One State's Reaction to Reaganomics: The 1982 Amendments to the Florida Income Tax Code

Tax Section of the Florida Bar

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One State's Reaction to Reaganomics: The 1982 Amendments to the Florida Income Tax Code

TAX SECTION OF THE FLORIDA BAR*

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* This report was prepared on behalf of the Tax Section of the Florida Bar by a committee composed of David M. Richardson, Henry H. Raattama, Jr., Benjamin K. Phipps II, K. Lawrence Gragg, Robert A. Pierce, and Robert H. Buker, Jr. Mr. Buker was the principal drafter of the report. The Tax Section (principally the committee that prepared this report) provided technical assistance in connection with the drafting of some of the legislation discussed in this article.

Representative Steven Pajcic of Jacksonville, Chairman of the House Committee on Finance and Taxation, and Laurel Landry and Alan Johansen of his staff deserve special credit. They were responsible for the initial legislation and both corrective amendments. Additionally, the Florida Department of Revenue, through the efforts of Larry Sartin, Assistant General Counsel, provided background information enabling the Tax Section to participate in the legislation’s development.

The authors rely on many public documents that in part comprise the legislative history of the Act. For the convenience of its readers, the Review has reproduced in appendices to this article six of the documents that the authors frequently cite. Throughout this article, citations to these documents will also include a parenthetical, parallel citation to the appendix in which the document is reproduced (e.g., (App. A, p. 711)).
I. INTRODUCTION

Following a 1971 constitutional amendment,1 the Florida Legislature adopted the Florida Income Tax Code,2 which provided for an income tax on all corporations3 conducting business, deriving income, or existing within Florida.4 In the interest of simplicity and administrative convenience, the Florida Income Tax Code incorporated by reference the Internal Revenue Code of 1954 (I.R.C.) in effect on January 1, 1972—a procedure commonly known as “piggybacking.” Piggybacking enabled the state and taxpayers to ascertain easily the Florida income tax due by starting with federal taxable income5 and then making adjustments to arrive at Florida taxable income.6 State administrative costs are reduced under this piggybacking system because the Department of Revenue can rely on a federal audit, limiting both the number of state revenue

1. Fla. Const. art. VII, § 5(b). This section was amended on November 2, 1971 to read in pertinent part:

No tax upon the income of residents and citizens other than natural persons shall be levied by the state, or under its authority, in excess of 5% of net income, as defined by law, or at such greater rate as is authorized by a three-fifths (3/5) vote of the membership of each house of the legislature . . . . This amendment does not provide for a corporate income tax; it merely prohibits such a tax from being levied at over a 5% rate unless approved by a super-majority of the legislature.


3. The income tax is levied on artificial entities, a category encompassing more than corporations. The term “corporation” used in this article means all artificial entities that have “permanent and inherent attributes not . . . available to natural persons . . . .” Fla. Stat. § 220.02(1) (1981). These entities include, inter alia, not-for-profit corporations, agricultural cooperatives, and “Subchapter S” corporations.

4. The income tax imposed on all such corporations is imposed on an apportioned basis. Thus, an interstate corporation doing business in several states would only be taxed on income properly apportioned to Florida. See Fla. Stat. §§ 214.70-.73 (1981); see also id. § 220.15. Apportionment theoretically prevents multiple taxation of the same income by several states.

5. 1972 Fla. Laws ch. 72-278, § 3 (codified as amended at Fla. Stat. § 220.03(1)(I) (Supp. 1982)).


7. Adjustments include both additions and subtractions to taxable income as defined in § 63 of the Internal Revenue Code of 1954. See Fla. Stat. § 220.13(2) (1981). Adjustments include the amount of state income taxes deducted in determining federal taxable income. Subtractions include foreign source income, dividends received from corporations with insubstantial contacts with the United States, and adjustments for allowable net operating and capital loss deductions. See Fla. Stat. § 220.13(1)(a)-(b) (Supp. 1982).
agents and the scope of state audits.\textsuperscript{8} This piggybacking approach, however, has some problems. The most serious problem is how to handle future amendments to the I.R.C. If future amendments are not incorporated by reference into the Florida Income Tax Code, then state and federal provisions will quickly become dissimilar, creating confusion, administrative burdens, and taxpayer noncompliance—the very problems that the piggybacking approach was designed to avoid. The simple answer to this problem—enacting a provision that automatically incorporates any amendments to the I.R.C.\textsuperscript{8}—is not available because the Florida Legislature constitutionally cannot delegate its lawmaking functions to another entity.\textsuperscript{10} Even if such a provision were constitutional, the Legislature is reluctant to piggyback future amendments to the I.R.C. without first subjecting them to legislative scrutiny,\textsuperscript{11} particularly when the amendments might have a significant impact on state revenues.

Consequently, during the spring legislative session each year from 1972 through 1980, the Legislature amended the Florida Income Tax Code to incorporate the I.R.C. in effect on January 1 of that year.\textsuperscript{12} This solved the problem of unconstitutional delegation

\textsuperscript{8} See Memorandum from Representative Steve Pajcic (Chairman, House Committee on Finance & Taxation) to Ralph Haben, Jr. (Speaker of the Florida House of Representatives) (May 17, 1982) (discussing 1982 Fla. Laws ch. 82-232 prior to amendment) [hereinafter cited as Pajcic House Memorandum], reprinted in Appendix A, infra p. 711. Administrative burdens to a taxpayer are also alleviated because the taxpayer has to defend against the same issue only once.

\textsuperscript{9} Such a provision could have been enacted by omitting the effective date from the definition in FLA. STAT. § 220.03(1)(l) (Supp. 1982) of the Internal Revenue Code. This would have served to keep the I.R.C. current for Florida purposes, but unfortunately would have been unconstitutional. See infra note 10.

\textsuperscript{10} Under the Florida Constitution, only the Legislature has the power to enact law. FLA. CONST. art. III, § 1. The automatic reception of I.R.C. amendments would be an unconstitutional delegation of the Florida Legislature's lawmaking power, effectively allowing Congress to enact law for the State of Florida. See Rosslow v. State, 401 So. 2d 1107 (Fla. 1981); Mahon v. County of Sarasota, 177 So. 2d 665 (Fla. 1965).


\textsuperscript{11} Cf. Pajcic House Memorandum, supra note 8, at 2 (App. A, p. 712) (the Legislature did not update the piggyback provisions in 1981 because the effect of Reaganomics on state revenue was unclear). But see infra note 21.

\textsuperscript{12} See, e.g., 1979 Fla. Laws ch. 79-35, § 1 (codified at FLA. STAT. § 220.03(1)(h) (1979).
of authority and allowed the Legislature to review the impact that changes in the I.R.C. would have on state revenue.

As a result of this consistent practice, Florida taxpayers anticipated the annual update and computed their Florida tax liability accordingly. For example, a taxpayer filing its Florida tax return on April 15, 1980 for its tax year ended December 31, 1979 normally applied the I.R.C. in effect on January 1, 1980—even though at that time the Legislature had not updated the Florida Tax Code and technically, the I.R.C. in effect on January 1, 1979 applied.


FIRPTA was especially important to Florida because under this statute foreign corporations that previously did not have Florida taxable income now would be required to report income and pay taxes to Florida.

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13. One inherent problem with the piggyback system remains: retroactive application of law. Retroactive application of changes to tax law may be unconstitutional depending upon the circumstances. Although retroactive changes in the rate at which previously taxable transactions are taxed is generally constitutional, changes that require the taxation of transactions not previously taxable are not. See, e.g., Untermeyer v. Anderson, 276 U.S. 440 (1928); Nichols v. Coolidge, 274 U.S. 531 (1927) (in both cases retroactive taxes were held unconstitutional).

There always has been an element of retroactivity in the manner in which Florida updates its piggyback provisions, casting doubt on the constitutionality of this procedure. Although the issue of retroactivity has never been fully resolved, it may be the only practical solution in a piggyback system. See generally Tanen & Golden, The Legislature Abandons the Internal Revenue Code, 55 FLA. BAR J. 606 (1981).


17. FLA. STAT. § 220.22 (1981). This statute compelled every taxpayer required to file a federal tax return also to file a Florida tax return. Section 897(a)(1) of the I.R.C., added by FIRPTA, provides that “gain or loss of a nonresident alien individual or a foreign corporation from the disposition of a United States real property interest shall be taken into account . . . as if the taxpayer were engaged in a trade or business within the United States . . . and as if such gain or loss were effectively connected with such trade or business.”

18. Thus, Florida would now tax this type of transaction because it is no longer a sale from “sources outside the United States.” FLA. STAT. § 220.13(1)(b)(2)(b) (Supp. 1982). Previously, this transaction was subtracted from federal taxable income to arrive at Florida taxable income.
During the spring of 1981, the Legislature had to contend not only with the three significant amendments to the I.R.C., but also with Governor Graham’s threat to veto any act that did not require the taxation of foreign source income. Additionally, President Reagan had just proposed the Economic Recovery Tax Act of 1981 (ERTA), which included one proposal that would drastically reduce Florida income tax: the accelerated cost recovery system (ACRS). The legal questions arising from any attempt to adopt prospectively federal changes that were yet to be enacted, coupled with the numerous 1980 amendments, caused the Legislature not to update the Florida Income Tax Code. Therefore, the I.R.C. in effect on January 1, 1980 was carried over into 1981 without the 1980 amendments.

Because of the failure to piggyback from January 1, 1980 to January 1, 1982 (the “hiatus period”) taxpayers were in a quandary about how taxable income should be reported in Florida. The Department of Revenue estimated that the great majority of taxpayers did not comply with the tax law because they were preparing and filing their 1980 and 1981 tax returns as if the Legislature had piggybacked the I.R.C. in effect on January 1, 1981 and January 1, 1982.

The resolution of these problems occurred on April 28, 1982 when Governor Graham approved the legislative amendments (“the Act”) to the Florida Income Tax Code, including pig-

21. Pub. L. No. 97-34, § 201(a), 95 Stat. 172, 203 (codified at I.R.C. § 168 (Supp. V 1981) (amended 1982) (effective for property placed in service after December 31, 1980)). The estimated revenue loss to Florida from the effect of increased depreciation deductions under ACRS was $34,000,000 for fiscal year 1981-1982, increasing to $267,000,000 for fiscal year 1985-1986. Memorandum from Alan W. Johansen to David Beggs (Staff Director, Senate Committee on Finance, Taxation & Claims) (October 29, 1981) (discussing fiscal impact of adopting ACRS) [hereinafter cited as Johansen House Memorandum], reprinted in Appendix B, infra p. 717; see supra text accompanying notes 36-45. The revenue increase resulting from FIRPTA was not netted against the projected revenue loss caused by the application of ACRS to Florida.
23. Id.; see also Memorandum from William F. Zuna (Research, Planning and Budgeting Director, Department of Revenue) to Randy Miller (Executive Director, Department of Revenue) at 3 (April 15, 1982) (Changes to Corporate Income Tax and Creation of the Emergency Excise Tax) [hereinafter cited as Department of Revenue Report No. 2], reprinted in Appendix C, infra p. 722.
gybacking the I.R.C. in effect on January 1, 1982.28 Although the Legislature agreed to adopt the current I.R.C., it also desired to avoid the revenue loss anticipated by the adoption of ERTA. The Legislature, therefore, not only piggybacked the current I.R.C. but also tied the advantages and convenience of piggybacking to the two percent Emergency Excise Tax (EET),28 which was intended to achieve revenue neutrality.27

To effectuate the Legislature's dual intent to piggyback28 and to prevent revenue loss, the Act allows taxpayers to choose whether to (1) piggyback retroactively,29 (2) piggyback prospectively,30 or (3) not piggyback at all.31 The Act ties piggybacking to


27. In theory, the EET is revenue neutral because it imposes an additional tax on taxpayers that equals the amount of revenue lost if taxpayers used ACRS for Florida tax purposes. Recognizing that ACRS presents only a timing difference and not an actual revenue loss, the Act provides for a credit equal to the EET imposed in later years when the deduction under ACRS is less than under traditional depreciation methods. Compare I.R.C. § 168 (West Supp. 1982) with I.R.C. § 167 (1976 & Supp. V 1981).

28. Actually, the I.R.C. has always been piggybacked to the Florida Income Tax Code, but it has not always been piggybacked currently. Thus on January 1, 1982 the I.R.C. in effect on January 1, 1980 was piggybacked to the Florida Income Tax Code. To avoid confusion in this article, the term piggyback will mean currently piggybacked unless otherwise stated.


The application of the general rule and the elections on consolidated returns is not addressed by the Act. Currently, there is no requirement for an affiliated group filing consolidated returns to make a uniform election. Thus, it is possible for some members of the group to choose the general rule to piggyback retroactively and other members of the group to postpone piggybacking under either of the two elections. As a result, the members of the group could be governed by different tax laws. This could have a significant impact if the regulations governing intergroup transactions changed.

At present the possibility of applying different laws to members of the same group is
the EET, which is designed to offset the adverse revenue impact of ERTA. The EET applies only to taxpayers electing to piggyback the current I.R.C., whether retroactively or prospectively, onto the Florida Income Tax Code. The Act also contains provisions that were enacted to achieve equity, prevent abuse, and provide true revenue neutrality. This article discusses the rationale behind the various provisions of the Act and its amendments, analyzes their impact on the Florida Income Tax Code, outlines the mechanics of the provisions, and raises issues that are presently unresolved.

II. The Act

A. Background

1. Revenue Impact of ACRS

After ERTA was passed in 1981, the legislative and executive branches in Florida closely scrutinized the potential impact on Florida tax revenue. Because of the significant potential revenue loss, the Legislature delayed updating the Florida Income Tax Code. Initial Department of Revenue studies resulted in the following projection of potential revenue loss:

supported by the election form, which provides that each member must file an election on its own behalf. Fla. Department of Revenue Form F-1120A, Pt. One, Gen. Instruction (1). But cf. Fla. Admin. Code Rule 12-c-1.131(1)(h) (1982) (parent is the agent for each subsidiary in an affiliated group).

32. See supra note 27.

33. 1982 Fla. Laws ch. 82-232, § 3 (codified as amended at Fla. Stat. §§ 221.01-.04 (Supp. 1982)).

34. See, e.g., 1982 Fla. Laws ch. 82-232, § 3 (codified as amended at Fla. Stat. § 221.01(1)(b) (Supp. 1982)) (exempting certain net operating loss situations from all or part of the EET).


36. See Johansen House Memorandum, supra note 21; see also Memorandum from David Beggs (Staff Director, Senate Committee on Finance, Taxation & Claims) to participants in the October 23, 1981 Revenue Estimating Conference (November 6, 1981) (fiscal impact of adopting ACRS) [hereinafter cited as Beggs Senate Memorandum], reprinted in Appendix D, infra p. 729.

37. The House Committee on Finance & Taxation, the Senate Committee on Finance, Taxation & Claims, the Department of Revenue, and the Office of Planning and Budget held joint conferences to discuss the revenue impact of ACRS.

38. These studies were conducted in conjunction with the staff of the House Committee on Finance & Taxation. See generally Johansen House Memorandum, supra note 21.
Fiscal Year

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* (figures in millions of dollars)

The Department of Revenue projections indicated that almost all of the revenue loss for the 1981-1982 fiscal year and the majority of subsequent revenue losses were attributable to ACRS deductions.40 These projections were computed by first examining a sample of sales tax receipts and estimating the amount of property, plant, and equipment put in service in Florida.41 Then the Department computed the difference between the aggregate ACRS and pre-ACRS deductions42 based on the estimated property put in service, resulting in the estimated reduction in corporate taxable income caused by ACRS.43

40. Memorandum from William F. Zuna (Research, Planning & Budgeting Director, Department of Revenue) to Randy Miller (Executive Director, Department of Revenue) (February 12, 1982) [hereinafter cited as Department of Revenue Report No. 1], reprinted in Appendix E, infra p. 731; see also Johansen House Memorandum, supra note 21.

Other provisions of ERTA, such as the safe harbor leasing provisions, also contributed to revenue loss. See Department of Revenue Report No. 1, supra. The revenue loss caused by safe harbor leasing, however, was not directly taken into account in the economic assumptions underlying the Act. The Department of Revenue indicated that it viewed the revenue loss caused by leasing as being included in the revenue loss estimates forecasted by the U.S. Treasury. Because these loss estimates formed part of the background for the state's estimate, the Act may have been intended to offset leasing revenue loss through the EET in the same manner as it was intended to offset ACRS revenue loss. The EET apparently was also intended to offset the bonus deduction under I.R.C. § 179 (Supp. V 1981). See Department of Revenue Report No. 2, supra note 23, at 3 (App. C, p. 724). To the extent that the EET was intended to offset the revenue loss caused by safe harbor leasing and I.R.C. § 179, it is inequitable.

41. See Department of Revenue Report No. 1, supra note 40, at 4 (App. E, p. 734). The estimate of the effect of the ACRS was based on purchases of plant and equipment. This, of course, did not reveal what amount of plant and equipment was purchased outside of Florida, or what portion of Florida purchases were subsequently transported outside the state. Because a substantial portion of the Florida income tax is paid by national and international corporations, the sampling of Florida purchases provided only a rough estimate of the plant and equipment put in service. This estimate formed the basis for the ACRS revenue projections. The Department computed the amount of real estate put in service by applying the federal projection of the ratio of real property to plant and equipment. This ratio is approximately one to two. Id. at 6-7 (App. E, pp. 736-37).

42. See Johansen House Memorandum, supra note 21, at 2-3 (App. B, p. 718-19). The aggregate deduction was calculated by comparing the useful lives under the asset depreciation range system (ADR) to the recovery lives under ACRS. See Department of Revenue Report No. 1, supra note 40, at 2-3 (App. E, pp. 732-33).

The principal difference between ACRS and pre-ACRS deductions is the effect on the timing of tax revenues: ACRS allows a faster write-off of an asset than does the pre-ACRS depreciation method. Although both methods provide for a 100% write-off, the Legislature projected that a taxpayer could depreciate an asset 67% faster, on average, using ACRS. The revenue loss caused by the faster write-off under ACRS was the principal problem addressed by the Legislature in the Act.

2. LEGISLATIVE DESIRE TO ACHIEVE REVENUE NEUTRALITY THROUGH A SIMPLE AND EQUITABLE SYSTEM

Although the need for revenue neutrality was a major concern in the piggyback legislation, the Legislature was determined to ensure that any proposal be simple and equitable. One proposal that the Legislature considered was raising the corporate income tax rate. This solution was simple but inequitable because it would place a burden on all Florida corporations, while the ACRS benefits would accrue only to capital intensive corporations; the majority of Florida corporations are noncapital intensive entities that receive no significant benefit from ACRS. Early proposals, therefore, focused on methods of tying revenue recovery provisions

44. See, e.g., id. at 2-3 (App. E, pp. 732-33). ACRS may harm some taxpayers, if the ACRS life exceeds class life under ADR. If the taxpayer uses the alternative class lives provided by I.R.C. § 168(b)(3) (Supp. V 1981), the benefit of ACRS will be even less pronounced. (Note that actual deductions taken pursuant to § 168(b)(3) are not taxed under the Act. See infra notes 66-77 and accompanying text.)

45. See Department of Revenue Report No. 1, supra note 40, at 2-3 (App. E, pp. 732-33). Initially, the Department assumed that ACRS deductions would be twice the pre-ACRS deductions. This 100% estimated increase was reduced to 67% when the Department realized that many taxpayers were depreciating property over lives shorter than the published IRS guidelines. The Department of Revenue assumed not only that the useful lives used would be the published lives, but also that the lives would be the lower published lives. Id. at 2 (App. E, p. 732).

The 67% estimate was based on ERTA as enacted. Although the Tax Equity and Fiscal Responsibility Act, § 206(a)(1)-(3), Pub. L. No. 97-248, 96 Stat. 324, 431 (1982) (amending I.R.C. § 168(b)), capped the § 168 deductions at 150% declining balance, no revisions of the Act have been proposed, notwithstanding that some of the initial assumptions underlying the Act have changed. See supra note 49.

46. See Department of Revenue Report No. 1, supra note 40, at 5 (App. E, p. 738). This proposal would not have been effective in many instances: If ACRS did reduce corporate income to the extent projected, then many taxpayers would not have taxable income; if taxable income is zero, the tax levied will be zero no matter what tax rate is applied. Thus, an increase in tax rate would never recover the revenue lost from taxpayers that have no taxable income as the result of the ACRS benefits.
to the use of ACRS.\(^4^7\) These early proposals sought to achieve simplicity and consistency within the piggyback system by adding back to taxable income for Florida purposes a percentage of the ACRS deductions taken.\(^4^8\)

Although these early proposals were simple, consistent with the piggyback system, and equitable in that they levied the tax upon those entities benefiting from ACRS, they still suffered from an inequity that could not be cured simply. That inequity arises because the only difference between the ACRS deductions and the pre-ACRS deductions is timing. The property’s useful economic life is unchanged; rather the annual depreciation deductions are larger initially under ACRS than those allowed under prior law. Under both systems, the taxpayer eventually writes off the entire basis of the property.\(^4^9\) For a piggyback provision to be revenue neutral under these early proposals, it would have to allow deductions in later years for the amount of ACRS deductions currently added back to taxable income for Florida purposes. An identical situation would result from a provision to return the amount of tax paid as a result of the increase in income resulting from the addback of ACRS deductions.\(^5^0\) If the additional tax were not returned in later years, then the provision would effectively deny taxpayers a full write-off of their property and would be revenue positive,\(^5^1\) not revenue neutral.

