[JOINT COMMITTEE PRINT]

GENERAL EXPLANATION OF CERTAIN TAX LEGISLATION ENACTED IN THE 115TH CONGRESS

PREPARED BY THE STAFF

OF THE

JOINT COMMITTEE ON TAXATION

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116TH CONGRESS, 1ST SESSION

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INTRODUCTION

This document,[1] prepared by the staff of the Joint Committee on Taxation in consultation with the staffs of the House Committee on Ways and Means and the Senate Committee on Finance, provides an explanation of certain tax legislation enacted in the 115th Congress. This document does not include a description and explanation of Public Law 115–97; a separate document describes the provisions of that Act.[2]

For each provision, this document includes a description of present law, explanation of the provision, and effective date. Present law describes the law in effect immediately before enactment of the provision and does not reflect changes to the law made by the enacting legislation or by subsequent legislation. In a case where a Committee report accompanies a bill, this document is based on the language of the report. For a bill with no Committee report but with a contemporaneous technical explanation prepared and published by the staff of the Joint Committee on Taxation, this document is based on the language of the explanation. This document follows the chronological order of the tax legislation as signed into law.

Section references are to the Internal Revenue Code of 1986, as amended, unless otherwise indicated.

Part One is an explanation of Titles II and V of the Disaster Tax Relief and Airport and Airway Extension Act of 2017 (Pub. L. No. 115–63).

Part Two is an explanation of Division D of the Fourth Continuing Appropriations for Fiscal Year 2018, Federal Register Printing Savings, Healthy Kids, Health-Related Taxes, and Budgetary Effects (Pub. L. No. 115–120).

Part Three is an explanation of the revenue provisions of the Bipartisan Budget Act of 2018 (Pub. L. No. 115–123).

Part Four is an explanation of the revenue provisions of the Consolidated Appropriations Act, 2018 (Pub. L. No. 115–141).

Part Five is an explanation of the revenue provisions of the Airport and Airway Extension Act of 2018, Part II (Pub. L. No. 115–250).

Part Six is an explanation of the revenue provisions of the FAA Reauthorization Act of 2018 (Pub. L. No. 115–254).

Part Seven is an explanation of the Protecting Access to the Courts for Taxpayers Act (Pub. L. No. 115–332).

The Appendix provides the estimated budget effects of tax legislation described in this document.

[1] This document may be cited as follows: Joint Committee on Taxation, *General Explanation of Certain Tax Legislation Enacted in the 115th Congress* (JCS–2–19), October 2019.

[2] See Joint Committee on Taxation, *General Explanation of Public Law 115–97* (JCS–1–18), December 2018.

The first footnote in each Part gives the legislative history of the Act explained in that Part.

PART ONE: DISASTER TAX RELIEF AND AIRPORT AND AIRWAY EXTENSION ACT OF 2017 (PUBLIC LAW 115–63)[3]

A. Aviation Revenue Provisions

1. Extension of expenditure authority and taxes funding Airport and Airway Trust Fund (secs. 201 and 202 of the Act and secs. 4081, 4083, 4261, 4271, and 9502 of the Code)

Present Law

Taxes dedicated to the Airport and Airway Trust Fund

Excise taxes are imposed on amounts paid for commercial air passenger and freight transportation and on fuels used in commercial and noncommercial (*i.e.*, transportation that is not "for hire") aviation to fund the Airport and Airway Trust Fund.[4] The present aviation excise taxes and rates are as follows:

Tax (and Code section)	Tax Rates
Domestic air passengers (sec. 4261)	7.5 percent of fare, plus $4.10 (2017) per domestic flight segment generally[5]
International air passengers (sec. 4261)	$18.00 (2017) per arrival or departure[6]
Amounts paid for right to award free or reduced rate passenger air transportation (sec. 4261).	7.5 percent of amount paid
Air cargo (freight) transportation (sec. 4271)	6.25 percent of amount charged for domestic transportation; no tax on international cargo transportation
Aviation fuels (sec. 4081):[7]	
Commercial aviation	4.3 cents per gallon
Noncommercial (general) aviation:	
Aviation gasoline	19.3 cents per gallon
Jet fuel	21.8 cents per gallon
Fractional aircraft fuel surtax (sec. 4043)	14.1 cents per gallon

The Airport and Airway Trust Fund excise taxes (except for 4.3 cents per gallon of the taxes on aviation fuels and the 14.1 cents

[3] H.R. 3823. The bill was introduced in the House of Representatives on September 25, 2017, and was passed by the House on September 28, 2017. The bill passed the Senate with an amendment on September 28, 2017, to which the House agreed on September 28, 2017. The President signed the bill on September 29, 2017.

[4] Air transportation through U.S. airspace that neither lands in nor takes off from a point in the United States (or the "225-mile zone") is exempt from the aviation excise taxes, but the transportation provider is subject to certain "overflight fees" imposed by the Federal Aviation Administration pursuant to section 45301 of Title 49 of the United States Code. The "225-mile zone" is defined as "that portion of Canada or Mexico which is not more than 225 miles from the nearest point in the continental United States." Sec. 4262(c)(2).

[5] The domestic flight segment portion of the tax is adjusted annually (effective each January 1) for inflation (adjustments based on the changes in the consumer price index (the "CPI")). Special rules apply to air transportation between the continental United States and Alaska or Hawaii and between Alaska and Hawaii. The portion of such transportation that is not within the United States (*e.g.*, the portion over the Pacific Ocean) is not subject to the 7.5-percent domestic air passenger excise tax. In addition to this prorated *ad valorem* tax, a $9.00 (2017) international tax rate for the excluded portion of the travel is imposed. The domestic flight segment component of tax applies under the same rules as for flights within the continental United

Continued

per gallon fractional aircraft fuel surtax) are scheduled to expire after September 30, 2017. The 4.3-cents-per-gallon fuels tax rate is permanent.

With respect to fractional aircraft, the exemption from the excise tax on commercial transportation for fractional aircraft is scheduled to expire after September 30, 2017.[8] The fractional aircraft fuel surtax expires after September 30, 2021.

Airport and Airway Trust Fund expenditure provisions

The Airport and Airway Trust Fund was established in 1970 to finance a major portion of national aviation programs (previously funded entirely with General Fund revenues). Operation of the Trust Fund is governed by parallel provisions of the Code and authorizing statutes.[9] The Code provisions govern deposit of revenues into the Trust Fund and approve expenditure purposes in authorizing statutes as in effect on the date of enactment of the latest authorizing Act. The authorizing Acts provide for specific Trust Fund expenditure programs.

No expenditures are permitted to be made from the Airport and Airway Trust Fund after September 30, 2017. The purposes for which Airport and Airway Trust Fund monies are permitted to be expended are fixed as of the date of enactment of the FAA Extension, Safety, and Security Act of 2016; therefore, the Code must be amended in order to authorize new Airport and Airway Trust Fund expenditure purposes.[10] The Code contains a specific enforcement provision to prevent expenditure of Trust Fund monies for purposes not authorized under section 9502.[11] This provision provides that, should such unapproved expenditures occur, no further aviation excise tax receipts will be transferred to the Trust Fund. Rather, the aviation taxes will continue to be imposed, but the receipts will be retained in the General Fund.

Explanation of Provision

The provisions extend the taxes, expenditure authority, and exemption for fractional aircraft transportation from the taxes on commercial aviation transportation through March 31, 2018.

Effective Date

The provision is effective on the date of enactment (September 29, 2017).

B. Tax Relief for Hurricanes Harvey, Irma, and Maria

The provisions below were enacted to provide temporary tax relief to those areas affected by Hurricanes Harvey, Irma, and Maria. The provisions use the terms "disaster area" and "disaster zone" for

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States. Further, transportation within Alaska or Hawaii is taxed in the same manner as domestic transportation within the continental United States.

[6] The international arrival and departure tax rate is adjusted annually for inflation (measured by changes in the CPI).

[7] Like most other taxable motor fuels, aviation fuels are subject to an additional 0.1-cent-per-gallon excise tax to fund the Leaking Underground Storage Tank ("LUST") Trust Fund.

[8] Sec. 4261(j).

[9] Sec. 9502 and 49 U.S.C. sec. 48101, *et seq.*

[10] Sec. 9502(d).

[11] Sec. 9502(e)(1).

each specified hurricane.[12] As used in the Act, a "disaster area" refers to an area with respect to which a major disaster has been declared by the President before October 17, 2017, in the case of Hurricanes Harvey and Irma,[13] or before September 21, 2017, in the case of Hurricane Maria, under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act by reason of the specified hurricane. A "disaster zone" refers to that portion of the "disaster area" described above that has been determined by the President to warrant individual or individual and public assistance from the Federal government under the Robert T. Stafford Disaster Relief and Emergency Assistance Act by reason of the specified hurricane.

1. Special disaster-related rules for use of retirement funds (sec. 502 of the Act and sec. 72 of the Code)

Present Law

Distributions from tax-favored retirement plans

A distribution from a qualified retirement plan, a tax-sheltered annuity plan (a "section 403(b) plan"), an eligible deferred compensation plan of a State or local government employer (a "governmental section 457(b) plan"), or an individual retirement arrangement (an "IRA") generally is included in income for the year distributed.[14] These plans are referred to collectively as "eligible retirement plans." In addition, unless an exception applies, a distribution from a qualified retirement plan, a section 403(b) plan, or an IRA received before age 59½ is subject to a 10-percent additional tax (referred to as the "early withdrawal tax") on the amount includible in income.[15]

In general, a distribution from an eligible retirement plan may be rolled over to another eligible retirement plan within 60 days, in which case the amount rolled over generally is not includible in income. The Internal Revenue Service has the authority to waive the 60-day requirement if failure to waive the requirement would be against equity or good conscience, including for cases of casualty, disaster, or other events beyond the reasonable control of the individual.

The terms of a qualified retirement plan, section 403(b) plan, or governmental section 457(b) plan generally determine when distributions are permitted. However, in some cases, restrictions may apply to distributions before an employee's termination of employment, referred to as "in-service" distributions. Despite such restrictions, an in-service distribution may be permitted in the case of financial hardship or an unforeseeable emergency.

[12] See sec. 501 of the Act.

[13] With respect to Hurricanes Harvey and Irma, section 20201(a) of the Bipartisan Budget Act of 2018, Pub. L. No. 115-123, modified the definition of "disaster area" in section 501 of the Act by delaying the date by which the disaster must be declared from September 21, 2017, to October 17, 2017.

[14] Secs. 401(a), 403(a), 403(b), 457(b), and 408. Under section 3405, distributions from these plans are generally subject to income tax withholding unless the recipient elects otherwise. In addition, certain distributions from a qualified retirement plan, a section 403(b) plan, or a governmental section 457(b) plan are subject to mandatory income tax withholding at a 20-percent rate unless the distribution is rolled over.

[15] Sec. 72(t). The 10-percent early withdrawal tax does not apply to distributions from a governmental section 457(b) plan.

Loans from tax-favored retirement plans

Employer-sponsored retirement plans may provide loans to participants. Unless the loan satisfies certain requirements in both form and operation, the amount of a retirement plan loan is a deemed distribution from the retirement plan. Among the requirements that the loan must satisfy are that the loan amount must not exceed the lesser of 50 percent of the participant's vested account balance (or other accrued benefit), or $50,000 (generally taking into account outstanding balances of previous loans), and the loan's terms must provide for a repayment period of not more than five years (except for a loan specifically to purchase a home) and for level amortization of loan payments to be made not less frequently than quarterly.[16] Thus, if an employee stops making payments on a loan before the loan is repaid, a deemed distribution of the outstanding loan balance generally occurs. A deemed distribution of an unpaid loan balance generally is taxed as though an actual distribution occurred, including being subject to the 10-percent early withdrawal tax, if applicable. A deemed distribution is not eligible for rollover to another eligible retirement plan. Subject to the limit on the amount of loans, which treats the amount of any loan that would exceed the limit as a deemed distribution, the rules relating to loans do not limit the number of loans an employee may obtain from a plan.

Tax-favored retirement plan compliance

Tax-favored retirement plans generally are required to be operated in accordance with the terms of the plan document, and amendments to reflect changes to the plan generally must be adopted within a limited period.

Explanation of Provision

Distributions and recontributions

In the case of a "qualified hurricane distribution" from a qualified retirement plan, a section 403(b) plan, or an IRA, the provision provides an exception to the 10-percent early withdrawal tax. In addition, income attributable to a qualified hurricane distribution may be included in income ratably over three years, and the amount of a qualified hurricane distribution may be recontributed to an eligible retirement plan within three years.

A qualified hurricane distribution is a permissible distribution with respect to the relevant hurricane (described below) from a qualified retirement plan, section 403(b) plan, or governmental section 457(b) plan, regardless of whether a distribution otherwise would be permissible.[17] A plan is not treated as violating any Code requirement merely because it treats a distribution as a qualified hurricane distribution, provided that the aggregate amount of such distributions from plans maintained by the employer and members of the employer's controlled group or affiliated service group does not exceed $100,000. Thus, a plan is not treated as violating any Code requirement merely because an individual might receive total

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[16] Sec. 72(p).

[17] A qualified hurricane distribution is subject to income tax withholding unless the recipient elects otherwise. Mandatory 20-percent withholding does not apply.

distributions in excess of $100,000 when taking into account distributions from plans of other employers or IRAs.

With respect to each of the relevant hurricanes, a qualified hurricane distribution is any distribution from an eligible retirement plan made on or after the date specific to the hurricane and before January 1, 2019, to an individual whose principal place of abode on the date specific to that hurricane was located in that hurricane's disaster area and who has sustained an economic loss by reason of that hurricane. The dates specific to each hurricane are August 23, 2017, for Hurricane Harvey; September 4, 2017, for Hurricane Irma; and September 16, 2017, for Hurricane Maria. The total amount of distributions to an individual from all eligible retirement plans that may be treated as qualified hurricane distributions is $100,000. Thus, any distributions in excess of $100,000 are not qualified hurricane distributions.

Any amount required to be included in income as a result of a qualified hurricane is included in income ratably over the three-year period beginning with the year of distribution unless the individual elects not to have ratable inclusion apply.

Any portion of a qualified hurricane distribution may, at any time during the three-year period beginning the day after the date on which the distribution was received, be recontributed to an eligible retirement plan to which a rollover can be made. Any amount recontributed within the three-year period is treated as a rollover and thus is not includible in income. For example, if an individual receives a qualified hurricane distribution in 2017, that amount is included in income, generally ratably over the year of the distribution and the following two years, but is not subject to the 10-percent early withdrawal tax. If, in 2019, the amount of the qualified hurricane distribution is recontributed to an eligible retirement plan, the individual may file an amended return to claim a refund of the tax attributable to the amount previously included in income. In addition, if, under the ratable inclusion provision, a portion of the distribution has not yet been included in income at the time of the contribution, the remaining amount is not includible in income.

Recontributions of withdrawals for purchase of a home

Any individual who received a qualified distribution [18] after February 28, 2017, and before September 21, 2017, which was to be used to purchase or construct a principal residence in the Hurricane Harvey, Hurricane Irma, or Hurricane Maria disaster area, but which was not so purchased or constructed on account of Hurricane Harvey, Hurricane Irma, or Hurricane Maria may, during the period beginning on August 23, 2017, and ending on February 28, 2018, make one or more contributions in an aggregate amount not to exceed the amount of such qualified distribution to an eligible retirement plan of which such individual is a beneficiary and to which a rollover contribution of such distribution could be made.[19] A plan is not treated as violating any Code requirement merely because an individual repays such distributions as provided above,

[18] As described in sections 401(k)(2)(B)(i)(IV), 403(b)(7)(A)(ii) (but only to the extent such distribution relates to financial hardship), 403(b)(11)(B), or 72(t)(2)(F).

[19] Under section 402(c), 403(a)(4), 403(b)(8), or 408(d)(3), as the case may be.

provided that the aggregate amount of such repayments from plans maintained by the employer and members of the employer's controlled group or affiliated service group does not exceed $100,000.

Loans

In the case of a "qualified individual" with respect to Hurricane Harvey, Hurricane Irma, or Hurricane Maria who obtained a loan from a qualified employer plan [20] during the period beginning on September 29, 2017, and ending on December 31, 2018, the permitted maximum loan amount is the lesser of the present value of the nonforfeitable accrued benefit of the employee under the plan (rather than one-half of the present value of the nonforfeitable accrued benefit of the employee under the plan) or $100,000 (rather than $50,000). A loan meeting this limit is not treated as a distribution.[21] For this purpose, a qualified individual with respect to the relevant hurricane is an individual whose principal place of abode on the date specific to that hurricane was located in that hurricane's disaster area and who sustained an economic loss by reason of that hurricane. The dates specific to each hurricane are August 23, 2017, for Hurricane Harvey, September 4, 2017, for Hurricane Irma, and September 16, 2017, for Hurricane Maria.

In the case of such a qualified individual with an outstanding loan on or after the relevant "qualified beginning date" (August 23, 2017, for Hurricane Harvey, September 4, 2017, for Hurricane Irma, and September 16, 2017, for Hurricane Maria) from a qualified employer plan, if the due date for any repayment with respect to such a loan occurs during the period beginning on the qualified beginning date and ending on December 31, 2018, the due date is delayed for one year and any subsequent repayments are appropriately adjusted to reflect the delay in any repayment date noted above, but the repayment delay is disregarded in determining the five-year period and the term of the loan.[22]

Plan amendments

A plan amendment made pursuant to the provision (or a regulation issued thereunder) may be retroactively effective if, in addition to the requirements described below, the amendment is made on or before the last day of the first plan year beginning after January 1, 2019 (or in the case of a governmental plan, January 1, 2021), or a later date prescribed by the Secretary. In addition, the plan is treated as operated in accordance with plan terms during the period beginning with the date the provision or regulation takes effect (or the date specified by the plan if the amendment is not required by the provision or regulation) and ending on the last permissible date for the amendment (or, if earlier, the date the amendment is adopted). For an amendment to be retroactively effective, it must apply retroactively for that period, and the plan must be operated in accordance with the amendment during that period.

[20] As defined under section 72(p)(4).
[21] See sec. 72(p)(2)(A).
[22] See sec. 72(p)(2)(B) or (C).

Effective Date

The provision is effective on the date of enactment (September 29, 2017).

2. Disaster-related employment relief (sec. 503 of the Act and sec. 38 of the Code)

Present Law

There is no generally applicable employer tax credit for wages paid in connection with employment in disaster areas.[23]

Explanation of Provision

The provision provides a credit of 40 percent of the qualified wages (up to a maximum of $6,000 in qualified wages per employee) paid by an eligible employer to an eligible employee.

An eligible employer is any employer (1) that conducted an active trade or business on August 23, 2017 (in the case of Hurricane Harvey), September 4, 2017 (in the case of Hurricane Irma), or September 16, 2017 (in the case of Hurricane Maria) in such hurricane's disaster zone and (2) with respect to which the trade or business described in (1) is inoperable on any day after the specified date and before January 1, 2018, as a result of damage sustained by reason of the hurricane.

An eligible employee is, with respect to an eligible employer, an employee whose principal place of employment on the date specific to the relevant hurricane with such eligible employer was in the disaster zone of the relevant hurricane. The dates specific to each hurricane are August 23, 2017, for Hurricane Harvey, September 4, 2017, for Hurricane Irma, and September 16, 2017, for Hurricane Maria. An employee may not be treated as an eligible employee for any period with respect to an employer if such employer is allowed a credit under section 51, the work opportunity credit, with respect to the employee for the period.

Qualified wages are wages (as defined in section 51(c)(1) of the Code, but without regard to section 3306(b)(2)(B)) paid or incurred by an eligible employer with respect to an eligible employee on any day after August 23, 2017, September 4, 2017, or September 16, 2017, with respect to the relevant hurricane, and before January 1, 2018, during the period (1) beginning on the date on which the trade or business first became inoperable at the principal place of employment of the employee immediately before the hurricane and (2) ending on the date on which such trade or business has resumed significant operations at such principal place of employment. Qualified wages include wages paid without regard to whether the employee performs no services, performs services at a different place of employment than such principal place of employment, or performs services at such principal place of employment before significant operations have resumed.

The credit is treated as a current year business credit under section 38(b) and therefore is subject to the tax liability limitations of

[23] But see former sec. 1400R, which provided an employer credit for employers affected by Hurricane Katrina, Hurricane Rita, and Hurricane Wilma. The provision was repealed as deadwood by the Consolidated Appropriations Act, Pub L. No. 115–141, sec. 401(d)(6)(A).

section 38(c). Rules similar to sections 51(i)(1), 52, and 280C(a)[24] apply to the credit.

Effective Date

The provision is effective on the date of enactment (September 29, 2017).

3. Temporary suspension of limitations on charitable contributions (sec. 504(a) of the Act and sec. 170 of the Code)

Present Law

In general

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 donee organization.[25]

Charitable contributions of cash are deductible in the amount contributed. In general, contributions of capital gain property to a qualified charity are deductible at fair market value with certain exceptions. Capital gain property means any capital asset or property used in the taxpayer's trade or business the sale of which at its fair market value, at the time of contribution, would have resulted in gain that would have been long-term capital gain. Contributions of other appreciated property generally are deductible at the donor's basis in the property. Contributions of depreciated property generally are deductible at the fair market value of the property.

Percentage limitations

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 applicable percentage of the contribution base varies depending on the type of donee organization and property contributed. The contribution base is defined as the taxpayer's adjusted gross income computed without regard to any net operating loss carryback.

Contributions by an individual taxpayer of property (other than appreciated capital gain property) to a charitable organization described in section 170(b)(1)(A) (*e.g.,* public charities, private foundations other than private non-operating foundations, and certain governmental units) may not exceed 50 percent of the taxpayer's contribution base. Contributions of this type of property to nonoperating private foundations and certain other organizations generally may be deducted up to 30 percent of the taxpayer's contribution base.

Contributions of appreciated capital gain property to charitable organizations described in section 170(b)(1)(A) generally are deductible up to 30 percent of the taxpayer's contribution base. An in-

[24] Section 20201(b) of the Bipartisan Budget Act of 2018, Pub. L. No. 115–123, amended section 503(a)(3), (b)(3), and (c)(3) of the Act to provide that rules similar to section 280C(a) apply to the credit.

[25] Sec. 170.

dividual may elect, however, to bring all these contributions of appreciated capital gain property for a taxable year within the 50-percent limitation category by reducing the amount of the contribution deduction by the amount of the appreciation in the capital gain property. Contributions of appreciated capital gain property to charitable organizations described in section 170(b)(1)(B) (*e.g.,* private nonoperating foundations) are deductible up to 20 percent of the taxpayer's contribution base.

Contributions by corporations

For corporations, in any taxable year, charitable contributions are not deductible to the extent the aggregate contributions exceed 10 percent of the corporation's taxable income computed without regard to net operating loss or capital loss carrybacks.

For purposes of determining whether a corporation's aggregate charitable contributions in a taxable year exceed the applicable percentage limitation, contributions of capital gain property are taken into account after other charitable contributions.

Carryforward of excess contributions

Charitable contributions that exceed the applicable percentage limitation may be carried forward for up to five years.[26] 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 provision.

Overall limitation on itemized deductions ("Pease" limitation)

For taxable years beginning before January 1, 2018, the total amount of otherwise allowable itemized deductions (other than medical expenses, investment interest, and casualty, theft, or wagering losses) is reduced by three percent of the amount of the taxpayer's adjusted gross income in excess of a certain threshold. The otherwise allowable itemized deductions may not be reduced by more than 80 percent. For 2017, the adjusted gross income threshold is $261,500 for an individual taxpayer ($313,800 for a married taxpayers filing a joint return). These dollar amounts are adjusted for inflation.

Explanation of Provision

Suspension of percentage limitations

Under the provision, in the case of an individual, the deduction for qualified contributions is allowed up to the amount by which the taxpayer's contribution base exceeds the deduction for other charitable contributions. Contributions in excess of this amount are carried over to succeeding taxable years as contributions described

[26] Sec. 170(d).

in 170(b)(1)(A), subject to the limitations of section 170(d)(1)(A)(i) and (ii).

In the case of a corporation, the deduction for qualified contributions is allowed up to the amount by which the corporation's taxable income (as computed under section 170(b)(2)) exceeds the deduction for other charitable contributions. Contributions in excess of this amount are carried over to succeeding taxable years, subject to the limitations of section 170(d)(2).

In applying subsections (b) and (d) of section 170 to determine the deduction for other contributions, qualified contributions are not taken into account (except to the extent qualified contributions are carried over to succeeding taxable years under the rules described above).

Qualified contributions are cash contributions paid during the period beginning on August 23, 2017, and ending on December 31, 2017, to a charitable organization described in section 170(b)(1)(A), other than contributions to (i) a supporting organization described in section 509(a)(3) or (ii) for the establishment of a new, or maintenance of an existing, donor advised fund (as defined in section 4966(d)(2)). Contributions of noncash property, such as securities, are not qualified contributions. Under the provision, qualified contributions must be to an organization described in section 170(b)(1)(A); thus, contributions to, for example, a charitable remainder trust generally are not qualified contributions, unless the charitable remainder interest is paid in cash to an eligible charity during the applicable time period. Qualified contributions must be made for relief efforts in the Hurricane Harvey disaster area, the Hurricane Irma disaster area, or the Hurricane Maria disaster area. Taxpayers must substantiate that the contribution is made for this purpose. A taxpayer must elect to have the contributions treated as qualified contributions.

Limitation on overall itemized deductions

Under the provision, the charitable contribution deduction up to the amount of qualified contributions (as defined above) paid during the year is not treated as an itemized deduction for purposes of the overall limitation on itemized deductions.

Effective Date

The provision is effective on the date of enactment (September 29, 2017).

4. Special rules for qualified disaster-related personal casualty losses (sec. 504(b) of the Act and sec. 165 of the Code)

Present Law

For tax years beginning before December 31, 2017, a taxpayer may generally claim an itemized deduction for any loss sustained during the taxable year and not compensated by insurance or otherwise.[27] For individual taxpayers, deductible losses must be in-

[27] Sec. 165. For tax years beginning after December 31, 2017, and before January 1, 2026, an individual may claim an itemized deduction for a personal casualty loss only if such loss was

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

Explanation of Provision

Under the provision, personal casualty losses that arose in the disaster area of Hurricane Harvey, Hurricane Irma, or Hurricane Maria on or after August 23, 2017 (in the case of Hurricane Harvey), September 4, 2017 (in the case of Hurricane Irma), or September 16, 2017 (in the case of Hurricane Maria), and that were attributable to such hurricane, are deductible without regard to whether aggregate net losses exceed 10 percent of a taxpayer's adjusted gross income. In order to be deductible, however, such losses must exceed $500 per casualty. Finally, such losses may be claimed in addition to the standard deduction and may be claimed by taxpayers subject to the alternative minimum tax.

Effective Date

The provision is effective on the date of enactment (September 29, 2017).

5. Special rule for determining earned income (sec. 504(c) of the Act and secs. 24 and 32 of the Code)

Present Law

Eligible taxpayers are allowed an earned income credit and a child credit. In general, the earned income credit is a refundable credit for low-income workers.[28] The amount of the credit depends on the earned income of the taxpayer and whether the taxpayer has one, more than one, or no qualifying children. Earned income generally includes wages, salaries, tips, and other employee compensation, plus net earnings from self-employment.

For taxable years beginning before December 31, 2017, taxpayers with incomes below certain threshold amounts are eligible for a $1,000 credit for each qualifying child.[29] In some circumstances, all or a portion of the otherwise allowable credit is treated as a refundable credit (the "additional child tax credit"). The amount of the additional child tax credit equals 15 percent of the taxpayer's earned income in excess of $3,000.[30] A taxpayer with three or more qualifying children may take the additional child tax credit in the amount by which the taxpayer's Social Security taxes exceed the

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attributable to a disaster declared by the President under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act. An exception applies to the extent a personal casualty loss of an individual does not exceed the individual's personal casualty gains.

[28] Sec. 32.

[29] Sec. 24.

[30] For taxable years beginning after December 31, 2017, and before January 1, 2026, the amount of the child credit is $2,000, the refundable portion of the child credit is capped at $1,400 (indexed for inflation), and the earned income threshold is $2,500.

taxpayer's earned income credit, if that amount is greater than the additional child tax credit based on the taxpayer's earned income.

Bona fide residents of Puerto Rico with only Puerto Rico source income do not have U.S. earned income and are ineligible to claim the earned income credit. Such residents are allowed an additional child tax credit only if they have three or more children, and the amount of the credit is limited to Social Security taxes paid.

Explanation of Provision

The provision permits qualified individuals to elect to calculate their earned income credit and additional child tax credit for the taxable year that includes the applicable date using their earned income from the prior taxable year. Qualified individuals are permitted to make the election only if their earned income for the taxable year that includes the applicable date is less than their earned income for the preceding taxable year. The applicable date is August 23, 2017 (in the case of Hurricane Harvey), September 4, 2017 (in the case of Hurricane Irma), and September 16, 2017 (in the case of Hurricane Maria).

Qualified individuals who are residents of Puerto Rico may elect to determine the additional child tax credit for the taxable year that includes the applicable date by using their Social Security taxes from the prior year, if Social Security taxes for the taxable year that includes the applicable date are less than Social Security taxes for the preceding taxable year.

Qualified individuals are (1) individuals who on the relevant applicable date, had their principal place of abode in the disaster zone or (2) individuals who on such date were not in the disaster zone but whose principal place of abode was in the disaster area and were displaced from such principal place of abode by reason of the relevant hurricane.

For purposes of the provision, in the case of a joint return for a taxable year that includes the applicable date, the provision applies if either spouse is a qualified individual. In such cases, the earned income that is attributable to the taxpayer for the preceding taxable year is the sum of the earned income that is attributable to each spouse for such preceding taxable year.

Any election to use the prior year's earned income under the provision applies with respect to both the earned income credit and additional child tax credit. 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.

Effective Date

The provision is effective on the date of enactment (September 29, 2017).

6. Application of disaster-related tax relief to possessions of the United States (sec. 504(d) of the Act)

Present Law

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. Virgin Islands and Puerto Rico 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 sources 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.[31] A corporation that is organized in a territory is generally treated as a foreign corporation for U.S. tax purposes.

Because the U.S. Virgin Islands lacks authority to enact its own internal tax laws, its local tax system is a mirrored version of the Internal Revenue Code of 1986, as amended, in which the U.S. Virgin Islands is substituted for the United States wherever the Code refers to the United States. A resident of the U.S. Virgin Islands generally files a single tax return with the U.S. Virgin Islands and not with the United States. Puerto Rico, by contrast, has its own internal tax laws, and a resident of Puerto Rico may be required to file income tax returns with both Puerto Rico and the United States.

Explanation of Provision

The U.S. Treasury will make a payment to the U.S. Virgin Islands in an amount equal to the loss in revenue by reason of the temporary tax relief allowable by reason of Title V of the Act to residents of the U.S. Virgin Islands against its income tax. This amount will be determined by the Treasury Secretary based on information provided by the government of the U.S. Virgin Islands.

The U.S. Treasury will make a payment to Puerto Rico in an amount estimated by the Treasury Secretary as being equal to loss in revenue by reason of the temporary tax relief allowable by reason of Title V of the Act that would have been allowed to residents of Puerto Rico if a mirror code tax system had been in effect in Puerto Rico. Accordingly, the amount of each payment to Puerto Rico will be an estimate of the aggregate amount of the temporary tax relief that would be allowed to residents of Puerto Rico if the relief provided by Title V of the Act to U.S. residents were provided by Puerto Rico to its residents. This payment will not be made to Puerto Rico unless Puerto Rico has a plan that has been approved by the Secretary under which Puerto Rico will promptly distribute the payment to its residents.

No temporary tax relief provided by Title V of the Act is permitted under the provision for any person to whom relief is allowed against possession income taxes as a result of Title V of the Act (*e.g.,* under the U.S. Virgin Islands' mirror income tax). Similarly,

[31] See secs. 932, 933, and 937.

no tax relief against U.S. income taxes is permitted for any person who is eligible for a payment under Puerto Rico's plan for distributing to its residents the payment described above from the U.S. Treasury.

Effective Date

The provision is effective on the date of enactment (September 29, 2017).

PART TWO: FOURTH CONTINUING APPROPRIATIONS FOR FISCAL YEAR 2018, FEDERAL REGISTER PRINTING SAVINGS, HEALTHY KIDS, HEALTH–RELATED TAXES, AND BUDGETARY EFFECTS (PUBLIC LAW 115–120)[32]

1. Extension of moratorium on medical device excise tax (sec. 4001 of the Act and sec. 4191 of the Code)

Present Law

Effective for sales after December 31, 2012, excluding sales during the period beginning on January 1, 2016 and ending on December 31, 2017, a tax equal to 2.3 percent of the sale price is imposed on the sale of any taxable medical device by the manufacturer, producer, or importer of such device.[33] A taxable medical device is any device, as defined in section 201(h) of the Federal Food, Drug, and Cosmetic Act,[34] intended for humans. Regulations further define a medical device as one that is listed by the Food and Drug Administration ("FDA") under section 510(j) of the Federal Food, Drug, and Cosmetic Act and 21 C.F.R. Part 807, pursuant to FDA requirements.[35]

The excise tax does not apply to eyeglasses, contact lenses, hearing aids, or any other medical device determined by the Secretary to be of a type that is generally purchased by the general public at retail for individual use ("retail exemption"). Regulations provide guidance on the types of devices that are exempt under the retail exemption. A device is exempt under these provisions if: (1) it is regularly available for purchase and use by individual consumers who are not medical professionals; and (2) the design of the device demonstrates that it is not primarily intended for use in a medical institution or office or by a medical professional.[36] Additionally, the regulations provide certain safe harbors for devices eligible for the retail exemption.[37]

The medical device excise tax is generally subject to the rules applicable to other manufacturers excise taxes. These rules include certain general manufacturers excise tax exemptions including the exemption for sales for use by the purchaser for further manufacture (or for resale to a second purchaser in further manufacture)

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[32] H.R. 195. The bill was introduced in the House of Representatives on January 3, 2017, and was passed by the House on May 17, 2017. The bill passed the Senate with an amendment on December 21, 2017, to which the House agreed on January 22, 2018. The President signed the bill on that same day.

[33] Sec. 4191.

[34] 21 U.S.C. sec. 321. Section 201(h) defines device as "an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component, part, or accessory, which is (1) recognized in the official National Formulary, or the United States Pharmacopeia, or any supplement to them, (2) intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease, in man or other animals, or (3) intended to affect the structure or any function of the body of man or other animals, and which does not achieve its primary intended purposes through chemical action within or on the body of man or other animals and which is not dependent upon being metabolized for the achievement of its primary intended purposes."

