not fail to satisfy the requirements of § 411(d)(6) by reason of the amendment.

However, with respect to a particular plan provision, relief under § 1107 of PPA '06 applies only to the first plan amendment that implements the post-PPA '06 applicable interest rate and/or post-PPA '06 applicable mortality table with respect to the provision, and any subsequent amendment with respect to the provision will not be treated as adopted "pursuant to" statutory provisions under PPA '06, as required for relief under § 1107 of PPA '06. For purposes of determining whether an amendment that implements the post-PPA '06 applicable interest rate and/or post-PPA '06 applicable mortality table with respect to a particular plan provision is the first such amendment, amendments adopted on or before June 30, 2008, are disregarded. Thus, if a plan amendment is adopted that provides that the amount payable under an optional form of benefit that is subject to the minimum present value requirements of § 417(e)(3) is calculated in the manner described in Q&A–16 of this notice, and the plan is subsequently amended (during the period established in § 1107 of PPA '06) so that the amount payable is calculated without reference to the pre-PPA '06 applicable mortality table and pre-PPA '06 applicable interest rate, the relief under § 1107 of PPA '06 will apply with respect to the subsequent amendment only if the initial amendment was adopted on or before June 30, 2008.

Q–18. Does the relief under § 1107 of PPA '06, as described in Rev. Rul. 2007–67 and this notice, apply to a plan amendment that replaces a plan reference to the pre-PPA '06 applicable mortality table and/or pre-PPA '06 applicable interest rate with a reference to the post-PPA '06 applicable mortality table and/or post-PPA '06 applicable interest rate, without regard to whether § 302 of PPA '06 requires such amendment?

A–18. The relief under § 1107 of PPA '06, as described in Rev. Rul. 2007–67 and this notice, applies to an amendment to a plan that is subject to § 401(a)(11) and that replaces a plan reference to the pre-PPA '06 applicable mortality table and/or pre-PPA '06 applicable interest rate with a reference to the post-PPA '06 applicable mortality table and/or post-PPA '06 applicable interest rate, without regard to whether § 302 of PPA '06 requires such amendment. For example, if a plan calculates the amount of an optional form of benefit that is not subject to the minimum present value requirements of § 417(e)(3) by reference to the pre-PPA '06 applicable mortality table and/or pre-PPA '06 applicable interest rate and the plan is amended, pursuant to an amendment adopted during the period established in § 1107(b)(2)(A) of PPA '06, so that it calculates the amount of the optional form of benefit by reference to the post-PPA '06 applicable mortality table and/or post-PPA '06 applicable interest rate, the plan will not fail to satisfy the requirements of § 411(d)(6) by reason of the amendment.

V. GAP-PERIOD EARNINGS

The final regulations (T.D. 9324, 2007–22 I.R.B. 1302) under § 402(g), published in the Federal Register (72 FR 21103) on April 30, 2007, provide that the gap-period earnings must be included with the distribution of excess deferrals to the extent the employee is or would be credited with an allocable gain or loss on those excess deferrals for the gap period, if the total amount were to be distributed. This gap-period earnings rule applies to both pre-tax excess deferrals and excess deferrals that are designated Roth contributions. The effective date for the rule on gap-period earnings is taxable years beginning on or after January 1, 2007.

Section 5.04 of Rev. Proc. 2007–44, 2007–28 I.R.B. 54, generally requires an interim plan amendment to be adopted by the time described in section 5.05 of the revenue procedure when there is a statutory or regulatory change with respect to plan qualification requirements that will impact provisions of the written plan document.

Q–19. Is a plan restatement submitted to the Service in Cycle B (February 1, 2007, through January 31, 2008) or Cycle C (February 1, 2008, through January 31, 2009) required to provide for the inclusion of gap-period earnings in the distribution of excess deferrals?

A–19. Yes. As described in section 12.03 of Rev. Proc. 2007–44, a restated plan submitted to the Service in Cycle B or Cycle C is required to provide for the distribution of gap-period earnings. A plan sponsor of a plan submitted before March 24, 2008 that does not provide for the distribution of gap-period earnings will be asked to amend the plan to include the distribution of gap-period earnings in order to receive a determination letter.

