PART IV — DISASTER AND RESILIENCY

1. Exclusion of amounts received from State-based catastrophe loss mitigation programs (sec. 135401 of the bill and sec. 139 of the Code)

Present Law

In General

Any amount that an individual receives as a qualified disaster relief payment or that is received as a qualified disaster mitigation payment is excluded from gross income.[88]

Qualified Disaster Relief Payment

A qualified disaster relief payment is any amount paid to or for the benefit of the individual (1) to reimburse or pay reasonable and necessary personal, family, living, or funeral expenses incurred as a result of a qualified disaster; (2) to reimburse or pay reasonable and necessary expenses incurred for the repair or rehabilitation of a personal residence or repair or replacement of its contents to the extent that the need for the repair, rehabilitation, or replacement is attributable to a qualified disaster; (3) by a person engaged in the furnishing or sale of transportation as a common carrier by reason of the death or personal physical injuries incurred as a result of a qualified disaster; or (4) if the amount is paid by a Federal, State, or local government, or by an agency or instrumentality of the government, in connection with a qualified disaster in order to promote the general welfare, but only to the extent that any expense compensated by the payment is not otherwise compensated by insurance or other sources.[89]

A qualified disaster is a disaster that results from a terrorist or military action; a Federally declared disaster;[90] a disaster that results from an accident involving a common carrier, or from any other event, that the Secretary determines is of a catastrophic nature; or, in respect of general welfare payments by a government, a disaster that by determination of an applicable Federal, State, or local authority, warrants assistance from the Federal, State, or local government (or an agency or instrumentality of the government).[91]

Qualified Disaster Mitigation Payment

A qualified disaster mitigation payment is any amount that is paid under the Robert T. Stafford Disaster Relief and Emergency Assistance Act or the National Flood Insurance Act to or

[88] Sec. 139(a), (g)(1).

[89] Sec. 139(b).

[90] A Federally declared disaster is a disaster declared by the President to be eligible for Federal assistance under the Robert T. Stafford Disaster Relief and Emergency Assistance Act.

[91] Sec. 139(c).

for the benefit of the owner of any property for hazard mitigation with respect to the property.[92] The term does not include any amount received for the sale or disposition of any property.[93]

Special Rules

For purposes of the Code provisions for employment tax and self-employment tax, qualified disaster relief payments and qualified disaster mitigation payments are not treated as net earnings from self-employment, wages, or compensation subject to tax.[94]

If with respect to any property an amount is excluded from gross income as a qualified disaster mitigation payment, no increase in the basis or adjusted basis of the property may result from the excluded amount.[95]

The person for whose benefit a qualified disaster relief payment or a qualified disaster mitigation payment is made is not allowed a deduction or credit for, or by reason of, any expenditure to the extent of the amount excluded under this section with respect to the expenditure (a "no-double-benefit rule").[96]

Explanation of Provision

The provision allows an exclusion from gross income for any amount that an individual receives as a qualified catastrophe mitigation payment under a program established by a State or a political subdivision or instrumentality of a State for the purpose of making these payments.[97]

For this purpose, a qualified catastrophe mitigation payment is any amount that an individual receives to make improvements to the individual's residence for the sole purpose of reducing the damage that would be done to the residence by a windstorm, earthquake, or wildfire.

For purposes of the employment tax and self-employment tax provisions of the Code, qualified catastrophe mitigation payments are not treated as net earnings from self-employment, wages, or compensation subject to tax.

---

[92] Sec. 139(g)(2).

[93] *Ibid.*

[94] Sec. 139(d).

[95] Sec. 139(g)(3).

[96] Sec. 139(h).

[97] Such programs include programs established by a joint powers authority or an entity created by state law to ensure the availability of an adequate market of last resort for essential property insurance over which a State agency or State department of insurance has regulatory oversight. A technical correction may be needed to reflect this intent.

Rules similar to the rule denying an increase in the basis of property with respect to which an amount is excluded as a qualified disaster mitigation payment apply in the case of qualified catastrophe mitigation payments.

The provision extends to qualified catastrophe mitigation payments the present law no-double-benefit rule that applies to qualified disaster relief payments and qualified disaster mitigation payments.

Effective Date

The provision is effective for taxable years beginning after December 31, 2020.

2. Repeal of temporary limitation on personal casualty losses (sec. 135402 of the bill and sec. 165 of the Code)

Present Law

Personal Casualty Losses

A taxpayer may generally claim a deduction for any loss sustained during the taxable year, not compensated by insurance or otherwise. For individual taxpayers, deductible losses must be incurred in a trade or business or other profit-seeking activity or consist of property losses arising from fire, storm, shipwreck, or other casualty, or from theft.[98]

The term "other casualty" has been defined to mean the complete or partial damage, destruction, or loss of property resulting from an identifiable event of a sudden, unexpected, and unusual nature.[99] Damage or loss resulting from progressive deterioration of property through a steadily operating cause is not a casualty loss.[100]

A casualty loss generally is allowed as a deduction only for the taxable year in which the loss is sustained.[101] If the taxpayer has a claim for reimbursement of the loss from insurance or otherwise for which there is a reasonable prospect of recovery, no portion of the loss for which reimbursement may be received is deductible until it can be ascertained with reasonable certainty whether the reimbursement will be received.[102]

The amount of a taxpayer's casualty loss generally is the decrease in the fair market value of the property as a result of the casualty, limited to the taxpayer's adjusted basis in the property.[103] Treasury regulations allow taxpayers to use an alternative method of valuation that

---

[98] Sec. 165(c).

[99] Rev. Rul. 72-592, 1972-2 C.B. 101.

[100] See *Matheson v. Commissioner*, 54 F.2d 537 (2d Cir. 1931).

[101] Treas. Reg. sec. 1.165-1(d)(1).

[102] Treas. Reg. sec. 1.165-1(c)(4), (d)(2).

[103] Treas. Reg. sec. 1.165-7(b).

allows the cost of repairs to the damaged property as evidence of the decrease in value of the property.[104]

Personal casualty or theft losses are deductible only if they exceed $100 per casualty or theft. In addition, aggregate net personal casualty and theft losses are deductible only to the extent they exceed 10 percent of an individual taxpayer's adjusted gross income.[105]

For losses incurred in taxable years beginning after December 31, 2017, and before January 1, 2026, personal casualty or theft losses are further limited.[106] An individual may claim an itemized deduction for a personal casualty loss (subject to the limitations described above) only if such loss is attributable to a disaster declared by the President to be eligible for Federal assistance under the Robert T. Stafford Disaster Relief and Emergency Assistance Act. An exception applies to the extent an individual's personal casualty loss does not exceed the individual's personal casualty gains.

Deteriorating Concrete Foundations

Revenue Procedure 2017-60

On November 23, 2017, prior to enactment of the temporary limitation on personal casualty loss deductions, the IRS published Revenue Procedure 2017-60.[107] The revenue procedure provides a safe harbor that allows an individual to deduct amounts paid to repair damage to his or her personal residence caused by deteriorating concrete foundations containing the mineral pyrrhotite. The revenue procedure describes that residents in the northeastern part of the United States have reported problems with certain residential concrete foundations, which resulted in investigations by the Connecticut Office of the Attorney General and the Connecticut Department of Consumer Protection. Investigators concluded that the presence of pyrrhotite in the concrete used in the foundations was causing the concrete to deteriorate prematurely.

The safe harbor method allows taxpayers to treat certain damage resulting from deteriorating concrete foundations as a casualty loss and provides a formula for determining the amount of the loss. A taxpayer who pays to repair damage to the taxpayer's personal residence caused by a deteriorating concrete foundation may treat the amount paid as a casualty loss in the year of payment. To utilize the safe harbor, the taxpayer must obtain a written evaluation from a

---

[104] Treas. Reg. sec. 1.165-7(a)(2)(ii).

[105] Congress has chosen to modify these requirements in certain recent disaster relief bills. For example, in the Taxpayer Certainty and Disaster Tax Relief Act of 2020, Pub. L. No. 116-260, Div. EE, sec. 304(b), with respect to losses arising from certain qualified disasters in 2020, a taxpayer is allowed a deduction for a personal casualty loss without regard to whether the individual's aggregate net losses exceed 10 percent of AGI, but such a loss is deductible only if it exceeds $500. See also Pub. L. No. 116-94, sec. 204(b), December 20, 2019 (certain disasters occurring in 2018 and 2019); sec. 20104(b) of Pub. L. No. 115-123 (certain California wildfires); Sec. 504(b) of Pub. L. No. 115-63 (Hurricanes Harvey, Irma, and Maria); and former sec. 1400S(b) (Hurricanes Katrina, Rita, and Wilma).

[106] The temporary limitation on personal casualty or theft loss deductions was enacted in Pub. L. No. 115-97, on December 22, 2017.

[107] 2017-50 I.R.B. 559.

licensed engineer stating that the foundation was made with defective concrete and may have to satisfy other criteria. The amount of loss that may be claimed under the safe harbor is equal to all unreimbursed amounts paid during the taxable year to repair damage to the taxpayer's personal residence caused by the deteriorating foundation, limited to the taxpayer's adjusted basis in the property. Additional rules apply for taxpayers who have pending claims for reimbursement or intend to pursue reimbursement.

Revenue Procedure 2018-14

On February 18, 2018, following enactment of the temporary limitation on personal casualty loss deductions, the IRS published Revenue Procedure 2018-14, which modified Revenue Procedure 2017-60.[108] Because of the newly-enacted temporary limitation on personal casualty losses for losses incurred in taxable years beginning after December 31, 2017, the IRS stated that a taxpayer generally must have paid to repair damage caused by a deteriorating concrete foundation before January 1, 2018, to claim a casualty loss under the safe harbor in Revenue Procedure 2017-60.

The Treasury Department and IRS modified the safe harbor method in Revenue Procedure 2017-60 to give taxpayers additional time to pay to repair damage to their personal residences. The modified safe harbor allows a taxpayer who pays to repair damage caused by a deteriorating foundation after filing an original 2017 income tax return and before the last day for filing a timely amended return for the 2017 tax year to treat the amount paid as a casualty loss on a timely filed amended return for the 2017 tax year. Accordingly, a taxpayer utilizing the safe harbor method provided by Revenue Procedure 2017-60, as modified by Revenue Procedure 2018-14, for damage caused by a deteriorating concrete foundation generally must have paid to repair the damage prior to May 17, 2021 (or October 15, 2021, if the taxpayer received a filing extension).[109]

Explanation of Provision

The provision repeals the temporary limitation on personal casualty or theft losses that limited such losses to those attributable to a Federally declared disaster. The provision repeals the limitation for losses incurred in taxable years beginning after December 31, 2017. Losses previously limited by the temporary limitation are no longer so limited.

The provision directs the Secretary to issue regulations or other guidance as necessary to implement the amendments made by the provision, including regulations or guidance consistent with Revenue Procedure 2017-60. Regulations or guidance consistent with Revenue Procedure 2017-60 would continue to provide a safe harbor to a taxpayer who pays to repair damage to the taxpayer's personal residence caused by a deteriorating concrete foundation, without the time limitation imposed by the modification in Revenue Procedure 2018-14. In addition, the provision extends the period of limitations to file a claim for credit or refund by one year in the case of a claim for credit or refund properly allocable to a personal casualty loss described in Revenue Procedure 2017-60, as modified by Revenue Procedure 2018-14, and

---

[108] 2018-9 I.R.B. 378.

[109] See sec. 6511(a); see also Notice 2021-21, 2021-15 I.R.B. 986 (granting an extension to the period of limitations to file a claim for credit or refund of Federal income tax from April 15, 2021, to May 17, 2021).

claimed for taxable years beginning after December 31, 2016. The extension allows a taxpayer utilizing the existing safe harbor method provided by Revenue Procedure 2017-60, as modified by Revenue Procedure 2018-14, an additional year to file an amended return for the 2017 tax year.

Effective Date

The provision to repeal the temporary limitation of personal casualty and theft losses is effective for losses incurred in taxable years beginning after December 31, 2017.

3. Credit for qualified wildfire mitigation expenditures (sec. 135403 of the bill and new sec. 28 of the Code)

Present Law

A deduction is allowed for ordinary and necessary expenses paid or incurred in carrying on a trade or business.[110]

A taxpayer's basis in real property generally increases as a result of expenditures to improve the property.[111]

Certain enumerated credits for various activities undertaken in connection with a business are allowed in the computation of the general business credit.[112]

There is no credit specifically for expenditures with respect to real property for wildfire mitigation.

Explanation of Provision

In General

The provision provides a credit against income tax for 30 percent of the qualified wildfire mitigation expenditures paid or incurred by a taxpayer with respect to real property that the taxpayer owns or leases.

Qualified Wildfire Mitigation Expenditures

Qualified wildfire mitigation expenditures are any specified wildfire mitigation expenditure made under a qualified State wildfire mitigation program of a State that requires expenditures for wildfire mitigation to be paid by the taxpayer and the State. An expense item is not a qualified wildfire mitigation expenditure unless the ratio of the State's expenditure for the item to the sum of the State's and taxpayer's expenditures for the item is at least 25 percent.

---

[110] Sec. 162.

[111] Sec. 1016(a).

[112] Sec. 38.

A specified wildfire mitigation expenditure is, with respect to real property owned or leased by a taxpayer, any amount paid or incurred to reduce the risk of wildfire by removing accumulations of vegetation (including establishing, expanding, or maintaining fuel breaks to serve as fire breaks) on the real property.

A qualified State wildfire mitigation program is any program of a State the primary purpose of which is to mitigate the risk of wildfires in the State.

An amount that is originally paid or incurred by a taxpayer and is reimbursed by a State under a qualified wildfire mitigation program of that State is treated as paid by the State, not by the taxpayer.

Rules of Application

The portion of the credit that is attributable to expenditures made in the ordinary course of the taxpayer's trade or business is treated as a credit that is allowed in the computation of the general business credit. This rule also applies to expenditures made by a State that would have been expenditures made in the ordinary course of a taxpayer's trade or business if they had been made by the taxpayer.

To the extent the credit is not allowed as part of the general business credit, the credit is treated as a nonrefundable personal credit.

Reduction in Credit Percentage

If a taxpayer's expenditure percentage for any item of qualified wildfire mitigation expenditure is less than 30 percent, the credit percentage for that item equals that expenditure percentage rather than the generally applicable 30-percent credit rate. For this purpose, a taxpayer's expenditure percentage for any item of qualified wildfire mitigation expenditure any portion of which is paid or incurred by a state is the ratio (expressed as a percentage) of the taxpayer's expenditure for the item divided by the sum of the taxpayer's and the State's expenditures for the item.

Special Rules

An expenditure is not taken into account in determining the credit if the expenditure is properly allocable to timber that the taxpayer sells or exchanges. This treatment of expenditures related to marketable timber does not apply to the extent that the expenditure exceeds the gain on a sale or exchange of the timber.

If the basis of property otherwise would be determined by taking into account a qualified wildfire mitigation expenditure, the basis of that property is reduced by the amount of the credit allowed with respect to the expenditure (determined without regard to the rule treating the credit as part of the general business credit).

The amount of any deduction or other credit allowable for any expenditure for which the qualified wildfire mitigation expenditure credit is allowable is reduced by the amount of the qualified wildfire mitigation expenditure credit allowed for the expenditure (determined without regard to the rule treating the credit as part of the general business credit).

Effective Date

The provision applies to expenditures paid or incurred after the date of enactment, in taxable years ending after that date.

PART V — HOUSING

Low Income Housing Tax Credit

1. Increases in State allocations (sec. 135501 of the bill and sec. 42 of the Code)

Present Law

A taxpayer may claim the low-income housing tax credit annually over a 10-year period for the costs of building or rehabilitating rental housing occupied by low-income tenants. To be eligible for the credit, a low-income building must have received a credit allocation from the State or been financed with the proceeds of certain tax-exempt bonds that are subject to the private activity bond volume limit. For any calendar year, the total amount of housing credits available for allocation by a State is limited to the State housing credit ceiling. However, the amount of housing credit allocated to a low-income building reduces the State housing credit ceiling only once, in the year the housing credit is allocated.

State Housing Credit Ceiling

The State housing credit ceiling is an amount equal to the sum of four components: (1) the unused State housing credit ceiling (if any) for the preceding calendar year (the "unused carryforward component"), (2) the population component, (3) the amount of State housing credit ceiling returned in the calendar year (the "returned credit component"), plus (4) the amount (if any) that the Secretary allocates to the State from the national pool of unused housing credits (the "national pool component").[113]

The unused carryforward component is the excess, if any, of (1) the sum of the population, returned credit, and national pool components for the preceding calendar year, over (2) the aggregate amount of housing tax credits actually allocated by the State for such year, reduced by the amount of credits allocated from such year's unused State housing credit ceiling.[114] Any credits in the unused carryforward component that are not allocated in the current calendar year are forfeited to the national pool.

For calendar year 2021, the population component of the State housing credit ceiling is equal to the greater of (1) $2.8125 multiplied by the State population or (2) $3,245,625.[115]

Explanation of Provision

The provision modifies the population component of the State housing credit ceiling. For 2022, the population component of the State housing credit ceiling is equal to the greater of (1) $3.22 multiplied by the State population, or (2) $3,711,575. For 2023, the population component of the State housing credit ceiling is equal to the greater of (1) $3.70 multiplied by

[113] Sec. 42(h)(3)(C); Treas. Reg. sec. 1.42-14(a)(1).

[114] Sec. 42(h)(3)(C); Treas. Reg. sec. 1.42-14(b).

[115] Rev. Proc. 2020-45. These amounts include a temporary increase enacted in the Consolidated Appropriations Act of 2018, Pub. L. No. 115-141. These limits do not apply in the case of projects that also receive financing with proceeds of tax-exempt bonds issued subject to the private activity bond volume limit.

the State population, or (2) $4,269,471. For 2024, the population component of the State housing credit ceiling is equal to the greater of (1) $4.25 multiplied by the State population, or (2) $4,901,620. For 2025, the population component of the State housing credit ceiling is equal to the greater of (1) $4.88 multiplied by the State population, or (2) $5,632,880. These amounts are adjusted for inflation in calendar years 2026, 2027, and 2028.

Effective Date

The provision is effective for calendar years beginning after December 31, 2021.

2. Tax-exempt bond financing requirement (sec. 135502 of the bill and sec. 42 of the Code)

Present Law

A taxpayer may claim the low-income housing tax credit annually over a 10-year period for the costs of building or rehabilitating rental housing occupied by low-income tenants. The amount of credit that may be claimed each year is an amount equal to the applicable percentage of the qualified basis of each qualified low-income building.

Credit Calculations

The applicable percentage for non-Federally subsidized newly constructed housing and non-Federally subsidized substantial rehabilitation is calculated such that the present value of the credit amounts is at least 70 percent of a building's qualified basis, depending on the prevailing interest rate.[116] These credits are sometimes referred to as "nine-percent credits."

The applicable percentage for Federally subsidized newly constructed housing, Federally subsidized substantial rehabilitation, and certain housing acquisition costs, is calculated such that the present value of the credit amounts is at least 30 percent of a building's qualified basis, depending on the prevailing interest rate.[117] These credits are sometimes referred to as "four-percent credits."

Credit Allocations

---

[116] See sec. 42(b) and (e). This credit is referred to as the 70-percent credit. See Joint Committee on Taxation, *General Explanation of the Tax Reform Act of 1986* (JCS-10-87), May 4, 1987. This document can be found on the Joint Committee on Taxation website at www.jct.gov. However, under the Housing and Economic Recovery Act of 2008, the minimum applicable percentage for such credits was temporarily set at nine percent (the "nine-percent floor"). The Consolidated Appropriations Act, 2016 made the nine-percent floor permanent. The enactment of the nine-percent floor on the credit implies that, under the statutory formula, the present value is always 70 percent or greater.

[117] This credit is referred to as the 30-percent credit. See Joint Committee on Taxation, *General Explanation of the Tax Reform Act of 1986* (JCS-10-87), May 4, 1987. This document can be found on the Joint Committee on Taxation website at www.jct.gov. However, under the Consolidated Appropriations Act, 2020, the minimum applicable percentage for such credits was set at four percent (the "four-percent floor"). The enactment of the four-percent floor on the credit implies that, under the statutory formula, the present value is always 30 percent or greater.

A low-income housing tax credit is generally allowable only if the building owner receives a housing credit allocation from a State or local housing credit agency. The amount of housing credit allocated by a State to a low-income building reduces the State housing credit ceiling only once, in the year the housing credit is allocated.

Special rule for buildings financed by tax-exempt bonds

If 50 percent or more of the aggregate basis of the building and the land on which the building is located is financed by the proceeds of tax-exempt bonds, a low-income housing tax credit is allowable with respect to the entire eligible basis of the project without an allocation from the State or local housing credit agency and at no charge to the States' housing tax credit cap. If less than 50 percent of the aggregate basis is so financed, a low-income housing tax credit is allowable only with respect to the portion financed by the proceeds of tax-exempt bonds. The tax-exempt bonds must be subject to the volume cap for private activity bonds and once bond proceeds are used to finance a project, principal payments on such financing must be applied within a reasonable period to redeem the bonds.[118]

Explanation of Provision

The provision modifies the rule which allows a low-income housing tax credit on the entire eligible basis of a building without an allocation from the State or local housing credit agency and at no charge to the States' housing tax credit cap as long as more than 50 percent of the aggregate basis is financed with certain tax-exempt bonds. The percent limitation is lowered from 50 percent to 25 percent for buildings which are financed by the proceeds of certain tax-exempt bonds issued in calendar year 2022, 2023, 2024, 2025, 2026, 2027, or 2028 (and not by any obligation taken into account during any taxable year beginning during calendar year 2019, 2020, or 2021).

Effective Date

The provision applies to buildings placed in service in taxable years beginning after December 31, 2021.

3. Buildings designated to serve extremely low-income households (sec. 135503 of the bill and sec. 42 of the Code)

Present Law

A taxpayer may claim the low-income housing tax credit annually over a 10-year period for the costs of building or rehabilitating rental housing occupied by low-income tenants.

To be eligible for the credit, a low-income building must have received a credit allocation from the State or been financed with the proceeds of certain tax-exempt bonds that are subject to the private activity bond volume limit. For any calendar year, the total amount of housing credits available for allocation by a State is limited to the State housing credit ceiling.

[118] Sec. 42(h)(4)(A).

Under present law, at least 10 percent of the State housing credit ceiling of a State must be set aside and allocated to qualified low-income housing projects.[119] For this purpose, the term "qualified low-income housing project" means a project in which a qualified nonprofit organization owns an interest (directly or through a partnership) and materially participates in the development and operation of the project throughout the project's compliance period.

Generally, buildings located in high cost areas are eligible for enhanced low-income housing tax credit, which is effectuated by increasing such buildings' eligible basis or the rehabilitation expenditures taken into account for purposes of the credit. For this purpose, qualified census tracts and difficult development areas are treated as high cost areas.[120] Buildings designated by a State housing credit agency as requiring enhanced credit in order to be financially feasible are also treated as located in difficult development areas. For a building located in a high cost area, the eligible basis of such building is increased to 130 percent of the otherwise applicable eligible basis, or, in the case of a substantial rehabilitation, the rehabilitation expenditures taken into account are increased to 130 percent of the otherwise applicable rehabilitation expenditures.

Explanation of Provision

The provision adds a new set-aside requirement for certain buildings with extremely low-income households. The provision requires that at least 10 percent of the State housing credit ceiling of a State be allocated to certain buildings with extremely low-income households. Such buildings are buildings where 20 percent or more of the residential units are rent-restricted (determined as if the imputed income limitation applicable to such units was 30 percent of area median gross income), which have been designated by the taxpayer for occupancy by households the aggregate household income of which does not exceed the greater of (1) 30 percent of area median gross income, or (2) 100 percent of an amount equal to the Federal poverty line ("extremely low-income buildings"). The requirements of the new set-aside do not apply to allocations after December 31, 2031.

The provision also makes certain extremely low-income buildings eligible for enhanced low-income housing tax credit. For any extremely low-income building which is designated by the State housing credit agency as requiring an increase in credit in order for the building to be financially feasible, such building's eligible basis is increased to 150 percent of the otherwise applicable eligible basis. However, a housing credit agency may not allocate more than 15 percent of the portion of the State housing credit ceiling amount to such buildings. In addition, in the case of projects financed by tax-exempt bonds, a State may not issue more than 10 percent of its private activity bond volume cap to such buildings. The enhanced credit is not available for allocations made after December 31, 2031.

Effective Date

The provision is effective for allocations, and determinations, of housing credit dollar amount after December 31, 2021.

[119] Sec. 42(h)(5).

[120] See sec. 42(d)(5)(B).

4. Inclusion of rural areas as difficult development areas (sec. 135504 of the bill and sec. 42 of the Code)

Present Law

A taxpayer may claim the low-income housing tax credit annually over a 10-year period for the costs of building or rehabilitating rental housing occupied by low-income tenants. The amount of credit that may be claimed each year is an amount equal to the applicable percentage of the qualified basis of each qualified low-income building.[121]

Credit Calculations

Determination of applicable percentage

The applicable percentage for non-Federally subsidized newly constructed housing and non-Federally subsidized substantial rehabilitation is calculated such that the present value of the credit amounts is at least 70 percent of a building's qualified basis, depending on the prevailing interest rate.[122] These credits are sometimes referred to as "nine-percent credits."

The applicable percentage for Federally subsidized newly constructed housing, Federally subsidized substantial rehabilitation, and certain housing acquisition costs, is calculated such that the present value of the credit amounts is at least 30 percent of a building's qualified basis, depending on the prevailing interest rate.[123] These credits are sometimes referred to as "four-percent credits."

Calculation of eligible basis

The qualified basis for purposes of determining the amount of low-income housing credit to be claimed each year is an amount equal to the applicable fraction of eligible basis.[124] The eligible basis of a new building is its adjusted basis as of the close of the first taxable year of the credit period. The eligible basis of an existing building is zero unless the building meets the following requirements: the building is acquired by purchase; there is a period of at least 10

---

[121] Sec. 42.

[122] See sec. 42(b) and (e). This credit is referred to as the 70-percent credit. See Joint Committee on Taxation, *General Explanation of the Tax Reform Act of 1986* (JCS-10-87), May 4, 1987. This document can be found on the Joint Committee on Taxation website at www.jct.gov. However, under the Housing and Economic Recovery Act of 2008, the minimum applicable percentage for such credits was temporarily set at nine percent (the "nine-percent floor"). The Consolidated Appropriations Act, 2016 made the nine-percent floor permanent. The enactment of the nine-percent floor on the credit implies that, under the statutory formula, the present value is always 70 percent or greater.

[123] This credit is referred to as the 30-percent credit. See Joint Committee on Taxation, *General Explanation of the Tax Reform Act of 1986* (JCS-10-87), May 4, 1987. This document can be found on the Joint Committee on Taxation website at www.jct.gov. However, under the Consolidated Appropriations Act, 2020, the minimum applicable percentage for such credits was set at four percent (the "four-percent floor"). The enactment of the four-percent floor on the credit implies that, under the statutory formula, the present value is always 30 percent or greater.

[124] Sec. 42(c)(1)(A).

years between the date of its acquisition by the taxpayer and the date the building was last placed in service; the building was not previously placed in service by the taxpayer or a related person; and the building was rehabilitated and is eligible for the low income housing credit for rehabilitation expenditures treated as a separate new building.

Generally, buildings located in high cost areas are eligible for enhanced low-income housing tax credit, which is effectuated by increasing such buildings' eligible basis or the rehabilitation expenditures taken into account for purposes of the credit. For this purpose, qualified census tracts and difficult development areas are treated as high cost areas.[125] A qualified census tract is a census tract designated by the Secretary of Housing and Urban Development in which 50 percent or more of households have an income of less than 60 percent of area median gross income, or which has a poverty rate of at least 25 percent. A difficult development area is an area designated by the Secretary of Housing and Urban Development in which construction, land, or utility costs are high relative to area median gross income.

In the case of a new building located in a qualified census tract or difficult development area, the eligible basis is increased to 130 percent of such basis calculated without regard to this increase. In the case of a substantial rehabilitation to an existing building, the rehabilitation expenditures taken into account are increased to 130 percent of such expenditures calculated without regard to this increase.

Qualified Allocation Plans

A low-income housing tax credit is allowable only if the building owner receives a housing credit allocation from a State or local housing credit agency. Generally, the aggregate credit authority provided annually to each State for calendar year 2021 is $2.8125 multiplied by the State population, with a minimum annual cap of $3,245,625 for certain small population States and territories.[126] In turn, each State and local housing credit agency allocates credits to developers of low income rental housing pursuant to a qualified allocation plan which sets forth selection criteria to be used to determine housing priorities of the housing credit agency which are appropriate to local conditions; which gives preference to serving the lowest income tenants, projects obligated to serve qualified tenants for the longest periods, and projects which are located in qualified census tracts that contribute to community revitalization; and which provides a procedure for the housing credit agency to follow in monitoring for noncompliance.

Explanation of Provision

The provision amends the definition of difficult development area to include any rural area for the purpose of determining eligible basis. A rural area is defined to be any non-

[125] Sec. 42(d)(5)(B).

[126] See Notice 2021-19, 2021-11 I.R.B. 920, March 15, 2021. Section 42(h)(3)(I) provides for an increase in the State housing credit ceiling for 2018, 2019, 2020, and 2021. The increase is calculated by multiplying the State housing credit ceiling by 1.125.

In 2021, the most recent year for which the IRS has issued population estimates for purposes of the low-income housing tax credit, the small population States are Alaska, Delaware, the District of Columbia, Montana, North Dakota, Rhode Island, South Dakota, Vermont, and Wyoming. The small populatiou territories are American Samoa, Guam, the Northern Mariana Islands, and the U.S. Virgin Islands. *Ibid.*

metropolitan area, or any open country, place, town, village, or city which is not part of or associated with an urban area and either has low population or is not contained within a standard metropolitan statistical area and has a serious lack of mortgage credit for lower and moderate-income families, as determined by the Secretary of Agriculture and the Secretary of Housing and Urban Development[127] and which is identified by the qualified allocation plan of the housing credit agency.

Effective Date

The provision applies to buildings placed in service after December 31, 2021.

5. Repeal of qualified contract option (135505 of the bill and sec. 42 of the Code)

Present Law

A taxpayer may claim the low-income housing tax credit annually over a 10-year credit period for the costs of building or rehabilitating rental housing occupied by low-income tenants.[128] The amount of credit that may be claimed each year is an amount equal to the applicable percentage of the qualified basis of each qualified low-income building.[129]

State Housing Credit Ceiling

A low-income housing tax credit is generally allowable only if the building owner receives a housing credit allocation from a State or local housing credit agency.[130] The aggregate credit authority provided annually to each State for calendar year 2021 is $2.8125 multiplied by the State population, with a minimum annual cap of $3,245,625 for certain small population States.[131] The amount of housing credit allocated by a State to a low-income building reduces the State housing credit ceiling only once, in the year the housing credit is allocated. However, credit allocations are not needed for buildings that receive 50 percent or more of their financing from the proceeds of tax-exempt bonds that are subject to the private activity bond volume limit.[132] These projects must still satisfy the qualified allocation plan

---

[127] 42 U.S.C. 1490

[128] Sec. 42.

[129] Sec. 42(a).

[130] Sec. 42(h)(1).

[131] See Notice 2021-19, 2021-11 I.R.B. 920, March 15, 2021. Section 42(h)(3)(I) provides for an increase in the State honsing credit ceiling for 2018, 2019, 2020, and 2021. The increase is calculated by multiplying the State housing credit ceiling by 1.125.

In 2021, the most recent year for which the IRS has issued population estimates for purposes of the low-income housing tax credit, the small population States were Alaska, Delaware, the District of Columbia, Montana, North Dakota, Rhode Island, South Dakota, Vermont, and Wyoming. *Ibid.*

[132] Sec 42(h)(4)(B). If less than 50 percent of a building is financed with tax-exempt bonds, only the portion of credits attributable to the bond-financed portion of the building is allowed without allocation. Sec. 42(h)(4)(A).

("QAP") requirements and financial feasibility determinations that apply to projects receiving allocations.[133]

Qualified Low-Income Housing Projects And Qualified Low-Income Buildings

A qualified low-income building is a building that is subject to a 15-year compliance period and is part of a qualified low-income housing project.[134] The 10-year credit period and 15-year compliance period generally start in the first taxable year in which the building is placed into service.[135]

Minimum Set-Aside Requirement

To meet the minimum set-aside requirement, a qualified low-income housing project must satisfy one of three tests (whichever is elected by the taxpayer):[136]

- 20-50 test. The 20-50 test is met if 20 percent or more of the residential units in the project are both rent-restricted and occupied by individuals whose income is 50 percent or less of area median gross income.
- 40-60 test. The 40-60 test is met if 40 percent or more of the residential units in such project are both rent-restricted and occupied by individuals whose income is 60 percent or less of area median gross income.
- Average income test. The average income test is met if 40 percent or more (25 percent or more in the case of a project located in a high cost housing area) of the residential units in such project are both rent-restricted and occupied by individuals whose income does not exceed the imputed income limitation designated by the taxpayer with respect to the respective unit. The imputed income limitation is determined in 10-percentage-point increments, and may be designated as 20, 30, 40, 50, 60, 70, or 80 percent. The average of the imputed income limitations designated must not exceed 60 percent of area median gross income.[137]

Extended Use Period

To be eligible for housing credits, a building owner is generally required to enter into an extended low-income housing commitment with the housing credit agency to maintain housing affordability restrictions on the property for an additional 15 years following the end of

---

[133] Sec. 42(m)(1)(D), (m)(2)(D).

[134] Sec. 42(c)(2).

[135] Sec. 42(f), (i)(1).

[136] Sec. 42(g)(1). The 40-60 test is used to satisfy the minimum set-aside requirement in the majority of projects. For example, in 2019, the 40-60 test was used for 100 percent of units in 16 States. In only three States was the 40-60 test used for less than 50 percent of the units in the State (45 percent in Indiana, 35 percent in Nevada, and 45 percent in Virginia). NCSHA, HFA Factbook: 2019 Annual Survey Results, Table 9.

[137] In October 2020, the IRS published proposed regulations setting forth guidance on administering the average income test. 85 Fed. Reg. 68816, October 30, 2020.

the initial 15-year compliance period (the "extended use period").[138] However, the extended use period may be terminated early under three scenarios: (1) if the building is acquired by foreclosure,[139] (2) if the building owner exercises the qualified contract option,[140] or (3) where a qualified nonprofit organization or other qualified buyer has a right of first refusal, if such buyer exercises the right.[141]

Qualified Contracts

To exercise the qualified contract option, the building owner must submit to the housing credit agency a written request to find a buyer that agrees to acquire the owner's interest in the low-income portion of the building.[142] An owner may only make such a request after the 14th year of the compliance period.[143]

The housing credit agency has a period of one year beginning on the date the owner makes the written request to produce a qualified contract, in which a buyer agrees to acquire the building at a specified statutory price.[144]

For any non-low-income portion of the building the price is the fair market value.[145] For the low-income portion of the building the price is an amount not less than the applicable fraction of the sum of (1) the outstanding indebtedness secured by, or with respect to, the building; (2) the adjusted investor equity in the building; plus (3) other capital contributions; but reduced by (4) cash distributions from the project.[146]

If the agency is unable to present a qualified contract before the end of the one-year period, the building's extended use period terminates and the housing affordability restrictions are removed.[147]

---

[138] Sec. 42(h)(6).

[139] Sec. 42(h)(6)(E)(i)(I).

[140] Sec. 42(h)(6)(E)(i)(II), (F); see also Treas. Reg. sec. 1.42-18(a).

[141] Sec sec. 42(i)(7).

[142] Sec. 42(h)(6)(I).

[143] *Ibid.*

[144] Sec. 42(h)(6)(E)(i)(II).

[145] Sec. 42(h)(6)(F).

[146] *Ibid.*

[147] Sec. 42(h)(6)(E)(i)(II).

The qualified contract exception does not apply to the extent more stringent termination requirements are provided in the agreement with the housing credit agency or in State law.[148]

Explanation of Provision

The provision eliminates the qualified contract exception for buildings receiving allocations after January 1, 2022. Specifically, the provision limits the use of the exception to (1) buildings that received housing credit allocations before January 1, 2022, or (2) with respect to buildings financed with tax-exempt bonds, buildings that received before January 1, 2022 a determination from the issuer of the tax-exempt bonds or the housing credit agency that the building has satisfied the QAP requirements and the financial feasibility determination.

In addition, for buildings that may still make use of the qualified contract exception, the provision modifies the specified statutory price. The price for any non-low income portion remains the fair market value. The price for the low-income portion is the fair market value, determined by the housing credit agency taking into account the rent restrictions required to continue to satisfy the minimum set aside requirements. The Secretary is directed to prescribe regulations necessary or appropriate to the determination of the specified statutory price.

Effective Date

The provision is generally effective on the date of enactment.

The provision to modify the specified statutory price applies to buildings with respect to which the building owner submits, after the date of enactment, a written request to find a buyer that agrees to acquire the owner's interest in the low-income portion of the building.

6. Modification and clarification of rights relating to building purchase (sec. 135506 of the bill and sec. 42 of the Code)

Present Law

A taxpayer may claim the low-income housing tax credit annually over a 10-year credit period for the costs of building or rehabilitating rental housing occupied by low-income tenants.[149] The amount of credit that may be claimed each year is an amount equal to the applicable percentage of the qualified basis of each qualified low-income building.[150]

State housing credit ceiling and QAPs

[148] Sec. 42(h)(6)(E)(i).

[149] Sec. 42.

[150] Sec. 42(a).

A low-income housing tax credit is generally allowable only if the building owner receives a housing credit allocation from a State or local housing credit agency.[151] The aggregate credit authority provided annually to each State for calendar year 2021 is $2.8125 multiplied by the State population, with a minimum annual cap of $3,245,625 for certain small population States.[152] The amount of housing credit allocated by a State to a low-income building reduces the State housing credit ceiling only once, in the year the housing credit is allocated. However, credit allocations are not needed for buildings that receive 50 percent or more of their financing from the proceeds of tax-exempt bonds that are subject to the private activity bond volume limit.[153] These projects must still satisfy the qualified allocation plan ("QAP") requirements and financial feasibility determinations that apply to projects receiving allocations.[154]

The low-income housing credit must be allocated pursuant to a housing credit agency's QAP.[155] A QAP is defined as any plan that (1) sets forth the selection criteria to be used to determine the housing priorities of the housing credit agency which are appropriate to local conditions, (2) which give preference in allocating housing credit to certain projects (*e.g.*, projects serving the lowest income tenants), and (3) which provide a procedure that the agency will follow in monitoring for noncompliance and in notifying the IRS of such noncompliance and in monitoring for noncompliance with habitability standards through regular site visits.[156] QAPs must use the following selection criteria: project location, housing needs characteristics, project characteristics, sponsor characteristics, tenant populations with special housing needs, public housing waiting lists, tenant populations of individuals with children, projects intended for eventual tenant ownership, the energy efficiency of the project, and the historic nature of the project.[157]

Qualified Low-Income Housing Projects And Qualified Low-Income Buildings

[151] Sec. 42(h)(1).

[152] See Notice 2021-19, 2021-11 I.R.B. 920, March 15, 2021. Section 42(h)(3)(I) provides for an increase in the State housing credit ceiling for 2018, 2019, 2020, and 2021. The increase is calculated by multiplying the State housing credit ceiling by 1.125.

In 2021, the most recent year for which the IRS has issued population estimates for purposes of the low-income housing tax credit, the small population States were Alaska, Delaware, the District of Columbia, Montana, North Dakota, Rhode Island, South Dakota, Vermont, and Wyoming. *Ibid.*

[153] Sec 42(h)(4)(B). If less than 50 percent of a building is financed with tax-exempt bonds, only the portion of credits attributable to the bond-financed portion of the building is allowed without allocation. Sec. 42(h)(4)(A).

[154] Sec. 42(m)(1)(D), (m)(2)(D).

[155] Sec. 42(m).

[156] Sec. 42(m)(1)(B).

[157] Sec. 42(m)(1)(C).

A qualified low-income building is a building that is subject to a 15-year compliance period and is part of a qualified low-income housing project.[158] The 10-year credit period and 15-year compliance period generally start in the first taxable year in which the building is placed into service.[159]

Extended Use Period

To be eligible for housing credits, a building owner is generally required to enter into an extended low-income housing commitment with the housing credit agency to maintain housing affordability restrictions on the property for an additional 15 years following the end of the initial 15-year compliance period (the "extended use period").[160] However, the extended use period may be terminated early under three scenarios: (1) if the building is acquired by foreclosure,[161] (2) if the building owner exercises the qualified contract option,[162] or (3) where a qualified nonprofit organization or other qualified buyer has a right of first refusal, if such buyer exercises the right.[163]

Right of First Refusal

Ownership structures

The low-income housing tax credit may be claimed against income tax liability, but it is not refundable.[164] Investors in credit projects may also be entitled to other benefits such as depreciation[165] or interest deductions.[166] Certain entities, such as nonprofit organizations that foster low-income housing or tenant cooperatives or resident management corporations, may have an interest in developing or continuing qualified low-income housing projects. However, to the extent that these entities have no Federal income tax liability, they are unable to claim the credit or related deductions.[167]

---

[158] Sec. 42(c)(2).

[159] Sec. 42(f), (i)(1).

[160] Sec. 42(h)(6).

[161] Sec. 42(h)(6)(E)(i)(I).

[162] Sec. 42(h)(6)(E)(i)(II), (F); *see also* Treas. Reg. sec. 1.42-18(a).

[163] *See* sec. 42(i)(7).

[164] See sec. 38. Additionally, the credit generally may offset alternative minimum tax. Sec. 38(c).

[165] See sec. 167. The credit does not reduce the taxpayer's basis in the qualified low-income building. *Cf.* sec. 50(c) (providing that, if a credit is determined under the investment credit with respect to any property, the basis of such property shall be reduced by the amount of the credit so determined).

[166] See sec. 163.

[167] Sec. 501.

In order to use these benefits, the nonprofit organization or other entity may develop low-income housing projects in an ownership structure with taxable investors. For example, a nonprofit organization may join with taxable investors to form a partnership. Under such a structure, the partnership owns the qualified low-income building and generally allocates the low-income housing tax credit and deductions to taxable investors.[168]

Right Of First Refusal Safe Harbor

At the time of acquisition of a building, credit investors may want to grant an option or other right to a nonprofit organization or other entity, in a contract or other agreement, to acquire the building at the end of the compliance period. For example, credit investors in a partnership may want to grant a right to acquire the building at the end of the compliance period to the nonprofit organization developer partner.

A taxpayer's grant of an option or other right to acquire property to another party may, depending on the terms, cause the taxpayer to not be treated as the owner of the property for Federal income tax purposes.[169] If the taxpayer is not treated as the tax owner of the property, the taxpayer generally is not able to claim credits or deductions with respect to the property.

The low-income housing tax credit rules provide a safe harbor where the grant by a taxpayer of certain rights to acquire a qualified low-income building will not cause a loss in Federal income tax benefits. Under the safe harbor, no Federal income tax benefit fails to be allowable to a taxpayer with respect to any qualified low-income building merely by reason of a right of first refusal that is (1) held by a qualified nonprofit organization or certain other qualified buyers (2) to purchase the building (3) after the end of the compliance period (4) for a price not less than the minimum purchase price.[170]

A qualified nonprofit organization is (1) a nonprofit organization[171] (2) determined by the State housing credit agency not to be affiliated with a or controlled by a for-profit organization, (3) that has as an exempt purpose the fostering of low-income housing.[172]

The minimum purchase price is an amount equal to the sum of the principal amount of indebtedness secured by the building (other than indebtedness incurred within the five-year period ending on the date of the sale), plus certain exit taxes.[173]

---

[168] See sec. 704(b); Treas. Reg. sec. 1.704-1(b)(4)(ii).

[169] See, *e.g.*, *Frank Lyon Co. v. Commissioner*, 435 U.S. 561 (1978), *Dettmers v. Commissioner*, 430 F.2d 1019 (6th Cir. 1970).

[170] Sec. 42(i)(7)(A).

[171] The organization must be exempt from tax under sections 501(c)(3) or (4).

[172] Sec. 42(h)(5).

[173] Sec. 42(i)(7)(B).

The safe harbor is silent as to whether the right to purchase all of the interests in a partnership that owns a qualified low-income building satisfies the safe harbor,[174] or whether the right to purchase assets relating to the building satisfies the safe harbor.

The safe harbor does not require credit building owners to grant a right of first refusal. However, in some states, housing credit agencies favor low-income housing credit applications that give qualified nonprofit organizations or certain other parties a right of first refusal.

Right of First Refusal Safe Harbor And State Law

A right of first refusal is a contractual right defined under State law. In general, a right of first refusal is "a potential buyer's contractual right to meet the terms of a third party's highest offer."[175]

A right of first refusal is a subset of a purchase option, which is a "contractual provision by which an owner of realty enters an agreement with another allowing the latter to buy the property at a specified price within a specified time, or within a reasonable time in the future, but without imposing an obligation to purchase on the person to whom it is given."[176] In general, an option does not require a third-party offer, while a right of first refusal does.

A number of State courts have come to different conclusions as to what criteria must be satisfied in order to trigger a right of first refusal grant that meets the low-income housing tax credit safe harbor. For example, in *Homeowner's Rehab*, the court held that neither a bona fide third-party offer nor the approval of the offer by the building owner is needed.[177] In contrast, in *Senior Housing Assistance Group*, the court held that a bona fide third-party offer acceptable to the property owner is needed.[178]

Explanation of Provision

The provision changes the right of first refusal safe harbor into an option safe harbor.

For existing agreements, the provision clarifies, for purposes of the safe harbor, that the right to acquire the building includes the right to acquire all of the partnership interests relating to the building.[179] It also clarifies that the right to acquire the building includes the right to acquire assets held for the development, operation, or maintenance of the building. Thus,

[174] But see Rev. Rul. 99-6, 1999-6 I.R.B. 6.

[175] Black's Law Dictionary (11th ed. 2019), right of first refusal.

[176] Black's Law Dictionary (11th ed. 2019), definition 5, option to purchase real property.

[177] *Homeowner's Rehab, Inc v. Related Corp. V SLP, L.P.*, 479 Mass. 741 (2018).

[178] *Senior Housing Assistance Grp. v. AMTAX Holdings 260, LLC*, No. C17-1115 RSM, 2019 WL 1417299 (W.D. Wash. Mar. 29, 2019), *appeal dismissed*, No. 19-35354, 2019 WL 5576461 (9th Cir. Sept. 13, 2019).

[179] This excludes partnership interests of the right holder or a related person within the meaning of section 267(b) or 707(b)(1).

agreements which provide for the right to acquire these partnership interests or building assets do not fail to satisfy the safe harbor.

For existing agreements, the provision also clarifies that the right of first refusal safe harbor may be satisfied by the grant of an option. A right of first refusal may be exercised in response to an offer by a related party; a bona fide third-party offer is not needed. A right of first refusal may be exercised without the approval of any owner of a credit project. Thus, agreements with these terms do not fail to satisfy the safe harbor.

Finally, the provision amends the minimum purchase price to exclude exit taxes. Thus, agreements that do not include exit taxes as part of the minimum purchase price do not fail to satisfy the safe harbor.

Effective Date

The provisions to change the right of first refusal safe harbor into an option safe harbor and to exclude exit taxes from the minimum purchase price are effective for agreements entered into or amended after the date of enactment.

The other provisions of the provision are effective for agreements entered into before, on, or after the date of enactment. However, none of the changes of the provision are intended to supersede express language in any agreement with respect to the terms of a right of first refusal or option permitted under the safe harbor.

7. Increase in credit for bond-financed projects designated by housing credit agency (sec. 135507 of the bill and sec. 42 of the Code)

Present Law

A taxpayer may claim the low-income housing tax credit annually over a 10-year period for the costs of building or rehabilitating rental housing occupied by low-income tenants. The amount of credit that may be claimed each year is an amount equal to the applicable percentage of the qualified basis of each qualified low-income building.[180]

Credit Calculations

Determination of Applicable Percentage

The applicable percentage for non-Federally subsidized newly constructed housing and non-Federally subsidized substantial rehabilitation is calculated such that the present value of the credit amounts is at least 70 percent of a building's qualified basis, depending on the prevailing interest rate.[181] These credits are sometimes referred to as "nine-percent credits."

---

[180] Sec. 42.

[181] See sec. 42(b) and (e). This credit is referred to as the 70-percent credit. See Joint Committee on Taxation, *General Explanation of the Tax Reform Act of 1986* (JCS-10-87), May 4, 1987. This document can be found on the Joint Committee on Taxation website at www.jct.gov. However, under the Housing and Economic Recovery Act of 2008, the minimum applicable percentage for such credits was temporarily set at nine percent (the

The applicable percentage for Federally subsidized newly constructed housing, Federally subsidized substantial rehabilitation, and certain housing acquisition costs, is calculated such that the present value of the credit amounts is at least 30 percent of a building's qualified basis, depending on the prevailing interest rate.[182] These credits are sometimes referred to as "four-percent credits."

Calculation of Eligible Basis

The qualified basis for purposes of determining the amount of low-income housing credit to be claimed each year is an amount equal to the applicable fraction of eligible basis.[183] The eligible basis of a new building is its adjusted basis as of the close of the first taxable year of the credit period. The eligible basis of an existing building is zero unless the building meets the following requirements: the building is acquired by purchase; there is a period of at least 10 years between the date of its acquisition by the taxpayer and the date the building was last placed in service; the building was not previously placed in service by the taxpayer or a related person; and the building was rehabilitated and is eligible for the low income housing credit for rehabilitation expenditures treated as a separate new building.

Special statutory rules for determining eligible basis include increased credit amounts for buildings located in qualified census tracts or difficult development areas.[184] A qualified census tract is a census tract designated by the Secretary of Housing and Urban Development in which 50 percent or more of households have an income of less than 60 percent of area median gross income, or which has a poverty rate of at least 25 percent. A difficult development area is an area designated by the Secretary of Housing and Urban Development in which construction, land, or utility costs are high relative to area median gross income.

In the case of a new building, the eligible basis in qualified census tracts or difficult development areas is increased to 130 percent of such basis calculated without regard to this increase. For an existing building, the rehabilitation expenditures are increased to 130 percent of such expenditures calculated without regard to this increase.

State housing credit agencies may designate a building as requiring an increase in credit in order for such building to be financially feasible as part of a qualified low-income housing project. A building so designated is treated as though it were located in a difficult development area for purposes of determining eligible basis. However, a designated building is

---

"nine-percent floor"). The Consolidated Appropriations Act, 2016 made the nine-percent floor permanent. The enactment of the nine-percent floor on the credit implies that, under the statutory formula, the present value is always 70 percent or greater.

[182] This credit is referred to as the 30-percent credit. See Joint Committee on Taxation, *General Explanation of the Tax Reform Act of 1986* (JCS-10-87), May 4, 1987. This document can be found on the Joint Committee on Taxation website at www.jct.gov. However, under the Consolidated Appropriations Act, 2020, the minimum applicable percentage for such credits was set at four percent (the "four-percent floor"). The enactment of the four-percent floor on the credit implies that, under the statutory formula, the present value is always 30 percent or greater.

[183] Sec. 42(c)(1)(A).

[184] Sec. 42(d)(5)(B).

not treated as located in a difficult development area if the building is financed with the proceeds of tax-exempt bonds which are subject to the volume cap for private activity bonds and for which principal payments on such financing are applied within a reasonable period to redeem the bonds after bond proceeds are used to finance a project.[185]

Explanation of Provision

The provision modifies the rule which treats as difficult development areas for purposes of determining eligible basis, those buildings designated by housing credit agencies as requiring an increase in credit. Under the provision, buildings so designated and financed with the proceeds of certain tax-exempt bonds are treated as difficult development areas for purposes of determining eligible basis as long as the determinations of housing credit dollar amounts are not made after December 31, 2028.

Effective Date

The provision applies to buildings which receive a determination of housing credit dollar amount pursuant to section 42(m)(2)(D) of the Code after the date of enactment.

[185] Sec. 42(h)(4)(A).

B. Neighborhood Homes Credit

1. Neighborhood Homes Credit (sec. 135511 of the bill and sec. 38 and new sec. 42A of the Code)

Present Law

Several provisions of the Code provide favorable tax treatment to homeowners. These include: (1) the home mortgage interest deduction; (2) the capped deduction for real property taxes; (3) the exclusion of gain from sale of a principal residence; (4) tax-exempt bonds for owner-occupied housing; (5) mortgage credit certificates; (6) qualified first-time homebuyer distributions from an individual retirement plan; (7) exclusion from gross income of the rental value of parsonages and military housing allowances; and (8) exclusion from gross income of discharge of certain qualified principal residence indebtedness.

Certain tax benefits are also available for rental housing. These include: (1) the low-income housing tax credit, (2) the rehabilitation credit, (3) the exclusion of interest on State and local government qualified private activity bonds, (4) expensing of qualified improvement property and tangible personal property under bonus depreciation, (5) exceptions from the passive activity loss rules for certain rental real estate activities, (6) the rental real estate safe harbor for the section 199A deduction, and (7) the election out of the interest limitation for real property trades or businesses.[186]

The Code does not presently provide a general business credit to subsidize the new construction or substantial rehabilitation of owner-occupied affordable housing.

Explanation of Provision

The provision adds a new neighborhood homes credit as part of the general business credit.[187] The credit may be provided to (1) taxpayers that develop or rehabilitate property that will be sold to an eligible purchaser who will use the property as the purchaser's principal residence, or (2) taxpayers that rehabilitate certain owner-occupied property.

Credit calculation and definitions

Generally, the credit amount for a taxable year with respect to a qualified residence sold by a taxpayer in an affordable sale is the lesser of (1) the excess (if any) of (i) the reasonable development costs paid or incurred by the taxpayer with respect to the qualified residence, over (ii) the sale price of the qualified residence (reduced by any reasonable expenses paid or incurred by the taxpayer in connection with such sale); or (2) 35 percent of the lesser of (i) the eligible development costs paid or incurred by the taxpayer with respect to the qualified residence, or (ii) 80 percent of the national median sale price for new homes (as determined pursuant to the most recent census data available as of the credit allocation date). As discussed below, an alternative

[186] Sec. 163(j)(7).

[187] See sec. 38.

method for calculating credit amounts is used in the case of certain rehabilitations of owner-occupied residences.

For purposes of the credit, the term "reasonable development costs" means amounts paid or incurred for the acquisition of buildings and land, construction, substantial rehabilitation, demolition of structures, or environmental remediation, to the extent that such amounts are determined by the neighborhood homes credit agency (as of the date on which the construction or substantial rehabilitation is substantially complete) as meeting the standards promulgated by the agency.[188] The term "neighborhood homes credit agency" means the agency designated by the governor of a State[189] as the State's neighborhood homes credit agency. The term "eligible development costs" means the amount which would be reasonable development costs if the amounts taken into account as paid or incurred for the acquisition of buildings and land did not exceed 75 percent of the costs determined without regard to any amount paid or incurred for the acquisition of buildings and land.[190]

Reasonable development costs and eligible development costs do not include any amounts paid or incurred before the date on which an allocation is made to a taxpayer with respect to the qualified project of which the qualified residence is part. unless the amount paid or incurred is for the acquisition of buildings or land. Amounts paid or incurred for the acquisition of buildings or land are included only if paid or incurred not more than three years before the allocation date. If a taxpayer acquires any building or land from an entity (or any related party to the entity) that holds an ownership interest in the taxpayer, the entity must also have acquired the property within the three-year period, and taxpayer's acquisition costs may not exceed the amount paid or incurred by the entity to acquire the property.

The term "substantial rehabilitation" means amounts paid or incurred for the rehabilitation of a qualified residence if such amounts exceed the greater of (1) $20,000, or (2) 20 percent of the amounts paid or incurred for the acquisition of buildings and land.

In the case of qualified residences that are condominium units or houses or apartments owned by a cooperative housing corporation,[191] the reasonable development costs and eligible development costs of the qualified residence are equal to the costs of the entire

[188] In making its determination, the agency must consider: (1) the sources and uses of funds and total financing, (2) any proceeds or receipts expected to be generated by reason of tax benefits, and (3) the reasonableness of the development costs and fees.

[189] For purposes of this provision, the term "State" includes the District of Columbia and the possessions of the United States.

[190] Under this definition, eligible development costs will be lower than reasonable development costs for a qualified residence when the acquisition costs of buildings and land are significantly higher than the other reasonable development costs for such residence. For example, assume a qualified residence had reasonable development costs of $1800, with $800 of acquisition costs for building and land and $1000 of other reasonable development costs. In that case, the $800 of acquisition costs exceeds 75 percent of the other costs (75 percent of $1000 = $750). Therefore, the eligible development costs are equal to the sum of 75 percent of the other costs ($750) and the other costs ($1000), or $1750.

[191] With respect to cooperative housing corporations (as such term is defined in section 216(b)), tenant-stockholders are treated as owning the house or apartment which they are entitled to occupy.

condominium or cooperative housing property, multiplied by the qualified residence's share of the total floor space (relative to the total floor space of all residences within the property).

"Qualified residence" means a residence that (1) is real property affixed on a permanent foundation, (2) is (i) a house which contains four or fewer residential units, (ii) a condominium unit, or (iii) a house or apartment owned by a cooperative housing; (3) is part of a qualified project which has received an allocation from a neighborhood homes credit agency, and (4) is located in a qualified census tract (determined as of the date of such allocation).

To be a qualified census tract, a census tract must satisfy one of the following sets of conditions:

1. The census tract must (i) have a median family income[192] which does not exceed 80 percent of the median family income for the applicable area, (ii) has a poverty rate that is not less than 130 percent of the poverty rate of the applicable area, and (iii) has a median value for owner-occupied homes that does not exceed the median value for owner-occupied homes in the applicable area;

2. The census tract must (i) be located in a city with a population of at least 50,000 and a poverty rate that is at least 150 percent of the poverty rate of the applicable area, (ii) has a median family income which does not exceed the median family income for the applicable area, and (iii) has a median value for owner-occupied homes that does not exceed 80 percent of the median value for owner-occupied homes in the applicable area;

3. The census tract must be located in a nonmetropolitan county and (i) have a median family income which does not exceed the median family income for the applicable area, and (ii) have been designated by a neighborhood homes credit agency; or

4. The census tract is located in a disaster area.[193]

In the case of a metropolitan census tract, "applicable area" means the metropolitan area in which the census tract is located. In any other case, "applicable area" refers to the State in which the census tract is located. The provision requires that the Secretary of Housing and Urban Development make publicly available a list of qualified census tracts each year.

The term "affordable sale" means a sale to a qualified homeowner of a qualified residence that (1) the agency certifies as meeting the standards promulgated by the agency (2) for a price that does not exceed (i) in the case of a house containing two residential units, an amount equal to five times the median family income for the applicable area; (ii) in the case of a house containing three residential units, an amount equal to six times the median family income for the applicable area; (iii) in the case of a house containing four residential units, an amount equal to

[192] Rules similar to the rules of section 143(f)(2) apply for determinations of family income.

[193] "Disaster area" is as defined in section 7508A(d)(3), but only with respect to any period for which the President of the United States has determined that the area warrants individual or individual and public assistance by the Federal government under the Robert T. Stafford Disaster Relief and Emergency Assistance Act.

seven times the median family income for the applicable area; or (iv) in the case of any qualified residence not described in (i), (ii), or (iii), an amount equal to four times the median family income for the applicable area. As discussed below, sales between related parties do not qualify as affordable sales.

The term "qualified homeowner" means an individual who owns and uses a qualified residence as the individual's principal residence, and whose family income (determined as of the date that a binding contract for the affordable sale of the residence is entered into) is 140 percent or less of the median family income for the applicable area in which the residence is located. Qualified project means a project that a neighborhood homes credit agency certifies will build or substantially rehabilitate one or more qualified residences.

For purposes of the credit, dollar amounts are inflation adjusted, using calendar year 2021 as the base year.

Credit Limitations

In general, the credit allowed to a taxpayer in a taxable year with respect to one or more qualified residences that are part of the same qualified project cannot exceed the excess (if any) of (1) the amount allocated by the agency to the taxpayer for the qualified project, over (2) the aggregate amount of credit previously allowed to the taxpayer for all prior taxable years.

No amount may be allowed with respect to any qualified residence unless, during the five-year period that begins on the date of the allocation to the qualified project of which the residence is a part, either the affordable sale or the substantial rehabilitation of the residence is completed (the "required five-year period"). If the required event does not occur within the required five-year period, the amount of the unallocated credit is returned to the State's neighborhood homes credit ceiling, as discussed below.

Repayment Rules, Denial of Rental Deductions, and Related Party Sales

Generally, if a qualified residence is sold during the five-year period that begins immediately after the affordable sale of the residence (the "repayment period"), the seller is required to transfer an amount equal to the repayment amount to the relevant neighborhood homes credit agency. The repayment amount is an amount equal to 50 percent of the gain from the sale, reduced by 20 percent for each year of the five-year period which has ended before the date of the sale. The agency may only use such repayment amounts for purposes of qualified projects. As discussed below, qualified rehabilitations of owner-occupied rehabilitations are subject to different repayment rules.

Neighborhood homes credit agencies must place a lien on each qualified residence that is built or rehabilitated as part of a qualified project for the amount that the agency deems is necessary to ensure potential repayment. However, an agency may waive repayment in the event that a homeowner is experiencing a hardship.

If, during the five-year period beginning after the affordable sale of a qualified residence, the owner of the qualified residence fails to use the residence as the owner's principal residence for any period of time, no deduction will be allowed for rental expenses paid or incurred by the owner with respect to renting the residence during this time period.

In general, a sale between related persons is not treated as an affordable sale. A related person is related to another person if the related person bears a relationship to the other person, or the related person and the other person are engaged in trades or businesses under common control.

Alternative Rules and Definitions for Owner-Occupied Rehabilitations

The credit may also be provided to a taxpayer that rehabilitates certain owner-occupied residences. To be eligible, the taxpayer may not be the owner of the qualified residence or a related person with respect to the owner. For purposes of owner-occupied rehabilitations, certain alternative rules and definitions apply.

An alternative method of determining credit amounts is used for owner-occupied rehabilitations. For such rehabilitations, credit is allowed in the taxable year in which the qualified rehabilitation is completed, and the credit amount is equal to the least of (1) the excess (if any) of (i) the amounts paid or incurred by the taxpayer for the qualified rehabilitation of the qualified residence, to the extent the amounts are certified by the neighborhood homes credit agency (at the time of the completion of such rehabilitation) as meeting the standards promulgated by the agency, over (ii) any amounts paid to the taxpayer for the rehabilitation; (2) 50 percent of the amounts in (1)(i); or (3) $50,000.

For purposes of owner-occupied rehabilitations, the term "qualified rehabilitation" means a rehabilitation performed pursuant to a written binding contract between the taxpayer and the qualified homeowner, if the amount paid or incurred by the taxpayer in the performance of the rehabilitation exceeds $20,000. Substantial rehabilitation costs do not include any amount paid or incurred before the date on which an allocation is made to the taxpayer with respect to the qualified residence.

For purposes of owner-occupied rehabilitations, the term "qualified homeowner" means an individual (1) who owns and uses a qualified residence as the individual's principal residence, and (2) whose family income (determined as of the date that the binding contract between the taxpayer and homeowner is entered into) does not exceed the median family income for the applicable area in which the residence is located.

For purposes of owner-occupied rehabilitations, the term "qualified census tract" includes (1) any census tract which (i) has a median family income which does not exceed 80 percent of the median family income for the applicable area or has a poverty rate that is not less than 130 percent of the poverty rate of the applicable area, and (ii) is designated by the neighborhood homes credit agency; and (2) any census tract which is located in a disaster area.[194]

For owner-occupied rehabilitations, the repayment period is the time period that (1) begins on the earlier of (i) the date that the owner enters into a binding contract for the performance of the rehabilitation or (ii) the date on which such rehabilitation begins, and (2)

[194] "Disaster area" is as defined in section 7508A(d)(3), but only with respect to any period for which the President of the United States has determined that the area warrants individual or individual and public assistance by the Federal government under the Robert T. Stafford Disaster Relief and Emergency Assistance Act.

ends on the date that the rehabilitation is completed. This repayment period is in lieu of the five-year repayment period discussed above.

State Neighborhood Homes Credit Ceiling

For any calendar year, the aggregate amount allocated to qualified projects by the neighborhood homes credit agency of a State may not exceed the State neighborhood homes credit ceiling for such calendar year. Further, the credit allocated to any qualified project may not exceed the amount that the neighborhood homes credit agency determines (as of the date of the allocation) is necessary to ensure the financial feasibility of the qualified project.

The State neighborhood homes credit ceiling for a calendar year is an amount equal to the sum of (1) the greater of (i) $6 multiplied by the State population or (ii) $8,000,000, and (2) any amount previously allocated to a qualified project by the agency which can no longer be allocated to a qualified residence because the required five-year period expired during the calendar year.[195]

In addition, the credit ceiling is increased by the excess (if any) of the State credit ceiling for the prior calendar year, over the aggregate amount allocated by the agency during the prior calendar year (such amount, a "carryforward"). The amount of carryforward does not carry past the third calendar year after the calendar year in which the credit amount originally arose, determined on a first-in, first-out basis.

Responsibilities of Neighborhood Homes Credit Agencies

The State neighborhood homes credit dollar amount is zero for a calendar year unless the neighborhood homes credit agency of the State (1) allocates the credit amount pursuant to a qualified allocation plan, (2) in the prior year, allocates not more than 20 percent of such amount to qualified residences which (i) are in certain qualified census tracts or (ii) are not located in qualified census tracts but meet certain requirements for pyrrhotite remediation, (3) promulgates standards with respect to reasonable qualified development costs and fees, (4) promulgates standards with respect to construction quality, (5) promulgates standards with respect to protecting the owners of owner-occupied residences, in the event of an owner-occupied rehabilitation, with consideration to the ability of such owners to pay rehabilitation costs not covered by the credit and providing for the disclosure to owners of their rights and responsibilities, (6) and submits to the Secretary (at such time and in such manner as the Secretary may prescribe) an annual report.

Annual reports by neighborhood homes credit agencies must include the following information: (1) the amount of the credits allocated to each qualified project for the previous year, and (2) with respect to each qualified residence completed in the prior year, (i) the census tract in which such qualified residence is located, (ii) the year in which the qualified project including the qualified residence received an allocation, (iii) whether the qualified residence was new or substantially rehabilitated, (iv) the eligible basis of the qualified residence, (v) the amount

[195] For example, if a qualified project has a required five-year period that expires in 2027, the credit that was previously allocated to the project would be included in the State credit ceiling for that year. Rules similar to the rules of sectiou 42(h)(5) apply for purposes of determining the portion of the State credit ceiling set-aside for certain nonprofit organizations.

of the credit with respect to the qualified residence, (vi) the sales price of the qualified residence, or, in the case of a substantially rehabilitated qualified residence, the cost of the substantial rehabilitation, (vii) the family income of the qualified homeowner (expressed as a percentage of the applicable area median family income for the location of the qualified residence), and (viii) such other information as the Secretary may require.

A qualified allocation plan is any plan which (1) sets forth the selection criteria to be used to prioritize qualified projects for allocations of State neighborhood homes credit dollar amounts, including (i) the need for new or substantially rehabilitated owner-occupied homes in the area addressed by the project, (ii) the expected contribution of the project to neighborhood stability and revitalization, (iii) the capability of the project sponsor, and (iv) the likelihood the project will result in long-term homeownership; (2) has been made available for public comment; and (3) provides a procedure that the neighborhood homes credit agency (or any agent or contractor of such agency) must follow for purposes of (i) identifying noncompliance with any provisions of this provision and (ii) notifying the IRS of any such noncompliance of which the agency becomes aware.

The Secretary is required to produce an annual report, to be made available to the public, which contains the information in the annual reports submitted by neighborhood homes credit agencies discussed above. Any information made public must exclude any information that would allow for the identification of qualified homeowners.

Effective Date

The provision is effective for taxable years beginning after December 31, 2021.

PART VI — INVESTMENTS IN TRIBAL INFRASTRUCTURE

1. Treatment of Indian tribes as States with respect to bond issuance (sec. 135601 of the bill and sec. 7871(c) of the Code)

Present Law

Treatment of Indian Tribal Governments as states for Certain Purposes

Section 7871 expressly provides that Indian tribal governments are treated as States for certain tax purposes. For example, tribal governments are extended the treatment provided to States in connection with any exemption from, credit or refund of, or payment with respect to the following excise taxes: tax on special motor fuels, manufacturers excise taxes, communications excise tax, and tax on use of certain highway vehicles.[196] Special treatment relating to excise taxes is available to tribal governments only with regard to transactions involving the exercise of an essential governmental function by the Indian tribal government. Section 7871(e) limits the term essential governmental function to exclude any function that is not customarily performed by State and local governments with general taxing powers.

Indian tribal governments are also treated as States in that they may issue tax-exempt bonds, subject to certain conditions described further below.

Tax-Exempt Bonds

In General

Under present law, gross income does not include interest on State or local bonds. State and local bonds are classified generally as either governmental bonds or private activity bonds. Governmental bonds are bonds the proceeds of which are primarily used to finance governmental facilities or the debt is repaid with governmental funds. Private activity bonds are bonds in which the State or local government serves as a conduit providing financing to nongovernmental persons. For these purposes, the term "nongovernmental person" includes the Federal government and all other individuals and entities other than States or local governments. Interest on private activity bonds is taxable, unless the bonds are issued for certain purposes permitted by the Code and other requirements are met.

States may issue tax-exempt private activity bonds subject to a per-State volume cap. For calendar year 2021, the State volume cap, which is indexed for inflation, equals $110 per resident of the State, or $324,995,000, if greater.[197]

---

[196] Sec. 7871(b).

[197] Rev. Proc. 2020-45, 2020-46 I.R.B. 1016, p. 1022, November 9, 2020.

Issuance of Tax-Exempt Bonds by Indian Tribal Governments

Indian tribal governments may issue tax-exempt bonds[198] in several types of circumstances if they meet requirements applicable to bonds issued by States and local governments as well as certain other rules applicable only to Indian tribal governments. Indian tribal governments may issue tax-exempt bonds for governmental purposes, subject to the requirement that substantially all of the proceeds of the issue are used in an essential governmental function, as discussed below.[199] Indian tribal governments also may issue private activity bonds but only for the purpose of financing manufacturing facilities.[200]

The Code provides that Indian tribal governments may also issue a third type of tax-exempt bond called "tribal economic development bonds" to finance projects and facilities (but not certain gambling facilities) if the bonds would be tax-exempt if issued by a State or local government.[201] The restriction of essential government function and the limitation on private activity bonds to certain manufacturing facilities do not apply. However, this Code provision is subject to an allocation limit of $2 billion.

Governmental Bonds

Like States and local governments, Indian tribal governments may issue so-called "governmental bonds." These bonds are bonds the proceeds of which are primarily used to finance governmental facilities or which are repaid with governmental funds. The Code does not expressly define governmental bonds. Instead, bonds are generally treated as governmental bonds if they limit private involvement sufficiently to avoid classification as private activity bonds,[202] contain arbitrage restrictions,[203] and satisfy bond registration and information reporting requirements and various other restrictions described in the Code.[204]

Indian tribal governments must meet an additional requirement to issue governmental bonds. Specifically, all bond proceeds must be used in an essential governmental function,[205]

---

[198] Generally, gross income does not include interest on State or local bonds. Sec. 103.

[199] Sec. 7871(c)(1).

[200] Secs. 7871(c)(3), 103.

[201] The American Recovery and Reinvestment Act of 2009 ("ARRA"), Pub. L. No. 111-5, sec. 1402, added section 7871(f) to the Code.

[202] The exclusion from income of interest on State and local bonds does not apply to private activity bonds, unless the bonds are issued for certain permitted purposes ("qualified private activity bonds") and other Code requirements are met. Secs. 103, 141.

[203] Secs. 103(b), 148.

[204] Secs. 103(b), 149.

[205] Sec. 7871(c)(1).

and such function must be customarily performed by State and local governments with general taxing powers.[206]

Private Activity Bonds for Tribal Manufacturing Facilities

As with governmental bonds, Indian tribal governments are more restricted than States and local governments in their ability to issue private activity bonds. Section 7871(c)(3) permits tribal governments to issue private activity bonds[207] so long as the bond proceeds are used for manufacturing facilities[208] that are owned and operated by the tribal government on "qualified Indian lands,"[209] and that employ tribal members.[210]

A project financed by manufacturing facility bonds must meet requirements as to use, location and ownership, and employment. The use requirement provides that at least 95 percent of the net proceeds of the issue are to be used for the acquisition, construction, or improvement of property that is part of a manufacturing facility and subject to an allowance for depreciation. The location and ownership requirement provides that at least 95 percent of the net proceeds are to be used to finance property to be located on qualified Indian lands of the issuer, which is to be owned and operated by the issuer.[211] At the time of issuance, it must be reasonably expected that the employment requirements will be met with respect to the facility financed by the bonds. As of the close of each calendar year in the testing period, the aggregate face amount of all outstanding tax-exempt bonds financing the facility cannot be more than 20 times greater than the aggregate wages paid during the preceding calendar year to enrolled members of the Indian tribe of the issuer (or spouse of such member) for services rendered. The employment requirement must be met each year beginning two years after the date of issuance. If the employment requirement is not met for any year for which it applies with respect to an issuance,

---

[206] Sec. 7871(e).

[207] Outside the Indian tribal government context, private activity bonds are generally bonds in which the State or local government serves as a conduit providing financing to nongovernmental persons. For these purposes, the term "nongovernmental person" includes the Federal government and all other individuals and entities other than States or local governments. Interest on private activity bonds is taxable, unless the bonds are issued for certain purposes permitted by the Code and other requirements are met. Section 7871(c)(3)(C) provides that an obligation to which this paragraph (dealing with the exception for certain private activity bonds used for certain tribal manufacturing facilities) applies shall be treated as a private activity bond.

[208] The term "manufacturing facility" is defined by cross reference to section 144(a)(12)(C) as any facility which is used in the manufacturing or production of tangible personal property (including the processing resulting in a change in the condition of such property).

[209] "Qualified Indian lands" means land which is held in trust by the United States for the benefit of an Indian tribe. The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. Sec. 7871(c)(3)(E).

[210] Sec. 7871(c)(3)(D).

[211] Tribes may jointly finance a manufacturing facility, and the employment test may be met in such case by *pro rata* apportionment of wages by tribe according to the relative participation of each tribe.

all bonds that are part of that issuance cease to be tax-exempt to their holders. The annual tribal employment test is in lieu of an annual aggregate volume limit.[212]

Tribal Economic Development Bonds

Indian tribal governments are also permitted to issue "tribal economic development bonds."[213] A tribal economic development bond is any bond issued by an Indian tribal government (1) the interest on which would be tax-exempt if issued by a State or local government, and (2) that is designated by the Indian tribal government as a tribal economic development bond.[214]

The aggregate face amount of bonds that may be designated by any Indian tribal government cannot exceed the amount of national tribal economic development bond limitation allocated to such government.[215] There is a national bond limitation of $2 billion, allocated as the Secretary determines appropriate, in consultation with the Secretary of the Interior.[216] As of this writing, approximately $58.7 million in volume limitation is available for allocation (subject to the forfeiture of unused volume limitation previously awarded).[217]

Under the tribal economic development bond program, Indian tribal governments have the authority to issue bonds to finance projects and facilities owned by Indian tribes and located on Indian reservations, but outside the scope of "essential governmental function" bonds, such as convention centers, golf courses, hotels, restaurants, certain entertainment facilities, etc. In addition, Indian tribal governments have the authority to issue private activity bonds for any

---

[212] Manufacturing facility private activity bonds issued by tribes are not subject to State volume caps. See H.R. Conf. Rep. No. 100-495 (1987). Thus, the private activity bonds issued by tribes do not count against the volume cap of the State where the reservation is located. However, persons living on Indian reservations within a State are counted for purposes of calculating that State's volume cap, thus, States could issue bonds for the benefit of tribal reservations located within the State.

[213] Sec. 7871(f).

[214] Sec. 7871(f)(3). Tribal economic development bonds issued by an Indian tribal government are treated as if such bonds were issued by a State except that section 146 (relating to State volume limitations) does not apply. Sec. 7871(f)(2).

[215] Sec. 7871(f)(3)(C).

[216] Sec. 7871(f)(1)(B). Announcement 2011-71, 2011-46 I.R.B. 770, November 14, 2011 (IRS sought comment from Indian tribal governments on the reallocation of available amounts of national bond volume limitation authority that were previously allocated and have been, or subsequently are, forfeited under Notice 2009-51, 2009-28 I.R.B. 128, July 13, 2009, and Announcement 2010-88, 2010-47 I.R.B. 753, November 22, 2010). In Notice 2-12-48, 2012-31 I.R.B. 102, July 30, 2012, the Treasury department and IRS solicited applications for allocations of available volume cap (including amounts previously allocated and subsequently forfeited) and provided detailed guidance regarding the requirements for such applications and the method that will be used to allocate volume cap.

[217] Seehttps://www.irs.gov/tax-exempt-bonds/published-volume-cap-limit-for-tribal-economic-development-bonds#:~:text=The%20Published%20Volume%20Cap%20Limit,or%20(2)%20%24100%2C000%2C000) (as of August 1, 2021).

one of the seven types of "qualified bonds" used for purposes that Congress has permitted[218] and are not limited to financing tribal manufacturing facilities. The six other types of qualified private activity bonds include (1) exempt facility bonds;[219] (2) qualified mortgage bonds[220] to finance the purchase or repair or rehabilitation of owner-occupied single-family homes located in the jurisdiction of the issuer; (3) qualified veteran's mortgage bonds[221] to finance veterans' purchases of owner-occupied single-family homes (as long as a State issued such bonds before June 22, 1984); (4) qualified student loan bonds;[222] (5) qualified redevelopment bonds[223] to finance the redevelopment of blighted areas; and (6) qualified 501(c)(3) bonds[224] to fund the exempt activities of a section 501(c)(3) organization.

Tribal economic development bonds cannot be used to finance any portion of a building in which class II or class III gaming (as defined in section 4 of the Indian Gaming Regulatory Act) is conducted, or housed, or any other property used in the conduct of such gaming. Nor can tribal economic development bonds be used to finance any facility located outside of the Indian reservation.[225]

Explanation of Provision

The provision allows Indian tribal governments to issue governmental bonds and private activity bonds on a basis similar to State and local governments, but with certain location and gambling facility restrictions applicable to private activity bonds.

First, under the provision, the essential governmental function standard does not apply to the issuance of tax-exempt bonds by Indian tribal governments.

Second, for private activity bonds, the provision requires the Secretary annually to establish a national Tribal private activity bond volume cap for all Indian tribes based on the

---

[218] Sec. 141(e) (provides the list of seven categories of qualified private activity bonds). For purposes of tribal economic development bonds, use of bond proceeds by an Indian tribe, or instrumentality thereof, is treated as use by a State. Sec. 7871(f)(2)(B).

[219] Sec. 142. Business facilities eligible for this financing include transportation (airports, ports, local mass commuting, high-speed intercity rail facilities, and qualified highway or surface freight transfer facilities); privately owned and/or operated public works facilities (sewage, solid waste disposal, water, local district heating or cooling, and hazardous waste disposal facilities); privately-owned and/or operated residential rental housing; and certain private facilities for the local furnishing of electricity or gas. Bonds issued to finance "environmental enhancements of hydro-electric generating facilities," qualified public educational facilities, and qualified green building and sustainable design projects also may qualify as exempt facility bonds.

[220] Sec. 143.

[221] Sec. 143. Sec. 142(l)(2).

[222] Sec. 144(b).

[223] Sec. 144(c).

[224] Sec. 145.

[225] Sec. 7871(f)(3)(B).

greater of (1) the State population formula approach in section 146(d)(1)(A) (using national tribal population estimates supplied annually by the Department of the Interior in consultation with the Census Bureau), and (2) the minimum State ceiling amount in section 146(d)(1)(B) (as adjusted for the cost of living). The Secretary also is required annually to allocate the national bond volume cap among Indian tribal governments seeking an allocation in a particular year under regulations prescribed by the Secretary. The present-law limits on using State volume cap to finance a facility located outside of the State (section 146(k)(1)) do not apply to volume cap allocated under the provision to the extent that such cap is used with respect to financing for a facility located on qualified Indian lands.

No portion of volume cap allocated to an Indian tribal government under the provision may be used with respect to the financing of any portion of a building in which class II or class III gaming (as defined in section 4 of the Indian Gaming Regulatory Act) is conducted or housed or any property actually used in the conduct of such gaming.

There is no volume cap for governmental bonds issued by an Indian tribal government.

For purposes of the provision, the term "Indian tribal government" means the governing body of an Indian tribe, band, nation, or other organized group or community, or of Alaska Natives, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. The term "Indian tribal government" also includes any agencies, instrumentalities, or political subdivisions thereof. The term "qualified Indian lands" means an Indian reservation as defined in section 3(d) of the Indian Financing Act of 1974,[226] including lands that are within the jurisdictional area of an Oklahoma Indian tribe (as determined by the Secretary of the Interior). The term "qualified Indian lands" also includes lands outside a reservation where the facility is to be placed in service in connection with (1) the active conduct of a trade or business by an Indian tribe on, contiguous to, within reasonable proximity of, or with a substantial connection to, an Indian reservation or Alaska Native village, or (2) infrastructure (including roads, power lines, water systems, railroad spurs, and communication facilities) serving an Indian reservation or Alaska Native village.

The provision includes a special rule for situations where an Indian tribal government has authorized an intertribal consortium, a Tribal organization, or an Alaska Native regional or village corporation[227] to plan for, coordinate, or otherwise administer services, finances, functions, or activities on its behalf. In such cases, the authorized entity shall have the rights and responsibilities of the authorizing Indian tribal government only to the extent provided in the authorizing resolution.

Effective Date

The provision is effective for obligations issued in calendar years beginning after the date of enactment.

[226] 25 U.S. C. 1452(d).

[227] As defined in, or established pursuant to, the Alaska Native Claims Settlement Act.

2. New markets tax credit for Tribal Statistical Areas (sec. 135602 of the bill and sec. 45D of the Code)

Present Law

New Markets Tax Credit

In General

The New Markets Tax Credit ("NMTC") is a geography-based tax credit program. Under section 45D(a), an investor may claim tax credits for a qualified equity investment in a qualified community development entity ("CDE"). The qualified CDE designates equity investments as qualified equity investments, rendering the investor eligible to receive tax credits. The qualified CDE can only designate up to an amount allocated to it by the Department of the Treasury's Community Development Financial Institutions Fund ("CDFI Fund"). The CDFI Fund annually allocates NMTCs to CDEs under a competitive application process.

Qualifying Geography

The NMTC provisions require CDEs to serve or provide investment capital for low-income communities or low-income persons. A low-income community is either (1) a population census tract that meets certain criteria or (2) a specific area designated by the Secretary. Specifically, a "low-income community" is a population census tract with either (1) a poverty rate of at least 20 percent or (2) median family income which does not exceed 80 percent of the greater of metropolitan area median family income or statewide median family income (for a nonmetropolitan census tract, generally does not exceed 80 percent of statewide median family income).

CDEs may also qualify for the NMTC if they serve targeted populations, as designated by the Secretary, regardless of the composition of the population census tract or tracts in which the targeted populations live. Under this rule, the targeted population is treated as a low-income census tract. For this purpose, a "targeted population" is defined by reference to section 103(20) of the Riegle Community Development and Regulatory Improvement Act of 1994 (the "Act") to mean individuals, or an identifiable group of individuals, including an Indian tribe, who are low-income persons or otherwise lack adequate access to loans or equity investments. Section 103(17) of the Act provides that "low-income" means (1) for a targeted population within a metropolitan area, less than 80 percent of the area median family income; and (2) for a targeted population within a nonmetropolitan area, less than the greater of 80 percent of the area median family income or 80 percent of the statewide nonmetropolitan area median family income.

Allocation Process

The CDFI Fund annually allocates NMTCs to CDEs under a competitive application process. CDEs, in turn, allocate NMTCs to equity investors. The maximum annual amount of NMTCs that the CDFI Fund can allocate is $3.5 billion for calendar years 2010 through 2019 and $5 billion for calendar years from 2020 through 2025. No amount of unused allocation limitation may be carried to any calendar year after 2030.

In general, there is no set aside of any portion of the allocation limitation to a subset of low-income communities. However, Congress has allocated specific amounts to areas affected by certain natural disasters.[228] In addition, the CDFI Fund is required to assure that non-metropolitan counties receive a proportional allocation of the limitation.[229]

Applicability of the NMTC for Projects in Native American Areas

The NMTC provisions require CDEs to serve or provide investment capital for low-income communities. CDEs formed to support Native American projects may satisfy this requirement in two ways.

First, the CDE may invest in a project in a population census tract designated as a low-income community; a population census tract in a Native American area[230] can qualify as a "low-income community." Second, the CDE may invest in a project that serves a targeted population, as designated by the Secretary. Targeted populations are treated as low-income communities regardless of the composition of the population census tract or tracts in which the targeted population lives.[231] Certain Indian tribes are included in the list of groups that may be designated as targeted populations.[232]

Tribal and Other Census Designations

The United States Census Bureau has several designations for tribal and other areas.[233] Tribal Census Tracts are areas within Federally recognized American Indian reservations and off-reservation trust land areas. Tribal Designated Statistical Areas are areas relating to Federally recognized American Indian tribes that do not currently have a federally

---

[228] See Gulf Opportunity Zone Act of 2005, Pub. L. No. 109-135, sec. 101, December 21, 2005 (allocated an additional $1 billion of credits over a period of three years for qualified areas affected by Hurricane Katrina).

[229] Sec. 45(i)(6).

[230] "Native American area" is the term used by the U.S. Department of Treasury, CDFI Fund, Office of Financial Strategies and Research to describe land designated as Indian reservations by Federal or State authorities. These areas are composed of U.S. Census Bureau "American Indian/Alaska Native/Native Hawaiian Areas," available at https://catalog.data.gov/dataset/tiger-line-shapefile-2018-nation-u-s-current-american-indian-alaska-native-native-hawaiian-area (last visited May 14, 2021).

[231] Sec. 45D(e)(2).

[232] Sec. 45D(e)(2); 12 U.S.C. sec. 4702(20); see also Treas. Reg. 1.45D-1(d)(9). An Indian tribe may be designated as a targeted population if the tribe are (i) low income persons or (ii) otherwise lack adequate access to loans or equity investments. 12 U.S.C. sec. 4702(20). A targeted population is "low-income" for this purpose if (1) in the case of a metropolitan area, the group's median family income does not exceed 80 percent of the area median family income, or (2) in the case of a non-metropolitan area, the group's median family income does not exceed 80 percent of either area median family income or statewide nonmetropolitan area median family income. 12 U.S.C. sec. 4702(17); Treas. Reg. sec. 1.45D-1(d)(9).

[233] See generally U.S. Census Bureau, TIGERweb Geography, American Indian, Alaska Native, and Native Hawaiian Areas, *available at https://tigerweb.geo.census.gov/tigerwebmain/TIGERweb_geography_details.html* (last accessed August 26, 2021); U.S. Census Bureau, Tribal Glossary, *available at https://www.census.gov/tribal/tribal_glossary.php* (las accessed August 26, 2021).

recognized land base. Oklahoma Tribal Statistical Areas are areas relating to Federally recognized American Indian tribes based in Oklahoma. Alaska Native Village Statistical Areas are areas that represent a portion of Alaska Native villages. Hawaiian Home Lands are areas held in trust for Native Hawaiians by the state of Hawaii, pursuant to the Hawaiian Homes Commission Act of 1920, as amended.[234]

Explanation of Provision

The provision broadens the definition of low-income community to include an area used for a project which services a significant population of Tribal or Alaska Native Village members who are residents of a low-income community. This tribal population rule only applies if the relevant Indian Tribal government, within the meaning of section 7871(c),[235] documents the eligibility of such project.

In addition, beginning in 2022, the provision provides an additional allocation limitation of NMTC of $175 million, which may be allocated only with respect to low-income communities that are Tribal Statistical Areas. Low-income communities that are Tribal Statistical Areas remain eligible for the general allocation limitation. For calendar years after 2024, the $175 million amount is indexed to inflation.

Unused additional allocation limitation for low-income communities that are Tribal Statistical Areas increases the additional allocation limitation in the subsequent year. Thus, for example, if $10 million in additional allocation limitation is not used in calendar year 2022, the additional allocation limitation in 2023 is increased by the $10 million. However, if unused additional allocation limitation is carried over unused for five calendar years, on the sixth calendar year it increases the general allocation limitation.

A low-income community that is a Tribal Statistical Area is any low-income community located in any Tribal Census Tract, Oklahoma Tribal Statistical Area, Tribal-Designated Statistical Area, Alaska Native Village Statistical Area, or Hawaiian Home Land. It also includes low-income communities that are areas used for projects which service a significant population of tribal or Alaska Native Village members. The Treasury Secretary is directed to prescribe regulations related to such projects, including procedures that must take into account the particular location needs of the projects, especially with respect to projects that serve multiple tribal communities.

Effective Date

The provision applies to the new markets tax credit limitation determination for calendar years after December 31, 2021.

---

[234] *Ibid.* See also Hawaiian Homes Commission Act, 1920, 42 Stat. 108, *et seq.*

[235] Under section 7871(c), as amended by this bill, an Indian Tribal government means the governing body of an Indian Tribe, band, nation, or other organized group or community, or of Alaska Natives, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, and also includes any agencies, instrumentalities or political subdivisions thereof.

3. Inclusion of Indian areas as difficult development areas for purposes of certain buildings (sec. 135603 of the bill and sec. 42 of the Code)

Present Law

A taxpayer may claim the low-income housing tax credit annually over a 10-year period for the costs of building or rehabilitating rental housing occupied by low-income tenants. The amount of credit that may be claimed each year is an amount equal to the applicable percentage of the qualified basis of each qualified low-income building.[236]

Credit Calculations

Determination of Applicable Percentage

The applicable percentage for non-Federally subsidized newly constructed housing and non-Federally subsidized substantial rehabilitation is calculated such that the present value of the credit amounts is at least 70 percent of a building's qualified basis, depending on the prevailing interest rate.[237] These credits are sometimes referred to as "nine-percent credits."

The applicable percentage for Federally subsidized newly constructed housing, Federally subsidized substantial rehabilitation, and certain housing acquisition costs, is calculated such that the present value of the credit amounts is at least 30 percent of a building's qualified basis, depending on the prevailing interest rate.[238] These credits are sometimes referred to as "four-percent credits."

Calculation of Eligible Basis

The qualified basis for purposes of determining the amount of low-income housing credit to be claimed each year is an amount equal to the applicable fraction of eligible basis.[239] The eligible basis of a new building is its adjusted basis as of the close of the first taxable year of the credit period. The eligible basis of an existing building is zero unless the building meets the following requirements: the building is acquired by purchase; there is a period of at least 10

---

[236] Sec. 42.

[237] See sec. 42(b) and (e). This credit is referred to as the 70-percent credit. See Joint Committee on Taxation, *General Explanation of the Tax Reform Act of 1986* (JCS-10-87), May 4, 1987. This document can be found on the Joint Committee on Taxation website at www.jct.gov. However, under the Housing and Economic Recovery Act of 2008, the minimum applicable percentage for such credits was temporarily set at nine percent (the "nine-percent floor"). The Consolidated Appropriations Act, 2016 made the nine-percent floor permanent. The enactment of the nine-percent floor on the credit implies that, under the statutory formula, the present value is always 70 percent or greater.

[238] This credit is referred to as the 30-percent credit. See Joint Committee on Taxation, *General Explanation of the Tax Reform Act of 1986* (JCS-10-87), May 4, 1987. This document can be found on the Joint Committee on Taxation website at www.jct.gov. However, under the Consolidated Appropriations Act, 2020, the minimum applicable percentage for such credits was set at four percent (the "four-percent floor"). The enactment of the four-percent floor on the credit implies that, under the statutory formula, the present value is always 30 percent or greater.

[239] Sec. 42(c)(1)(A).

years between the date of its acquisition by the taxpayer and the date the building was last placed in service; the building was not previously placed in service by the taxpayer or a related person; and the building was rehabilitated and is eligible for the low income housing credit for rehabilitation expenditures treated as a separate new building.

Generally, buildings located in high cost areas are eligible for enhanced low-income housing tax credit, which is effectuated by increasing such buildings' eligible basis or the rehabilitation expenditures taken into account for purposes of the credit. For this purpose, qualified census tracts and difficult development areas are treated as high cost areas.[240] A qualified census tract is a census tract designated by the Secretary of Housing and Urban Development in which 50 percent or more of households have an income of less than 60 percent of area median gross income, or which has a poverty rate of at least 25 percent. A difficult development area is an area designated by the Secretary of Housing and Urban Development in which construction, land, or utility costs are high relative to area median gross income.

In the case of a new building located in a qualified census tract or difficult development area, the eligible basis is increased to 130 percent of such basis calculated without regard to this increase. In the case of a substantial rehabilitation to an existing building, the rehabilitation expenditures taken into account are increased to 130 percent of such expenditures calculated without regard to this increase.

Indian Areas

Present law does not require housing credit agencies to allocate credits to projects located in Native American areas.[241] However, agencies are allowed to give preference in allocating credits to projects serving the lowest-income tenants and to set project selection criteria that reflect the housing priorities of the agency and are appropriate to local conditions.[242]

Depending on the rules of the particular State or locality, a Native American tribe may be involved in a low-income housing tax credit project in various ways. For example, an applicant for housing credits may be required to obtain legal authorization or permits from a tribal government for a project that is located on land controlled by the tribe. A tribe may also be more directly involved and serve as the lender, developer, or property manager for a project.[243]

---

[240] Sec. 42(d)(5)(B).

[241] The term "Native American area" refers to Federal- and State-designated Native American areas, off-reservation trust lands, Hawaiian home lands, State-designated tribal statistical areas, tribal designated statistical areas, Oklahoma tribal statistical areas, and Alaskan Native village statistical areas. See Census Bureau, *Class Codes and Definitions*, available at https://www.census.gov/library/reference/code-lists/class-codes.html; Censns Bureau, *TIGER/Line Shapefile, 2017, nation, U.S., Current American Indian/Alaska Native/Native Hawaiian Areas National (AIANNH) National*, October 17, 2019, available at https://catalog.data.gov/dataset/tiger-line-shapefile-2017-nation-u-s-current-american-indian-alaska-native-native-hawaiian-area.

[242] Sec. 42(m)(1).

[243] For more detailed information regarding projects located on Native American lands, see Joint Committee on Taxation, *Overview of Federal Tax Provisions and Analysis of Selected Issues Relating to Native American Tribes and Their Members* (JCX-8-20), February 28, 2020, pp. 49-51. This document can be found on the Joint Committee on Taxation website at www.jct.gov.

Explanation of Provision

The provision amends the definition of difficult development area to include any Indian area for the purpose of determining eligible basis. An Indian area is defined to be an area in which a Federally recognized tribe or a State recognized tribe ("Indian tribe"), or a tribally designated housing entity that is authorized by one or more Indian tribes provides assistance for affordable housing, including permanent housing for homeless persons with disabilities, transitional housing, and single room occupancy housing.[244] A tribally designated housing entity may include existing Indian housing authorities as well as other entities that provide assistance for affordable housing for Indians.

In the case of an area which is a difficult development area solely because it is an Indian area, a building is not considered to be located in a difficult development area for the purpose of determining eligible basis unless the building is financed under the Native American Housing Assistance and Self Determination Act of 1996,[245] sponsored by an Indian tribe or a tribally designated housing entity, or wholly owned or controlled by an Indian tribe or a tribally designated housing entity.

Effective Date

The provision applies to buildings placed in service after December 31, 2021.

[244] 25 U.S.C. 4103.

[245] 25 U.S.C. 4101 et seq.

PART VII — INVESTMENTS IN THE TERRITORIES

1. Possessions economic activity credit (sec. 135701 of the bill and new sec. 45V of the Code)

Present Law

Federal tax rules apply to the territories in a manner that is different from their application in relation to both the States and foreign countries. Broadly, an individual resident of a territory is exempt from U.S. tax on income that has a source in that territory but is subject to U.S. tax on U.S.-source and non-possession-source income. A corporation that is organized in a territory is generally treated as a foreign corporation for U.S. tax purposes. On the other hand, a number of Code provisions have effect in one or all of the territories as if the territories were States. For example, the tax credit for research and experimentation has been available for research conducted in a territory.

Historically, the Federal tax rules also have included preferences for territory activities. Until its expiration in 2006, the section 936 possession tax credit permitted qualifying U.S. corporations a credit against their U.S. tax liability in respect of possession-source income.[246] After section 936 expired, a similar, temporary provision was enacted for American Samoa activities,[247] and the section 199 domestic production activities deduction was expanded temporarily to include production activities conducted in Puerto Rico. The latter has since

---

[246] For taxable years beginning before January 1, 2006, certain domestic corporations with business operations in the U.S. possessions were eligible for the possessiou tax credit. Secs. 27(b) and 936. This credit offset the U.S. tax imposed on certain income related to operations in the U.S. possessions. Subject to certain limitations, the amount of the possession tax credit allowed to any domestic corporation equaled the portion of that corporation's U.S. tax that was attributable to the corporate taxable income from (1) the active conduct of a trade or business within a U.S. possession, (2) the sale or exchange of substantially all of the assets that were used in such a trade or business, or (3) certain possessions investment. No deduction or foreign tax credit was allowed for any possessions or foreign tax paid or accrued with respect to taxable income that was taken into account in computing the credit under section 936. Under the economic activity-based limit, the amount of the credit could not exceed an amount equal to the sum of (1) 60 percent of the taxpayer's qualified possession wages and allocable employee fringe benefit expenses, (2) 15 percent of depreciation allowances with respect to short-life qualified tangible property, plus 40 percent of depreciation allowauces with respect to medium-life qualified tangible property, plus 65 percent of depreciation allowances with respect to long-life qualified tangible property, and (3) in certain cases, a portion of the taxpayer's possession income taxes. A taxpayer could elect, instead of the economic activity-based limit, a limit equal to the applicable percentage of the credit that otherwise would have been allowable with respect to possession business income. Beginning in 1998, the applicable percentage was 40 percent.

To qualify for the possession tax credit for a taxable year, a domestic corporation was required to satisfy two conditions. First, the corporation was required to derive at least 80 percent of its gross income for the three-year period immediately preceding the close of the taxable year from sources within a possession. Second, the corporation was required to derive at least 75 percent of its gross income for that same period from the active conduct of a possession business. Sec. 936(a)(2). The section 936 credit was phased out during the 10-year period starting in 1996. During this phase-out period, the Puerto Rico economic activity credit of section 30A was available for trade or business activity in Puerto Rico.

[247] Section 199 was repealed for taxable years beginning after December 31, 2017, by "An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018," Pub. L. No. 115-97 (the "2017 Act"), section 13305.

expired.[248] At present, there is no economic development credit in the Code applicable only to activities in the U.S. possessions. The credit for American Samoa activities remains in effect for taxable years ending before January 1, 2022.[249]

The credit applicable to activities in American Samoa was first enacted in 2006. The credit is not part of the Code but is computed based on the rules of former sections 30A, 199, and 936. For purposes of this credit, the Code is applied without regard to the repeal of sections 30A and 936 in 2018,[250] or the repeal of section 199 in 2017.[251]

For taxable years beginning before January 1, 2011, as originally enacted, the credit was limited to domestic corporations that were existing credit claimants with respect to American Samoa who had elected the application of section 936 for its last taxable year beginning before January 1, 2006. The credit is based on the corporation's economic activity-based limitation with respect to American Samoa. An existing claimant is a domestic corporation that (1) was engaged in the active conduct of a trade or business within American Samoa on October 13, 1995, and (2) elected the benefits of the possession tax credit in an election in effect for its taxable year that included October 13, 1995, or that acquired all of the assets of a trade or business that met the foregoing conditions. A corporation that added a substantial new line of business (other than in a qualifying acquisition of all the assets of a trade or business of an existing credit claimant) ceased to be an existing credit claimant as of the close of the taxable year ending before the date on which that new line of business was added.

The amount of the credit allowed to a qualifying domestic corporation under the provision is equal to the sum of the amounts used in computing the corporation's economic activity-based limitation with respect to American Samoa, except that no credit is allowed for the amount of any American Samoa income taxes. Thus, for any qualifying corporation the amount of the credit equals the sum of (1) 60 percent of the corporation's qualified American Samoa wages and allocable employee fringe benefit expenses and (2) 15 percent of the corporation's depreciation allowances with respect to short-life qualified American Samoa tangible property, plus 40 percent of the corporation's depreciation allowances with respect to medium-life qualified American Samoa tangible property, plus 65 percent of the corporation's depreciation allowances with respect to long-life qualified American Samoa tangible property.

---

[248] Sec. 199(d)(8).

[249] This credit was again extended during the 116th Congress by section 139 of the Taxpayer Certainty and Disaster Relief Act of 2020 (Division EE of the "Consolidated Appropriations Act, 2021," Pub. L. No. 116-260), described in Part Seven of this document.

[250] See *The Consolidated Appropriations Act 2018*, Pub. L. No. 115-141, Division U, Title IV, at sec. 401(d)(1)(C) (the repeal of section 936) and sec. 401(d)(1)(D)(viii)(I) (definition of intangible property added to section 367(d)) (March 23, 2018).

[251] Pub. L. No. 115-97, section 13305(a).

The rule denying a credit or deduction for any possessions tax or foreign tax paid with respect to taxable income that is taken into account in computing the credit under section 936[252] does not apply with respect to the credit allowed by this provision.

For taxable years beginning after December 31, 2011, the credit rules are modified in two ways. First, domestic corporations with operations in American Samoa are allowed the credit even if those corporations are not existing credit claimants. Second, the credit is available to a domestic corporation (either an existing credit claimant or a new credit claimant) only if the corporation has qualified production activities income (as defined in section 199(c) by substituting "American Samoa" for "the United States" in each place that the latter term appears).

In the case of a corporation that is an existing credit claimant with respect to American Samoa and that elected the application of section 936 for its last taxable year beginning before January 1, 2006, the credit applies to the first 16 taxable years of the corporation which begin after December 31, 2005, and before January 1, 2022. For any other corporation, the credit applies to the first ten taxable years of that corporation which begin after December 31, 2011, and before January 1, 2022.

Explanation of Provision

The provision creates a new economic activity credit related to active businesses conducted in U.S. territory or possessions. The new credit is a general business credit equal to 20 percent of the sum of qualified possessions wages and fringe benefits paid or incurred by a qualified domestic corporation for a taxable year. For purposes of this credit, "possessions" include American Samoa, Guam, Commonwealth of Northern Marianas, Commonwealth of Puerto Rico, and the U.S. Virgin Islands.

"Qualified domestic corporation" encompasses both U.S. corporations and a U.S. shareholder of a foreign qualified corporation that is wholly owned by the same U.S. group if they meet both source of income and active conduct of trade or business tests.

The source of income test requires that the qualified corporation have received 80 percent or more of its income from sources within a possession of the United States for a three-year period that precedes the close of the year for which the credit is claimed. Where applicable, a shorter period ending on the close of the taxable year may be used for the test period. The amount is determined without regard to the rules for determining overall foreign losses under the foreign tax credit limitation rules of section 904(f).

The trade or business test also looks to the three-year period preceding the close of the taxable year. During that period, at least 75 percent of gross income of the corporation must be derived from the active conduct of a trade or business in the possession.

Qualified possessions wages are defined as wages paid as part of the active conduct of a trade or business in a possession to an employee whose principal place of employment is the in the possession and whose services were in fact performed in a possession. The amount of wages per employee that may be taken into account as qualified possessions wages is limited to

[252] See sec. 936(c).

$50,000. If an employee is part-time or performs such services outside the possession, the amount of wages eligible for the credit are reduced accordingly. Wages paid to an employee for services performed for another party are ineligible, unless the business of the taxpayer is providing temporary employees for others.

Allocable employee fringe benefits are also taken into account in determining the credit. The portion of fringe benefits allocable to possession wages is the amount of that bears the same proportion to total fringe benefits as the amount of possession wages bears to total wages paid by the qualified domestic corporation, up to 15 percent of the amount of qualified possession wages. In determining the employee fringe benefits, expenses for employer contributions to certain retirement or profit-sharing funds and for health benefits to employees are taken into account.

Finally, the provision creates a defined subset of qualified domestic corporations that are eligible for an enhanced credit if certain parameters are met. A "qualified small domestic corporation" is a qualified domestic corporation (including any foreign subsidiaries that are themselves qualified corporations) that meets two additional tests with respect to gross receipts and number of employees. First, the qualified small domestic corporation may have annual gross receipts of no more than $50 million in each year of the three-year test period. Second, a qualified small domestic corporation may have no more than 30 employees group-wide, at least five of whom must be full-time employees in a U.S. possession.

For employers within these parameters, the possession wage credit is increased from 20 percent to 50 percent of eligible possessions wages and allocable fringe benefits for each employee. In addition, the maximum amount of wages taken into account for each such employee is increased from $50,000 per employee to $139,500.[253] For purposes of determining eligibility for the enhanced credit, the gross receipts and number of employees of other persons who would be considered related to the qualified small domestic corporation for purposes of section 52 (as amended by this bill) are taken into account. These rules treat corporations, partnerships (and other non-corporate entities such as sole proprietorships) as a single employer and generally apply to entities linked through 50-percent-or-greater direct ownership interests. Foreign entities are included.[254]

Effective Date

The provision is generally effective for taxable years beginning after date of enactment. For qualified corporations that are foreign corporations, the provision is effective for taxable years beginning after date of enactment and to the taxable year of United States shareholders that includes the date on which such taxable year of the foreign corporation ends.

---

[253] The intent of the provision is to increase the maximum per-employee wages taken into account to the social security wage base for 2021, which is $142,800 per employee. A technical correction may be necessary to carry out this intent.

[254] Section 52(a) references section 1563(a) and section 52(b) applies using principles similar to the principles of section 52(a). For purposes of section 1563(a), the exclusions in 1563(b) are not relevant and thus both domestic and foreign entities are subject to aggregation under section 52.

2. Additional new markets tax credit allocations for the territories (sec. 135702 of the bill and sec. 45D of the Code)

Present Law

New Markets Tax Credit

In General

The New Markets Tax Credit ("NMTC") is a geography-based tax credit program. Under section 45D(a), an investor may claim tax credits for a qualified equity investment in a qualified community development entity ("CDE"). The qualified CDE designates equity investments as qualified equity investments, rendering the investor eligible to receive tax credits. The qualified CDE can only designate up to an amount allocated to it by the Department of the Treasury's Community Development Financial Institutions Fund ("CDFI Fund"). The CDFI Fund annually allocates NMTCs to CDEs under a competitive application process.

Qualifying Geography

The NMTC provisions require CDEs to serve or provide investment capital for low-income communities or low-income persons. A low-income community is either (1) a population census tract that meets certain criteria or (2) a specific area designated by the Secretary. Specifically, a "low-income community" is a population census tract with either (1) a poverty rate of at least 20 percent or (2) median family income which does not exceed 80 percent of the greater of metropolitan area median family income or statewide median family income (for a nonmetropolitan census tract, generally does not exceed 80 percent of statewide median family income). For population census tracts within the U.S. territories, this definition is applied using possession-wide median family income.

CDEs may also qualify for the NMTC if they serve targeted populations, as designated by the Secretary, regardless of the composition of the population census tract or tracts in which the targeted populations live. Under this rule, the targeted population is treated as a low-income census tract. For this purpose, a "targeted population" is defined by reference to section 103(20) of the Riegle Community Development and Regulatory Improvement Act of 1994 (the "Act") to mean individuals, or an identifiable group of individuals, including an Indian tribe, who are low-income persons or otherwise lack adequate access to loans or equity investments. Section 103(17) of the Act provides that "low-income" means (1) for a targeted population within a metropolitan area, less than 80 percent of the area median family income; and (2) for a targeted population within a nonmetropolitan area, less than the greater of 80 percent of the area median family income or 80 percent of the statewide nonmetropolitan area median family income.

Allocation Process

The CDFI Fund annually allocates NMTCs to CDEs under a competitive application process. CDEs, in turn, allocate NMTCs to equity investors. The maximum annual amount of NMTCs that the CDFI Fund can allocate is $3.5 billion for calendar years 2010 through 2019 and $5 billion for calendar years from 2020 through 2025. No amount of unused allocation limitation may be carried to any calendar year after 2030.

In general, there is no set aside of any portion of the allocation limitation to a subset of low-income communities. However, Congress has allocated specific amounts to areas affected by certain natural disasters.[255] In addition, the CDFI Fund must assure that non-metropolitan counties receive a proportional allocation of the limitation.[256]

U.S. Territories

Citizens of the United States are generally subject to Federal income tax on their U.S. and foreign income regardless of whether they live in a State, a foreign country, or a U.S. territory. Residents of the five U.S. territories[257] are generally subject to the Federal income tax system based on their status as U.S. citizens or residents of the territories, with certain special rules for determining residence and source of income specific to the territory. Broadly, a bona fide individual resident of a territory is exempt from U.S. tax on income derived from sources within that territory but is subject to U.S. tax on U.S.-source and non-territory-source income.[258] A bona fide resident of a territory for a taxable year is generally an individual (1) who is present for at least 183 days during the taxable year in the territory, and (2) who does not have either a tax home outside the territory or a closer connection to the United States or a foreign country than to the territory.[259]

The application of the Federal tax rules to the territories varies from one territory to another. Three territories—Guam, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands—are referred to as mirror Code territories because the Code serves as the internal tax law of those territories (substituting the particular territory for the United States wherever the Code refers to the United States).[260] Thus, there is a mirror Code version of the child and dependent care tax credit under the internal revenue laws of each mirror Code territory. A resident of one of those territories generally files a single tax return only with the territory of which the individual is a resident, and not with the United States.[261]

American Samoa and Puerto Rico, by contrast, are non-mirror Code territories. These two territories have their own internal tax laws, and a resident of either American Samoa or Puerto Rico may be required to file income tax returns with both their territory of residence and the United States.

[255] See Gulf Opportunity Zone Act of 2005, Pub. L. No. 109-135, sec. 101, December 21, 2005 (allocated an additional $1 billion of credits over a period of three years for qualified areas affected by Hurricane Katrina).

[256] See sec. 45(i)(6).

[257] The Code refers to the territories as "possessions."

[258] See secs. 932, 933, and 937; see also former sec. 935 (1986), which remains in effect pursuant to the Tax Reform Act of 1986, Pub. L. No. 99-514, sec. 1277(b), October 22, 1986; 48 U.S.C. sec. 1801 note, sec. 601.

[259] Sec. 937.

[260] 48 U.SC. sec. 1397 (U.S. Virgin Islands); 48 U.S.C. sec. 1421i (Guam); 48 U.S.C. 1801 note, sec. 601 (Commonwealth of the Northern Mariana Islands).

[261] Sec. 932 and former sec. 935.

For purposes of the NMTC, low-income communities include population census tracts and targeted populations in the U.S. territories. Thus, taxpayers subject to U.S. tax may claim the NMTC for qualifying investments in projects in the territories.

Explanation of Provision

Beginning in 2022, the provision provides an additional allocation limitation of NMTC of $80 million, which may be allocated only with respect to low-income communities located in Puerto Rico. The provision also provides an additional allocation limitation of NMTC of $20 million, which may be allocated only with respect to low-income communities located in the territories of Guam, the Commonwealth of the Northern Marian Islands, the U.S. Virgin Islands, or American Samoa. Low-income communities in the territories remain eligible for the general allocation limitation.

For calendar years after 2024, the $80 million and $20 million amounts are indexed to inflation.

Unused additional allocation limitation for either Puerto Rico or the other territories increases the respective additional allocation limitation in the subsequent year. Thus, for example, if $10 million in additional allocation limitation for Puerto Rico is not used in calendar year 2022, the additional allocation limitation for Puerto Rico in 2023 is increased by the $10 million. However, if unused additional allocation limitation is carried over unused for five calendar years, on the sixth calendar year it increases the general allocation limitation.

Effective Date

The provision is effective for calendar years after December 31, 2021.

SUBTITLE G — GREEN ENERGY

Summary of Present Law Renewable Electricity and Certain Other Energy-Related Tax Incentives

The Internal Revenue Code contains a number of tax incentives to encourage zero or low carbon electricity production, including credits relating to renewable power, nuclear power, other forms of energy efficient power, as well as carbon oxide sequestration. The following tables provide summaries of these incentives.

Summary of Credit for Electricity Produced from Certain Renewable Resources		
Eligible Electricity Production Activity (sec. 45)[262]	**Credit Rate for 2021**[263] **(cents per kilowatt-hour)**	**Expiration**[264]
Wind	2.5	January 1, 2022
Closed-loop biomass	2.5	January 1, 2022
Open-loop biomass	1.3	January 1, 2022
Geothermal	2.5	January 1, 2022
Municipal solid waste (including landfill gas facilities and trash combustion facilities)	1.3	January 1, 2022
Qualified hydropower	1.3	January 1, 2022
Marine and hydrokinetic	1.3	January 1, 2022

1

2 .

3

262 Except where otherwise provided, all section references are to the Internal Revenue Code of 1986, as amended (the "Code").

263 Credit rates are adjusted annually for inflation. See 86 Fed. Reg. 22300, April 27, 2021. In general, the credit is available for electricity produced during the first 10 years after a facility has been placed in service. Taxpayers may also elect to get a 30-percent investment tax credit in lieu of this production tax credit. In the case of wind facilities, the available production tax credit or investment tax credit is reduced by 20 percent for facilities the construction of which began in 2017, by 40 percent for facilities the construction of which began in 2018, by 60 percent for facilities the construction of which began in 2019, and by 40 percent for facilities the construction of which began after 2019

264 Expires for property the construction of which begins after this date.

Summary of Investment Tax Credits for Energy Property and Personal Credit for Residential Energy Efficient Property			
Qualified Energy Property (sec. 48)	**Credit Rate**	**Maximum Credit**	**Expiration[4]**
Equipment to produce energy from a geothermal deposit	30% (in lieu of production tax credit)	None	January 1, 2022
	10%	None	None
Equipment to use ground or ground water for heating or cooling	10%	None	January 1, 2024
Equipment that uses fiber-optics to distribute sunlight inside a structure	30%	None	January 1, 2020
	26%		January 1, 2023
	22%		January 1, 2024
Microturbine property (< 2 megawatt electrical generation power plants of ≥ 26% efficiency)	10%	$200 per kilowatt of capacity	January 1, 2024
Combined heat and power property (simultaneous production of electrical/mechanical power and useful heat > 60% efficiency)	10%	None	January 1, 2024
Solar electric or solar hot water property	30%	None	January 1, 2020
	26%		January 1, 2023
	22%		January 1, 2024
	10%		None
Fuel cell property (generates electricity through electrochemical process)	30%	$1,500 for each ½ kilowatt of capacity	January 1, 2020
	26%		January 1, 2023
	22%		January 1, 2024
Small (< 100 kilowatt capacity) wind electrical generation property	30%	None	January 1, 2020
	26%		January 1, 2023

Summary of Investment Tax Credits for Energy Property and Personal Credit for Residential Energy Efficient Property (cont'd)			
Qualified Energy Property (sec. 48)	**Credit Rate**	**Maximum Credit**	**Expiration[265]**
Waste energy recovery property266	26%	None	January 1, 2023
	22%		January 1, 2024
Wind, biomass, municipal solid waste, qualified hydropower, and marine and hydrokinetic property	30% (in lieu of production tax credit)	None	January 1, 2022[267] January 1, 2026, in the case of offshore wind facilities[268]
Credit for residential energy efficient property (sec. 25D) Personal credit for residential solar water heating or solar electric property, fuel cell, small wind property, geothermal heat pump property, qualified biomass fuel property (wood/pellet stoves)	30%	$500 per ½ kilowatt of capacity for fuel cells	December 31, 2019[269]
	26%		December 31, 2022
	22%		December 31, 2023

Summary of Credits Relating to Nuclear Power and Carbon Oxide Sequestration

265 For all eligible property, construction of the property must begin before the expiration date, except where otherwise noted. For credits subject to a rate phase down, except where noted, construction must begin before the dates listed and placed in service before January 1, 2026.

266 In the case of waste energy recovery property, the phrase "if the primary purpose of such building or equipment is not the generation of electricity" under paragraph (A) of subsection (c)(5) is intended to refer to building or equipment that is a utility-scale power plant or enterprise whose primary purpose is the generation of electricity. Electrical generation equipment that generates waste heat as a byproduct at industrial, commercial, or residential facilities is eligible for the credit so long as it otherwise meets subsection (c)(5).
Any sources of waste heat that generate electricity without additional emissions or fuel, including pressure drop applications, qualify for the credit.

267 In the case of wind facilities other than offshore wind facilities, the available investment tax credit is reduced by 20 percent for facilities the construction of which begins in 2017, by 40 percent for facilities the construction of which begins in 2018, by 60 percent for facilities the construction of which begins in 2019, and by 40 percent for facilities the construction of which begins after 2019.

268 In the case of an offshore wind facility, energy property includes such offshore wind property as the project-owned export cable that brings the electricity to shore and project-owned substation and transformer onshore. Offshore wind facilities may be located in the waters of the Great Lakes or in the territorial seas of the United States, the exclusive economic zone of the United States, and the outer Continental Shelf of the United States.

269 Residential energy efficient property must be placed in service by the dates listed in order to be eligible for a credit.

Eligible Activity	Description	Credit Amount	Expiration
Advanced nuclear power production credit (sec. 45J)	• Credit for production of nuclear power from new facilities that use modern designs and have received an allocation from the Secretary • Secretary may allocate up 6,000 megawatts of credit-eligible capacity	• 1.8 cents per kilowatt-hour for the eight-year period starting when the facility was placed in service. • Not inflation adjusted.	None
Carbon oxide sequestration credit (sec. 45Q)	• Credit for the sequestration of carbon oxides captured at qualified U.S. facilities • Sequestered carbon oxides can be captured from either industrial sources or directly from the ambient air, within the U.S. • The credit amount varies depending on the method by which captured carbon oxides are sequestered (geologic storage versus use commercially or as a tertiary injectant)	• In 2021, the credit amount is $22.68 per metric ton of carbon dioxide captured and used as a tertiary injectant for fossil fuel extraction or utilized for certain other commercial purposes. • In 2021, the credit amount is $34.81 per metric ton of carbon dioxide captured and sequestered in secure geological storage. • The credit period is the 12-year period beginning on the date the carbon capture equipment was originally placed in service	January 1, 2026[7]

[7] Carbon capture equipment must be placed in service at a qualified facility the construction of which begins before that date.

Summary of Certain Other Energy Provisions		
Eligible Activity	**Description of Provision**	**Expiration**
Five-year cost recovery for certain energy property (secs. 168(e)(3)(B)(vi) and 48(a)(3)(A))	• A five-year Modified Accelerated Cost Recovery System ("MACRS") recovery period is generally provided for equipment using solar and wind energy to generate electricity (*e.g.*, solar panels), to heat or cool (or provide hot water for use in) a structure, or to provide solar (or wind) process heat; equipment using solar energy to illuminate the inside of a structure using fiber-optic distributed sunlight; equipment used to produce, distribute, or use energy derived from a geothermal deposit; qualified fuel cell or microturbine property; combined heat and power system property; equipment using the ground or ground water as a thermal energy source (or sink) to heat (or cool) a structure; and waste energy recovery property • A five-year MACRS recovery period is also provided for certain small power production biomass facilities (*i.e.*, a qualifying small power production facility within the meaning of section 3(17)(C) of the Federal Power Act (16 U.S.C. 796 (17)(C)), as in effect on September 1, 1986, that also qualifies as certain biomass property, including (i) a boiler, the primary fuel for which will be an alternate substance; (ii) a burner (including necessary on-site equipment to bring the alternate substance to the burner) for a combustor other than a boiler if the primary fuel for such burner will be an alternate substance; (iii) equipment for converting an alternate substance into a qualified fuel; (iv) certain pollution control equipment; and (v) equipment used for the unloading, transfer, storage, reclaiming from storage, and preparation (including, but not limited to, washing, crushing, drying, and weighing) at the point of use of an alternative substance for use in equipment described in (i), (ii) or (iii))	January 1, 2024, for all property except for solar and wind energy property
Certain publicly traded partnerships treated as corporations (secs. 7704 and 851)	• General rule that a publicly traded partnership is taxed as a corporation is not applicable if 90 percent of gross income is interest, dividends, real property rents, or certain other types of qualifying income • Other types of qualifying income include income and gains from certain activities with respect to natural resources. These activities include the exploration, development, mining or production, processing, refining, transportation (including pipelines), or the marketing of any mineral or natural resource, industrial source carbon dioxide, or the transportation or storage of certain renewable fuels.	None

PART I — RENEWABLE ELECTRICITY AND REDUCING CARBON EMISSIONS

1. Extension and modification of credit for electricity produced from certain renewable resources (sec. 136101 of the bill and secs. 45 and 48 of the Code)

Explanation of Provision

Facilities with a maximum output of less than one megawatt

For facilities with a maximum output of less than one megawatt of electricity, the provision extends the section 45 credit for electricity produced from certain renewable resources for twelve years, through December 31, 2033. The provision applies this extension to electricity produced from solar energy, which had expired at the end of 2005. The provision also extends for twelve years the election to claim a 30-percent investment tax credit in lieu of this production tax credit for these facilities.

For these smaller facilities, the provision modifies the credit rate phasedown for wind power such that wind facilities that are placed in service after December 31, 2021, and the construction of which begins before January 1, 2032, are entitled to the full credit. For calendar year 2032, the credit rate is for all facilities reduced to 80 percent of the otherwise applicable rate. For calendar year 2033, the credit rate for all facilities is reduced to 60 percent of the otherwise applicable rate. These phasedown rules apply to both the renewable electricity production tax credit and the investment credit in lieu of the production tax credit.

Facilities with a Maximum Output of at Least One Megawatt

For facilities with a maximum output of at least one megawatt of electricity, the provision extends the section 45 credit for electricity produced from certain renewable resources for twelve years, through December 31, 2033. The provision applies this extension at a base rate to electricity produced from solar energy facilities with at least one megawatt of maximum output. The provision also extends for twelve years at the base rate the election to claim a 30-percent investment tax credit in lieu of this production tax credit for these facilities. The base rate is equal to 20 percent of the otherwise applicable rate. Thus, for example, the 30-percent investment tax credit is extended at a 6 percent rate for these larger facilities.

For these larger facilities, the provision modifies the credit rate phasedown for wind power such that wind facilities that are placed in service after December 31, 2021, and the construction of which begins before January 1, 2032, are not further reduced by a phasedown calculation, after the application of the reduced rate. For calendar year 2032, the base credit rate for all facilities is further reduced to 80 percent of the otherwise applicable rate. For calendar year 2033, the base credit rate for all facilities is further reduced to 60 percent of the otherwise applicable rate. These phasedown rules apply to both the renewable electricity production tax credit and the investment credit in lieu of the production tax credit.

Enhanced Credit Rate Where Certain Wage and Workforce Requirements are Met

Prevailing Wages

For facilities with a maximum output of at least one megawatt, an enhanced credit rate equal to 80 percent of the otherwise applicable rate is added to the base credit rate during the extension period if the taxpayer ensures that any laborers and mechanics employed by contractors and subcontractors in the construction, alteration, or repair of such facility prior to it being placed in service or during the 10-year credit period are paid wages at a rate not less than the prevailing wage rates for construction, alteration, or repair of a similar character in the locality as most recently determined by the Secretary of Labor, in accordance with subchapter IV of chapter 31, of title 40, United States Code.

With respect to any facility, a taxpayer is not entitled to the enhanced credit rate unless the prevailing wage requirements are met during construction, before such facility is placed in service. However, a taxpayer may bring a facility into compliance, and have the facility qualify, by paying any affected workers the difference between the actual compensation paid to such workers and the wages required to be paid to those workers to meet prevailing wage requirements, plus any applicable interest. In addition, such taxpayer must pay a penalty to the IRS equal to $5,000 per affected worker.

Once a qualifying facility has been placed in service, a taxpayer that does not meet the prevailing wage requirements associated with the alteration or repair of such facility is ineligible for any enhanced production credits for energy produced during the taxable year of noncompliance. A taxpayer may bring the facility into compliance by paying any affected workers the difference between the actual compensation paid to such workers and the wages required to be paid to those workers to meet prevailing wage requirements, plus any applicable interest. In addition, such taxpayer must also pay a penalty to the IRS equal to $5,000 per affected worker.

In the case where an election for an investment tax credit in lieu of a production tax credit has been made, once a qualifying facility has been placed in service, if it does not meet prevailing wage requirements associated with any alterations or repairs, the enhanced credits are recaptured under rules similar to the rules governing the disposal of investment credit property under the rules of section 50(a)(1). As with the production tax credit, a taxpayer may bring the facility into compliance by paying any affected workers the difference between the actual compensation paid to such workers and the wages required to be paid to those workers to meet prevailing wage requirements, plus any applicable interest. In addition, such taxpayer must also pay a penalty to the IRS equal to $5,000 per affected worker.

Apprenticeship Requirements

To be eligible for the enhanced credit, a taxpayer must also ensure that certain qualified apprenticeship requirements are satisfied by ensuring that not less than 15 percent (five percent for projects the construction of which begins before calendar year 2023 and 10 percent for projects beginning in calendar year 2023) of the total labor hours of construction, alteration, or repair work on any applicable project are performed by qualified apprentices. In addition, the ratio of apprentice-to-journeyworker must meet the standard set by the Department of Labor or applicable State apprenticeship agency. Exceptions from these requirements are provided for

taxpayers that demonstrate a lack of available qualified apprentices in the geographic area of the construction, alteration, or repair work and make a good faith effort to comply with the requirements of the provision. Labor hours are the total number of hours devoted to construction, alteration, or repair work by employees of the contractor or subcontractor and excludes certain hours worked by managers or owners. A qualified apprentice is an employee of the contractor or subcontractor who is participating in a registered apprenticeship program. Facilities that began construction prior to date of enactment are also eligible for the enhanced credit, without regard to wage and apprenticeship requirements.

Domestic Content

The provision increases the otherwise applicable section 45 credit rate (after the application of all other enhancements) by 10 percent with respect to facilities which certify that the steel, iron, and manufactured products used in such facility were produced in the United States. For purposes of steel and iron, this requirement shall be applied consistent with section 661.5(b) of title 49, Code of Federal Regulations. In the case of manufactured products, the manufactured product shall be considered manufactured in the United States if the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product.

With respect to facilities that do not meet domestic content requirements and have a maximum net output of at least one megawatt of electricity, the election for direct payment shall be limited to 90 percent of otherwise allowable credit value in calendar year 2024, to 85 percent of otherwise allowable credit value in calendar year 2025, and to zero percent of credit value in calendar year 2026 and later. Taxpayers making a direct payment election under this rule forfeit 100 percent of their otherwise allowable tax credits, notwithstanding the reduction in the direct payment. This rule may be waived if the Secretary, after consultation with Secretary of Commerce and the United States Trade Representative, determines that, (1) the application of the domestic content requirements would be inconsistent with the public interest, (2) such materials and products are not produced in the United States in sufficient and reasonable available quantities and of a satisfactory quality, or (3) inclusion of domestic material will increase the construction cost of the qualified facility by more than 25 percent.

These domestic content rules shall be applied in a manner consistent with the United States' obligations under international agreements.

Effective Date

The provision is effective for facilities placed in service after December 31, 2021.

2. Extension and modification of energy credit (sec. 136102 of the bill and sec. 48 of the Code)

Explanation of Provision

Energy Projects with a Maximum Output of Less Than One Megawatt

For property energy projects with a maximum output of less than one megawatt of electricity, the provision extends the enhanced credit rates and expiring portions of the section 48 energy investment tax credit for ten years, through December 31, 2033. This extension does not apply to the election to claim an investment credit in lieu of the renewable power production credit, which is extended under a different provision.

The phaseout rules under present law are modified such that qualified property used in these smaller projects gets the full credit through calendar year 2031. Property entitled to a 30 percent credit has its credit rate reduced to 26 percent for property the construction of which begins in 2032. Such property has its credit rate further reduced to 22 percent for property the construction of which begins in 2033. Qualified property must be placed in service before January 1, 2036.

Energy Projects with a Maximum Output of at Least One Megawatt

For energy projects with a maximum output of at least one megawatt of electricity, the provision extends at a base rate the enhanced credit rates and expiring portions of the section 48 energy investment tax credit for ten years, through December 31, 2033. This extension does not apply to the election to claim an investment credit in lieu of the renewable power production credit, which is extended under a different provision. The ten percent permanent investment tax credits available for qualified solar and geothermal property are also subject to this base credit rate once the enhancements have expired.

The base rate for property used in these larger projects is equal to 20 percent of the otherwise applicable rate. Thus, for example, the 30-percent investment tax credit is extended at a 6 percent rate for property used in these larger projects. The 26 percent and 22 percent phasedown rates describe above with respect to property used in smaller projects for calendar years 2032 and 2033, respectively, also apply to property used in larger projects, but the base rate is 20 percent of those amounts.

Energy Storage Technology

The provision adds energy storage technology property to the energy investment tax credit. Energy storage technology property is allowed a 30 percent credit, subject to the credit rate phasedown described above. The credit expires for property the construction of which begins after December 31, 2033, and is subject to the same phasedown rules described above for calendar years 2032 and 2033.

Qualified property used in energy projects with a maximum output of at least one megawatt of electricity are subject to the base rate described above.

Energy storage technology means equipment (other than equipment primarily used in the transportation of good or individuals and not for the production of electricity) which uses batteries, compressed air, pumped hydropower, hydrogen storage, thermal energy storage, regenerative fuel cells, flywheels, capacitors, superconducting magnets, or other technologies identified by the Secretary, after consultation with the Secretary of Energy, to store energy for conversion to electricity (except for hydrogen storage property) and has a capacity of not less than 5 kilowatt hours.

If otherwise eligible property that has a capacity of less than 5 kilowatt hours is modified to increase its capacity to at least 5 kilowatt hours, such property shall be treated as qualified property, except that its credit-eligible basis shall not include the basis of such property prior to its modification. Similarly, qualified property with a capacity of at least 5 kilowatt hours that increases its capacity shall also be eligible for a credit, with its credit-eligible basis reduced by the basis of such property prior to its modification.

Biogas Property

The provision adds qualified biogas property to the energy investment tax credit. Such property is allowed a 30 percent credit, subject to the phasedown described above. The credit expires for property the construction of which begins after December 31, 2033, and is subject to the same phasedown rules described above for calendar years 2032 and 2033.

All property used in a biogas facility is subject to the base rate described above (regardless of the size of the facility).

Qualified biogas property is property comprising a system that converts biomass into a gas which consists of not less than 52 percent methane, or is concentrated into a gas which consists of not less than 52 percent methane, and which captures such gas for productive use. Such property incudes any property that is part of such system which cleans or conditions such gas.

Qualified biogas property cannot be used in a facility eligible for the renewable electricity production tax credit.

Microgrid Controllers

The provision adds microgrid controllers to the energy investment tax credit. Such property is allowed a 30 percent credit, subject to the phasedown described above. The credit expires for property the construction of which begins after December 31, 2033, and is subject to the same phasedown rules described above for calendar years 2032 and 2033.

Qualified property used in energy projects with a maximum output of at least one megawatt of electricity are subject to the base rate described above.

Microgrid controllers are property that is part of a qualified microgrid and designed and used to monitor and control the energy resources and loads on such microgrid to maintain acceptable frequency, voltage, or economic dispatch. A qualified microgrid is an electrical system that (1) includes equipment that is capable of generating not less than 4 kilowatts and not greater than 20 megawatts of electricity, (2) is capable of operating in connection with the electrical grid and as a single controllable entity with respect to such grid, and independently (and disconnected) from such grid, and (3) is not part of a bulk-power system (as defined in section 215 of the Federal Power Act.

Linear Generator Assemblies

The provision adds linear generator assemblies to the definition of fuel cells eligible for the energy investment tax credit. Linear generator assemblies must have a nameplate

capacity of at least 1 kilowatt of electricity using an electromechanical process that does not contain any rotating parts.

Qualified property used in energy projects with a maximum output of at least one megawatt of electricity are subject to the base rate described above.

Electrochromic Glass

The provision adds electrochromic glass to the energy investment tax credit. Such property is allowed a 30 percent credit, subject to the phasedown described above. The credit expires for property the construction of which begins after December 31, 2033, and is subject to the same phasedown rules described above for calendar years 2032 and 2033. Electrochromic glass is property that uses electricity to change its light transmittance properties in order to heat or cool a structure.

Qualified property used in energy projects with a maximum output of at least one megawatt of electricity are subject to the base rate described above.