[35] Treas. Reg. sec. 48.4191–2(a). The regulations also include as devices items that should have been listed as a device with the FDA as of the date the FDA notifies the manufacturer or importer that corrective action with respect to listing is required.

[36] Treas. Reg. sec. 48.4191–2(b)(2).

[37] Treas. Reg. sec. 48.4191–2(b)(2)(iii). The safe harbors include devices that are described as over-the-counter devices in relevant FDA classification headings as well as certain FDA device classifications listed in the regulations.

or for export (or for resale to a second purchaser for export).[38] If a medical device is sold free of tax for resale to a second purchaser for further manufacture or for export, the exemption does not apply unless, within the six-month period beginning on the date of sale by the manufacturer, the manufacturer receives proof that the medical device has been exported or resold for use in further manufacturing.[39] In general, the exemption does not apply unless the manufacturer, the first purchaser, and the second purchaser are registered with the Secretary of the Treasury. Foreign purchasers of articles sold or resold for export are exempt from the registration requirement.

The lease of a medical device is generally considered to be a sale of such device.[40] Special rules apply for the imposition of tax to each lease payment. The use of a medical device subject to tax by manufacturers, producers, or importers of such device, is treated as a sale for the purpose of imposition of excise taxes.[41]

There are also rules for determining the price of a medical device on which the excise tax is imposed.[42] These rules provide for (1) the inclusion of containers, packaging, and certain transportation charges in the price, (2) determining a constructive sales price if a medical device is sold for less than the fair market price, and (3) determining the tax due in the case of partial payments or installment sales.

Explanation of Provision

The provision extends the moratorium on the medical device excise tax to include sales after December 31, 2017, and before January 1, 2020.[43]

Effective Date

The provision applies to medical device sales after December 31, 2017.

2. Delay in implementation of excise tax on high cost employer-sponsored health coverage (sec. 4002 of the Act and sec. 4980I of the Code)

Present Law

In general

Effective for taxable years beginning after December 31, 2019, an excise tax is imposed on the provider of applicable employer-sponsored health coverage (the "coverage provider") if the aggregate cost of the coverage for an employee (including a former employee,

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[38] Sec. 4221(a). Other general manufacturers excise tax exemptions (*i.e.,* the exemption for sales to purchasers for use as supplies for vessels or aircraft, to a State or local government, to a nonprofit educational organization, or to a qualified blood collector organization) do not apply to the medical device excise tax.
[39] Sec. 4221(b).
[40] Sec. 4217(a).
[41] Sec. 4218.
[42] Sec. 4216.
[43] Section 4191(c) provides a moratorium under which the medical device excise tax does not apply to sales during the period beginning on January 1, 2016, and ending on December 31, 2017. The provision repeals the medical device excise tax for sales after December 31, 2017, and before January 1, 2020.

surviving spouse, or any other primary insured individual) exceeds a threshold amount (referred to as "high cost health coverage"). The tax is 40 percent of the amount by which the aggregate cost exceeds the threshold amount (the "excess benefit").

The annual threshold amount for 2018 is $10,200 for self-only coverage and $27,500 for other coverage (such as family coverage), multiplied by a one-time health cost adjustment percentage.[44] This threshold is then adjusted annually by an age and gender adjusted excess premium amount. The age and gender adjusted excess premium amount is the excess, if any, of (1) the premium cost of standard Federal Employees Health Benefit Program ("FEHBP") coverage for the type of coverage provided to an individual if priced for the age and gender characteristics of all employees of the employer, over (2) the premium cost of standard FEHBP coverage if priced for the age and gender characteristics of the national workforce. For this purpose, standard FEHBP coverage means the per employee cost of Blue Cross/Blue Shield standard benefit coverage under FEHBP.

The excise tax is determined on a monthly basis, by reference to the monthly aggregate cost of applicable employer-sponsored coverage for the month and 1⁄12 of the annual threshold amount.

Applicable employer-sponsored coverage and determination of cost

Subject to certain exceptions, applicable employer-sponsored coverage is coverage under any group health plan offered to an employee by an employer that is excludible from the employee's gross income or that would be excludible if it were employer-sponsored coverage.[45] Thus, applicable employer-sponsored coverage includes coverage for which an employee pays on an after-tax basis. Applicable employer-sponsored coverage includes coverage under any group health plan established and maintained primarily for its civilian employees by the Federal government or any Federal agency or instrumentality, or the government of any State or political subdivision thereof or any agency or instrumentality of a State or political subdivision.

Applicable employer-sponsored coverage includes both insured and self-insured health coverage, including, in general, coverage under a health flexible spending arrangement ("health FSA"), a health reimbursement arrangement, a health savings account ("HSA"), or Archer medical savings account ("Archer MSA").[46] In

[44] The health cost adjustment percentage is 100 percent plus the excess, if any, of (1) the percentage by which the cost of standard FEHBP coverage for 2018 (determined according to specified criteria) exceeds the cost of standard FEHBP coverage for 2010, over (2) 55 percent.

[45] Section 106 provides an exclusion for employer-provided coverage.

[46] Some types of coverage are not included in applicable employer-sponsored coverage, such as long-term care coverage, separate insurance coverage substantially all the benefits of which are for treatment of the mouth (including any organ or structure within the mouth) or of the eye, and certain excepted benefits. Excepted benefits for this purpose include (whether through insurance or otherwise) coverage only for accident, or disability income insurance, or any combination thereof; coverage issued as a supplement to liability insurance; liability insurance, including general liability insurance and automobile liability insurance; workers' compensation or similar insurance; automobile medical payment insurance; credit-only insurance; and other similar insurance coverage (as specified in regulations), under which benefits for medical care are secondary or incidental to other insurance benefits. Applicable employer-sponsored coverage does not include coverage only for a specified disease or illness or hospital indemnity or other

Continued

the case of a self-employed individual, coverage is treated as applicable employer-sponsored coverage if the self-employed individual is allowed a deduction for all or any portion of the cost of coverage.[47]

For purposes of the excise tax, the cost of applicable employer-sponsored coverage is generally determined under rules similar to the rules for determining the applicable premium for purposes of COBRA continuation coverage,[48] except that any portion of the cost of coverage attributable to the excise tax is not taken into account. Cost is determined separately for self-only coverage and other coverage. Special valuation rules apply to retiree coverage, certain health FSAs, contributions to HSAs and Archer MSAs, and qualified small employer health reimbursement arrangements ("QSEHRAs").

Calculation of excess benefit and imposition of excise tax

In determining the excess benefit with respect to an employee (*i.e.,* the amount by which the cost of applicable employer-sponsored coverage for the employee exceeds the threshold amount), the aggregate cost of all applicable employer-sponsored coverage of the employee is taken into account. The threshold amount for other than self-only coverage applies to an employee. The threshold amount for other coverage applies to an employee only if the employee and at least one other beneficiary are enrolled in coverage other than self-only coverage under a group health plan that provides minimum essential coverage and under which the benefits provided do not vary based on whether the covered individual is the employee or the other beneficiary. For purposes of the threshold amount, any coverage provided under a multiemployer plan is treated as coverage other than self-only coverage.[49]

The excise tax is imposed on the coverage provider.[50] In the case of insured coverage (*i.e.,* coverage under a policy, certificate, or contract issued by an insurance company), the health insurance issuer is liable for the excise tax. In the case of self-insured coverage, the person that administers the plan benefits ("plan administrator") is generally liable for the excise tax. However, in the case of employer contributions to an HSA or an Archer MSA, the employer is liable for the excise tax.

The employer is generally responsible for calculating the amount of excess benefit allocable to each coverage provider and notifying each coverage provider (and the Internal Revenue Service) of the coverage provider's allocable share. In the case of applicable em-

fixed indemnity insurance if the cost of the coverage is not excludible from an employee's income or deductible by a self-employed individual.

[47] Section 162(l) allows a deduction to a self-employed individual for the cost of health insurance.

[48] Sec. 4980B(f)(4).

[49] As defined in section 414(f), a multiemployer plan is generally a plan to which more than one employer is required to contribute and that is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer.

[50] The excise tax is allocated pro rata among the coverage providers, with each responsible for the excise tax on an amount equal to the total excess benefit multiplied by a fraction, the numerator of which is the cost of the applicable employer-sponsored coverage of that coverage provider and the denominator of which is the aggregate cost of all applicable employer-sponsored coverage of the employee.

ployer-sponsored coverage under a multiemployer plan, the plan sponsor is responsible for the calculation and notification.[51]

Explanation of Provision

Under the provision, implementation of the excise tax on high cost employer-sponsored health coverage is delayed until taxable years beginning after December 31, 2021.

Effective Date

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

3. Suspension of annual fee on health insurance providers (sec. 4003 of the Act and sec. 9010 of the Patient Protection and Affordable Care Act)

Present Law

Annual fee on health insurance providers

An annual fee applies to any covered entity engaged in the business of providing health insurance with respect to United States health risks ("U.S. health risks").[52] The aggregate annual fee for all covered entities is the applicable amount. The applicable amount is $8 billion for calendar year 2014, $11.3 billion for calendar years 2015 and 2016, $13.9 billion for calendar year 2017, and $14.3 billion for calendar year 2018. However, a one-year moratorium applies to the annual fee on health insurance providers for calendar year 2017. For calendar years after 2018, the applicable amount is indexed to the rate of premium growth.

The aggregate annual fee is apportioned among the providers based on a ratio designed to reflect relative market share of U.S. health insurance business. For each covered entity, the fee for a calendar year is an amount that bears the same ratio to the applicable amount as (1) the covered entity's net premiums written during the preceding calendar year with respect to health insurance for any U.S. health risk, bears to (2) the aggregate net written premiums of all covered entities during such preceding calendar year with respect to such health insurance.

Explanation of Provision

The provision suspends the annual fee on health insurance providers for calendar year 2019.

Effective Date

The provision is effective for calendar years beginning after December 31, 2018.

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[51] The employer or multiemployer plan sponsor may be liable for a penalty if the total excise tax due exceeds the tax on the excess benefit calculated and allocated among coverage providers by the employer or plan sponsor.

[52] Sec. 9010 of the Patient Protection and Affordable Care Act.

PART THREE: BIPARTISAN BUDGET ACT OF 2018 (PUBLIC LAW 115–123) [53]

A. Tax Relief and Medicaid Changes Related to Certain Disasters: California Fires

The provisions below were enacted to provide temporary tax relief to those areas affected by California wildfires. The provisions use the terms "California wildfire disaster area" and "California wildfire disaster zone." [54] As used in the Act, "California wildfire disaster area" refers to an area with respect to which a major disaster has been declared by the President between January 1, 2017, through January 18, 2018, under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act by reason of wildfires in California. A "California wildfire disaster zone" refers to that portion of the "California wildfire disaster area" described above that has been determined by the President to warrant individual or individual and public assistance from the Federal government under the Robert T. Stafford Disaster Relief and Emergency Assistance Act by reason of the relevant wildfires.

1. Special disaster-related rules for use of retirement funds (sec. 20102 of the Act and sec. 72 of the Code)

Present Law

Distributions from tax-favored retirement plans

A distribution from a qualified retirement plan, a tax-sheltered annuity plan (a "section 403(b) plan"), an eligible deferred compensation plan of a State or local government employer (a "governmental section 457(b) plan"), or an individual retirement arrangement (an "IRA") generally is included in income for the year distributed.[55] These plans are referred to collectively as "eligible retirement plans." In addition, unless an exception applies, a distribution from a qualified retirement plan, a section 403(b) plan, or an IRA received before age 59½ is subject to the 10-percent additional tax (referred to as the "early withdrawal tax") on the amount includible in income.[56]

In general, a distribution from an eligible retirement plan may be rolled over to another eligible retirement plan within 60 days, in which case the amount rolled over generally is not includible in income. The Internal Revenue Service has the authority to waive the 60-day requirement if failure to waive the requirement would be against equity or good conscience, including cases of casualty,

[53] H.R. 1892. The House passed H.R. 1892 on May 18, 2017. The Senate passed the bill with an amendment on November 28, 2017. The House agreed to the Senate amendment with an amendment on February 6, 2018. The Senate agreed to the House amendment with an amendment on February 9, 2018. The House agreed to the Senate amendment on February 9, 2018. The President signed the bill on February 9, 2018.

[54] See sec. 20101 of the Act.

[55] Secs. 401(a), 403(a), 403(b), 457(b), and 408. Under section 3405, distributions from these plans are generally subject to income tax withholding unless the recipient elects otherwise. In addition, certain distributions from a qualified retirement plan, a section 403(b) plan, or a governmental section 457(b) plan are subject to mandatory income tax withholding at a 20-percent rate unless the distribution is rolled over.

[56] Sec. 72(t). The 10-percent early withdrawal tax does not apply to distributions from a governmental section 457(b) plan.

disaster, or other events beyond the reasonable control of the individual.

The terms of a qualified retirement plan, section 403(b) plan, or governmental section 457(b) plan generally determine when distributions are permitted. However, in some cases, restrictions may apply to distribution before an employee's termination of employment, referred to as "in-service" distributions. Despite such restrictions, an in-service distribution may be permitted in the case of financial hardship or an unforeseeable emergency.

Loans from tax-favored retirement plans

Employer-sponsored retirement plans may provide loans to participants. Unless the loan satisfies certain requirements in both form and operation, the amount of a retirement plan loan is a deemed distribution from the retirement plan. Among the requirements that the loan must satisfy are that the loan amount must not exceed the lesser of 50 percent of the participant's vested account balance (or other accrued benefit) or $50,000 (generally taking into account outstanding balances of previous loans), and the loan's terms must provide for a repayment period of not more than five years (except for a loan specifically to purchase a home) and for level amortization of loan payments to be made not less frequently than quarterly.[57] Thus, if an employee stops making payments on a loan before the loan is repaid, a deemed distribution of the outstanding loan balance generally occurs. A deemed distribution of an unpaid loan balance is generally taxed as though an actual distribution occurred, including being subject to the 10-percent early withdrawal tax, if applicable. A deemed distribution is not eligible for rollover to another eligible retirement plan. Subject to the limit on the amount of loans, which treats the amount of any loan that would exceed the limit as a deemed distribution, the rules relating to loans do not limit the number of loans an employee may obtain from a plan.

Tax-favored retirement plan compliance

Tax-favored retirement plans are generally required to be operated in accordance with the terms of the plan document, and amendments to reflect changes to the plan generally must be adopted within a limited period.

Explanation of Provision

Distributions and recontributions

Under the provision, an exception to the 10-percent early withdrawal tax applies in the case of a "qualified wildfire distribution" from a qualified retirement plan, a section 403(b) plan, or an IRA. In addition, as discussed further, income attributable to a qualified wildfire distribution may be included in income ratably over three years, and the amount of a qualified wildfire distribution may be recontributed to an eligible retirement plan within three years.

A qualified wildfire distribution is a permissible distribution with respect to the relevant wildfires from a qualified retirement plan,

[57] Sec. 72(p).

section 403(b) plan, or governmental section 457(b) plan, regardless of whether a distribution otherwise would be permissible.[58] A plan is not treated as violating any Code requirement merely because it treats a distribution as a qualified wildfire distribution, provided that the aggregate amount of such distributions from plans maintained by the employer and members of the employer's controlled group or affiliated service group does not exceed $100,000. Thus, a plan is not treated as violating any Code requirement merely because an individual might receive total distributions in excess of $100,000, taking into account distributions from plans of other employers or IRAs.

With respect to the wildfires, a qualified wildfire distribution is any distribution from an eligible retirement plan made on or after October 8, 2017, and before January 1, 2019, to an individual whose principal place of abode during any portion of the period from October 8, 2017, to December 31, 2017 was located in the California wildfire disaster area and who has sustained an economic loss by reason of the wildfires giving rise to the Presidential disaster declaration. The total amount of distributions to an individual from all eligible retirement plans that may be treated as qualified wildfire distributions is $100,000. Thus, any distributions in excess of $100,000 are not qualified wildfire distributions.

Any amount required to be included in income as a result of a qualified wildfire distribution is included in income ratably over the three-year period beginning with the year of distribution unless the individual elects not to have ratable inclusion apply.

Any portion of a qualified wildfire distribution may, at any time during the three-year period beginning the day after the date on which the distribution was received, be recontributed to an eligible retirement plan to which a rollover can be made. Any amount recontributed within the three-year period is treated as a rollover and thus is not includible in income. For example, if an individual receives a qualified wildfire distribution in 2017, that amount is included in income, generally ratably over the year of the distribution and the following two years, but is not subject to the 10-percent early withdrawal tax. If, in 2019, the amount of the qualified wildfire distribution is recontributed to an eligible retirement plan, the individual may file an amended return to claim a refund of the tax attributable to the amount previously included in income. In addition, if, under the ratable inclusion provision, a portion of the distribution has not yet been included in income at the time of the contribution, the remaining amount is not includible in income.

Recontributions of withdrawals for purchase of a home

Any individual who received a qualified distribution[59] after March 31, 2017, and before January 15, 2018, which was to be used to purchase or construct a principal residence in the California disaster area, but which was not so purchased or constructed on account of the California wildfires, may, during the period beginning on October 8, 2017, and ending on June 30, 2018, make

[58] A qualified wildfire distribution is subject to income tax withholding unless the recipient elects otherwise. Mandatory 20-percent withholding does not apply.

[59] As described in sections 401(k)(2)(B)(i)(IV), 403(b)(7)(A)(ii) (but only to the extent such distribution relates to financial hardship), 403(b)(11)(B), or 72(t)(2)(F).

one or more contributions in an aggregate amount not to exceed the amount of such qualified distribution to an eligible retirement plan of which such individual is a beneficiary and to which a rollover contribution of such distribution could be made.[60] A plan is not treated as violating any Code requirement merely because it repays such distributions as provided above, provided that the aggregate amount of such repayments from plans maintained by the employer and members of the employer's controlled group or affiliated service group does not exceed $100,000.

Loans

In the case of a "qualified individual" who obtained a loan from a qualified employer plan[61] during the period beginning on February 9, 2018, and ending on December 31, 2018, the permitted maximum loan amount is the lesser of "the present value of the nonforfeitable accrued benefit of the employee under the plan" (rather than "one-half of the present value of the nonforfeitable accrued benefit of the employee under the plan") or $100,000 (rather than $50,000), and a loan meeting this limit is not treated as a distribution.[62] For this purpose, a qualified individual is an individual whose principal place of abode during any portion of the period from October 8, 2017, to December 31, 2017, was located in the California wildfire disaster area and who sustained an economic loss by reason of the California wildfires.

In the case of such a qualified individual with an outstanding loan on or after October 8, 2017, from a qualified employer plan, if the due date for any repayment with respect to such a loan[63] occurs during the period beginning on October 8, 2017, and ending on December 31, 2018, the due date is delayed for one year and any subsequent repayments will be appropriately adjusted to reflect the delay in any repayment date noted above, but the repayment delay is disregarded in determining the five-year period and the term of the loan.[64]

Plan amendments

A plan amendment made pursuant to the provision (or a regulation issued thereunder) may be retroactively effective if, in addition to the requirements described below, the amendment is made on or before the last day of the first plan year beginning after January 1, 2019 (or in the case of a governmental plan, January 1, 2021), or a later date prescribed by the Secretary. In addition, the plan is treated as operated in accordance with plan terms during the period beginning with the date the provision or regulation takes effect (or the date specified by the plan if the amendment is not required by the provision or regulation) and ending on the last permissible date for the amendment (or, if earlier, the date the amendment is adopted). For an amendment to be retroactively effective, it must apply retroactively for that period, and the plan must be operated in accordance with the amendment during that period.

[60] Under section 402(c), 403(a)(4), 403(b)(8), or 408(d)(3), as the case may be.
[61] As defined under section 72(p)(4).
[62] See section 72(p)(2)(A).
[63] See section 72(p)(2).
[64] Under section 72(p)(2)(B) or (C).

Effective Date

The provision is effective on the date of enactment (February 9, 2018).

2. Employee retention credit for employers affected by California wildfires (sec. 20103 of the Act and sec. 38 of the Code)

Present Law

There is no generally applicable employer tax credit for wages paid in connection with employment in disaster areas. There is a credit, however, for employers affected by Hurricane Harvey, Hurricane Irma, and Hurricane Maria.[65]

Explanation of Provision

The provision provides a credit of 40 percent of the qualified wages (up to a maximum of $6,000 in qualified wages per employee) paid by an eligible employer to an eligible employee.

An eligible employer is any employer that (1) conducted an active trade or business on October 8, 2017, in the California wildfire disaster zone and (2) with respect to which the trade or business described in (1) is inoperable on any day after October 1, 2017, and before January 1, 2018, as a result of damage sustained by reason of the wildfires.

An eligible employee is, with respect to an eligible employer, an employee whose principal place of employment on October 8, 2017, with such eligible employer was in the California wildfire disaster zone. An employee may not be treated as an eligible employee for any period with respect to an employer if such employer is allowed a credit under section 51, the work opportunity credit, with respect to the employee for the period.

Qualified wages are wages (as defined in section 51(c)(1) of the Code, but without regard to section 3306(b)(2)(B) of the Code) paid or incurred by an eligible employer with respect to an eligible employee on any day after October 8, 2017, and before January 1, 2018, during the period (1) beginning on the date on which the trade or business first became inoperable at the principal place of employment of the employee immediately before the wildfires and (2) ending on the date on which such trade or business has resumed significant operations at such principal place of employment. Qualified wages include wages paid without regard to whether the employee performs no services, performs services at a different place of employment than such principal place of employment, or performs services at such principal place of employment before significant operations have resumed.

The credit is treated as a current year business credit under section 38(b) and therefore is subject to the tax liability limitations of section 38(c). Rules similar to sections 51(i)(1), 52, and 280C(a) apply to the credit.

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[65] Sec. 503 of the Disaster Tax Relief and Airport and Airway Extension Act of 2017, Pub. L. No. 115–63. See also former sec. 1400R, which provided an employer credit for employers affected by Hurricane Katrina, Hurricane Rita, and Hurricane Wilma. The provision was repealed as deadwood by the Consolidated Appropriations Act, Pub L. No. 115–141, sec. 401(d)(6)(A).

Effective Date

The provision is effective on the date of enactment (February 9, 2018).

3. Temporary suspension of limitations on charitable contributions (sec. 20104(a) of the Act and sec. 170 of the Code)

Present Law

In general

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 donee organization.[66]

Charitable contributions of cash are deductible in the amount contributed. In general, contributions of capital gain property to a qualified charity are deductible at fair market value with certain exceptions. Capital gain property means any capital asset or property used in the taxpayer's trade or business the sale of which at its fair market value, at the time of contribution, would have resulted in gain that would have been long-term capital gain. Contributions of other appreciated property generally are deductible at the donor's basis in the property. Contributions of depreciated property generally are deductible at the fair market value of the property.

Percentage limitations

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 applicable percentage of the contribution base varies depending on the type of donee organization and property contributed. The contribution base is defined as the taxpayer's adjusted gross income computed without regard to any net operating loss carryback.

Contributions by an individual taxpayer of property (other than appreciated capital gain property) to a charitable organization described in section 170(b)(1)(A) (*e.g.*, public charities, private foundations other than private non-operating foundations, and certain governmental units) may not exceed 50 percent of the taxpayer's contribution base. Contributions of this type of property to nonoperating private foundations and certain other organizations generally may be deducted up to 30 percent of the taxpayer's contribution base.

For contributions taken into account for taxable years beginning after December 31, 2017, and before January 1, 2026, new section 170(b)(1)(G) increases the percentage limit for contributions by an individual taxpayer of cash to an organization described in section 170(b)(1)(A) to 60 percent. The 60-percent limit does not apply to noncash contributions. The 60-percent limit is intended to be applied after, and reduced by, the amount of noncash contributions to organizations described in section 170(b)(1)(A).

[66] Sec. 170.

Contributions of appreciated capital gain property to charitable organizations described in section 170(b)(1)(A) generally are deductible up to 30 percent of the taxpayer's contribution base. An individual may elect, however, to bring all these contributions of appreciated capital gain property for a taxable year within the 50-percent limitation category by reducing the amount of the contribution deduction by the amount of the appreciation in the capital gain property. Contributions of appreciated capital gain property to charitable organizations described in section 170(b)(1)(B) (*e.g.*, private nonoperating foundations) are deductible up to 20 percent of the taxpayer's contribution base.

Contributions by corporations

For corporations, in any taxable year, charitable contributions are not deductible to the extent the aggregate contributions exceed 10 percent of the corporation's taxable income computed without regard to net operating loss or capital loss carrybacks.

For purposes of determining whether a corporation's aggregate charitable contributions in a taxable year exceed the applicable percentage limitation, contributions of capital gain property are taken into account after other charitable contributions.

Carryforward of excess contributions

Charitable contributions that exceed the applicable percentage limitation may be carried forward for up to five years.[67] 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 provision.

Overall limitation on itemized deductions ("Pease" limitation)

For taxable years beginning before January 1, 2018, the total amount of otherwise allowable itemized deductions (other than medical expenses, investment interest, and casualty, theft, or wagering losses) is reduced by three percent of the amount of the taxpayer's adjusted gross income in excess of a certain threshold. The otherwise allowable itemized deductions may not be reduced by more than 80 percent. For 2017, the adjusted gross income threshold is $261,500 for an individual taxpayer ($313,800 for a married taxpayers filing a joint return). These dollar amounts are adjusted for inflation. The Pease limitation does not apply to any taxable year beginning after December 31, 2017, and before January 1, 2026.

[67] Sec. 170(d).

Explanation of Provision

Suspension of percentage limitations

Under the provision, in the case of an individual, the deduction for qualified contributions is allowed up to the amount by which the taxpayer's contribution base exceeds the deduction for other charitable contributions. Contributions in excess of this amount are carried over to succeeding taxable years as contributions described in 170(b)(1)(A), subject to the limitations of section 170(d)(1)(A)(i) and (ii).

In the case of a corporation, the deduction for qualified contributions is allowed up to the amount by which the corporation's taxable income (as computed under section 170(b)(2)) exceeds the deduction for other charitable contributions. Contributions in excess of this amount are carried over to succeeding taxable years, subject to the limitations of section 170(d)(2).

In applying subsections (b) and (d) of section 170 to determine the deduction for other contributions, qualified contributions are not taken into account (except to the extent qualified contributions are carried over to succeeding taxable years under the rules described above).

Qualified contributions are cash contributions paid during the period beginning on October 8, 2017, and ending on December 31, 2018, to a charitable organization described in section 170(b)(1)(A), other than contributions to (i) a supporting organization described in section 509(a)(3) or (ii) for the establishment of a new, or maintenance of an existing, donor advised fund (as defined in section 4966(d)(2)). Contributions of noncash property, such as securities, are not qualified contributions. Under the provision, qualified contributions must be to an organization described in section 170(b)(1)(A); thus, contributions to, for example, a charitable remainder trust generally are not qualified contributions, unless the charitable remainder interest is paid in cash to an eligible charity during the applicable time period. Qualified contributions must be made for relief efforts in the California wildfire disaster area. Taxpayers must substantiate that the contribution is made for this purpose. A taxpayer must elect to have the contributions treated as qualified contributions.

Limitation on overall itemized deductions

Under the provision, the charitable contribution deduction up to the amount of qualified contributions (as defined above) paid during the year is not treated as an itemized deduction for purposes of the overall limitation on itemized deductions (the "Pease" limitation). As noted above, the Pease limitation does not apply to any taxable year beginning after December 31, 2017, and before January 1, 2026.

Effective Date

The provision is effective on the date of enactment (February 9, 2018).

4. Special rules for qualified disaster-related personal casualty losses (sec. 20104(b) of the Act and sec. 165 of the Code)

Present Law

For tax years beginning before December 31, 2017, a taxpayer may generally claim an itemized deduction for any loss sustained during the taxable year and not compensated by insurance or otherwise.[68] 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. Personal casualty or theft losses are deductible only if they exceed $100 per casualty or theft. In addition, aggregate net casualty and theft losses are deductible only to the extent they exceed 10 percent of an individual taxpayer's adjusted gross income.

For tax years beginning after December 31, 2017, and before January 1, 2026, an individual may claim an itemized deduction for a personal casualty loss only if such loss was attributable to a disaster declared by the President under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act.[69] An exception applies to the extent a personal casualty loss of an individual does not exceed the individual's personal casualty gains.

Explanation of Provision

Under the provision, personal casualty losses that arose in the California wildfire disaster area on or after October 8, 2017, and that were attributable to such wildfire, are deductible without regard to whether aggregate net losses exceed 10 percent of a taxpayer's adjusted gross income. In order to be deductible, however, such losses must exceed $500 per casualty. Finally, such losses may be claimed in addition to the standard deduction and may be claimed by taxpayers subject to the alternative minimum tax.

Effective Date

The provision is effective on the date of enactment (February 9, 2018).

5. Special rule for determining earned income (sec. 20104(c) of the Act and secs. 24 and 32 of the Code)

Present Law

Eligible taxpayers are allowed an earned income credit and a child credit. In general, the earned income credit is a refundable credit for low-income workers.[70] The amount of the credit depends on the earned income of the taxpayer and whether the taxpayer has one, more than one, or no qualifying children. Earned income generally includes wages, salaries, tips, and other employee compensation, plus net earnings from self-employment.

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[68] Sec. 165.
[69] Sec. 165(h)(5).
[70] Sec. 32.

For taxable years beginning before December 31, 2017, taxpayers with incomes below certain threshold amounts are eligible for a $1,000 credit for each qualifying child.[71] In some circumstances, all or a portion of the otherwise allowable credit is treated as a refundable credit (the "additional child tax credit"). The amount of the additional child tax credit equals 15 percent of the taxpayer's earned income in excess of $3,000.

For taxable years beginning after December 31, 2017, and before January 1, 2026, the amount of the credit is $2,000, the refundable portion of the child credit is capped at $1,400 (indexed for inflation), and the earned income threshold is $2,500.[72]

Explanation of Provision

The provision permits qualified individuals to elect to calculate their earned income credit and additional child tax credit for a taxable year that includes any portion of the period from October 8, 2017, to December 31, 2017, using their earned income from the prior taxable year. Qualified individuals are permitted to make the election with respect to a taxable year only if their earned income for such taxable year is less than their earned income for the preceding taxable year.

Qualified individuals are (1) individuals who, during any portion of the period from October 8, 2017, to December 31, 2017, had their principal place of abode in the California wildfire disaster zone or (2) individuals who, during any portion of such period, were not in the California wildfire disaster zone but whose principal place of abode was in the California wildfire disaster area, and were displaced from such principal place of abode by reason of the wildfires.

For purposes of the provision, in the case of a joint return for a taxable year that includes any portion of the period from October 8, 2017, to December 31, 2017, the provision applies if either spouse is a qualified individual. In such cases, the earned income which is attributable to the taxpayer for the preceding taxable year is the sum of the earned income which is attributable to each spouse for such preceding taxable year.

Any election to use the prior year's earned income under the provision applies with respect to both the earned income credit and additional child tax credit. 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.

Effective Date

The provision is effective on the date of enactment (February 9, 2018).

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[71] Sec. 24.
[72] Sec. 24(h).

B. Tax Relief for Hurricanes Harvey, Irma, and Maria

1. Tax Relief for Hurricanes Harvey, Irma, and Maria (sec. 20201 of the Act and sec. 501(a)(2) and (b)(2) of the Disaster Tax Relief and Airport and Airway Extension Act of 2017, Pub. L. No. 115–63)

Present Law

Section 501 of the Disaster Tax Relief and Airport and Airway Extension Act of 2017[73] defines the Hurricanes Harvey and Irma "disaster area" as an area with respect to which a major disaster has been declared by the President before September 21, 2017.

Explanation of Provision

The provision modifies the definition of "disaster area" with respect to Hurricanes Harvey and Irma by delaying the date by which the disaster must be declared from September 21, 2017, to October 17, 2017.

Effective Date

The amendment is effective as if included in the provisions of the Disaster Tax Relief and Airport and Airway Extension Act of 2017.

C. Tax Relief for Families and Individuals

1. Extension of exclusion from gross income of discharge of qualified principal residence indebtedness (sec. 40201 of the Act and sec. 108 of the Code)

Present Law

In general

Gross income includes income that is realized by a debtor from the discharge of indebtedness,[74] subject to certain exceptions for debtors in Title 11 bankruptcy cases, insolvent debtors, certain student loans, certain farm indebtedness, and certain real property business indebtedness.[75] In cases involving discharges of indebtedness that are excluded from gross income under the exceptions to the general rule, taxpayers generally reduce certain tax attributes, including basis in property, by the amount of the discharge of indebtedness.

The amount of discharge of indebtedness excluded from income by an insolvent debtor not in a Title 11 bankruptcy case cannot exceed the amount by which the debtor is insolvent. In the case of a discharge in bankruptcy or where the debtor is insolvent, any reduction in basis may not exceed the excess of the aggregate bases of properties held by the taxpayer immediately after the discharge over the aggregate of the liabilities of the taxpayer immediately after the discharge.[76]

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[73] Pub. L. No. 115–63.

[74] A debt cancellation which constitutes a gift or bequest is not treated as income to the donee debtor. Sec. 102.

[75] Secs. 61(a)(11) and 108.

[76] Sec. 1017.

For all taxpayers, the amount of discharge of indebtedness generally is equal to the difference between the adjusted issue price of the debt being cancelled and the amount used to satisfy the debt. These rules generally apply to the exchange of an old obligation for a new obligation, including a modification of indebtedness that is treated as an exchange (a debt-for-debt exchange).

Qualified principal residence indebtedness

An exclusion from gross income is provided for any discharge of indebtedness income by reason of a discharge (in whole or in part) of qualified principal residence indebtedness. Qualified principal residence indebtedness means acquisition indebtedness (within the meaning of section 163(h)(3)(B), except that the dollar limitation is $2 million) with respect to the taxpayer's principal residence.[77] Acquisition indebtedness with respect to a principal residence generally means indebtedness which is incurred in the acquisition, construction, or substantial improvement of the principal residence of the individual and is secured by the residence. It also includes refinancing of such indebtedness to the extent the amount of the indebtedness resulting from such refinancing does not exceed the amount of the refinanced indebtedness. For these purposes, the term "principal residence" has the same meaning as under section 121 of the Code.

