FUTTERMAN DUPREE
DODD CROLEY MAIER LLP

Summary of the Tax Provisions in

The Emergency Economic Stabilization Act of 2008

NOVEMBER 18, 2008
EAST BAY TAX CLUB
Don Read
Jim Anderson
Tom Maier

TAX PROVISIONS IN THE EMERGENCY ECONOMIC STABILIZATION ACT OF 2008 (PL 110-343, HR 1424, Enacted October 3, 2008)

I. Financial Products – Ordinary Loss on Sale of Fannie Mae or Freddie Mac Preferred Stock Held by Banks

In a narrowly targeted change, EESA characterizes gain or loss on the sale of "applicable preferred stock" by an "applicable financial institution" as ordinary gain or loss. Applicable preferred stock, for this purpose, is preferred stock of Fannie Mae or Freddie Mac that is held by an applicable financial institution on September 6, 2008 or that was sold by an applicable financial institution between January 1, 2008 and September 6, 2008. An applicable financial institution is a bank (either as defined in Section 582(c)(2) of the Internal Revenue Code of 1986, as amended (the "Code"), or an FDIC-insured deposit-taking institution).

II. Compensation Planning

1. **Bicycle Commuting – Employee Fringe Benefits.** Section 132(f) of the Code is amended to permit employers to provide up to $20 per month in excludable fringe benefits to employees to offset costs of purchasing, storing or repairing a bicycle used for commuting.

2. **Executive Compensation Limitations on Companies Participating in Bailout.** A financial institution that sells distressed assets to the federal government in the Troubled Asset Relief Program ("TARP") will be subject to restrictions on providing executive compensation. The nature of the restrictions will depend on whether the sale is a direct sale or a sale through an auction procedure.

    a. **Direct Sales.** A bank that sells directly to the federal government under TARP is subject to the following restrictions:

        i. The bank must eliminate incentives for senior executives to take "unnecessary and excessive risks that threaten the value of the financial institution."

        ii. The bank must be able to recover any incentive compensation paid to an executive that is based on earnings if the earnings are later proven to be materially inaccurate.

        iii. The bank must prohibit golden parachute payments to executives.

An "executive," for these purposes, generally means the top five executives whose compensation is subject to disclosure under relevant securities rules.

    b. **Auction Sales**. A bank that sells through an auction procedure under TARP faces lesser restrictions. The prohibition on golden parachute payments applies only if the bank sells $300,000,000 in assets and only to a limited range of executive contracts. Banks that sell through an auction procedure are also subject to a limit of $500,000 (rather than $1,000,000) under Section 162(m) with respect to the deductibility of payments to certain executives, and the "performance-based pay" exemption under Section 162(m) will not apply.

    c. **Effective Date.** The executive compensation restrictions are generally effective for taxable years ending on or after October 11, 2008.

3. **Nonqualified Deferred Compensation from Tax Indifferent Parties.** EESA adds new Section 457A to the Code. Section 457A will require a service provider to recognize compensation immediately once there is no substantial risk of forfeiture where the compensation is payable by a "nonqualified entity." The income inclusion will occur even if the payment obligation is unfunded and unsecured at the time the substantial risk of forfeiture lapses.

   a. **Nonqualified Entity.** For this purpose, a nonqualified entity is (i) a foreign corporation, unless substantially all of its income is connected with a US business or subject to a comprehensive tax treaty, or (ii) a partnership, unless substantially all of its income is allocated to persons other than (x) foreign persons not subject to a comprehensive foreign income tax or (y) tax-exempt organizations.

   b. **Section 409A-Style Tax Sanctions if Compensation Is Only Determinable at a Later Date.** If the amount of includable compensation is not determinable at the time the substantial risk of forfeiture lapses, the income is includable at the first date it is determinable and then it is subject to a 20-percent supplemental tax and an interest charge.

   c. **Compensation Based on Gain Recognized on Disposition of an Investment Asset.** If compensation is based on the gain recognized on disposition of an investment asset, the compensation is treated as subject to a substantial risk of forfeiture until the date the investment asset is disposed of. For purposes of this rule, the term "investment asset" means any asset owned by the investment entity which the entity does not actively manage and substantially all of the gain from which is allocated to the investors in the investment entity.

   d. **Effective Date.** New Section 457A is effective for amounts deferred that are attributable to services performed after December 31, 2008. If amounts attributable to services performed prior to the effective date would otherwise be deferred beyond 2017, the amounts are includable on the later of (i) the last taxable year beginning before 2018 or (ii) the first date on which the compensation is no longer subject to a substantial risk of forfeiture.

   e. **Accelerations – Transitional Rule.** The Treasury Department will issue guidance permitting the acceleration of payment terms for compensation attributable to services performed prior to 2009 so as to coordinate the payment date and the inclusion date under the new Section 457A.