Enhanced Credit Rate Where Certain Wage and Workforce Requirements are Met

Prevailing Wages

For property subject to the base credit rate, an enhanced credit rate equal to 80 percent of the otherwise applicable rate is added to the base credit rate during the extension period if the taxpayer ensures that any laborers and mechanics employed by contractors and subcontractors in the construction, alteration, or repair of such facility prior to it being placed in service are paid wages at a rate not less than the prevailing wage rates for construction, alteration, or repair of a similar character in the locality as most recently determined by the Secretary of Labor, in accordance with subchapter IV of chapter 31, of title 40, United States Code.

With respect to any facility, a taxpayer is not entitled to the enhanced credit rate unless the prevailing wage requirements are met during construction, before such facility is placed in service. However, a taxpayer may bring the facility into compliance, and have the facility qualify, by paying any affected workers the difference between the actual compensation paid to such workers and the wages required to be paid to workers to meet prevailing wage requirements, plus any applicable interest. In addition, such taxpayer must also pay a penalty to the IRS equal to $5,000 per affected worker.

Once a qualifying facility has been placed in service, if it does not meet prevailing wage requirements associated with any alterations or repairs during the five year period beginning after it has been placed in service, the enhanced credits shall be recaptured under rules similar to the rules governing the disposal of investment credit property under section 50(a)(1). A taxpayer may bring the facility into compliance by paying any affected workers the difference between the actual compensation paid to such workers and the wages required to be paid to those workers to meet prevailing wage requirements, plus any applicable interest. In addition, such taxpayer must also pay a penalty to the IRS equal to $5,000 per affected worker.

Apprenticeship Requirements

To be eligible for the enhanced credit, a taxpayer must also ensure that certain qualified apprenticeship requirements are satisfied by ensuring that not less than 15 percent (five percent for projects the construction of which begins before calendar year 2023 and 10 percent for projects beginning in calendar year 2023) of the total labor hours of construction, alteration, or repair work on any applicable project are performed by qualified apprentices. In addition, the ratio of apprentice-to-journeyworker must meet the standard set by the Department of Labor or applicable State apprenticeship agency. Exceptions from these requirements are provided for taxpayers that demonstrate a lack of available qualified apprentices in the geographic area of the construction, alteration, or repair work and make a good faith effort to comply with the requirements of the provision. Labor hours are the total number of hours devoted to construction, alteration, or repair work by employees of the contractor or subcontractor and excludes certain hours worked by managers or owners. A qualified apprentice is an employee of the contractor or subcontractor who is participating in a registered apprenticeship program. Energy projects that began construction prior to date of enactment are also eligible for the enhanced credit, without regard to wage and apprenticeship requirements.

Domestic Content

The provision increases the otherwise applicable section 48 credit rate (after the application of all other enhancements and reductions) by two percentage points (10 percentage points where the wage and workforce standards have been met) with respect to energy projects which certify that the steel, iron, and manufactured products used in such facility were produced in the United States. For purposes of steel and iron, this requirement shall be applied consistent with section 661.5(b) of title 49, Code of Federal Regulations. In the case of manufactured products, the manufactured product shall be considered manufactured in the United States if the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product.

With respect to energy projects that do not meet domestic content requirements, the election for direct payment shall be limited to 90 percent of otherwise allowable credit value in calendar year 2024, to 85 percent of otherwise allowable credit value in calendar year 2025, and to zero percent of credit value in calendar year 2026 and later.

These domestic content rules shall be applied in a manner consistent with the United States' obligations under international agreements.

Effective Date

The provision is generally effective for property placed in service after December 31, 2021. The addition of energy storage property, biogas property, microgrid controllers, and the extension of waste energy recovery property are effective for periods after December 31, 2021, under rules similar to the rules of section 48(m)(as in effect on the day before the date of enactment of the Revenue Reconciliation Act of 1990).

3. Increase in energy credit for solar facilities placed in service in connection with low-income communities (sec. 136103 of the bill and sec. 48 of the Code)

Explanation of Provision

In General

The provision creates a bonus energy investment credit for certain property placed in service at a qualified solar facility in connection with low-income communities. The bonus credit is equal to either 10 or 20 percent of the investment, depending on the project specifications. Only projects that receive an allocation from the Secretary, after consultation with the Secretary of Energy and the EPA Administrator, are eligible for the bonus credit. The Secretary is authorized under the provision to allocate credits to projects representing a maximum of 1.8 gigawatts per year of nameplate capacity for each calendar year starting in calendar year 2022 and ending after calendar year 2031.

Credit Rate

Qualified projects located in a low-income community (as defined in section 45D(e) are eligible for a 10 percent bonus credit. Qualified projects that are part of a qualified low-income residential building project or qualified low-income economic benefit project are eligible for a 20 percent bonus credit. If a project is both located in a low-income community and is part of a qualified low-income residential building project or qualified low-income economic benefit project, the bonus credit amount is capped at 20 percent.

Definitions

Qualified Solar Facility

A qualified solar facility is a solar power generation facility with a nameplate capacity of 5 megawatts or less that is either (1) located in a low-income community (as defined in section 45D(e) or (2) part of a qualified low-income residential building project or qualified low-income economic benefit project. A qualified solar facility includes energy storage property and qualified interconnection property installed in connection with the production of solar power at the facility.

Qualified Interconnection Property

The term "qualified interconnection property" means, with respect to a qualified facility which is not a microgrid, any tangible property which is part of an addition, modification, or upgrade to a transmission or distribution system which is required at or beyond the point at which the qualified facility interconnects to such transmission or distribution system in order to accommodate such interconnection, which is constructed, reconstructed, or erected by the taxpayer, or for which the cost with respect to the construction, reconstruction, or erection of such property is paid or incurred by such taxpayer, and the original use of which, pursuant to an interconnection agreement, commences with the utility.

Qualified Low-Income Residential Building Project

A facility is treated as part of a qualified low-income residential building project if such facility is installed on a residential rental building which participates in a covered housing program (as defined in section 41411(a) of the Violence Against Women Act of 1994 (34 U.S.C. sec. 12491(a)(3)), a Housing Development Fund Corporation cooperative under Article XI of the New York State Private Housing Finance Law, a housing assistance program administered by the U.S. Department of Agriculture under Title V of the Housing Act of 1949, or such other affordable housing programs as the Secretary may provide, and the financial benefits of the electricity produced by such facility are allocated equitably among the occupants of the dwelling units of such building.

Qualified Low-Income Economic Benefit Project

A facility is part of a qualified low-income economic benefit project if at least 50 percent of the financial benefits of the electricity produced by such facility are provided to households with income of less than 200 percent of the poverty line applicable to a family of the size involved or less than 80 percent of area median gross income (as determined under section 142(d)(2)(B).

Allocation Criteria and Other Rules

In determining to which qualified solar facilities to allocate environmental justice solar capacity limitation under this paragraph, the Secretary must take into consideration which facilities will result in the greatest health and economic benefits, including the ability to withstand extreme weather events, for individuals described in section 45D(e)(2), the greatest employment and wages for such individuals, and the greatest engagement with, outreach to, or ownership by, such individuals, including through partnerships with local governments and community-based organizations.

The Secretary shall, upon making an allocation of environmental justice solar capacity limitation under this paragraph, publicly disclose the identity of the applicant, facility location, and the amount of the environmental justice solar capacity limitation allocated to such applicant and facility.

Facilities receiving an allocation must be placed in service within four years of the date credits are allocated to such facility. Allocated bonus credits may be recaptured if allocated to projects that cease to qualify based upon the above requirements under rules similar to the rules of section 50(a).

Under the provision, this credit is added to the section 48 energy investment tax credit, and is subject to all the other rules applicable to that credit, including the base credit for property used in larger facilities, the enhanced credit for property used in facilities that satisfy certain wage and workforce requirements, and the domestic content rules. The enhanced credit rates under this provision are applied after the application of all other enhancements and reductions.

Effective Date

The provision is effective for periods after December 31, 2021, under rules similar to the rules of section 48(m) of the Internal Revenue Code of 1986 (as in effect on the day before the date of the enactment of the Revenue Reconciliation Act of 1990)

4. Elective payment for energy property and electricity produced from certain renewable resources, etc. (sec. 136104 of the bill and new sec. 6417 of the Code)

Explanation of Provision

In General

The provision permits taxpayers to elect a direct payment in lieu of the section 30C credit for alternative fuel refueling property, the section 45 renewable electricity production credit, the section 45Q carbon oxide sequestration credit, the section 48 energy investment tax credit, and the section 48C qualifying advanced energy project credit. For purposes of this election, tax-exempt entities, including State and local governments and Indian tribal governments, shall not fail to be treated as taxpayers eligible to elect a direct payment[270]. In the case of a partnership or S-corporation, elections and direct payments are made at the entity level (*i.e.*, by and to the partnership or S corporation).

If the election is made, the direct payment is generally treated as a payment against the tax imposed by subtitle A for the taxable year with respect to which the credit was determined, and the amount of the credit is reduced to zero and the taxpayer shall be deemed to have taken such credit. The Secretary shall issue guidance to ensure that the amount of payment or deemed payment made under this section is commensurate with the amount of credit that would be otherwise allowable. Special rules apply to tax-exempt and governmental entities, partnerships, and S corporations.

If the Secretary determines that a payment made to a taxpayer was an excessive payment (*i.e.*, in excess of the amount otherwise allowable as a credit for the taxable year) that did not result from reasonable cause, the taxpayer's income tax for the taxable year for which such determination is made will be increased by the amount of the excessive payment plus 20 percent of such amount.

Special Rules for United States Territories

The provision establishes special rules in the case of United States territories. For non-mirror code jurisdictions, Treasury will reimburse a territorial government for any direct payments if such jurisdiction establishes similar program to the satisfaction of Secretary. For mirror-code jurisdictions, this provision shall not be treated as part of the income tax laws of the United States for purposes of determining the income tax law of such possession unless such possession elects to have it be so treated.

---

[270] A technical correction may be needed to reflect intent.

Effective Date

The provision is generally effective for property placed in service after December 31, 2021.

5. Investment credit for electric transmission property (sec. 136105 of the bill and new sec. 48D of the Code)

Explanation of Provision

In General

The provision creates a new 6 percent investment tax credit for investments in qualifying electric transmission property. For this purpose, qualifying electric transmission property is tangible depreciable property which is a qualifying electric transmission line or related transmission property, the construction, reconstruction, or erection of which is completed by the taxpayer, or which is acquired by the taxpayer if the original use of such property commences with taxpayer. The credit sunsets for property placed in service after December 31, 2031.

Definitions

A qualifying electric transmission line is an electric transmission line capable of transmitting at least 275 kilovolts, with a capacity of not less than 500 megawatts.

Related transmission property, with respect to any electric transmission line, is any property listed as "transmission plant" in the Uniform System of Accounts for the Federal Energy Regulatory Commission under part 101 of Subchapter C of chapter I of title 18, Code of Federal Regulations, which is necessary for the operation of such electric transmission line. No credit is allowable with respect to related transmission property unless the taxpayer is also allowed a credit for the qualifying electric transmission line to which it relates.

Upgrades of an existing electric transmission line are treated as a replacement of such line. In the case of any qualifying electric transmission line which replaces an existing electric transmission line, the 500 megawatt amount is increased by the existing amount of capacity, and the basis attributable to such existing transmission line is not eligible for the credit.

Enhanced Credit Rate Where Certain Wage And Workforce Requirements Are Met

Prevailing Wages

During the extension period, an enhanced credit equal to 24 percentage points is available if the taxpayer ensures that any laborers and mechanics employed by contractors and subcontractors in the construction, alteration, or repair of such facility prior to it being placed in service are paid wages at a rate not less than the prevailing wage rates for construction, alteration, or repair of a similar character in the locality as most recently determined by the Secretary of Labor, in accordance with subchapter IV of chapter 31, of title 40, United States Code.

With respect to any facility, a taxpayer is not entitled to the enhanced credit rate unless the prevailing wage requirements are met during construction, before such facility is placed in service. However, a taxpayer may bring the facility into compliance, and have the facility qualify, by paying any affected workers the difference between the actual compensation paid to such workers and the wages required to be paid to workers to meet prevailing wage requirements, plus any applicable interest. In addition, such taxpayer must also pay a penalty to the IRS equal to $5,000 per affected worker.

Once a qualifying facility has been placed in service, if it does not meet prevailing wage requirements associated with any alterations or repairs during the five year period beginning after it has been placed in service, the enhanced credits shall be recaptured under rules similar to the rules governing the disposal of investment credit property under the rules of section 50(a)(1). A taxpayer may bring the facility into compliance by paying any affected workers the difference between the actual compensation paid to such workers and the wages required to be paid to those workers to meet prevailing wage requirements, plus any applicable interest. In addition, such taxpayer must also pay a penalty to the IRS equal to $5,000 per affected worker.

Apprenticeship Requirements

To be eligible for the enhanced credit, a taxpayer must also ensure that certain qualified apprenticeship requirements are satisfied by ensuring that not less than 15 percent (five percent for projects the construction of which begins before calendar year 2023 and 10 percent for projects beginning in calendar year 2023) of the total labor hours of construction, alteration, or repair work on any applicable project are performed by qualified apprentices. In addition, the ratio of apprentice-to-journeyworker must meet the standard set by the Department of Labor or applicable State apprenticeship agency. Exceptions from these requirements are provided for taxpayers that demonstrate a lack of available qualified apprentices in the geographic area of the construction, alteration, or repair work and make a good faith effort to comply with the requirements of the provision. Labor hours are the total number of hours devoted to construction, alteration, or repair work by employees of the contractor or subcontractor and excludes certain hours worked by managers or owners. A qualified apprentice is an employee of the contractor or subcontractor who is participating in a registered apprenticeship program.

Domestic Content

The provision increases the otherwise applicable credit rate (after the application of all other enhancements and reductions) by two percentage points (10 percentage points where the wage and workforce standards have been met) with respect to facilities which certify that the steel, iron, and manufactured products used in such facility were produced in the United States. For purposes of steel and iron, this requirement shall be applied consistent with section 661.5(b) of title 49, Code of Federal Regulations. In the case of manufactured products, the manufactured product shall be considered manufactured in the United States if the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product.

With respect to facilities that do not meet domestic content requirements, the election for direct payment (described below) shall be limited to 90 percent of otherwise allowable credit

value in calendar year 2024, to 85 percent of otherwise allowable credit value in calendar year 2025, and to zero percent of credit value in calendar year 2026 and later.

These domestic content rules shall be applied in a manner consistent with the United States' obligations under international agreements.

Special Rules

No Credit for Certain Projects Already in Progress

No credit is allowed for with respect to (1) any property if the Federal Energy Regulatory Commission or any regional transmission organization or similar rate-making body has, before January 1, 2022, selected for cost allocation such property for cost recovery, or (2) any property if the construction of such property begins before January 1, 2022, or construction of any portion of the qualifying electric transmission line to which such property relates begins before such date.

Progress Expenditures

The progress expenditures rules apply to this credit.

Election for Direct Payment

In lieu of this credit, taxpayers may elect a direct payment under the rules applicable to direct payments described in the preceding provision.

Effective Date

The provision is effective for property placed in service after December 31, 2021.

6. Zero emissions facility credit (sec. 136106 of the bill and new sec. 48E of the Code)

Explanation of Provision

In General

The provision creates a capped 30-percent investment tax credit for qualified investments in qualified property which is part of a zero emissions facility. A zero emissions facility is a facility which (1) generates electricity, (2) does not generate greenhouse gases, (3) utilizes a technology or process which, in the calendar year preceding the calendar year in which construction of the qualified facility began, achieved a market penetration level of less than three percent for the commercial generation of electricity, and (4) does not otherwise meet the definitions for eligible property or facilities under the renewable electricity production credit, the advanced nuclear power credit, the carbon oxide sequestration, or the energy investment tax credit. Eligible property is tangible, depreciable property, not including a building or its structural components, that is necessary for the generation of electricity.

Credits are allocated by the Secretary through an application process. The Secretary is authorized to allocate up to $250 million in credits for calendar year starting with calendar year 2022 and ending with calendar year 2031. Unallocated credits may be allocated in subsequent

years, increasing the limitation for those years. No unallocated amount may be carried forward past calendar year 2031. To be credit eligible, qualified property must be placed in service within four years from the date of credit allocation. Credits allocable to projects that fail to meet this four-year deadline may be reallocated by the Secretary.

In selecting projects for credit allocations, the Secretary take into consideration facilities that (1) will result in the greatest reduction in greenhouse gas emissions, (2) have the greatest potential for technological innovation and commercial deployment, and (3) will result in the greatest reduction of local environmental effects that are harmful to human health.

The Secretary must publicly disclose the identity of any applicant receiving a credit allocation, the location of the facility, along with the amount of the credit allocation with respect to such applicant and facility.

Taxpayers may elect to receive a direct payment in lieu of this credit under the rules described in the earlier provision providing for an elective payment for energy property and electricity from certain renewable resources.

Wage and Workforce Requirements

Prevailing Wages

For property to be qualified property for purposes of this provision, the taxpayer must ensure that the any laborers and mechanics employed by contractors and subcontractors in the construction of such property are paid wages at a rate not less than the prevailing wage rates for construction of a similar character in the locality as determined by the Secretary of Labor, in accordance with subchapter IV of chapter 31, of title 40, United States Code.

With respect to any property used at a facility, a taxpayer is not entitled to this credit unless the prevailing wage requirements are met during construction, before such facility is placed in service. However, a taxpayer may bring the facility into compliance, and have the property qualify, by paying any affected workers the difference between the actual compensation paid to such workers and the wages required to be paid to workers to meet prevailing wage requirements, plus any applicable interest. In addition, such taxpayer must also pay a penalty to the IRS equal to $5,000 per affected worker.

Once a qualifying facility has been placed in service, if it does not meet prevailing wage requirements associated with any alterations or repairs during the five year period beginning on the date it has been placed in service, the property comprising such facility shall be treated as disposed of under the rules of section 50(a)(1). A taxpayer may bring the facility into compliance by paying any affected workers the difference between the actual compensation paid to such workers and the wages required to be paid to those workers to meet prevailing wage requirements, plus any applicable interest. In addition, such taxpayer must also pay a penalty to the IRS equal to $5,000 per affected worker.

Apprenticeship Requirements

To be qualified property, a taxpayer must also ensure that certain qualified apprenticeship requirements are satisfied by ensuring that not less than 15 percent (five percent

for projects the construction of which begins before calendar year 2023 and 10 percent for projects beginning in calendar year 2023) of the total labor hours of construction, alteration, or repair work on any applicable project are performed by qualified apprentices. In addition, the ratio of apprentice-to-journeyworker must meet the standard set by the Department of Labor or applicable State apprenticeship agency. Exceptions from these requirements are provided for taxpayers that demonstrate a lack of available qualified apprentices in the geographic area of the construction, alteration, or repair work and make a good faith effort to comply with the requirements of the provision. Labor hours are the total number of hours devoted to construction, alteration, or repair work by employees of the contractor or subcontractor and excludes certain hours worked by managers or owners. A qualified apprentice is an employee of the contractor or subcontractor who is participating in a registered apprenticeship program.

Effective Date

The provision is effective for periods after December 31, 2021, under rules similar to the rules of section 48(m) as in effect on the day before the date of enactment of the Revenue Reconciliation Act of 1990.

7. Extension and modification of credit for carbon oxide sequestration (sec. 136107 of the bill and sec. 45Q of the Code)

Explanation of Provision

In General

The provision changes the base credit rate for new section 45Q carbon oxide sequestration facilities to $10 per ton for direct sequestration in secure geological storage and to $7 per ton of carbon that is used for enhanced oil recovery or utilized in a permitted manner. The provision also extends the credit for six years, through December 31, 2031, and makes other modifications.

Minimum Capture Requirements

The provision reduces the minimum amount of carbon oxide a qualified facility must capture annually to 1,000 metric tons of qualified carbon oxide in the case of a direct air capture facility, to 18,750 metric tons of qualified carbon oxide (not less than 75 percent of which would otherwise have been released into the atmosphere) in the case of an electricity generating facility, and 12,500 metric tons in the case of any other facility (not less than 50 percent of which would otherwise have been released into the atmosphere).

Increased Credit Rate for Direct Air Capture Facilities

The provision changes the base credit rate for direct air capture facilities to $36 per metric ton for carbon oxide that is captured and disposed of in secure geological storage without being first used as tertiary injectant. The provision increases the credit for direct air capture facilities to $26 per metric for carbon oxide that is captured and (1) used a tertiary injectant before being disposed of in secure geological storage or (2) utilized by the taxpayer in an approved manner. These amounts are adjusted for inflation.

Enhanced Credit Rate Where Certain Wage and Workforce Requirements are Met

Prevailing Wages

An enhanced credit equal to four times the otherwise applicable base credit is added to that applicable base credit if the taxpayer ensures that any laborers and mechanics employed by contractors and subcontractors in the construction, alteration, or repair of such facility prior to it being placed in service or during the 12-year credit period are paid wages at a rate not less than the prevailing wage rates for construction, alteration, or repair of a similar character in the locality as most recently determined by the Secretary of Labor, in accordance with subchapter IV of chapter 31, of title 40, United States Code.

With respect to any facility, a taxpayer is not entitled to the enhanced credit rate unless the prevailing wage requirements are met during construction, before such facility is placed in service. However, a taxpayer may bring a facility into compliance, and have the facility qualify, by paying any affected workers the difference between the actual compensation paid to such workers and the wages required to be paid to those workers to meet prevailing wage requirements, plus any applicable interest. In addition, such taxpayer must pay a penalty to the IRS equal to $5,000 per affected worker.

Once a qualifying facility has been placed in service, a taxpayer that does not meet the prevailing wage requirements associated with the alteration or repair of such facility during the twelve-year period beginning after it has been placed in service is ineligible for any enhanced carbon oxide sequestration credits with respect to such facility during the taxable year of noncompliance. A taxpayer may bring the facility into compliance by paying any affected workers the difference between the actual compensation paid to such workers and the wages required to be paid to those workers to meet prevailing wage requirements, plus any applicable interest. In addition, such taxpayer must also pay a penalty to the IRS equal to $5,000 per affected worker.

Apprenticeship Requirements

To be eligible for the enhanced credit, a taxpayer must also ensure that certain qualified apprenticeship requirements are satisfied by ensuring that not less than 15 percent (five percent for projects the construction of which begins before calendar year 2023 and 10 percent for projects beginning in calendar year 2023) of the total labor hours of construction on any applicable project are performed by qualified apprentices. In addition, the ratio of apprentice-to-journeyworker must meet the standard set by the Department of Labor or applicable State apprenticeship agency. Exceptions from these requirements are provided for taxpayers that demonstrate a lack of available qualified apprentices in the geographic area of the construction, alteration, or repair work and make a good faith effort to comply with the requirements of the provision. Labor hours are the total number of hours devoted to construction, alteration, or repair work by employees of the contractor or subcontractor and excludes certain hours worked by managers or owners. A qualified apprentice is an employee of the contractor or subcontractor who is participating in a registered apprenticeship program. Carbon capture equipment and a qualified facility are eligible for the enhanced credit amount if construction on such facility began before the date of enactment, without regard to the wage and apprenticeship requirements.

Effective Date

The extension is effective for facilities the construction of which begins after December 31, 2025. The other changes are effective for taxable years beginning after December 31, 2021.

8. Green energy publicly traded partnerships (136108 of the bill and sec. 7704 of the Code)

Explanation of Provision

The provision expands the rules governing publicly traded partnerships in section 7704 to include as qualified income the following items:

- The generation of electric power or thermal energy exclusively using as its energy source wind, biomass, geothermal energy, solar energy, small irrigation power, municipal solid waste, qualified hydropower (as defined in section 45), and marine and hydrokinetic renewable energy.

- Tipping fees paid to open loop biomass or municipal solid waste facilities for accepting or processing open loop biomass or municipal solid waste.

- Income from the operation of energy investment credit property (as defined in section 48(a)(3)) without regard to any date by which the construction of such property must begin.

- The production, storage, or transportation of any fuel which (1) uses as its primary feedstock carbon oxides captured from an anthropogenic source or the atmosphere, (2) does not sue as its primary feedstock carbon oxide which is deliberately released from naturally occurring subsurface springs, and (3) is determined by the Secretary, in consultation with the Secretary of Energy and the EPA Administrator to achieve a reduction of not less than a 60 percent in lifecycle greenhouse gas emissions (as defined in section 211(o)(1)(H) of the Clean Air Act, as in effect on the date of the enactment of this clause) compared to baseline lifecycle greenhouse gas emissions (as defined in section 211(o)(1)(C) of such Act, as so in effect).

- Income from the operation of a facility that qualifies under section 45Q(d)(without regard to any sunset date).

Effective Date

The provision is effective for taxable years beginning after December 31, 2021.

9. Zero-emission nuclear power production credit (sec. 136109 of the bill and sec. 45W of the Code)

Explanation of Provision

In General

The provision creates a new 0.3 cents per kilowatt-hour credit for electricity produced at a qualified nuclear power facility and sold to an unrelated person. The credit is reduced as the sale price of such electricity increases. Under the credit reduction formula, the credit with respect to any qualified nuclear power facility for any taxable year is reduced (but not below zero) by 80 percent of the excess of the gross receipts (excluding certain State and local zero-emissions grants) from any electricity (and related products and services) produced and sold by such facility over the product of 0.5 cents times the amount of electricity sold during the taxable year. Under this formula, the credit is totally phased out if the qualified facility is able to sell its electricity for an average of at least 0.875 cents per kilowatt-hour during the taxable year. The 0.3 cent credit amount and 0.5 cent amounts used in the credit reduction formula are both adjusted for inflation using 2022 as the base year.

A qualified nuclear power facility is a facility owned by the taxpayer that uses nuclear energy to produce electricity, which has not received an allocation under section 45J, and which is placed in service before the date of the enactment of this section.

The credit expires for taxable years beginning after December 31, 2026.

Enhanced Credit Rate Where Certain Wage and Workforce Requirements are Met

Prevailing Wages

An additional enhanced credit equal to 1.2 cents per kilowatt-hour is available if the taxpayer ensures that any laborers and mechanics employed by contractors and subcontractors in the alteration or repair of such facility during the taxable year are paid wages at a rate not less than the prevailing wage rates for alteration or repair work of a similar character in the locality as most recently determined by the Secretary of Labor, in accordance with subchapter IV of chapter 31, of title 40, United States Code.

In addition to the enhanced credit, the phaseout range is increased from 0.5 cents to 2.5 cents if the wage and workforce requirements are met. These enhanced amounts are also adjusted for inflation under the same rules as the base credit.

A taxpayer that fails to meet these standards may bring a facility into compliance, and have the facility qualify for the additional enhanced credit and increased phaseout range, by paying any affected workers the difference between the actual compensation paid to such workers and the wages required to be paid to those workers to meet prevailing wage requirements, plus any applicable interest. In addition, such taxpayer must pay a penalty to the IRS equal to $5,000 per affected worker.

Apprenticeship Requirements

To be eligible for the enhanced credit, a taxpayer must also ensure that certain qualified apprenticeship requirements are satisfied by ensuring that not less than 15 percent (five percent for projects the construction of which begins before calendar year 2023 and 10 percent for projects beginning in calendar year 2023) of the total labor hours of alteration or repair work on any applicable project are performed by qualified apprentices. In addition, the ratio of apprentice-to-journeyworker must meet the standard set by the Department of Labor or applicable State apprenticeship agency. Exceptions from these requirements are provided for taxpayers that demonstrate a lack of available qualified apprentices in the geographic area of the alteration or repair work and make a good faith effort to comply with the requirements of the provision. Labor hours are the total number of hours devoted to construction, alteration, or repair work by employees of the contractor or subcontractor and excludes certain hours worked by managers or owners. A qualified apprentice is an employee of the contractor or subcontractor who is participating in a registered apprenticeship program.

Effective Date

The provision is effective for electricity produced and sold after December 31, 2021, in taxable years beginning after such date.

PART II — RENEWABLE FUELS

Summary of Present Law Clean Transportation Energy-Related Tax Incentives

The Code contains a number of tax incentives for biofuels, alternative fuels, alternative fuel vehicles, and related infrastructure. The following tables provide summaries of these incentives.

Summary of Certain Renewable and Alternative Fuel Incentives		
Fuel Type	**Per Gallon Incentive Amount**	**Expiration**
Agri-biodiesel and biodiesel (secs. 40A, 6426, and 6427)	\$1.00 per gallon, plus \$0.10 per gallon for small agri-biodiesel producers	January 1, 2023
Renewable diesel (secs. 40A, 6426, and 6427)	\$1.00 per gallon	January 1, 2023
Second generation biofuel (cellulosic and algae) (sec. 40(b)(6))	\$1.01 per gallon[1]	January 1, 2022
Alternative fuel and alternative fuel mixtures (secs. 6426 and 6427):[2] • liquefied petroleum gas • P Series Fuels • compressed or liquefied natural gas • liquefied hydrogen • any liquid fuel derived from coal through the Fischer-Tropsch process • compressed or liquefied gas derived from biomass • liquid fuel derived from biomass	\$0.50 per gallon[3]	January 1, 2022

[1] Income tax only credit which is not refundable.

[2] The refundable component of the alternative fuel mixture credit sunset for alternative fuel mixtures sold or used after December 31, 2011 (sec. 6427(e)(6)(D)).

[3] For alternative fuels that are used or sold "neat" (not as part of a mixture with taxable fuel) the incentive can be claimed two ways: (1) as an excise tax credit against fuel tax liability, or (2) as a cash (outlay) payment if the taxpayer has insufficient fuel tax liability. For alternative fuel in a mixture, only excise tax credits are allowed.

0. Extension of incentives for biodiesel, renewable diesel and alternative fuels (sec. 136201 of the bill and secs. 40A, 6426, and 6427(e) of the Code)

Explanation of Provision

Biodiesel and Renewable Diesel

The provision extends the biodiesel and renewable diesel tax incentives (income tax credit, excise tax credit and related payment provision) through December 31, 2031.

Alternative Fuel and Alternative Fuel Mixtures

The provision extends the alternative fuel credit and related payment provision through December 31, 2031. The alternative fuel mixture credit is also extended through December 31, 2031.

Effective Date

The provision applies to fuel sold or used after December 31, 2021.

1. Extension of second generation biofuel incentives (sec. 136202 of the bill and sec. 40(b)(6)(J)(i) of the Code)

Explanation of Provision

The provision extends the income tax credit for second generation biofuels through December 31, 2031.

Effective Date

The provision applies to qualified second generation biofuel production after December 31, 2021.

2. Sustainable aviation fuel credit (sec. 136203 of the bill and new secs. 40B, 6426(k), and 6427(e)(6)(E) of the Code)

Explanation of Provision

The provision creates a new general business credit, the sustainable aviation fuel credit. For this purpose, "sustainable aviation fuel" is a liquid fuel that (1) meets the requirements of either ASTM International Standard D7566 or the Fischer Tropsch provisions of ASTM International Standard D1655, Annex, (2) is not derived from palm fatty acid distillates or petroleum, and (3) has been certified, as provided by the provision, to achieve at least a 50 percent lifecycle greenhouse gas reduction percentage of at least 50 percent in comparison with petroleum-based jet fuel.

Calculation of the Credit

The sustainable aviation fuel credit for the taxable year is, with respect to any sale or use of a qualified mixture which occurs during such taxable year, an amount equal to the product of the number of gallons of sustainable aviation fuel in such mixture multiplied by (1) a base credit amount of $1.25 plus (2) the applicable supplementary credit amount.

The applicable supplementary credit amount is one cent for every percentage point above 50 percent for which the aviation fuel is certified, as described below, to reduce emissions as in comparison with petroleum jet fuel. The maximum applicable supplementary amount is 50 cents.

A "qualified mixture" means a mixture of sustainable aviation fuel and kerosene if (1) such mixture is produced by the taxpayer in the United States, (2) such mixture is used by the taxpayer (or sold by the taxpayer for use) in an aircraft, (3) such sale or use is in the ordinary course of the trade or business of the taxpayer, and (4) the transfer of such mixture to the fuel tank of such aircraft occurs in the United States.

Under rules prescribed by the Secretary, the amount of the income tax credit with respect to any sustainable aviation fuel is to be reduced to account for any benefit provided with respect to such sustainable aviation fuel under the related excise tax and payment provisions (described below). The Secretary is required to prescribe coordination rules for this purpose.

Certification Requirements and Registration

No credit shall be allowed unless the sustainable aviation fuel has been certified to achieve at least a 50 percent lifecycle greenhouse gas reduction percentage of at least 50 percent in comparison with petroleum-based jet fuel. For purposes of certification, the certification (including the methodology and process of such certification) must conform to all requirements (including requirements related to traceability and information transmission) of the most recent Carbon Offsetting and Reduction Scheme for International Aviation that has been adopted by the International Civil Aviation Organization ("ICAO") with the agreement of the United States. Not later than 24 months after the date of enactment of the provision, the Secretary, after consultation with the Administrator of the Environmental Protection Agency ("EPA Administrator"), shall establish procedures pursuant to which taxpayers may obtain a certification from the Secretary that meets the aforementioned certification requirements.

No credit shall be allowed with respect to any sustainable aviation fuel unless the producer of such fuel has entered into an agreement with the Secretary to provide the Secretary such information with respect to such fuel as the Secretary may require for purposes of carrying out the provision.

Excise Tax and Payment Provisions

The sustainable aviation fuel credit may be used to offset fuel excise tax liability or if there is insufficient fuel excise tax liability, the taxpayer may apply for a payment of the excess credit. The registration requirements and definitions for the income tax credit also apply for this purpose.

Inclusion in Gross Income

The sustainable aviation fuel credit is included in gross income under section 87.

Sunset

The sustainable aviation fuel credit does not apply to any sale or use after December 31, 2031.

Renewable diesel credit for aviation eliminated

The provision eliminates the category of renewable diesel relating to aviation fuel meeting Department of Defense specifications for military fuel or an ASTM for aviation turbine fuel. Fuel that qualifies as sustainable aviation fuel cannot qualify as biodiesel or renewable diesel.

Effective Date

The provision applies to fuel sold or used after December 31, 2022.

3. Clean hydrogen (sec. 136204 of the bill and new sec. 45X of the Code)

Explanation of Provision

Credit for production of clean hydrogen

The provision creates a new credit for hydrogen, the "clean hydrogen production credit." For any taxable year, the credit is an amount equal to the product of (1) the applicable amount multiplied by (2) the kilograms of qualified clean hydrogen (a) produced by the taxpayer at a qualified clean hydrogen production facility during the ten-year period beginning on the date the facility was placed in service.

The "applicable amount" is equal to $0.60 (or $3.00 in the case of the enhanced credit described below), rounded to the nearest 0.1 cent.[271] The "applicable percentage" is 20 percent in the case of qualified clean hydrogen which is produced through a process that, as compared to hydrogen produced by steam methane reforming, achieves a percentage reduction in lifecycle greenhouse gas emissions which is at least 40 percent but less than 75 percent. If the percentage reduction is at least 75 percent but less than 85 percent, the applicable percentage is 25 percent. If the percentage reduction is at least 85 percent but less than 95 percent, the applicable percentage is 34 percent. If the percentage reduction is at least 95 percent, the applicable percentage is 100 percent.

[271] The $0.60 amount (or the $3.00 in the case of the enhanced credit) is indexed for inflation beginning after December 31, 2021.

Definitions

The term "lifecycle greenhouse gas emissions" has the same meaning given such term under subparagraph (H) of section 211(o)(1) of the Clean Air Act as in effect on the date of enactment of this provision.

"Qualified clean hydrogen" means hydrogen that is produced through a process that, as compared to hydrogen produced by steam-methane reforming of non-renewable natural gas, achieves a percentage reduction in lifecycle greenhouse gas emissions of at least 40 percent. The hydrogen must be produced in the United States or a possession of the United States in the ordinary course of a trade or business of the taxpayer for sale or use.

A "qualified clean hydrogen production facility" is a facility owned by the taxpayer that produces qualified clean hydrogen. To qualify for the enhanced credit a qualified clean hydrogen production facility must also satisfy certain wage and workforce requirements described below.

The term "steam-methane reforming" means a hydrogen production process in which high-temperature steam is used to produce hydrogen from natural gas, without carbon capture and sequestration.

Special Rules

Rules similar to the rules of section 45(e)(3) apply for purposes of the provision. No credit is allowed with respect to qualified clean hydrogen produced at a facility which includes property for which a credit is allowed under section 45Q.

Guidance

Not later than one year after the date of enactment, the Secretary, in consultation with the Secretary of Energy and EPA Administrator shall publish regulations or other guidance to carry out the purposes of the provision, including prescribing methods for determining the credit based on lifecycle greenhouse gas emissions and requiring verification by one or more unrelated third parties of the production and sale or use of qualified clean hydrogen with respect to which credit is otherwise allowed under the provision.

Termination

No credit is available for facilities the construction of which begins after December 31, 2028.

Enhanced credit rate where certain wage and workforce requirements are met

Prevailing Wages

An enhanced credit equal to the applicable percentage of $3.00 if the taxpayer ensures that any laborers and mechanics employed by contractors and subcontractors in the construction, alteration, or repair of such facility prior to it being placed in service or during the 10-year credit

period are paid wages at a rate not less than the prevailing wage rates for construction, alteration, or repair of a similar character in the locality as most recently determined by the Secretary of Labor, in accordance with subchapter IV of chapter 31, of title 40, United States Code. Facilities for which construction began prior to the date of enactment are exempt from the requirement as it relates to construction. Such facilities must remain compliant with respect to alterations or repairs during the 10-year credit period.

With respect to any facility, a taxpayer is not entitled to the enhanced credit rate unless the prevailing wage requirements are met during construction, before such facility is placed in service. However, a taxpayer may bring a facility into compliance, and have the facility qualify, by paying any affected workers the difference between the actual compensation paid to such workers and the wages required to be paid to those workers to meet prevailing wage requirements, plus any applicable interest. In addition, such taxpayer must pay a penalty to the IRS equal to $5,000 per affected worker.

Once a qualifying facility has been placed in service, a taxpayer that does not meet the prevailing wage requirements associated with the alteration or repair of such facility is ineligible for any enhanced production credits for qualified clean hydrogen produced during the taxable year of noncompliance. A taxpayer may bring the facility into compliance by paying any affected workers the difference between the actual compensation paid to such workers and the wages required to be paid to those workers to meet prevailing wage requirements, plus any applicable interest. In addition, such taxpayer must also pay a penalty to the IRS equal to $5,000 per affected worker.

Apprenticeship Requirements

To be eligible for the enhanced credit, a taxpayer must also ensure that certain qualified apprenticeship requirements are satisfied by ensuring that not less than 15 percent (five percent for projects the construction of which begins before calendar year 2023 and 10 percent for projects beginning in calendar year 2023) of the total labor hours of construction, alteration, or repair work on any applicable project are performed by qualified apprentices. In addition, the ratio of apprentice-to-journeyworker must meet the standard set by the Department of Labor or applicable State apprenticeship agency. Exceptions from these requirements are provided for taxpayers that demonstrate a lack of available qualified apprentices in the geographic area of the construction, alteration, or repair work and make a good faith effort to comply with the requirements of the provision. Labor hours are the total number of hours devoted to construction, alteration, or repair work by employees of the contractor or subcontractor and excludes certain hours worked by managers or owners. A qualified apprentice is an employee of the contractor or subcontractor who is participating in a registered apprenticeship program.

Election for Direct Payment

In lieu of the clean hydrogen production credit, taxpayers may elect a direct payment under the rules applicable to direct payments as described in the provision entitled "Elective payment for energy property and electricity produced from certain renewable resources," which is discussed earlier in this document.

Credit for Electricity Produced from Renewable Resources Allowed if Electricity is Used to Produce Clean Hydrogen

The provision permits a taxpayer to receive both the section 45 credit for electricity produced from renewable resources and the credit for production of clean hydrogen. The electricity will be treated as sold to an unrelated person if such electricity is used at a qualified clean hydrogen production facility to produce clean hydrogen.

Election to Treat Clean Hydrogen Production Facilities as Energy Property

In lieu of the clean hydrogen production credit, the provision permits a taxpayer to elect to treat clean hydrogen facilities (or any portion of such facility) as energy property. The energy percentage with respect to such property ranges from six to 30 percent depending on the type of qualified clean hydrogen that the facility is designed and reasonably expected to produce. The election is irrevocable. The specified clean hydrogen facility must be placed in service after December 31, 2021 and with respect to which no credit has been allowed under the new section 45X (the clean hydrogen production credit) or section 45Q (the credit for carbon oxide sequestration). The Secretary, after consultation with the Secretary of Energy and the Administrator of the Environmental Protection Agency, is required to issue regulations or other guidance necessary to carry out the provision, including guidance on verification that the facility produces hydrogen consistent with the hydrogen such facility was designed and expected to produce and recaptures any excess credit amounts based on the actual verified production.

Termination of Excise Tax Credit for Hydrogen

The provision terminates the alternative fuel excise tax credit as it relates to hydrogen.

Effective Date

The provision as it relates to the clean hydrogen production credit applies to hydrogen produced after December 31, 2021.

The provision as it relates to renewable electricity used to produce clean hydrogen applies to electricity produced after December 31, 2021.

The provision as it relates to the energy property election for clean hydrogen production facilities applies periods after December 31, 2021, under rules similar to the rules of section 48(m) of the Internal Revenue Code of 1986 (as in effect on the day before the date of the enactment of the Revenue Reconciliation Act of 1990).

The termination of the alternative fuel excise tax credit incentives for hydrogen applies to fuel sold or used after December 31, 2021.

PART III — GREEN ENERGY AND EFFICIENCY INCENTIVES FOR INDIVIDUALS

Summary of Certain Present Law Energy Efficiency-Related Tax Incentives

The Code contains a number of tax incentives to encourage energy efficiency. The following tables provide summaries of a number of these incentives.

Summary of Certain Energy Efficiency Tax Incentives				
		Credit Rate or Amount	**Maximum Credit**	**Expiration**[2]
Personal credits:				
Credit for nonbusiness energy property installed at a principal residence (sec. 25C)	Insulation to 2009 international energy conservation code standard	10%	$500 (overall sec. 25C credit maximum)	December 31, 2021
	Energy efficient windows, doors, skylights, roofs	10%	$500 ($200 for windows and skylights)	December 31, 2021
	Advanced main air circulating fans	100%	$50	December 31, 2021
	Qualified natural gas, propane, or oil furnace or hot water boilers	100%	$150	December 31, 2021
	Qualified electric heat pump water heaters or natural gas, propane, or oil water heaters	100%	$300	December 31, 2021
	Qualified central air conditioners	100%	$300	December 31, 2021

Summary of Certain Energy Efficiency Tax Incentives				
		Credit Rate or Amount	**Maximum Credit**	**Expiration**[2]
Credit for residential energy efficient property (sec. 25D)	Personal credit for residential solar water heating or solar electric property, fuel cell, small wind property, geothermal heat pump property, qualified biomass fuel property (wood/pellet stoves)	30%	$500 per ½ kilowatt of capacity for fuel cells	December 31, 2019
		26%		December 31, 2022
		22%		December 31, 2023
Business Credit:				
Manufacturer credit for new energy efficient home (sec. 45L)	Homes 30 percent more efficient than standard or Energy Star manufactured homes	$1,000 per home	None	December 31, 2021
	Homes 50 percent more efficient than the specified standard or is a manufactured home that meets the requirements of the Energy Star Labeled Homes program	$2,000 per home	None	December 31, 2021

Exclusions and Deductions:

Eligible Activity	Description	Expiration
Energy conservation subsidies provided by public utilities (sec. 136)	Exclusion from gross income for energy conservation subsidies provided by public utilities for energy conservation measures designed to reduce electricity or natural gas consumption or to improve energy demand management with respect to a residential dwelling unit.	None
Energy efficient commercial buildings deduction (sec. 179D)	A taxpayer may take in the placed-in-service year an additional deduction of $1.80 per square foot of commercial building property that exceeds certain energy efficiency standards. If a section 179D deduction is allowed, the basis of the property is reduced by the amount of the deduction; the remaining basis is recovered under otherwise applicable rules	None

[2] Expires for property placed in service (acquired in the case of section 45L) after the expiration date.

0. Extension, increase, and modifications of nonbusiness energy property credit (sec. 136301 of the bill and sec. 25C of the Code)

Explanation of Provision

The provision extends the section 25C credit for nonbusiness energy property for ten years, through December 31, 2031. The provision also increases from 10 percent to 30 percent the credit rate for qualified energy efficient improvements. The provision replaces the lifetime credit limitation with an annual limitation of $1,200. The limit for windows is changed to $200 for any taxable year, $600 in the case of the most efficient Energy Star certified windows. The limit for an exterior door is changed to $250 for any taxable year, $500 with respect to all exterior doors.

The provision modifies the standards for energy efficient building envelope components such that a qualifying component must meet (1) in the case of an exterior window, a skylight, or an exterior door, the applicable Energy Star program requirements, and (2) in the case of any other component, the prescriptive criteria for such component established by the International Energy Conservation Code (IECC) standard in effect as of the beginning of the calendar year which is 2 years prior to the calendar year in which such component is placed in service.

The provision eliminates roofs as building envelope components for purposes of the credit but clarifies that air barrier insulation can qualify.

The provision expands the definition of residential energy efficient property expenditures to include expenditures at any dwelling unit located in the United States that is used as a residence by the taxpayer, regardless of whether the taxpayer owns such dwelling unit or whether such dwelling unit is the taxpayer's principal residence.

The provision modifies the definition of "qualified energy property" to mean any of the following which meet or exceed the highest efficiency tier (not including any advanced tier) established by the Consortium for Energy Efficiency which is in effect as of the beginning of the calendar year in which the property is placed in service:

- An electric heat pump water heater;
- An electric heat pump;
- A central air conditioner;
- A natural gas, propane, or oil water heater; or
- A natural gas, propane, or oil furnace or hot water boiler.

The provision also adds a 30 percent credit, up to $150, for the amount paid or incurred by the taxpayer during the taxable for home energy audits. For this purpose, a home energy audit means an inspection and written report with respect to a dwelling unit located in the United States owned or used by the taxpayer as the taxpayer's principal resident that (1) identifies the most significant and cost-effective energy efficiency improvements with respect to

such dwelling unit, including an estimate of the energy and cost savings with respect to each such improvement, and (2) is conducted and prepared by a home energy auditor that meets the certification or other requirements specified by the Secretary (after consultation with the Secretary of Energy).

Finally, the provision adds several compliance related rules, consisting of (1) rules giving Treasury authority to treat certain errors related to section 25C as mathematical or clerical errors, and (2) a product identification number requirement, requiring that various credit-eligible products (not including insulation) be assigned a unique identification number by that product's manufacturer.

Effective Date

The provision is generally effective for property placed in service after December 31, 2021. The portion of the provision related to home energy audits is effect for amounts paid or incurred after December 31, 2021. The product identification number requirement is effective for property placed in service after December 31, 2023.

1. Residential energy efficient property (sec. 136302 of the bill and sec. 25D of the Code)

Explanation of Provision

The provision extends the section 25D residential energy efficient property credit for 10 years, through December 31, 2033. The credit modifies the phaseout rules such that eligible property is entitled to a 30-percent credit for property placed in service after December 31, 2021 and before January 1, 2032, to a 26-percent credit for property placed in service in calendar year 2032, and to a 22-percent credit for property placed in service in calendar year 2033.

The provision also adds qualified battery storage technology expenditures to the list of expenditures eligible for the residential energy efficiency property credit. For this purpose, a qualified battery storage technology expenditure is an expenditure for battery storage technology (1) installed in connection with a dwelling unit located in the United States used as a residence by the taxpayer (2) that has a capacity of not less than 3 kilowatt hours.

Effective Date

The provision is effective for expenditures made after December 31, 2021.

2. Energy efficient commercial buildings deduction (sec. 136303 of the bill and sec. 179D of the Code)

Explanation of Provision

In general

The provision temporarily modifies the section 179D energy efficient commercial buildings deduction. The modifications are in effect for taxable years beginning after December 31, 2021, and before January 1, 2032.

The provision also permanently updates the application of the standard set forth in section 179D(c). Under the modified rule, any change to that standard under the prescribed rules must be published two years before date upon which the property to which that new standard would apply is placed in service.

Modification of Efficiency Standard

The provision reduces the amount by which a building must increase its efficiency relative to a reference building in order to be eligible for the section 179D deduction from 50 percent to 25 percent.

Maximum Amount of Deduction

Under the provision, the maximum energy efficient commercial buildings deduction is changed to an amount equal $0.50 per square foot increased (but not above $1.00) by $0.02 for each percentage point by which the total annual energy and power costs for the building are certified to be reduced by a percentage greater than 25 percent. This maximum amount represents the total 179D deduction that may be claimed for a building with respect to the current taxable year plus the three preceding taxable years. These amounts are adjusted for inflation and replace both the $1.80 per square foot maximum deduction and the partial allowance rule.

Alternative Deduction for Energy Efficient Retrofit Building Property

Under the provision, at the election of the taxpayer, there is allowed as a deduction for the taxable year which includes the date of a building's qualifying final certification with respect to a qualified retrofit plan, an amount equal to the lesser of (1) the maximum amount described above or (2) the aggregate adjusted basis of energy efficient retrofit building property placed in service by the taxpayer pursuant to such qualified retrofit plan.

A qualified retrofit plan is a written plan prepared by a qualified professional which specifies modifications to a building which, in the aggregate, are expected to reduce such building's energy usage intensity by 25 percent or more in comparison to the baseline energy usage intensity of such building. Such plan shall provide for a qualified professional to certify the energy intensity of the building both before and after the retrofit and certify the status of any energy efficient building property installed on the building pursuant to the retrofit plan.

Energy efficient building property is depreciable (or amortizable) property installed on or in any qualified building, which is installed as part of the interior lighting systems, the heating, cooling, ventilation, and hot water systems, or the building envelope, and which is certified under the rules described above.

A qualified building must be located in the United States and have been originally placed in service not less than 5 years before the establishment of the qualified retrofit plan with respect to such building.

The qualifying final certification is, with respect to any qualified retrofit plan, the certification by a qualified professional after the retrofit has been completed certifying that the energy usage intensity of the retrofitted building is not more than 75 percent of the baseline energy usage intensity of such building.

The baseline energy usage intensity means the energy usage intensity certified by a qualified professional prior to the retrofit. The energy intensity comparison may be adjusted to take into account weather under such rules as the Secretary, after consultation with the EPA Administrator, may provide.

A qualified professional is an individual who is a licensed architect or licensed engineer and who meets such other requirements as the Secretary may provide.

Allocation of Deduction by Certain Tax-Exempt Entities

The provision allows certain tax-exempt entities to allocate the deduction to the person primarily responsible for designing the property. These entities comprise the Federal government, any State or political subdivision, any possession of the United States, or any agency or instrumentality of any of the foregoing, any Indian tribal government, and any tax-exempt organization.

Enhanced Deduction Where Certain Wage and Workforce Requirements are Met

Prevailing Wages

During the 10-year period of the provision, an enhanced deduction equal to four times the deduction described above is available in addition to that above-deduction if the taxpayer ensures that any laborers and mechanics employed by contractors and subcontractors in the construction of such facility prior to it being are paid wages at a rate not less than the prevailing wage rates for construction of a similar character in the locality as most recently determined by the Secretary of Labor, in accordance with subchapter IV of chapter 31, of title 40, United States Code.

No enhanced deduction is allowed unless the prevailing wage requirements are satisfied. However, a taxpayer may come into compliance and qualify for the enhanced incentive by paying any affected workers the difference between the actual compensation paid to such workers and the wages required to be paid to those workers to meet prevailing wage requirements, plus any applicable interest. In addition, such taxpayer must also pay a penalty to the IRS equal to $5,000 per affected worker.

Apprenticeship Requirements

To be eligible for the enhanced deduction, a taxpayer must also ensure that certain qualified apprenticeship requirements are satisfied by ensuring that not less than 15 percent (five percent for projects the construction of which begins before calendar year 2023 and 10 percent for projects beginning in calendar year 2023) of the total labor hours of construction work on any applicable project are performed by qualified apprentices. In addition, the ratio of apprentice-to-journeyworker must meet the standard set by the Department of Labor or applicable State

apprenticeship agency. Exceptions from these requirements are provided for taxpayers that demonstrate a lack of available qualified apprentices in the geographic area of the construction, alteration, or repair work and make a good faith effort to comply with the requirements of the provision. Labor hours are the total number of hours devoted to construction work by employees of the contractor or subcontractor and excludes certain hours worked by managers or owners. A qualified apprentice is an employee of the contractor or subcontractor who is participating in a registered apprenticeship program.

Effective Date

The provision is generally effective for taxable years beginning after December 31, 2021. The alternative deduction for energy efficient retrofit property is effective for property placed in service after December 31, 2021, in taxable years ending after such date, if such property is placed in service pursuant to a qualified retrofit plan established after such date.

3. Extension, increase, and modifications of new energy efficient home credit (sec. 136304 of the bill and sec. 45L of the Code)

Explanation of Provision

The provision extends for ten years, through December 31, 2031, the section 45L credit for new energy efficient homes. The provision replaces the existing credit amounts with a $2,500 credit for new homes that meet certain energy efficiency standards and a $5,000 credit for new homes that are certified as zero-energy ready homes. The credit for multifamily dwelling units is reduced to 20 percent of the otherwise applicable amount.

For single-family homes, to be eligible for the $2,500 credit, a dwelling unit must meet the following standards, as applicable: (1) in the case of a dwelling unit acquired before January 1, 2025, the Energy Star Single-Family New Homes National Program Requirements 3.1, and (2) in the case of dwelling unit acquired after December 31, 2024, the Energy Star Single-Family New Homes National Program Requirements 3.2. In addition, such dwelling unit must meet the most recent Energy Star Single-Family Homes Program Requirements applicable to the location of such dwelling unit (as in effect on the latter of January 1, 2022, or the January 1 that is two calendar years prior to the date such dwelling unit is acquired).

A multifamily dwelling unit is eligible for $500 credit if such unit (1) meets the most recent Energy Star Multifamily New Construction National Program Requirements as in effect on the latter of January 1, 2022, or the January 1 that is three calendar years prior to the date such dwelling unit is acquired, and (2) meets the most recent Energy Star Multifamily New Construction Regional Program Requirements applicable to the location of such dwelling unit as in effect on the latter of January 1, 2022, or the January 1 that is three calendar years prior to the date such dwelling unit is acquired.

For the $5,000 credit ($1,000 in the case of multifamily housing), a dwelling unit must be certified as a zero-energy ready home under the zero-energy ready home program of the Department of Energy (or any successor program determined by the Secretary) as in effect as on January 1, 2022.

Enhanced Credit Amount for Multifamily Housing Where Certain Wage Requirements are Met

Prevailing Wages

During the extension period, an additional enhanced credit equal to 80 percent of the otherwise applicable credit amount is available with respect to multifamily housing units if the taxpayer ensures that any laborers and mechanics employed by contractors and subcontractors in the construction of such residence prior to it being placed in service are paid wages at a rate not less than the prevailing wage rates for construction of a similar character in the locality as most recently determined by the Secretary of Labor, in accordance with subchapter IV of chapter 31, of title 40, United States Code.

No enhanced credit is allowed unless the prevailing wage requirements are satisfied. However, a taxpayer may come into compliance and qualify for the enhanced incentive by paying any affected workers the difference between the actual compensation paid to such workers and the wages required to be paid to those workers to meet prevailing wage requirements, plus any applicable interest. In addition, such taxpayer must also pay a penalty to the IRS equal to $5,000 per affected worker.

Effective Date

The provision is effective for dwelling units acquired after December 31, 2021.

4. Modification to income exclusion for conservation subsidies (sec. 136305 of the bill and sec. 136 of the Code)

Explanatiou of Provision

The provision expands the section 136 income exclusion for energy conservation subsidies to exclude from income the following items:

- Amounts provided (directly or indirectly) by a public utility to a customer, or by a State of local government to a resident of such State or locality, for the purchase or installation of any water conservation or efficiency measure;
- Amounts provided (directly or indirectly) by a storm water management provider to a customer, or by a State or local government to a resident of such State or locality, for the purchase or installation of any storm water management measure; or
- Amounts provided (directly or indirectly) by a State or local government to a resident of such State or locality for the purchase or installation of any wastewater management measure, but only if such measure is with respect to the taxpayer's principal residence.

Effective Date

The provision is effective for amounts received after December 31, 2018.

PART IV — GREENING THE FLEET AND ALTERNATIVE VEHICLES

Summary of Present Law Alternative Fuel Vehicle and Related Infrastructure Incentives

The Code contains a number of tax incentives for alternative fuel vehicles and related infrastructure. The following table provides a summary of these incentives.

Summary of Alternative Fuel Vehicle Credits			
Type of Property	**Description of Qualifying Property**	**Credit Amount and Explanation**	**Expiration**
Fuel cell vehicles (sec. 30B)	Vehicles propelled by chemically combining oxygen with hydrogen and creating electricity	• Base credit of $4,000 for vehicles weighing 8,500 pounds or less • Heavier vehicles can get up to a $40,000 credit, depending on weight • An additional $1,000 to $4,000 credit is available to cars and light trucks to the extent fuel economy exceeds 2002 base fuel economy	December 31, 2021
Alternative fuel refueling property (sec. 30C)	Property that dispenses alternative fuels, including ethanol, biodiesel, natural gas, hydrogen, and electricity	30 percent credit up to $30,000 for business property and $1,000 for property installed at a principal residence	December 31, 2021
Plug-in electric-drive motor vehicles (sec. 30D)	Four-wheeled vehicles (excluding low speed vehicles and vehicles weighing 14,000 or more) propelled by a battery with at least 4 kilowatt-hours of electricity that can be charged from an external source	Base credit of $2,500, plus $417 for each kilowatt-hour of additional battery capacity in excess of 4 kilowatt-hours (up to $5,000) for a maximum combined credit of up to $7,500	200,000 vehicles per manufacturer limitation
Plug-in electric-drive motorcycles (sec. 30D)	Two-wheeled vehicles able to achieve speeds of at least 45 miles per hour propelled by a battery with at least 2.5 kilowatt-hours of electricity that can be charged from an external source	Credit is 10 percent of cost, up to $2,500	December 31, 2021

0. Refundable new qualified plug-in electric drive motor vehicle credit for individuals (sec. 136401 of the bill and sec. 30D and new sec. 36C of the Code)

Explanation of Provision

In General

The provision extends and modifies the section 30D credit for new qualified plug-in electric drive motor vehicles (the "EV credit").

Manufacturer Limitation

The provision eliminates the EV credit's limitation on the number of credit eligible EVs each manufacturer can sell.

EV Credit Made Refundable

Beginning January 1, 2022, the provision makes the EV credit a refundable personal income tax credit for vehicles acquired on or after that date.[272] The provision adds a requirement that taxpayers must list the vehicle identification number ("VIN") on their returns for the taxable year to claim the EV credit. The provision also gives the IRS mathematical error authority for taxpayers who omit the VIN.

EV Credit Amount

The base amount of the credit is increased to $4,000 (from $2,500). An additional credit of $3,500 is available for vehicles with a battery capacity of not less than 40 kilowatt hours acquired before January 1, 2027. This additional credit of $3,500 is available for vehicles with a battery capacity of not less than 50 kilowatt hours acquired after December 31, 2026.

The provision also provides another additional credit amount of $4,500 for new qualified plug-in electric drive motor vehicles for which the final assembly is at a facility located in the United States[273] operating under a collective bargaining agreement negotiated by an employee organization.[274] An additional credit amount of $500 for new qualified plug-in electric drive motor vehicles with battery cells manufactured in the U.S. and at least 50-percent of the component parts for final assembly are domestic content (including such battery cells).

Therefore, under the provision a new qualified plug-in electric drive motor vehicle is eligible for a maximum credit of $12,500, for a vehicle that meets the battery capacity, domestic assembly and collective bargaining, and domestic content standards listed above. However, the credit may not exceed 50-percent of the purchase price of the vehicle.

---

[272] Proposed sec. 36C.

[273] A technical correction may be necessary to reflect this intent.

[274] As defined in section 412(c)(4).

Vehicle Price and AGI Limitations

The provision requires that a new qualified plug-in electric drive motor vehicle purchased by the taxpayer have a manufacturer's suggested retail price ("MSRP") not in excess of certain limitations. That is, the credit amount is reduced to $0 if the MSRP for the vehicle exceeds the applicable limitation. This limitation is $74,000 in the case of a pickup truck, $69,000 in the case of a sport utility vehicle, $64,000 in the case of a van, and $55,000 in the case of a sedan. The Secretary is directed to release regulations to characterize vehicles into the appropriate category by applying rules similar to those employed by the EPA and the Department of Energy to determine vehicle class and size.

Additionally, the credit is reduced by $200 for each $1,000 (or fraction thereof) by which the taxpayer's modified AGI exceeds $800,000 in the case of a joint return or surviving spouse, $600,000 in the case of a head of household, or $400,000 in the case of any other taxpayer.[275] For this limitation and phaseout, the taxpayer may elect to apply the modified AGI of the preceding taxable year rather the modified AGI of the current taxable year.

Modification to New Qualified Plug-In Electric Drive Motor Vehicle Definition

The provision modifies the definition of new qualified plug-in electric drive motor vehicle to mean a motor vehicle[276] (a) the original use of which commences with the taxpayer; (b) which is acquired for use by the taxpayer and not for resale; (c) which is made by a qualified manufacturer; (d) which is treated as a motor vehicle for purposes of title II of the Clean Air Act; (e) which has a gross vehicle weight rating of less than 14,000 pounds; (f) which is propelled to a significant extent by an electric motor drawing electricity from a battery of a capacity of not less than seven kilowatt hours in the case of vehicles placed in service in 2022 or 2023 or ten kilowatt hours in the case of vehicles placed in service after 2023 and which is capable of being recharged from an external source of electricity; and (g) which is not of a character subject to an allowance for depreciation.

Qualified Manufacturer

The provision requires that new qualified plug-in electric drive motor vehicles and two- and three-wheeled plug-in electric vehicles be made by qualified manufacturers. A qualified manufacturer is a manufacturer[277] which agrees to ensure that VINs are assigned to certain vehicles and to make periodic written reports to the Secretary providing VINs and other information related to such vehicles as the Secretary may require. These certain vehicles are

[275] For this purpose modified AGI is AGI increased by any amount excluded from gross income under section 911, 931, or 933.

[276] For this purpose, a motor vehicle is a vehicle manufactured primarily for use on public streets, roads, and highways (not including a vehicle operated exclusively on a rail or rails) and which has at least 4 wheels. Sec. 30D(d)(2).

[277] For this purpose, manufacturer has the meaning given such term in regulations prescribed by the Administrator of the Environmental Protection Agency for purposes of the administration of title II of the Clean Air Act (42 U.S.C. 7521 et seq.)

vehicles which (a) are treated as motor vehicles for purposes of title II of the Clean Air Act, (b) have a gross vehicle weight rating of less than 14,000 pounds, (c) are propelled to a significant extent by an electric motor drawing electricity from a battery of a capacity of not less than seven kilowatt hours in 2022 or 2023 or ten kilowatt hours after 2023 (2.5 kilowatt hours in the case of a two- or three-wheeled vehicle) and that is capable of being recharged from an external source of electricity, and (d) are in compliance with applicable air quality and motor vehicle safety standards.[278]

Modifications for Two- and Three-Wheeled Plug-In Electric Vehicles

The provision extends the credit in section 30D for two- and three-wheeled plug-in electric vehicles[279] for vehicles acquired after December 31, 2021. The provision makes the credit a refundable personal income tax credit for vehicles acquired on or after that date. For two- and three-wheeled plug-in electric vehicles, the provision requires that taxpayers must list the VIN on their returns for the taxable year to claim the credit and grants the IRS mathematical error authority for taxpayers who omit the VIN.

Transfer of Credit

The Secretary is directed to issue regulations or guidance to allow a taxpayer who has purchased a vehicle to elect to transfer the credit to an eligible entity[280] The eligible entity is then treated as the taxpayer with respect to the credit for purposes of allowing a credit to the eligible entity in the amount that would have otherwise been allowed to the electing taxpayer. The Secretary is directed to establish a program to provide advance payments of these credit amounts to eligible entities. An election to transfer the credit must be made on or before the date of vehicle purchase.

An eligible entity is a dealer[281] which meets the following requirements: First, the dealer must be registered with the Secretary. Second, prior to the election of transfer, the dealer must disclose information to the buyer on the MSRP price of the vehicle, value of the credit or other incentives available, associated fees related to the purchase, and the amount provided by the dealer as a condition of an election to transfer. Third, the dealer must pay the taxpayer for the amount of the credit allowable. Finally, the dealer must ensure that the availability or use of any other available manufacturer or dealer incentive does not limit the ability of the taxpayer to make an election and that the election will not limit the value or use of any such incentive. The Secretary may revoke the registration of dealers that fail to comply with these requirements.

---

[278] These are equivalent to the standards under section 30D(f)(7).

[279] The credit for three-wheeled plug-in electric vehicles expired for vehicles acquired after December 31, 2013.

[280] A technical correction may be needed to reflect intent.

[281] A dealer is a person licensed by a State, territory of the U.S., or Indian tribe to engage in the sale of vehicles.

The payment made by dealers to buyers in connection with a credit transfer election is not includable in the gross income of the taxpayer and is not deductible to the dealer.

Special Rules[282]

The basis of any property for which an EV credit is taken must be reduced by the amount of such credit[283]. The amount of any deduction or other credit allowable for an EV must be reduced by the amount of EV credit taken. EVs used outside of the United States do not qualify for the credit.[284] The Secretary is directed to issue regulations to require recapture of the credit for property which ceases to be eligible. The taxpayer may elect not to have the EV credit apply to an EV. To qualify for the credit, a vehicle must be in compliance with applicable air quality and motor vehicle safety standards.[285]

Payments to Territories

Mirror Code Territories

The provision directs the Secretary to makes payments to each of Guam, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands in an amount equal to the loss in revenue by reason of the application of the EV credit to the territory's mirror Code for the taxable year. The amount is determined by the Secretary based on information provided by the government of the territory.

Nonmirror Code Territories

The provision directs the Secretary to make payments to each of American Samoa and Puerto Rico in an amount equal to the loss in revenue for operating a similar EV credit, if the territory establishes a similar EV credit approved by the Secretary with a plan to promptly distribute such payments to its residents.

EV Credit Termination

The credit does not apply to vehicles acquired after December 31, 2031.

Effective Date

[282] Proposed sec. 36C(f).

[283] In the case of a taxpayer electing to transfer the credit to a dealer, the electing taxpayer shall reduce credit by the amount of payment received from the dealer. A technical correction may be needed to reflect this intent.

[284] No credit is allowable with respect to property referred to in section 50(b)(1).

[285] These are equivalent to the standards under section 30D(f)(7).

The provision to allow for transfer of the credit is effective for vehicles purchased after December 31, 2022.

The other provisions of the provision are effective for vehicles acquired after December 31, 2021.

1. Credit for previously-owned qualified plug-in electric drive motor vehicles (sec. 136402 of the bill and new sec. 36D of the Code)

Explanation of Provision

In General

The provision creates a new credit for each previously-owned qualified plug-in electric drive motor vehicle placed in service by a qualified buyer (the "previously-owned EV credit").

Credit Amount and Limitations

The credit amount is $1,250 plus $208.50 times the number of kilowatt hours by which the capacity of the battery of the vehicle exceeds four kilowatt hours (determined at time of sale). The credit amount cannot exceed the lesser of $2,500 or 30 percent of the sale price of the vehicle.

Additionally, the credit is reduced by $200 for each $1,000 (or fraction thereof) by which the taxpayer's AGI exceeds $150,000 in the case of a joint return or surviving spouse, $112,500 in the case of a head of household, or $75,000 in the case of any other taxpayer.

Previously-Owned Qualified Plug-In Electric Drive Motor Vehicles

A previously-owned qualified plug-in electric drive motor vehicle is a vehicle (1) with a model year at least two years earlier than the calendar year of acquisition, (2) for which original use commences with a person other than the buyer, (3) acquired in a qualified sale, (4) registered by the taxpayer for operation in a State or territory of the U.S., and (5) that meets certain requirements of new qualified plug-in electric drive motor vehicles. These requirements are that the vehicle (1) is made by a qualified manufacturer, (2) is treated as a motor vehicle for purposes of title II of the Clean Air Act, (3) weighs less than 14,000 pounds, (4) is propelled to a significant extent by an electric motor drawing electricity from a battery of a capacity of not less than four kilowatt hours and which is capable of being recharged from an external source of electricity, and (5) is not of a character subject to an allowance for depreciation.

Qualified Sale

A qualified sale is a sale of motor vehicle by a seller holding such vehicle in inventory[286] for sale or lease, with a sales price not in excess of $25,000, which is the first

[286] Within the meaning of section 471.

transfer since the date of enactment to a person other than the person who originally placed the vehicle in service.

Qualified Buyer

A qualified buyer is an individual who (1) purchases a vehicle for use and not for resale, (2) is not a dependent of another taxpayer, (3) has not been allowed a previously-owned EV credit during the three years preceding the date of the vehicle's purchase, and (4) possesses a certificate issued by the seller. This certificate must certify (1) that the vehicle is a previously-owned qualified plug-in electric drive motor vehicle, (2) the VIN, (3) the battery capacity at time of sale, and (4) other information that the Secretary may require.

Special Rules

For a vehicle to qualify, a taxpayer must list the VIN of each vehicle on the return for the taxable year. The provision also gives the IRS mathematical error authority for taxpayers who omit the VIN. The Secretary may also require the certificate for qualified buyers to be submitted by the issuer.

Rules similar the rules in proposed section 36C(f) apply to the previously-owned EV credit.[287]

Payments to Territories

Mirror Code Territories

The provision directs the Secretary to makes payments to each of Guam, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands in an amount equal to the loss in revenue by reason of the application of the used EV credit to the territory's mirror Code for the taxable year. The amount is determined by the Secretary based on information provided by the government of the territory.

Nonmirror Code Territories

The provision directs the Secretary to make payments to each of American Samoa and Puerto Rico in an amount equal to the loss in revenue for operating a similar used EV credit, if the territory establishes a similar used EV credit approved by the Secretary with a plan to promptly distribute such payments to its residents.

Previously-Owned EV Credit Termination

The credit does not apply to vehicles acquired after December 31, 2031.

Effective Date

[287] A description of these rules is provided above in the section describing the modifications to the electric vehicle credit. These rules are similar to rules in section 30D(f).

The provision is effective for vehicles acquired after December 31, 2021.

2. Qualified commercial electric vehicles (sec. 136403 of the bill and new sec. 45Y of the Code)

Explanation of Provision

In General

The provision creates a new credit for each qualified commercial electric vehicle ("qualified commercial EV") placed in service by the taxpayer. The credit amount is 30 percent of the basis of a qualified vehicle.

Qualified Commercial Vehicles

To be a qualified commercial EV, the vehicle must be depreciable and (1) have original use commence with the taxpayer, (2) be acquired for use or lease by the taxpayer and not for resale, (3) be made by a qualified manufacturer,[288] and (4) be treated as a motor vehicle for purposes of title II of the Clean Air Act or be mobile machinery.[289] In addition, the vehicle must have a battery that has a capacity of at least 30 kilowatt-hours that is capable of being recharged from an external source and is not powered or charged by an internal combustion engine.

Additionally, a qualified commercial EV includes a new qualified fuel cell motor vehicle. To be a new qualified fuel cell motor vehicle for purposes of the qualified commercial EV credit, the vehicle must meet the requirements of a qualified commercial EV above except in place of the battery capacity and power source requirements the vehicle must (1) be propelled by power derived from one or more cells which convert chemical energy directly into electricity by combining oxygen with hydrogen fuel which is stored on board the vehicle and (2) in the case of a passenger automobile or light truck meet or exceed certain emissions levels.[290] [291]

Special Rules

For a vehicle to qualify, a taxpayer must list the VIN of each vehicle on the return for the taxable year. The provision also gives the IRS mathematical error authority for taxpayers who omit the VIN.

[288] Qualified manufacturer has the meaning as in proposed section 36C(e)(3) without regard to the 14,000 pound weight limit. A description of qualified manufacturer is provided above in the section describing the modifications to the electric vehicle credit.

[289] Sec. 4053(8).

[290] See sec. 30B(b)(3)(B).

291 A technical correction may be necessary to reflect this intent.

Rules similar the rules in proposed section 36C(f) apply to the commercial EV credit.[292] In the case of vehicle used by certain tax-exempt entities,[293] if the vehicle is not subject to a lease, the seller of a vehicle can be treated as the taxpayer that places the vehicle in service.

Commercial Alternative Fuel Vehicle Credit Termination

The credit does not apply to vehicles acquired after December 31, 2031.

Effective Date

The provision applies to vehicles acquired after December 31, 2021.

3. Qualified fuel cell motor vehicles (sec. 136404 of the bill and sec. 30B of the Code)

Explanation of Provision

The provision extends the sunset date for the credit for new qualified fuel cell motor vehicles in section 30B for ten years (through December 31, 2031).

The definition of new qualified fuel cell motor vehicle is modified such that the vehicle may not be of a character subject to an allowance for depreciation.

Effective Date

The provision is effective for property placed in service after December 31, 2021.

4. Alternative fuel refueling property credit (sec. 136405 of the bill and sec. 30C of the Code)

Explanation of Provision

In General

The provision extends the sunset date for the alternative fuel refueling property credit[294] for ten years (through December 31, 2031). For depreciable property, the credit is extended at a base rate equal to 20 percent of the rate currently available under present law. Thus, for depreciable property placed in service in calendar years 2022 through 2031, the credit rate is six percent. The credit rate remains unchanged at 30 percent for nondepreciable property. The provision also modifies the credit limitation for certain fuel refueling property.

---

[292] A description of these rules is provided above in the section describing the modifications to the electric vehicle credit. These rules are similar to rules in section 30D(f).

[293] Vehicles the use of which is described in sections 50(b)(3) or (4).

[294] Sec. 30C.

Supplemental Credit

In addition, the provision adds a supplemental four-percent credit (in addition to the base six-percent credit) on costs above the $100,000 limit for qualified property that is depreciable property if such property refuels only electricity or fuel consisting of at least 85 percent hydrogen by volume and is intended for general public use (and accept payments via a credit card reader, including contactless technology, or has no associated fee or payment arrangement) or is intended for use exclusively by fleets of commercial or government vehicles.

Modification of Qualified Alternative Fuel Vehicle Refueling Property Definition

The provision clarifies the definition of qualified alternative fuel vehicle refueling property to include property that can charge the battery of a motor vehicle propelled by electricity and allows discharging electricity from such battery to an electric load external to the motor vehicle.

In addition, the definition is modified to include property designed to charge two- and three-wheeled electric bikes and scooters manufactured for primary use on public streets, roads, or highways. This property must be depreciable, must refuel only electricity or fuel consisting of at least 85 percent hydrogen by volume, and be intended for general public use (and accept payments via a credit card reader, including contactless technology, or has no associated fee or payment arrangement) or be intended for use exclusively by fleets of commercial or government vehicles.

Enhanced Credit Rate Where Certain Wage and Workforce Requirements are Met

Prevailing Wages

During the extension period for depreciable property, an enhanced base credit rate equal to 30 percent and an enhanced supplemental credit rate of 20 percent are available if the taxpayer ensures that any laborers and mechanics employed by contractors and subcontractors in the construction of such property prior to it being placed in service are paid wages at a rate not less than the prevailing wage rates for construction of a similar character in the locality as most recently determined by the Secretary of Labor, in accordance with subchapter IV of chapter 31, of title 40, United States Code.

No enhanced incentive is allowed unless the prevailing wage requirements are satisfied. However, a taxpayer may come into compliance and qualify for the enhanced incentive by paying any affected workers the difference between the actual compensation paid to such workers and the wages required to be paid to those workers to meet prevailing wage requirements, plus any applicable interest. In addition, such taxpayer must also pay a penalty to the IRS equal to $5,000 per affected worker.

Apprenticeship Requirements

To be eligible for the enhanced credit rates for depreciable property, a taxpayer must also ensure that certain qualified apprenticeship requirements are satisfied by ensuring that not less than 15 percent (five percent for projects the construction of which begins before calendar

year 2023 and 10 percent for projects beginning in calendar year 2023) of the total labor hours of construction on any applicable project are performed by qualified apprentices. In addition, the ratio of apprentice-to-journeyworker must meet the standard set by the Department of Labor or applicable State apprenticeship agency. Exceptions from these requirements are provided for taxpayers that demonstrate a lack of available qualified apprentices in the geographic area of the construction work and make a good faith effort to comply with the requirements of the provision. Labor hours are the total number of hours devoted to construction work by employees of the contractor or subcontractor and excludes certain hours worked by managers or owners. A qualified apprentice is an employee of the contractor or subcontractor who is participating in a registered apprenticeship program. A project that commences construction prior to the date of enactment is eligible for the enhanced credit rates, without regard to the wage and apprenticeship requirements,

Alternative Fuel Refueling Property Credit Termination

No credit is allowed for any property placed in service after December 31, 2031.

Effective Date

The provision is effective for property placed in service after December 31, 2021.

5. Reinstatement and expansion of employer-provided fringe benefits for bicycle commuting (sec. 136406 of the bill and sec. 132 of the Code)

Present law

In General

The exclusion for qualified bicycle commuting reimbursement is suspended by Public Law No. 115-97 for taxable years beginning after December 31, 2017, and before January 1, 2026.

Qualified Bicycle Commuting Reimbursements

Qualified transportation fringe benefits include mass transit passes, qualified parking, transportation in a commuter highway vehicle, and any qualified bicycle commuting reimbursement.[295] Qualified bicycle commuting reimbursements of up to $20 per qualifying bicycle commuting month in a calendar year are excludable from an employee's gross income.[296] A qualifying bicycle commuting month is any month during which the employee regularly uses the bicycle for a substantial portion of the travel between the employee's residence and place of employment and during which the employee does not receive any qualified transportation fringe

[295] Sec. 132(f)(1).

[296] Secs. 132(a)(5), 132(f)(1)(D), and 132((f)(5)(F)(ii).

benefit for transportation in a commuter highway vehicle (in connection with travel between the employee's residence and place of employment), a transit pass, or qualified parking.[297]

A qualified bicycle commuting reimbursement for a calendar year is an employer reimbursement during the 15-month period beginning with the first day of the calendar year for reasonable expenses incurred by the employee during such calendar year for the purchase of a bicycle and bicycle improvements, repair, and storage, if the bicycle is regularly used for travel between the employee's residence and place of employment.[298]

Qualified bicycle commuting reimbursements that are excludable from gross income for income tax purposes are also excluded from wages for employment tax purposes.

Deduction Allowed

Qualified bicycle commuting reimbursements are intended to be allowed as a deductible expense to the employer during years in which the exclusion for qualified bicycle commuting reimbursement is suspended.[299]

Explanation of Provision

In General

The provision restores and modifies the exclusion for qualified bicycle commuting reimbursements.

Modified Qualified Bicycle Commuting Benefit

The provision modifies the definition of qualified transportation fringe benefits to include any qualified bicycle commuting benefit (in place of any qualified bicycle commuting reimbursement).[300]

The provision defines a qualified bicycle commuting benefit for a calendar year as (1) any employer reimbursement during the 15-month period beginning with the first day of the calendar year for reasonable expenses incurred by the employee during such calendar year for the purchase (including associated finance charges), lease, rental (including a bikeshare), improvement, repair, or storage of qualified commuting property, or (2) the direct or indirect provision by the employer to the employee during the calendar year of the use (including a

[297] Sec. 132(f)(5)(F)(iii).

[298] Sec. 132(f)(5)(F)(i).

[299] A technical correction may be necessary to reflect that the suspension relates to the exclusion (under subsection (a)(5) of section 132) rather than the definition of a qualified bicycle commuting reimbursement as a qualified transportation fringe, so that such taxable benefits are excepted from the deduction disallowance of section 274(a). See IRS Publication 15-B, *Employer's Tax Guide to Fringe Benefits* (revised Feb 5, 2021), p. 22.

[300] Sec. 132(f)(1).

bikeshare), improvement, repair, or storage of qualified commuting property. To constitute a qualified bicycle commuting benefit the employee must use the qualified commuting property for travel between the employee's residence, place of employment, or a mass transit facility that connects an employee to their residence or place of employment. Such benefit may be provided in the form of an account available to the employee for expenses, rather than limited to reimbursements after expenses are made.

Qualified commuting property is a bicycle (not equipped with any motor), an electric bicycle,[301] a two- or three-wheeled scooter (not equipped with any motor), or a two- or three-wheeled electric scooter weighing not more than 100 pounds that either (1) does not provide assistance at speeds exceeding 20 mile per hour or (2) cannot reach speeds exceeding 20 miles per hour.

A bikeshare is a rental operation at which qualified commuting property is made available to customers to pick up and drop off for point-to-point use withing a defined geographic area.

Modified Limitations on Exclusion

Qualified bicycle commuting reimbursements are excludable from an employee's gross income up to 30 percent of the dollar limitation on qualified transportation fringe benefits per month.[302]

The provision modifies the limitation on constructive receipt such that qualified bicycle commuting benefits are treated the same as other qualified transportation fringe benefits.[303] That is, a bicycle commuting benefit can be funded by an elective salary contribution on the part of an employee.

Effective Date

The provision is effective for taxable years beginning after December 31, 2021.

6. Credit for certain new electric bicycles (sec. 136407 of the bill and new sec. 36E of the Code)

Present Law

Certain bicycle commuting expenses provided to employees are deductible to employers under present law. A description of this provision may be found above in the section

[301] Within the meaning of proposed section 36E regarding the electric bicycle credit.

[302] The monthly limitation for qualified transportation fringe benefits is $270 for taxable years beginning in 2021. See section 3.18 of Rev. Proc. 2020-45. 2020-46 I.R.B 1016 (November 9, 2020).

[303] The provision modifies section 132(f)(4) such that the exception applies to qualified bicycle commuting benefits.

describing the reinstatement and expansion of employer-provided fringe benefits for bicycle commuting.

Explanation of Provision

In General

The provision creates a new refundable credit for each qualified electric bicycle placed in service by a taxpayer (the "electric bicycle credit"). The credit amount is 15 percent of the cost of a qualified electric bicycle.

Limitations on Credit Amount

The cost taken into account for calculating the amount of credit my not exceed $5,000 for any qualified electric bicycle.

The number of bicycles taken into account for calculating the amount of the credit for a taxpayer for a taxable year cannot exceed one (two in the case of joint return) and must be reduced by the aggregate number of bicycles for which a credit was claimed by the taxpayer for the preceding two taxable years.

The credit is reduced by $200 for every $1,000 by which the taxpayer's modified AGI exceeds $150,000, $112,500, or $75,000 in the case of a joint return or surviving spouse, head of household, or any other taxpayer, respectively. For this purpose, modified AGI means AGI increased by any amount excluded from gross income under section 911, 931, or 933.

Qualified Electric Bicycle

A qualified electric bicycle is a bicycle (1) for which the original use commences with the taxpayer, (2) acquired for use by the taxpayer and not for resale, (3) made by a qualified manufacturer and labeled with a qualified vehicle identification number, (4) that costs not more than $8,000, and (5) that satisfies certain equipment requirements. These equipment requirements are (1) fully operable pedals, (2) a saddle or seat for the rider, and (3) an electric motor of less than 750 watts designed to provide assistance in propelling the vehicle and (a) does not provide assistance if the bicycle is moving in excess of 20 miles per hour, or (b) if assistance is provided only while the rider is pedaling, does not provide assistance if the bicycle is moving in excess of 28 miles per hour.

The provision adds a requirement that taxpayers must list the qualified vehicle identification number on their returns for the taxable year to claim the electric bicycle credit. The provision also gives the IRS mathematical error authority for taxpayers who omit the qualified vehicle identification number.

Qualified Manufacturer

The provision requires that qualified electric bicycles be made by qualified manufacturers. A qualified manufacturer is a manufacturer which agrees to (1) ensure that vehicle identification numbers are assigned to each qualified electric bicycle, (2) label each

qualified electric bicycle in a manner as the Secretary may provide, and (3) make periodic written reports to the Secretary providing vehicle identification numbers assigned to qualified electric bicycles and other information the related to such qualified electric bicycles as the Secretary may require. The vehicle identification numbers required for qualified manufacturers must use a methodology that ensures that each number is unique to each bicycle.[304]

Special Rules

The provision requires that the basis of any property for which an electric bicycle credit is taken be reduced by the amount of such credit. The amount of any deduction or other credit allowable for a qualified electric bicycle must be reduced by the amount of electric bicycle credit taken. Electric bicycles must be used in United States in order to qualify for the credit. The Secretary is directed to issue regulations to require the recapture of the credit for property that ceases to be eligible. Finally, a taxpayer may elect not to have the electric bicycle credit apply to any bicycle.

Payments to Territories

Mirror Code Territories

The provision directs the Secretary to makes payments to each of Guam, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands in an amount equal to the loss in revenue by reason of the application of the electric bicycle credit to the territory's mirror Code for the taxable year. The amount is determined by the Secretary based on information provided by the government of the territory.

Nonmirror Code Territories

The provision directs the Secretary to make payments to each of American Samoa and Puerto Rico in an amount equal to the loss in revenue for operating a similar electric bicycle credit, if the territory establishes a similar electric bicycle credit approved by the Secretary with a plan to promptly distribute such payments to its residents.

Electric Bicycle Credit Termination

The credit does not apply to bicycles placed in service after December 31, 2031.

Effective Date

The provision applies to property placed in service after the date of enactment, in taxable years ending after such date.

---

[304] This may be achieved by using numbers or letters unique to each manufacturer or by some other method as the Secretary may provide.

PART V — INVESTMENT IN THE GREEN WORKFORCE

1. Extension of the advanced energy project credit (sec. 136501 of the bill and sec. 48C of the Code)

Present Law

Eligible Activity	Description	Credit Amount	Expiration
Advanced energy project credit (sec. 48C)	• Investment credit for qualified projects that re-equip, expand, or establish a manufacturing facility for the production of specified energy related products • Credits are allocated by the Secretary and are capped at $2.3 billion • All credits have been fully allocated	30 percent	None

Explanation of Provision

In General

Under the provision, the 30-precent credit for investment in qualified property used in a qualified advance energy manufacturing project is provided new allocations and modified as follows.

Qualified Advanced Energy Projects

A qualified advanced energy project is a project that re-equips, expands, or establishes a manufacturing or industrial facility for the production of: (1) property designed to be used to produce energy from the sun, water, geothermal deposits, or other renewable resources; (2) fuel cells, microturbines, or energy storage systems and components; (3) electric grid modernization equipment or components; (4) property designed to capture and use or sequester carbon oxide emissions; (5) property designed to refine or blend renewable fuels or to produce energy conservation technologies (including energy-conserving lighting technologies and smart grid technologies); (6) certain alternative fuel vehicles[305] or components which are designed specifically for use with such vehicles, including electric motors, generators, power control units, and equipment used for charging or refueling; (7) property designed to be used to

[305] These are vehicles described in proposed sections 36C (the refundable credit for new qualified plug-in electric drive motor vehicles), 45Y (the credit for qualified commercial electric vehicles), and 36E (the refundable credit for electric bicycles).

produce qualified clean hydrogen;[306] or (8) other advanced energy property designed to reduce greenhouse gas emissions as may be determined by the Secretary.

A qualifying advanced energy project also includes a facility that recycles batteries or similar energy storage property.[307]

Qualified property must be depreciable (or amortizable) property used in a qualified advanced energy project. Only tangible personal property and other tangible property (not including a building or its structural components) are credit-eligible. The basis of qualified property must be reduced by the amount of credit received.

Additional Allocations

Credits are available only for projects certified by the Secretary of Treasury, in consultation with the Secretary of Energy. The Secretary of Treasury must establish a certification program no later than 180 days after the date of enactment this provision. The provision provides additional base annual allocations of $2.5 billion in credits for calendar years 2022 through 2031. $400 million of each base annual allocation must be allocated to projects in automotive communities.[308] Unallocated credit amounts may be allocated in succeeding calendar years. The amount of credits allocated in a year may not exceed the sum of the base annual allocation and any unallocated credit amounts from prior calendar years. While no base annual allocations are provided for calendar years after 2031, unallocated credit amounts may still be allocated until 2036, five years after the final base annual allocation. No credit is allowed for any qualified investment that was allowed a credit under sections 48, 48A, or 48B.

Selection Criteria

In selecting projects, the Secretary may consider only those projects where there is a reasonable expectation of commercial viability and which will ensure that any laborers and mechanics employed by contractors and subcontractors in the construction, alteration, or repair of such projects are paid wages at a rate not less than the prevailing wage rates for construction, alteration, or repair of a similar character in the locality as most recently determined by the Secretary of Labor, in accordance with subchapter IV of chapter 31, of title 40, United States Code and that qualified apprenticeship requirements are satisfied by ensuring that not less than 15 percent (five percent for projects the construction of which begins before calendar year 2023

[306] As defined in proposed section 45X.

[307] As defined in section 48(c)(1)(A)(i).

[308] An automotive community is a census tract that has experienced major job losses in the automotive manufacturing sector since January 1, 1994, as determined by the Secretary in consultation with the Secretary of Energy and Secretary of labor, or a census tract that is immediately adjacent to one such census tract.

and 10 percent for projects beginning in calendar year 2023) of the total labor hours are performed by qualified apprentices.[309]

In addition, the Secretary must give highest priority to projects that manufacture (other than primarily assembly of components) property, or components thereof, in any of the eight categories listed above which define a qualified advanced energy project, and have the greatest potential for commercial deployment of new applications. The Secretary must also consider other selection criteria, including which projects (1) will provide the greatest net impact in avoiding or reducing anthropogenic emissions of greenhouse gases as determined by the Secretary in consultation with the EPA administrator, (2) will provide the greatest domestic job creation during the credit period, (3) will provide the greatest job creation within the vicinity of the project, particularly with respect to low-income communities[310] and dislocated workers previously employed in manufacturing, coal power plants, or coal mining, (4) will provide the greatest job creation in areas with a population at risk of experiencing higher or more adverse human health or environmental effects where a significant portion of such population is comprised of communities of color, low-income communities, Tribal and Indigenous communities, or individual formerly employed in the fossil fuel industry, (5) have the lowest levelized cost of generated or stored energy, or of measured reduction in energy consumption of greenhouse gas emissions, and (6) have the shortest project time from certification to completion.[311]

Certification

Each project application must be submitted at such time and manner as the Secretary may require. An applicant for certification has two years from the date the Secretary accepts the application to provide the Secretary with evidence that the requirements for certification have been met. Upon certification, the applicant has two years from the date of issuance of the certification to place the project in service.

Disclosure

Upon allocation of a credit, the Secretary is directed to publicly disclose the identity of the applicant, the amount of credit, and the location of the project for which the allocation is provided.

---

[309] These apprenticeship requirements are similar to those that apply for section 30C. A description of these requirements is provided above in the section describing the enhanced alternative refueling property credit.

[310] Within the meaning of section 45D(e).

[311] The provision adds several new criteria as described in addition to factors described in section 48C(d)(3)(B).

Direct Pay

Taxpayers may elect to receive a direct payment in lieu of this credit under the rules described in the earlier provision providing for an elective payment for energy property and electricity from certain renewable resources.

Effective Date

The provision is effective on date of enactment.

2. Labor costs of installing mechanical insulation property (sec. 136502 of the bill and new sec. 45Z of the Code)

Present Law

Present law does not contain any specific tax incentives for the installation of mechanical insulation.

Explanation of Provision

The provision creates a new 10-percent general business credit for mechanical insulation labor costs paid or incurred by the taxpayer during a taxable year. Mechanical insulation labor costs are the labor costs of installing mechanical insulation property with respect to a mechanical system located in the United States. Mechanical insulation property is depreciable property consisting of insulation materials, as well as facings and accessory products installed in connection to such insulation materials, placed in service in connection with a mechanical system that meets the requirements of title 10, section 434.403 of the Code of Regulations, which results in a reduction in energy loss from the mechanical system that is greater than the expected reduction from the installation of insulation materials meeting the minimum requirements of Reference Standard 90.1 (as defined in section 179D(c)(2)). The credit expires for costs paid or incurred after December 31, 2031.

Effective Date

The provision is effective for amounts paid or incurred after December 31, 2021, in taxable years ending after such date.

PART VI — ENVIRONMENTAL JUSTICE

1. Qualified environmental justice program Credit (sec. 136601 of the bill and new sec. 36F of the Code)

Present Law

Present law does not provide a tax incentive specifically for costs incurred as part of an environmental justice program.

Explanation of Provision

The provision creates a new refundable tax credit for eligible educational institutions that incur costs during the taxable year as part of a qualified environmental justice program that receives a credit dollar allocation from the Secretary.[312] The provision establishes an application process by which eligible institutions apply to the Secretary for an allocation of credit for an applicable percentage of costs incurred with respect to their qualified environmental justice programs. The applicable percentage is 30 percent with respect to a program involving material participation of faculty and students of an institution described in section 371(a) of the Higher Education Act of 1965, and 20 percent in all other cases. The Secretary is required to publish the identity of each eligible educational institution receiving an allocation and the amount of the allocation.

The Secretary is authorized to allocate $1 billion per year for the period 2022 through 2031 to the selected eligible educational institutions. Applications are submitted in such form and at such time as prescribed by the Secretary. After consultation with the Secretaries of Energy, Education, and Health and Human Services, the Secretary is to select programs for an allocation based on the following criteria:

- The extent of participation of faculty and students of an institution described in section 371(a) of the Higher Education Act of 1965.
- The extent of the expected effect on the health or economic outcomes of individuals residing in areas within the United States that are low-income areas or areas that experience, or are at risk of experiencing, multiple exposures to qualified environmental stressors
- The creation or significant expansion of qualified environmental justice programs.

The Secretary is required to publish the identity of each eligible educational institution receiving an allocation and the amount of the allocation.

Applicants selected to receive an allocation are required to make their submitted applications publicly available and are required to report annually to the Secretary the amounts

[312] The term 'eligible educational institution' means an institution of higher education (as such term is defined in section 101 or 102(c) of the Higher Education Act of 1965) that is eligible to participate in a program under title IV of such Act.

paid or incurred, and the expected impact of the project. Failure to comply with these requirements reduces the eligible educational institution's allocation to zero.

The eligible educational institution has five years after receiving an allocation to incur costs eligible for the credit. The amount of credit for any taxable year is limited to the credit dollar amount allocated to such program less any credits previously claimed for such program.

Effective Date

The provision is effective on the date of enactment.

PART VII — SUPERFUND

1. Reinstatement of Superfund (sec. 136701 of the bill and section 4611 of the Code)

Prior Law

The Superfund program addresses cleanup activity of hazardous substances at contaminated sites. Before January 1, 1996, an excise tax on domestic crude oil and imported petroleum products (the "Hazardous Substance Superfund financing rate") was imposed at the rate of 9.7 cents per barrel.[313] The Hazardous Substance Superfund financing rate ceased to apply after December 31, 1995.

A Superfund chemicals tax was imposed on taxable chemicals sold by a manufacturer, producer or importer at rates that varied between $0.22 to $4.87 per ton. In addition, imported substances made with these taxable chemicals also were subject to tax. The taxes on taxable chemicals and imported substances also expired after December 31, 1995, when the Hazardous Substance Superfund financing rate ceased to apply.[314]

Explanation of Provision

The Hazardous Substance Superfund financing rate is reinstated at 16.4 cents per barrel. The tax is annually indexed for inflation beginning with calendar year 2023. The taxes on taxable chemicals and imported substances will apply, at twice the rates enacted in prior law, during any period when the Hazardous Substance Superfund financing rate applies.[315] [316]

Effective Date

The provision is effective on January 1, 2022.

PART VIII — APPROPRIATIONS

1. Appropriations (Sec. 136801 of the bill)

Explanation of Provision

This provision appropriates $3,831,000,000 to remain available through 2031 for the IRS to carry out this subtitle.

---

[313] Sec. 4611(c)(2)(A).

[314] Sec. 4661(c) and sec. 4671(e).

[315] Section 9507(d)(1) authorizes to be appropriated to the Superfund, as repayable advances, such sums as may be necessary to carry out the purposes of the Superfund. The authority for repayable advances expired December 31, 1995, with all advances required to be repaid on or before such date. The provision allows further advances to be made and that such advances must be repaid on or before December 31, 2031.

[316] A technical change is needed to reflect the intent of this provision

Effective Date

The provision is effective on date of enactment.

SUBTITLE H — SOCIAL SAFETY NET

PART I — CHILD TAX CREDIT

1. Child tax credit (secs. 137101-137104 of the bill, secs. 24 and 7527A of the Code, and new secs. 24A, 24B, and 7527B of the Code)

Present Law

In General

Taxpayers are allowed a child tax credit for each qualifying child. Due to recent temporary expansions of the child tax credit, different sets of rules apply for taxable years beginning in ("tax years") (i) 2021, (ii) 2022 through 2025, and (iii) after 2025.[317] For tax year 2021, the amount of the child tax credit is $3,000, or $3,600 for children who have not attained the age of 6 as of the close of the calendar year.[318] For tax years 2022 through 2025, the amount of the child tax credit is $2,000.[319] After tax year 2025, the amount of the credit is $1,000.

In tax year 2021, the aggregate amount of otherwise allowable child tax credit is reduced under two separate phaseouts. The initial phaseout applies to taxpayers with modified adjusted gross income ("AGI") over an applicable threshold amount of $150,000 for married taxpayers filing jointly and for surviving spouses, $112,500 for head of household taxpayers, and $75,000 for all other taxpayers.[320] The secondary phaseout applies at higher applicable threshold amounts of $400,000 for taxpayers filing jointly and $200,000 for all other taxpayers.[321] For both phaseouts, the amount of child tax credit is reduced by $50 for each $1,000 (or fraction thereof) of modified AGI over the applicable threshold amount. However, the initial phaseout is limited so that it only applies to the temporary increased child tax credit amount for 2021 ($1,600 per child under age six and $1,000 per child age six and older); it does not reduce the child tax credit amount below $2,000. For purposes of the modified AGI limitations, modified AGI means AGI increased by any amount excluded from gross income under section 911 (foreign earned income exclusion), 931 (exclusion of income for a bona fide resident of American Samoa), or 933 (exclusion of income for a bona fide resident of Puerto Rico).[322]

---

[317] For taxable years beginning in 2021, rules enacted in the American Rescue Plan Act (ARPA), Pub. L. No. 117-2, apply. For taxable years 2018 through 2025, temporary rules enacted in Pub. L. No. 115-97 apply, except to the extent they were superseded by temporary rules enacted in ARPA for 2021. After 2025, all temporary child tax credit provisions expire.

[318] Sec. 24(i)(3).

[319] Sec. 24(a), (h)(2).

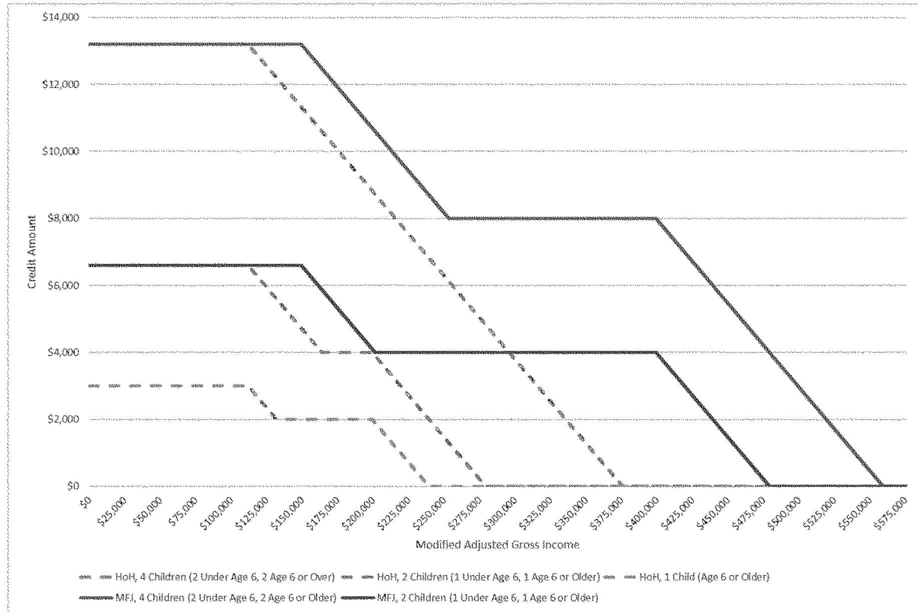
[320] Sec. 24(i)(4).

[321] Sec. 24(b), (h)(3).

[322] Sec. 24(b)(1).

Figure 1 illustrates the 2021 child tax credit by modified AGI for selected combinations of filing status and number of qualifying children.

Figure 1.– Child Tax Credit for 2021
by Modified AGI for Selected Taxpayers*



* Joint Committee staff calculations.

For tax years 2022 through 2025, the initial phaseout is not in effect, so the applicable threshold amounts at which the credit begins to phase out are $400,000 for taxpayers filing jointly and $200,000 for all other taxpayers. For tax years after 2025, the applicable threshold amounts at which the credit begins to phase out are $75,000 for individuals who are not married, $110,000 for married individuals filing joint returns, and $55,000 for married individuals filing separate returns.[323]

Through 2025, the name and Social Security number ("SSN") of the qualifying child must appear on the return, and the SSN must be issued before the due date for filing the return.[324] The SSN also must be issued to a citizen or national of the United States or pursuant to a provision of the Social Security Act relating to the lawful admission for employment in the

[323] Sec. 24(b)(2).

[324] Sec. 24(h)(7).

United States.[325] For tax years after 2025, the child tax credit may be claimed if any valid taxpayer identification number ("TIN") of the qualifying child, rather than only the SSN of the child, appears on the return.[326] In all years, the TIN of the taxpayer must be issued on or before the due date for filing the return.[327]

Dependents

Under section 152, a taxpayer's dependents include both the taxpayer's qualifying children and the taxpayer's qualifying relatives.[328] A dependent must be a citizen, national,[329] or resident of the United States or of a country contiguous to the United States (*i.e.*, Canada or Mexico).[330]

Generally, a qualifying child of a taxpayer is any child who (1) meets the age test,[331] and (2) is the taxpayer's son, daughter, stepson, stepdaughter, adopted child, foster child, brother, sister, stepbrother, stepsister, or a descendant of any such individual.[332] The child also (3) must share the same principal place of abode as the taxpayer for more than one-half of the taxable year,[333] (4) may not have provided over one-half of his or her own support for the taxable year,[334] and (5) may not file a joint return with a spouse.[335] The age test for purposes of determining a qualifying child dependent under section 152 (which differs from the child tax credit age test, as described below) requires that the qualifying child must be either (1) under the age of 19 at the end of the calendar year, (2) under the age of 24 at the end of the calendar year

---

[325] See sec. 205(c)(2)(B)(i)(I) (or that portion of subclause (III) that relates to subclause (I)) of the Social Security Act.

[326] Sec. 24(e)(1).

[327] Sec. 24(e)(2).

[328] Sec. 152.

[329] Non-citizen U.S. nationals include (i) individuals born in American Samoa or (ii) certain individuals born in the Commonwealth of the Northern Mariana Islands who have chosen to be U.S. nationals instead of U.S. citizens. See 8 U.S.C. sec. 1408; *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015); 48 U.S.C. sec. 1801 note, Article III.

[330] Sec. 152(b)(3). There are special rules for certain adopted children.

[331] Sec. 152(c)(1)(C), (c)(3).

[332] Sec. 152(c)(1)(A), (c)(2), (f)(1).

[333] Sec. 152(c)(1)(B).

[334] Sec. 152(c)(1)(D).

[335] Sec. 152(c)(1)(E); see also sec. 152(b)(2).

and a full-time student,[336] or (3) permanently and totally disabled at any time during the calendar year, regardless of age.[337]

A qualifying relative of a taxpayer is any individual who (1) bears the appropriate relationship to the taxpayer,[338] (2) has gross income for the taxable year that does not exceed the personal exemption amount,[339] (3) receives over one-half of his or her support from the taxpayer,[340] and (4) is not a qualifying child of the taxpayer.[341] A qualifying relative who files a joint return with a spouse does not qualify as a dependent.[342]

For purposes of the definition of qualifying relative, an individual bears the appropriate relationship to the taxpayer if the individual is the taxpayer's lineal descendent or ancestor, brother, sister, aunt, uncle, niece, or nephew.[343] Some relations by marriage also qualify, including stepmothers, stepfathers, stepbrothers, stepsisters, sons-in-law, daughters-in-law, fathers-in-law, mothers-in-law, brothers-in-law, and sisters-in-law. In addition, an individual bears the appropriate relationship if the individual has the same principal place of abode as the taxpayer and is a member of the taxpayer's household.[344]

Qualifying Child for Purposes of the Child Tax Credit

---

[336] Sec. 152(c)(3), (f)(2). To qualify as a full-time student, the individual must be, during five calendar months during a calendar year: (1) a full-time student at a school that has a regular teaching staff, course of study, and regular student body at the school, or (2) a student taking a full-time, on-farm training course given by a school described in (1), or a state, county, or local government.

[337] An individual is permanently and totally disabled if he or she cannot engage in any substantial gainful activity because of a physical or mental condition and a doctor determines the condition has lasted or can be expected to last continuously for at least a year or can lead to death. Secs. 22(e)(3) and 152(c)(3)(B).

[338] Sec. 152(d)(1)(A), (d)(2).

[339] Sec. 152(d)(1)(B). For tax years 2018 through 2025, the reduction of the personal exemption amount to zero under section 151(d)(5) will not be taken into account in determining whether an individual is a qualifying relative under section 152(d)(1)(B). The exemption amount referenced in section 152(d)(1)(B) will be treated as $4,150 (adjnsted for inflation for taxable years beginning after 2018). See Prop. Treas. Reg. sec. 1.152-3(c)(3), 85 Fed. Reg. 35233; Notice 2018-70, 2018-38 I.R.B. 441. The personal exemption amount for this purpose is $4,300 for tax year 2021. Rev. Proc. 2020-45, 2020-46 I.R.B. 1016.

[340] Sec. 152(d)(1)(C).

[341] Sec. 152(d)(1)(D).

[342] Sec. 152(b)(2).

[343] Sec. 152(d)(2).

[344] Sec. 152(d)(2)(H).

Generally, for purposes of the child tax credit, a qualifying child is a qualifying child under section 152 who is under the age of 17.[345] For 2021 only, the age limit was increased to a qualifying child who is under the age of 18.[346] Only a child who is a U.S. citizen, national, or resident may be a qualifying child; citizens of contiguous countries are ineligible under the child tax credit definition of qualifying child.

Refundability

Prior to tax year 2021, the child tax credit was partially refundable under two separate formulas as described below. The credit is allowable against both the regular tax and the alternative minimum tax.[347]

For tax year 2021, the child tax credit is made fully refundable for taxpayers with a principal place of abode in the United States for more than one half of the taxable year.[348] Thus, the child tax credit is generally refundable up to $3,000 (or $3,600) per qualifying child. In the case of a joint return, at least one spouse must satisfy the principal place of abode requirement. Principal place of abode is determined as provided in section 32.[349] The modified AGI limitation on the credit still applies (regardless of refundability).

After tax year 2021, the refundable portion of the child tax credit (the "additional child tax credit") is subject to certain limits.[350] For tax years 2022 through 2025, the credit is treated as refundable in an amount equal to 15 percent of earned income in excess of $2,500 (the "earned income formula").[351] For tax years after 2025, the earned income threshold for the refundable child tax credit is increased to $3,000. Earned income generally has the same definition as for purposes of the EITC and is defined as the sum of wages, salaries, tips, and

---

[345] Sec. 24(c). The age requirement must be met at the close of the taxable year. See 2020 Instructions 1040 (rev. April 2021), p.18.

[346] Sec. 24(i)(2).

[347] Sec. 26(a).

[348] Sec. 24(i)(1). For purposes of the principal place of abode rule, the United States includes the States and the District of Columbia. Sec. 7701(a)(9).

A refundable income tax credit means that if the amount of a taxpayer's refundable income tax credits exceeds the taxpayer's income tax liability (net of other nonrefundable credits), these credits create an overpayment, which may generate a refund or be credited against any other internal revenue tax liability. See secs. 37, 6401, and 6402. A refund or credit is authorized for a taxable year only if an overpayment exists, that is, if the amounts paid or deemed paid exceed the tax liability for that year. See sec. 6402(a).

[349] Thus, a member of the Armed Forces of the United States stationed outside the United States while serving on extended active duty is treated as having a principal place of abode in the United States. Sec. 32(c)(4).

[350] Sec. 24(d).

[351] Sec. 24(d)(1)(B)(i), (h)(6).

other taxable employee compensation plus net self-employment earnings.[352] For purposes of the additional child tax credit, only items taken into account in computing taxable income are treated as earned income.[353] However, combat pay that is excluded from gross income under section 112 is also taken into account.

In addition, after 2021, a taxpayer with three or more qualifying children may determine the additional child tax credit using the "alternative formula," if this results in a larger additional child tax credit than determined under the earned income formula. Under the alternative formula, the additional child tax credit equals the amount by which the taxpayer's Social Security taxes exceed the taxpayer's EITC.[354] After 2021, there is no principal place of abode requirement for the additional child tax credit.

For tax years 2022 through 2025, the maximum amount of the additional child tax credit is $1,400 per qualifying child.[355] This amount is indexed for inflation, although the amount may not exceed the $2,000 total amount of the child tax credit. For tax years after 2025, there is no separately stated maximum amount of the additional child tax credit; however, the refundable credit may not exceed the total amount of the credit of $1,000 for tax years after 2025.

Credit for Other Dependents

For tax years prior to 2025, a taxpayer is allowed a $500 nonrefundable credit for each dependent of the taxpayer as defined in section 152, other than a qualifying child as defined for purposes of the child tax credit.[356] For tax years after 2025, there is no tax credit for other dependents.

Withholding

Chapter 24 of the Code provides rules for employers to deduct and withhold amounts from employee wages for the payment of income tax. Under rules determined by the Secretary, an employee may be entitled to a withholding allowance that reduces the amount of income tax

[352] Sec. 32(c)(2).

[353] Sec. 24(d)(1)(B)(i). For example, some ministers' parsonage allowances are considered self-employment income (see section 1402(a)(8)) and thus are considered earned income for purposes of computing the EITC, but they are excluded from gross income for income tax purposes and thus are not considered earned income for purposes of the additional child tax credit.

[354] Sec. 24(d)(1)(B)(ii).

[355] Sec. 24(h)(5).

[356] Sec. 24(h)(4). A child who is a qualifying child for purposes of the dependent rules under section 152, but not a qualifying child for purposes of the child tax credit (*e.g.*, a child who is age 18, or a full-time student under age 24) is eligible to be a qualifying dependent for purposes of the $500 nonrefundable credit for other dependents.

withholding. A taxpayer's withholding allowances take into account the number of children for whom it is reasonably expected that the taxpayer is entitled to a child tax credit.[357]

Temporary Advance Payments of the Child Tax Credit

In General

Effective for tax year 2021, pursuant to section 7527A, the Secretary is directed to establish a program to make periodic advance payments of the child tax credit to eligible taxpayers.[358] In aggregate, the advance payments are to equal the annual advance amount for the calendar year and, in general, are to be made in equal amounts. Monthly advance payments are only to be made for months between July 1, 2021, and December 31, 2021.[359]

The Secretary must make advance payments by electronic funds transfer as if such payments were non-tax Federal payments.[360]

Annual Advance Amount

A taxpayer's annual advance amount for a calendar year is 50 percent of the taxpayer's child tax credit for the taxable year beginning in such calendar year, but calculated based on a reference taxable year ("reference year").[361] For purposes of this calculation, (1) the taxpayer's principal place of abode is determined based on the reference year;[362] (2) the taxpayer's modified AGI for the reference year is used to determine any phaseout of credit; and (3) the taxpayer is treated as having only the number of qualifying children the taxpayer had in the reference year.[363] For purposes of this calculation, the age of any qualifying children and their status as qualifying children is determined by taking into account the passage of time. Thus, for example, a qualifying child who was 17 in the reference year would not be a qualifying child for purposes of the calculation. In addition, a qualifying child is not taken into account for the annual advance amount if the child is deceased as of the beginning of the calendar year for which the credit is determined.[364] Thus, for 2021, a child that is known to the Secretary as being

[357] Sec. 3402(f)(1)(C).

[358] Sec. 7527A(a).

[359] Sec. 7527A(f).

[360] Sec. 7527A(e)(1). Electronic payment requirements for non-tax Federal payments are described in 31 U.S.C. sec. 3332.

[361] Sec. 7527A(b).

[362] If the information on the taxpayer's tax return for the reference year is insufficient to determine the taxpayer's principal place of abode, the Secretary may make that determination based on other information sources. Sec. 7527A(b)(4).

[363] Sec. 7527A(b)(1).

[364] Sec. 7527A(b)(5).

deceased as of January 1, 2021, is not taken into account for the advance amount for taxable year 2021.

The reference year is the taxpayer's tax year beginning in the preceding calendar year or, if the taxpayer did not file a tax return for that year, the taxpayer's taxable year beginning in the second preceding calendar year.[365] The Secretary may modify the advance annual amount for a calendar year to take into account a tax return filed by the taxpayer, including by treating the tax year of the return as the new reference year.[366] The Secretary may also modify the advance annual amount to take into account any other information provided to the Secretary by the taxpayer that allows the Secretary to more closely determine the taxpayer's child tax credit for the tax year.[367] Finally, if the Secretary does modify the advance annual amount, the Secretary may increase or decrease subsequent advance payments in the calendar year in order to account for excessive or deficient prior advance payments based on the pre-modified advance annual amount.[368]

The Secretary is directed to create an online portal to allow taxpayers to provide information regarding (1) a change in the number of the taxpayer's qualifying children, including by reason of the birth of a qualifying child; (2) a change in the taxpayer's marital status; (3) a significant change in the taxpayer's income; and (4) any other factors that the Secretary may provide.[369] A taxpayer may also use the online portal to elect out of advance payments.[370]

Withholding and Administrative Provisions

The Secretary must take the receipt of advance payments of the child tax credit into account in determining the rules regarding withholding allowances.

The Secretary must provide notice to the taxpayer of the aggregate amount of advance payments made to the taxpayer during the calendar year and other information as the Secretary determines appropriate by no later than January 31 of the calendar year following the year in which any such payments were made.[371]

[365] Sec. 7527A(b)(2).

[366] Sec. 7527A(b)(3)(A).

[367] *Ibid.*

[368] Sec. 7527A(b)(3)(B).

[369] Sec. 7527A(c)(2).

[370] Sec. 7527A(c)(1).

[371] Sec. 7527A(d).

Any advance payment is not subject to reduction or offset by other assessed Federal taxes that would otherwise be subject to levy or collection, by other taxes, or by non-tax debts owed to the Federal government or State governments.[372]

Reconciliation

The amount of the child tax credit allowed for any tax year is reduced by the aggregate advance payments made during the tax year.[373] A failure to so reduce the credit is treated as a mathematical or clerical error.

If the taxpayer receives advance payments in excess of the taxpayer's allowable child tax credit during a tax year, the taxpayer's tax liability for the taxable year is increased by the excess amount.[374] This increase in tax liability is not considered to be part of a taxpayer's regular tax liability.[375] However, for taxpayers that have modified AGI below certain thresholds, the excess amount may be reduced by a safe harbor amount, limiting the increase in tax liability and allowing the taxpayer to retain a portion of the excess amount. The safe harbor amount is $2,000 for each child incorrectly taken into account in determining the advance payment amount, subject to a phaseout based on taxpayer modified AGI.[376]

Regulatory Authority

The Secretary is directed to issue regulations or other guidance the Secretary determines is necessary or appropriate to carry out the advance payment program, the temporary changes to the child tax credit, and the reconciliation of the child tax credit and advance payments.[377] This includes regulations or other guidance that provide for the application of these rules in cases where the filing status of the taxpayer changes between taxable years.

---

[372] Sec. 7527A(e)(3).

[373] Sec. 24(j)(1).

[374] Sec. 24(j)(2).

[375] See sec. 26(b). Because of this, the taxpayer may not use nonrefundable tax credits to offset the increase. Sec. 26(a).

[376] The safe harbor amount is $2,000 multiplied by the difference in number of qualifying children used to determine the advance amount and number of qualifying children used to determine the credit for the taxable year. The full safe harbor amount is allowed to taxpayers with modified AGI of up to $60,000 for married taxpayers filing jointly and surviving spouses, $50,000 for heads of households, and $40,000 for all other taxpayers. The safe harbor amount is reduced ratably over these same sized intervals for each filing status, respectively. Thus, the safe harbor amount is $0 if modified AGI equals or exceeds $120,000 for married taxpayers filing jointly and surviving spouses, $100,000 for heads of households, and $80,000 for all other taxpayers.

[377] Sec. 7527A(g).

Application of the Child Tax Credit in the Territories of the United States

The three mirror Code territories (Guam, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands) have, under their mirror Codes, a child tax credit identical to that in the U.S. Code. A resident of one of these territories claims the child tax credit on the income tax return filed with the territory's revenue authority. The non-mirror Code territories (Puerto Rico and American Samoa) do not have a mirror child tax credit because they have their own internal revenue laws.

Prior to 2021, residents of the territories with three or more qualifying children could receive the additional child tax credit under the alternative formula in the U.S. Code. The U.S. Treasury historically has made payments to each territory other than Puerto Rico to cover the cost of this credit. Residents of Puerto Rico could claim the additional child tax credit under the alternative formula by filing a Form 1040-SS or Form 1040-PR with the IRS.

Application of the Child Tax Credit in the Territories Beginning in 2021

Beginning in 2021, the Secretary must make payments to each territory that relate to the cost or approximate cost of that territory's child tax credit or make payments of the credit directly to territory residents. These payments reflect the full child tax credit, not just the additional child tax credit under the alternative formula.

The Secretary must make payments to each of Guam, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands in an amount equal to the loss in revenue by reason of the application of the child tax credit to the territory's mirror Code for the taxable year.[378] This amount is determined by the Secretary based on information provided by the government of the territory. Because of their mirror Codes, the temporary changes to the child tax credit apply to these territories for 2021. No child tax credit under the Internal Revenue Code is permitted for any resident of a mirror Code territory with respect to whom a child tax credit is allowed against income taxes of the territory.

For 2021, the child tax credit is made fully refundable for taxpayers who are bona fide residents of Puerto Rico for the taxable year, claimed by filing a tax return with the IRS.[379] Thus, for bona fide residents of Puerto Rico, the child tax credit is generally refundable up to $3,000 (or $3,600) per qualifying child, without regard to the earned income formula or alternative formula, but subject to the modified AGI phaseouts.

For tax years after 2021, bona fide residents of Puerto Rico may claim an additional child tax credit up to the maximum amount[380] from the U.S. Treasury under the alternative

[378] Sec. 24(k)(1).

[379] Sec. 24(i)(1).

[380] This amount is $1,400 for taxable years beginning in 2021, prior to being increased by ARPA.

formula, but determined without regard to the requirement that the taxpayer have three or more children, by filing a return with the IRS.[381]

The Secretary must make payments to American Samoa in an amount estimated by the Secretary as being equal to the aggregate benefits that would have been allowed to residents of American Samoa under the child tax credit if a mirror Code tax system had been in effect in American Samoa in that taxable year.[382] These amounts include, for 2021, amounts resulting from the temporary expansion of the child tax credit. The Secretary is prohibited from making these payments unless American Samoa has a plan approved by the Secretary to promptly distribute the payments to its residents. For years with respect to which American Samoa has an approved plan, no child tax credit under the Internal Revenue Code is permitted for any person who is eligible for a payment under the plan. If American Samoa does not have a plan in place for a taxable year, a bona fide resident of American Samoa may claim a child tax credit by filing a return with the IRS under rules similar to those for Puerto Rico, described above.

Each of the mirror Code territories and American Samoa may elect to provide territory residents with advance payments of the child tax credit, as administered by the territory government.[383] The Secretary shall provide administrative expenses to a territory making such election.[384] The child tax credit advance payment program does not apply to Puerto Rico.[385]

Explanation of Provision

Modifications Applicable Beginning in 2021

For tax year 2021, the provision makes several modifications to the child tax credit and advance payment rules. First, recapture is allowed without taking into account the safe harbor amount for a child if the Secretary determines that the child was taken into account in determining the annual advance amount due to fraud by the taxpayer or intentional disregard of rules and regulations by the taxpayer. For this purpose, intentional disregard of the rules and regulations includes, with respect to any child taken into account in determining the annual advance amount of a taxpayer, such taxpayer entering into a plan or other arrangement with, or expecting, another taxpayer to take the child into account in determining the credit for the tax year.

The provision also provides a rule regarding advance payments with respect to a joint return by treating half of such payment as being made to each individual filing the return.

---

[381] Sec. 24(k)(2).

[382] Sec. 24(k)(3).

[383] Sec. 7527A(e)(4)(B), (C).

[384] Sec. 7527A(e)(4)(C).

[385] Secs. 24(k)(2)(A)(ii) and 7527A(e)(4)(A).

Finally, the provision clarifies that the annual advance amount used to make advance payments may be determined based on other information known to the Secretary.

Each of these modifications also will apply for tax year 2022.

Extension and Modification of Child Tax Credit, Modification of Other Dependent Credit, and Advance Payment for 2022

The provision extends many of the ARPA expansions that otherwise expire after 2021 through tax year 2022. These extensions include (i) full refundability for taxpayers who have a principal place of abode in the United States for more than one-half of the year or who are bona fide residents of Puerto Rico for the tax year, (ii) the increase in the age limit of a qualifying child for purposes of the child tax credit to include children who have not attained age 18, (iii) the increase in child tax credit amount to $3,000, and $3,600 for qualifying children who have not attained the age of 6, (iv) the application of the initial phaseout to the increased child tax credit amount at the following applicable threshold amounts: $150,000 for taxpayers filing jointly or surviving spouses, $112,500 for head of household taxpayers, and $75,000 for all other taxpayers, and (v) certain rules regarding payments to the territories and payments directly to the territory residents with respect to the child tax credit.

The provision changes the modified AGI used for purposes of the income phaseout of the credit to be the modified AGI of the taxpayer for the preceding tax year (2021) if such modified AGI is less than the modified AGI of the current tax year (2022).

Under the provision, for tax year 2022, the child tax credit may be claimed if any valid taxpayer identification number ("TIN") of the qualifying child, rather than only the SSN of the child, appears on the return. The TIN must be issued on or before the due date of the return.

For purposes of reconciling the aggregate advance payments with the child tax credit, the safe harbor amount for tax year 2022 is $3,000 ($3,600 in the case of a qualifying child who has not attained age 6) for each qualifying child taken into account in determining the annual advance amount with respect to the taxpayer for months beginning in the tax year, but not taken into account in determining the credit allowed to such taxpayer for the tax year.

The provision also adjusts the $3,000 and $3,600 child tax credit amounts, the $500 other dependent credit, and the child tax credit initial phaseout thresholds for inflation, from 2021, beginning in 2022. The new safe harbor amount is also adjusted for inflation to match the child tax credit amounts. The inflation adjustment is made using the CPI (as opposed to the chained CPI).

The provision also extends advance payments of the child tax credit under section 7527A through December 31, 2022, and removes the 50 percent limit on the annual advance

amount that was applicable for 2021. Accordingly, advance payments will be made for the full year in 2022, rather than one-half of the year as in 2021.[386]

Establishment of Monthly Child Tax Credit for 2023 through 2025

The provision creates, for tax years 2023 through 2025, a new monthly refundable child tax credit in section 24A in lieu of the existing child tax credit in section 24.[387] The credit allowed for the tax year is the sum of the monthly specified child allowances for the taxpayer for each calendar month during the tax year. The monthly specified child allowance for any month is $250 for each specified child, or $300 for each specified child who will not, as of the close of the tax year which includes such month, have attained age six.

The credit is fully refundable for any month for which the taxpayer (in the case of a joint return, either spouse) has a principal place of abode in the United State or Puerto Rico for more than one-half of the calendar month.[388]

A central feature of the new monthly child tax credit is the requirement of the taxpayer to establish presumptive eligibility. Presumptive eligibility, as described in detail below, allows a child to be treated as the specified child of a taxpayer and therefore allows a taxpayer to claim a monthly child tax credit and receive advance payments for such child. In addition, presumptive eligibility provides protection from recapture. Advance payments generally may not be recaptured unless they are made outside of a period of presumptive eligibility (for example, a period of presumptive eligibility ends if the taxpayer was found to have committed fraud or intentionally disregarded rules or regulations in establishing presumptive eligibility or if a child moved and another taxpayer established presumptive eligibility).

Monthly Specified Child Allowance

The monthly specified child allowance is reduced under two separate phaseouts. The initial phaseout applies to taxpayers with modified AGI over an applicable threshold amount of $150,000 for married taxpayers filing jointly and for surviving spouses, $75,000 for married individuals filing a separate return, and $112,500 for all other taxpayers. The secondary phaseout applies at higher applicable threshold amounts of $400,000 for taxpayers filing jointly and for surviving spouses, $300,000 for heads of households, and $200,000 for all other taxpayers. For both phaseouts, the amount of monthly child tax credit is reduced by 1/12 of five percent of the excess (if any) of modified AGI for the applicable taxable year over the applicable threshold amount. However, the initial phaseout is limited so that it does not reduce the monthly

---

[386] The Secretary remains obligated to take the receipt of advance payments of the child tax credit into account in determining the rules regarding withholding allowances.

[387] During this period the existing child tax credit in section 24 does not apply.

[388] All determinations of principal place of abode under the provision are determined as provided in section 32.

specified child allowance below $166.67.[389] For purposes of the modified AGI limitations, modified AGI means AGI increased by any amount excluded from gross income under section 911 (foreign earned income exclusion), 931 (exclusion of income for a bona fide resident of American Samoa), or 933 (exclusion of income for a bona fide resident of Puerto Rico).

Modified AGI for the applicable taxable year means the tax year for which the taxpayer has the lowest modified AGI among the current tax year and the two preceding tax years.

The provision adjusts the monthly specified child allowance and the initial phaseout thresholds for inflation, from 2021, beginning in tax year 2023 and using the CPI. The provision reflects that the annualized monthly specified child allowance for a specified child is the $3,000 (or $3,600 for qualifying or specified children who have not attained the age of 6) first in effect for 2021, adjusted consistently for inflation in each subsequent year.

Specified Child

Under the provision a specified child with respect to a taxpayer for a calendar month is defined as a child:

1. Who has the same principal place of abode as the taxpayer for more than one-half of the month,
2. Who is younger than the taxpayer and will not, as of the close of the tax year which includes such month, have attained age 18,[390]
3. Who receives care from the taxpayer during the month that is not compensated,
4. Who is not the spouse of the taxpayer during the month,
5. Who is not a taxpayer with respect to whom any child is a specified child for the month, and
6. Who is either a citizen, national, or resident of the United States, or, if the taxpayer is a citizen or national of the United States, who is legally adopted by the taxpayer or is lawfully placed with the taxpayer for legal adoption by the taxpayer

In determining principal place of abode, a temporary absence is treated as a day at the child's principal place of abode and not a day at any other location. An absence is treated as

[389] Thus, the annualized amount for a specified child cannot be reduced below $2,000 under the initial phaseout.

[390] A taxpayer receives no monthly specified child allowances for any months in the calendar year during which a child turns 18 years old, meaning credits may be made for a total of 18 years for a given child (12 months for each calendar year during which the child is age zero to 17).

temporary if the child would have resided at the place of abode but for the absence and it is reasonable to assume that the child will return to reside at the place of abode.

The provision provides that, except as otherwise provided by the Secretary, whether a child receives care from the taxpayer is a facts and circumstances determination based on the following factors: (i) the supervision provided by the taxpayer regarding the daily activities and needs of the child, (ii) the maintenance by the taxpayer of a secure environment at which the child resides, (iii) the provision or arrangement by the taxpayer of, and transportation by the taxpayer to, medical care for the child at regular intervals and as required, (iv) the involvement by the taxpayer in, and financial and other support by the taxpayer for, educational or similar activities of the child, and (v) any other factor that the Secretary determines appropriate. For determining whether care is compensated, compensation from the Federal government, a State or local government, a tribal government, or territorial government is not taken into account.

The provision provides special rules regarding the birth and death of a specified child. In the case of a birth, the child is treated as a specified child of the relevant taxpayer for each month in the calendar year that precedes the first calendar month that the child is a specified child with respect to any taxpayer. That is, a taxpayer properly claiming a newborn may receive a monthly specified child allowance for the entire year of the birth (*e.g.*, a December birth results in 12 monthly allowances for the year of birth).[391] In the case of death, the child is treated as a specified child of the relevant taxpayer for each month in the calendar year that follows the last month the child is alive. The relevant taxpayer is the first (in the case of birth) or last (in the case of death) taxpayer for whom the child is a specified child.

Tie-Breaking Rules

The provision provides for tie-breaking rules similar to tie-breaking rules in section 152, but with certain modifications. Under the provision, if a child would otherwise be a specified child with respect to more than one individual for a month (*e.g.*, a child lives with his or her mother and grandmother in the same residence) and more than one taxpayer claims the credit with respect to that child, then the following rules apply. First, if only one of the individuals claiming the child as a specified child is the child's parent, the child is treated as the specified child of the parent. Second, if the child is not a specified child of any parent, the child is treated as the specified child of the specified relative with the highest AGI for the tax year that includes the month at issue.[392] Third, if the child is not a specified child of any parent or specified relative, the child is treated as the specified child of the taxpayer claiming the child with the highest AGI for the tax year that includes the month at issue. Fourth, if both parents claim the child and the parents do not file a joint return, then the child is deemed a specified child first with respect to the parent with whom the child resides for the longest period of time during the month, and second with respect to the parent with the highest AGI for the tax year that

---

[391] Thus, a specified child, regardless of when the child is born during the year, will have the same number of (i) total months for which the child may be claimed for the credit for children under 6 and (2) total months for which the child may be claimed for the credit.

[392] A specified relative for this purpose is (i) an ancestor of a parent of the specified child, (ii) a brother or sister of a parent of the specified child, or (iii) a brother, sister, stepbrother, or stepsister of the specified child.

includes the month at issue. If a parent of the child elects not to treat the child as a specified child for the month, then such parent is disregarded in applying the tie-breaking rules if the claimant's AGI is higher than the highest AGI of any parent of the child for the tax year that includes the month at issue.[393] A similar rule applies for specified relatives electing not to treat the child as a specified child for the month.

Rules similar to the special rules provided for divorced parents in section 152(e) apply for purposes of the provision. In general, these rules allow divorced parents to share the child tax credit by agreement. In addition, the rules for missing children in section 152(f)(6) apply for purposes of the provision.

Presumptive Eligibility

In determining specified child status, the provision provides that if a period of presumptive eligibility has been established under the advance payment rules in proposed section 7527B for a child with respect to a taxpayer, then the child is treated as the specified child of such taxpayer for any month in the period of presumptive eligibility, and is not treated as the specified child of any taxpayer for whom a period of presumptive eligibility has not been established. If a taxpayer does not elect to receive advance payments, such taxpayer is not precluded from establishing a period of presumptive eligibility for any specified child for purposes of claiming the monthly child tax credit on a tax return.

Identification Requirement

The provision provides that the name and TIN of the specified child must appear on the return, and the TIN must be issued on or before the due date for filing the return. In addition, the TIN of the taxpayer must be issued on or before the due date for filing the return for the tax year.

Disallowance for Prior Fraudulent, Reckless, or Improper Claims

The monthly child tax credit and advance payments of the credit are disallowed for certain periods after a taxpayer has made a fraudulent, reckless, or other improper claim for the credit. If there is a final determination that a taxpayer's claim of the monthly child tax credit or receipt of advance payment is fraudulent, the taxpayer is not allowed the monthly child tax credit or advance payment for any period beginning on the date of the final determination and for the 10 taxable years after the year of the fraudulent claim. If there is a final determination that a taxpayer's claim of the monthly child tax credit or receipt of advance payment is due to reckless or intentional disregard of rules and regulations, the taxpayer is not allowed the monthly child tax credit or advance payment for any period beginning on the date of the final determination and for the two taxable years after the reckless claim. If a taxpayer makes a monthly child tax credit claim that is not determined to be fraudulent or reckless but that is denied under the deficiency

[393] Thus, for example, if a child would otherwise be the specified child of a parent and grandparent for a month, and the grandparent has a higher AGI for the tax year that includes the month, the parent may elect not to treat the child as a specified child, allowing the child to be the specified child of the grandparent. If the parent has a higher AGI for the tax year that includes the month, no such election is allowed.

procedures of subchapter B of chapter 63 of the Code, the taxpayer is not allowed the monthly child tax credit for any subsequent year and the advance payments for any subsequent month unless the taxpayer provides such information that the Secretary may require to demonstrate eligibility for the credit.

