

Follow-up Questions for the Record  
George Madison  
Senator Chuck Grassley

*Question 1*

*Do you commit to respond quickly and completely to any requests made by myself or my staff for information?*

Answer: If confirmed, I will seek to work closely with Congress and Committee staff to address the important financial issues within Treasury's purview and to perform its oversight role. I agree with Executive Branch policy that seeks to accommodate whatever legitimate interests Congress may have in obtaining information while at the same time preserving Executive Branch interests in maintaining essential confidentiality. Within these parameters, if confirmed, I intend to respond promptly to reasonable requests for information.

*Follow-up: Please explain what you mean by "legitimate interests Congress may have" and what exactly in your mind constitutes a "reasonable request for information." As they relate to your duties, if you are confirmed, please describe in detail what "Executive branch interests in maintaining essential confidentiality" you had in mind in your earlier response, and what kind of information you expect to withhold from Congressional oversight.*

*How can Congress know that the Treasury Department will not cherry-pick information provided to Congress if certain requests are deemed to be unreasonable? What assurances does Congress have that information that might reflect poorly on the Treasury Department will not be withheld in the name of "essential confidentiality."*

Answer: Thank you for the opportunity to clarify my response. I would presume that all Congressional requests for information are reasonable and reflect legitimate interests. Moreover, I never would support withholding information from Congress simply because it might reflect poorly on the Treasury Department. With respect to maintaining essential confidentiality, I was merely noting the longstanding executive branch practice by which the President may, in appropriate circumstances, assert a claim of executive privilege in response to a request from Congress. However, I have no such scenario in mind. Of course, decisions about executive privilege are made by the President, not the Treasury Department.

*Question 7*

*Section 382 of the Internal Revenue Code limits the ability of acquiring companies that acquire target companies to offset the taxable income of the acquiring company with the Net Operating Losses of the target. Section 382 was enacted after extensive scholarly reflection by the staffs of the Senate Finance Committee and the Joint Committee on Taxation, as well as after reflection by the House Ways & Means Committee. It has been an established part of the law ever since 1986.*

*On September 29, 2008 the House said no to the first bail-out bill; on September 30, 2008 the Treasury virtually waived section 382 for banks in Notice 2008-83; and on October 2, 2008, Wells Fargo acquired Wachovia, which took advantage of millions of dollars in Net Operating Losses.*

*In the opinion of many tax scholars, Treasury simply lacked the authority to issue Notice 2008-83. This is not a minor issue – this unauthorized waiver of an act of Congress likely had a revenue cost to the government of, at a minimum, several billion dollars. Congress found Treasury’s action so egregious that Notice 2008-83 was rapidly overturned.*

*In your role as General Counsel you will be asked to review Treasury’s authority to issue guidance. In your opinion, did Treasury have authority to issue Notice 2008-83? Please fully explain your answer. If you disagree with the Treasury Secretary or any of the Deputy, Under, or Assistant Secretaries about Treasury’s authority to issue guidance, how will you resolve such conflicts? Will you notify the appropriate Congressional Committees if you believe that an action by Treasury may be illegal?*

Answer: It is my understanding that Notice 2008-83 was issued under the authority of Internal Revenue Code (Code) Section 382(m), which authorizes the Secretary of the Treasury to issue such regulations as may be necessary or appropriate to carry out the purposes of the section. The issues raised by that notice are complex and concern issues such as the underlying purposes of Code Section 382, as well as Treasury's authority to issue such guidance and the transparency of the guidance process itself. I have not reviewed the prior Administration's determination that the notice was necessary or appropriate to carry out the underlying purposes of Code Section 382. I understand that you have asked for an Inspector General's report on the issue, and I look forward to reviewing that report when it is completed. If confirmed as General Counsel, I will respect the limits on the Treasury Department's authority to interpret statutory provisions, including tax provisions, and will ensure that authority issues such as those raised by Notice 2008-83 are fully vetted and debated before such guidance is approved for publication.

