

the election was made. Such a revocation is permitted irrespective of whether the carryover option described in paragraph (c)(1)(ii) is elected with respect to qualified investment made in a year for which a general rule election is revoked.

(ii) *Pro rata use of credit.* A corporation does not fail to comply merely because, for an applicable year ending prior to January 19, 1979, it provides for pro rata use of the regular 10-percent credit and the 1-percent additional credit to the extent that less than all of a taxpayer's credit earned for a taxable year is allowable.

(iii) *Transitional rule.* The Commissioner, based on the particular facts and circumstances of individual cases, may determine that a good faith failure to comply before January 19, 1979, with a final or temporary rule adopted under this section on or after that date does not require retroactive correction under paragraph (h)(5)(ii) of this section.

(Sec. 301(d)(2)(C) of the Tax Reduction Act of 1975; sec. 7805 of the Internal Revenue Code of 1954 (89 Stat. 38, 68A Stat. 917; 26 U.S.C. 7805))

[T.D. 7857, 47 FR 54795, Dec. 6, 1982]

**§ 1.46-9 Requirements for taxpayers electing an extra one-half percent additional investment credit.**

(a) *Introduction*—(1) *In general.* A corporation that qualifies for an additional credit under § 1.46-8 may elect under section 46(a)(2)(B)(ii) of the Code to obtain an extra one-half percent additional investment credit for property described in section 46(a)(2)(D). Paragraph (c) of this section provides additional procedures for electing this extra credit. This section also provides rules for implementing an employee stock ownership plan that meets the requirements of sections 301 (d) and (e) of the Tax Reduction Act of 1975 ('1975 TRA'). The plan must meet the additional formal requirements of paragraph (d), and the additional operational requirements of paragraph (e) of this section. Unless otherwise indicated, statutory references in this section are to the Internal Revenue Code of 1954, as applicable for the year in which a qualified investment is made.

(2) *Applicability of one-percent TRASOP provisions.* Subject to the exceptions and additional rules of this section, the provisions of § 1.46-8 apply to an election made, and to a plan implemented, under this section. However, this section does not change the requirements of § 1.46-8 for purposes of obtaining an additional one-percent credit.

(3) *Effective date.* This section applies only to taxable years beginning after December 31, 1976. See section 803(j)(2)(A) of the Tax Reform Act of 1976.

(b) *Definitions*—(1) *One-percent terms.* When used in this section, the terms listed below have the same meanings as in § 1.46-8(b):

- (i) TRASOP. See § 1.46-8(b)(1).
- (ii) Employer. See § 1.46-8(b)(3).
- (iii) Employer securities. See § 1.46-8(b)(4).
- (iv) TRASOP securities. See § 1.46-8(b)(5).
- (v) Publicly traded. See § 1.46-8(b)(6).
- (vi) Value. See § 1.46-8(b)(7).
- (vii) Compensation. See § 1.46-8(b)(8).

(2) *Additional credit.* An "additional credit" or "extra additional credit" is the extra one-half percent additional investment credit under section 46(a)(2)(B)(ii)—

- (i) For purposes of applying this section, and
- (ii) When the context requires, for purposes of applying § 1.46-8 to this extra credit.

(3) *Matching employee contribution.* A "matching employee contribution" is a contribution that meets the requirements of paragraph (f) of this section.

(4) *Basic amount.* A "basic amount" is a matching employee contribution which is equal to the maximum credit multiplied by a fraction. The numerator of this fraction is a participant's compensation for the plan year. (See § 1.46-9(f)(3)(ii), concerning disregarded compensation.) The denominator is the aggregate of all participants' compensation for the plan year. The "maximum credit" is the estimated value of all employer contributions under paragraph (c)(4)(i) of this section for the applicable year, determined as if the maximum possible matching employee contributions were made.

(5) *Supplemental contribution.* A “supplemental contribution” is a matching employee contribution made in addition to a basic amount.

(c) *Special procedures for extra additional credit—(1) Statement of election.* A corporation’s statement of election described in §1.46-8(c)(3) must contain the name and taxpayer identification number of the corporation. Also, it must declare in the following words, or in words having substantially the same meaning, that:

(i) The corporation elects to have section 46(a)(2)(B) (i) and (ii) of the Internal Revenue Code of 1954 apply; and

(ii) The corporation agrees to implement (or continue to implement, as appropriate) a TRASOP and to claim the additional credit as required by §1.46-8 and §1.46-9 of the Income Tax Regulations.