Q–20. Is an interim plan amendment to provide for the inclusion of gap-period earnings in the distribution of excess deferrals required to be adopted by the time described in section 5.05 of Rev. Proc. 2007–44?

A–20. No. An interim plan amendment to provide for the inclusion of gap-period earnings in the distribution of excess deferrals will not be required to be adopted until the last day of the first plan year beginning on or after January 1, 2009.

Q–21. Are plans required to include gap-period earnings in the distribution of excess deferrals in accordance with the final regulations under § 402(g)?

A–21. Yes. Although the interim plan amendment requirement has been delayed until 2009, plans must include gap-period earnings in the distribution of excess deferrals, effective for excess deferrals attributable to taxable years beginning on or after January 1, 2007.

DRAFTING INFORMATION

The principal author of this notice is Angelique Carrington 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. Carrington at *RetirementPlanQuestions@irs.gov*.

Credit for New Qualified Alternative Motor Vehicles (Qualified Fuel Cell Motor Vehicles)

Notice 2008–33

SECTION 1. PURPOSE

This notice sets forth interim guidance, pending the issuance of regulations, relating to the new fuel cell motor vehicle credit under § 30B(a)(1) and (b) of the Internal Revenue Code. Specifically, this notice

provides procedures for a vehicle manufacturer (or, in the case of a foreign vehicle manufacturer, its domestic distributor) to certify to the Internal Revenue Service (Service) both:

(1) that a vehicle of a particular make, model, and model year meets certain requirements that must be satisfied to claim the new qualified fuel cell motor vehicle credit under § 30B(a)(1) and (b); and

(2) the amount of the credit allowable with respect to that vehicle.

This notice also provides guidance to taxpayers who purchase vehicles regarding the conditions under which they may rely on the vehicle manufacturer's (or, in the case of a foreign vehicle manufacturer, its domestic distributor's) certification in determining whether a credit is allowable with respect to the vehicle and the amount of the credit. The Service and the Treasury Department expect that the regulations will incorporate the rules set forth in this notice.

SECTION 2. BACKGROUND

Section 30B(a)(1) provides for a credit determined under § 30B(b) for certain new qualified fuel cell motor vehicles. The base amount of the new qualified fuel cell motor vehicle credit varies with the gross vehicle weight rating of the vehicle. The base amount of the credit applicable to vehicles having a gross vehicle weight of not more than 8,500 pounds is $8,000 for vehicles placed in service on or before December 31, 2009, and $4,000 for vehicles placed in service after that date. The base amount of the credit applicable to heavier vehicles varies from $10,000 to $40,000 and is not reduced for vehicles placed in service after December 31, 2009. Passenger automobiles and light trucks, as defined in section 4 of this notice are eligible for an additional fuel economy amount that varies with the rated fuel economy of a qualifying vehicle compared to the 2002 model year city fuel economy for a vehicle in its weight class.

SECTION 3. SCOPE OF NOTICE

.01 *Vehicles Covered*. This notice applies only to fuel cell motor vehicles. This notice applies with respect to a fuel cell motor vehicle whether such vehicle is a passenger automobile, a light truck, or a motor vehicle other than a passenger automobile or light truck.

.02 *Rules Common to All Qualifying Vehicles*. This notice does not address a number of rules that are common to all motor vehicles that qualify for credits under § 30B. These rules include: (1) rules under which lessors may claim the credits allowable under § 30B; (2) the rule preventing the credits from being used to reduce alternative minimum tax liability; and (3) rules relating to recapture of the credit. Certain rules applicable to all motor vehicles that qualify for credits under § 30B are described in Fact Sheet 2007–9 (*http://www.irs.ustreas.gov/newsroom/article/0,,id=165649,00.html*).

