under § 24 that may be refundable is $3,000.

.05 *Hope and Lifetime Learning Credits*.

(1) For taxable years beginning in 2009, the Hope Scholarship Credit under § 25A(b)(1) is an amount equal to 100 percent of qualified tuition and related expenses not in excess of $2,000 plus 25 percent of those expenses in excess of $2,000, but not in excess of $4,000. Accordingly, the maximum Hope Scholarship Credit allowable under § 25A(b)(1) for taxable years beginning in 2009 is $2,500.

(2) For taxable years beginning in 2009, a taxpayer's modified adjusted gross income in excess of $80,000 ($160,000 for a joint return) is used to determine the reduction under § 25A(d)(2)(A)(ii) in the amount of the Hope Scholarship Credit otherwise allowable under § 25A(a)(1). For taxable years beginning in 2009, a taxpayer's modified adjusted gross income in excess of $50,000 ($100,000 for a joint return) is used to determine the reduction under § 25A(d)(2)(A)(ii) in the amount of the Lifetime Learning Credit otherwise allowable under § 25A(a)(2).

.06 *Earned Income Credit*.

(1) *In general*. For taxable years beginning in 2009, the following amounts are used to determine the earned income credit under § 32(b). The "earned income amount" is the amount of earned income at or above which the maximum amount of the earned income credit is allowed. The "threshold phaseout amount" is the amount of adjusted gross income (or, if greater, earned income) above which the maximum amount of the credit begins to phase out. The "completed phaseout amount" is the amount of adjusted gross income (or, if greater, earned income) at or above which no credit is allowed. The threshold phaseout amounts and the completed phaseout amounts shown in the table below for married taxpayers filing a joint return include the $5,000 increase provided in § 32(b)(3)(B)(i) for taxable years beginning in 2009.

Item	One	Two	Three or More	None
	Number of Qualifying Children			
Earned Income Amount	$ 8,950	$12,570	$12,570	$ 5,970
Maximum Amount of Credit	$ 3,043	$ 5,028	$ 5,657	$ 457
Threshold Phaseout Amount (Single, Surviving Spouse, or Head of Household)	$16,420	$16,420	$16,420	$ 7,470
Completed Phaseout Amount (Single, Surviving Spouse, or Head of Household)	$35,463	$40,295	$43,279	$13,440
Threshold Phaseout Amount (Married Filing Jointly)	$21,420	$21,420	$21,420	$21,420
Completed Phaseout Amount (Married Filing Jointly)	$40,463	$45,295	$48,279	$18,440

The instructions for the Form 1040 series provide tables showing the amount of the earned income credit for each type of taxpayer.

.12 *Qualified Transportation Fringe*. For taxable years beginning in 2009, the monthly limitation under § 132(f)(2)(A) for months beginning after February 17, 2009, regarding the aggregate fringe benefit exclusion amount for transportation in a commuter highway vehicle and any transit pass, and under § 132(f)(2)(B), regarding the fringe benefit exclusion amount for qualified parking, is $230. For January and February 2009, the monthly limitation under § 132(f)(2)(A) is $120 and the monthly limitation under § 132(f)(2)(B) is $230.

.20 *Election to Expense Certain Depreciable Assets*. For taxable years beginning in 2009, under § 179(b)(1) the aggregate cost of any § 179 property a taxpayer may elect to treat as an expense cannot exceed $250,000. Under § 179(b)(2) the $250,000 limitation is reduced (but not below zero) by the amount by which the cost of § 179 property placed in service during the 2009 taxable year exceeds $800,000.

SECTION 5. EFFECT ON OTHER DOCUMENTS

Section 3.04 of Rev. Proc. 2007–66 and sections 3.04, 3.05, 3.06(1), 3.12 and 3.20 of Rev. Proc. 2008–66 are modified and superseded.

SECTION 6. EFFECTIVE DATE

Section 3.04 of Rev. Proc. 2007–66 is modified and superseded effective for taxable years beginning in 2008. Sections 3.04, 3.05., 3.06(1), 3.12, and 3.20 of Rev. Proc. 2008–66 are modified and superseded effective for taxable years beginning in 2009.