Perhaps even more serious than the timing problem was the problem of basis adjustments. If taxable income were merely increased by a percentage of the ACRS deduction taken and no corresponding basis adjustment were made for Florida purposes, Florida would tax the ACRS deduction again upon resale of the property.


\(^{48}\) See id. § 4.

\(^{49}\) This assumes that there is no salvage value. To the extent that salvage value exists, an asset will not be depreciable to 100% of its tax cost under the pre-ACRS provisions. Compare I.R.C. § 167(f) (1976) with I.R.C. § 168(b) (West Supp. 1982).

\(^{50}\) This is what was finally done through the excise tax credits. See Department of Revenue Report No. 2, supra note 23, at 3 (App. C, p. 724).

\(^{51}\) The provision would be revenue positive because in later years the taxpayer would be unable to take ACRS deductions for property after its recovery life had expired. In later years, the taxpayer would have less deductions and more taxable income than under the pre-ACRS depreciation provisions. Therefore, any act that exacted an increased tax liability in the initial years without providing for a credit in later years would be revenue neutral initially and revenue positive in later years. Most states that addressed the ACRS problem by an additional tax or an addback also provided for a subsequent tax credit or a deduction for the amount of additional tax or addback, respectively. See, e.g., CONN. GEN. STAT. ANN. § 12-217(b)(1) (West Supp. 1982).
property. In effect, this would create a "phantom gain" for Florida purposes because gain would be recognized using the federal basis computed after the effect of ACRS. Thus, the gain for Florida purposes would reflect the full ACRS deductions while a portion of those deductions would have been denied for Florida purposes because of the addback.

The taxation of any Florida "phantom gain" was of doubtful constitutional validity. The Legislature could have resolved the constitutional question by providing for annual increases to the federal basis equal to the ACRS addback. This would have created, however, tremendous administrative burdens. The Legislature would have forced taxpayers to keep separate Florida records for each asset so that the gain from the sale of an asset could be separately computed for Florida purposes. If separate records were kept for Florida purposes, then the Department of Revenue would no longer be able to rely on federal audits with respect to property transactions. This would have resulted in increased administrative and audit costs for both taxpayers and the Department of Revenue. The Legislature desired to avoid such administratively complex basis adjustments while providing for revenue neutral taxation. It rejected early proposals that merely adjusted taxable income by a percentage of the ACRS deduction and instead adopted the EET.

The EET proposal satisfied the four legislative goals: simplicity, revenue neutrality, equitability, and consistency within Florida's piggyback system. The EET is simple because it is easily applied: The tax is two percent of the total ACRS deductions, except those allowed under section 168(b)(3) of the I.R.C. The EET levied in the initial years is returned as a credit in the fifth year following

52. "Phantom gain" is a gain for federal purposes that does not exist for state purposes. For state purposes, the asset's basis should not be decreased to the extent that ACRS is disallowed. Therefore, the gain upon sale or disposition should be less for state purposes than for federal purposes. When basis adjustments are not made for state purposes, "phantom gain" results. This "phantom gain" would be recognized in Florida because Florida taxable income is predicated on federal taxable income. See Fla. Stat. §§ 220.12-.13 (1981) (amended 1982); cf. Act of March 22, 1982, ch. 523, art. 40, § 4, 1982 Minn. Laws 686, 914 (to be codified at Minn. Stat. Ann. § 290.09(7)(c) (percentage of ACRS disallowed with no corresponding basis adjustment)).

53. See Fla. P.C.B. 5, § 4, H.B. 3-F, 1982 Reg. Sess. (Draft No. 2) (App. F, p. 746). This proposed legislation would have required an addback of 49% to 50% of the ACRS deduction to federal taxable income for Florida purposes. Fiscal Impact Statement on P.C.B. 5, § 3 (prepared by House Committee on Finance & Taxation) (Jan. 11, 1982). The proposed bill was rejected because it was not revenue neutral—it did not provide for basis adjustments or tax credits—and particularly because it would create an administrative nightmare.
initial imposition of the EET, achieving revenue neutrality. It is theoretically equitable because it applies only to entities benefiting from the post-1980 amendments to the I.R.C. Some equitability was sacrificed, however, because the rate of the EET was determined from an aggregate economic analysis that was based on multifarious assumptions. Therefore, it is unlikely that the EET will be exactly equal to the tax benefit of the post-1980 amendments to the I.R.C. Although the Act perhaps was not equitable in each individual case, the Legislature reasoned that, in the aggregate, it achieves equitability and revenue neutrality. Through various elections, the EET was woven into the piggyback system and is therefore consistent with Florida's traditional tax system.

Another factor that made the EET more appealing than raising the income tax rate is that the latter requires a three-fifths vote of both houses of the Florida Legislature, while the former only requires a simple majority. The EET is not an increase in the tax rate, but instead is a modification of deductions allowed in

54. See infra notes 65-72 and accompanying text.
55. See Department of Revenue Report No. 1, supra note 40, at 6 (App. E, p. 736). The EET was calculated to be revenue neutral for five-year recovery property. This is inequitable in two respects. First, it over- or undercollects for recovery property other than five-year property. Second, the extent to which a taxpayer benefits from ACRS will depend upon its mix of assets and the previously available depreciation deductions.

Although these provisions may be inequitable, they are simple and have administrative advantages over more equitable provisions. For example, West Virginia has a variable add-back provision that is dependent on whether the source of the deduction is 3, 5, 10, or 15-year property. See W. Va. Const. § 11-24-6(b)(5) (Supp. 1982).

Recognizing that the actual revenue loss might be higher than originally anticipated, the Legislature included a second-look provision. This provision was necessary because projections of ERTA's effect could not be quantified accurately at the time the Act was passed. Moreover, the accuracy of the projections was dependent upon extraneous variables and economic factors that were impossible to predict accurately. The second-look provision provides that the revenue impact of the Act be reviewed by the Revenue Estimating Conference before the 1983 regular session of the Legislature. 1982 Fla. Laws ch. 82-232, § 6 (not codified). Other states have enacted similar provisions. See, e.g., Act of May 4, 1982, ch. 704, § 9, 1982 Me. Legis. Serv. 701, 705 (application of its revenue neutrality provisions is dependent upon an annual certification by the state budget officer that unappropriated revenues are sufficient to fund full federal conformity).

56. See infra notes 122-46 and accompanying text.
57. See Fla. Const. art. VII, § 5(b). Raising the income tax rate above five percent requires a three-fifths vote by each house. Instead of raising the tax rate, the Legislature could redefine the “net income” subject to the tax. See id. (“No tax . . . shall be levied . . . in excess of 5% of net income, as defined by law . . . .”) (emphasis added). The EET is analogous to any of the other addbacks to adjusted federal income under Fla. Stat. § 220.13 (1981). Because addbacks are analogous to the EET, addbacks and subtractions are valid exercises of the power granted to the Legislature to define “net income” for Florida purposes. But see infra note 168.
computing taxable income upon which the five percent corporate tax is levied. Therefore, if only one-half of the legislators approved the Act, it would probably withstand constitutional scrutiny.

B. The Emergency Excise Tax (EET)

The Act included the EET in new chapter 221 of the Florida Statutes. The EET is tied to the piggybacking elections and applies to any period in which a taxpayer deducts depreciation using ACRS for Florida purposes. All excise taxes collected in a given period are assessed against the ACRS deduction allowed for federal purposes.

59. See Fla. Stat. § 220.11(2) (1981); supra note 57.
60. An additional constitutional question is raised under Fla. Const. art. III, § 12, which states, "Laws making appropriations for salaries of public officers and other current expenses of the state shall contain provisions on no other subject." The Act included appropriations for twenty persons to be added to the Department of Revenue's staff. 1982 Fla. Laws ch. 82-232, § 4 (not codified). At first glance, the constitution seems to prohibit the inclusion of this appropriation in a general law such as the Act. The validity of the Act in this respect is supported, however, by Amos v. Morely, 74 Fla. 555, 77 So. 619 (1917). Amos held that the inclusion of appropriations in a general law is unconstitutional where such appropriations are for the payment of salaries and expenses necessary or incidental to the law itself. The appropriations in the Act seem to be related to tax law, although the portion of the appropriations regarding review of personal property assessments is only tenuously related to corporate income tax. But cf. Brown v. Firestone, 382 So. 2d 654 (Fla. 1980) (general appropriations bill may not contain provisions on other subjects).
62. See infra notes 116-46 and accompanying text.
63. The Florida Department of Revenue promulgated tax forms that require the taxation of all ACRS deductions taken for federal purposes apportioned to Florida, regardless of whether the ACRS deductions reduced "adjusted federal income" for Florida purposes. For example, foreign source income is excluded from Florida taxable income after reducing such foreign source income by its associated deducted expenses. Fla. Stat. § 220.13(1)(b)(2) (1981). Thus, the ACRS deductions associated with foreign source income do not reduce Florida taxable income and produce no Florida benefit. Under the Department's interpretation of the Act, however, the EET could be levied against these deductions.

Close technical scrutiny of the statutory language proves the implausibility of the Department's construction. Fla. Stat. § 221.01(1)(a) (Supp. 1982) states that the amount of the tax "shall be equal to 2 percent of the [ACRS] deduction allowed, in computing adjusted federal income as defined in s. 220.13 . . . ." (emphasis added). Fla. Stat. § 220.13(1) (Supp. 1982) states that "'adjusted federal income' means an amount equal to the taxpayer's taxable income as defined in subsection (2) . . . adjusted as follows . . . ." Subsection (2) defines a taxpayer's taxable income as "taxable income as defined in s. 63 of the Internal Revenue Code . . . ." One of the adjustments in determining adjusted federal income is foreign source income. Id. § 220.13(1)(b)(3).

In computing the EET, a taxpayer must start with federal taxable income, subtract all foreign source income, and then add all deductions associated with that foreign source income. Since the ACRS deductions from foreign source income have been added back for Florida purposes, they are not a deduction "allowed in computing adjusted federal income" within the meaning of § 221.01(1)(a). Therefore, the EET must be levied without reference to the disallowed ACRS deductions associated with foreign source income.
year are returned to the taxpayer in the form of a credit in the fifth year following imposition of the EET. No excise tax is levied on a taxpayer in any operating loss situation, to the extent that the loss is not caused by increased ACRS deductions.64

1. COMPUTATION OF THE EET

To enact a revenue neutral provision, the Legislature intended to levy the five percent corporate tax on that portion of the ACRS deductions which exceeded the pre-ACRS depreciation deductions;65 to achieve simplicity, the Legislature desired to impose a tax on the entire ACRS deductions without regard to pre-ACRS deductions.66 The result of these twin goals is the two percent EET, which is levied on the total ACRS deduction without reference to pre-ACRS depreciation. A two percent tax on the total ACRS deduction is equal to the five percent Florida corporate income tax applied to the expected excess of the ACRS over the pre-ACRS depreciation deductions.67

Two modifications to this application of the EET to the ACRS deductions are incorporated into the Act. The first modification is that the EET applies only to the ACRS deductions “apportioned

64. 1982 Fla. Laws ch. 82-232, § 3, amended by 1982 Fla. Laws ch. 82-385, § 4 & 1982 Fla. Laws ch. 82-399, § 6 (codified at Fla. Stat. § 221.01(1)(b) (Supp. 1982)).
65. See Department of Revenue Report No. 2, supra note 23, at 6 (App. C, p. 727) (illustration). The revenue loss is caused by the sheltering of otherwise taxable income from the Florida 5% corporate income tax.
66. If a taxpayer were required to account for actual ACRS deductions taken and deductions that would have been taken if the old depreciation provisions were used, an enormous administrative burden would be imposed on the taxpayer and revenue agents.
67. The EET was set at 2% using the following formula:

\[
EET = \frac{\text{marginal } \% \text{ increase}}{100\% + \text{marginal } \% \text{ increase}} \times \text{Tax}
\]

\[
= \frac{67\%}{167\%} \times 5\% \\
= 40\% \times 5\% = 2\%; \text{ where}
\]

marginal \% increase = expected increase in depreciation deductions caused by ACRS;
\[100\% + \text{marginal } \% \text{ increase} = \text{total depreciation deductions under ACRS expressed in terms of the pre-ACRS deductions; and}
\]
\[\text{Tax} = 5\% \text{ Florida corporate income tax rate.}
\]

The Florida Department of Revenue projected that ACRS would cause a 67% increase in depreciation deductions. See supra notes 44-45 and accompanying text.

The principles of the textual discussion are best exemplified by the following example: Assume that corporation A's net income before depreciation is $250; depreciation under pre-ACRS is $60; and under ACRS, $100 ($60 \times 167\%).
to this state under section 220.15 for the taxable year for which the return is required to be filed by Chapter 220. 68 Although strictly speaking, "taxable income" and not "deductions" are apportioned under section 220.15 of the Florida Statutes, section 220.15 is consistent with the legislative intent to only recover the revenue lost to Florida through the ACRS provisions. 69 This modification is consistent with other Florida taxation provisions that require taxation only on the portion of federal taxable income that is apportioned to Florida. 70

The second modification, as initially enacted, stated,

The amount of the tax shall be an amount equal to 2 percent of the excess of the deduction allowed under s. 168 of the Internal Revenue Code of 1954, as amended, apportioned to this state under s. 220.15, over the amount of the deduction allowed under s. 168 of the Internal Revenue Code of 1954, as amended, determined under s. 168(b)(3) of the Internal Revenue Code of 1954, as amended, apportioned to this state under s. 220.15 for the taxable year for which the return required by chapter 220 is filed. 71

The use of the word "allowed" when referring both to the accelerated and straight line ACRS deductions made this section difficult to interpret. Under general tax law principles, the word "allowed" refers to deductions that are actually taken, while the word "allowable" refers to deductions that may be taken. 72 Many tax-

<table>
<thead>
<tr>
<th></th>
<th>Pre-ACRS</th>
<th>ACRS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Income before depreciation</td>
<td>$250.00</td>
<td>$250.00</td>
</tr>
<tr>
<td>Depreciation</td>
<td>60.00</td>
<td>100.00</td>
</tr>
<tr>
<td>Taxable Income</td>
<td>190.00</td>
<td>150.00</td>
</tr>
<tr>
<td>Tax Rate</td>
<td>x 5%</td>
<td>x 5%</td>
</tr>
<tr>
<td>Tax Liability</td>
<td>9.50</td>
<td>7.50</td>
</tr>
<tr>
<td>EET</td>
<td>--</td>
<td>2.00*</td>
</tr>
<tr>
<td>Total Tax Revenue</td>
<td>$ 9.50</td>
<td>$ 9.50</td>
</tr>
</tbody>
</table>

* $100 (ACRS deduction) x 2%

The EET of $2.00 is equal to the 5% corporate tax rate applied to the excess of the ACRS over the pre-ACRS deductions. ($100 - $60 = $40 x 5% = $2.00).

68. FLA. STAT. § 221.01(1)(a)(1) (Supp. 1982).
70. See FLA. STAT. §§ 214.70-.73, 220.15 (1981). Apportionment is based on a three-factor formula using property, sales, and payroll.
71. 1982 Fla. Laws ch. 82-232, § 3 (emphasis added) (codified as amended at FLA. STAT. § 221.01(1)(a) (Supp. 1982)).
72. See I.R.C. § 1016(a)(2) (1976); Treas. Reg. § 1.167(a)-10 (1960); see also Commissioner v. Superior Yarn Mills, Inc., 228 F.2d 736 (4th Cir. 1955); Gardiner v. United States,
payers interpreted this section to levy the EET on the excess of the accelerated ACRS deductions "allowed" under I.R.C. sections 168(b)(1) and 168(b)(2) over the straight line ACRS deduction "allowable" under section 168(b)(3). Under this interpretation, if the accelerated ACRS deduction allowed were twenty dollars, and the straight line ACRS deduction allowable were eleven dollars, the EET would be levied only on the excess of the allowed accelerated ACRS deduction over the allowable straight line ACRS deduction, or nine dollars.

The legislative intent, however, was to tax all ACRS deductions other than straight line ACRS actually taken. Applying this concept to the above example, the EET should be levied on the entire twenty dollar ACRS deduction since no straight line ACRS deduction was actually taken. If both straight line and accelerated ACRS deductions are taken, the EET will be levied only on the accelerated ACRS deductions. This result is illogical because the straight line ACRS deductions are exempted from the EET only if they are actually taken. If the EET does not apply to straight line ACRS deductions actually taken, then the EET should apply only to the excess of accelerated ACRS actually taken over "allowable" straight line ACRS deductions; but as originally adopted, the Act contains the illogical approach and is not consistent with the concept of equitability and revenue neutrality.

Because the initial legislation caused confusion, the Legislature amended section 221.01(1) to explicitly levy the EET on all ACRS deductions except straight line. Section 221.01(1) now states, "The amount of the tax shall be an amount equal to 2 per-

391 F. Supp. 1202 (D. Utah 1975). Section 168(b)(3) of the I.R.C. allows a taxpayer to elect straight line depreciation; §§ 168(b)(1) and 168(b)(2) provide for accelerated depreciation.

73. Incorrect analysis published by certain tax services fostered this mistake.

74. See Pajcic House Memorandum, supra note 8, at 4 (App. A, p. 714). Initially, the Legislature intended to tax all § 168 deductions, whether straight line or accelerated. See Fla. P.C.B. 5, H.B. 3-F, 1982 Reg. Sess. (Draft No. 2), reprinted in Appendix F, infra p. 740. The change in attitude resulted from political pressure applied by income property investor groups. Department of Revenue studies indicated that expected revenue loss caused by excluding the § 168(b)(3) deductions was insubstantial. See Department of Revenue Report No. 2, supra note 23, at 4 (App. C, p. 725). Revenue loss under § 168(b)(3) would be caused by a taxpayer electing to use a shorter useful life than he was entitled to under the pre-ACRS methods.

75. The law as originally drafted levied the EET on all ACRS deductions, whether accelerated or straight line. Compare Department of Revenue Report No. 2, supra note 23, with Department of Revenue Report No. 1, supra note 40. Only Report No. 2 discusses the offset of the straight line exemptions—this problem was not present when Report No. 1 was written.

76. But see supra notes 67 & 74.
percent of the deduction allowed, in computing adjusted federal income as defined in s. 220.13, under s. 168 . . . exclusive of any deduction allowed under s. 168(b)(3) . . . ." The amendment retained the term "allowed" in referring to both the straight line and accelerated ACRS deductions, but deleted any reference to the excess of the accelerated over straight line ACRS deductions. Although it is still possible to misinterpret the term "allowed," and the logical inconsistency of exempting "allowed" straight line ACRS deductions while taxing "allowable" straight line ACRS deductions remains, the amendments to the Act more clearly reflect the legislative intent to tax all ACRS deductions actually taken except for straight line.

a. Net Operating Loss

In the interest of equity, the Legislature provided for separate treatment of taxpayers with net operating losses, if the net operating losses did not result from increased depreciation deductions under ACRS. Following the legislative intent, section 221.01(1)(b) of the Florida Statutes provides for a separate computation of the EET for taxpayers in an operating loss situation.\(^77\)

Unlike the normal EET computation, which levies a two percent tax over the entire accelerated ACRS deduction, the net operating loss computation levies a five percent tax on forty percent of the ACRS deduction in excess of the net operating loss. This method of computation is necessary because the Legislature could not tax the entire ACRS deduction and still exempt a taxpayer in an otherwise exempt operating loss situation. The Act therefore levied a five percent tax only on forty percent of the ACRS deduction after reducing it by the amount of the net operating loss.\(^78\)


79. See Fla. Stat. § 221.01(1)(b) (Supp. 1982). Actually, the statute levies a 2% tax on the result of the following equation: \(2.5 \times (.4 \text{ACRS} - \text{NOL})\), where ACRS equals the ACRS deductions taken, and NOL equals the net operating loss, excluding net operating loss carryforwards and carrybacks. Algebraically, this formula can be reduced to \(5\% \times (.4 \text{ACRS} - \text{NOL})\). If a taxpayer did not have an NOL, the equation would reduce to \(\text{EET} = .02 \times (\text{ACRS})\), or 2% of the ACRS deductions. Department of Revenue Form F-0221 ET uses this relationship.

Like the ACRS deduction, only the net operating loss apportioned to Florida is used in the computation. See supra note 70 and accompanying text. The net operating loss subtracted from the ACRS deduction is exclusive of net operating loss carryforwards or carrybacks. These were excluded to ensure that a taxpayer could not get a double benefit from losses, sheltering the EET. Otherwise, the ACRS deduction would be reduced in the loss
The forty percent figure was used because forty percent of the total accelerated ACRS deduction equals a sixty-seven percent increase over the pre-ACRS depreciation deduction, the amount over which the Legislature desired to levy the EET. (67%/167% = 40%). The Act then applies the EET to forty percent of the accelerated ACRS deduction after reducing that amount by the year's net operating loss. Under these provisions, the EET is not levied if the net operating loss equals forty percent of the accelerated ACRS deduction. The EET will be levied, however, to the extent that the net operating loss is less than forty percent of the ACRS deduction. This result is consistent with the legislative intent to enact a revenue-neutral provision and with the assumption that the revenue loss will stem from a sixty-seven percent increase in deductions under ACRS. In a net operating loss situation, the

year and then reduced again in a carryforward or carryback year. See 1982 Fla. Laws ch. 82-385, § 4 (codified at Fla. Stat. § 221.011(1)(b)(2) (Supp. 1982)).