Advance Payment of the Monthly Child Tax Credit for 2023 through 2025

For tax years 2023 through 2025, pursuant to proposed section 7527B, the Secretary is directed to establish a program to make monthly advance child payments of the monthly child tax credit.

Monthly Advance Child Payment

The monthly advance child payment with respect to a taxpayer for a calendar month is the amount estimated by the Secretary as the monthly specified child allowance under proposed section 24A (monthly child tax credit) for the taxpayer for the calendar month, but calculated based on a reference month and a reference taxable year. For purposes of this calculation, (1) unless determined by the Secretary, based on any information known to the Secretary, the taxpayer is treated as having only the specified children the taxpayer had for the reference month; (2) unless determined by the Secretary, based on any information known to the Secretary, the ages of such children (and the status of such children as specified children) are determined by taking into account the passage of time since the reference month; (3) the taxpayer's modified AGI for the reference taxable year, rather than the applicable taxable year, is used to determine any phaseout of the credit; and (4) unless determined by the Secretary, based on any information known to the Secretary, no monthly specified child allowance is determined for the taxpayer unless the taxpayer (in the case of a joint return, either spouse) has a principal place of abode in the United States or Puerto Rico for more than one-half of the reference month.

The name and TIN of the specified child must be provided on the tax return for the reference taxable year or via a specified alternative mechanism (if information for purposes of advance payments was provided via a specified alternative mechanism).[394]

A specified child is not taken into account for the monthly advance child payment if the child is deceased as of the beginning of the calendar year that includes the month at issue if the Secretary knows of the child's death as of date on which the Secretary estimates the monthly payment. Thus, for 2023, a child that is known to the Secretary as being deceased as of January 1, 2023, is not taken into account for any monthly advance child payment in 2023.

For purposes of determining monthly advance child payments, the reference month with respect to any taxpayer for any calendar month is the most recent of (i) in the case of a taxpayer who filed a tax return for the last tax year ending before the calendar month, the last month of such tax year, (ii) in the case of a taxpayer who filed a tax return for the tax year preceding the last tax year ending before the calendar month, the last month of such preceding tax year, and (iii) in the case of a taxpayer who provided information through a specified alternative mechanism which is sufficient to estimate the taxpayer's monthly advance child

[394] In addition, the TIN must be issued on or before the due date for filing the return for the tax year.

payment for the month, such month. The reference taxable year is the most recent of (i) the taxpayer's last tax year ending before the calendar month, (ii) the tax year preceding the last tax year ending before the calendar month, or (iii) in the case of a taxpayer who provided information through a specified alternative mechanism which is sufficient to estimate the taxpayer's modified AGI for the tax year that includes such month, such tax year.

No month or year described above shall be taken into account for purposes of determining the reference month or reference taxable year unless all relevant information is available to the Secretary and the Secretary has adequate time to make estimates on the basis of the information before the beginning of the calendar month at issue. If the taxpayer has not provided sufficient information under any of the methods described above, the monthly advance child payment is zero, unless the Secretary determines that the Secretary can make estimates on the basis of reasonably reliable information known to the Secretary.

The Secretary is directed to create an on-line portal to allow taxpayers to provide information regarding the monthly advance child payment, including (1) the number of the taxpayer's specified children, including by reason of the birth of a specified child; (2) the taxpayer's marital status; (3) the taxpayer's income; (4) the taxpayer's principal place of abode, and (5) any other factors that the Secretary may provide. A taxpayer may also use the on-line portal to elect in or out of advance payments.

A specified alternative mechanism includes the on-line portal described above, the on-line portal established for purposes of advance payments of the child tax credit under section 7527A, and any other mechanism or method established by the Secretary to allow taxpayers to provide the information described above for the on-line portal. Such mechanism includes the filing of a tax return.

Presumptive Eligibility for Monthly Advance Child Payments

In addition to the above rules, a child shall be treated as a specified child of a taxpayer for purposes of determining the monthly advance child payment for a month only if the month is part of a period of presumptive eligibility for the taxpayer. A taxpayer establishes presumptive eligibility with respect to a specified child for a month at the time and in the manner provided by the Secretary. Except as otherwise provided by the Secretary, to establish the period of presumptive eligibility for a specified child, the taxpayer must express a reasonable expectation and intent that the taxpayer will continue to be eligible with respect to the specified child for at least two months following the month for which presumptive eligibility is established. Presumptive eligibility may be established by providing information on the prior-year tax return, through the on-line portal, or in such other manner as the Secretary may provide.

Except as otherwise provided by the Secretary, a period of presumptive eligibility begins with the month for which presumptive eligibility is established and ends with the earliest of (i) the beginning of that same month if the Secretary determines the taxpayer committed fraud or intentionally disregarded rules or regulations in establishing presumptive eligibility (*i.e.*, no presumptive eligibility), (ii) in the case of notification from the Secretary that the period of presumptive eligibility has been terminated or suspended because of a question regarding the taxpayer's eligibility, the month specified in the notification as when termination or suspension

begins, and (iii) the month following any failure of the taxpayer to make the required annual renewal of presumptive eligibility by the date prescribed by the Secretary. Periods of presumptive eligibility include any period of hardship or grace period as described below.

Under the provision, the Secretary shall issue regulations or other guidance to establish procedures to the maximum extent administratively feasible allowing for automatic presumptive eligibility for the birth of a child. In addition, the Secretary shall issue regulations or other guidance to establish procedures allowing for automatic presumptive eligibility, and termination of such eligibility, for a parent or specified relative of a child based on information provided to the Secretary by one or more government entities.

If a taxpayer's period of presumptive eligibility ends because of a failure to make the required annual renewal of presumptive eligibility, the Secretary shall provide written notice to the taxpayer.

Specified Child of More than one Taxpayer

In the event of competing claims for a monthly advance child payment with respect to a specified child by more than one taxpayer for the same calendar month, the child shall be taken into account only by the taxpayer with the most recent reference month. If more than one taxpayer has the same reference month, or if any taxpayer uses the specified alternative method to receive the monthly advance child payment for a specified child of another taxpayer, the Secretary shall establish procedures under which the Secretary expeditiously adjudicates the competing claims of presumptive eligibility. The procedures shall provide for an expedited process and for appeals.

The Secretary may make a one-time retroactive payment following the adjudication of a competing claim if the Secretary determines that a child is a specified child of a taxpayer and the Secretary did not make payments to the taxpayer with respect to the child during the period of the determination. The retroactive payment shall be limited to the increase in the aggregate amount of monthly advance child payments that the taxpayer would have received during the determination period if the determination had been made immediately.

If the Secretary makes payments during the determination period with respect to a child, the Secretary shall provide notice to each taxpayer that such payments may be subject to recapture. Upon making a determination to resolve competing claims, the Secretary shall determine whether any such payments should be subject to recapture and notify the affected taxpayers.

The provision provides for information sharing with other Federal agencies; State, local, tribal, and territorial governments; and other individuals or entities as appropriate for purposes of adjudicating a competing claim. Such an adjudication shall not be treated as an assessment, examination, or inspection of the taxpayer for purposes of administrative provisions in the Code.[395]

---

[395] See secs. 6201 and 7605(b).

Grace Periods and Hardships

In the event of a failure or delay in establishing presumptive eligibility for a specified child, a taxpayer may elect to receive a retroactive advance payment or monthly child tax credit for a period of up to three months. The grace-period payment or credit is allowed to a taxpayer only once in a 36-month period. No grace-period payment or credit may be made or allowed in the event of fraud or reckless or intentional disregard of rules and regulations.

In the event of a failure or delay in establishing presumptive eligibility for a specified child due to hardship, a taxpayer is allowed a retroactive advance payment or monthly child tax credit for a period of up to six months. A hardship includes domestic violence, serious illness, natural disaster, or any other hardship, as determined by the Secretary.

Reconciliation of Credit and Monthly Advance Child Payments

The amount of the monthly child tax credit allowed for any tax year is reduced by the aggregate advance payments made during the tax year. A failure to so reduce the credit is treated as a mathematical or clerical error.

If a taxpayer is subject to recapture and receives advance payments in excess of the taxpayer's allowable monthly child tax credit during a tax year, the taxpayer's tax liability for the tax year is increased by the excess amount. This increase in tax liability is not considered to be part of a taxpayer's regular tax liability.[396] Taxpayers are subject to recapture if they are described in any of the following:

1. The Secretary determined that the aggregate amount of advance payments with respect to the taxpayer for the tax year was determined on the basis of fraud or reckless or intentional disregard of rules and regulations.

2. The aggregate amount of advance payments with respect to the taxpayer for the tax year was determined on the basis of modified AGI that was less than the taxpayer's modified AGI for appliable taxable year (the lowest modified AGI of the current tax year and the two preceding tax years). The amount subject to recapture is limited to the increase in advance payments due to the use of the lower modified AGI. A similar rule applies if the aggregate amount of advance payments with respect to the taxpayer for the tax year was determined on the basis of a filing status that differs from the taxpayer's filing status for the applicable tax year.

3. An advance payment was made to a taxpayer with respect to a child for a month which was not part of a period of presumptive eligibility for the child. The amount subject to recapture is limited to the amount of advance payments made outside of a period of presumptive eligibility.

---

[396] See sec. 26(b). Because of this, the taxpayer may not use nonrefundable tax credits to offset the increase. Sec. 26(a).

4. The Secretary notifies the taxpayer under procedures established to adjudicate competing claims of presumptive eligibility with respect to the same child that the taxpayer is subject to recapture with respect to certain advance payments. The amount subject to recapture is limited to the aggregate amount of such payments.

5. The taxpayer has a principal place of abode in the United States or Puerto Rico for more than one-half of one or more calendar months during the tax year but does not have such a principal place of abode for all calendar months during the tax year, pursuant to regulations or other guidance issued by the Secretary for purposes of minimizing advance payments made to ineligible individuals.

6. Other recapture circumstances described in regulations or other guidance issued by the Secretary to facilitate administration and enforcement of advance payments and to minimize the amount of advance payments made to ineligible individuals and to prevent abuse.

The provision also provides a rule regarding advance payments with respect to a joint return by treating half of such payment as being made to each individual filing the return.

Administrative Provisions

The Secretary must make advance payments by electronic funds transfer as if such payments were non-tax Federal payments.[397]

Any advance payment is not subject to reduction or offset by other assessed Federal taxes that would otherwise be subject to levy or collection, by other taxes, or by non-tax debts owed to the Federal government or State governments.[398]

The Secretary must provide notice to the taxpayer of the aggregate amount of advance payments made to the taxpayer during the calendar year and other information as the Secretary determines appropriate by no later than January 31 of the calendar year following the year in which any such payments were made. If the Secretary has determined that any payments made to the taxpayer are subject to recapture, the notice shall include the amounts subject to recapture.

The Secretary must take the receipt of advance payments of the monthly child tax credit into account in determining the rules regarding withholding allowances.

The monthly advance payment program established pursuant to proposed section 7527B terminates for any month beginning after December 31, 2025.

---

[397] Electronic payment requirements for non-tax Federal payments are described in 31 U.S.C. sec. 3332.

[398] See rules in sec. 6402(c) through (f).

Application of the Monthly Child Tax Credit and Advance Payments in the Territories for 2023 through2025

Under the provision, the Secretary must make payments to each territory, with the exception of Puerto Rico, that relate to the cost or approximate cost of that territory's monthly child tax credit or make payments of the credit directly to territory residents for tax years 2023 through 2025. Puerto Rican residents claim the credit directly from the IRS.

The Secretary must make payments to each of Guam, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands in an amount equal to the loss in revenue by reason of the application of the monthly child tax credit to the territory's mirror Code for the taxable year. This amount is determined by the Secretary based on information provided by the government of the territory. No monthly child tax credit under the Internal Revenue Code is permitted for any resident of a mirror Code territory with respect to whom a monthly child tax credit is allowed against income taxes of the territory.

For 2023 through 2025, the monthly child tax credit is made fully refundable for taxpayers with a principal place of abode in Puerto Rico for more than one-half of any calendar month during the tax year, claimed by filing a tax return with the IRS. In addition, such taxpayers may receive advance payment of the monthly child tax credit from the IRS.

The Secretary must make payments to American Samoa in an amount estimated by the Secretary as being equal to the aggregate benefits that would have been allowed to residents of American Samoa under the monthly child tax credit if a mirror Code tax system had been in effect in American Samoa in 2023 through 2025. The Secretary is prohibited from making these payments unless American Samoa has a plan approved by the Secretary to promptly distribute the payments to its residents. For years with respect to which American Samoa has an approved plan, no monthly child tax credit under the Internal Revenue Code is permitted for any person who is eligible for a payment under the plan. If American Samoa does not have a plan in place for a tax year, a taxpayer with a principal place of abode in American Samoa for more than one-half of any calendar month during the tax year may claim a monthly child tax credit by filing a return with the IRS under rules similar to those for Puerto Rico, described above.

Each of the mirror Code territories and American Samoa may elect to provide territory residents with advance payments of the monthly child tax credit for tax years 2023 through 2025, as administered by the territory government. The Secretary shall provide administrative expenses to a territory making such election.

Regulatory Authority

The Secretary is directed to issue regulations or other guidance the Secretary determines is necessary or appropriate to carry out the purposes of the monthly child tax credit. This includes regulations or other guidance (1) for determining whether an individual receives care from a taxpayer for purposes of the specified child definition, and (2) to coordinate or modify the application of the monthly child tax credit with the child tax credit under section 24 and the advance payment provisions in section 7527A and proposed section 7527B, (i) in the case of any taxpayer whose tax year is other than a calendar year, (ii) whose filing status for a tax year is

different from the status used for determining advance payments during such tax year, or (iii) whose principal place of abode for any month is different than the principal place of abode used for determining the monthly advance payment for such month.

Credit for Certain Other Dependents

For tax years 2023 through 2025, the provision modifies the existing credit for other dependents by creating a new credit in proposed section 24B with similar rules to the existing credit. Under the provision, a taxpayer is allowed a $500 nonrefundable credit for each dependent of the taxpayer as defined in section 152, other than a specified child as defined for purposes of the monthly child tax credit. In addition, the dependent must be a citizen, national, or resident of the United States. The $500 credit amount is indexed for inflation, from 2021, beginning in 2023 and using the CPI.[399]

The credit for other dependents is reduced by $50 for each $1,000 (or fraction thereof) of modified AGI over the threshold amount. The threshold amounts are $400,000 for taxpayers filing jointly and for surviving spouses, $300,000 for heads of households, and $200,000 for all other taxpayers. The phaseout is separate from the monthly child tax credit phaseout of proposed section 24A.

The provision provides that the name and TIN of the dependent must appear on the return, and the TIN must be issued on or before the due date for filing the return. In addition, the TIN of the taxpayer must be issued on or before the due date for filing the return.

For tax years after 2025, there is no tax credit for other dependents.

Refundable Child Tax Credit after 2025

For tax years after 2025, the child tax credit under section 24 is made fully refundable for taxpayers (in the case of a joint return, either spouse) who have a principal place of abode in the United States for more than one-half of the tax year. The credit is also fully refundable for taxpayers who are bona fide residents of Puerto Rico and, in the absence of a plan by American Samoa to administer its own child tax credit program, who are bona fide residents of American Samoa. Bona fide residents of Puerto Rico and American Samoa (in the absence of a plan by American Samoa to administer its own program) may claim the credit directly from the IRS.

The provision does not modify the current law requirement that the Secretary continue its cover over to the mirror Code territories and (if it has a plan to administer its own program) American Samoa.

There is no provision for advance payments after 2025.

Effective Date

[399] The policy reflects that the credit amount of $500 is first adjusted for inflation in 2022, and then adjusted consistently for inflation in each subsequent year.

The provision modifying the child tax credit rules for 2021 is effective for taxable years beginning, and payments made, after December 31, 2020.

The provision providing a one-year extension of the ARPA expansions of the child tax credit (*i.e.*, for 2022) is effective for taxable years beginning, and payments made, after December 31, 2021.

The provision providing for establishment of a monthly child tax credit through 2025 is effective for taxable years beginning after December 31, 2022. The provision providing for advance payments of such credit is effective for payments made for calendar months beginning after December 31, 2022.

The provision providing for a refundable child tax credit after 2025 is effective for taxable years beginning after December 31, 2025.

2. Appropriations (Sec. 136105 of the bill)

Explanation of Provision

This provision appropriates $10,000,000,000 to remain available through September 30, 2026, $9,000,000 of which is for the IRS to administer the child tax credit, and $1,000,000 of which is designated for the IRS to increase out reach and enrollment efforts for the child tax credit. c.

Effective Date

The provision is effective on date of enactment of this Act.

PART II — CHILD AND DEPENDENT CARE TAX CREDIT

1. Certain improvements to the child and dependent care credit made permanent (sec. 137201 of the bill and sec. 21 of the Code)

Present Law

Child and Dependent Care Tax Credit

General Structure

Under section 21, a taxpayer with one or more qualifying individuals may claim a credit against income tax liability for employment-related expenses for child and dependent care.[400] For this purpose, employment-related expenses are expenses for household services and expenses for the care of a qualifying individual.[401] These expenses must be incurred to enable the taxpayer to be gainfully employed during any period for which there are one or more qualifying individuals with respect to the taxpayer.

The amount of employment-related expenses that may be taken into account for purposes of the credit is subject to a limitation. The applicable limitation is reduced by any amount excluded from income under an employer-provided dependent care assistance program under section 129.

Generally, a qualifying individual is: (1) a dependent[402] of the taxpayer who is under the age of 13, or (2) a dependent or spouse of the taxpayer if the dependent or spouse is physically or mentally incapable of caring for himself or herself and shares the same principal place of abode with the taxpayer for over one half the year.[403] Married taxpayers must file a joint return in order to claim the credit.

Credit for 2021

For taxable years beginning in 2021, the credit is refundable for a taxpayer who has a principal place of abode in the United States for more than one half of the taxable year.[404] In the case of a joint return, refundability is allowed if at least one spouse satisfies the principal place of

---

[400] Sec. 21.

[401] Sec. 21(b)(2). Expenses do not include amounts paid for a camp where a qualifying individual stays overnight. Household services are the performance in and about the taxpayer's home of ordinary and usual services necessary to the maintenance of the household and attributable to the care of the qualifying individual. Treas. Reg. sec. 1.21-1(d)(3).

[402] See sec. 152 for the definition of dependent.

[403] Sec. 21(b)(1).

[404] Sec. 21(g)(1).

abode requirement. Principal place of abode is determined as provided in section 32.[405] A taxpayer who does not satisfy the principal place of abode requirement may still be able to claim a nonrefundable credit.

The amount of the credit is 50 percent of employment-related expenses up to a limitation of $8,000 in the case of one qualifying individual and $16,000 if there are two or more qualifying individuals.[406] Thus, the maximum credit is $4,000 if there is one qualifying individual and $8,000 if there are two or more qualifying individuals.

The credit is subject to a two-part phaseout to the 50-percent credit rate.[407] Under the first part, the 50-percent credit rate is reduced, but not below 20 percent, by one percentage point for each $2,000 (or fraction thereof) of adjusted gross income ("AGI") above $125,000. Under the second part, the 20-percent credit rate is reduced, but not below zero, by one percentage point for each $2,000 (or fraction thereof) of AGI above $400,000. Thus, for taxpayers with AGI between $183,000 and $400,000, the credit rate is 20 percent and, for taxpayers with AGI above $438,000, the credit is fully phased out. Figure 2 illustrates the credit amount by AGI for a taxpayer with one qualifying individual and for a taxpayer with two or more qualifying individuals, in each case assuming that the taxpayer has the maximum amount of employment-related expenses ($8,000 and $16,000, respectively).[408]

---

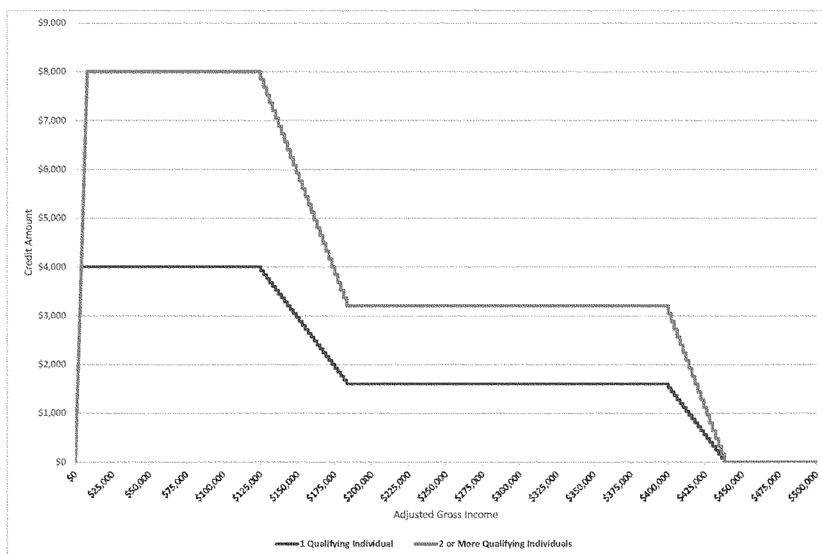
[405] Thus, a member of the Armed Forces of the United States stationed outside the United States while serving on extended active duty is treated as having a principal place of abode in the United States.

[406] Sec. 21(g)(2), (3).

[407] Sec. 21(g)(4).

[408] Figure 1 assumes AGI and earned income are equal for these taxpayers.

Figure 2.– Child and Dependent Care Tax Credit for 2021 by AGI for Selected Taxpayers*



* Joint Committee staff calculations.

Credit for Years after 2021

For taxable years beginning after 2021, the credit is nonrefundable. A taxpayer's employment-related expenses for which the credit is allowed are limited to $3,000 if the taxpayer has one qualifying individual or $6,000 if the taxpayer has two or more qualifying individuals.[409] The maximum credit rate is 35 percent. Thus, the maximum credit is $1,050 if there is one qualifying individual and $2,100 if there are two or more qualifying individuals.

The 35-percent credit rate is reduced, but not below 20 percent, by one percentage point for each $2,000 (or fraction thereof) of AGI above $15,000.[410] Thus, for taxpayers with AGI above $43,000, the credit rate is 20 percent, and the maximum credit is $600 if the taxpayer has one qualifying individual or $1,200 if the taxpayer has two or more qualifying individuals. The phaseout threshold and the amount of expenses eligible for the credit are not indexed for inflation.

[409] Sec. 21(c).

[410] Sec. 21(a).

Earned Income Limitation

Employment-related expenses generally cannot exceed the taxpayer's earned income.[411] In the case of a joint return, expenses cannot exceed the earned income of the spouse with the least earned income.

A special rule applies in the case of a joint return, where one spouse is either (1) a full-time student or (2) physically or mentally incapable of caring for himself or herself and shares the same principal place of abode with the taxpayer for over one half of the year. Under this rule, for each month in which the student or incapacitated spouse qualifies, the spouse is deemed to have $250 of earned income in the case of one qualifying individual and $500 if there are two or more qualifying individuals.[412] Thus, if the spouse qualifies under the rule for 12 months, the spouse is deemed to have $3,000 in the case of one qualifying individual and $6,000 if there are two or more qualifying individuals, equal to the applicable limitations for taxable years beginning after 2021. Only one spouse may have deemed earned income under this rule.

Child and Dependent Care Tax Credit in the U.S. territories

General Income Tax Rules for the Territories

Citizens of the United States are generally subject to Federal income tax on their U.S. and foreign income regardless of whether they live in a State, a foreign country, or a U.S. territory. Residents of the five U.S. territories[413] are generally subject to the Federal income tax system based on their status as U.S. citizens or residents of the territories, with certain special rules for determining residence and source of income specific to the territory. Broadly, a bona fide individual resident of a territory is exempt from U.S. tax on income derived from sources within that territory but is subject to U.S. tax on U.S.-source and non-territory-source income.[414] A bona fide resident of a territory for a taxable year is generally an individual (1) who is present for at least 183 days during the taxable year in the territory, and (2) who does not have either a tax home outside the territory or a closer connection to the United States or a foreign country than to the territory.[415]

The application of the Federal tax rules to the territories varies from one territory to another. Three territories—Guam, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands—are referred to as mirror Code territories because the Code serves as the

---

[411] Sec. 21(d). Earned income has the same definition as for purposes of the EITC. Treas. Reg. sec. 1.21-2(b)(3).

[412] Sec. 21(d)(2).

[413] The Code refers to the territories as "possessions."

[414] See secs. 931, 932, 933, and 937; see also former sec. 935 (1986), which remains in effect pursuant to the Tax Reform Act of 1986, Pub. L. No. 99-514, sec. 1277(b), October 22, 1986; 48 U.S.C. sec. 1801 note, sec. 601.

[415] Sec. 937.

internal tax law of those territories (substituting the particular territory for the United States wherever the Code refers to the United States).[416] Thus, there is a mirror Code version of the child and dependent care tax credit under the internal revenue laws of each mirror Code territory. A resident of one of those territories generally files a single tax return only with the territory of which the individual is a resident, and not with the United States.[417]

American Samoa and Puerto Rico, by contrast, are non-mirror Code territories. These two territories have their own internal tax laws, and a resident of either American Samoa or Puerto Rico may be required to file income tax returns with both their territory of residence and the United States.

The non-mirror Code territories may offer individual refundable income tax credits to their residents under their own tax laws. In addition, residents of the territories may be entitled to individual refundable income tax credits from the U.S. Treasury under the Code.

The Child and Dependent Care Credit in the Territories

With respect to taxable years beginning in 2021, the Secretary is directed to make payments to each of the mirror Code territories of Guam, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands that relate to the cost to that territory of the child and dependent care tax credit. The Secretary is further directed to make similar payments for 2021 to each non-mirror Code territory.

The Secretary is directed to pay to each mirror Code territory amounts equal to the aggregate amount of the credits allowable by reason of the application of section 21. This amount is determined by the Secretary based on information provided by the government of the territory.[418]

The Secretary is directed to pay to each of non-mirror Code territories of Puerto Rico and American Samoa amounts estimated by the Secretary as being equal to the aggregate benefits that would have been provided to the residents of the territory under section 21 if a mirror Code tax system had been in effect in the territory.[419] The Secretary is prohibited from making these payments unless the territory has a plan approved by the Secretary to promptly distribute the payments to its residents.

No credit against U.S. income taxes is permitted for any person to whom a credit is allowed against territory income taxes as a result of the territory's mirror Code.[420] Similarly, no

[416] 48 U.SC. sec. 1397 (U.S. Virgin Islands); 48 U.S.C. sec. 1421i (Guam); 48 U.S.C. 1801 note, sec. 601 (Commonwealth of the Northern Mariana Islands).

[417] Sec. 932 and former sec. 935.

[418] Sec. 21(h)(1).

[419] Sec. 21(h)(2).

[420] Sec. 21(h)(3).

credit against U.S. income taxes is permitted for any person who is eligible for a payment under a non-mirror Code territory's plan for distributing to its residents the payment described above from the Secretary.

Explanation of Provision

The provision makes permanent the provisions of the child and dependent care credit that only apply for taxable years beginning in 2021. Thus, the credit is fully refundable for taxpayers with a principal place of abode in the United States for more than one-half of the taxable year. The amount of the credit is 50 percent of employment-related expenses up to a limitation of $8,000 in the case of one qualifying individual and $16,000 if there are two or more qualifying individuals. The credit is subject to a two-part phaseout to the 50-percent credit rate. Under the first part, the 50-percent credit rate is reduced, but not below 20 percent, by one percentage point for each $2,000 (or fraction thereof) of adjusted gross income ("AGI") above $125,000. Under the second part, the 20-percent credit rate is reduced, but not below zero, by one percentage point for each $2,000 (or fraction thereof) of AGI above $400,000.

The $8,000 and $16,000 limitations as well as the $125,000 phaseout threshold are adjusted for inflation for taxable years beginning after 2021.

The provision also modifies the special rule for earned income in the case of a joint return, where one spouse is either (1) a full-time student or (2) physically or mentally incapable of caring for himself or herself and shares the same principal place of abode with the taxpayer for over one half of the year. Under the provision, for each month in which the student or incapacitated spouse qualifies, the spouse is deemed to have earned income equal to one-twelfth of $8,000 (adjusted for inflation) in the case of one qualifying individual or one-twelfth of $16,000 (adjusted for inflation) if there are two or more qualifying individuals.

Finally, the provision makes permanent the payments by the Secretary to the territories to cover the cost of the territorial child and dependent care tax credit or analogous benefit.

Effective Date

The provision applies to taxable years beginning after December 31, 2021.

2. Increase in exclusion for employer-provided dependent care assistance made permanent (sec. 137202 of the bill and sec. 129 of the Code)

Present Law

An annual exclusion[421] from the gross income of an employee is allowed for employer-provided dependent care assistance if such assistance is provided pursuant to a "dependent care assistance program." The amount of the exclusion was $5,000 ($2,500 in the case of a separate return by a married individual) through taxable years beginning in 2020. The

---

[421] Sec. 129(a).

ARPA temporarily increased the amount of the exclusion for employer-provided dependent care assistance for taxable years beginning in 2021 from $5,000 to $10,500 (and half of such amount in the case of a separate return by a married individual).[422] Amounts attributable to dependent care assistance that are excludable from gross income are also excludable from wages for employment tax purposes.[423]

Among other requirements, a dependent care assistance program[424] must be a separate written plan of an employer for the exclusive benefit of the employer's employees to provide such employees with dependent care assistance that does not discriminate in favor of highly compensated employees or their dependents as to contributions, benefits, and eligibility.[425]

A dependent care assistance program may be structured to allow contributions on a pre-tax basis through a cafeteria plan.[426] A cafeteria plan is a written plan maintained by an employer whereby all participants are employees who may choose among two or more benefits including qualified benefits and cash.[427] Qualified benefits provided under a cafeteria plan include dependent care assistance.

The amount excludable for any taxable year cannot exceed the earned income of the employee or, if the employee is married, the lesser of the earned income of the employee or the earned income of the employee's spouse.[428]

The ARPA provided that a plan that otherwise satisfied the requirements of a dependent care assistance program and cafeteria plan would not fail to meet those requirements if the plan was amended to reflect the increased temporary thresholds allowed pursuant to the bill and the amendment was retroactive if the following were satisfied: (1) the amendment is adopted no later than the last day of the plan year in which the amendment is effective; and (2) the plan is operated consistently with the amendment terms beginning on the effective date of the amendment and ending on the date the amendment is adopted.

Explanation of Provision

---

[422] Pub. L. No. 117-2.

[423] Secs. 3401(b)(18), 3121(a)(18), 3306(b)(14).

[424] Sec. 129(d).

[425] Sec. 129(d)(2) and (3). The exclusion applies if the contributions or benefits under the program do not discriminate in favor of highly compensated employees, within the meaning of section 414(q), or their dependents, and the program benefits employees under a classification established by the employer found not to be discriminatory in favor or such highly compensated employees or their dependents.

[426] Sec. 125.

[427] Sec. 125(d).

[428] Sec. 129(b). The provisions of section 21(d)(2) apply in determining the earned income of a spouse who is a student or incapable of caring for himself. Sec. 129(b)(2).

The provision amends section 129(a)(2)(A) to make permanent the 2021 increase to the annual threshold from $5,000 to $10,500 (and half of such amount in the case of a separate return filed by married taxpayers). This amount will also be adjusted for inflation. For any taxable year beginning after December 31, 2021, the $10,500 amount in section 129(a)(2)(A) is increased by an amount equal to $10,500 multiplied by the cost-of-living adjustment determined for that taxable year.[429]

A plan that otherwise satisfies the requirements of a dependent care assistance program and cafeteria plan would not fail to meet those requirements if the plan was amended to reflect the provision and the amendment was retroactive if the following were satisfied: (1) the amendment is adopted no later than the last day of the plan year in which the amendment is effective; and (2) the plan is operated consistently with the amendment terms beginning on the effective date of the amendment and ending on the date the amendment is adopted.

Effective Date

The provision is effective for taxable years beginning after December 31, 2021.

[429] Sec. 1(f)(3).

PART III — SUPPORTING CAREGIVERS

1. Payroll tax credit for child care workers (sec. 137301 of the bill and new sec. 3135 of the Code)

Present Law

Federal Employment Taxes

Federal employment taxes are imposed on wages paid to employees with respect to employment and include taxes imposed under the Federal Insurance Contributions Act ("FICA"), the Federal Unemployment Tax Act ("FUTA"), and Federal income tax.[430] In addition, Tier 1 of the Railroad Retirement Tax Act ("RRTA") imposes a tax on compensation paid to railroad employees and representatives.[431]

FICA taxes are comprised of two components: the Old-Age, Survivors, and Disability Insurance ("OASDI") and Hospital Insurance ("Medicare").[432] With respect to Medicare taxes, the applicable rate is 2.9 percent with half of such rate (1.45 percent) imposed on the employee and the remainder (1.45 percent) imposed on the employer.[433] The employee portion of Medicare taxes must be withheld and remitted to the Federal government by the employer during the quarter, as required by the applicable deposit rules.[434] The employer is liable for the employee portion of Medicare taxes, in addition to its own share, whether or not the employer withholds the amount from the employee's wages.[435] OASDI and Medicare taxes are generally allocated by statute among separate trust funds: the OASDI Trust Funds, Medicare's Hospital Insurance Trust Fund, and Supplementary Medical Insurance Trust Fund.[436]

[430] Secs. 3101, 3111, 3301, and 3401.

[431] Sec. 3221.

[432] The Hospital Insurance tax includes two components: Medicare tax and Additional Medicare tax. Additional Medicare taxes are imposed on wages in excess of certain thresholds and are only imposed on the employee. Sec. 3101(b). There is no employer match for Additional Medicare tax. For purposes of this explanation, when referencing Medicare taxes, the term does not include Additional Medicare tax.

[433] Sec. 3101(b); 3111(b).

[434] Sec. 3102(a) and Treas. Reg. sec. 31.3121(a)-2. Sec. 6302.

[435] Sec. 3102(b).

[436] Secs. 201 and 1817 of the Social Security Act, Pub. L. No. 74-271 as amended (42 U.S.C. secs. 401 and 1395i). This section appropriates to the OASI and DI trust funds 100 percent of "the taxes imposed . . . by chapter 21 (other than sections 3101(b) and 3111(b)[*i.e.*, 3101(a) and 3111(a)]) of the Internal Revenue Code of 1954 with respect to wages (as defined in section 3121 of such Code)" "determined by the Secretary of the Treasury by applying the applicable rates of tax under such subchapter or chapter 21 (other than sections 3101(b) and 3111(b)) to such wages." Accordingly, the amount appropriated is based on the tax rate in effect on wages as defined in the statute. Similarly, section 1817 of the Social Security Act, 42 U.S.C. sec. 1395i, appropriates to the HI trust fund 100 percent of "the taxes imposed by sections 3101(b) and 3111(b) of the Internal Revenue Code of 1986 with

Generally, the term "wages" for Medicare tax purposes means all remuneration for "employment," including the cash value of all remuneration (including benefits) paid in any medium other than cash, with certain exceptions.[437] The name given to the remuneration for employment is immaterial. Medicare wages includes salaries, vacation allowances, bonuses, deferred compensation, commissions, and fringe benefits. The term "employment" is generally defined for FICA tax purposes as any service, of whatever nature, performed by an employee for the person employing him or her, with certain specific exceptions.

Railroad Retirement Program

Railroad workers do not participate in the FICA tax system. Compensation subject to RRTA tax is exempt from FICA taxes.[438] Instead, the railroad retirement system, while separate from and parallel to the Social Security Administration ("SSA"), is overseen by the SSA and the Railroad Retirement Board ("RRB"). The SSA collects taxes to fund the program, while the RRB is tasked with distributing benefits to eligible railroad industry employees and their family members to provide income assurance during retirement. These two governing bodies cooperate in determining an individual's benefits.

RRTA Tax Rates

The RRTA imposes a tax on compensation paid by covered employers to employees in recognition for the performance of services.[439] Employees whose compensation is subject to RRTA are ultimately eligible for railroad retirement benefits that fall under a two-tier structure. Rail employees and employers pay tier 1 taxes at the same rate as other employment taxes.[440] In addition, rail employees and employers both pay tier 2 taxes which are used to finance railroad retirement benefits over and above social security benefit levels.[441] Tier 2 benefits are similar to a private defined benefit pension. Those taxes are funneled to the railroad retirement system and

---

respect to wages reported to the Secretary of the Treasury or his delegate pursuant to subtitle F of such Code after December 31, 1965, as determined by the Secretary of the Treasury by applying the applicable rates of tax under such sections to such wages."

[437] Sec. 3121(a).

[438] Sec. 3121(b)(9).

[439] Secs. 3201 through 3233. Instead of FICA taxes, railroad employers and employees are subject, under the RRTA, to taxes equivalent to the Social Security and Medicare taxes under FICA. Under the RRTA, employers and employees are also subject to an additional tax, referred to as the "tier 2" tax, on compensation up to a certain amount.

[440] 7.65 percent, consisting of 6.2 percent for retirement on earnings up to $137,700 in 2020, and 1.45 percent for Medicare hospital insurance on all earnings. An additional 0.9 percent in Medicare taxes are withheld from employees on earnings above $200,000.

[441] In 2020, the tier 2 tax rate on earnings up to $102,300 is 4.9 percent for employees and 13.1 percent for employers.

used to fund basic retirement benefits for railroad workers and an investment trust that generates returns for the pension fund.

Employment Tax and Income Tax in the U.S. Territories

FICA Tax

Employers and employees in the U.S. territories are generally subject to FICA payroll tax obligations.[442] In contrast, employers and employees in the territories are generally not subject to withholding at the source for Federal income tax, although they are subject to withholding of local taxes.[443] These payroll obligations of the employers are generally applicable to Federal agencies with personnel in the territory. Employers in the territories file quarterly tax returns with the Federal government to report and pay FICA taxes for employees in the respective territories.

Income Tax

Citizens of the United States are generally subject to Federal income tax on their worldwide income, including those citizens in the U.S. territories. Residents of the U.S. territories are generally subject to the Federal income tax system based on their status as U.S. citizens or residents in the territories, with certain special rules for determining residence and source of income specific to the territory. Broadly, a bona fide individual resident of a territory is exempt from U.S. tax on income derived from sources within that territory but is subject to U.S. tax on U.S.-source and non-territory-source income.[444]

The application of the Federal income tax rules to the territories varies from one territory to another. Three territories, Guam, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands, are referred to as mirror Code territories because the Code serves as the internal tax law of those territories (substituting the particular territory for the United States wherever the Code refers to the United States). A resident of one of those territories generally files a single tax return only with the territory of which the individual is a resident, and not with the United States. American Samoa and Puerto Rico, by contrast, are referred to as non-mirror Code territories that have their own internal tax laws. A resident of either American Samoa or Puerto Rico may be required to file income tax returns with both the territory of residence and the United States.

Payroll Tax Credits

[442] The U.S. territories referred to in this document are American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, and the U.S. Virgin Islands.

[443] Under section 3401(a)(8), most wages paid to U.S. persons for services performed in one of the territories are excluded from withholding of Federal income tax if the payments are subject to withholding by the territory, or, in the case of Puerto Rico, the payee is a bona fide resident of the territory for the full year.

[444] See secs. 931, 932, 933, and 937; see also former sec. 935 (1986), which remains in effect pursuant to the Tax Reform Act of 1986, Pub. L. No. 99-514, sec. 1277(b), October 22, 1986; 48 U.S.C. sec. 1801 note, sec. 601.

Under present law, there is no tax credit against FICA taxes for child care wages. Recently enacted credits against OASDI or Medicare taxes include paid sick or expanded family and medical leave,[445] employee retention,[446] and COBRA premium assistance.[447]

Explanation of Provision

An eligible child care employer is allowed a refundable credit against the applicable employment taxes imposed on the employer for each calendar quarter in an amount equal to 50 percent of the qualified child care wages paid with respect to each eligible employee of such employer for such calendar quarter. The amount of qualified child care wages for an eligible employer which may be taken into account for any calendar quarter shall not exceed $2,500, indexed to inflation. An eligible child care employer may elect (at such time and in such manner as the Secretary may prescribe) not to take certain qualified wages into account. In addition, no credit is allowed for the United States Government or to an agency or instrumentality thereof, except any section 501(c)(1) organization exempt from tax under section 501(a).

The credit is applied against an eligible employer's applicable employment taxes, which includes the employer's share of Medicare taxes and the equivalent amount of RRTA taxes imposed on railroad employers.[448] The term wages includes amounts paid or incurred by the eligible child care employer to provide and maintain a group health plan,[449] but only to the extent such amounts are excluded from the employees' income as coverage under an accident or health plan.[450] Qualified health plan expenses are allocated to child care wages in such manner as the Secretary of Treasury (or the Secretary's delegate) may prescribe. Except as otherwise

[445] Pub. L. No. 116-127; Secs. 3131, 3132. The expiration of the credits was extended by the Taxpayer Certainty and Disaster Relief Act of 2020, to March 30, 2021. Pub. L. No. 116-260. The ARPA allowed certain employers to claim refundable tax credits for the cost of providing paid sick and expanded family and medical leave to employees to receive or recover from vaccination for COVID-19. The ARPA extension and expansion of the tax credits were for paid sick and expanded family and medical leave from April 1, 2021 through September 30, 2021. Sec. 3131; 3132.

[446] Pub. L. No. 117-136. The Taxpayer Certainty and Disaster Relief Act of 2020 amended and extended the employee retention credit to June 30, 2021, and the ARPA added section 3134 to amend and extend the employee retention credit to December 31, 2021.

[447] Pub. L. No. 117-2; sec. 6432. The ARPA provided a credit against the employer's share of Medicare tax, or the equivalent amount of RRTA tax, in an amount equal to COBRA premiums payable for continuation coverage not paid by assistance eligible individuals.

[448] Secs. 3111(b); 3221(a). The term "wages" means wages, as defined in section 3121(a) for FICA purposes without regards to the exclusions enumerated in paragraphs (1) through (22) of section 3121(b), and compensation, as defined in section 3231(e) without regards to any exclusions from the term enumerated in paragraph (1). Any credit allowed under this provision shall be treated as a credit of the customer of the certified professional employer organization as described in section 3511(d)(2).

[449] Sec. 5000(b)(1).

[450] Sec. 106(a).

provided by the Secretary, such allocations are treated as properly made under the provision if made on the basis of being pro rata on the basis of periods of coverage.

An eligible child care employer is any employer that operates one or more qualified child care facilities.[451] A qualified child care facility for purposes of this provision is any facility which is certified as an "HHS Participating Child Care Provider" by the Secretary of Health and Human Services under section 418A(c) of the Social Security Act. The provision has an aggregation rule requiring persons to be treated as a single employer to the extent subsection (a) or (b) of section 52, or subsection (m) or (o) of section 414, apply for purposes of this section.

An eligible employee is any employee of an eligible child care employer for any calendar quarter who meets two criteria: (1) the aggregate wages paid to the employee in the quarter may not exceed 25 percent of the dollar amount in effect for the quarter for highly-compensated employees ($130,000 annually in 2021),[452] and (2) the aggregate wages paid to such employee for the one-year period ending with the close of such quarter do not exceed 100 percent of such dollar amount.

Child care wages are wages paid for the employee's services to provide child care at a qualified child care facility or to provide support services for such a facility.[453] The qualified child care wages taken into account for this credit are the child care wages paid by the child care employer in excess of the applicable minimum rate. Applicable minimum rate means the rate of basic pay which is payable for GS-3, step 1, of the General Schedule,[454] at the time the wages are paid and determined based on the locality in which the services are provided. Qualified child care wages does not include any wages paid by an eligible child care employer during a period where the employer does not have the HHS certification, described above.

Qualified child care wages paid by an eligible child care employer cannot include the following taken into account as payroll costs in connection with: (1) a covered loan under section 7(a)(37) or 7A of the Small Business Act; (2) a grant under section 324 of the Economic Aid to Hard-Hit Small Businesses, Non-Profits, and Venues Act, or (3) a restaurant revitalization grant under section 5003 of the ARPA. The Secretary is directed to issue guidance providing that payroll costs paid during the covered period may be included in qualified child care wages to the extent that: (1) a covered loan under section 7(a)(37) of the Small Business Act is not forgiven by reason of a decision under section 7(a)(37)(J) of such Act; or (2) a covered loan of the taxpayer under section 7A of the Small Business Act is not forgiven by reason of a decision under section 7A(g) of such Act.

---

[451] All persons treated as a single employer under subsection (a) or (b) of section 52, or subsection (m) or (o) of section 414, shall be treated as one employer for purposes of this provision.

[452] Sec. 414(q)(1)(B)(i).

[453] Child care wages does not include wages taken into account under sections 41, 45A, 45P, 45R, 51, 1396, 3131, 3132, 3134, or 6432.

[454] Subchapter III, Chapter 53, Title 5, United States Code.

The provision provides that the credit allowed may not exceed the tax imposed on the employer, reduced by certain other payroll tax credits[455] for that calendar quarter on the wages paid with respect to all the employer's employees. However, if for any calendar quarter the amount of the credit exceeds the applicable employment taxes imposed on the employer, reduced as described in the prior sentence, such excess is treated as a refundable overpayment.[456] The credit may be advanced according to forms and instructions provided by the Secretary.

The provision also includes a denial of double benefit rule. The gross income of the employer, for the taxable year which includes the last day of the quarter with respect to which a credit is allowed under this provision, shall be increased by the amount of such credit for purposes of the income tax under Chapter 1.

The Secretary will prescribe regulations or other guidance to prevent avoidance of the purposes of this provision, to minimize compliance and record-keeping burdens under this provision, providing for a waiver of penalties for failure to deposit amounts in anticipation of the allowance of the credit allowed under the provision, for recapturing the benefit of credits determined under this proposed in cases where a subsequent adjustment to the credit is determined, to permit advancement of the credit, and for determining qualified child care wages of eligible employees not paid at a single rate of pay.

Effective Date

The amendments made by this provision shall apply to calendar quarters beginning after December 31, 2021.

2. Credit for caregiver expenses (sec. 137302 of the bill and new sec. 25E of the Code)

Present Law

Child and Dependent Care Tax Credit

A taxpayer with one or more qualifying individuals is allowed a credit against income tax liability for employment-related expenses for child and dependent care.[457] For this purpose, employment-related expenses are expenses for household services and expenses for the care of a qualifying individual.[458] These expenses must be incurred to enable the taxpayer to be gainfully

---

[455] Applicable employment taxes for this purpose are reduced by any credits allowed under sections 3131, 3132, 3134, and 6432.

[456] The excess is treated as an overpayment and refunded under sections 6402(a) and 6413(b). In addition, any amount that is due to an employer is treated in the same manner as a refund due from a credit provision. 31 U.S.C. sec. 1324. Thus, amounts are appropriated to the Secretary of the Treasury for refunding such excess amounts.

[457] Sec. 21.

[458] Sec. 21(b)(2). Expenses do not include amounts paid for a camp where a qualifying individual stays overnight. Household services are the performance in and about the taxpayer's home of ordinary and usual services

employed during any period for which there are one or more qualifying individuals with respect to the taxpayer.

A qualifying individual is, in general: (1) a dependent[459] of the taxpayer who is under the age of 13, or (2) a dependent or spouse of the taxpayer if the dependent or spouse is physically or mentally incapable of caring for himself or herself and shares the same principal place of abode with the taxpayer for over one half the year.[460]

Employment-related expenses taken into account in determining the credit generally may not exceed a taxpayer's earned income.[461] In the case of a joint return, expenses taken into account generally may not exceed the earned income of the spouse with the lower earned income.[462] The amount of employment-related expenses that may be taken into account is reduced by any amount excluded from income under an employer-provided dependent care assistance program under section 129.[463]

The maximum allowable credit for a taxable year beginning in 2021 is 50 percent of employment-related expenses up to $8,000 for a taxpayer with one qualifying individual and $16,000 for a taxpayer with two or more qualifying individuals.[464] The maximum credit is therefore $4,000 if there is one qualifying individual and $8,000 if there are two or more qualifying individuals.

The credit for 2021 is subject to a two-part income-based phaseout.[465] The 50-percent credit rate is reduced, but not below 20 percent, by one percentage point for each $2,000 (or fraction thereof) of adjusted gross income ("AGI") above $125,000. The 20-percent credit rate is reduced, but not below zero, by one percentage point for each $2,000 (or fraction thereof) of AGI above $400,000. Thus, for taxpayers with AGI between $183,000 and $400,000, the credit rate is 20 percent and, for taxpayers with AGI above $438,000, the credit is fully phased out.

---

necessary to the maintenance of the household and attributable to the care of the qualifying individual. Treas. Reg. sec. 1.21-1(d)(3).

[459] See sec. 152 for the definition of dependent.

[460] Sec. 21(b)(1).

[461] Sec. 21(d). Earned income has the same definition as for purposes of the EITC. Treas. Reg. sec. 1.21-2(b)(3).

[462] Special rules apply to married couples in cases where one spouse is either a full-time student or physically or mentally incapable of caring for himself or herself. Sec. 21(d)(2). In these cases, the student or incapacitated spouse is deemed to be employed and deemed to have earned income of no less than $250 (if the household has one qualifying individual) or $500 (if the household has two or more qualifying individuals).

[463] Sec. 21(c).

[464] Sec. 21(g)(2), (3).

[465] Sec. 21(g)(4).

The credit is refundable in 2021 for a taxpayer who has a principal place of abode in the United States for more than one half of the taxable year.[466] In the case of a joint return, refundability is allowed if at least one spouse satisfies the principal place of abode requirement. Principal place of abode is determined as provided in the rules for the earned income tax credit.[467] A taxpayer who otherwise is allowed the child and dependent care credit but does not satisfy the principal place of abode is allowed a nonrefundable credit.

For taxable years beginning after 2021, the maximum allowable credit is 35 percent of employment-related expenses up to $3,000 for a taxpayer with one qualifying individual, and $6,000 for a taxpayer with two or more qualifying individuals.[468] The maximum credit is, therefore, $1,050 in respect of one qualifying individual and $2,100 in respect of two or more qualifying individuals. The 35-percent credit rate is reduced, but not below 20 percent, by one percentage point for each $2,000 (or fraction thereof) of AGI above $15,000.[469] For a taxpayer with AGI above $43,000 the credit rate is, therefore, 20 percent, and the maximum credit is $600 for one qualifying individual and $1,200 for two or more qualifying individuals. The credit is nonrefundable in taxable years beginning after 2021.

For taxpayers in the U.S. territories, special rules apply.

Exclusions and Deductions for Dependent Care and Medical Expenses

For 2021 an employee generally is allowed to exclude from gross income up to $10,000 ($5,000 for a married individual filing a separate return) for amounts paid or incurred by the employer for dependent care assistance to the employee under a dependent care assistance program.[470]

An individual generally is allowed an itemized deduction for expenses, not compensated by insurance or otherwise, paid for medical care of the individual, the individual's spouse, or a dependent to the extent that the expenses exceed 7.5 percent of adjusted gross income.[471]

An individual who is covered under a high deductible health plan and who satisfies certain other requirements generally is allowed an itemized deduction for a limited amount paid in cash by or on behalf of the individual to the individual's health savings account.472 For an

[466] Sec. 21(g)(1).

[467] See sec. 32(c)(3)(C).

[468] Sec. 21(c).

[469] Sec. 21(a).

[470] Sec. 129. The child and dependent care tax credit is not allowed (and no other deduction or credit is allowed) for amounts excluded under section 129. See sec. 129(e)(7).

[471] Sec. 213. This deduction is not allowed for any expense for which the child and dependent care tax credit is allowed. Sec. 213(e).

[472] Sec. 223.

individual with family coverage, the maximum amount of the deduction in 2021 is $7,200. For an individual with self-only coverage, the maximum deduction in 2021 is $3,600. Distributions from health savings accounts used to pay qualified medical expenses are not includible in gross income.

Explanation of Provision

In General

The provision provides a nonrefundable credit against income tax (the "caregiver credit") for an individual for whom there is at least one qualified care recipient. The credit generally equals 50 percent of the amount that the individual pays or incurs in a taxable year (and for which the individual is not compensated by insurance or otherwise) for qualified expenses of up to $4,000. This 50-percent credit rate is reduced by 1 percentage point for every $2,500 or fraction thereof by which the individual's adjusted gross income exceeds $75,000.

Qualified Care Recipient

For purposes of the caregiver credit, an individual is a qualified care recipient for a taxable year with respect to the person claiming the credit if the individual (1) is the spouse of the person claiming the credit or bears to the person claiming the credit any one of the relationships described in subparagraphs (A) through (H) of section 152(d)(2); (2) has been certified before the tax return filing due date for the taxable year (but within the 18-month period ending on that due date (or another period prescribed by the Secretary)) by a licensed health practitioner (as defined in section 7702B(c)(4)) as being an individual with certain long-term care needs (described below) for a period that is expected to be at least 180 consecutive days and a portion of which occurs within the taxable year; and (3) resides in a personal residence, not an institutional care facility.

An individual is considered to have long-term care needs if the individual satisfies any one of several age-based requirements. An individual who is at least six years of age has long-term care needs if the individual (1) is unable to perform without substantial assistance from another individual at least two activities of daily living (defined in section 7702B(c)(2)(B)) due to a loss of functional capacity, or (2) requires substantial supervision to protect the individual from threats to health and safety due to severe cognitive impairment and (a) is unable to perform without reminding or cuing assistance at least one activity of daily living (defined in section 7702B(c)(2)(B)), or (b) to the extent provided in regulations prescribed by the Secretary (in consultation with the Secretary of Health and Human Services), is unable to engage in age appropriate activities. An individual who is at least two but not six years of age is considered to have long-term care needs if the individual is unable, due to a loss of functional capacity, to perform without substantial assistance from another individual at least two of the following activities: eating, transferring, and mobility. An individual who is under the age of two is considered to have long-term care needs if the individual requires specific durable medical equipment by reason of a severe health condition or requires a skilled practitioner trained to address the individual's condition to be available if the individual's parents or guardians are absent.

An institutional care facility (including two or more places, establishments, or institutions owned by the same legal entity) includes any congregate, protected living residential arrangement that provides or coordinates personal or health care services, including assistance with the activities of daily living and social care, for two or more adults who are aged, infirm, or disabled.

Qualified Expenses

Qualified expenses for which the caregiver credit is allowed are expenses for certain goods, services, and supports that assist a qualified care recipient with accomplishing activities of daily living (as defined in section 7702B(c)(2)(B)) and instrumental activities of daily living (as defined in section 1915(k)(6)(F) of the Social Security Act) and that are provided solely for use by the qualified care recipient. The goods, services, and supports for which qualified care expenses may be paid are human assistance, supervision, cuing, and standby assistance; health maintenance tasks (such as medication management); respite care; assistive technologies and devices (including remote health monitoring); accessibility modifications of the qualified care recipient's residence; counseling, support groups, or training related to caring for a qualified care recipient; and any other items that directly relate to the health and safety of a qualified care recipient, as determined by the Treasury Secretary after consultation with the Secretary of Health and Human Services.

An amount may not be taken into account as a qualified expense if it is taken into account for purposes of the child and dependent care tax credit, the exclusion for amounts paid to employees under dependent care assistance programs, the itemized deduction for medical expenses that exceed 7.5 percent of adjusted gross income, or as an amount for which an exclusion from gross income is allowed for a distribution from a health savings account.

An individual may treat an amount as a qualified expense only if the individual substantiates the expense under regulations or other guidance prescribed by the Secretary.

Special Rules

Under rules similar to those for the child and dependent care tax credit, no credit is allowed for expenses paid to certain related individuals.[473]

The licensed health care practitioner making the certification of long-term care needs must satisfy the following requirements. The individual may not be related (within the meaning of section 51(i)(1)) to, or have a conflict of interest (under regulations prescribed by the Secretary) with respect to, the individual claiming the credit or the qualified care recipient. The individual must be licensed and eligible under applicable State law to certify limitations in performing activities of daily living. The individual must be a participant in either the Medicare program (under section 1866(j) of the Social Security Act)[474], Medicaid program (under sections

[473] See sec. 21(e)(6).

[474] A technical change required to match intent of this provision

1902(a)(77) and 1932(d)(6) of the Social Security Act) or the State Children's Health Insurance Program (under Social Security Act section 2107(e)(1)(G)).

An individual is allowed the caregiver credit with respect to a qualified care recipient only if the individual includes on the tax return the name and specified provider identification number of the licensed health care practitioner who makes the long-term care certification. A specified provider identification number is a valid National Provider Identifier as authorized under Social Security Act section 1173. Similarly, an individual is allowed the caregiver credit with respect to a qualified care recipient only if the individual includes on the tax return the taxpayer identification number of that recipient. The omission of a correct specified provider identification number or a correct taxpayer identification number is an error for which the provision gives the IRS math error authority.[475]

An individual may be treated as a qualified care recipient with respect to only one taxpayer for a taxable year.

Termination

The caregiver credit is not allowed for any taxable year beginning after December 31, 2025.

Effective Date

The provision applies to taxable years beginning after December 31, 2021.

[475] See sec. 6213(g)(2).

PART IV — EARNED INCOME TAX CREDIT

1. Certain improvements to the earned income tax credit made permanent and funds for administration of earned income tax credits in the possessions (secs. 137401 and 137402 of the bill and secs. 32 and 7530 of the Code)

Present law

In General

Low- and moderate-income workers may be eligible for the refundable earned income tax credit ("EITC"). The amount of the EITC is based on the presence and number of qualifying children in the worker's family, filing status, AGI, and earned income.[476]

The EITC generally equals a specified percentage of earned income.[477] Earned income for this purpose cannot exceed a maximum dollar amount, known as the earned income amount. The maximum EITC amount applies over a certain income range and then diminishes to zero over a specified phaseout range. For a taxpayer with earned income (or AGI, if greater) in excess of the beginning of the phaseout range, the maximum EITC amount is reduced by the phaseout rate multiplied by the amount of earned income (or AGI, if greater) in excess of the beginning of the phaseout range. For a taxpayer with earned income (or AGI, if greater) in excess of the end of the phaseout range, no credit is allowed. The specified percentage, maximum dollar amount, and phaseout rate and range vary with filing status and number of children. Four separate credit percentage schedules apply: one for taxpayers with no qualifying children, one for taxpayers with one qualifying child, one for taxpayers with two qualifying children, and one for taxpayers with three or more qualifying children.[478]

For an individual to be a qualifying child for purposes of the EITC, generally that individual must meet the relationship, age, and residency tests under section 152.[479]

The EITC may be claimed by a taxpayer if the taxpayer is a U.S. citizen or a resident alien.[480] An individual who is a nonresident alien for any portion of the taxable year is not eligible to claim the EITC unless an election is in effect for the year under section 6013(g) or (h) (relating to an individual who is married to a citizen or resident of the United States at the end of the year). In addition, individuals who claim the benefits of section 911 (relating to the income

[476] Sec. 32.

[477] Sec. 32(a), (b).

[478] Sec. 32(b). All income thresholds are indexed for inflation annually.

[479] Sec. 32(c)(3)(A). See section 152(c)(1) for the definition of qualifying child. For purposes of the EITC the support test in section 152(c)(1)(D) is disregarded. The residency test in section 152(c)(1)(B) is only satisfied if the principal place of abode is in the United States.

[480] Sec. 32(c)(1)(D).

exclusion election available to U.S. citizens or resident aliens living abroad) are not eligible to claim the EITC.[481]

A taxpayer with certain investment income in excess of $10,000 for the taxable year may not claim the EITC.[482]

The earned income amount, beginning of the phaseout range, and $10,000 investment income thresholds are adjusted for inflation.[483]

To claim the EITC, the taxpayer must include the taxpayer's valid SSN and valid SSN for the qualifying child (and, if married, the spouse's valid SSN) on his or her tax return.[484] For these purposes, a valid SSN is an SSN issued to an individual, other than an SSN issued to an individual solely for the purpose of applying for or receiving Federally funded benefits, on or before the due date for filing the return for the year.[485]

Credit Structure for EITC for Taxpayers with No Qualifying Children

For taxable years beginning in 2021

A taxpayer with no qualifying children may claim a credit if the taxpayer satisfies the age requirements (discussed below), has a principal place of abode in the United States for more than half of the taxable year, and cannot be claimed as a dependent on anyone else's return.[486] For purposes of the principal place of abode requirement, a member of the Armed Forces of the United States stationed outside the United States while serving on extended active duty is treated as having a principal place of abode in the United States.[487]

ARPA expanded the EITC for taxpayer with no qualifying children for one year. For taxable years beginning in 2021, the credit is 15.3 percent of earned income up to an earned income amount of $9,820, resulting in a maximum credit of $1,502.[488] The maximum credit is available for a taxpayer with earned income between $9,820 and $11,610 ($17,560 if married filing jointly). The credit begins to phaseout out at a rate of 15.3 percent of earned income or

---

[481] Sec. 32(c)(1)(C).

[482] Sec. 32(i).

[483] Sec. 32(j).

[484] Sec. 32(c)(1)(E), (c)(3)(D), (m).

[485] Sec. 205(c)(2)(B)(i)(II) (and that portion of sec. 205(c)(2)(B)(i)(III) relating to it) of the Social Security Act.

[486] Sec. 32(c)(1)(A)(ii).

[487] Sec. 32(c)(4).

[488] Sec. 32(n)(3), (4).

AGI above $11,610 ($17,560 if married filing jointly), resulting in a $0 credit at $21,430 of earned income or AGI ($27,380 if married filing jointly).[489]

For taxable years beginning after 2021

For taxable years beginning in 2022, the credit is 7.65 percent of earned income up to an earned income amount of $7,200, resulting in a maximum credit of $551.[490] The maximum credit is available for a taxpayer with earned income between $7,200 and $9,010 ($15,050 if married filing jointly). The credit begins to phase out at a rate of 7.65 percent of earned income or AGI above $9,010 ($15,050 if married filing jointly) resulting in a $0 credit at $16,210 of earned income or AGI ($22,250 if married filing jointly).

For taxable years beginning after 2022, these amounts are adjusted for inflation.

Age Requirements for EITC for Taxpayers with No Qualifying Children

For Taxable Years Beginning in 2021

For taxable years beginning in 2021, the minimum age for taxpayer's claiming the EITC for taxpayers with no qualifying children is generally 19.[491] However, if the individual is a specified student (or, in the case of a married individual, if both the individual and the individual's spouse are specified students), the minimum age is 24.[492] A specified student means, with respect to a taxable year, an individual who is an eligible student during at least five calendar months during the year. An eligible student is defined in section 25A(b)(3) (relating to the American opportunity tax credit) as a student who, with respect to any academic period, meets the requirements of section 484(a)(1) of the Higher Education Act of 1965 and is carrying at least half the normal full-time work load for the course of study the student is pursuing.

The minimum age is 18 for any qualified former foster youth or qualified homeless youth.[493] A qualified former foster youth is an individual who, at the age of 14 or older, was in foster care provided under the supervision or administration of an entity administering (or eligible to administer) a plan under part B[494] or part E[495] of Title IV of the Social Security Act.

[489] Rev. Proc. 2021-23.

[490] See sec. 32(b), (j).

[491] Sec. 32(n)(1)(A), (B)(i).

[492] Sec. 32(n)(1)(A), (B)(ii). The Secretary is required to develop and implement procedures for confirming a taxpayer's status as a specified student using information returns made with respect to such taxpayer under section 6050S (returns relating to higher education tuition and related expenses).

[493] Sec. 32(n)(1)(B)(iii), (D), (C).

[494] 42 U.S.C. secs. 621-628b.

[495] 42 U.S.C. secs. 670-679c.

A qualified former foster youth must give the applicable entity consent to disclose to the Secretary information related to the taxpayer's status as a qualified former foster youth.

A qualified homeless youth is an individual who is certified by a local educational agency or a financial aid administrator during the year as being either (1) an unaccompanied youth who is a homeless child or youth or (2) unaccompanied, at risk of homelessness, and self-supporting.[496] A qualified homeless youth must give the applicable educational agency or financial aid administrator consent to disclose to the Secretary information related to the taxpayer's status as a qualified homeless youth.

For taxable years beginning in 2021, there is no upper age limit on the credit for taxpayers with no qualifying children.[497] Therefore, taxpayers 65 and older without qualifying children may claim the credit in 2021.

For Taxable Years Beginning after 2021

A taxpayer with no qualifying children may claim the EITC if the taxpayer is age 25 or older and below age 65.

Earned Income Lookback

For taxable years beginning in 2021, a taxpayer may elect to calculate the taxpayer's EITC using 2019 rather than 2021 earned income, if the taxpayer's earned income in 2021 is less than in 2019.[498]

In the case of a joint return, the earned income which is attributable to the taxpayer for 2019 is the sum of the earned income which is attributable to each spouse for 2019.

For administrative purposes, the incorrect use on a return of earned income pursuant to an election under this provision is treated as a mathematical or clerical error. An election under the provision is disregarded for purposes of calculating gross income in the election year.

EITC in the Territories

If Puerto Rico enacts changes to its EITC which increase the percentage of earned income allowed as a credit in a manner designed to substantially increase workforce participation, the Secretary is required to pay to Puerto Rico each calendar year, starting in 2021, a specified matching amount of the cost of its EITC.[499] For each calendar year 2021 through 2025, the Secretary is also required to pay to Puerto Rico the lesser of (1) Puerto Rico's

[496] See section 480(d)(1) of the Higher Education Act of 1965, 20 U.S. Code § 1087vv, for the meaning of terms used in this definition.

[497] Proposed sec. 32(n)(2).

[498] ARPA, Pub. L. No. 117-2, sec. 9626.

[499] Sec. 7530(a).

expenditures for education efforts with respect to taxpayers and tax return preparers regarding the EITC, or (2) $1 million.

The Secretary is required to make payments to Guam, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands each calendar year starting in 2021 equal to the cost to that territory of its EITC in the year.[500] For each calendar year 2021 through 2025, the Secretary is also required to pay to each territory an amount equal to the lesser of (1) the territory's expenditures for education efforts with respect to taxpayers and tax return preparers regarding the EITC, or (2) $50,000.

The Secretary is required to make a payment to American Samoa in each calendar year during which American Samoa has a refundable EITC designed to substantially increase workforce participation.[501] The amount of the annual payment is the lesser of (1) the cost to American Samoa of such credit each year, or (2) $16 million, indexed for inflation. For each calendar year 2021 through 2025, the provision also directs the Secretary to pay the lesser of (1) American Samoa's expenditures in that year for education efforts with respect to taxpayers and tax return preparers regarding the EITC, or (2) $50,000.

The determination of the cost of the EITC to each territory is determined without taking into account administrative costs.

Explanation of Provision

EITC for Taxpayers with No Qualifying Children

The provision makes permanent the credit structure for the EITC for taxpayers with no qualifying children that currently applies only to taxable years beginning in 2021. Thus, it makes permanent the 15.3 percent credit percentage and increased earned income amounts and beginning amounts of the phaseout range.

The provision also makes permanent the changes to the minimum and maximum age for the EITC for taxpayers with no qualifying children that currently apply only to taxable years beginning in 2021.

Earned Income Lookback

Under the provision, a taxpayer may elect to calculate the taxpayer's EITC using preceding taxable year rather than current taxable year earned income, if the taxpayer's earned income in the preceding year is less than in the current year.

---

[500] Sec. 7530(b).

[501] Sec. 7530(c).

In the case of a joint return, the earned income which is attributable to the taxpayer for the preceding year is the sum of the earned income which is attributable to each spouse for the preceding year.

For administrative purposes, the incorrect use on a return of earned income pursuant to an election under this provision is treated as a mathematical or clerical error. An election under the provision is disregarded for purposes of calculating gross income in the election year.

EITC in the Territories

Under the provision, for each calendar year beginning in 2021, Puerto Rico is provided up to $4,000,000 to pay for the reasonable administrative costs of implementing its EITC.[502]

Under the provision, for each calendar year beginning in 2021, the mirror Code territories are provided up to $200,000 to pay for the reasonable administrative costs of implementing their EITCs.

Under the provision, for each calendar year beginning in 2021, American Samoa is provided up to $200,000 to pay for the reasonable administrative costs of implementing its EITC.[503]

Effective Date

The provision generally applies to taxable years beginning after December 31, 2021.

The provision with respect to the EITC in the territories is effective on the date of enactment for payments made for calendar years beginning after December 31, 2021.

[502] This payment is only required for years in which the Secretary, because Puerto Rico has enacted changes to its EITC designed to substantially increase workforce participation, is required to make payments to Puerto Rico to cover a portion of the cost of its EITC

[503] This payment is only required for years in which the Secretary, because American Samoa has enacted an EITC designed to substantially increase workforce participation, is required to make payments to American Samoa to cover the cost of its EITC.

PART V — EXPANDING ACCESS TO HEALTH COVERAGE AND LOWERING COSTS

1. Improve affordability and reduce premium costs of health insurance for consumers and other provisions to modify the premium assistance credit (secs. 137501-137504, and sec. 137507 of the bill and secs. 36B and 4980H of the Code)

Present Law

In General

A refundable tax credit (the "premium assistance credit") is provided for eligible individuals and families to subsidize the purchase of "qualified health plans,"[504] health insurance plans offered through an American Health Benefit Exchange ("Exchange") created by the Patient Protection and Affordable Care Act ("PPACA").[505] In general, the Treasury Department makes advance payments with respect to the premium assistance credit during the year directly to the insurer, as discussed below.[506] However, eligible individuals may choose to pay their total health insurance premiums without advance payments and to claim the credit for the taxable year on a Federal income tax return.

The premium assistance credit is generally available for individuals (single or joint filers) with household incomes between 100 percent and 400 percent of the Federal poverty level ("FPL") for the applicable family size.[507] For taxable years beginning in 2021 and 2022, eligibility for the premium assistance credit was expanded to individuals with household incomes above 400 percent of FPL.[508]

Household income is defined as the sum of (1) the individual's modified AGI, plus (2) the aggregate modified AGI of all other individuals taken into account in determining the individual's family size (but only if the other individuals are required to file tax returns for the

---

[504] Sec. 36B. Qualified health plans generally must meet certain requirements. Secs. 1301 and 1302 of the PPACA, 42 U.S.C. secs. 18021 and 18022.

[505] Pub. L. No. 111-148, March 23, 2010. The PPACA was modified by the Health Care and Education Reconciliation Act of 2010 ("HCERA"), Pub. L. No. 111-152, Title I, sec. 1001, March 30, 2010. PPACA and HCERA are referred to collectively as the Affordable Care Act ("ACA").

[506] Sec. 1412 of the PPACA, 42 U.S.C sec. 18082.

[507] Sec. 36B(c)(1). Federal poverty level refers to the most recently published poverty guidelines determined by the Secretary of Health and Human Services ("HHS"). Levels for 2021 and previous years are available at https://aspe.hhs.gov/prior-hhs-poverty-guidelines-and-federal-register-references.

Under sec. 36B(c)(1)(B), a taxpayer with household income less than 100 percent of FPL who is an alien lawfully present but is ineligible for Medicaid under title XIX of the Social Security Act by reason of such alien status may be treated as an applicable taxpayer with a household income equal to 100 percent of FPL.

[508] Sec. 36B(c)(1)(E). This temporary expansion was enacted in ARPA, sec. 9661.

taxable year).[509] Modified AGI is defined as AGI increased by (1) any amount excluded from gross income for citizens or residents living abroad,[510] (2) any tax-exempt interest received or accrued during the tax year, and (3) any portion of the individual's Social Security benefits not included in gross income.[511] To be eligible for the premium assistance credit, individuals who are married must file a joint return.[512] Individuals who are listed as dependents on a return are not eligible for the premium assistance credit.

An individual who is eligible for minimum essential coverage from a source other than the individual insurance market generally is not eligible for the premium assistance credit.[513] However, an individual who is offered minimum essential coverage under an employer--sponsored health plan may be eligible for the premium assistance credit if (1) the coverage is either unaffordable or does not provide minimum value, and (2) the individual declines the employer-offered coverage.[514] Thus, an individual who enrolls in an employer--sponsored health plan generally is ineligible for the premium assistance credit even if the coverage is considered unaffordable or does not provide minimum value. Coverage is considered unaffordable if an employee's share of the premium for self-only coverage under the plan exceeds 9.83 percent (for 2021)[515] of the employee's household income. Coverage is considered to not provide minimum value if the plan's share of total allowed costs of plan benefits is less than 60 percent of such costs.

Qualified Small Employer Health Reimbursement Arrangements

Employees and their family members who are provided a qualified small employer health reimbursement arrangement ("QSEHRA") that constitutes affordable coverage are not eligible for the premium assistance credit.[516] The affordability determination for QSEHRAs is similar to the affordability determination for an employer-sponsored health plan. Specifically, a QSEHRA is treated as constituting affordable coverage for a month if an employee's share of the premium for self-only coverage under the second lowest cost silver plan offered in the relevant individual health insurance market does not exceed 9.83 percent (for 2021) of the employee's household income. A QSEHRA is defined in section 9831(d)(2).

---

[509] Sec. 36B(d)(2).

[510] Sec. 911.

[511] Under section 86, only a portion of an individual's Social Security benefits is included in gross income.

[512] Sec. 36B(c)(1)(C).

[513] Sec. 36B(c)(2). Minimum essential coverage is defined in section 5000A(f).

[514] Sec. 36B(c)(2)(C).

[515] Rev. Proc. 2020-36, 2020-32 I.R.B. 244.

[516] Sec. 36B(c)(4)(C).

Amount of Credit

The premium assistance credit amount is generally the lower of (1) the premium for the qualified health plan in which the individual or family enrolls, and (2) the premium for the second lowest cost silver plan in the rating area where the individual resides,[517] reduced by the individual's or family's share of premiums.[518] As shown in Table 1 below, an individual's or a family's share of premiums is a certain percentage of household income. The percentage is indexed annually to the rate of premium growth over income growth for the preceding calendar year.

Prior to amendment by ARPA, for 2021, the share of premiums was 2.07 percent of household income up to 133 percent of FPL and is determined on a sliding scale in a linear manner up to 9.83 percent as household income rises from 133 percent of FPL to 400 percent of FPL.[519] However ARPA reduced or eliminated the individual's or family's share of premiums used in determining the amount of the premium assistance credit for taxable years beginning in 2021 and 2022. ARPA also extended eligibility to individuals and families with household income above 400 percent of FPL. Table 1 below shows an individual's or family's modified share of premiums applicable for 2021 and 2022 under ARPA. The share of premiums ranges from 0.0 percent of household income (up to 150 percent of FPL) up to 8.5 percent of household income, determined on a sliding scale in a linear manner. The share of premiums is not indexed for 2022 under ARPA.

---

[517] A "silver plan" refers to the level of coverage provided by the health plan. PPACA sec. 1302(d), 42 U.S.C. sec. 18022. Most health plans sold through an Exchange are required to meet actuarial value ("AV") standards, among other requirements. AV is a summary measure of a plan's generosity, expressed as a percentage of medical expenses estimated to be paid by the insurer for a standard population and set of allowed charges. Silver-level plans are designed to provide benefits that are actuarially equivalent to 70 percent of the full AV of the benefits provided under the plan. The premium assistance credit looks to the second lowest cost plan of all of the silver plans available in the relevant rating area.

An individual's "rating area" refers to the geographical unit within the State where the individual resides. Insurers may vary individual market premiums based on rating areas, among other factors. See PPACA sec. 1201, 42 U.S.C. 300gg.

[518] Sec. 36B(b). The amount of the premium assistance credit is determined on a monthly basis, and the amount of the credit for a year is the sum of the monthly amounts.

[519] Rev. Proc. 2020-36, 2020-32 I.R.B. 244. The percentages are indexed to the excess of premium growth over income growth for the preceding calendar year. After 2018, if the aggregate amount of premium assistance credits (and cost-sharing reductions under section 1402 of PPACA) exceeds 0.504 percent of the gross domestic product for that year, the percentage of household income is also adjusted to reflect the excess (if any) of premium growth over the rate of growth in the Consumer Price Index for the preceding calendar year. Such an adjustment was not required for 2021.

Table 1.–Household's Share of Premiums (for 2021)

Household income (expressed as a percent of FPL)	Prior to ARPA		Under ARPA	
	Initial percentage of household income*	Final percentage of household income*	Initial percentage of household income*	Final percentage of household income*
Less than 133%	2.07	2.07	0.0	0.0
133% up to 150%	3.10	4.14	0.0	0.0
150% up to 200%	4.14	6.52	0.0	2.0
200% up to 250%	6.52	8.33	2.0	4.0
250% up to 300%	8.33	9.83	4.0	6.0
300% up to and including 400%	9.83	9.83	6.0	8.5
400% and higher	not eligible	not eligible	8.5	8.5

* The initial percentage of household income corresponds to the bottom of the corresponding FPL range, and the final percentage of household income corresponds to the top of the corresponding FPL range.

Advance Payments of the Premium Assistance Credit

As part of the process of enrollment in a qualified health plan through an Exchange, an individual may apply and be approved for advance payments with respect to a premium assistance credit ("advance payments").[520] The individual must provide information on income, family size, changes in marital or family status or income, and citizenship or lawful presence status.[521] Eligibility for advance payments is generally based on the individual's income for the

[520] Secs. 1411 and 1412 of PPACA, 42 U.S.C. secs. 18081 and 18082. Under section 1402 of PPACA, 42 U.S.C sec. 18071, certain individuals eligible for advance premium assistance payments also are eligible for a reduction in their share of medical costs, such as deductibles and copays, under the plan, referred to as reduced cost-sharing. Eligibility for reduced cost-sharing is also determined as part of the Exchange enrollment process. HHS is responsible for rules relating to Exchanges and the eligibility determination process.

[521] Under section 1312(f)(3) of PPACA, 42 U.S.C. sec. 18032(f)(3), an individual may not enroll in a qualified health plan through an Exchange if the individual is not a citizen or national of United States or an alien lawfully present in the United States. Thus, such an individual is not eligible for the premium assistance credit.

taxable year ending two years prior to the enrollment period. The Exchange process is administered by HHS and includes a system through which information provided by the individual is verified using information from the IRS and certain other sources.[522] If an individual is approved for advance payments, the Secretary pays the advance amounts on a monthly basis directly to the issuer of the health plan in which the individual is enrolled. The individual then pays to the issuer of the plan the difference between the advance payment amount and the total premium charged for the plan.

An individual on whose behalf advance payments of the premium assistance credit for a taxable year are made is required to file an income tax return to reconcile the advance payments with the credit that the individual is allowed for the taxable year.[523]

If the advance payments of the premium assistance credit exceed the amount of credit that the individual is allowed, the excess ("excess advance payments") is treated as an additional tax liability on the individual's income tax return for the taxable year (is "recaptured"), subject to a limit on the amount of additional liability in some cases.[524] For an individual with household income below 400 percent of FPL, recapture for a taxable year generally is limited to a specific dollar amount (the "applicable dollar amount") as shown in Table 2 below. One-half of the applicable dollar amount shown in Table 2 applies to an unmarried individual who is not a surviving spouse or filing as a head of household.

---

[522] Under section 6103, returns and return information are confidential and may not be disclosed, except as authorized by the Code, by IRS employees, other Federal employees, State employees, and certain others having access to such information. Under section 6103(l)(21), upon written request of the Secretary of HHS, the IRS is permitted to disclose certain return information for use in determining an individual's eligibility for advance premium assistance payments, reduced cost-sharing, or certain other State health subsidy programs, including a State Medicaid program under title XIX of the Social Secnrity Act, 42 U.S.C. secs. 1396w-1 through 1396w-5, a State's Children's Health Insurance Program under title XXI of the Social Security Act, 42 U.S.C. secs. 1397aa though 1397mm, and a Basic Health Program under section 1331 of PPACA, 42 U.S.C. sec. 18051.

[523] Treas. Reg. sec. 1.6011-8. Under section 6055, health insurance issuers are required to report to the IRS and to the individual the months during a year for which the individual was covered by minimum essential coverage issued by the insurer. In Notices 2019-63 and 2020-76, however, the IRS announced that for 2019 and 2020 it will not assess penalties for the failure to provide the required statement to individuals if certain conditions are met, following the reduction of the individual shared responsibility payment in section 5000A to $0. 2019-51 I.R.B. 1390; 2020-47 I.R.B. 1058.

In addition, under section 36B(f)(3), an Exchange is required to report to the IRS and to the individual the months during a year for which the individual was covered by a qualified health plan purchased through the Exchange; the level of coverage; the name, address, and TIN of the primary insured and each individual covered by the policy; the total premiums paid by the individnal; and, if applicable, advance premium assistance payments made on behalf of the individual.

[524] For a taxable year beginning in 2020, ARPA temporarily removed the requirement that excess advance payments are treated as an additional tax liability on the individual's income tax return for the taxable year. Accordingly, for 2020, no excess advance payment was subject to recapture. Sec. 36B(f)(2)(B)(iii).

Table 2.–Recapture Limits (for 2021)[525]

Household income (expressed as a percent of FPL)	Applicable dollar amount
Less than 200%	$650
At least 200% but less than 300%	$1,600
At least 300% but less than 400%	$2,700

If the advance payments of the premium assistance credit for a taxable year are less than the amount of the credit that the individual is allowed, the additional credit amount is allowed when the individual files an income tax return for the year.

Employer Shared Responsibility Payment

An applicable large employer, as defined below, may be subject to a tax, called an "assessable payment," for a month if one or more of its full-time employees is certified to the employer as receiving for the month a premium assistance credit with respect to health insurance purchased through an Exchange (commonly referred to as the "employer mandate").[526] As discussed below, the amount of the assessable payment depends on whether the employer offers its full-time employees and their dependents the opportunity to enroll in minimum essential coverage under a group health plan sponsored by the employer and, if it does, whether the coverage offered is affordable and provides minimum value.

Definitions of Full-Time Employee and Applicable Large Employer

An applicable large employer generally means, with respect to a calendar year, an employer who employed an average of at least 50 full-time employees on business days during the preceding calendar year. For purposes of these rules, full-time employee means, with respect to any month, an employee who is employed on average at least 30 hours of service per week. Solely for purposes of determining whether an employer is an applicable large employer (that is, whether the employer has at least 50 full-time employees), besides the number of full-time employees, the employer must include the number of its full-time equivalent employees for a month, determined by dividing the aggregate number of hours of service of employees who are not full-time employees for the month by 120. In addition, in determining whether an employer is an applicable large employer, members of the same controlled group, group under common

[525] Rev. Proc. 2020-45, 2020-46 I.R.B. 1016. The applicable dollar amounts are indexed to reflect cost-of-living increases, with the amount of any increase rounded down to the next lowest multiple of $50.

[526] Sec. 4980H.

control, and affiliated service group are treated as a single employer.[527] If the group is an applicable large employer under this test, each member of the group is an applicable large employer even if any member by itself would not be an applicable large employer.

Assessable Payments

If an applicable large employer does not offer coverage or offers coverage to less than 95 percent of its fulltime employees and their dependents under an employer-sponsored plan and at least one fulltime employee is so certified to the employer, the employer may be subject to an assessable payment (for 2021) of $2,700 (divided by 12 and applied on a monthly basis) multiplied by the number of its fulltime employees in excess of 30, regardless of the number of fulltime employees so certified.

Generally, an employee who is offered minimum essential coverage under an employer sponsored plan is not eligible for a premium assistance credit or reduced cost-sharing unless the coverage is unaffordable or fails to provide minimum value. However, if an employer offers coverage to at least 95 percent of its fulltime employees and their dependents under an employer-sponsored plan and at least one fulltime employee is certified as receiving a premium assistance credit or reduced cost-sharing (because the coverage is unaffordable or fails to provide minimum value), the employer may be subject to an assessable payment (for 2021) of $4,060 (divided by 12 and applied on a monthly basis) multiplied by the number of such fulltime employees. However, the assessable payment in this case is capped at the amount that would apply if the employer failed to offer its fulltime employees and their dependents minimum essential coverage.

Income Taxation of Social Security Benefits

Section 86 provides rules for determining what amount, if any, of a taxpayer's Social Security benefits are includible in gross income. Social Security benefits that are not taxed under section 86 are excluded from gross income. For purposes of section 86, Social Security benefits generally include monthly retirement benefits payable under title II of the Social Security Act and tier 1 Railroad Retirement benefits.[528]

Portion of Social Security Benefits Includible in Gross Income

The amount of Social Security benefits includible in gross income is determined under a two-tier system. Taxpayers receiving Social Security benefits are not required to include any portion of such benefits in gross income if their provisional income does not exceed a first-tier threshold, which is $25,000, in the case of unmarried individuals, or $32,000, in the case of

[527] The rules for determining controlled group, group under common control, and affiliated service group under section 414(b), (c), (m), and (o) apply for this purpose.

[528] If a taxpayer's Social Security benefits or Railroad Retirement benefits are offset by worker's compensation benefits, then the amount of the taxpayer's Social Security benefits is increased by the amount of such offset.

married individuals filing jointly.[529] A second--tier threshold for provisional income is $34,000, in the case of unmarried individuals, or $44,000, in the case of married individuals filing joint returns.[530] These thresholds are not indexed for inflation.

If the taxpayer's provisional income exceeds the first-tier threshold but does not exceed the second-tier threshold, then the amount required to be included in gross income is the lesser of: (1) 50 percent of the taxpayer's Social Security benefits, or (2) 50 percent of the excess of the taxpayer's provisional income over the first-tier threshold.

If the amount of provisional income exceeds the second-tier threshold, then the amount required to be included in gross income is the lesser of: (1) 85 percent of the taxpayer's Social Security benefits; or (2) the sum of (a) 85 percent of the excess of the taxpayer's provisional income over the second-tier threshold, plus (b) the smaller of (i) the amount of benefits that would have been included in income if the 50-percent inclusion rule (described in the previous paragraph) were applied, or (ii) one-half of the difference between the taxpayer's second-tier threshold and first-tier threshold.[531]

<u>Treatment of Lump-Sum Payment of Social Security Benefits</u>

In the event of a lump-sum payment of Social Security benefits received during the taxable year that are attributable in any part to prior years, an individual may make an election to compute the taxable amount of the payment of benefits as if the benefits had been received in the prior taxable years to which they are attributable. A Social Security benefit may be attributed to a particular taxable year if the generally applicable payment date for such benefit occurred during the taxable year. If the election is made, the taxpayer will determine the tax for the taxable year of receipt of the lump-sum payment by including in gross income for the current year the sum of the increases in gross income that result solely from taking into account the appropriate portions of the lump-sum payment in the taxable year to which they are attributable.

Unemployment Compensation

[529] In the case of a married individual who files a separate return, the first-tier threshold is generally zero. However, if the individual lives apart from his or her spouse for the entire year, the first-tier threshold is $25,000.

For purposes of these computations, a taxpayer's provisional income is defined as AGI increased by certain amounts, including, generally: (1) tax-exempt interest; (2) excludable interest on educational savings bonds; (3) adoption assistance payments; (4) certain deductible student loan interest; (5) certain excludable foreign-source earned income; (6) certain U.S. possession income; and (7) one-half of the taxpayer's Social Security benefits.

[530] In the case of a married individual who files a separate return, the second-tier threshold is generally zero. However, if the individual lives apart from his or her spouse for the entire year, the second-tier threshold is $34,000.

[531] Special rules apply in some cases. In the case of nonresident individuals who are not U.S. citizens, 85 percent of Social Security benefits are includible in gross income and subject to the 30-percent withholding tax (sec. 871(a)(3)). The taxation of Social Security benefits may also be specified in income tax treaties between the United States and other countries.

Unemployment compensation benefits are includible in gross income.[532] Unemployment compensation is defined as any amount received under a law of the United States or of a State which is in the nature of unemployment compensation.[533]

ARPA provided a temporary special rule in the case of a taxpayer who has received, or has been approved to receive, unemployment compensation (as defined in section 85(b)) for any week during calendar year 2021.[534] Under the rule, for a taxable year beginning in 2021, (i) such a taxpayer is treated as an applicable taxpayer, and (ii) the taxpayer's household income is not taken into account to the extent it exceeds 133 percent of FPL for a family of the size involved. Accordingly, under the provision, a taxpayer receiving unemployment compensation during 2021 and whose household income exceeds 133 percent of FPL may receive a larger premium assistance credit and may by subject to lower recapture than under present law. In addition, a taxpayer receiving unemployment compensation during 2021 whose household income is less than 100 percent of FPL for a family of the size involved may be allowed a premium assistance credit.

Explanation of Provision

Improve Affordability and Reduce Premium Costs of Health Insurance for Consumers

The provision makes permanent the reduction in ARPA of the share of premiums that individuals or households must contribute towards the cost of health insurance in calculating the amount of their premium assistance credit. The provision also makes permanent the expansion in ARPA of eligibility for the premium assistance credit to individuals and families with household incomes above 400 percent of FPL for a family of the size involved, provided the other eligibility criteria are met. The provision permanently repeals indexing of the individual or household's share of premiums used in determining the premium assistance credit.

Modification of Employer-Sponsored Coverage Affordability Test in Health Insurance Premium Tax Credit

The provision lowers the affordability percentage for employer-sponsored plans from 9.83 percent (for 2021) to 8.5 percent. Accordingly, an individual who is offered minimum essential coverage under an employer-sponsored health plan may be eligible for the premium assistance credit if (1) the employee's share of the premium for self-only coverage under the plan exceeds 8.5 percent or does not provide minimum value, and (2) the individual declines the employer-offered coverage.

The provision also lowers the affordability percentage for QSEHRAs from 9.83 percent (for 2021) to 8.5 percent.

---

[532] Sec. 85.

[533] Sec. 85(b); see also Treas. Reg. sec. 1.85-1(b)(1).

[534] Sec. 36B(g).

Under the provision, the 8.5 percent affordability percentages for employer-sponsored plans and QSEHRAs are not indexed for inflation.

Treatment of Lump-Sum Social Security Benefits in Determining Household Income

For purposes of determining household income with respect to the premium assistance credit, the provision excludes from the definition of modified AGI any portion of a lump-sum payment of Social Security benefits received during the taxable year that is attributable to months ending before the beginning of the taxable year. A lump-sum payment of Social Security benefits means any payment of Social Security benefits which constitutes more than one month of benefits. For any taxable year beginning after the termination date described below, a taxpayer may elect to not exclude the portion of a lump-sum payment of Social Security benefits allowed to be excluded under the provision.

The provision applies with respect to the amount of Social Security benefits includible in gross income and the amount of Social Security benefits not includible in gross income (but included in modified AGI for purposes of the premium assistance credit).

Temporary Expansion of Health Insurance Premium Tax Credits for Certain Low-Income Populations

The provision provides temporary rules for the premium assistance credit to certain low-income taxpayers. The temporary rules are effective for taxable years beginning after December 31, 2021 and before the termination date. The termination date is the later of (i) January 1, 2025, or (ii) the date on which the Secretary of Health and Human Services makes a written certification that the Secretary of Health and Human Services has fully implemented the program described in section 1948 of the Social Security Act (relating to the Federal Medicaid program).

First, the provision expands eligibility for the premium assistance credit to individuals and families with household incomes below 100 percent of FPL for a family of the size involved.

Second, the provision expands eligibility for the premium assistance credit to an employee who is offered an affordable employer-sponsored health plan (and an individual who is eligible to enroll in the plan by reason of a relationship to the employee) that provides minimum value if (1) the taxpayer's household income does not exceed 138 percent of FPL for a family of the size involved, and (2) the employee (or individual) declines the employer-offered coverage. The provision also expands eligibility to an employee (or any spouse or dependent of such employee) who is provided an affordable QSEHRA if the employee's household income does not exceed 138 percent of FPL for a family of the size involved.

Third, the provision reduces the recapture limitation for a taxpayer whose household income is less than 200 percent of FPL for a family of the size involved from $650 (for 2021) to $300 ($150 for an unmarried individual who is not a surviving spouse or filing as a head of household).

Finally, the provision provides special rules for certain taxpayers whom the Exchange has determined are low-income. For a taxpayer for any taxable year who would not be required

to file an income tax return but for any requirement to reconcile advance payments, and who an Exchange determines (i) is eligible for advance payments of the premium tax credit for any portion of the taxable year and (ii) such taxpayer's household income is projected to not exceed 138 percent of FPL for a family of the size involved, the taxpayer is not subject to recapture and shall not be required to file such return. An Exchange is required to report to the Secretary and to the taxpayer information necessary to determine that the Exchange made the determinations described above with respect to the taxpayer. The employer shared responsibility provision is modified under the provision to not be applicable if a premium assistance credit is allowed or paid for a taxable year of an employee where an Exchange has determined that the employee's household income for the taxable year is projected to not exceed 138 percent of FPL for a family of the size involved or such employee's household income for the taxable year does not exceed 138 percent of FPL for a family of the size involved.

Extension of Special Rule for Individuals Receiving Unemployment Compensation

The provision temporarily extends the special rule enacted in ARPA for a taxpayer who has received, or has been approved to receive, unemployment compensation (as defined in section 85(b)) for an applicable week.[535] Under the provision, for any week beginning after December 31, 2020, and before January 1, 2026, for the taxable year in which such week begins, such taxpayer is treated as an applicable taxable and such taxpayer's household income is not taken into account to the extent it exceeds 150 percent of FPL for a family of the size involved.

Effective Date

The provisions are effective for taxable years beginning after December 31, 2021.

2. Ensuring affordability of coverage for certain low-income populations (sec. 137505 of the bill).

Present Law

Certain Exchange enrollees may receive cost-sharing reductions (CSRs) that decrease cost-sharing requirements under qualified health plans (QHPs) sold through Exchanges. To be eligible for CSRs, individuals must have annual household incomes between 100% and 250% of FPL, be enrolled in a silver Exchange plan, and meet other criteria. A silver plan is a plan with an actuarial value (AV) of 70%; AV measures a plan's generosity expressed as the percentage of estimated medical expenses paid by the health insurance issuer for a standard population and set of allowed charges.

For eligible individuals, the cost-sharing requirements (for the plans in which they have enrolled, e.g., copayments, coinsurance, and deductibles) are reduced to ensure that the plans cover a certain percentage of allowed health care expenses, on average. The practical effect

[535] Sec. 36B(g).

of this CSR is to increase the AV of the Exchange plan in which the person is enrolled. Under present law, the increased AV by household income FPL tier is as follows:

Household Income Tier By FPL	New AV for CSR Recipients
100% to 150%	94%
Greater than 150% to 200%	87%
Greater than 2005 to 250%	73%

Consumers may enroll in coverage through the exchanges only during specified enrollment periods. Generally, consumers qualify for special enrollment periods (SEPs) for a certain amount of time (e.g., 60 days) after a triggering event. During an SEP, a qualified individual can enroll in or change from one qualified health plan to another.

The ACA generally requires that the private health insurance plans offered through an Exchange are QHPs. To be a certified as a QHP, a plan must be offered by a state-licensed health insurance issuer and must meet specified requirements, including covering the essential health benefits (EHB). Beyond applicable state and federal requirements (including those that apply to plans sold both on and off the Exchanges), plans may differ in terms of specific benefit packages and provider networks offered, and in terms of premium and cost-sharing amounts.

Federal statute and regulations require exchanges to carry out certain consumer outreach and assistance functions. These functions generally include in-person and other forms of outreach and assistance. Each Exchange must have a Navigator program. Navigators are entities whose employees and/or volunteers conduct public outreach and education activities about the exchanges and QHPs; provide impartial information to consumers about their insurance options; help consumers access Exchange coverage, Exchange financial assistance, and/or public program coverage (e.g., Medicaid or CHIP) if they qualify; and refer consumers to any applicable consumer assistance programs as needed, such as state agencies that assist consumers with questions or complaints about their plans. Navigators are funded by the exchanges, via grants provided to qualifying organizations. These grants, and other exchange consumer education and outreach activities, are federally funded for federally facilitated exchanges (FFEs).

Besides facilitating in-person assistance, Exchanges must conduct consumer outreach and education activities that meets specified standards, including regarding accessibility for individuals with disabilities or with limited English proficiency.

Explanation of Provision

The section would amend current law applicable to CSRs to (1) make a temporary change to income eligibility criteria and (2) provide special access for a limited time to individuals with incomes below 138% of FPL. Such individuals would be treated as having household income at 100% of FPL for any month beginning on January 1, 2022 and ending on

December 31, 2022. For plan years 2023 and 2024, the provision would reduce cost-sharing requirements to increase the AV—of the exchange plan in which a specified enrollee is enrolled—to 99%.

This section would create a new federal SEP to allow individuals with household income of less than 138% of FPL who are not otherwise eligible for certain types of "government sponsored program" minimum essential coverage to enroll in Exchange coverage at a CSR level that would be continuous through the end of the plan year.

This section would require QHP issuers to provide certain non-emergency medical transportation services and family planning services and supplies benefits (without any restriction on the choice of a qualified provider) to CSR eligible individuals with household income less than 138% of FPL, via certain plans, in plan year 2024 without any imposition of cost sharing. QHP issuers would be required to include the benefits in their silver level QHPs for which CSRs are applicable.

This section would amend 42 U.S.C. §18041 to require the HHS Secretary to carry out consumer outreach and education activities focused on informing specified individuals in Medicaid non-expansion states about the availability of QHPs and of financial assistance for such Exchange coverage. The specified individuals would be defined as those who are eligible through the ACA Medicaid expansion in states that have not taken up the ACA Medicaid expansion.

For purposes of conducting these outreach activities, $15 million for FY 2022 and $30 million for each of FYs 2023 and 2024 would be appropriated, and would remain available until expended.

The section would also amend 42 U.S.C. §18031 to require the HHS Secretary to obligate $10 million for FY 2022 and $20 million for each of FYs 2023 and 2024, for the purpose of awarding grants to Navigator entities in FFEs. These funds would be obligated from exchange issuer user fee amounts collected, and would remain available until expended.

Effective Date

The provision is effective for any month occurring during the period beginning on January 1, 2022.

3. Establishing a health insurance affordability fund (sec. 137506 of the bill).

Present Law

The ACA, at 42 U.S.C. §18061, established the Transitional Reinsurance Program, which was a temporary federal reinsurance program that provided reimbursement to most individual health insurance issuers that enrolled high-cost enrollees. Under the program, if an enrollee's total claims exceed a specified level (referred to as the attachment point), the issuer would be

paid a proportion of claims costs (referred to as the coinsurance rate) beyond the attachment point until total claims costs reached a cap (referred to as the reinsurance cap). The Transitional Reinsurance Program operated from plan year 2014 through plan year 2016.

Explanation of Provision

This section would establish the "Improve Health Insurance Affordability Fund," which would be used to provide funding to the 50 states and the District of Columbia for specified purposes beginning on January 1, 2023.

The section specifies that states would be required to use any funding it receives from the Fund for one of two purposes: (1) to provide reinsurance payments to issuers with respect to their individual health insurance coverage enrollees, or (2) to provide other types of assistance to reduce out-of-pocket costs (e.g., copayments, coinsurance, and deductibles) for individuals enrolled in QHPs offered through an individual market health insurance exchange and individuals enrolled in plans offered through a Basic Health Plan. Any reinsurance payments would not account for individuals enrolled in grandfathered health plans, transitional plans, student health insurance coverage, or excepted benefits. States must submit an application to the CMS Administrator in order to be eligible for an allocation from the Fund.

This section would appropriate $10 billion in 2023 and each subsequent year for the HHS Secretary to allocate funding to states (including non-expansion states in 2023 and 2024) and would require the HHS Secretary to allocate funding to states by certain deadlines. State allocation amounts would be determined by the HHS Secretary using a formula that assumes all funding would go to reinsurance payments.

This section applies different rules to non-expansion Medicaid states in 2023 and 2024. For 2023 and 2024, states that had not implemented the Medicaid expansion as of January 1 of the prior year would be prevented from submitting an application for an allocation from the Fund for the respective year. Instead, for non-expansion states in 2023 and 2024, the CMS Administrator, in consultation with applicable state authorities, would be required to provide reinsurance payments to issuers in such states with respect to their individual health insurance coverage enrollees.

Effective Date

The fund established under Section 137506 would be used to provide funding beginning on January 1, 2023.

4. Permanent credit for health insurance costs (sec. 137508 of the bill and sec. 35 of the Code)

Present Law

Eligible Coverage Months

An eligible individual is allowed a refundable tax credit for 72.5 percent of the individual's premiums for qualified health insurance of the individual and qualifying family members for each eligible coverage month beginning in the taxable year.[536] The credit is commonly referred to as the health coverage tax credit. The credit is available only with respect to amounts paid by the individual for qualified health insurance. Advance monthly payments paid by the Secretary directly to the health plan administrator are available.[537]

Eligibility for the credit is determined on a monthly basis. In general, an eligible coverage month is any month if (1) the month begins before January 1, 2022, and (2) as of the first day of the month, (i) the individual is an eligible individual; (ii) is covered by qualified health insurance the premium for which is paid by the individual; (iii) does not have other specified coverage; and (iv) is not imprisoned under Federal, State, or local authority. In the case of a joint return, the eligibility requirements are met if at least one spouse satisfies the requirements.

Eligible Individuals

An eligible individual is an individual who is (1) an eligible Trade Adjustment Assistance ("TAA") recipient, (2) an eligible alternative TAA recipient or an eligible reemployment TAA recipient, or (3) an eligible Pension Benefit Guaranty Corporation ("PBGC") pension recipient. In general, an individual is an eligible TAA recipient for a month if the individual (1) receives for any day of the month a trade readjustment allowance under the Trade Act of 1974 or would be eligible to receive such an allowance but for the requirement that the individual exhaust unemployment benefits before being eligible to receive an allowance, and (2) with respect to such allowance, is covered under a required certification. An individual is an eligible alternative TAA recipient or an eligible reemployment TAA recipient for a month if the individual participates in certain programs under the Trade Act of 1974 providing wage supplements and receives a related benefit for the month. Generally, an individual is an eligible PBGC pension recipient for any month if the individual (1) is age 55 or over as of the first day of the month, and (2) receives a benefit for the month, any portion of which is paid by the PBGC. A person who may be claimed as a dependent on another person's tax return is not an eligible individual. In addition, an otherwise eligible individual is not eligible for the credit for a month if, as of the first day of the month, the individual has certain specified coverage, such as certain employer-provided coverage or coverage under certain governmental health programs.

Qualified Health Insurance

Qualified health insurance in respect of which the credit is allowed is: (1) coverage under a COBRA continuation provision;[538] (2) State-based continuation coverage provided by

---

[536] Qualifying family members are the individual's spouse and any dependent for whom the individual is entitled to claim a dependency exemption. Any individual who has certain specified coverage is not a qualifying family member.

[537] Sec. 7527.

[538] As defined in section 9832(d)(1).

the State under a State law that requires such coverage; (3) coverage offered through a qualified State high risk pool; (4) coverage under a health insurance program offered to State employees or a comparable program; (5) coverage through an arrangement entered into by a State and a group health plan, an issuer of health insurance coverage, an administrator, or an employer; (6) coverage offered through a State arrangement with a private sector health care coverage purchasing pool; (7) coverage under a State-operated health plan that does not receive any Federal financial participation; (8) coverage under a group health plan that is available through the employment of the eligible individual's spouse; (9) coverage under individual health insurance[539] (other than coverage purchased through an American Health Benefit Exchange);[540] and (10) coverage under an employee benefit plan funded by a voluntary employee beneficiary association ("VEBA")[541] established pursuant to an order of a bankruptcy court (or by agreement with an authorized representative).[542]

Qualified health insurance does not include any State-based coverage (*i.e.*, coverage described in (2)-(7) in the preceding paragraph) unless the State has elected to have such coverage treated as qualified health insurance and such coverage meets certain consumer-protection requirements.[543] Such State coverage must provide that each qualifying individual is guaranteed enrollment if the individual pays the premium for enrollment or provides a qualified health insurance costs eligibility certificate and pays the remainder of the premium. In addition, the State-based coverage cannot impose any pre-existing condition limitation with respect to qualifying individuals. State-based coverage cannot require a qualifying individual to pay a premium or contribution that is greater than the premium or contribution for a similarly situated individual who is not a qualified individual. Finally, benefits under the State-based coverage must be the same as (or substantially similar to) benefits provided to similarly situated individuals who are not qualifying individuals.

A qualifying individual for this purpose is an eligible individual who seeks to enroll in the State-based coverage and who has aggregate periods of creditable coverage[544] of three months or longer, does not have other specified coverage, and is not imprisoned.

---

[539] For this purpose, "individual health insurance" means any insurance that constitutes medical care offered to individuals other than in connection with a group health plan. Such term does not include Federal- or State-based health insurance coverage.

[540] The premium assistance credit is provided for eligible individuals and families who purchase health insurance through an American Health Benefit Exchange. See sec. 36B.

[541] As defined in section 501(c)(9).

[542] See 11 U.S.C. sec. 1114.

[543] For guidance on how a State elects a health program to be qualified health insurance for purposes of the credit, see Rev. Proc. 2004-12, 2004-1 C.B. 528.

[544] Creditable coverage is determined under section 9801(c).

Qualified health insurance does not include coverage under a flexible spending or similar arrangement or any insurance if substantially all of the coverage is for excepted benefits.

Explanation of Provision

The provision makes the health coverage tax credit permanent (instead of expiring for months beginning on or after January 1, 2022). It also increases the amount of the credit from 72.5 percent of the individual's premiums for qualified health insurance to 80 percent.

Effective Date

The provision is effective for coverage months beginning after December 31, 2021.

PART VI — PATHWAY TO PRACTICE TRAINING PROGRAMS

Present Law

There are a number of programs intended to increase the number of physicians practicing in rural and underserved communities. For example, the Health Resources and Services Administration (HRSA) within the Department of Health and Human Services (HHS), administers a scholarship program, authorized under 42 U.S.C. §293a, the provides scholarships for individuals from disadvantaged backgrounds to attend health professional school, including medical school. This program does not include support for medical school preparation or residency training.

The Department of Defense also offers the Health Professions Scholarship Program for medical and dental students, the program provides scholarships for tuition, fees, other educational expenses (e.g., books), and a monthly living stipend. In exchange for this support, the recipient must spend one year for each year of support received working for the military branch which supported their training.[545]

Programs throughout the federal government make student loan forgiveness benefits available to individuals. In some cases, programs are targeted to health professionals and incur a service commitment.[546] For example, National Health Service Corps, administered by HRSA, provides loan repayment benefits to health professionals, including but not exclusive to physicians, in exchange for providing care in a health professional shortage area, which may include a rural area.[547]

Given HRSA's focus on health care access for underserved populations, the agency annually designates areas or populations as being in shortage or being medically underserved to determine area/population eligibility for certain HRSA programs, such as the National Health Service Corps.[548] HRSA also administers workforce programs that seek to connect individuals from disadvantaged backgrounds to health professions. These include the Health Careers Opportunity Program (HCOP), authorized under 42 U.S.C. §293c, which provides funds to

[545] Air Force Medical Service, "Health Professions Scholarship Program (HPSP) Fact Sheet," June 2021, https://www.airforcemedicine.af.mil/Media-Center/Fact-Sheets/Display/Article/425437/hpsp-fact-sheet/.

[546] CRS Report R43571, *Federal Student Loan Forgiveness and Loan Repayment Programs*.

[547] This program also provides scholarships, and prioritizes individuals from disadvantaged backgrounds when making scholarships awards; the majority of program awards are for loan repayment. See CRS Report R44970, *The National Health Service Corps*.

[548] CRS Infographic IG10015, *Health Professional Shortage Areas (HPSAs)*.

health professional schools to assist with recruiting qualified individuals from disadvantaged backgrounds into health professions and providing enrichment programs and community-based training for HCOP participants.[549] Another HRSA program, the Area Health Education Centers (AHEC), funds medical and nursing schools to provide health care training experiences in rural and underserved areas for those seeking to enter health careers or start clinical practice. In academic year 2019-2020, more than 40 percent of AHEC's participants were from a rural area or come from a disadvantaged background.[550]

Scholarships received by an educational institution on behalf of a student for educational expenses are not tax deductible to the institution under current law (although like other payments for educational expenses, they would generally be included in the institution's revenue). Students, in contrast, may receive a tax benefit from a scholarship. Specifically, students generally do not have to pay tax on a scholarship as long as it is not considered compensation for services (e.g., research, student teaching). Scholarship or fellowship income that is considered compensation for services generally is taxable, unless specifically excluded by law—statutory exceptions include amounts received under the National Health Service Corps Scholarship Program and the Armed Forces Health Professions Scholarship and Financial Assistance program.[551]

Medicare pays hospitals with an approved medical residency program for the direct and indirect costs of a medical residency training program.[552] Direct costs include resident stipends, supervisory physician salaries, and administrative costs. Indirect costs associated with residency programs relate to the higher patient care costs in teaching hospitals relative to non-teaching hospitals. For example, resident-provided care may be more costly due to additional tests that residents may order as part of their training. Medicare uses different formulae for determining payments for direct GME (referred to as Direct Graduate Medical Education or DGME) costs and indirect GME (referred to as Indirect Medical Education or IME) costs—DGME is a lump sum (or pass-through) payment and IME is a per-discharge payment.[553]

Medicare DGME and IME payments to hospitals are not open-ended. Rather, Medicare's GME (DGME and IME) payments to a hospital in a given year are subject to a hospital-specific full-time equivalent (FTE) limit or "cap" for allopathic and osteopathic

[549] U.S. Department of Health and Human Services, "Health Resources and Services Administration: Justification of Estimates for Appropriations Committees FY2022, pp. 101-103.

[550] U.S. Department of Health and Human Services, "Health Resources and Services Administration: Justification of Estimates for Appropriations Committees FY2022, pp. 126-130.

[551] See Internal Revenue Code (IRC) §117(c)(2).

[552] 42 C.F.R. §413.75(b).

[553] See CRS In Focus IF10960, *Medicare Graduate Medical Education Payments: An Overview* or CRS Report R44376, *Federal Support for Graduate Medical Education: An Overview* for details about DGME and IME payment formulas.

residents.[554] The FTE cap is based on the number of FTE residents that a hospital was training in its base year, which is the hospital's most recent cost-reporting period ending on or before December 31, 1996.[555]

1. Establishing rural and underserved pathway to practice training programs for post-baccalaureate students and medical students (sec. 137601 of the bill).

Present Law

No provision.

Explanation of Provision

This section establishes Section 1899C of the Social Security Act for the Rural and Underserved Pathway to Practice Training Program for Post-Baccalaureate and Medical Students. This section incentivizes those from rural and underserved communities to become physicians and to practice in those communities through a scholarship and stipend for qualifying medical students to attend medical school or post-baccalaureate and medical school.

Students eligible for this program include first generation college or professional students; Pell Grant recipients; those who lived in a medically underserved, rural, or health professional shortage areas.

Beginning in 2023, the Secretary shall award 1,000 scholarships per year, which includes tuition, academic fees, textbooks, equipment, and a monthly stipend tied to the amount in for the Armed Forces Health Professions Scholarship Program, which for 2021 is $2,540. The Secretary shall prioritize those students who participated in the Health Careers Opportunity Program, were Area Health Education Scholars, are disadvantaged students as defined by the

[554] Generally, the FTE cap is determined at the hospital level. However, under Medicare GME rules, groups of hospitals may enter into formal affiliation agreements that permit these hospitals to "pool" their FTEs. This permits some hospitals within the affiliated group to reduce their FTE cap and others to increase their FTE cap for purposes of Medicare GME payments as long as the aggregate number of FTEs among the affiliated group remains the same. For further information about Medicare GME affiliated groups and affiliation agreements, see 42 C.F.R. §413.75 and §413.79(f).

[555] 42 U.S.C. §1395g. Generally, Medicare pays hospitals for inpatient services in a given fiscal year based on the Center for Medicare & Medicaid Services' (CMS) prospective estimate of payment rates and eligibility for certain payment adjustments using the most recently available data. Medicare determines the appropriate amount of some payment adjustments based on the cost report data hospitals provide. The Medicare Provider Reimbursement Manual, Chapter 1, Section 102 permits a hospital to choose when its annual cost-reporting period begins and ends, within certain parameters. For the DGME FTE "cap," see 42 U.S.C. §1395ww(h)(4)(F); for the IME FTE "cap," see 42 U.S.C. §1395ww(d)(5)(B)(v).

National Health Service Corps, or attended a Historically Black College or University or minority serving institution.

Upon scholarship acceptance, the student agrees to complete medical school (and post- baccalaureate program as applicable), residency, and practice for at least one year per scholarship year in a health professional shortage area, a medically underserved area, public hospital, or a rural area.

If the student is not compliant with the terms of the scholarship, the student must repay the amounts and the Secretary will collect these repayments with interest, except for the case of hardship.

2. Funding for the Rural and Underserved Pathway to Practice Training Programs for Post-Baccalaureate and Medical Students (sec. 137602 of the bill and new sec. 36G of the Code)

Present Law

The Code does not presently provide a tax credit to educational institutions for the purpose of subsidizing scholarship awards to post-baccalaureate and medical students who agree to practice in certain medically underserved or rural areas after graduation.

Generally, gross income of a scholarship recipient does not include any amount received as a qualified scholarship by a recipient who is a candidate for a degree at an education organization.[556] A "qualified scholarship" means any amount received by an individual as a scholarship or fellowship grant to the extent the individual establishes that, in accordance with the conditions of the grant, such amount was used for qualified tuition and related expenses.

Explanation of Provision

The provision creates a new refundable Pathway to Practice medical scholarship voucher credit for qualified educational institutions. The credit amount for a taxable year is equal to the aggregate amount paid or incurred by a qualified educational institution during the taxable year pursuant to a Pathway to Practice medical scholarship voucher awarded to a qualifying student enrolled at the institution.

Amounts are treated as paid or incurred pursuant to an annual award of a Pathway to Practice medical scholarship voucher only if such amount is paid or incurred in reimbursement, or anticipation of, a qualifying expense and is subject to verification in such manner as the Secretary of Health and Human Services may provide. In the case of any amount credited by a qualified educational institution against a liability owed by the qualifying student to the

[556] Sec. 117. For this purpose, an educational organization is an organization that normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on. Sec. 170(b)(1)(A)(ii).

institution, such amount will be treated as paid by the institution to the student as of the date that the liability would otherwise be due.

The credit allowed to a qualified educational institution for a taxable year with respect to a Pathway to Practice medical scholarship voucher may not exceed the amount of the voucher, which is for qualifying expenses, reduced by any voucher amounts for which credit was allowed in any prior taxable years.

Qualified educational institutions are qualifying medical schools and providers of post-baccalaureate programs that meet the requirements of the Program.[557] A qualifying student is a student to whom the Secretary of Health and Human Services has made an annual award of a Pathway to Practice medical scholarship voucher. An annual award of a Pathway to Practice medical scholarship voucher is an award to a qualifying student for each year of enrollment in a post-baccalaureate program and a qualifying medical school, as appropriate.[558]

Information Sharing

The provision requires the Secretary of Health and Human Services to provide to the Secretary of the Treasury annually such information[559] regarding the Program as the Secretary of the Treasury may require to administer the credit, including information to identify (1) qualifying students and the qualified educational institutions at which such students are enrolled and (2) the amount of each annual award of the Pathway to Practice medical scholarship voucher awarded to each qualifying student at the institution.

Income Exclusion for Medical Scholarship Voucher Recipients

General rules under section 117 apply with respect to the Pathway to Practice medical scholarship vouchers awarded to qualifying students. A scholarship voucher recipient who is a candidate for a degree at an educational organization generally may exclude from gross income any amounts paid or incurred for qualified tuition and related expenses, in accordance with the conditions of the Pathway to Practice medical scholarship voucher.

3. Establishing Rural and Underserved Pathway to Practice Training Programs for Medical Residents (sec. 137603 of the bill)

Present Law

The amount Medicare pays for each FTE—the per-resident amount or PRA—for DGME is based on a hospital's costs for a resident FTE in a base period which is the hospital's cost-reporting period that began during FY1984 (October 1, 1983-September 30, 1984), updated

[557] Section 1899C(b)(2)(A) and (c)(6) of the Social Security Act, as added by this provision.

[558] Section 1899C(d)(3) of the Social Security Act, as added by this provision.

[559] Section 1899C of the Social Security Act, as added by this provision.

by the Consumer Price Index for All Urban Consumers (CPI-U).[560] The IME statute does not explicitly set a PRA since the IME payment is an adjustment to the Medicare inpatient per-discharge payment; however, the IME payment formulae in statute indirectly limits IME payments through use of resident-to-beds and resident-to-average daily census ratios which are subject to the FTE cap.[561]

In some cases, the FTE cap is not absolute—Medicare provides GME funding for *new* medical residency programs sponsored either by a new hospital, or an existing hospital that develops a new residency program, or one that was not training residents during its base period (i.e., the most recent cost-reporting period ending on or before December 31, 1996). For these hospitals and programs, there is a 5-year cap-building period.[562] The PRA for residency programs established after the PRA base period (October 1, 1983-September 30, 1984) is the lower of a hospital's actual costs or the average PRA for all hospitals located in the same geographic area. In comparison, a hospital that already has an FTE cap and wishes to grow its medical residency training program to correspond with the growth of the hospital, its service area, or population served cannot receive additional Medicare GME funding to support additional residents.

Explanation of Provision

This section amends subsection 1886(h)(4)(H) of the SSA by adding a new clause (vii) to incentivize additional residency training by increasing physician residency training positions to certain applicable hospitals that are recognized by the Accreditation Council for Graduate Medical Education (ACGME) for committing to train physicians with additional requirements, such as increased mentorship, structural and cultural competency training, and training in the community. There are 1,000 slots per year for these residency positions, beginning on October 1, 2026.

---

[560] For the DGME PRA, see 42 U.S.C. §1395ww(h)(2)(A).

[561] 42 U.S.C. §1395ww(d)(5)(B).

[562] The Medicare FTE cap for new residency training programs is the highest number of FTE residents in any program year as determined in the fifth year of the new program's existence multiplied by the number of years residents are expected to take to complete the program based on the minimum accredited length for each type of program. CMS considers a number of factors on a case-by-case basis to determine whether a residency program is truly "new." For a more extensive discussion of CMS's perspective on these factors, see CMS, "Medicare Program; Changes to the Hospital Inpatient Prospective Payment Systems for Acute Care Hospitals and Fiscal Year 2010 Rates; and Changes to the Long Term Care Hospital Prospective Payment System and Rate Years 2010 and 2009 Rates," 74 *Federal Register* 43754, August 27, 2009, p. 43908.

4. Administrative funding of the Rural and Underserved Pathway to Practice Training Programs for Post-Baccalaureate Students, Medical Students, and Medical Residents (sec. 137604 of the bill)

Present Law

No provision.

Explanation of Provision.

This section invests $6 million into implementation of the Pathway to Practice program.

Effective Dates

Section 137601 directs awards to begin in 2023; section 137602 is effective for taxable years ending after the date of enactment; section 137603 is effective for cost reporting years on or after October 1, 2026; and section 137604 is effective upon enactment.

PART VII — HIGHER EDUCATION

1. Credit for public university research infrastructure (sec. 137701 of the bill and new sec. 45AA of the Code)

Present Law

General Business Credits

For any taxable year, a taxpayer may be allowed a general business credit under section 38 against income tax, in an amount equal to the sum of the (1) business credit carryforwards carried to such taxable year, (2) the amount of the current year business credit, and (3) the business credit carrybacks carried to such taxable year.

The amount of the current year business credit is the sum of the credits identified in section 38(b)(2). The credit allowed for any taxable year is subject to the income tax liability restrictions under section 38(c).

Charitable Contributions in General

An income tax deduction is permitted for charitable contributions, subject to certain limitations that depend on the type of taxpayer, the property contributed, and the recipient organization.[563] Charitable contributions of cash generally are deductible in the amount contributed.

The Code does not presently allow a general business credit for qualified cash contributions to a public university for research infrastructure.

Percentage Limitations on the Deductible Amount of Charitable Contributions Made in Cash

Contributions by Individuals

For individuals, in any taxable year, the amount deductible as a charitable contribution is limited to a percentage of the taxpayer's contribution base. The contribution base is defined as the taxpayer's adjusted gross income computed without regard to any net operating loss carryback. The applicable percentage of the contribution base varies depending on the type of recipient organization and property contributed.

Contributions by an individual taxpayer of cash and property (other than appreciated capital gain property) to a public charity[564] may not exceed 50 percent of the taxpayer's contribution base. For contributions taken into account for taxable years beginning after

---

[563] Sec. 170.

[564] For this purpose, the term "public charity" means an organization described in section 170(b)(1)(A), *e.g.*, public charities, private foundations other than private non-operating foundations, and certain governmental units.

December 31, 2017, and before January 1, 2026, the percentage limit for contributions by an individual taxpayer of cash to a public charity is increased to 60 percent.[565] A State college or university generally is treated as a public charity for this purpose; as such, a charitable contribution of cash to a State college or university generally qualifies for the percentage limits described in this paragraph.

Contributions by Corporations

For corporations, in any taxable year, charitable contributions generally are not deductible to the extent the aggregate contributions exceed 10 percent of the corporation's taxable income computed with certain modifications.

Contributions by Estates and Trusts

Estates and certain trusts may generally deduct charitable contributions without a percentage limitation.[566]

Carryforwards of Excess Contributions

Charitable contributions that exceed the applicable percentage limitation may be carried forward for up to five years.[567] The amount that may be carried forward from a taxable year ("contribution year") to a succeeding taxable year may not exceed the applicable percentage of the contribution base for the succeeding taxable year less the sum of contributions made in the succeeding taxable year plus contributions made in taxable years prior to the contribution year and treated as paid in the succeeding taxable year under this rule.

Temporary Modifications to Charitable Contribution Limitations

A temporary rule increases the percentage limits for individuals and corporations for certain cash contributions paid during 2020 or 2021.[568]

Explanation of Provision

The provision adds a new public university research infrastructure credit as part of the section 38 general business credit.

---

[565] Sec. 170(b)(1)(G).

[566] Sec. 642(c).

[567] Sec. 170(d).

[568] In general, cash contributions by an individual taxpayer made during 2020 and 2021 to certain public charities are allowed up to the amount by which the taxpayer's contribution base exceeds the deduction for other charitable contributions. In the case of a corporation, the deduction for such contributions is allowed up to 25 percent of the corporation's taxable income. See Pub. L. No. 116-260 (December 27, 2020), Div. EE, sec. 213 (extending section 2205 of the CARES Act, Pub. L. No. 116-136 (March 27, 2020)).

Amount of Credit and Definitions

The credit for a taxable year is an amount equal to 40 percent of the qualified cash contributions made by a taxpayer during the taxable year.[569]

For this purpose, a qualified cash contribution for a taxable year is the aggregate amount contributed in cash by a taxpayer during such taxable year to a certified educational institution in connection with a qualifying project, provided that the contribution would have been treated as a charitable contribution for purposes of the income tax charitable deduction (section 170(c) of the Code), if the credit were not available.[570] A contribution is treated as a qualified cash contribution only to the extent that it is designated as such by a certified educational institution, as outlined below. No other credit or deduction is allowed for a qualified cash contribution for which is credit is allowed under the provision.

The term "qualifying project" means a project to purchase, construct, or improve research infrastructure property. The term "research infrastructure property" means any portion of a property, building, or structure of an eligible educational institution, or any land associated with such property, building, or structure, that is used for research. An "eligible educational institution" is: (1) an institution of higher education (as defined in section 101 or 102(c) of the Higher Education Act of 1965) that is a college or university described in section 511(a)(2)(B) (generally describing State colleges and universities); or (2) an organization described in section 170(b)(1)(A)(iv)[571] or a supporting organization described in section 509(a)(3) to which authority has been delegated by an institution of higher education described in (1), above, for purposes of applying for or administering credit amounts on behalf of such institution.

As indicated above, a qualified cash contribution must be made to a certified educational institution. The term "certified educational institution" means an eligible educational institution that has been allocated a credit amount for a qualifying project, has received a certification for the project (as described below), and designates credit amounts to taxpayers for qualifying cash contributions toward such project (as also described below).

Establishment of Qualifying University Research Infrastructure Program

The provision requires the Secretary, in consultation with the Secretary of Education, to establish the qualifying university research infrastructure program within 180 days of the date of enactment. The program must: (1) certify and allocate credit amounts for qualifying projects

---

[569] No other credit or deduction is allowed for a qualified cash contribution for which a credit is allowed under the provision. In addition, in the case of a trust or estate, rules similar to the rules of section 52(d) (generally relating to the apportionment of the credits between the trust or estate and the beneficiaries) shall apply.

[570] A qualified cash contribution for which a credit is allowed is taken into account in determining the taxpayer's annual percentage limitations for purposes of the income tax charitable deduction under section 170(b).

[571] Section 170(b)(1)(A)(iv) describes certain organizations organized and operated exclusively to receive, hold, invest, and administer property and to make expenditures to or for the benefit of a State college or university.

to eligible educational institutions; and (2) allow certified educational institutions to designate cash contributions for qualifying projects of such institutions as qualified cash contributions.

The total amount of qualifying project credit amounts that may be allocated shall not exceed $500 million for each of calendar years 2022, 2023, 2024, 2025, and 2026, and $0 for each subsequent year. Any portion of this overall limitation that remains unallocated during a calendar year is carried to the succeeding calendar year and added to the limitation allowable for such succeeding year. Credit amounts allocated to any one certified educational institution for all projects shall not exceed $50 million per calendar year.

The Secretary, after consultation with the Secretary of Education, must select applications from eligible education institutions: (1) based on the extent of the expected expansion of the institution's targeted research within disciplines in science, mathematics, engineering, and technology; and (2) in a manner that ensures consideration is given to institutions with full-time student populations of less than 12,000. The provision also requires the Secretary, after consultation with the Secretary of Education, to establish a process by which certified educational institutions must designate cash contributions to such institution as qualified cash contributions.

The aggregate amount of cash contributions which are designated by a certified educational institution as qualifying cash contributions with respect to any qualifying project may not exceed 250 percent of the credit amount allocated by the Secretary. For example: The Secretary allocates a $10 million credit amount to a certified educational institution for a qualifying project. The institution may designate up to $25 million (250 percent of $10 million) in qualifying cash contributions. These qualifying cash contributions, in turn, may generate up to $10 million (40 percent of $25 million) in credits for taxpayers. Thus, each dollar of credit amount is equal to a dollar of credit.

The provision requires disclosure of allocations and designations. The Secretary is required, upon allocating credit amounts to an applicant, to publicly disclose the identity of the applicant and the credit amount allocated to the applicant. Each certified educational institution shall, upon designating contributions of a taxpayer as qualified cash contributions, publicly disclose the identity of the taxpayer and the amount of contributions designated in such time, form, and manner as the Secretary may require.

Regulations and Other Guidance

The provision requires the Secretary, after consultation with the Secretary of Education, to prescribe such regulations and other guidance as may be necessary or appropriate to carry out the purposes of the provision, including regulations for prevention of abuse, establishment of reporting requirements, establishment of selection criteria for applications, and disclosure of allocations.

Penalties for Noncompliance

The provision includes rules that apply if, at any time during the five-year period beginning on the date of the allocation of credit amounts to a certified educational institution, there is a noncompliance event with respect to such credit amounts. In general, in the case of a

noncompliance event, any cash contribution designated as a qualifying cash contribution with respect to a qualifying project for which such credit amounts were allocated shall be treated as unrelated business taxable income (within the meaning of section 512) of the certified educational institution. In addition, where (1) there is a failure to designate cash contributions as qualified cash contributions within the two years after December 31 of the year in which the credit amount was allocated (as described below), and (2) the Secretary identified such unused credits during a review by the Secretary (as also described below), the Secretary shall reallocate such unused credit amounts to other certified education institutions in lieu of imposing the general rule described in the preceding sentence.

The term "noncompliance event" means, with respect to a credit amount allocated to a certified educational institution: (1) cash contributions equaling the amount of such credit amount are not designated as qualified cash contributions within two years after December 31 of the year such credit amount is allocated; (2) a qualifying project with respect to which such credit amount was allocated is not placed in service within either (a) four years after December 31 of the year such credit amount is allocated or (b) a period of time that the Secretary determines is appropriate; or (3) the research infrastructure property placed in service as part of a qualifying project with respect to which such credit amount was allocated ceases to be used for research within five years after such property is placed in service.

Review and Reallocation of Credit Amounts

Not later than five years after the date of enactment, the Secretary shall review the credit amounts allocated under the provision. The Secretary may reallocate credit amounts allocated under the provision if the Secretary determines, as of the date of the review, that such credit amounts are subject to a noncompliance event. If the Secretary determines that credits are available for reallocation, the Secretary is authorized to conduct an additional program for applications for certification, but the Secretary shall not certify any project, or reallocate any credit amount after December 31, 2031.

Termination

The provision does not apply to qualified cash contributions made after December 31, 2033.

Effective Date

The provision is effective for qualified cash contributions made after December 31, 2021.

2. Modification of excise tax on investment income of private colleges and universities (sec. 137702 of the bill and sec. 4968 of the Code)

Present Law

Section 4968 imposes an excise tax on an applicable educational institution for each taxable year equal to 1.4 percent of the net investment income of the institution for the taxable

year. Net investment income is determined using rules similar to the rules of section 4940(c) (relating to the net investment income of a private foundation).

An applicable educational institution is an eligible educational institution (as defined in section 25A):[572] (1) that has at least 500 tuition-paying students during the preceding taxable year; (2) more than 50 percent of the tuition-paying students of which are located in the United States; (3) that is not described in the first section of section 511(a)(2)(B) (generally describing State colleges and universities); and (4) the aggregate fair market value of the assets of which at the end of the preceding taxable year (other than those assets that are used directly in carrying out the institution's exempt purpose)[573] is at least $500,000 per student. For these purposes, the number of students of an institution is based on the average daily number of full-time students attending the institution, with part-time students being taken into account on a full-time student equivalent basis.

For purposes of determining whether an educational institution meets the asset-per-student threshold[574] and for purposes of determining net investment income, assets and net investment income of a related organization with respect to the educational institution are treated as assets and net investment income, respectively, of the educational institution, except that:

- No such amount is taken into account with respect to more than one educational institution; and
- Unless the related organization is controlled by the educational institution or is a supporting organization (described in section 509(a)(3)) with respect to the institution for the taxable year, assets and net investment income that are not intended or available for the use or benefit of the educational institution are not taken into account. For example, assets of a related organization that are earmarked or restricted for (or fairly attributable to) the educational institution would be treated as assets of the educational institution, whereas assets of a related organization that are held for unrelated purposes (and are not fairly attributable to the educational institution) would be disregarded.

An organization is treated as related to the institution for this purpose if the organization: (1) controls, or is controlled by, the institution; (2) is controlled by one or more

[572] Section 25A(f)(2) defines an eligible educational institution as an institution that (1) is described in section 481 of the Higher Education Act of 1965 (20 U.S.C. sec. 1088), as in effect on August 5, 1977, and (2) is eligible to participate in a program under title IV of such Act.

[573] Assets used directly in carrying out the institution's exempt purpose include, for example, classroom buildings and physical facilities used for educational activities and office equipment or other administrative assets used by employees of the institution in carrying out exempt activities, among other assets.

[574] In cross-referencing the asset-per-student threshold for this purpose, section 4968(d)(1) includes a reference to subsection "(b)(1)(C)" that should instead read "(b)(1)(D)." A clerical correction may be necessary to correct this cross-reference.

persons that control the institution; or (3) is a supported organization[575] or a supporting organization[576] during the taxable year with respect to the institution.

Explanation of Provision

Phaseout of Excise Tax

The provision provides for a phaseout of the section 4968 excise tax for certain institutions providing qualified aid awards. The amount of excise tax determined under section 4968(a) (without regard to the phaseout rules) is reduced (not below zero) by the amount that bears the same ratio to such amount of tax as (1) the excess (if any) of (a) the aggregate amount of qualified aid awards provided by the institution to its first-time, full-time undergraduate students for academic periods beginning during the taxable year, over (b) an amount equal to 20 percent of the aggregate undergraduate tuition and fees received by the institution from first-time, full-time undergraduate students for such academic periods, bears to (2) an amount equal to 13 percent of such aggregate undergraduate tuition and fees so received.

For this purpose, the term "first-time, full-time undergraduate student" has the same meaning as when used in section 132 of the Higher Education Act of 1965.[577] The term "qualified aid awards" means, with respect to an applicable educational institution, grants and scholarships to the extent used for undergraduate tuition and fees. The term "undergraduate tuition and fees" means, with respect to any institution, the tuition and fees required for the enrollment or attendance of a student as an undergraduate student at the institution.

To qualify for the excise tax phaseout described above, an institution must meet certain reporting requirements. The institution must furnish to the Secretary, and make widely available, a statement detailing the average aggregate amount of Federal student loans received by a student for attendance at the institution, averaged among each of the following groups of first-time, full-time undergraduate students who during the taxable year completed a course of study for which the institution awarded a baccalaureate degree: (1) all such students; (2) the students who have been awarded a Federal Pell Grant under subpart 1 of part A of title IV of the Higher Education Act of 1965 for attendance at the institution; (3) the students who received work-study assistance under part C of title IV of such Act for attendance at such institution; and (4) the students who were provided such Federal student loans. For this purpose, the term "Federal student loans" means a loan made under part D of title IV of the Higher Education Act of 1965, except such term does not include a Federal Direct PLUS Loan made on behalf of a dependent student. The statement must be furnished at such time and in such form and manner, and made widely available, under such regulations as the Secretary may prescribe.