(2) *Separate election.* A separate election must be made for each year’s qualified investment to obtain the extra additional credit for the qualified investment. If a corporation does not make a timely election to obtain an extra additional credit for a taxable year, it may not subsequently make the election on an amended return or otherwise.

(3) *No partial election.* To reduce administrative costs, a plan may establish a ceiling on matching employee contributions. Thus, for example, it may provide for the contribution of only a basic amount without supplemental contributions under paragraph (f)(2)(iv) of this section. Such a ceiling that in effect limits the additional credit to less than one-half percent of the qualified investment is not a partial election prohibited by §1.46-8(c)(5).

(4) *Funding a TRASOP—(i) Employer contributions.* The carryover option under §1.46-8(c)(1)(ii) is available for both the one-percent and one-half percent additional credits or for the one-half percent additional credit alone. In applying §1.46-8(c)(8)(iii), the value of TRASOP securities, other than those acquired with matching employee contributions, for an applicable year must equal one-half percent of the corporation’s qualified investment for that year or, if less, the amount of matching employee contributions received (including pledges, where permitted by

the plan) by the time the election for that year is made. However, if a corporation exercises the carryover option in §1.46-8(c)(1)(ii), the value of these TRASOP securities for an applicable year must equal the amount of additional credit claimed for that year determined after being reduced, if necessary, to equal contributions received (including pledges, if permitted) by the time the credit is claimed for that year. The value of these TRASOP securities, but not the amount of credit claimed, is further reduced to the extent that the employer withholds TRASOP securities to take into account start-up and administrative expenses under paragraph (e)(1) of this section or an investment tax credit reduction under paragraph (e)(2) of this section.

(ii) *Employee contributions.* Paragraph (f)(4) of this section, but not §1.46-8(c)(8) (i) through (iii), applies to TRASOP securities acquired with matching employee contributions.

(5) *Claiming additional credit.* In applying §1.46-8(c)(9)(ii), if less than all of a corporation’s credit earned for a taxable year is allowed, the extra additional credit under this section for that year is allowed last.

(d) *Additional formal plan requirements—(1) Contributions by employees—(i) In general.* The plan must contain statements relating to matching employee contributions as required under paragraph (f) of this section.

(ii) *Aggregate floor.* A plan may provide for the return of all matching employee contributions for a year if the aggregate amount of such contributions is not at least equal to an amount stated in the plan. See also §1.46-9(f)(3)(iv).

(2) *Separate accounting.* The plan must state that employer contributions and matching employee contributions respectively described in paragraph (c)(4)(i) and (ii) of this section are accounted for separately from each other as well as from other contributions, including those described in §1.46-8(c)(8).

(3) *Allocation of TRASOP securities contributed by employer.* The plan must provide for the allocation under section 301(e)(5) of the 1975 TRA and this subparagraph (3) of TRASOP securities

contributed by the employer. These allocations reflect a ratable reduction for TRASOP securities withheld by the employer under paragraph (c)(4)(i) of this section. TRASOP securities so allocated are deemed to be allocated under section 301(d) of the 1975 TRA. In applying § 1.46-8(d)(6) to this section, only subdivisions (ii), (iv), (ix), (x), (xi) and (xii) thereof apply to allocations under this section.

(4) *Effect of section 415.* In applying the limitations of section 415 to limitation years beginning after January 19, 1979, allocations of TRASOP securities are considered in the following order: first, allocations under § 1.46-8; second, allocations under this section. See § 1.46-8(d)(6)(v) concerning the allocation of amounts under any other defined contribution plan. No suspense or escrow account may be maintained to hold contributions under this section that are unallocated because of section 415. Thus, section 415 in effect limits the availability of an extra additional credit in a particular year. However, if the plan so provides, a potential extra additional credit is treated as an investment credit carryover under the carryover option described in § 1.46-8(c)(1)(ii) to the extent that it is not used in a particular year because of section 415.

(5) *Nonforfeitability.* Employer contributions are also not considered to be forfeitable under § 1.46-8(d)(7) merely because the plan provides for their return to the corporation in an amount equal to the excess of employer contributions under this section over matching employee contributions or in the case of discriminatory operation under paragraph (f)(3) of this section. See paragraph (f)(3)(iv).