80. See supra note 67.
81. Two examples illustrate this point:
1. (a) ACRS = $100; (b) NOL = $40;
   (c) EET = 5% × [.40 (100) - 40] = $0.
2. (a) ACRS = $100; (b) NOL = $20;
   (c) EET = 5% × [.40 (100) - 20] = $1.
These examples assume a 100% apportionment factor and no carryforwards or carrybacks.

The EET computed in the above examples is equal to the 5% corporate income tax applied to the excess of the ACRS over the pre-ACRS deductions that actually reduced taxable income. Under the Department of Revenue's assumptions, the pre-ACRS deduction would have been $60 ($100 ÷ 167%). In the table below, it is assumed that the $100 ACRS deduction has two components: an amount equal to the pre-ACRS depreciation ($60) and an amount attributable to faster write-offs allowed by ACRS ($40). Using these assumptions, the following table shows the relationship between the EET, the corporate tax, and ACRS:

<table>
<thead>
<tr>
<th></th>
<th>Example 1</th>
<th>Example 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>Income before depreciation</td>
<td>$ 60</td>
<td></td>
</tr>
<tr>
<td>Pre-ACRS depreciation</td>
<td>60</td>
<td></td>
</tr>
<tr>
<td>Taxable income before</td>
<td></td>
<td></td>
</tr>
<tr>
<td>ACRS additional depreciation</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>ACRS additional depreciation that reduces taxable income</td>
<td>0</td>
<td>20</td>
</tr>
<tr>
<td>ACRS additional depreciation that did not reduce taxable income</td>
<td>40</td>
<td></td>
</tr>
<tr>
<td>NOL</td>
<td>$(40)</td>
<td></td>
</tr>
</tbody>
</table>

In example 2, the additional ACRS deduction reduced taxable income; in example 1, it did not. Applying the tax rate to the reduced taxable income results in no tax revenue lost in example 1 but $1 of tax revenue lost in example 2 (5% × $20). See supra note 67.
82. See example 2, supra note 81.
EET is levied on ACRS deductions only to the extent that they reduce taxable income. This is revenue neutral under the state's assumptions because the state would not have collected revenue under the old law in an operating loss situation.

The first amendment to the net operating loss provision deleted the reference to the excess of accelerated over straight line ACRS and replaced it with wording that imposes the EET on all ACRS deductions exclusive of straight line ACRS actually taken; this amendment provided consistency between net operating loss and non-net operating loss situations.

In net operating loss and non-net operating loss situations, only the ACRS deduction apportioned to Florida is taxed. Similarly, in the net operating loss situation, the apportioned ACRS deductions are reduced by the net operating loss apportioned to Florida. Initially, the Act allowed the entire federal net operating loss to be applied against the apportioned ACRS deduction, which would have given taxpayers a potential windfall. The first amendment changed these provisions to allow only the apportioned net operating loss deduction to be subtracted from the apportioned ACRS deduction, thus preventing the potential windfall.

2. EET CREDIT

To achieve revenue neutrality, the Legislature required that the Act include credit provisions designed to return the EET collected; the credit is evidence of a legislative recognition that the revenue "loss" to the state is not a real "loss," but rather a timing problem. The credit provision is designed to adjust the annual flow of revenues to approximate the flow under pre-ERTA law.

To approximate the pre-ERTA flow of revenues, the Act added section 221.02 of the Florida Statutes, which provides for a credit, equal to the EET paid, in the fifth taxable year following the taxable year in which the EET was paid. If a taxpayer files a

83. See supra note 81.
84. 1982 Fla. Laws ch. 82-385, § 4 (codified at Fla. Stat. § 221.01(1)(b)(1) (Supp. 1982)).
85. See supra notes 71-77 and accompanying text.
86. See supra note 70 and accompanying text.
87. See Fla. Stat. § 221.01(1)(b)(2) (Supp. 1982); supra note 79.
89. See 1982 Fla. Laws ch. 82-385, § 4.
90. See supra notes 44-45 and accompanying text.
91. See 1982 Fla. Laws ch. 82-385, § 3 (codified at Fla. Stat. § 221.02 (Supp. 1982)).
The credit is primarily a credit against the EET due in the year the credit is given, but if the credit exceeds the EET due in any year, the excess is allowed as a credit against the regular corporate income tax. If a taxpayer cannot use the credit either against the EET or regular corporate income tax due in a taxable year, the credit will carryover to the succeeding five taxable years.

Although the EET is a carryover credit, other credits granted by the Florida Income Tax Code are "non-carryover" credits that may only be used in the year granted. Section 220.02(9) of the Florida Statutes, which was added by the Act, establishes a hierarchy for applying carryover and non-carryover credits in any taxable year. This section provides that the non-carryover credits must be used before the carryover credits; only the amount of the EET credit that exceeds the EET due in any year is controlled by the section. The excess EET credit is the last credit that a taxpayer may apply against its franchise or corporate income tax in any taxable year. Section 220.02(9) does not apply, however, to the EET credit to the extent that the taxpayer applies it against the EET due in any year.

Section 220.02(9) of the Florida Statutes also specifies, inter alia, the bank franchise tax credit under section 220.68; both the bank franchise tax and the EET credits apply against any bank franchise tax due. The bank franchise tax credit applies against the franchise tax imposed on banks and savings and loan associations to the extent of forty percent of the franchise tax due. Because the franchise tax is a de facto income tax, banks and savings

92. See Fla. Stat. § 221.02(1) (Supp. 1982).
93. Id; see infra note 97.
96. Id. § 220.02(9) (Supp. 1982).
97. The section states, "It is the intent of the Legislature that credits against either the corporate income or the franchise tax be applied in the following order . . . ." Id. (emphasis added). Section 221.02(1) states, "The emergency excise tax paid pursuant to s. 221.01 . . . shall be allowed as a credit against the emergency excise tax. . . . To the extent that the credit exceeds the emergency excise tax, . . . such excess shall be allowed as a . . . credit against, any tax imposed by chapter 220 . . . ." Id. § 221.02(1) (emphasis added).
99. See id. §§ 220.02(9), .68(2) (1981) (amended 1982). The credit is the lesser of the intangible tax paid by a bank or savings association under id. § 199.032(1) (1981) or 40% of the franchise tax imposed on banks and savings associations. For purposes of this article, it will be assumed that the credit will be derived solely from the franchise tax.
and loan associations argued that if the EET is also considered to be an income tax, then they should be able to claim the EET paid as a credit under both sections 221.02 and 220.68.

Although this argument had merit, this overlap of credits was not technically supported by the wording of the statutes. Section 220.68(2) allowed a credit of "40% of the tax due pursuant to Part VII." Read strictly, this section allowed only a credit of forty percent of the franchise tax due under Part VII of chapter 220 without reference to the EET levied under chapter 221. A bank or savings and loan association, therefore, was allowed two separate, non-overlapping credits—one under chapter 220 and another under chapter 221.

The first amendment to the Act rectified this problem by modifying section 220.68 to include the EET due under chapter 221. As amended, the Florida Statutes provide banks and savings and loan associations with two overlapping credits. The first credit, which has priority under section 220.02(9) is "[f]orty percent of the sum of the tax due pursuant to part VII and the tax due pursuant to chapter 221 [EET]." The second credit is the EET credit provided by section 221.02. The dual-credit provisions are consistent with the concept that the EET is an income tax levied to offset a timing difference.

3. MISCELLANEOUS PROVISIONS OF THE EET

a. Addback of EET to Federal Taxable Income

For federal income tax purposes, a taxpayer may deduct from gross income the EET paid or accrued in any taxable year. Be-
cause the Florida corporate income tax is based on federal taxable income, any EET deducted for federal purposes would reduce state income tax revenues by 5% of the deduction, or approximately $1,700,000 in fiscal year 1981-1982, increasing to $13,335,000 in fiscal year 1985-1986.107 The first amendment addressed this problem by adding section 220.13(1)(a)(6) to the Florida Statutes.108 This section requires that a taxpayer add-back to federal taxable income an amount equal to the EET deducted for federal purposes. The add-back allows the state to collect the same tax revenues as it would if the EET were not in effect.

b. Multitiered Business Entities

The first amendment created section 221.01(1)(c) of the Florida Statutes,109 which applies the EET to corporate taxpayers plac-
ing ACRS property in a partnership and receiving a distributive share of the partnership's ACRS deduction. This section was added to prevent taxpayers from merely placing property subject to the ACRS in a partnership and then distributing the deduction; this maneuver would have avoided the EET as originally enacted, which would have applied only to corporate entities.

Although the first amendment addressed the partnership problem generally, its failure to address certain permutations of the problem created ambiguities. The initial partnership provision addressed property placed in a single-tiered partnership, but it did not address the effect of placing property in either a multitiered partnership or another noncorporate entity, such as a trust. Multitiered partnerships could have escaped this provision because it applied only to partners of a partnership owning ACRS property; it did not apply to partners of a partnership that was in turn a partner in a partnership owning ACRS property.

The second amendment remedied this problem by requiring the section to apply to "[a] taxpayer [that] directly or indirectly owns an interest in a partnership, trust or other entity which is not treated as an association taxable as a corporation under the Internal Revenue Code . . ." This section covers all direct or indirect interests in any partnership or other entity, whether multi- or single-tiered, from which the benefit of the ACRS deductions flows back to a corporate taxpayer. A corporate taxpayer will be subject to the EET on any ACRS benefit flowing through an entity to the same extent as if the taxpayer had received the benefit directly. For example, if a taxpayer owns a fifty percent interest in a partnership, whether directly or indirectly, the EET will apply to the taxpayer to the extent of fifty percent of the accelerated ACRS deductions taken by the partnership and apportioned to Florida under section 220.15.
C. To Whom Does the EET Apply?

1. INTRODUCTION

The Act updates the definition of the "Internal Revenue Code" in section 220.03(1)(1) of the Florida Statutes to include the "United States Internal Revenue Code of 1954, as amended and in effect on January 1, 1982."118 Newly created section 220.03(5) of the Florida Statutes, which controls other provisions of the Florida Income Tax Code,117 including the definitional provisions, provides that the effective dates of all amendments to the I.R.C. from January 1, 1980 to January 1, 1982 (the hiatus period) will be their effective dates for federal purposes.118 Section 220.03(5) also contains two elections that override these general provisions. One election piggybacks all amendments to the I.R.C. during the hiatus period prospectively from January 1, 1982.119 The other election postpones piggybacking indefinitely, allowing a taxpayer to apply indefinitely both the I.R.C. and the Florida Income Tax Code in effect on January 1, 1980.120 Finally, a taxpayer may revoke its initial election.121

2. RETROACTIVE PIGGYBACKING—THE GENERAL RULE

The general rule, which is contained in section 220.03(5)(a) of the Florida Statutes, provides,

Notwithstanding any other provision of this code, each amendment to the Internal Revenue Code of 1954, as amended and in effect on January 1, 1980, which was enacted by the Congress of the United States after January 1, 1980, and before January 1, 1982, and which had an effective date prior to January 1, 1982, shall be given effect under this code retroactive to the effective date of such amendment unless the taxpayer makes the

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118. Id.

119. See Fla. Stat. § 220.03(5)(b) (Supp. 1982). This section is commonly known as "Election A." See Department of Revenue Form F-1120A, § II. A taxpayer who makes this election has effectively elected to have the I.R.C. in effect on January 1, 1980 apply until January 1, 1982.

120. See Fla. Stat. § 220.03(5)(c). This election is commonly known as "Election B." See Department of Revenue Form F-1120A, § II.

121. See Fla. Stat. § 220.03(5)(e).
election provided for in paragraph (b) or in paragraph (c).\textsuperscript{122}

The purpose of this provision is to control the definitional provision of section 220.03(1)(l) of the Florida Statutes, and apply the hiatus period amendments retroactively to their effective dates for federal purposes, unless an election is made to either partially or indefinitely postpone piggybacking.\textsuperscript{123} The general rule had to be enacted because the amendment of section 220.03(1)(l) only applied the I.R.C. as in effect on January 1, 1982 from January 1, 1981 onward.\textsuperscript{124} This means that, without section 220.03(5)(a), the January 1, 1980 I.R.C. would apply to all taxable years ending before January 1, 1981 and the hiatus period would remain governed by the I.R.C. in effect on January 1, 1980.\textsuperscript{125}

The general rule is selectively retroactive because each post-1980 amendment is retroactive to its effective date for federal purposes. This ensures that amendments to the I.R.C. are not given effect in Florida before they are effective for federal purposes. By providing for retroactivity to the effective date for federal purposes, the Legislature created a consistent piggybacking system that does not need further adjustments between the Florida and federal income tax codes.

Under the wording of the statute, the general rule applies unless a taxpayer makes a positive election to the contrary. Thus any taxpayer that fails to make one of the two elections\textsuperscript{126} to postpone piggybacking will be subject to the EET. Additionally, if a taxpayer has filed Florida tax returns "correctly" during the hiatus period (applying the I.R.C. as in effect on January 1, 1980) and subsequently makes an election (or fails to make an election) that results in retroactive piggybacking, it may be required to amend its returns for those years.\textsuperscript{127}

\begin{footnotes}
\item 122. Id. § 220.03(5)(a). (Supp. 1982)).
\item 123. See Pajcic House Memorandum, supra note 8, at 3 (App. A, p. 713).
\item 124. This is also true for calendar year taxpayers, who must file their 1981 tax returns under the Florida Income Tax Code as amended by the Act. For fiscal year taxpayers, however, the Act may apply prior to January 1, 1981. Thus, a fiscal year taxpayer whose tax year ended July 1, 1981 would be affected by the Act even for the period from July 1, 1980 to January 1, 1981. The constitutional validity of this application to fiscal year taxpayers is questionable. See supra note 13.
\item 125. This period would also remain governed by the Florida Income Tax Code in effect on January 1, 1980.
\item 126. A taxpayer must make an election by August 26, 1982. A taxpayer merely unaware or negligent will be deemed to have chosen the general rule if neither election is made by August 26, 1982. See Fla. Stat. § 220.03(5)(b)-(c) (Supp. 1982); see also id. § 220.03(5)(d).
\item 127. Amended returns will not be required if the tax returns previously filed are unaffected by the post-1980 amendments. Amended returns, if required, must be filed within 60
\end{footnotes}
3. PROSPECTIVE PIGGYBACKING—THE FIRST ELECTION

The first election provided in section 220.03(5)(b) of the Florida Statutes\(^{128}\) allows a taxpayer to piggyback from January 1, 1982 onward. This election obviates the constitutional prohibition against levying a “retroactive” tax by allowing all taxpayers the option of electing a prospective tax.\(^{129}\)

While avoiding constitutional prohibitions, the first election provision is ambiguous. The last clause of the first election states, “the continuing tax ramifications of such events and transactions shall be governed by the law in effect on January 1, 1980.”\(^{130}\) This clause does not define whether the “law” in effect on January 1, 1980 is the I.R.C. in effect on January 1, 1980, the Florida Income Tax Code in effect on January 1, 1980, or both. An analogous provision in the second election, section 220.03(5)(c) of the Florida Statutes\(^{131}\) states that both the I.R.C. in effect on January 1, 1980 and the Florida Income Tax Code in effect in 1980 will apply during the period that piggybacking is indefinitely postponed.\(^{132}\) The second election’s intent is that both the Florida Income Tax Code and the I.R.C. in effect on January 1, 1980, applicable during any non-piggybacked period, should also apply to the non-piggybacked period under the first election. As a practical matter, few significant amendments were made to the Florida Income Tax Code during the hiatus period\(^{133}\) and the first election clearly states that amendments to the I.R.C. made during the hiatus period do not apply until January 1, 1982.\(^{134}\) The consistent approach is to apply

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\(^{128}\) FLA. STAT. § 220.03(5)(b) (Supp. 1982).

\(^{129}\) The Legislature was unsure of the constitutionality of forcing taxpayers to go back two years to pick up the federal amendments for Florida purposes. This election did not entirely avoid the problem of a retroactive tax, however, because the election applies amendments made during the hiatus period and applies the EET from January 1, 1982 onward, while the Act did not take effect until April 26, 1982. If the election is made, it will be retroactive for the period between January 1, 1982 and April 26, 1982. See supra note 13.

\(^{130}\) FLA. STAT. § 220.03(5)(b) (Supp. 1982) (emphasis added).

\(^{131}\) Id. § 220.03(5)(c).


\(^{134}\) Because the federal amendments do not apply until January 1, 1982 and because no significant amendments were made to the Florida Income Tax Code, the issue is merely one of clarity unless taxpayers or the Department argue that post-1980 judicial and administrative decisions also do not apply. If this argument prevails, then the issue as to which
both the Florida Income Tax Code and the I.R.C. in effect on January 1, 1980 during the non-piggybacked hiatus period.

As initially promulgated, the Act did not specify when the first election had to be made. The first amendment to the Act stated that a taxpayer must make the election “within 90 days after the effective date of this act, or upon filing the first return for tax due under this chapter, whichever is later.” The intent of this amendment was to provide two deadlines for making the election. The first deadline required all taxpayers who had filed Florida corporate income tax returns in previous years (“old” taxpayers) to make the election within ninety days of the first amendment. The second deadline required all taxpayers filing an initial Florida corporate income tax return (“new” taxpayers) to make the election concurrently with such filing.

As written, however, the wording of the first amendment was ambiguous and some taxpayers interpreted the phrase “or upon filing the first return for tax due under this chapter, whichever is later,” as an alternative date for “old” taxpayers. Interpreted in this manner, the clause would allow all taxpayers, whether “old” or “new,” to make the election upon filing their first Florida corporate income tax return after the effective date of the first amendment. The deadline clause also allowed those taxpayers, who had filed Florida corporate income tax returns between January 1, 1982 and the effective date of the first amendment, ninety days after the statute’s enactment in which to make an election, whether such taxpayers were “old” or “new.”

This confusion was remedied in the second amendment to the Act, which amended the deadline language to read, “[A] taxpayer may make an election . . . by August 26, 1982, or for a taxpayer filing an initial return, upon filing the first return for tax due

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Florida law—1980 or 1982—applies becomes crucial. See infra note 146.

135. See 1982 Fla. Laws ch. 82-232, § 1 (codified as amended at Fla. Stat. § 220.03(5)(b) (Supp. 1982)). The Act only provided that “[a] taxpayer may make . . . an . . . election, as prescribed by the department . . . .”

136. 1982 Fla. Laws ch. 82-385, § 1 (codified as amended at Fla. Stat. § 220.03(5)(b) (Supp. 1982)).

137. Id.

138. As finally amended, this alternative is available to both “new” and “old” taxpayers. It is the only deadline applicable to “old” taxpayers and is an alternative deadline for “new” taxpayers. This deadline only applies to “new” taxpayers, however, if the taxpayer files an initial return before August 26, 1982. Therefore, this alternative will no longer be available to “new” taxpayers after that date and they will have to make an election upon filing their initial return. See Fla. Stat. § 220.03(5)(b)-(c) (Supp. 1982).
under this chapter, whichever is later . . . .” 139 Deleting “within 90 days after the effective date of this Act” and inserting a specific date resolved the problem of determining the effective date of “this Act” and made the election deadline easily ascertainable. The phrase “for taxpayers filing an initial return” was added to make it clear that the second deadline is only for taxpayers that have never filed a Florida corporate income tax return. Two distinct deadlines now exist, one for “old” taxpayers and one for “new” taxpayers. 140

The same election deadlines also apply to the second election, which postpones piggybacking indefinitely, 141 and indirectly to the general rule. 142 Because the first and second elections are affirmative elections out of the general rule, a failure to exercise the right of election will cause the taxpayer to be deemed to have elected the general rule—retroactive piggybacking. 143

4. INDEFINITE POSTPONEMENT OF PIGGYBACKING—THE SECOND ELECTION

The second election allows a taxpayer to pay the Florida corporate income tax as if both the I.R.C. and the Florida Income Tax Code as amended and in effect on January 1, 1980, are in effect indefinitely. 144 This election, which must be made by the same deadlines as the first election, fully avoids the retroactive imposition of the EET. 145 The price for avoiding the EET is that all post-

139. 1982 Fla. Laws ch. 82-399, § 4 (codified at Fla. Stat. § 220.03(5)(b)-(c) (Supp. 1982)).
140. “New” taxpayers actually can use both deadlines until August 26, 1982. See supra note 138.
142. The deadlines apply to the general rule by exclusion. If neither election is made by the deadline, the general rule will apply. The taxpayer may, however, revoke the general rule and choose the second election. See infra notes 154-72 and accompanying text.
143. The election form that the Department of Revenue promulgated contradicts the statute. The statute states that “new” taxpayers must make their elections “upon filing the first return for tax due under this chapter.” Fla. Stat. § 220.03(5)(c) (Supp. 1982) (emphasis added). This means that even if a taxpayer files a return late, the election will be timely if made before the return is filed. This prevents a “new” taxpayer filing a late initial return from electing the general rule by default. In contrast, the election form states that the election must be made by the due date for filing the initial tax return. Under this interpretation a “new” taxpayer filing a late initial return would be deemed to have elected the general rule even before the return was filed. See Department of Revenue Form F-1120A, pt. one, instruction 2.
144. Fla. Stat. § 220.03(5)(c) (Supp. 1982). This election was the result of a political decision to allow taxpayers not benefiting from ACRS to avoid the EET by electing to apply the I.R.C. in effect on January 1, 1980.
145. See supra notes 137-43 and accompanying text.
1980 changes to the I.R.C. will not apply for Florida purposes and the taxpayer will be governed by the Florida Corporate Income Tax Code in effect on January 1, 1980.¹⁴⁶

a. FIRPTA

The second election contains one exception to the nonapplication of post-1980 amendments to the I.R.C. The first amendment to the Act amended the second election to state that the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA)¹⁴⁷ will be considered to be part of the I.R.C. in effect on January 1, 1980.¹⁴⁸ The Legislature added this provision when it realized that numerous foreign entities would choose to forego piggybacking indefinitely to avoid for state tax purposes the application of FIRPTA.