Example.–Institution A is an applicable educational institution. Its excise tax liability computed under section 4968(a) (without regard to the phaseout rules) for taxable year 2023 is

---

[575] Sec. 509(f)(3).

[576] Sec. 509(a)(3).

[577] 20 U.S.C. 1015a.

$2 million. Institution A provides $25 million in qualified aid awards to its first-time, full-time undergraduate students for academic periods beginning during the taxable year. Institution A receives $100 million in aggregate undergraduate tuition and fees from its first-time, full-time undergraduate students for such academic periods. Because Institution A satisfied the above-described reporting requirements, it is eligible to reduce its excise tax liability under the provision. To compute Institution A's reduction in excise tax liability, one must first determine the ratio of (a) the excess of its qualified aid awards in excess of 20 percent of its undergraduate tuition and fees to (b) 13 percent of such tuition and fees. This ratio can be expressed as follows: ($25 million - (20% of $100 million, or $20 million)) / (13% of $100 million, or $13 million) = 5/13. This ratio is then applied to the amount of Institution A's excise tax liability to determine the amount of Institution A's reduction in tax liability ($2 million excise tax liability x (5 / 13) = $769,231 phaseout of excise tax liability). Institution A could fully phase out its $2 million excise tax liability by making qualified aid awards equal to or greater than 33 percent of its aggregate undergraduate tuition and fees, or $33 million (($33 million - (20% of $100 million, or $20 million)) / (13% of $100 million, or $13 million) = 13/13, or 1).

Inflation Adjustment and Clarification

In the case of any taxable year beginning after 2022, the $500,000-per-student asset threshold used for determining whether an institution is an applicable educational institution is adjusted for inflation. In addition, the requirement that an applicable educational institution must have had at least 500 tuition-paying students during the preceding taxable year is clarified to apply only to tuition-paying students below the graduate level. Thus, for example, the excise tax would not apply to a graduate-only institution.

Effective Date

The provision is effective for taxable years beginning after December 31, 2021.

3. Treatment of Federal Pell Grants for income tax purposes (sec. 137703 of the bill and secs. 25A and 117 of the Code)

Present Law

Qualified Scholarships

Present law provides an exclusion from gross income for amounts received as a qualified scholarship by an individual who is a candidate for a degree at a qualifying educational organization.[578] In general, a qualified scholarship is any amount received by such an individual as a scholarship or fellowship grant if the amount is used for qualified tuition and related expenses.

Qualified tuition and related expenses include tuition and fees required for enrollment or attendance, or fees, books, supplies, and equipment required for courses of instruction, at the

[578] Sec. 117.

qualifying educational organization.[579] This definition does not include regular living expenses, such as room and board. A qualifying educational organization is an educational organization that normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on.[580]

The exclusion for qualified scholarships does not apply to any amount received by a student that represents payment for teaching, research, or other services by the student required as a condition for receiving the scholarship.[581] Instead, amounts received as a qualified scholarship that constitute payments for such services are included in gross income and wages. An exception to this rule applies in the case of the National Health Services Corps Scholarship Program, the Armed Forces Health Professions Scholarship and Financial Assistance Program, and a comprehensive student work-learning-service program operated by a work college. Amounts received as a qualified scholarship that represent payment for teaching, research, or other services by the student that are required under these programs is excluded from gross income and wages.

American Opportunity Tax Credit and Lifetime Learning Credit

The American Opportunity Tax Credit ("AOTC") is a partially refundable income tax credit for certain costs associated with postsecondary education. The amount of the AOTC is 100 percent of the first $2,000 of qualifying expenses and 25 percent of the next $2,000 of these expenses. The AOTC is determined on a per-student basis, with a maximum credit of $2,500 for any single eligible student.[582] As an example of the per-student calculation, a taxpayer who pays $4,000 or more of qualified expenses for each of two eligible students may, subject to other AOTC rules, be allowed a credit of $5,000.

Expenses for which the credit are allowed are qualified tuition and related expenses that an individual pays in the taxable year for education furnished in any academic period that begins in that year to an eligible student for whom an election is in effect for the year.[583]

Qualified tuition and related expenses are tuition, fees, and course materials required for the taxpayer's, the taxpayer's spouse's, or the taxpayer's dependent's enrollment or attendance at an eligible educational institution for courses of instruction.[584] Qualified tuition and related expenses do not, however, include (1) expenses for any course or other education involving sports, games, or hobbies unless the course or other education is part of the

---

[579] Sec. 117(b)(2).

[580] Sec. 117(a); sec. 170(b)(1)(A)(ii).

[581] Sec. 117(c).

[582] See Treas. Reg. sec. 1.25A-3(b).

[583] Sec. 25A(a)(1), (b)(1).

[584] Sec. 25A(f)(1)(A), (D).

individual's degree program or (2) student activity fees, athletic fees, insurance expenses, or other expenses unrelated to an individual's academic course of instruction.[585] Examples of nonqualifying expenses are room and board and transportation expenses.[586]

The Lifetime Learning Credit (also in section 25A) generally allows a taxpayer a 20-percent credit for up to $10,0000 in qualified tuition and related expenses that the taxpayer pays during a taxable year for education furnished in an academic period beginning that year.[587] Qualified tuition and related expenses taken into account for the AOTC may not be taken into account for determining the Lifetime Learning Credit.[588]

For the purpose of determining the amount of the AOTC and the Lifetime Learning Credit, qualified tuition and related expenses that may be taken into account for an individual for any academic period must be reduced by the amount of tax-free educational assistance that is paid for the benefit of that individual and is allocable to that period.[589] For this purpose, tax-free educational assistance means a qualified scholarship that is excludable from gross income under section 117; a veterans or member-of-the-armed-forces educational assistance allowance under certain provisions of the U.S. Code; employer-provided educational assistance that is excludable from income under section 127; or any other educational assistance that is excludable from gross income (other than as a gift, bequest, devise, or inheritance within the meaning of section 102(a)).[590]

Explanation of Provision

The provision expands the definition of a qualified scholarship excludable from gross income to include any amount received by an individual as a Federal Pell grant under section 401 of the Higher Education Act of 1965. To the extent Federal Pell grants are used for qualified tuition and related expenses, they are excluded from gross income under present law. To the extent Federal Pell grants are used for expenses that are not qualified tuition and related expenses, such as room and board, the provision would exclude such amounts from gross income.

---

[585] Sec. 25A(f)(1)(B), (C).

[586] See Treas. Reg. sec. 1.25A-2(d)(3).

[587] Sec. 25A(a)(2), (c). In contrast with the AOTC, the Lifetime Learning Credit is a per-taxpayer (rather than per-student) credit. As a consequence, the maximum Lifetime Learning Credit is $2,000. In contrast with the AOTC scope of qualifying expenses, qualified tuition and related expenses for the Lifetime Learning Credit do not include course materials. See sec. 25A(f)(1)(D). By contrast, for the Lifetime Learning Credit, solely for purposes of the Lifetime Learning Credit, qualified tuition and related expenses includes required tuition and fees with respect to any course of instruction at an eligible educational institution to acquire or improve job skills of the individual. Sec. 25A(c)(2)(B).

[588] Sec. 25A(c)(2)(A).

[589] Secs. 25A(g)(2); Treas. Reg. sec. 1.25A-5(c).

[590] Treas. Reg. sec. 1.25A-5(c)(1).

Under the provision, the amount of expenses eligible for the AOTC or the Lifetime Learning Credit shall not be reduced by any amount paid for the benefit of an individual as a Federal Pell grant.

Effective Date

The amendments made by the provision shall apply to taxable years beginning after December 31, 2021.

4. Repeal of denial of American Opportunity Tax Credit on basis of felony drug conviction (sec. 137704 of the bill and sec. 25A of the Code)

Present Law

In General

The American Opportunity Tax Credit ("AOTC") is a partially refundable income tax credit for certain costs associated with postsecondary education.[591] The amount of the AOTC is 100 percent of the first $2,000 of qualifying expenses and 25 percent of the next $2,000 of these expenses.

The AOTC is determined on a per-student basis, with a maximum credit of $2,500 for any single eligible student.[592] As an example of the per-student calculation, a taxpayer who pays $4,000 or more of qualified expenses for each of two eligible students may, subject to other AOTC rules, be allowed a credit of $5,000.

Expenses for which the credit are allowed are qualified tuition and related expenses that an individual pays in the taxable year for education furnished in any academic period that begins in that year to an eligible student for whom an election is in effect for the year.[593]

Qualified tuition and related expenses are tuition, fees, and course materials required for the taxpayer's, the taxpayer's spouse's, or the taxpayer's dependent's enrollment or attendance at an eligible educational institution for courses of instruction.[594] Qualified tuition

[591] Sec. 25A.

[592] See Treas. Reg. sec. 1.25A-3(b).

[593] Sec. 25A(a)(1), (b)(1). Generally, the AOTC is allowed only for qualified tuition and related expenses that are paid for an academic period that begins in the year of payment. Sec. 25A(b)(1). For example, under this rule the credit would not be allowed for a payment in December 2020 for a winter semester beginning in January 2021. Under a special prepayment rule, if a taxpayer pays qualified tuition and related expenses during a year for an academic period that starts in the first three months of the next year, that academic period is treated as beginning during the earlier year of payment. Sec. 25A(g)(4).

[594] Sec. 25A(f)(1)(A), (D). For the purpose of determining the amount of the AOTC, qualified tuition and related expenses that may be taken into account for an individual for any academic period must be reduced by the amount of tax-free educational assistance that is paid for the benefit of that individual and is allocable to that period. Sec. 25A(g). For this purpose, tax-free educational assistance means a qualified scholarship that is excludable from

and related expenses do not, however, include (1) expenses for any course or other education involving sports, games, or hobbies unless the course or other education is part of the individual's degree program or (2) student activity fees, athletic fees, insurance expenses, or other expenses unrelated to an individual's academic course of instruction.[595] Examples of nonqualifying expenses are room and board and transportation expenses.[596]

Income-Based Phaseout and Refundability

The AOTC is reduced or eliminated for taxpayers with incomes above certain levels. For a taxpayer other than a married individual filing a joint return, the amount of the AOTC otherwise allowed is reduced ratably over a $10,000 phaseout range by the excess of the taxpayer's modified AGI over $80,000. For a taxpayer that does not file a joint return, therefore, the credit is fully phased out at $90,000 of modified AGI. The phaseout range for a married taxpayer filing a joint return is $160,000 to $180,000 of modified AGI.[597] For purposes of the phaseout, modified AGI means AGI increased by any amount excluded from gross income under section 911 (foreign earned income exclusion), section 931 (exclusion for a bona fide resident of American Samoa), or section 933 (exclusion for a bona fide resident of Puerto Rico).[598]

Forty percent of the amount of the AOTC otherwise determined (after application of any income-based reduction) is treated as a refundable credit except in the case of a taxpayer who is a child to whom the section 1(g) "kiddie tax" applies.[599]

Restrictions

The AOTC is subject to several restrictions in addition to the dollar limitations and the income-based phaseout. The credit may be claimed in respect of an eligible student for only four taxable years.[600] The AOTC is allowed for a taxable year in respect of the qualified tuition and related expenses of an individual only if the individual is an eligible student for at least one academic period that starts during that year. The AOTC is allowed for a taxable year in respect of an eligible student's qualified tuition and related expenses only if the student has not already

---

gross income under section 117; a veterans or member-of-the-armed-forces educational assistance allowance under certain provisions of the U.S. Code; employer-provided educational assistance that is excludable from income under section 127; or any other educational assistance that is excludable from gross income (other than as a gift, bequest, devise, or inheritance within the meaning of section 102(a)).

[595] Sec. 25A(f)(1)(B), (C).

[596] See Treas. Reg. sec. 1.25A-2(d)(3).

[597] Sec. 25A(d)(1).

[598] Sec. 25A(d)(2).

[599] Sec. 25A(i).

[600] Sec. 25A(b)(2).

completed (before the beginning of the year) the first four years of post-secondary education at an eligible educational institution.

The credit is not allowed for qualified tuition and related expenses for a student's enrollment or attendance for any academic period if the student has been convicted of a Federal or State felony drug possession or distribution offense before the end of the taxable year with or within which the academic period ends.[601]

A taxpayer who is a married individual (within the meaning of section 7703) may claim the AOTC in a taxable year only if the taxpayer and the taxpayer's spouse file a joint return for that year.[602] A taxpayer who is a nonresident alien individual for any portion of the taxable year may claim the AOTC for that year only if the individual is treated as a resident alien for the year because an election is made under section 6013(g) or (h) (resident alien election for certain married individuals).[603]

The AOTC is allowed only if certain identification requirements related to the taxpayer, the student, and the educational institution are satisfied and only if the taxpayer receives a payee statement from the educational institution to which the qualified tuition and related expenses are paid.[604]

Rules for Eligible Students and Eligible Educational Institutions

For purposes of the rules for determining the amount of the AOTC and the rules limiting the AOTC, an eligible student is, for any academic period, a student who carries at least half the normal full-time workload for the course of study the student is pursuing and who satisfies certain requirements prescribed by the Higher Education Act of 1965 for eligibility for Federal grants, loans, and work assistance.[605]

An eligible educational institution is an institution that is described in section 481 of the Higher Education Act of 1965[606] as in effect on August 5, 1997 (generally all accredited public, nonprofit, and private postsecondary institutions) and that participates or is eligible to participate in a Federal financial aid program under title IV of the Higher Education Act of 1965.[607]

---

[601] Sec. 25A(b)(2)(D).

[602] Sec. 25A(g)(6).

[603] Sec. 25A(g)(7).

[604] See sec. 25A(g)(1), (g)(8). Payee statements generally are provided on a Form 1098-T. Prop. Treas. Reg. sec. 1.25A-1(f); Treas. Reg. sec. 1.6050S-1(b)(2).

[605] Sec. 25A(b)(3).

[606] 20 U.S.C. sec. 1088.

[607] Sec. 25A(f)(2); Treas. Reg. sec. 1.25A-2(b)(1).

Disallowance for Prior Fraudulent, Reckless, or Improper Claims

The AOTC is disallowed for certain periods after a taxpayer has made a fraudulent, reckless, or other improper claim for the credit.[608] If there is a final determination that a taxpayer's claim of the AOTC is fraudulent, the taxpayer is not allowed the AOTC for the 10 taxable years after the year of the fraudulent claim. If there is a final determination that a taxpayer's claim of the AOTC is due to reckless or intentional disregard of rules and regulations, the taxpayer is not allowed the AOTC for the two taxable years after the reckless claim. If a taxpayer makes an AOTC claim that is not determined to be fraudulent or reckless but that the IRS denies by notice of deficiency, the taxpayer is not allowed the AOTC for any subsequent year unless the taxpayer provides such information that the Secretary may require to demonstrate eligibility for the credit.

Explanation of Provision

The provision repeals the restriction that the AOTC is not allowed for qualified tuition and related expenses for a student's enrollment or attendance for any academic period if the student has been convicted of a Federal or State felony drug possession or distribution offense before the end of the taxable year with or within which the academic period ends.

Effective Date

The amendments made by the provision shall apply to taxable years beginning after December 31, 2021.

[608] Sec. 25A(b)(4).

SUBTITLE I — RESPONSIBLY FUNDING OUR PRIORITIES

PART I — CORPORATE AND INTERNATIONAL TAX REFORMS

A. Corporate Tax Rate

1. Increase in corporate tax rate (sec. 138101 of the bill and sec. 11 of the Code)

Present Law

In General

Corporate taxable income is generally subject to a tax rate of 21 percent.[609] While no separate rate structure exists for corporate capital gains, a corporation may not deduct the amount of capital losses in excess of capital gains for any taxable year.

Dividends-Received Deduction

Corporations are allowed a deduction with respect to dividends received from other taxable domestic corporations.[610] The amount of the deduction is generally equal to 50 percent of the dividend received.

In the case of any dividend received from a 20-percent owned corporation, the amount of the deduction is equal to 65 percent of the dividend received.[611] The term "20-percent owned corporation" means any corporation if 20 percent or more of the stock of such corporation (by vote and value) is owned by the taxpayer. For this purpose, certain preferred stock is not taken into account.

In the case of a dividend received from a corporation that is a member of the same affiliated group, a corporation is generally allowed a deduction equal to 100 percent of the dividend received.[612]

Explanation of Provision

Corporate Tax Rate

The provision taxes corporate taxable income under a three-step graduated rate structure. The top corporate tax rate is 26.5 percent on taxable income in excess of $5,000,000. The corporate taxable income brackets and tax rates are as set forth in the table below.

---

[609] Sec. 11.

[610] Sec. 243(a).

[611] Sec. 243(c).

[612] Sec. 243(a)(3) and (b)(1). For this purpose, the term "affiliated group" generally has the meaning given such term by section 1504(a). Sec. 243(b)(2).

Taxable Income	Tax rate (percent)
Not over $400,000	18
Over $400,000 but not over $5,000,000	21
Over $5,000,000	26.5

An additional three-percent tax is imposed on a corporation's taxable income in excess of $10,000,000. The maximum additional tax is $287,000.

Certain personal service corporations[613] pay tax on their entire taxable income at the rate of 26.5 percent.

In addition, for taxpayers subject to the normalization method of accounting (*e.g.*, regulated public utilities), the provision clarifies the normalization of the tax reserve deficit resulting from the change in the corporate income tax rate structure (with respect to prior depreciation or recovery allowances taken on assets placed in service as of the day before the corporate rate change takes effect).

The tax reserve deficit is the difference in the reserve for deferred taxes as of the day before the corporate rate change takes effect compared to what the reserve would have been if the corporate rate change had been in effect for all prior periods. If a tax reserve deficit is reduced less rapidly or to a lesser extent than such reserve would be reduced under the average rate assumption method, the taxpayer will not be treated as using a normalization method with respect to the corporate rate change. If the taxpayer does not use a normalization method of accounting for the corporate rate change, such taxpayer will not be treated as using a normalization method of accounting for purposes of section 168(f)(2) and (i)(9)(C).

The average rate assumption method reduces the tax reserve deficit over the remaining regulatory lives of the property that gave rise to the reserve for deferred taxes during the years in which the deferred tax reserve related to such property is reversing. Under this method, the tax reserve deficit is reduced as the timing differences (*i.e.*, differences between tax depreciation and regulatory depreciation with respect to the property) reverse over the remaining life of the asset. The reversal of timing differences generally occurs when the amount of the tax depreciation taken with respect to an asset is less than the amount of the regulatory depreciation taken with respect to the asset. To ensure that the deferred tax reserve, including the tax reserve deficit, is reduced to zero at the end of the regulatory life of the asset that generated the reserve, the amount of the timing difference which reverses during a taxable year is multiplied by the ratio of (1) the aggregate deferred taxes as of the beginning of the period in question, to (2) the aggregate timing differences for the property as of the beginning of the period in question.

Instead of the average rate assumption method, a taxpayer may also use the alternative method as its normalization method if certain requirements are met. If, as of the first

[613] As defined in section 448(d)(2).

day of the taxable year that includes the date of enactment, (i) the taxpayer was required by a regulatory agency to compute depreciation for public utility property on the basis of an average life or composite rate method, and (ii) the taxpayer's books and underlying records do not contain the vintage account data necessary to apply the average rate assumption method,[614] the taxpayer is treated as using a normalization method of accounting if, with respect to such jurisdiction, the taxpayer uses the alternative method for public utility property that is subject to the regulatory authority for that jurisdiction.[615] Under the alternative method, the taxpayer (i) computes the tax reserve deficit on all public utility property included in the plant account based on the weighted average life or composite rate used to compute depreciation for regulatory purposes, and (ii) reduces the tax reserve deficit ratably over the remaining regulatory life of the property.[616]

The Secretary is directed to issue regulations or other guidance the Secretary determines is necessary or appropriate to carry out the normalization requirements, including regulations or other guidance to provide appropriate coordination between the provision, section 13001(d) of Public Law 115-97, and section 203(e) of the Tax Reform Act of 1986.[617]

Dividends-Received Deduction

The provision increases the 50 percent dividends-received deduction to 60 percent and the 65 percent dividends-received deduction to 72.5 percent.

Effective Date

The provision is effective for taxable years beginning after December 31, 2021.

---

[614] See, *e.g.*, in the case of corporate tax rate reductions, sec. 2.05 of Rev. Proc. 88-12, 1988-1 C.B. 637, and secs. 2.07 and 2.08 of Rev. Proc. 2020-39, 2020-36 I.R.B. 546.

[615] If a taxpayer is subject to the jurisdiction of more than one regulatory body, the taxpayer may use a single method, provided that the regulatory bodies agree. See sec. 4.01(5) of Rev. Proc. 2020-39, 2020-36 I.R.B. 546.

[616] See, *e.g.*, in the case of corporate tax rate reductions, sec 4 of Rev. Proc. 88-12, 1988-1 C.B. 637, and sec. 2.08 of Rev. Proc. 2020-39, 2020-36 I.R.B. 546.

[617] Pub. L. No. 99-514.

B. Limitations on Deduction for Interest Expense

1. Limitations on deduction for interest expense (sec. 138111 of the bill and new sec. 163(n) of the Code)

Present Law

Limitation on Deduction of Business Interest Expense

Interest paid or accrued by a business generally is deductible in the computation of taxable income, subject to a number of limitations.[618] In particular, the deduction for business interest expense[619] is generally limited to the sum of (1) business interest income of the taxpayer for the taxable year,[620] (2) 30 percent of the adjusted taxable income[621] of the taxpayer for the taxable year (not less than zero), and (3) the floor plan financing interest[622] of the taxpayer for

---

[618] Sec. 163(a). Additional limitations include: denial of the deduction for the disqualified portion of the original issue discount on an applicable high yield discount obligation (sec. 163(e)(5)), denial of deduction for interest on certain obligations not in registered form (sec. 163(f)), reduction of the deduction for interest on indebtedness with respect to which a mortgage credit certificate has been issued under section 25 (sec. 163(g)), disallowance of deduction for interest on debt with respect to certain life insurance contracts (sec. 264(a)), and disallowance of deduction for interest relating to tax-exempt income (sec. 265(a)(2)). Interest may also be subject to capitalization. See, *e.g.*, secs. 263A(f) and 461(g). Section 385 also may recharacterize certain debt instruments as equity, effectively denying the deductibility of certain payments as nondeductible dividends.

[619] Business interest means any interest paid or accrued on indebtedness properly allocable to a trade or business and does not include investment interest (within the meaning of section 163(d)). Sec. 163(j)(5). Section 163(j) applies only to business interest that would otherwise be deductible in the current taxable year, absent the application of section 163(j). Treas. Reg. sec. 1.163(j)-3(b)(1). Thus, section 163(j) applies after the application of provisions that subject interest to deferral, capitalization, or other limitation (*e.g.*, secs. 163(e)(3), 163(e)(5)(A)(ii), 246A, 263A, 263(g), 267, 1277, and 1282), but before application of sections 461(l), 465, and 469. See Treas. Reg. secs. 1.163(j)-3(b)(2)-(6).

[620] Business interest income means the amount of interest includible in the gross income of the taxpayer for the taxable year that is properly allocable to a trade or business and does not include investment income (within the meaning of section 163(d)). Sec. 163(j)(6).

[621] Adjusted taxable income means the taxable income of the taxpayer computed without regard to: (1) any item of income, gain, deduction, or loss that is not properly allocable to a trade or business; (2) any business interest or business interest income; (3) the amount of any net operating loss deduction; and (4) the amount of any deduction allowed under section 199A. Additionally, for taxable years beginning after December 31, 2017 and before January 1, 2022, adjusted taxable income is computed without regard to any deduction allowable for depreciation, amortization, or depletion. For taxable years beginning after December 31, 2021, adjusted taxable income is computed with regard to deductions allowable for depreciation, amortization, or depletion. Sec. 163(j)(8)(A). Treasury regulations provide other adjustments to the definition of adjusted taxable income. Treas. Reg. sec. 1.163(j)-1(b)(1).

[622] Floor plan financing interest means interest paid or accrued on floor plan financing indebtedness. Floor plan financing indebtedness means indebtedness used to finance the acquisition of motor vehicles held for sale or lease to retail customers and secured by the inventory so acquired. A motor vehicle means a motor vehicle that is: (1) any self-propelled vehicle designed for transporting person or property on a public street, highway, or road; (2) a boat; or (3) farm machinery or equipment. Sec. 163(j)(9).

the taxable year.[623] Thus, other than floor plan financing interest, business interest expense in excess of business interest income is generally deductible only to the extent of 30 percent of adjusted taxable income.[624] The amount of any business interest expense not allowed as a deduction for any taxable year may be carried forward indefinitely.

The limitation generally applies at the taxpayer level (although special rules apply in the case of partnerships, described below). In the case of a group of affiliated corporations that file a consolidated return, the limitation applies at the consolidated tax return filing level.[625]

Carryforward of Disallowed Business Interest

The amount of any business interest expense not allowed as a deduction for any taxable year is generally treated as business interest expense paid or accrued by the taxpayer in the succeeding taxable year. Such business interest expense may be carried forward indefinitely.[626]

Application to Passthrough Entities

In General

In the case of a partnership, the business interest limitation is generally applied at the partnership level.[627] Once business interest is determined to be deductible at the partnership level, the deduction is allocated to the partners and not tested again at the partner level. Disallowed business interest expense, or excess business interest expense ("EBIE"), is carried forward at the partner level, but is not allocated to the partner until the partnership can allocate to the partner taxable income that can support such business interest expense deduction, or excess

---

[623] These rules were modified for taxable years beginning in 2019 or 2020 to permit certain taxpayers to deduct more business interest than would be allowed under the rules described herein. See sec. 163(j)(10).

[624] The business interest limitation does not apply in certain cases. The business interest limitation does not apply to any taxpayer (other than a tax shelter prohibited from using the cash method under section 448(a)(3)) that meets the $26 million gross receipts test of section 448(c). At the taxpayer's election, any real property development, redevelopment, construction, reconstruction, acquisition, conversion, rental, operation, management, leasing, or brokerage trade or business (*i.e.*, any electing real property trade or business) is not treated as a trade or business for purposes of the limitation, and therefore the limitation does not apply to such trades or businesses. Similarly, at the taxpayer's election, any farming business or any business engaged in the trade or business of a specified agricultural or horticultural cooperative (collectively, any electing farming business) is not treated as a trade or business for purposes of the limitation, and therefore the limitation does not apply to any such trade or business. The limitation does not apply to certain regulated public utilities. See sec. 163(j)(7).

[625] See Treas. Reg. sec. 1.163(j)-4(d) (providing that a consolidated group has a single section 163(j) limitation and generally treating all members of the consolidated group as a single taxpayer for section 163(j) purposes).

[626] Sec. 163(j)(2). With respect to corporations, any carryforward of disallowed business interest of a corporation is an item taken into account in the case of certain corporate acquisitions described in section 381 and is subject to limitation under section 382. Secs. 381(c)(20) and 382(d)(3).

[627] Sec. 163(j)(4)(A)(i).

taxable income ("ETI"), or until the partnership can allocate to the partner excess business interest income ("EBII").

A partner generally must perform its own section 163(j) calculation for business interest expense it incurs at the partner level. To prevent double counting, the business interest income and adjusted taxable income of each partner are generally determined without regard to such partner's distributive share of any items of income, gain, deduction, or loss of the partnership.[628] However, in cases where the partnership has an excess amount of business interest income, an excess amount of adjusted taxable income, or both, section 163(j) may allow for partnership items to support additional business interest expense deductions by the partnership's partners. Specifically, a partner's business interest deduction limitation is increased by the sum of the partner's distributive share of the partnership's EBII and 30 percent of the partner's distributive share of the partnership's ETI.[629]

Similar rules apply with respect to any S corporation and its shareholders.[630]

Carryforward Rules for Partnerships

Special rules for the carryforward of disallowed business interest expense apply only to partnerships and their partners.[631] Partnerships deduct BIE arising at the partnership level to the extent allowed by section 163(j). Unlike other taxpayers, however, partnerships do not treat BIE suspended under section 163(j) for a tax year as BIE paid or accrued by the partnership in the succeeding tax year. Instead, the disallowed amount creates a partner-level tax attribute, excess business interest expense ("EBIE"). The statute provides that a partnership's EBIE is allocated to each partner in the same manner as the partnership's non-separately stated taxable income or loss and that EBIE allocated to a partner may be deducted by that partner in succeeding tax years only to the extent the partner is allocated excess taxable income ("ETI") or excess business interest income ("EBII") from the same partnership and from the same activities of which gave rise to the disallowed business interest expense carryforward.[632] ETI is generally a partnership's ATI that is not used to support a partnership-level BIE deduction. EBII is generally a partnership's BII that is not used to support a partnership-level BIE deduction· Any amount that is not allowed as a deduction generally continues to be carried forward.

Thus, for example, a partner that is allocated EBIE in a particular year that also has ATI from other sources in that year is not able to deduct any of the EBIE to reduce its taxable

[628] Sec. 163(j)(4)(A)(ii)(I); Treas. Reg. sec. 1.163(j)-6(e)(1).

[629] Sec. 163(j)(4)(A)(ii)(II); Treas. Reg. sec. 1.163(j)-6(e)(1).

[630] Sec. 163(j)(4)(D).

[631] Sec. 163(j)(4)(B).

[632] Sec. 163(j)(4)((B)(ii)(I); Treas. Reg. sec. 1.163(j)-6(g)(2). See also Joint Committee on Taxation, *General Explanation of Public Law 115–97* (JCS–1–18), December 2018, pp. 175-178 (describing section 163(j)(4) as it was intended to work).

income from other sources. Instead, the partner will be able to deduct the EBIE only if and when, in a subsequent year, the same partnership allocates the partner ETI.

Section 163(j) requires that a partner perform its own section 163(j) calculation for BIE it incurs. The statute provides that a partner generally computes its ATI without regard to the partner's distributive share of any items of income, gain, deduction, or loss from a partnership. A partner may, however, increase its ATI by the partner's distributive share of a partnership's ETI, which is allocated to each partner in the same manner as the partnership's non-separately stated taxable income or loss. More specifically, ETI must first be used by a partner to apply against any EBIE allocated by the same partnership and carried forward by the partner. Once all such EBIE has been treated as used by the partner as a result of the allocation of ETI, any additional ETI is taken into account by the partner in computing the partner's ATI.

All amounts of business interest expense, including EBIE, decrease the partner's basis in the partnership interest. When the partner disposes of a portion of or all of its partnership interest, special rules provide for add-back adjustments to a partner's basis in its partnership interest for EBIE that had previously decreased the partner's basis in the partnership interest.[633]

These special carryforward rules do not apply to S corporations and their shareholders.[634]

Explanation of Provision

The provision limits the amount of net interest expense (*i.e.*, interest expense in excess of interest income) deductible by a "specified domestic corporation," defined as a domestic corporation which is a member of a multinational group (*i.e.* a group of two or more entities if either at least one entity is a foreign corporation engaged in a trade or business within the United States, or at least one entity is a foreign corporation and another entity is a domestic corporation) that prepares an applicable financial statement[635] (an "international financial reporting group") and which has average business interest expense for the three-taxable-year reporting period ending with such taxable year in excess of $12 million annually.[636] The provision applies regardless of whether the parent corporation of the international financial reporting group is a domestic corporation or a foreign corporation. All domestic corporations that are members of the same international financial reporting group are treated as a single corporation for purposes of applying the annual net interest expense exception. A specified domestic corporation does not include certain small businesses to which section 163(j) does not apply, or any S corporation, real estate investment trust, or regulated investment company. Foreign corporations that are engaged in a U.S. trade or business are considered "domestic

[633] See sec. 163(j)(4)(B).

[634] Sec. 163(j)(4)(D).

[635] As defined in section 451(b)(3).

[636] The provision does not expressly modify interest with "business" because it is limited to domestic corporations (and foreign corporations engaged in a U.S. trade or bnsiness), to whom all interest is treated as business interest.

corporations" that may be determined to be specified domestic corporations for purposes of the provision.

A specified domestic corporation may elect (at such time and in such manner as the Secretary may provide) to treat any eligible corporation as a member of the international financial reporting group of which such specified domestic corporation is a member if such eligible corporation maintains (and such specified domestic corporation has access to) such books and records as the Secretary determines are satisfactory to allow for the application of this provision with respect to such eligible corporation. Any such election only applies with respect to the specified domestic corporation making such election. An "eligible corporation" is, with respect to any international financial reporting group, any corporation if at least 20 percent of the stock of such corporation (determined by vote and value) is held (directly or indirectly) by members of such international financial reporting group (determined without regard to the election).

For such specified domestic corporations, the deductible amount of interest expense is capped at the "allowable percentage" of 110 percent of its net interest expense (*i.e.*, interest expense in excess of interest income for the taxable year). The allowable percentage for a specified domestic corporation for any taxable year is equal to the ratio of (a) the member's "allocable share" of the international financial reporting group's reported net interest expense over (b) such corporation's reported net interest expense. For this purpose, "reported net interest expense" means, with respect to an international financial reporting group for any reporting year, the excess of the aggregated amount of interest expense reported in such group's applicable financial statements for the taxable year, over the aggregate amount of interest income reported in such group's applicable financial statements for such taxable year. With respect to a specified domestic corporation for any reporting year, "reported net interest expense" means the amount of interest expense of such corporation reported in the books and records of the international financial reporting group which are used in preparing such group's applicable financial statements for such taxable year, over the amount of interest income of such corporation reported in such books and records.

The specified domestic corporation's "allocable share" of the international financial reporting group's reported net interest expense is equal to the ratio of (a) the member's earnings before interest income and interest expense, taxes, depreciation, depletion, and amortization "("EBITDA") for the reporting year to (b) the group's EBITDA for the reporting year.

A specified domestic corporation's EBITDA is determined without regard to any distribution received by such corporation from any other member of the international financial reporting group. Any foreign corporation engaged in a trade or business within the United States is treated as a domestic corporation with respect to any EBITDA which is effectively connected with the conduct of a trade or business in the United States. The provision does not apply to any specified domestic corporation which is a member of an international financial reporting group with EBITDA or zero or less. In addition, the allowable percentage is zero percent in the case of any specified domestic corporation with EBITDA of zero or less.

The provision's limitation would operate concurrently with the limitation applicable to partnerships under section 163(j)(4), and the amount of interest that may be deductible in any tax year would be determined by the more restrictive of the two limitations.

Any interest deduction that is disallowed as a result of the provision is carried forward for up to five taxable years after the taxable year in which such interest was so paid or accrued.

The provision gives the Secretary authority to address several issues, including coordination with section 163(j)(4)) and the ability to include or exclude any corporation as a member of any international financial reporting group.

The provision modifies the rules with respect to business interest expense incurred by partnerships and S corporations. Under the provision, the limitation with respect to business interest expense under section 163(j) is applied at the partner level and at the S corporation shareholder level. Transition rules are provided.

Effective Date

The provision is effective to taxable years beginning after December 31, 2021.

C. Outbound International Provisions

1. Modifications to deduction for foreign-derived intangible income and global intangible low-taxed income (sec. 138121 of the bill and sec. 250 of the Code)

Present Law

Deduction Percentages for FDII and GILTI

Domestic corporations generally are taxed at preferential rates on their foreign-derived intangible income ("FDII") and their global intangible low-taxed income ("GILTI") by means of a deduction under section 250.

The preferential rate on FDII is achieved by allowing corporations a deduction equal to 37.5 percent of their FDII.[637] For taxable years beginning after December 31, 2025, the deduction for FDII is reduced to 21.875 percent.[638]

The preferential rate on GILTI is achieved by allowing corporations a deduction equal to 50 percent of their GILTI (including the corresponding section 78 gross-up amount).[639] For taxable years beginning after December 31, 2025, the deduction for GILTI is reduced to 37.5 percent.[640]

Taxable Income Limitation

If the sum of a domestic corporation's FDII and GILTI exceeds its taxable income determined without regard to section 250, then the amount of FDII and GILTI (including the corresponding section 78 gross-up amount) for which a deduction is allowed is reduced (but not below zero) by an amount determined by such excess. The deduction under section 250 is not taken into account for purposes of determining a net operating loss ("NOL") of the taxpayer.[641]

Explanation of Provision

The provision changes the percentages with respect to FDII and GILTI. The percentage for FDII is changed to 21.875 percent (from 37.5 percent) and the percentage for

---

[637] Sec. 250(a)(1)(A).

[638] Sec. 250(a)(3)(A). In other words, for taxable years beginning before January 1, 2026, the effective U.S. tax rate (*i.e.*, taking into account the effect of the deduction) on FDII is 13.125 percent. For taxable years beginning after December 31, 2025, the effective U.S. tax rate on FDII is 16.406 percent.

[639] Sec. 250(a)(1)(B). Under section 78, a taxpayer claiming the foreign tax credit with respect to foreign-source income generally must include in income the amount of the related foreign taxes paid.

[640] Sec. 250(a)(3)(B). In other words, for taxable years beginning before January 1, 2026, the effective U.S. tax rate (*i.e.*, taking into account the effect of the deduction) on GILTI is 10.5 percent. For taxable years beginning after December 31, 2025, the effective U.S. tax rate on GILTI is 13.125 percent.

[641] Sec. 172(d)(9).

GILTI is changed to 37.5 percent (from 50 percent). In other words, the provision accelerates the changes that under current law are in effect for taxable years beginning after December 31, 2025.

The provision repeals the taxable income limitation and allows for the deduction under section 250 to be taken into account for purposes of determining the NOL of the taxpayer.

The provision includes several technical amendments to rules relating to the section 250 deduction. These amendments identify income that is not taken into account for purposes of determining the amount of a deduction allowed to a domestic corporation on its FDII. Such excluded income includes (i) any income received or accrued which is of a kind which would be foreign personal holding company income (as defined in section 954(c)),[642] (ii) any amount included in the gross income of such corporation under section 1293,[643] and (iii) any disqualified extraterritorial income.[644]

Effective Date

The provision generally is effective for taxable years beginning after December 31, 2021.

The provision provides a transition rule for fiscal-year taxpayers. In the case of any taxable year which includes December 31, 2021 (other than a taxable year with respect to which such date is the last day of such taxable year) the percentage in effect for FDII is treated as being equal to the sum of (i) the pre-effective date percentage of 37.5 percent plus (ii) the post-effective date percentage of 21.875 percent, and the percentage in effect for GILTI (including the corresponding section 78 gross-up amount) is treated as being equal to the sum of (i) the pre-effective date percentage of 50 percent plus (ii) the post-effective date percentage of 37.5 percent.

For purposes of the transition rule, with respect to any taxable year, the pre-effective date percentage means the ratio that the portion of such taxable year which precedes January 1,

[642] This clause is intended to exclude passive income, not active income. See, *e.g.*, Treas. Reg. sec. 1.904-4(b)(2)(iii).

[643] Section 1293 provides that every U.S. person who owns or is treated (under section 1298(a)) as owning stock of a qualified electing fund (i.e., any passive foreign investment company for which an appropriate election has been made) at any time during the taxable year of such fund must include in gross income (i) as ordinary income, such shareholder's pro rata share of the ordinary earnings of such fund for such year, and (ii) as long-term capital gain, such shareholder's pro rata share of the net capital gain of such for such year.

[644] For these purposes, disqualified extraterritorial income means any amount included in the gross income of the corporation with respect to any transaction for any taxable year if any amount could (determined after application of rule allowing the corporation to elect out of extraterritorial income benefits but without regard to any election under section 942(a)(3) as in effect before its repeal) be excluded from the gross income of the corporation with respect to such transaction for such taxable year by reason of section 114 pursuant to the application of subsection (d) or (f) of section 101 of the American Jobs Creation Act of 2004.

2022, bears to the entire taxable year and the post-effective date percentage means the ratio that the remainder of such taxable year bears to the entire taxable year.

2. Repeal of election for one-month deferral in determination of taxable year of specified foreign corporations (sec. 138122 of the bill and sec. 898 of the Code)

Present Law

In general, controlled foreign corporations ("CFCs") and other specified foreign corporations are required to use as a taxable year the taxable year of their majority U.S. shareholder (the "majority U.S. shareholder year").[645] A CFC, however, may elect a taxable year beginning one month earlier than the majority U.S. shareholder year (a "one-month deferral year").

Explanation of Provision

The provision repeals the election for a one-month deferral year. Thus, a CFC using a one-month deferral year is required to change to use its majority U.S. shareholder year.

Effective Date

The provision applies to taxable years of specified foreign corporations which would (but for the amendments made by the provision) begin after November 30, 2021.

A transition rule provides that a taxpayer's first taxable year beginning after November 30, 2021, ends at the same time as the first required year (within the meaning of section 898(c)(1)) ending after such date.

3. Modifications of foreign tax credit rules applicable to certain taxpayers receiving specific economic benefits (sec. 138123 of the bill and new sec. 901(n) of the Code)

Present Law

To be a tax eligible for the foreign tax credit, a foreign levy must require a compulsory payment pursuant to the authority of a foreign country to levy taxes.[646] Neither a penalty, fine, interest, nor customs duty is a tax.

In certain cases, foreign countries may seek to charge a foreign company a fee or a royalty for a specific economic benefit bestowed on the company. Instead of doing so directly, however, the foreign country may try to disguise the charge as a tax, knowing that in many cases the foreign company (a "dual capacity" taxpayer)[647] may receive a foreign tax credit from its home country. A foreign country may do so by applying a higher rate or a different base with

---

[645] Sec. 898(a) and (c).

[646] Sec. 901; Treas. Reg. sec. 1.901-2(a)(2)(i).

[647] Treas. Reg. sec. 1.901-2(a)(2)(ii)(A).

respect to certain taxpayers or activities. If a foreign levy requires a compulsory payment pursuant to the authority of a foreign country to levy taxes and requires such compulsory payment in exchange for a specific economic benefit, the levy is considered to have two distinct elements: a tax and a requirement of compulsory payment in exchange for such specific economic benefit.[648]

In general, no foreign tax credit is allowable with respect to a foreign levy paid by a dual capacity taxpayer unless the taxpayer establishes, based on all the relevant facts and circumstances, that an amount paid is pursuant to the distinct element of the levy that is a tax.[649] Instead of the facts-and-circumstances method, however, a taxpayer may elect with respect to a foreign country a safe-harbor method, which determines by formula the element of a foreign levy that is a tax, which is eligible for a foreign tax credit, and the element that is attributable to a payment for an economic benefit, which is not.[650]

In general, the safe-harbor method yields an amount that is approximately equal to the amount the dual capacity taxpayer would pay under the generally applicable foreign income tax (if the taxpayer were not a dual capacity taxpayer), with any additional amounts paid deemed to have been paid in exchange for economic benefits pursuant to the foreign levy not eligible for a foreign tax credit but allowed as a deduction.[651] If the foreign country has no generally applicable income tax, however, then the safe-harbor method uses the U.S. corporate rate (if less than the rate of the foreign levy).[652]

Explanation of Provision

The provision generally codifies the regulatory safe-harbor method. With respect to a foreign levy of a country with no generally applicable income tax, no amount paid by a dual capacity taxpayer is allowable for purposes of the foreign tax credit.

In general, any amount paid or accrued by a dual capacity taxpayer to a foreign country or possession of the United States for any period is not considered a tax (A) if, for the period, such foreign country or possession does not impose a generally applicable income tax or (B) to the extent such amount exceeds the amount which would be paid or accrued by the dual capacity taxpayer under the generally applicable income tax imposed by such country or possession if the taxpayer were not a dual capacity taxpayer.

---

[648] Treas. Reg. sec. 1.901-2(a)(2)(i) and (ii)(B) (defining "specific economic benefit").

[649] Treas. Reg. sec. 1.901-2(a)(2)(i) and -2A(b) (describing the burden of proof for dual capacity taxpayers).

[650] Treas. Reg. sec. 1.901-2A(c)(3), (d), and (e).

[651] Treas. Reg. sec. 1.901-2A(e)(1).

[652] Treas. Reg. sec. 1.901-2A(e)(5).

Nothing in the preceding paragraph is to be construed to imply the proper treatment of any amount not in excess of the amount determined under (B) above.

A dual capacity taxpayer, with respect to any foreign country or possession of the United States, is a person who is subject to a levy of such country or possession and receives (or will receive) directly or indirectly a specific economic benefit from the country or possession.

A generally applicable income tax is an income tax (or a series of income taxes) of a foreign country or possession of the United States which is generally imposed on citizens or residents that are not dual capacity taxpayers.

Effective Date

The provision applies taxable years of foreign corporations beginning after December 31, 2021, and to taxable years of U.S. shareholders in which or with which such taxable years of foreign corporations end.

4. Modifications to foreign tax credit limitations (sec. 138124 of the bill and new sec. 904(e) of the Code)

Present Law

Foreign Tax Credit

Subject to certain limitations, U.S. citizens, resident individuals, and domestic corporations are allowed a credit for foreign income taxes they pay directly. In addition, a domestic corporation is allowed a credit for foreign income taxes paid by a CFC with respect to income included by the corporation as subpart F income and GILTI; such taxes are deemed to have been paid by the domestic corporation for purposes of calculating the foreign tax credit.[653]

The foreign tax credit generally is limited to a taxpayer's U.S. tax liability on its foreign-source taxable income. The limit is intended to ensure that the credit mitigates double taxation of foreign-source income without offsetting U.S. tax on U.S.-source income.[654] The limit is computed by multiplying a taxpayer's total pre-credit U.S. tax liability for the year by the ratio of the taxpayer's foreign-source taxable income for the year to the taxpayer's total taxable income for the year. If the total amount of foreign income taxes paid and deemed paid for the year exceeds the taxpayer's foreign tax credit limitation for the year, the taxpayer may (in certain cases) carry back the excess foreign taxes to the previous year or carry forward to one of the succeeding 10 years.[655] No carryback or carryover of excess foreign tax credits are allowed in the GILTI foreign tax credit limitation category.

---

[653] Secs. 901 and 960; see also secs. 1291(g) and 1293(f) (providing, in the PFIC context, coordination with foreign tax credit rules).

[654] Secs. 901 and 904.

[655] Sec. 904(c).

Deemed Paid Taxes

For any subpart F income included in the gross income of a domestic corporation, the corporation is deemed to have paid foreign taxes equal to the aggregate foreign income taxes paid or accrued with respect to such income by the CFC.

For any GILTI included in the gross income of a domestic corporation, the corporation is deemed to have paid foreign taxes equal to 80 percent of the corporation's inclusion percentage multiplied by the aggregate foreign income taxes paid or accrued with respect to tested income (but not tested loss) by each CFC with respect to which the domestic corporation is a U.S. shareholder.[656]

Allocation and Apportionment of Deductions

To determine its foreign tax credit limitation, a taxpayer must first determine its taxable income from foreign sources by allocating and apportioning deductions between U.S.-source gross income and foreign-source gross income in each limitation category. In general, deductions are allocated and apportioned to the gross income to which the deductions "definitely related."[657] In other words, allocations and apportionments are made based on the factual relationship of deductions to gross income. If a deduction is not definitely related to any gross income, the deduction must be apportioned ratably. Thus, subject to certain exceptions, deductions for interest expense, stewardship expenses, and research and experimental expenses are apportioned based on certain ratios.[658] For example, interest expense is apportioned based on the ratio of the corporation's foreign or domestic (as applicable) assets to its worldwide assets.[659]

Certain other special rules also apply for purposes of determining a taxpayer's foreign tax credit limitation. For example, in the context of a domestic corporation that is a U.S. shareholder of a specified 10-percent owned foreign corporation, such taxpayer must determine its foreign-source taxable income (and entire taxable income) by disregarding any dividend for which a dividends-received deduction under section 245A is taken, and any deductions properly allocable or apportioned to income (other than amounts includible under section 951(a)(1) or 951A(a)) with respect to stock of such foreign corporation, or the stock to the extent income with respect to the stock is other than amounts includible under section 951(a)(1) or 951A(a).[660] In addition, a special rule set forth in section 864(e)(3) provides that for purposes of allocating and apportioning any deductible expense, any tax-exempt asset, and any income from such an asset,

[656] Sec. 960(d)(1). The inclusion percentage means, with respect to any domestic corporation, the ratio of such corporation's GILTI divided by the aggregate amount of its pro rata share of the tested income (but not tested loss) of each CFC with respect to which it is a U.S. shareholder. Tested foreign income taxes do not include any foreign income tax paid or accrued by a CFC that is properly attributable to the CFC's tested loss (if any).

[657] Treas. Reg. sec. 1.861-8(b) and (c) and Temp. Treas. Reg. sec. 1.861-8T(c).

[658] Treas. Reg. sec. 1.861-8 through Temp. Treas. Reg. sec. 1.861-14T and Treas. Reg. sec. 1.861-17 set forth detailed rules relating to the allocation and apportionment of expenses.

[659] Sec. 864(e)(2).

[660] Sec. 904(b)(4).

is not taken into account. A similar rule applies for the portion of any dividend (other than a qualifying dividend (as defined in section 243(b)) equal to the dividends received deduction allowable under section 243 or 245(a) with respect to such dividend and the like portion of any stock the dividends on which would be so deductible.[661] In other words, section 864(e)(3) provides that dividends described in section 243 and section 245(a) are treated in a manner similar to tax-exempt income to the extent of the deductions allowed under those sections and, in doing so, excludes such amounts from the allocation and apportionment formula.

Limitation Categories ("Baskets")

The foreign tax credit limitation is applied separately to any amount includible in gross income under section 951A (GILTI), foreign branch income,[662] passive category income, and general category income.[663] For this purpose, GILTI and foreign branch income include only income that is not passive category income. Passive category income includes passive income, such as portfolio interest and dividend income, and certain specified types of income.[664] All other income is in the general category. Passive income is treated as general category income if earned by a qualifying financial services entity or if highly taxed (*i.e.*, if the foreign tax rate is determined to exceed the highest tax rate specified in section 1 or 11, as applicable).[665] Dividends (and subpart F inclusions), interest, rents, and royalties received by a U.S. shareholder from a CFC are assigned to the passive category to the extent the payments or inclusions are allocable to passive category income of the CFC.[666] Dividends received by a 10-percent corporate shareholder of a foreign corporation that is not a CFC are also categorized on a look-through basis.[667]

Special rules apply to the allocation of income and losses from foreign and U.S. sources within each category of income.[668] Foreign losses from one category first offset foreign-source income from that category and then other categories. Any remaining overall foreign loss offsets U.S.-source income. The same principle applies to losses from U.S. sources. In subsequent years, any losses deducted against another category or source of income are

---

[661] Sec. 864(e)(3).

[662] Foreign branch income is defined for this purpose as "the business profits of [the U.S. taxpayer] which are attributable to 1 or more qualified business units (as defined in section 989(a)) in 1 or more foreign countries. For purposes of the preceding sentence, the amount of business profits attributable to a qualified business unit shall be determined under rules established by the Secretary." Sec. 904(d)(2)(J)(i).

[663] Sec. 904(d); Treas. Reg. sec. 1.904-4(a). The foreign tax credit limitation is also applied separately to certain additional separate categories. See Treas. Reg. sec. 1.904-4(m).

[664] Sec. 904(d)(2)(A)(i) and (B).

[665] Sec. 904(d)(2)(B).

[666] Sec. 904(d)(3).

[667] Sec. 904(d)(4).

[668] Sec. 904(f) and (g).

recaptured. That is, an equal amount of income from the same category or source that generated a loss in a prior year is recharacterized as income from the other category or source against which the loss was deducted. Foreign-source income in a particular category may be fully recharacterized as income in another category, whereas only up to 50 percent of income from one source in any subsequent year may be recharacterized as income from the other source.

A taxpayer's ability to claim a foreign tax credit may be further limited by a matching rule that prevents the separation of creditable foreign taxes from the associated foreign income. Under this rule, a foreign tax generally is not taken into account for U.S. tax purposes, and thus no foreign tax credit is available with respect to that foreign tax, until the taxable year in which the related income is taken into account for U.S. tax purposes.[669]

Other Special Rules

Foreign Oil and Gas Taxes

Special rules set forth in section 907 apply with respect to foreign oil and gas taxes paid or accrued during a taxable year. In addition to the foreign tax credit limitations that apply to all foreign tax credits, a special limitation is placed on foreign oil and gas taxes.[670] Under this special limitation, amounts claimed as taxes paid on the amount of combined foreign oil and gas income are creditable in a given taxable year (if they otherwise so qualify) only to the extent that the amount of such taxes do not exceed the product of the highest U.S. tax rate on corporations (in the case of corporations) multiplied by such combined foreign oil and gas income for such taxable year. The amount of any such taxes paid or accrued (or deemed paid) in any taxable year in excess of the special limitation (*i.e.*, excess foreign taxes) may be carried back to the immediately preceding taxable year and carried forward 10 taxable years and credited, but not deducted, to the extent that the taxpayer otherwise has excess limitation with regard to combined foreign oil and gas income in a carryover year.[671]

Section 338 and Foreign Tax Credits

Section 338(a) permits a unilateral election by a buyer corporation to treat a qualified stock purchase of a corporation as a deemed asset acquisition, whether or not the seller of the stock is a corporation (or an S corporation is the target). In such a case, the seller or sellers recognize gain or loss on the stock sale, and the target corporation recognizes gain or loss on the deemed asset sale. The target corporation generally has a fair market value basis in its assets following the transaction.

In certain circumstances, taxpayers can make an election under section 338(h)(10) to treat a qualifying purchase of 80 percent of the stock of a target corporation by a corporation from a corporation that is a member of an affiliated group (or a qualifying purchase of 80 percent of the stock of an S corporation by a corporation from S corporation shareholders) as a sale of

[669] Sec. 909.

[670] Sec. 907(a).

[671] Sec. 907(f)(1).

the assets of the target corporation, rather than as a stock sale. The election must be made jointly by the buyer and seller of the stock and is due by the 15th day of the ninth month beginning after the month in which the acquisition date occurs. An agreement for the purchase and sale of stock often may contain an agreement of the parties to make a section 338(h)(10) election.

Section 338(h)(16) generally provides that section 338 does not apply for purposes of determining the source or character of any item for purposes of the foreign tax credit rules in sections 901 through 909. Section 338(h)(16), however, only applies to certain qualified stock purchases of a target corporation and not to transactions that produce results similar to a qualified stock purchase for which a section 338 election is made.

Foreign Tax Redeterminations

Taxpayers are entitled to either deduct or claim a credit with respect to foreign income taxes. If such taxes are redetermined, taxpayers may change such election on a timely claim for refund or amended return.[672] Foreign taxes are deductible in the year in which the all-events test is met,[673] while credits relate back to the date actually paid. A special exception to the limitations period for claiming refunds extends the period for filing a claim arising from foreign tax credits "actually paid or accrued" to ten years after the filing of the return for the taxable year, but not for claims arising from claims for deductions of foreign taxes.[674] There is no analogous special exception with respect to a change in a foreign tax credit in the statute of limitations for assessment of additional tax.[675] Instead, taxpayers are required to notify the IRS of adjustments to foreign taxes for which a credit or deduction was claimed. Such adjustments include instances in which accrued taxes when paid differ from the amounts claimed as credits by the taxpayer, accrued taxes are not paid before the date two years after the close of the taxable year to which such taxes relate, or any tax paid is refunded in whole or in part. The Secretary is then required to redetermine the amount of the tax for the year or years affected.[676] The

[672] Secs. 164 (authorizing a deduction for creditable foreign income taxes) and 275(a)(4) (providing no deduction permitted for taxes with respect to which a credit is claimed under section 901).

[673] *Dixie Pine Products Company v. Commissioner*, 320 U.S. 516 (1944) (holding that an accrual-basis taxpayer could not simultaneously contest a liability and claim a deduction for unpaid taxes).

[674] Sec. 6511(d)(3); see also *Trusted Media Brands v. United States*, 899 F. 3d 175 (2d Cir. 2018). The general rule in section 6511(a) requires that claims be filed within a three-year period following the due date (or actual filing date if later) of the original return. Additional special rules are provided for claiming refunds arising from adjustments to other business credits or net operating losses. Section 6511(b) further limits refunds to taxes paid within the two years preceding the claim.

[675] See section 6501 generally. In contrast, special provisions therein permit additional periods for assessment of deficiencies resulting from net operating loss or capital loss carrybacks (section 6501(h)) or changes in elections of and deficiencies attributable to certain credits (section 6501(m)).

[676] Sec. 905(c)(1).

interaction of the limitations on changes to foreign tax credit claims, special rules for net operating losses and other business credits is presently under reconsideration by the Secretary.[677]

Explanation of Provision

Country-by-Country Application of Section 904 Foreign Tax Credit Limitations

In General

The provision applies the foreign tax credit limitation rules, including the rules relating to foreign oil and gas taxes and deemed paid credits, on a country-by-country basis, thereby preventing taxpayers from using excess foreign tax credits from foreign taxes paid to high-tax countries to reduce their U.S. tax liability on income earned in low-tax countries. Such rules each must be applied separately with respect to each country by taking into account the aggregate income properly attributable or otherwise allocable to a taxable unit[678] of the taxpayer that is a tax resident of such country. In other words, after identifying all taxable units of the taxpayer (as described below) and attributing or otherwise allocating all items, the corresponding aggregate amounts in each country are used for purposes of applying the relevant foreign tax credit rules on a country-by-country basis. For these purposes, each item is attributable or otherwise allocable to one, and only one, taxable unit of the taxpayer.[679]

The taxable units of a taxpayer include (i) each CFC with respect to which the taxpayer is a U.S. shareholder; (ii) each interest held (directly or indirectly) by the taxpayer, or any CFC with respect to which the taxpayer is a U.S. shareholder, in a pass-through entity[680] if such pass-through entity is a tax resident of a country other than the country with respect to which such taxpayer or CFC (as the case may be) is a tax resident; (iii) each branch[681] (or portion thereof) the activities of which are directly or indirectly carried on by the taxpayer, or any CFC with respect to which the taxpayer is a U.S. shareholder, and which give rise to a taxable presence in a country other than the country in which the taxpayer or any such CFC (as the case

[677] Rev. Rul. 2020-08, in which Rev. Rul. 71-533 is suspended and Rev. Rul. 68-150 is suspended in part.

[678] The taxable unit standard is intended to serve as a proxy for determining the type of entity or level of activities subject to tax under the tax law of a particular foreign jurisdiction, whether that be as a result of tax residence or a taxable presence.

[679] Further guidance may be necessary to address situations in which the same item of income may be attributable to more than one taxable unit in a tier of taxable units. This may occur, for example, in situations in which a CFC operates a branch in a country other than the country in which the CFC is a tax resident and income earned by the branch is reflected on the books of both the CFC and the branch. Such item is expected to be treated for these purposes as properly attributable to the branch (*i.e.*, the lowest tier).

[680] A pass-through entity includes any partnership or other entity or arrangement to the extent that income, gain, deduction, or loss of the entity or arrangement is taken into account in determining the income or loss of a person that owns (directly or indirectly) an interest in such entity or arrangement.

[681] A branch is defined as a taxable presence of a tax resident in a country other than its country of residence as determined under such other country's tax law or as otherwise provided by the Secretary to activities in a country that does not subject income to tax on the basis of residence or taxable presence.

may be) is a tax resident; and (iv) the person that is the taxpayer and not otherwise described in (i), (ii), or (iii).[682] For these purposes, tax resident means a person or arrangement subject to tax under the tax law of a country as a resident, or a person or arrangement that gives rise to a taxable presence by reason of its activities in such country.[683] If an entity is organized under the law of a country or resident in a country that does not impose an income tax with respect to such entity, such entity is treated as subject to tax under the laws of such country.

The provision provides the Secretary with the authority to issue regulations or other guidance as may be necessary or appropriate to carry out, or prevent avoidance of, the purposes of the provision, including regulations or other guidance (i) providing for the application of provision to entities, arrangements, and branches that are otherwise considered a resident of more than one country or no country; (ii) providing for the application of the provision to hybrid entities or hybrid transactions (as such terms are used for purposes of section 267A), pass-through entities, passive foreign investment companies, trusts and other entities or arrangements not otherwise described in this subsection; and (iii) providing for the assignment of any item (including foreign income taxes and deductions) to taxable units, including in the case of amounts not otherwise taken into account in determining taxable income.

Application of Recapture of Overall Foreign Loss

The provision applies the separate limitation loss rules on a country-by-country basis, modifying the definition of income category to mean each separate category of income described for purposes of the foreign tax credit limitation applied separately with respect to each relevant country in which the taxpayer has a taxable unit.

Application of Separate Limitation Losses with Respect to GILTI

The provision provides a special separate limitation loss rule with respect to income in the GILTI foreign tax credit limitation category. Pursuant to the provision, the amount of the separate limitation losses for any taxable year reduce income in the GILTI basket for such year only to the extent the aggregate amount of such losses exceeds the aggregate amount of the separate limitation incomes (not including income in the GILTI basket) for such taxable year.

Repeal of Separate Application to Foreign Branch Income

[682] Therefore, the general taxable unit is similar to a residual taxable unit, one that is a tax resident of a country not otherwise described in the other clauses. For example, foreign source royalty income earned, and corresponding withholding tax incurred on such income, by the U.S. taxpayer from intangible property held in the United States is properly attributable to this general taxable unit. If, however, intangible property were held by the taxpayer through a taxable unit (*e.g.*, pass-through entity that is a tax resident of a foreign country), royalty income earned, and corresponding tax paid with respect to such income, would be properly attributable to such taxable unit and not the general taxable unit of the taxpayer.

[683] For these purposes, any fiscally autonomous jurisdiction and each possession of the United States is treated as a separate country. For this purpose, possession of the United States means American Samoa, the Commonwealth of the Northern Mariana Islands, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands. Fiscally autonomous is not intended to include, *e.g.*, subnational tax systems that apply in addition to national tax systems.

The provision repeals the foreign branch income basket, thereby reducing the number of foreign tax credit limitation categories from four to three.

Several conforming changes are made to account for the elimination of the concept of foreign branch income, which include replacing the exclusion of foreign branch income from gross income taken into account for purposes of determining the amount of a section 250 deduction allowed to a domestic corporation on its FDII. The provision expands the scope of income subject to this exclusion to include income of a U.S. person that is attributable to one or more taxable units of the taxpayer that are branches or pass-through entities in one or more foreign countries.

Modification of Foreign Tax Credit Carryback and Carryforward

The provision repeals the carry back of excess taxes paid or accrued to foreign countries or possessions of the United States for any taxable year and limits the carry forward of such excess foreign taxes to any of the first five succeeding taxable years. A similar change is made with respect to excess foreign oil and gas taxes paid or accrued during any taxable year subject to the special limitation provision relating to such taxes. A conforming change is made to section 6511(d)(3) with respect to the special period of limitation on a credit or refund claim relating to an overpayment attributable to foreign taxes paid or accrued. The provision also extends application of the foreign tax credit carry forward rules to excess foreign taxes in the section 951A foreign tax credit limitation category.

Treatment of Certain Tax-Exempt Dividends

The provision repeals the provision requiring that, for purposes of the foreign tax credit limitation, a domestic corporation that is a U.S. shareholder of a specified 10-percent owned foreign corporation must determine its foreign-source taxable income (and entire taxable income) by disregarding any dividend for which a dividends-received deduction under section 245A is taken, and any deductions properly allocable or apportioned to income (other than amounts includible under section 951(a)(1) or 951A(a)) with respect to stock of such foreign corporation, or the stock to the extent income with respect to the stock is other than amounts includible under section 951(a)(1) or 951A(a). In addition, for purposes of allocating and apportioning any deductible expense, the portion of any dividend equal to the dividends received deduction allowable under section 245A with respect to such dividend and the like portion of any stock the dividends on which would be so deductible are treated similarly to exempt income and exempt assets, meaning such amounts are excluded from the allocation and apportionment formula.

Rules for Allocation of Certain Deductions to Certain Foreign Source Income

Under the provision, for purposes of determining a domestic corporation's foreign tax credit limitation with respect to GILTI, such taxpayer's taxable income from sources without the United States is determined by allocating any deduction allowed under section 250 to such income and by treating any expense of such domestic corporation as not allocable to such income. As a result, deductions for interest expense, stewardship expenses, and research and

experimental expenses do not reduce the taxpayer's foreign tax credit limitation with respect to GILTI.

Treatment of Certain Asset Dispositions

The provision extends the principles of section 338(h)(16) to transactions that produce results similar to a qualified stock purchase for which a section 338 election is made, which may include a sale of an interest in an entity that is treated as a corporation for foreign tax purposes but as a partnership or a disregarded entity for U.S. tax purposes, or a taxable change in the classification of an entity for U.S. tax purposes that is not recognized for foreign tax purposes. Pursuant to the provision, the principles of section 338(h)(16) apply in determining the source and character of any item recognized in connection with a "covered asset disposition" for purposes of applying the foreign tax credit rules. A covered asset disposition means any transaction which is treated as a disposition of assets for U.S. tax purposes but is treated as a disposition of stock of a corporation (or is disregarded) for purposes of the tax laws of the relevant foreign country or possession of the United States. The provision also grants authority to the Secretary to issue regulations or other guidance as may be necessary or appropriate to carry out, or prevent the avoidance of, the purposes of the provision.

Redetermination of Foreign Taxes and Related Claims

The provision establishes the period in which elections to either claim a credit or a deduction with respect to foreign taxes under section 901. Absent a consent to extend the time within which an assessment may be made by the IRS with respect to a taxable year, the election to claim a credit is limited by the special limitations period for refunds, and the time to elect to deduct foreign taxes is limited by the general period for seeking a refund. In addition, such changes to the election to claim a credit or deduct foreign taxes, as well as any change in the amount or treatment of foreign taxes which affect a taxpayer's U.S. tax liability, are added to the list of adjustments within the scope of section 905(c) authorizing the IRS to redetermine taxes. The scope and effect of these additions are intended to parallel proposed regulatory changes.[684] For this purpose, changes in treatment of foreign taxes may include changes that are not the result of determinations by a foreign jurisdiction, such as voluntary elections or changes to elections that result in inconsistent treatment. Finally, the provision clarifies that special limitations period for filing a claim for refund with respect to foreign tax credits is limited to refunds arising by reason of changes in the foreign tax liability and is shortened to from ten to five years.

Effective Date

The provision generally is effective for taxable years of foreign corporations beginning after December 31, 2021, and to taxable years of U.S. shareholders in which or with which such taxable years of foreign corporations end. With respect to the modifications to the foreign tax credit carryback, the provision is effective for excess foreign taxes arising in tax years beginning after December 31, 2021, and with respect to the modifications to the foreign tax credit carryforward, the provision is effective for excess foreign taxes that (without regard to the

[684] Prop. Treas. Reg. sec. 1.905-3(c), REG-101657-20, 85 Fed. Reg. 72028 (November 12, 2020).

amendments made by this provision) may be carried to any tax year beginning after December 31, 2021.[685] The modifications relating to the redetermination of foreign taxes are effective 60 days after the date of enactment.

5. Foreign oil and gas extraction income and foreign oil related income to include income with respect to minerals from oil shale and tar sands (sec. 138125 of the bill and sec. 907(c) of the Code)

Present Law

Special Foreign Tax Credit Limitation for Foreign Oil and Gas Taxes

For purposes of calculating the foreign tax credit allowable, a special limitation applies to certain foreign taxes related to foreign oil and gas income.[686] In general, for a corporation applying the foreign tax credit limitation, the amount of any foreign oil and gas taxes paid or accrued (or deemed to have been paid) during the taxable year that is limited to the amount of the taxpayer's combined foreign oil and gas income for the taxable year multiplied by the corporate tax rate (*i.e.*, 21 percent).

Combined foreign oil and gas income with respect to any taxable year is the sum of foreign oil and gas extraction income ("FOGEI") and foreign oil related income ("FORI").[687] Foreign oil and gas taxes generally are any income taxes paid or accrued (or deemed paid or accrued) during the taxable year with respect to FOGEI or FORI.[688]

FOGEI includes taxable income derived from sources without the United States and its possessions from the extraction (by the taxpayer or any other person) of minerals from oil or gas wells.[689] FORI includes taxable income derived from sources outside the United States and its possessions from (A) the processing of minerals extracted (by the taxpayer or by any other person) from oil or gas wells into their primary products, (B) the transportation of such minerals or primary products, and (C) the distribution or sale of such minerals or primary products.[690]

---

[685] A technical correction may be necessary to reflect this intent.

[686] Sec. 907(a).

[687] Sec. 907(b)(1).

[688] Sec. 907(b)(2) and (c)(5).

[689] Sec. 907(c)(1).

[690] Sec. 907(c)(2).

Exclusion of FOGEI and Inclusion of FORI under GILTI

In general, FORI is tested income for purposes of GILTI.[691] FOGEI, however, is expressly excluded from tested income.[692] Neither FOGEI nor FORI is subpart F income.

Explanation of Provision

The provision amends the definitions of FOGEI and FORI, such that oil and gas wells include oil shale and tar sands.

Effective Date

The provision applies to taxable years of foreign corporations beginning after December 31, 2021, and to taxable years of U.S. shareholders in which or with which such taxable years of foreign corporations end.

6. Modifications to inclusion of global intangible low-taxed income (sec. 138126 of the bill and new sec. 951A(g) of the Code)

Present Law

Global Intangible Low-Taxed Income

A U.S. shareholder of a controlled foreign corporation ("CFC")[693] must include in gross income its GILTI.[694] GILTI is the excess of the shareholder's net CFC tested income over the shareholder's net deemed tangible income return.[695] The shareholder's net deemed tangible income return equals the excess of 10 percent of the aggregate of its *pro rata* share of the qualified business asset investment ("QBAI") of each CFC over certain interest expense.[696]

---

[691] Sec. 951A(c).

[692] Sec. 951A(c)(2)(A)(i)(V). Section 138126(e) of the bill repeals this exclusion.

[693] U.S. shareholders are U.S. persons that own at least 10 percent (measured by vote or value) of the stock of a foreign corporation. A CFC generally is any foreign corporation in which U.S. shareholders own (directly, indirectly, or constructively) more than 50 percent of the corporation's stock (measured by vote or value). See secs. 951(b), 957, and 958.

[694] See also sec. 951A(f)(1) (treating any GILTI inclusion in the same manner as subpart F income under section 951(a)(1)(A) for purposes of applying sections 168(h)(2)(B), 535(b)(10), 851(b), 904(h)(1), 959, 961, 962, 993(a)(1)(E), 996(f)(1), 1248(b)(1), 1248(d)(1), 6501(e)(1)(C), 6654(d)(2)(D), and 6655(e)(4)) and (2) (providing rules relating to the allocation of GILTI inclusions to CFCs).

[695] Sec. 951A(b)(1).

[696] The interest expense that reduces a U.S. shareholder's net deemed tangible income return is that which is taken into account in determining its net CFC tested income for the taxable year to the extent that the interest income attributable to such interest expense is not taken into account in determining the shareholder's net CFC tested income. Sec. 951A(b)(2)(B).

The formula for GILTI is:

$$GILTI = Net\ CFC\ Tested\ Income - [(10\% \times QBAI) - Interest\ Expense]$$

Net CFC Tested Income

Net CFC tested income means the excess of the aggregate of the shareholder's *pro rata* share of the tested income of each CFC over the aggregate of its *pro rata* share of the tested loss of each CFC.[697] In other words, GILTI is calculated on a worldwide basis.

The tested income of a CFC is the excess of the gross income of the CFC determined without regard to certain amounts that are excluded from tested income (referred to in this document as "gross tested income") over deductions (including taxes) properly allocable to such gross tested income.[698] The exclusions from gross tested income are: (1) any effectively connected income described in section 952(b); (2) any gross income taken into account in determining the CFC's subpart F income;[699] (3) any gross income excluded from foreign base company income or insurance income by reason of the high-tax exception under section 954(b)(4);[700] (4) any dividend received from a related person (as defined in section 954(d)(3)); and (5) any foreign oil and gas extraction income (as defined in section 907(c)(1)).[701]

The tested loss of a CFC means the excess of deductions (including taxes) properly allocable to the CFC's gross tested income over the amount of such gross tested income.[702]

Qualified Business Asset Investment

QBAI means, with respect to any CFC for a taxable year, the average of the aggregate of the CFC's adjusted bases in specified tangible property that is both used in its trade or

---

[697] Sec. 951A(c)(1). *Pro rata* shares are determined under subpart F principles (*i.e.*, the rules of section 951(a)(2) and the regulations thereunder). See sec. 951A(e).

[698] Sec. 951A(c)(2)(A).

[699] Earnings of a CFC may constitute income to U.S. shareholders under the traditional anti-deferral regime of subpart F of the Code, which applies to certain passive income and certain other related-party income that is readily movable from one jurisdiction to another. Subpart F income is taxed at full rates with related foreign income taxes generally eligible for the foreign tax credit.

[700] In general, subpart F income excludes any item of income if the taxpayer establishes that the income was subject to an effective foreign income tax rate greater than 90 percent of the maximum U.S. corporate income tax rate (currently 21 percent). See sec. 954(b)(4).

[701] Section 951A does not, however, exclude from gross tested income any foreign oil related income (as defined in section 907(c)(2)).

[702] Sec. 951A(c)(2)(B).

business and of a type with respect to which a deduction is generally allowable under section 167.[703]

Specified tangible property means any tangible property used in the production of tested income.[704] In the case of property used both in the production of tested income and income which is not tested income, such property shall be treated as specified tangible property in the same proportion that the gross tested income produced with respect to such property bears to the total gross income produced with respect to such property.

Explanation of Provision

Country-by-Country Application of Section 951A Based on CFC Taxable Units

The provision applies section 951A on a country-by-country basis, incorporating a CFC taxable unit concept (based on the taxable unit standard adopted for purposes of applying the foreign tax credit limitation provisions) as the mechanism for identifying each relevant country with respect to which a CFC is subject to tax or in which a CFC has a taxable presence. For these purposes, the term "CFC taxable unit" means, with respect to any CFC with respect to which the taxpayer is a U.S. shareholder, (i) the controlled foreign corporation itself, (ii) each interest held (directly or indirectly) by the CFC in a pass-through entity[705] if such pass-through entity is a tax resident of a country other than the country with respect to which such CFC is a tax resident; and (iii) each branch[706] (or portion thereof) the activities of which are directly or indirectly carried on by the CFC and which give rise to a taxable presence in a country other than the country in which such CFC is a tax resident. The terms used for purposes of applying section

[703] Sec. 951A(d)(1).

[704] Sec. 951A(d)(2). Specified tangible property does not include property used in the production of tested loss; thus, a CFC with a tested loss in a taxable year does not have QBAI for such taxable year.

[705] A pass-through entity includes any partnership or other entity or arrangement to the extent that income, gain, deduction, or loss of the entity or arrangement is taken into account in determining the income or loss of a person that owns (directly or indirectly) an interest in such entity or arrangement.

[706] A branch is defined as a taxable presence of a tax resident in a country other than its country of residence as determined under such other country's tax law or as otherwise provided by the Secretary to activities in a country that does not subject income to tax on the basis of residence or taxable presence.

951A on a country-by-country basis have the same meaning when used for purposes of applying the foreign tax credit limitation rules on a country-by-country basis (*e.g.*, tax resident[707]).[708]

The provision provides that if a CFC taxable unit of a U.S. shareholder is a tax resident of a country that is different from the country with respect to which at least one other CFC taxable unit of such U.S. shareholder is a tax resident, then such shareholder's GILTI equals the sum of the amounts of GILTI determined separately with respect to each country with respect to which any CFC taxable unit of such shareholder is a tax resident. For purposes of determining such separate amounts, section 951A(b), (c), and (d) apply on a country-by-country basis by treating any reference in those provisions to a CFC of such shareholder to a CFC taxable unit of such shareholder. In addition, the provision provides that net CFC tested income, net deemed tangible income return, QBAI, interest expense described in section 951A(b)(2)(B), and such other items and amounts as the Secretary may provide, must be determined separately with respect to each such country by determining such amounts with respect to each CFC taxable unit of such shareholder which is a tax resident of such country. Rules similar to those applicable for purposes of applying the foreign tax credit limitation provisions on a country-by-country basis also apply for purposes of applying section 951A on a country-by-country basis. In short, after identifying all CFC taxable units and the country in which each taxable unit is a tax resident, the corresponding aggregate relevant items and amounts in each country are used for purposes of making the necessary determinations.

The provision also provides that, except as otherwise provided by the Secretary, the rules relating to the allocation of GILTI to CFCs set forth in section 951A(f)(2) must be applied separately with respect to each CFC taxable unit.

The provision moves the grant of regulatory authority under section 951A(d)(4) to new section 951A(g) to clarify that such authority is not limited to section 951A(d), and expands that grant of authority to account for the country-by-country application of section 951A based on CFC taxable units.

Carryover of Net CFC Tested Loss

The provision provides that, if, after determining the net CFC tested income of a U.S. shareholder in a particular country for any taxable year, such U.S. shareholder has a net CFC tested loss, such net CFC tested loss of the U.S. shareholder carries over to, and is treated as a tested loss in, the next succeeding taxable year with respect to such country. Proper

[707] For these purposes, tax resident means a person or arrangement subject to tax under the tax law of a country as a resident, or a person or arrangement that gives rise to a taxable presence by reason of its activities in such country. If an entity is organized under the law of a country, or resident in a country, that does not impose an income tax with respect to such entity, such entity is treated as subject to tax under the tax law of such country. In addition, any fiscally autonomous jurisdiction and each possession of the United States is treated as a separate country. For this purpose, possession of the United States means American Samoa, the Commonwealth of the Northern Mariana Islands, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands. Fiscally autonomous is not intended to include, *e.g.*, subnational tax systems that apply in addition to national tax systems.

[708] See section 138124 of the bill for a description of the provision applying the foreign tax credit limitation rules on a country-by-country basis.

adjustments must be made in allocating the total amount of GILTI included by such U.S. shareholder to take into account any decrease in GILTI by reason of the net CFC tested loss carryover. The provision also provides for coordination with the country-by-country application of section 951A, and that, for purposes of applying the limitation on NOL carryforwards following an ownership change, any excess net CFC tested loss carried over to a future year be included as a "pre-change loss" under rules similar to section 382(d)(1).

Reduction in Net Deemed Tangible Income Return for Purposes Of Determining GILTI

The provision generally reduces the deemed rate of return on the aggregate of a U.S. shareholder's pro rata share of the QBAI of each of its CFC taxable units in a country from 10 percent to five percent for purposes of determining the U.S. shareholder's net deemed tangible income return. A special rule applies to specified tangible properly located in a possession of the United States, which retains the 10 percent deemed rate of return on the aggregate amount of such property in such possession.

Inclusion of Foreign Oil and Gas Extraction Income in Determining Tested Income and Loss

The provision repeals the exclusion from gross tested income for foreign oil and gas extraction income (as defined in section 907(c)(1)). As a result, foreign oil and gas extraction income must be taken into account in determining tested income and tested loss.

Coordination with Other Provisions

The provision clarifies that references to section 951 or section 951(a) in sections 959, 961, 962, and such other sections as the Secretary may identify shall include references to section 951A or 951A(a), respectively.

Effective Date

The provision generally applies to taxable years of foreign corporations beginning after December 31, 2021, and to taxable years of U.S. shareholders in which or with which such taxable years of foreign corporations end. The provision clarifying the coordination of section 951A with other provisions applies to taxable years of foreign corporations beginning after December 31, 2017, and to taxable years of U.S. shareholders in which or with which such taxable years of foreign corporations end.

7. Modifications to determination of deemed paid credit for taxes properly attributable to tested income (sec. 138127 of the bill and sec. 960(d) of the Code)

Present Law

Subject to certain limitations, U.S. citizens, resident individuals, and domestic corporations are allowed a credit for foreign income taxes they pay. In addition, a domestic corporation is allowed a credit for foreign income taxes paid by a CFC with respect to income

included by the corporation as subpart F income and GILTI; such taxes are deemed to have been paid by the domestic corporation for purposes of calculating the foreign tax credit.[709]

The foreign tax credit generally is limited to a taxpayer's U.S. tax liability on its foreign-source taxable income. The limit is intended to ensure that the credit mitigates double taxation of foreign-source income without offsetting U.S. tax on U.S.-source income.[710] The limit is computed by multiplying a taxpayer's total pre-credit U.S. tax liability for the year by the ratio of the taxpayer's foreign-source taxable income for the year to the taxpayer's total taxable income for the year. If the total amount of foreign income taxes paid and deemed paid for the year exceeds the taxpayer's foreign tax credit limitation for the year, the taxpayer may (in certain cases) carry back the excess foreign taxes to the previous year or carry forward to one of the succeeding 10 years.[711] No carryback or carryover of excess foreign tax credits are allowed in the GILTI foreign tax credit limitation category.

Deemed-Paid Taxes

For any subpart F income included in the gross income of a domestic corporation, the corporation is deemed to have paid foreign taxes equal to the aggregate foreign income taxes paid or accrued with respect to such income by the CFC.

For any GILTI included in the gross income of a domestic corporation, the corporation is deemed to have paid foreign taxes equal to 80 percent (the "20-percent haircut") of the corporation's inclusion percentage multiplied by the aggregate foreign income taxes paid or accrued with respect to tested income (but not tested loss) by each CFC with respect to which the domestic corporation is a U.S. shareholder.[712]

The inclusion percentage means, with respect to any domestic corporation, the ratio of such corporation's GILTI divided by the aggregate amount of its pro rata share of the tested income (but not tested loss) of each CFC with respect to which it is a U.S. shareholder. Tested foreign income taxes do not include any foreign income tax paid or accrued by a CFC that is properly attributable to the CFC's tested loss (if any).[713]

Explanation of Provision

The provision replaces, in section 960(d)(1), "80 percent" with "95 percent (100 percent in the case of tested foreign income taxes paid or accrued to a possession of the United

[709] Secs. 901 and 960; see also secs. 1291(g) and 1293(f) (providing, in the PFIC context, coordination with foreign tax credit rules).

[710] Secs. 901 and 904.

[711] Sec. 904(c).

[712] Sec. 960(d)(1).

[713] Sec. 960(d)(3).

States)." In other words, the provision generally replaces the 20-percent haircut with a five-percent haircut.

The provision expands the definition of tested foreign income taxes to include foreign income taxes that are properly attributable to amounts taken into account in determining tested income or tested loss under section 951A.

In addition, the provision grants the Secretary the authority to expand the definition of tested foreign income taxes to include foreign income taxes paid or accrued by a foreign corporation (other than such CFC) which owns, directly or indirectly, 80 percent or more (by vote or value) of the stock in such domestic corporation but only if (i) such foreign income taxes are properly attributable to amounts of such controlled foreign corporation taken into account in determining tested income or tested loss under section 951A and (ii) no credit is allowed, in whole or in part, for such foreign taxes in any foreign jurisdiction.

Effective Date

The provision applies to taxable years of foreign corporations beginning after December 31, 2021, and to taxable years of U.S. shareholders in which or with which such taxable years of foreign corporations end.

8. Deduction for foreign-source portion of dividends limited to controlled foreign corporations, etc. (sec. 138128 of the bill; sec. 245A and new sec. 951B of the Code)

Present Law

In the case of any dividend received from a specified 10-percent owned foreign corporation by a domestic corporation which is a U.S. shareholder with respect to the foreign corporation, a deduction is allowed equal to the foreign-source portion of the dividend.[714]

In general, a specified 10-percent owned foreign corporation is any foreign corporation with respect to which any domestic corporation is a U.S. shareholder.[715]

For purposes of determining when a person is a U.S. shareholder, section 958 applies the constructive ownership rules of section 318(a), with a few modifications. Section 318(a)(3) provides rules for when a corporation, partnership, trust, or estate is considered to own stock owned by a shareholder, partner, or beneficiary (so-called "downward attribution"). For example, under section 318(a)(3)(C), a corporation is considered as owning stock owned, directly or indirectly, by or for any shareholder that owns 50 percent or more of the corporation. Before the repeal of section 958(b)(4), stock owned by a foreign person was not attributed

[714] Sec. 245A(a). The foreign-source portion of any dividend equals the amount of the dividend multiplied by the percentage of undistributed earnings that are attributable neither to ECI nor to certain dividends received from domestic corporations. Sec. 245A(c).

[715] Sec. 245A(b)(1). U.S. shareholders are U.S. persons that own at least 10 percent of the stock (measured by vote or value) of a foreign corporation. Sec. 951(b).

downward to a U.S. person.[716] As a result, a wholly owned domestic subsidiary of a foreign corporation was not treated as owning stock in other foreign corporations owned by the foreign parent. Since the repeal of section 958(b)(4), attribution of certain stock of a foreign corporation owned by a foreign person to a related U.S. person is required for purposes of determining whether the U.S. person is a U.S. shareholder of the foreign corporation and, therefore, whether the foreign corporation is a CFC.

Explanation of Provision

First, the provision limits the deduction under section 245A to dividends received from a CFC.

Second, the provision allows U.S. shareholders of a foreign corporation which is not a CFC to elect, along with the foreign corporation, to treat the foreign corporation as a CFC (but not for purposes of new section 951B (described below) or for any other purpose determined by the Secretary). The election requires the consent of all current U.S. shareholders and is binding also on all future U.S. shareholders of the foreign corporation. The election is revocable only with consent of the Secretary.

Third, the provision restores former section 958(b)(4).

Fourth, the provision provides a narrow rule in new section 951B for downward attribution from a foreign person in certain cases. In general, the rules of subpart F apply to a foreign controlled U.S. shareholder ("FCUSS") of a foreign controlled foreign corporation ("FCFC") as if the former were a U.S. shareholder and the latter were a CFC. An FCUSS is a U.S. person that would be a U.S. shareholder with respect to a foreign corporation if (1) to be a U.S. shareholder the U.S. person must own more than 50 percent of the stock of the foreign corporation and (2) downward attribution from foreign persons applies. An FCFC is a foreign corporation, other than a CFC, more than 50 percent of which is owned by FCUSS. Given that a U.S. person is an FCUSS only with respect to a foreign corporation of which the U.S. person owns more than 50 percent, the foreign corporation with respect to which the U.S. person is an FCUSS is always an FCFC.

The provision grants the Secretary regulatory authority to determine when any such U.S. person or foreign corporation should be considered a U.S. shareholder or CFC, respectively, and to prescribe anti-avoidance measures consistent with the intent of the provision.

Effective Date

The provision generally applies to distributions made after the date of enactment.[717]

---

[716] See former sec. 958(b)(4) (repealed by sec. 14213 of Pub. L. 115-97).

[717] A technical correctiou may be necessary to reflect the intent that the new election (the second change described above) applies to elections made after the date of enactment and applies prospectively.

With respect to the modifications related to the restoration of former section 958(b)(4) and the enactment of new section 951B, the provision applies to (A) the last taxable year of foreign corporations beginning before January 1, 2018, and each subsequent taxable year of such foreign corporations and (B) taxable years of U.S. persons in which or with which such taxable years of foreign corporations end.

9. Limitation on foreign base company sales and services income (sec. 138129 of the bill and sec. 954 of the Code)

Present Law

Subpart F Income

Under subpart F of the Code, U.S. shareholders of a CFC must include in income their *pro rata* shares of subpart F income, without regard to whether the income is distributed to the shareholders.[718] In effect, U.S. shareholders of a CFC are treated as having received a current distribution of the CFC's subpart F income. With exceptions described below, subpart F income generally includes passive income and other income that is readily movable from one jurisdiction to another. Subpart F income consists of foreign base company income,[719] insurance income,[720] and certain income relating to international boycotts and other violations of public policy.[721]

Foreign base company income consists of foreign personal holding company income, foreign base company sales income, and foreign base company services income.[722] Foreign personal holding company income includes passive income such as dividends, interest, rents, and royalties. Foreign base company sales income generally includes income derived in connection with (i) the purchase of personal property from a related person and its sale to any person, (ii) the sale of personal property to any person on behalf of a related person, (iii) the purchase of personal property from any person and its sale to a related person, or (iv) the purchase of personal property from any person on behalf of a related person, but only if (1) the property which is purchased (or in the case of property sold on behalf of a related person, the property which is sold) is manufactured, produced, grown, or extracted outside the country under the laws of which the controlled foreign corporation is created or organized, and (2) the property is sold for use, consumption, or disposition outside such foreign country, or, in the case of property purchased on behalf of a related person, is purchased for use, consumption, or disposition outside such foreign country.[723] In other words, foreign base company sales income includes income

[718] Sec. 951(a).

[719] Secs. 952(a)(2) and 954.

[720] Secs. 952(a)(1) and 953.

[721] Sec. 952(a)(3)-(5).

[722] Sec. 954.

[723] See also sec. 954(d)(2) (providing a special rule applicable in situations in which the carrying on of activities by a CFC through a branch or similar establishment outside the country of incorporation of the CFC has

derived by a CFC from a purchase or sale of personal property involving a related party in which the goods are both manufactured and sold for use or consumption outside the CFC's country of organization. Foreign base company services income generally includes income (whether in the form of compensation, commissions, fees, or otherwise) derived in connection with the performance of technical, managerial, engineering, architectural, scientific, skilled, industrial, commercial, or like services which are performed (i) for, or on behalf of, any related person, and (ii) outside the country under the laws of which the controlled foreign corporation is created or organized.[724] For purposes of determining foreign base company sales or services income, a person is a related person with respect to a CFC, if such person is an individual, corporation, partnership, trust, or estate which controls, or is controlled by, the CFC, or such person is a corporation, partnership, trust, or estate which is controlled by the same person or persons which control the CFC.

Insurance income subject to current inclusion under subpart F includes any income of a CFC attributable to the issuing or reinsuring of any insurance or annuity contract in connection with risks located in a country other than the CFC's country of organization.[725]

Investments in U.S. Property

U.S. shareholders also must include their *pro rata* shares of a CFC's untaxed earnings invested in certain items of U.S. property.[726] For this purpose, U.S. property generally includes tangible property located in the United States, stock of a U.S. corporation, an obligation of a U.S. person, and certain intangible assets, such as patents and copyrights, acquired or developed by the CFC for use in the United States.[727] There are specific exceptions to the general definition of U.S. property, including for bank deposits, certain export property, and certain trade or business obligations.[728]

Exceptions

Subpart F income does not include certain dividends, interest, rents, and royalties received by a CFC from a related corporation organized and operating in the same foreign

---

substantially the same effect as if such branch or similar establishment were a wholly owned subsidiary corporation deriving such income; in such situations, pursuant to regulations prescribed by the Secretary, the income attributable to the carrying on of such activities of such branch or similar establishment shall be treated as income derived by a wholly owned subsidiary of the CFC and shall constitute foreign base company sales income of the CFC).

[724] See also sec. 954(e)(2) (providing an exception for income derived in connection with the performance of services which are directly related to (i) the sale or exchange by the CFC of property manufactured, produced, grown, or extracted by it and which are performed before the time of the sale or exchange, or (ii) an offer or effort to sell or exchange such property).

[725] Sec. 953(a) and (e).

[726] Secs. 951(a)(1)(B) and 956.

[727] Sec. 956(c)(1).

[728] Sec. 956(c)(2).

country in which the CFC is organized.[729] The same-country exception is not available to the extent that the payments reduce the subpart F income of the payor. A second exception (the "high-tax exception") is available for any item of income received by a CFC if the taxpayer establishes that the income was subject to an effective foreign income tax rate greater than 90 percent of the maximum U.S. corporate income tax rate in effect at the time the income was earned (*e.g.*, for income earned by a CFC in tax year 2021, more than 90 percent of 21 percent, or 18.9 percent).[730] A third exception excludes from foreign personal holding company income dividends, interest, rents, and royalties received or accrued by one CFC from a related CFC to the extent attributable or properly allocable to income of the payor that is not subpart F income.[731]

There is also an exclusion from subpart F income for certain income of a CFC that is derived in the active conduct of a banking or financing business ("active financing income").[732] With respect to income derived in the active conduct of a banking, financing, or similar business, a CFC is required to be predominantly engaged in such business and to conduct substantial activity with respect to such business, and other requirements must be met.

For a securities dealer, foreign personal holding company income excludes any interest or dividend (or certain equivalent amounts) from any transaction entered into in the ordinary course of the dealer's trade or business as a dealer in securities within the meaning of section 475.[733]

Exclusion of Previously Taxed Earnings and Profits

A U.S. shareholder may exclude from its income actual distributions of earnings and profits from a CFC that were previously included in income by the U.S. shareholder under subpart F.[734] Any income inclusion resulting from an investment in U.S. property also may be excluded when such earnings and profits are ultimately distributed.[735]

Basis Adjustments

A U.S. shareholder of a CFC generally increases the basis in its CFC stock by the amount of subpart F income inclusions and generally reduces the basis in its CFC stock by the

---

[729] Sec. 954(c)(3).

[730] Sec. 954(b)(4). This exception applies to an item of income that would otherwise be included in foreign base company income or insurance income within the meaning of sections 954(a) and 953, respectively.

[731] Sec. 954(c)(6). CFC look-through applies to taxable years of foreign corporations beginning before January 1, 2026, and to taxable years of U.S. shareholders with or within which such taxable years of foreign corporations end.

[732] Sec. 954(h).

[733] Sec. 954(c)(2)(C).

[734] Sec. 959(a)(1).

[735] Secs. 959(a)(2) and 956.

amount of any distributions that are excluded from its income as previously taxed earnings and profits.[736]

Explanation of Provision

Pursuant to the provision, foreign base company sales income and foreign base company services income would be limited to situations in which the related person is a related U.S. person that is a taxable unit (within the meaning of section 904(e)) which is a tax resident of the United States.[737] As a result, arrangements that would otherwise give rise to foreign base company sales or services income, but for the fact that such arrangements do not involve a related U.S. person, are outside the scope of such rules and, instead, subject to section 951A.

In addition, the provision provides that the rules in section 961(c) apply in determining the basis of stock and certain property and the recognition of gain for all purposes of the Code. The provision further provides that gain may be recognized by reason of section 961(b) and (c) upon a distribution of previously taxed earnings and profits by a lower-tier CFC to an upper-tier CFC in situations in which the amount of the distribution exceeds the upper-tier CFC's basis in the stock of the lower-tier CFC.

Several other amendments are included that are integral to the prospective application of the provision. One amendment allocates section 951(a) items to a U.S. shareholder to the extent such U.S. shareholder received a distribution of current earnings and profits that: (1) would give rise to a deduction under section 245A(a), or (2) in the case of a dividend paid directly or indirectly to a CFC with respect to stock owned by the shareholder within the meaning of section 958(a)(2) (*i.e.*, stock owned through foreign entities), would not result in subpart F income to the CFC by reason of section 954(b)(4), (c)(3), or (c)(6). Consistent with current law, the provision allocates the remaining section 951(a) items to U.S. shareholders in proportion to their ownership on the last day, in the foreign corporation's taxable year, on which the foreign corporation is a CFC. Related amendments are made to section 951A(e)(1) and (2) and to section 953(c)(5)(A). In addition, an amendment clarifies that foreign tax credits taken by reason of withholding tax imposed on a distribution of previously taxed earnings and profits do not result in an additional section 78 gross-up.

Effective Date

The provision generally applies to taxable years of foreign corporations beginning after December 31, 2021, and to taxable years of U.S. shareholders in which or with which such taxable years of foreign corporations end.

---

[736] Sec. 961.

[737] The provision grants authority to the Secretary to issue regulations or other guidance as may be necessary or appropriate to carry out the purposes of the provision, including such regulations or other guidance providing for the proper application of the provision in situation in which the relevant arrangement (including a single transaction or series of transactions) involves a related U.S. person (or a U.S. taxable unit of a related U.S. person).

The other amendments made with respect to the pro rata share rules apply to distributions made after December 31, 2017, and the amendment made with respect to the section 78 gross-up apply to taxable years of foreign corporations beginning after December 31, 2017, and to taxable years of U.S. shareholders in which or with which such taxable years of foreign corporations end.

D. Inbound International Provisions

1. Modifications to base erosion and anti-abuse tax (sec. 138131 of the bill and Code section 59A)

Present Law

The base erosion and anti-abuse tax (the "BEAT") is an additional tax imposed on certain multinational corporations with respect to payments to foreign affiliates.[738]

The BEAT applies only to corporate taxpayers with average gross receipts in excess of $500 million and is determined, in part, by the extent to which a taxpayer has made payments to foreign related parties.[739] The BEAT generally does not apply to taxpayers for which reductions to taxable income ("base erosion tax benefits") arising from payments to foreign related parties ("base erosion payments") are less than three percent of total deductions (*i.e.*, a "base erosion percentage" of less than three percent).

For a taxpayer subject to the BEAT (an "applicable taxpayer"), the additional tax (the "base erosion minimum tax amount" or "BEAT liability") for the year generally equals the excess, if any, of 10 percent of its modified taxable income over an amount equal to its regular tax liability reduced (but not below zero) by the sum of a certain tax credits.[740]

Base Erosion Payments and Base Erosion Benefits

A base erosion tax benefit generally reflects the reduction in taxable income arising from the associated base erosion payment.

A base erosion payment generally is any amount paid or accrued by a taxpayer to a foreign person that is a related party of the taxpayer and with respect to which a deduction is allowable.[741] A base erosion payment includes any amount paid or accrued by the taxpayer to a foreign related party in connection with the acquisition by the taxpayer from the related party of property of a character subject to the allowance for depreciation (or amortization in lieu of depreciation).[742]

Base erosion payments generally do not include any amount that constitutes a reduction in gross receipts, including payments for cost of goods sold. Certain other payments are

---

[738] Sec. 59A.

[739] For this purpose, a related party is, with respect to the taxpayer, any 25-percent owner of the taxpayer; any person who is related (within the meaning of sections 267(b) or 707(b)(1)) to the taxpayer or any 25-percent owner of the taxpayer; and any other person who is related (within the meaning of section 482) to the taxpayer. Sec. 59A(g). The 25-percent ownership threshold is determined by vote or value.

[740] Sec. 59A(b).

[741] Sec. 59A(d)(1).

[742] Sec. 59A(d)(2).

excluded from the definition of base erosion payment, including certain payments for services[743] and qualified derivative payments.[744] A payment for a service by a U.S. corporation to a foreign related party is a base erosion payment, except to the extent that the services in question included a markup component. In final regulations, the Secretary provided that a portion of costs meeting the standards for use of the "services cost method"[745] may not be treated as base erosion payments. Instead, only the portion of the outbound payment in excess of actual costs incurred by the recipient of the payment, i.e., the markup component of the price charged, is a base erosion payment.[746]

The BEAT treats as a base erosion payment any reinsurance premium payment paid by a U.S. life insurance company or by a U.S. property and casualty insurance company to a related foreign reinsurer (*e.g.*, a U.S. insurer pays a reinsurance premium to a related foreign reinsurer to cover risk of storm damage in the United States).[747] It also may apply to payment by a U.S. reinsurer to a related foreign insurer on the occurrence of a covered event (*e.g.*, if reinsurance recoverable is paid for earthquake damage in a foreign country). However, the BEAT provides no rule of exclusion for receipt by the U.S. insurer of reinsurance recovered (*e.g.*, the related foreign reinsurer pays the U.S. insurer when a claim is made for storm damage in the United States), nor is there a rule of exclusion applicable to the reinsurance premium paid by a foreign insurer to a related U.S. reinsurer (*e.g.*, to cover earthquake risk in a foreign country).

Taxpayers are permitted to waive deductions and thus avoid "base erosion tax benefits" of such deduction to reduce exposure to the BEAT. The Secretary adopted a rule permitting taxpayers to waive the right to deductions for payments otherwise within the scope of base erosion payments.[748] The waiver authority extended to insurance-related payments that were reductions from gross premiums and other consideration.

Calculation of BEAT Liability

BEAT liability generally equals the excess, if any, of 10 percent of the taxpayer's modified taxable income over the amount of regular tax liability[749] reduced (but not below zero) by the sum of certain tax credits. The amount of regular tax liability is reduced (and the base erosion minimum tax amount increased) by all income tax credits except for the research

[743] Sec. 59A(d)(5).

[744] Sec. 59A(h).

[745] Treas. Reg. sec. 1.482-9.

[746] Treas. Reg. sec. 1.59A-3(b)(3)(i).

[747] Secs. 59A(d)(3), 803(a)(1)(B) and 832(b)(4)(A).

[748] Treas. Reg. sec. 1.59A-3(c)(6).

[749] As defined in section 26(b).

credit[750] and a certain portion of applicable section 38 credits.[751] Modified taxable income is the taxpayer's regular taxable income increased by any base erosion tax benefit with respect to any base erosion payment and an adjustment for the taxpayer's NOL deduction, if any.[752]

Special Rules for Taxable Years Beginning after December 31, 2025

For taxable years beginning after December 31, 2025, the 10-percent rate on modified taxable income is increased to 12.5 percent and regular tax liability is reduced (and the base erosion minimum tax amount is therefore increased) by the sum of all the taxpayer's income tax credits for the taxable year.[753]

Special Rules for Banks and Securities Dealers

An applicable taxpayer that is a member of an affiliated group that includes a bank (as defined in section 581) or securities dealer registered under section 15(a) of the Securities Exchange Act of 1934 is subject to a tax rate on its modified taxable income that is one-percentage point higher than the generally applicable tax rate.[754] In addition, for purposes of determining whether they are subject to the BEAT, banks and securities dealers are subject to a base erosion percentage threshold of two percent (rather than three percent).[755]

Explanation of Provision

The provision changes the scope for determining which companies are applicable taxpayers. In taxable years beginning after December 31, 2023, applicable taxpayers are no longer limited to those with a three-percent base erosion percentage or higher. As a result, all corporations (other than a regulated investment company, a real estate investment trust, or an S corporation) that meet the gross receipts threshold are applicable taxpayers and potentially subject to the BEAT.

[750] Sec. 41(a).

[751] Sec. 59A(b)(4). Applicable section 38 credits are credits allowed under section 38 for the taxable year that are properly allocable to the low-income housing credit (section 42(a)), the renewable energy production credit (section 45(a)), and the energy investment credit (section 48). In general, no more than 80 percent of the amount of applicable section 38 credits for a taxable year can be used to reduce an applicable taxpayer's base erosion minimum tax liability and in no case can applicable section 38 credits reduce the taxpayer's base erosion minimum tax liability by more than 80 percent. Sec. 59A(b)(1)(B)(i)(II).

[752] An applicable taxpayer's modified taxable income is its taxable income for the taxable year increased by (1) any base erosion tax benefit with respect to any base erosion payment and (2) the base erosion percentage of any NOL deduction allowed under section 172 for such taxable year. Sec. 59A(c)(1).

[753] Sec. 59A(b)(2).

[754] Sec. 59A(b)(3).

[755] Sec. 59A(e)(1)(C).

In addition, the applicable calculations required under the BEAT to target base-eroding activity and undertaxed payments, including modified taxable income, base erosion benefits and payments, as well as the rates of the BEAT tax are changed as described below.

Base Erosion Tax Benefits and Base Erosion Payments

Modified taxable income adds certain indirect costs regarding inventory to the category of base erosion payments and the treatment of net operating losses in the determination of base erosion benefits[756]. In addition, the provision expands and clarifies the exceptions from base erosion payments.

Indirect Costs of Goods Sold and Base Erosion Payments

Amounts paid or incurred by the taxpayer to a related foreign party are base erosion payments to the extent that they constitute indirect costs that are required to be included in inventory costs by reason of section 263A. In addition, costs incurred in acquiring property that is inventory in the hands of the taxpayer are treated as base erosion payments to the extent such costs exceed the sum of the direct costs of the property in the hands of the foreign related party and the indirect costs (as described in section 263A(a)(2)(B)) of such foreign related party that are demonstrated to have been paid or incurred by such foreign related party to an unrelated U.S. person. Transactions between two foreign entities related to the taxpayer are subject to similar rules regarding characterization of the payment as an indirect cost within the scope of base erosion payments, unless they were paid or incurred (directly or indirectly) to an unrelated U.S. person.

In lieu of including the indirect costs of a related foreign party in its computation of base erosion payments, a taxpayer may elect to treat 20 percent of the amount paid or incurred to such related foreign party for the acquisition of inventory as indirect costs that are not base erosion payments[757]. The items or classes of inventory eligible for such election, as well as the time and manner for making such election are to be determined by the Secretary.

Net Operating Losses in Computing Modified Taxable Income

For taxable years beginning after 2021, the net operating loss for which a deduction is permitted under section 172 is taken into account in determining modified taxable income, but is determined without regard to any deduction which is a base erosion tax benefit. Such determination is made for each taxable year. Appropriate adjustments are made to take into account the percentage limitations applicable to corporations under section 172, as well as the rules therein regarding certain contributions and capital gains property.

Rules similar to the tax benefit and coordination rules applicable to the alternative minimum tax computations under section 59(g) and (h) are to be used in determining modified

[756] A technical correction may be necessary to the definition of modified taxable income

[757] A technical correction may be necessary to reflect intent.

taxable income, including those arising from net operating losses or base erosion tax benefits arising from the new category of base erosion payments and related basis adjustments.

Consolidation and Expansion of Exceptions from Base Erosion Payments

Payments that are subject to Federal income tax by either the payor or the payee are outside the scope of base erosion payments, without regard to whether the income related to such payments was eligible for a reduced rate of tax. Thus, outbound payments to a related party that are included in the computation of Subpart F or GILTI (without regard to the section 250 deduction), subject to withholding tax, or taxable as effectively connected income to the recipient are not base erosion payments. With respect to payments to partnerships and payments subject to withholding tax, whether a payment is subject to Federal income tax is determined using principles similar those in former section 163(j)(5).

In addition, payments that are subject to a sufficient level of foreign income tax are not within the scope of base erosion payments. Payments are subject to sufficient foreign tax if they are subject to an effective tax rate at least equal to the applicable percentage for a taxpayer tax in that taxable year. For this purpose, the effective tax rate is computed in the same manner as under the provisions of section 904 and may be based on applicable financial statements. The Secretary is authorized to prescribe rules to prevent tax avoidance, including criteria for recharacterizing a transaction or series of transactions among related parties.

Calculation of BEAT liability

The provision strikes the provision that required adding credits back to the regular tax liability before determining the BEAT.

The BEAT liability, computed using the applicable percentage, now equals the excess of BEMTA over regular tax liability. The applicable percentage is 10 percent for taxable years beginning after December 31, 2021, and ending before January 1, 2024, increasing to 12.5 percent for taxable years beginning after December 31, 2023, and ending before January 1, 2026. For taxable years beginning after December 31, 2025, the applicable percentage is 15 percent.

The general business credit may be applied to offset BEAT liability that exceeds regular tax liability.

Effective Date

The provision is effective for taxable years beginning after December 31, 2021.

Other Business Tax Provisions

2. Credit for clinical testing of orphan drugs limited to first use or indication (sec. 138141 of the bill and sec. 45C(b)(2) of the Code)

Present Law

The Code provides a 25-percent business tax credit for qualified clinical testing expenses incurred in testing of certain drugs for rare diseases or conditions, generally referred to as "orphan drugs." Qualified clinical testing expenses are costs paid or incurred to test an orphan drug after the drug has been approved for human testing by the Food and Drug Administration (the "FDA") but before the drug has been approved for sale by the FDA.[758] A rare disease or condition is defined as one that (1) affects fewer than 200,000 persons in the United States, or (2) affects more than 200,000 persons, but for which there is no reasonable expectation that businesses could recoup the costs of developing a drug for such disease or condition from sales in the United States of the drug.[759]

Amounts included in computing the credit are excluded from the computation of the research credit.[760]

No deduction is allowed for the portion of otherwise allowable qualified clinical testing expenses equal to the amount of the orphan drug credit allowed for the taxable year.[761]

Explanation of Provision

The provision requires that human clinical testing may be taken into account for purposes of the credit only to the extent that such testing is related to the first use or indication with respect to which a drug for a rare disease or condition is designated under section 526 of the Federal Food, Drug, and Cosmetic Act. Further, the provision requires that such testing must occur (1) before the first date on which an application (with respect to any use or indication with respect to any disease or condition) with respect to a drug is approved under section 505(c) of the Federal Food, Drug, and Cosmetic Act, or (2) if a drug is a biological product, before the first date on which a license (with respect to any use or indication with respect to any disease or condition) for such drug is issued under section 351(a) of the Public Health Service Act.

Effective Date

The provision applies to taxable years beginning after December 31, 2021.

---

[758] Sec. 45C(b).

[759] Sec. 45C(d)(1).

[760] Sec. 45C(c).

[761] Sec. 280C(b).

3. Modifications to treatment of certain losses (sec. 138142 of the bill and sec. 165 of the Code)

Present Law

Section 165(a) and worthlessness

Deductions may be allowed for any loss sustained during the taxable year and not compensated for by insurance or otherwise.[762] For such loss to be allowed as a deduction, the loss must be "evidenced by closed and completed transactions, fixed by identifiable events, and . . . actually sustained during the taxable year."[763] The amount of the deduction is determined by reference to the adjusted tax basis of the property used for "determining the loss from the sale or other disposition of property."[764]

Among the events giving rise to such a loss deduction is worthlessness.[765] The test for worthlessness, which is a facts and circumstances analysis,[766] is two-pronged. A taxpayer must demonstrate (1) the asset in question is objectively valueless ("objective worthlessness") and (2) a subjective determination of worthlessness ("subjective worthlessness").[767]

To show objective worthlessness, the taxpayer must make a reasonable showing that the asset was "in fact valueless at the time selected by the taxpayer."[768] A mere diminution in the asset's value is insufficient to establish worthlessness.[769] Taxpayers normally demonstrate objective worthlessness by showing an "identifiable event."[770]

To satisfy the subjective prong of the test, the taxpayer must reasonably believe that the asset lacks any future value[771] and the taxpayer's actions should reflect the taxpayer's

---

[762] Sec. 165(a).

[763] Treas. Reg. §1.165-1(b).

[764] Sec. 165(b). Furthermore, for individuals, section 165 deductions are limited to (1) losses incurred in a trade or bnsiness, (2) losses incurred in a transaction entered into for profit and (3) except in certain circumstances, losses arising from fire, storm, shipwreck or other casualty, or from theft. Sec.165(c).

[765] See, *e.g.*, Rev. Rul. 2004-58, 2004-24 I.R.B. 1043 (discussing the requirements for a "deduction for worthlessness under §165[a]").

[766] See, *e.g.*, *Boehm v. Comm'r*, 326 U.S. 287 (1945).

[767] *Morton v. Comm'r*, 38 B.T.A. 1270, 1278-79 (1938).

[768] *Echols v. Comm'r*, 935 F.2d 703, 708 (5th Cir. 1991), *rehearing denied*, 950 F.2d 209 (5th Cir. 1991).

[769] *Kraft, Inc. v. U.S.*, 30 Fed. Cl. 739, 785-86 (1994); *Proesel v. Comm'r*, 77 T.C. 992, 1006 (1981).

[770] *Morton v. Comm'r*, 38 B.T.A. 1270 (1938) (nonacq.), *aff'd*, 112 F.2d 320 (7th Cir. 1940).

[771] *Lawson v. Comm'r*, 42 B.T.A. 1103, 1108 (1940).

subjective determination.[772] The judicial standard requires a taxpayer neither to be an "incorrigible optimist"[773] nor a "stygian pessimist"[774]

Worthless Partnership Interests

Courts have held that a partner may claim a loss with respect to the worthlessness of a partnership interest under section 165(a).[775] Case law and service guidance indicates whether such loss is generally ordinary or capital depends on whether the loss is deemed to result from the sale or exchange of a capital asset.[776] Specifically, the character generally depends on whether the partner claiming such loss has any share of partnership liabilities immediately before the worthlessness claim. This is because a shift in liabilities (in connection with a worthlessness claim or otherwise) causes a deemed distribution under the partnership tax rules[777] and a distribution (deemed or otherwise) is treated as a sale or exchange under the partnership tax rules.[778] Thus, generally, a partner will take an ordinary loss upon the worthlessness of its partnership interest if the partner claiming worthlessness has no share of any partnership liability immediately prior to the claim and a partner will take a capital loss upon the worthlessness of its partnership interest if the partner has a share of any partnership liability immediately prior to the claim.

Worthless Securities

Present law provides special rules for worthless securities. If a security that is a capital asset becomes worthless during the taxable year, the resulting loss is treated as a loss from the sale or exchange of such capital asset on the last day of the taxable year. For this purpose, securities are defined as (1) a share of stock in a corporation; (2) a right to subscribe for, or to receive, a share of stock in a corporation; or (3) a bond, debenture, note, or certificate, or other evidence of indebtedness, issued by a corporation or by a government or political subdivision thereof, with interest coupons or in registered form.

---

[772] See *e.g., Echols v. Comm'r*, 935 F.2d 703, 707-708 (5th Cir. 1991), *rehearing denied*, 950 F.2d 209 (5th Cir. 1991).

[773] *United States v. S.S. White Dental Manufacturing Co.*, 274 U.S. 398, 403 (1927).

[774] *Ruppert v. U.S.*, 22 F. Supp. 428, 431 (Ct. Cl. 1938), *cert. denied*, 305 U.S. 630 (1938) (worthlessness claim for a bad debt).

[775] See *Echols v. Comm'r*, 935 F.2d 703 (5th Cir. 1991), *rehearing denied*, 950 F.2d 209 (5th Cir. 1991); *Zeeman v. U.S.*, 75 F. Supp. 235 (S.D.N.Y. 1967), *aff'd in part, rev'd in part*, 395 F.2d 861 (2d Cir. 1968); *In Re. Kreidle*, 91-2 U.S.T.C. ¶50,371 (Bankr. D. Col. 1991), *aff'd*, 143 B.R. 941 (D.C. Col. 1992); *Tejon Ranch v. Comm'r*, 49 T.C.M. (CCH) 1357 (1985). See also Rev. Rul. 93-80, 1993-2 C.B. 235.

[776] *La Rue v. Comm'r*, 90 T.C. 465 (1988); Rev. Rul. 93-80, 1993-2 C.B. 235. Section 751's hot assets rules may apply in the case of capital loss.

[777] Sec. 752(b).

[778] Sec. 761(e).

A security is not considered worthless if there is a reasonable hope and expectation of future value. Taxpayers must demonstrate the existence of an identifiable event that clearly indicates the "destruction of both the potential and liquidating values of the stock."[779]

Corporate Liquidations

In general, the sale of a corporation's assets does not generate a tax at the shareholder level. However, if the selling corporation distributes the sale proceeds in a complete liquidation (other than a complete liquidation of a subsidiary into a parent company to which section 332 applies), each of the corporation's shareholders recognizes gain or loss equal to the difference between the value of the liquidating distributions and the basis of the stock. The loss is generally capital gain or loss if the asset is a capital asset in the hands of the taxpayer[780]. The gain or loss generally is recognized at the time that the liquidation proceeds are received.

Explanation of Provision

The provision provides that if any partnership interest becomes worthless during the taxable year, the loss resulting therefrom is considered as a loss from the sale or exchange of a capital asset and such loss is recognized to the transferor partner at the time of the identifiable event establishing worthlessness. Thus, the character of the loss is generally capital, subject to the rules of section 751(relating to unrealized receivables and inventory items). Furthermore, the presence or absence of partnership liabilities is not determinative.

The provision accelerates the timing of the loss resulting from a worthless security. Such loss is treated as a loss from the sale or exchange at the time of the identifiable event establishing worthlessness. The provision expands the rules relating to worthless securities (sec. 165(g)) to certain securities issued by partnerships. It expands the definition of security to include a bond, debenture, note, or certificate, or other evidence of indebtedness, issued by a partnership, with interest coupons or in registered form.

The provision also provides a deferral of losses in the case of a complete liquidation to which section 331 applies when the two corporations are members of the same controlled group.[781] No loss may be recognized by the distributee corporation (with respect to the stock or securities of the distributing corporation received in the liquidation) until the distributee corporation disposes of substantially all of the properties received in the liquidation to a party that is not related to the distributee corporation.[782]

---

[779] See *Austin Co. v. Commissioner, 71 T.C. 955*

[780] A special statutory rule provides ordinary treatment when a security held by a parent corporation in a controlled subsidy becomes worthless. Sec 165(g)(3). In general, a liquidation may be treated as an event establishing worthlessness.

[781] As defined in sec. 267(f).

[782] Related is defined to mean two corporations which are members of the same controlled group (as defined in sec. 267(f)) or controlled partnerships within the meaning of sec. 707(b)(1).

The Secretary is instructed to issue any regulations or other guidance that may be necessary or appropriate, including regulations or other guidance to carry out the purposes of the provision and to apply the principles of the provision to liquidating corporation stock or securities owned by a corporation indirectly through one or more partnerships.

Effective Date

The part of the provision concerning loss deductions applies to taxable years beginning after December 31, 2021. The part of the provision concerning losses on liquidations applies to liquidations on or after the date of enactment.

4. Adjusted basis limitation for divisive reorganization (sec. 138143 of the bill and new sec. 361(d) of the Code)

Present Law

In a divisive reorganization under sections 368(a)(1)(D) and 355, a distributing corporation generally (1) transfers property to a section 368(c) controlled corporation in exchange for stock (and also in some cases for (i) money and other property of the controlled corporation and (ii) securities or other debt obligations of which the controlled corporation is the obligor) and (2) distributes the controlled stock to its shareholders (as well as cash or securities, if applicable).

There are three economically similar methods through which a distributing corporation can extract value from the controlled corporation in a divisive reorganization. First, the distributing corporation can reduce its liabilities by causing the subsidiary to assume them under section 357. Second, the distributing corporation can transfer money and other property received from the controlled corporation to the distributing corporation's creditors to satisfy its debt obligations, subject to section 361(b). Third, the distributing corporation can exchange the controlled corporation's debt securities for debt held by the distributing corporation's creditors.

The distributing corporation must recognize gain to the extent that the amount of the liability assumption, and money and other property transferred to the distributing corporation's creditors, exceeds the aggregate adjusted basis of the assets that the distributing corporation transfers to the controlled corporation in the divisive reorganization. However, the amount of the controlled corporation's debt securities that the distributing corporation may transfer to its creditors to reduce its debt without gain recognition is not limited under section 361.

Explanation of Provision

The provision amends section 361 to provide that a distributing corporation recognizes gain in a divisive reorganization under sections 368(a)(1)(D) and 355 to the extent that the amount of the controlled corporation's debt securities received by the distributing corporation and transferred to its creditors in connection with the divisive reorganization exceeds the aggregate adjusted basis of the assets transferred by the distributing corporation to the controlled corporation, as reduced by the amount of (i) the total amount of the liabilities of the distributing corporation assumed by the controlled corporation (within the meaning of section

357(c)), and (ii) the total amount of money and the fair market value of other property received by the distributing corporation from the controlled corporation.

Effective Date

The provision applies to reorganizations occurring on or after the date of enactment.

5. Rents from prison facilities not treated as qualified income for purposes of REIT income tests (sec. 138144 of the bill and sec. 856 of the Code)

Present Law

A real estate investment trust ("REIT") is an entity that otherwise would be taxed as a domestic corporation but elects to be taxed under a special REIT tax regime pursuant to which the REIT receives a deduction for dividends paid and for that reason generally is not subject to corporate tax on income distributed to its shareholders. To qualify as a REIT, an entity must meet several requirements. At least 90 percent of REIT income (other than net capital gain) must be distributed annually;[783] the REIT must derive most of its income from passive, generally real estate-related, investments; and REIT assets must be primarily real estate-related. In addition, a REIT must have transferable interests and at least 100 shareholders, and no more than 50 percent of the REIT interests may be owned by five or fewer individual shareholders (as determined using specified attribution rules). Other requirements also apply.[784]

A REIT is restricted to earning certain types of generally passive income. Among other requirements, at least 75 percent of the gross income of a REIT in each taxable year must consist of real estate-related income. Such income includes: rents from real property; gain from the sale or other disposition of real property (including interests in real property) that is not stock in trade of the taxpayer, inventory, or other property held by the taxpayer primarily for sale to customers in the ordinary course of its trade or business; interest on mortgages secured by real property or interests in real property; and certain income from foreclosure property (the "75-percent income test").[785] Qualifying rents from real property include rents from interests in real property and charges for services customarily furnished or rendered in connection with the rental of real property,[786] but do not include impermissible tenant service income.[787]

Explanation of Provision

---

[783] Even if a REIT meets the 90-percent income distribution requirement for REIT qualification, more stringent distribution requirements must be met in order to avoid an excise tax under section 4981.

[784] Secs. 856 and 857.

[785] Secs. 856(c)(3) and 1221(a)(1). Income from sales that are not prohibited transactions solely by virtue of section 857(b)(6) also is qualified REIT income.

[786] Sec. 856(d)(1)(A) and (B).

[787] Sec. 856(d)(2)(C).

The provision provides that qualifying rents from real property do not include any amount received or accrued, directly or indirectly, with respect to any real or personal property which is primarily used in connection with any correctional, detention, or penal facility.

Effective Date

The provision applies to taxable years beginning after December 31, 2021.

6. Modifications to exemption for portfolio interest (sec. 138145 of the bill and sec. 871(h)(3)(B) of the Code)

Present Law

Nonresident aliens and foreign corporations generally are subject to U.S. tax on only their U.S.-source income. There are two broad types of U.S.-source income of foreign taxpayers: (1) income that is "fixed or determinable annual or periodical gains, profits, and income" ("FDAP income") and (2) income that is "effectively connected with the conduct of a trade or business within the United States" ("ECI"). FDAP income, although nominally subject to a statutory 30-percent gross-basis tax withheld at its source, in many cases is subject to a reduced rate of, or entirely exempt from, U.S. tax under the Code or a bilateral income tax treaty.

FDAP income received by foreign persons from U.S. sources is subject to a 30-percent gross-basis tax (*i.e.*, a tax on gross income without reduction for related expenses), which is collected by withholding at the source of the payment. FDAP income includes interest, dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, and emoluments.[788] The items enumerated in defining FDAP income are illustrative, and the words "annual or periodical" are "merely generally descriptive" of the payments within the purview of the statute.[789] The categories of income subject to the 30-percent tax and the categories for which withholding is required generally are coextensive.[790]

Although FDAP income includes U.S.-source portfolio interest, such interest is exempt from the 30-percent gross-basis tax.[791] Portfolio interest is any interest (including original issue discount) that is paid on an obligation that is in registered form and for which the beneficial owner has provided to the U.S. withholding agent a statement certifying that the beneficial owner is not a U.S. person.[792] Portfolio interest, however, does not include interest received by a 10-percent shareholder.[793]

---

[788] Secs. 871(a) and 881. FDAP income that is ECI is taxed as ECI.

[789] *Commissioner v. Wodehouse*, 337 U.S. 369, 393 (1949).

[790] See secs. 1441 and 1442.

[791] Sec. 871(h)(1).

[792] Sec. 871(h)(2).

[793] Sec. 871(h)(3)(A).

For this purpose, a 10-percent shareholder is, in the case of an obligation issued by a corporation, any person who owns 10 percent or more of the total combined voting power of all classes of stock of such corporation entitled to vote, or, in the case of an obligation issued by a partnership, any person who owns 10 percent or more of the capital or profits interest in such partnership.[794]

Explanation of Provision

The provision provides that, in the case of an obligation issued by a corporation, a 10-percent shareholder is (1) any person who owns 10 percent or more of the total combined voting power of all classes of stock of such corporation entitled to vote and (2) any person who owns more than 10 percent of the total value of the stock of such corporation.

Effective Date

The provision applies to obligations issued after the date of enactment.

7. Certain partnership interest derivatives (sec. 138146 of the bill and new sec. 871(m)(8) of the Code)

Present Law

In general, income arising from notional principal contracts are sourced based on the residence of the recipient of the payment.[795] However, if the notional principal contract income arises from a U.S. trade or business, the income is treated as "effectively connected" with the conduct of a U.S. trade or business, which is taxable at rates generally applicable to U.S. taxpayers.[796] The determination as to whether notional principal contract income arises from a U.S. trade or business depends on the facts and circumstances, including an analysis of whether the income, gain, or loss is derived from assets used in, or held for use in, the conduct of the trade or business in the United States (the "asset-use test") and whether the activities of the trade or business conducted in the United States were a material factor in the realization of the income, gain, or loss (the "business-activities test").[797]

In general, if the interests in a partnership are traded on an established securities market or readily tradable on a secondary market (or the substantial equivalent thereof), then the

---

[794] Sec. 871(h)(3)(B).

[795] Treas. Reg. sec. 1.863-7(b)(1).

[796] Treas. Reg. sec. 1.863-7(b)(3).

[797] Treas. Reg. sec. 1.864-4(c).

partnership is treated as a corporation.[798] However, partnerships with certain passive income are excepted from the rule.[799]

In the case of notional principal contracts whose payments are calculated by reference to the income or gain of a publicly traded partnership that is not engaged in a U.S. trade or business, the general rule described above applies and the source of the payments is based on the residence of the recipient.

Explanation of Provision

The provision treats sale-repurchase transactions with respect to publicly traded partnerships and notional principal contract income calculated by reference to the U.S. source income or gain of all publicly traded partnerships, including those that are not engaged in a U.S. trade or business, as "dividend equivalent amounts." t. The provision generally excludes amounts determined by reference to income or gain exempt from income tax or that would be treated as from sources outside the United States if paid to a nonresident alien individual[800]. As a result of this provision, these amounts are U.S.-source payments subject to 30-percent U.S. withholding tax (which may be reduced by tax treaty). The Secretary may expand the application of the provision to other partnerships by regulation and may exclude contracts or transactions that the Secretary determines do not have the potential for tax avoidance. To determine the portion of the notional principal contract income that is attributable to the income or gain of a publicly traded partnership that is subject to the new sourcing rule, the publicly traded partnerships themselves must provide relevant information in notices to the relevant withholding agents under regulations to be provided by the Secretary.

The provision also provides that a dividend equivalent amount under section 871(m) is treated as a dividend paid by a domestic corporation.

Effective Date

The provision applies to payments made after the date that is 180 days after enactment.

8. Adjustments to earnings and profits of controlled foreign corporations (sec. 138147 of the bill; sec. 952(c)(3) and new sec. 312(n)(9) of the Code)

Present Law

---

[798] Sec. 7704(a).

[799] Sec. 7704(b) and (c).

[800] A technical correction may be necessary to reflect this intent

In general, a U.S. shareholder of a controlled foreign corporation (a "CFC")[801] must include currently its *pro rata* share of the CFC's subpart F income (generally passive income and certain other related-party income that is readily movable from one jurisdiction to another).[802] For any taxable year, however, a CFC's subpart F income generally is limited to the CFC's earning and profits ("E&P") for the taxable year.[803]

For that purpose, the E&P of a CFC is determined without regard to three rules in section 312(n): LIFO ("last-in, first-out") inventory adjustments, installment sales, and the completed contract method of accounting.[804] For other purposes, however, the E&P of a CFC is determined with regard to those three rules.

In an installment sale, the purchase price is paid over time.[805] In general, under the installment method of accounting, income is included following the payments of the purchase price (*i.e.*, over time).[806] Under the rule in section 312(n), however, E&P is computed as if the corporation did not use the installment method.[807] In other words, in the case of an installment sale of a domestic corporation, E&P increases to reflect all gain otherwise deferred for income tax purposes.

In the case of an installment sale of a CFC, for purposes of determining subpart F inclusions, the E&P of the CFC is lower than E&P would otherwise be, because the rule in section 312(n) is disregarded.[808] For other purposes, however, the E&P of the CFC reflects all gain otherwise deferred for income tax purposes. Thus, in the case of an installment sale of a CFC, E&P for purposes of subpart F inclusions is lower than E&P for purposes of paying dividends (which may be eligible for the deduction under section 245A).

Explanation of Provision

[801] A CFC generally is defined as any foreign corporation in which U.S. persons own (directly, indirectly, or constructively) more than 50 percent of the corporation's stock (measured by vote or value), taking into account only "U.S. shareholders," that is, U.S. persons that own at least 10 percent of the stock (measured by vote or value). Secs. 951(b), 957, and 958.

[802] Subpart F comprises sections 951 through 965.

[803] Sec. 952(c)(1)(A).

[804] Sec. 952(c)(3) referring to the rules in sec. 312(n)(4)-(6).

[805] Sec. 453(b)(1) (defining an installment sale as a disposition of property where at least one payment is to be received after the close of the taxable year in which the disposition occurs).

[806] Sec. 453(c) (defining the installment method as a method of accounting under which the income recognized for any taxable year from a disposition is that proportion of the payments received in that year which the gross profit (realized or to be realized when payment is completed) bears to the total contract price).

[807] Sec. 312(n)(5).

[808] Sec. 952(c)(3).

The provision makes the special rule for E&P of a CFC for purposes of determining subpart F inclusion the general rule for E&P of a CFC. In other words, the provision provides that for all purposes the E&P of a CFC is determined without regard to paragraphs (4) (LIFO), (5) (installment sales), and (6) (completed contract method of accounting) of section 312(n). Thus, in the case of an installment sale, the E&P of a CFC is lower for all purposes than E&P would otherwise be; in other words, under the provision, E&P of a CFC generally follows the income tax treatment.

Effective Date

The provision applies to taxable years of foreign corporations beginning after December 31, 2021, and to taxable years of U.S. shareholders in which or with which such taxable years of foreign corporations end.

9. Certain dividends from controlled foreign corporations to United States shareholders treated as extraordinary dividends (sec. 138148 of the bill and new sec. 1059(g) of the Code)

Present Law

If any corporation receives any extraordinary dividend with respect to any share of stock and the corporation has not held such stock for more than two years before the dividend announcement date, then (1) the corporation's basis in the stock is reduced (but not below zero) by the nontaxed portion of such dividends and (2) if the nontaxed portion of the dividends exceeds such basis, the excess is treated as gain from the sale or exchange of the stock for the taxable year in which the extraordinary dividend is received.[809]

In general, an extraordinary dividend is any dividend the amount of which equals or exceeds a given percentage of the taxpayer's adjusted basis in the relevant stock. The percentage for preferred stock is five percent and ten percent for any other stock.[810]

In general, the nontaxed portion of a dividend is the amount of the dividend reduced by a deduction allowable with respect to the dividend under section 243, 245, or 245A.[811]

Explanation of Provision

The provision provides that any disqualified CFC dividend received from a controlled foreign corporation ("CFC") by any taxpayer which is a U.S. shareholder[812] of such foreign

[809] Sec. 1059(a).

[810] Sec. 1059(c)(1).

[811] Sec. 1059(b).

[812] As defined in sec. 951(b).

corporation shall be treated as an extraordinary dividend to which section 1059(a) applies without regard to the period the taxpayer held the stock of such foreign corporation.

For purposes of the provision, disqualified CFC dividend means any dividend paid by a CFC to a taxpayer that is a U.S. shareholder of such foreign corporation that is attributable to earnings and profits which were earned, or gain with respect to property which accrued, during a period (i) such foreign corporation was not a CFC or (ii) such stock was not owned by a U.S. shareholder.

Finally, the provision directs the Secretary to prescribe rules coordinating the application of section 1059 with other provisions of the Code, including section 1248.

Effective Date

The provision applies to distributions made after the date of enactment.

10. Modification of rules for partnership interests held in connection with performance of services (sec. 138149 of the bill and sec. 1061 of the Code)

Present Law

Section 1061 provides for a three-year holding period in the case of certain net long-term capital gain with respect to any applicable partnership interest (known as a carried interest) held by the taxpayer.[813] In general, if the three-year holding period requirement is not satisfied, section 1061 treats gain subject to the provision as short-term capital gain (taxed at ordinary rates). This rule applies notwithstanding the rules of section 83 relating to property transferred in connection with the performance of services or any election in effect under section 83(b) to include amounts in gross income in the year of transfer.

Gain subject to the provision to which the three-year holding period requirement applies means gain from, and loss from, the sale or exchange of a capital asset held for more than one year, to the extent such gain is taken into account in computing gross income and such loss is taken into account in computing taxable income.[814]

An applicable partnership interest is generally any interest in a partnership that, directly or indirectly, is transferred to (or held by) the taxpayer in connection with performance of services in any applicable trade or business. The services may be performed by the taxpayer or by any other related person or persons in any applicable trade or business. An applicable partnership interest does not include a capital interest in a partnership giving the taxpayer a right to share in partnership capital commensurate with the amount of capital contributed (as of the time the partnership interest was received), or commensurate with the value of the partnership interest that is taxed under section 83 upon the receipt or vesting of the partnership interest.

---

[813] Section 1061 is effective for taxable years beginning after December 31, 2017.

[814] Sec. 1061(a)(2), referring to secs. 1222(3) and (4).