SECTION 4. MEANING OF TERMS

The following definitions apply for purposes of this notice:

(1) *Passenger Automobile and Light Truck*. Section 30B provides that the terms "passenger automobile" and "light truck" have the meaning given in regulations prescribed by the Administrator of the Environmental Protection Agency for purposes of the administration of Title II of the Clean Air Act (42 U.S.C. 7521 *et seq.*). Those regulations currently do not include a definition of these terms, but § 30B(b)(2)(B) provides the 2002 model year city fuel economy tables that must be used to determine the amount of the credit for passenger automobiles and light trucks. Those tables do not prescribe the fuel economy for vehicles having a gross vehicle weight of more than 8,500 pounds. Accordingly, until either the Environmental Protection Agency issues regulations or future guidance issued by the Service provides otherwise (whichever occurs first), any vehicle having a gross vehicle weight of more than 8,500 pounds will not be treated as a passenger automobile or light truck for purposes of this notice.

(2) *City Fuel Economy*. The term "city fuel economy" has the meaning prescribed in 40 CFR § 600.002–85(11). If fuel is stored on board a fuel cell motor vehicle as hydrogen and not in a form that requires reformation prior to use, city fuel economy is determined by reference to the consumption of hydrogen. If fuel is stored on board a fuel cell motor vehicle in a form that requires reformation prior to use, city fuel economy is determined by reference to the consumption of such fuel.

(3) *Gasoline Gallon Equivalent*. In the case of a motor vehicle that does not use gasoline, the 2002 model year city fuel economy is determined on a gasoline-gallon-equivalent basis. If fuel is stored on board a fuel cell motor vehicle as hydrogen and not in a form that requires reformation prior to use, the gasoline gallon equivalent for the 2002 model year city fuel economy is determined by converting miles per gallon of gasoline into miles per kilogram of hydrogen at a conversion ratio of 0.98 mile per kilogram of hydrogen for each mile per gallon of gasoline. Thus, for example, the 2002 model year city fuel economy for a hydrogen-fueled passenger automobile in the 7,000 to 8,500 pounds vehicle inertia weight class is 11.1 miles per kilogram of hydrogen (0.98 x 11.3 (the 2002 model year city fuel economy in miles per gallon of gasoline)). If fuel (other than gasoline) is stored on board a fuel cell motor vehicle in a form that requires reformation prior to use, the gasoline gallon equivalent for the 2002 model year city fuel economy may be obtained from the Environmental Protection Agency, Office of Transportation and Air Quality at the following address:

Mailing Address	Courier Address
USEPA Headquarters	USEPA Headquarters
Ariel Rios Building	Ariel Rios Building
1200 Pennsylvania Avenue, N.W.	1200 Pennsylvania Avenue, N.W.
Mail Code: 6401A	Room 6502A
Washington, DC 20460	Washington, DC 20004

(4) *Vehicle Inertia Weight Class*. The term "vehicle inertia weight class" means, with respect to a motor vehicle, its inertia weight class determined under 40 CFR § 86.129–94. Under 40 CFR § 86.082–2, the inertia weight class is the class (a group of test weights) into which a vehicle is grouped based on its loaded vehicle weight in accordance with the provisions of 40 CFR part 86.

SECTION 5. MANUFACTURER'S CERTIFICATION

.01 *When Certification Permitted*. A vehicle manufacturer (or, in the case of a foreign vehicle manufacturer, its domestic distributor) may certify to purchasers that a vehicle of a particular make, model, and model year meets all requirements (other than those listed in section 5.02 of this notice) that must be satisfied to claim the new qualified fuel cell motor vehicle credit, and the amount of the credit allowable under § 30B(a)(1) and (b) with respect to the vehicle, if the following requirements are met:

(1) The manufacturer (or, in the case of a foreign vehicle manufacturer, its domestic distributor) has submitted to the Service, in accordance with section 6 of this notice, a certification with respect to the vehicle and the certification satisfies the requirements of section 5.03 of this notice; and

(2) The manufacturer (or, in the case of a foreign vehicle manufacturer, its domestic distributor) has received an acknowledgment of the certification from the Service.