If, immediately before the discharge, only a portion of a discharged indebtedness is qualified principal residence indebtedness, the exclusion applies only to so much of the amount discharged as exceeds the portion of the debt which is not qualified principal residence indebtedness. Thus, assume that a principal residence is secured by an indebtedness of $1 million, of which $700,000 is qualified principal residence indebtedness. If the residence is sold for $600,000 and $400,000 debt is discharged, then only $100,000 of the amount discharged may be excluded from gross income under the qualified principal residence indebtedness exclusion.

The basis of the individual's principal residence is reduced by the amount excluded from income under the provision.

The qualified principal residence indebtedness exclusion does not apply to a taxpayer in a Title 11 case; instead the general exclusion rules apply. In the case of an insolvent taxpayer not in a Title 11 case, the qualified principal residence indebtedness exclusion applies unless the taxpayer elects to have the general exclusion rules apply instead.

The exclusion does not apply to the discharge of a loan if the discharge is on account of services performed for the lender or any other factor not directly related to a decline in the value of the residence or to the financial condition of the taxpayer.

The exclusion for qualified principal residence indebtedness is effective for discharges of indebtedness before January 1, 2017.

Explanation of Provision

The provision extends for one additional year (through December 31, 2017) the exclusion from gross income for discharges of qualified principal residence indebtedness. The provision also provides

[77] Sec. 108(h)(2).

for an exclusion from gross income in the case of those taxpayers whose qualified principal residence indebtedness was discharged on or after January 1, 2018, if the discharge was subject to a written arrangement entered into before January 1, 2018.

Effective Date

The provision generally applies to discharges of indebtedness after December 31, 2016.

2. Extension of mortgage insurance premiums treated as qualified residence interest (sec. 40202 of the Act and sec. 163 of the Code)

Present Law

In general

Qualified residence interest is deductible notwithstanding the general rule that personal interest is nondeductible.[78]

Acquisition indebtedness and home equity indebtedness

For tax years beginning before December 31, 2017, qualified residence interest is interest on acquisition indebtedness and home equity indebtedness with respect to a principal and a second residence of the taxpayer. The maximum amount of acquisition indebtedness is $1,000,000 ($500,000 in the case of married taxpayers filing separately) and the maximum amount of home equity indebtedness is $100,000 ($50,000 in the case of married taxpayers filing separately). Acquisition indebtedness means debt that is incurred in acquiring, constructing, or substantially improving a qualified residence of the taxpayer, and that is secured by the residence. Home equity indebtedness is debt (other than acquisition indebtedness) that is secured by the taxpayer's qualified residence, to the extent the aggregate amount of such debt does not exceed the difference between the total acquisition indebtedness with respect to the residence, and the fair market value of the residence.

For tax years beginning after December 31, 2017, and before January 1, 2026, qualified residence interest does not include home equity indebtedness. The maximum amount of acquisition indebtedness is $750,000 ($375,000 in the case of married taxpayers filing separately). This reduced limitation on acquisition indebtedness does not apply to indebtedness incurred on or before December 15, 2017.

Qualified mortgage insurance

Certain premiums paid or accrued for qualified mortgage insurance by a taxpayer during the taxable year in connection with acquisition indebtedness on a qualified residence of the taxpayer are treated as interest that is qualified residence interest and thus deductible. The amount allowable as a deduction is phased out ratably by 10 percent for each $1,000 (or fraction thereof) by which the taxpayer's adjusted gross income exceeds $100,000 ($500 and $50,000, respectively, in the case of a married individual filing a

[78] Sec. 163(h).

separate return). Thus, the deduction is not allowed if the taxpayer's adjusted gross income exceeds $109,000 ($54,000 in the case of married individual filing a separate return).

For this purpose, qualified mortgage insurance means mortgage insurance provided by the Department of Veterans Affairs, the Federal Housing Administration, or the Rural Housing Service, and private mortgage insurance (defined in section two of the Homeowners Protection Act of 1998 as in effect on the date of enactment of the provision).

Amounts paid for qualified mortgage insurance that are properly allocable to periods after the close of the taxable year are treated as paid in the period to which they are allocated. No deduction is allowed for the unamortized balance if the mortgage is paid before the end of its term (except in the case of qualified mortgage insurance provided by the Department of Veterans Affairs or Rural Housing Service).

The deduction does not apply with respect to any mortgage insurance contract issued before January 1, 2007. The deduction is disallowed for any amount paid or accrued after December 31, 2016, or properly allocable to any period after that date.

Information reporting rules apply to mortgage insurance premiums for premiums paid or accrued during periods to which the deductibility provision applies.[79]

Explanation of Provision

The provision extends the deduction for private mortgage insurance premiums for one year (with respect to contracts entered into after December 31, 2006). Thus, the provision applies to amounts paid or accrued in 2017 (and not properly allocable to any period after 2017).

Effective Date

The provision applies to amounts paid or accrued after December 31, 2016.

3. Extension of above-the-line deduction for qualified tuition and related expenses (sec. 40203 of the Act and sec. 222 of the Code)

Present Law

An individual is allowed a deduction for qualified tuition and related expenses for higher education paid by the individual during the taxable year.[80] The deduction is allowed in computing adjusted gross income. The term qualified tuition and related expenses is defined in the same manner as for the American Opportunity and Lifetime Learning credits,[81] and includes tuition and fees required for the enrollment or attendance of the taxpayer, the taxpayer's spouse, or any dependent of the taxpayer with respect to whom the

[79] Sec. 6050H(h) and Treas. Reg. sec. 1.6050H–3.
[80] Sec. 222.
[81] See sec. 25A(f). The American Opportunity tax credit allows course materials to be taken into account in addition to tuition and fees, but such materials are not taken into account for purposes of the deduction for qualified tuition and related expenses.

taxpayer is allowed a deduction for a personal exemption,[82] at an eligible institution of higher education for courses of instruction of such individual at such institution.[83] The expenses must be in connection with enrollment at an institution of higher education during the taxable year, or with an academic period beginning during the taxable year or during the first three months of the next taxable year. The deduction is not available for tuition and related expenses paid for elementary or secondary education.

The maximum deduction is $4,000 for an individual whose adjusted gross income for the taxable year does not exceed $65,000 ($130,000 in the case of a joint return), or $2,000 for an individual whose adjusted gross income does not exceed $80,000 ($160,000 in the case of a joint return). No deduction is allowed for an individual whose adjusted gross income exceeds the relevant adjusted gross income limitations, for a married individual who does not file a joint return, or for an individual with respect to whom a personal exemption deduction is allowable to another taxpayer for the taxable year. The deduction is not available for taxable years beginning after December 31, 2016.

The amount of qualified tuition and related expenses must be reduced by certain scholarships, educational assistance allowances, and other amounts paid for the benefit of such individual,[84] and by the amount of such expenses taken into account for purposes of determining any exclusion from gross income of: (1) income from certain U.S. savings bonds used to pay higher education tuition and fees; and (2) income from a Coverdell education savings account.[85] Additionally, such expenses must be reduced by the earnings portion (but not the return of principal) of distributions from a qualified tuition program if an exclusion under section 529 is claimed with respect to expenses eligible for the qualified tuition deduction. No deduction is allowed for any expense for which a deduction is otherwise allowed or with respect to an individual for whom an American Opportunity or Lifetime Learning credit is elected for such taxable year.

Explanation of Provision

The provision extends the qualified tuition deduction for one year, through 2017.

Effective Date

The provision applies to taxable years beginning after December 31, 2016.

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[82] Notwithstanding that the exemption amount is zero for taxable years beginning after December 31, 2017, and before January 1, 2026, the reduction of the exemption amount to zero is not taken into account in determining whether a deduction for a personal exemption is still allowed or allowable. Sec. 151(d)(5)(B).

[83] The deduction generally is not available for expenses with respect to a course or education involving sports, games, or hobbies, and is not available for student activity fees, athletic fees, insurance expenses, or other expenses unrelated to an individual's academic course of instruction. Secs. 222(d)(1) and 25A(f).

[84] Secs. 222(d)(1) and 25A(g)(2).

[85] Sec. 222(c). These reductions are the same as those that apply to the American Opportunity and Lifetime Learning credits.

D. Incentives for Growth, Jobs, Investment, and Innovation

1. Extension of Indian employment tax credit (sec. 40301 of the Act and sec. 45A of the Code)

Present Law

In general, a credit against income tax liability is allowed to employers for the first $20,000 of qualified wages and qualified employee health insurance costs paid or incurred by the employer with respect to certain employees.[86] The credit is equal to 20 percent of the excess of eligible employee qualified wages and health insurance costs during the current year over the amount of such wages and costs incurred by the employer during 1993. The credit is an incremental credit, such that an employer's current-year qualified wages and qualified employee health insurance costs (up to $20,000 per employee) are eligible for the credit only to the extent that the sum of such costs exceeds the sum of comparable costs paid during 1993. No deduction is allowed for the portion of the wages equal to the amount of the credit.

Qualified wages means wages paid or incurred by an employer for services performed by a qualified employee. A qualified employee means any employee who is an enrolled member of an Indian tribe or the spouse of an enrolled member of an Indian tribe, who performs substantially all of the services within an Indian reservation, and whose principal place of abode while performing such services is on or near the reservation in which the services are performed. An "Indian reservation" is a reservation as defined in section 3(d) of the Indian Financing Act of 1974[87] or section 4(10) of the Indian Child Welfare Act of 1978.[88] For purposes of the preceding sentence, section 3(d) is applied by treating "former Indian reservations in Oklahoma" as including only lands that are (1) within the jurisdictional area of an Oklahoma Indian tribe as determined by the Secretary of the Interior, and (2) recognized by such Secretary as an area eligible for trust land status under 25 C.F.R. Part 151 (as in effect on August 5, 1997).

An employee is not treated as a qualified employee for any taxable year of the employer if the total amount of wages paid or incurred by the employer with respect to such employee during the taxable year exceeds an amount determined at an annual rate of $30,000 (which after adjustment for inflation is $45,000 for 2016).[89] In addition, an employee will not be treated as a qualified employee under certain specific circumstances, such as where the employee is related to the employer (in the case of an individual employer) or to one of the employer's specified shareholders, owners, partners, grantors, beneficiaries, or fiduciaries, or is a dependent thereof.[90] Similarly, an employee will not be treated as a qualified employee where the employee has more than a five percent ownership interest in the employer. Finally, an employee will not be considered a qualified employee to the extent the employee's services

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[86] Sec. 45A.
[87] Pub. L. No. 93–262.
[88] Pub. L. No. 95–608.
[89] See Instructions for Form 8845, Indian Employment Credit (2016).
[90] Sec. 51(i)(1).

relate to gaming activities or are performed in a building housing such activities.

The wage credit is available for wages paid or incurred in taxable years beginning on or before December 31, 2016.

Explanation of Provision

The provision extends the Indian employment tax credit for one year (through taxable years beginning on or before December 31, 2017).

Effective Date

The provision applies to taxable years beginning after December 31, 2016.

2. Extension of railroad track maintenance credit (sec. 40302 of the Act and sec. 45G of the Code)

Present Law

In general

A business tax credit is allowed for 50 percent of qualified railroad track maintenance expenditures paid or incurred by an eligible taxpayer during taxable years beginning before January 1, 2017 (the "railroad track maintenance credit" or "credit").[91] For purposes of calculating the credit, all members of a controlled group of corporations or a group of businesses under common control are treated as a single taxpayer, and each member's credit is determined on a proportionate basis to each member's share of the aggregate qualified railroad track maintenance expenditures taken into account by the group for the credit.[92] The credit may reduce a taxpayer's tax liability below its tentative minimum tax.[93]

Limitation

The railroad track maintenance credit is limited to the product of $3,500 times the number of miles of railroad track[94] (1) owned or leased by an eligible taxpayer as of the close of its taxable year,[95] and (2) assigned to the eligible taxpayer by a Class II or Class III railroad that owns or leases such track at the close of the

[91] Sec. 45G(a) and (f). An eligible taxpayer generally claims the railroad track maintenance credit by filing Form 8900, Qualified Railroad Track Maintenance Credit. If a taxpayer's only source of the credit is a partnership or S corporation, the taxpayer may report the credit directly on Form 3800, General Business Credit (see Part III, line 4g).

[92] Sec. 45G(e)(2) and Treas. Reg. sec. 1.45G–1(f). See also Notice 2013–20, 2013–15 I.R.B. 902, April 8, 2013; and Field Attorney Advice 20151601F, December 19, 2014.

[93] Sec. 38(c)(4).

[94] Double track is treated as multiple lines of railroad track, rather than as a single line of railroad track (*i.e.,* one mile of single track is one mile, but one mile of double track is two miles). Treas. Reg. sec. 1.45G–1(b)(9).

[95] A Class II or Class III owns railroad track if the railroad track is subject to the allowance for depreciation under section 167 by such Class II or Class III railroad. Treas. Reg. sec. 1.45G–1(b)(2). Railroad track generally has a seven-year MACRS recovery period. Sec. 168(e)(3)(C)(i) and asset class 40.4 of Rev. Proc. 87–56, 1987–2 C.B. 674. Alternatively, railroad structures and similar improvements (*e.g.,* bridges, elevated structures, fences, etc.) generally have a 20-year MACRS recovery period (see asset class 40.2 of Rev. Proc. 87–56), while railroad grading and tunnel bores have a 50-year recovery period (see sec. 168(c)). The term "railroad grading or tunnel bore" means all improvements resulting from excavations (including tunneling), construction of embankments, clearings, diversions of roads and streams, sodding of slopes, and from similar work necessary to provide, construct, reconstruct, alter, protect, improve, replace, or restore a roadbed or right-of-way for railroad track. Sec. 168(e)(4).

taxable year.[96] Amounts that exceed the limitation are not carried over to another taxable year.[97]

Assignments

Each mile of railroad track may be taken into account only once, either by the owner of such mile or by the owner's assignee, in computing the per-mile limitation.[98] Any assignment of a mile of railroad track may be made only once per taxable year of the Class II or Class III railroad, and is treated as made of the close of such taxable year.[99] Such assignment is taken into account for the taxable year of the assignee that includes the date that such assignment is treated as effective.

Eligible taxpayer

An eligible taxpayer means any Class II or Class III railroad, and any person (including a Class I railroad[100]) who transports property using the rail facilities[101] of a Class II or Class III railroad or who furnishes railroad-related property[102] or services[103] to a Class II or Class III railroad, but only with respect to miles of railroad track assigned to such person by such railroad under the provision.[104]

The terms Class II or Class III railroad have the meanings given by the Surface Transportation Board without regard to the controlled group rules under section 45G(e)(2).[105]

Qualified railroad track maintenance expenditures

Qualified railroad track maintenance expenditures are defined as gross expenditures (whether or not otherwise chargeable to capital account[106]) for maintaining railroad track (including roadbed,

[96] Sec. 45G(b)(1).
[97] Treas. Reg. sec. 1.45G–1(c)(2)(iii).
[98] Sec. 45G(b)(2). See also Treas. Reg. sec. 1.45G–1(d).
[99] An assignor must file Form 8900 with its timely filed (including extensions) Federal income tax return for the taxable year for which it assigns any mile of eligible railroad track, even if it is not itself claiming the railroad track maintenance credit for that taxable year. Treas. Reg. sec. 1.45G–1(d)(4). Both the assignor and the assignee must attach a statement to Form 8900 detailing the information required by Treas. Reg. sec. 1.45G–1(d)(4).
[100] The Surface Transportation Board currently classifies a Class I railroad as a carrier with annual operating revenue of $447,621,226 or more. The seven Class I railroads are BNSF Railway Company, Kansas City Southern Railway Company, Union Pacific Railway Company, Soo Line Railroad Company (Canadian Pacific's U.S. operations), CSX Transportation Inc., Norfolk Southern Railway Company, and Grand Trunk Corporation (Canadian National's U.S. operations). See the Surface Transportation Board FAQs—Economic and Industry Information, available at https://www.stb.gov/stb/faqs.html.
[101] Rail facilities of a Class II or Class III railroad are railroad yards, tracks, bridges, tunnels, wharves, docks, stations, and other related assets that are used in the transport of freight by a railroad and owned or leased by that railroad. Treas. Reg. sec. 1.45G–1(b)(6).
[102] Railroad-related property is property that is unique to railroads and provided directly to a Class II or Class III railroad. See Treas. Reg. sec. 1.45G–1(b)(7) for a detailed description.
[103] Railroad-related services are services that are provided directly to, and are unique to, a railroad and that relate to railroad shipping, loading and unloading of railroad freight, or repairs of rail facilities or railroad-related property. See Treas. Reg. sec. 1.45G–1(b)(8) for a detailed description.
[104] Sec. 45G(c).
[105] Sec. 45G(e)(1) and Treas. Reg. sec. 1.45G–1(b)(1). The Surface Transportation Board currently classifies a Class II railroad as a carrier with annual operating revenue of less than $447,621,226 but in excess of $35,809,698, and a Class III railroad as a carrier with annual operating revenue of $35,809,698 or less. See the Surface Transportation Board FAQs—Economic and Industry Information, available at https://www.stb.gov/stb/faqs.html.
[106] All or some of the qualified railroad track maintenance expenditures may be required to be capitalized under section 263(a) as a tangible or intangible asset. See, *e.g.,* Treas. Reg. sec. 1.263(a)–4(d)(8), which requires the capitalization of amounts paid or incurred by a taxpayer to

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bridges, and related track structures) owned or leased as of January 1, 2015, by a Class II or Class III railroad, determined without regard to any consideration for such expenditure given by the Class II or Class III railroad that made the assignment of such track.[107] However, consideration received directly or indirectly from persons other than the Class II or Class III railroad does reduce the amount of qualified railroad track maintenance expenditures.[108] Any amount that an assignee pays an assignor in exchange for an assignment of one or more miles of eligible railroad is treated as qualified railroad track maintenance expenditures paid or incurred by the assignee at the time and to the extent the assignor pays or incurs qualified railroad track maintenance expenditures.[109]

Basis adjustment

Basis of the railroad track must be reduced (but not below zero) by an amount equal to 100 percent of the taxpayer's qualified railroad track maintenance tax credit determined for the taxable year.[110] The basis reduction is taken into account before the depreciation deduction with respect to such railroad track is determined for the taxable year for which the railroad track maintenance credit is allowable.[111] If all or some of the qualified railroad track maintenance expenditures paid or incurred by an eligible taxpayer during the taxable year is capitalized under section 263(a) to more than one asset, whether tangible or intangible, the reduction to the basis of these assets is allocated among each of the assets subject to the reduction in proportion to the unadjusted basis of each asset at the time the qualified railroad track maintenance expenditures are paid or incurred during that taxable year.[112]

Explanation of Provision

The provision extends the credit for one year, for qualified railroad track maintenance expenditures paid or incurred in taxable years beginning before January 1, 2018.

Effective Date

The provision generally applies to expenditures paid or incurred in taxable years beginning after December 31, 2016.

The provision also provides a safe harbor that treats assignments, including related expenditures paid or incurred, for taxable years ending after January 1, 2017, and before January 1, 2018, as effective as of the close of such taxable year if made pursuant to

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produce or improve real property owned by another (except to the extent the taxpayer is selling services at fair market value to produce or improve the real property) if the real property can reasonably be expected to produce significant economic benefits for the taxpayer. The basis of the tangible or intangible asset includes the capitalized amount of the qualified railroad track maintenance expenditures. Treas. Reg. sec. 1.45G–1(e)(1). Note that for purposes of Treas. Reg. sec. 1.263(a)–4(d)(8), real property includes property that is affixed to real property and that will ordinarily remain affixed for an indefinite period of time. Treas. Reg. sec. 1.263(a)–4(d)(8)(iii). Intangible assets described in Treas. Reg. sec. 1.263(a)–4(d)(8) are generally depreciable ratably over 25 years. See Treas. Reg. sec. 1.167(a)–3.

[107] Sec. 45G(d); Treas. Reg. sec. 1.45G–1(b)(5).

[108] Treas. Reg. sec. 1.45G–1(c)(3)(ii).

[109] Treas. Reg. sec. 1.45G–1(c)(3).

[110] Sec. 45G(e)(3). See also sec. 1016(a)(29) and Treas. Reg. sec. 1.45G–1(e).

[111] Treas. Reg. sec. 1.45G–1(e)(2).

[112] *Ibid.*

a written agreement entered into no later than 90 days following the date of enactment (*i.e.,* no later than May 10, 2018).

3. Extension of mine rescue team training credit (sec. 40303 of the Act and sec. 45N of the Code)

Present Law

An eligible employer may claim a general business credit against income tax with respect to each qualified mine rescue team employee equal to the lesser of: (1) 20 percent of the amount paid or incurred by the taxpayer during the taxable year with respect to the training program costs of the qualified mine rescue team employee (including the wages of the employee while attending the program); or (2) $10,000.[113]

A qualified mine rescue team employee is any full-time employee of the taxpayer who is a miner eligible for more than six months of a taxable year to serve as a mine rescue team member by virtue of either having completed the initial 20-hour course of instruction prescribed by the Mine Safety and Health Administration's Office of Educational Policy and Development, or receiving at least 40 hours of refresher training in such instruction.[114]

An eligible employer is any taxpayer that employs individuals as miners in underground mines in the United States.[115] The term "wages" has the meaning given to such term by section 3306(b)[116] (determined without regard to any dollar limitation contained in that section).[117]

No deduction is allowed for the portion of the expenses otherwise deductible that is equal to the amount of the credit.[118] The credit does not apply to taxable years beginning after December 31, 2016.[119] Additionally, the credit is not allowable for purposes of computing the alternative minimum tax.[120]

Explanation of Provision

The provision extends the credit for one year, through taxable years beginning before January 1, 2018.

Effective Date

The provision applies to taxable years beginning after December 31, 2016.

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[113] Sec. 45N(a).
[114] Sec. 45N(b).
[115] Sec. 45N(c).
[116] Section 3306(b) defines wages for purposes of Federal Unemployment Tax.
[117] Sec. 45N(d).
[118] Sec. 280C(e).
[119] Sec. 45N(e).
[120] Sec. 38(c).

4. Extension of classification of certain race horses as three-year property (sec. 40304 of the Act and sec. 168 of the Code)

Present Law

In general

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.[121] The period for depreciation or amortization generally begins when the asset is placed in service by the taxpayer.[122] 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 convention.[123]

The applicable recovery period for an asset is determined in part by statute and in part by historic Treasury guidance.[124] The "type of property" of an asset is used to determine the "class life" of the asset, which in turn dictates the applicable recovery period for the asset.

The MACRS recovery periods applicable to most tangible personal property range from three to 20 years. The depreciation methods generally applicable to tangible personal property are the 200-percent and 150-percent declining balance methods,[125] switching to the straight line method for the first taxable year where using the straight line method with respect to the adjusted basis as of the beginning of that year yields a larger depreciation allowance.

Race horses

The statute assigns a three-year recovery period to any race horse that is (1) placed in service before January 1, 2017, and (2) placed in service after December 31, 2016, and more than two

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[121] 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 addition, 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.

[122] 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).

[123] Sec. 168.

[124] Exercising authority granted by Congress, the Secretary issued Rev. Proc. 87–56, 1987–2 C.B. 674, laying out the framework of recovery periods for enumerated classes of assets. The Secretary clarified and modified the list of asset classes in Rev. Proc. 88–22, 1988–1 C.B. 785. In November 1988, Congress revoked the Secretary's authority to modify the class lives of depreciable property. Rev. Proc. 87–56, as modified, remains in effect except to the extent that the Congress has, since 1988, statutorily modified the recovery period for certain depreciable assets, effectively superseding any administrative guidance with regard to such property.

[125] Under the declining balance method the depreciation rate is determined by dividing the appropriate percentage (here 150 or 200) by the appropriate recovery period. This leads to accelerated depreciation when the declining balance percentage is greater than 100. The table below illustrates depreciation for an asset with a cost of $1,000 and a seven-year recovery period under the 200-percent declining balance method, the 150-percent declining balance method, and the straight line method.

Recovery method	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	Total
200-percent declining balance	285.71	204.08	145.77	104.12	86.77	86.77	86.77	1,000.00
150-percent declining balance	214.29	168.37	132.29	121.26	121.26	121.26	121.26	1,000.00
Straight-line	142.86	142.86	142.86	142.86	142.86	142.86	142.86	1,000.00

* Details may not add to totals due to rounding.

years old at such time it is placed in service by the purchaser.[126] A seven-year recovery period applies to any race horse that is placed in service after December 31, 2016, and that is two years old or younger at the time it is placed in service.[127]

Explanation of Provision

The provision extends the three-year recovery period for race horses for one year to apply to any race horse (regardless of age when placed in service) which is placed in service before January 1, 2018. Subsequently, the three-year recovery period for race horses will only apply to those which are more than two years old when placed in service by the purchaser after December 31, 2017.

Effective Date

The provision applies to property placed in service after December 31, 2016.

5. Extension of seven-year recovery period for motorsports entertainment complexes (sec. 40305 of the Act and sec. 168 of the Code)

Present Law

In general

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.[128] The period for depreciation or amortization generally begins when the asset is placed in service by the taxpayer.[129] 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 convention.[130]

The applicable recovery period for an asset is determined in part by statute and in part by historic Treasury guidance.[131] The "type

[126] Sec. 168(e)(3)(A)(i). A horse is more than two years old after the day that is 24 months after its actual birthdate. See Prop. Treas. Reg. sec. 1.168–3(c)(1)(iii) (interpreting ACRS); and Rev. Proc. 87–56, as clarified and modified by Rev. Proc. 88–22. Note that this measurement of a horse's age for depreciation purposes is different from the horse racing industry's convention that a race horse ages one year each January 1. See, *e.g.,* U.S. Department of the Treasury, *Report to Congress on the Depreciation of Horses,* March 1990, p. 35 ("Although the conventional age of a horse is usually derived from a fictional January 1 birthdate, the current classification of horses for depreciation purposes is dependent upon their true ages."); and Jennifer Caldwell, "Why do Thoroughbreds share the same birth date of New Year's Day?" Kentucky Derby News, November 17, 2017, available at https://www.kentuckyderby.com/horses/news/why-do-thoroughbreds-share-the-same-birth-date-of-new-years-day.

[127] See sec. 168(e)(3)(C)(v) and asset class 01.225 of Rev. Proc. 87–56, as clarified and modified by Rev. Proc. 88–22.

[128] 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 addition, 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.

[129] 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).

[130] Sec. 168.

[131] Exercising authority granted by Congress, the Secretary issued Rev. Proc. 87–56, 1987–2 C.B. 674, laying out the framework of recovery periods for enumerated classes of assets. The Secretary clarified and modified the list of asset classes in Rev. Proc. 88–22, 1988–1 C.B. 785.

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of property" of an asset is used to determine the "class life" of the asset, which in turn dictates the applicable recovery period for the asset.

The MACRS recovery periods applicable to most tangible personal property range from three to 20 years. The depreciation methods generally applicable to tangible personal property are the 200-percent and 150-percent declining balance methods,[132] switching to the straight line method for the first taxable year where using the straight line method with respect to the adjusted basis as of the beginning of that year yields a larger depreciation allowance.

Real property

The recovery periods for most real property are 39 years for nonresidential real property and 27.5 years for residential rental property.[133] The straight line depreciation method is required for the aforementioned real property.[134] In addition, nonresidential real and residential rental property are both subject to the mid-month convention, which treats all property placed in service during any month (or disposed of during any month) as placed in service (or disposed of) on the mid-point of such month.[135] All other property generally is subject to the half-year convention, which treats all property placed in service during any taxable year (or disposed of during any taxable year) as placed in service (or disposed of) on the mid-point of such taxable year.[136]

Land improvements (such as roads and fences) are generally recovered using the 150-percent declining balance method, a recovery period of 15 years, and the half-year convention.[137] An exception exists for the theme and amusement park industry, whose assets are generally assigned a recovery period of seven years by asset class 80.0 of Rev. Proc. 87–56.[138] Racetrack facilities are excluded

In November 1988, Congress revoked the Secretary's authority to modify the class lives of depreciable property. Rev. Proc. 87–56, as modified, remains in effect except to the extent that the Congress has, since 1988, statutorily modified the recovery period for certain depreciable assets, effectively superseding any administrative guidance with regard to such property.

[132] Under the declining balance method the depreciation rate is determined by dividing the appropriate percentage (here 150 or 200) by the appropriate recovery period. This leads to accelerated depreciation when the declining balance percentage is greater than 100. The table below illustrates depreciation for an asset with a cost of $1,000 and a seven-year recovery period under the 200-percent declining balance method, the 150-percent declining balance method, and the straight line method.

Recovery method	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	Total
200-percent declining balance	285.71	204.08	145.77	104.12	86.77	86.77	86.77	1,000.00
150-percent declining balance	214.29	168.37	132.29	121.26	121.26	121.26	121.26	1,000.00
Straight-line	142.86	142.86	142.86	142.86	142.86	142.86	142.86	1,000.00

* Details may not add to totals due to rounding.

[133] Sec. 168(c).

[134] Sec. 168(b)(3).

[135] Sec. 168(d)(2) and (d)(4)(B).

[136] Sec. 168(d)(1) and (d)(4)(A). However, if substantial property is placed in service during the last three months of a taxable year, a special rule requires use of the mid-quarter convention, which treats all property placed in service (or disposed of) during any quarter as placed in service (or disposed of) on the mid-point of such quarter. Sec. 168(d)(3) and (d)(4)(C). Nonresidential real property, residential rental property, and railroad grading or tunnel bore are not taken into account for purposes of the mid-quarter convention.

[137] Sec. 168(b)(2)(A) and asset class 00.3 of Rev. Proc. 87–56. Under the 150-percent declining balance method, the depreciation rate is determined by dividing 150 percent by the appropriate recovery period, switching to the straight-line method for the first taxable year where using the straight-line method with respect to the adjusted basis as of the beginning of that year will yield a larger depreciation allowance. Sec. 168(b)(2) and (b)(1)(B).

[138] This asset class includes assets used in the provision of rides, attractions, and amusements in activities defined as theme and amusement parks, and includes appurtenances associated

from the definition of theme and amusement park facilities classified under asset class 80.0.[139]

Although racetrack facilities are excluded from asset class 80.0, the statute assigns a recovery period of seven years to motorsports entertainment complexes placed in service before January 1, 2017.[140] For this purpose, a motorsports entertainment complex means a racing track facility that (i) is permanently situated on land, and (ii) during the 36-month period following its placed-in-service date hosts one or more racing events for automobiles (of any type), trucks, or motorcycles that are open to the public for the price of admission.[141]

A motorsports entertainment complex also includes ancillary facilities, land improvements (*e.g.,* parking lots, sidewalks, waterways, bridges, fences, and landscaping), support facilities (*e.g.,* food and beverage retailing, souvenir vending, and other nonlodging accommodations), and appurtenances associated with such facilities and related attractions and amusements (*e.g.,* ticket booths, race track surfaces, suites and hospitality facilities, grandstands and viewing structures, props, walls, facilities that support the delivery of entertainment services, other special purpose structures, facades, shop interiors, and buildings).[142] Such ancillary and support facilities must be (i) owned by the taxpayer who owns the motorsports entertainment complex, and (ii) provided for the benefit of patrons of the motorsports entertainment complex.

A motorsports entertainment complex does not include any transportation equipment, administrative services assets, warehouses, administrative buildings, hotels, or motels.[143]

Explanation of Provision

The provision extends the seven-year recovery period for motorsports entertainment complexes for one year to apply to property placed in service before January 1, 2018.

Effective Date

The provision applies to property placed in service after December 31, 2016.

with a ride, attraction, amusement or theme setting within the park such as ticket booths, facades, shop interiors, and props, special purpose structures, and buildings other than warehouses, administration buildings, hotels, and motels. It also includes all land improvements for or in support of park activities (*e.g.,* parking lots, sidewalks, waterways, bridges, fences, and landscaping) and support functions (*e.g.,* food and beverage retailing, souvenir vending and other nonlodging accommodations) if owned by the park and provided exclusively for the benefit of park patrons. Theme and amusement parks are defined as combinations of amusements, rides, and attractions which are permanently situated on park land and open to the public for the price of admission. This asset class is a composite of all assets used in this industry except transportation equipment (general purpose trucks, cars, airplanes, etc., which are included in asset classes with the prefix 00.2), assets used in the provision of administrative services (asset classes with the prefix 00.1), and warehouses, administration buildings, hotels and motels.

[139] See Joint Committee on Taxation, *General Explanation of Tax Legislation Enacted in the 108th Congress* (JCS–5–05), May 2005, p. 328.

[140] Sec. 168(e)(3)(C)(ii) and (i)(15)(D).

[141] Sec. 168(i)(15)(A).

[142] Sec. 168(i)(15)(B).

[143] Sec. 168(i)(15)(C).

6. Extension of accelerated depreciation for business property on an Indian reservation (sec. 40306 of the Act and sec. 168(j) of the Code)

Present Law

With respect to certain property used in connection with the conduct of a trade or business within an Indian reservation, depreciation deductions under section 168(j) are determined using the following recovery periods: [144]

3-year property	2 years
5-year property	3 years
7-year property	4 years
10-year property	6 years
15-year property	9 years
20-year property	12 years
Nonresidential real property	22 years

"Qualified Indian reservation property" eligible for accelerated depreciation includes property described in the table above that is: (1) used by the taxpayer predominantly in the active conduct of a trade or business within an Indian reservation; (2) not used or located outside the reservation on a regular basis; (3) not acquired (directly or indirectly) by the taxpayer from a person who is related to the taxpayer;[145] and (4) is not property placed in service for purposes of conducting or housing certain gaming activities.[146]

Certain "qualified infrastructure property" may be eligible for the accelerated depreciation, even if located outside an Indian reservation, provided that the purpose of such property is to connect with qualified infrastructure property located within the reservation (*e.g.,* roads, power lines, water systems, railroad spurs, and communications facilities).[147]

An "Indian reservation" means a reservation as defined in section 3(d) of the Indian Financing Act of 1974 (25 U.S.C. 1452(d)) [148] or section 4(10) of the Indian Child Welfare Act of 1978 (25 U.S.C. 1903(10)).[149] For purposes of the preceding sentence, section 3(d) is applied by treating "former Indian reservations in Oklahoma" as including only lands that are (1) within the jurisdictional area of an Oklahoma Indian tribe as determined by the Secretary of the Interior, and (2) recognized by such Secretary as an area eligible for trust land status under 25 C.F.R. Part 151 (as in effect on August 5, 1997).[150]

The depreciation deduction allowed for regular tax purposes is also allowed for purposes of the alternative minimum tax.[151]

The accelerated depreciation for qualified Indian reservation property is available with respect to property placed in service be-

[144] Section 168(j)(2) does not provide shorter recovery periods for water utility property, residential rental property, or railroad grading and tunnel bores.
[145] For these purposes, the term "related persons" is defined in section 465(b)(3)(C).
[146] Sec. 168(j)(4)(A).
[147] Sec. 168(j)(4)(C).
[148] Pub. L. No. 93–262.
[149] Pub. L. No. 95–608.
[150] Sec. 168(j)(6).
[151] Sec. 168(j)(3).

fore January 1, 2017.[152] A taxpayer may annually make an irrevocable election out of section 168(j) on a class-by-class basis.[153]

Explanation of Provision

The provision extends for one year the accelerated depreciation for qualified Indian reservation property to apply to property placed in service before January 1, 2018.