Under the second election, FIRPTA applies for all tax years beginning after January 1, 1982.¹⁴⁹ Therefore, FIRPTA does not apply to the hiatus period and it will affect only prospectively foreign taxpayers making this election.¹⁵⁰ Foreign taxpayers will not, therefore, be able to avoid application of FIRPTA after January 1, 1982.

As initially promulgated, the second election applied FIRPTA without reference to the amendments made by ERTA (pre-ERTA FIRPTA).¹⁵¹ This resulted in the anomaly of post-ERTA FIRPTA applying to those taxpayers who elected to piggyback retroac-

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¹⁴⁶. There may be an additional price: If the I.R.C. and Florida Income Tax Code in effect on January 1, 1980 apply, then post-1980 judicial and administrative decisions arguably will not. If this is correct, then the Florida income tax law for such taxpayers will be truly frozen on January 1, 1980. Any judicial decisions after that date which interpret pre-January 1, 1980 law would, under this theory, not apply. This could be more significant than the nonapplication of statutory changes.


¹⁴⁸. 1982 Fla. Laws ch. 82-385, § 1 (codified as amended at Fla. Stat. § 220.03(5)(c) (Supp. 1982)) provides,

For the purposes of taxation of taxpayers who make the election provided for in this paragraph, the Internal Revenue Code of 1954, as amended and in effect on January 1, 1980, shall include, for tax years beginning on or after January 1, 1982, the provisions of the Foreign Investment in Real Property Tax Act of 1980, P.L. 96-499.

¹⁴⁹. 1982 Fla. Laws ch. 82-385, § 1.

¹⁵⁰. Clearly, FIRPTA will not apply to the hiatus period under the first election either. This is because the I.R.C. in effect on January 1, 1980, which applies to the hiatus period, did not include FIRPTA. See Fla. Stat. § 220.03(5)(b) (Supp. 1982).

¹⁵¹. The first amendment referred to Pub. L. No. 96-499, the initial enactment of FIRPTA. The amendment contained no reference to Pub. L. No. 97-34 (ERTA).
tively\textsuperscript{152} and pre-ERTA FIRPTA applying to those taxpayers who elected to forego piggybacking indefinitely. The Legislature solved this problem in the second amendment to the Act by adding that “the amendments to . . . [FIRPTA] codified in the Internal Revenue Code, as defined in section 220.03(1)(l)” also apply.\textsuperscript{183} Therefore, all amendments to FIRPTA that the Florida Legislature piggybacks onto the Florida Income Tax Code will apply to taxpayers making the second election.

Applying all FIRPTA amendments to taxpayers making the second election is inconsistent with that election because it states that if piggybacking is postponed indefinitely, the provisions of the 1980 Florida Income Tax Code will apply. Various parties have argued that if piggybacking is postponed indefinitely, other provisions of the current Florida tax statutes (such as the installment sales revision amendments) do not apply and that the 1980 version of the Florida Income Tax Code applies instead for all purposes other than making the piggyback election.\textsuperscript{184} Interpreted in this manner, however, the amendment to the FIRPTA language becomes meaningless because the I.R.C. as defined in the 1980 Florida Code did not include FIRPTA or any revocation provisions. For FIRPTA and revocation purposes, however, the current Florida Code applies,\textsuperscript{185} even though an election is made to postpone piggybacking and under that election the 1980 Florida Income Tax Code will apply for all other purposes.

5. REVOCATION OF ELECTIONS

The Legislature desired to allow any taxpayer to revoke its initial election for three reasons: First, the elections involve a significant tax impact through the application of the EET; second, the election deadlines are fairly close to the date of enactment; and third, the precise effect of the post-1980 I.R.C. amendments was unknown. The initial revocation provision stated, “Notwithstanding the other provisions contained in this subsection, taxpayers may one time only revoke, in accordance with rules formulated by

\textsuperscript{152} Post-ERTA FIRPTA would also apply to those taxpayers electing to piggyback prospectively from January 1, 1982 because the I.R.C. in effect on January 1, 1982, which includes the amended FIRPTA, will apply.

\textsuperscript{153} 1982 Fla. Laws ch. 82-399, § 4 (codified at Fla. Stat. § 220.03(5)(c) (Supp. 1982)).

\textsuperscript{154} See, e.g., Pajcic House Memorandum, supra note 8, at 3 (App. A, p. 713); see also infra notes 208-10 and accompanying text.

\textsuperscript{155} See Fla. Stat. § 220.03(5)(c) (Supp. 1982).
the department, an election made pursuant to (a), (b) or (c)."\textsuperscript{158}

The intent of this provision was to allow one revocation of any election,\textsuperscript{157} including revocation of the general rule to piggyback retroactively. When read in conjunction with other provisions of the Act, however, certain problems arose. Initially, the first and second elections were termed "irrevocable elections,"\textsuperscript{158} creating some uncertainty as to how a taxpayer could later revoke an "irrevocable" election.\textsuperscript{159} A more serious question was how to determine the effect of a revocation.

The Act contained no guidance on how a revocation would affect the period between election and revocation. The revocation provision did state that a revocation must be in accordance with rules promulgated by the Department of Revenue,\textsuperscript{160} but significant uncertainty on the effect of a revocation justified legislative guidance.

In the first amendment to the Act, the word "irrevocable" was removed from the first election, a specific revocation provision was added to the second election (postponing piggybacking indefinitely), and the general revocation provision was entirely rewritten.\textsuperscript{161} The specific revocation provision added to the second election allows a taxpayer to revoke the second election one time and states that such revocation is only prospective in nature.\textsuperscript{162} Fur-

\begin{itemize}
\item 156. 1982 Fla. Laws ch. 82-232, § 1 (repealed 1982).
\item 157. See Pajcic House Memorandum, supra note 8, at 2 (App. A, p. 712). Revocation is particularly important for nonprofit and subchapter S corporations because their tax status may change radically and suddenly. A change in status may completely change a corporation's decisions with respect to, inter alia, accelerated depreciation, the EET, and method of accounting.
\item 158. 1982 Fla. Laws ch. 82-232, § 1 (codified as amended at Fla. Stat. § 220.03(5)(b)-(c) (Supp. 1982)).
\item 159. See Pajcic House Memorandum, supra note 8, at 3 (App. A, p. 713). The intent was for "irrevocable" to refer to the continuing tax consequences of events and transactions occurring during the time the initial election was in effect but before revocation.
\item 160. See supra text accompanying note 156.
\item 161. See 1982 Fla. Laws ch. 82-385, § 1 (codified as amended at Fla. Stat. § 220.03(5)(a)-(e) (Supp. 1982)). The new general revocation provision states,
\begin{quote}
A taxpayer who does not initially make the election provided for in paragraph (c) within the time period specified therein may subsequently make an election, in accordance with rules formulated by the department, to report and pay the tax as levied by this chapter as provided in said paragraph, except that the revocation provided in said paragraph shall be not available to such taxpayer. Such election shall be prospective in nature, and all transactions and events occurring during the period during which the initial method of tax treatment is in effect and the continuing tax ramifications of such events and transactions shall be governed by the provisions applicable to such method.
\end{quote}
\item 162. 1982 Fla. Laws ch. 82-385, § 1 (codified as amended at Fla. Stat. § 220.03(5)(c) (Supp. 1982)).
\end{itemize}
ther, all transactions and events occurring before revocation, and the continuing ramifications of such transactions and events, will be governed by the I.R.C. and Florida Code in effect in 1980.163

The first amendment also modified the first election (postponing piggybacking only during the hiatus period) to make it available only to taxpayers who had not opted initially for the second election (postponing piggybacking indefinitely).164 Therefore, a taxpayer revoking the second election in effect elects to have the general rule (retroactive piggybacking) apply from the date of revocation forward; a taxpayer cannot choose the first election after initially choosing the second election.

The revised general revocation provision, section 220.03(5)(e) of the Florida Statutes,165 provides that a taxpayer who initially chooses to have the general rule or the first election apply has a one-time option of revoking this election and choosing the second election. This section does not allow a taxpayer initially choosing the general rule to subsequently select the first election, nor does it allow a taxpayer initially opting for the first election to subsequently choose the general rule.166 The revocation under section 220.03(5)(e) is also prospective in nature and all transactions and events occurring before revocation will be governed by the provisions of the initial election.167

A purely prospective revocation was provided to prevent taxpayers from avoiding payments of estimated EET168 during a revo-

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163. See id. The phrase "shall be governed by the provisions of this paragraph" means that the 1980 law will apply indefinitely.
164. See 1982 Fla. Laws ch. 82-385, § 1 (codified as amended at Fla. Stat. § 220.03(5)(b), (e) (Supp. 1982)). This was accomplished by adding an introductory clause to the first election, which states, "[u]nless a taxpayer elects under paragraph (c)." Paragraph (c) is the election to postpone piggybacking indefinitely.
166. See supra note 159. The only option available under § 220.03(5)(e) is to choose subsequently the second election (postponing piggybacking indefinitely).
168. The administrative procedures that apply to the assessment, collection, and payment of the corporate income tax also apply to the EET. See Fla. Stat. § 221.04 (Supp. 1982). Although no regulations have been promulgated yet, the Department of Revenue has indicated that payments of estimated EET will be due for all tax years beginning on or after July 1, 1982. See Department of Revenue Form F-0221 ET, pt. two. The payment of esti-
cation year. For example, if revocation were retroactive, a taxpayer who had initially chosen the second election could revoke the election at the end of the tax year, allowing the taxpayer to piggyback retroactively while avoiding payment of the estimated EET payments that would have been due if revocation were made at the beginning of the year. To prevent this, the Department of Revenue is currently promulgating regulations that will parallel the federal election provisions for subchapter S corporations. Under the Department's proposed regulations, a revocation is effective for a tax year only if a taxpayer makes the revocation during the first month of the tax year. If the revocation is made after the first month of a tax year, it will not be effective until the following tax year.

Because revocation can only be prospective from the date of revocation onward, and because the hiatus period occurred before the effective date of the Act, revocation will not be possible during the hiatus period. Therefore, the initial election will govern the entire hiatus period. Although this result is somewhat inequitable, since the elections are revocable any time after the hiatus period, the intent was to place the hiatus period under one election in the interest of simplicity. The specific revocation clause in the estimated EET will be due at the same time as the payment of the estimated corporate income tax and will be due from all taxpayers with an expected annual EET in excess of $2,500. Id. Thus, EET payments may be due from taxpayers who are not required to make estimated corporate income tax payments.

The fact that a taxpayer may be liable for the EET, but not the corporate income tax, in the same year casts doubt upon the constitutional validity of the Act. Article 7, section 5(b) of the Florida Constitution states, "There shall be exempt from taxation not less than five thousand dollars (5,000) of the excess of net income subject to tax over the maximum amount allowed to be credited against income taxes levied by the United States and other states." A taxpayer who elects the general rule and uses the accelerated ACRS deductions may be liable for the EET, but not have any taxable income. To the extent that the EET is construed to be an income tax, it would, in the above example, be unconstitutional if applied to the first $5,000 of additional ACRS deductions.

169. See supra note 168. If the revocation were made at the beginning of the tax year and expected EET is in excess of $2,500 for that year as the result of the revocation, then estimated EET payments would be due.


171. By not allowing retroactive revocation, only one tax method will be allowed for the entire hiatus period. During any other two-year period, a taxpayer may choose a different treatment for each year—realizing of course that a taxpayer is allowed only one revocation. Additionally, the initial choice of elections by definition is retroactive. A consistent, but more complicated, treatment would allow retroactive revocation during the hiatus period only. This would allow a taxpayer to split the hiatus period but would prevent retroactive revocation, with its concomitant problems, after January 1, 1982.

172. If, however, the word "prospective" is interpreted as relating to tax years instead
ond election supports this conclusion: "Such revocation shall be prospective in nature . . . ."173

The general revocation provision differs from the second election's revocation provision:

A taxpayer who does not initially make the [second] election . . . may subsequently make an election . . . to report and pay . . . tax [using the second election]. Such election shall be prospective in nature, and all transactions and events occurring during the period during which the initial method of tax treatment is in effect and the continuing tax ramifications of such events and transactions shall be governed by the provisions applicable to such method.174

Although this provision serves as a revocation provision, it is worded in terms of a subsequent election, rather than in terms of revocation.175

Making an election for different tax treatment necessarily involves a concomitant de facto revocation of the previous tax treatment. Because section 220.03(5)(e) of the Florida Statutes does not state that both a revocation and a subsequent election are prospective, it can be interpreted to allow the de facto revocation to be retroactive. Under this interpretation, the initial election would not be in effect during the period to which the revocation applied retroactively. Interpreted in this manner, the election to postpone piggybacking indefinitely could be retroactively chosen upon retroactive revocation of the other election. This would, however, conflict with the language of the general revocation provision, which states that the election to postpone indefinitely, if chosen upon revocation, will be prospective.

The most consistent interpretation of these provisions is that, because the subsequent election may only be prospective in nature, and because the period after revocation must necessarily be governed by some election, revocation under the general revocation provision is also only prospective. This ambiguity could be resolved by regulation.176 Consistent interpretation of these provisions would make revocation under the general revocation provi-

of the date of enactment, then the taxpayer could elect alternative treatment for each year during the hiatus period.

173. Fla. Stat. § 220.03(5)(c) (Supp. 1982); see supra note 172.
175. See supra text accompanying note 173.
176. Section 220.03(5)(e) states that the subsequent election must be made "in accordance with rules formulated by the department."
sion prospective from the effective date of revocation in the same manner as the specific revocation provision. A consistent interpretation would allow any given period to be governed by only one election.

a. How Many Times May a Taxpayer Revoke?

Only one revocation is available to a taxpayer and any election made thereafter will apply permanently. Coupling the second election, which provides for a one-time revocation of its provisions, with the wording of the general revocation provision—which states, “A taxpayer who does not initially make the [second] election . . . ”—means that a taxpayer initially making the second election, and subsequently revoking it under its specific revocation provisions, will be barred from making a further revocation under the general revocation provision.

The general revocation provision also contains a second clause that similarly prevents a taxpayer from first using the general revocation provision to change to the second election, and then revoking a second time under that election’s specific revocation provision. That clause states that “the power to revoke [the second election] . . . shall not be available” to a taxpayer who did not initially choose the second election. Thus, the specific revocation provision included in the election to postpone indefinitely is only available to taxpayers making that election as an initial election and is not available to taxpayers subsequently making that election through the general revocation provision.

6. EFFECTIVE DATE OF THE EET

In its initial form, section 221.01(1) of the Florida Statutes levied the EET on “every taxpayer, who is subject to s. 220.03(5)(d), liable for the tax imposed by, and required to file a return under, chapter 220 for taxable years ending after the effective date of this chapter [221].” Additionally, the EET was to “apply retroactively to all such taxpayers, effective to the effective date of s. 168 of the Internal Revenue Code of 1954.”

177. See Fla. Stat. § 220.03(5)(c) (Supp. 1982); supra note 164 and accompanying text.
179. Id.
181. Id.
section 220.03(5)(d) of the Florida Statutes subjected any taxpayer who had not elected to postpone piggybacking indefinitely (the second election) to the provisions of chapter 221 and provided that "chapter [221] shall be retroactively effective to the effective date of s. 168 of the Internal Revenue Code of 1954 . . . ." 182 Unfortunately, when section 220.03(5)(d) was read in conjunction with chapter 221, when and to whom the EET applied became unclear.

Part of the confusion stemmed from the reference in section 221.01(1) to the effective date of chapter 221. The effective date of chapter 221 was uncertain because it was tied to the effective date of ACRS ("s. 168 of the Internal Revenue Code"). And the term "the effective date of [ACRS]" was ambiguous because it could refer to either the effective date for federal purposes (January 1, 1981) or the effective date for state purposes. 183 Because section 220.03(5)(d) only exempted taxpayers who had chosen the second election from the EET, the effective date of ACRS became crucial to taxpayers choosing the first election (postponing piggybacking during the hiatus period only). 184 If the "effective date" referred to the effective date for Florida purposes, then the EET would not apply to these taxpayers during the hiatus period; if the "effective date" referred to the effective date for federal purposes, however, then the EET would apply. Since the legislature did not intend for the EET to apply during the hiatus period to taxpayers choosing the first election, 185 clarification was necessary.

The first amendment to the Act added the phrase to section 220.03(5)(d), "unless the taxpayer has made the [first] election . . . in which event the provisions of . . . chapter [221] apply retroactively to January 1, 1982." 186 This section now clearly states that if a taxpayer chooses to postpone piggybacking during the hiatus period, then the EET does not apply until January 1, 1982. The Legislature also amended section 221.01(1) by deleting both the reference to section 220.03(5)(d) and the phrase "for taxable years

182. Id. § 1 (codified as amended at Fla. Stat. § 220.03(5)(d) (Supp. 1982)).
183. The effective date for state purposes is predicated on the election made under § 220.03(5). There are thus two possible effective dates for state purposes: January 1, 1980 (general rule) or January 1, 1982 (first election). One limitation on Florida effective dates is the federal effective dates. See Fla. Stat. § 220.03(5)(a) (Supp. 1982).
184. Additionally, because § 220.03(5)(d) exempted taxpayers choosing the second election, but did not mention any exemption for taxpayers choosing the first election, the question arose whether the latter taxpayers were exempt from the EET during the hiatus period.
186. 1982 Fla. Laws ch. 82-385, § 1 (codified at Fla. Stat. § 220.03(5)(d) (Supp. 1982)).
ending after the effective date of this chapter.”

When read together, these amendments come closer to reflecting the legislative intent that the EET was to be levied only if piggybacking was chosen and then only during those periods in which ACRS deductions were taken for Florida purposes. Chapter 221 still stated, however, that it would apply retroactively to the “effective date” of ACRS.

This problem was partially addressed in the second amendment to the Act, which added the following to section 221.01(1): “except for those taxpayers subject to section 220.03(5)(c).” This clause, when read in conjunction with section 220.03(5)(d), makes it clear that the EET will not apply to taxpayers choosing to postpone piggybacking indefinitely.

The second amendment did not, however, address the problem of interpreting “the effective date” of ACRS as applied to taxpayers postponing piggybacking during the hiatus period. The “effective date” mentioned in section 221.01(1) can be interpreted to mean either the federal or Florida “effective date” of ACRS. When section 220.03(5)(d), which applies the EET to taxpayers postponing piggybacking during the hiatus period only after January 1, 1982, is read in conjunction with section 221.01(1), the “effective date” of ACRS to which chapter 221 refers is the “effective date” for Florida purposes.

The Act, as amended, clearly indicates that the EET will apply only to those taxpayers who do not elect to indefinitely postpone piggybacking, and then only during those periods when ACRS applies for Florida purposes. Thus, the EET will be levied retroactively on those taxpayers who piggyback retroactively and will be levied from January 1, 1982 forward on those taxpayers who choose the first election.

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187. See 1982 Fla. Laws ch. 82-385, § 4 (codified as amended at FLA. STAT. § 221.01(1) (Supp. 1982)). This amendment deleted the phrases “who is subject to s. 220.03(5)(d)” and “for taxable years ended after the effective date of this chapter.” This latter phrase was deleted because it created an inference, contrary to legislative intent, that the EET was to be levied only prospectively.

188. See 1982 Fla. Laws ch. 82-399, § 6 (codified at FLA. STAT. § 221.01(1) (Supp. 1982)).

189. If this provision had not been added, the uncertainty of whether “effective date” meant the federal or Florida effective date would have remained.