*Follow-up:*

- *In your response, you said "It is my understanding that Notice 2008-83 was issued under the authority of ... Section 382(m), which authorizes the Secretary of the Treasury to issue such regulations as may be necessary or appropriate to carry out the purposes of the section." Are you saying that Notice 2008-83 was necessary or appropriate to carry out the purposes of section 382? Are you saying that Section 382(m) did actually provide authority for Notice 2008-83?*
- *Did Treasury have authority to issue Notice 2008-83?*
- *Had you been General Counsel of the Treasury at the time Notice 2008-83 was issued, how would you have handled the situation differently?*
- *How will you ensure full compliance with the Congressional Review Act of 1996?*

Answer: The Secretary's authority to issue guidance under Internal Revenue Code Section 382 is derived in part from Section 382(m) itself which authorizes the Secretary of the Treasury to issue such regulations as may be necessary or appropriate to carry out the purposes of Section 382. I was not at Treasury at the time but from what I understand, in September 2008, the Treasury Department determined in issuing Notice 2008-83 (Notice) that the guidance contained within was necessary and appropriate to carry out the purposes of Section 382, which is meant to prevent abusive transfers of tax benefits through corporate ownership changes. I also understand, however, that the finding of Congress as expressed in section 1261(a)(3) of the American Recovery and Reinvestment Act of 2009 (ARRA) was that the legal authority to prescribe Notice 2008-83 was "doubtful." In addition, in ARRA section 1261(b), Congress determined that the Notice would have no force or effect with respect to any ownership changes

after January 16, 2009. I do not know the details of the discussions and deliberations that lead to the issuance of Notice 2008-83, so it is difficult for me to say how I would have handled the matter differently. However, the guidance process should be studied and changes recommended, if appropriate. If confirmed, I would review the Inspector General's report on this matter to determine whether it indicates that changes in the guidance process are necessary, especially with respect to determinations of authority to issue guidance. Then, I would review the process for the issuance of tax guidance to ensure compliance with all applicable requirements, including the determination of authority to issue the guidance as well as compliance with the Congressional Review Act of 1996 (CRA). I understand that the CRA requires the delivery to Congress and GAO of agency statements of general applicability and future effect designed to implement, interpret, or prescribe law or policy (e.g., regulations, tax rulings). The Internal Revenue Service (IRS) Office of the Associate Chief Counsel's Legal Processing Division and the IRS Office of Legislative Affairs are charged with the IRS's CRA compliance. Therefore, if confirmed the next step would be the review of the IRS procedures for complying and make any necessary changes.

#### *Question 8*

*In the stimulus bill, the section 25C credit for windows, doors, and skylights was modified as of the date of enactment so that such items do not qualify "unless such component is equal to or below a U factor of 0.30 and SHGC of 0.30." However, the IRS issued guidance saying that windows, doors, and skylights qualify under section 25C if they meet the old Energy Star standards through May 31, 2009. In your view, did the IRS have the authority to issue such guidance, which appears to contradict the language of the statute? If yes, please explain what you think is the source of the IRS' authority.*

Answer: Prior to amendment by the American Recovery & Reinvestment Act of 2009 (ARRA), Section 25C of the Internal Revenue Code provided a credit for windows, skylights, and doors that met the requirements of the 2000 International Energy Conservation Code (IECC). In the case of windows and skylights, the IECC requirements and Energy Star requirements were the same, so IRS Notice 2006-26 provided that purchasers of windows and skylights could rely on an Energy Star label. Thus, under this arrangement homeowners are generally relieved of the obligation to determine independently whether a particular item qualified for the credit.

The ARRA amended Section 25C to provide that, in addition to meeting the IECC requirements, windows, skylights, and doors must have a U factor and an SHGC equal to or below 0.30 to qualify for the credit. As a consequence of that amendment, taxpayers could no longer rely on Energy Star labels on windows and skylights to verify eligibility for the credit.

The amendment took effect for items placed in service after the date of enactment on February 17, 2009. I understand that the IRS was concerned that immediate implementation of the amendments to Section 25C would have had the perverse effect of discouraging homeowners from purchasing energy efficient products. Until the IRS issued guidance to provide an alternative way to confirm that items would qualify for the credit, homeowners likely would find it difficult to determine whether a particular energy efficient property qualified, even though many of those products would have met the new standards.

I understand that in this case the IRS determined that providing transition relief to homeowners purchasing windows, skylights, and doors until a new certification mechanism could be implemented was a reasonable exercise of its responsibility and authority to administer the tax laws and was consistent with congressional intent in the ARRA to stimulate spending on energy efficient property. I have not reviewed this determination, but you have my commitment that, if confirmed, I will work closely with the Office of Tax Policy and the Commissioner of the IRS to ensure that the law is always administered appropriately.