An applicable trade or business means any activity (regardless of whether the activity is conducted in one or more entities) that consists in whole or in part of the following: (1) raising or returning capital, and either (2) investing in (or disposing of) specified assets (or identifying specified assets for investing or disposition), or (3) developing specified assets. Specified assets mean securities (generally as defined under rules for mark-to-market accounting for securities dealers), commodities (as defined under rules for mark-to-market accounting for commodities dealers), real estate held for rental or investment, cash or cash equivalents, options or derivative contracts with respect to such securities, commodities, real estate, cash or cash equivalents, as well as an interest in a partnership to the extent of the partnership's proportionate interest in the foregoing. Reporting requirements and regulatory authority are provided under the provision.[815]

Explanation of Provision

Under the provision, if one or more applicable partnership interests are held by a taxpayer at any time during a taxable year, the taxpayer's net applicable partnership gain for the taxable year is treated as short-term capital gain. Net applicable partnership gain means net long-term capital gain[816] determined by only taking into account the taxpayer's gains and losses with respect to applicable partnership interests, and any other amounts includable in gross income with respect to an applicable partnership interest that are treated as capital gain or are subject to tax at the rate applicable to capital gain. The provision thus expands the types of gain that are treated as short-term capital gain under section 1061.

Net applicable partnership gain generally does not include amounts realized after a five-year holding period, with certain exceptions. The holding period is three years for any taxpayer (other than a trust or estate) with adjusted gross income ("AGI") as determined under the provision of less than $400,000 for the taxable year.[817] The holding period is three years for any income with respect to any applicable partnership interest that is attributable to a real property trade or business.[818]

The provision adds rules for measuring the five-year or three-year holding period, including for tiered entities. The holding period is measured from the latest of specified dates. The dates are (i) the date on which the taxpayer acquired substantially all of the applicable partnership interest with respect to which the amount is realized, (ii) the date on which the partnership in which such applicable partnership interest is held acquired substantially all of the assets held by such partnership, and (iii) if the partnership in which the taxpayer holds an

[815] The Department of Treasury and IRS have issued final regulations regarding the application of, and reporting for, section 1061. See T.D. 9945, 86 Fed. Reg. 5480, January 19, 2021.

[816] Net long-term capital gain is described in section 1222(7).

[817] AGI as determined under the provision is AGI determined without regard to sections 911, 931, or 933. These sections provide certain income exclusions for U.S. citizens or residents living abroad and exclusions for certain income from sources within certain possessions and within Puerto Rico.

[818] For this purpose, a real property trade or business is defined as in section 469(c)(7)(C) as any real property development, redevelopment, construction, reconstruction, acquisition, conversion, rental, operation, management, leasing, or brokerage trade or business.

applicable partnership interest owns, directly or indirectly, interests in one or more other partnerships, the dates determined by applying rules similar to the foregoing in the case of each such other partnership. The Treasury Secretary is directed to provide guidance in determining the amount of gain that is treated as short-term capital gain under these rules, as well as guidance as to any necessary and appropriate reporting to enable administration and carry out the purposes of the provision.

The provision provides that the present-law rule with respect to certain services that are not taken into account in determining whether an interest is an applicable partnership interest applies to services with respect to a trade or business that is not an applicable trade or business.

The provision modifies the definition of a specified asset, providing that a partnership interest is itself treated as a specified asset (except as otherwise provided by the Secretary) if the partnership has a direct or indirect interest in an asset that is a specified asset (that is, securities, commodities, real estate held for rental or investment, cash or cash equivalents, and options or derivative contracts with respect to any of the foregoing). Regulatory guidance may, for example, define a de minimis direct or indirect interest of a partnership in an asset that is not taken into account for this purpose.

The provision gives regulatory authority to provide that statutory exclusions from the definition of an applicable partnership interest do not apply, for example, when the application of an exception would not carry out the purposes of section 1061. The provision also clarifies that the exception for ownership by a corporation of an interest that would otherwise be an applicable partnership interest applies only to C corporations.

The provision modifies the rule relating to transfers of applicable partnership interests to provide that transfer of an applicable partnership interest requires recognition of gain notwithstanding any other Federal income tax rules.

The provision requires the issuance of Treasury guidance to prevent the avoidance of the purposes of the provision through the distribution of property by a partnership or through a carry waiver (*e.g.*, the waiver of gain subject to this provision in return for a future allocation of income, gain, or property). The guidance also must apply the rules of section 1061 in the case of financial instruments, contracts, or interests in entities other than partnerships to the extent necessary or appropriate to carry out the purposes of the provision.

Effective Date

The provision is effective for taxable years beginning after December 31, 2021.

0. Limitation on certain special rules for section 1202 gains (sec. 138150 of the bill and sec. 1202 of the Code)

Present Law

Exclusion of Gain on Sale of Small Business Stock

In General

A taxpayer other than a corporation may exclude 50 percent of the gain from the sale of qualified small business stock acquired at original issue and held for at least five years.[819] The amount of gain eligible for the exclusion by an individual with respect to the stock of any corporation is the greater of (1) ten times the taxpayer's basis in the stock, or (2) $10 million (reduced by the amount of eligible gain excluded by the taxpayer in prior years).[820] To qualify as a small business, before and immediately after the issuance, the aggregate gross assets (*i.e.*, cash plus aggregate adjusted basis of other property) held by the corporation may not exceed $50 million.[821] The corporation also must meet certain active trade or business requirements. Only C corporation stock may qualify as qualified small business stock.[822]

The portion of the gain includible in taxable income is taxed at a maximum rate of 28 percent under the regular tax rates applicable to the net capital gain of individuals.[823] Seven percent of the excluded gain is an alternative minimum tax preference.[824]

Special Rules for Certain Stock Acquired after February 17, 2009

For qualified small business stock acquired after February 17, 2009, and before September 28, 2010, the percent of gain which may be excluded is increased to 75 percent ("75-percent exclusion rule").[825]

For qualified small business stock acquired after September 27, 2010, the percent of gain which may be excluded is increased to 100 percent and the minimum tax preference does not apply ("100-percent exclusion rule").[826]

Rollover of Gain from Sale of Small Business Stock

An individual may elect to roll over tax-free any gain realized on the sale of qualified small business stock held more than six months to the extent of the taxpayer's cost of purchasing other qualified small business stock within 60 days of the sale.[827]

Explanation of Provision

---

[819] Sec. 1202(a)(1) and (2).

[820] Sec. 1202(b)(1).

[821] Sec. 1202(d)(1)(A) and (B).

[822] Sec. 1202(c)(1).

[823] Sec. 1(h)(4), (7).

[824] Sec. 57(a)(7).

[825] Sec. 1202(a)(3).

[826] Sec. 1202(a)(4).

[827] Sec. 1045(a).

The provision limits the application of the 75-percent exclusion and 100-percent exclusion rules to taxpayers with adjusted gross income ("AGI") of less than $400,000. The provision also provides that the 75-percent exclusion and 100-percent exclusion rules do not apply to trusts and estates. Consequently, for qualified small business stock acquired any time after February 17, 2009, taxpayers with AGI equal to or greater than $400,000, as well as all trusts and estates, may only exclude 50 percent of the gain for income tax purposes from the sale of qualified small business stock.

For purposes of the provision, AGI is determined without regard to sections 911 (foreign earned income exclusion), 931 (exclusion of income for a bona fide resident of American Samoa), and 933 (exclusion for a bona fide resident of Puerto Rico).

AGI is also determined without regard to the exclusion of gain from the sale of qualified small business stock. Thus, the full amount of such gain is included in AGI for purposes of determining the applicable exclusion.

Effective Date

In general, the provision applies to sales or exchanges of stock on or after September 13, 2021. However, the provision does not apply to any sale or exchange of stock executed pursuant to a written binding contract which was in effect on September 12, 2021, and which is not later materially modified.

1. Rules relating to common control (sec. 138152 of the bill and sec. 52 of the Code)

Present Law

Aggregation rules are applied under the tax law to treat multiple taxpayers as a single taxpayer for purposes of particular tax rules. The section 52 aggregation rules generally treat groups of corporations and other entities under common control as a single employer.[828] Corporate entities making up the same controlled group of corporations are treated as a single employer.[829] A separate rule in section 52 aggregates organizations under common control.[830] Thus, partnerships (and other non-corporate entities such as sole proprietorships) may be aggregated under section 52(b).

Under the aggregation rules of section 52(b), all employees of trades or business (whether or not incorporated) that are under common control are treated as employed by a single

[828] The aggregation rules of section 52 (originally designed to assist taxpayers in computing the work opportunity tax credit) are applied by many other Code provisions. Such other Code provisions are themselves cross-referenced, broadening the reach of section 52's aggregation rules. For example, section 163(j)(3)'s small business exception references section 448 and thus requires the application of the aggregation rules of section 52 to determine whether a taxpayer is subject to section 163(j)'s business interest expense limitation.

[829] Sec. 52(a). A controlled group is defined by reference to section 1563(a).

[830] Section 52(b).

employer.[831] The regulations generally apply a vote or value ownership test whereby a parent-subsidiary group, a brother-sister group or a combined group may be treated as a single taxpayer. In broad terms, a parent-subsidiary group requires the organizations to be linked through 50-percent-or-greater direct ownership interests. A brother-sister group generally only exists in the case of closely held entities, and a combined group requires both a parent-subsidiary group and a brother-sister group.

Aggregation under section 52 applies to taxpayers conducting a trade or business.

Explanation of Provision

The provision provides that a trade or business for purposes of section 52(b) includes any activity treated as trade or business under section 469(c)(5) (activity involving research or experimentation) or section 469(c)(6) (including certain investment activity). Thus, for example, if a partnership engages in activity that gives rise to a section 212 deduction, such partnership may be aggregated under section 52(b).

Effective Date

The provision is effective for taxable years beginning after December 31, 2021.

2. Wash sales and constructive sales (secs. 138151 and 138153 of the bill and secs. 1091 and 1259 of the Code)

Present Law

Wash Sales

In general, a loss claimed by a taxpayer with respect to any sale or other disposition of shares of stock or securities is not allowed if, within a period beginning 30 days before the date of such sale or disposition and ending 30 days after such date, the taxpayer has acquired (by purchase or by an exchange on which the entire amount of gain or loss was recognized by law), or has entered into a contract or option so to acquire, substantially identical stock or securities.[832] In other words, a loss claimed with respect to a wash sale is not allowed.

The basis of the stock or securities acquired (or the contract or option entered into) that resulted in denial of the loss from the sale or other disposition of substantially identical stock or securities is the basis of the stock or securities so sold or disposed of.[833] In other words, the loss is deferred. The basis is increased or decreased by the difference, if any, between the price

[831] An entity generally must include the gross receipts of another entity in which it has a controlling interest (generally, a more-than-50-percent interest). Sec. 52; Treas. Reg. sec. 1.52-1.

[832] Sec. 1091(a). For this purpose, stock or securities generally includes contracts or options to acquire or sell stock or securities.

[833] Sec. 1091(d).

at which the stock or securities were acquired and the price at which the substantially identical stock or securities were sold or otherwise disposed of.

Constructive Sales

In general, in the case of a constructive sale of an appreciated financial position, a taxpayer must recognize gain as if the position were sold, assigned, or otherwise terminated at its fair market value on the date of the constructive sale.[834]

In general, an appreciated financial position is any position with respect to any stock, debt instrument, or partnership interest if there would be gain were such position sold, assigned, or otherwise terminated at its fair market value.[835]

A taxpayer is treated as having made a constructive sale of an appreciated financial position if the taxpayer (or a related person) (A) enters into a short sale of the same or substantially identical property, (B) enters into an offsetting notional principal contract with respect to the same or substantially identical property, (C) enters into a futures or forward contract to deliver the same or substantially identical property, (D) in the case of an appreciated financial position that is a short sale or a contract described in (B) or (C) with respect to any property, acquires the same or substantially identical property, or (E) to the extent prescribed by the Secretary in regulations, enters into one or more other transactions (or acquires one or more positions) that have substantially the same effect as a transaction described in any of the preceding sentence.

Explanation of Provision

Wash Sales

The provision modifies the wash sale rules to apply to a loss claimed with respect to any sale or other disposition of a specified asset. Other specified assets include (1) any security described in subparagraph (A), (B), (C), (D), or (E) of section 475(c)(2), (2) any foreign currency, (3) any commodity described in subparagraph (A), (B), or (C) of section 475(e)(2), (4) any digital representation of value which is recorded on a cryptographically secured distributed ledger or any similar technology as specified by the Secretary. Except as provided in regulations, specified assets include contracts or options to acquire or sell any specified assets. The provision also provides a business needs and hedging exception for foreign currencies and commodities.

The provision expands application of the wash sale rules to acquisition of substantially identical specified assets by the taxpayer or a related party. In the case of any

[834] Sec. 1259(a)(1). Any gain or loss realized after the constructive sale with respect to the position is adjusted to reflect any gain taken into account as a result of the constructive sale. In addition, the holding period of the position is determined as if the position were originally acquired on the date of the constructive sale. Sec. 1259(a)(2).

[835] Sec. 1259(b)(1). A position is an interest, including a futures or forward contract, short sale, or option. Sec. 1259(b)(3).

acquisition of substantially identical specified assets by a related party (other than the taxpayer's spouse), the basis of the substantially identical specified assets is not adjusted to include the disallowed loss. If the substantially identical specified assets are acquired by the taxpayer (or the taxpayer's spouse), the basis of the acquired specified assets is increased by the amount of the disallowed loss.

Constructive Sales

The provision adds digital asset (as defined above) to the definition of appreciated financial position. Thus, a constructive sale of a digital asset is subject to the general rule for constructive sales, such that a taxpayer must recognize gain as if the position with respect to the digital asset were sold, assigned, or otherwise terminated at its fair market value on the date of the constructive sale.

Effective Date

The provision concerning wash sales applies to sales and other dispositions after December 31, 2021. The provision concerning constructive sales applies to contracts entered into and constructive sales executed after the date of enactment

PART II — TAX INCREASES FOR HIGH-INCOME INDIVIDUALS

1. Increase in top marginal individual income tax rate (sec. 138201 of the bill and sec. 1 of the Code)

Present Law

In General

To determine regular tax liability, individual, estate, and trust taxpayers generally must apply the tax rate schedules (or the tax tables) to their regular taxable income. The rate schedules are broken into several ranges of income, known as income brackets, and the marginal tax rate increases as a taxpayer's income bracket increases.

Tax Rate Schedules

Separate rate schedules apply based on an individual's filing status. Public Law 115-97 (the "2017 Tax Act") changed the prior-law rate schedules for taxable years beginning after December 31, 2017, and beginning before January 1, 2026. For 2022, the regular individual, estate, and trust income tax rate schedules are projected to be as follows:

Table 1.–Projected Federal Individual, Estate, and Trust Income Tax Rates for 2022[1]

If taxable income is:	Then income tax equals:
Single Individuals	
Not over $10,250	10% of the taxable income
Over $10,250 but not over $41,675	$1,025 plus 12% of the excess over $10,250
Over $41,675 but not over $88,850	$4,796 plus 22% of the excess over $41,675
Over $88,850 but not over $169,600	$15,174.50 plus 24% of the excess over $88,850
Over $169,600 but not over $215,375	$34,556.50 plus 32% of the excess over $169,600
Over $215,375 but not over $538,675	$49,202.50 plus 35% of the excess over $215,375
Over $538,675	$162,287.50 plus 37% of the excess over $538,675

If taxable income is:	Then income tax equals:
Heads of Households	
Not over $14,600	10% of the taxable income
Over $14,600 but not over $55,750	$1,460 plus 12% of the excess over $14,600
Over $55,750 but not over $88,850	$6,398 plus 22% of the excess over $55,750
Over $88,850 but not over $169,600	$13,680 plus 24% of the excess over $88,850
Over $169,600 but not over $215,350	$33,060 plus 32% of the excess over $169,600
Over $215,350 but not over $538,450	$47,700 plus 35% of the excess over $215,350
Over $538,450	$160,785 plus 37% of the excess over $538,450
Married Individuals Filing Joint Returns and Surviving Spouses	
Not over $20,500	10% of the taxable income
Over $20,500 but not over $83,350	$2,050 plus 12% of the excess over $20,500
Over $83,350 but not over $177,700	$9,592 plus 22% of the excess over $83,350
Over $177,700 but not over $339,200	$30,349 plus 24% of the excess over $177,700
Over $339,200 but not over $430,750	$69,109 plus 32% of the excess over $339,200
Over $430,750 but not over $646,150	$98,405 plus 35% of the excess over $430,750
Over $646,150	$173,795 plus 37% of the excess over $646,150
Married Individuals Filing Separate Returns	
Not over $10,250	10% of the taxable income
Over $10,250 but not over $41,675	$1,025 plus 12% of the excess over $10,250
Over $41,675 but not over $88,850	$4,796 plus 22% of the excess over $41,675
Over $88,850 but not over $169,600	$15,174.50 plus 24% of the excess over $88,850
Over $169,600 but not over $215,375	$34,554.50 plus 32% of the excess over $169,600
Over $215,375 but not over $323,075	$49,202.50 plus 35% of the excess over $215,375
Over $323,075	$86,897.50 plus 37% of the excess over $323,075
Estates and Trusts	
Not over $2,700	10% of the taxable income
Over $2,700 but not over $9,850	$270 plus 24% of the excess over $2,700
Over $9,850 but not over $13,450	$1,986 plus 35% of the excess over $9,850
Over $13,450	$3,246 plus 37% of the excess over $13,450

[1] Joint Committee staff calculations.

For 2026, after the expiration of changes made by the 2017 Tax Act, the regular individual, estate, and trust income tax rate schedules are projected to be as follows:

Table 2.–Projected Federal Individual, Estate, and Trust Income Tax Rates for 2026[1]

If taxable income is:	Then income tax equals:
	Single Individuals
Not over $11,200	10% of the taxable income
Over $11,200 but not over $45,450	$1,120 plus 15% of the excess over $11,200
Over $45,450 but not over $110,100	$6,257.50 plus 25% of the excess over $45,450
Over $110,100 but not over $229,600	$22,420 plus 28% of the excess over $110,100
Over $229,600 but not over $499,200	$55,880 plus 33% of the excess over $229,600
Over $499,200 but not over $501,250	$144,848 plus 35% of the excess over $499,200
Over $501,250	$145,565.50 plus 39.6% of the excess over $501,250
	Heads of Households
Not over $16,000	10% of the taxable income
Over $16,000 but not over $60,900	$1,600 plus 15% of the excess over $16,000
Over $60,900 but not over $157,200	$8,335 plus 25% of the excess over $60,900
Over $157,200 but not over $254,600	$32,410 plus 28% of the excess over $157,200
Over $254,600 but not over $499,200	$59,682 plus 33% of the excess over $254,600
Over $499,200 but not over $532,600	$140,400 plus 35% of the excess over $499,200
Over $532,600	$152,090 plus 39.6% of the excess over $532,600
	Married Individuals Filing Joint Returns and Surviving Spouses
Not over $22,400	10% of the taxable income
Over $22,400 but not over $90,900	$2,240 plus 15% of the excess over $22,400
Over $90,900 but not over $183,450	$12,515 plus 25% of the excess over $90,900
Over $183,450 but not over $279,550	$35,652.50 plus 28% of the excess over $183,450
Over $279,550 but not over $499,200	$62,560.50 plus 33% of the excess over $279,550
Over $499,200 but not over $563,900	$135,045 plus 35% of the excess over $499,200
Over $563,900	$157,690 plus 39.6% of the excess over $563,900

If taxable income is:	Then income tax equals:
Married Individuals Filing Separate Returns	
Not over $11,200	10% of the taxable income
Over $11,200 but not over $45,450	$1,120 plus 15% of the excess over $11,200
Over $45,450 but not over $91,725	$6,257.50 plus 25% of the excess over $45,450
Over $91,725 but not over $139,775	$17,826.25 plus 28% of the excess over $91,725
Over $139,775 but not over $249,600	$31,280.25 plus 33% of the excess over $139,775
Over $249,600 but not over $281,950	$67,522.50 plus 35% of the excess over $249,600
Over $281,950	$78,845 plus 39.6% of the excess over $281,950
Estates and Trusts	
Not over $3,050	15% of the taxable income
Over $3,050 but not over $7,200	$457.50 plus 25% of the excess over $3,050
Over $7,200 but not over $10,950	$1,495 plus 28% of the excess over $7,200
Over $10,950 but not over $14,950	$2,545 plus 33.0% of the excess over $10,950
Over $14,950	$3,865 plus 39.6% of the excess over $14,950

[1] Joint Committee staff calculations.

Explanation of Provision

The provision increases the top individual, estate, and trust income tax rate of 37 percent to 39.6 percent and reduces the dollar amounts at which the 39.6-percent bracket begins. For 2022, the provision modifies the start of the 39.6 percent bracket to be $400,000 for singles, $425,000 for heads of households, $450,000 for married individuals filing jointly and surviving spouses, and $225,000 for married individuals filing separately. These amounts are adjusted for inflation starting in 2023. Under the provision, for 2022, the regular individual income tax rate schedules are projected to be as follows (changes from present law are in bold):

Table 3.–Federal Individual, Estate, and Trust Income Tax Rates for 2022 Under the Provision[1]

[illegible]	[illegible]
[illegible]	
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]

If taxable income is:	Then income tax equals:
Over $169,600 but not over $215,375	$34,554.50 plus 32% of the excess over $169,600
Over $215,375 but not over **$400,000**	$49,202.50 plus 35% of the excess over $215,375
Over **$400,000**	**$113,821.25** plus **39.6%** of the excess over **$400,000**
Heads of Households	
Not over $14,600	10% of the taxable income
Over $14,600 but not over $55,750	$1,460 plus 12% of the excess over $14,600
Over $55,750 but not over $88,850	$6,398 plus 22% of the excess over $55,750
Over $88,850 but not over $169,600	$13,680 plus 24% of the excess over $88,850
Over $169,600 but not over $215,350	$33,060 plus 32% of the excess over $169,600
Over $215,350 but not over **$425,000**	$47,700 plus 35% of the excess over $215,350
Over **$425,000**	**$121,077.50** plus **39.6%** of the excess over **$425,000**
Married Individuals Filing Joint Returns and Surviving Spouses	
Not over $20,500	10% of the taxable income
Over $20,500 but not over $83,350	$2,050 plus 12% of the excess over $20,500
Over $83,350 but not over $177,700	$9,592 plus 22% of the excess over $83,350
Over $177,700 but not over $339,200	$30,349 plus 24% of the excess over $177,700
Over $339,200 but not over $430,750	$69,109 plus 32% of the excess over $339,200
Over $430,750 but not over **$450,000**	$98,405 plus 35% of the excess over $430,750
Over **$450,000**	**$105,142.50** plus **39.6%** of the excess over **$450,000**
Married Individuals Filing Separate Returns	
Not over $10,250	10% of the taxable income
Over $10,250 but not over $41,675	$1,025 plus 12% of the excess over $10,250
Over $41,675 but not over $88,850	$4,796 plus 22% of the excess over $41,675
Over $88,850 but not over $169,600	$15,174.50 plus 24% of the excess over $88,850
Over $169,600 but not over $215,375	$34,554.50 plus 32% of the excess over $169,600
Over $215,375 but not over **$225,000**	$49,202.50 plus 35% of the excess over $215,375
Over **$225,000**	**$52,571.25** plus **39.6%** of the excess over **$225,000**

If taxable income is:	Then income tax equals:
Estates and Trusts	
Not over $2,700	10% of the taxable income
Over $2,700 but not over $9,850	$270 plus 24% of the excess over $2,700
Over $9,850 but not over $13,450	$1,986 plus 35% of the excess over $9,850
Over $13,450	$3,246 plus **39.6%** of the excess over $13,450

[1] Joint Committee staff calculations.

The provision's change to lower the start of the brackets for the top marginal rate also applies to taxable years beginning after December 31, 2025. As a result, the 35-percent bracket is eliminated for taxable years beginning after December 31, 2025.[836] Under the provision, for 2026, the regular individual income tax rate schedules are projected to be as follows (changes from present law are in bold):

Table 4.–Federal Individual, Estate, and Trust Income Tax Rates for 2026 Under the Provision[1]

If taxable income is:	Then income tax equals:
Single Individuals	
Not over $11,200	10% of the taxable income
Over $11,200 but not over $45,450	$1,120 plus 15% of the excess over $11,200
Over $45,450 but not over $110,100	$6,257.50 plus 25% of the excess over $45,450
Over $110,100 but not over $229,600	$22,420 plus 28% of the excess over $110,100
Over $229,600 but not over **$437,700**	$55,880 plus 33% of the excess over $229,600
Over **$437,700**	**$124,553** plus **39.6%** of the excess over **$437,700**
Heads of Households	
Not over $16,000	10% of the taxable income
Over $16,000 but not over $60,900	$1,600 plus 15% of the excess over $16,000
Over $60,900 but not over $157,200	$8,335 plus 25% of the excess over $60,900
Over $157,200 but not over $254,600	$32,410 plus 28% of the excess over $157,200
Over $254,600 but not over **$465,100**	$59,682 plus 33% of the excess over $254,600
Over **$465,100**	**$129,147** plus **39.6%** of the excess over **$465,100**

[836] Other rates and brackets revert to levels from prior law in effect before enactment of the 2017 Tax Act (adjusted appropriately for inflation) for taxable years beginning after December 31, 2025.

If taxable income is:	Then income tax equals:
Married Individuals Filing Joint Returns and Surviving Spouses	
Not over $22,400	10% of the taxable income
Over $22,400 but not over $90,900	$2,240 plus 15% of the excess over $22,400
Over $90,900 but not over $183,450	$12,515 plus 25% of the excess over $90,900
Over $183,450 but not over $279,550	$35,652.50 plus 28% of the excess over $183,450
Over $279,550 but not over **$492,450**	$62,560.50 plus 33% of the excess over $279,550
Over **$492,450**	**$132,817.50** plus **39.6%** of the excess over **$492,450**
Married Individuals Filing Separate Returns	
Not over $11,200	10% of the taxable income
Over $11,200 but not over $45,450	$1,120 plus 15% of the excess over $11,200
Over $45,450 but not over $91,725	$6,257.50 plus 25% of the excess over $45,450
Over $91,725 but not over $139,775	$17,826.25 plus 28% of the excess over $91,725
Over $139,775 but not over **$246,225**	$31,280.25 plus 33% of the excess over $139,775
Over **$246,225**	**$66,408.75** plus **39.6%** of the excess over **$246,225**
Estates and Trusts	
Not over $3,050	15% of the taxable income
Over $3,050 but not over $7,200	$457.50 plus 25% of the excess over $3,050
Over $7,200 but not over $14,950	$1,495 plus 28% of the excess over $7,200
Over $10,950 but not over $14,950	$2,545 plus 33% of the excess over $10,950
Over $14,950	$3,865 plus 39.6% of the excess over $14,950

[1] Joint Committee staff calculations.

Effective Date

The provision is effective for taxable years beginning after December 31, 2021.

2. Increase in capital gains rate for certain high-income individuals (sec. 138202 of the bill and sec. 1(h) of the Code)

Present Law

Preferential Rates on Capital Gain and Qualified Dividends

In general, gain or loss reflected in the value of an asset is not recognized for income tax purposes until a taxpayer disposes of the asset. On the sale or exchange of a capital asset, any gain generally is included in income.[837]

For individuals, estates, and trusts, any net capital gain is taxed at maximum rates lower than the rates applicable to ordinary income. Net capital gain is the excess of the net long-term capital gain for the taxable year over the net short-term capital loss for the year.[838] Gain or loss is treated as long-term if the asset is held for more than one year.[839] Qualified dividend income generally is taxed at the same rate as net capital gain.[840]

Capital losses generally are deductible in full against capital gains.[841] In addition, individual, trust, and estate taxpayers may deduct capital losses against up to $3,000 of ordinary income in each year.[842] Any remaining unused capital losses may be carried forward indefinitely to another taxable year.[843]

The maximum rate of tax on the adjusted net capital gain depends on the taxpayer's taxable income and filing status. These maximum rates apply for purposes of both the regular tax and the alternative minimum tax. For 2021, the adjusted net capital gain rate schedules are as follows:

[837] Gain from the sale of a taxpayer's principal residence may be excluded up to certain limits if certain conditions are met. See sec. 121.

[838] See sec. 1222.

[839] *Ibid.*

[840] Sec. 1(h).

[841] Sec. 1211(b).

[842] *Ibid.*

[843] Sec. 1212(b).

Table 5.–Adjusted Net Capital Gain Maximum Rates for 2021

Filing Status and Rate Start Amount (Taxable Income)					Rate
Single Individuals	Heads of Households	Married Individuals Filing Joint Returns and Surviving Spouses	Married Individuals Filing Separate Returns	Estates and Trust	
$0	$0	$0	$0	$0	0%
$40,400	$54,100	$80,800	$40,400	$2,700	15%
$445,850	$473,750	$501,600	$250,800	$13,250	20%

The breakpoints between the zero- and 15-percent rates (the "15-percent breakpoints") and the 15- and 20-percent rates (the "top capital-gain breakpoints") do not correspond to the ordinary income breakpoints.[844]

Additionally, in certain cases, there are additional higher capital gains rate brackets. A maximum 25 percent rate applies to unrecaptured section 1250 gain. Unrecaptured section 1250 gain arises upon the sale of depreciable real property, gain from which may be treated as long-term gain under section 1231 (for property used in a trade or business). Upon the sale of such property, a portion of the gain attributable to depreciation recapture is treated as capital gain but taxed at a higher rate.[845] A maximum 28 percent rate applies to gain from the sale of collectibles.[846]

The preferential capital gains rates apply for both the regular income tax as well as the alternative minimum tax ("AMT").

Conforming Provisions

Certain provisions in the Internal Revenue Code and in the U.S Code operate with a rate equal to the highest marginal regular capital gains rate: (1) the accumulated earnings tax,[847]

---

[844] Sec. 1(j)(5) For taxable years beginning before January 1, 2018, the start of the 15-percent breakpoints corresponded to the breakpoints that began the then-in-effective 25 percent ordinary rate, while the start of the top capital-gain breakpoints corresponded to the breakpoints that began the then-in-effective 39.6 percent ordinary rate. See sec. 1(h)(1).

[845] Sec. 1(h)(1)(E) and (6).

[846] The term collectible is defined in section 408(m). In addition, certain gain from the sale of qualified small business stock is subject to a maximum 28 percent rate.

[847] Sec. 531.

(2) the personal holding company tax,[848] (3) the FIRPTA withholding rules for certain distributions relating to dispositions of real property interests,[849] and (4) 46 U.S.C. sec. 53511(f)(2).

Section 15

If tax rates change during a taxable year, section 15 provides rules for apportioning taxable income for the year between the portion of the year ending with the day before the effective date of the change and the portion beginning with the effective date.[850]

Explanation of Provision

The provision aligns the top capital-gain breakpoints with the breakpoints that begin the top ordinary rate.[851] The 15-percent breakpoints are not changed.

The provision increases the top regular capital gains rate for individuals, estates, and trusts from 20 percent to 25 percent. The rates for unrecaptured section 1250 gain and collectible gain remain the same. The rate increase applies for purposes of both the regular tax and the AMT.

Conforming changes are made to the accumulated earnings tax, (2) the personal holding company tax, (3) the FIRPTA withholding rules for certain distributions relating to dispositions of real property interests, and (4) 46 U.S.C. sec. 53511(f)(2).

The provision provides that section 15 does not apply to the rate increase.

Effective Date

The provision to align the top capital-gain breakpoints with the breakpoints that begin the top ordinary rate is effective for taxable years beginning after December 31, 2021.

The provision to increase the top regular capital gains rate is effective for taxable years ending after the date of introduction (September 13, 2021).

The conforming change to the FIRPTA withholding rules applies to dispositions made after the effective date of the provision.

The provision has a transition rule for the taxable year including the date of introduction. Under this rule, gains and losses for the portion of the taxable year on or before the

---

[848] Sec. 541.

[849] Sec. 1445(e)(1) and (6).

[850] Sec. 15.

[851] The preceding provision of the bill lowers the top ordinary income breakpoints and raises the top ordinary income rate to 39.6 percent. This provision aligns the top capital-gain breakpoints with those breakpoints.

date of introduction are separately taken into account, and net capital gain with respect to such gain and losses is subject to a top marginal regular capital gains rate of 20 percent. Gains and losses for the portion of the taxable year after the date of introduction are also separately taken into account, and net capital with respect to such gain and losses is subject to a top marginal regular capital gains rate of 25 percent. A similar transition rule applies for purposes of the AMT. If the taxpayer has gains or losses allocated from a passthrough entity, the determination of when the gain or loss is taken into account is made at the entity level.

For purposes of the transition rule, capital gain recognized in the portion of the taxable year after the date of introduction shall be treated as recognized in the portion of the taxable year on or before the date of introduction if the gain arises from a transaction that occurs pursuant to a written binding contract entered into on or before the date of introduction. This safe harbor shall not apply if the written binding contract is modified in any material respect after the date of introduction.

3. Application of net investment income tax to trade or business income of certain high-income individuals (sec. 138203 of the bill and sec. 1411 of the Code)

Present Law

In General

As part of the financing for Social Security and Medicare benefits, a tax is imposed on the wages of an individual received with respect to his or her employment under the Federal Insurance Contributions Act ("FICA").[852] A similar tax is imposed on the self-employment income of an individual under the Self-Employment Contributions Act ("SECA").[853]

FICA

The FICA tax has two components. Under the old-age, survivors, and disability insurance component ("OASDI"), the rate of tax is 12.4 percent, half of which is imposed on the employer, and the other half of which is imposed on the employee.[854] The amount of wages subject to this component is capped at $142,800 for 2021. Under the hospital insurance ("HI") component, the rate is 2.9 percent, also split equally between the employer and the employee. The amount of wages subject to the HI component of the tax is not capped.

The employee portion of the HI tax under FICA (not the employer portion) is increased by an additional tax of 0.9 percent on wages received in excess of a threshold amount. The threshold amount for the additional 0.9 percent is $250,000 in the case of a joint return, $125,000 in the case of a married individual filing a separate return, and $200,000 in any other

[852] See Chapter 21 of the Code.

[853] Sec. 1401.

[854] Secs. 3101 and 3111.

case. The threshold amount is not indexed for inflation.[855] The wages of individuals employed by a business in any form (for example, a C corporation) generally are subject to the FICA tax. The employee portion of the FICA tax is collected through withholding from wages.[856]

SECA

The SECA tax rate is the combined employer and employee rate for FICA taxes. Under the OASDI component, the rate of tax is 12.4 percent and the amount of earnings subject to this component is capped at $142,800 for 2021. Under the HI component, the rate is 2.9 percent, and the amount of self-employment income subject to the HI component is not capped. An additional 0.9 percent HI tax applies to self-employment income in excess of the same threshold amount that is applicable under FICA (reduced by FICA wages).[857]

For SECA tax purposes, self-employment income generally means net earnings from self-employment subject to a de minimis floor, but, for the OASDI component, self-employment income is limited to the annual cap less wages paid to the individual during the taxable year. Net earnings from self-employment generally includes the gross income derived by an individual from any trade or business carried on by the individual, less the deductions attributable to the trade or business that are allowed under the self-employment tax rules.[858] Net earnings from self-employment generally includes the distributive share of income or loss from any trade or business of a partnership in which the individual is a partner, subject to certain exceptions.

Specified types of income or loss are excluded, such as rentals from real estate in certain circumstances, dividends and interest, and gain or loss from the sale or exchange of a capital asset or from timber, certain minerals, or other property that is neither inventory nor held primarily for sale to customers.

Trust Funds

---

[855] Sec. 3101(b)(2).

[856] Sec. 3102.

[857] Sec. 1401(b)(2).

[858] For purposes of determining net earnings from self-employment, taxpayers are permitted a deduction from net earnings from self-employment equal to the product of the taxpayer's net earnings (determined without regard to this deduction) and one-half of the sum of the rates for OASDI (12.4 percent) and HI (2.9 percent), *i.e.*, 7.65 percent of net earnings. This deduction reflects the fact that the FICA rates apply to an employee's wages, which do not include FICA taxes paid by the employer, whereas a self-employed individual's net earnings are economically the equivalent of an employee's wages plus the employer share of FICA taxes. The deduction is intended to provide parity between FICA and SECA taxes. However, for a discussion of why the present law deduction does not provide exact parity with FICA taxes and a provision to modify the deduction, see Joint Committee on Taxation, *Options to Improve Tax Compliance and Reform Tax Expenditures*, JCS-02-05 (Jan. 27, 2005), at pp. 74-79. In addition, self-employed individuals may deduct one-half of self-employment taxes for income tax purposes under section 164(f).

Under the Social Security Act, OASDI taxes are directed to Treasury trust funds that provide Social Security benefits, and HI taxes are directed to the Federal Hospital Insurance Trust Fund.

S corporation Shareholders

An S corporation is treated as a passthrough entity for Federal income tax purposes. Each shareholder takes into account and is subject to Federal income tax on the shareholder's pro rata share of the S corporation's income.[859]

A shareholder of an S corporation who performs services as an employee of the S corporation is subject to FICA tax on his or her wages from the S corporation. A shareholder of an S corporation generally is not subject to FICA tax on amounts that are not wages, such as the shareholder's share of the S corporation's income.

An S corporation shareholder's pro rata share of S corporation income is not subject to SECA tax.[860] Nevertheless, courts have held that an S corporation shareholder is subject to FICA tax on the amount of his or her reasonable compensation, even though the amount may have been characterized by the taxpayer as other than wages. The case law has addressed the issue of whether amounts paid to shareholders of S corporations constitute reasonable compensation and therefore are wages subject to the FICA tax, or rather, are properly characterized as another type of income that is not subject to FICA tax.[861]

Partners

In General

A partnership is treated as a passthrough entity for Federal income tax purposes. Each partner includes in income its distributive share of partnership items of income, deduction, gain and loss.[862]

---

[859] Sec. 1366.

[860] See Rev. Rul. 59-221, 1959-1 C.B. 225, and Rev. Rul. 74-44, 1974-1 C.B. 287. This treatment differs from a partner's distributive share of income or loss from the partnership's trade or business, which is generally subject to SECA tax, as described below. Sec. 1402(a).

[861] See the discussion of case law in, *e.g.*, Thomas L. Dickens and Judson R. Jahn, "Reasonable Compensation For S Corporation Shareholder-Employees," 94 *Practical Tax Strategies* 159, April 2015 (also listing websites with ranges of reasonable compensation for various sectors); Richard Winchester, "The Gap in the Employment Tax Gap," 20 *Stanford Law and Policy Review* 127, 2009; James Parker and Claire Y. Nash, "Anticipate Close Inspection of Closely Held Company Pay Practices - Part I," 80 *Practical Tax Strategies* 215, April 2008; "Renewed Focus on S Corp. Officer Compensation," AICPA Tax Division's S Corporation Taxation Technical Resource Panel, *Tax Advisor,* May 2004, at 280. See also Treasury Inspector General for Tax Administration, Department of the Treasury, *Efforts to Address the Compliance Risk of Underreporting of S Corporation Officers' Compensation Are Increasing, but More Action Can be Taken*, (TIGTA 2021-30-042), August 11, 2021.

[862] Secs. 701 and 702.

A partner's distributive share of partnership items is not treated as wages for FICA tax purposes. Rather, a partner who is an individual is subject to the SECA tax on his or her distributive share of trade or business income of the partnership. The net earnings from self-employment generally include the partner's distributive share (whether or not distributed) of income or loss from any trade or business carried on by the partnership (excluding specified types of income, such as rent, dividends, interest, and capital gains and losses, as described above[863]).

Limited Partners

An exclusion from SECA applies in certain circumstances for limited partners of a partnership.[864] Under this rule, in determining a limited partner's net earnings from self-employment, an exclusion is generally provided for his or her distributive share of partnership income or loss. The exclusion does not apply with respect to guaranteed payments to the limited partner for services actually rendered to or on behalf of the partnership to the extent that those payments are established to be in the nature of remuneration for those services.[865]

The owners of a limited liability company that is classified as a partnership for Federal tax purposes are treated as partners for tax purposes. However, under State law, limited liability company owners are not defined as either general partners or limited partners.

---

[863] Sec. 1402(a).

[864] Sec. 1402(a)(13).

[865] In *Renkemeyer, Campbell, & Weaver, LLP v. Commissioner*, the Tax Court held that distributive shares of limited partners in a law firm that was an LLP (limited liability partnership under applicable State law) of partnership income "arising from the legal services they performed in their capacity as partners in the law firm are subject to self-employment tax" in the years at issue. 136 T. C. 137, 150 (2011); see also Amy S. Elliott, "Tax Court Decision Could Reignite Debate Over Partnerships and Employment Taxes," *Tax Notes Today*, March 11, 2011. The Tax Court has continued to apply a functional test in evaluating whether a taxpayer's interest in a partnership is sufficiently analogous to a limited partner interest for income attributable to the interest to be covered by the section 1402(a)(13) exclusion. See, *e.g.*, *Joseph v. Commissioner*, T.C.M. 2020-65, 20-21 (2020) ("[W]e concluded in *Renkemeyer* that an interest other than a limited partner interest could be treated as such for purposes of that section only if the holder is merely a passive investor in the entity who does not actively participate in the entity's business operations.")

In *Howell v. Commissioner*, the Tax Court concluded that a member of a limited liability company (treated as a partnership for tax purposes) who received guaranteed payments had performed services for the partnership and therefore was required to include the payments in net earnings from self-employment. T.C. Memo. 2012-303, Nov. 1, 2012. Similarly in *Riether v. U.S.*, the court held that the two members of a diagnostic imaging LLC should have treated all their income from the LLC as self-employment income because they participated in the partnership business. 919 F.Supp.2d 1140 (D.N.M. 2012).

In 1997, the Treasury Department issued proposed regulations defining a limited partner for purposes of the self-employment tax rules. Prop. Treas. Reg. sec. 1.1402(a)-2 (January 13, 1997). These regulations provided, among other things, that an individual is not a limited partner if the individual participates in the partnership business for more than 500 hours during the taxable year. However, in the Taxpayer Relief Act of 1997, the Congress imposed a moratorium on regulations regarding employment taxes of limited partners. The moratorium provided that any regulations relating to the definition of a limited partner for self-employment tax purposes could not be issued or effective before July 1, 1998. No regulations have been issued to date.

Net Investment Income ("NII") Tax

Rate and Application of the Tax

An additional tax is imposed on net investment income in the case of an individual, estate, or trust. In the case of an individual, the tax is 3.8 percent of the lesser of net investment income or the excess of modified adjusted gross income ("AGI") over the threshold amount.[866]

The threshold amount is $250,000 in the case of a joint return or surviving spouse, $125,000 in the case of a married individual filing a separate return, and $200,000 in any other case.[867] The threshold amount is not indexed for inflation. Modified AGI is AGI increased by the amount excluded from income as foreign earned income under section 911(a)(1) (net of the deductions and exclusions disallowed with respect to the foreign earned income).[868]

The tax is subject to the individual estimated tax provisions.[869] The tax is not deductible for income tax purposes.

Net investment income definition

Net investment income is investment income reduced by the deductions properly allocable to such income.[870]

Investment income is the sum of (i) gross income from interest, dividends, annuities, royalties, and rents (other than such income derived in the ordinary course of any trade or business to which the tax does not apply), (ii) other gross income derived from any trade or business to which the tax applies, and (iii) net gain (to the extent taken into account in computing taxable income) attributable to the disposition of property other than property held in a trade or business to which the tax does not apply.[871]

Deductions properly allocable to net investment income may include net operating loss deductions allowed under section 172.[872] Treasury regulations provide rules for calculating section 1411 net operating loss amounts of a net operating loss deduction for a taxable year.

[866] Sec. 1411(a)(1).

[867] Sec. 1411(b).

[868] Sec. 1411(d).

[869] Sec. 6654(a).

[870] Sec. 1411(c).

[871] Gross income does not include items, such as interest on tax-exempt bonds, veterans' benefits, and excluded gain from the sale of a principal residence, which are excluded from gross income under the income tax. See Treas. Reg. sec. 1.1411-1(d)(4).

[872] Treas. Reg. sec. 1.1411-4(f)(2)(iv) and (h).

The NII tax applies if a trade or business is a passive activity with respect to the taxpayer, or if the trade or business consists of trading financial instruments or commodities (as defined in section 475(e)(2)). In general, for a trade or business to be a passive activity (within the meaning of section 469) with respect to a taxpayer, the taxpayer does not materially participate in the trade or business (with certain exceptions).

Consequently, the NII tax generally does not apply to income or gain from a trade or business conducted as a sole proprietor, partnership, or S corporation, if the individual taxpayer materially participates in the trade or business activity. The NII tax does not apply to wages of an employee.

In the case of the disposition of a partnership interest or stock in an S corporation, gain or loss is taken into account only to the extent gain or loss would be taken into account by the partner or shareholder if the entity had sold all its properties for fair market value immediately before the disposition. Thus, only net gain or loss attributable to property held by the entity which is not property attributable to an active trade or business is taken into account.[873]

Income, gain, or loss on working capital is not treated as derived from a trade or business. Investment income does not include distributions from a qualified retirement plan. Nor does net investment income include amounts subject to SECA tax; thus, in effect, the application of SECA tax is determined before NII is determined.

Application of NII Tax to Trusts and Estates

In the case of an estate or trust, the NII tax is 3.8 percent of the lesser of (1) undistributed net investment income, or (2) the excess of adjusted gross income over the dollar amount at which the highest income tax bracket applicable to an estate or trust begins[874] ($13,050 for taxable years beginning in 2021).[875] Adjusted gross income is determined as provided in section 67(e), which provides that trusts and estates may deduct certain administrative expenses,[876] the applicable personal exemption,[877] and distributions made to beneficiaries[878] as part of the calculation of adjusted gross income.[879]

---

[873] For this purpose, a business of trading financial instruments or commodities is not treated as an active trade or business.

[874] Sec. 1411(a)(2).

[875] Rev. Proc. 2020-45, 2020-46 I.R.B. 1016.

[876] The trust or estate may deduct costs which are paid or incurred in connection with the administration of the trust or estate and which would not have been incurred if the property were not held in such trust or estate.

[877] See sec. 642(b) (providing the personal exemption amounts for trusts and estates).

[878] Secs. 651, 661.

[879] Adjusted gross income is otherwise calculated in the same manner as it is for individuals. Sec. 67(e); see also sec. 62.

The tax does not apply to a trust all the unexpired interests in which are devoted to charitable purposes.[880] It also does not apply to (1) a trust that is exempt from tax under section 501, (2) a charitable remainder trust exempt from tax under section 664, (3) a trust, fund, or account exempt from tax under subtitle A, (4) a grantor trust, (5) Electing Alaska Native Settlement Trusts subject to taxation under section 646; (6) Cemetery Perpetual Care Funds to which section 642(i) applies; or (7) foreign trusts or estates.[881]

A trust or estate may materially participate in a trade or business, making the trade or business a non-passive trade or business the income from which is not subject to the NII tax. The Internal Revenue Service has taken the position that material participation is determined by whether the fiduciary of the trust or estate is involved in the operations of the activities of the trade or business on a regular, continuous, and substantial basis.[882]

Application of NII Tax to CFCs and PFICs

Special rules apply to taxpayers who own certain foreign corporations. First, U.S. shareholders of controlled foreign corporations ("CFCs") must include currently under sections 951 and 951A certain income earned by the CFC (referred to as "subpart F income" and "global intangible low-taxed income" ("GILTI"), respectively).[883] Second, special rules apply with respect to U.S. persons that are shareholders (regardless of their percentage ownership) in any foreign corporation that is not a CFC but is a passive foreign investment company ("PFIC").[884] In certain cases, taxpayers that own stock in a PFIC may elect (under a "qualified electing fund" or "QEF" election) to include currently under section 1293 their pro rata share of the PFIC's ordinary income and long-term capital gain.[885] For taxpayers that own marketable stock in a PFIC, another option is to elect to mark to market their PFIC stock under section 1296.

Absent an election of current NII taxation under the regulations,[886] subpart F and GILTI inclusions in respect of stock of a CFC and QEF inclusions in respect of stock of a PFIC

[880] Sec. 1411(e).

[881] Treas. Reg. 1.11411-3(b)(1).

[882] See Technical Advice Memorandum 201317010 (Jan. 18, 2013), Private Letter Ruling 201029014 (July 23, 2010), Technical Advice Memorandum (Aug. 17, 2007); see also *Frank Aragona Trust*, 142 T.C. No. 9 (2014) (holding that the activities of the trustees constituted material participation); *Mattie K. Carter Trust*, 256 F. Supp. 2d 536 (N.D. Tex. 2003) (holding that in determining material participation for a trust, the activities of its employees and agents should be included with the activities of its trustee).

[883] A CFC generally is defined as any foreign corporation in which U.S. persons own (directly, indirectly, or constructively) more than 50 percent of the corporation's stock (measured by vote or value), taking into account only "U.S. shareholders," that is, U.S. persons that own at least 10 percent of the stock (measured by vote or value). Secs. 951(b), 957, and 958.

[884] See secs. 1291 through 1298. The PFIC rules generally seek to prevent the deferral of passive income through the use of foreign corporations.

[885] Such a PFIC is referred to as a qualified electing fund ("QEF"). See secs. 1293 and 1295.

[886] Treas. Reg. secs. 1.951A-5(b)(1), 1.1411-10(g).

are not net investment income even though those inclusions may be comparable to other items of income that are net investment income. Under the regulations' default rules, only distributions of earnings that have been previously taxed under subpart F, GILTI, or the QEF rules are net investment income. By contrast, mark-to-market inclusions in respect of PFIC stock generally are net investment income even though the inclusions do not result from an actual sale of PFIC stock.[887]

Application of Employment Taxes and the NII Tax to Individuals

As described above, the FICA HI tax, the SECA HI tax, and the NII tax each apply up to a 3.8 percent tax rate,[888] but they apply to different categories of taxpayers and to different tax bases. The differences in the application of these taxes mean that some income, including income derived from passthrough businesses, is not subject to a 3.8-percent tax rate under any of the three regimes. Table 6 summarizes the application of each regime for different categories of taxpayers:

Table 6.–Application of FICA, SECA, and NII Tax Regimes Under Present Law

Type of Taxpayer	FICA	SECA	NII tax	No 3.8% tax
Employees	Wages			
S corporation shareholders - active	Reasonable compensation			Distributive share in excess of reasonable compensation; net gain from sale of business property
General partners		Self-employment income		
LP, LLP, and LLC limited partners or members - active		Guaranteed payments		Distributive share of partners claiming limited partner exception from SECA and material participation exception from NII tax; net gain

[887] Treas. Reg. sec. 1.1411-10.

[888] For FICA and SECA, the HI tax rate is 2.9 percent, plus an additional 0.9 percent rate on wages and self-employment income above the threshold amounts ($250,000 in the case of a joint return, $125,000 in the case of a married individual filing a separate return, and $200,000 in any other case).

Type of Taxpayer	FICA	SECA	NII tax	No 3.8% tax
				from sale of business property
S corporation shareholders; LP, LLP, and LLC limited partners or members - passive			Distributive share; net gain from sale of business property	
Sole proprietors		Self-employment income		
Investors			Investment income and net gain from passive activities or trading businesses	Investment income and net gain from active interests

Explanation of Provision

In general, the provision provides that a high-income individual (determined based on specified, filing-status-based amounts described below) is subject to NII tax on net income or net gain regardless of whether the taxpayer materially participates in a trade or business that generated the net income or net gain, where such net income or net gain is not otherwise subject to FICA or SECA tax in the hands of the taxpayer. A principal effect of the provision is that those S corporation shareholders, limited partners, and LLC members who currently are not liable for FICA or SECA tax, respectively, on their pro rata shares, distributive shares, and partnership income and gain become subject to NII tax on this income and gain above certain income thresholds.

For taxpayers subject to the provision, the provision expands the definition of net investment income subject to the NII tax. Under the provision, in the case of any individual whose modified AGI exceeds the high income threshold amount, the NII tax of 3.8 percent applies to the greater of specified net income or net investment income (as defined under present law).

Under the provision, in the case of an estate or trust, the NII tax is 3.8 percent of the lesser of (1) the greater of undistributed specified net income or undistributed net investment income, or (2) the excess of adjusted gross income over the dollar amount at which the highest income tax bracket applicable to an estate or trust begins.

Specified Net Income

Specified net income under the provision includes, among other items described below, income derived in the ordinary course of a trade or business without regard to the present law limitation that the trade or business is a passive activity with respect to the taxpayer or consists of trading financial instruments or commodities. Specified net income is specified income reduced by the deductions properly allocable to such income. Specified income is the sum of (i) gross income from interest, dividends, annuities, royalties, and rents, (ii) other gross income derived from a trade or business, and (iii) net gain (to the extent taken into account in computing taxable income) attributable to the disposition of property.

Specified net income is determined without regard to the special rules for determining net investment income for income on investment of working capital and for dispositions of a partnership interest or stock in an S corporation.

In determining specified net income, a trade or business includes any activity involving research or experimentation (within the meaning of section 174) and any activity in connection with a trade or business or with respect to which expenses are allowable as a deduction under section 212 (to the extent provided in regulations pursuant to section 469(c)(6)).

Specified net income does not include distributions from a qualified retirement plan. Specified net income does not include amounts subject to SECA tax or wages subject to FICA tax.

Income Thresholds and Phase-In of Increase

The high-income threshold amount is $500,000 in the case of a joint return or surviving spouse, $250,000 in the case of a married individual filing a separate return, and $400,000 in any other case.

The increase in tax under the provision is phased in based on a ratio of (i) the excess of the taxpayer's modified AGI over the applicable high income threshold amount to (ii) $100,000 (one-half of such amount in the case of a married taxpayer filing separately). Under this phase-in, if a married individual who files a joint return has modified adjusted gross income of, for example, $540,000, the increase in tax under the provision is limited to 40 percent ($540,000 - $500,000 / $100,000) of the increase that would be determined in the absence of the phase-in limitation.

The provision retains the unindexed threshold amounts above which the NII tax applies, specifically, $250,000 in the case of a joint return or surviving spouse, $125,000 in the case of a married individual filing a separate return, and $200,000 in any other case.

Clarifications Regarding Net Investment Income

The provision provides several clarifications regarding the determination of net investment income, which also apply to determinations of specified net income under the provision. First, the provision clarifies that net investment income does not include wages subject to FICA tax.

Second, the provision clarifies that deductions properly allocable to investment income in determining net investment income do not include net operating loss deductions under section 172.

Finally, the provision provides that net investment income includes subpart F and GILTI inclusions in respect of stock of a CFC and QEF inclusions in respect of stock of a PFIC. It codifies the existing regulatory treatment of mark-to-market inclusions in respect of PFIC stock as net investment income. The provision provides that the Secretary shall issue regulations or other guidance providing for the treatment of distributions of amounts previously included in gross income for purposes of chapter 1 but not previously subject to NII tax. The regulations or other guidance shall include transition rules for proper coordination and application of existing inclusion rules with the inclusion rules under the provision for subpart F and GILTI inclusions in respect of stock of a CFC and inclusions in respect of stock of a PFIC.

Effective Date

The provision is effective for taxable years beginning after December 31, 2021.

4. Limitation on deduction of qualified business income for certain high-income individuals (sec. 138204 of the bill and sec. 199A of the Code)

Present Law[889]

For taxable years beginning after December 31, 2017, and before January 1, 2026, a taxpayer other than a corporation (that is, individuals as well as trusts and estates) generally may deduct 20 percent of qualified business income from a partnership, S corporation, or sole proprietorship, as well as 20 percent of aggregate qualified real estate investment trust ("REIT") dividends and qualified publicly traded partnership income of the taxpayer for the taxable year.[890]

The amount deductible may not exceed 20 percent of the taxpayer's taxable income for the taxable year (reduced by net capital gain).[891]

Limitations based on W-2 wages and capital investment phase in above a threshold amount of taxable income.[892] A disallowance of the deduction of income of specified service

[889] The provision, section 199A, as originally enacted in 2017, is described in more detail in Joint Committee on Taxation, *General Explanation of Public Law 115-97*, JCS-1-18, December 2018, pages 11-38. For a description of changes to section 199A in 2018 (as still in effect), see Joint Committee on Taxation, *General Explanation of Certain Tax Legislation Enacted in the 115th Congress*, JCS-2-19, October 2019, pages 120-139.

[890] Sec. 199A.

[891] Sec. 199A(a). For this purpose, taxable income is computed without regard to the deduction allowable under the provision. Sec. 199A(e)(1).

[892] For a taxpayer with taxable income above the threshold, the taxpayer is allowed a deductible amount for each qualified trade or business equal to the lesser of (1) 20 percent of the qualified business income with respect to such trade or business, or (2) the greater of (a) 50 percent of the W-2 wages paid with respect to the qualified

trades or businesses[893] also phases in above the threshold amount of taxable income. The threshold amount is indexed for inflation for taxable years beginning after 2018. For 2021, the threshold amount is $329,800 for married filing joint returns, $164,925 for married filing separate returns, and $164,900 for all other returns.[894]

For any taxable year, qualified business income means the net amount of qualified items of income, gain, deduction, and loss with respect to any qualified trade or business of the taxpayer.[895] The determination of qualified items of income, gain, deduction, and loss takes into account such items only to the extent included or allowed in the determination of taxable income for the year.[896] Items are treated as qualified items of income, gain, deduction, and loss only to the extent they are effectively connected with the conduct of a trade or business within the United States.[897]

A specified agricultural or horticulture cooperative generally may deduct nine percent of the lesser of the cooperative's qualified production activities income or taxable income (determined without regard to the cooperative's section 199A deduction and reduced by certain payments or allocations to patrons) for the taxable year.[898]

Explanation of Provision

The provision adds a dollar limitation on the deduction for qualified business income under section 199A(a) for a taxable year. In the case of a taxpayer other than a corporation, the amount of the deduction for any taxable year may not exceed $500,000 for a joint return or

---

trade or business, or (b) the sum of 25 percent of the W-2 wages paid with respect to the qualified trade or business plus 2.5 percent of the unadjusted basis immediately after acquisition of all qualified property of the qualified trade or business. Sec. 199A(b)(2).

[893] A specified service trade or business means any trade or business involving the performance of services in the fields of health, law, accounting, actuarial science, performing arts, consulting, athletics, financial services, brokerage services, or any trade or business where the principal asset of such trade or business is the reputation or skill of one or more of its employees or owners, or which involves the performance of services that consist of investing and investment management, trading, or dealing in securities, partnership interests, or commodities. Sec. 199A(d)(2).

[894] Sec. 3.27 of Rev. Proc. 2020-45, 2020-46 I.R.B. 1016.

[895] Qualified business income does not include any qualified REIT dividends or qualified publicly traded partnership income. Sec. 199A(c)(1).

[896] Certain items are not qualified items of income, gain, deduction, or loss. Sec. 199A(c)(3)(B).

[897] For this purpose, section 864(c) is applied by substituting "qualified trade or business (within the meaning of section 199A)" for "nonresident alien individual or a foreign corporation" or for "a foreign corporation," each place they appear. Sec. 199A(c)(3)(A).

[898] Sec. 199A(g). The deduction is limited to 50 percent of W-2 wages that are paid by the cooperative during the calendar year that ends in such taxable year and are properly allocable to domestic production gross receipts. The deduction may instead be allocated to and deducted by the cooperative's patrons, limited to each patron's taxable income for the taxable year (determined without regard to such deduction but after taking into account the patron's other deductions under section 199A(a)). See sec. 199A(g).

surviving spouse, $250,000 for a married individual filing a separate return, $10,000 for an estate or trust, or $400,000 for any other taxpayer. The present-law phaseouts of the deduction above the threshold amount continue to apply, subject to this additional limitation.

Effective Date

The provision is effective for taxable years beginning after December 31, 2021.

5. Limitations on excess business losses of noncorporate taxpayers (sec. 138205 of the bill and sec. 461(l) of the Code)

Present Law

For taxable years beginning after December 31, 2020, and before January 1, 2027, an excess business loss of a taxpayer other than a corporation is not allowed for the taxable year.[899] The disallowed excess business loss is treated as a net operating loss ("NOL") for the taxable year for purposes of determining any NOL carryover for subsequent taxable years.[900]

An excess business loss for the taxable year is the excess (if any) of the aggregate deductions of the taxpayer which are attributable to trades or businesses of such taxpayer, over the sum of the aggregate gross income or gain of such taxpayer attributable to such trades or businesses plus a threshold amount.[901] The threshold amount is indexed for inflation for taxable years beginning after 2018.[902] For 2021, the threshold amount is $262,000 ($524,000 for joint returns).[903]

The aggregate deductions taken into account to determine the excess business loss of the taxpayer for the taxable year that are attributable to trades or businesses of the taxpayer are determined without regard to the limitation of the provision, and without regard to any deduction under section 172 (relating to NOLs) or 199A (relating to the deduction for qualified business income). For example, assume that a taxpayer has an NOL carryover from a prior taxable year to the current taxable year. Such NOL carryover is not part of the taxpayer's aggregate deductions attributable to the trade or business for the current taxable year under section 461(l).

An excess business loss (the deduction for which is limited by section 461(l)) does not take into account gross income or gains or deductions attributable to the trade or business of

---

[899] Sec. 461(l).

[900] See sec. 172.

[901] Sec. 461(l)(3)(A).

[902] Sec. 461(l)(3)(C).

[903] See sec. 3.32 of Rev. Proc. 2020-45, 2020-46 I.R.B. 1016.

performance of services as an employee.[904] For example, assume married taxpayers filing jointly for the taxable year have a loss from a trade or business conducted by one spouse as a sole proprietorship as well as wage income of the other spouse from employment. The wage income is not taken into account in determining the amount of the deduction limited under section 461(l).

Capital loss deductions are not taken into account in computing the section 461(l) limitation.[905] The amount of capital gain taken into account in calculating the section 461(l) limitation cannot exceed the lesser of capital gain net income from a trade or business or capital gain net income.

In the case of a partnership or S corporation, the provision applies at the partner or shareholder level.[906] Each partner's distributive share and each S corporation shareholder's pro rata share of items of income, gain, deduction, or loss of a partnership or S corporation are taken into account in applying the limitation under the provision for the taxable year of the partner or S corporation shareholder. Regulatory authority is provided to require any additional reporting as the Secretary determines is appropriate to carry out the purposes of the provision.[907]

Section 461(l) applies after the application of certain other limitations on losses, namely, the passive activity loss limitation,[908] the at-risk limitation,[909] and in the case of a taxpayer who is a partner or S corporation shareholder, the rules limiting the taxpayer's distributive or pro rata share of loss for the taxable year to the taxpayer's adjusted basis in the partnership interest or in the S corporation stock and debt.[910]

For taxable years beginning after December 31, 2017, and before January 1, 2027, the limitation relating to excess farm losses under section 461(j) does not apply.

Explanation of Provision

The provision makes permanent the limitation on any excess business loss of a taxpayer other than a corporation.

---

[904] For this purpose, the trade or business of performance of services by the taxpayer as an employee has the same meaning as it does under section 62(a)(1).

[905] Sec. 461(l)(3)(B).

[906] Sec. 461(l)(4).

[907] Sec. 461(l)(5).

[908] Sec. 469.

[909] Sec. 465.

[910] Sec. 704(d) (for partners) and sec. 1366(d) (for S corporation shareholders). See sec. 461(l)(6) (applying section 461(l) after section 469), and Treas. Reg. sec. 1.469-2T(d)(6) (applying section 469 after sections 704(d), 1366(d), and 465). Note that other rules could potentially limit a taxpayer's loss (*e.g.*, section 267). A discussion of all potential loss limitation rules is beyond the scope of the description of this provision.

The provision also repeals the limitation on excess farm losses under section 461(j).

The provision modifies the treatment of an excess business loss disallowed for a taxable year. Any such loss that is disallowed for a particular year is carried forward to the next taxable year and treated as a deduction attributable to trades or businesses of the taxpayer in that year. Thus, in lieu of being carried forward as an NOL carryover, such loss is taken into account as part of the aggregate deductions under section 461(l) for the next taxable year (and therefore may be subject to the excess business loss limitation in that year).

Effective Date

The provision is effective for taxable years beginning after December 31, 2020.

6. Surcharge on high income individuals, estates, and trusts (sec. 138206 of the bill and new sec. 1A of the Code)

Present Law

To determine regular income tax liability, an individual, estate, or trust applies a tax rate schedule to the individual's, estate's, or trust's taxable income. There are different tax rate schedules for estates and trusts, single individuals, heads of households, married individuals filing joint returns and surviving spouses, and married individuals filing separate returns. Each tax rate schedule is divided into ranges of income referred to as income brackets, and marginal income tax rates increase with increasing income brackets.

The highest marginal income tax rate applicable to individuals, estates, and trusts is 37 percent. For taxable years beginning after December 31, 2021, the bill increases the highest rate to 39.6 percent and decreases the taxable income thresholds at which the highest rate applies. For example, under present law in 2022 for married individuals filing a joint return, the 37 percent rate is projected to apply to taxable income in excess of $646,150.[911] In 2022 for married individuals filing a joint return, the bill's 39.6 percent rate applies to taxable income in excess of $450,000.

There is no separate income tax surcharge applicable to taxpayers with income above certain levels.

Explanation of Provision

The provision imposes (in addition to any other tax imposed by Subtitle A of the Code) a three-percent tax on the modified adjusted gross income of an individual, estate, or trust that exceeds a prescribed amount.

For single individuals, heads of households, married individuals filing joint returns and surviving spouses, the three-percent tax applies to modified adjusted gross income in excess of $5 million. For married individuals filing separate returns, the three-percent tax applies to

[911] Joint Committee staff calculation.

modified adjusted gross income in excess of $2.5 million. For estates or trusts, the three-percent tax applies to modified adjusted gross income that exceeds $100,000.

For purposes of the three-percent tax, modified adjusted gross income is adjusted gross income reduced by any deduction (not taken into account in determining adjusted gross income) allowed for investment interest (as defined in section 163(d)). For this purpose, adjusted gross income of an estate or a trust is determined under the rules of section 67(e).

The amount of the three-percent tax imposed on a nonresident alien individual is determined by taking into account only amounts that are taken into account in determining the individual's section 1 net income tax liability under section 871(b) (that is, only income that is effectively connected with the conduct of a U.S. trade or business, and the deductions allocable to that income).

The $5 million and $2.5 million modified adjusted gross income thresholds at which the three-percent tax applies are reduced by any amounts excluded from a taxpayer's gross income under the foreign earned income and housing cost amount rules of section 911, less any deductions or exclusions properly allocable to amounts excluded under section 911.

The three-percent tax does not apply to a trust if all the unexpired interests in the trust are devoted to one or more purposes described in section 170(c)(2)(B) (among other things, religious, charitable, scientific, literary, or educational purposes).

The three-percent tax is not treated as tax imposed by Subtitle A (Income Taxes), Chapter 1 (Normal taxes and Surtaxes) of the Code for purposes of determining the amount of any Chapter 1 credit or for purposes of the alternative minimum tax.

Effective Date

The provision applies to taxable years beginning after December 31, 2021.

7. Termination of temporary increase in unified credit (sec. 138207 of the bill and sec. 2010 of the Code)

Present Law

In General

A gift tax is imposed on certain lifetime transfers, and an estate tax is imposed on certain transfers at death. A generation-skipping transfer tax generally is imposed on transfers, either directly or in trust or similar arrangement, to a "skip person" (*i.e.*, a beneficiary in a generation more than one generation younger than that of the transferor). Transfers subject to the generation-skipping transfer tax include direct skips, taxable terminations, and taxable distributions.

Income tax rules determine the recipient's tax basis in property acquired from a decedent or by gift. Gifts and bequests generally are excluded from the recipient's gross income.[912]

Unified Credit (Exemption) and Tax Rates

Unified Credit

A unified credit is available with respect to taxable transfers by gift and at death.[913] The unified credit offsets tax, computed using the applicable estate and gift tax rates, on a specified amount of transfers, referred to as the applicable exclusion amount, or exemption amount. Exemption used during life to offset taxable gifts reduces the amount of exemption that remains at death to offset the value of a decedent's estate. An election is available under which exemption that is not used by a decedent may be used by the decedent's surviving spouse (exemption portability).

For decedents dying and gifts made before January 1, 2018, the basic exclusion amount that is used to determine the unified credit is $5 million, indexed for inflation for decedents dying and gifts made after 2011. The basic exclusion amount temporarily increases for estates of decedents dying and gifts made after December 31, 2017, and before January 1, 2026. This is accomplished by doubling the basic exclusion amount provided in section 2010(c)(3) of the Code from $5 million to $10 million. The $10 million amount is indexed for inflation occurring after 2011. For 2021, the basic exclusion amount is $11,700,000.[914]

The temporary increase in the basic exclusion amount expires for decedents dying and gifts made after December 31, 2025. At that time, the basic exclusion amount returns to $5 million, indexed for inflation occurring after 2011.

---

[912] Sec. 102.

[913] Sec. 2010.

[914] Rev. Proc. 2020-45, 2020-46 I.R.B. 1016, p. 1024 (November 9, 2020). As a conforming amendment to the increase in the basic exclusion amount, Public Law 115-97 also amends section 2001(g) (regarding computation of estate tax). This conforming amendment, which was enacted as a permanent provision, provides that the Secretary shall prescribe regulations as may be necessary or appropriate to carry out the purposes of section 2001 with respect to differences between the basic exclusion amount in effect at the time of the decedent's death and at the time of any gifts made by the decedent. The purpose of the regulatory authority is to address the computation of the estate tax where (1) a decedent dies in a year in which the basic exclusion amount is lower than the basic exclusion amount that was in effect when the decedent made taxable gifts during his or her life, and (2) such taxable gifts exceeded the basic exclusion amount in effect at the time of the decedent's death. Because the temporary increase in the basic exclusion amount under Public Law 115-97 does not apply for estates of decedents dying after December 31, 2025, it was expected that such guidance would prevent the estate tax computation under section 2001(g) from recapturing, or "clawing back," all or a portion of the benefit of the increased basic exclusion amount used to offset gift tax for certain decedents who make large taxable gifts between January 1, 2018, and December 31, 2025, and die after December 31, 2025. In November 2019, the IRS published final regulations pursuant to this regulatory authority. See Treasury Decision 9884 (November 26, 2019).

Common Tax Rate Table

A common tax-rate table with a top marginal tax rate of 40 percent is used to compute gift tax and estate tax. The 40-percent rate applies to taxable transfers in excess of $1 million. Because the 2021 exemption amount ($11.7 million) is greater than this $1 million threshold at which the highest marginal tax rate applies, transfers in excess of the exemption amount generally are subject to tax at the 40 percent rate.

Generation-Skipping Transfer Tax Exemption and Rate

The generation-skipping transfer tax is a separate tax that can apply in addition to either the gift tax or the estate tax. The tax rate and exemption amount for generation-skipping transfer tax purposes, however, are set by reference to the estate tax rules. Generation-skipping transfer tax is imposed at a flat rate equal to the highest estate tax rate (40 percent) in effect at the time of the transfer. Tax is imposed on cumulative generation-skipping transfers in excess of the generation-skipping transfer tax exemption amount in effect for the year of the transfer. The generation-skipping transfer tax exemption for a given year is equal to the estate tax exemption amount in effect for that year ($11.7 million for 2021).

Explanation of Provision

The provision accelerates the expiration of the temporary increase in the estate and gift tax exemption amount. As a result, for decedents dying and gifts made after December 31, 2021, the basic exclusion amount is determined by increasing $5 million for inflation occurring after 2011). The staff of the Joint Committee on Taxation currently estimates that the basic exclusion amount under the provision would be $6,020,000 for 2022.

Effective Date

The provision is effective for estates of decedents dying and gifts made after December 31, 2021.

8. Increase in limitation on estate tax valuation reduction for certain real property used in farming or other trades of businesses (sec. 138208 of the bill and sec. 2032A of the Code)

Present Law

An executor may elect to value for estate tax purposes certain "qualified real property" used in farming or another qualifying trade or business at its current-use value rather than its fair market value.[915] The inflation-adjusted maximum reduction in value for such real property is $1,190,000 for 2021.[916] In general, real property qualifies for special-use valuation only if (1) at least 50 percent of the adjusted value of the decedent's gross estate (including both

[915] Sec. 2032A.

[916] Rev. Proc. 2020-45, I.R.B. 2020-46, p. 1024. Section 2032A(a) provides for a maximum reduction in value of $750,000, with this amount being adjusted for inflation for years after 1997.

real and personal property) consists of a farm or closely-held business property and (2) at least 25 percent of the adjusted value of the gross estate consists of farm or closely-held business real property. In addition, the property must be used in a qualified use (for example, farming) by the decedent or a member of the decedent's family for periods aggregating five years or more of during the eight-year period ending on the date of the decedent's death.

If, within 10 years after the decedent's death and before the death of the qualified heir, the heir disposes of an interest in the property or ceases to use the property in its qualified use, an additional estate tax is imposed to recapture the benefit of the special-use valuation.[917]

Explanation of Provision

The provision increases the maximum reduction in value for qualified real property under section 2032A to $11,700,000, indexed for inflation for years after 2021.

Effective Date

The provision is effective for estates of decedents dying after December 31, 2021.

9. Certain tax rules applicable to grantor trusts (sec. 138209 of the bill and new secs. 1062 and 2091 of the Code)

Present Law

Grantor Trusts, in General

A trust is a grantor trust if the grantor or another individual is treated as the owner of all or a portion of the trust for Federal income tax purposes. An individual who is treated as the owner of all or a portion of a grantor trust must include in computing his or her taxable income and credits those items of income, deductions, and credits against tax of the trust that are attributable to the portion of the trust deemed owned by such individual.[918]

In general, a trust with respect to which a grantor has retained a right or benefit described in sections 673 through 679 is treated as a grantor trust. A grantor generally is treated as the owner of a trust for Federal income tax purposes if, for example: she has a reversionary interest in the income or corpus of the trust; she or a non-adverse party has the power to revoke the trust; or she (without the approval or consent of an adverse party) has the power to distribute trust income to herself or to her spouse.[919] As another example, if a U.S. person transfers property to a foreign trust that has a U.S. beneficiary, the grantor trust rules generally treat the transferor as the owner of a portion of the trust for Federal income tax purposes.[920] A grantor's

[917] Sec. 2032A(c).

[918] Sec. 671.

[919] Secs. 673(a), 676(a), and 677(a)(1).

[920] Sec. 679.

retention of certain administrative powers also may cause a trust to be treated as a grantor trust.[921] For example, a grantor's power to borrow from the corpus or income of the trust without adequate interest or security, or a grantor's power to reacquire the trust corpus and substitute property of equivalent value, may cause the trust to be treated as a grantor trust.[922] In some cases, a person other than the grantor may be treated as deemed owner.[923]

Because a grantor trust and its grantor are treated as one taxpayer for Federal income tax purposes, the IRS has taken the position that transactions between the grantor and the trust generally are disregarded for Federal income tax purposes.[924] In Revenue Ruling 85-13,[925] for example, the IRS concludes that a grantor's acquisition of the corpus of a grantor trust (shares of stock) in exchange for a promissory note is not a sale for Federal income tax purposes, because the grantor is treated as the owner of the shares both before and after the sale. As a result, a grantor's acquisition of assets from a grantor trust generally does not result in recognition of gain or loss, and the payment of interest by the trust to the grantor generally does not result in income to the grantor. Similarly, a grantor generally does not realize or recognize gain or loss for Federal income tax purposes on the transfer of appreciated or depreciated assets to the trust.

The IRS also takes the position that the grantor's payment of the income taxes of a grantor trust is not treated as an additional gift to the trust beneficiaries for Federal gift tax purposes, because the grantor is obligated to pay the income tax of the trust.[926]

Federal Estate and Gift Tax Treatment of Certain Transfers in Trust

In general, a gift tax is imposed on certain lifetime transfers and an estate tax is imposed on certain transfers at death. For Federal gift tax purposes, a transfer to a trust generally is treated as a gift to the beneficiaries of the trust.[927]

In certain cases, lifetime transfers that are treated as completed transfers for gift tax purposes and thus are subject to gift tax in the year of the transfer nevertheless are included in the transferor's gross estate for Federal estate tax purposes at the time of his or her death.[928] These transfers generally include transfers for less than adequate and full consideration if: (1)

---

[921] Sec. 675.

[922] Secs. 675(2) & (4)(C).

[923] Sec. 678.

[924] *Cf. Rothstein v. United States*, 735 F.2d 704 (2d Cir. 1984).

[925] 1985-1 C.B. 184, 1985.

[926] Rev. Rul. 2004-64, 2004-2 C.B. 7, 2004.

[927] *Helvering v. Hutchings*, 312 U.S. 393, 396-397 (1941).

[928] See secs. 2035-2038.

the decedent retained the beneficial enjoyment of the property during his or her life;[929] (2) the decedent retained the power to alter, amend, revoke, or terminate a previous lifetime transfer;[930] (3) the decedent held an interest in such property within three years of death;[931] or (4) the transfer takes effect at the death of the decedent.[932]

Intentionally Defective Grantor Trusts ("IDGTs")

As an estate planning technique, taxpayers sometimes structure trusts that are treated as separate from the grantor for Federal transfer tax purposes, but as owned by the grantor for Federal income tax purposes. Such trusts sometimes are referred to as intentionally defective grantor trusts ("IDGTs"), because the taxpayer intentionally includes in the trust agreement a right or power that causes the trust to be treated as a grantor trust under sections 671 through 679.

Certain rights or powers that result in grantor trust status, however, may not cause the assets of the trust to be included in the grantor's estate for Federal estate tax purposes. In other words, a transfer may, under certain circumstances, be treated as a completed transfer for Federal gift tax purposes, but not for income tax purposes. For example, in certain circumstances a grantor might retain an administrative power that causes the trust to be treated as a grantor trust, such as the power to reacquire the corpus of a trust and to substitute assets of equivalent value under section 675(4)(C), without causing the assets of the trust to be included in the grantor's gross estate under sections 2036 through 2038.

An example of transfer tax planning using IDGTs is an estate "freeze" transaction. In a simple estate freeze transaction, a grantor might transfer assets to such an IDGT by way of a taxable gift during his or her lifetime. The gift tax value is measured ("frozen") at the time of the transfer, and any subsequent appreciation accrues to the trust (and ultimately the trust beneficiaries) without further gift or estate tax consequences, provided the trust is structured to avoid inclusion in the grantor's gross estate. Furthermore, as the deemed owner of the trust assets for income tax purposes, the grantor may satisfy the income tax liability of the trust out of the grantor's separate assets, thereby preserving trust assets for the beneficiaries, without being treated as having made additional taxable gifts to the trust beneficiaries by reason of the tax payments. Finally, any transactions between the grantor and the trust (such as the grantor's reacquisition of the trust corpus) are disregarded for Federal income tax purposes. Because grantors in these estate "freeze" structures often have annuity interests in trust assets, the trusts in these structures are commonly referred to as grantor retained annuity trusts.

---

[929] Sec. 2036.

[930] Sec. 2038.

[931] Sec. 2035.

[932] Sec. 2037.

Explanation of Provision

Application of Transfer Taxes to Certain Grantor Trusts

The provision generally is intended to more closely align the income tax and transfer tax (Federal estate and gift tax) rules for grantor trusts by imposing transfer tax consequences on certain assets held in or distributed from a grantor trust. For any portion of a trust with respect to which the grantor is the deemed owner: (1) the gross estate of a deceased deemed owner of such portion includes all assets attributable to that portion at the time of the deemed owner's death; (2) any distribution (other than to a deemed owner or the deemed owner's spouse) from such portion to one or more beneficiaries during the life of the deemed owner of such portion, other than in discharge of an obligation of the deemed owner, is treated as a transfer by gift for gift tax purposes; and (3) if during life the deemed owner ceases to be treated as the deemed owner of such portion, all assets attributable to such portion are treated as having been transferred by gift for gift tax purposes at such time. Proper adjustment must be made for any amounts included in the gross estate or treated as transferred by gift under (1), (2), or (3) to account for amounts treated previously as taxable gifts at the time the deemed owner transferred assets to the trust.

For purposes of the provision, a "deemed owner" is any person who is treated as owner of a portion of a trust under the grantor trust rules (sections 671 through 679 of the Code). The provision does not apply to any trust that is includible in the gross estate of the deemed owner (without regard to the provision).

Certain Sales to Grantor Trusts

In the case of any transfer of property between a trust and a person (whether or not the grantor) who is a deemed owner[933] of the trust (or portion thereof), the provision provides that the person's treatment as the owner of the trust is disregarded in determining whether there is a sale or exchange for income tax purposes. As a result, such a transfer might result in the realization and recognition of gain.[934] This rule does not apply to any trust that is fully revocable by the deemed owner.

The provision amends section 267, which disallows certain losses on sales and exchanges between persons with a relationship described in subsection 267(b), to add as one such relationship a grantor trust and the person treated as the owner of the trust (or portion thereof) under the grantor trust rules.

Effective Date

The provision is generally effective for (1) trusts created on or after the date of enactment and (2) any portion of a trust established before the date of enactment that is attributable to a contribution made on or after such date. The portion of the provision relating to

[933] For purposes of this rule, the term "deemed owner" has the meaning described above.

[934] The provision thus changes the nonrecognition rule stated in Rev. Rul. 85-13, 1985 C.B. 184, described above.

sales and exchanges between a deemed owner and a grantor trust is intended to be effective for sales and other dispositions after the date of enactment.[935]

10. Valuation rules for certain transfers of nonbusiness assets (sec. 138210 of the bill and sec. 2031 of the Code)

Present Law

In General

The value of property subject to transfer taxes is the fair market value of the property being transferred on the date of transfer.[936] The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts.[937]

If actual sales prices and bona fide bid and ask prices are lacking, the fair market value of stock in a closely held business is determined by looking to various factors including: the company's net worth; its prospective earning power and dividend-paying capacity; the goodwill of the business; the economic outlook overall and in the particular industry; the company's position in the industry and its management; the degree of control of the business represented by the block of stock to be valued; and the values of securities of corporations engaged in the same or similar lines of businesses.[938]

Discounts

In General

Courts and the IRS have recognized that for various reasons interests in an entity (shares in a corporation or interests in a partnership, for instance) may be worth less than the owner's proportionate share of the value of the entity's assets. For example, the value of stock held by a 50-percent shareholder might differ from the value of 50 percent of the assets owned by the corporation in which the stock is held. Some (but not all) of the valuation discounts claimed under present law are described below.[939] In many cases courts apply more than one

[935] A technical correction may be necessary to reflect this intent.

[936] Secs. 2031 (estate tax), 2512 (gift tax), and 2624 (generation-skipping transfer tax). Fair market value is determined on the date of the gift in the case of the gift tax or on the date of the decedent's death (or on the alternate valuation date if the executor so elects) in the case of the estate tax.

[937] Treas. Reg. secs. 20.2031-1(b) and 25.2512-1.

[938] Treas. Reg. secs. 20.2031-2(f)(2) and 25.2512-2(f)(2); Rev. Rul. 59-60, 1959-1 C.B. 237, 1959.

[939] Other valuation discounts that courts have recognized include a blockage discount (if the sale of a block of assets, such as 80 percent of the stock of a public company, would depress the market for that asset); a key man (thin management) discount (if the value of a business declines due to the loss of a key manager); and a capital gain (or *General Utilities)* discount (to reflect the tax on gain from the eventual sale of assets acquired by gift or held by a corporation).

discount. The theories for some discounts overlap, and court decisions sometimes blur the distinctions between those discounts.

Minority (or Lack of Control) Discount

Numerous courts and the IRS have recognized that shares of stock or other ownership interests in a closely-held business entity that represent a minority interest are usually worth less than a proportionate share of the value of the assets of the entity.[940] Minority discounts arise from a division of control because the holder of a minority interest cannot control the ongoing direction of the business entity, the timing and amount of income distributed by the entity to its owners, or the liquidation of its assets. Minority discounts often result in reductions in the value of transferred property from 15 percent to 40 percent.[941]

Marketability (or Illiquidity) Discount

Recognizing that closely held stock and partnership interests may be less attractive to investors and may have fewer potential purchasers than publicly traded stock, courts and the IRS grant discounts to reflect the illiquidity of such interests. Courts sometimes combine marketability and minority discounts into a single discount,[942] but the discounts reflect different concerns. Whereas the minority discount compensates for lack of control over an interest, the marketability discount compensates for the limitations upon free exit inherent in interests for which no public market exists. The marketability discount may be appropriate whether valuing a controlling or a minority ownership interest.[943] Generally, the size of the marketability discount is reduced as the donor's or decedent's control of the corporation or partnership increases. However, the discount has been applied to a 100-percent ownership interest in a closely-held

---

[940] See Rev. Rul. 93-12, 1993-2 C.B. 202, 1993; *Propstra v. United States,* 680 F.2d 1248 (9th Cir. 1982); *Ward v. Commissioner,* 87 T.C. 78 (1986); *Estate of Leyman v. Commissioner,* 40 T.C. 100 (1963).

In *Pierre v. Commissioner*, 133 T.C. 2 (2009), the Tax Court allowed minority and marketability discounts in valuing transfers of interests in a single member LLC to trusts established for the transferor's children. The taxpayer had funded the LLC with cash and marketable securities 12 days before she transferred the LLC interests to the trusts. Although the LLC was treated as a disregarded entity for Federal tax purposes under the "check-the-box" regulations, the court rejected the Service's argument that the taxpayer should be treated as having transferred for Federal gift tax purposes a proportionate share of the underlying assets of the LLC and thus should not be entitled to claim valuation discounts. The court reasoned that State law controlled the determination of what property interests were transferred for Federal transfer tax purposes; under State law, the LLC was a separate legal entity, and the taxpayer did not have a property interest in the underlying assets of the LLC. In its opinion, the court noted that "Congress has not acted to eliminate entity-related discounts in the case of LLCs or other entities generally or in the case of a single-member LLC specifically."

[941] See David T. Lewis and Andrea Chomakos, *The Family Limited Partnership Deskbook: Forming and Funding FLPs and Other Closely Held Business Entities*, ABA Publishing, 2004, p. 11.

[942] *E.g.*, *Central Trust Co. v. United States*, 305 F.2d 393 (Ct. Cl. 1962); *Estate of Titus v. Commissioner*, T.C. Memo 1989-466.

[943] Controlling shares in a nonpublic corporation, which do not qualify for a minority discount, may nonetheless receive a marketability discount because there is no ready private placement market and because transaction costs would be incurred if the corporation were to publicly offer its stock.

corporation.[944] Marketability discounts often result in reductions in the value of transferred property of 20 to 30 percent[945] in addition to any applicable minority discount.[946] Marketability discounts often are created by placing assets in a limited partnership. Marketability discounts claimed through the use of a limited partnership permit the donee or legatee to recreate value by liquidating the partnership or having a partner's interest redeemed by the partnership.

Fragmentation (or Fractional Interest) Discount

Fragmentation discounts are similar to minority discounts. This discount arises from the lack of control inherent in joint ownership of an asset (*e.g.*, a gift of an undivided fractional interest in real estate).[947] Fragmentation discounts often result in reductions in the value of transferred property of 15 to 60 percent.[948]

Investment Company Discount

The investment company discount arises because the market values of closed-end mutual funds and investment companies often are less than the net asset values of those funds and companies. These discounts may overlap with the marketability discount.[949]

---

[944] See, *e.g.*, *Estate of Bennett v. Commissioner*, T.C. Memo 1993-34, in which the Tax Court concluded that in determining the discount, the corporate form could not be ignored. ("Here, we have a real estate management company whose assets are varied and nonliquid. We think that the corporate form is a quite important consideration here: there is definitely a difference in owning the assets and liabilities of Fairlawn directly and in owning the stock of Fairlawn, albeit 100 percent of the stock. We think some discounting is necessary to find a buyer willing to buy Fairlawn's package of desirable and less desirable properties.").

[945] There is no established formula to compute the size of a discount. One measure of the size of a discount, applicable when valuing a controlling interest, is the total cost of registering securities with the Securities and Exchange Commission, *i.e.*, converting nonliquid securities into liquid ones. Other factors considered are the size of any costs and the amounts realizable on a private placement or secondary offering, the opportunity cost of losing access to the invested funds, and the discounts applied in comparable transactions involving sales of comparable closely held businesses.

[946] The Tax Court has noted that the application of a minority discount and a marketability discount is multiplicative rather than additive. According to the Court, the minority discount should be applied first and then the marketability discount should be applied to that figure. For example, a 20-percent minority discount and a 40-percent marketability discount should result in a 52-percent discount (20 percent + (40 percent x 80 percent)), not a 60-percent discount. See *Estate of Bailey v. Commissioner*, T.C. Memo 2002-152.

[947] Because the holder of a fractional interest in real property has the power to compel partition (a remedy not available to minority holders of other interests), the discount should reflect the cost of partition and the value of the interest secured thereby. See Boris I. Bittker & Lawrence Lokken, *Federal Income Taxation of Estates, Gifts, and Trusts*, 2d ed., 1993, para. 135.3.4. Courts, however, often apply a minority discount instead. See, *e.g.*, *LeFrak v. Commissioner*, T.C. Memo 1993-526.

[948] See, *e.g.*, *Estate of Van Loben Sels v. Commissioner*, T.C. Memo 1986-501.

[949] For example, the Tax Court in *Estate of Folks v. Commissioner*, T.C. Memo 1982-43, granted the taxpayer a 50-percent investment company discount and then applied to the resulting value a 50-percent marketability discount, resulting in a total discount of 75 percent.

Explanation of Provision

For transfer tax purposes,[950] the provision disallows the use of valuation discounts in valuing certain transfers of nonbusiness assets. In the case of the transfer of any interest in an entity other than an interest which is actively traded,[951] the value of any nonbusiness assets held by the entity with respect to such interest are determined as if the transferor had transferred such assets directly to the transferee, and no valuation discount is allowed with respect to such nonbusiness assets. The value of such nonbusiness assets is disregarded when determining the value of the interest in the entity.

The term "nonbusiness asset" means any passive asset held for the production or collection of income that is not used in the active conduct of a trade or business. For this purpose, a passive asset is not treated as used in the active conduct of a trade or business unless the asset is: (a) generally, inventory property or accounts or notes receivable,[952] or a hedge with respect to such property; or (b) real property used in the active conduct of one or more real property trades or businesses[953] in which the transferor materially participates and with respect to which the transferor meets an hours-based requirement.[954] Material participation is determined under the rules of section 469(h),[955] which generally require that the taxpayer be involved in the operations of the activity on a basis that is regular, continuous, and substantial. Notwithstanding the general rule stated above, a passive asset that is held as part of the reasonably required working capital needs of a trade or business is treated as used in the active conduct of a trade or business. In general, the provision is not intended to treat real property that is used directly in the active conduct of a trade or business, such as a farming trade or business, as a nonbusiness asset.

---

[950] As drafted, the provision applies to chapters 11 and 12 of the Code, which relate to estate tax and gift tax. The provision is intended to apply to all of subtitle B, which also includes chapters 13 (relating to tax on generation-skipping transfers), 14 (relating to special valuatiou rules), and 15 (relating to gifts and bequests from expatriates). A technical correction may be necessary to reflect this intent.

[951] The term "actively traded" is defined by reference to section 1092. The regulations under section 1092 generally define the term to mean property for which there is an established financial market. See Treas. Reg. sec. 1.1092(d)-1(a).

[952] More specifically, the provision references property described in section 1221(a)(1) ("stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if ou hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business") and 1221(a)(4) ("accounts or notes receivable acquired in the ordinary course of trade or business for services rendered or from the sale of property described in paragraph (1)").

[953] The term "real property trade or business" has the meaning given the term under section 469(c)(7)(C) ("any real property development, redevelopment, construction, reconstruction, acquisition, conversion, rental, operation, management, leasing, or brokerage trade or business").

[954] See sec. 469(c)(7)(B)(ii) (requiriug that the taxpayer perform more than 750 hours of services during the taxable year in real property trades or businesses in which the taxpayer materially participates).

[955] For this purpose, the material participation standards of section 469(h) area apply without regard to the limitation to farming activity in section 469(h)(3).

The term "passive asset" means any:

- Cash or cash equivalents;
- Except to the extent provided by the Secretary, stock in a corporation or any other equity, profits, or capital interest in a partnership;
- Evidence of indebtedness, option, forward or futures contract, notional principal contract, or derivative;
- Foreign currency;[956] interest in a real estate investment trust, common trust fund, regulated investment company, or publicly traded partnership;[957] or interest in a precious metal;[958]
- Annuity;
- Real property;
- Asset (other than a patent, trademark, or copyright) which produces royalty income;
- Commodity;
- Collectible;[959]
- Personal property[960] or position in personal property;[961] or
- Other asset specified in regulations prescribed by the Secretary.

The provision includes a look-through rule that applies if a passive asset of an entity consists of a 10-percent interest in another entity. In such cases, the valuation rules of the provision are applied by disregarding the 10-percent interest and by treating the entity as holding directly its ratable share of the assets of the other entity. This rule is applied successively to any 10-percent interest of such other entity in any other entity. The term "10-percent interest" means: (a) ownership of at least 10 percent (by vote or value) of the stock of a corporation; (b) ownership of at least 10 percent of the capital or profits interest in a partnership; and (c)

---

[956] Sec. 351(e)(1)(B)(iii).

[957] As described in section 351(e)(1)(B)(iv), including any other equity interest (other than in a corporation) which pursuant to its terms or any other arrangement is readily convertible into, or exchangeable for, any asset described in this clause (*i.e.*, an interest in a real estate investment trust, common trust fnnd, regulated investment company, or publicly traded partnership), an interest in a precious metal, or any other asset prescribed by the Secretary in regulations.

[958] As described in section 351(e)(1)(B)(v).

[959] Within the meaning of section 408(m) (*i.e.*, any work of art, rug or antique, metal or gem, stamp or coin, alcoholic beverage, or other tangible personal property specified in regulations).

[960] As defined in section 1092(d)(1) ("property of a type which is actively traded").

[961] Within the meaning of section 1092(d)(2) ("an interest (including a futures or forward contract or option) in personal property").

ownership of at least 10 percent of the beneficial interests in any other entity. For purposes of the definition of a 10-percent interest, the ownership attribution rules of section 318 apply.[962] Thus, for example, if a transferor is transferring an interest in Entity 1, which has an 8 percent interest in Entity 2, and transferor separately has a direct 5 percent interest in Entity 2, the look-through rule applies.

The provision directs the Secretary to issue such regulations or other guidance as is necessary or appropriate to carry out the provision, including regulations or other guidance to: (1) determine whether a passive asset is used in the active conduct of a trade or business; and (2) determine whether a passive asset is held as part of the reasonably required working capital needs of a trade or business.[963]

Effective Date

The provision is effective for transfers after the date of enactment.

[962] Section 318 includes rules for constructive ownership of stock that generally apply for determining whether a redemption of stock is treated as a sale or exchange. These rules, in some cases, treat the shareholder as owning stock that is in fact owned by another person, such as a family member or an entity or trust. For example, an individual generally is treated as owning stock owned directly or indirectly by his or her spouse, children, grandchildren, or parents. Sec. 318(a)(1). Certain stock owned directly or indirectly by a partnership, estate, trust, or corporation is treated as owned by the partners, beneficiaries (or a deemed owner in the case of a grantor trust), or shareholders. Sec. 318(a)(2). A partnership, estate, trust, or corporation is treated as owning certain stock owned directly or indirectly by partners, beneficiaries (or a deemed owner in the case of a grantor trust), or shareholders. Sec. 318(a)(3). A person who has an option to acqnire stock is treated as owning the stock. Sec. 318(a)(4).

[963] Subsection 2031(b) (relating to the valuation of unlisted stock and secnrities for purposes of determining the value of a decedent's gross estate) is to be applied after the valuation rules of the provision.

PART III — MODIFICATIONS OF RULES RELATED TO RETIREMENT PLANS

Limitations on High-Income Taxpayers with Large Retirement Account Balances

1. Contribution limit for individual retirement plans of high-income taxpayers with large account balances and increase in minimum required distributions for high-income taxpayers with large retirement account balances (secs. 138301 and 138302 of the bill and new sec. 409B and secs. 72, 401, 403(b), 457, 3405, 4973, 4974 and 6057 of the Code)

Present Law

In General

An individual retirement arrangement ("IRA") is a tax-favored savings arrangement under which retirement savings are held in a tax-exempt trust or custodial account (or annuity contract) until distributed. There are two basic types of IRAs under present law: traditional IRAs,[964] to which both deductible and nondeductible contributions may be made,[965] and Roth IRAs, to which only nondeductible contributions may be made.[966] The principal difference between these two types of IRAs is the timing of income tax inclusion. For a traditional IRA, an eligible contributor may deduct the contributions made for the year, and distributions are includible in gross income to the extent attributable to earnings on the account and the deductible contributions. For a Roth IRA, all contributions are after-tax (that is, no deduction is allowed) and, if certain requirements are satisfied, distributions are not includible in gross income.

Tax-favored treatment applies also to certain employer-sponsored retirement plans, including qualified retirement plans and annuities,[967] tax-deferred annuities,[968] governmental eligible deferred compensation plans,[969] SIMPLE (savings incentive match plan for employees) individual retirement arrangements ("IRAs"),[970] and simplified employee pensions ("SEPs").[971] A qualified defined contribution plan may include a qualified cash-or-deferred arrangement ("section 401(k) plan"), under which a participant may make pretax elective deferrals.

[964] Sec. 408. IRAs include individual retirement accounts under section 408(a) and individual retirement annuities under section 408(b).

[965] Sec. 219.

[966] Sec. 408A.

[967] Secs. 401(a) and 403(a).

[968] Sec. 403(b).

[969] Sec. 457(b). Section 401(k) provides rules for a cash-or-deferred arrangement.

[970] Sec. 408(p).

[971] Sec. 408(k).

Section 403(b) plans and governmental section 457(b) plans also generally provide for pretax elective deferrals. These plans may also provide for pretax employer contributions that are not elective deferrals. The distinction between traditional accounts (or also called pretax accounts) and Roth accounts also exists for amounts held in individual accounts under these tax-favored- employer-sponsored retirement plans with a qualified Roth contribution program.[972]

Accumulations or aggregate account balances in IRAs (both traditional and Roth IRAs) include both regular IRA contributions and rollover contributions from tax-favored employer-sponsored retirement plans and other IRAs. As discussed in more detail below, the amount (and attributable earnings) held in Roth IRAs may consist of not only amounts originally contributed to Roth accounts (Roth IRAs or designated Roth accounts under employer-sponsored plans) as Roth contributions, but also amounts originally contributed to traditional or pretax accounts and then subsequently converted to Roth accounts.

An individual may receive an interest in a traditional or Roth IRA as a result of a transfer from a spouse or former spouse under a divorce or separation instrument.[973] Such a transfer is not taxable for the transferring spouse, and the resulting IRA is considered to be the IRA of the recipient spouse maintained for his or her benefit. An individual may also become the beneficiary of a traditional or Roth IRA after the death of the original IRA owner.[974] In some respects, an IRA inherited by a beneficiary other than the IRA's surviving spouse are subject to more restrictive rules than other IRAs. If the spouse of the original IRA owner inherits the IRA, the spouse may treat the IRA as his or her own IRA, rather than as an inherited IRA.

Limits on Regular Annual IRA Contributions

Annual Contribution Limit

An annual limit applies to contributions to IRAs. The contribution limit is coordinated so that the aggregate maximum amount that can be contributed to all of an individual's IRAs (both traditional and Roth) for a taxable year is the lesser of (1) a certain dollar amount ($6,000 for 2021) plus $1,000 for an individual who has attained age 50 before the end of the taxable year or (2) the individual's compensation. In the case of a married couple, contributions can be made up to the dollar limit for each spouse if the combined compensation of the spouses is at least equal to the contributed amount. In addition, deductible contributions to traditional IRAs and after-tax contributions to Roth IRAs generally are subject to adjusted gross income ("AGI") limits. IRA contributions generally must be made in cash.

Traditional IRAs

An individual may make deductible contributions to a traditional IRA up to the IRA contribution limit if neither the individual nor the individual's spouse is an active participant in

---

[972] Section 402A describes a qualified Roth contribution program.

[973] Sec. 408(d)(6).

[974] Sec. 408(d)(3)(C).

an employer-sponsored retirement plan. If an individual (or the individual's spouse) is an active participant in an employer-sponsored retirement plan, the deduction is phased out for taxpayers with AGI for the taxable year over certain indexed levels. In the case of an individual who is an active participant in an employer-sponsored plan, the AGI phase-out ranges for 2021 are: (1) for single taxpayers, $66,000 to $76,000; (2) for married taxpayers filing joint returns, $105,000 to $125,000; and (3) for married taxpayers filing separate returns, $0 to $10,000. If an individual is not an active participant in an employer-sponsored retirement plan, but the individual's spouse is, the deduction is phased out for taxpayers with AGI for 2021 between $198,000 and $208,000.

To the extent an individual cannot or does not make deductible contributions to a traditional IRA or contributions to a Roth IRA for the taxable year, the individual may make nondeductible contributions to a traditional IRA (that is, no AGI limits apply), subject to the same contribution limits as the limits on deductible contributions, including catch-up contributions.

Roth IRAs

Individuals with AGI below certain levels may make nondeductible contributions to a Roth IRA. The maximum annual contribution that can be made to a Roth IRA is phased out for taxpayers with AGI for the taxable year over certain indexed levels. The AGI phase-out ranges for 2021 are: (1) for single taxpayers, $125,000 to $140,000; (2) for married taxpayers filing joint returns, $198,000 to $208,000; and (3) for married taxpayers filing separate returns, $0 to $10,000.

Excise Tax on Excess Contributions

To the extent that contributions to an IRA exceed the contribution limits, the individual is subject to an excise tax equal to six percent of the excess amount.[975] This excise tax generally applies each year until the excess amount is distributed. Any amount contributed for a taxable year that is distributed with allocable income by the due date for the taxpayer's return for the year will be treated as though not contributed for the year.[976]

Taxation of Distributions from Traditional IRAs

Amounts held in a traditional IRA are includible in income when withdrawn, except to the extent that the withdrawal is a return of the individual's basis.[977] All traditional IRAs of an individual are treated as a single contract for purposes of recovering basis in the IRAs. The portion of the individual's basis that is recovered with any distribution is the ratio of the amount

---

[975] Sec. 4973(a), (b) and (f).

[976] Sec. 408(d)(4). To receive this treatment for a contribution to a traditional IRA, the taxpayer must not have claimed a deduction for the amount of the distributed contribution.

[977] Basis results from after-tax contributions to the IRA or a rollover to the IRA of after-tax amounts from another eligible retirement plan.

of the aggregate basis in all the individual's traditional IRAs to the amount of the aggregate account balances in all of the individual's traditional IRAs.

Taxation of Roth IRA Distributions

Amounts held in a Roth IRA that are withdrawn as a qualified distribution are not includible in income. A qualified distribution is a distribution that (1) is made after the five-taxable-year period beginning with the first taxable year for which the individual first made a contribution to a Roth IRA, and (2) is made after attainment of age 59½, on account of death or disability, or is made for first-time homebuyer expenses of up to $10,000.

Distributions from a Roth IRA that are not qualified distributions are includible in income to the extent attributable to earnings; amounts that are attributable to a return of contributions to the Roth IRA are not includible in income. All Roth IRAs are aggregated for purposes of determining the amount that is a return of contributions. To determine the amount includible in income, a distribution that is not a qualified distribution is treated as made in the following order: (1) regular Roth IRA contributions (including contributions rolled over from other Roth IRAs); (2) conversion contributions (on a first in, first out basis); and (3) earnings. To the extent a distribution is treated as made from a conversion contribution, it is treated as made first from the portion, if any, of the conversion contribution that was required to be included in income as a result of the conversion. Thus, nonqualified distributions from all Roth IRAs are excludable from gross income until all amounts attributable to contributions have been distributed.

The Code imposes an early distribution tax on distributions made from Roth IRAs before the earlier of when the Roth IRA owner attains age 59½, becomes disabled, or dies unless an exception applies.[978] The tax is equal to 10 percent of the amount of the distribution that is includible in gross income. The 10-percent tax is in addition to the taxes that would otherwise be due on distribution.

Distributions from Roth IRAs are permitted to be rolled over tax-free to another Roth IRA. The rollover generally can be achieved by direct rollover (direct payment from the distributing plan to the recipient plan) or by contributing the distribution to the eligible retirement plan within 60 days of receiving the distribution ("60-day rollover").[979] Distributions from an inherited IRA (except in the case of an IRA acquired by the surviving spouse by reason

---

[978] Sec. 72(t). The tax also applies to early distributions made from qualified retirement plans, section 403(b) plans and traditional IRAs. The early distribution tax does not apply to distributions from governmental section 457(b) plans.

[979] Distributions from other IRAs will generally be included in income and taxed as ordinary income and may also be subject to the 10% early distribution tax (unless rolled over within 60 days), depending on the age of the individual taking the IRA distribution and the purpose for which they will be using the distribution.

of the IRA owner's death) and required minimum distributions are not permitted to be rolled over.[980]

Separation of Traditional and Roth IRA Accounts and Roth Conversions

Contributions to traditional IRAs and to Roth IRAs must be segregated into separate IRAs, meaning arrangements with separate trusts, accounts, or contracts, and separate IRA documents.

Taxpayers generally may convert any amount in a traditional IRA into an amount in a Roth IRA through a distribution from the traditional IRA and rollover to a Roth IRA (either a direct payment or a 60-day rollover).[981] The amount converted is includible in the taxpayer's income as if a withdrawal had been made, except that the 10-percent early distribution tax does not apply. However, the early distribution tax is imposed if the taxpayer withdraws the amount within five years of the conversion.

Rollovers from Employer-Sponsored Plans to Roth IRAs

A distribution from a qualified retirement plan, section 403(b) plan, or a governmental section 457(b) plan that is an eligible rollover distribution may be rolled over to another such plan or an IRA (including to a Roth IRA).[982] The rollover generally can be achieved by direct rollover or 60-day rollover. Amounts that are rolled over are usually not included in gross income.

Distributions from designated Roth accounts may be rolled over tax-free to a Roth IRA. Other distributions from qualified retirement plans, section 403(b) plans, and governmental section 457(b) plans also may be rolled into a Roth IRA. However, under the Roth IRA conversion rules, distributions from these plans that are rolled over into a Roth IRA and that are not distributions from a designated Roth account must be included in gross income to the extent required if not rolled over.[983]

Required Minimum Distributions

---

[980] A trustee to trustee transfer between IRAs is not treated as a distribution and rollover. Thus, nonspouse beneficiaries of IRAs can move funds to another inherited IRA established as a beneficiary of the decedent IRA owner. In contrast, a surviving spouse is permitted to roll over a distribution to his or her own IRA.

[981] Sec. 408A(d)(3). A conversion can also be achieved by simply redesignating the traditional IRA as a Roth IRA if the entire balance in the account is converted.

[982] Under section 402(c)(4), any distribution of all or any portion of the balance to the credit of a participant is an eligible rollover distribution with exceptions, for example, certain periodic payments, required minimum distributions, and hardship distributions. Treas. Reg. sec. 1.402(c)-1 identifies certain other payments that are not eligible for rollover, including, for example, certain corrective distributions, loans that are treated as deemed distributions under section 72(p), and dividends on employer securities as described in section 404(k).

[983] Sec. 408A(d)(3).

Distributions from traditional IRAs and employer-sponsored- retirement plans are generally required to begin at attainment of age 72 and to be made in certain minimum amounts ("required minimum distributions").[984] Under present law, the requirement to begin distributions at attainment of age 72 does not apply to Roth IRAs.[985]

The Code imposes an excise tax on an individual if the amount distributed to an individual during a taxable year is less than the required minimum distribution under the plan for that year.[986] The excise tax is equal to 50 percent of the shortfall (that is, 50 percent of the amount by which the required minimum distribution exceeds the actual distribution). However, the Secretary may waive the tax if the individual establishes that the shortfall was due to reasonable error and reasonable steps are taken to remedy the error.

Explanation of Provision

Dollar and income limit for IRAs of high-income taxpayers

Under the provision, a $10,000,000 limit ("applicable dollar amount") is provided with respect to aggregate accumulations in applicable retirement accounts of certain high-income taxpayers ("applicable taxpayers").[987] An applicable taxpayer is a taxpayer whose adjusted taxable income for a taxable year[988] exceeds: (1) $450,000 in the case of a taxpayer who is a married individual filing a joint return or a surviving spouse;[989] (2) $425,000 in the case of a taxpayer who is a head of household;[990] and (3) $400,000 for a taxpayer not described in (1) or (2). An applicable retirement plan includes a qualified defined contribution plan or annuity,[991] a tax-deferred annuity,[992] a governmental eligible deferred compensation plan,[993] or an IRA.[994] The $10,000,000 applicable dollar amount as well as the adjusted taxable income amounts are

[984] Secs. 401(a)(9) and 408(a)(6) and (b)(3).

[985] Sec. 408A(c)(4).

[986] Sec. 4974.

[987] The provision is added to new section 409B.

[988] Adjusted taxable income means taxable income determined without regard to (1) any deduction for annual additions to individual retirement plans to which section 409B(a) applies, and (2) any increase in minimum required distributions by reason of section 4974(e) (as added by this provision).

[989] As defined in section 2(a).

[990] As defined in section 2(b).

[991] As defined in section 401(a) or 403(a).

[992] As defined in section 403(b).

[993] As defined in section 457(b) which is maintained by an eligible employer described in section 457(e)(1)(A).

[994] As defined in sections 408 and 408A.

increased for cost-of-living adjustments for taxable years beginning in 2023 or later, with adjustments for the accumulation limit being rounded to the next lowest multiple of $250,000 and adjustments for the adjusted taxable income being rounded to the next lowest multiple of $1,000.

In applying the applicable dollar limit for a taxable year, an individual's aggregate vested account balances in all applicable retirement plans maintained on behalf of the individual (whether as a participant, owner, or beneficiary), determined as of the close of the calendar year preceding the calendar year in which the taxable year begins ("prior year aggregate applicable retirement plan balances"), are compared to the individual's applicable dollar amount.

Contribution limit on individual retirement plans of high-income taxpayers with large account balances

The provision provides that in the case of an individual who is an applicable taxpayer for a taxable year, no annual additions[995] which are allocable to a taxable year may be made, by or on behalf of such individual, to any IRA to the extent such annual additions exceed the excess (if any) of the applicable dollar limit over the prior year aggregate applicable retirement plan balances. If any such annual additions are made to an IRA, an excise tax applies (see below).

For purposes of making that determination, the acquisition of an IRA (or the transfer to or contribution of amounts to an IRA) (1) by reason of the death of another individual, (2) on account of divorce or separation,[996] or (3) by a rollover contribution[997] is not treated as an annual addition. In addition, any employer or employee contributions by, or on behalf of, an individual to a SEP or a SIMPLE are not treated as annual additions for purposes of applying the limitation, but the excess (of the applicable dollar amount over the prior year aggregate applicable retirement plan balances) is reduced by the amount of such contributions in applying the limitation to other annual additions with respect to the individual.

Excise Tax (Special Rules for IRAs with Excess Annual Additions

The provision imposes an excise tax on excess contributions, which for purposes of the provision means, with respect to any taxable year, the sum of (A) the excess of the annual additions[998] to such IRAs over the limitation[999] for such taxable year, reduced by the amount of any other types of excess contributions,[1000] and (B) the lesser of (1) the excess contributions

[995] An annual addition is defined as any contribution to an individual retirement plan.

[996] Pursuant to section 408(d)(6).

[997] Under sections 402(c), 402A(c)(3)(A), 403(a)(4), 403(b)(8), 408(d)(3)(A), 408A(e)(1), or 457(e)(16).

[998] Within the meaning of section 409B(b)(1), as added by this provision.

[999] Determined under section 409B(a), that is, the excess (if any) of the applicable dollar limit over the prior year aggregate applicable retirement plan balances.

[1000] Determined under section 4973(b) and (f), relating to contributions that exceed the general contribution limits that apply to traditional and Roth IRAs.

determined under this provision for the previous taxable year, with respect to such IRAs, reduced by the aggregate distributions from such plans for the taxable year[1001] or (2) the amount (if any) by which the prior year aggregate applicable retirement plan balances exceed the applicable dollar amount for the taxable year.

Regulations

The Secretary is to prescribe such regulations and guidance as are necessary or appropriate to carry out the purposes of this provision, including regulations or guidance that provide for the application of this provision and the application of the proposed rules relating to increased minimum required distributions (described below)[1002] in the case of a plans with a valuation date other than the last day of a calendar year.

Reporting Requirements

The provision requires certain additional reporting related to IRAs with high account balances. If, as of the close of any plan year, one or more participants in an applicable retirement plan have a vested account balance of at least $2,500,000[1003] for that plan year, the plan administrator must file a statement with the Secretary which includes: (1) the name and identifying number of each such participant (without regard to whether such participant has separated from employment) and (2) the amount to which each such participant is entitled. If a plan that is subject to this reporting requirement must file a Form 8955-SSA,[1004] then the plan administrator must include the required information on the IRS Form 8955-SSA for that plan year rather than file a separate statement with the Secretary.

Increase in Minimum Required Distributions for High-Income Taxpayers with Large Retirement Account Balances

Increased minimum required distributions are required to be made for a taxable year by applicable taxpayers[1005] whose retirement account balances exceed the applicable dollar amount ($10,000,000, adjusted for inflation). For purposes of this provision, all qualified retirement plans and eligible deferred compensation plans of the taxpayer which are treated as applicable retirement plans are taken into account in computing the excess that is subject to

[1001] Including increased minimum distributions required under section 4974(e) to the extent not contributed in a rollover contribution to another eligible retirement plan in accordance with section 402(c), 402A(c)(3)(A), 403(a)(4), 403(b)(8), 408(d)(3), 408A(d)(3), or 457(e)(16).

[1002] Section 4974(e), as added by this provision.

[1003] The $2,500,000 vested account balance used to determine this reporting requirement is increased for cost-of-living adjustments for taxable years beginning in 2023 or later, with adjustments for the accumulation limit being rounded to the next lowest multiple of $250,000.

[1004] IRS Form 8955-SSA is filed by plan administrators of plans subject to the vesting standards of section 203 of ERISA and is used to satisfy the reporting requirements of section 6057(a).

[1005] Defined above.

increased minimum required distributions during a taxable year, and solely for that purpose, such plans are treated as one plan.

The increase in the minimum required distributions for a taxable year is equal to the excess (if any) of (a) the sum of (1) 100 percent of the "applicable Roth excess amount" plus (2) 50 percent of the "excess aggregate vested retirement plan balance" reduced by the applicable Roth excess amount ***over*** (b) the sum of the minimum required distributions (determined without regard to this provision) for all such plans.

The excess aggregate vested retirement plan balance for a taxable year is equal to the amount by which the aggregate vested balances to the credit of the taxpayer (whether as a participant, owner, or beneficiary) in all applicable retirement plans (determined as of the close of the calendar year preceding the calendar year in which the taxable year begins) exceed the applicable dollar amount for the calendar year in which the taxable year begins and applies to a taxpayer without regard to whether amounts are otherwise required to be distributed as minimum required distributions.[1006]

The applicable Roth excess amount applies to a taxpayer for a taxable year if the aggregate vested balances to the credit of the taxpayer (whether as a participant, owner or beneficiary) in all applicable retirement plans (determined as of the close of the calendar year preceding the calendar year to which the taxable year begins) exceeds 200 percent of the applicable dollar amount for the calendar year in which the taxable year begins (or $20,000,000, adjusted for inflation). The applicable Roth excess amount for any taxable year to which this provision applies is an amount equal to the lesser of (1) the excess as determined in the prior sentence, or (2) the aggregate balances to the credit of the taxpayer (whether as a participant, owner or beneficiary) in all Roth IRAs and Roth designated accounts.[1007]

Coordination and Application of the Rule

If this increase in minimum required distributions applies to a taxpayer for any taxable year, the general excise tax that applies to minimum required distributions that are not timely distributed is first applied to minimum required distributions determined without regard to this provision (and nothing in this provision is to be construed to affect the amount of any such minimum required distributions) and then to any increase in minimum required distributions required by this provision.

With respect to any increased minimum required distributions, the portion of any increase in minimum required distributions equal to the applicable Roth excess amount is allocated first to Roth IRAs and then to designated Roth accounts.[1008] Once that allocation is complete, the taxpayer may, in such form and manner as the Secretary may prescribe, allocate any increase in minimum required distributions to applicable retirement plans, treated as one

[1006] Under sections 401(a)(9), 403(b)(10), 408((a)(6), 408(b)(3), or 457(d)(2).

[1007] Within the meaning of section 402A.

[1008] Within the meaning of section 402A.

plan for purposes of this provision, in such manner as the taxpayer chooses subject to certain requirements. If the taxpayer has account balances in one or more employee stock ownership plans ("ESOPs"),[1009] any portion of which is invested in employer securities which are not readily tradable on an established securities market, the increase in minimum required distributions shall be allocated: (1) first, to all account balances of the taxpayer in all applicable retirement plans (other than such portions that are invested in employer securities which are not readily tradable on an established securities market) in the manner described above, and then to such portions in such manner as the taxpayer chooses. The Secretary must prescribe regulations under which a taxpayer may elect for the first taxable year of the taxpayer beginning in 2022, in which any such increase is allocated to any such portion of an account balance in an ESOP, to have such portion distributed over a period of years not greater than the period specified by the Secretary in such regulations (and any distributions made in accordance with such election will be treated for purposes of this section as made in the first taxable year).

A defined contribution plan will not constitute a qualified plan unless it provides that an employee, who certifies to the plan that he or she is a taxpayer subject to increased minimum required distributions,[1010] may elect to receive a distribution from an employee's defined contribution plan account[1011] in such amount as the employee may elect, including any amounts attributable to a qualified cash or deferred arrangement.[1012] Any distribution from an applicable retirement plan which is attributable to any increase in minimum required distributions by reason of this provision is, similar to other minimum required distributions, not treated as an eligible rollover distribution.

Ten Percent Early Distribution Tax

Such distributions to satisfy the requirements of this provision are excepted from the ten percent[1013] tax on early distributions from qualified retirement plans to the extent such distributions for the taxable year do not exceed the amount required to be distributed from such plan.

[1009] As defined in sec. 4975(e)(7).

[1010] Under section 4974(e).

[1011] Including from a custodial account under section 403(b)(7)(A), contributions made pursuant to a salary reduction agreement (within the meaning of section 402(g)(3)) from an annuity contract pursuant to section 403(b)(11), or from a governmental eligible deferred compensation plan under section 457.

[1012] The provision also amends section 401(a) by adding a new section 401(a)(39) providing for such a distribution. Similar rules are also added for section 403(b) arrangements and governmental eligible deferred compensation plans. Secs. 403(b)(7)(A) and 457(d)(1). However, this rule does not apply to an ESOP to the extent provided under regulations prescribed by the Secretary pursuant to section 4974(e)(4)(B)(iii).

[1013] Sec. 72(t).

Withholding

A distribution from a qualified retirement plan, a section 403(b) arrangement, or from a governmental eligible deferred compensation plan to satisfy the requirements of this provision[1014] is treated as a nonperiodic distribution to which 35 percent withholding is required.[1015] An individual may not elect to not have withholding apply to such distributions.[1016] Withholding does not apply to a qualified distribution from a designated Roth account.[1017]

Plan Amendments

With respect to any plan or contract amendments required by this provision to increase minimum required distributions or pursuant to any regulations issued by the Secretary, such plan or contract will be treated as being operated in accordance with the terms of the plan during the period beginning on the date the legislative or regulatory amendment takes effect (or in the case of a plan or contract amendment not required by such legislative or regulatory amendment, the effective date specified in such amendment), and ending on or before the last day of the first plan year beginning after December 31, 2022, or such later date as the Secretary may prescribe, if the plan or contract is operated as if such plan or contract amendment were in effect, and such plan or contract amendment applies retroactively for such period.

With respect to governmental plans or collectively bargained plan to which this provision applies, the end date for the period specified will be December 31, 2024 rather than December 31, 2022.

Effective Date

With respect to the provision related to limiting contributions to certain IRAs of high-income taxpayers and the excise tax on excess annual additions, the provision is applicable to taxable years beginning after December 31, 2021.

With respect to the reporting requirements, the provision is applicable to plan years beginning after December 31, 2021.

With respect to the increased minimum required distributions, the provision is generally applicable to taxable years beginning after December 31, 2021.

With respect to the special rules for plans related to the increased minimum required distributions, the provision is applicable to plan years beginning after December 31, 2021.

[1014] Pursuant to section 401(a)(39), the last sentence of section 403(b)(7)(A), the last sentence of section 403(b)(11), and the last sentence of section 457(d)(1).

[1015] Sec. 3405(b).

[1016] Sec. 3405(b)(2).

[1017] Within the meaning of section 402A.

With respect to plan amendments, the provision is generally effective as of the date of enactment.

Other Provisions Relating to Individual Retirement Plans

2. Tax treatment of rollovers to Roth IRAs and accounts (sec. 138311 of the bill and secs. 402A and 408A of the Code)

Present Law

In General

Background on IRAs may be found above in the discussion of sections 138301 and 138302 of the bill.

Roth IRA Conversions

There are two basic types of IRAs under present law: traditional IRAs and Roth IRAs. For a traditional IRA, an eligible contributor may deduct the contributions made for the year, and distributions are includible in gross income to the extent attributable to earnings on the account and the deductible contributions. For a Roth IRA, all contributions are after-tax (that is, no deduction is allowed) and, if certain requirements are satisfied, distributions are not includible in gross income. The contribution limit is coordinated so that the aggregate maximum amount that can be contributed to all of an individual's IRAs (both traditional and Roth) for a taxable year is the lesser of (1) a certain dollar amount ($6,000 for 2021) plus $1,000 for an individual who has attained age 50 or (2) the individual's compensation.

Taxpayers generally may convert any amount in a traditional IRA into an amount in a Roth IRA through a distribution from the traditional IRA and rollover to a Roth IRA (either a direct payment or a 60-day rollover).[1018] The amount converted is includible in the taxpayer's income as if a withdrawal had been made, except that the 10 percent early distribution tax[1019] does not apply. Distributions from employer-sponsored retirement plans that are not from designated Roth accounts (described below) may also be contributed to a Roth IRA as a rollover and thereby converted to a Roth IRA amount. The amount rolled over must be included in gross income to the extent required if not rolled over. However, for both types of conversions, the early distribution tax is imposed if the taxpayer withdraws the amount within five years of the conversion.

In-Plan Roth Conversions

Section 401(k) Plans, Section 403(b) Plans, and Governmental Section 457(b) Plans

A qualified defined contribution plan may allow an employee to make elective deferrals (that is, contributions made pursuant to an election between cash and an employer

[1018] A conversion can also be achieved by simply redesignating the traditional IRA as a Roth IRA if the entire balance in the account is converted.

[1019] Section 72(t).

contribution to the plan pursuant to a qualified cash or deferred arrangement).[1020] A plan with this feature is generally referred to as a section 401(k) plan. A section 403(b) plan may also allow an employee to make elective deferrals. The elective deferrals generally are excludable from gross income (pretax elective deferrals) and only taxed along with attributable earnings upon distribution from the plan. Alternatively, the plan may include a qualified Roth contribution program under which eligible employees are offered a choice of either making pretax elective deferrals or making elective deferrals that are not excluded from income and are designated as Roth contributions.[1021] If certain requirements are satisfied, distributions of designated Roth contributions and attributable earnings are excluded from gross income. The employer may also make nonelective and matching contributions for employees under a section 401(k) or 403(b) plan. These are not permitted to be designated as Roth contributions and generally are pretax contributions. A plan may also allow participants to make elective after-tax- contributions that are not elective deferrals and are not treated as designated Roth contributions.

A limit applies to the aggregate amount of elective deferrals (both pretax elective deferrals and designated Roth contributions) that an employee is permitted to contribute to section 401(k) and section 403(b) plans for a taxable year. The limit is $19,500 for 2021, plus an additional catch-up amount of $6,500 for 2021 if the employee is age 50 or older (or the employee's compensation if less than this sum). Total contributions, including pretax employer nonelective and matching contributions, elective deferrals (but not including catch-up contributions), and after-tax contributions, to a section 401(k) plan or 403(b) plan for a plan year for an employee generally cannot exceed $58,000 for 2021 (or the employee's compensation, if less).[1022]

A governmental section 457(b) plan may also provide for elective deferrals. Contributions to a governmental section 457(b) plan are subject to a limit of $19,500 for 2021 plus an additional $6,500 catch-up contribution amount for 2021 for employees at least age 50 (or the employee's compensation, if less).[1023] This limit is separate from the limit on elective deferrals to section 401(k) and section 403(b) plans.[1024] As in the case of a section 401(k) plan or a section 403(b) plan, the plan may include a qualified Roth contribution program under

---

[1020] Sec. 401(k).

[1021] Sec. 402A. Under Treas. Reg. secs. 1.401(k)-1(f) and 1.403(b)-3(c), a plan is not permitted to only allow employees to make designated Roth contributions; pretax elective deferrals must also be permitted.

[1022] Secs. 415(c) and 403(b)(1).

[1023] Under a special rule, additional catch-up contributions may be made by a participant to a governmental section 457(b) for the last three years before attainment of normal retirement age.

[1024] For example, if an employee participates in both a section 403(b) plan and a governmental section 457(b) plan of the same employer, the employee may contribute up to $19,500 (plus $6,500 catch-up contributions if at least age 50) to the section 403(b) plan and up to $19,500 (plus $6,500 catch-up contributions if at least age 50) to the section 457(b) plan.

which employees are given the choice between making pretax elective deferrals and designated Roth contributions.

Designated Roth Accounts

All designated Roth contributions made under a qualified Roth contribution program must be maintained in a separate account (a designated Roth account) under the plan. A qualified distribution from a designated Roth account is excludable from gross income. A qualified distribution is a distribution that is made after (1) an employee's completion of a specified five-year period and (2) the employee's attainment of age 59½, death, or disability.

A distribution from a designated Roth account (other than a qualified distribution) is included in the distributee's gross income to the extent allocable to pretax earnings on the account and excluded from gross income to the extent allocable to the after-tax designated Roth contributions (commonly referred to as "basis" in the account).

Roth Conversions

A section 401(k) plan, section 403(b) plan, or governmental section 457(b) plan that maintains a qualified Roth contribution program may allow amounts held in accounts that are not designated Roth accounts ("non-Roth accounts") to be transferred ("converted"). The transfer is allowed whether or not the amount is otherwise distributable. However, the converted amount must be included in gross income as though distributed, as in the case of Roth IRA conversions, and the early distribution tax is imposed if the taxpayer withdraws the amount within five years of the conversion.

Explanation of Provision

Under the provision, in the case of an applicable taxpayer, amounts held in traditional IRAs may not be converted to amounts held in Roth IRAs. Further, amounts held in non-Roth accounts in section 401(k) plans, section 403(b) plans, and governmental section 457(b) plans by an applicable taxpayer may not be converted into either amounts held in a designated Roth account or a Roth IRA. Amounts distributed from a Roth IRA or from a designated Roth account may be rolled over to a Roth IRA.

An applicable taxpayer is a taxpayer whose adjusted taxable income for a taxable year[1025] exceeds (1) $450,000 in the case of a taxpayer who is a married individual filing a joint

[1025] Adjusted taxable income is defined in section 409(B)(b)(4)(C) (which section is added to the Code by section 138301 of this Subtitle I) and means taxable income determined without regard to (a) any deduction for annual additions to individual retirement plans to which section 409B(a) applies and (b) any increase in minimum required distributions by reason of section 4974(e) (which section is added to the Code by section 138302 of this Subtitle I).

return or a surviving spouse;[1026] (2) $425,000 in the case of a taxpayer who is a head of household;[1027] and (3) $400,000 for a taxpayer not described in (1) or (2).

In addition, for all taxpayers (regardless of income level), the provision prohibits amounts held in non-Roth accounts in an employer-sponsored retirement plan[1028] or in a traditional IRA from being converted to a Roth IRA or a designated Roth account if any portion of the distribution that is being converted consists of after-tax contributions.

Effective Date

With respect to the provision prohibiting certain conversions to Roth IRAs or Roth designated accounts by applicable taxpayers, the provision applies to distributions, transfers, and contributions made in taxable years beginning after December 31, 2031.

With respect to the provision prohibiting conversions of employee after-tax contributions- in qualified retirement plans and IRAs to Roth IRAs or Roth designated accounts by all taxpayers, the provision is effective for distributions, transfers, and contributions made after December 31, 2021.

3. Prohibition of IRA investments conditioned on account holder's status (sec. 138312 of the bill and sec. 408 of the Code)

Present Law

In General

Background on IRAs may be found above in the discussion of sections 138301 and 138302 of the bill.

Prohibited Transactions

ERISA and the Code prohibit certain transactions ("prohibited transactions") between an employer-sponsored retirement plan and a disqualified person (referred to as a "party in interest" under ERISA).[1029] Under ERISA, the prohibited transaction rules apply to employer-sponsored retirement plans and welfare benefit plans. Under the Code, the prohibited transaction rules apply to qualified retirement plans and qualified retirement annuities,[1030] as well as

---

[1026] As defined in section 2(a).

[1027] As defined in section 2(b).

[1028] A section 401(k) plan, section 403(b) plan, or a governmental section 457(b) plan.

[1029] ERISA sec. 406; Code sec. 4975.

[1030] Sections 401(a) and 403(a) provide the requirements for qualified retirement plans. The prohibited transaction rules under ERISA and the Code generally do not apply to governmental plans or church plans. However, under section 503, the trust holding assets of a governmental or church plan may lose its tax exempt status in the case of a prohibited transaction listed in section 503(b).

individual retirement accounts and annuities,[1031] health savings accounts ("HSAs"),[1032] Archer MSAs,[1033] and Coverdell education savings accounts.[1034]

Disqualified persons include: (1) a fiduciary of the plan; (2) a person providing services to the plan; (3) an employer with employees covered by the plan; (4) an employee organization any of whose members are covered by the plan; (5) a direct or indirect owner of an interest of 50 percent or more in the employer or employee organization; or (6) a corporation, partnership, or trust or estate of which (or in which) an interest of 50 percent or more is held directly or indirectly by a person described in (1), (2), (3), (4) or (5). For this purpose, a fiduciary includes any person who (1) exercises any authority or control respecting management or disposition of the plan's assets, (2) renders investment advice for a fee or other compensation with respect to any plan moneys or property, or has the authority or responsibility to do so, or (3) has any discretionary authority or responsibility in the administration of the plan.

Prohibited transactions include the following transactions, whether direct or indirect, between a plan and a disqualified person: (1) the sale, exchange or leasing of property; (2) the lending of money or other extension of credit; (3) the furnishing of goods, services or facilities; (4) the transfer to, or use by or for the benefit of, a disqualified person, the income or assets of the plan; (5) in the case of a fiduciary, any act that deals with the plan's income or assets for the fiduciary's own interest or account; and (6) the receipt by a fiduciary of any consideration for the fiduciary's own personal account from any party dealing with the plan in connection with a transaction involving the income or assets of the plan.[1035] However, certain transactions are exempt from prohibited transaction treatment, for example, certain loans to plan participants.

Loss of Exemption of IRA

An individual retirement account ("IRA") is exempt from taxation unless such account has ceased to be an IRA by reason of engaging in certain prohibited transactions.[1036]

[1031] These are included in the definition of "plan" under section 4975(e)(1).

[1032] Sec. 223.

[1033] Sec. 220.

[1034] Sec. 530.

[1035] Sec. 4975(c)(1). Under section 4975(d), certain transactions are statutorily exempt from prohibited transaction treatment. In addition, under section 4975(c)(2), an administrative exemption may be granted, on either an individual or class basis, subject to a finding that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan.

[1036] Sec. 408(e)(1). Section 408(e)(1) and this provision apply to individual retirement accounts as defined in section 408(a), not to individual retirement annuities under section 408(b). Similarly, under section 408(m), an individual retirement account, or an individually-directed account under a section 401(a) qualified plan, is prohibited from being invested in collectibles. A collectible generally means a work of art, a rug or antique, a metal or gem, a stamp or coin, an alcoholic beverage, or certain other tangible personal property. The acquisition of a collectible by an IRA is also treated as a distribution from the IRA in an amount equal to the cost of the collectible.

If during any taxable year of the individual for whose benefit any IRA is established, that individual or beneficiary of such individual engages in any prohibited transaction with respect to that IRA, the IRA will cease to be an IRA as of the first day of such taxable year.[1037] In that case, the IRA is treated as having distributed an amount equal to the fair market value of all the assets in the account, as of the first day of the taxable year in which the prohibited transaction occurs.

If the fair market value of the IRA assets exceeds the basis in the account, the individual has taxable gain that is includible in gross income. If the individual is under age 59½, the individual may also be subject to the 10-percent tax on early distributions.[1038] The individual and the individual's beneficiaries are exempt, however, from the excise tax that otherwise applies to prohibited transactions.[1039]

Explanation of Provision

The provision provides that no part of the trust funds of an IRA may be invested in any security if the issuer of that security (or any other person specified by the Secretary) requires the individual on whose behalf the trust is maintained to make a representation to the issuer, or such other person, that such individual: (1) has a specified minimum amount of income or assets; (2) has completed a specified minimum level of education, or (3) holds a specific license or credential.