190. The legislative history supports this conclusion. See Pajcic House Memorandum, supra note 8, at 4 (App. A, p. 714).
D. Miscellaneous Provisions of the Act

1. PIGGYBACKING THE INSTALLMENT SALES REVISION ACT OF 1980

In addition to amending the piggyback provisions, the Act revised the installment sales provisions of the Florida Income Tax Code.\textsuperscript{191} The original installment sales provision, section 220.13(1)(c) of the Florida Statutes, was necessary because some taxpayers were recognizing income from installment sales made before the adoption of the Florida Income Tax Code. To avoid the constitutional problems of a retroactive tax,\textsuperscript{192} the Florida installment sales provision was enacted. This section did not permit taxpayers to use the I.R.C. installment sales provisions unless they affirmatively elected to treat all installment sales as they were treated under section 453 of the I.R.C.,\textsuperscript{193} including those sales occurring before the enactment of the Florida Income Tax Code.\textsuperscript{194}

The Legislature intended the Act to piggyback the Installment Sales Revision Act of 1980\textsuperscript{195} so that installment sales occurring after October 19, 1980\textsuperscript{196} would be treated for Florida purposes in the same manner as they were for federal purposes, while installment sales occurring on or before October 19, 1980 would continue to be governed by the then-existing Florida Income Tax Code. The Act left the old Florida installment sales provisions intact\textsuperscript{197} and added subsection 220.13(1)(d), which applies to installment sales occurring in taxable years ending after October 19, 1980.\textsuperscript{198}

\begin{itemize}
  \item 191. See 1982 Fla. Laws chs. 82-232, § 2, 82-385, § 2, 82-399, § 5 (codified as amended at FLA. STAT. § 220.13(1)(c)-(d) (Supp. 1982)). These revisions were necessary because the I.R.C. had never been fully piggybacked onto the Florida Income Tax Code. See FLA. STAT. § 220.13(1)(c)(1) (1981) (amended 1982). Under the general rule prior to the Act, taxpayers computed installment sales income using their regular accounting method for Florida purposes. They could only use the installment method of reporting income if they made a positive election. See id. § 220.13(1)(c)(2).
  \item 192. See supra note 13 and accompanying text. Corporate income tax levied on installment sales occurring before the effective date of the Florida Income Tax Code would be a retroactive application of a tax.
  \item 196. The Installment Sales Revision Act of 1980 applies to dispositions occurring after October 19, 1980.
  \item 197. The Act did amend, however, the introduction to FLA. STAT. § 220.13(1)(c) (Supp. 1982) to read: "Installment sales for taxable years ending on or before October 19, 1980." 1982 Fla. Laws ch. 82-399, § 5.
  \item 198. 1982 Fla. Laws ch. 82-232, § 2 (codified as amended at FLA. STAT. § 220.13(1)(d) (Supp. 1982)). The introduction to paragraph (d) reads as follows: "Installment sales for
As initially written, this new subsection provided that the income from an installment sale made after October 19, 1980 would be taken into account in the same manner as it was for federal income tax purposes under section 453 of the I.R.C. in effect on October 19, 1980. Moreover, the subsection stated that if a disposition was made on or before October 19, 1980, in any taxable year ending after that date, the income from the disposition would be taken into account under the old Florida installment sales provisions, including the election to take the income into account for state purposes in the same manner as for federal purposes.

An interpretive difficulty arose because the Installment Sales Revision Act of 1980 only applies to dispositions taking place after October 19, 1980, but section 220.13(1)(d)(1) applied the law in effect on October 19, 1980. The Act was arguably effectuating pre-Installment Sales Revision Act of 1980 law—the law that applied on October 19, 1980.

The first and second amendments to the Act addressed this difficulty. In the first amendment, the reference to section 453 of the I.R.C. in effect on October 19, 1980 was deleted. The amended subsection now requires that any disposition made after October 19, 1980 be treated the same for state purposes as it is for federal purposes, thus avoiding the question of which federal law to apply. The second amendment to the Act deleted all references to taxable years, simplifying the Florida Income Tax Code by making both the old and new Florida installment sales provi-

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200. Id. (repealed). The initial provisions, although complicated, may have effectuated the legislative intent. All installment sales in tax years ending on or before October 19, 1980 would have been taxed under the old Florida provisions. All installment sales in tax years ending after October 19, 1980 would have been separated into two categories depending on when the transaction took place. Transactions on or before October 19, 1980 would have been taxed under the old Florida provisions, while transactions after that date would have been taxed identically for state and federal purposes. The categorization of installment sales first by taxable year and then by date was complicated, but did provide for identical state and federal treatment of dispositions occurring after the effective date of the Installment Sales Revision Act of 1980.


202. See Fla. Stat. § 220.13(1)(d)(1) (Supp. 1982). This subsection now states, "In the case of any disposition made after October 19, 1980, the income from an installment sale shall be taken into account for the purposes of this code in the same manner that such income is taken into account for federal income tax purposes."
sions dependent solely upon the date of disposition. The amended provisions now apply the old Florida installment sales provisions to all dispositions taking place on or before October 19, 1980 and the new Florida installment sales provisions, which in essence piggyback the federal provisions, to all dispositions occurring after October 19, 1980.

The piggybacking of the Installment Sales Revision Act of 1980 now offers many taxpayers the opportunity to change the initial election made under the old Florida installment sales provisions without suffering any adverse tax consequences. Under the old Florida installment sales provisions, if the taxpayer did not initially elect to be treated for Florida purposes in the same manner as for federal purposes, any subsequent election to be so treated would require amending all tax returns for periods ending after January 1, 1972, paying any additional tax due (including interest from the due date of the original return), and waiving the statute of limitations for those prior periods. Because of these burdens, taxpayers not making the initial election to apply the federal installment sales provisions for Florida purposes usually did not make the election subsequently. The new installment sales provisions, however, require a taxpayer disposing of property using an installment sale to treat the sale identically for federal and state purposes, but do not impose the burdens of filing amended returns, paying additional tax (and interest), and waiving the statute of limitations.

The specific piggybacking of the Installment Sales Revision Act of 1980 may conflict with the piggyback elections under section 220.03(5) of the Florida Statutes. For example, it is unclear whether the new Florida installment sales provisions apply to taxpayers electing to postpone piggybacking indefinitely. The rules of statutory construction, which state that the specific controls the general, would seem to control in this situation.

203. See 1982 Fla. Laws ch. 82-399, § 5. The amendment deleted Fla. Stat. § 220.13(1)(d)(2) (repealed before codification) and all references to taxable years.

204. The Department of Revenue election form, however, does not reflect this change. It states that the installment sales piggybacking is keyed to taxable years rather than the date of disposition. See Department of Revenue Form F-1120A, pt. two, instruction III.


207. The two installment sales provisions do not conflict in this regard. Under the old provision, the penalties only apply to an election made after the first taxable year in which installment income is reported. Under the new provisions, however, no election is made because the new provisions are mandatory for installment sales occurring after October 19, 1980.
general, support the interpretation that the specific installment sales revision provisions would override the general election provisions. Therefore, application of the current I.R.C. and the Florida Income Tax Code for installment sale purposes is possible even though the election to piggyback indefinitely requires application of the I.R.C. and Florida Income Tax Code in effect on January 1, 1980 for the majority of other tax purposes.\(^{208}\)

The Department of Revenue has argued, however, that the election to postpone piggybacking, either during the hiatus period or indefinitely, requires that the provisions of the 1980 Florida Income Tax Code apply for all purposes. Under this interpretation, the new installment sales provisions would not apply during the non-piggybacked period because they are not included in the 1980 tax law. The election to postpone piggybacking indefinitely, which states that the 1980 Florida Income Tax Code will apply if a taxpayer makes this election, specifically supports this interpretation.\(^{209}\) The Department reasons that the election to postpone piggybacking, resulting in the application of 1980 law, overrides the specific installment sales provisions of the Act and forecloses the application of these provisions to any period in which piggybacking is not elected.\(^{210}\) This issue is unresolved.

2. **SUNSET PROVISIONS**

The Legislature was uncertain of the efficacy of ACRS, the EET, and the piggyback provisions. Therefore, it provided that "[t]he amendments [to the Florida Income Tax Code] made pursuant to this act shall expire and be void for taxable years beginning after December 31, 1984."\(^{211}\) The Legislature realized that this

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\(^{208}\) This interpretation is consistent with the specific revocation provision contained in the election to postpone piggybacking indefinitely. That provision provides that chapter 220, as in effect in 1980, will apply if the election is made. FLA. STAT. § 220.03(5)(c) (Supp. 1982). The election is nonetheless revocable, but revocation is only possible under the 1982 law. Therefore, the 1980 law applies for some purposes and the 1982 law applies for others. 209. See id.

\(^{210}\) The application of this argument to the first election (postponing piggybacking during the hiatus period only) is not as clear. That election does not specifically state that the 1980 Florida law applies. In addition, the legislative history only refers to the election to postpone indefinitely and does not address the installment sales effect of an election to postpone for the hiatus period only. See Pajcic House Memorandum, supra note 8, at 3 (App. A, p. 713). The Department of Revenue views the tie-in of the installment sales provisions to the elections as a "big stick" to force taxpayers to choose the general rule.

\(^{211}\) 1982 Fla. Laws ch. 82-232, § 8, amended by Fla. Laws chs. 82-385, § 9 & 82-399, § 8. In 1982 Fla. Laws ch. 82-232, § 8, the Legislature mandated that a "Revenue Estimating Conference shall estimate the extent to which the provisions of this act have neutralized any
sunset date would void the EET credit provisions and therefore provided that unused EET credits would continue to be available after the sunset date.212

If the Legislature allows the EET provisions to sunset, the state will be faced with revenue losses equal to the EET credit starting with the fifth year after the EET is initially imposed. The Legislature will not welcome this result.213

3. SURVIVABILITY PROVISIONS

Because the Legislature intended that piggybacking be inextricably tied to the EET, it included the following provision in the Act: "If any amendments [to the Florida Income Tax Code] made pursuant to this act are held to be invalid or inoperative for any reason, all amendments made pursuant to this act shall be deemed to be void."214 This section ensured that if the EET were held to be invalid, piggybacking would not apply and the state would thereby avoid revenue loss.215 As initially drafted, this section was overbroad because it would have allowed the appropriation provisions to sunset also.

To ensure the complete severability of the EET and pig-

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212. 1982 Fla. Laws ch. 82-232, § 8. The sunset provision stipulates that all amendments made pursuant to the Act shall expire and be void after the sunset date; this presumably includes chapter 221 in its entirety. If chapter 221 is void pursuant to the sunset provisions, it is unclear how unused credits can continue to be allowed since the provisions governing such credits will have become void.

213. See supra text accompanying notes 36-45. The Legislature may also not welcome the result that will occur if Fla. Stat. § 11.61(8) (1981) applies. That statute provides,

Any fees collected pursuant to a program or function subsequently abolished shall be refunded on a pro rata basis by the unit or subunit of government that was abolished, or by the Comptroller pursuant to s. 215.26, upon request of the person who paid the fee, if such request is made within 1 year after the abolition of the program or function.

If this section applies to the sunset of chapter 221, the entire EET collected prior to sunset would be due at that time. Under the terms of § 11.61(8), the taxpayer has one year in which to make a request. The EET credit will not be due, however, until 1986, at the earliest. Therefore, the taxpayer will be in the posture of requesting funds that, according to pre-sunset law, are not due. If the taxpayer waits until the EET credit is due, however, the risk exists that the one-year limitation period of § 11.61(8) will bar the refund.


gybacking provisions from the appropriation provisions, the Legislature amended the Act to provide that "[i]f any provision of sections 1 or 3 of this act is held to be invalid or inoperative for any reason, all provisions contained in section 1 and section 3 of this act and any subsequent amendments to the provisions contained in said sections shall be deemed to be void." This section is overbroad, however, because nonrevenue-sensitive provisions, like the installment sales provisions, are contained in sections 1 and 3 of the Act. Nonrevenue-sensitive provisions should be severable because their validity will not affect the state revenues that the EET was designed to protect. The broad reach of the antiseverability provisions is somewhat burdensome to the taxpayer but is consistent with the legislative intent to use the benefits of the installment sales provisions to persuade taxpayers to piggyback.

III. THE CHOICE TO PAY TAX

The significance and impact of the EET will vary among taxpayers depending upon their peculiar circumstances. The most obvious variable is the net operating loss situation. Because a net operating loss may shelter a taxpayer from the EET, a taxpayer anticipating a net operating loss should consider making an initial election to piggyback. This will allow it to take full advantage of the administrative convenience of piggybacking and the liberalized provisions of ERTA, while retaining the ability to revoke piggybacking should subsequent events dictate a change.

The Legislature intended that the EET, in conjunction with the EET credit provisions, will be revenue neutral to the taxpayer after five years. A taxpayer considering the impact of the EET should be aware, however, that although this was the legislative intent, it is not the actual result. For example, under I.R.C. sections 1245 and 1250, ACRS deductions taken by the taxpayer may be recaptured if the taxpayer disposes of the ACRS property. When recapture occurs, prior ACRS deductions become income and the taxpayer loses the benefit of ACRS. Because the prior ACRS deductions become income, the taxpayer's federal taxable income is increased and, accordingly, the taxpayer's Florida taxa-

\[\text{216. 1982 Fla. Laws ch. 82-232, § 4.}\]
\[\text{217. Id. ch. 82-399, § 7.}\]
\[\text{218. See supra note 210.}\]
\[\text{219. See supra notes 78-89 and accompanying text.}\]
\[\text{220. See supra notes 156-79 and accompanying text.}\]
ble income is also increased. The taxpayer will have lost the ACRS benefit for both federal and Florida purposes and the state will have recovered lost revenues as a result of the original ACRS benefit.222

Although the state will recover any revenues lost upon recapture, the taxpayer must wait for the statutory period to expire before receiving a refund or credit for the EET previously paid; depreciation recapture does not trigger the credit provisions. If recapture occurs before the EET has been fully refunded under the EET credit provisions, the state will receive a windfall223 while the taxpayer will lose the time value of money for the uncredited EET from the time of recapture until the time of full refund.

The state characterized the impact of the EET as merely a timing difference. In the state's view, the only impact would be a five-year timing difference caused by the lag between the collection and the refund of the EET. This analysis is true when applied to a taxpayer with only one piece of property or when examining one piece of property in isolation. When a taxpayer consistently places new property in service, however, the five-year difference represents a permanent loss to the taxpayer of five years of EET. This is because the taxpayer will receive a credit in the fifth year following the collection of the EET, but this credit will only offset the EET due in that year.224 The state nevertheless insists that this is merely a timing difference. It views the credit as creating an asset that will inure to the benefit of the taxpayer at some future point. Assuming that the EET remains in force indefinitely and that a taxpayer continues to put property in service each year, then the present value of this asset approaches zero.225 For example, if the taxpayer consistently puts enough property into service each year to take an annual one hundred-dollar ACRS deduction, two dollars of EET will be due annually. The EET collected in the first year will be refunded in the form of a credit in the sixth year, but if the same ACRS deduction is taken each year, then the two-dollar credit in the sixth year will only offset the two dollars of EET due

222. Of course, this assumes that the amount realized upon disposition exceeds the adjusted basis of the property.
223. All revenue that could possibly be lost as a result of ACRS will be recovered upon recapture, assuming that the gain on disposition is equal to or greater than the ACRS deductions taken.
224. See Fla. Stat. § 221.02(1) (Supp. 1982); supra notes 90-94 and accompanying text.
225. If the EET actually sunsets in 1984 or is repealed, however, then the state's position is valid. The longer the EET is in force, however, the more it resembles a permanent loss.
in that year. This taxpayer will lose two dollars per year for the first five years. Although it is true that the taxpayer will pay no EET from the sixth through the tenth year, the initial five years’ EET will not be recovered until the taxpayer ceases taking ACRS deductions for Florida purposes.

The final analysis that the taxpayer must make in determining the impact of the EET is to compare the pre-ACRS depreciation deductions to the EET amount. If the taxpayer does not piggyback and instead uses pre-ACRS depreciation, the deduction allowable to the taxpayer will probably be different than that under ACRS and will affect the Florida corporate income tax due. On the other hand, if a taxpayer chooses to piggyback, the EET will be levied. The comparison must therefore be between the cost of the EET and the cost of using pre-ACRS depreciation.

Taxpayers should note that pre-ACRS depreciation deductions will probably be different than the ACRS deductions, but it will not necessarily be less than the ACRS deduction. Under ACRS, a taxpayer’s property is placed into classes with recovery lives that may have no relationship to the period over which the taxpayer previously depreciated similar property. Because a taxpayer has only limited control over the recovery life under the ACRS provisions, the taxpayer may actually be disadvantaged by ACRS as compared to pre-ACRS depreciation. For example, a taxpayer may have been taking an aggressive stance under pre-ACRS depreciation and writing off property over a four-year period, while under the ACRS provisions the taxpayer is required to use a five-

226. The EET is cyclical. In the example in the text, two dollars is paid in years 1 through 5, 11 through 15, 21 through 25, and so on. No tax is paid in years 6 through 10, 16 through 20, 26 through 30, and so on. This applies only if the same ACRS deduction is taken each year, but not necessarily if the same amount of property is placed in service each year.

227. Table 1 analyzes the cost of the EET, assuming that $100 of property is put in service in year 1:

228. In analyzing this cost, the taxpayer must be aware of the effect of the EET credit provisions. These provisions are designed to provide equitable deductions for five-year recovery property. They will be inequitable, however, to either the state or the taxpayer, if 3-, 10-, or 15-year property is placed in service. If three-year property is the source of the deductions, the credit will delay the return of the EET beyond the recovery life of the property. If property with a recovery life longer than five years is the source of the deductions, however, the state will be disadvantaged and the EET will be returned during the property’s life. See supra note 227.

<table>
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<th>Year</th>
<th>ADR (a)</th>
<th>ACRS (b)</th>
<th>Total (a) + (b)</th>
<th>Difference (3)</th>
<th>Actual Cash Outlay (4)</th>
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**Table 1**

- **No piggybacking**

- **Increased (decreased) cost by not using ACRS**

- **Piggybacking Cost of ACRS**

*5% (state tax) \times 54% (1 - 46\% (federal tax)) = 0.027. In years 1 through 5, the ACRS deduction is greater than the ADR deduction. This results in higher state taxes, which are deductible from the taxpayer's federal tax return. The increased cost of the state tax must be adjusted, therefore, by the corresponding increased federal deduction. For example, in year 1 a taxpayer would have $4.29 greater state taxable income if piggybacking is not elected than if piggybacking were elected, increasing state tax by $2.145 ($4.29 \times 5\%). The increased state tax causes a corresponding federal deduction of $2.145, reducing federal tax by $0.0987 ($2.145 \times 46\%) (assuming a marginal federal tax rate of 46\%). The net result is an additional cash outlay of $1.158 ($2.145 - $0.0987). Note that $4.29 \times 0.027 = $1.158.

**2% (EET) \times 54\% (1 - 46\% (federal tax)) = 0.0108. In year 1, the ACRS deduction is $15.00, resulting in an EET of $0.30. This tax is also deductible in computing federal taxable income, resulting in a federal tax savings of $1.38 ($0.30 \times 46\%). The overall cost of the EET in year 1, therefore, is $1.62 ($0.30 - 0.138). Note that $15.00 \times 0.0108 = $1.620.*
The following table reflects the cumulative effect of placing the same amount of property in service each year for 15 years, and depreciating it in the same manner as shown in Table 1.

### TABLE 2

<table>
<thead>
<tr>
<th>Year</th>
<th>(1) Actual Cash Outlay</th>
<th>(c) Increase (decrease) in cash outlay if piggybacking is elected ([a) - (b)]</th>
<th>(2) Cost of piggybacking assuming five million dollars of property is placed in service each year**</th>
<th>(3) Present value of $1 at 10%***</th>
<th>(4) Present value of cost to piggyback [2) × (3)]</th>
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</table>
TABLE 2 (cont.)

* In year 7, for example, $700 of property will be in service. The $100 of property placed in service in year 7 will cost the taxpayer an additional $.162 (Table 1, column 4(b), row 1). The $100 of property placed in service in year 6 will cost the taxpayer an additional $.2376 (Table 1, column 4(b), row 2). Similar computations are made for the property placed in service in years 5, 4, and 3; property placed in service in years 1 and 2 will be completely depreciated by year 7 and, therefore, do not trigger the EET. The sum of the additional cost of property placed in service in years 3, 4, 5, 6, and 7 less the EET credit allowed in year 7 (the amount of the EET in year 2) equals $.6804 (Table 2, column (1)(a), row 7) ($.1620 + .2376 + .2268 + .2268 + .2268 - .3996 = .6804). Table 2, column (1)(b) is computed in a similar manner.

** The ACRS deduction would be $750,000 ($5,000,000 \times 15\%) in the first year.

*** Present value of the amount of $1 = \frac{1}{(1 + i)^n}$; where $i =$ cost of capital and $n =$ number of years.
year period; thus, the ACRS deductions would be less.\textsuperscript{230} In such a case, the taxpayer is disadvantaged by piggybacking irrespective of the EET cost.

Even if a taxpayer benefits from ACRS, it may well not be to the amount of the EET. The EET was calculated to be revenue neutral for taxpayers receiving a sixty-seven percent increase in deductions from ACRS. If a taxpayer were aggressive and wrote off assets over a fairly short period under pre-ACRS law, ACRS may not provide a sixty-seven percent increase in deductions to this taxpayer. Coupling this with the concomitant application of the EET may severely disadvantage this taxpayer. For example, if a taxpayer previously wrote off an asset over a seven-year period and the asset has an ACRS recovery period of five years, the EET will be approximately double the benefit derived from ACRS. A taxpayer in this position should postpone piggybacking.\textsuperscript{231}

IV. Conclusion

As a result of President Reagan's tax legislation, Florida, along with other states with similar piggybacked systems, found itself in a quandary. The need to maintain administrative simplicity and convenience was outweighed by the projected revenue losses anticipated if ERTA was adopted for state taxation purposes. Although Florida’s response to the dilemma is not without problems, it does achieve, in large measure, revenue neutrality in a fairly simple manner.