*Follow-up: You stated in your response to my original question 8 that you had not reviewed the IRS's determination that it had authority to issue guidance relating to section 25C. That guidance appears to contradict the plain language of the statute, which provides for a 30/30 standard as of the date of enactment. I will ask question 8 again in a different manner since I didn't get an answer the first time to my question, which was, in your view, did the IRS have authority to issue this guidance regarding section 25C? Instead of referring to a broad purpose of the legislation that is not found in the legislative text, please review the legislative text of the amendment to section 25C referenced in my earlier question 8 and answer the question. Please fully explain your answer.*

Answer: I have been provided with the explanation for the guidance that follows. Upon an initial review of the explanation, I believe that there are reasonable arguments for the position taken by IRS while I also recognize that others might disagree. If confirmed, I commit to

review, in coordination with the IRS Commissioner, the IRS Chief Counsel, and the Assistant Secretary for Tax Policy the procedures utilized by Treasury and the IRS in issuing tax guidance.

Section 25C of the Internal Revenue Code (Code) allows a tax credit to individuals who invest in certain non-business property such as energy efficient windows and doors. The American Recovery and Reinvestment Act of 2009 (ARRA) amended Code section 25C by requiring that to qualify for the credit, windows and doors must have a so-called U factor or a SHGC of 0.30. Before this amendment by the ARRA, the requirements for claiming the credit under section 25C were not more restrictive than the “Energy Star” requirements, so IRS Notice 2006-26 provided that taxpayers could rely on an Energy Star label in determining whether property could qualify for the credit. ARRA provides that the change in standards is effective for property placed in service after February 17, 2009.

I understand that following passage of ARRA there were immediate concerns expressed regarding how taxpayers could determine whether property met the new standards. There was concern that the uncertainty could discourage taxpayers from purchasing energy efficient windows and other products, contrary to the purpose of the provision to encourage immediate investment in energy-efficient property. Thus, until Treasury and the IRS issued guidance to provide a new way to confirm that property would qualify for the credit, taxpayers would find it difficult to determine whether a particular energy efficient property qualified for the credit, even though many of those products in fact would have met the new standards.

I understand that the IRS in consultation with Treasury, to ease compliance and administration of an immediately effective provision, therefore announced that it would issue guidance providing a transition rule allowing taxpayers to continue to rely on the Energy Star label to document eligibility for the credit. Under Code section 7805(a) the Secretary of the Treasury has authority to provide all “needful” rules and regulations for the enforcement of the Code.

In addition, it has been explained to me that prior to ARRA, Treasury and the IRS had published rules allowing individuals to rely on certifications that property qualified for the section 25C credit as opposed to having to make the determination on their own. See Notice 2006-26. Those rules have been subsequently revised and updated. See Notice 2009-53. Similar procedures are followed for other credits, such as the credit for the purchase of hybrid automobiles (see Notice 2006-9), where individuals generally lack the expertise to determine whether a property meets the technical requirements for the credit. In these cases Treasury and the IRS have provided that the law is to be administered by allowing taxpayers to rely on certifications. This approach is particularly important when Congress intends to provide individuals an inducement to purchase property with certain technical specifications. If taxpayers are uncertain about whether the credit is available the intended effect of the credit can be significantly undermined.

If confirmed, I would expect to meet with the IRS Chief Counsel, upon his confirmation, to review the guidance process generally and in particular understand his thoughts on transition guidance of this type.

Additional Questions:

Question: It was reported to my office that there is some disagreement about the nature and authority of the Special Inspector General for the Troubled Assets Relief Program (SIGTARP) to operate and access documents within Treasury. Specifically, my office received information that there was a dispute over certain Treasury documents that were being withheld from SIGTARP auditors on a specious claim of attorney-client privilege, and that this disagreement then escalated into a broader question about whether SIGTARP is subject to Secretary Geithner's direct supervision and direction, which may have been referred outside Treasury for an independent legal opinion.

Do you believe that the SIGTARP is part of the Treasury Department?

Answer: *Yes.*

Do you believe that the Treasury Department may use attorney-client confidentiality to withhold information from the SIGTARP?

Answer: *No.*

Has the question of whether the SIGTARP is subject to the Secretary's direct supervision and direction been referred outside Treasury for an independent legal opinion? If yes, where has the question been referred, why, and what was the response?

Answer: *Yes, the question was referred to the Justice Department. However, this was handled by career lawyers in the Office of General Counsel who made the referral in order to seek clarification of the status of the SIGTARP within Treasury. This occurred before I started at Treasury and I have not been involved in this matter. The Justice Department is still considering the question.*

If confirmed as General Counsel for the Treasury Department, will you cooperate with any requests for information made by the SIGTARP, the Treasury Inspector General, or any other Inspector General?

Answer: *Yes.*