If, during any taxable year of the individual for whose benefit any IRA is maintained, the investment of any part of the funds of such IRA does not comply with such restriction, the IRA ceases to be an IRA as of the first day of that taxable year. Thus, as in the case of an IRA owner who engages in a prohibited transaction, the IRA is treated as having distributed an amount equal to the fair market value of all the assets in the account as of the first day of the taxable year.

Effective Date

The provision is effective for taxable years beginning after December 31, 2021. However, in the case of any such investment held in the individual's IRA as of the date of enactment of this provision, the provision is effective, with respect to such assets, for taxable years beginning after December 31, 2023.

[1037] Sec. 408(e)(2) and 4975(c)(3). This treatment also applies to an interest in a trust created as an individual retirement account under section 408(c).

[1038] Sec. 72(t).

[1039] Sec. 4975(c)(3).

3. Statute of limitations with respect to IRA noncompliance (sec. 138313 of the bill and sec. 6501 of the Code)

Present Law

In General

Background on IRAs may be found above in the discussion of sections 138301 and 138302 of the bill.

Excise Taxes

ERISA and the Code prohibit certain transactions ("prohibited transactions") between an employer-sponsored retirement plan and a disqualified person (referred to as a "party in interest" under ERISA).[1040] Under ERISA, the prohibited transaction rules apply to employer-sponsored retirement plans and welfare benefit plans. Under the Code, the prohibited transaction rules apply to qualified retirement plans and qualified retirement annuities,[1041] as well as individual retirement accounts and annuities ("IRAs"),[1042] health savings accounts ("HSAs"),[1043] Archer MSAs,[1044] and Coverdell education savings accounts.[1045]

Disqualified persons include: (1) a fiduciary of the plan; (2) a person providing services to the plan; (3) an employer with employees covered by the plan; (4) an employee organization any of whose members are covered by the plan; (5) a direct or indirect owner of an interest of 50 percent or more in the employer or employee organization; or (6) a corporation, partnership, or trust or estate of which (or in which) an interest of 50 percent or more is held directly or indirectly by a person described in (1), (2), (3), (4) or (5). For this purpose, a fiduciary includes any person who (1) exercises any authority or control respecting management or disposition of the plan's assets, (2) renders investment advice for a fee or other compensation with respect to any plan moneys or property, or has the authority or responsibility to do so, or (3) has any discretionary authority or responsibility in the administration of the plan.

Prohibited transactions include the following transactions, whether direct or indirect, between a plan and a disqualified person: (1) the sale, exchange or leasing of property; (2) the lending of money or other extension of credit; (3) the furnishing of goods, services or facilities;

[1040] ERISA sec. 406; Code sec. 4975.

[1041] Sections 401(a) and 403(a) provide the requirements for qualified retirement plans. The prohibited transaction rules under ERISA and the Code generally do not apply to governmental plans or church plans. However, under section 503, the trust holding assets of a governmental or church plan may lose its tax exempt status in the case of a prohibited transaction listed in section 503(b).

[1042] These are included in the definition of "plan" under section 4975(e)(1).

[1043] Sec. 223.

[1044] Sec. 220.

[1045] Sec. 530.

(4) the transfer to, or use by or for the benefit of, a disqualified person of the income or assets of the plan; (5) in the case of a fiduciary, any act that deals with the plan's income or assets for the fiduciary's own interest or account; and (6) the receipt by a fiduciary of any consideration for the fiduciary's own personal account from any party dealing with the plan in connection with a transaction involving the income or assets of the plan.[1046] However, certain transactions are exempt from prohibited transaction treatment, for example, certain loans to plan participants.

Under the Code, if a prohibited transaction occurs, the disqualified person who participates in the transaction is subject to a two-tier excise tax. The first level tax is 15 percent of the amount involved in the transaction. The second level tax is imposed if the prohibited transaction is not corrected within a certain period and is 100 percent of the amount involved.[1047] Under ERISA, the Secretary of Labor may assess a civil penalty against a person who engages in a prohibited transaction, other than a transaction with a plan covered by the prohibited transaction rules of the Code (*i.e.*, involving a qualified retirement plan or annuity). The penalty may not exceed five percent of the amount involved in the transaction. If the prohibited transaction is not corrected within 90 days after notice from the Secretary of Labor, the penalty may be up to 100 percent of the amount involved in the transaction.[1048] For purposes of these rules, the "amount involved" generally means the greater of (1) the amount of money and the fair market value of the other property given, or (2) the amount of money and the fair market value of other property received by the plan.[1049]

Loss of Exemption of IRA

An IRA is exempt from taxation unless such account has ceased to be an IRA by reason of engaging in certain prohibited transactions.[1050]

If during any taxable year of the individual for whose benefit any individual retirement account is established, that individual or beneficiary of such individual engages in any prohibited transaction with respect to that IRA, the IRA will cease to be an individual retirement

[1046] Sec. 4975(c)(1). Under section 4975(d), certain transactions are statutorily exempt from prohibited transaction treatment. In addition, under section 4975(c)(2), an administrative exemption may be granted, on either an individual or class basis, subject to a finding that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan.

[1047] The terms "correction" and "correct" mean, with respect to a prohibited transaction, undoing the transaction to the extent possible, but in any case, placing the plan in a financial position not worse than the position in which it would be if the disqualified person were acting under the highest fiduciary standards.

[1048] A prohibited transaction violates the fiduciary responsibility provisions of ERISA. Under section 502(l) of ERISA, in the case of a violation of fiduciary responsibility, a civil penalty is generally imposed of 20 percent of the amount recovered from a person with respect to the violation in a settlement agreement with the Department of Labor or a judicial proceeding, but the penalty is reduced by the amount of any excise tax or other civil penalty with respect to a prohibited transaction.

[1049] Amount involved is defined in Code section 4975(f)(4), which is cross-referenced in ERISA section 502(i).

[1050] Sec. 408(e)(1).

account as of the first day of such taxable year.[1051] In that case, the individual retirement account is treated as having distributed an amount equal to the fair market value of all the assets in the account, as of the first day of the taxable year in which the prohibited transaction occurs.

If the fair market value of the IRA assets exceeds the basis in the account, the individual has taxable gain that is includible in gross income. If the individual is under age 59½, the individual may also be subject to the 10-percent tax on early distributions.[1052] The individual and the individual's beneficiaries are exempt, however, from the excise tax that otherwise applies to prohibited transactions.[1053]

Statute of Limitations

In general, in order for the IRS to assess a tax, the tax must be assessed within three years after the return to which the tax relates was filed (referred to as the "statute of limitations on assessment"), regardless of whether the return is filed by the due date for the return.[1054] For this purpose, a return filed before the due date for the return is treated as filed on the due date.[1055]

In some cases, a longer statute of limitation applies. For example, the statute of limitations is six years after an income tax return is filed if the taxpayer omits an amount of includible income exceeding 25 percent of the income shown on the return.[1056] If certain information required to be included with a return is not so included, the statute of limitations may be determined by reference to the date when the information is provided to the IRS, rather than when the return was filed.[1057] In addition, in some cases in which a tax results from a particular transaction, the statute of limitations may be determined by reference to the date when the IRS is notified of the transaction, rather than when the return was filed.[1058]

Explanation of Provision

The provision extends the statute of limitations in certain cases relating to IRAs and prohibited transactions. In the case of any substantial error (willful or otherwise) in the reporting on a return of any information relating to the valuation of investment assets of an IRA, the time

[1051] Sec. 408(e)(2) and 4975(c)(3). This treatment also applies to an interest in a trust created as an individual retirement account under section 408(c).

[1052] Sec. 72(t).

[1053] Sec. 4975(c)(3).

[1054] Sec. 6501(a). Under section 6501(c)(3), in the case of a failure to file a return, tax may be assessed at any time.

[1055] Sec. 6501(b)(1).

[1056] Sec. 6501(e)(1).

[1057] See, for example, sec. 6501(c)(10), relating to listed transactions.

[1058] See, for example, 4979(e)(2)(D), relating to certain prohibited allocations of employer securities under an employee stock ownership plan.

for assessment of any tax, or increase in tax, imposed with respect to such an IRA will not expire before the date that is six years after the return containing such error is filed (whether or not such return was filed on or after the date prescribed).

With respect to a prohibited transaction, whether or not it involves an IRA, the time for assessment of any tax[1059] will not expire before the date which is six years after the return was filed (whether or not such return was filed on or after the date prescribed.

Effective Date

The provision applies to taxes with respect to which the three-year statute of limitations period ends (without regard to the amendment made by this provision) after December 31, 2021.

4. Prohibition of investment of IRA assets in entities in which the owner has a substantial interest (sec. 138314 of the bill and sec. 408 of the Code)

Present Law

Background on IRAs may be found in the discussion of sections 138301 and 138302 of the bill and background on prohibited transactions may be found in the discussion of section 138312 of the bill.

Explanation of Provision

The provision prohibits any individual retirement account ("IRA")[1060] funds from being invested in a non-publicly traded entity if the IRA owner has an interest of 10 percent or more. Specifically, no IRA funds may be invested in a corporation, partnership or other unincorporated enterprise, or trust or estate, the interests of which are not readily tradable on an established market, if 10 percent or more of the entity is owned (directly or indirectly) or held by the IRA owner. For this purpose, an interest is measured by reference to (1) in the case of a corporation, the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of the corporation, (2) in the case of a partnership or other enterprise, the capital interest or profits interest in the partnership or enterprise, and (3) in the case of a trust or estate, the beneficial interest in the trust or estate.

In determining ownership for purposes of the provision, constructive ownership rules apply.[1061] For example, an individual is treated as owning interests held by certain family members, defined for this purpose as the individual's spouse, ancestors, lineal descendants, and spouses of lineal descendants. In addition, any interest held by the IRA is treated as held by the

---

[1059] Imposed by section 4975.

[1060] Sec. 408(a). This provision does not apply to individual retirement annuities, described in section 408(b).

[1061] The provision incorporates the constructive ownership rules under section 4975(e)(4) and (5), which refer to the rules of section 267(c), but using the definition of family members under section 4975(e)(6).

IRA owner. Thus, an interest held by the IRA and an interest held by the IRA owner, as well as any constructively owned interest, are combined for purposes of the provision.

The provision also prohibits an IRA from investing in a corporation, partnership, or other unincorporated enterprise if the IRA owner is an officer or director (or individual having powers or responsibilities similar to officers or directors) of such entity.

If, during any taxable year of an IRA owner, the assets of the IRA are invested in a non-publicly-traded entity in which the IRA owner has an interest of 10 percent or more, or in which the IRS owner is an officer or director, the IRA ceases to be an IRA as of the first day of the taxable year. In that case, an amount is included in income, determined as if there were a distribution on the first day of the taxable year in an amount equal to the fair market value (as of that day) of all the assets in the account as of that day.

Effective Date

The provision applies to investments made in taxable years beginning after December 31, 2021. However, a special rule applies in the case of existing investments. If an IRA holds an investment prohibited under this provision on the date of enactment of the provision, the provision applies to such investment for taxable years beginning after December 31, 2023.

5. IRA owners treated as disqualified persons for purposes of prohibited transactions rules (sec. 138315 of the bill and sec. 4975 of the Code)

Present Law

Background on IRAs may be found in the discussion of sections 138301 and 138302 of the bill and background on prohibited transactions may be found in the discussion of section 138312 of the bill.

Explanation of Provision

The provision modifies the statutory definition of disqualified person for purposes of the prohibited transaction rules to specifically provide that an IRA owner is a disqualified person with respect to the IRA (regardless of whether the IRA owner would be a disqualified person on another basis). In addition, the following are treated as disqualified persons: (1) a family member of the IRA owner; (2) a corporation, partnership, or trust or estate in which an interest of 50 percent or more is held directly or indirectly by the IRA owner; and (3) a 10-percent or more (in capital or profits) partner or joint venturer of the IRA owner. The constructive ownership rules applicable under present law apply for purposes of the provision. Moreover, for purposes of (2) and (3) above, any interest held by the IRA is treated as held by the IRA owner. Thus, an interest held by the IRA and an interest held by the IRA owner, as well as any constructively owned interest, are combined for those purposes.[1062]

[1062] The provision also revises section 408(c)(2) to clarify that it applies to the individual for whose benefit an IRA is maintained, that is, the IRA owner as used herein.

Effective Date

The provision applies to transactions occurring after December 31, 2021.

PART IV — FUNDING THE INTERNAL REVENUE SERVICE AND IMPROVING TAXPAYER COMPLIANCE

1. Funding of the Internal Revenue Service (sec. 138401 of the bill)

Present Law

Almost all the IRS operating costs are funded by congressional appropriations.[1063] For fiscal year 2021, the IRS received appropriations of $11.919 billion distributed among four accounts: $2.556 billion for taxpayer services, $5.213 billion for enforcement, $3.928 billion for operations support, and $223 million for business systems modernization.[1064]

Explanation of Provision

The provision provides for the following appropriation amounts for fiscal year 2022 (in addition to amounts otherwise available) through September 30, 2031: (i) $78.935 billion for strengthening tax enforcement and increasing voluntary compliance, expanding audits and other enforcement activities, and modernizing information technology to support enforcement; (ii) $410 million for the Treasury Inspector General for Tax Administration to provide oversight of the IRS, including ensuring taxpayer privacy and that no undue burden is imposed on small businesses from IRS enforcement; and (iii) $157 million for the United States Tax Court for adjudicating tax disputes.

The provision specifies that the use of the additional resources for tax enforcement is not intended to increase taxes on any taxpayer with taxable income below $400,000.

Effective Date

The provision is effective as of the date of enactment.

2. Application of backup withholding with respect to third party network transactions (sec. 138402 of the bill and sec. 3406 of the Code)

Present law requires persons to file an information return concerning certain transactions with other persons.[1065] The person filing an information return generally is also

---

[1063] Information is available at https://www.irs.gov/pub/irs-pdf/p4450.pdf (last visited September 13, 2021).

[1064] Consolidated Appropriations Act, Pub. L. No. 116-260, Div. E, Title I, December 27, 2020. The IRS also received appropriations to carry out rebates and address COVID-related tax administration issues of $178 million for taxpayer services, $273 million for operations support, and $57 million for enforcement. Pub. L. No. 116-260, Div. N, Title II, Subtitle B, sec. 272 (the "COVID-related Tax Relief Act of 2020"), December 27, 2020. In addition, the IRS received $1.465 billion for the administration of the advance payments, the provision of taxpayer assistance, and the furtherance of integrated, modernized, and secure IRS systems, and $397 million to carry out advance payments of the child tax credit. American Rescue Plan Act of 2021, Pub. L. No. 117-2, Title IX, Subtitle G, secs. 9601 and 9611, March 11, 2021.

[1065] Secs. 6041 through 6050Y.

required to provide the other party in the transaction with a written statement showing certain information and the contact information for the filer.[1066] These returns are intended to assist taxpayers in preparing their income tax returns and to help the IRS determine whether such income tax returns are correct and complete.

Returns Relating to Payments Made in Settlement of Payment Card and Third Party Network Transactions

Starting in 2012 (for payments received in 2011), payment settlement entities are required to report the gross amount of payments made in settlement of payment card transactions and third party network transactions to the IRS and to businesses that receive these payments.[1067]

Payment settlement entities are required to report the following on Form 1099-K: (1) all payments made in settlement of payment card transactions, such as credit cards and (2) payments in settlement of third party network transactions if the *de minimis* exception, described below, does not apply. Specifically, any payment settlement entity making a payment to a participating payee in settlement of reportable payment transactions must report annually to the IRS and to the participating payee the gross amount of such reportable payment transactions, as well as the name, address, and TIN of the participating payees. A "reportable payment transaction" means any payment card transaction and any third party network transaction.

A "payment settlement entity" means, in the case of a payment card transaction, a merchant acquiring entity and, in the case of a third party network transaction, a third party settlement organization.[1068] A "participating payee" means, in the case of a payment card transaction, any person who accepts a payment card as payment and, in the case of a third party network transaction, any person who accepts payment from a third party settlement organization in settlement of such transaction.[1069] A "person" includes a governmental unit, although, generally, not someone with a foreign address.

Returns relating to payments made in settlement of payment card transactions

For purposes of the reporting requirement, the term "merchant acquiring entity" means a bank or other organization with the contractual obligation to make payment to participating payees in settlement of payment card transactions.[1070] A "payment card transaction" means any transaction in which a payment card is accepted as payment.[1071] A

[1066] See, *e.g.*, sec. 6041(d).

[1067] Sec. 6050W; Pub. L. No. 110-289 (2008), sec. 3091(a) added sec. 6050W, effective generally for returns for calendar years beginning after December 31, 2010.

[1068] Sec. 6050W(b).

[1069] Sec. 6050W(d)(1).

[1070] Sec. 6050W(b)(2).

[1071] For this purpose, the acceptance as payment of any account number or other indicia associated with a payment card also qualifies a payment card transaction.

"payment card" is defined as any card (*e.g.*, a credit card or debit card) which is issued pursuant to an agreement or arrangement which provides for: (1) one or more issuers of such cards; (2) a network of persons unrelated to each other, and to the issuer, who agree to accept such cards as payment; and (3) standards and mechanisms for settling the transactions between the merchant acquiring entities and the persons who agree to accept such cards as payment.[1072] Thus, under the provision, a bank that enrolls a business to accept credit cards and contracts with the business to make payment on credit card transactions is required to report to the IRS the business's gross credit card transactions for each calendar year on a Form 1099-K, *Payment Card and Third Party Network Transactions*. The bank also is required to provide a copy of the information return to the business.

Returns Relating to Payments Made in Settlement of Third Party Network Transactions

The statute also requires reporting on a third party network transaction. The term "third party network transaction" means any transaction which is settled through a third party payment network.[1073] A "third party payment network" is defined as any agreement or arrangement: (1) that involves the establishment of accounts with a central organization by a substantial number of persons (*e.g.*, more than 50) who are unrelated to such organization, provide goods or services, and have agreed to settle transactions for the provision of such goods or services pursuant to such agreement or arrangement; (2) that provides for standards and mechanisms for settling such transactions; and (3) that guarantees persons providing goods or services pursuant to such agreement or arrangement that such persons will be paid for providing such goods or services.[1074]

In the case of a third party network transaction, the payment settlement entity is the third party settlement organization, which is defined as the central organization which has the contractual obligation to make payment to participating payees of third party network transactions.[1075] Thus, an organization generally is required to report if it provides a network enabling buyers to transfer funds to sellers who have established accounts with the organization and have a contractual obligation to accept payment through the network. However, an organization operating a network which merely processes electronic payments (such as wire transfers, electronic checks, and direct deposit payments) between buyers and sellers, but does not have contractual agreements with sellers to use such network, is not required to report. Similarly, an agreement to transfer funds between two demand deposit accounts will not, by itself, constitute a third party network transaction.

A third party payment network does not include any agreement or arrangement that provides for the issuance of payment cards as defined by the provision. In addition, there is an exception for *de minimis* payments that applies to payments made by third party settlement

---

[1072] Sec. 6050W(d)(2).

[1073] Sec. 6050W(c)(3).

[1074] Sec. 6050W(d)(3).

[1075] Sec. 6050W(b)(3).

organizations but not to payments made by merchant acquiring entities. For calendar years beginning prior to January 1, 2022, a third party settlement organization is not required to report unless the aggregate value of third party network transactions with respect to a participating payee for the year exceeds $20,000 and the aggregate number of such transactions with respect to a participating payee exceeds 200.[1076] If a payment of funds is made to a third party settlement organization by means of a payment card (*i.e.*, as part of a payment card transaction), the $20,000 and 200 transaction *de minimis* rule continues to apply to any reporting obligation with respect to payment of such funds to a participating payee by the third party settlement organization made as part of a third party network transaction.

For example, in calendar year 2021, if a business that provides a web-based rental platform for short-term travelers is considered a third party settlement organization, it does not have to provide a Form 1099-K to property owners participating on its web-based platform who have received payments of $20,000 or less. On the other hand, if that company is considered a merchant acquiring entity, it would have to issue a Form 1099-K to all payees participating on its platform who have received payments of any amount starting with the first dollar.

For calendar years beginning after December 31, 2021, the threshold below which a third party settlement organization is not required to report payments to participants in its network was recently lowered and modified. Beginning in such calendar years, a third party settlement organization is required to report third party network transactions with any participating payee that exceed a minimum threshold of $600 in aggregate payments.[1077] There is no longer a threshold requirement for the number of transactions. In addition, effective on the date of enactment, Congress clarified that third party network transactions only include transactions for the provision of goods or services. Reporting is not required for other transactions, including personal gifts, charitable contributions, and reimbursements.

Rules Regarding Reporting Requirements

There are also reporting requirements on intermediaries who receive payments from a payment settlement entity and distribute such payments to one or more participating payees.[1078] Such intermediaries are treated as participating payees with respect to the payment settlement entity and as payment settlement entities with respect to the participating payees to whom the intermediary distributes payments. Thus, for example, in the case of a corporation that receives payment from a bank for credit card sales effectuated at the corporation's independently-owned franchise stores, the bank is required to report the gross amount of reportable payment transactions settled through the corporation (notwithstanding the fact that the corporation does not accept payment cards and would not otherwise be treated as a participating payee). In turn, the corporation, as an intermediary, would be required to report the gross amount of reportable

[1076] Sec. 6050W(e).

[1077] Sec. 6050W(e); Pub. L. No. 117-2, Title IX, sec. 9674, March 11, 2021, amending sec. 6050W(e), effective generally for returns for calendar years beginning after December 31, 2021.

[1078] Sec. 6050W(b)(4).

payment transactions allocable to each franchise store. The bank would have no reporting obligation with respect to payments made by the corporation to its franchise stores.

If a payment settlement entity contracts with a third-party facilitator to settle reportable payment transactions on behalf of the payment settlement entity, the third party facilitator is required to file the annual information return in lieu of the payment settlement entity.[1079]

Under the statute, returns shall be made at such time and in such form and manner as the Secretary may require by regulations.[1080] Pursuant to regulations, the reporting is annual, and, in the information return for each calendar year, payment settlement entities must provide the aggregate reportable payment transactions for the calendar year and the aggregate reportable payment transactions for each month of the calendar year.[1081] The payment settlement entity is required to file the information return with the IRS on or before February 28th (March 31st if filing electronically) of the year following the calendar year for which the return must be filed.[1082] Statements are required to be furnished to the participating payees on or before January 31st of the year following the calendar year for which the return was required to be made.[1083]

The Secretary has exercised authority under these rules to issue guidance to implement the reporting requirement, including rules to prevent the reporting of the same transaction more than once.[1084] The reportable payment transactions subject to information reporting generally are subject to backup withholding requirements.

Backup Withholding

Under section 3406, a payor is required to deduct and withhold income tax on certain "reportable payments" at a rate equal to 24 percent[1085] if: (1) the payee fails to furnish his or her taxpayer identification number (TIN) to the payor; (2) the IRS notifies the payor that the payee's TIN is incorrect; (3) a notified payee underreporting of reportable payments has occurred; or (4) a payee certification failure with respect to reportable payments has occurred.[1086] The

---

[1079] Sec. 6050W(b)(4)(B); Treas. Reg. sec. 1.6050W-1(d)(2)

[1080] Sec. 6050W(a).

[1081] Treas. Reg. sec. 6050W-1(a).

[1082] Treas. Reg. sec. 1.6050W-1(g). Taxpayers that file these information returns that report reportable payment transactions are entitled to a 30-day automatic extension of time to file. Treas. Reg. sec. 1.6081-8(a) (effective for requests for extension of time to file certain information returns due after December 31, 2016).

[1083] Sec. 6050W(f); Treas. Reg. sec. 1.6050W-1(h).

[1084] Treas. Reg. sec. 1.6050W-1(a)(4)(ii).

[1085] The backup withholding rate is the fourth lowest rate of tax applicable under section 1(c). In 2021, this rate is 24 percent.

[1086] Sec. 3406(a)(1).

requirement to deduct and withhold in the case of a notified payee underreporting or a payee certification failure apply solely to reportable interest or dividend payments. The deducting and withholding requirements under section 3406 are referred to as backup withholding.

Reportable payments are defined as any reportable interest or dividend payment and any other reportable payment.[1087] A reportable interest or dividend payment means any payment of a kind, and to a payee, required to be shown on an information return required under section (i) 6049(a), relating to payments of interest, (ii) 6042(a), relating to payments of dividends, or (iii) 6044, relating to payments of patronage dividends, but only to the extent such payment is in money and only if 50 percent or more of such payment is in money. Any other reportable payment means any payment of a kind, and to a payee, required to be shown on a return required under section (i) 6041, relating to certain information at source, (ii) 6041A(a), relating to payments of remuneration for services, (iii) 6045, relating to returns of brokers, (ii) 6050A, relating to reporting requirements of certain fishing boat operators, but only to the extent such payment is in money and represents a share of the proceeds of the catch, (v) 6050N, relating to payments of royalties, or (vi) 6050W, relating to payments made in settlement of payment card and third party settlement transactions. Examples of payments that may be subject to backup withholding include interest, dividends, rents, royalties, commissions, non-employee compensation, broker payments, and other payments.

In general, a payment is a determined to be a reportable payment, and therefore subject to backup withholding, without regard to any minimum amount which must be paid before an information return is required under the applicable information reporting statute.[1088] Therefore, payments made in settlement of payment card and third party settlement transactions required to be reported under section 6050W are subject to backup withholding without regard to the minimum dollar threshold applicable for the information reporting obligation of third party settlement organizations ($20,000 prior to 2022, $600 thereafter).[1089]

In 2011, the Treasury Department and IRS determined that for third party settlement organizations the transactional threshold (200 transactions) for determining information reporting obligations under section 6050W should be met before a backup withholding obligation under section 3406 arises.[1090] Following the amendments to the *de minimis* threshold for third party settlement organizations for calendar years beginning after December 31, 2021, there is no longer a transactional threshold for determining information reporting obligations under 6050W.

For payments required to be shown on a return under sections 6041(a) or 6041A(a), relating to certain information at the source and payments of remuneration for services, a minimum amount generally must be paid before the payment is subject to backup

---

[1087] Sec. 3406(b).

[1088] Sec. 3406(b)(4).

[1089] See Treas. Reg. sec. 31.3406(b)(3)-5(b).

[1090] Notice 2011-42, 2011-23 I.R.B. 866.

withholding.[1091] Such payments shall be treated as reportable payments, and therefore subject to backup withholding, only if (i) the aggregate amount of such payment and all previous payments described in sections 6041(a) or 6041A(a) by the payor to the payee during such calendar year equals or exceeds $600, (ii) the payor was required under sections 6041(a) or 6041A(a) to file an information return for the preceding calendar year with respect to payments to the payee, or (iii) during the preceding calendar year, the payor made reportable payments to the payee with respect to which amounts were required to be deducted and withheld under the backup withholding requirements.

Backup withholding generally applies only to payments made to U.S. persons who have failed to provide the payor with a valid IRS Form W-9, "Request for Taxpayer Identification Number and Certification;" however, it may also apply to certain payments made to persons in the absence of valid documentation of foreign status. Backup withholding does not apply to payments made to exempt recipients, including tax-exempt organizations, government entities, and certain other entities.[1092] Thus, a payor of reportable payments generally must request that a U.S. payee (other than certain exempt recipients) furnish a Form W-9 providing that person's name and taxpayer identification number.[1093]

Explanation of Provision

Under the provision, a third party settlement organization generally shall not be subject to backup withholding on the first dollar of payments made in settlement of third party network transactions. Such transactions shall be treated as reportable payments, and therefore subject to backup withholding during any calendar year, only if (i) the aggregate amount of such payment and all previous payments made by the third party settlement organization to the participating payee during the calendar year equals or exceeds $600, or (ii) the third party settlement organization was required under section 6050W to file an information return for the preceding calendar year with respect to payments to the participating payee.

For payments made during calendar year 2022, the provision provides that a third party network transaction required to be shown on a return required under section 6050W shall be treated as a reportable payment only if the aggregate number of transactions between a third party settlement organization and participating payee exceeds 200 within a calendar year. This one-year transition rule provides that a payment may be subject to backup withholding only if the transactional threshold is met, consistent with Notice 2011-42.

In addition, the provision aligns the $600 dollar threshold for information reporting under section 6050W with the $600 dollar threshold for backup withholding under section 3406. Under the provision, both thresholds are for transactions that equal or exceed $600.

[1091] Sec. 3406(b)(6).

[1092] Sec. 3406(g); Treas. Reg. sec. 31.3406(g)-1.

[1093] Treas. Reg. sec. 31.3406(h)-3.

Effective Date

The provision is effective for calendar years beginning after December 31, 2021.

3. Limitation on deduction for qualified conservation contributions made by pass-through entities, etc. (sec. 138403 of the bill and secs. 170(h), 6662, and 6664 of the Code)

Present Law

Charitable Contributions Generally

In general, a deduction is permitted for charitable contributions, subject to certain limitations that depend on the type of taxpayer, the property contributed, and the donee organization. The amount of deduction generally equals the fair market value of the contributed property on the date of the contribution. Charitable deductions are provided for income, estate, and gift tax purposes.[1094]

Qualified Conservation Contributions

Except where allowed by the Code, a taxpayer may not take a charitable deduction for a contribution of a partial interest in property (the "partial interest rule"). A qualified conservation contribution is one type of partial interest contribution for which a charitable deduction is allowed.[1095]

A qualified conservation contribution is a contribution of a qualified real property interest to a qualified organization exclusively for conservation purposes.[1096] A qualified real property interest is defined as: (1) the entire interest of the donor other than a qualified mineral interest; (2) a remainder interest; or (3) a restriction (granted in perpetuity) on the use that may be made of the real property.[1097] Qualified organizations include certain governmental units, public charities that meet certain public support tests, and certain supporting organizations.[1098] Conservation purposes include: (1) the preservation of land areas for outdoor recreation by, or for the education of, the general public; (2) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem; (3) the preservation of open space (including farmland and forest land) where such preservation will yield a significant public benefit and is either for the scenic enjoyment of the general public or pursuant to a clearly delineated Federal, State, or

[1094] Secs. 170, 2055, and 2522, respectively.

[1095] Sec. 170(f)(3)(B)(iii) and 170(h).

[1096] Sec. 170(h)(1).

[1097] Sec. 170(h)(2).

[1098] See sec. 170(h)(3).

local governmental conservation policy; and (4) the preservation of an historically important land area or a certified historic structure.[1099]

Preferential rules apply in determining the amount of a taxpayer's deduction for a qualified conservation contribution. These rules generally allow an individual taxpayer making a qualified conservation contribution to offset a higher percentage of her contribution base,[1100] and a corporate taxpayer making such a contribution to offset a higher percentage of its taxable income, than taxpayers making charitable contributions of other types of property.[1101]

IRS Notice 2017-10

On December 23, 2016, the IRS issued Notice 2017-10, which designates certain conservation easement transactions as listed transactions that are subject to certain disclosure and list maintenance requirements.[1102] According to the Notice, "[t]he Department of the Treasury . . . and the Internal Revenue Service . . . are aware that some promoters are syndicating conservation easement transactions that purport to give investors the opportunity to obtain charitable contribution deductions in amounts that significantly exceed the amount invested." The Notice generally provides that a transaction is a listed transaction under the Notice if an investor receives promotional materials that offer prospective investors in a pass-through entity the possibility of a charitable contribution deduction that equals or exceeds an amount that is two and one-half times the amount of the investor's investment. The investor purchases an interest in the pass-through entity that holds real property. The entity then contributes a conservation easement encumbering the property to a tax-exempt organization and allocates a charitable contribution deduction to the investor.

Accuracy-Related Penalty (sec. 6662)

An accuracy-related penalty under section 6662 applies to the portion of any underpayment that is attributable to (1) negligence, (2) any substantial understatement of income tax, (3) any substantial valuation misstatement, (4) any substantial overstatement of pension liabilities, (5) any substantial estate or gift tax valuation understatement, (6) any disallowance of claimed tax benefits by reason of a transaction lacking economic substance, (7) any undisclosed foreign financial asset understatement, (8) any inconsistent estate basis, or (9) any overstatement of the deduction provided in section 170(p). If the correct income tax liability exceeds that reported by the taxpayer by the greater of 10 percent of the correct tax or $5,000 (or, in the case of corporations, by the lesser of (a) 10 percent of the correct tax (or $10,000 if greater) or (b) $10 million), then a substantial understatement exists and a penalty may be imposed equal to 20

[1099] Sec. 170(h)(4).

[1100] An individual taxpayer's contribution base is her adjusted gross income computed without regard to any net operating loss carrybacks to the taxable year under section 162. Secs. 170(b)(1)(H).

[1101] Sec. 170(b)(1)(E), (b)(2)(B), and (b)(2)(C).

[1102] Treas. Reg. secs. 1.6011-4 and 301.6111-3. See also sec. 6501(c)(10) (special limitations period for assessment of tax related to a listed transaction that was not properly disclosed).

percent of the underpayment of tax attributable to the understatement.[1103] The section 6662 penalty generally is abated (even with respect to tax shelters[1104]) in cases in which the taxpayer can demonstrate that there was "reasonable cause" for the underpayment and that the taxpayer acted in good faith and adequate disclosure is made.[1105] The relevant regulations provide that reasonable cause exists where the taxpayer "reasonably relies in good faith on [a professional] tax advisor's analysis of the pertinent facts and authorities [that] . . . unambiguously states that the tax advisor concludes that there is a greater than 50-percent likelihood that the tax treatment of the item will be upheld if challenged" by the IRS.[1106] However, if the underpayment is attributable to a reportable transaction, the standard for reasonable cause is more stringent,[1107] and applies only if (1) the treatment of the item is supported by substantial authority, or (2) facts relevant to the tax treatment of the item were adequately disclosed and there was a reasonable basis for its tax treatment. The Secretary may prescribe a list of positions that the Secretary believes do not meet the requirements for substantial authority under this provision.

With certain exceptions, section 6662 does not apply to any portion of an underpayment that is attributable to a reportable transaction understatement on which a penalty is imposed under section 6662A.[1108]

The 20-percent penalty is increased to 40 percent when there is a gross valuation misstatement involving a substantial valuation overstatement, a substantial overstatement of pension liabilities, a substantial estate or gift tax valuation understatement, or when a transaction lacking economic substance or a foreign financial asset is not properly disclosed.[1109] In the case of an overstatement of qualified charitable contributions, the 20-percent penalty is increased to 50 percent.[1110]

Mandatory Supervisory Approval to Assert Penalty

Assessment of an addition to tax or penalty under the Code is barred in the absence of prior supervisory approval. Such approval requires that the initial determination of the penalty or addition to tax be approved in writing by the immediate supervisor of the person asserting the penalty. The Code authorizes the Secretary to designate a higher-level official to provide the

[1103] Sec. 6662(d).

[1104] A tax shelter is defined for this purpose as a partnership or other entity, an investment plan or arrangement, or any other plan or arrangement if a significant purpose of such partnership, other entity, plan, or arrangement is the avoidance or evasion of Federal income tax. Sec. 6662(d)(2)(C).

[1105] Secs. 6662(d)(2)(B) and 6664(c).

[1106] Treas. Reg. sec. 1.6662-4(g)(4)(i)(B). See also Treas. Reg. sec. 1.6664-4(c).

[1107] Secs. 6664(d).

[1108] Sec. 6662(b) (flush language).

[1109] Secs. 6662(h), (i), and (j).

[1110] Sec. 6662(l).

supervisory approval. Certain penalties are exempt from the requirement for supervisory approval, including those penalties "automatically calculated through electronic means."[1111] Because the IRS bears the burden of producing evidence to support assessment of a penalty in any court proceeding, the Commissioner must produce evidence of compliance with the supervisory approval requirement, even if the IRS does not bear the burden of proof.[1112]

Explanation of Provision

Certain Contributions Not Treated as Qualified Conservation Contributions

The provision provides that certain charitable contributions made by a partnership in a conservation easement transaction will not be treated as qualified conservation contributions. The contribution will not be so treated if the amount of the contribution exceeds two and one-half times the sum of each partner's relevant basis in such partnership (the "disallowance rule"). A partner's relevant basis is the portion of the partner's modified basis in the partnership[1113] that is allocable[1114] to the portion of the real property interest with respect to which the qualified conservation contribution is made.

The disallowance rule does not apply to contributions made after a three-year holding period. The holding period is satisfied if such contribution is made at least three years after the latest of: (1) the last date on which the partnership that made the contribution acquired any portion of the real property with respect to which the contribution was made; (2) the last date on which any partner in the partnership that made the contribution acquired any interest in the partnership; and (3) if the interest in the partnership making the contribution is held through one or more partnerships, the last date on which any such partnership acquired any interest in any other such partnership and the last date on which any partner in any such partnership acquired any interest in such partnership. The provision also includes an exception for certain family partnerships.

Except as provided by the Secretary, rules similar to the rules in the provision relating to qualified conservation contributions of partnerships apply to S corporations and other pass-through entities. The Secretary is directed to issue such regulations or other guidance as may be

[1111] Sec. 6751(b), generally. Other penalties exempt from the pre-approval requirement are penalties under sections 6651 (failure to file or pay taxes), 6654 (failure to pay estimated individual taxes), 6655 (failure to pay estimated corporate taxes), and section 6662(b)(9) (overstatement of the charitable deduction for nonitemizers provided in section 170(p)).

[1112] *Graev v. Commissioner*, 149 T.C. 485 (2017). Cf. *Chai v. Commissioner*, 851 F.3d 190 (2d Cir. 2017) (held that the Commissioner bears both the burden of production and burden of proof with respect to the penalty).

[1113] For this purpose, the partner's modified basis in the partnership means the partner's adjusted basis in the partnership as determined: (1) immediately before the contribution, (2) without regard to section 752 (relating to the treatment of certain liabilities), and (3) by the partnership after taking into acount the adjustments described in (1) and (2) and such other adjustments as the Secretary may provide.

[1114] The allocable portion is determined under rules similar to the rules of section 755 (rules for allocation of basis).

necessary or appropriate to carry out or prevent avoidance of the purposes of the provision, including reporting related to tiered partnerships and modified basis of partners.

The provision makes several changes to the application of section 6662 accuracy related penalties in conservation easement cases. First, the provision provides that the section 6662 accuracy-related penalty applies to any underpayment of tax attributable to the disallowance of a deduction by reason of the new limitation on qualified conservation contributions in this provision. In addition, any such disallowance is treated as a gross valuation misstatement, which increases the amount of the accuracy-related penalty to from 20 percent to 40 percent of the underpayment of tax. No defense based on reasonable cause otherwise available to an accuracy-related penalty under section 6664(c) is available for any such underpayment. Finally, the requirement for supervisory approval of the penalty assessment under section 6751(b) does not apply.

The provision also addresses the applicable statute of limitations for assessment of tax or penalties related to syndicated conservation easement transactions. First, for returns filed for partnership taxable years beginning before January 1, 2018, the assessment of tax is subject to the rules of former section 6229, under which the period in which the tax must be assessed against the partners does not expire before one year following the date on which a final partnership administrative adjustment may no longer be petitioned to the U.S. Tax Court or, if a petition was filed, the date on which a decision of the court with respect to such petition becomes final. The provision extends this one-year period to two years. Second, in the case of any disallowance of a deduction by reason of the provision, the transaction shall be treated as having been identified by the Secretary on December 23, 2016, as a tax avoidance transaction within the meaning of section 6011 for purposes of the statute of limitations rule described in sections 6501(c)(10) and 6235(c)(6). Finally, in the case of any disallowance of a deduction under section 170 for a transaction described in IRS Notice 2017-10, the disallowance will be treated as having been made by reason of the provision for purposes of the penalty and statute of limitations provisions described above.

Notice of Certain Failures

The provision allows certain taxpayers an opportunity to correct certain defects in a deed that grants an easement. If a donor is found by the Secretary to have failed to meet the requirement that a qualified conservation easement be granted and protected in perpetuity by reason of defective language in the deed relating to property line adjustments or extinguishment clauses, the donor has 90 days from the written notice by the Secretary to correct the failure, unless the Secretary can demonstrate that the donor's failure was intentional. This rule does not apply to any transaction that is a reportable transaction or any other contribution that is not treated as a qualified conservation contribution by reason of the disallowance rule described above.

Effective Date

Except as provided below, the provision is effective for contributions made after December 23, 2016 (the date of IRS Notice 2017-10), in taxable years ending after such date. For contributions of easements with a purpose of preserving a certified historic structure (as

defined in section 170(h)(4)(C)), the provision is effective for contributions made in taxable years beginning after December 31, 2018. No inference is intended as to the appropriate treatment of contributions made in taxable years ending on or before the applicable date specified above as to any activity not described in the relevant portion of the provision.

The portion of the provision that allows certain taxpayers to correct defects in a deed granting an easement is effective for (1) returns filed after the date of enactment and (2) returns filed on or before such date if the period of limitations specified in section 6501 for assessment of taxes with respect to which the return relates has not expired as of such date.

4. Modification of procedural requirements relating to assessment of penalties (sec. 138404 of the bill and sec. 6751 of the Code)

Present Law

The Code includes multiple provisions governing the proper application of penalties and additions to tax. Under those provisions there are rules regarding the details required to be included in such notices, as well as limitations periods applicable to assertion of such additions to tax and penalties. The IRS also publishes guidance for the public and its employees on the administration of penalties in support of encouraging voluntary compliance, by requiring that penalties be administered in compliance with its general policy statement regarding the need for penalties to be based on merits and fairness to the taxpayer.[1115]

Under the Code, assessment of a penalty is generally barred in the absence of supervisory approval before "initial determination of such assessment."[1116] Such approval is required to be in writing and signed by the immediate supervisor of the person asserting the penalty. The Code authorizes the Secretary to designate a higher-level official to provide the supervisory approval. Certain penalties are exempt from the requirement for supervisory approval, including those penalties "automatically calculated through electronic means."[1117] Other penalties exempt from the pre-approval requirement are penalties under sections 6651 (failure to file or pay taxes), 6654 (failure to pay estimated individual taxes) and 6655 (failure to pay estimated corporate taxes).

Assessment of tax generally refers to the formal recording of a tax liability for a specific taxable period of a specific taxpayer, and time and manner of assessment is generally prescribed by regulations to the extent not specified in statute.[1118] In proceedings to determine

---

[1115] Sec. 6751, generally, and Policy Statement 20-1, outlining the obligations of managers and employees in evaluating assertion of penalties, noting, "This means that penalties are not a "bargaining point" in resolving the taxpayer's other tax adjustments. Rather, the imposition of penalties in appropriate cases serves as an incentive for taxpayers to avoid careless or overly aggressive tax reporting positions."

[1116] Sec. 6751(b)(1). The "initial determination of assessment" is not defined.

[1117] Sec. 6751(b), generally.

[1118] Secs. 6201- 6207.

deficiencies, further restrictions on assessment apply.[1119] Because the IRS bears the burden of producing evidence to support assessment of a penalty in any court proceeding, the Commissioner must produce evidence of compliance with the supervisory approval requirement, even if the IRS does not bear the burden of proof.[1120] In resulting litigation, the U.S. Tax Court has established varying benchmarks or "consequential moments" as the point at which an "initial determination" was made to assess a penalty, without regard to efforts made to comply with standards as they existed at the time of the examination of years before the Court.[1121]

Explanation of Provision

This provision repeals the requirements for prior supervisory approval of penalties before assessment by the IRS. In its place, the provision mandates that appropriate IRS supervisors certify quarterly to the Commissioner that they are in compliance with the statutory requirements of section 6751(a) and related policies of the IRS.

Effective Date

The repeal of the requirement for prior supervisory approval of assertion of penalties is effective as if included in section 3306 of the Internal Revenue Service Restructuring and Reform Act of 1998.[1122]

The provision requiring quarterly certification is effective for all notices of penalties issued after date of enactment.

[1119] See secs. 6211-6216.

[1120] *Chai v. Commissioner*, 851 F.3d 190 at 220-221 (2d Cir. 2017) (held that the Commissioner bears both the burden of production and burden of proof with respect to the penalty). Cf. *Graev v. Commissioner*, 149 T.C. 485 (2017).

[1121] See, Chief Counsel Notice 2018-006, published June 6, 2018, discussing various scenarios in which the provisions of subsection 6751(b) could be at issue. See *Chai v. Commissioner*, 851 F.3d at 220-221(referring to the task of determining whether a specific scenario is a "consequential moment" in forming IRS position on asserting a penalty). See also *Beland v. Commissioner*, 156 T.C. No.5 (March 1, 2021) (granting taxpayer's motion for partial summary judgment that a fraud penalty was not timely where the supervisory approval was signed August 21, 2015, after a revenue agent report was provided to the taxpayer during a summons administration conference convened on August 19, 2015, citing the standards first articulated in *Chai* and *Graev, infra*, in 2017).

[1122] Pub. L. No. 105-206, Title III.

PART V — OTHER PROVISIONS

1. Modifications to limitation on deduction of excessive employee remuneration (sec. 138501 of the bill and sec. 162(m) of the Code)

Present Law

An employer generally may deduct reasonable compensation for personal services as an ordinary and necessary business expense.[1123] However, under section 162(m)(1),[1124] in the case of a publicly held corporation, a deduction limit of $1 million generally applies to compensation of the principal executive officer or the three most highly compensated officers for the taxable year other than the principal executive officer. A corporation is treated as publicly held if it has a class of common equity securities that is requires to be registered under section 12 of the Securities Exchange Act of 1934.

Prior to the American Rescue Plan Act of 2021 ("ARPA"),[1125] a "covered employee" was an employee who was (1) the principal executive officer, (2) principal financial officer, or (3) among the three most highly compensated officers for the taxable year (other than the principal executive officer or financial officer), defined in reference to the Exchange Act.[1126] A covered employee also includes any individual who had met the criteria to be a covered employee since January 1, 2014. Thus, an individual remains a covered employee with respect to compensation otherwise deductible for subsequent years, including for years during which the individual is no longer employed by the corporation and years after the individual has died. Under Treasury regulations, the requirement that the individual meet the criteria as of the last day of the taxable year applies to the principal executive officer, principal financial officer, and the three highest compensated officers.[1127]

Unless specifically excluded, the deduction limitation applies to applicable employee renumeration,[1128] which includes all remuneration for services, including cash and the cash value of all remuneration (including benefits) paid in a medium other than cash. If an individual is a covered employee for a taxable year, the deduction limitation applies to all compensation not explicitly excluded from the deduction limitation, regardless of whether the compensation is for services as a covered employee and regardless of when the compensation was earned. The $1 million cap is reduced by excess parachute payments (as defined in section 280G) that are not deductible by the corporation. Compensation does not fail to be compensation with respect to a

---

[1123] Sec. 162.

[1124] Added to the Code by the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, and amended by the Tax Cuts and Jobs Act, Pub. L. No. 115-97.

[1125] Pub. L. No. 117-2, March 11, 2021.

[1126] Notice 2007-49, 2007-25 I.R.B. 1429.

[1127] Treas. Reg. sec. 1.162-27(c)(2).

[1128] Sec. 162(m)(4).

covered employee and thus subject to the deduction limit for a taxpayer year merely because the compensation is includible in the income of, or paid to, another individual, such as compensation paid to a beneficiary after the employee's death, or to a former spouse pursuant to a domestic relations order.

Prior to Public Law 115-97, certain types of compensation were excepted from the limit, including remuneration payable on a commission basis ("commission compensation") and, if certain outside director and shareholder approval requirements were met, remuneration payable solely on account of the attainment of one or more performance goals ("performance-based compensation"). The statute expanded the definition of compensation subject to the limit to include commission compensation and performance-based compensation in addition to other types of payments.

Section 162(m) was expanded by the ARPA to include five additional individuals as covered employees. This expansion was to take effect in taxable years beginning after December 31, 2026. Accordingly, up to ten individuals, including the principal executive officer, principal financial officer, and the next eight highest paid employees may be covered employees for purposes of section 162(m) after December 31, 2026.

Explanation of Provision

The provision accelerates the treatment of the five additional individuals as covered employees to December 31, 2021. Accordingly, up to ten individuals, including the principal executive officer, principal financial officer, and the next eight highest paid employees, may be covered employees for purposes of section 162(m) after December 31, 2021.

The provision also modifies the definition of applicable employee remuneration[1129] to be, except as otherwise provided, the aggregate amount allowable as a deduction for such taxable year for remuneration for services by the covered employee, including performance-based compensation, commissions, post-termination compensation, and beneficiary payments, whether or not such remuneration is paid directly by the publicly held corporation.

The provision adds an aggregation rule requiring two or more persons who are treated as a single employer under section 414[1130] to be treated as a single employer. For purposes of this determination, the brother-sister-controlled group[1131] and combined group[1132] rules under section 1563(a) shall be disregarded.

The Secretary will prescribe regulations or other guidance as may be necessary to carry out the purposes of paragraph (1), including regulations or other guidance to prevent the

---

[1129] Sec. 162(m)(4)(A).

[1130] Subsections (b), (c), (m), or (o) of Sec. 414.

[1131] Sec. 1563(a)(2).

[1132] Sec. 1563(a)(3).

avoidance of the provision, including through the performance of services other than as an employee or by providing compensation through a passthrough or other entity.

Effective Date

The provision is effective for taxable years beginning after December 31, 2021.

2. Extension of tax to fund the Black Lung Disability Trust Fund (sec. 138502 of the bill and sec. 4121 of the Code)

Present Law

Coal extracted from mines is taxed at either $1.10 per ton if from an underground mine or $0.55 per ton if from a surface mine.[1133] The total amount of tax is not to exceed 4.4 percent of the price at which such ton of coal was sold by the producer.

After December 31, 2021, the "temporary increase termination date," the tax rates decline to rates of $0.50 for underground mines and $0.25 for surface mines. After the temporary increase termination date, the total amount of tax is not to exceed two percent of the price at which such ton of coal is sold by the producer.

Explanation of Provision

The provision extends the coal excise tax through December 31, 2025.

Effective Date

The provision is effective for sales after December 31, 2021.

3. Prohibited transactions relating to holding DISC or FSC in individual retirement account (sec. 138503 of the bill; secs. 992 and 4975 and former sec. 922 of the Code)

Present Law

Individual Retirement Arrangements

An individual retirement arrangement ("IRA") is a tax-favored savings arrangement under which retirement savings are held in a tax-exempt trust, custodial account, or annuity contract until distributed. The term includes both individual retirement accounts[1134] and individual retirement annuities.[1135] In addition, IRAs fall into two categories based on the timing of income inclusion: traditional IRAs,[1136] to which both deductible and nondeductible

---

[1133] Sec. 4121.

[1134] Sec. 408(a).

[1135] Sec. 408(b).

[1136] Sec. 408.

contributions may be made,[1137] and Roth IRAs, to which only nondeductible contributions may be made.[1138] For a traditional IRA, an eligible contributor may deduct the contributions made for the year, but distributions are includible in gross income to the extent attributable to earnings on the account and the deductible contributions. For a Roth IRA, all contributions are after-tax (that is, no deduction is allowed) but, if certain requirements are satisfied, distributions are not includible in gross income.

The total amount that an individual may contribute to one or more IRAs for a year is generally limited to the lesser of: (1) a dollar amount ($6,000 for 2021); and (2) the amount of the individual's compensation that is includible in gross income for the year.[1139] In the case of an individual who has attained age 50 by the end of the year, the dollar amount is increased by $1,000. In the case of a married couple, contributions can be made up to the dollar limit for each spouse if the combined compensation of the spouses that is includible in gross income is at least equal to the contributed amount.

An individual may make contributions to a traditional IRA (up to the contribution limit) without regard to his or her adjusted gross income. An individual may deduct his or her contributions to a traditional IRA if neither the individual nor the individual's spouse is an active participant in an employer-sponsored retirement plan. If an individual or the individual's spouse is an active participant in an employer-sponsored retirement plan, the deduction is phased out for taxpayers with adjusted gross income over certain levels.[1140] In order to be eligible to make contributions to a Roth IRA, an individual's adjusted gross income must be below certain levels.[1141]

Prohibited Transactions

The Code prohibits certain transactions ("prohibited transactions") between a plan, including an IRA, and a disqualified person.[1142] Disqualified persons include a fiduciary of the plan; a person providing services to the plan; an employer with employees covered by the plan; an employee organization any of whose members are covered by the plan; certain owners,

---

[1137] Sec. 219.

[1138] Sec. 408A.

[1139] Sec. 219(b)(2) and (5), as referenced in secs. 408(a)(1) and (b)(2)(B) and 408A(c)(2). Under section 4973, IRA contributions in excess of the applicable limit are generally subject to an excise tax of six percent per year until withdrawn.

[1140] Sec. 219(g).

[1141] Sec. 408A(c)(3).

[1142] Sec. 4975. In addition to IRAs, these rules apply to qualified retirement plans, Archer MSAs, HSAs, and Coverdell ESAs. Sec. 4975(e)(1). Similar rules apply to certain plans under the Employee Retirement Income Security Act of 1974.

officers, directors, highly compensated employees,[1143] family members, and related entities.[1144] A fiduciary includes any person who (1) exercises any discretionary authority or discretionary control respecting management of the plan or exercises any authority or control respecting management or disposition of the plan's assets, (2) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of the plan, or has any authority or responsibility to do so, or (3) has any discretionary authority or discretionary responsibility in the administration of the plan.[1145]

Prohibited transactions include the following transactions, whether direct or indirect, between a plan and a disqualified person: (1) the sale or exchange or leasing of property; (2) the lending of money or other extension of credit; (3) the furnishing of goods, services, or facilities; (4) the transfer to, or use by or for the benefit of, the income or assets of the plan; (5) in the case of a fiduciary, an act dealing with the plan's income or assets in the fiduciary's own interest or for the fiduciary's own account; and (6) the receipt by a fiduciary of any consideration for the fiduciary's own personal account from any party dealing with the plan in connection with a transaction involving the income or assets of the plan.[1146]

Sanctions for Violations

Under the Code, if a prohibited transaction occurs, the disqualified person who participated in the transaction is generally subject to a two-tiered excise tax. The first tier tax is 15 percent of the amount involved in the transaction. The second tier tax, imposed if the prohibited transaction is not corrected within a certain period, is 100 percent of the amount involved.

A special rule applies in the case of certain prohibited transactions involving IRAs. If an individual for whose benefit an IRA is established (or such individual's beneficiary) engages in a prohibited transaction with respect to the IRA, the IRA loses its tax-favored status and ceases to be an IRA as of the first day of the taxable year in which the prohibited transaction occurs.[1147] As a result, the IRA is treated as distributing to the individual on the first day of that taxable year the fair market value of all of the assets in the account. If the fair market value of the IRA assets exceeds the basis in the account, the individual has taxable gain that is includible in gross income. If the individual is under age 59½, the individual may also be subject to the 10-

[1143] Within the meaning of section 414(q).

[1144] Sec. 4975(e)(2).

[1145] Sec. 4975(d)(3).

[1146] Sec. 4975(c)(1)(A)-(F).

[1147] Sec. 408(e)(2). Similar rules apply in the case of certain prohibited transactions involving an HSA, Archer MSA, or Coverdell ESA.

percent tax on early distributions.[1148] The individual and the individual's beneficiaries are exempt, however, from the excise tax that otherwise applies to prohibited transactions.[1149]

IRS Guidance on Abusive Roth IRA Transactions

In 2004, the IRS released guidance describing certain Roth IRA transactions that the agency identifies as tax avoidance transactions that must be reported to the IRS as listed transactions.[1150] The notice describes the transactions as generally involving (1) a taxpayer who owns a pre-existing business such as a corporation or sole proprietorship (the "Business"), (2) a Roth IRA maintained for the taxpayer, and (3) a corporation substantially all the shares of which are owned or acquired by the Roth IRA ("Roth IRA Corporation"). The Roth IRA Corporation and the Business or the taxpayer[1151] enter into a transaction or arrangement that has the effect of transferring value to the Roth IRA Corporation comparable to a contribution to the Roth IRA. Examples of such transactions under the notice include transactions in which the Roth IRA Corporation acquires property, such as accounts receivable, from the Business for less than fair market value, or contributions of property, including intangible property, by a person other than the Roth IRA, without a commensurate receipt of stock ownership.

The notice provides that such transactions are designed to avoid the statutory limits on contributions to a Roth IRA, and states further that because the taxpayer in these arrangements controls the Business and is the beneficial owner of substantially all of the Roth IRA Corporation, the taxpayer is in a position to shift value from the Business to the Roth IRA Corporation. The notice provides that the Secretary will challenge the tax benefits resulting from these transactions.

Interest Charge Domestic International Sales Corporations ("IC-DISC")[1152]

The U.S. tax system has had various provisions intended to ameliorate disadvantages that U.S. multinational enterprises may face in competing with entities based in jurisdictions that based their tax regimes on territorial principles to a greater extent than the United States did prior to 2018. By exempting foreign-source income to varying degrees, the tax systems of other countries arguably provide a competitive advantage for their exports (as well as other foreign-related business activities of their residents). The DISC and FSC regimes were designed to address that disparity. The FSC regime was later repealed and replaced by the extraterritorial income systems ("ETI") in 2000, with transition rules that allowed continued existence of

---

[1148] Sec. 72(t).

[1149] Sec. 4975(c)(3).

[1150] Notice 2004-8, 2004-4 I.R.B. 333, January 26, 2004. A listed transaction is a transaction that is the same or substantially similar to one of the types of transactions that the IRS has determined to be a tax avoidance transaction and identified by notice, regulation, or other form of published guidance as a listed transaction. Treas. Reg. sec. 1.6011-4(b)(2). Every taxpayer that has participated in such a transaction and who is required to file a tax return must file a disclosure statement disclosing such transaction.

[1151] Including related parties described in section 267(b) or 707(b).

[1152] Secs. 991 through 997.

certain FSCs.[1153] Only a modified version of the DISC regime remains in effect, as described below.

Under the IC-DISC regime, certain domestic corporations are exempt from Federal corporate income tax on their export income, with partial deferral of tax for its shareholders. In general, the IC-DISC is not subject to corporate-level Federal income tax.[1154] To qualify as an IC-DISC, a domestic corporation must have a valid election (to which all shareholders consent) to be taxed as a IC-DISC[1155] and satisfy the following conditions: 95 percent of its gross receipts must be qualified export receipts; 95 percent of the sum of the adjusted bases of all its assets must be attributable to the sum of the adjusted bases of qualified export assets; the corporation must have no more than one class of stock; and the par or stated value of the outstanding stock must be at least $2,500 on each day of the taxable year.[1156]

The U.S. tax system has had a series of special tax regimes intended to provide incentives for foreign trade, including the DISC regime and foreign sales corporations ("FSC"). Benefits of the DISC regime were curtailed when the FSC regime was enacted in 1984. The FSC regime was repealed and replaced by the extraterritorial income systems ("ETI") in 2000, with transition rules that allowed continued existence of certain FSCs.[1157] These regimes were

---

[1153] Former secs. 921 through 927 (FSC); former secs. 941-943. See section 2, *The FSC Repeal and Extraterritorial Income Exclusion Act of 2000*, Pub. L. No. 106-519, which provided that no new FSCs could be created, terminated inactive FSCs, but allowed an election to be treated as a domestic corporation under former section 943. With the repeal of the ETI provisions in 2004, further transition rules were provided for transactions in taxable years 2005 and 2006. Sec. 101(b)(2), *American Jobs Creation Act of 2004*, Pub. L. No. 108-357. Earlier efforts included the special rules and benefits for China Trade Corporations and Western Hemisphere Corporations under the Code of 1939, in addition to the partial deferral for DISCS under the Internal Revenue Code of 1954. Prior to being supplanted by FSCs, DISCs were eligible for more generous tax benefits. See Joint Committee on Taxation, *General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984*, at 1066.

For an overview of the history of various special regimes and the trade disputes they engendered, see Joseph Isenbergh, Vol. 3 *U.S. Taxation of Foreign Persons and Foreign Income*, Para. 81. (Fourth Ed. 2016). See also, *Joint Committee on Taxation, The U.S. International Tax Rules: Background, Data, and Selected Issues Relating to the Competitiveness of U.S.-Based Business Operations* (JCX-67-03), July 3, 2003.

[1154] Sec. 991.

[1155] See Form 4876-A, *Election to be Treated as an Interest-Charge DISC.*

[1156] Secs. 992(a) and (b). If a corporation fails to satisfy either or both 95-percent tests, it may be deemed to satisfy such tests if it makes a pro rata distribution of its gross receipts which are not qualified export receipts and the fair market value of its assets which are not qualified export assets. Sec. 992(c).

[1157] Former secs. 921 through 927 (FSC); former secs. 941-943. See section 2, *The FSC Repeal and Extraterritorial Income Exclusion Act of 2000*, Pub. L. No. 106-519, which provided that no new FSCs could be created, terminated inactive FSCs, but allowed an election to be treated as a domestic corporation under former section 943. With the repeal of the ETI provisions in 2004, further transition rules were provided for transactions in taxable years 2005 and 2006. Sec. 101(b)(2), *American Jobs Creation Act of 2004*, Pub. L. No. 108-357. Earlier efforts included the special rules and benefits for China Trade Corporations and Western Hemisphere Corporations under the Code of 1939, in addition to the partial deferral for DISCS under the Internal Revenue Code of 1954.

intended to ameliorate disadvantages that U.S. multinational enterprises may face in competing with entities based in jurisdictions that based their tax regimes on territorial principles to a greater extent than the United States did prior to 2018. By exempting foreign-source income to varying degrees, the tax systems of other countries arguably provide a competitive advantage for their exports (as well as other foreign-related business activities of their residents). Only a modified version of the DISC regime remains in effect, as described below.

Under the IC-DISC regime, certain domestic corporations are exempt from Federal corporate income tax on their export income, with partial deferral of tax for its shareholders. In general, the IC-DISC is not subject to corporate-level Federal income tax.[1158] To qualify as an IC-DISC, a domestic corporation must have a valid election (to which all shareholders consent) to be taxed as a IC-DISC[1159] and satisfy the following conditions: 95 percent of its gross receipts must be qualified export receipts; 95 percent of the sum of the adjusted bases of all its assets must be attributable to the sum of the adjusted bases of qualified export assets; the corporation must have no more than one class of stock; and the par or stated value of the outstanding stock must be at least $2,500 on each day of the taxable year.[1160]

While an election is in effect, it applies to each shareholder who owns stock in the corporation. Personal holding companies, corporations exempt from tax under section 501, regulated investment companies, insurance companies, and S corporations are ineligible to be treated as IC-DISCs.[1161] An IC-DISC is not required to have its own employees, offices or equipment. It need only have a bank account and be maintained as a separate accounting entity.[1162]

Shareholders are generally not required to pay tax on undistributed taxable income of the IC-DISC to the extent that the taxable income is attributable to no more than $10 million qualified export receipts annually. Instead, shareholders must pay an interest charge to account for the benefit of deferring the tax liability on undistributed IC-DISC income. The shareholders of a corporation that is not currently an IC-DISC but was in a previous taxable year and has

Prior to being supplanted by FSCs, DISCs were eligible for more generous tax benefits. See Joint Committee on Taxation, *General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984*, at 1066.

For an overview of the history of various special regimes and the trade disputes they engendered, see Joseph Iscubergh, Vol. 3 *U.S. Taxation of Foreign Persons and Foreign Income*, Para. 81. (Fourth Ed. 2016). See also, *Joint Committee on Taxation, The U.S. International Tax Rules: Background, Data, and Selected Issues Relating to the Competitiveness of U.S.-Based Business Operations* (JCX-67-03), July 3, 2003.

[1158] Sec. 991.

[1159] See Form 4876-A, *Election to be Treated as an Interest-Charge DISC.*

[1160] Secs. 992(a) and (b). If a corporation fails to satisfy either or both 95-percent tests, it may be deemed to satisfy such tests if it makes a pro rata distribution of its gross receipts which are not qualified export receipts and the fair market value of its assets which are not qualified export assets. Sec. 992(c).

[1161] Sec. 992(d).

[1162] Treas. Reg. sec. 1.992-1(a)(7).

previously-taxed income or accumulated IC-DISC income, are also required to pay interest on the deferral benefit. Gain on the sale or exchange of stock in such corporation is treated as a dividend.[1163]

The deferral benefit is the excess of the amount of tax for which the shareholder would be liable if deferred DISC income were included as ordinary income over the actual tax liability of such shareholder. The rate is the average of one-year constant maturity Treasury yields.[1164]

Shareholders of an IC-DISC are subject to tax on actual distributions as well as certain items of DISC income that are treated as deemed distributions for the taxable year. Distributions treated as dividends are qualified dividends eligible for the rate applicable to net capital gains.[1165] Corporations are not eligible for a dividends-received deduction on any distributions received by an IC-DISC.[1166] All such gains and distributions are treated

Most IC-DISC deemed distributions[1167] are comprised of interest on producer's loans (defined in section 993(d)); gains on the sale or exchange of property (other than qualified export property) previously acquired by the IC-DISC in a tax-free transaction; 50 percent of the taxable income of the IC-DISC attributable to military property; taxable income attributable to qualified export receipts that exceed $10,000,000;[1168] and, if the shareholder is a C corporation, 1/17th of the taxable income during the year (after accounting for the items above, but before accounting for any actual distributions made).

The amount of deemed distributions cannot exceed the IC-DISC's earnings and profits for any given year, even if the IC-DISC has accumulated earnings and profits.[1169] Since a shareholder does not actually receive a constructive dividend, the shareholder's basis in the IC-DISC is increased by the amount of the dividend.[1170] When that portion of the IC-DISC's previously taxed income is actually distributed to the shareholder, this income is not taxed to the shareholder, and reduces the shareholder's basis in the IC-DISC. To the extent such a

---

[1163] Sec. 995(c)(1)(B).

[1164] Sec. 995(f).

[1165] Secs. 995(a) and (b); sec. 1(h)(11) provides a tax rate of 15 percent for individuals.

[1166] Sec. 246(d).

[1167] The full list can be found in section 995(b)(1).

[1168] Sec. 995(b)(4). The amount of the deemed distribution is the sum of several items, including qualified export receipts in excess of $10 million. For purposes of this calculation, multiple IC-DISCs that are part of the same controlled group are treated as one corporation (which has the effect of aggregating their receipts).

[1169] Treas. Reg. sec. 1.995-2(b).

[1170] Sec. 996(e).

distribution exceeds the shareholder's basis, it is treated as gain on the sale or exchange of property.[1171]

Any actual distribution is considered to be distributed first out of previously taxed income, then from accumulated tax deferred income, and then from all other earnings and profits.[1172] Gain on the sale of IC-DISC stock is treated as a dividend to the extent of accumulated IC-DISC income.[1173]

Explanation of Provision

The provision amends the definition of prohibited transaction to include an individual retirement account that holds an interest in a DISC[1174] or FSC[1175] that receives any commission or other payment from an entity any stock or interest in which is owned by the individual for whose benefit the individual retirement account is maintained. For this purpose, if an individual retirement account holds an interest in an entity that owns, directly or indirectly, an interest in a DISC or FSC, the account is treated as holding an interest in such DISC or FSC.

Constructive ownership rules under the Code apply in determining ownership of stock or interest in the entity making commissions or payments to the DISC or FSC, as well as in determining ownership of a DISC or FSC by an entity in which the individual retirement account holds an interest.[1176] However, for purposes of the provision, the constructive ownership rules relating to attribution of ownership to corporations apply based on 10 percent, rather than 50 percent, ownership in such corporation.[1177]

The provision also provides that the exception from the excise tax that applies to prohibited transactions involving an IRA that loses its tax-favored status does not apply in the case of the prohibited transaction added by the provision. Thus, if the owner of an individual retirement account engages in a prohibited transaction involving a DISC or FSC, as described in the provision, the individual retirement account will lose its tax-favored status (and be treated as distributing its assets as of the first day of the taxable year), and excise taxes will also apply.

[1171] Sec. 996(e).

[1172] Sec. 996(a).

[1173] Sec. 995(c).

[1174] Sec. 992(a)(1).

[1175] Sec. 922(a), as in effect before its repeal by the FSC Repeal and Extraterritorial Income Exclusion Act of 2000. All references to FSC include electing "small FSC" entities under section 922(b).

[1176] Sec. 318.

[1177] Sec. 318(a)(2)(C) and (3)(C).

Effective Date

The provision applies to stock and other interests acquired or held on or after December 31, 2021.

4. Increase in tax on certain tobacco products, imposition of tax on nicotine, and clarification of rules regarding tobacco drawback (secs. 138504 and 138505 of the bill and secs. 5701 and 5706 of the Code)

Present Law

Federal excise taxes are imposed upon various types of tobacco products and cigarette papers and tubes.[1178] "Tobacco products" are cigars, cigarettes, smokeless tobacco, pipe tobacco, and roll-your-own tobacco.[1179]

A "cigar" is any roll of tobacco wrapped in leaf tobacco or in any substance containing tobacco, other than any roll of tobacco which is a cigarette.[1180]

A "cigarette" is (1) any roll of tobacco wrapped in paper or in any substance not containing tobacco; and (2) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette.[1181]

"Smokeless tobacco" is any snuff or chewing tobacco.[1182] "Snuff" is finely cut, ground or powdered tobacco that is not intended to be smoked.[1183] "Chewing tobacco" is any leaf tobacco that is not intended to be smoked.[1184]

"Pipe tobacco" is any tobacco which, because of its appearance, type, packaging, or labeling, is suitable for use and likely to be offered to, or purchased by, consumers as tobacco to be smoked in a pipe.[1185]

[1178] Sec. 5701.

[1179] Sec. 5702(c).

[1180] Sec. 5702(a).

[1181] Sec. 5702(b).

[1182] Sec. 5702(m)(1).

[1183] Sec. 5702(m)(2).

[1184] Sec. 5702(m)(3).

[1185] Sec. 5702(n).

"Roll-your-own tobacco" is any tobacco, which, because of its appearance, type, packaging, or labeling, is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes.[1186]

"Cigarette paper" is paper, or any other material except tobacco, prepared for use as a cigarette wrapper. A "cigarette tube" is cigarette paper made into a hollow cylinder for use in making cigarettes.[1187]

The following table lists the tax rates on tobacco products and cigarette papers and tubes.

Tobacco Product	**Present Law Tax Rates**
"Small cigars" (weighing three pounds or less per thousand)[1]	$50.33 per thousand
"Large cigars" (weighing more than three pounds per thousand)[2]	52.75 percent of manufacturer's sale price, but not more than 40.26 cents per cigar
"Small cigarettes" (weighing three pounds or less per thousand)[3]	$50.33 per thousand
"Large cigarettes" (weighing more than three pounds per thousand)[4]	$105.69 per thousand
Snuff[5]	$1.51 per pound[6]
Chewing tobacco[7]	50.33 cents per pound
Pipe tobacco[8]	$2.8311 per pound
Roll-your-own tobacco[9]	$24.78 per pound

[1186] Sec. 5702(o).

[1187] Sec. 5702(f).

Tobacco Product	Present Law Tax Rates
Cigarette papers[10]	3.15 cents for each 50 papers (or fractional part thereof)
Cigarette tubes[11]	6.30 cents for each 50 tubes (or fractional part thereof)

[1] Sec. 5701(a)(1).

[2] Sec. 5701(a)(2).

[3] Sec. 5701(b)(1).

[4] Large cigarettes more than 6.5 inches in length are taxed as small cigarettes, counting each 2.75 inches (or fraction thereof) of the length of each as one cigarette. Sec. 5701(b)(2).

[5] Sec. 5701(e)(1).

[6] Each of the tax rates on snuff, chewing tobacco, pipe tobacco, and roll-your-own tobacco is applied proportionately to fractional parts of a pound.

[7] Sec. 5701(e)(2).

[8] Sec. 5701(f).

[9] Sec. 5701(g).

[10] Cigarette papers measuring more than 6.5 inches in length are taxed at the rate prescribed, counting each 2.75 inches (or fraction thereof) of the length of each as one cigarette paper. Sec. 5701(c).

[11] Cigarette tubes measuring more than 6.5 inches in length are taxed at the rate prescribed, counting each 2.75 inches (or fraction thereof) of the length of each as one cigarette tube. Sec. 5701(d).

The excise tax liability arises when the tobacco products or cigarette papers and tubes are manufactured or imported, but the requirement to pay the tax is not triggered until the product is removed from the taxpayer's premises or, in the case of an imported product, from customs custody or bond.[1188] The tax is determined and paid at the time of removal unless the taxpayer has a deferral bond in place, in which case the taxes are paid on the basis of semi-monthly return periods.[1189] Any taxpayer who is liable for a gross amount of taxes equal to or exceeding $5,000,000 during a calendar year must make deposits of tax for the following year by electronic funds transfer.[1190]

Transfer Rules and Removals without Tax

Tobacco products and cigarette papers and tubes may be transferred between bonded premises of manufacturers of tobacco products and export warehouse proprietors without payment of the tax; the transferee is liable for the tax on the transferred tobacco products and papers and tubes.[1191] Tobacco products and cigarette papers and tubes may also be removed without payment of tax for exportation; the exporter is relieved from the tax once proof of

---

[1188] Sec. 5703.

[1189] Sec. 5703(b).

[1190] Sec. 5703(b)(3).

[1191] Sec. 5703(a) and 5704.

exportation is obtained.[1192] Tax-paid product exported from the United States is eligible for drawback of the tax under certain conditions.[1193] Imported tobacco products may be released from customs custody in bulk for transfer to the bonded premises of a manufacturer or export warehouse proprietor without payment of the tax; the transferee is then responsible for the taxes.[1194] Generally, previously exported domestic tobacco products may be relanded[1195] in the United States only if they are transferred to the original manufacturer or to an export warehouse proprietor authorized by the original manufacturer.[1196] To prevent the diversion of tobacco products destined for export without payment of tax, however, packages bearing export marks are not allowed in the domestic marketplace.[1197] The tax is refunded or credited (without interest) for products withdrawn from the market and returned to bonded premises.[1198] Tax-paid products that are lost by casualty or certain disasters are eligible for tax refunds or credits.[1199]

Permits and Bonds

Manufacturers and importers of tobacco products, processed tobacco, and proprietors of export warehouses must obtain permits to engage in such businesses.[1200] A permit is obtained by application to the Secretary. The Secretary may deny the application if (1) the business premises are inadequate to protect the revenue; (2) the activity to be carried out at the business premises does not meet such minimum capacity or activity requirements as prescribed by the Secretary; (3) the applicant is, by reason of his business experience, financial standing, or trade connections, not likely to maintain operations in compliance with the applicable provisions of the Code; (4) the applicant has been convicted of a felony violation of Federal or state criminal law relating to tobacco products, processed tobacco, cigarette paper, or cigarette tubes; or (5) the applicant has failed to disclose any material information required or made any material false statement in the application. In the case of a corporation, an applicant includes any officer, director, or principal stockholder and, in the case of a partnership, a partner.[1201]

[1192] Sec. 5704(b).

[1193] Sec. 5706.

[1194] Sec. 5704(c).

[1195] A good is relanded if it is marked for export, but is returned to the United States without payment of duty. See 18 U.S.C. sec. 544.

[1196] Secs. 5754 and 5761(c).

[1197] Secs. 5754(a) and 5761(c).

[1198] Sec. 5705.

[1199] Secs. 5705 and 5708.

[1200] Sec. 5713(a).

[1201] Sec. 5712.

A permit is conditioned upon compliance with relevant provisions of the Code and related regulations pertaining to tobacco products and cigarette papers and tubes. The Secretary may suspend or revoke a permit after a notice and hearing if the holder (1) has not in good faith complied with those rules or has violated any other provision of the Code involving intent to defraud; (2) has violated the conditions of the permit; (3) has failed to disclose any material information required or made any material false statement in the permit application; (4) has failed to maintain the business premises in such a manner as to protect the revenue; (5) is, by reason of previous or current legal proceedings involving a felony violation of any other provision of Federal criminal law relating to tobacco products, processed tobacco, cigarette paper, or cigarette tubes, not likely to maintain operations in compliance with the applicable provisions of the Code; or (6) has been convicted of a felony violation of Federal or state criminal law relating to tobacco products, processed tobacco, cigarette paper, or cigarette tubes.[1202]

A surety bond is required to be furnished by manufacturers of tobacco products or cigarette papers and tubes and export warehouse proprietors before they commence business.[1203] Importers are not required to post a surety bond because the requirement to pay the tax is triggered at the time the tobacco products or cigarette papers or tubes are released from customs custody. Prior to that time, the customs bond is applicable.

Occupational Tax

An occupational tax of $1,000 per year is imposed on manufacturers of tobacco products, cigarette papers and tubes, and export warehouse proprietors.[1204] A reduced rate of $500 per year applies to taxpayers with excise tax liability in the prior year of less than $500,000.[1205] Controlled groups are treated as a single person. Any person engaged in business subject to the occupational tax who willfully fails to pay the tax imposed is subject to a fine of not more than $5,000 or imprisonment of not more than two years, or both, for each such offense.[1206]

Miscellaneous Rules, including Operational, Reporting, and Recordkeeping Requirements

Before removal, tobacco products, processed tobacco, and cigarette papers and tubes must be in packages and bear such marks, labels, and notices as required by the regulations.[1207]

[1202] Sec. 5713.

[1203] Sec. 5711.

[1204] Sec. 5731(a).

[1205] Sec. 5731(b).

[1206] Sec. 5731(c).

[1207] Secs. 5723(a) and (b).

The Code prohibits lottery features and indecent or immoral material from being contained in or attached to a package of tobacco products or cigarette papers or tubes.[1208]

Manufacturers, importers, and export warehouse proprietors are required to keep records, file operating reports, and make accurate inventories as required by regulations.[1209] Tobacco products may be furnished by a manufacturer to its employees or put to experimental use without payment of tax under conditions set forth in regulations.[1210]

Fines and Penalties

The Code contains provisions relating to the purchase, receipt, possession, sale, or disposal of certain tobacco products and cigarette papers and tubes.[1211] It also imposes restrictions on importation of previously exported tobacco products.[1212] Civil and criminal penalties and forfeiture provisions apply for failure to comply with the tobacco provisions.[1213] The criminal and forfeiture provisions of subtitle F of the Code that apply to taxes in general also apply to tobacco taxes.

Civil penalties apply to certain actions including the willful failure to comply with the duties imposed (such as recordkeeping and labeling), failure to pay tax, and for the illegal sale of tobacco products.[1214] Criminal penalties apply to certain actions including engaging in business unlawfully, failing to furnish certain information or furnishing false or fraudulent information, tax evasion, unlawful removal of tobacco products or cigarette papers or tubes, and for purchasing, receiving, possessing, or selling tobacco products or cigarette papers or tubes unlawfully.[1215] Tobacco products and cigarette papers and tubes are subject to forfeiture if they are possessed with the intent to defraud the United States, or are not in packaging as required under the law.[1216] Additional property may also be subject to forfeiture if it is used to engage in the manufacturing business unlawfully, or if the proprietor makes false or fraudulent records or reports with the intent to defraud the United States. Certain forfeited, condemned, or abandoned

[1208] Secs. 5723(c) and (d).

[1209] Secs. 5721, 5722 and 5741.

[1210] Sec. 5704(a).

[1211] Sec. 5751.

[1212] Sec. 5754.

[1213] Secs. 5751-52 and 5761-63.

[1214] Sec. 5761.

[1215] Sec. 5762.

[1216] Sec. 5763.

tobacco products or cigarette papers and tubes may be disposed of in accordance with regulations.[1217]

Explanation of Provision

The provision increases the Federal excise taxes on tobacco products. The tax rates for cigarette papers and tubes are unchanged.

The provision changes the form of the tax on large cigars from a tax on percentage of sales price to a tax per pound,[1218] with a minimum tax per cigar. The provision delegates to the Secretary or the Secretary's delegate the authority to determine the appropriate method for determining the weight of large cigars for purposes of the tax. The proposed tax rate for large cigars is $49.56 per pound with a min. tax of 10.06 cents per cigar.

The provision also adds discrete single-use units to the definition of smokeless tobacco. A "discrete single use unit" is any product containing tobacco that (1) is not intended to be smoked, and (2) is in the form of a lozenge, tablet, pill, pouch, dissolvable strip, or other discrete single-use or single-dose unit. The proposed tax rate for discrete single-use units is $100 per thousand.[1219]

The provision modifies the definition of "roll your own tobacco" to include processed tobacco that is removed for delivery or delivered to a person other than a person with a permit.[1220]

The provision also imposes a new excise tax on taxable nicotine. The amount of tax is the dollar amount specified for small cigarettes per 1,810 milligrams of nicotine (and a proportionate tax on any fractional part thereof).

The provision defines taxable nicotine as any nicotine which has been extracted, concentrated, or synthesized. However, the definition excludes any nicotine if the manufacturer or importer demonstrates to the satisfaction of the Secretary of Health and Human Services that such nicotine will be used in a drug which has been approved by the Food and Drug Administration for sale as a nicotine replacement therapy. Additionally, other tobacco products that are currently subject to tax will not be treated as containing taxable nicotine solely because of any concentration of nicotine naturally occurring in such products or any addition of nicotine to such products during the manufacturing process.

[1217] Sec. 5753.

[1218] Under the provision, the tax rate for large cigars is applied proportionately to fractional parts of a pound.

[1219] The definitions of snuff and chewing tobacco are amended to exclude discrete single-use units.

[1220] The definition excludes removals of processed tobacco for exportation as well as removals for delivery to permitted persons engaged in businesses as a manufacturer or importer of tobacco products or processed tobacco or as an export warehouse proprietor.

Under the provision, taxable nicotine is treated as a tobacco product. General provisions that apply to tobacco products, such as (i) packaging requirements, (ii) provisions relating to purchase, receipt, possession, or sale, and (iii) provisions relating to civil and criminal penalties, apply to taxable nicotine.

Additionally, the provision provides that references in the Code to a manufacturer of tobacco products or to manufacturing tobacco products include references to a manufacturer of taxable nicotine or to manufacturing taxable nicotine, respectively. Therefore, a manufacturer of taxable nicotine is subject to the occupational tax and other requirements that apply to manufacturers of tobacco products. Under the provision, a manufacturer of taxable nicotine includes any person who extracts, concentrates, or synthesizes nicotine.

The provision requires the Secretary to prescribe regulations or other guidance as necessary or appropriate, including regulations or other guidance for coordinating the taxation of tobacco products and taxable nicotine to protect revenue and prevent double taxation.

Under the provision, the Federal excise taxes on tobacco products (including taxable nicotine) and cigarette papers and tubes are:

Tobacco Product	Current Tax	Proposed Tax
"Small cigars"	$50.33 per thousand	$100.66 per thousand
"Large cigars"	52.75 percent of manufacturer's sale price, but not more than 40.26 cents per cigar	$49.56 per pound, with a min. tax of 10.06 cents per cigar
"Small cigarettes"	$50.33 per thousand	$100.66 per thousand
"Large cigarettes"	$105.69 per thousand	$211.39 per thousand
Snuff	$1.51 per pound	$26.84 per pound
Chewing tobacco	50.33 cents per pound	$10.70 per pound
Discrete single-use unit	*Not applicable*	$100 per thousand
Pipe tobacco	$2.8311 per pound	$49.56 per pound
Roll-your-own tobacco	$24.78 per pound	$49.56 per pound
Cigarette papers	3.15 cents for each 50 papers (or fractional part thereof)	*Unchanged*
Cigarette tubes	6.30 cents for each 50 tubes (or fractional part thereof)	*Unchanged*
Taxable nicotine	*Not applicable*	$100.66 per 1,810 milligrams of nicotine

Under the provision, the Federal excise tax dollar amounts are adjusted for inflation for calendar years beginning after 2022.

The provision imposes a floor stock tax on covered tobacco products and cigarette papers and tubes manufactured in or imported into the United States which are removed before the effective date and held for sale on such date by any person. The amount of the tax is (1) the tax that would be imposed under section 5701 if the article had been removed on the effective date less (2) any prior tax imposed under section 5701. Covered tobacco products are tobacco products other than large cigars, discrete single-use units, and taxable nicotine. Covered tobacco products and cigarette papers and tubes which are located in a foreign trade zone on the effective date are subject to the floor stock tax if (1) internal revenue taxes have been determined, or customs duties liquidated, with respect to such articles before the effective date, pursuant to a request under the Foreign Trade Zone Act,[1221] or (2) such articles are held on the effective date under the supervision of a customs officer.

The provision provides a transition rule for permit and bond requirements. A person who is lawfully engaged in business as a manufacturer or importer of taxable nicotine, first becomes subject to such requirements by reason of the amendments under the provision, and submits an application to engage in such business not later than 90 days after the date of the enactment, will not be denied the right to carry on such business by reason of such requirements before final action on such application.

Finally, the provision amends the drawback rules for tobacco products, cigarette papers and tubes to provide that an exemption from tax under section 5704 is a drawback, and no further drawback will be allowed based on merchandise that has not been subject to tax.[1222]

Effective Date

The provision generally applies to articles removed in calendar quarters beginning after the date of enactment.

The provisions to modify the tax treatment of large cigars, impose a tax on discrete single-use units, and impose a tax on taxable nicotine apply to articles removed in calendar quarters beginning 180 days after the date of enactment.

The provision with respect to drawbacks applies to drawback claims made on or after December 18, 2018.

[1221] 19 U.S.C. 81a *et seq.*

[1222] The provision provides that this change will not be construed to create any inference with respect to any drawback claim made before December 18, 2018.

5. Termination of employer credit for paid family and medical leave (sec. 138506 of the bill and sec. 45S of the Code)

Present Law

In general

The Family and Medical Leave Act of 1993, as amended (the "FMLA"), generally requires employers to provide employees with up to 26 weeks of leave under certain circumstances.[1223] In general, FMLA does not require that the employer continue to pay employees during such leave, although employers may choose to pay for all or a portion of such leave. State and local governments may provide, or State and local laws may require employers to provide, employees with up to a certain amount of paid leave for types of leave that may or may not fall under the FMLA.

Employer Credit for Paid Family and Medical Leave

Eligible employers can claim a general business credit equal to 12.5 percent of the amount of eligible wages (based on the normal hourly wage rate) paid to "qualifying employees" during any period in which such employees are on "family and medical leave" if the rate of payment under the program is 50 percent of the wages normally paid to an employee for actual services performed for the employer.[1224] The credit is increased by 0.25 percentage points (but not above 25 percent) for each percentage point by which the rate of payment exceeds 50 percent. The maximum amount of family and medical leave that may be taken into account with respect to any qualifying employee for any taxable year is 12 weeks.

An "eligible employer" is one which has in place a written policy that allows all qualifying full-time employees not less than two weeks of annual paid family and medical leave, and which allows all less-than-full-time qualifying employees a commensurate amount of leave (on a *pro rata* basis) compared to the leave provided to full-time employees. The policy must also provide that the rate of payment under the program is not less than 50 percent of the wages normally paid to any such employee for services performed for the employer.

In addition, in order to be an eligible employer, the employer is prohibited from certain practices or acts which are also prohibited under the FMLA, regardless of whether the employer is subject to the FMLA. Specifically, the employer must provide paid family and medical leave in compliance with a written policy that ensures that the employer will not interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under the policy and will not discharge or in any other manner discriminate against any individual for opposing any practice prohibited by the policy.

[1223] Pub. L. No. 103-3, Feb. 5, 1993.

[1224] Wages for this purpose are Federal Unemployment Tax Act wages defined in section 3306(b), without regard to the dollar limitation, but do not include amounts taken into account for purposes of determining any other credit under subpart D of the Code.

A "qualifying employee" means any individual who is an employee under tax rules and principles and is defined in section 3(e) of the Fair Labor Standards Act of 1938,[1225] as amended, who has been employed by the employer for one year or more, and who for the preceding year, had compensation not in excess of 60 percent of the compensation threshold in such year for highly compensated employees.[1226] For 2021, this 60 percent amount is $78,000.

"Family and medical leave" for purposes of new section 45S is generally defined as leave described under sections 102(a)(1)(A)-(E) or 102(a)(3) of the FMLA.[1227] If an employer provides paid leave as vacation leave, personal leave, or other medical or sick leave[1228] (unless the medical or sick leave is specifically for one or more of the "family and medical leave" purposes defined above), such paid leave would not be considered to be family and medical leave. In addition, leave paid for by a State or local government or required by State or local law (including such leave required to be paid by the employer) is not taken into account in determining the amount of paid family and medical leave provided by the employer that is eligible for the credit. Any wages for paid sick or expanded family and medical leave taken into account for the payroll tax credit on such wages are not taken into account for purposes of determining the employer credit for certain paid family and medical leave under section 45S.[1229]

The Secretary will make determinations as to whether an employer or an employee satisfies the applicable requirements for an eligible employer or qualifying employee, based on information provided by the employer that the Secretary determines to be necessary or appropriate.

The Taxpayer Certainty and Disaster Tax Relief Act of 2020[1230] extended the employer credit for paid family and medical leave so that it would expire on December 31, 2025.

[1225] Pub. L. No. 75-718.

[1226] Sec. 414(q)(1)(B) ($130,000 for 2021).

[1227] FMLA section 102(a)(1) provides leave for FMLA purposes due to (A) the birth of a son or daughter of the employee and in order to care for such son or daughter; (B) the placement of a son or daughter with the employee for adoption or foster care; (C) caring for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition; (D) a serious health condition that makes the employee unable to perform the functions of the employee's position; (E) any qualifying exigency (as the Secretary of Labor shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces. In addition, FMLA section 102(a)(3) provides leave for FMLA purposes due to the need of an employee who is a spouse, son, daughter, parent, or next-of-kin of an eligible service member to care for such service member.

[1228] These terms mean these types of leave within the meaning of FMLA section 102(d)(2).

[1229] Pub. L. No. 116-127; Secs. 3131, 3132. The employer may not claim a credit under section 45S with respect to the qualified sick leave or family leave wages paid but may be able to take a credit under section 45S with respect to any additional wages paid, provided the requirements of section 45S are met with respect to the additional wages.

[1230] Pub. L. No. 116-260, December 27, 2020.

Explanation of Provision

The provision amends the expiration date of the credit for paid family and medical leave from December 31, 2025[1231] to December 31, 2023.

Effective Date

The provision is effective upon date of enactment.

6. Clarification of treatment of DISC gains and distributions of certain foreign shareholders (sec. 138507 of the bill and sec. 996(g) and former sec. 926 of the Code)

Present Law

The U.S. tax system has had various provisions intended to ameliorate disadvantages that U.S. multinational enterprises may face in competing with entities based in jurisdictions that based their tax regimes on territorial principles to a greater extent than the United States did prior to 2018. By exempting foreign-source income to varying degrees, the tax systems of other countries arguably provide a competitive advantage for their exports (as well as other foreign-related business activities of their residents). The DISC and FSC regimes were designed to address that disparity. The FSC regime was later repealed and replaced by the extraterritorial income systems ("ETI") in 2000, with transition rules that allowed continued existence of certain FSCs.[1232] Only a modified version of the DISC regime remains in effect, as described below.

Under the IC-DISC regime, certain domestic corporations are exempt from Federal corporate income tax on their export income, with partial deferral of tax for its shareholders. In general, the IC-DISC is not subject to corporate-level Federal income tax.[1233] To qualify as an IC-DISC, a domestic corporation must have a valid election (to which all shareholders consent)

[1231] Sec. 45S(i).

[1232] Former secs. 921 through 927 (FSC); former secs. 941-943. See section 2, *The FSC Repeal and Extraterritorial Income Exclusion Act of 2000*, Pub. L. No. 106-519, which provided that no new FSCs could be created, terminated inactive FSCs, but allowed an election to be treated as a domestic corporation under former section 943. With the repeal of the ETI provisions in 2004, further transition rules were provided for transactions in taxable years 2005 and 2006. Sec. 101(b)(2), *American Jobs Creation Act of 2004*, Pub. L. No. 108-357. Earlier efforts included the special rules and benefits for China Trade Corporations and Western Hemisphere Corporations under the Code of 1939, in addition to the partial deferral for DISCs under the Internal Revenue Code of 1954. Prior to being supplanted by FSCs, DISCs were eligible for more generous tax benefits. See Joint Committee on Taxation, *General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984*, at 1066.

For an overview of the history of various special regimes and the trade disputes they engendered, see Joseph Isenbergh, Vol. 3 *U.S. Taxation of Foreign Persons and Foreign Income*, Para. 81. (Fourth Ed. 2016). See also, *Joint Committee on Taxation, The U.S. International Tax Rules: Background, Data, and Selected Issues Relating to the Competitiveness of U.S.-Based Business Operations* (JCX-67-03), July 3, 2003.

[1233] Sec. 991.

to be taxed as a IC-DISC[1234] and satisfy the following conditions: 95 percent of its gross receipts must be qualified export receipts; 95 percent of the sum of the adjusted bases of all its assets must be attributable to the sum of the adjusted bases of qualified export assets; the corporation must have no more than one class of stock; and the par or stated value of the outstanding stock must be at least $2,500 on each day of the taxable year.[1235]

While an election is in effect, it applies to each shareholder who owns stock in the corporation. Personal holding companies, corporations exempt from tax under section 501, regulated investment companies, insurance companies, and S corporations are ineligible to be treated as IC-DISCs.[1236] An IC-DISC is not required to have its own employees, offices or equipment. It need only have a bank account and be maintained as a separate accounting entity.[1237]

Shareholders are generally not required to pay tax on undistributed taxable income of the IC-DISC to the extent that the taxable income is attributable to no more than $10 million qualified export receipts annually. Instead, shareholders must pay an interest charge to account for the benefit of deferring the tax liability on undistributed IC-DISC income. The shareholders of a corporation that is not currently an IC-DISC but was in a previous taxable year and has previously-taxed income or accumulated IC-DISC income, are also required to pay interest on the deferral benefit. Gain on the sale or exchange of stock in such corporation is treated as a dividend.[1238]

The deferral benefit is the excess of the amount of tax for which the shareholder would be liable if deferred DISC income were included as ordinary income over the actual tax liability of such shareholder. The rate is the average of one-year constant maturity Treasury yields.[1239]

Shareholders of an IC-DISC are subject to tax on actual distributions as well as certain items of DISC income that are treated as deemed distributions for the taxable year. Individual shareholders who receive distributions that are treated as dividends are entitled to the rate on qualified dividends, i.e., the rate applicable to net capital gains.[1240] Corporations are not

---

[1234] See Form 4876-A, *Election to be Treated as an Interest-Charge DISC.*

[1235] Secs. 992(a) and (b). If a corporation fails to satisfy either or both 95-percent tests, it may be deemed to satisfy such tests if it makes a pro rata distribution of its gross receipts which are not qualified export receipts and the fair market value of its assets which are not qualified export assets. Sec. 992(c).

[1236] Sec. 992(d).

[1237] Treas. Reg. § 1.992-1(a)(7).

[1238] Sec. 995(c)(1)(B).

[1239] Sec. 995(f).

[1240] Secs. 995(a) and (b); sec. 1(h)(11) provides a tax rate of 15 percent for individuals.

eligible for a dividends-received deduction on any distributions received by an IC-DISC.[1241] Gains, dividends and other distributions (including deemed distributions) to foreign shareholders, whether corporate or nonresident aliens, are treated as income that is effectively connected with a U.S. trade or business conducted through a permanent establishment and therefore derived from sources in the United States.[1242]

Most IC-DISC deemed distributions[1243] are comprised of interest on producer's loans (defined in section 993(d)); gains on the sale or exchange of property (other than qualified export property) previously acquired by the IC-DISC in a tax-free transaction; 50 percent of the taxable income of the IC-DISC attributable to military property; taxable income attributable to qualified export receipts that exceed $10,000,000;[1244] and, if the shareholder is a C corporation, 1/17th of the taxable income during the year (after accounting for the items above, but before accounting for any actual distributions made).

The amount of deemed distributions cannot exceed the IC-DISC's earnings and profits for any given year, even if the IC-DISC has accumulated earnings and profits.[1245] Since a shareholder does not actually receive a constructive dividend, the shareholder's basis in the IC-DISC is increased by the amount of the dividend.[1246] When that portion of the IC-DISC's previously taxed income is actually distributed to the shareholder, this income is not taxed to the shareholder, and reduces the shareholder's basis in the IC-DISC. To the extent such a distribution exceeds the shareholder's basis, it is treated as gain on the sale or exchange of property.[1247]

Any actual distribution is considered to be distributed first out of previously taxed income, then from accumulated tax deferred income, and then from all other earnings and profits.[1248] Gain on the sale of IC-DISC stock is treated as a dividend to the extent of accumulated IC-DISC income.[1249]

[1241] Sec. 246(d).

[1242] Sec. 996(g).

[1243] The full list can be found in section 995(b)(1).

[1244] Sec. 995(b)(4). The amount of the deemed distribution is the sum of several items, including qualified export receipts in excess of $10 million. For purposes of this calculation, multiple IC-DISCs that are part of the same controlled group are treated as one corporation (which has the effect of aggregating their receipts).

[1245] Treas. Reg. § 1.995-2(b).

[1246] Sec. 996(e).

[1247] Sec. 996(e).

[1248] Sec. 996(a).

[1249] Sec. 995(c).

Explanation of Provision

Foreign shareholders of DISCs and FSCs are deemed to have a permanent establishment in the United States from which any DISC or FSC gains or distributions are derived.

Effective Date

The provision is applicable to gains and distributions after December 31, 2021.

7. Access to self-employment income information for paid leave administration (sec. 138508 of the bill and sec. 6103(l) of the Code)

Present Law

Confidentiality of Returns and Return Information

Section 6103 provides that returns and return information are confidential and may not be disclosed by the IRS, other Federal employees, State employees, and certain others having access to such information except as provided in the Code. There are a number of exceptions to the general rule of nondisclosure that authorize disclosure in specifically identified circumstances.

For example, the Code provides for 22 specific exceptions to allow the disclosure of returns and return information to various persons or entities for a nontax administration purpose.[1250]

Universal Paid Family and Medical Leave

Subtitle A of the provision creates a universal paid family and medical leave benefit in a new title XXII of the Social Security Act. The paid leave benefit is administered by the Secretary and provides up to 12 weeks of paid family and medical leave per year for workers to address their own serious medical issue, the serious medical issue of a family member, the birth or adoption of a child, the death of a family member (up to 3 days for a typical worker employed 5 days per week), and for circumstances arising from a loved one's military deployment or serious injury.

The amount of the benefit is determined under a progressive benefit formula, designed to replace at least two-thirds of monthly earnings for most workers and a larger share of earnings for low-income workers. The benefit applies to employees and self-employed individuals. The determination of benefit amounts is based on wage or self-employment income data from the most recent eight calendar quarters. For employees, the Secretary shall utilize wage date from the National Directory of New Hires in making benefit determinations.

[1250] Sec. 6103(l)(1) through (l)(22).

Explanation of Provision

The provision provides an exception to the general rule of confidentiality for disclosure of certain return information of self-employed individuals to carry out the paid family and medical leave benefit program. Under the provision, upon written request from the Secretary, officers and employees of the Department of the Treasury will have access to return information for a taxpayer whose self-employment income is relevant in determining eligibility for, or the correct amount of, a paid family and medical leave benefit under title XXII of the Social Security Act. Such information is limited to (i) taxpayer identity information of the taxpayer, (ii) self-employment income of the taxpayer,[1251] and (iii) the taxable year to which the self-employment income relates. The information may be used solely for the purpose of administering the paid family and medical leave benefit program.

Effective Date

The provision is effective upon date of enactment.

8. Temporary rule to allow certain S corporations to reorganize as partnerships without tax (sec. 138509 of the bill and sec. 332 of the Code)

Present Law

For Federal tax purposes, business income is taxed under rules relating to the form in which the business is conducted. The business may take the form of an entity or may be conducted as a sole proprietorship.[1252] The principal business entities for Federal income tax purposes are C corporations,[1253] partnerships, and S corporations. Partnerships and S corporations are often referred to as "passthrough entities" because their income is included in the gross income of the owners of the entities rather than in the income of the entities themselves.

Partnerships

Partnerships generally are treated for Federal income tax purposes as pass-through entities not subject to tax at the entity level.[1254] Items of income (including tax-exempt income), gain, loss, deduction, and credit of the partnership are taken into account by the partners in computing their income tax liability (based on the partnership's method of accounting and

---

[1251] As defined in section 1402(b) for purposes of the taxes imposed by section 1401(b).

[1252] A sole proprietorship is generally not treated as an entity separate from its owner. More complex or specialized arrangements involving, for example, affiliated corporations, tiered entities, special purpose entities, real estate investment trusts ("REITs"), regulated investment companies (mutual funds or "RICs") or foreign entities or investments are beyond the scope of this discussion.

[1253] For a discussion of the taxation of C corporations, see Joint Committee on Taxation, *Overview of the Federal Tax System as in Effect for 2021*, (JCX-18-21), April 15, 2021, pp. 15-22, available at www.jct.gov.

[1254] Sec. 701. Note, however, that certain publicly traded partnerships are treated as corporations. See sec. 7704.

regardless of whether the income is distributed to the partners).[1255] A partner's deduction for partnership losses is limited to the partner's adjusted basis in its partnership interest.[1256] Losses not allowed as a result of that limitation generally are carried forward to the next year. A partner's adjusted basis in the partnership interest generally equals the sum of (1) the partner's capital contributions to the partnership, (2) the partner's distributive share of partnership income, and (3) the partner's share of partnership liabilities, less (1) the partner's distributive share of losses allowed as a deduction and certain nondeductible expenditures, and (2) any partnership distributions to the partner.[1257] Partners generally may receive distributions of partnership property without recognition of gain or loss, subject to some exceptions.[1258]

In contrast with a corporation and its shareholders (for which the Code prescribes rules that generally do not allow different treatment of similarly situated shareholders), partnerships may allocate items of income, gain, loss, deduction, and credit among the partners, provided the allocations meet a test for substantial economic effect or are made in accordance with the partners' interests in the partnership.[1259] In general, an allocation has substantial economic effect to the extent the partner to which the allocation is made receives the economic benefit or bears the economic burden of such allocation and the allocation substantially affects the dollar amounts to be received by the partners from the partnership independent of tax consequences.[1260]

S corporations

For Federal income tax purposes, an S corporation[1261] generally is not subject to tax at the corporate level.[1262] In computing their income tax liabilities, S corporation shareholders take into account their pro rata shares of items of income (including tax-exempt income), gain, loss, deduction, and credit of the S corporation (based on the S corporation's method of accounting and regardless of whether the income is distributed to the shareholders). A

[1255] Sec. 702(a).

[1256] Sec. 704(d). In addition, passive loss and at-risk limitations limit the extent to which certain types of income can be offset by partnership deductions (sections 469 and 465). These limitations do not apply to corporate partners (except certain closely-held corporations) and may not be important to individual partners who have partner-level passive income from other investments.

[1257] Sec. 705.

[1258] Sec. 731. Gain or loss may nevertheless be recognized, for example, on the distribution of money or marketable securities, distributions with respect to contributed property, or in the case of disproportionate distributions (which can result in ordinary income).

[1259] Sec. 704(b).

[1260] Treas. Reg. sec. 1.704-1(b)(2).

[1261] An S corporation is so named because its Federal tax treatment is governed by subchapter S of the Code.

[1262] Secs. 1363 and 1366.

shareholder's deduction for corporate losses is limited to the sum of the shareholder's adjusted basis in its S corporation stock and the indebtedness of the S corporation to such shareholder. Losses not allowed as a result of that limitation generally are carried forward to the next year. A shareholder's adjusted basis in the S corporation stock generally equals the sum of (1) the shareholder's capital contributions to the S corporation and (2) the shareholder's pro rata share of S corporation income, less (1) the shareholder's pro rata share of losses allowed as a deduction and certain nondeductible expenditures, and (2) any S corporation distributions to the shareholder.[1263]

To be eligible to elect S corporation status, a corporation may not have more than 100 shareholders and may not have more than one class of stock.[1264] Only individuals (other than nonresident aliens), certain tax-exempt organizations, and certain trusts and estates are permitted to be shareholders of an S corporation. A corporation may elect S corporation status only with the consent of all of its shareholders, and may terminate its election with the consent of shareholders holding more than 50 percent of the stock.[1265] Measured by assets or profits, for example, businesses organized as S corporations may be as large as those organized as C corporations or partnerships. Certain corporations may not elect S corporation status, including financial institutions using the reserve method of accounting for bad debts and insurance companies subject to tax under subchapter L.[1266]

In general, an S corporation shareholder is not subject to tax on corporate distributions unless the distributions exceed the shareholder's basis in the stock of the corporation.

Certain Differences Between the Tax Treatment of Partnerships and S Corporations

In the case of the death of an owner (*i.e.*, a partner or shareholder), partnerships and S corporations provide differing tax treatment. Specifically, upon the death of an individual S corporation shareholder or partner, the basis of the deceased shareholder's S corporation stock or the deceased partner's partnership interest in the hands of the heirs is its fair market value at the time of the shareholder's or partner's death (or the alternate valuation date).[1267] In the case of a partnership, but not in the case of an S corporation, the basis of the partnership's assets is equal

[1263] Sec. 1367. If any amount that would reduce the adjusted basis of a shareholder's S corporation stock exceeds the amount that would reduce that basis to zero, the excess is applied to reduce (but not below zero) the shareholder's basis in any indebtedness of the S corporation to the shareholder. If, after a reduction in the basis of such indebtedness, there is an event that would increase the adjusted basis of the shareholder's S corporation stock, such increase is instead first applied to restore the reduction in the basis of the shareholder's indebtedness. Sec. 1367(b)(2).

[1264] Sec. 1361. For this purpose, a husband and wife and all members of a family are treated as one shareholder. Sec. 1361(c)(1).

[1265] Sec. 1362.

[1266] Sec. 1361(b)(2).

[1267] Sec. 1014.

to the fair market value of the assets at the time of the deceased partner's death (or alternate valuation date), if the partnership has an election in effect under section 754 to adjust the basis of partnership assets.

Differing rules apply to a business seeking to convert to partnership or to S corporation status. For example, a C corporation may convert to an S corporation, but not a partnership, without immediate recognition of gain at either the corporate or the shareholder level. The conversion of a C corporation to a partnership is treated as a liquidation of the C corporation, and generally requires the corporation to recognize and pay tax on the built-in gain on its assets.[1268] However, the conversion of a C corporation to an S corporation (achieved through electing S corporation status) is not treated as a liquidation of the C corporation.[1269] Thus, if a C corporation can satisfy the limits on the number and types of shareholders, the single class of stock requirement, and other requirements for S corporation status, a conversion of a C corporation to an S corporation is not taxable, and all post-conversion income and appreciation of assets in the entity are subject only to shareholder-level tax.[1270]

Similarly, the termination of a subchapter S election results in the conversion of the S corporation to a C corporation generally on a tax-free basis, whether the termination is by a shareholder revocation of the election or because the corporation no longer satisfies the definition of a small business corporation.[1271] However, the conversion of an S corporation into a partnership is generally treated as a taxable liquidation of the S corporation.[1272]

Explanation of Provision

The provision temporarily allows an eligible S corporation to elect to reorganize as a partnership without the application of the otherwise applicable Federal income tax to the S corporation or its shareholders. Specifically, the provision treats a qualified liquidation of an eligible S corporation as a complete liquidation under section 332(b), and the transferee domestic partnership as (i) if it were a corporation which is an 80-percent distributee (within the meaning of section 337(c)) and (ii) a successor corporation of the eligible S corporation for purposes of section 1362(g).

The term "eligible S corporation" generally means any corporation (including any predecessor) that was an S corporation on May 13, 1996, and at all times thereafter through the date on which the qualified liquidation is completed, and that elects the application of the

[1268] See secs. 336-338 (providing some exceptions to this treatment).

[1269] Certain built-in gain of a C corporation that elects S corporation status remains subject to C corporation tax if recognized within five years after the conversion. See sec. 1374.

[1270] For a chart summarizing tax differences among C corporations, partnerships, S corporations, and sole proprietorships, see Joint Committee on Taxation, *Present Law and Data Related to the Taxation of Business Income* (JCX-42-17), September 15, 2017, pp. 11-16, available at www.jct.gov.

[1271] See secs. 1361 and 1362.

[1272] See secs. 331 and 336.

provision. An eligible S corporation does not, however, include an S corporation that, during the period beginning on September 13, 2021, and ending with the date the qualified liquidation is completed, holds, acquires, or transfers any asset for which the S corporation's basis is determined (in whole or part) by reference to the basis of such asset (or other property) in the hands of a C corporation.[1273] Thus, for example, if there is a merger or other transaction between a C corporation and an otherwise eligible S corporation that results in the S corporation holding carryover-basis property of the C corporation, then the S corporation is not treated as an eligible S corporation under this provision. A qualified liquidation is one or more transactions occurring within the two-year period beginning on December 31, 2021, which constitute the complete liquidation of the eligible S corporation, and the transfer of substantially all of the assets and liabilities of such S corporation to a domestic partnership.

An election must be made by the eligible S corporation in such manner as the Secretary may require and not later than the due date for filing the return of tax for the taxable year in which such liquidation is completed.

The Secretary is directed to issue regulations or other guidance as may be necessary or appropriate to carry out the provision.

Consequently, the provision allows eligible S corporations to reorganize as partnerships without tax on built-in gain on the S corporation's assets. The provision also allows S corporations that would have continued as S corporations under present law to reorganize as partnerships, thereby allowing partners who could not be S corporation shareholders under present law (such as nonresident alien or foreign individuals, certain tax-exempt organizations that are not allowed as S corporation shareholders, other partnerships or corporations, and more than one hundred partners). In addition, after reorganizing as a partnership, the former S corporation can make non-pro-rata allocations of income, gain, loss, deduction, and credits among the partners that are not permitted under the S corporation rules.

Effective Date

The provision is effective for transactions occurring on or after December 31, 2021, and before January 1, 2024.

9. Treatment of certain qualified sound recording productions (sec. 138510 of the bill and sec. 181 of the Code)

Present Law

Expensing of Certain Qualified Film, Television, and Live Theatrical Productions

Under section 181, a taxpayer may elect[1274] to deduct up to $15 million of the aggregate production costs of any qualified film, television or live theatrical production,

[1273] A technical correction may be necessary to reflect this intent.

[1274] See Treas. Reg. sec. 1.181-2 for rules on making (and revoking) an election under section 181.

commencing prior to January 1, 2026,[1275] in the year the costs are paid or incurred by the taxpayer, in lieu of capitalizing the costs and recovering them through depreciation allowances once the production is placed in service.[1276] The dollar limitation is increased to $20 million if a significant amount of the production costs are incurred in areas eligible for designation as a low-income community or eligible for designation by the Delta Regional Authority as a distressed county or isolated area of distress.[1277]

A section 181 election may only be made by an owner of the production.[1278] An owner of a production is any person that is required under section 263A to capitalize the costs of producing the production into the cost basis of the production, or that would be required to do so if section 263A applied to that person.[1279] In addition, the aggregate production costs of a qualified production that is co-produced include all production costs, regardless of funding source, in determining if the applicable dollar limit is exceeded. Thus, the term "aggregate production costs" means all production costs paid or incurred by any person, whether paid or incurred directly by an owner or indirectly on behalf of an owner.[1280] The costs of the production in excess of the applicable dollar limitation are capitalized and recovered under the taxpayer's method of accounting for the recovery of such property once placed in service (*e.g.*, under the income forecast method, or section 168(k) if eligible, as discussed below).[1281]

[1275] For purposes of determining whether a production is eligible for section 181 expensing, a qualified film or television production is treated as commencing on the first date of principal photography. The date on which a qualified live theatrical production commences is the date of the first public performance of such production for a paying audience.

[1276] Sec. 181(a)(2)(A). See Treas. Reg. sec. 1.181-1 for rules on determining eligible production costs. Eligible production costs under section 181 include participations and residuals paid or incurred. Treas. Reg. sec. 1.181-1(a)(3)(i). The special rule in section 167(g)(7) that allows taxpayers using the income forecast method of depreciation to include participations and residuals that have not met the economic performance requirements in the adjusted basis of the property for the taxable year the property is placed in service does not apply for purposes of section 181. Treas. Reg. sec. 1.181-1(a)(8). Thus, under section 181, a taxpayer may only include participations and residuals actually paid or incurred in eligible production costs. Further, production costs do not include the cost of obtaining a production after its initial release or broadcast. See Treas. Reg. sec. 1.181-1(a)(3). For this purpose, "initial release or broadcast" means the first commercial exhibition or broadcast of a production to an audience. Treas. Reg. sec. 1.181-1(a)(7). Thus, *e.g.*, a taxpayer may not expense the purchase of an existing film library under section 181. See T.D. 9551, 76 Fed. Reg. 64816, October 19, 2011.

[1277] Sec. 181(a)(2)(B).

[1278] Treas. Reg. sec. 1.181-1(a).

[1279] Treas. Reg. sec. 1.181-1(a)(2)(i).

[1280] Treas. Reg. sec. 1.181-1(a)(4). See Treas. Reg. sec. 1.181-2(c)(3) for the information required to be provided to the Internal Revenue Service when more than one person will claim deductions under section 181 for a production (to ensure that the applicable deduction limitation is not exceeded).

[1281] See Joint Committee on Taxation, *General Explanation of Tax Legislation Enacted in the 110th Congress* (JCS-1-09), March 2009, p. 448; and Treas. Reg. sec. 1.181-1(c)(2). A production is generally considered to be placed in service at the time of initial release, broadcast, or live staged performance (*i.e.*, at the time of the first commercial exhibition, broadcast, or live staged performance of a production to an audience). See, *e.g.*, Rev. Rul.

A qualified film, television, or live theatrical production means any production of a motion picture (whether released theatrically or directly to video cassette or any other format), television program, or live staged play if at least 75 percent of the total compensation expended on the production is for services performed in the United States by actors, directors, producers, and other relevant production personnel.[1282] Solely for purposes of this rule, the term "compensation" does not include participations and residuals (as defined in section 167(g)(7)(B)).[1283]

Each episode of a television series is treated as a separate production, and only the first 44 episodes of a particular series qualify under the provision.[1284] Qualified productions do not include sexually explicit productions as referenced by section 2257 of title 18 of the U.S. Code.[1285]

A qualified live theatrical production is defined as a live staged production of a play (with or without music) which is derived from a written book or script and is produced or presented by a commercial entity in any venue which has an audience capacity of not more than 3,000, or a series of venues the majority of which have an audience capacity of not more than 3,000.[1286] In addition, qualified live theatrical productions include any live staged production which is produced or presented by a taxable entity no more than 10 weeks annually in any venue which has an audience capacity of not more than 6,500.[1287] In general, in the case of multiple live-staged productions, each such live-staged production is treated as a separate production. Similar to the exclusion for sexually explicit productions from the definition of qualified film or television productions, qualified live theatrical productions do not include productions that include or consist of any performance of conduct described in section 2257(h)(1) of title 18 of the U.S. Code.[1288]

79-285, 1979-2 C.B. 91; and Priv. Ltr. Rul. 9010011, March 9, 1990. See also, Treas. Reg. sec. 1.181-1(a)(7). However, a production generally may not be considered to be placed in service if it is only exhibited, broadcasted or performed for a limited test audience in advance of the commercial exhibition, broadcast, or performance to general audiences. See Priv. Ltr. Rul. 9010011 and Treas. Reg. sec. 1.181-1(a)(7).

[1282] Sec. 181(d)(3)(A).

[1283] Sec. 181(d)(3)(B). Participations and residuals are defined as, with respect to any property, costs the amount of which by contract varies with the amount of income earned in connection with such property. See also Treas. Reg. sec. 1.181-3(c).

[1284] Sec. 181(d)(2)(B).

[1285] Sec. 181(d)(2)(C).

[1286] Sec. 181(e)(2)(A).

[1287] Sec. 181(e)(2)(D).

[1288] Sec. 181(e)(2)(E).

For purposes of recapture under section 1245, any deduction allowed under section 181 is treated as if it were a deduction allowable for amortization.[1289] Thus, the deduction under section 181 may be subject to recapture as ordinary income in the taxable year in which (i) the taxpayer revokes a section 181 election, (ii) the production fails to meet the requirements of section 181, or (iii) the taxpayer sells or otherwise disposes of the production.[1290]

Depreciation of Certain Intangible Property

A taxpayer generally must capitalize the cost of property used in a trade or business or held for the production of income and recover such cost over time through annual deductions for depreciation or amortization.[1291] The period for depreciation or amortization generally begins when the asset is placed in service by the taxpayer.[1292] Tangible property generally is depreciated under the modified accelerated cost recovery system ("MACRS"), which determines depreciation for different types of property based on an assigned applicable depreciation method, recovery period, and placed in service convention.[1293]

Films, Videos, and Sound Recordings

MACRS generally does not apply to certain property, including any motion picture film, video tape, or sound recording, or to any other property if the taxpayer elects to exclude such property from MACRS and the taxpayer properly applies a unit-of-production method or other method of depreciation not expressed in a term of years.[1294] Thus, the recovery of the cost of a film, video tape, or similar property that is produced by the taxpayer or is acquired on a "stand-alone" basis by the taxpayer may not be determined under either the MACRS depreciation provisions or under the section 197 amortization provisions.[1295] The cost recovery

---

[1289] Sec. 1245(a)(2)(C). For a discussion of the recapture rules applicable to depreciation and amortization deductions, see Joint Committee on Taxation, *Tax Incentives for Domestic Manufacturing* (JCX-15-21), March 12, 2021, pp. 14-17. This document can be found on the Joint Committee on Taxation website at www.jct.gov.

[1290] See Treas. Reg. sec. 1.181-4.

[1291] See secs. 263(a) and 167. In general, only the tax owner of property (*i.e.*, the taxpayer with the benefits and burdens of ownership) is entitled to claim tax benefits such as cost recovery deductions with respect to the property. In additiou, where property is not used exclusively in a taxpayer's business, the amount eligible for a deduction must be reduced by the amount related to personal use. See, *e.g.*, sec. 280A.

[1292] See Treas. Reg. secs. 1.167(a)-10(b), -3, -14, and 1.197-2(f). See also Treas. Reg. sec. 1.167(a)-11(e)(1)(i).

[1293] Sec. 168.

[1294] Sec. 168(f)(1), (3) and (4).

[1295] Under section 197, when a taxpayer acquires intangible assets held iu connection with a trade or business, any value properly attributable to a "section 197 intangible" is amortizable on a straight-line basis over 15 years. No other depreciation or amortization deduction (such as bonus depreciation under section 168(k)) is allowable with respect to any section 197 intangible. Section 197 does not apply to certain intangible property, including certain property produced by the taxpayer or any interest in a film, sound recording, video tape, book or

of such property is determined under section 167, which allows a depreciation deduction for the reasonable allowance for the exhaustion, wear and tear, or obsolescence of the property if it is used in a trade or business or held for the production of income. In addition, the costs of motion picture films, video tapes, sound recordings, copyrights, books, and patents are eligible to be recovered using the income forecast method of depreciation once the property is placed in service.[1296]

Under the income forecast method, a property's depreciation deduction for a taxable year is determined by multiplying the adjusted basis of the property by a fraction, the numerator of which is the gross income generated by the property during the year, and the denominator of which is the total forecasted or estimated gross income expected to be generated prior to the close of the tenth taxable year after the year the property is placed in service. Any costs that are not recovered by the end of the tenth taxable year after the property is placed in service may be taken into account as depreciation in that year.[1297]

Additional First-Year Depreciation Deduction for Certain Productions

Under section 168(k), qualified property acquired and placed in service after September 27, 2017, and before January 1, 2023 (January 1, 2024, for longer production period property and certain aircraft), as well as specified plants planted or grafted after September 27, 2017, and before January 1, 2023, is eligible for an additional first-year depreciation deduction equal to 100 percent of the adjusted basis of the property. The 100-percent allowance is phased down by 20 percent per calendar year for qualified property acquired after September 27, 2017, and placed in service after December 31, 2022 (after December 31, 2023, for longer production period property and certain aircraft), as well as specified plants planted or grafted after December 31, 2022. This additional first-year depreciation is commonly referred to as "bonus depreciation."

Qualified property eligible for bonus depreciation under section 168(k) includes qualified film, television, and live theatrical productions placed in service after September 27, 2017, and before January 1, 2027, for which a deduction otherwise would have been allowable under section 181, without regard to the dollar limitation or termination of such section.[1298] A

---

similar property not acquired in a transaction (or a series of related transactions) involving the acquisition of assets constituting a trade or business or substantial portion thereof. See sec. 197(c)(2) and (e)(4)(A).

[1296] Sec. 167(g)(6).

[1297] Sec. 167(g)(1). In general, the adjusted basis of property that may be taken into account under the income forecast method only includes amounts that have been incurred under the economic performance requirements of section 461(h). An exception to this rule applies to participations and residuals. Specifically, solely for purposes of computing the allowable deduction for property under the income forecast method of depreciation, participations and residuals may be included in the adjusted basis of the property beginning in the year such property is placed in service (even if economic performance has not yet occurred) if such participations and residuals relate to income to be derived from the property before the close of the tenth taxable year following the year the property is placed in service. For this purpose, participations and residuals are defined as costs the amount of which, by contract, varies with the amount of income earned in connection with such property. See sec. 167(g)(7).

[1298] See sec. 168(k)(2)(A); Treas. Reg. sec. 1.168(k)(2)(b).

qualified production is considered to be placed in service, and thus eligible for bonus depreciation, at the time of initial release, broadcast, or live staged performance (*i.e.*, at the time of the first commercial exhibition, broadcast, or live staged performance of a production to an audience).[1299]

Explanation of Provision

The provision expands the special expensing rules for qualified film, television, and live theatrical productions under section 181 to include qualified sound recording production costs of up to $150,000 per taxable year. A qualified sound recording production is defined as a sound recording (as defined in section 101 of title 17 of the U.S. Code) produced and recorded in the United States.

The provision also expands the definition of qualified property eligible for bonus depreciation to include qualified sound recording productions (*i.e.*, for the production costs in excess of $150,000 once the production is placed in service). For purposes of the provision, a qualified sound recording production is considered to be placed in service at the time of initial release or broadcast.

Effective Date

The provision applies to productions commencing in taxable years ending after the date of enactment.

10. Payment to certain individuals who dye fuel (sec. 138511 of the bill and new sec. 6433 of the Code)

Present Law

In general, under section 4081, tax is imposed upon the removal of taxable fuel (including diesel fuel and kerosene) from a terminal. Taxable fuel transferred in bulk by pipeline or vessel to registered terminals is exempt from the tax imposed by section 4081. The Code provides exemptions from section 4081 taxes for diesel fuel and kerosene destined for nontaxable uses, provided that fuel is indelibly dyed in accordance with Treasury regulations.

Under section 4081(e), if tax is paid and reported to the government on more than one taxable event for a taxable fuel under section 4081, the person paying the "second tax" on such fuel may claim a refund (without interest) of that second tax if certain conditions and reporting requirements are met. As an example, if fuel is removed from a terminal, taxed, and then transported by truck to a second terminal, the tax imposed upon removal from the second terminal is the second taxable event. The person who paid the second tax may make a claim a refund under section 4081(e). However, if the fuel is dyed at removal from the second terminal, there is no second tax paid on the fuel and refund relief is not available under section 4081(e) for the dyed fuel.

[1299] See Treas. Reg. sec. 1.168(k)-2(b)(4)(iii).

Explanation of Provision

The provision creates a new refund mechanism that would allow for refunds, without interest, to a taxpayer who removes from a terminal "eligible indelibly dyed diesel fuel or kerosene" for nontaxable use, and establishes to the satisfaction of the Secretary that tax for such fuel under section 4081 has already been paid. The term "eligible indelibly dyed diesel fuel or kerosene" means diesel fuel or kerosene with respect to which a tax under section 4081 was previously paid (and not credited or refunded) and which is exempt from taxation under section 4082(a) (relating to exemptions for diesel fuel and kerosene destined for a nontaxable use).

Effective Date

The provision applies to previously taxed, eligible indelibly dyed diesel fuel or kerosene removed on or after the date that is 180 days after the date of enactment.

11. Extension of credit for portion of employer social security taxes paid with respect to employee tips to beauty service establishments (sec. 138512 of the bill and sec. 45B of the Code)

Present Law

Federal Employment Taxes

Federal employment taxes are imposed on wages paid to employees with respect to employment and include taxes imposed under the Federal Insurance Contributions Act ("FICA"), the Federal Unemployment Tax Act ("FUTA"), and Federal income tax.[1300] In addition, Tier 1 of the Railroad Retirement Tax Act ("RRTA") imposes a tax on compensation paid to railroad employees and representatives.[1301]

FICA taxes are comprised of two components: the Old-Age, Survivors, and Disability Insurance ("OASDI") and Hospital Insurance ("Medicare"). With respect to OASDI taxes, the applicable rate is 12.4 percent with half of such rate (6.2 percent) imposed on the employee and the remainder (6.2 percent) imposed on the employer.[1302] The tax is assessed on covered wages up to the OASDI wage base ($142,800 in 2021). Generally, the OASDI wage base rises based on increases in the national average wage index.[1303] With respect to Medicare

[1300] Secs. 3101, 3111, 3301, and 3401.

[1301] Sec. 3221.

[1302] Sec. 3101.

[1303] Sec. 230 of the Social Security Act (42 U.S.C. sec. 430).

taxes,[1304] the applicable rate is 2.9 percent with half of such rate (1.45 percent) imposed on the employee and the remainder (1.45 percent) imposed on the employer.[1305]

The tax is assessed on covered wages, which is defined for FICA tax purposes as all remuneration for "employment," including the cash value of all remuneration (including benefits) paid in any medium other than cash, with certain exceptions.[1306] The name given to the remuneration for employment is immaterial. FICA wages includes salaries, vacation allowances, bonuses, deferred compensation, commissions, and fringe benefits. The term "employment" is generally defined for FICA tax purposes as any service, of whatever nature, performed by an employee for the person employing him or her, with certain specific exceptions.

Employer Credit for Employee Tips

Employee tip income is treated as wages for FICA tax purposes,[1307] and tips received by an employee in the course of his or her employment are remuneration for employment and deemed to have been paid by the employer for FICA tax purposes.[1308] Employees are required to report to the employer tips received by the employee.[1309]

Employers that operate food and beverage establishments are eligible for a nonrefundable general business tax credit[1310] equal to an employer's FICA taxes paid on tips in excess of those treated as wages for purposes of meeting the minimum wage requirements of the Fair Labor Standards Act ("FLSA").[1311] The credit applies only with respect to FICA taxes paid on tips received from customers in connection with the providing, delivering, or serving of food or beverages for consumption if the tipping of employees delivering or serving food or beverages by customers is customary. The credit is available whether or not the employee reports the tips on which the employer FICA taxes were paid. No deduction is allowed for any amount taken

[1304] The Hospital Insurance tax includes two components: Medicare tax and Additional Medicare tax. Additional Medicare taxes are imposed on wages in excess of certain thresholds and are only imposed on the employee. Sec. 3101(b). There is no employer match for Additional Medicare tax. For purposes of this explanation, when referencing Medicare taxes, the term does not include Additional Medicare tax.

[1305] Sec. 3101(b); 3111(b).

[1306] Sec. 3121(a).

[1307] Section 3121(a)(12)(A) provides that the definition of wages does not include tips paid in any medium other than cash. Section 3121(a)(12)(B) excludes from the definition of wages cash tips received by an employee in any calendar month in the course of employment unless the amount of the cash tips is $20 or more.

[1308] Sec. 3121(q).

[1309] Sec. 6053(a).

[1310] Sec. 38.

[1311] Sec. 45B. The tip credit applies to the employer's share of both OASDI and Medicare taxes on tip income in excess of the required minimum wage, which for these purposes is $2.13 per hour. Sec. 45B(b)(1).

into account in determining the tip credit. A taxpayer may elect not to have the credit apply for a taxable year.

Explanation of Provision

The provision extends the tip credit to beauty service businesses. Under the provision, tips received from customers or clients in connection with the following services are eligible for the credit: (1) providing, delivering or servicing of food and beverages for consumption, if the tipping of employees delivering or serving food or beverages by customers is customary; and (2) providing beauty services to a customer or client if the tipping of employees providing such services is customary. Beauty service is defined as barbering and hair care, nail care, esthetics, and body and spa treatments.

The amount of the tip credit for an employer providing beauty services is the FICA taxes paid by the employer with respect to tip income deemed to have been paid by the employer to the employee in excess of the minimum wage rate applicable to such individual under section 6(a)(1) of the FLSA, determined without regard to section 3(m) of such Act.[1312]

Effective Date

The amendments made by this provision shall apply to taxable years beginning after December 31, 2021.

12. Enhancement of work opportunity credit during COVID-19 recovery period (sec. 138513 of the bill and sec. 51 of the Code)

Present Law

In General

The work opportunity tax credit is available on an elective basis for employers hiring individuals from one or more of ten targeted groups. The amount of the credit available to an employer is determined by the amount of qualified wages paid by the employer. Generally, qualified wages consist of wages attributable to service rendered by a member of a targeted group during the one-year period beginning with the day the individual begins work for the employer (two years in the case of an individual in the long-term family assistance recipient category).

Targeted groups eligible for the credit

Generally, an employer is eligible for the credit only with respect to qualified wages paid to members of a targeted group.

[1312] Secs. 45S(b)(1)(A); 3121(q). The amount of the tip credit for food and beverage establishments remains unchanged in the amount of the employer's FICA taxes on employee tip income in excess of the FLSA minimum wage of $2.13.

(1) Families Receiving TANF

An eligible recipient is an individual certified by the designated local agency (*e.g.*, a State employment security agency) as being a member of a family eligible to receive benefits under the Temporary Assistance for Needy Families Program ("TANF") for a period of at least nine months, part of which is during the 18-month period ending on the hiring date. For these purposes, members of the family are defined to include only those individuals who are taken into account for purposes of determining eligibility for the TANF.

(2) Qualified Veteran

A qualified veteran is a veteran who is certified by the designated local agency as belonging to one of five categories: (1) a member of a family eligible to receive assistance under a supplemental nutritional assistance program (for at least a three-month period during the year prior to the hiring date); (2) entitled to compensation for a service-connected disability and hired within one year of discharge; (3) entitled to compensation for a service-connected disability and unemployed for an aggregate of at least six months during the one-year period ending on the hiring date; (4) unemployed for at least four weeks but less than six months (whether or not consecutive) during the one-year period ending on the date of hiring; or (5) unemployed for at least six months (whether or not consecutive) during the one-year period ending on the date of hiring.

A veteran is an individual who has served on active duty (other than for training) in the Armed Forces for more than 180 days or who has been discharged or released from active duty in the Armed Forces for a service-connected disability. However, any individual who has served for a period of more than 90 days during which the individual was on active duty (other than for training) is not a qualified veteran if any of this active duty occurred during the 60-day period ending on the date the individual was hired by the employer. This latter rule is intended to prevent employers who hire current members of the armed services (or those departed from service within the last 60 days) from receiving the credit.

(3) Qualified Ex-Felon

A qualified ex-felon is an individual certified by the designated local agency as (1) having been convicted of a felony under any State or Federal law; and (2) having a hiring date within one year of release from prison or the date of conviction.

(4) Designated Community Resident

A designated community resident is an individual certified by the designated local agency as being at least age 18 but not yet age 40 on the hiring date and as having a principal place of abode within an empowerment zone, enterprise community, renewal community, or a rural renewal county. For these purposes, a rural renewal county is a county outside a metropolitan statistical area (as defined by the Office of Management and Budget) that had a net population loss for each of the five-year periods 1990-1994 and 1995-1999. Qualified wages do not include wages paid or incurred for services performed while the individual's principal place of abode is outside an empowerment zone, enterprise community, renewal community or a rural renewal county.

(5) Vocational Rehabilitation Referral

A vocational rehabilitation referral is an individual who is certified by the designated local agency as an individual who has a physical or mental disability that constitutes a substantial handicap to employment and who has been referred to the employer while receiving, or after completing vocational rehabilitation services: (1) under an individualized, written plan for employment under a State plan approved under the Rehabilitation Act of 1973; (2) under a rehabilitation plan for veterans carried out under Chapter 31 of Title 38, U.S. Code; or (3) under an individual work plan developed and implemented by an employment network pursuant to subsection (g) of section 1148 of the Social Security Act. Certification is provided by the designated local agency upon assurances from the vocational rehabilitation agency that the employee has met the above conditions.

(6) Qualified Summer Youth Employee

A qualified summer youth employee is an individual: (1) who performs services during any 90-day period between May 1 and September 15; (2) who is certified by the designated local agency as being 16 or 17 years of age on the hiring date; (3) who has not been an employee of that employer before; and (4) who is certified by the designated local agency as having a principal place of abode within an empowerment zone, enterprise community, or renewal community. As with designated community residents, no credit is available for wages paid or incurred for service performed while the individual's principal place abode is outside an empowerment zone, enterprise community, or renewal community. If, after the end of the 90-day period, the employer continues to employ a youth who was certified during the 90-day period as a member of another targeted group, the limit on qualified first-year wages takes into account wages paid to the youth while a qualified summer youth employee.