Florida has resolved the dilemma imposed by Reaganomics, but improvements can be made. The Legislature should establish a committee composed of representatives from the private and public sectors to review other states’ responses to Reaganomics. Certain aspects of these responses, such as a graduated excise tax, could be successfully engrafted onto our law, making it more equitable. The committee should also review the application of the Act to the particular provisions of the Florida Income Tax Code, such

\textsuperscript{230} This assumes that the four-year life over which the property was previously depreciated was less than the published ADR class life. Under ACRS the recovery life would be five years because the published ADR class life was longer than four years. See I.R.C. § 168(c)(2) (Supp. V 1981).

\textsuperscript{231} See supra note 227. In the illustration in note 227, one-half of the property had a depreciation life of seven years as compared to a recovery life of five years. For this property, the EET does exceed the ACRS benefit. The illustration is more evenly balanced; however, since the other half of the property had a depreciation life of 14 years and a recovery life of five years. For this property, the EET did not offset the ACRS benefit. Even so, in the aggregate the EET still exceeded the ACRS benefit.
as the subtraction of foreign source income.\textsuperscript{232} The committee could propose any future amendments that may be needed to fully integrate the Act into our existing tax laws.

The Legislature has harmonized its conflicting goals with little additional effort. Excellent results can now be achieved if the Act is modified in the light of considered reflection and review.

\textsuperscript{232} See supra note 63.
MEMORANDUM

TO: Honorable Ralph Haben, Jr., Speaker
FROM: Representative Steve Pajcic
SUBJECT: Committee Report on HB 3-F

Because of the controversial and complex nature of HB 3-F, the piggyback bill, we felt that it would be desirable for the committee to issue a report to explain the bill and to state legislative intent. Attached is a copy of this report. Additional copies will be available in the committee office for interested legislators, attorneys, accountants, and other members of the public.

SP/iam
attachment
BACKGROUND

Florida's corporate income tax was designed so that the determination of federal taxable income would form the basis to determine the amount due the State of Florida. This was termed "piggybacking" because it allowed Florida to rely on the federal concept of income and to utilize the already existing body of federal tax law. This had advantages both for the taxpayer and for the state. Taxpayers accounting costs were minimized because the Florida tax was based on the same set of figures and concepts as those used for federal tax purposes. The state also benefitted because it could in large part depend upon the federal I.R.S. to audit the accuracy of those figures. Thus, the legislature annually updated the Florida Statutes relating to corporate income tax to reflect any intervening changes in federal law.

In Spring of 1981, President Reagan had proposed far reaching changes in the federal income tax structure which would have significantly reduced Florida's tax base. During the 1981 legislative session it was unknown what form those federal changes might ultimately take. Legal questions were raised as to the constitutionality of prospectively adopting changes which were yet to be enacted at the federal level. So in 1981 the legislature declined to update the corporate tax provisions.

Florida corporate taxpayers found that they had to have separate sets of books for Florida and for the I.R.S. The Department of Revenue found that it had acquired a new magnitude of audit responsibilities. Non-compliance and taxpayer confusion were rampant. Piggybacking became a priority for the 1982 legislature, but it was necessary to minimize the substantial erosion of the tax base that would accompany straight piggybacking.

House Bill 3-F, Chapter 82-232, Laws of Florida, represents a political compromise that attempts to meet the goals articulated above and to provide alternatives corporate taxpayers can live with.

SECTION 1

Section 1 of the law updates the January 1, 1980 Internal Revenue Code reference to the Internal Revenue Code of 1954, as amended, and in effect on January 1, 1982. This provision is the
actual piggyback provision so that as a general rule, for the provisions relating to corporate income tax, the words “Internal Revenue Code” shall mean the updated 1982 Code.

A new subsection (5) is added to s. 220.03, F.S. Paragraph (a) provides that, as a general rule, the amendments to the Internal Revenue Code (I.R.C.) which occurred on or after January 1, 1980 and before January 1, 1982 shall be given effect for Florida purposes retroactively to the federal effective dates for those amendments. This allows taxpayers which are subject to (a) to piggyback completely for 1980 and 1981, as well as prospectively.

Paragraph (b) allows taxpayers the option of piggybacking prospectively, but not retroactively. For the taxpayers who choose this option, they will not be piggybacked for 1980 or 1981, or for the continuing tax consequences of transactions occurring during that period. They will be completely piggybacked for all events and transactions occurring on or after January 1, 1982.

Paragraph (c) allows taxpayers the option of not piggybacking at all. Taxpayers who make this election are required to report and pay the taxes as if the I.R.C., as in effect on January 1, 1980, and the provisions of Chapter 220, F.S. (1980), are in effect indefinitely.

Paragraph (d) requires all corporate income taxpayers, except for those who elect pursuant to paragraph (c), to be subject retroactively to the emergency excise tax/credit imposed by the new Chapter 221, F.S. Individuals who have made the election under paragraph (b) will, however, only be subject to the excise tax credit beginning January 1, 1982, because under paragraph (b) that is the effective date for Florida corporate tax purposes for s. 168 of the I.R.C.

Paragraphs (b) and (c) refer to irrevocable elections. Paragraph (e) allows a one time switch from tax treatment under paragraphs (a), (b) or (c). Thus a taxpayer must pick either (a), (b), or (c). If the taxpayer makes no affirmative election, it will automatically be subject to (a)]. The taxpayer may change its initial choice one time, but the initial choice is irrevocable as to the continuing tax consequences of events and transactions occurring during the period in which the initial choice of tax treatment was in effect.

SECTION 2

Previously, the I.R.C. did not require a real estate investment trust (R.E.I.T.) to include capital gains in its taxable income. Florida required the addition of a R.E.I.T.'s undistributed capital gains
to its taxable income in s. 220.13(1) (a), F.S. (1981). The I.R.C. has been amended to require R.E.I.T.'s to include capital gains in their taxable income. Section 2 of the chapter law deletes R.E.I.T.'s from the add-back requirement to conform to the federal change.

Section 2 adds a new paragraph (d) to s. 220.13(1) to conform treatment of installment sales to federal changes. Installment sales for taxable years ending on or before October 19, 1980 will be treated as they would have been prior to passage of Chapter Law 82-232. If the taxable year ends October 19, 1980, installment sales will vary in treatment depending upon when the sale occurred. The installment sale should be reported in the same manner as reported for federal purposes.

It should be noted that the amendments contained in Section 2 of the act do not apply to taxpayers who have made the election provided in s. 220.02(5) (c), F.S., because such taxpayers are subject to the provisions of Chapter 220, F.S. (1980).

SECTION 3

Section 3 creates Chapter 221, F.S., relating to an emergency excise tax on accelerated cost recovery system deductions (ACRS). Section 221.01 imposes the emergency tax on all taxpayers who are subject to the provisions of s. 220.03(5)(d), for taxable years ending after the effective date of the Chapter law. The tax is imposed retroactively on all such taxpayers effective to the effective date of s. 168 of the I.R.C. As noted before, however, the effective date, for Florida income tax purposes, of s. 168 for taxpayers subject to s. 220.03(5) (b) is January 1, 1982.

Subsection (1) provides that the tax shall be 2% of the apportioned deduction allowed under s. 168 of the I.R.C., exclusive of any deduction allowed under s. 168(b) (3) [straight-line method]. For taxpayers who are in a net operating loss position, subsection (2) provides a separate formula as follows:

\[
\text{TAX DUE} = 2\% \times 2\frac{1}{2} \times (40\% \ D - \text{net operating loss}) \\
D = \text{apportioned s. 168 deductions, excluding s. 168(b) (3) deductions}
\]

The tax is payable at the time and place for filing returns as provided in s. 220.222, F.S.

Section 221.02 provides that in the fifth taxable year following the taxable year for which the tax was paid the taxpayer may receive a credit equal to the emergency excise tax paid. (For exam-
pie, the taxpayer would pay the tax in year 1 and receive the credit in year 6.) the credit shall be taken against any emergency excise tax due. If the credit exceeds the emergency excise tax due, the credit shall be taken against any corporate income tax due. If the taxpayer is unable to fully utilize the credit in the first year it is available, it may be carried over to the next succeeding five taxable years.

Section 221.04 provides that administration of the tax shall be substantially as provided in Chapters 213, 214, and 220.

**SECTION 4**

Section 4 contains an appropriation to the Department of Revenue providing for 20 positions. Six positions are to be used to assure compliance with Florida Statutes relating to the Florida Corporate Income Tax. Fourteen positions are to be used to perform in-depth reviews of tangible personal property assessments.

**SECTION 5**

Section 5 creates a new subsection (9) for s. 220.02 which states the order in which credits are to be applied against the corporate or the franchise tax. The credits are “stacked” in such a way that those credits which do not carry over are applied before those credits which do carry over. Thus, the value of the credits is maximized for the taxpayer.

**SECTION 6**

Section 6 requires the Revenue Estimating Conference to estimate prior to the 1983 regular session the extent to which the provisions of this act have neutralized any revenue loss to the State of Florida associated with adopting the provisions of the Economic Recovery Tax Act of 1981.

**SECTION 7**

Section 7 contains a non-severability clause stating the legislative intent that if any of the amendments contained in the act are held invalid, all of the amendments contained therein shall be deemed void.

**SECTION 8**

Section 8 provides that the act shall take effect upon becoming
law. It also contains a statement that section 3, the emergency excise tax/credit, shall apply to taxable years ending after the effective date of this act. Section 3 applies retroactively, but the statement indicates the legislative intent that section 3 apply prospectively as well.

All amendments contained in this act shall be void for all taxable years beginning after December 31, 1984. Accrued credits under Chapter 221, however, shall continue to be available.
MEMORANDUM

TO: David Beggs, Senate Finance, Taxation & Claims
    Jim Zingale, Division of Economic and Demographic Research
    Gary Cooper, Office of Planning and Budget
    Henry C. Cain, Finance & Taxation Committee

FROM: Alan W. Johansen

RE: Fiscal Impact of Adopting the Accelerated Cost Recovery Act

DATE: October 29, 1981

In an attempt to refine an estimate of piggybacking the federal code with the Economic Recovery Tax Act provisions, I've contacted the people who produced the federal revenue impact estimates. Attached are the data they provided and a proposed methodology for the Florida fiscal impact estimate. Please check it out and get back with me if there are any problems. If not, David
Beggs will issue a memorandum as the October 1981 REC chairman which includes the final impact estimates.

**FISCAL IMPACT OF ADOPTING THE ACCELERATED COST RECOVERY SYSTEM**

**Methodology**

In order to estimate the impact of the Accelerated Cost Recovery System (ACRS) it is necessary to utilize different sources of data. The Tax Analysis Section of the Treasury provided the Corporate Tax Receipts estimates below: (OMB Mid-session Review of the 1982 Budget - July 15, 1981)

<table>
<thead>
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<tbody>
<tr>
<td>Federal</td>
<td>63.3</td>
<td>66.8</td>
<td>71.7</td>
<td>76.0</td>
<td>77.4</td>
<td>74.6</td>
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</table>


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</tr>
</thead>
<tbody>
<tr>
<td>Federal</td>
<td>1.6</td>
<td>10.7</td>
<td>18.6</td>
<td>28.3</td>
<td>39.3</td>
<td>54.5</td>
</tr>
</tbody>
</table>

Adding (1) and (2) yields a series of estimated Federal Corporate receipts without ERTA, but as if the induced effects on corporate activity took place anyway:

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</thead>
<tbody>
<tr>
<td>Federal</td>
<td>64.9</td>
<td>77.5</td>
<td>90.3</td>
<td>104.3</td>
<td>116.7</td>
<td>129.1</td>
</tr>
</tbody>
</table>

Converting the Federal fiscal years to State fiscal years yields:

<table>
<thead>
<tr>
<th></th>
<th>FY 81-82</th>
<th>FY 82-83</th>
<th>FY 83-84</th>
<th>FY 84-85</th>
<th>FY 85-86</th>
</tr>
</thead>
<tbody>
<tr>
<td>State</td>
<td>74.4</td>
<td>87.1</td>
<td>100.0</td>
<td>113.6</td>
<td>126.0</td>
</tr>
</tbody>
</table>

The Joint Committee on Taxation also provided an unpublished series of the revenue impact of only the deduction changes due to ACRS. Other published series include credits, especially in-
vestment tax credits under the new leasing provisions, which won’t affect Florida’s tax base. The revenue impact of the increased deductions under ACRS is shown below on a calendar year basis:

<table>
<thead>
<tr>
<th>Calendar</th>
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<th>Calendar</th>
<th>Calendar</th>
<th>Calendar</th>
</tr>
</thead>
<tbody>
<tr>
<td>(5)</td>
<td>2.7 b</td>
<td>7.5</td>
<td>15.4</td>
<td>22.7</td>
</tr>
</tbody>
</table>

Converting to a State fiscal year basis yields:

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<tbody>
<tr>
<td>FY 81-82</td>
<td>FY 82-83</td>
<td>FY 83-84</td>
<td>FY 84-85</td>
<td>FY 85-86</td>
</tr>
<tr>
<td>(6)</td>
<td>5.1 b</td>
<td>11.5</td>
<td>19.1</td>
<td>28.6</td>
</tr>
</tbody>
</table>

The next step is to divide (6), the estimated impact of only the depreciation changes under ERTA, by (4), the estimated Federal receipts without ERTA, but after the induced affects. This allows us to estimate the proportionate impact of only the depreciation changes on a state fiscal year basis.

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<th>State</th>
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<tbody>
<tr>
<td>FY 81-82</td>
<td>FY 82-83</td>
<td>FY 83-84</td>
<td>FY 84-85</td>
<td>FY 85-86</td>
</tr>
<tr>
<td>(7)</td>
<td>6.85 %</td>
<td>12.30 %</td>
<td>18.95 %</td>
<td>25.18 %</td>
</tr>
</tbody>
</table>

Rich Stevens, using a more roundabout approach and estimated based on earlier versions of ERTA, produced the following estimates: (Gov. Office - Revenue & Economic Analysis)

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<tbody>
<tr>
<td>FY 81-82</td>
<td>FY 82-83</td>
<td>FY 83-84</td>
<td>FY 84-85</td>
<td>FY 85-86</td>
</tr>
<tr>
<td>(8)</td>
<td>7.8 %</td>
<td>13.4 %</td>
<td>19.3 %</td>
<td>24.9 %</td>
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</tbody>
</table>

Citizens for Tax Justice using an approach similar to that outlined in this memo produced the following:

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<tbody>
<tr>
<td>FY 81-82</td>
<td>FY 82-83</td>
<td>FY 83-84</td>
<td>FY 84-85</td>
<td>FY 85-86</td>
</tr>
<tr>
<td>(9)</td>
<td>6.5 %</td>
<td>12.5 %</td>
<td>18.5 %</td>
<td>25.0 %</td>
</tr>
</tbody>
</table>

This conformity of results is encouraging and gives one some measure of confidence in the results. Two caveats should be noted. First, to the extent that the mix of corporations paying the Florida tax is less capital intensive than the national average, the estimates of the reduction will be overstated. However, since our dominant taxpayers are unitary operations active nationwide, the national averages should serve well. Secondly, perhaps counter-balancing
the first problem, is a problem with using two separate sources of data. The loss estimates [(2) & (6)] from the Joint Committee on Taxation implicitly contain a somewhat more pessimistic estimate of receipts than the Treasury - OMB series shown in (1). The Joint Committee does not publish receipts estimates. Consequently, basing the proportionate reduction in receipts on the Treasury estimates tends to understate the impact of the ACRS depreciation provisions.

The impact in Florida can be estimated by applying the national average reduction in receipts to our corporate estimates. The REC estimates already contain the induced effects of ERTA and the assumption is made that there will be no discernible impact on activity if we stay with ADR or instead piggyback retroactive to January 1, 1981.

FLORIDA CORPORATE TAX RECEIPTS
(10/81 Consensus Estimate for first 2 years; 5/81 Consensus Estimate for remainder)

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<thead>
<tr>
<th>State</th>
<th>FY 81-82</th>
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<th>FY 84-85</th>
<th>State</th>
<th>FY 85-86</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>$496.4 m</td>
<td>$549.4 m</td>
<td>$649.3 m</td>
<td>$733.1 m</td>
<td>$803.0 m</td>
<td></td>
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</tr>
</tbody>
</table>

Applying the estimated reduction in receipts due to ACRS (7) yields the following annual estimates of the loss:

<table>
<thead>
<tr>
<th>State</th>
<th>FY 81-82</th>
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<th>FY 82-83</th>
<th>State</th>
<th>FY 83-84</th>
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<th>FY 85-86</th>
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<tbody>
<tr>
<td></td>
<td>$34.0 m</td>
<td>$72.5 m</td>
<td>$123.0 m</td>
<td>$184.6 m</td>
<td>$267.0 m</td>
<td></td>
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</tr>
</tbody>
</table>

The estimates in (11) are based on the assumption that we piggyback retroactive to January 1, 1981. At this point, the effect of adopting ACRS beginning with 1982 cannot be estimated. This requires detail on the proportion of losses in each asset category under ACRS and also requires knowledge about how corporations stack their deductions for carry-forward purposes when they incur a net operating loss. Finally, to estimate corporate revenues, if we piggyback retroactively, the 1981-82 loss is best shown as materializing in 1982-83.
ESTIMATED FLORIDA CORPORATE TAX RECEIPTS WITH RETROACTIVE PIGGYBACK TO 1/81

<table>
<thead>
<tr>
<th>State FY 81-82</th>
<th>State FY 82-83</th>
<th>State FY 83-84</th>
<th>State FY 84-85</th>
<th>State FY 85-86</th>
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<td>$ (12)</td>
<td>$ 496.4 m</td>
<td>$ 442.9 m</td>
<td>$ 526.3 m</td>
<td>$ 548.5 m</td>
</tr>
</tbody>
</table>
April 15, 1982

MEMORANDUM

TO: Randy Miller, Executive Director
FROM: William F. Zuna, Research, Planning and Budgeting Director
SUBJECT: Evaluation of HB 3-F—Changes to Corporate Income Tax and Creation of the Emergency Excise Tax

In consultation with House staff, we have analyzed HB 3-F and, subject to its constitutionality and the satisfactory resolution of several technicalities in the forthcoming session, find it to be substantially revenue neutral. The bill principally accomplishes several things:

1. The bill brings Florida into conformance with the IRC as of January 1, 1982.

2. Since this enables the provisions of ERTA retroactive to January 1, 1981, it also subjects Florida corporate income tax to current and future reductions of revenue—principally due to the effect of ACRS.

3. The bill reestablishes a primary intent of corporate tax law—a clean and straightforward take-off from the federal income tax return for the purpose of computing Florida tax.

4. The bill neutralizes general revenue from the eroding effects of ERTA by compensating with the emergency excise tax.

5. Essentially the bill provides for conformance with the IRC, but buys time by deferring the negative consequences of ERTA until 1986.

6. Subject to the resolution of several technical issues relating
to language versus legislative intent, the bill affords the taxpayer the flexibility to:

(a) remain in conformance with 220, F.S., as it currently stands
(b) conform retroactively to all the changes to the IRC from January 1, 1980 to January 1, 1982
(c) conform to the IRC as it stood January 1, 1982
(d) elect a one-time change to conformance.

In view of the passage of the excise tax, which presumes that it was the Legislature's intent to temporarily hold Florida harmless from the effects of ACRS, the bill must stand either as is, or amended, to accommodate the following principles:

(a) ACRS accelerated depreciation deductions allowed for corporate income tax, whether retroactive, current, or prospective, must be subject to the excise tax.

(b) In order to preserve cash flow, the excise tax must be subject to the same estimated tax and extension payment provisions as corporate income tax. As the language now stands, it appears that combined tax liabilities will be shifted from estimated payments to the submission of the final returns. While combined tax liability is neutralized, cash flow to the extent of the tax value of ACRS, can be deferred six months to a year.

(c) To preserve cash flow, streamline administration, preclude the ability to legalize previous noncompliance, the one-time change of election should be allowed only prospectively.

Notwithstanding the several technical issues mentioned above, there are also incidental factors that are worth mentioning. These are as follows:

1. In relation to all previous estimates of the effect of ACRS, the economy is rapidly diminishing its potentially negative aspects. Investment in plant and equipment has stalled and will not pick up until interest rates drop and markets improve. As is characteristic of the business cycle, investments will lag and be predicated upon the resurgence of consumer spending. While corporate income tax receipts are certainly reflecting current business conditions, the initially per-
ceived impact of ACRS, in my opinion, overstates the near-
term effects of ACRS. Investment (and ACRS) will become
robust only after a strong surge of consumer spending and a
drop in interest rates.