(6) *Distributions.* Notwithstanding § 1.46-8(d)(9)(i), a plan may not distribute from a participant's employer contribution account cash or employer securities attributable to unpaid pledges of the participant.

(e) *Additional operational plan requirements—(1) Start-up and administrative expenses—(i) In general.* The expense of establishing plan features relating to the extra additional credit is a start-up expense. The expense of collecting matching employee contributions is an administrative expense.

(ii) *Payment.* Under § 1.46-8(e) (6) and (7), an employee may withhold or a plan may use, to the extent not withheld, TRASOP securities for start-up and administrative expense payments. However, withdrawals must be either limited to employer contributions under § 1.46-8(c)(8) or reasonably apportioned between these employer contributions and contributions under paragraph (c)(4)(i) of this section. An example of reasonable apportionment is earmarking expenses attributable to each of the additional credits and allocating any remaining non-earmarked expenses on either a 2:1 or 1:1 ratio between the additional credits. Another example is simply apportioning expenses between the additional credits on a 2:1 or 1:1 ratio basis without earmarking. However, if one-percent and one-half percent start-up expenses are attributable to different qualified investments, withdrawals for one-half percent expenses are limited to employer contributions under paragraph (c)(4)(i) of this section.

(iii) *Ceiling.* In determining the ceiling on start-up expenses under § 1.46-8(e)(6)(iii), only employer contributions under § 1.46-8(c)(8) and paragraph (c)(4)(i) of this section are considered. In determining the ceiling on administrative expenses under § 1.46-8(e)(7)(ii), dividends on all TRASOP securities, including those acquired with matching employee contributions, are considered.

(2) *Redeterminations and recaptures.* A reduction in investment credit because of a redetermination or recapture is allocated ratably under the principles of § 1.46-8(e)(9)(ii) among the 10-percent credit, the one-percent credit, and the one-half percent credit for a particular year. However, as illustrated in § 1.46-8(e)(9)(ii), this subparagraph (3) does not apply to a redetermination solely of one or both of the additional credits.

(3) *Withdrawal asset segregation.* The segregated accounting provisions of § 1.46-8(f) apply independently to withdrawal assets attributable to TRASOP securities under § 1.46-8 and to TRASOP securities under this section.

(f) *Matching employee contributions—(1) Designation by employee.* The plan must state that each employee on whose behalf an allocation is made

under §1.46-8(d)(6) for an applicable year is eligible to designate and contribute an amount to the TRASOP for that year as a matching employee contribution.

(2) *Form and timing of contribution—(i) Cash.* A participant may contribute in a manner provide under the plan a designated amount in cash directly to the plan or indirectly by the employer's withholding from amounts otherwise due the participant. The full amount, or pledge in lieu of an amount, for an applicable year must be contributed by the applicable last day described in §1.46-8(c)(8)(i).

(ii) *Optional pledges in lieu of cash.* The plan need not permit a pledge. However, when permitted by the plan, an irrevocable written pledge made in good faith by a participant is treated as a matching employee contribution of cash, whether or not the pledge is in fact contractually binding. The pledge must be to contribute, by no later than a time specified in the TRASOP, a designated amount in cash directly to the plan or indirectly by authorizing the employer to withhold from compensation otherwise due a participant. The specified time may not be later than 24 months after the close of the applicable year for which the amount is treated as a matching employee contribution.

(iii) *Transitional rule.* A plan may provide for the receipt of employee pledges at any time before the later of the applicable last day or January 15, 1980. If the last day for receipt of pledges for an applicable year is January 15, 1980, the one-half percent TRASOP credit for the applicable year may be elected on an amended return filed not later than that date, and employer contributions for the applicable year must be made by that date. A plan may provide that pledges which otherwise would have been payable on or before December 31, 1979 may be paid on or before January 15, 1980.

(iv) *Basic and supplemental contributions.* A plan formula may limit a matching employee contribution to a basic amount. It may also permit matching employee contributions of supplemental amounts to the extent that total basic amount contributions do not equal the amount of the addi-

tional credit claimed under this section. Employees may make supplemental contributions covering unpaid pledges only after the employer has disclosed the value of securities and income attributable to the unpaid pledge.