SECTION 7. DRAFTING INFORMATION

The principal author of this revenue procedure is Christina M. Glendening of the Office of Associate Chief Counsel (Income Tax & Accounting). For further information regarding this revenue procedure, contact Ms. Glendening at (202) 622–4920 (not a toll-free call).

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26 CFR 601.105: Examination of returns and claims for refund, credit, or abatement; determination of correct tax liability.
(Also: Part I, § 911, 1.911–1.)

Rev. Proc. 2009–22

SECTION 1. PURPOSE

.01 This revenue procedure provides information to any individual who failed to meet the eligibility requirements of § 911(d)(1) of the Internal Revenue Code because adverse conditions in a foreign country precluded the individual from meeting those requirements for taxable year 2008.

.02 This revenue procedure lists the countries for which the eligibility requirements of § 911(d)(1) are waived for taxable year 2008.

SECTION 2. BACKGROUND

.01 Section 911(a) of the Code allows a "qualified individual," as defined in § 911(d)(1), to exclude foreign earned income and housing cost amounts from gross income. Section 911(c)(4) of the Code allows a qualified individual to deduct housing cost amounts from gross income.

.02 Section 911(d)(1) of the Code defines the term "qualified individual" as an individual whose tax home is in a foreign country and who is (A) a citizen of the United States and establishes to the satisfaction of the Secretary of the Treasury that

the individual has been a *bona fide* resident of a foreign country or countries for an uninterrupted period that includes an entire taxable year, or (B) a citizen or resident of the United States who, during any period of 12 consecutive months, is present in a foreign country or countries during at least 330 full days.

.03 Section 911(d)(4) of the Code provides an exception to the eligibility requirements of § 911(d)(1). An individual will be treated as a qualified individual with respect to a period in which the individual was a *bona fide* resident of, or was present in, a foreign country, if the individual left the country during a period for which the Secretary of the Treasury, after consultation with the Secretary of State, determines that individuals were required to leave because of war, civil unrest, or similar adverse conditions that precluded the normal conduct of business. An individual must establish that but for those conditions the individual could reasonably have been expected to meet the eligibility requirements.

.04 For 2008, the Secretary of the Treasury, in consultation with the Secretary of State, has determined that war, civil unrest, or similar adverse conditions precluded the normal conduct of business in the following countries beginning on the specified date:

	Date of Departure
Country	*On or after*
Chad	February 3, 2008
Serbia	February 22, 2008
Yemen	April 7, 2008

.05 Accordingly, for purposes of § 911 of the Code, an individual who left one of the foregoing countries on or after the specified departure date during 2008 shall be treated as a qualified individual with respect to the period during which that individual was present in, or was a *bona fide* resident of, such foreign country, if the individual establishes a reasonable expectation of meeting the requirements of § 911(d) but for those conditions.

.06 To qualify for relief under § 911(d)(4) of the Code, an individual must have established residency, or have been physically present, in the foreign country on or prior to the date that the Secretary of the Treasury determines that individuals were required to leave the foreign country. Individuals who establish residency, or are first physically present, in the foreign country after the date that the Secretary prescribes shall not be treated as qualified individuals under § 911(d)(4) of the Code. For example, individuals who are first physically present or establish residency in Chad after February 3, 2008, are not eligible to qualify for the exception provided in § 911(d)(4) of the Code for taxable year 2008.

SECTION 3. INQUIRIES

A taxpayer who needs assistance on how to claim this exclusion, or on how to file an amended return, should contact a local IRS Office or, for a taxpayer residing or traveling outside the United States, the nearest overseas IRS office.

SECTION 4. DRAFTING INFORMATION

The principal author of this revenue procedure is Kate Y. Hwa of the Office of Associate Chief Counsel (International). For further information regarding this revenue procedure, contact Ms. Hwa at (202) 622–3840 (not a toll-free call).

Definition of Terms

Revenue rulings and revenue procedures (hereinafter referred to as "rulings") that have an effect on previous rulings use the following defined terms to describe the effect:

Amplified describes a situation where no change is being made in a prior published position, but the prior position is being extended to apply to a variation of the fact situation set forth therein. Thus, if an earlier ruling held that a principle applied to A, and the new ruling holds that the same principle also applies to B, the earlier ruling is amplified. (Compare with *modified*, below).