Effective Date

The provision applies to property placed in service after December 31, 2016.

7. Extension of election to expense mine safety equipment (sec. 40307 of the Act and sec. 179E of the Code)

Present Law

A taxpayer may elect to treat 50 percent of the cost of any qualified advanced mine safety equipment property as an expense in the taxable year in which the equipment is placed in service.[154] In computing earnings and profits, the amount deductible under section 179E is allowed as a deduction ratably over five taxable years beginning with the year the amount is deductible under section 179E.[155]

Qualified advanced mine safety equipment property means any advanced mine safety equipment property for use in any underground mine located in the United States the original use of which commences with the taxpayer and which is placed in service before January 1, 2017.[156]

Advanced mine safety equipment property means any of the following: (1) emergency communication technology or devices used to allow a miner to maintain constant communication with an individual who is not in the mine; (2) electronic identification and location devices that allow individuals not in the mine to track at all times the movements and location of miners working in or at the mine; (3) emergency oxygen-generating, self-rescue devices that provide oxygen for at least 90 minutes; (4) pre-positioned supplies of oxygen providing each miner on a shift the ability to survive for at least 48 hours; and (5) comprehensive atmospheric monitoring systems that monitor the levels of carbon monoxide, methane, and oxygen that are present in all areas of the mine and that can detect smoke in the case of a fire in a mine.[157]

The portion of the cost of any property with respect to which an expensing election under section 179 is made may not be taken into account for purposes of the 50-percent deduction under section 179E.[158] In addition, a taxpayer making an election under section 179E must file with the Secretary a report containing information

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[152] Sec. 168(j)(9).
[153] Sec. 168(j)(8).
[154] Sec. 179E(a). Such election may only be revoked with the consent of the Secretary. Sec. 179E(b).
[155] Sec. 312(k)(3)(B).
[156] Sec. 179E(c) and (g).
[157] Sec. 179E(d).
[158] Sec. 179E(e).

with respect to the operation of the mines of the taxpayer as required by the Secretary.[159]

Explanation of Provision

The provision extends for one year (through December 31, 2017) the placed-in-service date allowing a taxpayer to expense 50 percent of the cost of any qualified advanced mine safety equipment property.

Effective Date

The provision applies to property placed in service after December 31, 2016.

8. Extension of special expensing rules for certain productions (sec. 40308 of the Act and sec. 181 of the Code)

Present Law

Under section 181, a taxpayer may elect [160] to deduct up to $15 million of the aggregate production costs of any qualified film, television or live theatrical production, commencing prior to January 1, 2017,[161] 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.[162] 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.[163]

A section 181 election may only be made by an owner of the production.[164] 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.[165] 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

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[159] Sec. 179E(f).

[160] See Treas. Reg. sec. 1.181–2 for rules on making (and revoking) an election under section 181.

[161] 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.

[162] 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, for example, 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.

[163] Sec. 181(a)(2)(B).

[164] Treas. Reg. sec. 1.181–1(a).

[165] Treas. Reg. sec. 1.181–1(a)(2)(i).

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.[166] 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.[167]

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.[168] Solely for purposes of this rule, the term “compensation” does not include participations and residuals (as defined in section 167(g)(7)(B)).[169]

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.[170] Qualified productions do not include sexually explicit productions as referenced by section 2257 of title 18 of the U.S. Code.[171]

A qualified live theatrical production is defined as a live staged production of a play (with or without music) that 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.[172] 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 that has an audience capacity of not more than 6,500.[173] 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 stage performances that would be excluded by section 2257(h)(1) of title

[166] 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).

[167] 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. 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).

[168] Sec. 181(d)(3)(A).

[169] 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).

[170] Sec. 181(d)(2)(B).

[171] Sec. 181(d)(2)(C).

[172] Sec. 181(e)(2)(A).

[173] Sec. 181(e)(2)(D).

18 of the U.S. Code, if such provision were extended to live stage performances.[174]

For purposes of recapture under section 1245, any deduction allowed under section 181 is treated as if it were a deduction allowable for amortization.[175] 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.[176]

Explanation of Provision

The provision extends the special treatment for qualified film, television, and live theatrical productions under section 181 for one year to qualified productions commencing prior to January 1, 2018.

Effective Date

The provision applies to productions commencing after December 31, 2016.

9. Extension of deduction allowable with respect to income attributable to domestic production activities in Puerto Rico (sec. 40309 of the Act and former sec. 199 of the Code)

Present Law

In general

For taxable years beginning before January 1, 2018, former section 199[177] provides a deduction from taxable income (or, in the case of an individual, adjusted gross income) that is equal to nine percent of the lesser of the taxpayer's qualified production activities income or taxable income for the taxable year.[178] For corporations subject to the 35-percent corporate income tax rate, the nine-percent deduction effectively reduces the corporate income tax rate to slightly less than 32 percent on qualified production activities income.[179] A similar reduction applies to the graduated rates applicable to individuals with qualifying domestic production activities income.

In general, qualified production activities income is equal to domestic production gross receipts reduced by the sum of: (1) the costs of goods sold that are allocable to those receipts; and (2) other

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[174] Sec. 181(e)(2)(E).

[175] Sec. 1245(a)(2)(C). For a discussion of the recapture rules applicable to depreciation and amortization deductions, see Joint Committee on Taxation, *Background and Present Law Relating to Cost Recovery and Domestic Production Activities,* (JCX–19–12) February 27, 2012, pp. 45–46.

[176] See Treas. Reg. sec. 1.181–4.

[177] Section 199 was repealed by Public Law 115–97, for taxable years beginning after December 31, 2017. All references to former section 199 in this document refer to section 199 as in effect before its repeal.

[178] In the case of oil related qualified production activities income, the deduction is reduced by three percent of the least of the taxpayer's oil related qualified production activities income, qualified production activities income, or taxable income (determined without regard to the section 199 deduction) for the taxable year. See sec. 199(d)(9).

[179] This example assumes the deduction does not exceed the wage limitation discussed below.

expenses, losses, or deductions that are properly allocable to those receipts.[180]

Domestic production gross receipts generally are gross receipts of a taxpayer that are derived from: (1) any sale, exchange, or other disposition, or any lease, rental, or license, of qualifying production property[181] that was manufactured, produced, grown or extracted by the taxpayer in whole or in significant part within the United States; (2) any sale, exchange, or other disposition, or any lease, rental, or license, of qualified film[182] produced by the taxpayer; (3) any lease, rental, license, sale, exchange, or other disposition of electricity, natural gas, or potable water produced by the taxpayer in the United States; (4) construction of real property performed in the United States by a taxpayer in the ordinary course of a construction trade or business; or (5) engineering or architectural services performed in the United States for the construction of real property located in the United States.[183]

The amount of the deduction for a taxable year is limited to 50 percent of the W–2 wages paid by the taxpayer, and properly allocable to domestic production gross receipts, during the calendar year that ends in such taxable year.[184] Wages paid to bona fide residents of Puerto Rico generally are not included in the definition of wages for purposes of computing the wage limitation amount.[185]

Rules for Puerto Rico

When used in the Code in a geographical sense, the term "United States" generally includes only the States and the District of Columbia.[186] A special rule for determining domestic production gross receipts, however, provides that in the case of any taxpayer with gross receipts for a taxable year from sources within the Commonwealth of Puerto Rico, the term "United States" includes the Commonwealth of Puerto Rico, but only if all of the taxpayer's Puerto Rico-sourced gross receipts are taxable under the Federal income tax for individuals or corporations for such taxable year.[187] In computing the 50-percent wage limitation, the taxpayer is permitted to take into account wages paid to bona fide residents of Puerto Rico for services performed in Puerto Rico.[188]

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[180] Sec. 199(c)(1). In computing qualified production activities income, the domestic production activities deduction itself is not an allocable deduction. Sec. 199(c)(1)(B)(ii). See Treas. Reg. secs. 1.199–1 through 1.199–9 where the Secretary has prescribed rules for the proper allocation of items of income, deduction, expense, and loss for purposes of determining qualified production activities income.

[181] Qualifying production property generally includes any tangible personal property, computer software, and sound recordings. Sec. 199(c)(5).

[182] Qualified film includes any motion picture film or videotape (including live or delayed television programming, but not including certain sexually explicit productions) if 50 percent or more of the total compensation relating to the production of the film (including compensation in the form of residuals and participations) constitutes compensation for services performed in the United States by actors, production personnel, directors, and producers. Sec. 199(c)(6).

[183] Sec. 199(c)(4)(A).

[184] Sec. 199(b)(1). For purposes of the provision, "W–2 wages" include the sum of the amounts of wages as defined in section401(a) and elective deferrals that the taxpayer properly reports to the Social Security Administration with respect to the employment of employees of the taxpayer during the calendar year ending during the taxpayer's taxable year. See sec. 199(b)(2).

[185] Section 3401(a)(8)(C) excludes wages paid to U.S. citizens who are bona fide residents of Puerto Rico from the term wages for purposes of income tax withholding.

[186] Sec. 7701(a)(9).

[187] Sec. 199(d)(8)(A).

[188] Sec. 199(d)(8)(B).

The special rules for Puerto Rico apply only with respect to the first 11 taxable years of a taxpayer beginning after December 31, 2005, and before January 1, 2017.[189]

Explanation of Provision

The provision extends the special domestic production activities rules for Puerto Rico to apply for the first 12 taxable years of a taxpayer beginning after December 31, 2005, and before January 1, 2018.

Effective Date

The provision is effective for taxable years beginning during 2017.

10. Extension of special rule relating to qualified timber gain (sec. 40310 of the Act and former sec. 1201 of the Code)

Present Law [190]

Treatment of certain timber gain

If a taxpayer cuts standing timber, the taxpayer may elect to treat the cutting as a sale or exchange eligible for capital gains treatment.[191] The fair market value of the timber on the first day of the taxable year in which the timber is cut is used to determine the gain attributable to such cutting. Such fair market value is thereafter considered the taxpayer's cost of the cut timber for all purposes, such as to determine the taxpayer's income from later sales of the timber or timber products. Also, if a taxpayer disposes of the timber with a retained economic interest or makes an outright sale of the timber, the gain is eligible for capital gain treatment.[192] This treatment under either section 631(a) or (b) requires that the taxpayer has owned the timber or held the contract right for a period of more than one year.

The maximum regular rate of tax on the net capital gain of an individual is 20 percent.[193] Certain gains are subject to an additional 3.8-percent tax.[194]

The net capital gain of a corporation is taxed at the same rates as ordinary income, up to a maximum rate of 35 percent.[195]

Explanation of Provision

The provision extends for one year a 23.8-percent alternative tax rate for corporations on the portion of a corporation's taxable income that consists of qualified timber gain (or, if less, the net capital gain) for a taxable year.

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[189] Sec. 199(d)(8)(C).

[190] Section 1201 was repealed for taxable years beginning after December 31, 2017, by Public Law 115–97 as a conforming amendment to changes made to section 11 (which included lowering the top marginal corporate tax rate to 21 percent). This provision, enacted after that repeal, applies to taxable years beginning in 2017. For that reason, this description of present law describes the law in effect immediately before the first day on which the provision is effective.

[191] Sec. 631(a).

[192] Sec. 631(b).

[193] Sec. 1(h).

[194] Sec. 1411.

[195] Secs. 11 and 1201.

Qualified timber gain means the net gain described in section 631(a) and (b) for the taxable year, determined by taking into account only trees held more than 15 years.

Effective Date

The provision applies to taxable years beginning in 2017.

11. Extension of empowerment zone tax incentives (sec. 40311 of the Act and secs. 1391 and 1394 of the Code)

Present Law

The Omnibus Budget Reconciliation Act of 1993 ("OBRA 93")[196] authorized the designation of nine empowerment zones ("Round I empowerment zones") to provide tax incentives for businesses to locate within certain targeted areas[197] designated by the Secretaries of the Department of Housing and Urban Development ("HUD") and the U.S. Department of Agriculture ("USDA"). The first empowerment zones were established in large rural areas and large cities. OBRA 93 also authorized the designation of 95 enterprise communities,[198] which were located in smaller rural areas and cities.[199]

The Taxpayer Relief Act of 1997[200] authorized the designation of two additional urban Round I empowerment zones, and 20 additional empowerment zones ("Round II empowerment zones"). The Community Renewal Tax Relief Act of 2000 ("2000 Community Renewal Act")[201] authorized a total of 10 new empowerment zones ("Round III empowerment zones"), bringing the total number of authorized, and not relinquished, empowerment zones to 41.[202] In addition, the 2000 Community Renewal Act conformed the tax incentives that are available to businesses in the Round I, Round II, and Round III empowerment zones, and extended the empowerment zone tax incentives through December 31, 2009. Subsequent legis-

[196] Pub. L. No. 103–66.

[197] The targeted areas are those that have pervasive poverty, high unemployment, and general economic distress, and that satisfy certain eligibility criteria, including specified poverty rates and population and geographic size limitations.

[198] Sec. 1391(b)(1).

[199] Enterprise communities were eligible for only one tax benefit: tax-exempt bond financing. For tax purposes, the areas designated as enterprise communities continued as such for the ten-year period starting 1995 and ending at the end of 2004. However, after 2004 the enterprise communities may still be eligible for other Federal benefits (*e.g.*, grants and preferences).

[200] Pub. L. No. 105–34.

[201] Pub. L. No. 106–554. The 2000 Community Renewal Act also authorized the designation of 40 "renewal communities" within which special tax incentives were available. The tax incentives were generally available through December 31, 2009 when the renewal community designation expired. One of the tax incentives involving the exclusion of capital gain from the sale or exchange of a qualified community asset continued through 2014.

[202] The urban part of the program is administered by HUD and the rural part of the program is administered by the USDA. The eight urban Round I empowerment zones are Atlanta, GA; Baltimore, MD; Chicago, IL; Cleveland, OH; Detroit, MI; Los Angeles, CA; New York, NY; and Philadelphia, PA/Camden, NJ. Atlanta relinquished its empowerment zone designation in Round III. The three rural Round I empowerment zones are Kentucky Highlands, KY; Mid-Delta, MI; and Rio Grande Valley, TX. The 15 urban Round II empowerment zones are Boston, MA; Cincinnati, OH; Columbia, SC; Columbus, OH; Cumberland County, NJ; El Paso, TX; Gary/Hammond/East Chicago, IN; Ironton, OH/Huntington, WV; Knoxville, TN; Miami/Dade County, FL; Minneapolis, MN; New Haven, CT; Norfolk/Portsmouth, VA; Santa Ana, CA; and St. Louis, Missouri/East St. Louis, IL. The five rural Round II empowerment zones are Desert Communities, CA; Griggs-Steele, ND; Oglala Sioux Tribe, SD; Southernmost Illinois Delta, IL; and Southwest Georgia United, GA. The eight urban Round III empowerment zones are Fresno, CA; Jacksonville, FL; Oklahoma City, OK; Pulaski County, AR; San Antonio, TX; Syracuse, NY; Tucson, AZ; and Yonkers, NY. The two rural Round III empowerment zones are Aroostook County, ME; and Futuro, TX.

lation extended the empowerment zone tax incentives through December 31, 2016.[203]

The tax incentives available within the designated empowerment zones include a Federal income tax credit for employers who hire qualifying employees (the "wage credit"), increased expensing of qualifying depreciable property, tax-exempt bond financing, deferral of capital gains tax on the sale of qualified assets sold and replaced, and partial exclusion of capital gains tax on certain sales of qualified small business stock.

The following is a description of the empowerment zone tax incentives as in effect through 2016.

Wage credit

A 20-percent wage credit is available to employers for the first $15,000 of qualified wages paid to each employee (*i.e.*, a maximum credit of $3,000 with respect to each qualified employee) who (1) is a resident of the empowerment zone, and (2) performs substantially all employment services within the empowerment zone in a trade or business of the employer.[204]

The wage credit rate applies to qualifying wages paid before January 1, 2017. Wages paid to a qualified employee who earns more than $15,000 are eligible for the wage credit (although only the first $15,000 of wages is eligible for the credit). The wage credit is available with respect to a qualified full-time or part-time employee (employed for at least 90 days), regardless of the number of other employees who work for the employer. In general, any taxable business carrying out activities in the empowerment zone may claim the wage credit.[205]

An employer's deduction otherwise allowed for wages paid is reduced by the amount of wage credit claimed for that taxable year.[206] Wages are not to be taken into account for purposes of calculating the wage credit if such wages are taken into account in determining the employer's work opportunity tax credit under section 51.[207] In addition, the $15,000 cap is reduced by any wages taken into account in calculating the work opportunity tax credit.[208] The wage credit may be used to offset up to 25 percent of the employer's alternative minimum tax liability.[209]

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[203] Pub. L. No. 111–312, sec. 753 (2010); Pub. L. No. 112–240, sec. 327(a) (2013); Pub. L. No. 113–295, sec. 139 (2014); Pub. L. No. 114–113, Div. Q, sec. 171(a) (2015); and Pub. L. No. 115–123, sec. 40311 (2018). The empowerment zone tax incentives may expire earlier than December 31, 2017 if a State or local government provided for an expiration date in the nomination of an empowerment zone, or the appropriate Secretary revokes an empowerment zone's designation. The State or local government may, however, amend the nomination to provide for a new termination date.

[204] Sec. 1396. The $15,000 limit is annual, not cumulative, such that the limit is the first $15,000 of wages paid in a calendar year which ends with or within the taxable year.

[205] However, the wage credit is not available for wages paid in connection with certain business activities described in section 144(c)(6)(B), including a golf course, country club, massage parlor, hot tub facility, suntan facility, racetrack, liquor store, or certain farming activities. In addition, wages are not eligible for the wage credit if paid to: (1) a person who owns more than five percent of the stock (or capital or profits interests) of the employer, (2) certain relatives of the employer, or (3) if the employer is a corporation or partnership, certain relatives of a person who owns more than 50 percent of the business.

[206] Sec. 280C(a).

[207] Sec. 1396(c)(3)(A).

[208] Sec. 1396(c)(3)(B).

[209] Sec. 38(c)(2).

Increased section 179 expensing limitation

An enterprise zone business [210] is allowed up to an additional $35,000 of section 179 expensing for qualified zone property placed in service before January 1, 2017.[211] The section 179 expensing allowed to a taxpayer is reduced (but not below zero) by the amount by which the cost of qualifying property placed in service during the taxable year exceeds a specified dollar amount.[212] However, an enterprise zone business is only required to take into account 50 percent of the cost of qualified zone property placed in service during the year in determining whether the cost of qualifying property exceeds the specified dollar amount.[213]

The term "qualified zone property" is defined as depreciable tangible property (including buildings) provided that (i) the property is acquired by the taxpayer by purchase (from an unrelated party) after the date on which the designation of the empowerment zone took effect, (ii) the original use of the property in an empowerment zone commences with the taxpayer, and (iii) substantially all of the use of the property is in an empowerment zone in the active conduct of a qualified trade or business by the taxpayer in such zone.[214] Special rules are provided in the case of property that is substantially renovated by the taxpayer.[215]

An enterprise zone business means any qualified business entity and any qualified proprietorship. A qualified business entity means any corporation or partnership if for such year: (1) every trade or business of such entity is the active conduct of a qualified business within an empowerment zone; (2) at least 50 percent of the total gross income of such entity is derived from the active conduct of such business; (3) a substantial portion of the use of the tangible property of such entity (whether owned or leased) is within an empowerment zone; (4) a substantial portion of the intangible property of such entity is used in the active conduct of any such business; (5) a substantial portion of the services performed for such entity by its employees are performed in an empowerment zone; (6) at least 35 percent of its employees are residents of an empowerment zone; (7) less than five percent of the average of the aggregate unadjusted bases of the property of such entity is attributable to collectibles other than collectibles that are held primarily for sale to customers in the ordinary course of such business; and (8)

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[210] Sec. 1397C. The term "enterprise zone business" is separate and distinct from the term "enterprise community." Enterprise community, for purposes of the Code, means the areas designated as such under section 1391. Sec. 1393(b). Note, however, that for purposes of section 1394 relating to tax-exempt enterprise zone facility bonds, references to empowerment zones shall be treated as including references to enterprise communities. Sec. 1394(b)(3).

[211] Sec. 1397A.

[212] For taxable years beginning in 2016, the relevant dollar amount is 2,010,000. Sec. 179(b)(2) and 3.03 of Rev. Proc. 2016–14, 2016–9 I.R.B. 365.

[213] Sec. 1397A(a)(2). For example, assume that during 2016 a calendar year taxpayer in an enterprise zone business purchased and placed in service $4,500,000 of section 179 property that is qualified zone property. The $500,000 section 179(b)(1) dollar amount for 2016 is increased to $535,000 (by the lesser of $35,000 or $4,500,000). That amount is reduced by the excess section 179 property cost amount of $240,000 ((50 percent x $4,500,000) − $2,010,000)). The taxpayer's expensing limitation is $295,000 ($535,000 − $240,000). If the taxpayer had not been an enterprise zone business, its expensing limitation would be zero because the taxpayer would have been fully phased out.

[214] Sec. 1397D(a)(1). Note, however, that to be eligible for the increased section 179 expensing, the qualified zone property has to also meet the definition of section 179 property (*e.g.,* building property would only qualify if it constitutes qualified real property under section 179(f)), prior to amendment by Pub. L. No. 115–97).

[215] Sec. 1397D(a)(2).

less than five percent of the average of the aggregate unadjusted bases of the property of such entity is attributable to nonqualified financial property.[216]

A qualified proprietorship is any qualified business carried on by an individual as a proprietorship if for such year: (1) at least 50 percent of the total gross income of such individual from such business is derived from the active conduct of such business in an empowerment zone; (2) a substantial portion of the use of the tangible property of such individual in such business (whether owned or leased) is within an empowerment zone; (3) a substantial portion of the intangible property of such business is used in the active conduct of such business; (4) a substantial portion of the services performed for such individual in such business by employees of such business are performed in an empowerment zone; (5) at least 35 percent of such employees are residents of an empowerment zone; (6) less than five percent of the average of the aggregate unadjusted bases of the property of such individual that is used in such business is attributable to collectibles other than collectibles that are held primarily for sale to customers in the ordinary course of such business; and (7) less than five percent of the average of the aggregate unadjusted bases of the property of such individual that is used in such business is attributable to nonqualified financial property.[217]

A qualified business is defined as any trade or business other than a trade or business that consists predominantly of the development or holding of intangibles for sale or license or any business prohibited in connection with the empowerment zone employment credit.[218] In addition, the leasing of real property that is located within the empowerment zone is treated as a qualified business only if (1) the leased property is not residential rental property, and (2) at least 50 percent of the gross rental income from the real property is from enterprise zone businesses.[219] The rental of tangible personal property is not a qualified business unless at least 50 percent of the rental of such property is by enterprise zone businesses or by residents of an empowerment zone.

Expanded tax-exempt financing for certain zone facilities

States or local governments can issue enterprise zone facility bonds to raise funds to provide an enterprise zone business with qualified zone property.[220] These bonds can be used in areas designated as enterprise communities as well as areas designated as empowerment zones. To qualify, 95 percent (or more) of the net proceeds from the bond issue must be used to finance: (1) qualified zone property whose principal user is an enterprise zone business, and (2) certain land functionally related and subordinate to such property.

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[216] Sec. 1397C(b).

[217] Sec. 1397C(c). For these purposes, the term "employee" includes the proprietor.

[218] Sec. 1397C(d). Excluded businesses include any private or commercial golf course, country club, massage parlor, hot tub facility, sun tan facility, racetrack or other facility used for gambling, or any store the principal business of which is the sale of alcoholic beverages for off-premises consumption. Sec. 144(c)(6). Also, a qualified business does not include certain large farms. Sec. 1397C(d)(5)(B).

[219] Sec. 1397C(d)(2).

[220] Sec. 1394.

The term enterprise zone business is the same as that used for purposes of the increased section 179 deduction limitation (discussed above) with certain modifications for start-up businesses. First, an employee is considered a resident of an empowerment zone for purposes of the 35-percent in-zone employment requirement if they are a resident of an empowerment zone, an enterprise community, or a qualified low-income community within an applicable nominating jurisdiction.[221] The applicable nominating jurisdiction means, with respect to any empowerment zone or enterprise community, any local government that nominated such community for designation under section 1391. The definition of a qualified low-income community is similar to the definition of a low-income community provided in section 45D(e) (concerning eligibility for the new markets tax credit). A "qualified low-income community" is a population census tract with either (1) a poverty rate of at least 20 percent, or (2) median family income that does not exceed 80 percent of the greater of metropolitan area median family income or statewide median family income (for a nonmetropolitan census tract, does not exceed 80 percent of statewide median family income). In the case of a population census tract located within a high migration rural county, low-income is defined by reference to 85 percent (as opposed to 80 percent) of statewide median family income. For this purpose, a high migration rural county is any county that, during the 20-year period ending with the year in which the most recent census was conducted, has a net out-migration of inhabitants from the county of at least 10 percent of the population of the county at the beginning of such period.

The Secretary is authorized to designate "targeted populations" as qualified low-income communities. 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 (a) 80 percent of the area median family income, or (b) 80 percent of the statewide nonmetropolitan area median family income.

Second, a business will be treated as an enterprise zone business during a start-up period if (1) at the beginning of the period, it is reasonable to expect the business to be an enterprise zone business by the end of the start-up period, and (2) the business makes bona fide efforts to be an enterprise zone business. The start-up period is the period that ends with the start of the first tax year beginning more than two years after the later of (1) the issue date of the bond issue financing the qualified zone property, and (2) the date this property is first placed in service (or, if earlier, the date that is three years after the issue date).[222]

[221] Pub. L. No. 114-113, Div. Q, sec. 171 (2015) (effective for bonds issued after 2015).
[222] Sec. 1394(b)(3).

Third, a business that qualifies as an enterprise zone business at the end of the start-up period must continue to qualify during a testing period that ends three tax years after the start-up period ends. After the three-year testing period, a business will continue to be treated as an enterprise zone business as long as 35 percent of its employees are residents of an empowerment zone, enterprise community, or a qualified low-income community within an applicable nominating jurisdiction.

The face amount of the bonds may not exceed $60 million for an empowerment zone in a rural area, $130 million for an empowerment zone in an urban area with zone population of less than 100,000, and $230 million for an empowerment zone in an urban area with zone population of at least 100,000.

Elective rollover of capital gain from the sale or exchange of any qualified empowerment zone asset

Taxpayers can elect to defer recognition of gain on the sale of a qualified empowerment zone asset held for more than one year and replaced within 60 days by another qualified empowerment zone asset in the same zone.[223] A qualified empowerment zone asset generally means stock or a partnership interest acquired at original issue for cash in an enterprise zone business, or tangible property originally used in an enterprise zone business by the taxpayer. The deferral is accomplished by reducing the basis of the replacement asset by the amount of the gain recognized on the sale of the asset.

Explanation of Provision

The provision extends for one year, through December 31, 2017, the period for which the designation of an empowerment zone is in effect, thus extending for one year the empowerment zone tax incentives, including the wage credit, increased section 179 expensing for qualifying property,[224] tax-exempt bond financing, and deferral of capital gains tax on the sale of qualified assets replaced with other qualified assets. In the case of a designation of an empowerment zone the nomination for which included a termination date which is December 31, 2016, termination shall not apply with respect to such designation if the entity that made such nomination amends the nomination to provide for a new termination date in such manner as the Secretary may provide.

Effective Date

The provision applies to taxable years beginning after December 31, 2016.

[223] Sec. 1397B.

[224] Thus, for taxable years beginning in 2017, the total amount that may be expensed under section 179 is $545,000 ($510,000 section 179(b)(1) limitation + $35,000 increase for qualified zone property = $545,000 maximum dollar limitation). See sec. 179(b)(1) and section 3.25 of Rev. Proc. 2016–55, 2016–45 I.R.B. 707.

12. Extension of American Samoa economic development credit (sec. 40312 of the Act and sec. 119 of Division A of Pub. L. No. 109–432)

Present Law

Since 2006, certain domestic corporations have been entitled to an economic development credit with respect to operations in American Samoa. The credit is not part of the Code but is computed based on the rules of former sections 30A, 199, and 936.

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 [225] in an election in effect for its taxable year that included October 13, 1995.[226] 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

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[225] For taxable years beginning before January 1, 2006, certain domestic corporations with business operations in the U.S. possessions were eligible for the possession 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 corporation's non-U.S. source 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 allowances 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 generally expired for taxable years beginning after December 31, 2005.

[226] A corporation will qualify as an existing credit claimant if it acquired all the assets of a trade or business of a corporation that (1) actively conducted that trade or business in a possession on October 13, 1995, and (2) had elected the benefits of the possession tax credit in an election in effect for the taxable year that included October 13, 1995.

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.

The section 936(c) rule denying a credit or deduction for any possessions or foreign tax paid with respect to taxable income taken into account in computing the credit under section 936 does not apply with respect to the credit allowed by the 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 eleven taxable years of the corporation that begin after December 31, 2005, and before January 1, 2017. For any other corporation, the credit applies to the first five taxable years of that corporation that begin after December 31, 2011 and before January 1, 2017.

Explanation of Provision

The provision extends the credit to apply (a) 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, to the first 12 taxable years of the corporation that begin after December 31, 2005, and before January 1, 2018, and (b) in the case of any other corporation, to the first six taxable years of the corporation that begin after December 31, 2011 and before January 1, 2018.

For purposes of this credit, section 119(e) of Division A of the Tax Relief and Health Care Act of 2006 [227] is amended to provide that any reference to section 199 of the Code is to be treated as a reference to section 199 as in effect before its repeal.

Effective Date

The provision is effective for taxable years beginning after December 31, 2016.

[227] Tax Relief and Health Care Act of 2006, Pub. L. No. 109–432, Division A, sec. 119.

E. Incentives for Energy Production and Conservation

1. Extension of credit for nonbusiness energy property (sec. 40401 of the Act and sec. 25C of the Code)

Present Law

A 10-percent credit is available for the purchase of qualified energy efficiency improvements to existing homes.[228] A qualified energy efficiency improvement is any energy efficient building envelope component (1) that is installed in or on a dwelling located in the United States and owned and used by the taxpayer as the taxpayer's principal residence; (2) the original use of which commences with the taxpayer; and (3) that reasonably can be expected to remain in use for at least five years. The credit is nonrefundable.

Energy efficient building envelope components are building envelope components that meet (1) the applicable Energy Star program requirements, in the case of a roof or roof products; (2) version 6.0 Energy Star program requirements, in the case of an exterior window, a skylights, or an exterior door, and (3) the prescriptive criteria for such components established by the 2009 International Energy Conservation Code, as in effect on the date of enactment of the American Recovery and Reinvestment Tax Act of 2009, in the case of any other component.

Building envelope components are (1) insulation materials or systems that are specifically and primarily designed to reduce the heat loss or gain for a dwelling when installed in or on such dwelling unit, (2) exterior windows (including skylights); (3) exterior doors; and (4) metal or asphalt roofs installed on a dwelling unit, but only if such roof has appropriate pigmented coatings or cooling granules that are specifically and primarily designed to reduce the heat gain for a dwelling.

Additionally, credits are also available for the purchase of specific energy efficient property originally placed in service by the taxpayer during the taxable year. The allowable credit for the purchase of certain property is (1) $50 for each advanced main air circulating fan, (2) $150 for each qualified natural gas, propane, or oil furnace or hot water boiler, and (3) $300 for each item of energy efficient building property.

An advanced main air circulating fan is a fan used in a natural gas, propane, or oil furnace and that has an annual electricity use of no more than two percent of the total annual energy use of the furnace (as determined in the standard Department of Energy test procedures).

A qualified natural gas, propane, or oil furnace or hot water boiler is a natural gas, propane, or oil furnace or hot water boiler with an annual fuel utilization efficiency rate of at least 95.

Energy-efficient building property is: (1) an electric heat pump water heater that yields an energy factor of at least 2.0 in the standard Department of Energy test procedure, (2) an electric heat pump that achieves the highest efficiency tier established by the Consortium for Energy Efficiency, as in effect on January 1,

[228] Sec. 25C.

2009,[229] (3) a central air conditioner that achieves the highest efficiency tier established by the Consortium for Energy Efficiency as in effect on January 1, 2009,[230] (4) a natural gas, propane, or oil water heater that has an energy factor of at least 0.82 or thermal efficiency of at least 90 percent, and (5) a stove that burns biomass fuel to heat a dwelling unit located in the United States and used as a residence by the taxpayer, or to heat water for use in such dwelling unit, and that has a thermal efficiency rating of at least 75 percent. Biomass fuel is any plant-derived fuel available on a renewable or recurring basis, including agricultural crops and trees, wood and wood waste and residues (including wood pellets), plants (including aquatic plants), grasses, residues, and fibers.

Generally, the credit is available for property placed in service prior to January 1, 2017. The maximum credit for a taxpayer for all taxable years is $500, and no more than $200 of such credit may be attributable to expenditures on windows.

The taxpayer's basis in the property is reduced by the amount of the credit. Special proration rules apply in the case of jointly owned property, condominiums, and tenant-stockholders in cooperative housing corporations. If less than 80 percent of the property is used for nonbusiness purposes, only that portion of expenditures that is used for nonbusiness purposes is taken into account.

For purposes of determining the amount of expenditures made by any individual with respect to any dwelling unit, expenditures that are made from subsidized energy financing are not taken into account. The term "subsidized energy financing" means financing provided under a Federal, State, or local program a principal purpose of which is to provide subsidized financing for projects designed to conserve or produce energy.

Explanation of Provision

The provision extends the nonbusiness energy property credit through December 31, 2017.

Effective Date

The provision is effective for property placed in service after December 31, 2016.

2. Extension and modification of credit for residential energy property (sec. 40402 of the Act and sec. 25D of the Code)

Present Law

In general

A personal tax credit is available for the purchase of qualified solar electric property and qualified solar water heating property

[229] These standards are a seasonal energy efficiency ratio ("SEER") greater than or equal to 15, an energy efficiency ratio ("EER") greater than or equal to 12.5, and heating seasonal performance factor ("HSPF") greater than or equal to 8.5 for split heat pumps, and SEER greater than or equal to 14, EER greater than or equal to 12, and HSPF greater than or equal to 8.0 for packaged heat pumps.