(7) Qualified Supplemental Nutrition Assistance Program Benefits Recipient

A qualified supplemental nutrition assistance program benefits recipient is an individual at least age 18 but not yet age 40 certified by the designated local agency as being a member of a family receiving assistance under a food and nutrition program under the Food and Nutrition Act of 2008 for a period of at least six months ending on the hiring date. In the case of a family that ceases to be eligible for food and nutrition assistance under section 6(o) of the Food and Nutrition Act of 2008, the six-month requirement is replaced with a requirement that the family has been receiving food and nutrition assistance for at least three of the five months ending on the date of hire. For these purposes, members of the family are defined to include only those individuals taken into account for purposes of determining eligibility for a food and nutrition assistance program under the Food and Nutrition Act of 2008.

(8) Qualified SSI Recipient

A qualified SSI recipient is an individual designated by the designated local agency as receiving supplemental security income ("SSI") benefits under Title XVI of the Social Security Act for any month ending within the 60-day period ending on the hiring date.

(9) Long-Term Family Assistance Recipient

A qualified long-term family assistance recipient is an individual certified by the designated local agency as being: (1) a member of a family that has received family assistance for at least 18 consecutive months ending on the hiring date; (2) a member of a family that has received such family assistance for a total of at least 18 months (whether or not consecutive) after August 5, 1997 (the date of enactment of the welfare-to-work tax credit) if the individual is hired within two years after the date that the 18-month total is reached; or (3) a member of a family who is no longer eligible for family assistance because of either Federal or State time limits, if the individual is hired within two years after the Federal or State time limits made the family ineligible for family assistance.

(10) Long-Term Unemployment Recipient

A qualified long-term unemployment recipient is an individual certified by the designated local agency as being in a period of unemployment which: (1) is 27 consecutive weeks or more; and (2) includes a period in which the individual was receiving unemployment compensation under State or Federal law.

Qualified Wages

Generally, qualified wages are defined as cash wages paid by the employer to a member of a targeted group. The employer's deduction for wages is reduced by the amount of the credit.[1313]

For purposes of the credit, generally, wages are defined by reference to the FUTA definition of wages contained in sec. 3306(b) (without regard to the dollar limitation therein contained). Special rules apply in the case of certain agricultural labor and certain railroad labor.

Calculation of the Credit

The credit available to an employer for qualified wages paid to members of all targeted groups except for long-term family assistance recipients equals 40 percent (25 percent for employment of 400 hours or less) of qualified first-year wages. Generally, qualified first-year wages are qualified wages (not in excess of $6,000) attributable to service rendered by a member of a targeted group during the one-year period beginning with the day the individual began work for the employer. Therefore, the maximum per-employee credit is $2,400 (40 percent of the first $6,000 of qualified first-year wages).

The general $6,000 limitation on qualified first-year wages is different for certain targeted groups: (1) qualified summer youth employees; (2) qualified veterans who are entitled to compensation for a service-connected disability, and who are hired within one year of discharge; (3) qualified veterans who are entitled to compensation for a service-connected disability, and who have been unemployed for an aggregate of at least six months during the one-year period ending on the hiring date; (4) qualified veterans unemployed for at least six months

[1313] Sec. 280C(a).

(whether or not consecutive) during the one-year period ending on the date of hiring; and (5) long-term family assistance recipients. The maximum per-employee credit (and limitation on qualified wages) for a member of each of the first four of these groups is, respectively: (1) $1,200 (40 percent of the first $3,000 of qualified first-year wages); (2) $4,800 (40 percent of the first $12,000 of qualified first-year wages); (3) $9,600 (40 percent of the first $24,000 of qualified first-year wages); and (4) $5,600 (40 percent of the first $14,000 of qualified first-year wages).

In the case of long-term family assistance recipients, the credit equals 40 percent (25 percent for employment of 400 hours or less) of $10,000 for qualified first-year wages and 50 percent of the first $10,000 of qualified second-year wages. Generally, qualified second-year wages are qualified wages (not in excess of $10,000) attributable to service rendered by a member of the long-term family assistance category during the one-year period beginning on the day after the one-year period beginning with the day the individual began work for the employer. Therefore, the maximum credit per employee is $9,000 (40 percent of the first $10,000 of qualified first-year wages plus 50 percent of the first $10,000 of qualified second-year wages). Except for long-term family assistance recipients, no credit is allowed for second-year wages.

Certification Rules

Generally, an individual is not treated as a member of a targeted group unless: (1) on or before the day on which an individual begins work for an employer, the employer has received a certification from a designated local agency that the individual is a member of a targeted group; or (2) on or before the day an individual is offered employment with the employer, a pre-screening notice is completed by the employer with respect to that individual, and not later than the 28th day after the individual begins work for the employer, the employer submits the notice, signed by the employer and the individual under penalties of perjury, to the designated local agency as part of a written request for certification. For these purposes, a pre-screening notice is a document (in such form as the Secretary may prescribe) which contains information provided by the individual on the basis of which the employer believes that the individual is a member of a targeted group.

An otherwise qualified unemployed veteran is treated as certified by the designated local agency as having aggregate periods of unemployment (whichever is applicable under the qualified veterans rules described above) if the veteran is certified by the agency as being in receipt of unemployment compensation under a State or Federal law for such applicable periods. The Secretary of the Treasury is authorized to provide alternative methods of certification for unemployed veterans.

Minimum Employment Period

No credit is allowed for qualified wages paid to employees who work less than 120 hours in the first year of employment.

Qualified Tax-Exempt Organizations Employing Qualified Veterans

The credit is not available to qualified tax-exempt organizations other than those employing qualified veterans. If a qualified tax-exempt organization employs a qualified veteran

(as described above) a tax credit against the FICA taxes of the organization is allowed for the wages of the qualified veteran which are paid for the veteran's services in furtherance of the activities related to the function or purpose constituting the basis of the organization's exemption under section 501.[1314]

The credit available to a tax-exempt employer for qualified wages paid to a qualified veteran equals 26 percent (16.25 percent for employment of 400 hours or less) of qualified first-year wages. The amount of qualified first-year wages eligible for the credit is the same as those for non-tax-exempt employers (*i.e.*, $6,000, $12,000, $14,000 or $24,000, depending on the category of qualified veteran).

A qualified tax-exempt organization means an employer that is described in section 501(c) and exempt from tax under section 501(a).

The Social Security Trust Funds are held harmless from the effects of this provision by a transfer from the Treasury General Fund.

Treatment of Possessions

The "VOW to Hire Heroes Act of 2011" (the "VOW Act")[1315] provides a reimbursement mechanism for the U.S. possessions (American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, the Commonwealth of Puerto Rico, and the United States Virgin Islands). The Secretary pays to each mirror Code possession (Guam, the Commonwealth of the Northern Mariana Islands, and the United States Virgin Islands) an amount equal to the loss to that possession as a result of the VOW Act changes to the qualified veterans rules.[1316] Similarly, the Secretary pays to each non-mirror Code possession (American Samoa and the Commonwealth of Puerto Rico) the amount that the Secretary estimates as being equal to the loss to that possession that would have occurred as a result of the VOW Act changes if a mirror Code tax system had been in effect in that possession. The Secretary makes this payment to a non-mirror Code possession only if that possession establishes to the satisfaction of the Secretary that the possession has implemented (or, at the discretion of the Secretary, will implement) an income tax benefit that is substantially equivalent to the qualified veterans credit allowed under the VOW Act modifications.

An employer that is allowed a credit against U.S. tax under the VOW Act with respect to a qualified veteran must reduce the amount of the credit claimed by the amount of any credit (or,

[1314] Sec. 3111(e).

[1315] Pub. L. No. 112-56.

[1316] Prior to enactment of the VOW Act, there were two categories of qualified veterans to whom wages paid by an employer were eligible for the credit. Employers that hired veterans who were eligible to receive assistance under a supplemental nutritional assistance program were entitled to a maximum credit of 40 percent of $6,000 of qualified first-year wages paid to such individual. Employers that hired veterans who were entitled to compensation for a service-connected disability were entitled to a maximum wage credit of 40 percent of $12,000 of qualified first-year wages paid to such individual. The VOW Act expanded the work opportunity tax credit with respect to qualified veterans resulting in the present-law treatment of qualified veterans described above.

in the case of a non-mirror Code possession, another tax benefit) that the employer claims against its possession income tax.

Other Significant Rules

The work opportunity tax credit generally is not allowed for wages paid to individuals who were previously employed by the employer (the "rehire prohibition"). The credit is not allowed for wages paid to a relative or dependent of the taxpayer. No credit is allowed for wages paid to an individual who is a more than 50-percent owner of the entity. Similarly, wages paid to replacement workers during a strike or lockout are not eligible for the work opportunity tax credit. Wages paid to any employee during any period for which the employer received on-the-job training program payments with respect to that employee are not eligible for the work opportunity tax credit.

Expiration

The work opportunity tax credit is not available for individuals who begin work for an employer after December 31, 2025.

Explanation of Provision

Generally, the provision temporarily increases the credit amount to 50 percent of qualified first-year wages (up to a maximum of $10,000 of qualified first-year wages) and 50 percent of qualified second-year wages (up to a maximum of $10,000 of qualified second-year wages) for individuals who (1) are not qualified summer youth employees and (2) are hired after the date of enactment and before January 1, 2023 ("qualified hires"). Therefore, the maximum credit per employee is generally $10,000 (50 percent of the first $10,000 of qualified first-year wages plus 50 percent of the first $10,000 of qualified second-year wages). Qualified second-year wages are qualified wages which are attributable to service during the one-year period beginning on the day after the last day of the first one-year period.

For long-term family assistance recipients, the maximum per-employee credit (and limitation on qualified first-year wages) temporarily increases to $5,000 for the first year of employment (50 percent of the first $10,000 of qualified first-year wages) and remains at $5,000 for the second year of employment (50 percent of the first $10,000 of qualified second-year wages).

The $10,000 annual limitation on qualified first-year wages and qualified second-year wages does not apply to certain targeted groups: (1) qualified veterans who are entitled to compensation for a service-connected disability, and who are hired within one year of discharge; (2) qualified veterans who are entitled to compensation for a service-connected disability, and who have been unemployed for an aggregate of at least six months during the one-year period ending on the hiring date; (3) qualified veterans unemployed for at least six months (whether or not consecutive) during the one-year period ending on the date of hiring; and (4) qualified summer youth employees. The maximum per-employee credit (and limitation on qualified wages) for a member of one of the first three groups is, respectively: (1) $12,000 (50 percent of the first $12,000 of qualified first-year wages plus 50 percent of the first $12,000 of second-year wages); (2) $24,000 (50 percent of the first $24,000 of qualified first-year wages plus 50 percent

of the first $24,000 of qualified second-year wages; and (3) $14,000 (50 percent of the first $14,000 of qualified first-year wages plus 50 percent of the first $14,000 of qualified second-year wages).

The provision does not apply to qualified summer youth employees. Therefore, the maximum per-employee credit (and limitation on qualified first-year wages) for such individuals remains at $1,200 (40 percent of the first $3,000 of qualified first-year wages).

The provision temporarily waives the rehire prohibition for qualified hires. The provision also requires the Secretary to issue such regulations as appropriate to ensure a reasonable application of the waiver, including prohibiting attempts to claim the benefit through the termination and rehiring of an employee.

Effective Date

The provision applies to taxable years ending after the date of enactment.

13. Allowance of deduction for certain expenses of the trade or business of being an employee (sec. 138514 of the bill and secs. 62(a)(2) and 162 of the Code)

Present Law

Under the Code, gross income means "income from whatever source derived" except for certain items specifically exempt or excluded by statute.[1317] An individual's AGI is determined by subtracting certain "above-the-line" deductions from gross income, including trade or business expenses, losses from the sale or exchange of property, contributions to a qualified retirement plan by a self-employed individual, contributions to certain IRAs, certain moving expenses for members of the Armed Forces, and certain education-related expenses.[1318]

To determine taxable income, an individual reduces adjusted gross income ("AGI") by either the applicable standard deduction or applicable itemized deductions,[1319] and by the deduction for qualified business income.[1320] The amounts of the standard deductions are indexed annually for inflation. The deductions that may be itemized in lieu of claiming the standard deduction include personal State and local income, property, and sales taxes (up to $10,000 annually ($5,000 for married taxpayers filing separately)), home mortgage interest (on mortgages up to certain specified dollar amounts), charitable contributions, certain investment interest,

[1317] Sec. 61.

[1318] Sec. 62. In addition, alimony payments are generally deductible by the payor spouse for divorce and separation instruments executed before January 1, 2019.

[1319] Sec. 63(a) and (b). The basic standard deduction varies depending on a taxpayer's filing status. For 2020, the amount of the standard deduction is $12,400 for a single individual and for a married individual filing separately, $18,650 for a head of household, and $24,800 for married taxpayers filing jointly and for a surviving spouse. An additional standard deduction is allowed with respect to any individual who is elderly (*i.e.*, above age 64) and/or blind.

[1320] Secs. 63(b)(3), (d)(3), and 199A.

medical expenses (in excess of 7.5 percent of AGI), and casualty and theft losses attributable to Federally declared disasters (in excess of 10 percent of AGI and in excess of $100 per loss). However, unreimbursed employee business expenses, such as dues for membership in work-related organizations or labor unions, are miscellaneous itemized deductions. Such deductions are currently suspended until taxable years beginning after December 31, 2025, and deductible only to the extent that miscellaneous itemized deductions in aggregate exceed two percent of AGI.[1321]

Explanation of Provision

In determining adjusted gross income, a taxpayer whose trade or business is the performance of services as an employee may deduct up to $250 paid as membership dues to a labor organization within the meaning of section 501(c)(5), provided that the employee remained a member of the organization through the end of the year.

Effective Date

The provision is effective for taxable years beginning after December 31, 2021.

14. Cover over of certain distilled spirits taxes (sec. 138515 of the bill and sec. 7652 of the Code)

Present Law

Generally, distilled spirits are taxed at a rate of $13.50 per proof gallon.[1322] Liability for the excise tax on distilled spirits arises when the distilled spirits are produced or imported but is not determined and payable until bottled distilled spirits are removed from the bonded premises of the distilled spirits plant where they are produced, or customs custody. Generally, bulk distilled spirits may be transferred in bond between bonded premises; however, tax liability follows these products. Imported bulk distilled spirits may be released from customs custody without payment of tax and transferred in bond to a distillery. Distilled spirits be exported without payment of tax and may be withdrawn from a distillery without payment of tax or free of tax for certain authorized uses, including industrial uses and non-beverage uses.

There is a reduced tax rate schedule for distilled spirits based on the annual quantity (1) distilled or processed and removed for consumption or sale, or (2) imported into the United States. The rate of tax is lowered to $2.70 per proof gallon on the first 100,000 proof gallons of distilled spirits produced, $13.34 on the next 22,130,000 proof gallons, and $13.50 for amounts thereafter.

[1321] Secs. 67(a) and (g).

[1322] Secs. 5001, 5006, 5043, and 5054.

For purposes of the excise tax on distilled spirits, the territories of Puerto Rico and the U.S. Virgin Islands are not considered part of the United States.[1323] Additionally, distilled spirits brought into the United States from these territories are not considered imports for purposes of the excise tax.[1324] Thus, distilled spirits produced in these territories, whether or not brought into the United States, are not subject to tax under section 5001. However, section 7652(a) imposes an equalization tax equal to the tax imposed in the United States upon like articles of merchandise of domestic manufacture, including distilled spirits, produced in Puerto Rico and brought into the United States, and section 7652(b) imposes an equalization tax equal to the tax imposed in the United States upon like articles of merchandise of domestic manufacture, including distilled spirits, produced in the U.S. Virgin Islands and brought into the United States.

The revenue from the equalization tax on rum produced in Puerto Rico and brought into the United States is transferred ("covered over") to the Treasury of Puerto Rico.[1325] The revenue from the equalization tax on rum produced in the U.S. Virgin Islands and brought into the United States is covered over to the Treasury of the U.S. Virgin Islands.[1326] In addition, the revenues from the excise tax imposed on rum imported into the United States (less certain administrative costs) are covered over to the Treasury of Puerto Rico and the Treasury of the U.S. Virgin Islands.[1327] The revenues are apportioned between the two treasuries according to a formula determined by the Secretary.[1328]

For purposes of both the cover over of the equalization tax on rum and the cover over of the tax imposed on rum imported into the United States, the amount covered over is limited to the lesser of the tax imposed or $10.50 per proof gallon. The $10.50 per proof gallon limitation is increased to $13.25 per proof gallon during the period from July 1, 1999, through December 31, 2021.[1329]

With respect to both the cover over of the equalization tax on rum and the cover over of the tax imposed on rum imported into the United States, amounts covered over to Puerto Rico and the Virgin Islands are determined without regard to reduced rates or refunds in lieu of

---

[1323] Sec. 7701(a)(9).

[1324] See 19 C.F.R. sec. 7.2 and 19 C.F.R. sec. 101.1.

[1325] Sec. 7652(a)(3). For purposes of this provision, only distilled spirits for which at least 92 percent of the alcohol content is attributable to rum are eligible for cover over of equalization taxes. See sec. 7652(c).

[1326] Sec. 7652(b)(3). For purposes of this provision, only distilled spirits for which at least 92 percent of the alcohol content is attributable to rum are eligible for cover over of equalization taxes. See sec. 7652(c).

[1327] Sec. 7652(e)(1). For purposes of this provision the term "rum" means any article classified under subheading 2208.40.00 of the Harmonized Tariff Schedule of the United States (19 U.S.C. 1202). Sec. 7652(e)(4).

[1328] Sec. 7652(e)(2).

[1329] Sec. 7652(f)(1).

reduced rates. Refunds in lieu of reduced rates are not treated as refunds for purposes of determining the amounts of cover over.

Explanation of Provision

The provision repeals the limitation on cover over of taxes on rum to Puerto Rico and the Virgin Islands.

With respect to taxes collected on rum transported to the United States that are covered into the Treasury of Puerto Rico at a rate equal to or greater than $10.50 per proof gallon, the provision requires Puerto Rico to transfer to the Puerto Rico Conservation Trust Fund[1330] an amount per proof gallon of at least one-sixth of the difference between $10.50 and the rate (not to exceed $13.25) at which such taxes are covered into the Treasury of Puerto Rico. This requirement does not modify or impair payment priorities established under Puerto Rico law in effect on May 21, 2021.

Effective Date

The provision generally applies to distilled spirits brought into the United States after December 31, 2021.

15. Research and experimental expenditures (sec. 138516 of the bill and sec. 174 of the Code)

Present Law

Public Law 115-97[1331] modified section 174 for amounts paid or incurred in taxable years beginning after December 31, 2021 (with conforming changes made to sections 41 and 280C). Section 174 as applicable to amounts paid or incurred in taxable years beginning before January 1, 2022, is described first below, followed by a description of section 174 as applicable to amounts paid or incurred in taxable years beginning after December 31, 2021.

Amounts Paid or Incurred in Taxable Years Beginning before January 1, 2022

Business expenses associated with the development or creation of an asset having a useful life extending beyond the current year generally must be capitalized and depreciated over such useful life.[1332] However, with respect to taxable years beginning before January 1, 2022, taxpayers may elect to deduct currently the amount of certain reasonable research or

---

[1330] The Puerto Rico Conservation Trust Fund is the fund established pursuant to a Memorandum of Understanding between the United States Department of the Interior and the Commonwealth of Puerto Rico, dated December 24, 1968.

[1331] December 22, 2017.

[1332] Secs. 167 and 263(a).

experimental expenditures paid or incurred in connection with a trade or business.[1333] Taxpayers may elect to forgo a current deduction, capitalize their research or experimental expenditures, and recover them ratably over the useful life of the research, but in no case over a period of less than 60 months.[1334] Taxpayers, alternatively, may elect to amortize their research or experimental expenditures over a period of 10 years.[1335] Research and experimental expenditures deductible under section 174 are not subject to capitalization under either section 263(a)[1336] or section 263A.[1337] In addition, section 174 deductions are generally reduced by the amount of the taxpayer's research credit under section 41.[1338]

Amounts defined as research or experimental expenditures under section 174 generally include all costs incurred in the experimental or laboratory sense related to the development or improvement of a product.[1339] In particular, qualifying costs are those incurred for activities intended to discover information that would eliminate uncertainty concerning the development or improvement of a product.[1340] Uncertainty exists when information available to the taxpayer is not sufficient to ascertain the capability or method for developing, improving, and/or appropriately designing the product.[1341] The determination of whether expenditures qualify as deductible research expenses depends on the nature of the activity to which the costs

---

[1333] Secs. 174(a) and (e).

[1334] Sec. 174(b). Taxpayers generating significant short-term losses often choose to defer the deduction for their research and experimental expenditures under this section. Additionally, section 174 amounts are excluded from the definition of "start-up expenditures" under section 195 (section 195 generally provides that start-up expenditures in excess of $5,000 either are not deductible or are amortizable over a period of not less than 180 months once an active trade or business begins). So as not to generate significant losses before beginning its trade or business, a taxpayer may choose to defer the deduction and amortize its section 174 costs beginning with the month in which the taxpayer first realizes benefits from the expenditures (*i.e.*, the month in which its active trade or business begins).

[1335] Secs. 174(f)(2) and 59(e). This special 10-year election is available to mitigate the effect of the AMT adjustment for research expenditures set forth in section 56(b)(2). Note that the corporate AMT was repealed for taxable years beginning after December 31, 2017. See Pub. L. No. 115-97, sec. 2001, December 22, 2017. Taxpayers with significant losses also may elect to amortize their otherwise deductible research and experimental expenditures.

[1336] Sec. 263(a)(1)(B).

[1337] Sec. 263A(c)(2).

[1338] Sec. 280C(c). Taxpayers may alternatively elect to claim a reduced research credit amount under section 41 in lieu of reducing deductions otherwise allowed. Sec. 280C(c)(3), as effective for amounts paid or incurred in taxable years beginning before January 1, 2022.

[1339] Treas. Reg. sec. 1.174-2(a)(1) and (2). Product is defined to include any pilot model, process, formula, invention, technique, patent, or similar property, and includes products to be used by the taxpayer in its trade or business as well as products to be held for sale, lease, or license. Treas. Reg. sec. 1.174-2(a)(11), Example 10, provides an example of new process development costs eligible for section 174 treatment.

[1340] Treas. Reg. sec. 1.174-2(a)(1).

[1341] *Ibid.*

relate, not the nature of the product or improvement being developed or the level of technological advancement the product or improvement represents. Examples of qualifying costs include salaries for those engaged in research or experimentation efforts, amounts incurred to operate and maintain research facilities (*e.g.*, utilities, depreciation, rent, *etc.*), and expenditures for materials and supplies used and consumed in the course of research or experimentation (including amounts incurred in conducting trials).[1342] In addition, under administrative guidance, the costs of developing computer software have been accorded treatment similar to research and experimental expenditures.[1343]

Research or experimental expenditures under section 174 do not include expenditures for quality control testing; efficiency surveys; management studies; consumer surveys; advertising or promotions; the acquisition of another's patent, model, production or process; or research in connection with literary, historical, or similar projects.[1344] For purposes of section 174, quality control testing means testing to determine whether particular units of materials or products conform to specified parameters, but does not include testing to determine if the design of the product is appropriate.[1345]

Generally, no current deduction under section 174 is allowable for expenditures for the acquisition or improvement of land or of depreciable or depletable property used in connection with any research or experimentation.[1346] In addition, no current deduction is allowed for any expenditure incurred for the purpose of ascertaining the existence, location, extent, or quality of any deposit of ore or other mineral, including oil and gas.[1347]

Amounts Paid or Incurred in Taxable Years Beginning after December 31, 2021

With respect to taxable years beginning after December 31, 2021, amounts defined as specified research or experimental expenditures are required to be capitalized and amortized ratably over a five-year period, beginning with the midpoint of the taxable year in which the specified research or experimental expenditures were paid or incurred. Specified research or experimental expenditures that are attributable to research that is conducted outside of the United

[1342] See Treas. Reg. sec. 1.174-4(c). The definition of research and experimental expenditures also includes the costs of obtaining a patent, such as attorneys' fees incurred in making and perfecting a patent application. Treas. Reg. sec. 1.174-2(a)(1).

[1343] Rev. Proc. 2000-50, 2000-2 C.B. 601.

[1344] Treas. Reg. sec. 1.174-2(a)(6).

[1345] Treas. Reg. sec. 1.174-2(a)(7).

[1346] Sec. 174(c). However, depreciation and depletion allowances may be considered section 174 expenditures. *Ibid.*

[1347] Sec. 174(d). Special rules apply with respect to geological and geophysical costs (section 167(h)), qualified tertiary injectant expenses (section 193), intangible drilling costs (sections 263(c) and 291(b)), and mining exploration and development costs (sections 616 and 617).

States[1348] are required to be capitalized and amortized ratably over a period of 15 years, beginning with the midpoint of the taxable year in which such expenditures were paid or incurred. Specified research or experimental expenditures subject to capitalization include expenditures for software development.

Specified research or experimental expenditures do not include expenditures for the acquisition or improvement of land or for depreciable or depletable property used in connection with the research or experimentation, but do include the depreciation and depletion allowances of such property. Also excluded are exploration expenditures incurred for ore or other minerals (including oil and gas).

In the case of retired, abandoned, or disposed property with respect to which specified research or experimental expenditures are paid or incurred, any remaining basis may not be recovered in the year of retirement, abandonment, or disposal, but instead must continue to be amortized over the remaining amortization period.

The application of this rule is treated as a change in the taxpayer's method of accounting for purposes of section 481, initiated by the taxpayer, and made with the consent of the Secretary. This rule is applied on a cutoff basis to research or experimental expenditures paid or incurred in taxable years beginning after December 31, 2021 (hence there is no adjustment under section 481(a) for research or experimental expenditures paid or incurred in taxable years beginning before January 1, 2022).

If a taxpayer's research credit under section 41 (discussed more below) for a taxable year beginning after 2021 exceeds the amount allowed as an amortization deduction under section 174 for such taxable year, the amount chargeable to capital account under section 174 for such taxable year must be reduced by that excess amount. A taxpayer may alternatively elect to claim a reduced research credit amount under section 41 in lieu of reducing its section 174 expenditures for the taxable year. If such an election is made, the research credit is reduced by an amount equal to that credit multiplied by the highest corporate tax rate.

Explanation of Provision

The provision delays the effective date for the modifications made to section 174 by Public Law 115-97 for four taxable years, such that they will apply to amounts paid or incurred in taxable years beginning after December 31, 2025.

Effective Date

The provision is effective on the date of enactment.

[1348] For this purpose, the term "United States" includes the United States, the Commonwealth of Puerto Rico, and any possession of the United States.

16. Payroll credit for compensation of local news journalists (sec. 138517 of the bill)

Present Law

Federal Employment Taxes

Federal employment taxes are imposed on wages paid to employees with respect to employment and include taxes imposed under the Federal Insurance Contributions Act ("FICA"), the Federal Unemployment Tax Act ("FUTA"), and Federal income tax.[1349] In addition, Tier 1 of the Railroad Retirement Tax Act ("RRTA") imposes a tax on compensation paid to railroad employees and representatives.[1350]

FICA taxes are comprised of two components: the Old-Age, Survivors, and Disability Insurance ("OASDI") and Hospital Insurance ("Medicare").[1351] With respect to Medicare taxes, the applicable rate is 2.9 percent with half of such rate (1.45 percent) imposed on the employee and the remainder (1.45 percent) imposed on the employer.[1352] The tax is assessed on covered wages, which is defined for Medicare tax purposes as all remuneration for "employment," including the cash value of all remuneration (including benefits) paid in any medium other than cash, with certain exceptions.[1353] The name given to the remuneration for employment is immaterial. Medicare wages includes salaries, vacation allowances, bonuses, deferred compensation, commissions, and fringe benefits. The term "employment" is generally defined for FICA tax purposes as any service, of whatever nature, performed by an employee for the person employing him or her, with certain specific exceptions.

The employee portion of Medicare taxes must be withheld and remitted to the Federal government by the employer during the quarter, as required by the applicable deposit rules.[1354] The employer is liable for the employee portion of Medicare taxes, in addition to its own share, whether or not the employer withholds the amount from the employee's wages.[1355] OASDI and Medicare taxes are generally allocated by statute among separate trust funds: the OASDI Trust

---

[1349] Secs. 3101, 3111, 3301, and 3401.

[1350] Sec. 3221.

[1351] The Hospital Insurance tax includes two components: Medicare tax and Additional Medicare tax. Additional Medicare taxes are imposed on wages in excess of certain thresholds and are only imposed on the employee. Sec. 3101(b). There is no employer match for Additional Medicare tax. For purposes of this explanation, when referencing Medicare taxes, the term does not include Additional Medicare tax.

[1352] Secs. 3101(b); 3111(b).

[1353] Sec. 3121(a).

[1354] Sec. 3102(a) and Treas. Reg. sec. 31.3121(a)-2. Sec. 6302.

[1355] Sec. 3102(b).

Funds, Medicare's Hospital Insurance Trust Fund, and Supplementary Medical Insurance Trust Fund.[1356]

Explanation of Provision

An eligible local newspaper publisher is allowed a refundable credit against the Medicare taxes imposed on the employer[1357] for each calendar quarter in an amount equal to an applicable percentage of wages paid to each local news journalist employee of such employer for such calendar quarter.[1358] The applicable percentage of wages eligible for the credit is 50 percent in the case of each of the first four calendar quarters, and 30 percent in the case of each calendar quarter thereafter. The amount of wages which may be taken into account for any calendar quarter shall not exceed $12,500. An eligible employer may also elect not to claim the credit. In addition, no credit is allowed for the United States Government or to an agency or instrumentality thereof.

An eligible local news publisher is, with respect to any calendar quarter, any employer if substantially all of the gross receipts of such employer for such calendar quarter are derived in the trade or business of publishing local newspapers. All persons treated as a single employer under subsection (a) or (b) of section 52, or subsection (m) or (o) of section 414, shall be treated as one employer for purposes of this provision. This aggregation rule does not apply unless such persons are involved in the production of the same print or digital publication.

The term "local newspaper" means any print or digital publication if (1) the primary content of such publication is original content derived from primary sources and relating to news and current events, (2) such publication primarily serves the needs of a regional or local community, (3) the publisher of such publication employs at least one local news journalist who resides in such regional or local community, and (4) the publisher of such publication employs not more than 750 employees.

An eligible local news journalist is any employee of an eligible local newspaper publisher for any calendar quarter who provides at least 100 hours of services as a local news

[1356] Secs. 201 and 1817 of the Social Security Act, Pub. L. No. 74-271 as amended (42 U.S.C. secs. 401 and 1395i). Section 201, 42 U.S.C. sec. 402. This section appropriates to the OASI and DI trust funds 100 percent "the taxes imposed . . . by chapter 21 (other than sections 3101(b) and 3111(b)[i.e., 3101(a) and 3111(a)]) of the Internal Revenue Code of 1954 with respect to wages (as defined in section 3121 of such Code)" "determined by the Secretary of the Treasury by applying the applicable rates of tax under such subchapter or chapter 21 (other than sections 3101(b) and 3111(b)) to such wages." Accordingly, the amount appropriated is based on the tax rate in effect on wages as defined in the statute. Similarly, section 1817 of the Social Security Act, 42 U.S.C. sec. 1395i, appropriates to the HI trust fund 100 percent of "the taxes imposed by sections 3101(b) and 3111(b) of the Internal Revenue Code of 1986 with respect to wages reported to the Secretary of the Treasury or his delegate pursuant to subtitle F of such Code after December 31, 1965, as determined by the Secretary of the Treasury by applying the applicable rates of tax under such sections to such wages."

[1357] Sec. 3111(b).

[1358] The term "wages" means wages, as defined in section 3121(a) for FICA tax purposes. Any credit allowed under this provision shall be treated as a credit of the customer of the certified professional employer organization as described in section 3511(d)(2).

journalist during such calendar quarter to such eligible local newspaper publisher, during which time such individual regularly gathers, collects, photographs, records, writes, or reports news or information that concerns local events or other matters of local public interest, for such calendar quarter.

The provision provides that the credit allowed may not exceed the Medicare tax imposed on the employer, reduced by certain payroll tax credits[1359] for that calendar quarter on the wages paid with respect to all the employer's employees. However, if for any calendar quarter the amount of the credit exceeds the Medicare taxes imposed on the employer, reduced as described in the prior sentence, such excess is treated as a refundable overpayment.[1360] The provision also includes a denial of double benefit rule.[1361] Any credit allowed under this provision shall be treated as a credit described in section 3511(d)(2) with respect to third-party payors.

The Secretary shall issue such forms, instructions, regulations, and guidance as are necessary to implement the purposes of this section, including the application of the credit to third-party payors and regulations or guidance allowing such payors to submit documentation necessary to substantiate the eligible employer status of employers that use such payors.[1362]

Effective Date

The amendments made by this provision shall apply to calendar quarters during the first five calendar years beginning after the date of enactment.

17. Treatment of financial guaranty insurance companies as qualifying insurance corporations under passive foreign investment company rules (sec. 138518 of the bill and sec. 1297(f) of the Code)

Present Law

Present law includes requirements for a corporation the income of which is not included in passive income for purposes of the passive foreign investment company ("PFIC")

[1359] Secs. 3131, 3132, 3134, and 6432.

[1360] The excess is treated as an overpayment and refunded under sections 6402(a) and 6413(b). In addition, any amount that is due to an employer is treated in the same manner as a refund due from a credit provision. 31 U.S.C. sec. 1324. Thus, amounts are appropriated to the Secretary of the Treasury for refunding such excess amounts.

[1361] Secs. 41, 45A, 45P, 45S, 51, 1396, 3131, 3132, 3134, and 6432.

[1362] Third-party payors include professional employer organizations, certified professional employer organizations, or agents under section 3504. Any forms, instructions, regulations, or other guidance described in this subsection must require the customer to be responsible for the accounting of the credit and for any liability for improperly claimed credits and require the certified professional employer organization or other third-party payor to accurately report such tax credits based on the information provided by the customer. A technical correction may be needed to reflect this intent.

rules, in the case of certain insurance companies.[1363] Passive income for purposes of the PFIC rules generally does not include income derived in the active conduct of an insurance business by a corporation (1) that would be subject to tax under subchapter L if it were a domestic corporation; and (2) the applicable insurance liabilities of which constitute more than 25 percent of its total assets as reported on the company's applicable financial statement for the last year ending with or within the taxable year.[1364]

For the purpose of the provision's exception from passive income, applicable insurance liabilities mean, with respect to any property and casualty or life insurance business (1) loss and loss adjustment expenses, (2) reserves (other than deficiency, contingency, or unearned premium reserves) for life and health insurance risks and life and health insurance claims with respect to contracts providing coverage for mortality or morbidity risks. This includes loss reserves for property and casualty, life, and health insurance contracts and annuity contracts.

Unearned premium reserves with respect to any type of risk are not treated as applicable insurance liabilities for purposes of the provision.

For purposes of the provision, the amount of any applicable insurance liability may not exceed the lesser of such amount (1) as reported to the applicable insurance regulatory body in the applicable financial statement (or, if less, the amount required by applicable law or regulation), or (2) as determined under regulations prescribed by the Secretary.

An applicable financial statement is a statement for financial reporting purposes that (1) is made on the basis of generally accepted accounting principles, (2) is made on the basis of international financial reporting standards, but only if there is no statement made on the basis of generally accepted accounting principles, or (3) except as otherwise provided by the Secretary in regulations, is the annual statement required to be filed with the applicable insurance regulatory body, but only if there is no statement made on either of the foregoing bases. Unless otherwise provided in regulations, it is intended that generally accepted accounting principles means U.S. GAAP.

The applicable insurance regulatory body means, with respect to any insurance business, the entity established by law to license, authorize, or regulate such insurance business and to which the applicable financial statement is provided. For example, in the United States, the applicable insurance regulatory body is the State insurance regulator to which the corporation provides its annual statement.

If a corporation fails to qualify solely because its applicable insurance liabilities constitute 25 percent or less of its total assets, a United States person who owns stock of the corporation may elect in such manner as the Secretary prescribes to treat the stock as stock of a qualifying insurance corporation if (1) the corporation's applicable insurance liabilities constitute at least 10 percent of its total assets, and (2) based on the applicable facts and circumstances, the corporation is predominantly engaged in an insurance business, and its failure

[1363] Sec. 1297(b)(2)(B).

[1364] Sec. 1297(f)(1)(A) and (B).

to qualify under the 25 percent threshold is due solely to runoff-related or rating-related circumstances involving such insurance business.[1365]

Facts and circumstances that tend to show the firm may not be predominantly engaged in an insurance business include a small number of insured risks with low likelihood but large potential costs; workers focused to a greater degree on investment activities than underwriting activities; and low loss exposure. Additional relevant facts for determining whether the firm is predominantly engaged in an insurance business include: claims payment patterns for the current and prior years; the firm's loss exposure as calculated for a regulator such as the SEC or for a rating agency, or if those are not calculated, for internal pricing purposes; the percentage of gross receipts constituting premiums for the current and prior years; and the number and size of insurance contracts issued or taken on through reinsurance by the firm. The fact that a firm has been holding itself out as an insurer for a long period is not determinative either way.

Runoff-related or rating-related circumstances include, for example, the fact that the company is in runoff, that is, it is not taking on new insurance business (and consequently has little or no premium income), and is using its remaining assets to pay off claims with respect to pre-existing insurance risks on its books. Such circumstances also include, for example, the application to the company of specific requirements with respect to capital and surplus relating to insurance liabilities imposed by a rating agency as a condition of obtaining a rating necessary to write new insurance business for the current year.

Present law does not specifically state how the treatment of insurance companies under the PFIC rules applies in the case of a financial guaranty insurance company. A financial guaranty insurance company's business is generally to insure the risks related to the default of corporate and governmental bonds. Under NAIC guidelines,[1366] a financial guaranty insurer is a monoline company (*i.e.*, does not insure other types of risks). Any financial statements prepared in accordance with generally accepted accounting principles ("GAAP") of a financial guaranty insurer may not report an amount of reserves for losses and loss adjustment expenses until those items are expected to exceed unearned premium reserves with respect to the contract,[1367] a situation generally involving imminent or current default of insured bonds.

Explanation of Provision

The provision provides specific rules for financial guaranty insurance companies under the present-law PFIC rules for insurance companies.

[1365] See Treas. Reg. sec. 1.1297-4(d).

[1366] The National Association of Insurance Commissioners ("NAIC") issues model laws and model regulations that are frequently enacted (sometimes with modifications) by States for the purpose of their regulation of insurance companies in the State.

[1367] See Financial Accounting Standards Board, *FASB Statement No. 60,* interpreting *Statement of Financial Accounting Standards No. 163,* paragraphs 22-28 and B37-38, 2008.

Under the provision, applicable insurance liabilities of a financial guaranty insurance company include unearned premium reserves (notwithstanding the general rule that unearned premium reserves are not included[1368]) if the company meets requirements. The requirements are intended to limit the treatment provided under the provision to insurance companies that are actively engaged in the business of financial guaranty insurance and not in other activities such as, for example, hedge fund investing. The requirements are that (1) the company is prohibited under generally accepted accounting principles from reporting on its financial statement reserves for losses and loss adjustment expenses with respect to a financial guaranty insurance or reinsurance contract, except to the extent that those losses and loss adjustment expenses are expected to exceed the unearned premiums on the contract; (2) the applicable financial statement of the company reports financial guaranty exposure[1369] of at least 15-to-1 or State or local bond exposure[1370] of at least 9-to-1 (8-to-1 for a taxable year of the company ending on or before December 31, 2018), and (3) the company includes in its insurance liabilities only its unearned premium reserves relating to insurance written or assumed that is within the single risk limits of section D of subsection 4 of the NAIC's Financial Guaranty Insurance Guideline, as defined in the provision (modified by using total shareholders' equity as reported on the company's applicable financial statement rather than the aggregate of the surplus to policyholders and contingency reserves).

A financial guaranty insurance company is defined for purposes of the provision to mean any insurance company the sole business of which is writing or reinsuring financial guaranty insurance that is permitted.[1371] For this purpose, financial guaranty insurance means financial guaranty insurance as defined under section 1, subsection (A),[1372] of the NAIC's Financial Guaranty Insurance Guideline, which is permitted under section 4, subsection (B), of such Guideline, including single risk limits.[1373]

[1368] Sec. 1297(f)(3)(A)(ii).

[1369] For purposes of this requirement, the term financial guaranty exposure means the ratio of (1) the net debt service outstanding insured or reinsured by the company that is within the single risk limits set forth in the Financial Guaranty Insurance Guideline (as reported on the company's applicable financial statement, to (2) the company's total assets (as so reported). See below for a definition of this Guideline.

[1370] For purposes of this requirement, the term State or local bond exposure means the ratio of (1) the net unpaid principal of State or local bonds (as defined in section 103(c)(1)) insured or reinsured by the company that is within the single risk limits set forth in the Financial Guaranty Insurance Guideline (as reported on the company's applicable financial statement), to (2) the company's total assets (as so reported).

[1371] New sec. 1297(f)(3)(C)(iii).

[1372] This part of the NAIC Guideline provides, in relevant part, "'Financial guaranty insurance' means a surety bond, an insurance policy or, when issued by an insurer or any person doing an iusurance business as defined in Section [insert section], an indemnity contract and any guaranty similar to the foregoing types, under which loss is payable upon proof of occurrence of financial loss to an insured claimant, obligee or indemnitee as a result of any of the following events," which include failure of an obligor to pay when due.

[1373] This part of the NAIC Guideline sets forth limitations on the activities of the company; including that the obligations insured by the company must meet a minimum percentage of investment grade obligations, that the

The provision defines the NAIC's Financial Guaranty Insurance Guideline, which means the October 2008 model regulation that was adopted by the National Association of Insurance Commissioners on December 4, 2007. The determination of whether any provision of this Guideline has been satisfied is made by the Treasury Secretary under the provision.

In addition, a financial guaranty insurance company is treated as satisfying two requirements of the 10-percent facts and circumstances test, described above in the present law section, that (1) based on the applicable facts and circumstances, the corporation is predominantly engaged in an insurance business,[1374] and (2) the corporation's failure to qualify under the 25 percent threshold[1375] is due solely to runoff-related or rating-related circumstances involving such insurance business.[1376] Treating a financial guaranty insurance company as satisfying these particular requirements of the 10-percent facts and circumstances test, however, does not treat the company as having satisfied the requirement for that test that its applicable insurance liabilities constitute at least 10 percent of its total assets.[1377]

The provision requires reporting. An amount is treated as reported on an applicable financial statement for purposes of the provision if the amount is separately reported on that statement with respect to the corporation, or the amount is separately determined for purposes of calculating an amount that is reported on that statement. In addition, regulatory authority is provided to require reporting to the IRS or the Treasury Department such information as the IRS or Treasury require, in the case of each United States person who owns an interest in a specified non-publicly traded foreign corporation. A non-publicly traded foreign corporation is defined as any foreign corporation that would be a PFIC if section 1297(b)(2)(B) did not apply, and no interest in which is traded on an established securities market.

Effective Date

The provision generally is effective as if included with the enactment of section 1297(f) and of modifications to section 1297(b)(2)(B), that is, for taxable years beginning after

company must meet aggregate risk limits by maintaining surplus to policyholder and contingency reserves that meet specified percentages for identified types of insured obligations, and that the company must meet single risk limits (limits on exposure to losses from single risks) by conforming to specified percentages with respect to specified categories of insured obligations.

[1374] A financial guaranty insurance company, to be eligible for this treatment, separately must meet the statutory definition that relies on the criteria of the NAIC Guideline on which State insurance regulators generally rely to identify such a company. Thus, permitting this treatment in the case of a company meeting those requirements is considered unlikely to lead to avoidance of the purposes of section 1297(f). It is intended that the Treasury Secretary provide guidance consistent with preventing avoidance.

[1375] Sec. 1297(f)(1).

[1376] Sec. 1297(a)(2)(B). By treating the company as meeting these particular requirements of the 10-percent facts and circumstances test, the provision treats a financial guaranty insurance company similarly to an insurance company whose failure to qualify under the 25 percent threshold is due solely to runoff-related or rating-related circumstances involving such insurance business.

[1377] Sec. 1297(f)(2)(A).

December 31, 2017. The reporting of certain items under the provision is effective for reports made after the date of enactment of this provision.

18. Credit for qualified access technology for the blind (sec. 138519 of the bill and new sec. 36H of the Code)

Present Law

The standard deduction is the sum of the basic standard deduction and, if applicable, the additional standard deduction.[1378] The amount of the basic standard deduction varies depending upon a taxpayer's filing status. For 2021, the amount of the basic standard deduction is $12,550 for a single individual and a married individual filing a separate return, $18,800 for a head of household, and $25,100 for a joint return and a surviving spouse.[1379] An additional standard deduction is allowed to an individual who is elderly (has attained age 65 before the close of the taxable year) or blind.

For 2021, the additional amount is $1,350 for a married taxpayer (for each spouse meeting the applicable criteria in the case of a joint return) and surviving spouses. The additional amount for single individuals and heads of households is $1,700. An individual who qualifies as both blind and elderly is entitled to two additional standard deductions, for a total additional amount (for 2021) of $2,700 or $3,400, as applicable.[1380]

An individual is considered blind for purposes of the additional amount of the standard deduction only if the individual's central visual acuity does not exceed 20/200 in the better eye with correcting lenses, or if the individual's visual acuity is greater than 20/200 but is accompanied by a limitation in the fields of vision such that the widest diameter of the visual field subtends an angle no greater than 20 degrees.[1381]

Under present law, there is no credit for qualified access technology for the blind.

Explanation of Provision

The provision creates a new refundable credit for amounts paid or incurred during the taxable year by the taxpayer for qualified access technology for use by a qualified blind individual who is the taxpayer, the taxpayer's spouse, or any dependent of the taxpayer.

The aggregate amount of the credit allowed under the provision with respect to any qualified blind individual shall not exceed $2,000 in any period that consists of three consecutive

---

[1378] Sec. 63(c).

[1379] Rev. Proc. 2020-45, 2020-46 I.R.B. 1016.

[1380] Rev. Proc. 2020-45, 2020-46 I.R.B. 1016.

[1381] Sec. 63(f)(4).

taxable years. The $2,000 amount is adjusted for inflation for taxable years beginning after 2022. Amounts eligible for the credit may not be compensated for by insurance or otherwise.

A qualified blind individual has the same meaning as an individual who is blind for purposes of the additional amount of the standard deduction for the blind.[1382] Qualified access technology means hardware, software, or other information technology the primary function of which is to convert or adapt information which is visually represented into forms or formats useable by blind individuals.

No credit is allowed under the provision for any expenses for which a deduction or credit is allowed under Chapter 1 of the Code.

The credit shall not apply to amounts paid or incurred in taxable years beginning after December 31, 2026.

Effective Date

The provision is effective for taxable years beginning after December 31, 2021.

19. Modification of REIT constructive ownership rules (sec. 138520 of the bill and sec. 856(d) of the Code)

Present Law

In General

To qualify as a REIT, an entity must meet several requirements. Among other requirements, an entity must meet the 75-percent income test and the 95-percent income test.[1383] For purposes of both income tests, qualifying rents constitute qualifying gross income.[1384]

Rents from a related party – generally otherwise qualifying rents received from corporate or noncorporate tenants in which the REIT, directly or indirectly, has an ownership interest of 10 percent or more – are generally not treated as qualifying rents.[1385] Additionally, where a REIT furnishes or renders services to a tenant, amounts received or accrued with respect to such property generally are not treated as qualifying rents unless the services are furnished through an independent contractor.[1386] In general, an independent contractor is a person who

---

[1382] *Ibid.*

[1383] Secs. 856(c)(2) and 856(c)(3).

[1384] Secs. 856(c)(2)(C) and 856(c)(3)(A).

[1385] Sec. 856(d)(2)(B).

[1386] Secs. 856(d)(2)(C) and 856(d)(7).

does not own more than a 35 percent interest in the REIT and in which no more than a 35 percent interest is held by persons with a 35 percent or greater interest in the REIT.[1387]

Constructive Ownership Rules

For purposes of determining a REIT's ownership interest in a tenant and whether a contractor is independent, the constructive ownership rules of section 318(a), with certain modifications, apply.[1388]

Section 318(a) provides rules setting forth when stock is constructively owned. Stock may be attributed *from* partnerships, estates, trusts, and corporations to persons owning interests in such entities under so-called "upward" attribution rules.[1389] Stock may be attributed *to* partnerships, estates, trusts, and corporations from persons owning interest in such entities under so-called "downward" attribution rules.[1390] Stock may be considered owned in certain other cases. Section 318(a), moreover, contains operating rules.

Under section 856(d)(5), the constructive ownership rules of section 318(a) are modified in three ways. First, such rules ("modified section 318(a)") apply to determine the ownership of assets and net profits of any person (*i.e.*, interests in noncorporate entities), as well as stock.[1391]

Second, certain thresholds in the "upward" and "downward" attribution rules are modified such that attribution from and to corporations occurs in a greater number of situations. Specifically, 10 percent is substituted for 50 percent where it appears in subparagraph (C) of section 318(a)(2) and 318(a)(3).[1392] Thus, under section 318(a)(2)(C), as modified ("modified section 318(a)(2)(C)," with sections 318(a)(2)(B) and 318(a)(2)(C), the "modified upward attribution rules"), if 10 or more percent of a REIT or other corporation is owned, directly or indirectly, by or for a person, that person is treated as owning a proportionate share of any stock, assets or net profits owned, directly or indirectly, by the REIT or other corporation. Under section 318(a)(3)(C), as modified ("modified section 318(a)(3)(C)"), if 10 or more percent of a REIT or other corporation is owned, directly or indirectly, by or for a person, that REIT or other corporation is treated as owning the stock, assets, or net profits owned, directly or indirectly, by or for the person.

Third, a threshold in the downward attribution rules is modified such that attribution to partnerships occurs in a fewer number of situations. Specifically, section 318(a)(3)(A) is

---

[1387] Sec. 856(d)(3).

[1388] Sec. 856(d)(5).

[1389] Sec. 318(a)(2).

[1390] Sec. 318(a)(3).

[1391] Sec. 856(d)(5) (flush language).

[1392] Sec. 856(d)(5)(A).

applied in the case of a partnership by taking into account only partners who own, directly or indirectly, 25 percent or more of the capital interest, or the profit interest, in the partnership.[1393] Thus, under section 318(a)(3)(A), as modified ("modified section 318(a)(3)(A)," with section 318(a)(3)(B) and modified section 318(a)(3)(C), the "modified downward attribution rules"), stock, assets, and net profits owned, directly or indirectly, by or for a partner are considered owned by the partnership when that partner owns, directly or indirectly, a 25 percent or greater capital interest or profits interest in the partnership.

The examples below illustrate the application of modified section 318(a) under present law.

Example 1: Assume that 25 percent of the shares in a REIT ("REIT") are owned by a person ("A") who owns a 25 percent interest in a partnership ("P1"); another person ("B") owns a 25 percent interest in P1 and a 25 percent interest in another partnership ("P2"); and a third person ("C") owns a 25 percent interest in P2 and a 25 percent interest in a partnership that is a tenant of REIT ("T"). Because of successive applications of the modified downward attribution rules, REIT is considered to own 25 percent of T, and the rents paid by T are nonqualifying rents from a related party to REIT.

Example 2: Assume a person ("A") owns 100 percent of the shares in a corporation ("Parent"); Parent owns 100 percent of the shares in a second corporation ("Sub"); and Sub owns 10 percent of the shares in a REIT ("REIT"). Further assume A owns 100 percent of the shares in a corporation that is a tenant of REIT ("T"). Because of successive applications of the modified downward attribution rules or successive applications of the modified upward attribution rules followed by a single application of the modified downward attribution rules, REIT is considered to own 10 percent of T, and the rents paid by T are nonqualifying rents from a related party to REIT.

Example 3: Assume that 40 percent of the shares in a REIT ("REIT") are owned by a person ("A") who owns a 25 percent interest in a partnership ("P1"); another person ("B") owns a 25 percent interest in P1 and a 25 percent interest in a second partnership ("P2"); a third person ("C") owns a 25 percent interest in P2 and a 25 percent interest in third partnership ("P3"); and a fourth person ("D") owns a 25 percent interest in P3 and 40 percent of the shares in a corporation that is a contractor of REIT ("Contractor"). Because of successive applications of the modified downward attribution rules, the independent contractor definition will not be met: P1, P2, and P3 will be considered to own more than 35 percent interests in both REIT and Contractor.

Example 4: Assume that 50 percent of the shares in a REIT ("REIT") are owned by a person ("A") who owns 10 percent of the shares in a corporation ("Corp"), and another person ("B") owns 10 percent of the shares in Corp and 50 percent of the interests in a partnership that is a contractor of REIT ("Contractor"). Corp will be considered to own more than 35 percent of REIT stock and more than 35 percent of Contractor interests as a result of two applications of the modified downward attribution rules. The independent contractor definition will not be met

[1393] Sec. 856(d)(5)(B).

because Corp will be considered to own more than 35 percent interests in both REIT and Contractor.

Example 5: Assume a person ("A") owns a 25 percent interest in a partnership ("P1") that owns a 10 percent interest in REIT ("REIT"). Assume that A also owns a 20 percent interest in a tenant of REIT ("T"). REIT is deemed to own the 20 percent interest in T (as a result of an application of the modified downward attribution rules). Thus, rents paid by T are not qualifying rents to REIT.

Explanation of Provision

The provision modifies the constructive ownership rules that apply for purposes of determining a REIT's ownership interest in a tenant and whether a contractor is independent by amending section 856(d)(5).

Under the provision, stock, assets, and net profits constructively owned by a partnership, estate, trust, or corporation by reason of the application of section 318(a)(3) (as modified by sections 856(d)(5)(A) and 856(d)(5)(B)) (*i.e.*, the modified downward attribution rules) are not considered as owned by such entity for purposes of again applying such section (*i.e.*, the modified downward attribution rules) in order to make another person the constructive owner of such stock, assets, or net profits. Thus, the provision prevents multiple applications of the modified downward attribution rules in certain situations. The situations are limited to scenarios where the successive application of the modified downward attribution rules would otherwise make a second person the constructive owner of stock or an interest in a noncorporate entity. Said differently, the provision only prevents the successive application of the modified downward attribution rules where (1) an application of the modified downward attribution rules makes a person the constructive owner of stock or an interest in a noncorporate entity, and (2) such person's constructive ownership is attributed to a different person by virtue of an additional application of the modified downward attribution rules. The provision does not cover scenarios where two applications of the modified downward attribution rules make the same person the constructive owner of, for example, a REIT and a contractor.[1394]

The provision does not prevent any person from being the constructive owner of stock, assets, or net profits of any person as the result of any other application of modified section 318(a) (the "other application exception"). Thus, if there exist two (or more) applications of modified section 318(a) that result in a person constructively owning stock or an interest in a noncorporate entity and one (or more) application of modified section 318(a) does not require the successive application of the modified downward attribution rules in the manner described above, that person will be treated as a constructive owner.

The Secretary is authorized to circumscribe the situations to which the provision applies. This is intended to ensure that a REIT and a tenant, as well as a REIT and a contractor,

[1394] See Example 3, below.

are treated as related in appropriate situations such that REITs retain their character as passive investment vehicles.[1395]

No inference is created by the provision with respect to the application of section 318 outside the context of the provision.

The examples below illustrate the application of modified section 318(a), as amended by the provision.[1396]

Example 1: Assume that 25 percent of the shares in a REIT ("REIT") are owned by a person ("A") who owns a 25 percent interest in a partnership ("P1"); another person ("B") owns a 25 percent interest in P1 and a 25 percent interest in another partnership ("P2"); and a third person ("C") owns a 25 percent interest in P2 and a 25 percent interest in a partnership that is a tenant of REIT ("T"). Under the provision, the REIT stock constructively owned by P1 (as a result of an application of the modified downward attribution rules) is not taken into account when again applying the modified downward attribution rules to make another person (P2 or T) a constructive owner. Likewise, interests in T constructively owned by P2 (as a result of an application of the modified downward attribution rules) are not taken into account when again applying the modified downward attribution rules to make another person (P1 or REIT) a constructive owner. Thus, REIT is not considered to own interests in T, and the rents paid by T may be qualifying rents to REIT.

Example 2: Assume that 40 percent of the shares in a REIT ("REIT") are owned by a person ("A") who owns a 25 percent interest in a partnership ("P1"); another person ("B") owns a 25 percent interest in P1 and a 25 percent interest in a second partnership ("P2"); a third person ("C") owns a 25 percent interest in P2 and a 25 percent interest in third partnership ("P3"); and a fourth person ("D") owns a 25 percent interest in P3 and 40 percent of the shares in a corporation that is a contractor of REIT ("Contractor"). Under the provision, the REIT stock constructively owned by P1 (as a result of an application of the modified downward attribution rules) is not taken into account when again applying the modified downward attribution rules to make another person (P2, P3, or Contractor) a constructive owner. Likewise, the Contractor stock constructively owned by P3 (as a result of an application of the modified downward attribution rules) is not taken into account when again applying the modified downward attribution rules to make another person (P2, P1, or REIT) a constructive owner. Thus, under the provision, no person will be considered to own more than a 35 percent interest in both REIT and Contractor, and the independent contractor definition may be met.

Example 3: Assume that 50 percent of the shares in a REIT ("REIT") are owned by a person ("A") who owns 10 percent of the shares in a corporation ("Corp"), and another person ("B") owns 10 percent of the shares in Corp and 50 percent of the interests in a partnership that is a

[1395] Congress created REITs as passive investment vehicles. See H.R. Rep. No. 2020, 86th Cong., 2d Sess. 4 (1960) at 6 ("[O]ne of the principal purposes of your committee in imposing restrictions on types of income of a qualifying real estate investment trust is to be sure the bulk of its income is from passive income sources and not from the active conduct of a trade or business.").

[1396] The facts of these examples are the same as the facts of the examples in the present law section, above.

contractor of REIT ("Contractor"). Based on A's actual ownership of REIT and one application of the modified downward attribution rules, Corp will be considered to own more than 35 percent of REIT stock. Based on B's actual ownership of Contractor and one application of the modified downward attribution rules, Corp will be considered to own a more than 35 percent interest in Contractor. Because the second application of the modified downward attributions rules makes the same person (rather than another person) the constructive owner of REIT stock and Contractor interests, under the provision, like under present law, the independent contractor definition will not be met.

Example 4: Assume a person ("A") owns a 25 percent interest in a partnership ("P1") that owns a 10 percent interest in REIT ("REIT"). Assume that A also owns a 20 percent interest in a tenant of REIT ("T"). Under the provision, as under present law, REIT is deemed to own the 20 percent interest in T (as a result of an application of the modified downward attribution rules). Thus, rents paid by T are not qualifying rents to REIT.

Effective Date

The provision applies to taxable years ending after the date of enactment.

SUBTITLE J — DRUG PRICING

PART I — LOWERING PRICES THROUGH FAIR DRUG PRICE NEGOTIATION

SUBTITLE J – DRUG PRICING

EXPLANATION OF PROVISIONS

A. SUBTITLE J, PART 1 – LOWERING PRICES THROUGH FAIR DRUG PRICE NEGOTIATION

Present Law

Medicare Part A (Hospital Insurance, or HI) covers inpatient hospital services, skilled nursing care, hospice care, and some home health services. Part A typically pays providers for drugs as part of a predetermined per-episode payment. Hospitals can also receive add-on payments for certain new innovator drugs under Part A. Medicare Part B (Supplementary Medical Insurance, or SMI) covers physician services, outpatient services, and some home health and preventive services. Typically, providers who administer prescription drugs under Part B are paid based on a list price formula defined in statute (Average Sales Price or ASP). Beneficiaries generally pay 20 percent coinsurance under Part B, including for drugs.

The Medicare Part D outpatient prescription drug benefit provides coverage to Medicare beneficiaries who enroll in stand-alone private plans (PDP) or Medicare Part C managed care plans with a Part D component (MA-PD).

.

Explanation of the Provision

1. Providing for lower prices for certain high-priced single source drugs (sec. 139001 of the bill).

Present Law

The Part D noninterference provision bars the Secretary of Health and Human Services (HHS Secretary) from negotiating Part D drug prices, and from requiring a set formulary or pricing structure. Part D plan sponsors (insurers), working with pharmacy benefit managers (PBMs), negotiate prescription drug price discounts and rebates with manufacturers and dispensing pharmacies.[1397] Sponsors must offer enrollees their "negotiated price," as defined in regulations, for covered drugs. Under the HHS definition of negotiated prices, sponsors have latitude to decide whether to pass on rebates and certain other price concessions to enrollees at the pharmacy at the point of sale or reduce premiums for all plan enrollees. Point-of-sale plans are less popular that those plans that use rebates that reduce premiums for all plan enrollees. For example, in 2019 SilverScript's Medicare Part D Allure (Enhanced Alternative POS) plan set

[1397] 42 U.S.C. §1854(a)(6(B)(iii).

copays based on net prices, and as a result, had premiums of $80 per month. That same year, SilverScript also had a plan that did not base copays on net prices, SilverScript Choice (Basic) and the average premium for that plan was $31.50. There were 31,466 beneficiaries in the plan that set copays net price, whereas there were 4,441,668 in the plan that did not.

In the commercial market, which includes group health plans and health insurance offered in the group and individual markets, health plans, in conjunction with Pharmacy Benefit Managers (PBMs), negotiate discounts and rebates with manufacturers. Currently, there are no federal statutes or regulations related to the prices that health plans pay for prescription drugs.

Explanation of Provision

This provision adds a new Part E to Title XI of the Social Security Act which directs the Secretary of the Department of Health and Human Services (HHS) to establish a Fair Price Negotiation Program to reduce spending on and out-of-pocket costs for prescription drugs. The Secretary shall publish a list of selected drugs; enter into agreements with manufacturers of selected drugs; and negotiate and renegotiate maximum fair price (MFP) for each selected drug beginning in plan year 2025.

Each year, the Secretary will identify the 250 brand-name drugs that lack price competition for negotiation, and negotiate at least 25 drugs in 2025, and at least 50 drugs thereafter. A drug selected for negotiation would continue to be included in the program until competition enters the market.

Negotiation

The Secretary is required under the legislation to directly negotiate with drug manufacturers to establish a maximum fair price. The legislation also establishes an upper limit for the price reached in any negotiation as no more than 1.2 times (or 120 percent) of the volume-weighted average of the price of six countries (Australia, Canada, France, Germany, Japan, and the United Kingdom), known as the Average International Market (AIM) price.

2. Selected drug manufacturer excise tax imposed during noncompliance periods ((sec. 139002 of the bill and new sec. 4192 of the Code)

Present Law

Annual Fee on Branded Prescription Pharmaceutical Manufacturers and Importers

An annual fee is imposed on covered entities engaged in the business of manufacturing or importing branded prescription drugs for sale to any specified government program or pursuant to coverage under any such program.[1398]

The aggregate annual fee imposed on all covered entities is $2.8 billion for calendar year 2021.[1399] The aggregate fee is apportioned among the covered entities each year based on their relative market share of branded prescription drug sales taken into account during the previous calendar year.

A covered entity's annual fee equals an amount that bears the same ratio to the aggregate annual fee of $2.8 billion as the entity's branded prescription drug sales taken into account during the preceding calendar year bear to the aggregate branded prescription drug sales of all covered entities taken into account during the preceding calendar year. Sales taken into account during any calendar year with respect to a covered entity are: (1) zero percent of sales not more than $5 million; (2) 10 percent of sales over $5 million but not more than $125 million; (3) 40 percent of sales over $125 million but not more than $225 million; (4) 75 percent of sales over $225 million but not more than $400 million; and (5) 100 percent of sales over $400 million.

A covered entity is any manufacturer or importer with gross receipts from branded prescription drug sales. All persons treated as a single employer under section 52(a) or (b) or under section 414(m) or (o) are treated as a single covered entity. Thus, for example, corporations that are members of the same controlled group of corporations under section 52(a) are treated as a single covered entity. In applying the single employer rules under sections 52(a) and (b), foreign corporations are not excluded. If more than one person is liable for payment of the fee, all such persons are jointly and severally liable for payment of such fee.

Branded prescription drug sales are sales of branded prescription drugs made to any specified government program, or pursuant to coverage under any such program. The term branded prescription drugs includes any drug which is subject to section 503(b) of the Federal Food, Drug, and Cosmetic Act and for which an application was submitted under section 505(b) of such Act. Branded prescription drugs also include any biological product the license for which was submitted under section 351(a) of the Public Health Service Act ("PHSA"). Branded prescription drug sales do not include sales of any drug or biological product with respect to which an orphan drug tax credit was allowed for any taxable year under section 45C. The exclusion for orphan drug sales does not apply to any drug or biological product after such drug or biological product is approved by the Food and Drug Administration for marketing for any indication other than the rare disease or condition with respect to which the section 45C credit was allowed.

[1398] Sec. 9008 of the Patient Protection and Affordable Care Act ("PPACA"), Pub. L. No. 111-148, as amended by section 1404 of the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152.; *see also* Treas. Reg. sec. 51.1 - 51.11.

[1399] The aggregate annual fee amount for each year is set by statute; for calendar year 2019 and thereafter the amount is $2.8 billion.

Specified government programs include: (1) the Medicare Part D program[1400]; (2) the Medicare Part B program[1401]; (3) the Medicaid program[1402]; (4) any program under which branded prescription drugs are procured by the Department of Veterans Affairs; (5) any program under which branded prescription drugs are procured by the Department of Defense; or (6) the TRICARE retail pharmacy program.[1403]

The fees are treated in the same manner as those excise taxes identified in subtitle F of the Code, "Procedure and Administration," for which the only avenue for judicial review is a civil action for refund. Thus, the fees may be assessed and collected using the procedures in subtitle F without regard to the restrictions on assessment in section 6213.

The fee is required to be paid no later than an annual payment date determined by the Secretary of the Treasury, but in no event later than September 30th of each calendar year.

Finally, the fee is considered to be a nondeductible tax for purposes of section 275 and therefore is not deductible against income taxes.

Manufacturers Excise Taxes

Chapter 32 of the Code imposes excise taxes on sales by manufacturers of certain articles. The use of an article subject to tax by a manufacturer, producer, or importer of such article is treated as a sale for the purpose of imposing certain excise taxes.[1404] Articles subject to the manufacturers excise tax include certain gas guzzler automobiles, tires, fuels, coal, vaccines, sporting goods, and firearms. In general, uniform rules related to imposition, payment, reporting, and claiming of credits or refunds apply to each of the excise taxes in Chapter 32.[1405]

In general, manufacturers excise taxes are imposed on the sale of the applicable taxable article by the manufacturer, producer, or importer. A manufacturer is a person who produces a taxable article from new, raw, or used material (including scrap, salvage, or junk) by processing, manipulating, or changing the form of an article, or by combining or assembling two or more articles.[1406] An importer of a taxable article is any person who brings such an article into the United States from a source outside the United States, or who withdraws such an article from a customs bonded warehouse for sale or use in the United States.

[1400] Part D of title XVIII of the Social Security Act.

[1401] Part B of title XVIII of the Social Security Act.

[1402] Title XIX of the Social Security Act.

[1403] 10 U.S.C. sec. 1074g.

[1404] Sec. 4218.

[1405] Secs. 4216-4227, 6416.

[1406] Treas. Reg. sec. 48.0-2(a)(4)(i).

The price for which an article is sold and on which the excise tax is imposed is determined under certain rules.[1407] These rules provide for: (1) the inclusion of containers, packaging, and certain transportation charges in the price, (2) the determination of a constructive sale price if an article is sold at retail, sold on consignment, or sold for less than the fair market price, and (3) the determination of the tax due in the case of partial payments or installment sales. The rules also provide that in determining the price of an article on which an excise tax is imposed, the amount of excise tax imposed by Chapter 32 is excluded whether or not stated as a separate charge. If the manufacturer computes the tax on a sale price that is determined without regard to the excise tax and the proper excise tax is charged as a separate item, the amount of tax so charged does not become a part of the taxable sale price, and no tax is due on the tax so charged.[1408] If the manufacturer does not state a separate charge as tax, it will be presumed that the price charged to the purchaser includes the proper excise tax, and the proper percentage of such price will be allocated to the tax.[1409]

Certain sales are exempt from the excise taxes imposed on manufacturers, including sales for use by the purchaser for further manufacture or for resale to a second purchaser for use in further manufacture, and for export or for resale to a second purchaser for export.[1410] If an article is sold free of tax for resale to a second purchaser for further manufacture or for export, the exemption will not apply unless, within the six-month period beginning on the date of sale by the manufacturer, the manufacturer receives proof that the article has been exported or resold for use in further manufacture.[1411] In general, the exemptions will not apply unless the manufacturer, the first purchaser, and the second purchaser (if any) are registered with the Secretary.[1412]

A credit or refund is generally allowed for overpayments of manufacturers excise taxes.[1413] Overpayments may occur when tax-paid articles are sold for export and for certain specified uses and resales, when there are price adjustments, and where tax paid articles are subject to further manufacture. Generally, no credit or refund of any overpayment of tax is allowed or made unless the person who paid the tax establishes one of four prerequisites: (1) the tax was not included in the price of the article or otherwise collected from the person who purchased the article; (2) the tax was repaid to the ultimate purchaser of the article; (3) for overpayments due to specified uses and resales, the tax has been repaid to the ultimate vendor or the person has obtained the written consent of such ultimate vendor; or (4) the person has filed

---

[1407] Sec. 4216.

[1408] Treas. Reg. sec. 48.4216(a)-2(a)(1).

[1409] *Ibid. See* Treas. Reg. sec. 48.4216(a)-2(a)(2) for a formula to compute the taxable sale price.

[1410] See sec. 4221(a) for the complete list of exemptions. Some of these exemptions do not apply for purposes of certain manufacturers excise taxes.

[1411] Sec. 4221(b).

[1412] Sec. 4222.

[1413] Sec. 6416.

with the Secretary the written consent of the ultimate purchaser of the article to the allowance of the credit or making of the refund.[1414]

Taxable vaccines are among the articles currently subject to excise tax.[1415] However, prescription drugs currently are not subject to excise tax.

Explanation of Provision

The provision creates a new drug price negotiation program administered by the Secretary of Health and Human Services ("HHS"). Manufacturers, producers, and importers subject to the program who do not comply with certain requirements are subject to a new excise tax on drug sales during periods of noncompliance. The drug price negotiation program and selected drug excise tax are discussed in more detail below.

Drug Price Negotiation Program

Under the drug price negotiation program, beginning in 2023, HHS will choose selected drugs from a list of negotiation eligible drugs. HHS will publish the list by April 15 of a plan year (which for this purpose, means a plan year for self-funded plans and a policy year for insured coverage), effective with respect to an initial plan applicability year two years later.

By June 15 of the year in which a selected drug is published, manufacturers of the selected drug must enter into an agreement with HHS to negotiate a maximum fair price ("MFP") for the drug. The negotiation between HHS and the manufacturer takes place during a voluntary negotiation period beginning on the earlier of (1) the date on which HHS and the manufacturer enter into an agreement, or (2) June 15 of the year in which the selected drug is chosen. The voluntary negotiation period ends on March 31 of the following year. Upon the conclusion of the voluntary negotiation period, HHS and the manufacturer must agree to a MFP with respect to the selected drug for the initial plan applicability year. The manufacturer must charge the MFP to fair price eligible individuals and hospitals, physicians, and other providers of services and suppliers to such individuals. Fair price eligible individuals include individuals: (1) enrolled under the Medicare Part D program[1416] or a Medicare Advantage Prescription Drug plan under the Medicare Part C program[1417]; (2) enrolled under a group health plan or health insurance coverage offered in the group or individual market,[1418] if an agreement is in place with

[1414] Sec. 6416(a).

[1415] Sec. 4131.

[1416] Part D of title XVIII of the Social Security Act.

[1417] Part C of title XVIII of the Social Security Act.

[1418] See sec. 2791 of the PHSA, 42 U.S.C. sec. 300gg-91.

respect to such plan or coverage;[1419] or (3) entitled to benefits under the Medicare Part A program[1420] or enrolled under the Medicare Part B program.[1421]

For years after the initial plan applicability year, the MFP is indexed to inflation by reference to the consumer price index. The MFP of a selected drug generally cannot exceed 120 percent of the average international market price ("AIM price"), an average price determined by reference to the price of the drug in Australia, Canada, France, Germany, Japan, and the United Kingdom for the year. For drugs without an AIM price, the MFP cannot exceed 85 percent of the average manufacturer price for the year.[1422] The manufacturer is subject to the MFP limitations with respect to a drug until the end of the last year during which the drug is a selected drug.

The provision also establishes rules for the renegotiation of MFPs, for information sharing between manufacturers and HHS, and for repayments to Treasury in a case where a selected drug for which an AIM price is not initially available becomes available in a subsequent year.

Selected Drug Excise Tax

The provision creates a new manufacturers excise tax under Chapter 32. The tax is imposed on all sales by a manufacturer, producer, or importer of a selected drug on a day during a noncompliance period. A day is during a noncompliance period if it occurs:

1. After the June 15 date on which the manufacturer must enter into negotiations with HHS if the manufacturer has not entered into negotiations by such date;
2. After the March 31 end of the voluntary negotiation period if the manufacturer has not agreed to an MFP by such date;
3. After the last date of a renegotiation period, if the HHS Secretary has specified a renegotiation period and the manufacturer has not agreed to a renegotiated MFP;
4. Beginning on the date on which HHS has certified that information required to be submitted by the manufacturer has not been submitted and is overdue; or

[1419] Individuals enrolled in snch plans or coverage are fair price eligible individuals only if an agreement is in place with respect to such plan or coverage. The provision modifies the group health plan requirements to account for this treatment. These modifications are codified at Part A of title XXVII of the PHSA, Subpart B of part 7 of subtitle B of title I of the Employee Retirement Income Security Act of 1974, and subchapter B of chapter 100 of the Code.

[1420] Part A of title XVIII of the Social Security Act.

[1421] Part B of title XVIII of the Social Security Act.

[1422] See 42 U.S.C 1396-48(k)(1)(A).

5. Beginning on the date which HHS has certified that a repayment is due to Treasury, relating to a case where a drug for which an AIM price is not initially available has become available in a subsequent year, is overdue.

The amount of the tax is such that the applicable percentage is equal to the ratio of such tax divided by the sum of such tax and the price for which the selected drug is sold. Or, in other words:

$$applicable\ percentage = \frac{tax}{tax+price}$$

Thus, the base on which the tax is imposed is tax inclusive. The applicable percentage is initially 65 percent. It is increased by 10 percentage points after each 90 days in a noncompliance period. The applicable percentage is capped at 95 percent. For purposes of determining the increase in the applicable percentage, days in the noncompliance period are cumulative whether or not the days are consecutive.

The Secretary of the Treasury has authority under an anti-abuse rule to treat sales as occurring during a day in a noncompliance period if the manufacturer times such sales specifically for purposes of avoiding the excise tax. Finally, under section 275, manufacturers are prohibited from deducting the excise tax payments against their income taxes.

The following example illustrates the application of the excise tax: Manufacturer A produces drug A, which HHS selects and publishes as a selected drug on April 15 of a plan year, effective with respect to an initial plan applicability year two years later. Manufacturer A fails to enter into negotiations with HHS with respect to drug A by June 15 of the year in which the drug is chosen. Its sales on June 16 are sales during a noncompliance period, and are subject to the excise tax.

Assume that, prior to imposition of the excise tax, Manufacturer A charged $100 for drug A. If, after imposition of the excise tax, Manufacturer A charges $100 and does not separately state a tax, the price is deemed to be $35, and Manufacturer A owes $65 in tax.[1423] Alternatively, Manufacturer A could separately state a price of $100 and a tax of $186, in which case it would owe $186 in tax.[1424]

Assume Manufacturer A enters into negotiations with HHS on June 21. For purposes of determining the applicable percentage, Manufacturer A has had five days in a noncompliance period. If, on the following March 31, Manufacturer A has not agreed to an MFP, for purposes of determining the applicable percentage, April 1 would be the sixth day in a noncompliance period.

[1423] In other words, $65/($65+$35) equals 65 percent. Because Manufacturer A did not state a separate charge as tax, it is presumed that the price charged includes the excise tax. Treas. Reg. sec. 48.4216(a)-2(a)(1).

[1424] In other words, $186/($186+$100) equals 65 percent.

Effective Date

The excise tax is effective for sales after the date of enactment of the provision.

***3.* Fair Price Negotiation Implementation Fund (sec. 139003 of the bill)**

Present Law

No provision.

Explanation of Provision

This provision invests $3,000,000,000 into implementation of prescription drug negotiation.

B. SUBTITLE J, PART 2 – PRESCRIPTION DRUG INFLATION REBATES

Present Law

The Medicare program pays for certain covered outpatient drugs and biologics under Medicare Part B, which covers physician, outpatient, and some home health and preventive services, rather than under the Medicare Part D retail prescription drug benefit. Part B-covered drugs include: (1) those administered "incident to physician services" where providers purchase "separately payable" drugs and bill Medicare after administering the products to patients; and (2) those that are not separately payable, but are covered under Part B as part of a procedure or treatment, such as end-stage renal disease dialysis, certain vaccines, and new drugs included in the outpatient hospital new technology transitional pass-through payments.

Plan sponsors submit annual bids to CMS to offer Part D benefits in set regions of the country. Part D sponsors, and the pharmacy benefit managers (PBMs) they own or contract with, seek to control costs, in part, by negotiating price concessions with manufacturers. Part D manufacturer price concessions primarily take the form of rebates (price reductions after the point of sale) from a list price for a brand-name drug. Drug manufacturers are not required to participate in Part D and are not required to provide rebates. However, manufacturers that choose to participate in Part D must provide a 70 percent manufacturer discount on brand-name drugs, biologics, and biosimilars purchased by Part D enrollees in the coverage gap.

Explanation of the Provision

1. Medicare Part B Rebate by Manufacturers (sec. 139101 of the bill).

Present Law

With some exceptions, Part B payment for separately payable drugs or biologics is based on a product's average sales price (ASP) plus a 6 percent add-on payment. The ASP is a market price that excludes manufacturer price concessions, government sales, and other adjustments. Each drug's ASP is based on a manufacturer's quarterly sales of a drug to most U.S. purchasers,

divided by the total units of the drug sold to those purchasers in the quarter. To encourage the development of lower-priced biosimilar substitutes for biological products, the Part B payment rate for biosimilars is the ASP of the biosimilar plus an add-on payment equal to 6 percent of the ASP of the more expensive, reference biological. For most Part B services, Medicare beneficiaries are responsible for coinsurance of 20 percent of the cost of the item or service. For Part B drugs, the 20 percent coinsurance is based on a drug's ASP plus the 6 percent add-on payment.

The HHS Secretary sets Part B drug payments by aggregating ASP data for individual drugs into Medicare billing codes. A billing code payment amount is the volume-weighted average of the ASPs for all drugs grouped into the code. Generally, there is one drug in a billing code for biological, biosimilar and single source brand name products. In the case of multiple source drugs, brand-name and generic products can be grouped within a billing code.

Drug manufacturers are not required to pay rebates to Medicare as a condition for having their drugs covered under Part B.

Explanation of Provision

This provision establishes a mandatory rebate for drug manufacturers for certain Medicare Part B drugs with prices increasing faster than inflation beginning on July 1, 2023. Under this provision, the Secretary of HHS shall calculate a rebate amount based on the total number of units with respect to a Part B rebatable drug, including for the Medicare program and the commercial market, and determine the inflation-adjusted payment amount based on the percentage by which the price exceeded the inflation benchmark. Should a manufacturer not pay the mandated rebate, the manufacturer shall be subject to a civil monetary penalty equal to or at least 125 percent of the rebate amount for such calendar quarter.

2. Medicare part D rebate by manufacturers (sec. 139102 of the bill).

Present Law

More generally, pharmaceutical manufacturers are required to report certain price information to HHS for purposes of federal health care program administration. One such reporting requirement is data used to compile a price measure for the Medicaid program, known as the Average Manufacturer Price (AMP). The AMP, defined at Section 1927(k)(1) of the Social Security Act, is the average price a manufacturer receives in the United States for sales to wholesalers that supply retail community pharmacies and for sales directly to retail community pharmacies. The AMP does not include manufacturer rebates or discounts to PBMs and health plans, certain manufacturer prompt pay discounts, sales to other government programs, and consumer coupons. Certain other types of sales are exempt for purposes of calculating the AMP.

Explanation of Provision

This provision establishes a mandatory rebate for drug manufacturers for certain Medicare Part D drugs with prices increasing faster than inflation beginning in 2023. Under this provision, the Secretary shall calculate a rebate amount based on the total number of units with respect to a Part D rebatable drug, including for the Medicare program and the commercial market, and

determine the inflation-adjusted payment amount based on the percentage by which the price exceeded the inflation benchmark. Should a manufacturer not pay the mandated rebate, the manufacturer shall be subject to a civil monetary penalty equal to or at least 125 percent of the rebate amount for such calendar quarter.

C. Subtitle J, Part 3 – Part D Improvements and Maximum Out-of-pocket Cap for Medicare Beneficiaries

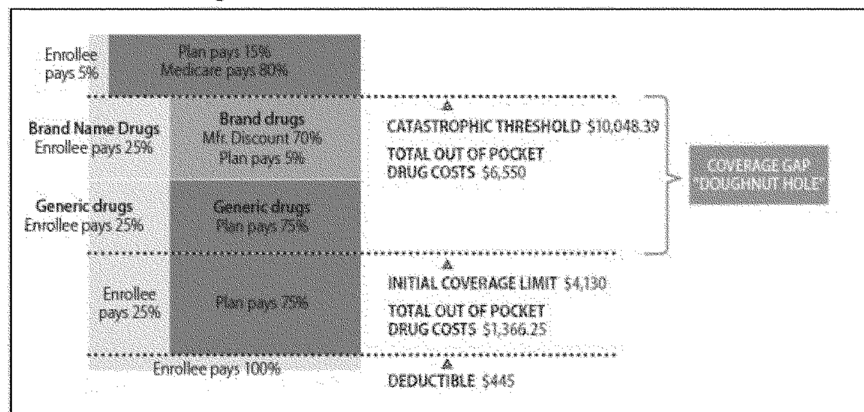
Present Law

Medicare Part D provides a voluntary, outpatient prescription drug benefit for Medicare beneficiaries and is the primary source of drug coverage for dually eligible individuals covered by both the Medicare and Medicaid programs. Part D coverage is provided by private insurers, or plan sponsors, that submit annual bids for either drug-only plans or Part C Medicare Advantage plans that include a Part D benefit. Congress designed Part D as a market-oriented program in which sponsors compete for enrollees based on plan premiums and scope of benefits, including cost-sharing requirements. Private drug plans participating in Part D bear some financial risk, although federal subsidies cover most program costs in an effort to encourage participation and keep benefits affordable. Part D plans are offered on a calendar year basis and enrollees may change plans during an annual enrollment period.

At a minimum, Part D sponsors must offer plans with "standard" benefits as defined in law. Plan sponsors may also offer alternative or enhanced coverage that is at least actuarially equivalent to a standard plan. Medicare provides subsidies to plan sponsors for each enrollee in a Part D plan that, on average, equal 74.5 percent of the value of standard coverage. Part D subsidies include direct subsidies, under which Medicare pays drug plans a risk-adjusted per enrollee payment and reinsurance under which Medicare subsidizes 80 percent of a plan's drug spending above a catastrophic threshold. Medicare covers a greater portion of costs for low-income individuals through the low-income subsidy (LIS), which varies by specified income and assets thresholds.

In 2021 under the Part D standard benefit, an enrollee first pays a deductible ($445). After the deductible has been met, the enrollee is responsible for 25 percent of the cost of prescription drugs (with the plan covering the remaining 75 percent) up to the initial coverage limit ($4,130). (See **Figure 1**.)

Figure 1. 2021 Medicare Part D Standard Benefit



Source: Figure based on data from CMS, "Announcement of Calendar Year (CY) 2021 Medicare Advantage Capitation Rates and Medicare Advantage and Part D Payment Policies and Final Call Letter," Attachments IV and V, https://www.cms.gov/files/document/2021-announcement.pdf.

Notes: Beneficiaries with out-of-pocket drug spending above the catastrophic threshold pay the greater of a $3.70 co-payment for generic drugs and a $9.20 co-payment for brand-name drugs or 5 percent cost sharing in 2021. LIS beneficiaries pay less out of pocket than other beneficiaries. For example, full-benefit dual eligibles pay no deductible, have minimal cost sharing in the coverage gap, and no cost sharing above the catastrophic threshold. Mfr. Discount means manufacturer discount.

After the initial coverage threshold has been reached, a beneficiary enters the coverage gap or "doughnut hole." Manufacturers that choose to sell their drugs through the Part D program are required to participate in the coverage gap discount program, which provides a 70 percent discount for brand-name, biologic, and biosimilar drugs purchased by non-LIS enrollees in the doughnut hole. Enrollees count the coverage gap discount as part of their own out-of-pocket spending. Enrollees exit the doughnut hole if they reach the catastrophic threshold, which is set at $6,550 in total out-of-pocket spending in 2021 (for those not receiving the LIS). Enrollees above the catastrophic threshold have a maximum 5 percent coinsurance.

The dollar level of beneficiary cost sharing for Part D drugs dispensed by network pharmacies in a standard plan is based on each Part D plan sponsor's negotiated price for a drug (for example, 25 percent coinsurance on a drug with a $100 negotiated price).[1425]

Explanation of the Bill

1. Medicare part D benefit redesign (sec. 139201 of the bill).

Present Law

There is no annual cap on Part D enrollee prescription out-of-pocket spending, with the exception of LIS beneficiaries with the lowest income and assets who have no cost-sharing once they reach the catastrophic threshold. Part D coverage parameters based on dollar amounts are

[1425] As defined at 42 C.F.R. §423.100.

generally updated each plan year based on changes in average per-capita spending for covered Part D drugs during the 12-month period ending in July of the previous year. In addition, Part D enrollees pay monthly premiums, which are based on a rate equal to 25.5 percent of the annual nationwide average of plan bids for standard benefits; however, actual premiums vary widely by the plan selected.

Explanation of Provision

This provision caps the costs for prescription drugs by setting the annual out-of-pocket limit at $2,000 beginning in 2024. The section reduces from 80 percent to 20 percent the government reinsurance in the catastrophic phase of Part D coverage, converting the current coverage gap discount program into a benefit-wide responsibility, requiring manufacturers of single source drugs to contribute to payments in both the initial (10 percent) and catastrophic phases (30 percent) of the benefit.

2. Allowing certain enrollees of prescription drug plans and MA–PD plans under Medicare program to spread out cost-sharing under certain circumstances (sec. 139202 of the bill).

Present Law

Under both current law and H.R. 3, Part D sponsors may offer the standard benefit with 25 percent cost sharing, or alterative and enhanced plans that can include tiered cost-sharing: a system in which enrollees have lower cost sharing for inexpensive generic drugs and higher cost sharing for non-preferred or more expensive drugs (such as 33 percent coinsurance for "specialty" drugs). The overall benefit under alternative and enhanced plans must be at least as generous as the standard benefit. According to the Medicare Payment Advisory Commission (MedPAC), in 2021, nearly all Part D enrollees are in plans with tiered pricing systems that set higher cost-sharing for specialty and non-preferred drugs. MedPAC data also show a growing share of non-LIS enrollees are incurring out-of-pocket costs sufficient to reach the catastrophic threshold, due mainly to rising prices. (LIS enrollees under current law and H.R. 3 have low set cost-sharing.) High-cost enrollees can face thousands of dollars in out-of-pocket spending to fill a single prescription, depending on the drug being used.

Explanation of Provision

The provision allows eligible beneficiaries who meet the out-of-pocket cap in a single prescription fill to pay for such costs in installments throughout the year, known as "smoothing."

D. SUBTITLE J, PART 4 – REPEAL OF CERTAIN PRESCRIPTION DRUG REBATE RULE

Present Law

The federal anti-kickback statute makes it a felony for a person to knowingly and willfully offer, pay, solicit, or receive anything of value (i.e., "remuneration") in return for a referral or to induce generation of business reimbursable under a federal health care program. There are certain statutory exceptions to the anti-kickback statute. In addition, the HHS Office of Inspector General (OIG) has promulgated regulations that contain several "safe harbors" to

prevent common business arrangements from being considered kickbacks, including safe harbors for arrangements that include discounts or other price concessions that meet specified criteria.

Explanation of the Bill

1. Prohibiting implementation of rule relating to eliminating the anti-kickback statute safe harbor protection for prescription drug rebates (sec. 139301 of the bill).

Present Law

In November 2020, the HHS OIG published a final rule that would, among other things, alter an anti-kickback regulatory safe harbor to restrict the use of manufacturer rebates to Part D plans. The rule would also create two new safe harbor protections, one for negotiated point-of-sale price reductions passed on at the pharmacy, and one for certain PBM fees paid by manufacturers. HHS OIG said the rule was intended, among other things, to increase price transparency. Implementation of the rule would be delayed until 2026 as part of H.R. 3684, the Infrastructure Investment and Jobs Act.

Explanation of Provision

This provision also prohibits the implementation after January 1, 2026, of the final rule entitled "Fraud and Abuse; Removal of Safe Harbor Protection for Rebates Involving Prescription Pharmaceuticals and Creation of New Safe Harbor Protection for Certain Point-of-Sale Reductions in Price on Prescription Pharmaceuticals and Certain Pharmacy Benefit Manager Services Fees" that was published by the Office of the Inspector General of HHS on November 30, 2020.

Effective Date

Part 1 is effective for each selected drug beginning in plan year 2025; Section 139101, Part 2, is effective for certain Medicare Part B drugs with prices increasing faster than inflation beginning on July 1, 2023; and Section 139102, Part 2, is effective for certain Medicare Part D drugs with prices increasing faster than inflation beginning in 2023; Section 139201, Part 3, is effective beginning in 2024; and Part 4 is effective after January 1, 2026.

VOTES OF THE COMMITTEE

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the following statement is made concerning the vote of the Committee on Ways and Means in its consideration of Subtitles F, G, H, J, and I, on September 14 and 15, 2021.

["2A_WMSubtitleFGHIJ_Vote_ Sheet_Insert"]

VOTES OF THE COMMITTEE

An amendment to the amendment in the nature of a substitute to the Committee Print which would strike the carveout from the college endowment anti-abuse tax was offered by Mr. Reed. The amendment was defeated by a vote of 17 yeas and 25 nays (with a quorum being present). The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
MR. DOGGETT		X		MR. BRADY	X		
MR. THOMPSON		X		MR. NUNES	X		
MR. LARSON		X		MR. BUCHANAN	X		
MR. BLUMENAUER		X		MR. SMITH (NE)	X		
MR. KIND		X		MR. REED	X		
MR. PASCRELL		X		MR. KELLY	X		
MR. DAVIS		X		MR. SMITH (MO)	X		
MS. SANCHEZ		X		MR. RICE	X		
MR. HIGGINS		X		MR. SCHWEIKERT	X		
MS. SEWELL		X		MS. WALORSKI	X		
MS. DELBENE		X		MR. LAHOOD			
MS. CHU		X		DR. WENSTRUP	X		
MS. MOORE		X		MR. ARRINGTON	X		
MR. KILDEE		X		DR. FERGUSON	X		
MR. BOYLE		X		MR. ESTES	X		
MR. BEYER		X		MR. SMUCKER	X		
MR. EVANS		X		MR. HERN	X		
MR. SCHNEIDER		X		MS. MILLER	X		
MR. SUOZZI		X					
MR. PANETTA		X					
MS. MURPHY		X					
MR. GOMEZ		X					
MR. HORSFORD		X					
MS. PLASKETT		X					
CHAIRMAN NEAL		X					
TOTALS		25		**TOTALS**	17		

An amendment to the amendment in the nature of a substitute to the Committee Print which would strike the green energy tax subsidies was offered by Mr. Estes. The amendment was defeated by a vote of 17 yeas and 25 nays (with a quorum being present). The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
MR. DOGGETT		X		MR. BRADY	X		
MR. THOMPSON		X		MR. NUNES	X		
MR. LARSON		X		MR. BUCHANAN	X		
MR. BLUMENAUER		X		MR. SMITH (NE)	X		
MR. KIND		X		MR. REED	X		
MR. PASCRELL		X		MR. KELLY	X		
MR. DAVIS		X		MR. SMITH (MO)	X		
MS. SANCHEZ		X		MR. RICE	X		
MR. HIGGINS		X		MR. SCHWEIKERT	X		
MS. SEWELL		X		MS. WALORSKI	X		
MS. DELBENE		X		MR. LAHOOD			
MS. CHU		X		DR. WENSTRUP	X		
MS. MOORE		X		MR. ARRINGTON	X		
MR. KILDEE		X		DR. FERGUSON	X		
MR. BOYLE		X		MR. ESTES	X		
MR. BEYER		X		MR. SMUCKER	X		
MR. EVANS		X		MR. HERN	X		
MR. SCHNEIDER		X		MS. MILLER	X		
MR. SUOZZI		X					
MR. PANETTA		X					
MS. MURPHY		X					
MR. GOMEZ		X					
MR. HORSFORD		X					
MS. PLASKETT		X					
CHAIRMAN NEAL		X					
TOTALS		25		**TOTALS**	17		

An amendment to the amendment in the nature of a substitute to the Committee Print which would eliminate the direct pay option for green subsidies for any big business with income over $5 million was offered by Mr. Rice. The amendment was defeated by a vote of 16 yeas and 25 nays (with a quorum being present). The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
MR. DOGGETT		X		MR. BRADY	X		
MR. THOMPSON		X		MR. NUNES	X		
MR. LARSON		X		MR. BUCHANAN	X		
MR. BLUMENAUER		X		MR. SMITH (NE)	X		
MR. KIND		X		MR. REED	X		
MR. PASCRELL		X		MR. KELLY	X		
MR. DAVIS		X		MR. SMITH (MO)	X		
MS. SANCHEZ		X		MR. RICE	X		
MR. HIGGINS		X		MR. SCHWEIKERT	X		
MS. SEWELL		X		MS. WALORSKI	X		
MS. DELBENE		X		MR. LAHOOD			
MS. CHU		X		DR. WENSTRUP	X		
MS. MOORE		X		MR. ARRINGTON			
MR. KILDEE		X		DR. FERGUSON	X		
MR. BOYLE		X		MR. ESTES	X		
MR. BEYER		X		MR. SMUCKER	X		
MR. EVANS		X		MR. HERN	X		
MR. SCHNEIDER		X		MS. MILLER	X		
MR. SUOZZI		X					
MR. PANETTA		X					
MS. MURPHY		X					
MR. GOMEZ		X					
MR. HORSFORD		X					
MS. PLASKETT		X					
CHAIRMAN NEAL		X					
TOTALS		25		**TOTALS**	16		

An amendment to the amendment in the nature of a substitute to the Committee Print which would reduce the maximum income threshold for EV tax credits from $800,000 to $150,000 ($75,000 for single filers) was offered by Dr. Ferguson. The amendment was defeated by a vote of 17 yeas and 25 nays (with a quorum being present). The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
MR. DOGGETT		X		MR. BRADY	X		
MR. THOMPSON		X		MR. NUNES	X		
MR. LARSON		X		MR. BUCHANAN	X		
MR. BLUMENAUER		X		MR. SMITH (NE)	X		
MR. KIND		X		MR. REED	X		
MR. PASCRELL		X		MR. KELLY	X		
MR. DAVIS		X		MR. SMITH (MO)	X		
MS. SANCHEZ		X		MR. RICE	X		
MR. HIGGINS		X		MR. SCHWEIKERT	X		
MS. SEWELL		X		MS. WALORSKI	X		
MS. DELBENE		X		MR. LAHOOD			
MS. CHU		X		DR. WENSTRUP	X		
MS. MOORE		X		MR. ARRINGTON	X		
MR. KILDEE		X		DR. FERGUSON	X		
MR. BOYLE		X		MR. ESTES	X		
MR. BEYER		X		MR. SMUCKER	X		
MR. EVANS		X		MR. HERN	X		
MR. SCHNEIDER		X		MS. MILLER	X		
MR. SUOZZI		X					
MR. PANETTA		X					
MS. MURPHY		X					
MR. GOMEZ		X					
MR. HORSFORD		X					
MS. PLASKETT		X					
CHAIRMAN NEAL		X					
TOTALS		25		**TOTALS**	17		

An amendment to the amendment in the nature of a substitute to the Committee Print which would eliminate eligibility for commercial EV tax credits for any big business with income over $5 million was offered by Mr. Smith of Missouri. The amendment was defeated by a vote of 17 yeas and 25 nays (with a quorum being present). The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
MR. DOGGETT		X		MR. BRADY	X		
MR. THOMPSON		X		MR. NUNES	X		
MR. LARSON		X		MR. BUCHANAN	X		
MR. BLUMENAUER		X		MR. SMITH (NE)	X		
MR. KIND		X		MR. REED	X		
MR. PASCRELL		X		MR. KELLY	X		
MR. DAVIS		X		MR. SMITH (MO)	X		
MS. SANCHEZ		X		MR. RICE	X		
MR. HIGGINS		X		MR. SCHWEIKERT	X		
MS. SEWELL		X		MS. WALORSKI	X		
MS. DELBENE		X		MR. LAHOOD			
MS. CHU		X		DR. WENSTRUP	X		
MS. MOORE		X		MR. ARRINGTON	X		
MR. KILDEE		X		DR. FERGUSON	X		
MR. BOYLE		X		MR. ESTES	X		
MR. BEYER		X		MR. SMUCKER	X		
MR. EVANS		X		MR. HERN	X		
MR. SCHNEIDER		X		MS. MILLER	X		
MR. SUOZZI		X					
MR. PANETTA		X					
MS. MURPHY		X					
MR. GOMEZ		X					
MR. HORSFORD		X					
MS. PLASKETT		X					
CHAIRMAN NEAL		X					
TOTALS		25		**TOTALS**	17		

An amendment to the amendment in the nature of a substitute to the Committee Print which would require regulations to ensure that individuals earning less than $400,000 will not be impacted by the tobacco tax under the section was offered by Dr. Ferguson. The amendment was defeated by a vote of 18 yeas and 24 nays (with a quorum being present). The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
MR. DOGGETT		X		MR. BRADY	X		
MR. THOMPSON		X		MR. NUNES	X		
MR. LARSON		X		MR. BUCHANAN	X		
MR. BLUMENAUER		X		MR. SMITH (NE)	X		
MR. KIND		X		MR. REED	X		
MR. PASCRELL		X		MR. KELLY	X		
MR. DAVIS		X		MR. SMITH (MO)	X		
MS. SANCHEZ		X		MR. RICE	X		
MR. HIGGINS		X		MR. SCHWEIKERT	X		
MS. SEWELL		X		MS. WALORSKI	X		
MS. DELBENE		X		MR. LAHOOD	X		
MS. CHU		X		DR. WENSTRUP	X		
MS. MOORE		X		MR. ARRINGTON	X		
MR. KILDEE		X		DR. FERGUSON	X		
MR. BOYLE		X		MR. ESTES	X		
MR. BEYER		X		MR. SMUCKER	X		
MR. EVANS		X		MR. HERN	X		
MR. SCHNEIDER		X		MS. MILLER	X		
MR. SUOZZI		X					
MR. PANETTA		X					
MS. MURPHY		X					
MR. GOMEZ		X					
MR. HORSFORD							
MS. PLASKETT		X					
CHAIRMAN NEAL		X					
TOTALS		24		**TOTALS**	18		

An amendment to the amendment in the nature of a substitute to the Committee Print which would suspend the Superfund excise taxes when gas prices exceed $3.00 and when inflation exceeds 2.5%. was offered by Ms. Miller. The amendment was defeated by a vote of 18 yeas and 25 nays (with a quorum being present). The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
MR. DOGGETT		X		MR. BRADY	X		
MR. THOMPSON		X		MR. NUNES	X		
MR. LARSON		X		MR. BUCHANAN	X		
MR. BLUMENAUER		X		MR. SMITH (NE)	X		
MR. KIND		X		MR. REED	X		
MR. PASCRELL		X		MR. KELLY	X		
MR. DAVIS		X		MR. SMITH (MO)	X		
MS. SANCHEZ		X		MR. RICE	X		
MR. HIGGINS		X		MR. SCHWEIKERT	X		
MS. SEWELL		X		MS. WALORSKI	X		
MS. DELBENE		X		MR. LAHOOD	X		
MS. CHU		X		DR. WENSTRUP	X		
MS. MOORE		X		MR. ARRINGTON	X		
MR. KILDEE		X		DR. FERGUSON	X		
MR. BOYLE		X		MR. ESTES	X		
MR. BEYER		X		MR. SMUCKER	X		
MR. EVANS		X		MR. HERN	X		
MR. SCHNEIDER		X		MS. MILLER	X		
MR. SUOZZI		X					
MR. PANETTA		X					
MS. MURPHY		X					
MR. GOMEZ		X					
MR. HORSFORD		X					
MS. PLASKETT		X					
CHAIRMAN NEAL		X					
TOTALS		25		**TOTALS**	18		

An amendment to the amendment in the nature of a substitute to the Committee Print which would delay the effective date of Subtitles F-J until the inflation rate has been at or below 2.5% for 12 consecutive months was offered by Ms. Hern. The amendment was defeated by a vote of 18 yeas and 25 nays (with a quorum being present). The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
MR. DOGGETT		X		MR. BRADY	X		
MR. THOMPSON		X		MR. NUNES	X		
MR. LARSON		X		MR. BUCHANAN	X		
MR. BLUMENAUER		X		MR. SMITH (NE)	X		
MR. KIND		X		MR. REED	X		
MR. PASCRELL		X		MR. KELLY	X		
MR. DAVIS		X		MR. SMITH (MO)	X		
MS. SANCHEZ		X		MR. RICE	X		
MR. HIGGINS		X		MR. SCHWEIKERT	X		
MS. SEWELL		X		MS. WALORSKI	X		
MS. DELBENE		X		MR. LAHOOD	X		
MS. CHU		X		DR. WENSTRUP	X		
MS. MOORE		X		MR. ARRINGTON	X		
MR. KILDEE		X		DR. FERGUSON	X		
MR. BOYLE		X		MR. ESTES	X		
MR. BEYER		X		MR. SMUCKER	X		
MR. EVANS		X		MR. HERN	X		
MR. SCHNEIDER		X		MS. MILLER	X		
MR. SUOZZI		X					
MR. PANETTA		X					
MS. MURPHY		X					
MR. GOMEZ		X					
MR. HORSFORD		X					
MS. PLASKETT		X					
CHAIRMAN NEAL		X					
TOTALS		25		**TOTALS**	18		

An amendment to the amendment in the nature of a substitute to the Committee Print which would delay the effective date of Subtitle I until the U.S. unemployment rate is lower than the pre-pandemic unemployment rate (in December 2019) for six consecutive months was offered by Mr. Smucker. The amendment was defeated by a vote of 18 yeas and 25 nays (with a quorum being present). The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
MR. DOGGETT		X		MR. BRADY	X		
MR. THOMPSON		X		MR. NUNES	X		
MR. LARSON		X		MR. BUCHANAN	X		
MR. BLUMENAUER		X		MR. SMITH (NE)	X		
MR. KIND		X		MR. REED	X		
MR. PASCRELL		X		MR. KELLY	X		
MR. DAVIS		X		MR. SMITH (MO)	X		
MS. SANCHEZ		X		MR. RICE	X		
MR. HIGGINS		X		MR. SCHWEIKERT	X		
MS. SEWELL		X		MS. WALORSKI	X		
MS. DELBENE		X		MR. LAHOOD	X		
MS. CHU		X		DR. WENSTRUP	X		
MS. MOORE		X		MR. ARRINGTON	X		
MR. KILDEE		X		DR. FERGUSON	X		
MR. BOYLE		X		MR. ESTES	X		
MR. BEYER		X		MR. SMUCKER	X		
MR. EVANS		X		MR. HERN	X		
MR. SCHNEIDER		X		MS. MILLER	X		
MR. SUOZZI		X					
MR. PANETTA		X					
MS. MURPHY		X					
MR. GOMEZ		X					
MR. HORSFORD		X					
MS. PLASKETT		X					
CHAIRMAN NEAL		X					
TOTALS		25		**TOTALS**	18		

An amendment to the amendment in the nature of a substitute to the Committee Print which would strike funding for the Internal Revenue Service and replace it with H.R. 5206, the Tax Gap Reform and IRS Enforcement Act, as well as authorize appropriations to fund implementation of the Taxpayer First Act was offered by Mr. Kelly. The amendment was defeated by a vote of 18 yeas and 25 nays (with a quorum being present). The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
MR. DOGGETT		X		MR. BRADY	X		
MR. THOMPSON		X		MR. NUNES	X		
MR. LARSON		X		MR. BUCHANAN	X		
MR. BLUMENAUER		X		MR. SMITH (NE)	X		
MR. KIND		X		MR. REED	X		
MR. PASCRELL		X		MR. KELLY	X		
MR. DAVIS		X		MR. SMITH (MO)	X		
MS. SANCHEZ		X		MR. RICE	X		
MR. HIGGINS		X		MR. SCHWEIKERT	X		
MS. SEWELL		X		MS. WALORSKI	X		
MS. DELBENE		X		MR. LAHOOD	X		
MS. CHU		X		DR. WENSTRUP	X		
MS. MOORE		X		MR. ARRINGTON	X		
MR. KILDEE		X		DR. FERGUSON	X		
MR. BOYLE		X		MR. ESTES	X		
MR. BEYER		X		MR. SMUCKER	X		
MR. EVANS		X		MR. HERN	X		
MR. SCHNEIDER		X		MS. MILLER	X		
MR. SUOZZI		X					
MR. PANETTA		X					
MS. MURPHY		X					
MR. GOMEZ		X					
MR. HORSFORD		X					
MS. PLASKETT		X					
CHAIRMAN NEAL		X					
TOTALS		25		**TOTALS**	18		

An amendment to the amendment in the nature of a substitute to the Committee Print which would strike the Superfund excise taxes was offered by Mr. Arrington. The amendment was defeated by a vote of 18 yeas and 24 nays (with a quorum being present). The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
MR. DOGGETT		X		MR. BRADY	X		
MR. THOMPSON		X		MR. NUNES	X		
MR. LARSON		X		MR. BUCHANAN	X		
MR. BLUMENAUER		X		MR. SMITH (NE)	X		
MR. KIND		X		MR. REED	X		
MR. PASCRELL		X		MR. KELLY	X		
MR. DAVIS		X		MR. SMITH (MO)	X		
MS. SANCHEZ		X		MR. RICE	X		
MR. HIGGINS		X		MR. SCHWEIKERT	X		
MS. SEWELL		X		MS. WALORSKI	X		
MS. DELBENE		X		MR. LAHOOD	X		
MS. CHU		X		DR. WENSTRUP	X		
MS. MOORE		X		MR. ARRINGTON	X		
MR. KILDEE		X		DR. FERGUSON	X		
MR. BOYLE		X		MR. ESTES	X		
MR. BEYER				MR. SMUCKER	X		
MR. EVANS		X		MR. HERN	X		
MR. SCHNEIDER		X		MS. MILLER	X		
MR. SUOZZI		X					
MR. PANETTA		X					
MS. MURPHY		X					
MR. GOMEZ		X					
MR. HORSFORD		X					
MS. PLASKETT		X					
CHAIRMAN NEAL		X					
TOTALS		24		**TOTALS**	18		

An amendment to the amendment in the nature of a substitute to the Committee Print which would make permanent the SALT deduction cap for millionaires and extend the increased standard deduction under the Tax Cuts and Jobs Act was offered by Mr. Rice. The amendment was defeated by a vote of 18 yeas and 24 nays (with a quorum being present). The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
MR. DOGGETT				MR. BRADY	X		
MR. THOMPSON		X		MR. NUNES	X		
MR. LARSON		X		MR. BUCHANAN	X		
MR. BLUMENAUER		X		MR. SMITH (NE)	X		
MR. KIND		X		MR. REED	X		
MR. PASCRELL		X		MR. KELLY	X		
MR. DAVIS		X		MR. SMITH (MO)	X		
MS. SANCHEZ		X		MR. RICE	X		
MR. HIGGINS		X		MR. SCHWEIKERT	X		
MS. SEWELL		X		MS. WALORSKI	X		
MS. DELBENE		X		MR. LAHOOD	X		
MS. CHU		X		DR. WENSTRUP	X		
MS. MOORE		X		MR. ARRINGTON	X		
MR. KILDEE		X		DR. FERGUSON	X		
MR. BOYLE		X		MR. ESTES	X		
MR. BEYER		X		MR. SMUCKER	X		
MR. EVANS		X		MR. HERN	X		
MR. SCHNEIDER		X		MS. MILLER	X		
MR. SUOZZI		X					
MR. PANETTA		X					
MS. MURPHY		X					
MR. GOMEZ		X					
MR. HORSFORD		X					
MS. PLASKETT		X					
CHAIRMAN NEAL		X					
TOTALS		24		**TOTALS**	18		

An amendment to the amendment in the nature of a substitute to the Committee Print which would make permanent the SALT deduction cap for millionaires and increase funding for cancer research was offered by Mr. Smith of Nebraska. The amendment was defeated by a vote of 18 yeas and 24 nays (with a quorum being present). The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
MR. DOGGETT				MR. BRADY	X		
MR. THOMPSON		X		MR. NUNES	X		
MR. LARSON		X		MR. BUCHANAN	X		
MR. BLUMENAUER		X		MR. SMITH (NE)	X		
MR. KIND		X		MR. REED	X		
MR. PASCRELL		X		MR. KELLY	X		
MR. DAVIS		X		MR. SMITH (MO)	X		
MS. SANCHEZ		X		MR. RICE	X		
MR. HIGGINS		X		MR. SCHWEIKERT	X		
MS. SEWELL		X		MS. WALORSKI	X		
MS. DELBENE		X		MR. LAHOOD	X		
MS. CHU		X		DR. WENSTRUP	X		
MS. MOORE		X		MR. ARRINGTON	X		
MR. KILDEE		X		DR. FERGUSON	X		
MR. BOYLE		X		MR. ESTES	X		
MR. BEYER		X		MR. SMUCKER	X		
MR. EVANS		X		MR. HERN	X		
MR. SCHNEIDER		X		MS. MILLER	X		
MR. SUOZZI		X					
MR. PANETTA		X					
MS. MURPHY		X					
MR. GOMEZ		X					
MR. HORSFORD		X					
MS. PLASKETT		X					
CHAIRMAN NEAL		X					
TOTALS		24		**TOTALS**	18		

An amendment to the amendment in the nature of a substitute to the Committee Print which expresses the sense of Congress that no tax provisions be added to the text after being reported out of the Committee on Ways and Means was offered by Mr. Arrington. The amendment was defeated by a vote of 17 yeas and 25 nays (with a quorum being present). The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
MR. DOGGETT		X		MR. BRADY	X		
MR. THOMPSON		X		MR. NUNES	X		
MR. LARSON		X		MR. BUCHANAN	X		
MR. BLUMENAUER		X		MR. SMITH (NE)	X		
MR. KIND		X		MR. REED	X		
MR. PASCRELL		X		MR. KELLY	X		
MR. DAVIS		X		MR. SMITH (MO)	X		
MS. SANCHEZ		X		MR. RICE			
MR. HIGGINS		X		MR. SCHWEIKERT	X		
MS. SEWELL		X		MS. WALORSKI	X		
MS. DELBENE		X		MR. LAHOOD	X		
MS. CHU		X		DR. WENSTRUP	X		
MS. MOORE		X		MR. ARRINGTON	X		
MR. KILDEE		X		DR. FERGUSON	X		
MR. BOYLE		X		MR. ESTES	X		
MR. BEYER		X		MR. SMUCKER	X		
MR. EVANS		X		MR. HERN	X		
MR. SCHNEIDER		X		MS. MILLER	X		
MR. SUOZZI		X					
MR. PANETTA		X					
MS. MURPHY		X					
MR. GOMEZ		X					
MR. HORSFORD		X					
MS. PLASKETT		X					
CHAIRMAN NEAL		X					
TOTALS		25		**TOTALS**	17		

An amendment to the amendment in the nature of a substitute to the Committee Print which would limit the money spent on energy credits to individuals making less than $400,000 and corporations with less than $5 million in profits and instead provide certainty for providers and patients by codifying necessary bipartisan telehealth policies was offered by Mr. Schweikert. The amendment was defeated by a vote of 16 yeas and 25 nays (with a quorum being present). The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
MR. DOGGETT		X		MR. BRADY	X		
MR. THOMPSON		X		MR. NUNES	X		
MR. LARSON		X		MR. BUCHANAN	X		
MR. BLUMENAUER		X		MR. SMITH (NE)	X		
MR. KIND		X		MR. REED	X		
MR. PASCRELL		X		MR. KELLY	X		
MR. DAVIS		X		MR. SMITH (MO)	X		
MS. SANCHEZ		X		MR. RICE			
MR. HIGGINS		X		MR. SCHWEIKERT	X		
MS. SEWELL		X		MS. WALORSKI	X		
MS. DELBENE		X		MR. LAHOOD	X		
MS. CHU		X		DR. WENSTRUP	X		
MS. MOORE		X		MR. ARRINGTON	X		
MR. KILDEE		X		DR. FERGUSON	X		
MR. BOYLE		X		MR. ESTES	X		
MR. BEYER		X		MR. SMUCKER	X		
MR. EVANS		X		MR. HERN	X		
MR. SCHNEIDER		X		MS. MILLER			
MR. SUOZZI		X					
MR. PANETTA		X					
MS. MURPHY		X					
MR. GOMEZ		X					
MR. HORSFORD		X					
MS. PLASKETT		X					
CHAIRMAN NEAL		X					
TOTALS		25		**TOTALS**	16		

An amendment to the amendment in the nature of a substitute to the Committee Print which would strike the new reinsurance program created in the amendment in the nature of a substitute and instead invest this money in cures and research at the National Institutes of Health (NIH) for diabetes, minority health and health disparities, maternal mortality and postpartum care, cancer, and Alzheimer's and other neurodegenerative diseases was offered by Mr. Estes. The amendment was defeated by a vote of 16 yeas and 25 nays (with a quorum being present). The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
MR. DOGGETT		X		MR. BRADY	X		
MR. THOMPSON		X		MR. NUNES	X		
MR. LARSON		X		MR. BUCHANAN	X		
MR. BLUMENAUER		X		MR. SMITH (NE)	X		
MR. KIND		X		MR. REED	X		
MR. PASCRELL		X		MR. KELLY	X		
MR. DAVIS		X		MR. SMITH (MO)	X		
MS. SANCHEZ		X		MR. RICE			
MR. HIGGINS		X		MR. SCHWEIKERT	X		
MS. SEWELL		X		MS. WALORSKI	X		
MS. DELBENE		X		MR. LAHOOD	X		
MS. CHU		X		DR. WENSTRUP	X		
MS. MOORE		X		MR. ARRINGTON	X		
MR. KILDEE		X		DR. FERGUSON	X		
MR. BOYLE		X		MR. ESTES	X		
MR. BEYER		X		MR. SMUCKER	X		
MR. EVANS		X		MR. HERN	X		
MR. SCHNEIDER		X		MS. MILLER			
MR. SUOZZI		X					
MR. PANETTA		X					
MS. MURPHY		X					
MR. GOMEZ		X					
MR. HORSFORD		X					
MS. PLASKETT		X					
CHAIRMAN NEAL		X					
TOTALS		25		**TOTALS**	16		

An amendment to the amendment in the nature of a substitute to the Committee Print which would exempt any drug used to treat or cure rare disease from price setting was offered by Mr. Hern. The amendment was defeated by a vote of 17 yeas and 25 nays (with a quorum being present). The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
MR. DOGGETT		X		MR. BRADY	X		
MR. THOMPSON		X		MR. NUNES	X		
MR. LARSON		X		MR. BUCHANAN	X		
MR. BLUMENAUER		X		MR. SMITH (NE)	X		
MR. KIND		X		MR. REED	X		
MR. PASCRELL		X		MR. KELLY	X		
MR. DAVIS		X		MR. SMITH (MO)	X		
MS. SANCHEZ		X		MR. RICE			
MR. HIGGINS		X		MR. SCHWEIKERT	X		
MS. SEWELL		X		MS. WALORSKI	X		
MS. DELBENE		X		MR. LAHOOD	X		
MS. CHU		X		DR. WENSTRUP	X		
MS. MOORE		X		MR. ARRINGTON	X		
MR. KILDEE		X		DR. FERGUSON	X		
MR. BOYLE		X		MR. ESTES	X		
MR. BEYER		X		MR. SMUCKER	X		
MR. EVANS		X		MR. HERN	X		
MR. SCHNEIDER		X		MS. MILLER	X		
MR. SUOZZI		X					
MR. PANETTA		X					
MS. MURPHY		X					
MR. GOMEZ		X					
MR. HORSFORD		X					
MS. PLASKETT		X					
CHAIRMAN NEAL		X					
TOTALS		25		**TOTALS**	17		

An amendment to the amendment in the nature of a substitute to the Committee Print which would prohibit the implementation of Subtitle J until the Secretary of Health and Human Services certifies to Congress that implementation would cause no reduction in access to medications that the Secretary has determined would mitigate racial health disparities was offered by Dr. Wenstrup. The amendment was defeated by a vote of 17 yeas and 25 nays (with a quorum being present). The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
MR. DOGGETT		X		MR. BRADY	X		
MR. THOMPSON		X		MR. NUNES	X		
MR. LARSON		X		MR. BUCHANAN	X		
MR. BLUMENAUER		X		MR. SMITH (NE)	X		
MR. KIND		X		MR. REED	X		
MR. PASCRELL		X		MR. KELLY	X		
MR. DAVIS		X		MR. SMITH (MO)	X		
MS. SANCHEZ		X		MR. RICE			
MR. HIGGINS		X		MR. SCHWEIKERT	X		
MS. SEWELL		X		MS. WALORSKI	X		
MS. DELBENE		X		MR. LAHOOD	X		
MS. CHU		X		DR. WENSTRUP	X		
MS. MOORE		X		MR. ARRINGTON	X		
MR. KILDEE		X		DR. FERGUSON	X		
MR. BOYLE		X		MR. ESTES	X		
MR. BEYER		X		MR. SMUCKER	X		
MR. EVANS		X		MR. HERN	X		
MR. SCHNEIDER		X		MS. MILLER	X		
MR. SUOZZI		X					
MR. PANETTA		X					
MS. MURPHY		X					
MR. GOMEZ		X					
MR. HORSFORD		X					
MS. PLASKETT		X					
CHAIRMAN NEAL		X					
TOTALS		25		**TOTALS**	17		

An amendment to the amendment in the nature of a substitute to the Committee Print which would prohibit the implementation of the drug pricing title until the Secretary of Health and Human Services certifies to Congress that none of the countries used to establish the International Market Price put a dollar value on a year of life was offered by Mr. Schweikert. The amendment was defeated by a vote of 17 yeas and 25 nays (with a quorum being present). The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
MR. DOGGETT		X		MR. BRADY	X		
MR. THOMPSON		X		MR. NUNES	X		
MR. LARSON		X		MR. BUCHANAN	X		
MR. BLUMENAUER		X		MR. SMITH (NE)	X		
MR. KIND		X		MR. REED	X		
MR. PASCRELL		X		MR. KELLY	X		
MR. DAVIS		X		MR. SMITH (MO)	X		
MS. SANCHEZ		X		MR. RICE			
MR. HIGGINS		X		MR. SCHWEIKERT	X		
MS. SEWELL		X		MS. WALORSKI	X		
MS. DELBENE		X		MR. LAHOOD	X		
MS. CHU		X		DR. WENSTRUP	X		
MS. MOORE		X		MR. ARRINGTON	X		
MR. KILDEE		X		DR. FERGUSON	X		
MR. BOYLE		X		MR. ESTES	X		
MR. BEYER		X		MR. SMUCKER	X		
MR. EVANS		X		MR. HERN	X		
MR. SCHNEIDER		X		MS. MILLER	X		
MR. SUOZZI		X					
MR. PANETTA		X					
MS. MURPHY		X					
MR. GOMEZ		X					
MR. HORSFORD		X					
MS. PLASKETT		X					
CHAIRMAN NEAL		X					
TOTALS		25		**TOTALS**	17		

An amendment to the amendment in the nature of a substitute to the Committee Print which would strike the drug pricing provisions in Subtitle J from the bill was offered by Mr. Brady. The amendment was defeated by a vote of 17 yeas and 25 nays (with a quorum being present). The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
MR. DOGGETT		X		MR. BRADY	X		
MR. THOMPSON		X		MR. NUNES	X		
MR. LARSON		X		MR. BUCHANAN	X		
MR. BLUMENAUER		X		MR. SMITH (NE)	X		
MR. KIND		X		MR. REED	X		
MR. PASCRELL		X		MR. KELLY	X		
MR. DAVIS		X		MR. SMITH (MO)	X		
MS. SANCHEZ		X		MR. RICE			
MR. HIGGINS		X		MR. SCHWEIKERT	X		
MS. SEWELL		X		MS. WALORSKI	X		
MS. DELBENE		X		MR. LAHOOD	X		
MS. CHU		X		DR. WENSTRUP	X		
MS. MOORE		X		MR. ARRINGTON	X		
MR. KILDEE		X		DR. FERGUSON	X		
MR. BOYLE		X		MR. ESTES	X		
MR. BEYER		X		MR. SMUCKER	X		
MR. EVANS		X		MR. HERN	X		
MR. SCHNEIDER		X		MS. MILLER	X		
MR. SUOZZI		X					
MR. PANETTA		X					
MS. MURPHY		X					
MR. GOMEZ		X					
MR. HORSFORD		X					
MS. PLASKETT		X					
CHAIRMAN NEAL		X					
TOTALS		25		**TOTALS**	17		

An amendment to the amendment in the nature of a substitute to the Committee Print which would strike the new universal entitlement and expansions created under the amendment in the nature of a substitute and replace them with more tailored policies to lower health care costs and improve coverage options for Americans was offered by Mr. Brady. The amendment was defeated by a vote of 17 yeas and 24 nays (with a quorum being present). The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
MR. DOGGETT		X		MR. BRADY	X		
MR. THOMPSON		X		MR. NUNES	X		
MR. LARSON		X		MR. BUCHANAN	X		
MR. BLUMENAUER		X		MR. SMITH (NE)	X		
MR. KIND				MR. REED	X		
MR. PASCRELL		X		MR. KELLY	X		
MR. DAVIS		X		MR. SMITH (MO)	X		
MS. SANCHEZ		X		MR. RICE			
MR. HIGGINS		X		MR. SCHWEIKERT	X		
MS. SEWELL		X		MS. WALORSKI	X		
MS. DELBENE		X		MR. LAHOOD	X		
MS. CHU		X		DR. WENSTRUP	X		
MS. MOORE		X		MR. ARRINGTON	X		
MR. KILDEE		X		DR. FERGUSON	X		
MR. BOYLE		X		MR. ESTES	X		
MR. BEYER		X		MR. SMUCKER	X		
MR. EVANS		X		MR. HERN	X		
MR. SCHNEIDER		X		MS. MILLER	X		
MR. SUOZZI		X					
MR. PANETTA		X					
MS. MURPHY		X					
MR. GOMEZ		X					
MR. HORSFORD		X					
MS. PLASKETT		X					
CHAIRMAN NEAL		X					
TOTALS		24		**TOTALS**	17		

An amendment to the amendment in the nature of a substitute to the Committee Print which would require that the corporate income tax rate be no higher than 21 percent was offered by Mr. Brady. The amendment was defeated by a vote of 18 yeas and 25 nays (with a quorum being present). The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
MR. DOGGETT		X		MR. BRADY	X		
MR. THOMPSON		X		MR. NUNES	X		
MR. LARSON		X		MR. BUCHANAN	X		
MR. BLUMENAUER		X		MR. SMITH (NE)	X		
MR. KIND		X		MR. REED	X		
MR. PASCRELL		X		MR. KELLY	X		
MR. DAVIS		X		MR. SMITH (MO)	X		
MS. SANCHEZ		X		MR. RICE	X		
MR. HIGGINS		X		MR. SCHWEIKERT	X		
MS. SEWELL		X		MS. WALORSKI	X		
MS. DELBENE		X		MR. LAHOOD	X		
MS. CHU		X		DR. WENSTRUP	X		
MS. MOORE		X		MR. ARRINGTON	X		
MR. KILDEE		X		DR. FERGUSON	X		
MR. BOYLE		X		MR. ESTES	X		
MR. BEYER		X		MR. SMUCKER	X		
MR. EVANS		X		MR. HERN	X		
MR. SCHNEIDER		X		MS. MILLER	X		
MR. SUOZZI		X					
MR. PANETTA		X					
MS. MURPHY		X					
MR. GOMEZ		X					
MR. HORSFORD		X					
MS. PLASKETT		X					
CHAIRMAN NEAL		X					
TOTALS		25		**TOTALS**	18		

An amendment to the amendment in the nature of a substitute to the Committee Print which would delay GILTI changes until China enacts a global minimum tax and would prohibit the GIL TI rate from increased to a rate than that in China was offered by Mr. Nunes. The amendment was defeated by a vote of 18 yeas and 25 nays (with a quorum being present). The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
MR. DOGGETT		X		MR. BRADY	X		
MR. THOMPSON		X		MR. NUNES	X		
MR. LARSON		X		MR. BUCHANAN	X		
MR. BLUMENAUER		X		MR. SMITH (NE)	X		
MR. KIND		X		MR. REED	X		
MR. PASCRELL		X		MR. KELLY	X		
MR. DAVIS		X		MR. SMITH (MO)	X		
MS. SANCHEZ		X		MR. RICE	X		
MR. HIGGINS		X		MR. SCHWEIKERT	X		
MS. SEWELL		X		MS. WALORSKI	X		
MS. DELBENE		X		MR. LAHOOD	X		
MS. CHU		X		DR. WENSTRUP	X		
MS. MOORE		X		MR. ARRINGTON	X		
MR. KILDEE		X		DR. FERGUSON	X		
MR. BOYLE		X		MR. ESTES	X		
MR. BEYER		X		MR. SMUCKER	X		
MR. EVANS		X		MR. HERN	X		
MR. SCHNEIDER		X		MS. MILLER	X		
MR. SUOZZI		X					
MR. PANETTA		X					
MS. MURPHY		X					
MR. GOMEZ		X					
MR. HORSFORD		X					
MS. PLASKETT		X					
CHAIRMAN NEAL		X					
TOTALS		25		**TOTALS**	18		

An amendment to the amendment in the nature of a substitute to the Committee Print which would require that no provision of H.R. 3 shall result in a shift in investment of pharmaceutical biotechnology or drug manufacturing jobs from the U.S. to other foreign countries, including China was offered by Mr. LaHood. The amendment was defeated by a vote of 18 yeas and 25 nays (with a quorum being present). The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
MR. DOGGETT		X		MR. BRADY	X		
MR. THOMPSON		X		MR. NUNES	X		
MR. LARSON		X		MR. BUCHANAN	X		
MR. BLUMENAUER		X		MR. SMITH (NE)	X		
MR. KIND		X		MR. REED	X		
MR. PASCRELL		X		MR. KELLY	X		
MR. DAVIS		X		MR. SMITH (MO)	X		
MS. SANCHEZ		X		MR. RICE	X		
MR. HIGGINS		X		MR. SCHWEIKERT	X		
MS. SEWELL		X		MS. WALORSKI	X		
MS. DELBENE		X		MR. LAHOOD	X		
MS. CHU		X		DR. WENSTRUP	X		
MS. MOORE		X		MR. ARRINGTON	X		
MR. KILDEE		X		DR. FERGUSON	X		
MR. BOYLE		X		MR. ESTES	X		
MR. BEYER		X		MR. SMUCKER	X		
MR. EVANS		X		MR. HERN	X		
MR. SCHNEIDER		X		MS. MILLER	X		
MR. SUOZZI		X					
MR. PANETTA		X					
MS. MURPHY		X					
MR. GOMEZ		X					
MR. HORSFORD		X					
MS. PLASKETT		X					
CHAIRMAN NEAL		X					
TOTALS		25		**TOTALS**	18		

An amendment to the amendment in the nature of a substitute to the Committee Print which would strike the FDII changes was offered by Mr. Hern. The amendment was defeated by a vote of 18 yeas and 25 nays (with a quorum being present). The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
MR. DOGGETT		X		MR. BRADY	X		
MR. THOMPSON		X		MR. NUNES	X		
MR. LARSON		X		MR. BUCHANAN	X		
MR. BLUMENAUER		X		MR. SMITH (NE)	X		
MR. KIND		X		MR. REED	X		
MR. PASCRELL		X		MR. KELLY	X		
MR. DAVIS		X		MR. SMITH (MO)	X		
MS. SANCHEZ		X		MR. RICE	X		
MR. HIGGINS		X		MR. SCHWEIKERT	X		
MS. SEWELL		X		MS. WALORSKI	X		
MS. DELBENE		X		MR. LAHOOD	X		
MS. CHU		X		DR. WENSTRUP	X		
MS. MOORE		X		MR. ARRINGTON	X		
MR. KILDEE		X		DR. FERGUSON	X		
MR. BOYLE		X		MR. ESTES	X		
MR. BEYER		X		MR. SMUCKER	X		
MR. EVANS		X		MR. HERN	X		
MR. SCHNEIDER		X		MS. MILLER	X		
MR. SUOZZI		X					
MR. PANETTA		X					
MS. MURPHY		X					
MR. GOMEZ		X					
MR. HORSFORD		X					
MS. PLASKETT		X					
CHAIRMAN NEAL		X					
TOTALS		25		**TOTALS**	18		

An amendment to the amendment in the nature of a substitute to the Committee Print which would repeal changes to GILTI was offered by Mr. Schweikert. The amendment was defeated by a vote of 18 yeas and 24 nays (with a quorum being present). The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
MR. DOGGETT		X		MR. BRADY	X		
MR. THOMPSON		X		MR. NUNES	X		
MR. LARSON		X		MR. BUCHANAN	X		
MR. BLUMENAUER		X		MR. SMITH (NE)	X		
MR. KIND		X		MR. REED	X		
MR. PASCRELL		X		MR. KELLY	X		
MR. DAVIS		X		MR. SMITH (MO)	X		
MS. SANCHEZ		X		MR. RICE	X		
MR. HIGGINS		X		MR. SCHWEIKERT	X		
MS. SEWELL		X		MS. WALORSKI	X		
MS. DELBENE		X		MR. LAHOOD	X		
MS. CHU		X		DR. WENSTRUP	X		
MS. MOORE				MR. ARRINGTON	X		
MR. KILDEE		X		DR. FERGUSON	X		
MR. BOYLE		X		MR. ESTES	X		
MR. BEYER		X		MR. SMUCKER	X		
MR. EVANS		X		MR. HERN	X		
MR. SCHNEIDER		X		MS. MILLER	X		
MR. SUOZZI		X					
MR. PANETTA		X					
MS. MURPHY		X					
MR. GOMEZ		X					
MR. HORSFORD		X					
MS. PLASKETT		X					
CHAIRMAN NEAL		X					
TOTALS		24		**TOTALS**	18		

An amendment to the amendment in the nature of a substitute to the Committee Print which would remove the 501(c)(3) status for five years for any entity found by the Secretary of the Treasury to have used Federal funds to conduct or support any gain-of-function research involving a potential pandemic pathogen by China, Russia, Iran, or North Korea was offered by Dr. Wenstrup. The amendment was defeated by a vote of 18 yeas and 25 nays (with a quorum being present). The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
MR. DOGGETT		X		MR. BRADY	X		
MR. THOMPSON		X		MR. NUNES	X		
MR. LARSON		X		MR. BUCHANAN	X		
MR. BLUMENAUER		X		MR. SMITH (NE)	X		
MR. KIND		X		MR. REED	X		
MR. PASCRELL		X		MR. KELLY	X		
MR. DAVIS		X		MR. SMITH (MO)	X		
MS. SANCHEZ		X		MR. RICE	X		
MR. HIGGINS		X		MR. SCHWEIKERT	X		
MS. SEWELL		X		MS. WALORSKI	X		
MS. DELBENE		X		MR. LAHOOD	X		
MS. CHU		X		DR. WENSTRUP	X		
MS. MOORE		X		MR. ARRINGTON	X		
MR. KILDEE		X		DR. FERGUSON	X		
MR. BOYLE		X		MR. ESTES	X		
MR. BEYER		X		MR. SMUCKER	X		
MR. EVANS		X		MR. HERN	X		
MR. SCHNEIDER		X		MS. MILLER	X		
MR. SUOZZI		X					
MR. PANETTA		X					
MS. MURPHY		X					
MR. GOMEZ		X					
MR. HORSFORD		X					
MS. PLASKETT		X					
CHAIRMAN NEAL		X					
TOTALS		25		**TOTALS**	18		

An amendment to the amendment in the nature of a substitute to the Committee Print which would require the Secretary of the Treasury to certify that tax increases in Subtitle I will not reduce employment or investment in the United States was offered by Mr. Kelly. The amendment was defeated by a vote of 17 yeas and 25 nays (with a quorum being present). The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
MR. DOGGETT		X		MR. BRADY	X		
MR. THOMPSON		X		MR. NUNES	X		
MR. LARSON		X		MR. BUCHANAN	X		
MR. BLUMENAUER		X		MR. SMITH (NE)	X		
MR. KIND		X		MR. REED	X		
MR. PASCRELL		X		MR. KELLY	X		
MR. DAVIS		X		MR. SMITH (MO)	X		
MS. SANCHEZ		X		MR. RICE	X		
MR. HIGGINS		X		MR. SCHWEIKERT	X		
MS. SEWELL		X		MS. WALORSKI	X		
MS. DELBENE		X		MR. LAHOOD	X		
MS. CHU		X		DR. WENSTRUP	X		
MS. MOORE		X		MR. ARRINGTON	X		
MR. KILDEE		X		DR. FERGUSON	X		
MR. BOYLE		X		MR. ESTES	X		
MR. BEYER		X		MR. SMUCKER	X		
MR. EVANS		X		MR. HERN			
MR. SCHNEIDER		X		MS. MILLER	X		
MR. SUOZZI		X					
MR. PANETTA		X					
MS. MURPHY		X					
MR. GOMEZ		X					
MR. HORSFORD		X					
MS. PLASKETT		X					
CHAIRMAN NEAL		X					
TOTALS		25		**TOTALS**	17		

An amendment to the amendment in the nature of a substitute to the Committee Print which would require the Secretary of Treasury to certify that changes to the treatment of foreign oil and gas extraction income will not reduce U.S. energy independence or increase oil and gas production in Russia, China, Venezuela, or Iran was offered by Mr. Arrington. The amendment was defeated by a vote of 18 yeas and 25 nays (with a quorum being present). The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
MR. DOGGETT		X		MR. BRADY	X		
MR. THOMPSON		X		MR. NUNES	X		
MR. LARSON		X		MR. BUCHANAN	X		
MR. BLUMENAUER		X		MR. SMITH (NE)	X		
MR. KIND		X		MR. REED	X		
MR. PASCRELL		X		MR. KELLY	X		
MR. DAVIS		X		MR. SMITH (MO)	X		
MS. SANCHEZ		X		MR. RICE	X		
MR. HIGGINS		X		MR. SCHWEIKERT	X		
MS. SEWELL		X		MS. WALORSKI	X		
MS. DELBENE		X		MR. LAHOOD	X		
MS. CHU		X		DR. WENSTRUP	X		
MS. MOORE		X		MR. ARRINGTON	X		
MR. KILDEE		X		DR. FERGUSON	X		
MR. BOYLE		X		MR. ESTES	X		
MR. BEYER		X		MR. SMUCKER	X		
MR. EVANS		X		MR. HERN	X		
MR. SCHNEIDER		X		MS. MILLER	X		
MR. SUOZZI		X					
MR. PANETTA		X					
MS. MURPHY		X					
MR. GOMEZ		X					
MR. HORSFORD		X					
MS. PLASKETT		X					
CHAIRMAN NEAL		X					
TOTALS		25		**TOTALS**	18		

An amendment to the amendment in the nature of a substitute to the Committee Print which would strike the Sec. 199 A limitation and add H.R. 1381, the Main Street Tax Certainty Act, to Subtitle I was offered by Mr. Smith of Missouri. The amendment was defeated by a vote of 18 yeas and 25 nays (with a quorum being present). The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
MR. DOGGETT		X		MR. BRADY	X		
MR. THOMPSON		X		MR. NUNES	X		
MR. LARSON		X		MR. BUCHANAN	X		
MR. BLUMENAUER		X		MR. SMITH (NE)	X		
MR. KIND		X		MR. REED	X		
MR. PASCRELL		X		MR. KELLY	X		
MR. DAVIS		X		MR. SMITH (MO)	X		
MS. SANCHEZ		X		MR. RICE	X		
MR. HIGGINS		X		MR. SCHWEIKERT	X		
MS. SEWELL		X		MS. WALORSKI	X		
MS. DELBENE		X		MR. LAHOOD	X		
MS. CHU		X		DR. WENSTRUP	X		
MS. MOORE		X		MR. ARRINGTON	X		
MR. KILDEE		X		DR. FERGUSON	X		
MR. BOYLE		X		MR. ESTES	X		
MR. BEYER		X		MR. SMUCKER	X		
MR. EVANS		X		MR. HERN	X		
MR. SCHNEIDER		X		MS. MILLER	X		
MR. SUOZZI		X					
MR. PANETTA		X					
MS. MURPHY		X					
MR. GOMEZ		X					
MR. HORSFORD		X					
MS. PLASKETT		X					
CHAIRMAN NEAL		X					
TOTALS		25		**TOTALS**	18		

An amendment to the amendment in the nature of a substitute to the Committee Print which would strike the Sec. 199A limitation, strike the NIIT expansion, and repeal the extension of the pass-through loss limitation beyond 2025 was offered by Mr. Buchanan. The amendment was defeated by a vote of 18 yeas and 25 nays (with a quorum being present). The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
MR. DOGGETT		X		MR. BRADY	X		
MR. THOMPSON		X		MR. NUNES	X		
MR. LARSON		X		MR. BUCHANAN	X		
MR. BLUMENAUER		X		MR. SMITH (NE)	X		
MR. KIND		X		MR. REED	X		
MR. PASCRELL		X		MR. KELLY	X		
MR. DAVIS		X		MR. SMITH (MO)	X		
MS. SANCHEZ		X		MR. RICE	X		
MR. HIGGINS		X		MR. SCHWEIKERT	X		
MS. SEWELL		X		MS. WALORSKI	X		
MS. DELBENE		X		MR. LAHOOD	X		
MS. CHU		X		DR. WENSTRUP	X		
MS. MOORE		X		MR. ARRINGTON	X		
MR. KILDEE		X		DR. FERGUSON	X		
MR. BOYLE		X		MR. ESTES	X		
MR. BEYER		X		MR. SMUCKER	X		
MR. EVANS		X		MR. HERN	X		
MR. SCHNEIDER		X		MS. MILLER	X		
MR. SUOZZI		X					
MR. PANETTA		X					
MS. MURPHY		X					
MR. GOMEZ		X					
MR. HORSFORD		X					
MS. PLASKETT		X					
CHAIRMAN NEAL		X					
TOTALS		25		**TOTALS**	18		

An amendment to the amendment in the nature of a substitute to the Committee Print which would strike estate and gift tax provisions was offered by Mr. Smith of Nebraska. The amendment was defeated by a vote of 18 yeas and 25 nays (with a quorum being present). The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
MR. DOGGETT		X		MR. BRADY	X		
MR. THOMPSON		X		MR. NUNES	X		
MR. LARSON		X		MR. BUCHANAN	X		
MR. BLUMENAUER		X		MR. SMITH (NE)	X		
MR. KIND		X		MR. REED	X		
MR. PASCRELL		X		MR. KELLY	X		
MR. DAVIS		X		MR. SMITH (MO)	X		
MS. SANCHEZ		X		MR. RICE	X		
MR. HIGGINS		X		MR. SCHWEIKERT	X		
MS. SEWELL		X		MS. WALORSKI	X		
MS. DELBENE		X		MR. LAHOOD	X		
MS. CHU		X		DR. WENSTRUP	X		
MS. MOORE		X		MR. ARRINGTON	X		
MR. KILDEE		X		DR. FERGUSON	X		
MR. BOYLE		X		MR. ESTES	X		
MR. BEYER		X		MR. SMUCKER	X		
MR. EVANS		X		MR. HERN	X		
MR. SCHNEIDER		X		MS. MILLER	X		
MR. SUOZZI		X					
MR. PANETTA		X					
MS. MURPHY		X					
MR. GOMEZ		X					
MR. HORSFORD		X					
MS. PLASKETT		X					
CHAIRMAN NEAL		X					
TOTALS		25		**TOTALS**	18		

An amendment to the amendment in the nature of a substitute to the Committee Print which would reinstate work requirements for the child tax credit and ensure that the child tax credit is included in means-testing for federal benefit programs was offered by Ms. Walorski. The amendment was defeated by a vote of 18 yeas and 25 nays (with a quorum being present). The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
MR. DOGGETT		X		MR. BRADY	X		
MR. THOMPSON		X		MR. NUNES	X		
MR. LARSON		X		MR. BUCHANAN	X		
MR. BLUMENAUER		X		MR. SMITH (NE)	X		
MR. KIND		X		MR. REED	X		
MR. PASCRELL		X		MR. KELLY	X		
MR. DAVIS		X		MR. SMITH (MO)	X		
MS. SANCHEZ		X		MR. RICE	X		
MR. HIGGINS		X		MR. SCHWEIKERT	X		
MS. SEWELL		X		MS. WALORSKI	X		
MS. DELBENE		X		MR. LAHOOD	X		
MS. CHU		X		DR. WENSTRUP	X		
MS. MOORE		X		MR. ARRINGTON	X		
MR. KILDEE		X		DR. FERGUSON	X		
MR. BOYLE		X		MR. ESTES	X		
MR. BEYER		X		MR. SMUCKER	X		
MR. EVANS		X		MR. HERN	X		
MR. SCHNEIDER		X		MS. MILLER	X		
MR. SUOZZI		X					
MR. PANETTA		X					
MS. MURPHY		X					
MR. GOMEZ		X					
MR. HORSFORD		X					
MS. PLASKETT		X					
CHAIRMAN NEAL		X					
TOTALS		25		**TOTALS**	18		

An amendment to the amendment in the nature of a substitute to the Committee Print which would strike the above-the-line deduction for union dues was offered by Mr. Smucker. The amendment was defeated by a vote of 18 yeas and 25 nays (with a quorum being present). The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
MR. DOGGETT		X		MR. BRADY	X		
MR. THOMPSON		X		MR. NUNES	X		
MR. LARSON		X		MR. BUCHANAN	X		
MR. BLUMENAUER		X		MR. SMITH (NE)	X		
MR. KIND		X		MR. REED	X		
MR. PASCRELL		X		MR. KELLY	X		
MR. DAVIS		X		MR. SMITH (MO)	X		
MS. SANCHEZ		X		MR. RICE	X		
MR. HIGGINS		X		MR. SCHWEIKERT	X		
MS. SEWELL		X		MS. WALORSKI	X		
MS. DELBENE		X		MR. LAHOOD	X		
MS. CHU		X		DR. WENSTRUP	X		
MS. MOORE		X		MR. ARRINGTON	X		
MR. KILDEE		X		DR. FERGUSON	X		
MR. BOYLE		X		MR. ESTES	X		
MR. BEYER		X		MR. SMUCKER	X		
MR. EVANS		X		MR. HERN	X		
MR. SCHNEIDER		X		MS. MILLER	X		
MR. SUOZZI		X					
MR. PANETTA		X					
MS. MURPHY		X					
MR. GOMEZ		X					
MR. HORSFORD		X					
MS. PLASKETT		X					
CHAIRMAN NEAL		X					
TOTALS		25		**TOTALS**	18		

An amendment to the amendment in the nature of a substitute to the Committee Print which would protect taxpayer dollars from waste, fraud and abuse by inserting good governance reforms to the Child Tax Credit and the Advanced Premium Tax Credit policies included in the amendment in the nature of a substitute was offered by Mr. Rice. The amendment was defeated by a vote of 18 yeas and 25 nays (with a quorum being present). The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
MR. DOGGETT		X		MR. BRADY	X		
MR. THOMPSON		X		MR. NUNES	X		
MR. LARSON		X		MR. BUCHANAN	X		
MR. BLUMENAUER		X		MR. SMITH (NE)	X		
MR. KIND		X		MR. REED	X		
MR. PASCRELL		X		MR. KELLY	X		
MR. DAVIS		X		MR. SMITH (MO)	X		
MS. SANCHEZ		X		MR. RICE	X		
MR. HIGGINS		X		MR. SCHWEIKERT	X		
MS. SEWELL		X		MS. WALORSKI	X		
MS. DELBENE		X		MR. LAHOOD	X		
MS. CHU		X		DR. WENSTRUP	X		
MS. MOORE		X		MR. ARRINGTON	X		
MR. KILDEE		X		DR. FERGUSON	X		
MR. BOYLE		X		MR. ESTES	X		
MR. BEYER		X		MR. SMUCKER	X		
MR. EVANS		X		MR. HERN	X		
MR. SCHNEIDER		X		MS. MILLER	X		
MR. SUOZZI		X					
MR. PANETTA		X					
MS. MURPHY		X					
MR. GOMEZ		X					
MR. HORSFORD		X					
MS. PLASKETT		X					
CHAIRMAN NEAL		X					
TOTALS		25		**TOTALS**	18		

An amendment to the amendment in the nature of a substitute to the Committee Print which would require the Secretary of the Treasury to certify that changes to the 199 A small business deduction will not force closure of small businesses eligible for the SBA Small Disadvantaged Business Program was offered by Dr. Ferguson. The amendment was defeated by a vote of 18 yeas and 25 nays (with a quorum being present). The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
MR. DOGGETT		X		MR. BRADY	X		
MR. THOMPSON		X		MR. NUNES	X		
MR. LARSON		X		MR. BUCHANAN	X		
MR. BLUMENAUER		X		MR. SMITH (NE)	X		
MR. KIND		X		MR. REED	X		
MR. PASCRELL		X		MR. KELLY	X		
MR. DAVIS		X		MR. SMITH (MO)	X		
MS. SANCHEZ		X		MR. RICE	X		
MR. HIGGINS		X		MR. SCHWEIKERT	X		
MS. SEWELL		X		MS. WALORSKI	X		
MS. DELBENE		X		MR. LAHOOD	X		
MS. CHU		X		DR. WENSTRUP	X		
MS. MOORE		X		MR. ARRINGTON	X		
MR. KILDEE		X		DR. FERGUSON	X		
MR. BOYLE		X		MR. ESTES	X		
MR. BEYER		X		MR. SMUCKER	X		
MR. EVANS		X		MR. HERN	X		
MR. SCHNEIDER		X		MS. MILLER	X		
MR. SUOZZI		X					
MR. PANETTA		X					
MS. MURPHY		X					
MR. GOMEZ		X					
MR. HORSFORD		X					
MS. PLASKETT		X					
CHAIRMAN NEAL		X					
TOTALS		25		**TOTALS**	18		

An amendment in the nature of a substitute to the Committee Print was agreed to by voice vote (with a quorum being present).