2. Based on a sampling of current tax returns, a majority of
corporations are not in compliance with respect to deprecia-
tion. From an analysis of the survey, it appears that our
receipts currently reflect non-compliance amounting to
nearly 20% of the previously estimated impact of retroac-
tive ACRS. While we can expect compliance to improve
over time by improved taxpayer awareness and audit effort,
the effect of ACRS compounds—and as long as we are de-
coupled from the current IRC, we can expect revenue ero-
sion of $5 to $10 million a year. This aspect of not pig-
gybacking must be weighed in the decision to update the
statutes.

3. While we had previously concluded that ACRS would
double depreciation expense for new property, the excise
tax is predicated upon the presumption that aggregate de-
preciation would increase by a factor of 1.67. I find this rea-
sonable in view of our improved knowledge of the numerous
aspects affecting the issue. Previously, we were concerned
about the safe harbor provisions but learned that they were
taken into account in the Treasury’s analysis. Initially we
felt that safe harbor had not been taken into account.

We now feel that we overstated the ACRS effects for real
property. We failed to account for the offsetting effect of
the termination of component depreciation and the election
of straight line over time periods consistent with ADR to
preserve current severance and ROI treatment relating to
other than income tax issues.

And finally, we failed to take into account the 20% first
year bonus depreciation currently available in amounts up
to $10,000 for tangible personal property with an adr useful
life of 6 or more years. While immeasurable, this and the
other adjustments lead me to view the mechanics of the 2%
excise tax as being reasonable.

4. The excise tax formula is technically sound in that it levies
the excise tax on a loss corporation only to the extent that
ACRS contributed to the loss. An attachment demonstrates
5. While initially difficult to recognize, the granting of the excise tax credit in the fifth year following its payment is technically revenue neutral. Its principle function is to allow the depreciation that is neutralized by the excise tax in early years to be expensed in the later years thereby allowing 100% of eligible depreciation expense to be deducted from combined taxes.

6. Initially, we were concerned with the exclusion of recovery property that the taxpayer elects to straight-line. The principal beneficiary of this election would be the income property investor seeking the shelter of depreciation and the capital gains treatment upon sale. ACRS allows him to depreciate property over 15 years—a substantial benefit—and elect either accelerated or straight-line depreciation. The prudent investor will most likely opt for straight-line, since this method preserves the capital gains treatment upon sale. To take accelerated depreciation would subject all or part of his gain to ordinary income treatment. In most cases, however, this investor is not in corporate form since individual, partnership, and subchapter S organizations afford him more beneficial overall tax treatment.

While the provisions of the excise tax do afford the exemption of straight line depreciation, I do not consider the effect to be substantial. While the majority of our corporate income tax is generated by capital intensive industries, few invest in plant and equipment to turn it over. Rather, the objective generally is to derive the longest useful economic and technological life. To this extent, the depreciation decision will be made on the basis of maximizing net present value—an objective that is extremely sensitive to near term write-offs as opposed to long-term gains treatment. In a majority of cases, capital intensive industry will opt for accelerated depreciation and thereby subject their depreciation to the excise tax. What must be borne in mind is that ACRS claimed in Florida will be ACRS claimed for Federal purposes and the overriding factor in the decision will be the federal tax rates which are greater than Florida's. It's unlikely that a corporation would straightline under ACRS merely to avoid a 2% tax. For those corporations attempting to preserve an ROI or severance benefit, their strategy
would be to maintain long useful lives, which while sheltering the depreciation from the excise tax, exposes it dollar-for-dollar, to corporate income tax by making it ADR equivalent.

Finally, there is a potential hazard that the bill does not address. Two corporations can form a partnership for the purpose of sheltering ACRS depreciation from the excise tax. Essentially, the partnership takes the depreciation and reports bottom line taxable income to the partners. While the partners then have the same taxable income as separate entities, they do not directly have ACRS depreciation and can thereby remain sheltered from the excise tax. The partnership, by its form, is immune from the excise tax.

MEMORANDUM

Randy Miller
April 15, 1982

Attached also is a list of the technical issues relating to the bill. While several of them have been discussed from a revenue standpoint, I have included them as an agenda for any cleanup effort.

WFZ/am
Attachments
ILLUSTRATION OF HOLD-HARMLESS EFFECT OF EMERGENCY EXCISE TAX WITH A 67% INCREASE IN DEPRECIATION (ACRS VS. ADR)

<table>
<thead>
<tr>
<th></th>
<th>Company A</th>
<th>Company B</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>ADR (1/1/80)</td>
<td>ACRS (1/1/81)</td>
</tr>
<tr>
<td>Gross Income</td>
<td>200,000</td>
<td>200,000</td>
</tr>
<tr>
<td>Less:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>ADR Depreciation</td>
<td>85,000</td>
<td>85,000</td>
</tr>
<tr>
<td>ACRS Depreciation</td>
<td>15,000</td>
<td>25,000</td>
</tr>
<tr>
<td>Subtotal</td>
<td>100,000</td>
<td>110,000</td>
</tr>
<tr>
<td>Other Expense</td>
<td>80,000</td>
<td>80,000</td>
</tr>
<tr>
<td>Taxable Income</td>
<td>20,000</td>
<td>10,000</td>
</tr>
<tr>
<td>5% Tax</td>
<td>1,000</td>
<td>500</td>
</tr>
</tbody>
</table>

2. EXCISE TAX

(a) Positive Income

<table>
<thead>
<tr>
<th></th>
<th>Company A</th>
<th>Company B</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACRS Dep</td>
<td>25,000</td>
<td></td>
</tr>
<tr>
<td>Times: 2%</td>
<td>500</td>
<td></td>
</tr>
<tr>
<td>Excise Tax</td>
<td>500</td>
<td></td>
</tr>
</tbody>
</table>

(b) NOL

<table>
<thead>
<tr>
<th></th>
<th>Company A</th>
<th>Company B</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACRS Dep</td>
<td>25,000</td>
<td></td>
</tr>
<tr>
<td>Times: 40%</td>
<td>10,000</td>
<td></td>
</tr>
<tr>
<td>Less: NOL</td>
<td>5,000</td>
<td></td>
</tr>
<tr>
<td>Subtotal</td>
<td>5,000</td>
<td></td>
</tr>
<tr>
<td>Times: 2.5</td>
<td>12,500</td>
<td></td>
</tr>
<tr>
<td>Times: 2%</td>
<td>250</td>
<td></td>
</tr>
<tr>
<td>Excise Tax</td>
<td>250</td>
<td></td>
</tr>
</tbody>
</table>

3. COMBINED TAXES

<table>
<thead>
<tr>
<th></th>
<th>Company A</th>
<th>Company B</th>
</tr>
</thead>
<tbody>
<tr>
<td>Income</td>
<td>1,000</td>
<td>500</td>
</tr>
<tr>
<td>Excise</td>
<td>0</td>
<td>500</td>
</tr>
<tr>
<td>Total</td>
<td>1,000</td>
<td>1,000</td>
</tr>
</tbody>
</table>
Technical Issues
1. Effective dates—jeopardy of losing neutralizing effects of intent.
2. Evaluation of eliminating the elections—either all taxpayers go ACRS or remain ADR.
3. Ensure only a prospective change of election.
4. Parallel ES payment provisions of income tax to excise tax.
5. Provide DOR with rulemaking power.
7. Preclude the creation of partnership to avoid the excise tax.
November 6, 1981

MEMORANDUM

TO: Participants in the October 23, 1981 Revenue Estimating Conference

FROM: David Beggs, Conference Chairman


The October 23, 1981 Revenue Estimating Conference agreed that consensus estimates should be made for potential reductions in corporate income tax collections should Florida adopt the current federal income tax code. A group consisting of Alan Johansen, Rich Stevens, Jim Zingale and myself has looked into this. Based on research done by Alan Johansen and Rich Stevens, we have agreed that the following amounts represent the best estimates of the potential loss in tax collections.

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Estimate</th>
</tr>
</thead>
<tbody>
<tr>
<td>FY 81-82</td>
<td>$34.0m</td>
</tr>
<tr>
<td>FY 82-83</td>
<td>$72.5 m</td>
</tr>
<tr>
<td>FY 83-84</td>
<td>$123.0 m</td>
</tr>
<tr>
<td>FY 84-85</td>
<td>$184.6 m</td>
</tr>
<tr>
<td>FY 85-86</td>
<td>$267.0 m</td>
</tr>
</tbody>
</table>

These estimates are based on the assumption that Florida adopts the federal code retroactive to January 1, 1981. At this point the effect of adopting the code beginning in 1982 cannot be estimated. This requires detail in the proportion of losses in each asset category under the Accelerated Cost Recovery System and also requires knowledge about how corporations stack their deductions for carry-forward purposes when they incur a net operating loss.

It should be remembered that our current corporate income tax estimates are based on an economic scenario which includes the effects of the Reagan tax package. The above estimates of potential loss, therefore, represent the total fiscal impact of Florida adopting legislation which piggybacks the federal code retroactively to January 1, 1981.
If you have any questions concerning the methodology or need additional information, please let me know.
February 12, 1982

MEMORANDUM

TO: Randy Miller, Executive Director, Department of Revenue

FROM: William F. Zuna, Research, Planning and Budgeting Director

SUBJECT: Corporate Income Tax

Attached is a point paper developed as an offshoot of our activity associated with evaluating various CIT legislative strategies.

Pages 1 - 8 deal with general characteristics of corporate data and the basis for our opinion that a combined 50% add-back for 5, 10, and 15 year depreciation is generally reasonable as a simple holdharmless approach.

Pages 8 - 11 deal with the elimination of the foreign source income exclusion. Prior to our current review, the tax value of the exclusion had been projected forward from a 79 survey of the 180 top firms which assumed that these firms represented almost all foreign operations that affect Florida returns. Our sampling down into the lower brackets of tax paid revealed substantial reporting of foreign operations. Our resulting shelter rate (tax value of the exclusion after apportionment vs. tax paid) was determined to be about 19.4%. Eliminating the exclusion for FY 82-83 represents a 19.4% gain in tax receipts over the $500 million projected. This amounts to an additional $97 million in revenue.

WFZ/am
Attachment
A. Composition

1. The largest national and international corporations in the United States contribute the substantial portion of Florida Corporate Income Tax (CIT). For example, about 180 of America's largest corporations pay about 37% of the total tax.

2. For FY 80-81, there were about 127,000 corporations that filed of which 27% paid tax.

3. The amount of tax paid is deceptive in that it doesn't necessarily represent the size of the corporation. A large corporation may remit a small amount of tax because of losses, low apportionment, and high exclusions, deductions and credits.

4. CIT receipts from the top 180 corporations are distributed as follows:

   Manufacturers 22.9%
   Communication and Transportation 15.3%
   Wholesalers and Retailers 12.6%
   Utilities 11.4%
   Insurance 7.8%
   Services 7.3%
   Petroleum 7.0%
   Construction and Real Estate 6.4%
   Banking and Finance 5.8%
   Mining 3.1%
   Agriculture 0.4%

B. ERTA Impact

1. Manufacturing, Communications, Transportation, Utilities, and Petroleum remit about 57% of the CIT from the top 180 corporations. A 16% sample of Florida's top 300 corporations indicates that a substantial portion within that group are manufacturers. Florida's CIT base is heavily influenced by capital-intensive industry. Since ERTA's
primary impact will be on capital intensive industry, Florida's tax base is sensitive to its effects.

2. ACRS has some rather significant ramifications. Listed below is a sampling of the various examples of types of property that have been grouped into the 3, 5, 10, and 15 year schedules. While it can be argued that ACRS may have minimal impact on some depreciable items, it should also be recognized that depreciation for other items will be accelerated substantially. The following are the groupings of 3, 5, 10, and 15 year property compared to their previous lower limit ADR lives.

(a) **Three Year Property**

<table>
<thead>
<tr>
<th>ADR Life (Lower Limit)</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Any M &amp; E used in R &amp; D - (Various)</td>
</tr>
</tbody>
</table>

(b) **Five Year Personal Property**

<table>
<thead>
<tr>
<th>ADR Life</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Vessels, Barges, Tugs</td>
<td>14.5</td>
</tr>
<tr>
<td>(2) Aircraft - Commercial</td>
<td>9.5</td>
</tr>
<tr>
<td>(3) Public Utility Personal Property</td>
<td>&lt;18</td>
</tr>
<tr>
<td>(4) Telephone Cen. Office Equipment</td>
<td>16</td>
</tr>
<tr>
<td>(5) Petroleum Storage Facilities</td>
<td>16</td>
</tr>
<tr>
<td>(6) Pulp and Paper</td>
<td>10.5</td>
</tr>
<tr>
<td>(7) Chemical</td>
<td>7.5</td>
</tr>
<tr>
<td>(8) Sawing Dim. Stock from Logs</td>
<td>8</td>
</tr>
<tr>
<td>(9) Cement</td>
<td>16</td>
</tr>
<tr>
<td>(10) Electronic Products</td>
<td>6.5</td>
</tr>
<tr>
<td>(11) Aerospace</td>
<td>8</td>
</tr>
<tr>
<td>(12) Instruments and Control Development</td>
<td>9.5</td>
</tr>
<tr>
<td>(13) Wholesalers/Retailers</td>
<td>7</td>
</tr>
</tbody>
</table>

(c) **Ten Year Property**

<table>
<thead>
<tr>
<th>ADR Life</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Utility Personal Property</td>
<td>14.8 - 20</td>
</tr>
<tr>
<td>(2) Theme Park Structures</td>
<td>Various</td>
</tr>
</tbody>
</table>

(d) **Fifteen Year Property**

<table>
<thead>
<tr>
<th>ADR Life</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Utility Personal Property</td>
<td>20+</td>
</tr>
<tr>
<td>(2) Depreciable Real Property</td>
<td>Various</td>
</tr>
</tbody>
</table>
3. Safe Harbor provisions allow a profitable company to purchase assets from a loss company to use the depreciation to shelter profits from tax. It's unlikely that the loss company would sell the assets if they represented any material shelter potential. The rational deal is going to shelter profits with a corresponding impact on CIT. This aspect of ERTA takes the ACRS impact well beyond the argument of ADR accelerated depreciation rates being modestly increased by ACRS.

C. Forecasts

1. CIT Revenue under a coupling with the IRS code as of January 1, 1980 reflect historical Florida growth rates and the stimulative effect of ERTA.

2. Sales Tax Revenue forecast also includes the stimulative effect of ERTA.

3. CIT erosion because of ACRS parallels federal estimates of loss rates.

4. With interest rates high, markets soft, inventories high, and plant utilization rates low, the stimulation of business is off to a poor start. Current spending for plant and equipment is sluggish. Until interest rates drop, business is unlikely to stimulate plant replacement, and certainly will not invest in expansion until inventories are worked down, capacity rates increase, and market demand picks up. Profitability will, most likely, decrease because of volume reductions and unit-cost increases resulting from the overhead impact of low plant utilization.

5. The DOR estimated the effect of ACRS by depreciating Florida purchases of plant and equipment under ACRS or ADR rules. The impact on CIT agrees favorably with the losses interpolated from federal estimates. Our losses in future years were lower than interpolated federal estimates, but the difference was qualitatively reconciled against two factors that we did not include: safe harbor provisions and stimulative assumptions.

[D]. The Florida Add-Back

1. The add-back, as outlined in PCB 5 essentially does three things:
(a) stalls ACRS at least three years
(b) phases the ACRS system in over time
(c) reduces the impact on a percentage basis by
deferring prior period losses into periods of higher
overall CIT collections.

2. The add-back concept neutralizes CIT from ACRS losses
only on account of ACRS activity whereas any other ad-
justments such as rate increases, surcharges, or total de-
preciation add-backs, essentially subsidize ACRS benefi-
ciaries at the expense of other corporations.

3. All benefits against federal taxes will accrue to corpora-
tions. For a corporation doing business only in Florida,
Florida CIT represents, on average, about 13% of Federal
CIT. For the largest corporations, the ratio diminishes to
about 11%. For the largest national corporations, the im-
 pact of an add-back on after-tax profits can be insignifi-
cant on a percentage basis. In all instances, federal tax re-
ductions will strongly overshadow the effect of the add-
back on after-tax profits.

4. On average for each dollar of profit, corporations accrue
$.38 in federal tax liability, and expense about $.90 in de-
preciation. In viewing the relationship of depreciation to
profits, essentially any percentage increase in depreciation
results in a corresponding percentage reduction in profits.
Federal tax, however, is progressive and ACRS will allow
smaller corporations to drive taxable income down into
lower tax brackets.

5. The 50% ACRS add-back for 5, 10, and 15 year property
is a simple method to adjust gross ACRS depreciation
back to an ADR value. Although simple, the add-back
against five year property for assets currently written-off
in seven years will overcompensate, whereas for assets cur-
rently written-off in twenty years, the add-back will un-
dercompensate. Depending on a corporation’s particular
mix of assets, the simple add-back might be neutral, might
be excessive or might be insufficient.

6. The 50% add-back was derived by an analysis of deprecia-
tion from several perspectives.
(a) Looking at 80-81 as a base year, the following are estimates for the purchase of capital items by business in Florida.

<table>
<thead>
<tr>
<th>Property Class</th>
<th>Amount $(Billions)</th>
<th>Weight</th>
</tr>
</thead>
<tbody>
<tr>
<td>3 Years (Equipment)</td>
<td>1.5</td>
<td>17%</td>
</tr>
<tr>
<td>5 Years (Equipment)</td>
<td>3.5</td>
<td>39</td>
</tr>
<tr>
<td>10 Years (Equipment)</td>
<td>1.0</td>
<td>11</td>
</tr>
<tr>
<td>15 Years (Structure)</td>
<td>2.9</td>
<td>33</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>8.9</strong></td>
<td><strong>100%</strong></td>
</tr>
</tbody>
</table>

This distribution agrees fairly well with national statistics which reflect the ratio of investment in equipment vs. structures at roughly 2 to 1.

(b) The DOR assumed ADR mid-life values for the above four classes at 4, 10, 21, and 35 years respectively. The combined weighted add-back amounts to a little over 48%.

The IRS recognizes that ACRS overstates true economic depreciation and provides alternate useful lives for property in order to adjust income statements to provide investors with a truer representation of depreciation. These lives for the above classes are 5, 12, 25 and 35 respectively. Using these values, the combined weighted add-back amounts to about 55%.

(c) The DOR compared ACRS depreciation with depreciation for selective lives within the respective class. We ran the comparison through five years and derived the average add-back for the total time period. The add-backs vary considerably.

(1) Within the 5 year class add-backs against sum of the years depreciation ran from 22% to 61% within the range of 8 year to 10 year useful lives. The arithmetic average for 8, 10, 12, 16, and 20 year property amounted to 42%.
(2) Within the 15 year class, add-backs against straight-line depreciation ran from 50% to 75% within the range of 20 year to 40 year useful lives. The arithmetic average for 20, 25, 30, 35, and 40 year property amounted to 65%.

(3) In view of 5 and 15 year property being the substantial classes, and taking into account the 2 to 1 dollar relationship between the investment in equipment vs. structures, we weighted the average amounts in (1) and (2) above to determine an overall average add-back of about 50%.

\[
\frac{(42\%)(2) + 65\%}{3} = 49.7\%
\]

(d) For capital planning purposes a corporation will, of course, select the mixture of stock replacement and expansion that fits overall corporate strategy and maximizes the present value of the firm. In selecting between alternatives that have neutral effects on any other strategy other than tax, the rational corporation will elect to concentrate non-strategic investment into the longest-life items within any particular ACRS class. ACRS to some extent will influence the structure of capital budgeting with the bias leaning to longer-life property.

E. Foreign Exclusions

1. A profile of corporations by the amount of tax paid is deceptive in analyzing foreign source income exclusions (FSE). The largest national corporations could remit next to nothing to Florida for several reasons:

   (a) completely sheltered income
   (b) substantial shelter on account of the FSE
   (c) low apportionment.

   On the other hand, some of Florida's largest corporations may exclude a substantial portion of their income vis-a-vis FSE.

2. In looking at the 180 corporations that paid the most tax in 1979, the following is the actual percentage of income that they were able to shelter with the FSE:
<table>
<thead>
<tr>
<th>Industry</th>
<th>Shelter Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Petroleum</td>
<td>38.0%</td>
</tr>
<tr>
<td>Mining</td>
<td>24.5%</td>
</tr>
<tr>
<td>Manufacturing</td>
<td>22.4%</td>
</tr>
<tr>
<td>Banking and Finance</td>
<td>10.3%</td>
</tr>
<tr>
<td>Insurance</td>
<td>6.4%</td>
</tr>
<tr>
<td>Transportation and Communication</td>
<td>2.3%</td>
</tr>
</tbody>
</table>

3. For the top 180 corporations the overall impact on revenue in 1979 was a sheltering of approximately 12%. On a dollar volume weighted basis, impact by industry was as follows:

<table>
<thead>
<tr>
<th>Industry</th>
<th>Shelter Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Manufacturing</td>
<td>5.9%</td>
</tr>
<tr>
<td>Petroleum</td>
<td>3.8%</td>
</tr>
<tr>
<td>Mining</td>
<td>0.9%</td>
</tr>
<tr>
<td>Banking and Finance</td>
<td>0.6%</td>
</tr>
<tr>
<td>Insurance</td>
<td>0.5%</td>
</tr>
<tr>
<td>Others Collectively</td>
<td>0.5%</td>
</tr>
</tbody>
</table>

4. These top corporations had served as a sample base which has been used to analyze CIT issues since CIT accounts are not yet computerized. This group of accounts was the basis for the past estimates of FSE. We recognized that this approach is biased to large accounts, so we elected to test this data against several completely random samples. We selected a 16% random sample of Florida’s top 300 companies as listed by Florida Trend magazine. This sample indicated a shelter rate of about 18%. Although these were spread fairly evenly with respect to amount of tax paid, this sample also was disproportionately biased to large corporations.