[230] These standards are a SEER greater than or equal to 16 and EER greater than or equal to 13 for split systems, and SEER greater than or equal to 14 and EER greater than or equal to 12 for packaged systems.

that is used exclusively for purposes other than heating swimming pools and hot tubs.[231] In general, the credit rate is equal to 30 percent of qualifying expenditures.

A 30-percent credit is also available for the purchase of qualified geothermal heat pump property, qualified small wind energy property, and qualified fuel cell power plants. The credit for any fuel cell may not exceed $500 for each 0.5 kilowatt of capacity.

The credit is nonrefundable. The credit with respect to all qualifying property may be claimed against the alternative minimum tax.

The credit for non-solar property expires for property placed in service after December 31, 2016. With respect to solar property, the credit expires for property placed in service after December 31, 2021. The credit rate for solar property is reduced to 26 percent for property placed in service in calendar year 2020 and to 22 percent for property placed in service in calendar year 2021.

Qualified property

Qualified solar electric property is property that uses solar energy to generate electricity for use in a dwelling unit. Qualifying solar water heating property is property used to heat water for use in a dwelling unit located in the United States and used as a residence if at least half of the energy used by such property for such purpose is derived from the sun.

A qualified fuel cell power plant is an integrated system comprised of a fuel cell stack assembly and associated balance of plant components that (1) converts a fuel into electricity using electrochemical means, (2) has an electricity-only generation efficiency of greater than 30 percent, and (3) has a nameplate capacity of at least 0.5 kilowatt. The qualified fuel cell power plant must be installed on or in connection with a dwelling unit located in the United States and used by the taxpayer as a principal residence.

Qualified small wind energy property is property that uses a wind turbine to generate electricity for use in a dwelling unit located in the United States and used as a residence by the taxpayer.

Qualified geothermal heat pump property means any equipment that (1) uses the ground or ground water as a thermal energy source to heat the dwelling unit or as a thermal energy sink to cool such dwelling unit, (2) meets the requirements of the Energy Star program that are in effect at the time that the expenditure for such equipment is made, and (3) is installed on or in connection with a dwelling unit located in the United States and used as a residence by the taxpayer.

Additional rules

The depreciable basis of the property is reduced by the amount of the credit. Expenditures for labor costs allocable to onsite preparation, assembly, or original installation of property eligible for the credit are eligible expenditures.

Special proration rules apply in the case of jointly owned property, condominiums, and tenant-stockholders in cooperative housing corporations. If less than 80 percent of the property is used for

[231] Sec. 25D.

nonbusiness purposes, only that portion of expenditures that is used for nonbusiness purposes is taken into account.

Explanation of Provision

The provision extends for five years, through December 31, 2021, the residential energy efficient property credit with respect to the purchase of qualified geothermal heat pump property, qualified small wind energy property, and qualified fuel cell power plants. The provision modifies the credit rate, reducing it to 26 percent for property placed in service in 2020 and 22 percent for property placed in service in 2021. Thus, the provision equalizes the phasedown and expiration dates for qualified solar and non-solar property.

Effective Date

The provision is effective for property placed in service after December 31, 2016.

3. Extension of credit for new qualified fuel cell motor vehicles (sec. 40403 of the Act and sec. 30B of the Code)

Present Law

A credit is available through 2016 for vehicles propelled by chemically combining oxygen with hydrogen and creating electricity ("fuel cell vehicles"). The base credit is $4,000 for vehicles weighing 8,500 pounds or less. Heavier vehicles can get up to a $40,000 credit, depending on their weight. An additional $1,000 to $4,000 credit is available to cars and light trucks to the extent their fuel economy exceeds the 2002 base fuel economy set forth in the Code.

Explanation of Provision

The provision extends the credit for fuel cell vehicles for one year, through December 31, 2017.

Effective Date

The provision applies to property purchased after December 31, 2016.

4. Extension of credit for alternative fuel vehicle refueling property (sec. 40404 of the Act and sec. 30C of the Code)

Present Law

Taxpayers may claim a 30-percent credit for the cost of installing qualified clean-fuel vehicle refueling property to be used in a trade or business of the taxpayer or installed at the principal residence of the taxpayer.[232] The credit may not exceed $30,000 per taxable year per location, in the case of qualified refueling property used in a trade or business and $1,000 per taxable year per location, in the case of qualified refueling property installed on property which is used as a principal residence.

[232] Sec. 30C.

Qualified refueling property is property (not including a building or its structural components) for the storage or dispensing of a clean-burning fuel or electricity into the fuel tank or battery of a motor vehicle propelled by such fuel or electricity, but only if the storage or dispensing of the fuel or electricity is at the point of delivery into the fuel tank or battery of the motor vehicle. The original use of such property must begin with the taxpayer.

Clean-burning fuels are any fuel at least 85 percent of the volume of which consists of ethanol, natural gas, compressed natural gas, liquefied natural gas, liquefied petroleum gas, or hydrogen. In addition, any mixture of biodiesel and diesel fuel, determined without regard to any use of kerosene and containing at least 20 percent biodiesel, qualifies as a clean fuel.

Credits for qualified refueling property used in a trade or business are part of the general business credit and may be carried back for one year and forward for 20 years. Credits for residential qualified refueling property cannot exceed for any taxable year the difference between the taxpayer's regular tax (reduced by certain other credits) and the taxpayer's tentative minimum tax. Generally, in the case of qualified refueling property sold to a tax-exempt entity, the taxpayer selling the property may claim the credit.

A taxpayer's basis in qualified refueling property is reduced by the amount of the credit. In addition, no credit is available for property used outside the United States or for which an election to expense has been made under section 179.

The credit is available for property placed in service before January 1, 2017.

Explanation of Provision

The provision extends for one year the 30-percent credit for alternative fuel refueling property, through December 31, 2017.

Effective Date

The provision applies to property placed in service after December 31, 2016.

5. Extension of credit for two-wheeled plug-in electric vehicles (sec. 40405 of the Act and sec. 30D of the Code)

Present Law

In general, for vehicles acquired before 2017, a 10-percent credit is available for qualifying plug-in electric motorcycles.[233] Qualifying electric motorcycles must have a battery capacity of at least 2.5 kilowatt-hours, be manufactured primarily for use on public streets, roads, and highways, and be capable of achieving speeds of at least 45 miles per hour. The maximum credit for any qualifying vehicle is $2,500.

[233] Sec. 30D(g). The credit lapsed and was not available for vehicles placed in service in calendar year 2014.

Explanation of Provision

The provision extends the electric motorcycles credit for one year, through December 31, 2017.

Effective Date

The provision applies to vehicles acquired after December 31, 2016.

6. Extension of second generation biofuel producer credit (sec. 40406 of the Act and sec. 40(b)(6) of the Code)

Present Law

The second generation biofuel producer credit is a nonrefundable income tax credit for each gallon of qualified second generation biofuel fuel production of the producer for the taxable year. The amount of the credit per gallon is $1.01. The provision does not apply to qualified second generation biofuel production after December 31, 2016.

"Qualified second generation biofuel production" is any second generation biofuel that is produced by the taxpayer and that, during the taxable year, is: (1) sold by the taxpayer to another person (a) for use by such other person in the production of a qualified second generation biofuel mixture in such person's trade or business (other than casual off-farm production), (b) for use by such other person as a fuel in a trade or business, or (c) who sells such second generation biofuel at retail to another person and places such cellulosic biofuel in the fuel tank of such other person; or (2) used by the producer for any purpose described in (1)(a), (b), or (c). Special rules apply for fuel derived from algae.[234]

"Second generation biofuel" means any liquid fuel that (1) is produced in the United States and used as fuel in the United States, (2) is derived by or from qualified feedstocks, and (3) meets the registration requirements for fuels and fuel additives established by the Environmental Protection Agency ("EPA") under section 211 of the Clean Air Act. "Qualified feedstock" means any lignocellulosic or hemicellulosic matter that is available on a renewable or recurring basis, and any cultivated algae, cyanobacteria or lemna. Second generation biofuel does not include fuels that (1) are more than four percent (determined by weight) water and sediment in any combination, (2) have an ash content of more than one percent (determined by weight), or (3) have an acid number greater than 25 ("unprocessed or excluded fuels"). It also does not include any alcohol with a proof of less than 150.

The second generation biofuel producer credit cannot be claimed unless the taxpayer is registered by the Internal Revenue Service ("IRS") as a producer of second generation biofuel. Second generation biofuel eligible for the section 40 credit is precluded from qualifying as biodiesel, renewable diesel, or alternative fuel for pur-

[234] In addition, for fuels derived from algae, cyanobacterial or lemna, a special rule provides that qualified second generation biofuel includes fuel that is sold by the taxpayer to another person for refining by such other person into a fuel that meets the registration requirements for fuels and fuel additives under section 211 of the Clean Air Act.

poses of the applicable income tax credit, excise tax credit, or payment provisions relating to those fuels.

Because it is a credit under section 40(a), the second generation biofuel producer credit is part of the general business credits in section 38. However, the credit can only be carried forward three taxable years after the termination of the credit. The credit is also allowable against the alternative minimum tax. Under section 87, the credit is included in gross income.

Explanation of Provision

The provision extends the credit through December 31, 2017.

Effective Date

The provision applies to qualified second generation biofuel production after December 31, 2016.

7. Extension of biodiesel and renewable diesel incentives (sec. 40407 of the Act and secs. 40A, 6426(c), and 6427(e) of the Code)

Present Law

Biodiesel

The biodiesel fuels credit is the sum of three credits: (1) the biodiesel mixture credit; (2) the biodiesel credit; and (3) the small agri-biodiesel producer credit. The biodiesel fuels credit is treated as a general business credit. The amount of the biodiesel fuels credit is includible in gross income. The biodiesel fuels credit is coordinated to take into account benefits from the biodiesel excise tax credit and payment provisions discussed below. The credit does not apply to fuel sold or used after December 31, 2016.

Biodiesel is monoalkyl esters of long chain fatty acids derived from plant or animal matter that meet (1) the registration requirements established by the EPA under section 211 of the Clean Air Act (42 U.S.C. sec. 7545) and (2) the requirements of the American Society of Testing and Materials ("ASTM") D6751. Agri-biodiesel is biodiesel derived solely from virgin oils including oils from corn, soybeans, sunflower seeds, cottonseeds, canola, crambe, rapeseeds, safflowers, flaxseeds, rice bran, mustard seeds, camelina, or animal fats.

Biodiesel may be taken into account for purposes of the credit only if the taxpayer obtains a certification (in such form and manner as prescribed by the Secretary) from the producer or importer of the biodiesel that identifies the product produced and the percentage of biodiesel and agri-biodiesel in the product.

Biodiesel mixture credit

The biodiesel mixture credit is $1.00 for each gallon of biodiesel (including agri-biodiesel) used by the taxpayer in the production of a qualified biodiesel mixture. A qualified biodiesel mixture is a mixture of biodiesel and diesel fuel that is (1) sold by the taxpayer producing such mixture to any person for use as a fuel or (2) used as a fuel by the taxpayer producing such mixture. The sale or use must be in the trade or business of the taxpayer and is to be taken into account for the taxable year in which such sale or use occurs. No credit is allowed with respect to any casual off-farm production of a qualified biodiesel mixture.

Per IRS guidance, a mixture need only contain 1/10th of one percent of diesel fuel to be a qualified mixture. Thus, a qualified biodiesel mixture can contain 99.9 percent biodiesel and 0.1 percent diesel fuel.

Biodiesel credit (B–100)

The biodiesel credit is $1.00 for each gallon of biodiesel that is not in a mixture with diesel fuel (100 percent biodiesel or B–100) and that during the taxable year is (1) used by the taxpayer as a fuel in a trade or business or (2) sold by the taxpayer at retail to a person and placed in the fuel tank of such person's vehicle.

Small agri-biodiesel producer credit

The Code provides a small agri-biodiesel producer income tax credit, in addition to the biodiesel and biodiesel mixture credits. The credit is 10 cents per gallon for up to 15 million gallons of agri-biodiesel produced by small producers, defined generally as persons whose agri-biodiesel production capacity does not exceed 60 million gallons per year. The agri-biodiesel must (1) be sold by such producer to another person (a) for use by such other person in the production of a qualified biodiesel mixture in such person's trade or business (other than casual off-farm production), (b) for use by such other person as a fuel in a trade or business, or, (c) who sells such agri-biodiesel at retail to another person and places such agri-biodiesel in the fuel tank of such other person; or (2) used by the producer for any purpose described in (a), (b), or (c).

Biodiesel mixture excise tax credit

The Code also provides an excise tax credit for biodiesel mixtures. The credit is $1.00 for each gallon of biodiesel used by the taxpayer in producing a biodiesel mixture for sale or use in a trade or business of the taxpayer. A biodiesel mixture is a mixture of biodiesel and diesel fuel that (1) is sold by the taxpayer producing such mixture to any person for use as a fuel or (2) is used as a fuel by the taxpayer producing such mixture. No credit is allowed unless the taxpayer obtains a certification (in such form and manner as prescribed by the Secretary) from the producer of the biodiesel that identifies the product produced and the percentage of biodiesel and agri-biodiesel in the product.

The credit is not available for any sale or use for any period after December 31, 2016. This excise tax credit is coordinated with the income tax credit for biodiesel such that credit for the same biodiesel cannot be claimed for both income and excise tax purposes.

Payments with respect to biodiesel fuel mixtures

If any person produces a biodiesel fuel mixture in such person's trade or business, the Secretary is to pay such person an amount equal to the biodiesel mixture credit. The biodiesel fuel mixture credit must first be taken against tax liability for taxable fuels. To the extent the biodiesel fuel mixture credit exceeds such tax liability, the excess may be received as a payment. Thus, if the person has no section 4081 liability, the credit is refundable. The Secretary is not required to make payments with respect to biodiesel fuel mixtures sold or used after December 31, 2016.

Renewable diesel

Renewable diesel is liquid fuel that (1) is derived from biomass (as defined in section 45K(c)(3)), (2) meets the registration requirements for fuels and fuel additives established by the EPA under section 211 of the Clean Air Act, and (3) meets the requirements of the ASTM D975 or D396, or equivalent standard established by the Secretary. ASTM D975 provides standards for diesel fuel suitable for use in diesel engines. ASTM D396 provides standards for fuel oil intended for use in fuel-oil burning equipment, such as furnaces. Renewable diesel also includes fuel derived from biomass that meets the requirements of a Department of Defense specification for military jet fuel or an ASTM specification for aviation turbine fuel.

For purposes of the Code, renewable diesel is generally treated the same as biodiesel. In the case of renewable diesel that is aviation fuel, kerosene is treated as though it were diesel fuel for purposes of a qualified renewable diesel mixture. Like biodiesel, the incentive may be taken as an income tax credit, an excise tax credit, or as a payment from the Secretary. The incentive for renewable diesel is $1.00 per gallon. There is no small producer credit for renewable diesel. The incentives for renewable diesel expired after December 31, 2016.

Explanation of Provision

The provision extends the income tax credit, excise tax credit and payment provisions for biodiesel and renewable diesel through December 31, 2017. As it relates to fuel sold or used in 2017, the provision creates a special rule to address claims regarding excise tax credits and claims for payment for the period beginning on January 1, 2017, and ending on December 31, 2017. In particular the provision directs the Secretary to issue guidance within 30 days of the date of enactment. Such guidance is to provide for a one-time submission of claims covering periods occurring during 2017. The guidance is to provide for a 180-day period for the submission of such claims (in such manner as prescribed by the Secretary) to begin no later than 30 days after such guidance is issued. Such claims shall be paid by the Secretary of the Treasury not later than 60 days after receipt. If the claim is not paid within 60 days of the date of the filing, the claim shall be paid with interest from such date determined by using the overpayment rate and method under section 6621 of the Code.

Effective Date

The extension applies to fuel sold or used after December 31, 2016.

8. Extension of production credit for Indian coal facilities (sec. 40408 of the Act and sec. 45 of the Code)

Present Law

In general, a credit is available for each ton of Indian coal produced from a qualified facility for during the 11-year period beginning January 1, 2006, and ending December 31, 2016.[235] Qualified Indian coal must be sold to an unrelated third party (either directly by the taxpayer or after sale or transfer to one or more related persons). The amount of the credit is $2.00 per ton (adjusted for inflation; $2.387 per ton for 2016). A qualified Indian coal facility is a facility that produces coal from reserves that on June 14, 2005, were owned by a Federally recognized tribe of Indians or were held in trust by the United States for a tribe or its members.

Explanation of Provision

The provision extends the credit for the production of Indian coal for one year, through December 31, 2017.

Effective Date

The extension of the credit applies to Indian coal produced after December 31, 2016.

9. Extension of credits with respect to facilities producing energy from certain renewable resources (sec. 40409 of the Act and secs. 45 and 48 of the Code)

Present Law

Renewable electricity production credit

An income tax credit is allowed for the production of electricity from qualified energy resources at qualified facilities (the "renewable electricity production credit").[236] Qualified energy resources comprise wind, closed-loop biomass, open-loop biomass, geothermal energy, municipal solid waste, qualified hydropower production, and marine and hydrokinetic renewable energy. Qualified facilities are, generally, facilities that generate electricity using qualified energy resources. To be eligible for the credit, electricity produced from qualified energy resources at qualified facilities must be sold by the taxpayer to an unrelated person.

SUMMARY OF CREDIT FOR ELECTRICITY PRODUCED FROM CERTAIN RENEWABLE RESOURCES

Eligible electricity production activity (sec. 45)	Credit amount for 2018 [1] (cents per kilowatt-hour)	Expiration [2]
Wind	2.4	December 31, 2019
Closed-loop biomass	2.4	December 31, 2016
Open-loop biomass (including agricultural livestock waste nutrient facilities).	1.2	December 31, 2016
Geothermal	2.4	December 31, 2016

[235] Sec. 45.

[236] Sec. 45. In addition to the renewable electricity production credit, section 45 also provides income tax credits for the production of Indian coal and refined coal at qualified facilities.

SUMMARY OF CREDIT FOR ELECTRICITY PRODUCED FROM CERTAIN RENEWABLE RESOURCES—Continued

Eligible electricity production activity (sec. 45)	Credit amount for 2018 [1] (cents per kilowatt-hour)	Expiration [2]
Municipal solid waste (including landfill gas facilities and trash combustion facilities).	1.2	December 31, 2016
Qualified hydropower	1.2	December 31, 2016
Marine and hydrokinetic	1.2	December 31, 2016

[1] In general, the credit is available for electricity produced during the first 10 years after a facility has been placed in service. For wind facilities, the credit is reduced by 20 percent for facilities the construction of which begins in calendar year 2017, by 40 percent for facilities the construction of which begins in calendar year 2018, and by 60 percent for facilities the construction of which begins in calendar year 2019.
[2] Expires for property the construction of which begins after this date.

Election to claim energy credit in lieu of renewable electricity production credit

A taxpayer may make an irrevocable election to have certain property that is part of a qualified renewable electricity production facility be treated as energy property eligible for a 30 percent investment credit under section 48. For wind facilities, the credit is reduced by 20 percent for facilities the construction of which begins in calendar year 2017, by 40 percent for facilities the construction of which begins in calendar year 2018, and by 60 percent for facilities the construction of which begins in calendar year 2019. For purposes of the investment credit, qualified facilities are facilities otherwise eligible for the renewable electricity production credit with respect to which no credit under section 45 has been allowed. A taxpayer electing to treat a facility as energy property may not claim the renewable electricity production credit. The eligible basis for the investment credit for taxpayers making this election is the basis of the depreciable (or amortizable) property that is part of a facility capable of generating electricity eligible for the renewable electricity production credit.

Explanation of Provision

For non-wind renewable power facilities, the provision extends for one year the renewable electricity production credit and the election to claim the energy credit in lieu of the electricity production credit, through December 31, 2017.

Effective Date

The provision takes effect January 1, 2017.

10. Extension of credit for energy-efficient new homes (sec. 40410 of the Act and sec. 45L of the Code)

Present Law

A credit is available to an eligible contractor for each qualified new energy-efficient home that is constructed by the eligible contractor and acquired by a person from such eligible contractor for use as a residence during the taxable year. To qualify as a new energy-efficient home, the home must be: (1) a dwelling located in the United States; (2) substantially completed after August 8, 2005; and (3) certified in accordance with guidance prescribed by the Secretary to have a projected level of annual heating and cooling energy consumption that meets the standards for either a 30-percent or 50-percent reduction in energy usage, compared to a comparable dwelling constructed in accordance with the standards of chapter 4 of the 2006 International Energy Conservation Code as in effect (including supplements) on January 1, 2006, and any applicable Federal minimum efficiency standards for equipment. With respect to homes that meet the 30-percent standard, one-third of such 30-percent savings must come from the building envelope, and with respect to homes that meet the 50-percent standard, one-fifth of such 50-percent savings must come from the building envelope.

Manufactured homes that conform to Federal manufactured home construction and safety standards are eligible for the credit provided all the criteria for the credit are met. The eligible contractor is the person who constructed the home, or in the case of a manufactured home, the producer of such home.

The credit equals $1,000 in the case of a new home that meets the 30-percent standard and $2,000 in the case of a new home that meets the 50-percent standard. Only manufactured homes are eligible for the $1,000 credit.

In lieu of meeting the standards of chapter 4 of the 2006 International Energy Conservation Code, manufactured homes certified by a method prescribed by the Administrator of the Environmental Protection Agency under the Energy Star Labeled Homes program are eligible for the $1,000 credit provided criteria (1) and (2), above, are met.

The credit applies to homes that are purchased prior to January 1, 2017.

Explanation of Provision

The provision extends the credit for one year, to homes that are acquired prior to January 1, 2018.

Effective Date

The provision applies to homes acquired after December 31, 2016.

11. Extension and phaseout of energy credit (sec. 40411 of the Act and sec. 48 of the Code)

Present Law

In general

A permanent nonrefundable 10-percent business energy credit [237] is allowed for the cost of new property that is equipment that either (1) uses solar energy to generate electricity, to heat or cool a structure, or to provide solar process heat or (2) is used to produce, distribute, or use energy derived from a geothermal deposit, but only, in the case of electricity generated by geothermal power, up to the electric transmission stage. Property used to generate energy

[237] Sec. 48.

for the purposes of heating a swimming pool is not eligible solar energy property.

In addition to the permanent credit, a number of energy technologies are entitled to the energy credit at rates of 10 percent or 30 percent, depending on the technology. These credits sunset for property placed in service after the expiration date for that technology. In addition, the credit rate for solar energy property has been temporarily increased.

The energy credit is a component of the general business credit.[238] An unused general business credit generally may be carried back one year and carried forward 20 years.[239] The taxpayer's basis in the property is reduced by one-half of the amount of the credit claimed.[240] For projects whose construction time is expected to equal or exceed two years, the credit may be claimed as progress expenditures are made on the project, rather than during the year the property is placed in service. The credit is allowed against the alternative minimum tax.

Increased credit rate for solar energy property

For property the construction of which begins before January 1, 2020, the credit rate for otherwise eligible solar energy property is increased to 30 percent. For property the construction of which begins in calendar year 2020 and that is placed in service by the end of calendar year 2023, the credit rate for otherwise eligible solar energy property is 26 percent. For property the construction of which begins in calendar year 2021 and that is placed in service by the end of calendar year 2023, the credit rate for otherwise eligible solar energy property is 22 percent. For property the construction of which begins after calendar year 2021 or that does not meet the 2023 deadline described above, the credit rate drops to the permanent 10-percent rate.

Fiber optic solar property

Equipment that uses fiber-optic distributed sunlight to illuminate the inside of a structure is eligible for a 30-percent credit for property placed in service prior to January 1, 2017.

Fuel cells and microturbines

The energy credit applies to qualified fuel cell power plants, but only for property placed in service prior to January 1, 2017. The credit rate is 30 percent.

A qualified fuel cell power plant is an integrated system composed of a fuel cell stack assembly and associated balance of plant components that (1) converts a fuel into electricity using electrochemical means, and (2) has an electricity-only generation efficiency of greater than 30 percent and a capacity of at least one-half kilowatt. The credit may not exceed $1,500 for each 0.5 kilowatt of capacity.

The energy credit applies to qualifying stationary microturbine power plants for property placed in service prior to January 1,

[238] Sec. 38(b)(1).
[239] Sec. 39.
[240] Sec. 50(c)(3).

2017. The credit is limited to the lesser of 10 percent of the basis of the property or $200 for each kilowatt of capacity.

A qualified stationary microturbine power plant is an integrated system comprised of a gas turbine engine, a combustor, a recuperator or regenerator, a generator or alternator, and associated balance of plant components that converts a fuel into electricity and thermal energy. Such system also includes all secondary components located between the existing infrastructure for fuel delivery and the existing infrastructure for power distribution, including equipment and controls for meeting relevant power standards, such as voltage, frequency and power factors. Such system must have an electricity-only generation efficiency of not less than 26 percent at International Standard Organization conditions and a capacity of less than 2,000 kilowatts.

Geothermal heat pump property

The energy credit applies to qualified geothermal heat pump property placed in service prior to January 1, 2017. The credit rate is 10 percent. Qualified geothermal heat pump property is equipment that uses the ground or ground water as a thermal energy source to heat a structure or as a thermal energy sink to cool a structure.

Small wind property

The energy credit applies to qualified small wind energy property placed in service prior to January 1, 2017. The credit rate is 30 percent. Qualified small wind energy property is property that uses a qualified wind turbine to generate electricity. A qualifying wind turbine means a wind turbine of 100 kilowatts of rated capacity or less.

Combined heat and power property

The energy credit applies to combined heat and power ("CHP") property placed in service prior to January 1, 2017. The credit rate is 10 percent.

CHP property is property: (1) that uses the same energy source for the simultaneous or sequential generation of electrical power, mechanical shaft power, or both, in combination with the generation of steam or other forms of useful thermal energy (including heating and cooling applications); (2) that has an electrical capacity of not more than 50 megawatts or a mechanical energy capacity of not more than 67,000 horsepower or an equivalent combination of electrical and mechanical energy capacities; (3) that produces at least 20 percent of its total useful energy in the form of thermal energy that is not used to produce electrical or mechanical power, and produces at least 20 percent of its total useful energy in the form of electrical or mechanical power (or a combination thereof); and (4) the energy efficiency percentage of which exceeds 60 percent. CHP property does not include property used to transport the energy source to the generating facility or to distribute energy produced by the facility.

The otherwise allowable credit with respect to CHP property is reduced to the extent the property has an electrical capacity or mechanical capacity in excess of any applicable limits. Property in excess of the applicable limit (15 megawatts or a mechanical energy capacity of more than 20,000 horsepower or an equivalent combination of electrical and mechanical energy capacities) is permitted to claim a fraction of the otherwise allowable credit. The fraction is equal to the applicable limit divided by the capacity of the property. For example, a 45 megawatt property would be eligible to claim 15/45ths, or one third, of the otherwise allowable credit. Again, no credit is allowed if the property exceeds the 50 megawatt or 67,000 horsepower limitations described above.

Additionally, systems whose fuel source is at least 90 percent open-loop biomass and that would qualify for the credit but for the failure to meet the efficiency standard are eligible for a credit that is reduced in proportion to the degree to which the system fails to meet the efficiency standard. For example, a system that would otherwise be required to meet the 60-percent efficiency standard, but which only achieves 30-percent efficiency, would be permitted a credit equal to one-half of the otherwise allowable credit (*i.e.,* a 5-percent credit).

Election of energy credit in lieu of section 45 production tax credit

In general, a taxpayer may make an irrevocable election to have certain property used in qualified facilities whose construction begins before January 1, 2017, be treated as energy property. For this purpose, qualified facilities are facilities otherwise eligible for the renewable electricity production credit with respect to which no credit under section 45 has been allowed. A taxpayer electing to treat a facility as energy property may not claim the renewable electricity production credit. For wind facilities, an election may be for property used in facilities whose construction begins before January 1, 2020. However, for such wind facilities, the credit is reduced by 20 percent for facilities the construction of which begins in calendar year 2017, by 40 percent for facilities the construction of which begins in calendar year 2018, and by 60 percent for facilities the construction of which begins in calendar year 2019.[241]

Explanation of Provision

The provision extends the energy credit for qualified non-solar energy property.

For fiber optic solar property, fuel cell property, and small wind energy property, the energy credit is extended for property the construction of which begins before January 1, 2022. For property the construction of which begins before January 1, 2020, the credit rate is 30 percent. For property the construction of which begins in calendar year 2020 and that is placed in service by the end of calendar year 2023, the credit rate is 26 percent. For property the construction of which begins in calendar year 2021 and that is placed in service by the end of calendar year 2023, the credit rate is 22 percent. No credit is available for property the construction of which begins after calendar year 2021 or that does not meet the 2023 placed-in-service deadline.

[241] See section 40409 of the Act for the provision extending section 45 and the election to claim an energy credit in lieu of that credit.

For geothermal heat pump property, microturbine property, and combined heat and power system property, the 10-percent credit is extended for property the construction of which begins before January 1, 2022.

Effective Date

In general, the provision is effective for periods after December 31, 2016, under rules similar to the rules of section 48(m), as in effect for the date of enactment of the Revenue Reconciliation Act of 1990. The extension of the credit for combined heat and power system property is effective for property placed in service after December 31, 2016. The phaseouts and terminations are effective on the date of enactment.

12. Extension of special allowance for second generation biofuel plant property (sec. 40412 of the Act and sec. 168(l) of the Code)

Present Law

In general

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.[242] The period for depreciation or amortization generally begins when the asset is placed in service by the taxpayer.[243] 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,[244] and convention.[245]

Special depreciation allowance for second generation biofuel plant property

An additional first-year depreciation deduction is allowed equal to 50 percent of the adjusted basis of qualified second generation biofuel plant property for the taxable year in which the property is placed in service.[246] In order to qualify, the property generally must be placed in service before January 1, 2017.[247]

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[242] 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 addition, 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.

[243] See Treas. Reg. secs. 1.167(a)–10(b), 1.167(a)–3, 1.167(a)–14, and 1.197–2(f). See also Treas. Reg. sec. 1.167(a)–11(e)(1)(i).

[244] The applicable recovery period for an asset is determined in part by statute and in part by historic Treasury guidance. Exercising authority granted by Congress, the Secretary issued Rev. Proc. 87–56, 1987–2 C.B. 674, laying out the framework of recovery periods for enumerated classes of assets. The Secretary clarified and modified the list of asset classes in Rev. Proc. 88–22, 1988-1 C.B. 785. In November 1988, Congress revoked the Secretary's authority to modify the class lives of depreciable property. Rev. Proc. 87–56, as modified, remains in effect except to the extent that the Congress has, since 1988, statutorily modified the recovery period for certain depreciable assets, effectively superseding any administrative guidance with regard to such property.

[245] Sec. 168.

[246] Sec. 168(l).

[247] Sec. 168(l)(2)(D).

The additional first-year depreciation deduction is allowed for both regular tax and alternative minimum tax purposes,[248] but is not allowed in computed earnings and profits.[249] The additional first-year depreciation deduction is subject to the general rules regarding whether a cost is subject to capitalization under section 263A. The basis of the property and the depreciation allowances in the year of purchase and later years are appropriately adjusted to reflect the additional first-year depreciation deduction.[250]

Qualified property

Qualified second generation biofuel plant property means depreciable property used in the U.S. solely to produce any liquid fuel that (1) is derived by, or from, qualified feedstocks, and (2) meets the registration requirements for fuels and fuel additives established by the Environmental Protection Agency ("EPA") under section 211 of the Clean Air Act.[251] Qualified feedstock means any lignocellulosic or hemicellulosic matter that is available on a renewable or recurring basis,[252] and any cultivated algae, cyanobacteria, or lemna.[253] Second generation biofuel does not include any alcohol with a proof of less than 150 or certain unprocessed fuel.[254] Unprocessed fuels are fuels that (1) are more than four percent (determined by weight) water and sediment in any combination, (2) have an ash content of more than one percent (determined by weight), or (3) have an acid number greater than 25.[255]

In order for such property to qualify for the additional first-year depreciation deduction, it must also meet the following requirements: (1) the original use of the property must commence with the taxpayer; and (2) the property must be (i) acquired by purchase (as defined under section 179(d)) by the taxpayer, and (ii) placed in service before January 1, 2017.[256] Property that is manufactured, constructed, or produced by the taxpayer for use by the taxpayer qualifies if the taxpayer begins the manufacture, construction, or production of the property before January 1, 2017 (and all other requirements are met).[257] Property that is manufactured, constructed, or produced for the taxpayer by another person under a contract that is entered into prior to the manufacture, construction, or production of the property is considered to be manufactured, constructed, or produced by the taxpayer.

Exceptions

Property not eligible for the additional first-year depreciation deduction under section 168(l) includes (i) any property to which the

[248] Sec. 168(l)(5).
[249] Sec. 312(k)(3).
[250] Sec. 168(l)(1)(B).
[251] Secs. 168(l)(2)(A) and 40(b)(6)(E).
[252] For example, lignocellulosic or hemicellulosic matter that is available on a renewable or recurring basis includes bagasse (from sugar cane), corn stalks, and switchgrass. See Joint Committee on Taxation, *General Explanation of Tax Legislation Enacted in the 109th Congress* (JCS–1–07), January 2007, p. 722.
[253] Sec. 40(b)(6)(F).
[254] Sec. 40(b)(6)(E)(ii) and (iii).
[255] Sec. 40(b)(6)(E)(iii).
[256] Sec. 168(l)(2). Requirements relating to actions taken before 2007 are not described herein since they have little (if any) remaining effect.
[257] Sec. 168(l)(4) and (k)(2)(E).

additional first-year depreciation allowance under section 168(k) applies,[258] (ii) any property required to be depreciated under the alternative depreciation system of section 168(g),[259] (iii) any property any portion of which is financed with the proceeds of a tax-exempt obligation under section 103,[260] and (iv) any property with respect to which the taxpayer has elected 50-percent expensing under section 179C (relating to election to expense certain refineries).[261]

A taxpayer may elect out of the additional first-year depreciation for any class of property for any taxable year.[262]

In addition, recapture rules apply if the property ceases to be qualified second generation biofuel plant property.[263]

Explanation of Provision

The provision extends the special depreciation allowance for one year, to qualified second generation biofuel plant property placed in service prior to January 1, 2018.

Effective Date

The provision applies to property placed in service after December 31, 2016.