III. Energy Related Provisions

1. **Energy Credit Extenders and Modifications. Credits extended through the end of the year in parentheses. Modifications as indicated.**

   a. **Nonbusiness Energy Property** – §25C (2009). Includes residential biomass fuel stove, water heaters with 90% efficiency. Modifies qualified energy efficiency improvements.

b. **Residential Energy Efficient Property** – §25D (2016). Credit can offset AMT in 2008 and later years. Adds credit for residential wind property and 30% credit for geothermal heat pump system, both starting in 2008.

c. **Alternative Fuel Vehicle Refueling Property** – §30C (2010). Starting 10/3/08, electricity is a clean burning fuel.

d. **Qualified Plug-In Electric Drive Vehicles** – §30D (2014). Commences in 2009. Credit is $2,500 - $15,000 depending on weight and battery capacity.

e. **Alcohol** – §40. Doesn't apply to alcohol produced and used abroad.

f. **Biodiesel and Renewable** – §40A. Doesn't apply to biodiesel produced and used abroad. Increased to $1 per gallon in 2009.

g. **Renewable Electricity** – §45 (2009 for refined coal and wind produced electricity, 2010 for biomass, geothermal, hydro, landfill gas, etc). Refined coal no longer subject to FMV test and emissions standards changed. Electricity from steel production process is $2/bbl oil equivalent. Marine and hydrokinetic sources included as of 10/3/08.

h. **Energy Efficient Home** – §45L (2009)

i. **Energy Efficient Appliance** – §45M (2010). Modifies credit for dishwashers, washing machines and refrigerators based on date of manufacture and efficiency.

j. **CO2 Sequestration** – §45Q. Commences 10/3/08 at rates of $10 (captured and used as tertiary injectant in oil and gas recovery) and $20 per metric ton (captured and securely stored geologically).

k. **Energy** – §48 (2016 for solar, fuel cell, and micro-turbine). Commencing 10/3/08: credit offsets AMT, energy property includes heat and power systems and heat pumps, ground or groundwater thermal energy systems and small wind turbines, and the fuel cell cap increased to $1,500. Commencing 2/13/08 public utility property is included.

l. **Qualifying Advanced Coal Project** – §48A (2011?). $1.25B of new credits for post 10/3/08 property. Highest priority is CO2 sequestration.

m. **Qualifying Gasification Project** – §48B. $250M of new credits for post 10/3/08 CO2 sequestration projects.

2. **Energy Bonds.**

a. **Clean Renewable Energy Bonds.** §54C – $250M of bonds issuable after 10/3/08 for electrical generation from renewable energy facilities. 1/3 of bonds to each of governments, public utilities and electric cooperatives.

b. **Qualified Energy Conservation Bonds.** §54D – $800M of bonds issuable after 10/3/08 for energy conservation. Allocated to states based on population.

c. **Zone Academy Bonds.** §54E (2009) – $400M new bonds. Replaces §1397E.

d. **Green Building/Sustainabl Design Bonds.** §142 (2012).

e. **Alternative Fuel Excise Tax Credit.** §6426 (2009). Imposes carbon capture requirement for certain fuel sold or used after 10/3/08. Includes biomass LP gas, certain natural gas and aviation fuel sold or used after 10/3/08.

3. **Other Energy Provisions.**

a. **Biomass Ethanol Plant Bonus Depreciation.** §168 (2012) – cellulosic biofuel projects now eligible for 50% immediate deduction.

b. **Depreciation of Smart Meters and Grids.** §168 – 10-year depreciation period for property placed in service after 10/3/08.

c. **Depreciation of Reuse and Recycling Property.** §168 – 50% immediate write-off of equipment placed in service after 10/3/08 and used to collect, distribute or recycle qualified reuse and recyclable materials.

d. **Expensing Qualified Refinery Property.** §179C (2013) Property must improve capacity, must be placed in service after 10/3/08 and must be pursuant to project started or contract signed before 1/1/10. Shale and tar sands projects now qualify.

e. **Energy Efficient Commercial Building Deduction.** §179D (2013).

f. **Domestic Production Activity Deduction.** §199. 2010 increase in rate from 6% to 9% won't apply to receipts from oil, natural gas or primary product of either.

g. **8-Year Ratable Gain Deferral on Utilities' Sales of Electrical Transmission Property.** § 451 (2010). Starting in 2008 applies to sales by "qualified electric utilities."

h. **Oil and Gas Percentage Depletion.** §613A – Suspension of taxable income limit ended at the end of 2007. Suspension renewed for taxable years beginning after 12/31/08 and before 1/1/20.

i. **Publicly-Traded Partnerships..** § 7704 – commencing 10/3/08, "qualifying income includes income from industrial source CO2 and from transporting or storing certain alternative fuels.

