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February 11, 2009

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Dear Speaker Pelosi:

With the nation facing its worst economic crisis since the Great Depression, the National Association of Home Builders (NAHB) applauds the Congress for swiftly putting together a stimulus package that will truly jump start the economy and add jobs quickly. A key component of that package is the Senate-approved homebuyer tax credit, which we estimate will add over 250,000 new jobs in the first year after enactment. NAHB urges your support of this critical economic stimulus policy.

There is also another tax provision of importance in both the House and Senate bills, the expansion of the section 172 net operating loss (NOL) carryback period. Michael Corkery, in the attached *Wall Street Journal* article, describes the potential for abuse of this provision, counter to the notions of efficient tax and economic policy. Indeed, we believe this article understates the potential for abuse.

For quite some time we have been hearing from our smaller builders about how the proposed NOL rules have the ability to help small businesses but also create tax incentives whereby the opportunistic, well capitalized home building companies would be able to unload their excess inventory of land onto the market at fire-sale prices solely for a tax benefit.

Specifically, the NOL carryback provision in the current House and Senate bills would allow large, well capitalized home building companies to receive cash from the sale of land, as well as cash from the federal government in the form of refunds of prior year tax liability. This temporary tax provision would further depress land prices in the areas where the larger home building companies have been most active.

The resulting downward pressure on land prices will put smaller builders with debt-financed land in a dangerous position. Smaller builders finance their land holdings with loans from local financial institutions, such as community banks. Falling prices have already put small businesses in precarious situations as banks seek new appraisals and demand more equity. Further devaluations due to significant land sales by these larger well capitalized home builders will make the small builders' plight even worse, with additional negative impacts on local and regional banks.

As the attached article demonstrates, some of these larger companies' business plans would use their NOL-supplemented cash position to buy the same land from distressed banks or small builders in anticipation of a recovery.

Then, once housing market stabilizes, these large companies could repurchase their recently sold properties, effectively monopolizing future land supply, driving smaller builders out of business, reducing market competition for homes, and hurting homebuyers and communities. Alternatively, these companies could enter into agreements by which they dispose of land today – thereby enabling claim on the proposed expanded NOL rules - while simultaneously entering into a contract with the buyer (or subsequent buyers) of the land (e.g. a hedge fund) for future repurchase of the same land. Clearly, the result of this exchange, which results in no ultimate change in ownership, would be entirely tax motivated, violating important principles of efficient tax policy. And the tax benefit generated by the exchange would ultimately result in reduced market competition in the market for new homes.

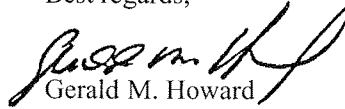
NAHB believes that the expanded NOL carryback is an important provision that will help many small and mid-size builders survive the economic downturn. However, as currently drafted, we believe it has the very real potential to: 1) Exacerbate the current housing crisis by further depressing housing pricing; 2) abuse Congressional intent by potentially creating a tool whereby larger builders can gain a competitive advantage in local communities in which they do business; and 3) drive small home builders out of business ...*all at the taxpayers' expense!*

NAHB believes there is a technical modification to the current NOL proposal that provides the relief Congress intends for business taxpayers, which is to help keep the doors open for small business, preserve and protect jobs, and supplement the other important provisions in the critical economic stimulus legislation.

Specifically, we propose modifying the expanded NOL carryback proposal in the stimulus bill to prevent churning of land and assets ordinarily held as inventory. This is accomplished by prohibiting the expanded NOL carryback to any taxpayer who enters into an agreement or engages in a transaction (or set of transactions), including forward contracts and similar arrangements, that serves to produce a tax loss with no resulting long-term change in ownership.

We stand ready to assist in any way to maintain this important economic stimulus while preventing abuse that appears in the minds of some companies. I and my staff are immediately available to assist.

Best regards,



Gerald M. Howard
NAHB President and
Chief Executive Officer

Attachment

cc: Edward D. Kleinbard, Chief of Staff
Joint Committee on Taxation
1015 Longworth House Office Building
Washington, D.C. 20515

THE WALL STREET JOURNAL

U.S. News: Tax Break Divides Large, Small Builders

By Michael Corkery

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As Congress prepares for a fight over its two versions of the economic stimulus bill, some small and large home builders are battling behind the scenes over a key tax break in the legislation that would benefit their industry.

The provision would allow corporations to use recent tax losses to offset taxable profits earned in the past five years. Typically, companies can carry back such losses only two years.

While the expanded tax break could benefit many companies, such as manufacturers and certain retailers, it is expected to be especially lucrative for big home builders, which saw big profits during the housing boom but aren't expected to report much profit for the foreseeable future.

According to Zelman & Associates, a housing research firm, the nation's 13 largest builders will reap \$2.4 billion in tax refunds this year under the current law, which is more cash than Zelman expects them to generate from selling homes and land. Under the current tax law, many big builders won't qualify for sizable refunds in the coming years, and they have been lobbying for the proposed change.

But some small builders say the measure would encourage big builders to continue to dump land and houses for artificially low prices to generate a loss for tax purposes. That, in turn, would drag values down even further, they argue.

"It's doing more harm than good," said Michael Sivage, chief executive of Sivage Homes, a small builder in Albuquerque, N.M. Mr. Sivage says he would also benefit from a refund, but he opposes the proposal because large builders' fire sales are driving down property values and prompting more scrutiny from his lenders.

The issue is exposing a rift between large builders and their small competitors, which make up the bulk of the industry. The downturn has forced dozens of small family-owned builders out of business, while many of the nation's large builders are not only expected to survive but have seen their stock prices beat the broader market. Since Jan. 1, the Dow Jones U.S. Homes Construction Index, which includes the largest builders, has fallen 7%, while the Dow Jones Industrial Average has declined 10%.

The rift also is putting the National Association of Home Builders, the industry's main lobbying group, in a dicey position. While the association supports the provision, it isn't actively lobbying for the measure and has called on Congress to curtail practices it finds objectionable such as dumping property.

"We are willing to work with Congress in crafting language that prevents businesses from artificially inflating losses and further distorting the marketplace," said Jerry Howard, chief executive of the association.

Meanwhile, large builders have hired their own lobbyists to push for the measure, which could cost as much as \$19.5 billion over 11 years.

A deal that Pulte Homes Inc. made late last year is the type that riles some small builders. Pulte, based in Bloomfield Hills, Mich., sold about 470 house lots in Southern California for \$2 million in December 2008, according to the buyer, Shopoff Properties Trust, a real-estate investment trust that focuses on buying distressed land. That is likely to generate a sizable tax refund because Pulte originally paid \$28 million for the property, according to Shopoff. As part of the deal, Shopoff says that Pulte has the right to buy the land should Shopoff choose to sell. Pulte executives weren't available to comment.

Some small builders worry that large competitors will be able to move the high-cost land off their balance sheet, file for a tax refund and then buy the land back at a cheaper cost. It is more difficult for small builders to liquidate land because they have debt tied to the properties. Large builders are financed with debt that typically isn't secured by land.

"I take real offense that my government is handing these big boys money to put me out of business," said Tom Woods, owner of TE Woods Homes, which builds in the Kansas City area.