(3) *Prohibited discrimination—(i) General rule.* Matching employee contributions must be based on a formula stated in the plan that does not result in prohibited discrimination under section 401(a)(4) either in form or in operation. Thus, for example, a flat dollar amount required as a matching employee contribution to qualify for employer-provided benefits under this section may not be too high for lower paid employees to contribute under the plan. Further, lower paid employees must participate to such an extent that allocations under this section do not result in prohibited discrimination

(ii) *Compensation disregarded.* Compensation disregarded in allocations under §1.46-8(d)(6)(iv) is disregarded under this paragraph and for purposes of determining basic amounts as defined in paragraph (b)(4) of this section.

(iii) *Former employees.* A TRASOP must give all participants a reasonable opportunity to make matching employee contributions. However, neither a former employee who is a participant at the end of the plan year by reason of §1.46-8(d)(6)(iii), nor the estate of a deceased employee, need have the same options as are available to other participants. Thus, for example, a former employee may be limited to cash contributions even though other participants are permitted to make pledges. Also, if former employees of estates of deceased employees fail to make matching employee contributions, they are not considered in determining whether or not a TRASOP is discriminatory.

(iv) *Return of contributions.* A plan may provide for the return of employee and employer contributions for a year to the extent that plan operation would otherwise result in prohibited discrimination.

(4) *Investment in employer securities—(i) General rule.* Matching employee contributions must be invested in TRASOP securities no later than 30 days after the time for funding a TRASOP under §1.46-8(c)(8)(ii) or, if

later, the time specified under the special rule for pledges.

(ii) *Special rule for pledges.* Cash contributed to pay a pledge permitted by paragraph (f)(2)(ii) of this section must be invested in employer securities so that the cash is not held more than 3 months. The 3-month period includes the period, if any, that the cash is held by the employer.

(5) *Reduction of matching employee contribution—(i) In general.* Matching employee contributions must be reduced in three cases. First, they are reduced to the extent that there are no corresponding employer contributions described in paragraph (c)(4)(i) of this section. This occurs, for example, when the aggregate of the basic amounts of matching employee contributions exceeds the allowable credit. Second, they are reduced to the extent that corresponding employer contributions matching them under paragraph (c)(4)(i) of this section are withdrawn under section 301(f) of the 1975 TRA. Third, they are reduced by the amount of any pledge unpaid at the time specified in paragraph (f)(2)(ii) of this section.

(ii) *Apportioning reductions.* Generally, the account of each contributor under this section for an applicable year is reduced by a percentage of the account. This percentage equals the total reduction of all matching employee contributions for that year divided by the total, before the reduction, of all matching employee contributions. However, if a reduction is directly attributable to a particular contributor, only that contributor's account is reduced. A reduction is directly attributable to a particular contributor when, for example, the limits of section 415 prohibit a full allocation of employer contributions equal to the contributor's matching employee contribution for an applicable year or when a contributor fails to pay a pledge. A reduction may not yield a negative balance in a participant's account.

(iii) *Disposing of reductions.* If a participant's matching employee contribution is reduced, the amount of the reduction must either be treated as a voluntary contribution or returned to the participant by the later of two

dates. The first date is 30 days after the time for investing in TRASOP securities under paragraph (f)(4) of this section. The second date is the 30th day after the date on which the withdrawal of employer contributions occurs that causes the reduction. It may be treated as a voluntary contribution only if, as stated in the plan, the participant so indicates in writing when making the matching employee contribution.

(iv) *Supplemental contributions covering unpaid pledges.* Notwithstanding the timing requirements of paragraph (f)(2) of this section, supplemental contributions covering unpaid pledges must be made no later than 60 days after accounting for the corresponding reduction under paragraph (f)(5)(ii) of this section.

(v) *Effect of reduction on credit.* For the purpose of applying section 415 to an additional allocation to the account of a participant attributable to a supplemental contribution covering an unpaid pledge, the contribution is treated as an annual addition to the supplemental contributor's account in the applicable year for which the reduction occurred. An amount in excess of the contribution may be allocated in equal amounts for each year from the applicable year to the year of the reduction. The employer's credit is reduced only to the extent that a proportionate transfer of assets is not made from the account of the participant to whom the reduction is attributable to the accounts of supplemental contributors.