.02 *Purchaser's Reliance*. Except as provided in section 5.05 of this notice, a purchaser of a vehicle may rely on the manufacturer's (or, in the case of a foreign vehicle manufacturer, its domestic distributor's) certification concerning the vehicle and the amount of the credit allowable with respect to the vehicle (including cases in which the certification is received after the purchase of the vehicle). The purchaser may claim a credit in the certified amount with respect to the vehicle if the following requirements are satisfied:

(1) The vehicle is placed in service by the taxpayer after December 31, 2005, and is purchased on or before December 31, 2014;

(2) The original use of the vehicle commences with the taxpayer;

(3) The vehicle is acquired for use or lease by the taxpayer, and not for resale; and

(4) The vehicle is used predominantly in the United States.

.03 *Content of Certification*.

(1) *All Vehicles.* For all vehicles, the certification must contain the following information:

(a) The name, address, and taxpayer identification number of the certifying entity;

(b) The make, model, model year, and any other appropriate identifiers of the motor vehicle;

(c) A statement that the vehicle is made by a manufacturer;

(d) The amount of the credit for the vehicle (showing computations);

(e) The gross vehicle weight rating of the vehicle;

(f) A statement that the vehicle is propelled by power derived from one or more cells that convert chemical energy directly into electricity by combining oxygen with hydrogen fuel which is stored on board the vehicle in any form and may or may not require reformation prior to use;

(g) A statement that the vehicle complies with the applicable provisions of the Clean Air Act;

(h) A statement that the vehicle complies with the applicable air quality provisions of state law of each state that has adopted the provisions under a waiver under § 209(b) of the Clean Air Act or a list identifying each state that has adopted applicable air quality provisions with which the vehicle does not comply;

(i) A statement that the vehicle complies with the motor vehicle safety provisions of 49 U.S.C. §§ 30101 through 30169; and

(j) A declaration, applicable to the certification and any accompanying documents, signed by a person currently authorized to bind the manufacturer (or, in the case of a foreign vehicle manufacturer, its domestic distributor) in these matters, in the following form:

"Under penalties of perjury, I declare that I have examined this certification, including accompanying documents, and to the best of my knowledge and belief, the facts presented in support of this certification are true, correct, and complete."

(2) *Passenger Automobiles and Light Trucks*. If the vehicle is a passenger automobile or light truck, the certification must include a copy of the certificate (received on or after August 8, 2005) that the vehicle meets or exceeds the applicable Bin 5 Tier II emission standard established in regulations prescribed by the Administrator of the Environmental Protection Agency under § 202(i) of the Clean Air Act for that make and model year vehicle.

(3) *Additional Fuel Economy Credit.* If the manufacturer (or, in the case of a foreign manufacturer, its domestic distributor) is certifying that a passenger automobile or light truck is eligible for the additional fuel economy credit allowable under § 30B(b)(2), the certification must also contain the following information:

(a) The vehicle inertia weight class of the vehicle; and

(b) The city fuel economy of the vehicle.

.04 *Acknowledgment of Certification*. The Service will review the original signed certification and issue an acknowledgment letter to the vehicle manufacturer (or, in the case of a foreign vehicle manufacturer, its domestic distributor) within 30 days of receipt of the request for certification. This acknowledgment letter will state whether purchasers may rely on the certification.

.05 *Effect of Erroneous Certification.* The acknowledgment that the Service provides for a certification is not a determination that a vehicle qualifies for the credit, or that the amount of the credit is correct. The Service may, upon examination (and after any appropriate consultation with the Department of Transportation or the Environmental Protection Agency), determine that the vehicle is not a new qualified fuel cell motor vehicle or that the amount of the credit determined by the manufacturer (or, in the case of a foreign vehicle manufacturer, its domestic distributor) to be allowable with respect to the vehicle is incorrect. In either event, the manufacturer's (or, in the case of a foreign vehicle manufacturer, its domestic distributor's) right to provide a certification to future purchasers of new fuel cell motor vehicles will be withdrawn, and purchasers who acquire a vehicle after the date on which the Service publishes an announcement of the withdrawal may not rely on the certification. Purchasers may continue to rely on the certification for vehicles they acquired on or before the date

on which the announcement of the withdrawal is published (including in cases in which the vehicle is not placed in service and the credit is not claimed until after that date), and the Service will not attempt to collect any understatement of tax liability attributable to such reliance. Manufacturers (or, in the case of foreign vehicle manufacturers, their domestic distributors) are reminded that an erroneous certification or an erroneous quarterly report may result in the imposition of penalties—

(1) under § 7206 for fraud and making false statements; and

(2) under § 6701 for aiding and abetting an understatement of tax liability in the amount of $1,000 ($10,000 in the case of understatements by corporations) per return on which a credit is claimed in reliance on the certification).