IV. Alternative Minimum Tax Relief (Act § C101 - C103)

1. **Increase in Exemption Amount.** Congress provided its annual inflation "patch" to the exemption amount for 2008. $69,950 for joint returns and $46,200 for single returns (up from $66,250 and $44,350, respectively, for 2007).

a. Would have reverted to $45,000 and $33,750, respectively, without the patch.

b. Applies to 2008 only.

c. Note. The exemption is fully phased out when AMTI is greater than $429,800 ($297,300 for single).

2. **Long-Term Unused Credits.** Minimum Tax Credit Carryovers (MTTCO) generated more than three years ago can be fully utilized in 2008 and 2009, with a minimum of 50% in 2008. This can result in refundable credits.

   a. Last year's relief provided for their utilization over 5 years, and was not available if AGI was above certain levels. The AGI limitation has been eliminated.

   b. 100% of any penalties and interest previously paid prior to enactment on any tax attributable to AMT on ISO exercises is added to the refundable credit, 50% in each 2008 and 2009.

3. **Abatement of Tax, Interest and Penalties Attributable to ISO's.** Any underpayment of tax outstanding on the date of enactment attributable to AMT on ISO exercises, and any interest and penalties thereon, is abated.

4. **Extension of the Use of Certain Personal Credits Against AMT.** The ability to use the following credits against AMT (as well as regular tax) has been extended one more year, to 2008:

   - Dependent care credit
   - Adoption credit
   - Child Tax Credit
   - Hope and Lifetime Credit
   - Credit for residential energy efficient property
   - Several others

   Comment: The credit for the personal use portion of alternative motor vehicles still cannot be used to reduce AMT. Therefore, you might not want to buy a Prius for tax reasons.

V. Individual Tax Relief

1. **Extensions of Various Benefits. The following expiring benefits have been extended:**

   a. Elementary and secondary school teacher expenses (Code § 62(a)(2)(d)). Extended to 2008 and 2009.

   b. Additional standard deduction for real property taxes (Code § 63(c)(i)(c)). New for 2008. (Up to $500, $1,000 on a joint return.) Now goes through 2009.

   c. Exclusion of income from discharge of qualified mortgage debt (Code § 108). The current exclusion for debt forgiven before 2010 now applies to debt forgiven before 2013.

   d. Deduction for state and local sales taxes in lieu of state and local income taxes (Code § 64(b)). Extend two more years, 2008 and 2009.

   e. Deduction for qualified tuition and related expenses (Code § 222). Extended two more years, 2008 and 2009.

2. **Child Tax Credit, Reduction in Earned Income Threshold**. The earned income threshold in Code § 24(d)(1)(b)(i) is reduced from $10,000 to $8,500, for years beginning after December 31, 2007 (Act § C501).

VI. Charitable Giving Tax Provisions

1. **Charitable Contributions from IRA's.** §408 – Non-inclusion in income of $100,000 of charitable contributions by persons over 70½ from IRA's extended through 2009.

2. **Charitable Contributions of Book and Food Inventory and Computer Equipment.** §170(e). Special deductions for book and food inventory and computer equipment extended to contributions made after 12/31/09.

VII. Business Tax Relief

1. **Research Credit.** §41 – extended to 2008 and 2009.
2. **Indian Employment Credit.** §45A – extended to tax years beginning in 2008 and 2009.
3. **New Markets Credit.** §45D – extended through calendar year 2009 (already applies to 2008).
4. **Railroad Track Maintenance Credit.** §45G – extended to 2008 through tax years beginning before 1/1/10.
5. **Mine Rescue Team Training Credit.** §45N – applies to tax years beginning in 2008; extended to tax years beginning in 2009.
6. **Farming Machinery and Equipment Depreciation.** §168 – 5-year property classification extended to property placed in service in 2009.
7. **Motor Racing Facilities.** §168 – 7-year property classification extended to property placed in service in 2008 and 2009.
8. **Leasehold Improvements, Restaurant and Retail Improvements**. §168 – 15-year property classification for leasehold and restaurant improvements extended to property placed in service in 2009. Retail improvement property is qualified property for 2009.
9. **Indian Reservation Business Property**. §168 – accelerated depreciation extended to **property placed in service in 2008 and 2009.**
10. **Mine Safety Equipment.** §179E – expensing election extended to property placed in service in 2009.
11. **Film and TV Productions.** §§ 181, 182 and 199 – extends through 2009 expensing of up to $15M of production costs. For years beginning after 2007, W-2 compensation of actors, directors, producers and production personnel included in domestic production activities base. Qualified film includes copyrights, trademarks and other intangibles. Method of distribution will not affect §199 eligibility.