(vi) *Example.* The rules contained in paragraphs (f) (2) and (5) of this section are illustrated by the following example:

*Example.* Assume that A is an employee of corporation M, a calendar year taxpayer that maintains a TRASOP. A has pledged \$100 as a matching employee contribution for 1977, the first applicable year of M's TRASOP. M has transferred employer securities valued at \$100 that have been allocated to A's account under the Plan. The TRASOP provides that pledges must be paid no later than 24 months after the end of the applicable year. Thus, A's \$100 pledge must be paid by December 31, 1979. As of December 31, 1979, the employer securities attributable to A's pledge have a value of \$90 and have produced undistributed dividend income of \$13. Thus, the value of the portion of A's account attributable to the unpaid pledge is \$103. After December 31, 1979, the value of this portion of

A's account is disclosed to participants, and employee B chooses to pay off A's unpaid pledge, as provided in the plan, by making a \$100 supplemental contribution. The full amount of the securities and dividend income attributable to the unpaid pledge are transferred from A's account to that of B as of December 31, 1979. M's credit for 1977 is not reduced. The \$100 supplemental contribution is an annual addition to B's account for purposes of applying section 415 in 1979. Income attributable to the pledge in excess of the supplemental contribution, \$3 (\$103-\$100), may be allocated and treated as an annual addition by spreading this excess amount over the years from the applicable year to the year of the reduction (1977, 1978, 1979).

(g) *Failure to comply*—(1) *General rule.* If a corporation elects under § 1.46-8(c) (2) through (5) and paragraph (c)(1) of this section to obtain an additional credit, § 1.46-8(h) (1), (2), (3), (5), (6), and (7) as modified by this paragraph (g) apply.

(2) *Failure to comply (penalty classifications)*—(i) *In general.* A corporation fails to comply with an extra additional credit election if a defect described in paragraph (g)(2) (ii)–(iv) of this section occurs in a taxable year.

(ii) *Funding defect.* A funding defect occurs under this section if a corporation or its TRASOP fails to satisfy the requirements of § 1.46-8(c) (8) or (9) or paragraph (c)(4) of this section, as they apply directly to the extra additional credit.

(iii) *Special operational defect.* A special operational defect occurs if a TRASOP fails in operation to satisfy the requirements described in § 1.46-8(d) (5) through (9) (except (6) (i), (iii), and (v) through (viii)) or (e)(3), or paragraphs (d) (5), (6), and (e)(3) of this section, as they apply directly to the extra additional credit.

(iv) *De minimis defect.* A *de minimis* defect occurs if a corporation or its TRASOP fails to satisfy the requirements, other than those enumerated in paragraphs (c) (1) and (2) and (g)(2) (ii) and (iii), of this section or of § 1.46-8 other than those excluded under § 1.46-8(h)(4)(iv).

(3) *Amount involved.* The amount involved in a failure to comply under this section is based upon the extra additional credit within the meaning of section 46(a)(2)(B)(ii).

(4) *Coordination of civil penalties.* The civil penalties under § 1.46-8 and this

section are determined separately. In no case may the amount involved with respect to a particular failure to comply in one year exceed under both sections the full additional credit within the meaning of section 46(a)(2)(B) (i) and (ii).

[T.D. 7856, 47 FR 54805, Dec. 6, 1982]

#### § 1.46-10 [Reserved]

#### § 1.46-11 Commuter highway vehicles.

(a) *In general.* Section 46(c)(6) provides that the applicable percentage to determine qualified investment under section 46(c)(1) for a qualifying commuter highway vehicle is 100 percent. A qualifying commuter highway vehicle is a vehicle (defined in paragraph (b) of this section)—

(1) Which is acquired by the taxpayer on or after November 9, 1978,

(2) Which is placed in service by the taxpayer before January 1, 1986, and

(3) With respect to which the taxpayer makes an election under paragraph (g) of this section.

(b) *Definition of commuter highway vehicle.* A commuter highway vehicle is a highway vehicle that meets the following requirements:

(1) The vehicle is section 38 property in the hands of the taxpayer. The rule of section 48(d), allowing a lessor to elect to treat the lessee of new section 38 property as having acquired the property, applies to commuter highway vehicles. If the vehicle is leased and that

election is made, the lessee is treated as the taxpayer under this section. However, if that election is not made, the lessor, and not the lessee, is treated as the taxpayer under this section.

(2) The vehicle must meet the seating capacity requirement of paragraph (c) of this section; and

(3) The taxpayer reasonably expects to meet the commuter use requirement of paragraph (d) of this section for at least the first 36 months after the vehicle is placed in service.

(c) *Seating capacity.* A commuter highway vehicle must have a seating capacity of at least 8 adults in addition to the driver's seat.

(d) *Commuter use requirement.* A vehicle meets the commuter use requirement only if at least 80 percent of the