Clarified is used in those instances where the language in a prior ruling is being made clear because the language has caused, or may cause, some confusion. It is not used where a position in a prior ruling is being changed.

Distinguished describes a situation where a ruling mentions a previously published ruling and points out an essential difference between them.

Modified is used where the substance of a previously published position is being changed. Thus, if a prior ruling held that a principle applied to A but not to B, and the new ruling holds that it applies to both A and B, the prior ruling is modified because it corrects a published position. (Compare with *amplified* and *clarified*, above).

Obsoleted describes a previously published ruling that is not considered determinative with respect to future transactions. This term is most commonly used in a ruling that lists previously published rulings that are obsoleted because of changes in laws or regulations. A ruling may also be obsoleted because the substance has been included in regulations subsequently adopted.

Revoked describes situations where the position in the previously published ruling is not correct and the correct position is being stated in a new ruling.

Superseded describes a situation where the new ruling does nothing more than restate the substance and situation of a previously published ruling (or rulings). Thus, the term is used to republish under the 1986 Code and regulations the same position published under the 1939 Code and regulations. The term is also used when it is desired to republish in a single ruling a series of situations, names, etc., that were previously published over a period of time in separate rulings. If the new ruling does more than restate the substance of a prior ruling, a combination of terms is used. For example, *modified* and *superseded* describes a situation where the substance of a previously published ruling is being changed in part and is continued without change in part and it is desired to restate the valid portion of the previously published ruling in a new ruling that is self contained. In this case, the previously published ruling is first modified and then, as modified, is superseded.

Supplemented is used in situations in which a list, such as a list of the names of countries, is published in a ruling and that list is expanded by adding further names in subsequent rulings. After the original ruling has been supplemented several times, a new ruling may be published that includes the list in the original ruling and the additions, and supersedes all prior rulings in the series.

Suspended is used in rare situations to show that the previous published rulings will not be applied pending some future action such as the issuance of new or amended regulations, the outcome of cases in litigation, or the outcome of a Service study.

Abbreviations

The following abbreviations in current use and formerly used will appear in material published in the Bulletin.

A—Individual.
Acq.—Acquiescence.
B—Individual.
BE—Beneficiary.
BK—Bank.
B.T.A.—Board of Tax Appeals.
C—Individual.
C.B.—Cumulative Bulletin.
CFR—Code of Federal Regulations.
CI—City.
COOP—Cooperative.
Ct.D.—Court Decision.
CY—County.
D—Decedent.
DC—Dummy Corporation.
DE—Donee.
Del. Order—Delegation Order.
DISC—Domestic International Sales Corporation.
DR—Donor.
E—Estate.
EE—Employee.
E.O.—Executive Order.
ER—Employer.
ERISA—Employee Retirement Income Security Act.
EX—Executor.
F—Fiduciary.
FC—Foreign Country.
FICA—Federal Insurance Contributions Act.
FISC—Foreign International Sales Company.
FPH—Foreign Personal Holding Company.
F.R.—Federal Register.
FUTA—Federal Unemployment Tax Act.
FX—Foreign corporation.
G.C.M.—Chief Counsel's Memorandum.
GE—Grantee.
GP—General Partner.
GR—Grantor.
IC—Insurance Company.
I.R.B.—Internal Revenue Bulletin.
LE—Lessee.
LP—Limited Partner.
LR—Lessor.
M—Minor.
Nonacq.—Nonacquiescence.
O—Organization.
P—Parent Corporation.
PHC—Personal Holding Company.
PO—Possession of the U.S.
PR—Partner.
PRS—Partnership.
PTE—Prohibited Transaction Exemption.
Pub. L.—Public Law.
REIT—Real Estate Investment Trust.
Rev. Proc.—Revenue Procedure.
Rev. Rul.—Revenue Ruling.
S—Subsidiary.
S.P.R.—Statement of Procedural Rules.
Stat.—Statutes at Large.
T—Target Corporation.
T.C.—Tax Court.
T.D. —Treasury Decision.
TFE—Transferee.
TFR—Transferor.
T.I.R.—Technical Information Release.
TP—Taxpayer.
TR—Trust.
TT—Trustee.
U.S.C.—United States Code.
X—Corporation.
Y—Corporation.
Z —Corporation.

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