13. Extension of energy efficient commercial buildings deduction (sec. 40413 of the Act and sec. 179D of the Code)

Present Law

In general Section 179D provides an election under which a taxpayer may take an immediate deduction equal to energy-efficient commercial building property expenditures made by the taxpayer. Energy-efficient commercial building property is defined as property that is (1) installed on or in any building located in the United States that is within the scope of Standard 90.1–2007 of the American Society of Heating, Refrigerating, and Air Conditioning Engineers and the Illuminating Engineering Society of North America ("ASHRAE/IESNA"), (2) installed as part of (i) the interior lighting systems, (ii) the heating, cooling, ventilation, and hot water systems, or (iii) the building envelope, and (3) certified as being installed as part of a plan designed to reduce the total annual energy and power costs with respect to the interior lighting systems, heating, cooling, ventilation, and hot water systems of the building by 50 percent or more in comparison to a reference building that meets the minimum requirements of Standard 90.1–2007 (as in effect before the date of the adoption of ASHRAE/IESNA Standard 90.1–2010). The deduction is limited to an amount equal to $1.80 per square foot of the property for which such expenditures are made. The deduction is allowed in the year in which the property is placed in service.

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[258] Sec. 168(l)(3)(A).
[259] Sec. 168(l)(3)(B).
[260] Sec. 168(l)(3)(C).
[261] Sec. 168(l)(7).
[262] Sec. 168(l)(3)(D).
[263] Sec. 168(l)(6).

Certain certification requirements must be met in order to qualify for the deduction. The Secretary, in consultation with the Secretary of Energy, will promulgate regulations that describe methods of calculating and verifying energy and power costs using qualified computer software based on the provisions of the 2005 California Nonresidential Alternative Calculation Method Approval Manual.

The Secretary is granted authority to prescribe procedures for the inspection and testing for compliance of buildings that are comparable, given the difference between commercial and residential buildings, to the requirements in the Mortgage Industry National Accreditation Procedures for Home Energy Rating Systems.[264] Individuals qualified to determine compliance shall only be those recognized by one or more organizations certified by the Secretary for such purposes.

For energy-efficient commercial building property expenditures made by a public entity, such as public schools, the deduction may be allocated to the person primarily responsible for designing the property in lieu of the public entity.

If a deduction is allowed under this section, the basis of the property is reduced by the amount of the deduction.

The deduction applies to property placed in service prior to January 1, 2017.

Partial allowance of deduction

System-specific deductions

In the case of a building that does not meet the overall building requirement of 50-percent energy savings, a partial deduction is allowed with respect to each separate building system that comprises energy efficient property and that is certified by a qualified professional as meeting or exceeding the applicable system-specific savings targets established by the Secretary. The applicable system-specific savings targets to be established by the Secretary are those that would result in a total annual energy savings with respect to the whole building of 50 percent, if each of the separate systems met the system specific target. The separate building systems are (1) the interior lighting system, (2) the heating, cooling, ventilation and hot water systems, and (3) the building envelope. The maximum allowable deduction is $0.60 per square foot for each separate system.

Interim rules for lighting systems

In general, in the case of system-specific partial deductions, no deduction is allowed until the Secretary establishes system-specific targets.[265] However, in the case of lighting system retrofits, until

[264] See IRS Notice 2006–52, 2006–1 C.B. 1175, June 2, 2006; IRS Notice 2008–40, 2008–14 I.R.B. 725, March 11, 2008.

[265] IRS Notice 2008–40 set a target of a 10-percent reduction in total energy and power costs with respect to the building envelope, and 20 percent each with respect to the interior lighting system and the heating, cooling, ventilation and hot water systems. IRS Notice 2012–26 (2012–17 I.R.B. 847 April 23, 2012) established new targets of 10-percent reduction in total energy and power costs with respect to the building envelope, 25 percent with respect to the interior lighting system and 15 percent with respect to the heating, cooling, ventilation and hot water systems,

Continued

such time as the Secretary issues final regulations, the system-specific energy savings target for the lighting system is deemed to be met by a reduction in lighting power density of 40 percent (50 percent in the case of a warehouse) of the minimum requirements in Table 9.3.1.1 or Table 9.3.1.2 of ASHRAE/IESNA Standard 90.1–2007. Also, in the case of a lighting system that reduces lighting power density by 25 percent, a partial deduction of 30 cents per square foot is allowed. A pro-rated partial deduction is allowed in the case of a lighting system that reduces lighting power density between 25 percent and 40 percent. Certain lighting level and lighting control requirements must also be met in order to qualify for the partial lighting deductions under the interim rule.

Explanation of Provision

The provision extends the deduction for one year, through December 31, 2017.

Effective Date

The provision applies to property placed in service after December 31, 2016.

14. Extension of special rule for sales or dispositions to implement FERC or State electric restructuring policy for qualified electric utilities (sec. 40414 of the Act and sec. 451(k) of the Code)

Present Law

A taxpayer selling property generally realizes gain to the extent the sales price (and any other consideration received) exceeds the taxpayer's basis in the property.[266] The realized gain is subject to current income tax[267] unless the recognition of the gain is deferred or excluded from income under a special tax provision.[268]

One such special tax provision permits taxpayers to elect to recognize gain from qualifying electric transmission transactions ratably over an eight-year period beginning in the year of sale if the amount realized from such sale is used to purchase exempt utility property within the applicable period[269] (the "reinvestment property").[270] If the amount realized exceeds the amount used to purchase reinvestment property, any realized gain is recognized to the extent of such excess in the year of the qualifying electric transmission transaction.

A qualifying electric transmission transaction is the sale or other disposition of property used by a qualified electric utility to an independent transmission company prior to January 1, 2017.[271] A qualified electric utility is defined as an electric utility, which as of the date of the qualifying electric transmission transaction, is

effective beginning March 12, 2012. The targets from Notice 2008–40 may be used until December 31, 2013, but the targets of Notice 2012–26 apply thereafter.

[266] See sec. 1001.

[267] See secs. 61 and 451.

[268] See, *e.g.*, secs. 453, 1031, and 1033.

[269] The applicable period for a taxpayer to reinvest the proceeds is four years after the close of the taxable year in which the qualifying electric transmission transaction occurs.

[270] Sec. 451(k).

[271] Sec. 451(k)(3).

vertically integrated in that it is both (1) a transmitting utility (as defined in the Federal Power Act[272]) with respect to the transmission facilities to which the election applies, and (2) an electric utility (as defined in the Federal Power Act[273]).[274]

In general, an independent transmission company is defined as: (1) an independent transmission provider[275] approved by the Federal Energy Regulatory Commission ("FERC"); (2) a person (i) who the FERC determines under section 203 of the Federal Power Act[276] (or by declaratory order) is not a "market participant" and (ii) whose transmission facilities are placed under the operational control of a FERC-approved independent transmission provider no later than four years after the close of the taxable year in which the transaction occurs; or (3) in the case of facilities subject to the jurisdiction of the Public Utility Commission of Texas, (i) a person that is approved by that Commission as consistent with Texas State law regarding an independent transmission organization, or (ii) a political subdivision, or affiliate thereof, whose transmission facilities are under the operational control of an organization described in (i).[277]

Exempt utility property is defined as: (1) property used in the trade or business of (i) generating, transmitting, distributing, or selling electricity or (ii) producing, transmitting, distributing, or selling natural gas; or (2) stock in a controlled corporation whose principal trade or business consists of the activities described in (1).[278] Exempt utility property does not include any property that is located outside of the United States.[279]

If a taxpayer is a member of an affiliated group of corporations filing a consolidated return, the reinvestment property may be purchased by any member of the affiliated group (in lieu of the taxpayer).[280]

Explanation of Provision

The provision extends for one year, through December 31, 2017, the deferral provision for qualifying electric transmission transactions.

Effective Date

The provision applies to dispositions after December 31, 2016.

[272] Sec. 3(23), 16 U.S.C. sec. 796, defines "transmitting utility" as any electric utility, qualifying cogeneration facility, qualifying small power production facility, or Federal power marketing agency that owns or operates electric power transmission facilities that are used for the sale of electric energy at wholesale.
[273] Sec. 3(22), 16 U.S.C. sec. 796, defines "electric utility" as any person or State agency (including any municipality) that sells electric energy; such term includes the Tennessee Valley Authority, but does not include any Federal power marketing agency.
[274] Sec. 451(k)(6).
[275] For example, a regional transmission organization, an independent system operator, or an independent transmission company.
[276] 16 U.S.C. sec. 824b.
[277] Sec. 451(k)(4).
[278] Sec. 451(k)(5).
[279] Sec. 451(k)(5)(C).
[280] Sec. 451(k)(7).

15. Extension of excise tax credits relating to alternative fuel (sec. 40415 of the Act and secs. 6426 and 6427 of the Code)

Present Law

Alternative fuel and alternative fuel mixture credits and payments

The Code provides two per-gallon excise tax credits with respect to alternative fuel: the alternative fuel credit, and the alternative fuel mixture credit. For this purpose, the term "alternative fuel" means liquefied petroleum gas, P Series fuels (as defined by the Secretary of Energy under 42 U.S.C. sec. 13211(2)), compressed or liquefied natural gas, liquefied hydrogen, liquid fuel derived from coal through the Fischer-Tropsch process ("coal-to-liquids"), compressed or liquefied gas derived from biomass, or liquid fuel derived from biomass. Such term does not include ethanol, methanol, or biodiesel.

For coal-to-liquids produced after December 30, 2009, the fuel must be certified as having been derived from coal produced at a gasification facility that separates and sequesters 75 percent of such facility's total carbon dioxide emissions.

The alternative fuel credit is allowed against section 4041 liability, and the alternative fuel mixture credit is allowed against section 4081 liability. Neither credit is allowed unless the taxpayer is registered with the Secretary. The alternative fuel credit is 50 cents per gallon of alternative fuel or gasoline gallon equivalents[281] of nonliquid alternative fuel sold by the taxpayer for use as a motor fuel in a motor vehicle or motorboat, sold for use in aviation or so used by the taxpayer.

The alternative fuel mixture credit is 50 cents per gallon of alternative fuel used in producing an alternative fuel mixture for sale or use in a trade or business of the taxpayer. An "alternative fuel mixture" is a mixture of alternative fuel and taxable fuel (gasoline, diesel fuel or kerosene) that contains at least 1/10 of one percent taxable fuel. The mixture must be sold by the taxpayer producing such mixture to any person for use as a fuel, or used by the taxpayer producing the mixture as a fuel. The credits expired after December 31, 2016.

A person may file a claim for payment equal to the amount of the alternative fuel credit (but not the alternative fuel mixture credit). The alternative fuel credit must first be applied to the applicable excise tax liability under section 4041 or 4081, and any excess credit may be taken as a payment. These payment provisions generally also expire after December 31, 2016.

For purposes of the alternative fuel credit, alternative fuel mixture credit and related payment provisions, "alternative fuel" does not include fuel (including lignin, wood residues, or spent pulping liquors) derived from the production of paper or pulp.

[281] "Gasoline gallon equivalent" means, with respect to any nonliquid alternative fuel (*e.g.*, compressed natural gas), the amount of such fuel having a Btu (British thermal unit) content of 124,800 (higher heating value).

Explanation of Provision

The provision extends the alternative fuel credit and related payment provisions, and the alternative fuel mixture credit through December 31, 2017.

In light of the retroactive nature of the provision, as it relates to alternative fuel sold or used in 2017, the provision creates a special rule to address claims regarding excise credits and claims for payment for the period beginning January 1, 2017, and ending on December 31, 2017. In particular, the provision directs the Secretary to issue guidance within 30 days of the date of enactment. Such guidance is to provide for a one-time submission of claims covering periods occurring during 2017. The guidance is to provide for a 180-day period for the submission of such claims (in such manner as prescribed by the Secretary) to begin no later than 30 days after such guidance is issued. Such claims shall be paid by the Secretary of the Treasury not later than 60 days after receipt. If the claim is not paid within 60 days of the date of the filing, the claim shall be paid with interest from such date determined by using the overpayment rate and method under section 6621 of the Code.

Effective Date

The provision generally applies to fuel sold or used after December 31, 2016.

16. Extension of Oil Spill Liability Trust Fund financing rate (sec. 40416 of the Act and sec. 4611 of the Code)

Present Law

The Oil Spill Liability Trust Fund financing rate ("oil spill tax") of nine cents per barrel generally applies to crude oil received at a U.S. refinery and to petroleum products entered into the United States for consumption, use, or warehousing.[282] The oil spill tax also applies to certain uses and the exportation of domestic crude oil.[283] If any domestic crude oil is used in or exported from the United States, and before such use or exportation no oil spill tax was imposed on such crude oil, then the oil spill tax is imposed on such crude oil. The tax does not apply to any use of crude oil for extracting oil or natural gas on the premises where such crude oil was produced.

For crude oil received at a refinery, the operator of the U.S. refinery is liable for the tax. For imported petroleum products, the person entering the product for consumption, use, or warehousing is liable for the tax. For certain uses and exports, the person using or exporting the crude oil is liable for the tax. No tax is imposed with respect to any petroleum product if the person who would be liable for such tax establishes that a prior oil spill tax has been imposed with respect to such product.

The tax does not apply to any periods after December 31, 2017.

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[282] The term "crude oil" includes crude oil condensates and natural gasoline. The term "petroleum product" includes crude oil.

[283] The term "domestic crude oil" means any crude oil produced from a well located in the United States.

Explanation of Provision

The provision extends the oil spill tax through December 31, 2018.

Effective Date

The provision applies on and after the first day of the first calendar month beginning after the date of enactment of this Act.

F. Modifications of Energy Incentives

1. Modifications of credit for production from advanced nuclear power facilities (sec. 40501 of the Act and sec. 45J of the Code)

Present Law

Taxpayers producing electricity at a qualifying advanced nuclear power facility may claim a credit equal to 1.8 cents per kilowatt-hour of electricity produced for the eight-year period starting when the facility is placed in service.[284] The aggregate amount of credit that a taxpayer may claim in any year during the eight-year period is subject to limitation based on allocated capacity and an annual limitation as described below.

An advanced nuclear facility is any nuclear facility for the production of electricity, the reactor design for which was approved after 1993 by the Nuclear Regulatory Commission. For this purpose, a qualifying advanced nuclear facility does not include any facility for which a substantially similar design for a facility of comparable capacity was approved before 1994.

A qualifying advanced nuclear facility is an advanced nuclear facility for which the taxpayer has received an allocation of megawatt capacity from the Secretary of the Treasury ("the Secretary") and is placed in service before January 1, 2021. The taxpayer may only claim credit for production of electricity equal to the ratio of the allocated capacity that the taxpayer receives from the Secretary to the rated nameplate capacity of the taxpayer's facility. For example, if the taxpayer receives an allocation of 750 megawatts of capacity from the Secretary and the taxpayer's facility has a rated nameplate capacity of 1,000 megawatts, then the taxpayer may claim three-quarters of the otherwise allowable credit, or 1.35 cents per kilowatt-hour, for each kilowatt-hour of electricity produced at the facility (subject to the annual limitation described below). The credit is restricted to 6,000 megawatts of national capacity. Once that limitation has been reached, the Secretary may make no additional allocations. Treasury guidance required allocation applications to be filed before February 1, 2014.[285]

A taxpayer operating a qualified facility may claim no more than $125 million in tax credits per 1,000 megawatts of allocated capacity in any one year of the eight-year credit period. If the taxpayer operates a 1,350 megawatt rated nameplate capacity system and

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[284] Sec. 45J. The 1.8-cents credit amount is reduced, but not below zero, if the annual average contract price per kilowatt-hour of electricity generated from advanced nuclear power facilities in the preceding year exceeds eight cents per kilowatt-hour. The eight-cent price comparison level is indexed for inflation after 1992 (12.9 cents for 2018).

[285] I.R.S. Notice 2013–68, 2013–46 I.R.B. 501, October 24, 2013.

has received an allocation from the Secretary for 1,350 megawatts of capacity eligible for the credit, the taxpayer's annual limitation on credits that may be claimed is equal to 1.35 times $125 million, or $168.75 million. If the taxpayer operates a facility with a nameplate rated capacity of 1,350 megawatts, but has received an allocation from the Secretary for 750 megawatts of credit eligible capacity, then the two limitations apply such that the taxpayer may claim a credit effectively equal to one cent per kilowatt-hour of electricity produced (calculated as described above) subject to an annual credit limitation of $93.75 million in credits (three-quarters of $125 million).

The credit is part of the general business credit.

Explanation of Provision

The provision modifies the national megawatt capacity limitation for the advanced nuclear power production credit. To the extent any amount of the 6,000 megawatts of authorized capacity remains unutilized after December 31, 2020, the provision requires the Secretary to allocate such capacity first to facilities placed in service before 2021, to the extent such facilities did not receive an allocation equal to their full nameplate capacity, and then to facilities placed in service after such date in the order in which such facilities are placed in service. The provision provides that the placed-in-service sunset date of January 1, 2021, does not apply with respect to allocations of such unutilized national megawatt capacity.

The provision also allows qualified public entities to elect to forgo credits to which they otherwise would be entitled in favor of an eligible project partner. Qualified public entities are defined as (1) a Federal, State, or local government of any political subdivision, agency, or instrumentality thereof; (2) a mutual or cooperative electric company; or (3) a not-for-profit electric utility that has or had received a loan or loan guarantee under the Rural Electrification Act of 1936.[286] An eligible project partner under the provision generally includes any person who designed or constructed the nuclear power plant, participates in the provision of nuclear steam or nuclear fuel to the power plant, or has an ownership interest in the facility. In the case of a facility owned by a partnership, where the credit is determined at the partnership level, any electing qualified public entity is treated as the taxpayer with respect to such entity's distributive share of such credits, and any other partner is an eligible project partner.

Effective Date

The provision requiring the allocation of unutilized national megawatt capacity limitation is effective on the date of enactment. The provision allowing an election by qualified public entities to forgo credits in favor of an eligible project partner is effective for taxable years beginning after the date of enactment.

[286] 7 U.S.C. sec. 901 *et seq.*

G. Miscellaneous Provisions

1. Modifications to rum cover-over (sec. 41102 of the Act and sec. 7652 of the Code)

Present Law

Section 5001 imposes an excise tax on distilled spirits per proof gallon[287] produced in or imported into the United States.[288]

Liability for the excise tax on distilled spirits arises when the alcohol is produced 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.[289] 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 may be exported without payment of tax and may be withdrawn from a distillery without payment of tax or free of tax for certain authorized purposes, including exportation, industrial uses, and non-beverage uses.

The permanent rate of the excise tax is $13.50 per proof gallon. For distilled spirits removed after December 31, 2017, and before January 1, 2020, the temporary rate of tax is reduced to $2.70 per proof gallon on the first 100,000 proof gallons of distilled spirits produced, $13.34 for all proof gallons in excess of that amount but below 22,130,000 proof gallons, and $13.50 thereafter. The temporary provision also contains rules so as to prevent members of the same controlled group from receiving the lower rate on more than 100,000 proof gallons of distilled spirits. Importers of distilled spirits are eligible for the temporary lower rates under assignment rules.

For purposes of the excise tax on distilled spirits under section 5001, the territories of Puerto Rico and the U.S. Virgin Islands are not considered part of the United States.[290] Additionally, distilled spirits brought into the United States from these territories are not considered imports for purposes of the excise tax.[291] 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

[287] A proof gallon is a liquid gallon consisting of 50 percent alcohol. See sec. 5002(a)(10) and (11).
[288] Sec. 5001(a)(1).
[289] Sec. 5006.
[290] Sec. 7701(a)(9).
[291] See 19 C.F.R. sec. 7.2 and 19 C.F.R. sec. 101.1.

over") to the Treasury of Puerto Rico.[292] 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.[293] 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.[294] The revenues are apportioned between the two treasuries according to a formula determined by the Secretary.[295]

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 the lesser of the tax imposed or $10.50 per proof gallon.[296] 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, 2016.[297]

Explanation of Provision

The provision extends the increased limitation of $13.25 per proof gallon, 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, for rum brought into or imported into the United States after December 31, 2016, and before January 1, 2022. After December 31, 2021, the limitation reverts to $10.50 per proof gallon.

The provision also provides that the amount covered over of tax imposed on rum imported into the United States is determined without regard to the temporary lower rates of tax for distilled spirits removed after December 31, 2017, and before January 1, 2020.[298]

Effective Date

The extension of the increased limitation is effective with respect to distilled spirits brought into or imported into the United States after December 31, 2016. The provision providing for calculation of the cover over of the tax imposed on rum imported into the United States without regard to the temporary lower rates of tax is effective with respect to distilled spirits imported into the United States after December 31, 2017.

[292] 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).

[293] 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).

[294] Sec. 7652(e). 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).

[295] Sec. 7652(e)(2).

[296] Sec. 7652(f)(1).

[297] Sec. 7652(f)(1).

[298] Sec. 5001(c).

2. Extension of waiver of limitations with respect to excluding from gross income amounts received by wrongly incarcerated individuals (sec. 41103 of the Act and sec. 139F of the Code)

Present Law

Under a provision added in the PATH Act,[299] with respect to any wrongfully incarcerated individual, gross income does not include any civil damages, restitution, or other monetary award (including compensatory or statutory damages and restitution imposed in a criminal matter) relating to the incarceration of such individual for the covered offense for which such individual was convicted.[300]

A wrongfully incarcerated individual means an individual:

1. who was convicted of a covered offense;
2. who served all or part of a sentence of imprisonment relating to that covered offense; and
3. (i) was pardoned, granted clemency, or granted amnesty for such offense because the individual was innocent, or

   (ii) for whom the judgment of conviction for the offense was reversed or vacated, and for whom the indictment, information, or other accusatory instrument for that covered offense was dismissed or who was found not guilty at a new trial after the judgment of conviction for that covered offense was reversed or vacated.

For these purposes, a covered offense is any criminal offense under Federal or State law, and includes any criminal offense arising from the same course of conduct as that criminal offense.

The Code contains a special rule allowing individuals to make a claim for credit or refund of any overpayment of tax resulting from the exclusion, even if such claim would be disallowed under the Code or by operation of any law or rule of law (including *res judicata*), if the claim for credit or refund is filed before the close of the one-year period beginning on the date of enactment of the PATH Act (December 18, 2015).[301]

Explanation of Provision

The provision extends the waiver on the statute of limitations with respect to filing a claim for a credit or refund of an overpayment of tax resulting from the exclusion described above for an additional year. Thus, under the provision, such claim for credit or refund must be filed before December 18, 2017.

Effective Date

The provision is effective on the date of enactment.

[299] Pub. L. No. 114–113 (2015), Division Q (Protecting Americans from Tax Hikes Act of 2015), sec. 304.

[300] Sec. 139F.

[301] Sec. 139F.

3. Individuals held harmless on improper levy on retirement plans (sec. 41104 of the Act and sec. 6343 of the Code)

Present Law

Tax-favored retirement savings

Under the Code, tax-favored treatment applies to traditional and Roth individual retirement arrangements ("IRAs") and certain employer-sponsored retirement plans ("employer-sponsored plans").[302] The rules for tax-favored treatment include annual limits on the amount that may be contributed to an IRA or employer-sponsored plan.

In general, a distribution from a traditional IRA or employer-sponsored plan (other than from a designated Roth account under an employer-sponsored plan) is includible in income, except to the extent attributable to any contributions that were made to the IRA or plan on an after-tax basis.[303] Contributions made to a Roth IRA or a designated Roth account are made on an after-tax basis, and with certain exceptions, distributions are tax-free.[304] Amounts that are withdrawn from an IRA or employer-sponsored plan before age 59½ and are includible in income are subject to a 10-percent early withdrawal tax unless an exception applies.[305]

A distribution from a traditional IRA or employer-sponsored plan (other than from a designated Roth account) generally may be rolled over to another traditional IRA or employer-sponsored plan (other than to a designated Roth account).[306] The rollover generally can be achieved by a direct payment from the distributing IRA or plan to the recipient IRA or plan ("direct rollover") or by contributing the distribution to the recipient IRA or plan within 60 days of receiving the distribution ("60-day rollover"). Amounts that are rolled over generally are not includible in gross income. A distribution from a Roth IRA generally may be rolled over to another Roth IRA by direct rollover or a 60-day rollover, and a distribution from a designated Roth account generally may be rolled over to a Roth IRA or another designated Roth account by direct rollover or a 60-day rollover. In general, an individual is permitted to make only one 60-day rollover from an IRA to another IRA within a one-year period.

In addition to these rollovers, an individual generally may convert an amount in a traditional IRA or a non-Roth account under an employer-sponsored defined contribution plan into a Roth IRA or a designated Roth account, referred to as a "Roth conversion." The amount converted is generally includible in the individual's income to the same extent as if a distribution had been made. The conversion may be accomplished by a direct transfer of the amount

[302] Sections 219, 408, and 408A provide rules for IRAs. Tax-favored employer-sponsored retirement plans consist of qualified retirement plans under sections 401(a) and 403(a), tax-deferred annuity plans under section 403(b), and State and local government eligible deferred compensation plans under section 457(b). Under section 7701(j), the Thrift Savings Fund is treated as a qualified retirement plan.

[303] Secs. 402 and 408(d).

[304] Secs. 402A(a)(2), 402A(d), 408A(c) and 408A(d).

[305] Sec. 72(t).

[306] A rollover is not permitted with respect to an IRA that an individual has inherited from another individual ("inherited IRA"). In addition, the beneficiary of a deceased employee under an employer-sponsored plan, other than a surviving spouse, may roll a distribution from the plan only to an IRA that is designated as an inherited IRA.

from the traditional IRA or non-Roth account to the Roth IRA or designated Roth account or by a distribution from the traditional IRA or non-Roth account and contribution to the Roth IRA or designated Roth account within 60 days.

Levy and seizure of IRAs and employer-sponsored plans

A taxpayer's property or monies, including property or money held in retirement plans, is subject to levy and seizure if the taxpayer failed to satisfy a notice and demand for payment of an assessed tax. If the property was wrongfully levied upon (*e.g.*, the property levied upon did not belong to the taxpayer or was exempt from levy), the Secretary is authorized to return the property to its owner, with interest.[307] If the property seized belongs to the taxpayer, but the Secretary determines that the levy was inadvisable on one of several grounds, the property may be returned to the taxpayer without interest.[308] If the property subject to an improper levy is money, the amount to be returned to the taxpayer is an amount equal to the amount levied upon.

If the property levied upon is an IRA or employer-sponsored plan, the amount withdrawn is applied toward the individual's unpaid tax and is includible in income of that individual in the same manner as other distributions. However, the 10-percent early withdrawal tax does not apply.[309] If the amounts withdrawn from a retirement plan pursuant to levy are later returned to an individual, and the individual wishes to contribute such returned amounts to an IRA or employer-sponsored plan, the contribution is subject to the normally applicable rules, including limits on contributions and the time for making a rollover.

Explanation of Provision

Under the provision, if an amount withdrawn on behalf of an individual from an IRA ("original IRA") or employer-sponsored plan pursuant to a levy is returned to the individual by the Secretary because the levy on the original IRA or employer-sponsored plan was wrongful or is determined to be premature or otherwise not in accordance with administrative procedures, the individual may contribute the amount returned, and any interest thereon, either to the original IRA or to the employer-sponsored plan, if permissible,[310] or to a different IRA to which a rollover from the original IRA or employer-sponsored plan would be permitted.[311] The contribution is allowed without regard to the normally applicable limits on IRA contributions and rollovers.

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[307] Sec. 6343(b) and (c).

[308] Sec. 6343(d) identifies four grounds for returning the property to a taxpayer as if the levy had been improper, but without interest thereon. The four grounds are (1) the levy was premature or not in accordance with administrative procedure, (2) the return of the property would facilitate collection of the tax liability, (3) the taxpayer has entered into an installment agreement, or (4) return of the property is in the best interests of the taxpayer (as determined by the National Taxpayer Advocate) and the United States.

[309] Sec. 72(t)(2)(vii).

[310] The terms of an employer-sponsored plan might not permit the amount returned by the Internal Revenue Service to be contributed to the plan. In addition, in the case of an amount withdrawn from a designated Roth account pursuant to the levy, the returned amount could be contributed only to the original designated Roth account (or to a Roth IRA).

[311] The provision allows a rollover with respect to an inherited IRA to an inherited IRA of the same type (traditional or Roth) as the original IRA.

A contribution under this provision must be made by the due date (not including extensions) for the individual's income tax return for the year in which the Internal Revenue Service returns the amount previously levied on. The contribution is treated as a rollover ("rollover contribution") made for the taxable year in which the distribution on account of the levy occurred. It is not taken into account for purposes of the limit of one IRA rollover within a one-year period. In addition, except in the case of a rollover contribution that is treated as a Roth conversion, any tax attributable to the amount distributed from the original IRA or employer-sponsored plan by reason of a levy (1) is not to be assessed, (2) if assessed, is to be abated, and (3) if collected, is to be credited or refunded as an overpayment made on the due date for the return for the taxable year in which the amount was levied on.

Interest at the overpayment rate is allowable on amounts returned to the taxpayer under this provision (*i.e.*, in the case of a levy that is determined to be premature or otherwise not in accordance with administrative procedures) as well as in cases of a wrongful levy. Such interest on the amount returned to the individual and contributed to an IRA or employer-sponsored plan is treated as earnings within the IRA or employer-sponsored plan after the rollover contribution was made and is not includible in gross income upon receipt.

When property or money is returned to a taxpayer under this provision, the Secretary is required to notify the individual that a contribution as described above may be made.

Effective Date

The provision is effective for amounts paid to individuals in taxable years beginning after December 31, 2017, as reimbursement for amounts wrongfully levied upon or subject to levies that the Secretary determines were premature or otherwise not in accordance with administrative procedures, plus any applicable interest thereon.

4. Modifications of user fee requirements for installment agreements (sec. 41105 of the Act and new sec. 6159(f) of the Code)

Present Law

The Code authorizes the IRS to enter into written agreements with any taxpayer under which the taxpayer agrees to pay taxes owed, as well as interest and penalties, in installments over an agreed schedule, if the IRS determines that doing so will facilitate collection of the amounts owed. This agreement provides for a period during which payments may be made and while other IRS enforcement actions are held in abeyance.[312] An installment agreement generally does not reduce the amount of taxes, interest, or penalties owed. However, the IRS is authorized to enter into installment agreements with taxpayers that do not provide for full payment of the taxpayer's liability over the life of the agreement. The IRS is required to review such partial payment installment

[312] Sec. 6331(k).

agreements at least every two years to determine whether the financial condition of the taxpayer has significantly changed so as to warrant an increase in the value of the payments being made.

Taxpayers can request an installment agreement by filing Form 9465, Installment Agreement Request.[313] If the request for an installment agreement is approved by the IRS, the IRS charges a user fee.[314] The IRS currently charges $225 for entering into an installment agreement.[315] If the application is for a direct debit installment agreement, whereby the taxpayer authorizes the IRS to request the monthly electronic transfer of funds from the taxpayer's bank account to the IRS, the fee is reduced to $107.[316] In addition, regardless of the method of payment, the fee is $43 for low-income taxpayers.[317] For this purpose, low-income is defined as a person who falls below 250 percent of the Federal poverty guidelines published annually. Finally, there is no user fee if the agreement qualifies for a short-term agreement (120 days or less).

Explanation of Provision

The provision generally prohibits increases in the amount of user fees charged by the IRS for installment agreements. For low-income taxpayers (those whose income falls below 250 percent of the Federal poverty guidelines), it alleviates the user fee requirement in two ways. First, it waives the user fee if the low-income taxpayer enters into an installment agreement under which the taxpayer agrees to make automated installment payments through a debit account. Second, it provides that low-income taxpayers who are unable to agree to make payments electronically remain subject to the required user fee, but the fee is reimbursed upon completion of the installment agreement.

Effective Date

The provision is effective for agreements entered into on or after the date that is 60 days after the date of enactment.

5. Form 1040SR for seniors (sec. 41106 of the Act)

Present Law

Persons required to make returns of income are generally required to file returns in the form prescribed by the Secretary in regulations.[318] Income tax returns are required from each individual whose taxable year gross income equals or exceeds the exemption amount, with certain exceptions.[319] The income tax re-

[313] The IRS accepts applications for installment agreements online, from individuals and businesses, if the total tax, penalties and interest is below $50,000 for the former, and $25,000 for the latter.

[314] 31 U.S.C. sec. 9701; Treas. Reg. sec. 300.1; The Independent Offices Appropriations Act of 1952 (IOAA) 65 Stat. B70 (June 27, 1951). A discussion of the IRS practice regarding user fees and a list of actions for which fees are charged is included in the Internal Revenue Manual. See "User Fees," paragraph 1.32.19 IRM, available at https://www.irs.gov/irm/part1/irm_01-035-019.

[315] Treas. Reg. sec. 300.1.

[316] *Ibid.*

[317] *Ibid.*

[318] Sec. 6011.

[319] See section 6012(a)(1)(A), which enumerates several conditions under which individuals with gross income in excess of the exemption amount in section 151(d) are nevertheless excused from the filing requirements.

turns are due on April 15 of the year following the taxable year, for taxpayers using a calendar year.

The standard form available for individuals subject to income tax are in the series of forms known as Form 1040, and include two simplified versions, the Form 1040A and the Form 1040EZ. In recent filing seasons, the majority of returns filed by individuals were filed electronically.[320]

Explanation of Provision

The provision requires that the IRS publish a simplified income tax return form designated a Form 1040SR, for use by persons who are age 65 or older by the close of the taxable year for which the form is to be used. The form is to be as similar as practicable to the Form 1040EZ with certain exceptions. The use of Form 1040SR cannot be restricted based on the amount of taxable income to be shown on the return, or the fact that the income to be reported for the taxable year includes social security benefits, distributions from qualified retirement plans, annuities or other such deferred payment arrangements, interest and dividends, or capital gains and losses taken into account in determining adjusted net capital gain.

Effective Date

The provision requires that the form be available for taxable years beginning after the date of enactment.