Again we selected on a purely random basis, a sufficient number of returns to give us a 1% sample against paying corporations. This represented 370 firms that paid tax. Their average shelter rate was about 15%. This sample had a reasonable distribution by size of account and amount paid, but did not pick up any of the largest firms which we know were responsible for at least $16 million in FSE. This sample, to some extent then, was biased away from the largest corporations.
As a final step, we merged the three samples and stratified them into account size groupings. The summary table of data is listed as follows:

<table>
<thead>
<tr>
<th>Amount Paid</th>
<th>1979-80 Corporate Ratio</th>
<th>1979-80 Corporate Ratio</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Percent of Firms</td>
<td>Percent of Total Tax Paid</td>
</tr>
<tr>
<td>$ 1 - $ 15K</td>
<td>85.1%</td>
<td>17.7%</td>
</tr>
<tr>
<td>15K - 75K</td>
<td>12.0%</td>
<td>28.0%</td>
</tr>
<tr>
<td>75K - 150K</td>
<td>1.6%</td>
<td>11.5%</td>
</tr>
<tr>
<td>150K - 300K</td>
<td>0.6%</td>
<td>8.5%</td>
</tr>
<tr>
<td>Above 300K</td>
<td>0.7%</td>
<td>34.4%</td>
</tr>
</tbody>
</table>

Weighted Average . . . . . . 19.4%

The reason for the weighted average of 19.4% being more than the average of any of the individual samples was because of the $15K - 75K increment. This increment had the highest overall shelter rate and the next to the highest proportion of total tax paid. Its high shelter rate indicates several possibilities; the first is that it could include large international companies with low apportionment factors and low levels of taxable income; the second is that it could consist of numerous Florida firms that have substantial foreign activity and relatively high apportionment factors. In any event, it carries the most strength in the weighted average.

5. The estimated tax revenue lost as a result of the FSE for the previous two fiscal years is as follows:

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>CIT Revenue $(Millions)</th>
<th>FSE Impact@ 19.4% $(Millions)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1979-80</td>
<td>371.4</td>
<td>72.1</td>
</tr>
<tr>
<td>1980-81</td>
<td>402.5</td>
<td>78.1</td>
</tr>
</tbody>
</table>

Projected losses for this and next fiscal year can be derived as 19.4% of the forthcoming official estimates.
A bill to be entitled
An act relating to tax administration; amending s. 220.03(1)(1) and (2)(c), Florida Statutes; defining the term “Internal Revenue Code” as used in the Florida Tax Code; creating s. 220.03(5); providing for election to report and pay tax under federal amendments to the Internal Revenue Code made between January 1, 1980 and January 1, 1982; providing for establishment of procedures for election of tax treatment; amending ss. 220.13(1) and (2), Florida Statutes; removing real estate investment trusts from certain requirements relating to adjustments to taxable income; changing the definition of “taxable income” with respect to a real estate investment trust; changing the amount of deductions allowable as a net operating loss carryover or a capital loss carryover to — percent of the deduction allowable under s. 168 of the Internal Revenue Code; adding to taxable income — percent of the deduction allowable under s. 168 of the Internal Revenue Code; providing separate formulas to be used in computing the amount of corporate income tax due on installment sales for certain tax years; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (1) of subsection (1) and paragraph (c) of subsection (2) of section 220.03, Florida Statutes, are amended to read:

220.03 Definitions.—
(1) SPECIFIC TERMS.—When used in this code, and when not otherwise distinctly expressed or manifestly incompatible with the intent thereof, the following terms shall have the following meanings:

(1) “Internal Revenue Code” means the United States Internal Revenue Code of 1954, as amended and in effect on January 1, 1980, except as provided in Subsection (3).

(2) DEFINITIONAL RULES.—When used in this code and neither otherwise distinctly expressed nor manifestly incompatible [sic] with the intent thereof:

(c) Any term used in this code shall have the same meaning as when used in a comparable context in the Internal Revenue Code and other statutes of the United States relating to federal income taxes, as such code and statutes are in effect on January 1,
However, if subsection (3) is implemented, the meaning of any term shall be taken at the time the term is applied under this code.

Section 2. Section 220.03(5), Florida Statutes, is hereby created to read:

(5)(a) Notwithstanding any other provision of this code, all amendments to the Internal Revenue Code of 1954, as amended and in effect on January 1, 1980, which were enacted by the Congress of the United States after January 1, 1980 and before January 1, 1982 and have effective dates prior to January 1, 1982, shall be given effect under this code retroactive to the effective date of each such amendment under the Internal Revenue Code unless the taxpayer makes the election provided for in subsection (b) below.

(b) A taxpayer may make an irrevocable election, as prescribed by the department, to report and pay the tax as levied by this chapter as if all such amendments described in subsection (a) above became effective on January 1, 1982. If such an election is made, all such amendments shall have no application to periods prior to January 1, 1982, and all transactions and events occurring between January 1, 1980 and January 1, 1982 and the continuing tax ramifications of such events and transactions shall be governed by the law in effect on January 1, 1980.

Section 3. Subsection (1) of section 220.13, Florida Statutes, is amended to read:

220.13 Adjusted federal income defined.—

(1) “Adjusted federal income” means an amount equal to the taxpayer’s taxable income as defined in subsection (2), or said taxable income of more than one taxpayer as provided in s. 220.131, for the taxable year, adjusted as follows:

(a) Additions.—There shall be added to such taxable income:

1. The amount of income tax paid or accrued as a liability to this state under this code which is deductible from gross income in the computation of taxable income for the taxable year;

2. The amount of interest which is excluded from taxable income under s. 103(a) of the Internal Revenue Code or any other federal law, less the associated expenses disallowed in the computation of taxable income under s. 265(2) of the Internal Revenue Code or any other law;

3. In the case of a regulated investment company or real estate investment trust, an amount equal to the excess of the net long-term capital gain for the taxable year over the amount of the capital gain dividends attributable to the taxable year.
4. That portion of the wages or salaries paid or incurred for the taxable year which is equal to the amount of the credit allowable for the taxable year under s. 220.181. The provisions of this subparagraph shall expire and be void on June 30, 1986.

5. That portion of the ad valorem school taxes paid or incurred for the taxable year which is equal to the amount of the credit allowable for the taxable year under s. 220.182. The provisions of this subparagraph shall expire and be void on December 31, 1986.

(b) Subtractions.—

1. In computing the net operating loss deduction allowable for federal income tax purposes under s. 172 of the Internal Revenue Code for the taxable year, the net capital loss allowable for federal income tax purposes under s. 1212 of the Internal Revenue Code for the taxable year, the excess charitable contribution deduction allowable for federal income tax purposes under s. 170(d)(2) of the Internal Revenue Code for the taxable year, and the excess contributions deductions allowable for federal income tax purposes under s. 404 of the Internal Revenue Code for the taxable year, there shall be subtracted from taxable income, in order to arrive at adjusted federal income, such amounts as reflect the following limitations:

   a. No deduction shall be allowed for net operating losses, net capital losses, and excess contribution deductions under ss. 170(d)(2) and 404 of the Internal Revenue Code which are carried forward from taxable years ending prior to January 1, 1972; and

   b. The net operating loss, net capital loss, and excess contributions deductions under ss. 170(d)(2) and 404 of the Internal Revenue Code, respectively, allowable for any taxable year beginning before and ending after January 1, 1972, shall be limited to an amount which bears the same ratio to the taxpayer's net operating loss, net capital loss, and excess contributions deductions under ss. 170(d)(2) and 404 of the Internal Revenue Code, respectively, for the entire taxable year as the number of days in such year after December 31, 1971, bears to the total number of days in such year, unless the taxpayer elects to account separately for income under s. 220.12(3) of this code, in which case the net operating loss, net capital loss, and excess contributions deductions under ss. 170(d)(2) and 404 of the Internal Revenue Code, respectively, allowable for such year shall be determined on the basis of the items actually earned, received, paid, incurred, or accrued after December 31, 1971; and
c. A net operating loss and a capital loss shall never be carried back as a deduction to a prior taxable year, but all deductions attributable to such losses minus * percent of the deduction allowed by section 168 for each loss year, shall be deemed net operating loss carryovers and capital loss carryovers, respectively, and treated in the same manner, to the same extent, and for the same time periods as are prescribed for such carryovers in ss. 172 and 1212, respectively, of the Internal Revenue Code.

2. There shall be subtracted from such taxable income any amount included therein:
   a. Under s. 78 or s. 951 of the Internal Revenue Code;
   b. Which was derived from sales outside the United States, and from sources outside the United States as interest, as a royalty, or as compensation for technical or other services; and
   c. Which was received as a dividend from a corporation which neither transacts any substantial portion of its business in the United States nor regularly maintains any substantial portion of its assets within the United States.

However, as to any amount subtracted under this subparagraph, there shall be added to such taxable income all expenses deducted on the taxpayer's return for the taxable year which are attributable, directly or indirectly, to such subtracted amount.

3. In computing "adjusted federal income" for taxable years beginning after December 31, 1976, there shall be allowed as a deduction the amount of wages and salaries paid or incurred within this state for the taxable year for which no deduction is allowed pursuant to s. 280C of the Internal Revenue Code (relating to credit for employment of certain new employees).

   (c) Installment sales for taxable years ending on or before October 19, 1980—

   1. Unless there has been an election under subparagraph 2., any taxpayer which returns any portion of its income for federal income tax purposes under s. 453 of the Internal Revenue Code, whether or not as a dealer, shall file its return under this code, and shall compute its adjusted taxable income, including income derived from transactions treated for federal tax purposes as installment sales, in accordance with the regular method by which the taxpayer accounts, under s. 446(c) of the Internal Revenue Code, for transactions which are not installment sales. In preparing its return under this code, the taxpayer shall adjust taxable income, as defined in subsection (2), by excluding therefrom all installment sale income reported in the taxable year with respect to income
realized from installment sales prior to January 1, 1972 and by including therein the full amount of all income realized from installment sales, under an accrual method of accounting, on or after said date. However, for a taxable year which begins before and ends after January 1, 1972, the ratio set forth in s. 220.12(2) shall not be applied to the taxpayer's apportioned share of installment sale income in computing net income.

2. Any taxpayer which has elected for federal income tax purposes to report any portion of its income on the installment basis under s. 453 of the Internal Revenue Code may elect so to return income from installment sales for purposes of this code. However, the election provided by this subparagraph shall only be allowed if:

   a. The election is made not later than the due date, including any extensions thereof, for filing the taxpayer's return under this code, in such manner as the department may prescribe; and

   b. The taxpayer consents in writing, at the time of its election, to the filing of its return without the adjustments to taxable income which are described in subparagraph 1.

Notwithstanding any other provision of this paragraph, if the election is not made for the taxpayer's first taxable year under this code in which a portion of its income is so returned for federal tax purposes, an election under this subparagraph may be made at any time thereafter if the taxpayer files amended returns for all prior periods ending after January 1, 1972, and pays the additional tax that would have been due, including interest from the due date of the original return until the tax due on each amended return is paid, as though an original election under this subparagraph adjusted as required under subparagraphs 4. and 5. had been timely made. By filing such amended returns, the taxpayer shall be deemed to have waived any statute of limitations defense and to have made the election as if it had been made on the original return.

3. If the taxpayer is a dealer or otherwise returns a portion of its income under s. 453 of the Internal Revenue Code, an election under subparagraph 2. must be made for the taxpayer's first taxable year under this code in which a portion of its income is so returned for federal tax purposes, and the election shall apply to all subsequent taxable years for which installment sale treatment is elected for federal income tax purposes, unless the department consents in writing to the revocation of such election prior to the first taxable year for which such revocation would apply.
4. If an election is made under subparagraph 2., then, in lieu of returning the entire amount of installment sale income returned for federal income tax purposes, the taxpayer may include in income for each taxable year under this code only the amount of income which is specified in subparagraph 5., in which event the taxpayer shall also add to taxable income, as defined in subsection (2), all expenses deducted on its federal return for the taxable year with respect to installment sale income excluded from Florida net income under this provision, including collection costs and the expenses attributable to servicing sales contracts.

5. The amount to be included in taxable income under subparagraph 4. shall be limited to the sum of the following amounts:
   a. An amount equal to 100 percent of the income derived from installment sale transactions consummated on or after January 1, 1972;
   b. An amount equal to 70 percent of the income returned for federal income tax purposes in the taxable year which was derived from installment sale transactions consummated prior to January 1, 1972, and after December 31, 1970;
   c. An amount equal to 50 percent of the income returned for federal income tax purposes in the taxable year which was derived from installment sale transactions consummated prior to January 1, 1971, and after December 31, 1968;
   d. An amount equal to 25 percent of the income returned for federal income tax purposes in the taxable year which was derived from installment sale transactions consummated prior to January 1, 1969, and after December 31, 1966; and
   e. An amount equal to 10 percent of the income returned for federal income tax purposes in the taxable year which was derived from installment sale transactions consummated prior to January 1, 1967.

6. The department may by regulation prescribe the methods or procedures for computing the amounts included and excluded from taxable income under subparagraphs 4. and 5.

(d) Installment sales for taxable years ending after October 19, 1980.

1. In the case of any disposition made after October 19, 1980, the income from an installment sale shall be taken into account for purposes of this code in the same manner that such income is taken into account for federal income tax purposes under section 453 of the Internal Revenue Code of 1954, as in effect on October 19, 1980.
2. In the case of any disposition made on or before October 19, 1980, in any taxable year ending after such date, the income from an installment sale reported in the installment method for federal income tax purposes shall be taken into account as provided in paragraph (c) for purposes of this code. If an election is made under subparagraph 2. of paragraph (c), the income from an installment sale reported on the installment method for federal income tax purposes shall be taken into account for purposes of this code in the same manner that such income is taken into account for federal income tax purposes.

3. Any taxpayer who regularly sells or otherwise disposes of personal property on the installment plan and reports the income therefrom on the installment method for federal income tax purposes under s. 453(a) of the Internal Revenue Code shall report such income in the same manner under this code.

Section 4. Subsection (2) of section 220.13, Florida Statutes, is amended to read:

(2) For purposes of this section, a taxpayer's taxable income for the taxable year shall mean taxable income as defined in section 63 of the Internal Revenue Code and properly reportable for federal income tax purposes for the taxable year plus * percent of the deduction allowed by section 168 (relating to accelerated cost recovery system), but subject to the limitations set forth in paragraph (1)(b) with respect to the deductions provided by sections 172 (relating to net operating losses), 170(d)(2) (relating the excess charitable contributions), 404(a)(1)(D) (relating to excess pension trust contribution), 404(a)(3)(A) and (B) (to the extent relating to excess stock bonus and profit-sharing trust contributions), 404(d) (relating to excess contributions under the 1939 code) and 1212 (relating to capital losses) of the Internal Revenue Code, except that, subject to the same limitations:

(a) "Taxable income," in the case of a life insurance company subject to the tax imposed by s. 802 of the Internal Revenue Code, shall mean life insurance company taxable income; however, the amount of that income determined under paragraph 802(b)(3) of the Internal Revenue Code which shall be taken into account for purposes of this code shall never exceed, cumulatively, the excess of amounts determined under said paragraph as of the close of the taxpayer's taxable year over the amount determined under said paragraph as of December 31, 1971;

(b) "Taxable income," in the case of a mutual insurance company subject to the tax imposed by s. 821(a) or (c) of the Inter-
nal Revenue Code, shall mean mutual insurance company taxable income or taxable investment income, as the case may be;

(c) "Taxable income," in the case of an insurance company subject to the tax imposed by s. 831(a) of the Internal Revenue Code, shall mean insurance company taxable income;

(d) "Taxable income," in the case of a regulated investment company subject to the tax imposed by s. 853 of the Internal Revenue Code, shall mean investment company taxable income;

(e) "Taxable income," in the case of a real estate investment trust subject to the tax imposed by s. 857 of the Internal Revenue Code, shall mean the income subject to tax, computed as provided in section 852 of the Internal Revenue Code, real estate investment trust taxable income;

(f) "Taxable income," in the case of a corporation which is a member of an affiliated group of corporations filing a consolidated income tax return for the taxable year for federal income tax purposes, shall mean taxable income of such corporation for federal income tax purposes as if such corporation had filed a separate federal income tax return for the taxable year and each preceding taxable year for which it was a member of an affiliated group, unless a consolidated return for the taxpayer and others is required or elected under s. 220.131;

(g) "Taxable income," in the case of a cooperative corporation or association, shall mean the taxable income of such organization determined in accordance with the provisions of ss. 1381 through 1398 of the Internal Revenue Code;

(h) "Taxable income," in the case of an organization which is exempt from the federal income tax by reason of s. 501(a) of the Internal Revenue Code, shall mean its unrelated business taxable income as determined under s. 512 of the Internal Revenue Code; and

(i) "Taxable income," in the case of a corporation for which there is in effect for the taxable year an election under s. 1372 of the Internal Revenue Code, shall mean the amount of income subject to tax at the corporate level under paragraph 1372(b)(1) of the Internal Revenue Code for each taxable year.

Section 5. This act shall take effect upon becoming a law.
STATE GOVERNMENT AND PRIVATE SECTOR IMPACT

In compliance with Rule 7.16, there is hereby submitted a fiscal note on the above listed bill relative to the effect on revenues, expenditures, or fiscal liability of the State.

I DESCRIPTION OF BILL:

A. Fund or Tax Affected Corporate Income Tax
B. Principal Agency Affected Department of Revenue
C. Sponsor’s Statement of Purpose

Amends the existing corporate income tax law to adopt changes in the Internal Revenue Code to January 1, 1982, to improve taxpayer compliance and administration, and to ease preparation of corporate tax returns.

D. Narrative Summary

Section 1: Amends section 220.03(1)(1) and (2)(c), F.S., deleting a reference to Internal Revenue Code of 1980 and inserting a reference to the Internal Revenue Code of 1982.

Section 2: Amends the corporate income tax law retroactively adopting changes in the Internal Revenue Code between January 1, 1980 and January 1, 1982, allowing an irrevocable election to report and pay the tax as if all these amendments became effective January 1, 1982.

Section 3: Section 220.13(1)(a), F.S., provides for the addition of undistributed capital gains to the taxable income of regulated investment companies and real estate investment trusts (R.E.I.T.’s). The federal government now requires inclusion of R.E.I.T.’s capital gains in their taxable income. This bill deletes R.E.I.T.’s from the addback requirement of section 220.13(1)(a).

Section 220.13(1)(b)1.c. is amended to require subtraction of **percent** from any carry back deductions attributable to Accelerated Cost Recovery Systems (A.C.R.S.) deductions for each loss year.
Section 220.13(1)(c) is amended and (d) is added to conform Florida law to changes in federal treatment of installment sales. Previously federal law required that income from an installment sales be reported under the accrual method unless the taxpayer elected to report the income under the installment method. Now, for installment sales after October 19, 1980, federal law requires taxpayers to report installment sales income under the installment method unless the taxpayer elects accrual treatment.

Section 4: Section 220.13(2) amends the definition of "taxable income" to require the addition of ___* percent of any A.C.R.S. deductions to the taxpayer's federal taxable income.

Section 220.13(2)(e) is amended to delete the reference to R.E.I.T. taxable income and includes all R.E.I.T. income subject to federal tax under s. 857 of the Internal Revenue Code.

II. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

A. Non-Recurring or First Year Start-up Effects
   None

B. Recurring or Annualized Continuation Effects
   Current corporate income tax estimates are based on an economic scenario which includes the effects of the Reagan tax package. The estimates of potential loss, therefore, represent the total fiscal impact of Florida adopting legislation which piggybacks the federal code retroactively to January 1, 1981, without a revenue recovery method.

   FY 81-82  FY 82-83  FY 83-84  FY 84-85  FY 85-86
   $ 34.0 m  $ 72.5 m  $123.0 m  $184.6 m  $267.0 m

   The addback of a percentage of A.C.R.S. depreciation represents an attempt to render piggybacking relatively neutral from a revenue collection standpoint.

C. Long Run Effects other than Normal Growth
   None

D. Appropriations Consequences/Source of Funds
   None
V. DIRECT IMPACT ON THE PRIVATE SECTOR:

A. Direct Private Costs
Because the addback figure is a broad average some taxpayers will receive less of an advantage from their allowed depreciation deductions than they would have under the previous system.

B. Direct Private Benefits
Burdensome accounting costs of maintaining separate books for Florida corporate tax purposes would be eliminated. Also, because the addback figure is an average, some taxpayers will benefit relative to others.

III. COMMENTS:
* The blank is intended to reflect the average speed-up of depreciation. We are currently attempting to obtain this information from the U.S. Treasury Department. The Department of Revenue has estimated this figure as approximately 49%. D.R.I., an economic forecasting service utilized by the legislature and executive branches, stated this figure as roughly 50%.

/s/ Henry C. Cain
Staff Director