12. **Environmental Remediation.** §198 – expensing extended to 2008 and 2009.

13. **Puerto Rico Domestic Production Activity.** §199 – extends to taxpayer's first 4 years (formerly 2) and to tax years beginning before 1/1/10.

14. **Regulated Investment Company Dividends.** §871 – extends election to treat dividends as "interest-related" (making them tax free for certain foreign investors) and as "short-term capital gain" extended to tax years beginning before 1/1/10.

15. **Exxon Valdez Settlements.** §1301 – 3-year averaging for amounts received by commercial fishermen and others whose livelihoods were adversely affected. Amounts also eligible for contribution to retirement accounts under §§ 72 and 408.

16. **Charitable Contributions by S Corporations.** §1367 – extends through 1009 the rule that shareholder basis is reduced by the shareholder's pro-rata share of the adjusted basis of property contributed by S corporation to charity.

17. **DC Enterprise Zone. §1400 – Extended to 2008 and 2009.**

VIII. Disaster Relief

1. **Midwestern Disaster Relief**. §168 – First year depreciation of 50% of real and personal property investments. §179 – Increases expensing by $100K. §§1400N – 1400S various other benefits. Various Katrina Tax Relief Act (KTRA) benefits extended.

2. **Hurricane Ike Disaster Relief.** §1400N – subsections (a) and (c) made applicable to Texas and Louisiana.

3. **Hurricane Katrina Relief.** §1400N – subsection (h) GO Zone rehabilitation credits extended to 2008 and 2009. KTRA work opportunity credit extended from 2 years to 4 years.

4. **National Disaster Relief.** For federally declared disasters in 2008 and 2009:

    a. **§143(k)(12).** New tax exempt bonds to finance loans to taxpayers whose principal residence has been damaged.

    b. **§165(b)(3).** Waives 10% casualty loss rule and raises $100 floor to $500. Nonitemizers can use these losses as standard deduction.

    c. **§168(n).** Additional first-year depreciation of 50% of cost of real and personal property.

    d. **§172(b)(1)(D).** Period for claiming casualty losses extended to 5 years.

    e. **§179(e).** Through 2008, $100K of additional first year expensing.

    f. **§198A.** Immediate expensing of demolition, cleanup, repair and environmental remediation.

IX. Foreign Tax Provisions

1. **Section 30A Extension of Economic Development Credit for American Samoa.** This credit, similar to the Puerto Rico economic activity credit, is extended from 2008 through the end of 2009.

2. **Expansion of FTC Limit for Foreign Petroleum Income.** This provision further restricts the FTC available to oil companies. The limit, which formerly applied only to foreign oil and gas extraction income, is extended to apply to foreign oil related income, which includes income from the processing, transportation and distribution of oil and gas.

3. **Subpart F Exception for Active Financing Income.** The exclusion from Subpart F income for certain insurance, banking and financing income under Section 953(e), 954(h) and 954(i) is extended through 2009.

4. **Extension of Look-Through Rule for Related CFCs.** The Section 954(c)(6) look-through rules for related CFCs are extended through 2009.

X. Tax Reporting

1. **Brokers are Required to Report Customer Basis in Securities Transactions. (Act § B403)**

    a. Applies to corporate stock acquired after 2010 (after 2011 if "average basis" method is permissible, such as Mutual funds and dividend reinvestment plans), and other securities acquired after 2012.)

    b. FIFO (or average basis) method required unless customer makes an adequate identification.

    c. Basis is determined without regard to wash sale rules unless wash sale occurred within the same account.

    d. Adjustments for option payments in the same account are required. (Applies to options granted or acquired after 2012.)

    e. Basis information has to be provided to new broker when securities are transferred by a broker, within 15 days after transfer.

2. **Extension of Time to Furnish Securities Transaction Information.** The January 31 due date for brokers to furnish information regarding gross proceeds and certain information regarding short sales has been extended to February 15. This new due date also applies to "consolidated reporting statements." Effective for statements required after 2008.

3. **Modification of Return Preparer Penalty Standards.** (Act § C506) The Act modifies the standards for return preparer penalties under Code § 6694 to be more in line with the taxpayer penalty standards under Code § 6662.

    a. "Substantial authority" for and undisclosed position (reduced from the "more likely than not") standard.

b. “Reasonable basis” for adequately disclosed positions.

c. “More likely than not” for tax shelter or reportable transactions, and then only if there is adequate disclosure. Note, taxpayer penalties do not provide disclosure relief, so there can be tension between the preparer and taxpayer.

d. Retroactive to tax returns prepared after May 25, 2007, except that item c applies to returns prepared for the years ending after October 3, 2008.