6. Attorneys' fees relating to awards to whistleblowers (sec. 41107 of the Act and sec. 62(a)(21) of the Code)

Present Law

The Code provides an above-the-line deduction for attorneys' fees and costs paid by, or on behalf of, the taxpayer in connection with any action involving a claim of unlawful discrimination, certain claims against the Federal government, or a private cause of action under the Medicare Secondary Payer statute.[321] The amount that may be deducted above the line may not exceed the amount includible in the taxpayer's gross income for the taxable year on account of a judgment or settlement (whether by suit or agreement and whether as lump sum or periodic payments) resulting from such claim. Additionally, the Code provides an above-the-line deduction for attorneys' fees and costs paid by, or on behalf of, the individual in connection with any award for providing information regarding

[320] The Internal Revenue Service Restructuring and Reform Act of 1998 ("RRA 1998") states a Congressional policy to promote the paperless filing of Federal tax returns, and set a goal for the IRS to have at least 80 percent of all Federal tax and information returns filed electronically by 2007. See sec. 2001(a) of RRA 1998. The Electronic Tax Administration Advisory Committee, the body charged with oversight of IRS progress in reaching that goal reported that e-filing by individuals exceeded 80 percent in the 2013 filing season, but projected an overall rate of 72.8 percent based on all Federal returns. See Electronic Tax Administration Advisory Committee, *Annual Report to Congress*, June 2013, IRS Pub. 3415, p. 6.

[321] Sec. 62(a)(20) and (e). Section 62(e) defines "unlawful discrimination" to include a number of specific statutes, any Federal whistleblower statute, and any Federal, State, or local law "providing for the enforcement of civil rights" or "regulating any aspect of the employment relationship . . . or prohibiting the discharge of an employee, the discrimination against an employee, or any other form of retaliation or reprisal against an employee for asserting rights or taking other actions permitted by law."

violations of the tax laws.[322] The amount that may be deducted above the line may not exceed the amount includible in the taxpayer's gross income for the taxable year on account of such award.[323]

Explanation of Provision

The provision provides an above-the-line deduction for attorneys' fees and court costs paid by, or on behalf of, the taxpayer in connection with any action involving a claim under the SEC whistleblower program,[324] State False Claim Acts, and the Commodity Future Trading Commission whistleblower program.[325]

Effective Date

The provision is effective for taxable years beginning after December 31, 2017.

7. Clarification of whistleblower awards (sec. 41108 of the Act and new sec. 7623(c) of the Code)

Present Law

Awards to whistleblowers

The Code authorizes the Internal Revenue Service ("IRS") to pay such sums as deemed necessary for: "(1) detecting underpayments of tax; or (2) detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same."[326] Generally, amounts are paid based on a percentage of proceeds collected based on the information provided.

The Tax Relief and Health Care Act of 2006 (the "Act")[327] established an enhanced reward program for actions in which the tax, penalties, interest, additions to tax, and additional amounts in dispute exceed $2,000,000 and, if the taxpayer is an individual, the individual's gross income exceeds $200,000 for any taxable year in issue. In such cases, the award is calculated to be at least 15 percent but not more than 30 percent of collected proceeds (including penalties, interest, additions to tax, and additional amounts).

The Act permits an individual to appeal the amount or a denial of an award determination to the United States Tax Court (the "Tax Court") within 30 days of such determination. Tax Court review of an award determination may be assigned to a special trial judge.

Rules relating to taxpayers with foreign assets

U.S. persons who transfer assets to, and hold interests in, foreign bank accounts or foreign entities may be subject to self-reporting requirements under both the Foreign Account Tax Compliance Act provisions in the Code and the provisions in the Bank Secrecy Act and its underlying regulations (which provide for FinCEN Form

[322] Secs. 7623 and 62(a)(21).
[323] Secs. 7623 and 62(a)(21).
[324] 15 U.S.C. secs. 78u–6 and 78u–7.
[325] 7 U.S.C. sec. 26.
[326] Sec. 7623.
[327] Pub. L. No. 109–432.

114, Report of Foreign Bank and Financial Accounts, known as the "FBAR"), as discussed below. Amounts recovered for violations of FATCA provisions in the Code may be considered for purposes of computing a whistleblower award under the Code. However, the IRS has found that amounts recovered for violations of non-tax laws, including the provisions of the Bank Secrecy Act (and FBAR) for which the IRS has delegated authority, may not be considered for purposes of computing an award under the Code.[328]

Foreign Account Tax Compliance Act

The Code imposes a withholding and reporting regime for U.S. persons engaged in foreign activities, directly or indirectly, through a foreign business entity.[329] This regime for outbound payments,[330] commonly referred to as the Foreign Account Tax Compliance Act ("FATCA"),[331] imposes a withholding tax of 30 percent of the gross amount of certain payments to foreign financial institutions ("FFIs") unless the FFI establishes that it is compliant with the information reporting requirements of FATCA, which include identifying certain U.S. accounts held in the FFI. An FFI must report with respect to a U.S. account (1) the name, address, and taxpayer identification number of each U.S. person holding an account or a foreign entity with one or more substantial U.S. owners holding an account; (2) the account number; (3) the account balance or value; and (4) except as provided by the Secretary, the gross receipts, including from dividends and interest, and gross withdrawals or payments from the account.[332]

Individuals are required to disclose with their annual Federal income tax return any interest in foreign accounts and certain foreign securities if the aggregate value of such assets is in excess of the greater of $50,000 or an amount determined by the Secretary in regulations. Failure to do so is punishable by a penalty of $10,000, which may increase for each 30-day period during which the failure continues after notification by the IRS, up to a maximum penalty of $50,000.[333]

Report of Foreign Bank and Financial Accounts

In addition to the reporting requirements under the Code, U.S. persons who transfer assets to, and hold interests in, foreign bank accounts or foreign entities may be subject to self-reporting requirements under the Bank Secrecy Act.[334]

The Bank Secrecy Act imposes reporting obligations on both financial institutions and account holders. With respect to account

[328] Chief Counsel Memorandum, "Scope of Awards Payable Under I.R.C. section 7623," April 23, 2012, available at http://www.tax-whistleblower.com/resources/PMTA-2012-10.pdf. Under Title 31, "[t]he Secretary may pay a reward to an individual who provides original information which leads to a recovery of a criminal fine, civil penalty, or forfeiture, which exceeds $50,000, for a violation of [chapter 53 of Title 31]. The Secretary shall determine the amount of a reward . . . [and] may not award more than 25 per centum of the net amount of the fine, penalty, or forfeiture collected or $150,000, whichever is less." 31 U.S.C. sec. 5323.

[329] See, *e.g.,* secs. 6038, 6038B, and 6046.

[330] Hiring Incentives to Restore Employment Act of 2010, Pub. L. No. 111–147.

[331] Foreign Account Tax Compliance Act of 2009 is the name of the House and Senate bills in which the provisions first appeared. See H.R. 3933 and S. 1934 (October 27, 2009).

[332] Sec. 1471(c).

[333] Sec. 6038D. Guidance on the scope of reporting required, the threshold values triggering reporting requirements for various fact patterns and how the value of assets is to be determined is found in Treas. Reg. secs. 1.6038D–1 to –8.

[334] Bank Secrecy Act, 31 U.S.C. secs. 5311–5332.

holders, a U.S. citizen, resident, or person doing business in the United States is required to keep records and file reports, as specified by the Secretary, when that person enters into a transaction or maintains an account with a foreign financial agency.[335] Regulations promulgated pursuant to broad regulatory authority granted to the Secretary in the Bank Secrecy Act[336] provide additional guidance regarding the disclosure obligation with respect to foreign accounts.

The FBAR must be filed by June 30[337] of the year following the year in which the $10,000 filing threshold is met.[338] Failure to file the FBAR is subject to both criminal[339] and civil penalties.[340] Willful failure to file an FBAR may be subject to penalties in amounts not to exceed the greater of $100,000 or 50 percent of the amount in the account at the time of the violation.[341] A non-willful, but negligent, failure to file is subject to a penalty of $10,000 for each negligent violation.[342] The penalty may be waived if (1) there is reasonable cause for the failure to report and (2) the amount of the transaction or balance in the account was properly reported. In addition, serious violations are subject to criminal prosecution, potentially resulting in both monetary penalties and imprisonment. Civil and criminal sanctions are not mutually exclusive.

FBAR enforcement responsibility

Until 2003, the Financial Crimes Enforcement Network ("FinCEN"), an agency of the Department of the Treasury, had exclusive responsibility for civil penalty enforcement of FBAR, although administration of the FBAR reporting regime was delegated to the IRS.[343] As a result, persons who were more than 180 days delinquent in paying any FBAR penalties were referred for collection action to the Financial Management Service of the Treasury Department, which is responsible for such non-tax collections.[344] Continued nonpayment resulted in a referral to the Department of Justice for institution of court proceedings against the delinquent

[335] 31 U.S.C. sec. 5314. The term "agency" in the Bank Secrecy Act includes financial institutions.

[336] 31 U.S.C. sec. 5314(a) provides: "Considering the need to avoid impeding or controlling the export or import of monetary instruments and the need to avoid burdening unreasonably a person making a transaction with a foreign financial agency, the Secretary of the Treasury shall require a resident or citizen of the United States or a person in, and doing business in, the United States, to keep records, file reports, or keep records and file reports, when the resident, citizen, or person makes a transaction or maintains a relation for any person with a foreign financial agency."

[337] The Surface Transportation and Veterans Health Care Choice Improvement Act of 2015, Pub. L. No. 114–41, changed the filing date for FinCEN Form 114 from June 30 to April 15 (with a maximum extension for a 6-month period ending on October 15 and with provision for an extension under rules similar to the rules in Treas. Reg. section 1.6081–5) for tax returns for taxable years beginning after December 31, 2015.

[338] 31 C.F.R. sec. 103.27(c). The $10,000 threshold is the aggregate value of all foreign financial accounts in which a U.S. person has a financial interest or over which the U.S. person has signature or other authority.

[339] 31 U.S.C. sec. 5322 (failure to file is punishable by a fine up to $250,000 and imprisonment for five years, which may double if the violation occurs in conjunction with certain other violations).

[340] 31 U.S.C. sec. 5321(a)(5).

[341] 31 U.S.C. sec. 5321(a)(5)(C).

[342] 31 U.S.C. sec. 5321(a)(5)(B)(i), (ii).

[343] Treas. Directive 15–14 (December 1, 1992), in which the Secretary delegated to the IRS authority to investigate violations of the Bank Secrecy Act. If the IRS Criminal Investigation Division declines to pursue a possible criminal case, it is to refer the matter to FinCEN for civil enforcement.

[344] 31 U.S.C. sec. 3711(g).

person. In 2003, the Secretary delegated FBAR civil enforcement authority to the IRS.[345] The authority delegated to the IRS in 2003 included the authority to determine and enforce civil penalties,[346] as well as to revise the form and instructions. However, the Bank Secrecy Act does not include collection powers similar to those available for enforcement of the tax laws under the Code. As a consequence, FBAR civil penalties remain collectible only in accord with the procedures for non-tax collection described above.

FBAR and awards to whistleblowers

Recent cases have considered FBAR penalties in connection with IRS whistleblower awards.[347] One case analyzed the provision dealing with "additional amounts in dispute" and linked that concept to amounts assessed and collected under the Code, which FBAR is not.[348] The issue was whether FBAR penalties constituted "additional amounts" for purposes of determining whether "additional amounts in dispute exceed $2,000,000." The case was disposed on summary judgment on the grounds that FBAR penalties are not assessed, collected or paid in the same manner as taxes. As such, they are not additional amounts in dispute and therefore the threshold was not exceeded. Notably, the court suggested that the petitioner present its policy arguments to Congress based on the fact that the connection between FBAR and tax enforcement justified the Secretary to redelegate FBAR administrative authority to the IRS.[349]

Another case dealt with the provision "collected proceeds" and held that the term is not limited to amounts assessed and collected under Title 26.[350] The issue in the case was whether payments of a criminal fine and civil forfeitures constitute collected proceeds.

The criminal fine was imposed under Title 18 as a result of guilty plea to conspiring to defraud the IRS, file false Federal income tax returns, and evade Federal income taxes. The money was forfeited pursuant to Title 18. The IRS argued that criminal fines and forfeitures are not collected proceeds because only amounts assessed and collected under Title 26 can be used to pay a whistleblower award. The IRS also argued that a criminal fine collected by the Government cannot be considered collected proceeds because (1) pursuant to 42 U.S.C. sec. 10601 all criminal fines collected from persons convicted of offenses against the United States are to be deposited in the Crime Victims Fund; (2) criminal fines are paid by the taxpayer directly to the imposing court, which in turn deposits them into the Crime Victims Fund; and (3) at no time are crimi-

[345] 31 C.F.R. sec. 103.56(g). Memorandum of Agreement and Delegation of Authority for Enforcement of FBAR Requirements (April 2, 2003); News Release, Internal Revenue Service, IR–2003–48 (April 10, 2003). Secretary of the Treasury, "A Report to Congress in Accordance with sec. 361(b) of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act)" (April 24, 2003).

[346] A penalty may be assessed before the end of the six-year period beginning on the date of the transaction with respect to which the penalty is assessed. 31 U.S.C. sec. 5321(b)(1). A civil action for collection may be commenced within two years of the later of the date of assessment and the date a judgment becomes final in any a related criminal action. 31 U.S.C. sec. 5321(b)(2).

[347] *Whistleblower 22716–13W* v. *Commissioner*, 146 T.C. No. 6 (March 14, 2016); and *Whistleblower 21276–13W* v. *Commissioner*, 147 T.C. No. 4 (August 3, 2016).

[348] *Whistleblower 22716–13W* v. *Commissioner*, 146 T.C. No. 6 (March 14, 2016).

[349] *Whistleblower 22716–13W* v. *Commissioner*, 146 T.C. No. 6 at 26–27.

[350] *Whistleblower 21276–13W* v. *Commissioner*, 147 T.C. No. 4 (August 3, 2016).

nal fines available to the Secretary. The court said that the Code did not refer to, or require, the availability of funds to be used in making an award.[351]

Petitioners said the payment resulted from action taken by Secretary and relates to acts committed by taxpayer in violation of Title 26 provisions. The court agreed and held that collected proceeds are not limited to amounts assessed and collected under Title 26. In reaching its holding it referenced *Whistleblower 21276–13W* v. *Commissioner*, discussed above, and noted there is no inconsistency because the issue there was about whether the threshold of $2,000,000 was exceeded. It is not clear whether FBAR penalties would be included under the holding because in the case, the taxpayer did violate Title 26 (even if the penalties were imposed under Title 18).

Explanation of Provision

Under the provision, collected proceeds eligible for awards under the Code are defined to include: (1) penalties, interest, additions to tax, and additional amounts; and (2) any proceeds under enforcement programs that the Treasury has delegated to the IRS the authority to administer, enforce, or investigate, including criminal fines and civil forfeitures, and violations of reporting requirements. This definition is also used to determine eligibility for the enhanced reward program under which proceeds and additional amounts in dispute exceed $2,000,000.

The collected proceeds amounts are determined without regard to whether such proceeds are available to the Secretary.

Effective Date

The provision is effective for information provided before, on, or after the date of enactment (February 9, 2018) with respect to which a final determination has not been made before such date.

8. Clarification regarding excise tax based on investment income of private colleges and universities (sec. 41109 of the Act 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 education institution (as defined in section 25A):[352] (1) that has at least 500 students during the preceding taxable year; (2) more than 50 percent of the students of which are located in the United States; (3) that is not described in the first section of section 511(a)(2)(B) of

[351] *Whistleblower 21276–13W* v. *Commissioner*, 147 T.C. No. 4 at 28–29.

[352] Section 25A(f)(2) defines an eligible educational institution as an institution (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) which is eligible to participate in a program under title IV of such Act.

the Code (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)[353] 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[354] 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 persons that control the institution; or (3) is a supported organization[355] or a supporting organization[356] during the taxable year with respect to the institution.

It is intended that the Secretary promulgate regulations to carry out the intent of the provision, including regulations that describe: (1) assets that are used directly in carrying out the educational institution's exempt purpose; (2) the computation of net investment income; and (3) assets that are intended or available for the use or benefit of the educational institution.

The IRS and Treasury Department have issued a notice addressing this provision.[357]

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[353] 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.

[354] In cross-referencing the asset-per-student threshold for this purpose, new 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.

[355] Sec. 509(f)(3).

[356] Sec. 509(a)(3).

[357] Notice 2018–55, 2018–26 I.R.B. 773, June 25, 2018.

Explanation of Provision

The provision modifies the definition of "applicable educational institution" by requiring that students be *tuition paying* students for purposes of the requirements that (1) the institution must have at least 500 students during the preceding taxable year,[358] and (2) more than 50 percent of the institution's students must be located in the United States.[359]

Effective Date

The provision is effective for taxable years beginning after December 31, 2017.

9. Exception from private foundation excess business holding tax for independently-operated philanthropic business holdings (sec. 41110 of the Act and sec. 4943 of the Code)

Present Law

Public charities and private foundations

An organization qualifying for tax-exempt status under section 501(c)(3) is further classified as either a public charity or a private foundation. An organization may qualify as a public charity in several ways.[360] Certain organizations are classified as public charities per se, regardless of their sources of support. These include churches, certain schools, hospitals and other medical organizations (including medical research organizations), certain organizations providing assistance to colleges and universities, and governmental units.[361] Other organizations qualify as public charities because they are broadly publicly supported. First, a charity may qualify as publicly supported if at least one-third of its total support is from gifts, grants, or other contributions from governmental units or the general public.[362] Alternatively, it may qualify as publicly supported if it receives more than one-third of its total support from a combination of gifts, grants, and contributions from governmental units and the public plus revenue arising from activities related to its exempt purposes (*e.g.,* fee-for-service income). In addition, this category of public charity must not rely excessively on endowment income as a source of support.[363] A supporting organization (*i.e.,* an organization that provides support to another section 501(c)(3) enti-

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[358] Sec. 4968(b)(1)(A).

[359] Sec. 4968(b)(1)(B).

[360] The Code does not expressly define the term "public charity," but rather provides exceptions for those entities that are treated as private foundations.

[361] Sec. 509(a)(1) (referring to sec. 170(b)(1)(A)(i) through (iv) for a description of these organizations).

[362] Treas. Reg. sec. 1.170A–9(f)(2). Failing this mechanical test, the organization may qualify as a public charity if it passes a "facts and circumstances" test. Treas. Reg. sec. 1.170A–9(f)(3).

[363] To meet this requirement, the organization must normally receive more than one-third of its support from a combination of (1) gifts, grants, contributions, or membership fees and (2) certain gross receipts from admissions, sales of merchandise, performance of services, and furnishing of facilities in connection with activities that are related to the organization's exempt purposes. Sec. 509(a)(2)(A). In addition, the organization must not normally receive more than one-third of its public support in each taxable year from the sum of (1) gross investment income and (2) the excess of unrelated business taxable income as determined under section 512 over the amount of unrelated business income tax imposed by section 511. Sec. 509(a)(2)(B).

ty that is not a private foundation and meets certain other requirements of the Code) also is classified as a public charity.[364]

A section 501(c)(3) organization that does not fit within any of the above categories is a private foundation. In general, private foundations receive funding from a limited number of sources (*e.g.,* an individual, a family, or a corporation).

The deduction for charitable contributions to private foundations is in some instances less generous than the deduction for charitable contributions to public charities. In addition, private foundations are subject to a number of operational rules and restrictions that do not apply to public charities, as well as a tax on their net investment income.[365]

Excess business holdings of private foundations

Private foundations are subject to tax on excess business holdings.[366] In general, a private foundation is permitted to hold 20 percent of the voting stock in a corporation, reduced by the amount of voting stock held by all disqualified persons (as defined in section 4946). If it is established that no disqualified person has effective control of the corporation, a private foundation and disqualified persons together may own up to 35 percent of the voting stock of a corporation. A private foundation shall not be treated as having excess business holdings in any corporation if it owns (together with certain other related private foundations) not more than two percent of the voting stock and not more than two percent in value of all outstanding shares of all classes of stock in that corporation. Similar rules apply with respect to holdings in a partnership (substituting "profits interest" for "voting stock" and "capital interest" for "nonvoting stock") and to other unincorporated enterprises (by substituting "beneficial interest" for "voting stock"). Private foundations are not permitted to have holdings in a proprietorship. Foundations generally have a five-year period to dispose of excess business holdings (acquired other than by purchase) without being subject to tax.[367] This five-year period may be extended an additional five years in limited circumstances.[368] The excess business holdings rules do not apply to holdings in a functionally related business or to holdings in a trade or business at least 95 percent of the gross income of which is derived from passive sources.[369]

The initial tax is equal to five percent of the value of the excess business holdings held during the foundation's applicable taxable year. An additional tax is imposed if an initial tax is imposed and

[364] Sec. 509(a)(3). Organizations organized and operated exclusively for testing for public safety also are classified as public charities. Sec. 509(a)(4). Such organizations, however, are not eligible to receive deductible charitable contributions under section 170.

[365] Unlike public charities, private foundations are subject to tax on their net investment income at a rate of two percent (one percent in some cases). Sec. 4940. Private foundations also are subject to more restrictions on their activities than are public charities. For example, private foundations are prohibited from engaging in self-dealing transactions (sec. 4941), are required to make a minimum amount of charitable distributions each year (sec. 4942), are limited in the extent to which they may control a business (sec. 4943), may not make speculative investments (sec. 4944), and may not make certain expenditures (sec. 4945). Violations of these rules result in excise taxes on the foundation and, in some cases, may result in excise taxes on the managers of the foundation.

[366] Sec. 4943. Taxes imposed may be abated if certain conditions are met. Secs. 4961 and 4962.

[367] Sec. 4943(c)(6).

[368] Sec. 4943(c)(7).

[369] Sec. 4943(d)(3).

at the close of the applicable taxable period, the foundation continues to hold excess business holdings. The amount of the additional tax is equal to 200 percent of such holdings.

Explanation of Provision

The provision creates an exception to the excess business holdings rules for certain philanthropic business holdings. Specifically, the tax on excess business holdings does not apply with respect to the holdings of a private foundation in any business enterprise that, for the taxable year, satisfies the following requirements: (1) the ownership requirements; (2) the "all profits to charity" distribution requirement; and (3) the independent operation requirements.

The ownership requirements are satisfied if: (1) all ownership interests in the business enterprise are held by the private foundation at all times during the taxable year; and (2) all the private foundation's ownership interests in the business enterprise were acquired by means other than by purchase.

The "all profits to charity" distribution requirement is satisfied if the business enterprise, not later than 120 days after the close of the taxable year, distributes an amount equal to its net operating income for such taxable year to the private foundation. For this purpose, the net operating income of any business enterprise for any taxable year is an amount equal to the gross income of the business enterprise for the taxable year, reduced by the sum of: (1) the deductions allowed by chapter 1 of the Code for the taxable year that are directly connected with the production of the income; (2) the tax imposed by chapter 1 on the business enterprise for the taxable year; and (3) an amount for a reasonable reserve for working capital and other business needs of the business enterprise.

The independent operation requirements are met if, at all times during the taxable year, the following three requirements are satisfied. First, no substantial contributor to the private foundation, or family member of such a contributor, is a director, officer, trustee, manager, employee, or contractor of the business enterprise (or an individual having powers or responsibilities similar to any of the foregoing). Second, at least a majority of the board of directors of the private foundation are not also directors or officers of the business enterprise or members of the family of a substantial contributor to the private foundation. Third, there is no loan outstanding from the business enterprise to a substantial contributor to the private foundation or a family member of such contributor. For purposes of the independent operation requirements, "substantial contributor" has the meaning given to the term under section 4958(c)(3)(C), and family members are determined under section 4958(f)(4).

The provision does not apply to the following organizations: (1) donor advised funds or supporting organizations that are subject to the excess business holdings rules by reason of section 4943(e) or (f); (2) any trust described in section 4947(a)(1) (relating to charitable trusts); or (3) any trust described in section 4947(a)(2) (relating to split-interest trusts).

Effective Date

The provision is effective for taxable years beginning after December 31, 2017.

10. Rule of construction for Craft Beverage Modernization and Tax Reform (sec. 41111 of the Act)

Present Law

Subpart A of part IX of subtitle C of title I of Public Law 115–97 amended the Code to reform the taxation of alcoholic beverages. That subpart includes eight provisions that address the production period for beer, wine, and distilled spirits; reduce the rate of excise tax on beer; address the transfer of beer between bonded facilities; reduce the rate of excise tax on certain wine; adjust the alcohol content level for application of excise tax rates; address the definition of mead and low alcohol by volume wine; reduce the rate of excise tax on certain distilled spirits; and address the taxation of bulk distilled spirits.

Explanation of Provision

The provision adds a rule of construction to Subpart A of part IX of subtitle C of title I of Public Law 115–97, clarifying that nothing in the reforms to the taxation of alcoholic beverages made by such subpart or any regulations promulgated under such subpart should be construed to preempt, supersede, or otherwise limit or restrict any State, local, or tribal law that prohibits or regulates the production or sale of distilled spirits, wine, or malt beverages.

Effective Date

The provision is effective as if included in Public Law 115–97.

11. Simplification of rules regarding records, statements, and returns (sec. 41112 of the Act and sec. 5555 of the Code)

Present Law

The Code requires those liable for taxation on alcoholic beverages to keep such records, render such statements, make such returns, and comply with such rules and regulations as prescribed by the Secretary.[370]

Explanation of Provision

Under the provision, the Secretary shall permit a unified system for any records, statements, and returns required to be kept, rendered, or made for any beer produced in a brewery for which tax is imposed, including any beer that has been removed for consumption on the premises of the brewery.

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[370] Sec. 5555(a).

Effective Date

The provision is effective for calendar quarters beginning after February 9, 2018, and before January 1, 2020.

12. Modifications of rules governing hardship distributions (sec. 41113 of the Act and secs. 401(k) and 403(b) of the Code)

Present Law

A qualified defined contribution plan may include a qualified cash or deferred arrangement, under which employees may elect to have contributions made to the plan (referred to as "elective deferrals") rather than receive the same amount as current compensation (referred to as a "section 401(k) plan"). A section 403(b) plan may also include an elective deferral arrangement. Amounts attributable to elective deferrals under a section 401(k) plan or a section 403(b) plan generally cannot be distributed before the occurrence of one or more specified events, including financial hardship of the employee.[371]

Applicable Treasury regulations provide that a distribution is made on account of hardship only if the distribution is made on account of an immediate and heavy financial need of the employee and is necessary to satisfy the heavy need.[372] Generally, the determination of whether these two requirements is met is based on the relevant facts and circumstances. However, the Treasury regulations provide a safe harbor under which a distribution may be deemed necessary to satisfy an immediate and heavy financial need. One requirement of this safe harbor is that the employee be prohibited from making elective deferrals and employee contributions to the plan and all other plans maintained by the employer for at least six months after receipt of the hardship distribution.

Explanation of Provision

The provision directs the Secretary of the Treasury to modify the applicable regulations[373] relating to the hardship safe harbor within one year of the date of enactment to (1) delete the requirement that an employee be prohibited from making elective deferrals and employee contributions for six months after the receipt of a hardship distribution in order for the distribution to be deemed necessary to satisfy an immediate and heavy financial need, and (2) make any other modifications necessary to carry out the purposes of the rule allowing elective deferrals to be distributed in the case of hardship. Thus, under the modified regulations, an employee would not be prevented for any period after the receipt of a hardship distribution from continuing to make elective deferrals and employee contributions.

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[371] Secs. 401(k)(2)(B)(i)(IV) and 403(b)(7)(A)(ii) and (11)(B). Other types of contributions may also be subject to this restriction. Under section 72(t), distributions on account of hardship may be subject to an additional 10-percent early withdrawal tax.

[372] Treas. Reg. sec. 1.401(k)–1(d)(3).

[373] Treas. Reg. sec. 1.401(k)–1(d)(3)(iv)(E).

Effective Date

The regulations as revised by the provision shall apply to plan years beginning after December 31, 2018.

13. Modification of rules relating to hardship withdrawals from cash or deferred arrangements (sec. 41114 of the Act and sec. 401(k) of the Code)

Present Law

Amounts attributable to elective deferrals (including earnings thereon) under a section 401(k) plan generally cannot be distributed before the earliest of the employee's severance from employment, death, disability or attainment of age 59½, or termination of the plan. Elective deferrals, but not associated earnings, may be distributed on account of hardship.[374]

An employer may also make nonelective and matching contributions for employees under a section 401(k) plan. Elective deferrals, and matching contributions and after-tax employee contributions, are subject to special tests ("nondiscrimination tests") to prevent discrimination in favor of highly compensated employees. Nonelective contributions and matching contributions that satisfy certain requirements ("qualified nonelective contributions and qualified matching contributions") may be used to enable the plan to satisfy these nondiscrimination tests. One of the requirements is that these contributions be subject to the same distribution restrictions as elective deferrals, except that these contributions (and associated earnings) are not permitted to be distributed on account of hardship.

Applicable Treasury regulations provide that a distribution is made on account of hardship only if the distribution is made on account of an immediate and heavy financial need of the employee and is necessary to satisfy the heavy need.[375] Generally, the determination of whether these two requirements is met is based on the relevant facts and circumstances. However, the Treasury regulations provide a safe harbor under which a distribution may be deemed necessary to satisfy an immediate and heavy financial need. One requirement of the safe harbor is that the employee represent that the need cannot be satisfied through currently available plan loans. This in effect requires an employee to take any available plan loan before receiving a hardship distribution.

Explanation of Provision

The provision allows earnings on elective deferrals under a section 401(k) plan, as well as qualified nonelective contributions and qualified matching contributions (and associated earnings), to be distributed on account of hardship. Further, a distribution is not treated as failing to be on account of hardship solely because the employee does not take any available plan loan.

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[374] Sec. 401(k)(2)(B)(i). Under section 72(t), distributions on account of hardship may be subject to an additional 10-percent early withdrawal tax.

[375] Treas. Reg. sec. 1.401(k)–1(d)(3).

Effective Date

The provision applies to plan years beginning after December 31, 2018.

14. Opportunity zones rule for Puerto Rico (sec. 41115 of the Act and sec. 1400Z–1 of the Code)

Present Law

In general

The provision allows taxpayers to make an election when investing in a qualified opportunity fund. The election results in the following three tax benefits: (1) the temporary deferral of inclusion in gross income of capital gains,[376] (2) the partial exclusion of such capital gains from gross income to the extent invested in the qualified opportunity fund for a certain length of time, and (3) the permanent exclusion of post-acquisition capital gains from the sale or exchange of an interest in a qualified opportunity fund held for at least 10 years.

The provision allows for the designation of certain low-income community population census tracts as qualified opportunity zones.[377] In addition, a limited number of other census tracts that are not low-income communities can be designated if they are contiguous to a designated low-income community and the median family income of such tracts does not exceed 125 percent of the median family income of the contiguous low-income community. The designation of a population census tract as a qualified opportunity zone remains in effect for the period beginning on the date of the designation and ending at the close of the tenth calendar year beginning on or after the date of designation.

The chief executive officer of the State, possession, or the District of Columbia (*i.e.*, Governor or mayor in the case of the District of Columbia) may submit nominations for a limited number of opportunity zones to the Secretary for certification and designation. If the number of low-income communities in a State is fewer than 100, the Governor may designate up to 25 tracts, otherwise the Governor may designate tracts not exceeding 25 percent of the number of low-income communities in the State.

Qualified opportunity funds

A qualified opportunity fund is an investment vehicle organized as a corporation or a partnership for the purpose of investing in qualified opportunity zone property (other than another qualified opportunity fund) that holds at least 90 percent of its assets in qualified opportunity zone property. The provision intends that the certification process for a qualified opportunity fund will be carried out in a manner similar to the process for allocating the new markets tax credit. The Secretary is granted the authority to administer this process.

If a qualified opportunity fund fails to meet the 90 percent requirement, unless the fund establishes reasonable cause, the fund

[376] A technical correction may be needed to reflect this intent.
[377] See sec. 45D(e) for the definition of low-income community.

is required to pay a monthly penalty of the excess of the amount equal to 90 percent of its aggregate assets, over the aggregate amount of qualified opportunity zone property held by the fund multiplied by the underpayment rate in the Code.[378] If the fund is a partnership, the penalty is taken into account proportionately as part of each partner's distributive share.

Qualified opportunity zone property

Qualified opportunity zone property means: (1) qualified opportunity zone stock, (2) qualified opportunity zone partnership interest, and (3) qualified opportunity zone business property.

Qualified opportunity zone stock consists of stock in a domestic corporation that is a qualified opportunity zone business. There are three requirements that must be met for property to be considered qualified opportunity zone stock.[379] First, the stock must be acquired at original issuance (directly or indirectly through an underwriter) solely for cash after December 31, 2017. Second, the corporation must have been a qualified opportunity zone business when the stock was issued (or, for a new corporation, was being organized to be a qualified opportunity zone business). Third, the corporation must qualify as a qualified opportunity zone business during substantially all of the qualified opportunity fund's holding period for the stock.

Qualified opportunity zone partnership interest consists of capital or profits interests in a domestic partnership that is a qualified opportunity zone business. There are three requirements that must be met for property to be considered a qualified opportunity zone partnership interest.[380] First, the interest must be acquired from the partnership solely for cash after December 31, 2017. Second, the partnership must have been a qualified opportunity zone business when the interest was acquired (or, for a new partnership, was being organized to be a qualified opportunity zone business). Third, the partnership must qualify as a qualified opportunity zone business during substantially all of the qualified opportunity fund's holding period for the interest.

Qualified opportunity zone business property consists of tangible property used in the trade or business of a qualified opportunity fund or qualified opportunity zone business. There are three main requirements that must be met for property to be considered qualified opportunity zone business property.[381] First, the property must be acquired by purchase[382] after December 31, 2017. Second, the original use of the property in the qualified opportunity zone must begin with the qualified opportunity fund or qualified opportunity zone business, or the qualified opportunity fund or qualified opportunity zone business must substantially improve the property. Only new or substantially improved property qualifies as opportunity zone business property.[383] Third, substantially all of the property must be in a qualified opportunity zone during substantially all of

[378] Sec. 6621.
[379] Sec. 1400Z–2(d)(2)(B).
[380] Sec. 1400Z–2(d)(2)(C).
[381] Sec. 1400Z–2(d)(2)(D).
[382] Certain related party purchases are excluded. See secs. 1400Z–2(d)(2)(D)(i)(I), 1400Z–2(d)(2)(D)(iii), and 1400Z–2(e)(2).
[383] A technical correction may be necessary to reflect this intent.

qualified opportunity fund's or qualified opportunity zone business's holding period for the property. Property is treated as substantially improved only if capital expenditures on the property in the 30 months after acquisition exceeds the property's adjusted basis on the date of acquisition.

A qualified opportunity zone business is any trade or business in which substantially all of the underlying value of the tangible property owned or leased by the business is qualified opportunity zone business property.