The Committee Print was ordered favorably transmitted to the House Committee on the Budget as amended by an amendment in the nature of a substitute offered by Chairman Neal by a vote of 24 yeas and 19 nays. The vote was as follows:

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
MR. DOGGETT	X			MR. BRADY		X	
MR. THOMPSON	X			MR. NUNES		X	
MR. LARSON	X			MR. BUCHANAN		X	
MR. BLUMENAUER	X			MR. SMITH (NE)		X	
MR. KIND	X			MR. REED		X	
MR. PASCRELL	X			MR. KELLY		X	
MR. DAVIS	X			MR. SMITH (MO)		X	
MS. SANCHEZ	X			MR. RICE		X	
MR. HIGGINS	X			MR. SCHWEIKERT		X	
MS. SEWELL	X			MS. WALORSKI		X	
MS. DELBENE	X			MR. LAHOOD (IL)		X	
MS. CHU	X			DR. WENSTRUP		X	
MS. MOORE	X			MR. ARRINGTON		X	
MR. KILDEE	X			DR. FERGUSON		X	
MR. BOYLE	X			MR. ESTES		X	
MR. BEYER	X			MR. SMUCKER		X	
MR. EVANS	X			MR. HERN		X	
MR. SCHNEIDER	X			MS. MILLER		X	
MR. SUOZZI	X						
MR. PANETTA	X						
MS. MURPHY		X					
MR. GOMEZ	X						
MR. HORSFORD	X						
MS. PLASKETT	X						
CHAIRMAN NEAL	X						
TOTALS	24			**TOTALS**		19	

BUDGET EFFECTS OF THE SUBTITLE

A. COMMITTEE ESTIMATE OF BUDGETARY EFFECTS

Pursuant to 3(c)(2) of rule XIII of the Rules of the House of Representatives the Committee has requested but not received from the Director of the Congressional Budget Office a cost estimate for the Committee's provision(s).

The bill is partially estimated to increase Federal fiscal year budget receipts by $859 billion for the period 2022 through 2031.

[Insert Revenue Table]

B. NEW BUDGET AUTHORITY AND COST ESTIMATE PREPARED BY THE CONGRESSIONAL BUDGET OFFICE

Pursuant to clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974, and pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has requested but not received a statement as to whether these provisions contain any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures.

OTHER MATTERS TO BE DISCUSSED UNDER THE RULES OF THE HOUSE

A. COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

With respect to clause 3(c)(1) of Rule XIII and clause 2(b)(1) of Rule X of the Rules of the House of Representatives, the Committee made findings and recommendations that are reflected in this report.

B. STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

Pursuant to clause 3(c)(4) of Rule XIII of the Rules of the House of Representatives, the Committee advises that general performance goal or objective for which the committee print authorizes funding is to administer green energy incentives, the expanded child tax credit, and to provide the Internal Revenue Service with adequate funds to strengthen tax enforcement activities.

C. INFORMATION RELATING TO UNFUNDED MANDATES

Pursuant to Section 423 of the Congressional Budget and Impoundment Control Act of 1974 (Pub. L. No. 104-4), the Committee adopts as its own the federal mandates estimate

GAD 45-536 09/26/2021

ESTIMATED BUDGETARY EFFECTS OF THE REVENUE PROVISIONS OF SUBTITLES F, G, H, I, AND J OF THE BUDGET RECONCILIATION LEGISLATIVE RECOMMENDATIONS RELATING TO INFRASTRUCTURE FINANCING AND COMMUNITY DEVELOPMENT, GREEN ENERGY, SOCIAL SAFETY NET, RESPONSIBLY FUNDING OUR PRIORITIES, AND DRUG PRICING, AS REPORTED BY THE COMMITTEE ON WAYS AND MEANS

Fiscal Years 2022 - 2031

[Millions of Dollars]

Provision	Effective	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2022-26	2022-31
SUBTITLE F - INFRASTRUCTURE FINANCING AND COMMUNITY DEVELOPMENT													
Part 1 - Infrastructure Financing													
A. Bond Financing													
1. Credit to issuer for certain infrastructure bonds [1].............	bia 12/31/21	-196	-899	-1,799	-2,472	-2,795	-2,795	-2,736	-2,793	-2,948	-3,105	-8,161	-22,539
2. Advance refunding bonds..	ar bimt 30da DOE	-267	-757	-1,140	-1,393	-1,608	-1,761	-1,878	-1,973	-2,042	-2,101	-5,164	-14,919
3. Permanent modification of small issuer exception to tax-exempt interest expense allocation rules for financial institutions..	oia DOE	-18	-69	-147	-231	-321	-419	-522	-631	-745	-862	-786	-3,965
4. Modifications to qualified small issue bonds.......................	oia DOE	-1	-2	-5	-8	-12	-16	-21	-26	-32	-38	-27	-161
5. Expansion of certain exceptions to the private activity bond rules for first-time farmers..	bia DOE	[2]	[2]	[2]	[2]	[2]	[2]	[2]	[2]	[2]	[2]	[2]	-2
6. Certain water and sewage facility bonds exempt from volume cap on private activity bonds...	oia DOE	[2]	-1	-3	-5	-6	-8	-10	-13	-15	-18	-16	-79
7. Exempt facility bonds for zero-emission vehicle infrastructure...	oia 12/31/21	[2]	-1	-3	-5	-7	-10	-14	-19	-25	-32	-15	-116
8. Application of Davis-Bacon Act requirements with respect to certain exempt facility bonds..............................	bia DOE	*No Revenue Effect*											
B. Other Provisions Related to Infrastructure Financing													
1. Credit for operations and maintenance costs of government-owned broadband [1].......................................	tyba 12/31/20	-73	-38	-35	-32	-29	-24	-20	-5	---	---	-207	-256
Total of Part 1 - Infrastructure Financing..		**-555**	**-1,767**	**-3,132**	**-4,146**	**-4,778**	**-5,033**	**-5,201**	**-5,460**	**-5,807**	**-6,156**	**-14,376**	**-42,037**
Part 2 - New Markets Tax Credit Made Permanent.....................	**[3]**	**---**	**-4**	**-19**	**-60**	**-106**	**-144**	**-212**	**-370**	**-587**	**-814**	**-189**	**-2,316**
Part 3 - Rehabilitation Tax Credit													
1. Temporary increases in credit percentage............................	ppisa 3/31/21	-376	-563	-858	-1,179	-1,375	-1,340	-1,146	-869	-557	-283	-4,351	-8,544
2. Increase in the rehabilitation credit for certain small projects...	tyba 12/31/21	---	---	---	---	-19	-76	-167	-281	-402	-511	-19	-1,457
3. Modification of definition of substantially rehabilitated.......	[4]	-28	-87	-206	-400	-662	-951	-1,229	-1,472	-1,655	-1,781	-1,383	-8,470
4. Elimination of rehabilitation credit basis adjustment...........	ppisa 3/31/21	---	-81	-257	-458	-667	-863	-961	-959	-937	-914	-1,463	-6,097

Provision	Effective	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2022-26	2022-31
5. Modifications regarding certain tax-exempt use property.....	leia 12/31/21	-14	-31	-40	-48	-53	-56	-57	-59	-60	-62	-186	-481
6. Qualification of rehabilitation expenditures for public school buildings for rehabilitation credit.............................	ppisa 3/31/21	-38	-86	-110	-139	-161	-169	-174	-178	-183	-189	-535	-1,427
Total of Part 3 - Rehabilitation Tax Credit		**-456**	**-848**	**-1,471**	**-2,224**	**-2,937**	**-3,454**	**-3,734**	**-3,818**	**-3,794**	**-3,740**	**-7,937**	**-26,476**
Part 4 - Disaster and Resiliency													
1. Exclusion of amounts received from State-based catastrophe loss mitigation programs...................................	tyba 12/31/20	-4	-10	-10	-11	-12	-13	-14	-15	-16	-17	-48	-122
2. Repeal of temporary limitation on personal casualty losses..	lii tyba 12/31/17	-467	-645	-320	-318	-261	---	---	---	---	---	-2,011	-2,011
3. Credit for qualified wildfire mitigation expenditures...........	epoia DOE ityeasd	-12	-28	-31	-36	-42	-44	-46	-48	-49	-50	-149	-387
Total of Part 4 - Disaster and Resiliency		**-483**	**-683**	**-361**	**-365**	**-315**	**-57**	**-60**	**-63**	**-65**	**-67**	**-2,208**	**-2,520**
Part 5 - Housing													
A. Low-Income Housing Tax Credit													
1. Increases in State allocations...	cyba 12/31/21	6	4	-57	-248	-593	-1,058	-1,585	-2,222	-2,577	-2,717	-889	-11,048
2. Tax-exempt bond financing requirement (sunset 12/31/28)..	bpisi tyba 12/31/21	-91	-242	-472	-719	-953	-1,176	-1,393	-1,393	-1,510	-1,549	-2,478	-9,498
3. Buildings designed to serve extremely low-income households..	[5]	-8	-37	-92	-158	-225	-292	-358	-412	-474	-548	-519	-2,603
4. Inclusion of rural areas as difficult development areas.........	bpisa 12/31/21	-7	-37	-92	-165	-232	-300	-366	-420	-483	-554	-532	-2,654
5. Repeal of qualified contract option......................................	DOE	2	8	17	28	39	49	59	73	85	105	95	466
6. Modification and clarification of rights relating to building purchase...	[6]	2	11	27	45	63	80	96	118	139	171	147	751
7. Increase in credit for bond-financed projects designated by housing credit agency...	[7]	-31	-98	-210	-355	-477	-591	-702	-685	-745	-766	-1,171	-4,660
B. Neighborhood Homes Investment Act													
1. Neighborhood homes credit..	tyba 12/31/21	-200	-605	-1,422	-1,861	-2,114	-2,175	-2,239	-2,305	-2,373	-2,443	-6,202	-17,736
Total of Part 5 - Housing..		**-326**	**-997**	**-2,300**	**-3,433**	**-4,494**	**-5,462**	**-6,488**	**-7,244**	**-7,938**	**-8,301**	**-11,549**	**-46,983**
Part 6 - Investments in Tribal Infrastructure													
1. Treatment of Indian Tribes as States with respect to bond issuance..	bia 12/31/21	[2]	-1	-3	-4	-6	-8	-10	-12	-15	-17	-14	-77
2. New markets tax credit for Tribal Statistical Areas.............	cya 12/31/21	---	[2]	-2	-6	-13	-22	-31	-41	-51	-59	-22	-226
3. Inclusion of Indian areas as difficult development areas for purposes of certain buildings................................	bpisa 12/31/21	[2]	-2	-4	-7	-10	-13	-16	-18	-21	-24	-23	-114
Total of Part 6 - Investments in Tribal Infrastructure..		**[2]**	**-3**	**-9**	**-17**	**-29**	**-43**	**-57**	**-71**	**-87**	**-100**	**-59**	**-417**
Part 7 - Investments in the Territories													
1. Possessions Economic Activity Credit.................................	[8]	-406	-853	-938	-1,017	-1,091	-1,169	-1,229	-1,270	-1,312	-1,356	-4,305	-10,641

Provision	Effective	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2022-26	2022-31
2. Additional new markets tax credit allocations for the territories........	cya 12/31/21	---	[2]	-1	-4	-8	-12	-18	-24	-29	-34	-12	-129
Total of Part 7 - Investments in the Territories........		**-406**	**-853**	**-939**	**-1,021**	**-1,099**	**-1,181**	**-1,247**	**-1,294**	**-1,341**	**-1,390**	**-4,317**	**-10,770**
TOTAL OF SUBTITLE F - INFRASTRUCTURE FINANCING AND COMMUNITY DEVELOPMENT........		**-2,226**	**-5,154**	**-8,231**	**-11,266**	**-13,758**	**-15,375**	**-16,999**	**-18,320**	**-19,619**	**-20,567**	**-40,635**	**-131,519**
SUBTITLE G - GREEN ENERGY THE "GROWING RENEWABLE ENERGY AND EFFICIENCY NOW (GREEN') ACT OF 2021"													
Part 1 - Renewable Electricity and Reducing Carbon Emissions													
1. Extension and modification of credit for electricity produced from certain renewable resources (sunset 12/31/33) [1].......	fpisa 12/31/21	-181	-584	-1,038	-1,717	-2,865	-4,184	-5,651	-7,269	-8,811	-10,549	-6,387	-42,851
2. Extension and modification of energy credit (sunset 12/31/33) [1]........	generally ppisa 12/31/21	-1,349	-2,392	-2,686	-3,721	-6,667	-8,332	-8,851	-9,404	-9,956	-10,547	-16,816	-63,907
3. Increase in energy credit for solar facilities placed in service in connection with low-income communities (sunset 12/31/31)........	pa 12/31/21	*Estimate Included in Items G.2. Above*											
4. Elective payment for energy property and electricity produced from certain renewable resources, etc........	ppisa 12/31/21	*Estimate Included in Items G.1. through G.3. Above*											
5. Investment credit for electric transmission property (sunset 12/31/31) [1]........	ppisa 12/31/21	---	---	---	-683	-1,050	-1,050	-1,050	-1,733	-2,100	-2,100	-1,733	-9,765
6. Zero emissions facility credit (sunset 12/31/31)........	pa 12/31/21	*Negligible Revenue Effect*											
7. Extension and modification of credit for carbon oxide sequestration (sunset 12/31/31)........	generally tyba 12/31/21	-12	-23	-29	-26	-9	-38	-75	-146	-216	-331	-100	-908
8. Green energy publicly traded partnerships........	tyba 12/31/21	-148	-126	-137	-144	-99	-50	-56	-64	-72	-80	-654	-975
9. Zero-emission nuclear power production credit (sunset 12/31/26) [1]........	epasa 12/31/21 itybasd	-4,383	-2,909	-3,253	-3,524	-1,650	-209	---	---	---	---	-15,719	-15,929
Total of Part 1 - Renewable Electricity and Reducing Carbon Emissions........		**-6,073**	**-6,034**	**-7,143**	**-9,815**	**-12,340**	**-13,863**	**-15,683**	**-18,616**	**-21,155**	**-23,607**	**-41,409**	**-134,335**
Part 2 - Renewable Fuels													
1. Extension of excise tax credits relating to alternative fuels, and extension of biodiesel and renewable diesel credit (sunset 12/31/31)........	fsoua 12/31/21	-149	-2,688	-3,721	-3,802	-3,816	-3,803	-3,700	-3,708	-3,725	-3,743	-14,177	-32,858
2. Extension of second generation biofuel incentives (sunset 12/31/31)........	qsgbpa 12/31/21	-10	-19	-20	-22	-24	-25	-27	-29	-30	-32	-95	-238
3. Sustainable aviation fuel credit (sunset 12/31/31)........	fsoua 12/31/22	---	-6	-13	-19	-24	-31	-66	-104	-145	-210	-62	-618
4. Credit for production of clean hydrogen [1]........	[9]	-60	-172	-313	-496	-707	-966	-1,271	-1,598	-1,756	-1,779	-1,748	-9,118
Total of Part 2 - Renewable Fuels........		**-219**	**-2,885**	**-4,067**	**-4,339**	**-4,571**	**-4,825**	**-5,064**	**-5,439**	**-5,656**	**-5,764**	**-16,082**	**-42,832**
Part 3 - Green Energy and Efficiency Incentives for Individuals													
1. Extension, increase, and modifications of nonbusiness energy property credit (sunset 12/31/31)........	generally ppisa 12/31/21 & apoia 12/31/21	-255	-1,696	-1,657	-1,628	-1,654	-1,631	-1,570	-1,599	-1,615	-1,632	-6,890	-14,938

Provision	Effective	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2022-26	2022-31
2. Extension and modification of residential energy efficient property credit (sunset 12/31/33)..	ema 12/31/21	-50	-387	-972	-2,562	-2,635	-2,712	-2,792	-2,872	-2,941	-3,029	-6,605	-20,951
3. Energy efficient commercial buildings deduction (sunset 12/31/31)..	tyba 12/31/21 & ppisa 12/31/21 ityeasd	-18	-72	-70	-68	-67	-66	-65	-66	-67	-69	-295	-626
4. Extension, increase, and modifications of new energy efficient home credit (sunset 12/31/31)....................	duaa 12/31/21	-132	-233	-258	-271	-289	-307	-321	-320	-305	-289	-1,182	-2,724
5. Modifications to income exclusion for conservation subsidies..	ara 12/31/18	-6	-2	-2	-3	-4	-5	-6	-6	-7	-7	-17	-48
Total of Part 3 - Green Energy and Efficiency Incentives for Individuals....................		**-461**	**-2,390**	**-2,959**	**-4,532**	**-4,649**	**-4,721**	**-4,754**	**-4,863**	**-4,935**	**-5,026**	**-14,989**	**-39,287**
Part 4 - Greening the Fleet and Alternative Vehicles													
1. Refundable new qualified plug-in electric drive motor vehicle credit for individuals (sunset 12/31/31) [1].............	vaa 12/31/21 & tovpola 12/31/22	-195	-1,002	-1,128	-1,268	-1,451	-1,682	-1,915	-2,112	-2,320	-2,499	-5,044	-15,574
2. Credit for previously-owned qualified plug-in electric drive motor vehicles (sunset 12/31/31)...	vaa 12/31/21	-27	-83	-96	-120	-132	-146	-162	-179	-197	-215	-457	-1,357
3. Qualified commercial electric vehicles (sunset 12/31/31).....	vaa 12/31/21	-229	-490	-663	-831	-1,033	-1,270	-1,488	-1,675	-1,850	-2,043	-3,246	-11,572
4. Qualified fuel cell motor vehicles (sunset 12/31/31)...........	ppisa 12/31/21	-4	-7	-8	-9	-11	-4	---	---	---	---	-40	-44
5. Alternative fuel refueling property credit (sunset 12/31/31)...	ppisa 12/31/21	-93	-404	-461	-523	-591	-666	-749	-837	-932	-1,027	-2,071	-6,283
6. Reinstatement and expansion of employer-provided fringe benefits for bicycle commuting [10]..................................	tyba 12/31/21	-20	-21	-23	-13	-16	-16	-18	-18	-19	-19	-93	-183
7. Credit for certain new electric bicycles (sunset 12/31/31)....	ppisa ityea DOE	-113	-305	-397	-517	-666	-826	-983	-1,121	-1,225	-1,277	-1,999	-7,430
Total of Part 4 - Greening the Fleet and Alternative Vehicles.......................................		**-681**	**-2,312**	**-2,776**	**-3,281**	**-3,900**	**-4,610**	**-5,315**	**-5,942**	**-6,543**	**-7,080**	**-12,950**	**-42,443**
Part 5 - Investment in the Green Workforce													
1. Extension of the advanced energy project credit [1][11]......	DOE	-273	-370	-289	-233	-307	-405	-169	-29	-25	-32	-1,472	-2,133
2. Labor costs of installing mechanical insulation property (sunset 12/31/31)..	apoia 12/31/21 ityeasd	-371	-745	-939	-1,099	-1,267	-966	-670	-564	-462	-343	-4,421	-7,426
Total of Part 5 - Investment in the Green Workforce..		**-644**	**-1,115**	**-1,228**	**-1,332**	**-1,574**	**-1,371**	**-839**	**-593**	**-487**	**-375**	**-5,893**	**-9,559**
Part 6 - Qualified Environmental Justice Credit (sunset 12/31/31) [1][11]..	**DOE**	**---**	**-400**	**-700**	**-800**	**-900**	**-1,000**	**-600**	**-300**	**-200**	**-100**	**-2,800**	**-5,000**
Part 7 - Reinstatement of Superfund..	**1/1/22**	**1,560**	**2,332**	**2,446**	**2,546**	**2,642**	**2,740**	**2,843**	**2,951**	**3,063**	**3,179**	**11,527**	**26,302**
TOTAL OF SUBTITLE G - GREEN ENERGY...		**-6,518**	**-12,804**	**-16,427**	**-21,553**	**-25,292**	**-27,650**	**-29,412**	**-32,802**	**-35,913**	**-38,773**	**-82,596**	**-247,154**

Provision	Effective	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2022-26	2022-31
SUBTITLE H - SOCIAL SAFETY NET													
Part 1 - Child Tax Credit: Extend and modify ARP modifications to CTC, index credit amounts and initial phaseout thresholds, no child SSN requirement (sunset 12/31/22); new monthly CTC, index credit amounts and initial phaseout thresholds, no child SSN requirement, advance payments to taxpayers with presumptive eligibility, recapture only in certain circumstances (taxable years beginning after 12/31/22, and sunset 12/31/25); full refundability of CTC unindexed $1,000 amount (taxable years beginning after 12/31/25) [1]....	**tyba 12/31/21**	**-106,463**	**-121,808**	**-129,345**	**-133,722**	**-46,959**	**-3,556**	**-3,510**	**-3,510**	**-3,537**	**-3,599**	**-538,297**	**-556,008**
Part 2 - Child and Dependent Care Tax Credit													
1. Certain improvements to the child and dependent care tax credit made permanent [1]....	tyba 12/31/21	-2,663	-9,179	-9,413	-9,786	-10,353	-10,195	-10,453	-10,706	-11,065	-11,324	-41,392	-95,135
2. Increase in exclusion for employer-provided dependent care assistance made permanent [12]....	tyba 12/31/21	-199	-270	-283	-294	-344	-362	-374	-383	-394	-400	-1,390	-3,302
Total of Part 2 - Child and Dependent Care Tax Credit....		**-2,862**	**-9,449**	**-9,696**	**-10,080**	**-10,697**	**-10,557**	**-10,827**	**-11,089**	**-11,459**	**-11,724**	**-42,782**	**-98,437**
Part 3 - Supporting Caregivers													
1. Payroll tax credit for child care workers [1]....	cqba 12/31/21	-334	-670	-674	-724	-749	-764	-780	-795	-811	-827	-3,152	-7,130
2. Credit for caregiver expenses (sunset 12/31/25)....	tyba 12/31/21	-3,248	-6,688	-7,084	-7,504	-3,860	---	---	---	---	---	-28,384	-28,384
Total of Part 3 - Supporting Caregivers....		**-3,582**	**-7,358**	**-7,758**	**-8,228**	**-4,609**	**-764**	**-780**	**-795**	**-811**	**-827**	**-31,536**	**-35,514**
Part 4 - Earned Income Tax Credit													
1. Certain improvements to the earned income tax credit made permanent [1]....	tyba 12/31/21	-578	-13,296	-13,955	-14,471	-14,890	-15,116	-15,377	-15,642	-15,894	-16,107	-57,190	-135,325
2. Funds for administration of earned income tax credits in the territories [1]....	tyba 12/31/21	---	-5	-5	-5	-5	-5	-5	-5	-5	-5	-19	-43
Total of Part 4 - Earned Income Tax Credit....	**tyba 12/31/21**	**-578**	**-13,301**	**-13,960**	**-14,476**	**-14,895**	**-15,121**	**-15,382**	**-15,647**	**-15,899**	**-16,112**	**-57,209**	**-135,368**
Part 5 - Expanding Access to Health Coverage and Lowering Costs													
1. Improve affordability and reduce premium costs of health insurance for consumers....	tyba 12/31/21	*Estimate to be Provided by the Congressional Budget Office*											
2. Modification of employer sponsored coverage affordability test in health insurance premium tax credit....	tyba 12/31/21	*Estimate to be Provided by the Congressional Budget Office*											
3. Treatment of lump-sum Social Security benefits in determining household income....	tyba 12/31/21	*Estimate to be Provided by the Congressional Budget Office*											
4. Temporary expansion of health insurance premium tax credits for certain low-income populations [13]....	tyba 12/31/21	*Estimate to be Provided by the Congressional Budget Office*											
5. Special rule for individuals receiving unemployment compensation (sunset 12/31/25)....	tyba 12/31/21	*Estimate to be Provided by the Congressional Budget Office*											

Provision	Effective	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2022-26	2022-31
6. Permanent credit for health insurance costs [1]...................	cmba 12/31/21	-2	-11	-19	-20	-21	-22	-23	-25	-26	-28	-74	-198
Total of Part 5 - Expanding Access to Health Coverage and Lowering Costs..		**-2**	**-11**	**-19**	**-20**	**-21**	**-22**	**-23**	**-25**	**-26**	**-28**	**-74**	**-198**
Part 6 - Pathway to Practice Training Programs													
1. Establishing rural and underserved pathway to practice training programs for post-baccalaureate students, medical students, and medical residents [1]......................................	tyea DOE	---	---	-74	-165	-262	-387	-589	-844	-1,136	-1,420	-500	-4,877
Total of Part 6 - Pathway to Practice Training Programs..		**---**	**---**	**-74**	**-165**	**-262**	**-387**	**-589**	**-844**	**-1,136**	**-1,420**	**-500**	**-4,877**
Part 7 - Higher Education													
1. Credit for public university research and infrastructure........	qccma 12/31/21	-24	-25	-25	-26	-19	-6	---	---	---	---	-119	-125
2. Phaseout of investment income excise tax for private colleges and universities providing sufficient grants and scholarships...	tyba 12/31/21	---	-244	-248	-253	-258	-257	-262	-267	-273	-278	-1,003	-2,341
3. Federal Pell Grants excluded from gross income [1]............	tyba 12/31/21	-6	-229	-225	-215	-212	-221	-214	-205	-196	-188	-887	-1,911
4. Repeal of denial of American Opportunity Tax Credit on basis of felony drug conviction [1]......................................	tyba 12/31/21	-3	-21	-21	-20	-20	-20	-20	-19	-18	-18	-85	-180
Total of Part 7- Higher Education..		**-33**	**-519**	**-519**	**-514**	**-509**	**-504**	**-496**	**-491**	**-487**	**-484**	**-2,094**	**-4,557**
TOTAL OF SUBTITLE H - SOCIAL SAFETY NET...		**-113,520**	**-152,446**	**-161,371**	**-167,205**	**-77,952**	**-30,911**	**-31,607**	**-32,401**	**-33,355**	**-34,194**	**-672,492**	**-834,959**
SUBTITLE I - RESPONSIBLY FUNDING OUR PRIORITIES													
Part 1 - Corporate and International Tax Reforms													
A. Increase in corporate tax rate to 26.5 percent	tyba 12/31/21	39,275	48,712	50,536	51,760	53,154	57,314	59,558	59,926	59,698	60,161	243,437	540,095
B. Limitations on deduction for interest expense......................	tyba 12/31/21	1,564	3,222	3,408	3,583	3,660	3,697	3,802	3,914	3,995	3,968	15,437	34,813
C. Outbound International Provisions													
1. Modifications to deduction for foreign-derived intangible income and global intangible low-taxed income..	tyba 12/31/21	4,319	16,051	24,248	25,511	15,467	2,592	2,410	1,762	1,709	2,377	85,595	96,447
2. Repeal of election for 1-month deferral in determination of taxable year of specified foreign corporations..................	tyosfcba 11/30/21	10,906	10,906	---	---	---	---	---	---	---	---	21,811	21,811
3. Modifications of foreign tax credit rules applicable to certain taxpayers receiving specific economic benefits....................	tpoai tyba DOE	217	436	485	554	623	621	657	706	652	710	2,315	5,662
4. Modifications to foreign tax credit limitations......................	[14]	-132	2,996	8,298	9,960	9,044	8,867	7,339	5,731	5,599	5,609	30,166	63,311
5. Foreign oil and gas extraction income and foreign oil related income to include oil shale and tar sands.................	[15]	*- - - - - - - - - - - - - - - - Estimate Included in Item C.6. Below - - - - - - - - - - - - - - - -*											
6. Modifications to inclusion of global intangible low-taxed income..	[15]	1,691	5,057	12,417	12,123	10,705	10,900	11,075	12,833	14,190	15,736	41,992	106,726
7. Modifications to determination of deemed paid credit for taxes properly attributable to tested income....................	[15]	-1,683	-3,692	-3,977	-4,022	-3,973	-4,097	-4,353	-4,482	-4,686	-4,809	-17,347	-39,774
8. Deduction for foreign source portion of dividends limited to controlled foreign corporations, etc......................................	Dma DOE	21	42	44	45	46	48	49	51	52	54	198	451
9. Limitation on foreign base company sales and services income...	[15]	943	2,182	2,624	2,766	2,344	1,938	1,977	1,954	1,927	1,968	10,859	20,622

Provision	Effective	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2022-26	2022-31
D. Inbound International Provisions													
Modifications to base erosion and anti-abuse tax................	tyba 12/31/21	473	559	887	1,647	2,396	3,180	3,593	3,839	4,019	4,270	5,962	24,863
E. Other Business Tax Provisions													
1. Credit for clinical testing of orphan drugs limited to first use or indication..	tyba 12/31/21	88	186	208	234	260	286	314	346	380	418	975	2,720
2. Modifications to treatment of certain losses..	lai tyba 12/31/21 & lo/a DOE	25	165	172	179	186	193	201	209	217	226	726	1,773
3. Adjusted basis limitation for divisive reorganizations..........	roo/a DOE	801	1,506	2,058	2,230	2,261	2,297	2,333	2,369	2,406	2,446	8,856	20,707
4. Rents from prison facilities not treated as qualified income for purposes of REIT income tests..........................	tyba 12/31/21	8	15	16	16	14	11	12	12	13	13	69	130
5. Modifications to exemption for portfolio interest................	oia DOE	576	876	405	118	25	20	16	13	10	8	2,000	2,067
6. Certain partnership interest derivatives................................	pmo/a 180da DOE	4	9	9	9	9	10	10	10	10	10	41	90
7. Adjustments to earnings and profits of controlled foreign corporations..	[15]	150	325	375	425	475	525	575	625	675	725	1,750	4,875
8. Certain dividends from controlled foreign corporations to United States shareholders treated as extraordinary dividends..	Dma DOE	------------------------------- *Estimate Included in Item C.4. Above* -------------------------------											
9. Modification of rules for partnership interests held in connection with the performance of services.......................	tyba 12/31/21	1,079	1,594	1,511	1,430	1,389	1,379	1,389	1,413	1,445	1,487	7,003	14,116
10. Limitation on certain special rules for section 1202 gains..	generally saeo/a 9/13/21	69	470	517	572	639	698	705	710	677	661	2,267	5,718
11. Constructive sales..	generally csa DOE	------------------------------- *Estimate Included in Item E.13 Below* -------------------------------											
12. Rules relating to common control..	tyba 12/31/21	768	1,550	1,560	1,606	1,754	1,958	2,186	2,459	2,749	3,004	7,238	19,593
13. Wash sales by related parties; wash sales of specified assets	saoda 12/31/21	3,226	4,946	2,725	1,626	1,074	804	653	587	562	559	13,597	16,762
Total of Part 1 - Corporate and International Tax Reforms..		**64,388**	**98,113**	**108,526**	**112,372**	**101,552**	**93,241**	**94,501**	**94,987**	**96,299**	**99,601**	**484,947**	**963,578**
Part 2 - Tax Increases for High-Income Individuals													
1. Increase the top rate on the individual income tax to 39.6% on taxable income above $400,000/$450,000......................	tyba 12/31/21	32,501	22,736	36,941	39,751	15,104	4,366	4,555	4,686	4,837	5,020	147,033	170,498
2. Increase the top tax rate on long-term capital gains and qualified dividends to 25% and lower the income thresholds to which it applies..	[16]	11,363	13,497	13,712	13,281	12,870	11,716	11,135	11,455	11,771	12,597	64,723	123,396
3. Application of net investment income tax to trade or business income of certain high income individuals............	tyba 12/31/21	12,742	19,543	21,734	24,050	25,861	27,966	28,997	29,675	30,439	31,156	103,930	252,163
4. Limitation on deduction of qualified business income for certain high income individuals.....................................	tyba 12/31/21	10,520	18,309	19,684	20,948	8,564	---	---	---	---	---	78,025	78,025
5. Limitations on excess business losses of noncorporate taxpayers made permanent, with carryforward modification..	tyba 12/31/20	3,127	2,046	2,123	2,204	2,288	22,671	32,639	31,422	33,272	34,991	11,788	166,783
6. Surcharge on high income individuals, trusts, and estates..	tyba 12/31/21	24,360	-13,294	12,384	13,052	13,713	14,406	14,731	15,353	15,988	16,643	50,215	127,335
7. Termination of temporary increase in unified credit............	dda & gma 12/31/21	2,676	12,188	13,073	12,694	11,710	1,490	265	95	64	9	52,341	54,265
8. Increase in limitation on estate tax valuation reduction for certain real property used in farming or other trades or businesses...	dda 12/31/21	---	-22	-31	-32	-34	-38	-38	-40	-40	-42	-119	-317

Provision	Effective	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2022-26	2022-31
9. Certain tax rules applicable to grantor trusts........................	tcoa & cmoa DOE	30	160	223	327	478	672	917	1,240	1,657	2,191	1,217	7,895
10. Valuation rules for certain transfers of nonbusiness assets...	ta DOE	382	1,775	1,880	1,865	1,919	2,205	2,335	2,399	2,519	2,666	7,822	19,945
Total of Part 2 - Tax Increases for High-Income Individuals....................................		**97,701**	**76,938**	**121,723**	**128,140**	**92,473**	**85,454**	**95,536**	**96,285**	**100,507**	**105,231**	**516,975**	**999,988**
Part 3 - Modifications of Rules Relating to Retirement Plans													
A. Limitations on High-Income Taxpayers with Large Retirement Account Balances													
1. Contribution limit for individual retirement plans of high-income taxpayers with large account balances............	generally tyba 12/31/21 [17]	*Estimate Included in Item A.2. Below*											
2. Increase in minimum required distributions for high-income taxpayers with large retirement account balances..................	generally tyba 12/31/21 [18]	3,618	3,027	1,302	318	-343	-576	-1,051	-1,273	-1,463	-1,760	7,922	1,798
B. Other Provisions Relating to Individual Retirement Plans													
1. Tax treatment of rollovers to Roth IRAs and accounts..............	generally [19] dtaemi tyba 12/31/31	---	---	---	---	---	---	---	---	140	609	---	749
2. Prohibition of IRA investments conditioned on account holder's status..............	generally tyba 12/31/21 [20]	125	153	155	158	177	182	184	186	188	193	768	1,701
3. Statute of limitations with respect to IRA noncompliance....	[21]	[22]	1	1	1	1	1	1	1	1	1	3	8
4. Prohibition of investment of IRA assets in entities in which the owner has a substantial interest..............	generally imi tyba 12/31/21 [23]	3	3	3	4	4	5	5	5	5	6	17	42
5. IRA owners treated as disqualified persons for purposes of prohibited transaction rules..............	toa 12/31/21	---	1	1	1	1	1	2	2	2	2	5	13
Total of Part 3 - Modifications of Rules Relating to Retirement Plans..........................		**3,745**	**3,186**	**1,462**	**481**	**-159**	**-388**	**-860**	**-1,079**	**-1,127**	**-950**	**8,714**	**4,311**
Part 4 - Funding the Internal Revenue Service and Improving Taxpayer Compliance													
1. Funding of the Internal Revenue Service..............................	---	*Estimate to be Provided by the Congressional Budget Office*											
2. Application of backup withholding and third party network transactions..............	tyba 12/31/21	-2	-1	[2]	[2]	[2]	[2]	[2]	[2]	[2]	[2]	-3	-4
3. Limitation on deduction for qualified conservation contributions made by pass-through entities........................	[24]	4,733	4,698	699	304	313	337	344	352	359	365	10,747	12,504
4. Modification of procedural requirements relating to assessment of penalties..............	[25]	201	221	113	116	119	122	125	128	132	135	771	1,414
Total of Part 4 - Funding the Internal Revenue Service and Improving Taxpayer Compliance..........................		**4,932**	**4,918**	**812**	**420**	**432**	**459**	**469**	**480**	**491**	**500**	**11,515**	**13,914**
Part 5 - Other Provisions													
1. Modifications to limitation on deduction of excessive employee remuneration..............	tyba 12/31/21	1,028	2,157	2,315	2,438	2,536	1,841	1,119	1,139	1,158	1,178	10,473	16,909
2. Extension of tax to fund Black Lung Disability Trust Fund [26]..............	sa 12/31/21	101	137	135	131	32	---	---	---	---	---	536	536
3. Prohibited transactions relating to holding DISC or FSC in individual retirement account..............	saoiaoho/a 12/31/21	39	95	126	157	187	217	249	277	292	301	605	1,940

Provision	Effective	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2022-26	2022-31
4. Increase in tax on certain tobacco products and imposition of tax on nicotine [1]	generally effective icqba DOE	6,368	9,517	9,528	9,776	9,838	9,955	10,159	10,371	10,539	10,710	45,026	96,760
5. Clarification of rules regarding tobacco drawback	demo/a 12/18/18	*Estimate Included In Item 4. Above*											
6. Repeal employer credit for paid family and medical leave [27]	tyba 12/31/23	---	---	101	219	168	77	44	26	7	---	489	642
7. Clarification of treatment of DISC gain and distributions of certain foreign shareholders	goda 12/31/21	41	86	92	95	96	97	99	101	103	106	410	915
8. Access to self-employment income information for paid leave administration [28]	DOE	*No Revenue Effect*											
9. Temporary rule to allow certain S corporations to reorganize as partnerships without tax	too/a 12/31/21 & before 1/1/24	-417	-1,182	-897	-235	-269	-305	-339	-369	-392	-416	-3,000	-4,820
10. Treatment of certain qualified sound recording productions [29]	pci tyea DOE	-310	-59	6	43	112	86	43	21	11	12	-208	-35
11. Payment to certain individuals who dye fuel	[30]	[2]	[2]	[2]	[2]	[2]	[2]	[2]	[2]	[2]	[2]	-2	-4
12. Extension of credit for portion of employer Social Security taxes paid with respect to employee tips to beauty service establishments	tyba 12/31/21	---	-66	-69	-72	-75	-79	-82	-86	-90	-94	-282	-711
13. Enhancement of work opportunity tax credit during COVID 19 recovery period (sunset 12/31/22)	tyea DOE	-2,306	-2,183	-1,198	-395	-57	---	---	---	---	---	-6,139	-6,139
14. Allow an above-the-line deduction of up to $250 in union dues paid	tyba 12/31/21	-66	-442	-442	-443	-449	-485	-483	-486	-479	-476	-1,843	-4,252
15. Cover over of certain distilled spirit taxes [1][31]	dsbiUSa 12/31/21	-31	-204	-204	-204	-204	-204	-204	-204	-204	-204	-847	-1,867
16. Expensing of research and amortization expenditures (sunset 12/31/25)	DOE	-29,091	-39,856	-32,161	-24,133	19,284	38,009	29,958	19,853	9,269	4,851	-105,956	-4,016
17. Payroll credit for compensation of local news journalists	[32]	-146	-276	-251	-240	-238	-118	---	---	---	---	-1,151	-1,269
18. Treatment of financial guaranty insurance companies as qualifying insurance corporations under passive foreign investment company rules	tyba 12/31/17 & rma DOE	[2]	-1	-4	-4	-7	-8	-11	-13	-13	-13	-17	-74
19. Credit for qualified access technology for the blind (sunset 12/31/26)	tyba 12/31/21	-375	-799	-302	-929	-900	-203	---	---	---	---	-3,305	-3,508
20. Modification of REIT constructive ownership rules	tyea DOE	[2]	[2]	[2]	[2]	[2]	[2]	[2]	[2]	[2]	[2]	[2]	[2]
Total of Part 5 - Other Provisions		**-25,165**	**-33,076**	**-23,225**	**-13,796**	**30,054**	**48,880**	**40,552**	**30,630**	**20,201**	**15,955**	**-65,211**	**91,007**
TOTAL OF SUBTITLE I - RESPONSIBLY FUNDING OUR PRIORITIES		**145,601**	**150,078**	**209,299**	**227,616**	**224,352**	**227,646**	**230,198**	**221,303**	**216,371**	**220,337**	**956,940**	**2,072,797**
SUBTITLE J - DRUG PRICING: Selected Drug Manufacturer Excise Tax Imposed During Noncompliance Periods	**sa DOE**	*No Revenue Effect*											
NET TOTAL		**23,337**	**-20,326**	**23,269**	**27,592**	**107,350**	**153,711**	**152,181**	**137,780**	**127,484**	**126,802**	**161,217**	**859,166**

Joint Committee on Taxation

NOTE: Details may not add to totals due to rounding. The date of enactment is assumed to be October 1, 2021.

[Legend and Footnotes for the Table are on the following pages]

Legend and Footnotes for the Table:

Legend for "Effective" column:

apoia = amounts paid or incurred after
ar = advance refunding
ara = amounts received after
bia = bonds issued after
bimt = bond issued more than
bpisa = buildings placed in service after
bpisi = buildings placed in service in
cmoa = contributions made on or after
cqba = calendar quarters beginning after
csa = constructive sales after
cya = calendar years after
da = days after
dsbiUSa = distilled spirits brought into the United States after
dcmo/a = drawback claims made on or after
dda = decedents dying after
DOE = date of enactment
Dma = distributions made after
dtacmi = distributions, transfers, and contributions made in
duaa = dwelling units acquired after
ema = expenditures made after
epasa = electricity produced and sold after

fpisa = facilities placed in service after
fsoua = fuel sold or used after
gma = gifts made after
goda = gains or distributions after
icqba = in calendar quarters beginning after
imi = investments made in
ityea = in taxable years ending after
itybasd = in taxable years beginning after such date
ityeasd = in taxable years ending after such date
lai = losses arising in
leia = leases entered into after
lii = losses incurred in
lo/a = liquidations on or after
oia = obligations issued after
pa = periods after
pci = productions commencing in
pmo/a = payments made on or after
ppisa = property placed in service after
rma = reports made after
roo/a = reorganizations occurring on or after

qccma = qualified cash contributions made after
qsgbpa = qualified second generation biofuel production after
sa = sales after
saeo/a = sales and exchanges on or after
saoiaoho/a = stock and other interests acquired or held on or after
ta = transfers after
tcoa = trusts created on or after
toa = transactions occurring after
too/a = transfers occurring on or after
tovpola = transfers of vehicle purchased or leased after
tpoai = taxes paid or accrued in
tyba = taxable years beginning after
tyea = taxable years ending after
tyosfcba = taxable years of specified foreign corporations beginning after
vaa = vehicles acquired after
30da = 30 days after
180da = 180 days after

[1] Estimate contains the following outlay effects:	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2022-26	2022-31
Credit to issuer for certain infrastructure bonds	256	1,255	2,830	4,525	5,999	7,048	7,844	8,599	9,398	10,208	14,866	57,961
Credit for operations and maintenance costs of government-owned broadband	73	38	35	32	29	24	20	5	---	---	207	256
Credit for electricity produced from certain renewable resources (sunset 12/31/31)	87	281	498	825	1,375	2,008	2,712	3,488	4,229	5,064	3,066	20,568
Extension and modification of energy credit (sunset 12/31/33)	358	641	724	1,267	2,874	3,748	3,999	4,270	4,534	4,815	5,866	27,232
Investment credit for electric transmission property (sunset 12/31/31)	73	38	35	32	29	24	20	5	---	---	207	256
Zero-emission nuclear power production credit (sunset 12/31/26)	2,104	1,396	1,562	1,692	792	100	---	---	---	---	7,546	7,646
Credit for production of clean hydrogen	-29	-75	-125	-189	-266	-370	-500	-640	-702	-698	-684	-3,593
Refundable new qualified plug-in electric drive motor vehicle credit for individuals (sunset 12/31/31)	65	74	83	96	114	134	149	165	180	182	434	1,243
Extension of the advanced energy project credit	131	178	139	112	147	195	81	14	12	15	707	1,024
Qualified environmental justice credit (sunset 12/31/31)	---	---	---	328	504	504	504	832	1,008	1,008	832	4,687
Child tax credit	83,132	94,593	97,189	100,654	28,205	3,556	3,510	3,510	3,537	3,599	403,773	421,484
Certain improvements to the child and dependent care tax credit made permanent	---	3,801	3,834	3,900	3,898	3,176	3,221	3,251	3,295	3,356	15,433	31,732
Payroll tax credit for child care workers	257	515	517	556	576	587	599	611	623	635	2,420	5,475
Certain improvements to the earned income tax credit made permanent	---	10,381	10,919	11,336	11,595	11,461	11,636	11,815	11,977	12,123	44,231	103,242
Funds for administration of earned income tax credits in the territories	---	5	5	5	5	5	5	5	5	5	19	43
Federal Pell Grants excluded from gross income	---	167	159	153	150	150	146	139	134	129	629	1,327

[Footnotes for the Table continue on the following pages]

Footnotes for the Table continued:

[1] Estimate contains the following outlay effects (continued):	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2022-26	2022-31
Repeal of denial of American Opportunity Tax Credit on basis of felony drug conviction	---	6	6	6	6	6	6	5	5	5	23	50
Establishing rural and underserved pathway to practice training programs for post-baccalaureate students, medical students, and medical residents [33]	---	---	37	82	131	205	370	614	899	1,176	250	3,514
Permanent credit for health insurance costs	2	6	8	8	8	9	9	10	11	11	32	82
Increase in tax on certain tobacco products and imposition of tax on nicotine [34]	-21	-77	-119	-153	-195	-224	-246	-264	-254	-235	-565	-1,788
Cover over of certain distilled spirit taxes	31	204	204	204	204	204	204	204	204	204	847	1,867

[2] Loss of less than $500,000.

[3] Generally effective for calendar years after 2021. The proposal to allow the new markets tax credit be used to offset AMT liability is effective for qualified equity investments initially made after December 31, 2021.

[4] Effective for determinations with respect to 24-month periods (referred to in clause (i) of section 47(c)(1)(B) of the Internal Revenue Code of 1986) and 60-month periods (referred to in clause (ii) of such section) which end after December 31, 2021.

[5] Effective for allocations and determinations of housing credit dollar amount after December 31, 2021.

[6] The amendments made by subsections (a) and (c) shall apply to agreements entered into or amended after the date of the enactment. The amendments made by subsection (b) shall apply to agreements among the owners of the project (including partners, members, and their affiliated organizations) and persons described in section 42(i)(7)(A) of the Internal Revenue Code of 1986 entered in of the Internal Revenue Code of 1986 entered into before, on, or after the date of the enactment.

[7] Applies to buildings which receive a determination of housing credit dollar amount after the date of enactment.

[8] Generally effective taxable years beginning after the date of enactment. In the case of a qualified corporation that is a foreign corporation, to taxable years beginning after the date of enactment and to taxable years of United States shareholders in which or with which such taxable years of foreign corporations end.

[9] Effective for hydrogen produced after December 31, 2021, at facilities for which construction commenced on or before December 31, 2028.

[10] Estimate includes the following budget effects:	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2022-26	2022-31
Total Revenue Effect	20	21	23	24	16	16	17	18	19	19	104	193
On-budget effects	12	13	14	15	9	10	10	11	11	12	63	117
Off-budget effects	8	8	9	9	6	7	7	7	8	8	40	77

[11] Annual base allocation amounts end 2031, unused amounts may be reallocated through 2036.

[12] Estimate includes the following budget effects:	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2022-26	2022-31
Total Revenue Effect	-199	-270	-283	-294	-344	-362	-374	-383	-394	-400	-1,390	-3,302
On-budget effects	-114	-155	-164	-171	-219	-234	-243	-248	-255	-259	-823	-2,061
Off-budget effects	-85	-115	-119	-123	-125	-128	-131	-135	-139	-141	-567	-1,241

[13] For purposes of this subsection, the term 'termination date' means the later of January 1, 2025, or the date on which the Secretary of Health and Human Services makes a written certification to the Secretary that the Secretary of Health and Human Services has fully implemented the program described in section 1948.

[14] Generally effective for taxable years beginning after December 31, 2021, except that changes with respect to foreign tax credit carryback or carryover are effective for taxes paid or accrued in December 31, 2021, and changes related to redeterminations of foreign taxes are effective 60 days after date of enactment.

[15] Applies to taxable years of foreign corporations beginning after December 31, 2021, and to taxable years of United States shareholders in which or with which such taxable years of foreign corporations end.

[16] Increase in the top rate to 25% is effective for long-term capital gain and qualified dividend income generated after the date of introduction. The change to 25% rate threshold is effective for taxable years beginning after December 31, 2021.

[17] With respect to the reporting requirements, applicable to plan years beginning after December 31, 2021.

[18] With respect to the special rules related to increased minimum required distributions, applicable to plan years beginning after December 31, 2021; with respect to plan amendments, effective on date of enactment.

[19] With respect to after-tax contributions, applicable to distributions, transfers, and contributions made after December 31, 2021.

[20] If, on the date of enactment, an individual retirement account holds an investment prohibited under section 408(a)(7) of the Internal Revenue Code of 1986 (as added by this proposal), the amendments made by this section shall be effective with respect to such investment for taxable years beginning after December 31, 2023.

[Footnotes for the Table continue on the following page]

Footnotes for the Table continued:

[21] Applicable for taxes with respect to which the 3-year period under section 6501(a) of the Internal Revenue Code of 1986 (without regard to the amendment made by this section) ends after December 31, 2021.
[22] Gain of less than $500,000.
[23] If, on the date of enactment, an individual retirement account holds an investment prohibited under section 408(a)(8) of the Internal Revenue Code of 1986 (as added by this proposal), the amendments made by this section shall apply to such investment for taxable years beginning after December 31, 2023.
[24] Generally effective for contributions made after December 23, 2016. Effective for historic structures for contributions made in taxable years beginning after December 31, 2018.
[25] Repeal of Code section 6751(b) is effective as if included in section 3306 of the Internal Revenue Service Restructuring and Reform Act of 1998. Quarterly certifications of compliance with procedural requirements apply to notices of penalty issued after date of enactment.
[26] The temporary increase in the amount of tax on coal terminates for sales after December 31, 2025.
[27] Estimate includes the following budget effects:

	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2022-26	2022-31
Total Revenue Effect	---	---	101	219	168	77	44	26	7	---	489	642
On-budget effects	---	---	107	227	171	77	44	26	7	---	505	659
Off-budget effects	---	---	-6	-8	-2	---	---	---	---	---	-17	-17

[28] Provision is necessary for the administration of a proposed family and medical leave program. The budgetary effects of that program are estimated by the Congressional Budget Office.
[29] Sunsets 12/31/25 (section 181) and 12/31/26 (section 168(k)).
[30] Effective for eligible indelibly dyed diesel fuel or kerosene removed on or after the date which is 180 days after the date of enactment.
[31] Preliminary estimate provided by the Congressional Budget Office and subject to review.
[32] Effective for calendar quarters during the first five calendar years beginning after the date of the enactment.
[33] Outlays arising from Medicare funding of residency positions are provided by the Congressional Budget Office.
[34] Outlay effects provided by the Congressional Budget Office.

prepared by the Director of the Congressional Budget Office. The Committee has requested but not received from the Director of the Congressional Budget Office a federal mandates estimate for the Committee's provisions.

D. ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

E. APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act.

F. TAX COMPLEXITY ANALYSIS

Section 4022(b) of Pub. L. No. 105-266, the Internal Revenue Service Restructuring and Reform Act of 1998 (the "RRA"), requires the staff of the Joint Committee on Taxation (in consultation with the Internal Revenue Service and the Treasury Department) to provide a tax complexity analysis. The complexity analysis is required for all legislation reported by the Senate Committee on Finance, the House Committee on Ways and Means, or any committee of conference if the legislation includes a provision that directly or indirectly amends the Internal Revenue Code of 1986 and has widespread applicability to individuals or small businesses.

Pursuant to clause 3(h)(1) of rule XIII of the Rules of the House of Representatives, for each such provision identified by the staff of the Joint Committee on Taxation, a summary description of the provision is provided below along with an estimate of the number and type of affected taxpayers, and a discussion regarding the relevant complexity and administrative issues.

Following the analysis of the staff of the Joint Committee on Taxation are comments of the IRS and Treasury regarding each provision included in the complexity analysis.

[Insert Complexity Analysis]

COMMISSIONER

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, DC 20224

September 17, 2021

Mr. Thomas A. Barthold
Chief of Staff
Joint Committee on Taxation
Washington, D.C. 20515

Dear Mr. Barthold:

I am responding to your letter dated September 15, 2021, in which you requested a complexity analysis related to the Committee Report for Budget Reconciliation Legislative Recommendations Relating to Infrastructure Financing, Green Energy, Social Safety Net, Responsibly Funding Our Priorities, and Prescription Drug Pricing.

Enclosed are the combined comments of the Internal Revenue Service (IRS) and the Department of the Treasury for inclusion in the complexity analysis in the Committee Report for Budget Reconciliation Legislative Recommendations Relating to Infrastructure Financing, Green Energy, Social Safety Net, Responsibly Funding Our Priorities, and Prescription Drug Pricing.

Our analysis covers the two provisions that you preliminarily identified in your letter: 1) Child tax credit provisions and 2) Certain improvements to the earned income tax credit made permanent. Please note that for purposes of this complexity analysis, IRS staff assumed timely enactment of this legislation. If legislation is not enacted before the end of the year, there would be complexity for IRS and for taxpayers that is not addressed in this response.

Our comments are based on the description of the provision provided in your letter. This analysis does not include the administrative cost estimates for the changes that would be required. Due to the short turnaround time, our comments are provisional and subject to change upon a more complete and in-depth analysis of the provisions.

I hope this information is helpful. If you have any questions, please feel free to contact me, or your staff may contact Scott Landes, Chief, Legislation and Reports Branch, Office of Legislative Affairs, at 202-317-6985.

Sincerely,

Charles P. Rettig

Enclosure

Enclosure

COMPLEXITY ANALYSIS OF BUDGET RECONCILIATION LEGISLATIVE RECOMMENDATIONS RELATING TO INFRASTRUCTURE FINANCING, GREEN ENERGY, SOCIAL SAFETY NET, RESPONSIBLY FUNDING OUR PRIORITIES, AND PRESCRIPTION DRUG PRICING

1. Child tax credit provisions

2021
Section 137101 makes several modifications to the child tax credit for tax year 2021. It provides that recapture is allowed without taking into account the safe harbor amount for a child if the Secretary determines that the child was taken into account in determining the annual advance amount due to fraud or intentional disregard of the rules and regulations by the taxpayer. In addition, the proposal clarifies that the annual advance amount used to make advance payments may be determined based on other information known to the Secretary.

2022
Section 137102 extends and modifies the child tax credit and advance payments of the credit for tax year 2022. The provision extends the expansions to the child tax credit made by ARPA, Pub. L. No. 117-2, through tax year 2022. These extensions include (i) full refundability for taxpayers who have a principal place of abode in the United States for more than one-half of the year or who are bona fide residents of Puerto Rico for the tax year, (ii) the increase in the age limit of a qualifying child for purposes of the child tax credit to include children who have not attained age 18, (iii) the increase in child tax credit amount to $3,000, and $3,600 for qualifying children who have not attained the age of 6, (iv) the application of the initial phaseout to the increased child tax credit amount at the following applicable threshold amounts: $150,000 for taxpayers filing jointly or surviving spouses, $112,500 for head of household taxpayers, and $75,000 for all other taxpayers, (v) certain rules regarding payments to the territories and payments directly to the territory residents with respect to the child tax credit, and (vi) advance periodic payments of the child tax credit under section 7527A.

The provision changes the modified AGI used for purposes of the income phaseout to be the lower modified AGI of the current tax year or the preceding tax year. The provision also changes the identification requirement of the qualifying child to be a taxpayer identification number instead of a Social Security number. The provision increases the safe harbor amount for purposes of reconciling aggregate advance payments to be the full amount of the applicable child tax credit. Finally, the provision indexes the child tax credit and other dependent credit amounts and the initial phaseout thresholds for inflation beginning in tax year 2022 and using the CPI (rather than the chained CPI).

2023

Section 137103 creates a new monthly refundable child tax credit for tax years 2023 through 2025 in lieu of the existing child tax credit in section 24. The monthly credit amount is $250 for each specified child, or $300 for each specified child who will not have attained age six as of the close of the tax year. The monthly tax credit is reduced under two separate phaseouts, similar to the child tax credit in 2021 and 2022, but the modified AGI used for purposes of the income phaseouts is the lowest modified AGI among the current tax year and the two preceding tax years. The credit amounts and initial phaseout thresholds are indexed for inflation beginning in tax year 2023 (as if annual inflation adjustments started in 2022) and using the CPI. The credit is fully refundable for taxpayers who have a principal place of abode in the United States or Puerto Rico for more than one-half of the month. Taxpayer must establish presumptive eligibility for a specified child to claim a monthly child tax credit and receive advance payments of the credit.

The provision creates a new definition of specified child. The new definition has several factors, including whether the child receives care from the taxpayer. Under the provision, the taxpayer is eligible for the full year of monthly credits during the year of birth or year of death of a child. The provision also creates tie-breaking rules in the event that a child may be a specified child with respect to more than one taxpayer in a month. The provision contains rules for disallowance in the event of prior fraudulent, reckless, or improper claims. The name and taxpayer identification number of the specified child must appear on the return to claim the credit, and the taxpayer identification number must be issued on or before the due date of the return.

The provision also provides for monthly advance child payments of the monthly child tax credit for tax years 2023 through 2025 for taxpayers who have established presumptive eligibility. The advance payment is the amount estimated by the Secretary as the monthly child tax credit amount but based on prior year tax return information, information provided through an on-line IRS portal, or through any other method of providing information as established by the Secretary. To establish presumptive eligibility for the advance payment, the taxpayer may provide information related to eligibility by the methods described above. Presumptive eligibility ends in the event of fraud or intentional disregard, notice from the Secretary regarding questions of eligibility, and failure of the taxpayer to make the required annual renewal of presumptive eligibility. The Secretary may allow for automatic presumptive eligibility for newborns and children with respect to whom a government entity has provided certain information to the Secretary.

The provision creates special rules in the event of competing claims for a monthly advance child payment of a specified child by more than one taxpayer for the same month. The Secretary shall establish procedures to expeditiously adjudicate such competing claims. The Secretary may make retroactive

payments following the adjudication to the proper taxpayer if the taxpayer did not receive payments during the adjudication. The provision also allows retroactive monthly advance payments during grace periods or in the event of hardship.

Monthly advance child payments in excess of the monthly child tax credit are subject to recapture only in certain specified circumstances. The Secretary must provide annual notice to the taxpayer of the aggregate amount of advance payments made and whether any amount is subject to recapture. The Secretary must take the receipt of advance payments into account in determining withholding rules.

Under the provision, the Secretary will cover over the costs of the child tax credit to the territories of Guam, the Commonwealth of the Northern Mariana Islands, the U.S. Virgin Islands, and American Samoa. Puerto Ricans will receive advance payments and the monthly child tax credit directly from the U.S. government.

Finally, for tax years 2023 through 2025, the provision modifies the existing credit for other dependents by creating a new credit with similar rules to the existing credit. The $500 credit amount is indexed for inflation beginning in 2023 (as if annual inflation adjustments started in 2022) using the CPI. The credit is subject to one phaseout beginning at the following applicable threshold amounts: $400,000 for taxpayers filing jointly or surviving spouses, $300,000 for head of household taxpayers, and $200,000 for all other taxpayers.

Section 137104 provides that after tax year 2025, when the operable child tax credit rules are those in section 24 but without the ARPA expansions, the child tax credit is fully refundable for taxpayers who have a principal place of abode in the United States for more than one-half of the year or who are bona fide residents of Puerto Rico for the tax year.

IRS and Treasury Comments:

- Forms would be revised, including to allow taxpayers to establish presumptive eligibility on the tax return and, for 2023 through 2025.
- Programming changes would be needed for external IRS online tools to educate and inform taxpayers about the changes and Internal tools used by IRS customer service employees will also require changes.
- Greater fallout of returns due to improper reconciliation of advance payments. This results in increased manual processing and processing times.
- Significantly increased call volumes would result in the need to add or enhance phone lines, develop or enhance chat and voice bot capabilities, and monitoring of phones and bot volumes.

- Provide customer service support to taxpayers with questions related to eligibility for the advance payment and payments, including payment traces.
- Provide customer service support to taxpayers with issues at filing, Math Errors, Amended Returns/Adjustments, etc.
- Provide customer service support for taxpayer responses to new notices, letters, and general correspondence.

- Internal Revenue Manuals and employee training would be updated.
- Internal communications would be shared with all employees and external communications with the public would need updating and sharing.
- IRS would need to update webpages and other publicly available information.
- The statutory language would require the creation of an entirely new process for issuing advance payments to eligible taxpayers for tax years 2023 through 2025 based on monthly determinations of presumptive eligibility and a new portal for taxpayers to provide information about mid-year changes to eligibility and to opt out of the revised advance payment program.
- The new process would require significant staffing to adjudicate competing claims for advance payments for a specified child by more than one taxpayer based on the monthly residency of the specified child, including whether the residency of the child is permanent or temporary.
- IRS would be required to develop, update, and issue millions of additional notices.
- The statutory language with regard to the determination of the CTC allows the taxpayer to rely on a lower prior year modified adjusted gross income (AGI) but does not provide the benefit as an election. While this benefit allows a taxpayer a higher credit amount when the taxpayer's income increases in the later year, providing the benefit as an automatic rule presents a recordkeeping burden for taxpayers and, as compared to the use of an election as is done with the earned income credit and prior disaster relief provisions, will delay tax refunds for many taxpayers who fail to consider prior year AGI when claiming the CTC when their incomes have increased.
- The statutory language with regard to the determination of the CTC for 2023 through 2025 requires the development of programming to track monthly presumptive eligibility and requires allowing the CTC for a specified child under a definition that differs from the unified definition of a qualifying child for other refundable credits to be claimed on those tax returns.
- Existing regulations regarding tax return preparer due diligence at 26 C.F.R. § 1.6695-2 would need to be revised in order to give effect to the addition of the monthly CTC to the due diligence requirements in section 6695(g)(2).
- Programming changes would be required to incorporate the changes into the appropriate processing and compliance systems.

- The proposed statutory changes would require taxpayers to maintain records of the advance payments received in order to properly reconcile their entitlement to CTC on their tax return and could lead to additional disputes between taxpayers and the IRS about the amount of advance payments and offsets when advance payments are not made and the additional CTC is claimed on a filed return.
- Revisions to the applicable lead sheets for Examination use would be needed for tax year 2023 through 2025.
- Plans would need to be written or revised with the Territories to distribute the monies.
- Issuing payments to bona fide residents of PR will require programming and process changes. Also, agreements of data/information sharing would need to be evaluated if one already exists OR created if none currently exists.
- Compliance challenges:
  - Section 137102 this provision eliminates the Social Security Number requirement for qualifying children, which was added by the Tax Cuts and Jobs Act (TCJA). Eliminating the SSN entirely would mean that the IRS would make many more improper payments. It would be difficult to track duplicate dependents, ineligible dependents due to age and deceased dependents.
  - Adjustments are needed to Section 6103 and other disclosure/privacy provisions in the Code to allow data sharing in the specific instance related to advance payments. This is due to the fact that the current provisions envision data sharing only of filed returns and view that taxpayer data is individualistic rather than a household. However, the advance payment program uses an anticipated/estimated return.
- Increased coordination with the software industry and preparers on changes to the law and forms.

2. Certain improvements to the earned income tax credit made permanent

Section 137401 makes permanent certain temporary changes to the EITC that currently apply only to taxable years beginning in 2021. For taxable years beginning after 2021, the provision makes certain changes to the "childless EITC" to: (1) lower the minimum age to (i) 24 for certain specified students; (ii) 18 for qualified former foster youth and qualified homeless youth; and (iii) 19 in all other cases; (2) remove the maximum age; and (3) increase (i) the credit and phaseout percentages to 15.3 percent, (ii) the earned income amount to $9,820, and (iii) the beginning of the phaseout range to $11,610. The earned income amount and beginning of the phaseout range are adjusted for inflation starting in 2022. The provision directs the Secretary to develop procedures to use information returns under section 6050S to check the status of individuals as specified students.

The provision permits a taxpayer to elect to calculate the taxpayer's EITC for taxable years beginning after 2021 using preceding year rather than current year earned income, if the taxpayer's earned income in the preceding year is less than in the current year.

IRS and Treasury Comments:

- The proposal could require the IRS to enter into multiple/numerous agreements to obtain information about former foster children and qualified homeless youth; and may require programming to accept and integrate that information into processing systems.
- The proposed statutory changes could require additional taxpayer record keeping relative to current law for former foster children, qualified homeless youth and certain students, and could lead to additional disputes between taxpayers and the IRS, especially with regard to these new categories of eligible recipients.
- Revisions to the applicable lead sheets for Examination use would be needed. Instructions and publications would need to be updated to reflect inflationary adjustments.
- Plans would need to be written or revised with the Territories to distribute the monies.

List of Provisions in the Complexity Analysis

Child tax credit provisions (secs. 137101 through 137104 of the bill)

Summary description of provision

2021

Section 137101 makes several modifications to the child tax credit for tax year 2021. It provides that recapture is allowed without taking into account the safe harbor amount for a child if the Secretary determines that the child was taken into account in determining the annual advance amount due to fraud or intentional disregard of the rules and regulations by the taxpayer. In addition, the provision clarifies that the annual advance amount used to make advance payments may be determined based on other information known to the Secretary.

2022

Section 137102 extends and modifies the child tax credit and advance payments of the credit for tax year 2022. The provision extends the expansions to the child tax credit made by ARPA, Pub. L. No. 117-2, through tax year 2022. These extensions include (i) full refundability for taxpayers who have a principal place of abode in the United States for more than one-half of the year or who are bona fide residents of Puerto Rico for the tax year, (ii) the increase in the age limit of a qualifying child for purposes of the child tax credit to include children who have not attained age 18, (iii) the increase in child tax credit amount to $3,000, and to $3,600 for qualifying children who have not attained the age of 6, (iv) the application of the initial phaseout to the increased child tax credit amount at the following applicable threshold amounts: $150,000 for taxpayers filing jointly or surviving spouses, $112,500 for head of household taxpayers, and $75,000 for all other taxpayers, (v) certain rules regarding payments to the U.S. territories and payments directly to the territory residents with respect to the child tax credit, and (vi) advance periodic payments of the child tax credit under section 7527A.

The provision changes the modified adjusted gross income ("AGI") used for purposes of the income phaseout to be the lower modified AGI of the current tax year or the preceding tax year. The provision also changes the identification requirement of the qualifying child to be a taxpayer identification number instead of a Social Security number. The provision increases the safe harbor amount for purposes of reconciling aggregate advance payments to be the full amount of the applicable child tax credit. Finally, the provision indexes the child tax credit and other dependent credit amounts and the initial phaseout thresholds for inflation beginning in tax year 2022. The inflation indexing is based on changes in the consumer price index ("CPI") rather than on so-called chained CPI.

2023

Section 137103 creates a new monthly refundable child tax credit for tax years 2023 through 2025 in lieu of the existing child tax credit. The monthly credit amount is $250 for each specified child, or $300 for each specified child who will not have attained age six as of the close of the tax year. The monthly credit is reduced under two separate phaseouts, similar to the child tax credit in 2021 and 2022, but the modified AGI used for purposes of the income phaseouts is

the lowest modified AGI among the current tax year and the two preceding tax years. The credit amounts and initial phaseout thresholds are indexed for inflation beginning in tax year 2023 (as if annual inflation adjustments started in 2022) based on changes in the CPI (rather than the chained CPI). The credit if fully refundable for taxpayers who have a principal place of abode in the United States or Puerto Rico for more than one-half of the month. Taxpayer must establish presumptive eligibility for a specified child to claim a monthly child tax credit and receive advance payments of the credit.

The provision creates a new definition of specified child. The new definition has several factors, including whether the child receives care from the taxpayer. Under the provision, the taxpayer is eligible for the full year of monthly credits during the year of birth or year of death of a child. The provision also creates tie-breaking rules that apply if a child otherwise may be a specified child with respect to more than one taxpayer in a month. The provision disallows the credit if a taxpayer made certain prior fraudulent, reckless, or improper claims. The name and taxpayer identification number of the specified child must appear on the return to claim the credit, and the taxpayer identification number must be issued on or before the due date of the return.

The provision also provides monthly advance child payments of the monthly child tax credit for tax years 2023 through 2025 for taxpayers who have established presumptive eligibility. The advance payment is the amount estimated by the Secretary as the monthly child tax credit amount but based on prior year tax return information, information provided through an on-line IRS portal, or through any other method of providing information as established by the Secretary. To establish presumptive eligibility for the advance payment, the taxpayer may provide information related to eligibility on a prior year tax return, through the on-line portal, or another method established by the Secretary. Presumptive eligibility ends in the event of fraud or intentional disregard, notice from the Secretary regarding questions of eligibility, or failure of the taxpayer to make the required annual renewal of presumptive eligibility. The Secretary may allow automatic presumptive eligibility for monthly advance payments for newborns and children with respect to whom a government entity has provided certain information to the Secretary.

The provision creates special rules in the event of competing claims for a monthly advance child payment of a specified child by more than one taxpayer for the same month. The Secretary is required to establish procedures to expeditiously adjudicate competing claims. The Secretary may make retroactive payments following the adjudication to the proper taxpayer if the taxpayer did not receive payments during the adjudication. The provision also allows retroactive monthly advance payments during grace periods or in the event of hardship.

Monthly advance child payments in excess of the monthly child tax credit are subject to recapture only in certain specified circumstances. The Secretary must provide annual notice to the taxpayer of the aggregate amount of advance payments made and whether any amount is subject to recapture. The Secretary must take the receipt of advance payments into account in determining withholding rules.

Under the provision, the Secretary will cover over the costs of the child tax credit to the territories of Guam, the Commonwealth of the Northern Mariana Islands, the U.S. Virgin

Islands, and American Samoa. Residents of Puerto Rico will receive advance payments and the monthly child tax credit directly from the U.S. Treasury.

Finally, for tax years 2023 through 2025, the provision modifies the existing credit for other dependents by creating a new credit with similar rules to the existing credit. The $500 credit amount is indexed for inflation beginning in 2023 (as if annual inflation adjustments started in 2022) using the CPI. The credit is subject to one phaseout beginning at the following applicable threshold amounts: $400,000 for taxpayers filing jointly or surviving spouses, $300,000 for head of household taxpayers, and $200,000 for all other taxpayers

Section 137104 provides that after tax year 2025, when the operable child tax credit rules are those in section 24 but without the ARPA expansions, the child tax credit is fully refundable for taxpayers who have a principal place of abode in the United States for more than one-half of the year or who are bona fide residents of Puerto Rico for the tax year.

Number of affected taxpayers

It is estimated that the provision will affect approximately 40 million tax returns in 2022, 50 million tax returns in 2023 through 2025, and 3 million tax returns in tax years after 2025.

Discussion

The IRS will need to modify forms, instructions, and publications to reflect each of the changes to the child tax credit, including the change in the safe harbor amount and applicable modified AGI for 2022 and establishment of a monthly child tax credit for tax years 2023 through 2025, described above. The IRS also will need to issue regulations or other guidance to clarify rules regarding eligibility for and the amount of the credit. Taxpayers newly eligible for the child tax credit may have to keep additional records. The changes may result in an increase in disputes with the IRS, especially with respect to adjudicating competing claims for presumptive eligibility for a specified child. The IRS will need to set up an adjudication system for such competing claims.

In order to continue the advance payment program established in 2021, the IRS will need to modify forms, instructions, and publications. It will need to provide for a method of annual renewal for taxpayers to establish presumptive eligibility for the credit. It will also need to maintain and modify an online portal or other specified mechanisms that allow taxpayers to elect in or out of the program, establish presumptive eligibility, and provide additional information. The IRS will need to provide processes for automatic presumptive eligibility in certain circumstances. The IRS will need to set up processes to allow grace periods and hardship payments. The IRS will also need to send an annual notice to taxpayers providing the aggregate amount of advance payments. Regulatory guidance may be necessary to provide additional rules for the advance payment program and reconciliation. This program will require significant programming and other information technology changes. Taxpayers will need to maintain records of advance payments received but will be assisted by receipt of the IRS notice. The advance payments and reconciliation may result in an increase in disputes with the IRS. The

advance payment program and reconciliation may also increase tax preparation costs for individuals.

The application of the provision to those with a principal place of abode in Puerto Rico will require the IRS to create new forms, instructions, and publications for these residents to file returns with the United States to claim the child tax credit. Regulatory guidance may be necessary to provide additional rules for these individuals. These individuals will need to keep additional records to establish eligibility for the child tax credit. There may be additional disputes between these individuals and the IRS about eligibility for the child tax credit and calculation of the child tax credit. Finally, these individuals will have increased tax preparation costs because they will have to claim the child tax credit or advance payments of the credit with the IRS.

Certain improvements to the earned income tax credit made permanent (sec. 137401 of the bill)

Summary description of provision

Section 137401 makes permanent certain temporary changes to the EITC that currently apply only to taxable years beginning in 2021. For taxable years beginning after 2021, the provision makes certain changes to the "childless EITC" to: (1) lower the minimum age to (i) 24 for certain specified students; (ii) 18 for qualified former foster youth and qualified homeless youth; and (iii) 19 in all other cases; (2) remove the maximum age; and (3) increase (i) the credit and phaseout percentages to 15.3 percent, (ii) the earned income amount to $9,820, and (iii) the beginning of the phaseout range to $11,610. The earned income amount and beginning of the phaseout range are adjusted for inflation starting in 2022. The provision directs the Secretary to develop procedures to use information returns under section 6050S to check the status of individuals as specified students

The provision permits a taxpayer to elect to calculate the taxpayer's EITC for taxable years beginning after 2021 using preceding year rather than current year earned income, if the taxpayer's earned income in the preceding year is less than in the current year.

Number of affected taxpayers

It is estimated that the provision will affect approximately 37 million tax returns.

Discussion

The IRS will need to modify forms, instructions, and publications to reflect the changes to the EITC due to the provision. It will also need to continue to use procedures for taxable year 2021 or create new procedures to determine specified student, qualified former foster youth, and qualified homeless youth status. Regulatory or other guidance may be necessary. Taxpayers newly eligible for the "childless EITC" may have to keep records, such as information about self-employment income, necessary for the determination of the EITC. It is not otherwise anticipated that taxpayers will need to keep additional records due to the provisions, or that compliance with the provision will impose new costs on taxpayers. Determination of qualified former foster youth or qualified homeless youth status

may result in an increase in disputes with the IRS. Otherwise, the provisions should not result in an increase in disputes with the IRS. In addition, the provision should not increase the tax preparation costs for most individuals.

G. Congressional Earmarks, Limited Tax Benefits, and Limited Tariff Benefits

With respect to clause 9 of Rule XXI of the Rules of the House of Representatives, the Committee has carefully reviewed the provisions of the subtitle, and states that the provisions of the committee print do not contain any congressional earmarks, limited tax benefits, or limited tariff benefits within the meaning of the rule.

H. Duplication of Federal Programs

In compliance with clause 3(c)(5) of Rule XIII of the Rules of the House of Representatives, the Committee states that no provision of the committee print establishes or reauthorizes: (1) a program of the Federal Government known to be duplicative of another Federal program; (2) a program included in any report to Congress pursuant to section 21 of Public Law 111139; or (3) a program related to a program identified in the most recent Catalog of Federal Domestic Assistance, published pursuant section 6104 of title 31, United States Code.

CHANGES IN EXISTING LAW MADE BY THE COMMITTEE PRINT, AS TRANSMITTED

With respect to clause 3(e) of rule XIII of the Rules of the House of Representatives, the Committee requested but did not receive the text of changes in existing law made by the subtitle, as reported.

DISSENTING VIEWS

["2D_WMSubtitle[]_Views_Insert"]

Congress of the United States
U.S. House of Representatives
COMMITTEE ON WAYS AND MEANS
1102 LONGWORTH HOUSE OFFICE BUILDING
(202) 225-3625
Washington, D.C 20515-0348
http://waysandmeans.house.gov

RICHARD E. NEAL
MASSACHUSETTS,
CHAIRMAN

LLOYD DOGGETT, TEXAS
MIKE THOMPSON, CALIFORNIA
JOHN B. LARSON, CONNECTICUT
EARL BLUMENAUER, OREGON
RON KIND, WISCONSIN
BILL PASCRELL JR., NEW JERSEY
DANNY K. DAVIS, ILLINOIS
LINDA T. SÁNCHEZ, CALIFORNIA
BRIAN HIGGINS, NEW YORK
TERRI A. SEWELL, ALABAMA
SUZAN DELBENE, WASHINGTON
JUDY CHU, CALIFORNIA
GWEN MOORE, WISCONSIN
DAN KILDEE, MICHIGAN
BRENDAN BOYLE, PENNSYLVANIA
DON BEYER, VIRGINIA
DWIGHT EVANS, PENNSYLVANIA
BRAD SCHNEIDER, ILLINOIS
TOM SUOZZI, NEW YORK
JIMMY PANETTA, CALIFORNIA
STEPHANIE MURPHY, FLORIDA
JIMMY GOMEZ, CALIFORNIA
STEVEN HORSFORD, NEVADA
STACEY PLASKETT, VIRGIN ISLANDS

BRANDON CASEY,
MAJORITY STAFF DIRECTOR

KEVIN BRADY
TEXAS,
RANKING MEMBER

DEVIN NUNES, CALIFORNIA
VERN BUCHANAN, FLORIDA
ADRIAN SMITH, NEBRASKA
TOM REED, NEW YORK
MIKE KELLY, PENNSYLVANIA
JASON SMITH, MISSOURI
TOM RICE, SOUTH CAROLINA
DAVID SCHWEIKERT, ARIZONA
JACKIE WALORSKI, INDIANA
DARIN LAHOOD, ILLINOIS
BRAD R. WENSTRUP, OHIO
JODEY ARRINGTON, TEXAS
DREW FERGUSON, GEORGIA
RON ESTES, KANSAS
LLOYD SMUCKER, PENNSYLVANIA
KEVIN HERN, OKLAHOMA
CAROL MILLER, WEST VIRGINIA

GARY ANDRES,
MINORITY STAFF DIRECTOR

September 17, 2021

DISSENTING VIEWS ON SUBTITLE F.
BUDGET RECONCILIATION LEGISLATIVE RECOMMENDATIONS RELATING TO INFRASTRUCTURE FINANCING

Improving America's infrastructure has always been achieved by both parties in Congress working together. It's a unifying, bipartisan issue that reflects our common belief that a growing nation deserves infrastructure that is growing with it. Unfortunately, Democrats' approach was crafted behind closed doors with no input from Republicans.

Worse, pairing infrastructure spending with crippling tax hikes sabotages America's recovery, hurts working families, and drives U.S. jobs overseas. We cannot fund infrastructure on the backs of American workers.

Our top infrastructure priority must be attracting more private funding. America lags the rest of the world in private-sector infrastructure investment. Public-private partnerships driven by private-sector dollars are much more common outside the United States.

According to a World Bank database, private investors have invested $356 billion in transportation infrastructure projects outside the U.S. since 1990. U.S. public-private partnership programs, like the $15 billion transportation private activity bonds program, pale in comparison. We should work on a bipartisan basis to expands private investment and reduce our dependence on taxpayer funding. Unfortunately, Democrat's partisan plan does the opposite.

This subtitle creates new "qualified infrastructure bonds" in the vein of Obama-era "Build America Bonds" (BABs), which offer direct-pay subsidies to government issuers of infrastructure bonds. In contrast to municipal bonds and tax-exempt private activity bonds, which offer tax-exempt treatment of interest income to the investor, direct-pay bonds provide direct funding from Treasury to the bond issuer. This means that individuals not subject to foreign tax, like billionaire foreign investors, receive the same benefits as an American investor. We should not be creating a new loophole for wealthy investors in tax haven jurisdictions.

As with BABs, qualified infrastructure bonds are granted a subsidy of up to 35 percent of the interest on the bond. A 2011 report by the Obama Treasury Department concluded that the 35 percent subsidy rate was more generous than necessary to offset the cost of taxable financing and resulted in an unexpected direct $20 billion subsidy to states. The Obama Administration even

proposed reinstating BABs at a lower subsidy rate that would be "revenue neutral." Thus, a 35 percent subsidy rate is not a responsible use of federal taxpayer dollars.

Democrats also repeal an important safeguard included in the 2017 tax reform law – preventing state and local governments from using "advance refunding" to refinance tax-exempt bonds. Prior to the 2017 tax law, state and local governments could refinance tax-exempt bonds by issuing new tax-exempt bonds far in advance of the redemption of the original bond. This allowed state and local governments to capture the benefits of lower prevailing interest rates.

By repealing this safeguard, Democrats open the door to no limit on the number of times that tax-exempt bonds can be refinanced (i.e., advance refunded). As a result, state and local governments could issue and have outstanding multiple tax-exempt bonds for the same project for extended periods of time. The federal taxpayer should not be required to subsidize the same project multiple times.

Broadband internet service is critical to advancing opportunities for all Americans, yet millions of Americans remain without access to high-speed broadband networks. Unfortunately, this legislation does not focus on areas of the country that currently lack coverage. Instead, it encourages overbuilding and allows government to unfairly compete against private companies with taxpayers left footing the bill.

Finally, this subtitle applies Davis-Bacon prevailing wage requirements to both BABs and exempt facility bonds for infrastructure projects, which will drive up costs and reduce the return on taxpayers' investment.

DISSENTING VIEWS ON SUBTITLE G. BUDGET RECONCILIATION LEGISLATIVE RECOMMENDATIONS RELATING TO GREEN ENERGY

Democrats have made an unfortunate departure from smart, pro-growth tax policy that promotes innovation, investment, and jobs. Instead, they wade into command-and-control industrial policy, where favored industries win and everyone else loses.

The American entrepreneurial spirit has led to unprecedented innovation, growth, and prosperity. When Americans step onto a fair and level playing field, they can compete with anyone in the world and win. A fair tax system with a broad base and low rates provides the level playing field and promotes innovation and jobs. That was the goal and result of the 2017 tax reform law, which led to unprecedented wins for U.S. workers and record investment in research and development.

A broad-base, low-rate tax system also ensures that the tax burden on any specific business is neither too low nor too high and everyone pays their fair share. When considered with the other subtitles, this subtitle will result in fewer businesses paying effective tax rates close to the statutory rate. Although tax rates are increased, favored industries receive huge new corporate tax breaks that will allow big businesses to escape paying taxes.

By expanding generous tax subsidies for technologies that have been around for nearly three decades, the proposed legislation also discourages innovation in new technologies that would have to try to compete with heavily subsidized market-dominating technologies. Republicans believe American solutions for cleaner energy sources will come from innovation and creativity, not through market control and corporate welfare for established technologies.

Republicans are encouraged to see businesses reducing their greenhouse gas footprint and individuals making choices that stimulate the development of energy technology. The best way for the government to achieve shared environmental goals is to take the thumb off the scale, avoid market disruptions, and allow American entrepreneurs to create a cost-efficient path for consumers and government alike.

When government tries to pick winners among favored industries and losers among disfavored industries, the result will be waste and failed investment of taxpayer dollars. With lower rates and a broader tax base that excludes unnecessary taxpayer-funded subsidies, businesses will have the investment dollars and proper incentives to create a new energy future.

The new and expanded cash tax credits for luxury electric vehicles (EVs) included in this subtitle are egregious examples of cronyism and unnecessary taxpayer subsidies. The EV credit for individuals rewards the wealthy and inflates the cost of vehicle, all at the federal taxpayer's expense. There is no reason that a wealthy household earning $800,000 needs to receive up to $12,500 for each EV they purchase. Similarly, the EV tax credit for businesses will reward wealthy corporations and allow them to avoid paying their fair share.

Republicans believe that workers driving a used car and paying the gas tax should not be footing the bill for the luxury EVs of the wealthy or their wear-and-tear on the roads. A factory worker driving a pickup to work to provide for his or her family shouldn't see lower wages or higher taxes so that a top 1% household in California can get a write-off for their new Tesla.

Democrats have also rushed through this policy without a full vetting, making clear the folly of trying to implement industrial policy. Only one car currently on the market meets all of the qualifications for the full EV tax credit, and starting this week, it comes with the following warning: "In an effort to reduce potential damage to structures and nearby vehicles in the rare event of a potential fire, we recommend parking on the top floor or on an open-air deck and park 50 feet or more away from another vehicle. Additionally, we still request you do not leave your vehicle charging unattended, even if you are using a charging station in a parking deck."

In addition, the inclusion of the direct-pay option for tax credits represents a total departure from the model of a tax on income. Tax credits are intended to provide an incentive for successful firms to (1) pursue preferred activities that may be less profitable than alternatives, or (2) reduce a preferred cost that they may not have otherwise undertaken. Tax credits that prop up firms that are unsuccessful and may never become successful create a major risk wasted taxpayer dollars.

Direct pay tax credits operate as grants administered through the tax code, but without the typical government oversight, transparency, and limits of traditional grants. And the generous tax credits in this subtitle do not provide the government with an equity stake in the businesses in which they have made a de facto equity investment.

Direct pay tax credits also create backwards incentive to support higher business tax rates because the value of a tax credit increases with the tax rate it is offsetting. The Democrats' plan is to increase business taxes across-the-board, and then provide special loopholes and tax shelters to the subset of businesses that they favor.

Some sections of this subtitle provide for "bonus" tax credits contingent on the use of domestic steel, aluminum, and manufactured products or on certain domestic assembly and local content requirements. Such requirements can raise questions about consistency with U.S. obligations under certain World Trade Organization agreements, and the Majority has not provided Committee Republicans with any analysis of these considerations.

Finally, the labor requirements in the proposed legislation run counter to the purported goal of cleaner energy production. These requirements will increase the cost of green energy projects and goods, so every dollar spent goes a shorter distance. This is just another example of how the Democrat's "government knows best" approach often makes it more difficult to achieve their intended outcome.

Trying to be constructive, we offered amendments to improve this legislation. At every turn, we were rebuffed by our colleagues on the other side, who defeated our efforts on technicalities or with prearranged party-line votes.

Here are some of the common-sense amendments that were opposed by our colleagues:

- "The Green New Deal Elimination and Middle-Class Family Protection Amendment" – would strike the green energy tax subsidies and avoid hundreds of billions in offsetting tax increases that will be borne by ordinary Americans.
- "The No Corporate Welfare Amendment" – would eliminate eligibility for commercial EV tax credits for any big business with income over $5 million.
- "The No Tax Breaks for the Top 1% Amendment" – would reduce the maximum income threshold for EV tax credits from $800,000 to $150,000 ($75,000 for single filers).
- "The Corporate Welfare Elimination Amendment" – would eliminate the direct pay option for green subsidies for any big business with income over $5 million.

In Democrats' rush to spend $3.5 trillion, they included numerous loopholes and subsidies to wealthy individuals and hand-picked businesses. That's not the path to strong economic growth. A smarter tax system with a broader base and lower rates is proven to generate prosperity and opportunity for all Americans.

DISSENTING VIEWS ON SUBTITLE H.
BUDGET RECONCILIATION LEGISLATIVE RECOMMENDATIONS RELATING TO SOCIAL SAFETY NET

Committee Republicans oppose all parts of Subtitle H. In Subtitle H, Democrats are turning the Child Tax Credit on its head by completely de-linking the credit from earnings and work in an unprecedented attempt to start using the IRS to distribute cash welfare – at a cost of $556 billion. This is the most expensive item on the Democrat's tax hikes and spending spree wish list. These monthly payments will flow, no strings attached, regardless of whether the recipient earned any income or worked.

This policy originated in the partisan American Rescue Plan Act (ARPA) (P.L. 117-2), where Democrats increased the child tax credit by 80 percent, from $2,000 to $3,600, and made the credit fully refundable regardless of income or earnings. In addition, the bill required the IRS to advance payments on a monthly basis. These changes were set to expire at the end of 2021. Prior to ARPA, in order to receive the child tax credit, families had to report at least $2,500 in income and the credit was refundable up to $1,400. Subtitle H provides an additional year extension through 2022 and then extends the CTC to 2025 with several changes that make it more susceptible to fraud and abuse.

America's struggling families need good-paying jobs, not more emergency spending and endless government checks. Democrats are using temporary emergency COVID relief as a backdoor to create permanent new welfare-without-work programs that foster greater dependence on government and pay people more not to work. According to scholars at the American Enterprise Institute, by ending CTC work requirements, Democrats will destroy up to 451,000 jobs.[1]

With more than 10 million job openings and national worker shortage in a post-COVID economy, the country can't afford to relegate an entire generation of workers to the sidelines. A Wall Street Journal Op-Ed laid out the big picture well:

> *"Under the guise of pandemic relief, the federal government would give a nonworking single parent with two preschool-age children and one in grade school $850 a month. This would come on top of other government benefits, including $680 a month in food stamps, amounting to $18,360 in combined annual income.*
>
> *That's the equivalent, without accounting for taxes, of working 28 hours a week at $12.50 an hour. On top of that, the family would receive health insurance from Medicaid, and it may also receive housing and child-care assistance. Government benefits to nonworking households that are this generous are bound to reduce employment."*[2]

It is especially pernicious that Democrats have been champions of the policy in this subtitle – to send monthly checks to non-earner, non-working households with children – as a way to

[1] American Enterprise Institute, "Unintended Consequences: Democrat's child tax credit will cost jobs," April 22, 2021.
[2] Wall Street Journal, "Democrats' Stealth Plan to Enact Universal Basic Income," Robert Doar and Matt Weidinger, March 2, 2021.

decrease child poverty. Democrats' version of the CTC will hold people down by keeping them reliant on government handouts. This is the opposite of how a safety net should work.

No amount of endless government checks —no matter how well-intentioned—can address the underlying challenges that could be holding a family back from success and economic independence.

Democrats big spending proposals in this bill, like the CTC, equate to turning a blind eye on America's most vulnerable families – what Arthur Brooks so artfully phrased as the "soft bigotry of low expectations." Families in poverty almost always face multiple challenges, such as a skills gap, language barriers, or lack of access to education, and/or have underlying problems that perpetuate the cycle of poverty – from domestic violence, addiction, and abuse and neglect, to unaddressed mental health problems. In Subtitle H, Democrats would create a system of automatic benefits that send poor families a check and walk away, as if the absence of money were the only obstacle families in poverty face. The human connection is pivotal.

Americans are a generous people. In fact, American taxpayers fund a social safety net of more than 80 programs to the tune of $1 trillion a year as a commitment to reducing child poverty and helping those in need. But there's one fundamental value American's have consistently held across the political spectrum. It's about personal responsibility and work in exchange for benefits. We all know that families, particularly the children in those families, do best when parents are connected to jobs and moving up the economic ladder. This subtitle goes in the opposite direction.

Instead of anchoring those in poverty to endless checks—Republicans believe we should be empowering them to seize greater opportunity and success for themselves and their children by linking them to jobs and the supportive services they need. The human connection is pivotal. Case management practices that promote work and focus on people, not programs, can help families set goals, connect them to needed services, and show them a path forward.

Committee Republicans offered an amendment to re-instate the $2,500 earnings work requirement and ensure that income from CTC counts towards eligibility for federal means-tested benefit programs. Democrats unanimously rejected this amendment to link federal benefits to the pursuit of work and the skills that lead to work.

Subtitle H, like many of the new programs in this bill, also is not well-targeted and would benefit high-earner households. Wealthy Americans earning well over $200,000 a year will receive checks whether they want them or not. In addition, the new monthly cash payment system of CTC will serve as a powerful magnet for fraudsters and identity thieves. We know that improper payments have persisted in Earned Income Tax Credit payments, rising from $15.6 billion (23.8 percent) in 2015 to $17.4 billion (25.3 percent of all payments) in 2019. A concerning pattern also exists for Additional Child Tax Credit (ACTC).

House and Senate Democrats should take a closer look at this bill. In the rush to claim ownership, Committee Democrats have created a shoddily constructed program with serious

design flaws. The subtitle makes a number of eligibility changes to CTC beginning in 2023 that raise even more concerns about the susceptibility to fraud and abuse.

First, the bill would change the definition of "qualified child" to "specified child." Broadly, the definition in the draft text is based on who the child lives with during the month and who provides care for the child during that month. This is a broader definition of a qualifying child which may allow non-relatives (i.e., kinship caregivers) and other relatives who care for the child to receive the benefit, again with no safeguards in place to prevent identity theft or assurances that the child actually lives with the person claiming the credit.

The bill would also allow for the Secretary of Treasury to provide "presumptive eligibility" to families on a monthly basis. Subtitle H outlines methods for the IRS to estimate the monthly benefit amount as well as procedures to issue the payment to the taxpayer who is deemed "presumptively eligible" for the benefit during a specified period of time. The exact details of how "presumptive eligibility" would work in practice are not entirely clear, as the language provides the Treasury Secretary with discretion in developing these processes within the bounds of the legislative text.

Committee Republicans offered a good governance amendment to address several of these weaknesses with common sense fixes. The amendment would have:

- Maintained the Social Security number requirement for the CTC;
  - U.S. Citizens, and people lawfully admitted to the U.S. on a permanent basis, including Permanent Residents, refugees, and asylees are all eligible for Social Security numbers.
  - Republican tax reform closed off a significant opportunity for fraud by requiring a social security number for each child claimed under the child tax credit. In Subtitle H Democrats seek to eliminate this requirement.
- Strike the section allowing presumptive eligibility for the CTC;
- Maintain the tax filing requirement for Obamacare's Advanced Premium Tax Credit;
  - This restores the requirement for people to file their tax returns at the end of the year. The IRS itself deems the premium tax credit program "high risk" and estimated that 27.4% of the total PTC payments in FY2019 were improper. The equivalent of $4.3 billion in a single year;
- Re-name the IRS the "Internal Revenue and Welfare Office" to reflect their new mission as a welfare agency disbursing checks and entitlement benefits to Americans.
  - Democrats want the IRS to run a new $500 billion paid family and medical leave entitlement program and expects them to turnaround applications in 15 days.
  - The IRS would also now be in charge of distributing monthly CTC welfare checks to every person with children who earn under $400,000 a year.
- Biden's Treasury Department has already rejected the idea of running a new benefit entitlement program.
-

Democrats unanimously rejected this amendment to protect the CTC from fraud and abuse and add simple common sense integrity measures.

A surprise inclusion in a bill was a $2.5 billion loophole for Ivy League universities. Republican tax reform in 2017 instituted a new anti-abuse tax, to prevent Ivy League schools from funneling tens of billions of tax-free dollars into massive endowment accounts that don't help students. The Republican approach made sense: the endowment tax would apply only to large schools and only if the university had stockpiled more than $500,000 per student in its endowment. As a result, only about 30 universities are subject to the excise tax – and they are generally the wealthiest schools in the country. The top 3 endowments at the end of 2020 were Harvard ($40 billion), Yale ($31 billion), and Stanford ($28 billion).

Responsible university presidents would deploy endowment funds to expand enrollment, particularly for historically disadvantaged minority groups. Instead, Ivy League presidents appear to have worked behind the scenes to create a special tax shelter. These schools don't need a loophole, and the structure of the loophole doesn't even make sense. A school could easily avoid the anti-abuse tax without impacting its bottom line by simultaneously increasing financial aid and tuition, with the end result being the same net amount of tuition received. Instead of tax shelters for the Ivy League, we should focus our efforts on good jobs, higher wages, and greater opportunity for American workers.

Trying to be constructive, we offered amendments to improve this legislation. At every turn, we were rebuffed by our colleagues on the other side, who defeated our efforts on technicalities or with prearranged party-line votes.

Here are some of the common-sense amendments that were opposed by our colleagues:

- "The No Tax Shelters for Ivy League Elites Amendment" – would remove the carveout from the college endowment anti-abuse tax.

Additionally, the cost of health insurance is an issue that we can, and should be, tackling on a bipartisan basis.

A recent study reported that healthcare spending in the U.S. during 2019 was nearly $3.8 trillion, or $11,582 per person. By 2028, these costs are expected to climb to $6.2 trillion—roughly $18,000 per person.[3]

Average unsubsidized family premiums for the Affordable Care Act (ACA) from 2015 through 2020 rose 97% from $8,724 to $17,244.

Those costs are too high – yet they pale in comparison to the staggering costs of bribing people into buying Obamacare plans. We don't even have a public CBO score of these costs, but apparently the attitude of the majority is, "if it's broke, raise taxes and throw more money at it."

We should be working together on policies that expand transparency, choices, and affordability for patients.

---

[3] Peterson Foundation. "Why Are Americans Paying More for Healthcare?" Accessed March 9, 2021.

To that end, Ways and Means Republicans offered an alternative that includes policies to:

- Allow patients of all ages to purchase affordable catastrophic plans that provide all the same benefits as the other exchange plans but don't break the bank with through-the-roof monthly premiums.
- Allow employees to receive on-site care from their employer and still receive contributions to their health savings accounts, a bipartisan priority.
- Double the contribution limit on health savings accounts, and yet another to allow patients with direct primary care arrangements to maintain eligibility for health savings accounts, another bipartisan priority.
- Codify the Trump Administration's rule to expand the flexibility of Individual Coverage Health Reimbursement Accounts (ICHRAs). This rule would add flexibility for both employers and employees, and contributions can only be used to purchase an ACA-compliant plan.

Republicans want to help Americans afford their health care. We just disagree on how you go about it. The inefficient spending in this bill, all to prop up a law that has failed to address the true cost of care in this country, is not the right approach.

We should work together to accomplish our shared goal – not use a process that allows for no bipartisanship to slap a band-aid on the problem of ballooning health care costs.

For these reasons and more, Ways and Means Republicans reject the Democrats' higher cost subsidy expansion as ordered reported by Committee Democrats.

DISSENTING VIEWS ON SUBTITLE I.
BUDGET RECONCILIATION LEGISLATIVE RECOMMENDATIONS RELATING TO FUNDING OUR PRIORITIES

In their rush to meet an artificial deadline for the largest partisan tax-and-spending spree in history, Committee Democrats cobbled together a set of incoherent policies that seemed to baffle some of their own Members. As the markup progressed, it was clear that some members were working from a set of carefully prepared talking points, rather than the actual text of the legislation before us. And it was hard to blame them, given the short amount of time Members were given to review an avalanche of paper, and the scope of this bill, most of which was coming before Committee as a matter of first impression.

Various provisions in this subtitle unwind important policies included in Republicans' 2017 tax reform law. We have clear evidence of the success of Republican tax reform. American workers were the big winners: incomes for black, Hispanic, and Asian Americans saw record increases; unemployment fell to all-time lows; wages grew at the strongest rate in a decade (wages grew faster for lower-income workers than for supervisors and executives); and income inequality actually decreased.

In addition, businesses made record investments in R&D to improve our status as the world's most innovative economy, and companies stopped fleeing offshore. Prior to the 2017 tax law, corporate inversions – where American companies expatriated to escape our previously uncompetitive tax system – were a signature failure of the Obama-Biden Administration. Yet there have been zero inversions since Republicans modernized the tax code.

Economists confirm that Democrats' trillions of dollars in tax increases will kill jobs, reduce wages, decrease economic growth and prosperity, and harm our economic recovery. Massive tax hikes are the last thing Americans need.

<u>Democrats' Attack on American Families and Main Street Businesses</u>

Dating back to his presidential campaign, President Biden has often repeated the pledge that "nobody making under 400,000 bucks would have their taxes raised, period, bingo." In this subtitle, Democrats have broken the pledge - "not a single penny" more in taxes for those who earn less than $400,000—repeatedly. Despite the rhetoric, it is clear that ordinary Americans will be forced to bear the brunt of Democrats' historic and devastating tax hikes.

This subtitle increases the top individual tax rate, nominally protecting those earning under $400,000 from a tax increase, but in fact harms some of our most vulnerable Americans. While joint filers have some protection from the tax increase, married individuals filing separate returns are subject to the higher rates at incomes as low as $200,000, half of the level of protection pledged by President Biden. Some married individuals filing tax returns separately have been victims of domestic violence who have fled a dangerous situation. For those individuals—generally women—it may not be safe to collaborate with the abusive spouse to meet annual tax filing obligations. And under the Democrats' plan, such women filing separate returns would be subject to a tax hike if they earn a penny over $200,000.

In addition, Democrats include in this subtitle a terribly regressive $97 billion tobacco tax that will be paid by the lowest-earning Americans. The Joint Committee on Taxation (JCT) estimates that 94 percent of the tobacco tax will be paid by Americans earning less than $200,000. Yet again, Democrats violate the Biden pledge by collecting new taxes from smokers and people who use vaping products, including those who have successfully quit smoking. A tax intended to thwart demand for a product often doesn't shift demand at all. Instead, an underground economy simply fills the gap in supply and prices go up. Penalizing dependency is not a viable path to discourage smoking, nor is it fair to the most financially vulnerable Americans.

Despite promises to the contrary, Democrats also target Main Street businesses with tax increases in this subtitle. The vast majority of small businesses are organized as a "pass-through," where the tax code assumes that business income is all passed through to the business owner and reported on the owner's individual tax return.

The 2017 tax reform law cut tax rates for pass-through business owners and also created the first-ever small business deduction under Section 199A. The deduction is directly related to the amount of wages the business pays; thus, a large 199A deduction is something to be celebrated, not vilified. It shows that the business is growing and likely hiring workers and increasing paychecks.

In this subtitle, Democrats impose a "small business growth tax" by setting an arbitrary limit on the Section 199A small business deduction. The change also includes a severe built-in marriage penalty, punishing the families of business owners. Democrats also increase the capital gains tax, create a new 3% surtax on income, and expand the reach of the Obamacare 3.8% net investment income tax to hit more Main Street businesses. The COVID-19 global pandemic created unprecedented challenges for businesses across the country, and Democrats' answer to them is a series of job-killing tax hikes.

Democrats' cradle-to-grave approach to policymaking also extends to taxes. In this subtitle, Democrats cut in half the death tax exemption amount, which will have devastating effects on the longevity of farms, ranches, and other family-owned businesses. Democrats' plan does not protect a family business owner who has retired and now holds a passive interest in the business. This confiscatory policy will cause a forced sale of assets or other pieces of family businesses in order to pay a bigger bill to the IRS. It shouldn't be surprising that the National Federation of Independent Business, the largest group representing America's small businesses, as well as the National Association of Manufacturers, the largest group representing U.S. manufacturers, are both sounding the alarm about this reckless plan.

Democrats' Global Tax Surrender

Prior to the 2017 tax reform law, our broken tax code forced companies and jobs overseas.

An EY study showed that from 2004 to 2016, over $510 billion in investment—the equivalent of 1,400 companies and business units—changed hands from American ownership to foreign ownership due to our uncompetitive tax system. Major U.S. companies relocated to lower-tax

foreign countries. Between 2001 and 2017, the number of U.S. headquartered companies in the Fortune Global 500 list of largest companies had fallen by nearly 30%, from 181 to 132. Countries like the United Kingdom, China, Switzerland, and the Netherlands were attracting companies and jobs with more favorable tax rules.

In the 2017 tax law, Republicans took action to stop widespread corporate inversions and job loss overseas. Congress reduced the U.S. corporate tax rate from highest in the developed world to a rate slightly above average. The 2017 tax law also reformed U.S. international tax rules by moving away from an outdated worldwide system and instituting new measures to reduce profit shifting (GILTI and BEAT) and encourage ownership of valuable intellectual property in the United States, rather than in tax havens (FDII).

This comprehensive approach to international taxation was not developed in a vacuum but was the result of open bipartisan and bicameral collaboration. For example, in 2015, the Boustany-Neal Innovation Box Discussion Draft proposed a concept that shares much in common with FDII. In the Senate, the Bipartisan Framework for International Tax Reform chaired by Sen. Rob Portman (R-OH) and Sen. Chuck Schumer (D-NY) recommended a FDII-type incentive, anti-base erosion rules in line with GILTI and BEAT, and other measures captured in the 2017 tax reform law.

Since the 2017 tax law, zero corporate inversions have been announced. Major companies that left the United States under the prior broken tax system came back. Recent analyses of tax and financial data have shown that investment and profits booked in the United States have materially increased, particularly in the technology industry. This represents major progress, as the technology industry has been attacked for seeking low-tax jurisdictions for its operations and intellectual property.

Republican tax reform also leveled the playing field by shifting toward a broad-base, low-rate system that doesn't choose winners and losers. Contrary to the false claims by some of our Democratic colleagues during the markup, the 2017 tax law was never meant to benefit any specific company or industry. It was a balanced approach, with most of the business tax reductions paid for by repealing special industry provisions and loopholes. Democrats' plan, as captured in this and other subtitles, is the exact opposite – high-rates for all businesses except for favored industries who qualify for special handouts and loopholes.

Democrats' partisan tax proposal would make it better to be a foreign company or worker than an American one. Since the 2017 tax law, 12 other developed countries have reduced their corporate taxes, because they know it is a critical component in attracting investment, jobs, and prosperity. The average combined (national and subnational) corporate tax rate among OECD countries is 23.1 percent, and the current corporate tax rate in Communist China is 25 percent. This subtitle would increase the combined U.S. (federal and state) corporate tax rate to nearly 31 percent, far higher than our major trading partners. The American workers are the biggest loser: economists project that a corporate tax rate at levels proposed in this subtitle would cost 500,000 jobs per year or more.

During the markup, the Joint Committee on Taxation (JCT) confirmed that American workers would end up bearing a significant share of any corporate tax increase. In fact, JCT recently reported that raising the corporate tax rate would result in 66.3% of the burden falling on lower- and middle-income households. This is yet another violation of President Biden's pledge that taxpayers with under $400,000 in income "will not pay one penny more." Of the 172 million taxpayers who would bear the burden of the increased corporate tax rate, 98.4% (about 169 million people) have incomes under $500,000. Even the left-leaning Tax Policy Center agrees – they find that the tax plan proposed by President Biden would raise taxes on 75% of middle-class families next year, rising to 95% of middle-class families in 2031.

For international tax changes, Democrats propose a substantial increase (to 17.4 percent) to the GILTI global minimum tax on U.S. companies. Under current law, GILTI imposes a minimum tax of at least 13.125 percent on the foreign earnings of most U.S. companies, and many U.S. manufacturing companies pay GILTI at rates even higher. Inexplicably, Democrats seek to tighten GILTI rules, despite the fact that no other country has adopted a similar tax on its own companies.

This approach makes no sense in the context of the Treasury Secretary's endorsement of the OECD framework for a 15 percent GILTI-type global minimum tax. Not only would the global minimum tax rate be higher for the United States than anywhere else in the world, but Democrats also propose other changes that would make GILTI more onerous than the plan being considered at the OECD. And most experts believe we are years away from full implementation of the OECD framework by other countries. In no event should we make GILTI changes that disadvantage Americans in the global economy, nor should we make any changes to GILTI before our trading partners have implemented a global minimum tax of their own.

Democrats also make the U.S. international tax system significantly more complicated, creating additional burden and cost on the IRS and American companies. If this subtitle is enacted, U.S. companies operating globally will have to contend with tracking each intercompany cross-border transaction and potentially assigning income and tax payments to more than 100 foreign tax credit baskets.

It is also difficult to understand Democrats' rollback of the FDII incentive for retaining valuable intellectual property in the United States, by increasing the tax rate on such property from 13.125 percent to 20.7 percent. Today, 16 OECD countries offer FDII-type incentives for intellectual property to encourage companies to locate research and development and its products domestically. This change sends a message that the United States has conceded the global race for innovation and break-through technologies. The changes to FDII will cause high-value intellectual property and high-paying innovation jobs to migrate offshore.

Together, these international tax changes will create unnecessary headwinds that will cost us jobs, investment, and growth. During the same 2001-2017 period that the US company representation in the Fortune Global 500 fell by 30 percent, the number of Chinese companies grew by almost 900 percent, from 11 to 109. That number has since increased by another two-thirds to 181. Now is not the time to punish American companies and workers with the highest

taxes in the developed world. A better approach is to ensure that our tax system will continue to fuel growth and prosperity in an increasingly competitive global economy.

Trying to be constructive, we offered amendments to improve this legislation. At every turn, we were rebuffed by our colleagues on the other side, who defeated our efforts on technicalities or with prearranged party-line votes.

Democrats' Price Increases for Working Families and Attack on American-Produced Energy

We will not protect Americans' pocketbooks and rebuild a strong economy if we raise fuel or consumer prices for families, increase our dependence on OPEC oil, or allow companies from countries with lax environmental standards control the global energy markets.

Democrats would reinstate the Superfund excise taxes that expired over 25 years ago, increasing the price of products American families purchase every day. Imposing these taxes – which increase the cost of gasoline, heating oil, utilities, appliances, and millions of consumer goods – is another violation of President Biden's pledge not to increase taxes on Americans making less than $400,000. What's more, there is nothing in this or any other subtitle that would dedicate Superfund tax revenues to any environmental purpose. Instead, these tax and price increases on ordinary Americans will be used to expand Democrats' socialist spending priorities.

This subtitle would also impose arbitrary and punitive tax penalties on U.S. resource extraction companies operating globally. By eliminating the foreign oil and gas extraction income rule for GILTI and repealing foreign tax credits for dual capacity taxpayers, Democrats are tilting the playing field in favor of foreign companies, often less-responsible operators headquartered in adversary countries.

Democrats' Punitive Retirement Rules and Retroactive Tax Increases

Continuing the tradition of bipartisan work on retirement security legislation, Democrats and Republicans on this committee unanimously approved a retirement bill in May. However, instead of working together to get that legislation enacted by year-end, Democrats have decided to reverse course and go it alone. In contrast to prior work on retirement security, where significant work over many months culminated in open consideration of legislation, the major retirement changes in this subtitle have received only a cursory review.

Democrats appear to be acting in response to cherry-picked taxpayer data illegally obtained from the IRS and strategically disclosed to generate media attention. Far from expressing concern about the implications of a politically motivated disclosure by IRS employees or contractors, Democrats are giving prominence to the breach of confidential taxpayer data. This unfortunate action guarantees that there will be future illegal disclosures and irreparably harms tax administration. Yet most concerning is the message Democrats are conveying to American savers and younger workers starting to contribute to a retirement plan: if Washington thinks your investments are too successful or your accounts grow too large, they can change the rules along the way and make you pay more. Democrats have suggested they have a goal of encouraging savings in qualified retirement plans, but this will do precisely the opposite.

The sweeping changes to retirement plans in this subtitle are not fully vetted and have the potential to harm tax administration. They also represent a missed opportunity to develop bipartisan solutions that promote retirement security for all Americans, rather than an ill-advised attempt to address a very small number of edge cases. Further, ordinary Americans will see more IRS audits and higher penalties from a provision that would increase the statute of limitations to six years for innocent mistakes that many IRA owners make. For every other issue on your tax return, including the generous new refundable tax credits that the Treasury Department says are a major component of the tax gap, the statute of limitations is 3 years. Yet for retirees, it's six years – six years of penalties and interest to compound on an innocent mistake. The inclusion of this change is particularly disappointing because it overrides a bipartisan provision included in the retirement bill approved in May.

The rushed process being pursued by Democrats has inevitably resulted in technical flaws that Republican staff has identified, and we are hopeful that Democrats will abandon this newfound practice of adopting complex retirement changes on an expedited and partisan basis.

Republicans also believe that various proposed changes to the Internal Revenue Code that are retroactive in application and potentially punitive in nature raise fundamental fairness questions for Americans who made decisions and entered into transactions based on current law. Americans should have the certainty that tax law changes will not ex post facto disrupt earlier economic choices and result in surprise tax bills from the IRS.

Trying to be constructive, we offered amendments to improve this legislation. At every turn, we were rebuffed by our colleagues on the other side, who defeated our efforts on technicalities or with prearranged party-line votes.

Here are some of the common-sense amendments that were opposed by our colleagues:

- "The Main Street Business Protection Amendment" – would eliminate the Section 199A small business deduction limitation and make the deduction permanent.
- "The American Small Business Protection Amendment" – would eliminate the Section 199A small business deduction limitation, the Obamacare surtax expansion, and the extension of the pass-through loss limitation beyond 2025.
- "The Saving America's Family Farms and Ranches Amendment" – would remove the death tax increase on farms, ranches, and other family businesses.
- "The Community Support Amendment" – would require Treasury to certify that tax increases in Subtitle I will not force closure of small businesses eligible for the SBA Small Disadvantaged Business Program.
- "The Protect Ordinary Americans from Tax Hikes Amendment" – would ensure that no Americans earning less than $400,000 will be forced to shoulder the burden of the tobacco excise tax.

- "The Gain of Function Accountability Amendment" – would curtail funds for the conduct or support of any gain-of-function research involving potential pandemic pathogen by China, Russia, Iran, or North Korea.
- "The Return to Full Employment in America Amendment" – would require Treasury to certify that tax increases in Subtitle I will not reduce employment or investment in the United States.
- "The No More Price Increases for Working Families Amendment" – would delay the effective date of Subtitles F-J until the inflation rate has been at or below 2.5% for 12 consecutive months.
- "The American Worker and Jobs Protection Amendment" – would delay the effective date of Subtitle I until the U.S. unemployment rate is lower than pre-pandemic levels (in December 2019) for six consecutive months.
- "The American Consumer Price Protection Amendment" – would suspend the Superfund excise taxes when gas prices exceed $3.00 and when inflation exceeds 2.5%.
- "The American Family Pocketbook Protection Amendment" – would strike the superfund excise taxes.
- "The No Giveaways to Polluting Countries Amendment" – would require Treasury to certify that changes to the treatment of foreign oil and gas extraction income will not reduce U.S. energy independence or increase oil and gas production in Russia, China, Venezuela or Iran.
- "The Working Families Before the Wealthy and Well-Connected Amendment" – would make permanent the SALT deduction cap for millionaires and extend the higher standard deduction for middle-class families under the Tax Cuts and Jobs Act.
- "The Cancer Cures Instead of SALT Tax Shelters for Millionaires Amendment" – would make permanent the SALT deduction cap for millionaires and increase funding for cancer research.
- An amendment expressing the sense of Congress that no tax provisions – including the SALT cap – be added to the text after being reported out of the Committee on Ways and Means.
-

Democrats approved these sweeping tax increases with only partisan support and with bipartisan opposition. They have also promised that the final version of the bill will include relief from the SALT cap, which would offer tens of thousands of dollars in tax cuts to millionaires and billionaires, while middle-class families would receive, on average, just $15.

In their rush to spend $3.5 trillion and raise taxes by an unprecedented $2 trillion, Democrats have put at risk our economic security and millions of jobs. The better path is to return to our pre-pandemic economic strength – including record gains for workers – and ensure that America remains the most innovative and prosperous country in the world.

Democrat Enhancement of Enforcement Activities at the Internal Revenue Service

Committee Republicans also strongly oppose the Committee's approach to enhancing enforcement activities at the Internal Revenue Service (IRS). There are two main components to the Majority's IRS enforcement proposal. The first is to provide the agency with an additional appropriation of $80 billion dollars over 10 years. The second is to create a robust financial account reporting regime as a means of providing the IRS with additional information returns. We are opposed to both pieces.

The Committee aims to add nearly $80 billion to the IRS budget over the next ten years via a mandatory funding stream. This would nearly double the size of the IRS. Committee Republicans are concerned that such a significant funding stream will exist outside of the normal appropriations process, making it more challenging to provide congressional oversight. The bill has no reporting requirements or accountability measures to ensure this massive new stream of funds is not wasted. Instead, the text provides an absurd amount of money for an agency that has a track record for programs with huge cost over runs and delays, all in an effort to increase audits and close the tax gap without a clear plan on how to accomplish those goals.

Furthermore, we are concerned that the IRS will not be able to hire the staff it claims it needs to increase audits and grow tax collections. Congress gave the IRS funding to implement Covid-relief legislation and one of the ways the agency used that money was to fund a plan to hire 5,000 additional customer service representatives (CSRs). Despite access to funding, the IRS was only able to hire 3,800 employees. Why? According to the agency, the pandemic led to low applicant pools. This is not surprising given that five million people have left the workforce and not yet returned. If the IRS was not able to hire 5,000 people to answer phones when it had access to plenty of funding, how does the agency expect to hire 87,000 new employees?

Most importantly, we are concerned that there is nothing in the bill to ensure that the super soldier army of IRS auditors envisioned by this enormous influx of funding do not target lower- and middle-income taxpayers. In fact, that is precisely what the nonpartisan Congressional Budget Office (CBO) believes will happen. CBO estimates that audit rates will rise for all taxpayers if the IRS were to receive this new funding.

Notably, Democrats have offered wildly speculative and optimistic estimates of potential return on investment (ROI) when it comes to increased IRS enforcement funding. Some have claimed that the IRS can capture five, six, or even ten dollars in revenue for every dollar we spend on the agency's budget. This is pure fantasy. Even CBO estimates a mere two and a half to one ROI ratio for the proposed $80 billion in new funding while also admitting that there a lot of uncertainties in arriving at even that generous of an estimate.

What Committee Democrats fail to explain is that IRS enforcement efforts with the highest ROI involve middle- and lower-income individuals with simple tax returns. Audits of high-wealth individuals and large corporations are the most complex and have much lower ROIs because they are done by humans and take time, sometimes ending in litigation. The IRS also has a poor history of identifying the right people and companies to audit.

In summary, if the IRS fails to correct its audit selection problems, the $80 billion in new funding won't bring in more revenue. It will create an army of new IRS agents attempting to squeeze law-abiding, compliant taxpayers. And we need only look back to Randy Sowers, the Maryland dairy farmer who had his business bank account wrongly seized by the IRS, to understand the consequences of a misguided IRS enforcement regime.

As for the new financial account reporting regime—although it was not explicit in the text of this bill, Chairman Neal made clear during a colloquy with Rep. Beyer that Committee Democrats are continuing to work with the Administration to include it as the legislative process continues. This poorly designed reporting regime imagined by the Administration and Committee Democrats, risks sweeping up the private financial data of law abiding, ordinary Americans. The Committee inappropriately left this provision out of this bill only to reveal in the final hours of the markup its intention to include some unknown version of the provision later on in the legislative process. This approach helped the Committee avoid public debate on a proposal that is quite unpopular with the American people. Unfortunately, this is emblematic of the closed and secretive process used to put together this massive bill.

Members should know what is in the bill before they vote on it, and they should have an opportunity for open and public debate on policy proposals brought before Congress. This Congress has repeatedly failed to operate under regular order and in an open and transparent manner. This institution remains unpopular with the American people and continues to cede its authority to an ever-growing executive branch. Congress needs to reclaim its proper place in our constitutional system of government, and it will only do so through a return to regular order.

Republicans believe every American should pay the taxes they owe. But we disagree with unleashing tens of thousands of new IRS agents on families, farmers, and local businesses. Taxpayers deserve a smart and targeted solution.

For these reasons and more, Ways and Means Republicans reject the Democrats' funding legislative recommendation as ordered reported by Committee Democrats.