SECTION 6. TIME AND ADDRESS FOR FILING CERTIFICATION

.01 *Time for Filing Certification*. In order for a certification under section 5 of this notice to be effective for new qualified fuel cell motor vehicles placed in service during a calendar year beginning after December 31, 2007, the certification must be received by the Service not later than December 31st of that calendar year. In order for a certification under section 5 of this notice to be effective for new fuel cell motor vehicles placed in service during 2006 and 2007, the certification must be received by the Service not later than December 31, 2008.

.02 *Address for Filing*. Certifications under section 5 of this notice must be sent to:

Internal Revenue Service
Industry Director, Large and Mid-Size Business,
Heavy Manufacturing and Transportation
Metro Park Office Complex — LMSB
111 Wood Avenue, South
Iselin, New Jersey 08830

SECTION 7. 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 1545–2028.

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 section 5. This information is required to be collected and retained in order to ensure that vehicles meet the requirements for the new qualified fuel cell motor vehicle credit under § 30B(a)(1) and (b). This information will be used to determine whether the vehicle for which the credit is claimed by a taxpayer is property that qualifies for the credit. The collection of information is required to obtain a benefit. The likely respondents are corporations and partnerships.

The estimated total annual reporting burden is 200 hours.

The estimated annual burden per respondent varies from 35 hours to 45 hours, depending on individual circumstances, with an estimated average burden of 40 hours to complete the certification required under this notice. The estimated number of respondents is 5.

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 8. DRAFTING INFORMATION

The principal author of this notice is Jaime C. Park of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this notice, contact Jaime C. Park at (202) 622–3110 (not a toll-free call).

Distressed Asset Trust (DAT) Transaction

Notice 2008–34

The Internal Revenue Service (Service) and the Treasury Department are aware of a type of transaction, described below, in which a tax indifferent party, directly or indirectly, contributes one or more distressed assets (for example, a creditor's interest in debt) with a high basis and low fair market value to a trust or series of trusts and sub-trusts, and a U.S. taxpayer acquires an interest in the trust (and/or series of trusts and/or sub-trusts) for the purpose of shifting a built-in loss from the tax indifferent party to the U.S. taxpayer that has not incurred the economic loss. This notice alerts taxpayers and their representatives that this transaction (referred to as a distressed asset trust or DAT transaction) is a tax avoidance transaction and identifies this transaction, and substantially similar transactions, as listed transactions for purposes of § 1.6011–4(b)(2) of the Income Tax Regulations and §§ 6111 and 6112 of the Internal Revenue Code. This notice also alerts persons involved with these transactions to certain responsibilities that may arise from their involvement with these transactions.

BACKGROUND

The Service and Treasury Department are aware that, prior to October 23, 2004, taxpayers used partnerships improperly to engage in variations of the distressed asset transaction described in this notice. The Coordinated Issue Paper, "Distressed Asset/Debt Coordinated Issue Paper," LMSB–04–0407–031 (Apr. 18, 2007) describes the variation of the distressed asset transaction involving partnerships (DAD). The American Jobs Creation Act of 2004, Public Law 108–357 (118 Stat. 1418) (AJCA), amended §§ 704, 734 and 743 effective after October 22, 2004, for contributions of built-in loss property to a partnership, for basis adjustment rules in the case of a distribution for which there is a substantial basis reduction, and for basis adjustment rules in the case of a transfer of a partnership interest for which there is a substantial built-in loss. The revisions to §§ 704, 734 and 743 generally (1) require that a built-in loss may be taken into account only by the contributing partner and not other partners, and (2) make the basis adjustment rules mandatory in cases with a substantial basis reduction or substantial built-in loss. Thus, the statutory changes to §§ 704, 734 and 743 under AJCA prevent taxpayers from shifting a built-in loss from a tax indifferent party