In addition, (1) at least 50 percent of the total gross income of the trade or business must be derived from the active conduct of business in the qualified opportunity zone, (2) a substantial portion of the business's intangible property must be used in the active conduct of business in the qualified opportunity zone, and (3) less than five percent of the average of the aggregate adjusted bases of the property of the business is attributable to nonqualified financial property.[384] Nonqualified financial property means debt, stock, partnership interests, annuities, and derivative financial instruments (including options, futures, forward contracts, and notional principal contracts), other than (1) reasonable amounts of working capital held in cash, cash equivalents, or debt instruments with a term of no more than 18 months, and (2) accounts or notes receivable acquired in the ordinary course of a trade or business for services rendered or from the sale of inventory property.[385] The business cannot be a golf course, country club, massage parlor, hot tub or suntan facility, racetrack or other facility used for gambling, or store whose principal business is the sale of alcoholic beverages for consumption off premises.[386]

Tangible property that ceases to be a qualified opportunity zone business property continues to be treated as a qualified opportunity zone business property for the lesser of five years after the date on which such tangible property ceases to be so qualified, or the date on which such tangible property is no longer held by the qualified opportunity zone business.[387]

Tax treatment of a deferred-gain investment

A taxpayer may elect to temporarily defer and partially exclude capital gains from gross income to the extent that the taxpayer invests the amount of those gains in a qualified opportunity fund. The maximum amount of the deferred gain is equal to the amount invested in a qualified opportunity fund by the taxpayer during the 180-day period beginning on the date of the asset sale that produced the gain to be deferred. Capital gains in excess of the deferred amount must be recognized and included in gross income.

In the case of any investment in a qualified opportunity fund, only a portion of which consists of the investment of gain with respect to which an election is made, such investment is treated as two separate investments, consisting of one investment that includes only amounts to which the election applies (herein "deferred-gain investment"), and a separate investment consisting of other

[384] Sec. 1400Z–2(d)(3)(A)(ii).
[385] Secs. 1400Z–2(d)(3)(A)(ii), 1397C(b)(8), and 1397C(e).
[386] Secs. 1400Z–2(d)(3)(A)(iii) and 144(c)(6)(B).
[387] Sec. 1400Z–2(d)(3)(B).

amounts. The temporary deferral and permanent exclusion provisions do not apply to the separate investment. For example, if a taxpayer sells stock at a gain and invests the entire sales proceeds (capital and return of basis) in a qualified opportunity zone fund, an election may be made only with respect to the capital gain amount. No election may be made with respect to amounts attributable to a return of basis, and no special tax benefits apply to such amounts.

The basis of a deferred-gain investment in a qualified opportunity zone fund immediately after its acquisition is zero. If the deferred-gain investment in the qualified opportunity zone fund is held by the taxpayer for at least five years, the basis in the deferred-gain investment is increased by 10 percent of the original deferred gain. If the opportunity zone asset or investment is held by the taxpayer for at least seven years, the basis in the deferred gain investment is increased by an additional five percent of the original deferred gain. Some or all of the deferred gain is recognized on the earlier of the date on which the qualified opportunity zone investment is disposed of or December 31, 2026. The amount of gain recognized is the excess of the lesser of the amount deferred and the current fair market value of the investment (taking into account any increases at the end of five or seven years). The taxpayer's basis in the investment is increased by the amount of gain recognized. No election under the provision may be made after December 31, 2026.

Exclusion of capital gains from the sale or exchange of an investment in a qualified opportunity fund

The provision excludes from gross income the post-acquisition capital gains on deferred-gain investments in opportunity zone funds that are held for at least 10 years. Specifically, in the case of the sale or exchange of an investment in a qualified opportunity zone fund held for more than 10 years, a further election is allowed by the taxpayer to modify the basis of such deferred-gain investment in the hands of the taxpayer to be the fair market value of the deferred-gain investment at the date of such sale or exchange.

In the case of a fund organized as a pass-through entity, investors recognize gains and losses associated with both deferred-gain and non-deferred gain investments in the fund, under the rules generally applicable to pass-through entities. Thus, for example, investor-partners in a fund organized as a partnership would recognize income and increase their basis with respect to their distributive share of the fund's taxable income.

The Treasury Department has proposed guidance addressing this provision.[388]

Example

Assume a taxpayer sells stock for a gain of $1,000 on January 1, 2019, and invests $1,000 in the stock of a qualified opportunity fund. Assume also that the taxpayer holds the investment for 10 years and then sells the investment for $1,500.

[388] Notice 2018–48, I.R.B. 2018–28 (July 9, 2018) and Prop. Treas. Reg. sec. 1.1400Z–2.

The taxpayer's initial basis in the deferred-gain investment is zero. After five years, the basis is increased to $100. After seven years, the basis is increased to $150. At the end of 2026, assume that the fair market value of the deferred-gain investment is at least $1,000, and thus the taxpayer has to recognize $850 of the deferred capital gain. So at that point the basis in the deferred-gain investment is $1,000 ($150 + $850). If the taxpayer holds the deferred-gain investment for 10 years and makes the election to increase the basis, the $500 post-acquisition capital gain on the sale is excluded.

Explanation of Provision

Each population census tract in Puerto Rico that is a low-income community is deemed certified and designated as a qualified opportunity zone.

Effective Date

The provision is effective on the date of enactment of Pub. L. No. 115–97 (December 22, 2017).

15. Tax home of certain citizens or residents of the United States living abroad (sec. 41116 of the Act and sec. 911 of the Code)

Present Law

U.S. citizens generally are subject to U.S. income tax on all their income, whether derived in the United States or elsewhere. Under section 911, a U.S. citizen or resident living abroad may be eligible to exclude from U.S. taxable income certain foreign earned income and foreign housing costs, without regard to whether any foreign tax is paid on the foreign earned income or housing costs, if the individual can establish that he or she is a "qualified individual."[389]

A qualified individual is a taxpayer with a tax home in a foreign country who meets one of two tests of foreign residency. First, a U.S. citizen may establish foreign residence by proving bona fide residence in a foreign country or countries for an uninterrupted period that includes an entire taxable year. Alternatively, both U.S. citizens and U.S. residents may establish foreign residence by demonstrating physical presence in a foreign country or countries for at least 330 full days in any 12-consecutive-month period.

For purposes of the qualified individual tests, a special definition of tax home is used. It is based on the general principle that tax home is the taxpayer's principal place of employment or business, unless such employment is temporary rather than indefinite, as used to determine deductibility of travel expenses. Unlike the general rules regarding existence of a tax home, a foreign tax home cannot be established for any period in which a person maintains

[389] Sec. 911. Amounts paid by the United States or any U.S. agency to an employee thereof are not treated as foreign earned income and therefore are not eligible for the exclusion from income. See sec. 911(b)(1)(B). Officers and employees may be eligible to exclude certain payments for service abroad under section 912 (civilian Federal employees and Peace Corps volunteers) or section 112 (exempting certain combat zone compensation for members of the U.S. Armed Forces).

his abode in the United States.[390] The determination of whether an individual maintains an abode in the United States is based on facts and circumstances, sometimes leading to anomalous results.[391]

The maximum amount of foreign earned income that an individual may exclude is adjusted annually. For taxable year 2018, the maximum exclusion is $103,900.[392] The maximum amount of foreign housing costs that an individual may exclude is also adjusted annually, based on the maximum foreign earned income excludible as well as Treasury adjustments for geographic differences in housing costs.[393] The combined foreign earned income exclusion and housing cost exclusion may not exceed the taxpayer's total foreign earned income for the taxable year. The taxpayer's foreign tax credit is reduced by the amount of the credit that is attributable to excluded income.

Explanation of Provision

The provision creates an exception to the definition of tax home for purposes of the foreign earned income exclusion. An individual who maintains an abode in the United States may satisfy the tax home requirement for the foreign earned income exclusion if his principal place of employment is in an area designated by the President as a combat zone for purposes of determining military personnel eligibility for certain benefits and the individual's services are in support of the U.S. military.

Effective Date

The provision is effective for taxable years beginning after December 31, 2017.

16. Treatment of foreign persons for returns relating to payments made in settlement of payment card and third party network transactions (sec. 41117 of the Act and sec. 6050W of the Code)

Present Law

A variety of information reporting requirements apply to participants in certain transactions.[394] These requirements are intended to assist taxpayers in preparing their income tax returns and to help the IRS determine whether such returns are correct and complete.

The primary provision governing information reporting by payors requires an information return by every person engaged in a trade or business who makes payments aggregating $600 or more in any taxable year to a single payee in the course of the payor's trade or

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[390] Sec. 911(d)(3).

[391] Compare *Linde v. Commissioner*, T.C. Memo. 2017–180 (helicopter pilot in Iraq working for a government contractor entitled to foreign earned income exclusion despite maintaining home for wife and children in Alabama, based on testimony) with *Lock v. Commissioner*, T.C. Summary Opinion, 2017–10 (government contractor employee working in Iraq, with wife and children in Florida, not entitled to foreign income exclusion).

[392] Sec. 911(b)(2)(D)(i). This amount is adjusted annually for inflation. Rev. Proc. 2017–58, available at https://www.irs.gov/pub/irs-drop/rp-17-58.pdf.

[393] Sec. 911(c)(1) and (2).

[394] Secs. 6031 through 6060.

business.[395] Payments to corporations generally are excepted from this requirement. Payments subject to reporting include fixed or determinable income or compensation, but do not include payments for goods or certain enumerated types of payments that are subject to other specific reporting requirements.[396] Detailed rules are provided for the reporting of various types of investment income, including interest, dividends, and gross proceeds from brokered transactions (such as a sale of stock) paid to U.S. persons.[397]

Special information reporting requirements exist for employers required to deduct and withhold tax from employees' income.[398] In addition, any service recipient engaged in a trade or business and paying for services is required to make a return according to regulations when the aggregate of payments is $600 or more.[399]

The payor of amounts described above is required to provide the recipient of the payment with an annual statement showing the aggregate payments made and contact information for the payor.[400] The statement must be supplied to taxpayers by the payors by January 31 of the following calendar year. Payors generally must file the information return with the IRS on or before January 31 of the year following the calendar year to which such returns relate.[401]

Returns relating to payments made in settlement of third party network transactions

Any payment settlement entity making 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 taxpayer identification number 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. A "participating payee" means, 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.

For purposes of the reporting requirement, the term "third party network transaction" means any transaction that is settled through a third party payment network. 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 (*i.e.*, more than 50) who are unrelated to such organization, provide goods or services, and have agreed to

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[395] The information return generally is submitted electronically as a Form 1099 or Form 1096, although certain payments to beneficiaries or employees may require use of Form 1041 or Forms W–2 and W–3, respectively. Treas. Reg. sec. 1.6041–1(a)(2).

[396] Sec. 6041(a) requires reporting as to fixed or determinable gains, profits, and income (other than payments to which secs. 6042(a)(1), 6044(a)(1), 6047(c), 6049(a), or 6050N(a) apply and other than payments with respect to which a statement is required under authority of section 6042(a), 6044(a)(2) or 6045). These payments excepted from section 6041(a) include most interest, royalties, and dividends.

[397] Secs. 6042 (dividends), 6045 (broker reporting), and 6049 (interest), and the Treasury regulations thereunder.

[398] Sec. 6051(a).

[399] Sec. 6041A.

[400] Secs. 6041(d) and 6041A(e).

[401] Sec. 6071(c).

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. 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 that has the contractual obligation to make payment to participating payees of third party network transactions. 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 that 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 under the provision. 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. In addition, a third party settlement organization is not required to report unless the aggregate value of third party network transactions for the year exceeds $20,000 and the aggregate number of such transactions exceeds 200.[402] If a payment of funds is made to a third party settlement organization by means of a payment card (*e.g.,* as part of a transaction that is 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.

Explanation of Provision

The provision amends the reporting requirements for payment settlement entities making payments from inside the United States to accounts outside the United States. In such cases, a payment settlement entity will not be required to report payments to a payee with only a foreign address merely because that payee submits requests for payment in U.S. dollars.

Effective Date

The provision applies to returns for calendar years beginning after December 31, 2017.

[402] Sec. 6050W(e).

17. Repeal of shift in time of payment of corporate estimated taxes (sec. 41118 of the Act and sec. 6655 of the Code)

Present Law

In general, corporations are required to make quarterly estimated tax payments of their income tax liability.[403] For a corporation whose taxable year is a calendar year, these estimated tax payments must be made by April 15, June 15, September 15, and December 15. The amount of any required estimated payment is 25 percent of the required annual payment.[404] The required annual payment is 100 percent of the tax liability for the taxable year or the preceding taxable year. The option to use the preceding taxable year is not available if the preceding taxable year was not a 12-month taxable year or the corporation did not file a return in the preceding taxable year showing a liability for tax. Further, in the case of a corporation with taxable income of at least $1 million in any of the three immediately preceding taxable years, the option to use the preceding taxable year is only available for the first installment of such corporation's taxable year.[405]

In the case of a corporation with assets of at least $1 billion (determined as of the end of the preceding taxable year), the amount of the required installment due in July, August, or September of 2020, is increased by eight percent of that amount (determined without regard to any increase in such amount not contained in the Internal Revenue Code) (*i.e.,* the installment due in July, August, or September of 2020, is increased to 108 percent of the payment otherwise due).[406] The next required installment is reduced accordingly (*i.e.,* the payment due in October, November, or December of 2020 is reduced by the amount that the prior payment was increased).

Explanation of Provision

The provision repeals the shift in the timing of corporate estimated tax payments for 2020. Thus, corporations will be required to make estimated tax payments in 2020 as if the prior legislation (*i.e.,* section 803 of the Trade Preferences Extension Act of 2015 [407]) had never been enacted.

Effective Date

The provision is effective on the date of enactment (February 9, 2018).

[403] Sec. 6655.
[404] Sec. 6655(d)(1).
[405] Sec. 6655(d)(2) and (g)(2).
[406] Trade Preferences Extension Act of 2015, Pub. L. No. 114–27, sec. 803.
[407] Pub. L. No. 114–27.

18. Credit for carbon oxide sequestration (sec. 41119 of the Act and sec. 45Q of the Code)

Present Law

A credit of $10 per metric ton is available for qualified carbon dioxide that is captured by the taxpayer at a qualified facility, used by such taxpayer as a tertiary injectant (including carbon dioxide augmented waterflooding and immiscible carbon dioxide displacement) in a qualified enhanced oil or natural gas recovery project ("EOR uses") and disposed of by such taxpayer in secure geological storage.[408] In addition, a credit of $20 per metric ton is available for qualified carbon dioxide captured by a taxpayer at a qualified facility and disposed of by such taxpayer in secure geological storage without being used as a tertiary injectant. Both credit amounts are adjusted for inflation after 2009. For 2018, as adjusted for inflation, the two credit amounts are $11.44 per metric ton and $22.87 per metric ton of carbon dioxide.[409]

Secure geological storage includes storage at deep saline formations, oil and gas reservoirs, and unminable coal seams. The Secretary, in consultation with the Administrator of the Environmental Protection Agency, the Secretary of Energy, and the Secretary of the Interior, is required to establish regulations for determining adequate security measures for the secure geological storage of carbon dioxide such that the carbon dioxide does not escape into the atmosphere.

Qualified carbon dioxide is defined as carbon dioxide captured from an industrial source that (1) would otherwise be released into the atmosphere as an industrial emission of greenhouse gas, and (2) is measured at the source of capture and verified at the point or points of injection. Qualified carbon dioxide includes the initial deposit of captured carbon dioxide used as a tertiary injectant but does not include carbon dioxide that is recaptured, recycled, and reinjected as part of an enhanced oil or natural gas recovery project process. A qualified enhanced oil or natural gas recovery project is a project that would otherwise meet the definition of an enhanced oil recovery project under section 43, if natural gas projects were included within that definition.

A qualified facility means any industrial facility (1) that is owned by the taxpayer, (2) at which carbon capture equipment is placed in service, and (3) that captures not less than 500,000 metric tons of carbon dioxide during the taxable year. The credit applies only with respect to qualified carbon dioxide captured and sequestered or injected in the United States[410] or one of its possessions.[411]

Except as provided in regulations, credits are attributable to the person that captures and physically or contractually ensures the disposal, or use as a tertiary injectant, of the qualified carbon dioxide. Credits are subject to recapture, as provided by regulation, with respect to any qualified carbon dioxide that ceases to be recaptured, disposed of, or used as a tertiary injectant in a manner consistent with the rules of the provision.

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[408] Sec. 45Q.
[409] IRS Notice 2018–40, May 14, 2018.
[410] Sec. 638(1).
[411] Sec. 638(2).

The credit is part of the general business credit. The credit sunsets at the end of the calendar year in which the Secretary, in consultation with the Administrator of the Environmental Protection Agency, certifies that 75 million metric tons of qualified carbon dioxide have been captured and sequestered. As of May 11, 2018, the credit had been claimed for 59,767,924 tons of qualified carbon dioxide.[412]

Explanation of Provision

In general

The provision makes significant changes to the credit for carbon dioxide sequestration. For carbon dioxide captured using equipment placed in service before February 9, 2018 (the provision's date of enactment), the provision adds a qualified use for the carbon that does not involve secure geological storage. For carbon dioxide captured using equipment placed in service on or after February 9, 2018, the provision extends, enhances, and modifies the credit.

Carbon dioxide captured using equipment placed in service before February 9, 2018

For carbon dioxide captured using equipment placed in service before February 9, 2018, the provision expands the $10 per metric ton credit (adjusted for inflation; $11.44 per metric ton for 2018) to permit such credit where the taxpayer "utilizes" the carbon dioxide in a prescribed manner. For this purpose, "utilization" of qualified carbon dioxide means: (1) the fixation of such carbon dioxide through photosynthesis or chemosynthesis, such as through the growing of algae or bacteria; (2) the chemical conversion of such qualified carbon dioxide to a material or compound that results in secure storage; or (3) the use of such carbon dioxide for any other purpose for which a commercial market exists (except for EOR uses), as determined by the Secretary of the Treasury.[413]

Carbon dioxide captured using equipment placed in service on or after February 9, 2018

For carbon dioxide captured using equipment placed in service on or after February 9, 2018, the provision modifies the carbon dioxide sequestration credit to include "utilization," as described above, as a credit-eligible means of capturing the carbon. The provision also expands the definition of qualified carbon to include carbon oxide as well as carbon dioxide, and allows for the direct air capture of carbon dioxide. Direct air capture involves the use of carbon capture equipment to capture carbon dioxide directly from the ambient air, excluding the capture of carbon dioxide deliberately released from naturally occurring subsurface springs or carbon dioxide captured using natural photosynthesis.

For EOR uses and for qualified carbon utilization, the provision increases the credit to $12.83 per metric ton increasing linearly each calendar year to $35 per metric ton by December 31, 2026, and adjusted for inflation thereafter. For direct sequestration in secure geological storage, the provision increases the credit to $22.66

[412] IRS Notice 2018–40, May 14, 2018.

[413] Sec. 45Q(f)(5).

per metric ton increasing linearly each calendar year to $50 per metric ton by December 31, 2026, and adjusted for inflation thereafter.

The provision eliminates the 75 million metric ton cap for carbon captured using equipment placed in service on or after February 9, 2018. Instead, taxpayers may claim the credit during the 12-year period beginning on the date the carbon capture equipment is originally placed in service. For this purpose, eligible carbon capture equipment must be placed in service at a qualified facility the construction of which begins before January 1, 2024.[414] In general, a qualified facility is any industrial facility or direct air capture facility subject to certain minimum capture requirements depending on the type of sequestration activity.

Effective Date

The provision is effective for taxable years beginning after December 31, 2017.

[414] Sec. 45Q(d).

PART FOUR: CONSOLIDATED APPROPRIATIONS ACT, 2018 (PUBLIC LAW 115–141) [415]

A. Aviation Revenue Provisions

1. Extension of expenditure authority and taxes funding Airport and Airway Trust Fund (secs. 201 and 202 of Division M of the Act (the "Airport and Airway Extension Act of 2018") and secs. 4081, 4083, 4261, 4271, and 9502 of the Code)

Present Law

Taxes dedicated to the Airport and Airway Trust Fund

Excise taxes are imposed on amounts paid for commercial air passenger and freight transportation and on fuels used in commercial and noncommercial (*i.e.,* transportation that is not "for hire") aviation to fund the Airport and Airway Trust Fund.[416] The present aviation excise taxes are as follows:

Tax (and Code section)	Tax Rates
Domestic air passengers (sec. 4261)	7.5 percent of fare, plus $4.10 (2018) per domestic flight segment generally [417]
International air passengers (sec. 4261)	$18.30 (2018) per arrival or departure [418]
Amounts paid for right to award free or reduced rate passenger air transportation (sec. 4261).	7.5 percent of amount paid (and the value of any other benefit provided) to an air carrier (or any related person)
Air cargo (freight) transportation (sec. 4271)	6.25 percent of amount charged for domestic transportation; no tax on international cargo transportation
Aviation fuels (sec. 4081): [419]	
Commercial aviation	4.3 cents per gallon
Noncommercial (general) aviation:	
Aviation gasoline	19.3 cents per gallon
Jet fuel	21.8 cents per gallon
Fractional aircraft fuel surtax (sec. 4043)	14.1 cents per gallon

The Airport and Airway Trust Fund excise taxes (except for 4.3 cents per gallon of the taxes on aviation fuels and the 14.1 cents per gallon fractional aircraft fuel surtax) are scheduled to expire after March 31, 2018. The 4.3-cents-per-gallon fuels tax rate is permanent. The fractional aircraft fuel surtax expires after September 30, 2021.

[415] H.R. 1625. The House passed H.R. 1625 on May 22, 2017. The Senate passed the bill with an amendment on February 28, 2018. The House agreed to the Senate amendment with an amendment on March 22, 2018. The Senate agreed to the House amendment on March 23, 2018. The President signed the bill on March 23, 2018.

[416] Air transportation through U.S. airspace that neither lands in nor takes off from a point in the United States (or the "225-mile zone") is exempt from the aviation excise taxes, but the transportation provider is subject to certain "overflight fees" imposed by the Federal Aviation Administration pursuant to section 45301 of Title 49 of the United States Code. The "225 mile zone" is defined as "that portion of Canada or Mexico that is not more than 225 miles from the nearest point in the continental United States." Sec. 4262(c)(2).

[417] The domestic flight segment portion of the tax is adjusted annually (effective each January 1) for inflation.

[418] The international arrival and departure tax rate is adjusted annually for inflation. Under a special rule for Alaska and Hawaii, the tax only applies to departures at a rate of $9.10 per departure for 2018.

[419] Like most other taxable motor fuels, aviation fuels are subject to an additional 0.1-cent-per-gallon excise tax to fund the LUST Trust Fund.

Airport and Airway Trust Fund expenditure provisions

The Airport and Airway Trust Fund was established in 1970 to finance a major portion of national aviation programs (previously funded entirely with General Fund revenues). Operation of the Trust Fund is governed by parallel provisions of the Code and authorizing statutes.[420] The Code provisions govern deposit of revenues into the Trust Fund and approve expenditure purposes in authorizing statutes as in effect on the date of enactment of the latest authorizing Act. The authorizing Acts provide for specific Trust Fund expenditure programs.

No expenditures are permitted to be made from the Airport and Airway Trust Fund after March 31, 2018. The purposes for which Airport and Airway Trust Fund monies are permitted to be expended are fixed as of the date of enactment of the Disaster Tax Relief and Airport and Airway Extension Act of 2017; therefore, the Code must be amended in order to authorize new Airport and Airway Trust Fund expenditure purposes.[421] The Code contains a specific enforcement provision to prevent expenditure of Trust Fund monies for purposes not authorized under section 9502.[422] This provision provides that, should such unapproved expenditures occur, no further aviation excise tax receipts will be transferred to the Trust Fund. Rather, the aviation taxes will continue to be imposed, but the receipts will be retained in the General Fund.

Explanation of Provision

The Airport and Airway Extension Act of 2018 extends through September 30, 2018, the taxes and expenditure authority that were scheduled to expire on March 31, 2018.

Effective Date

The provision is effective on the date of enactment (March 23, 2018).

[420] Sec. 9502 and 49 U.S.C. sec. 48101, et seq.
[421] Sec. 9502(d).
[422] Sec. 9502(e)(1).

B. Revenue Provisions

1. Modification of deduction for qualified business income of a cooperative and its patrons (sec. 101 of Division T of Pub. L. No. 115–141 and sec. 199A of the Code)

Prior and Present Law

Treatment of taxpayers with domestic production activities income (prior-law section 199)

In general

Former section 199 [423] provides a deduction from taxable income (or, in the case of an individual, adjusted gross income [424]) that is equal to nine percent of the lesser of the taxpayer's qualified production activities income or taxable income (determined without regard to the section 199 deduction) for the taxable year.[425] The amount of the deduction for a taxable year is limited to 50 percent of the W–2 wages paid by the taxpayer, and properly allocable to domestic production gross receipts, during the calendar year that ends in such taxable year.[426] W–2 wages are the total wages subject to wage withholding,[427] elective deferrals,[428] and deferred compensation [429] paid by the taxpayer with respect to employment of its employees during the calendar year ending during the taxable year of the taxpayer.[430] W–2 wages do not include any amount that is not properly allocable to domestic production gross receipts as a qualified item of deduction.[431] In addition, W–2 wages do not include any amount that was not properly included in a return filed with the Social Security Administration on or before the 60th day after the due date (including extensions) for such return.[432]

In the case of oil related qualified production activities income, the deduction is reduced by three percent of the least of the taxpayer's oil related qualified production activities income, qualified production activities income, or taxable income (determined with-

[423] Section 199 was repealed by Pub. L. No. 115–97, An Act to Provide for Reconciliation Pursuant to Titles II and V of the Concurrent Resolution on the Budget for Fiscal Year 2018, for taxable years beginning after December 31, 2017. All references to former section 199 in this document refer to section 199 as in effect before its repeal.

[424] For this purpose, adjusted gross income is determined after application of sections 86, 135, 137, 219, 221, 222, and 469, and without regard to the section 199 deduction. Sec. 199(d)(2).

[425] Sec. 199(a).

[426] Sec. 199(b).

[427] Defined in sec. 3401(a).

[428] Within the meaning of sec. 402(g)(3).

[429] Deferred compensation includes compensation deferred under section 457, as well as the amount of any designated Roth contributions (as defined in section 402A).

[430] Sec. 199(b). In the case of a taxpayer with a short taxable year that does not contain a calendar year ending during such short taxable year, the following amounts are treated as the W–2 wages of the taxpayer for the short taxable year: (1) wages paid during the short taxable year to employees of the qualified trade or business; (2) elective deferrals (within the meaning of section 402(g)(3)) made during the short taxable year by employees of the qualified trade or business; and (3) compensation actually deferred under section 457 during the short taxable year with respect to employees of the qualified trade or business. Amounts that are treated as W–2 wages for a taxable year are not treated as W–2 wages of any other taxable year. See Treas. Reg. sec. 1.199–2(b). In addition, in the case of a taxpayer who is an individual with otherwise qualified production activities income from sources within the Commonwealth of Puerto Rico, if all the income for the taxable year is taxable under section 1 (income tax rates for individuals), the determination of W–2 wages with respect to the taxpayer's trade or business conducted in Puerto Rico is made without regard to any exclusion under the wage withholding rules (as provided in section 3401(a)(8)) for remuneration paid for services in Puerto Rico. See sec. 199(d)(8)(B).

[431] Sec. 199(b)(2)(B).

[432] Sec. 199(b)(2)(C).

out regard to the section 199 deduction) for the taxable year.[433] For this purpose, oil related qualified production activities income for any taxable year is the portion of qualified production activities income attributable to the production, refining, processing, transportation, or distribution of oil, gas, or any primary product thereof[434] during the taxable year.

In general, qualified production activities income is equal to domestic production gross receipts reduced by the sum of: (1) the cost of goods sold that are allocable to those receipts;[435] and (2) other expenses, losses, or deductions that are properly allocable to those receipts.[436] Domestic production gross receipts generally are gross receipts of a taxpayer that are derived from: (1) any sale, exchange, or other disposition, or any lease, rental, or license, of qualifying production property[437] that was manufactured, produced, grown, or extracted by the taxpayer in whole or in significant part within the United States;[438] (2) any sale, exchange, or other disposition, or any lease, rental, or license, of any qualified film[439] produced by the taxpayer; (3) any sale, exchange, or other disposition, or any lease, rental, or license, of electricity, natural gas, or potable water produced by the taxpayer in the United States; (4) construction of real property performed in the United States by a taxpayer in the ordinary course of a construction trade or business; or (5) engineering or architectural services performed in the United States by the taxpayer for the construction of real property in the United States.[440]

Domestic production gross receipts do not include any gross receipts of the taxpayer derived from property leased, licensed, or rented by the taxpayer for use by any related person.[441] In addi-

[433] Sec. 199(d)(9).

[434] Within the meaning of sec. 927(a)(2)(C) as in effect before its repeal.

[435] For this purpose, any item or service brought into the United States is treated as acquired by purchase, and its cost is treated as not less than its value immediately after it entered the United States. A similar rule applies in determining the adjusted basis of leased or rented property where the lease or rental gives rise to domestic production gross receipts. In addition, for any property exported by the taxpayer for further manufacture, the increase in cost or adjusted basis may not exceed the difference between the value of the property when exported and the value of the property when brought back into the United States after the further manufacture. See sec. 199(c)(3)(A) and (B).

[436] Sec. 199(c)(1). In computing qualified production activities income, the domestic production activities deduction itself is not an allocable deduction. Sec. 199(c)(1)(B)(ii). See Treas. Reg. secs. 1.199–1 through 1.199–9 where the Secretary has prescribed rules for the proper allocation of items of income, deduction, expense, and loss for purposes of determining qualified production activities income.

[437] Qualifying production property generally includes any tangible personal property, computer software, and sound recordings. Sec. 199(c)(5).

[438] When used in the Code in a geographical sense, the term "United States" generally includes only the States and the District of Columbia. Sec. 7701(a)(9). A special rule for determining domestic production gross receipts, however, provides that for taxable years beginning after December 31, 2005, and before January 1, 2018, in the case of any taxpayer with gross receipts from sources within the Commonwealth of Puerto Rico, the term "United States" includes the Commonwealth of Puerto Rico, but only if all of the taxpayer's Puerto Rico-sourced gross receipts are taxable under the Federal income tax for individuals or corporations for such taxable year. Sec. 199(d)(8)(A) and (C). In computing the 50-percent wage limitation, the taxpayer is permitted to take into account wages paid to bona fide residents of Puerto Rico for services performed in Puerto Rico. Sec. 199(d)(8)(B).

[439] Qualified film includes any motion picture film or videotape (including live or delayed television programming, but not including certain sexually explicit productions) if 50 percent or more of the total compensation relating to the production of the film (including compensation in the form of residuals and participations) constitutes compensation for services performed in the United States by actors, production personnel, directors, and producers. Sec. 199(c)(6).

[440] Sec. 199(c)(4)(A).

[441] Sec. 199(c)(7). For this purpose, a person is treated as related to another person if such persons are treated as a single employer under subsection (a) or (b) of section 52 or subsection

Continued

tion, domestic production gross receipts do not include gross receipts that are derived from (1) the sale of food and beverages prepared by the taxpayer at a retail establishment, (2) the transmission or distribution of electricity, natural gas, or potable water, or (3) the lease, rental, license, sale, exchange, or other disposition of land.[442]

Special rules

All members of an expanded affiliated group[443] are treated as a single corporation and the deduction is allocated among the members of the expanded affiliated group in proportion to each member's respective amount, if any, of qualified production activities income. In addition, for purposes of determining domestic production gross receipts, if all of the interests in the capital and profits of a partnership are owned by members of a single expanded affiliated group at all times during the taxable year of such partnership, the partnership and all members of such group are treated as a single taxpayer during such period.[444]

For a tax-exempt taxpayer subject to tax on its unrelated business taxable income by section 511, the section 199 deduction is determined by substituting unrelated business taxable income for taxable income where applicable.[445]

The section 199 deduction is determined by only taking into account items that are attributable to the actual conduct of a trade or business.[446]

Partnerships and S corporations

With regard to the domestic production activities income of a partnership or S corporation, the deduction is determined at the partner or shareholder level. Each partner or shareholder generally takes into account such person's allocable share of the components of the calculation (including domestic production gross receipts; the cost of goods sold allocable to such receipts; and other expenses, losses, or deductions allocable to such receipts) from the partnership or S corporation, as well as any items relating to the partner's or shareholder's own qualified production activities income, if any.[447]

In applying the wage limitation, each partner or shareholder is treated as having been allocated wages from the partnership or S corporation in an amount that is equal to such person's allocable share of W–2 wages.[448]

(m) or (o) of section 414, except that determinations under subsections (a) and (b) of section 52 are made without regard to section 1563(b).

[442] Sec. 199(c)(4)(B).

[443] For this purpose, an expanded affiliated group is an affiliated group as defined in section 1504(a) determined (i) by substituting "more than 50 percent" for "more than 80 percent" each place it appears, and (ii) without regard to paragraphs (2) and (4) of section 1504(b). See sec. 199(d)(4)(B).

[444] Sec. 199(d)(4)(D).

[445] Sec. 199(d)(7).

[446] Sec. 199(d)(5).

[447] Sec. 199(d)(1)(A).

[448] In the case of a trust or estate, the components of the calculation are apportioned between (and among) the beneficiaries and the fiduciary. See sec. 199(d)(1)(B) and Treas. Reg. sec. 1.199–5(d) and (e).

Specified agricultural and horticultural cooperatives

In general

With regard to specified agricultural and horticultural cooperatives, section 199 provides the same treatment of qualified production activities income derived from agricultural or horticultural products that are manufactured, produced, grown, or extracted by such cooperatives,[449] as it provides for qualified production activities income of other taxpayers, including non-specified cooperatives (*i.e.*, the cooperative may claim a deduction for qualified production activities income). The cooperative is treated as having manufactured, produced, grown, or extracted in whole or significant part any qualifying production property marketed by the cooperative if such items were manufactured, produced, grown, or extracted in whole or significant part by its patrons.[450] In addition, the cooperative is treated as having manufactured, produced, grown, or extracted agricultural products with respect to which the cooperative performs storage, handling, or other processing activities (other than transportation activities) within the United States related to the sale, exchange, or other disposition of agricultural products, provided the products are consumed in connection with or incorporated into the manufacturing, production, growth, or extraction of qualifying production property (whether or not by the cooperative).[451] Finally, for purposes of determining the cooperative's section 199 deduction, qualified production activities income and taxable income are determined without regard to any deduction allowable under section 1382(b) and (c) (relating to patronage dividends, per-unit retain allocations, and nonpatronage distributions) for the taxable year.[452]

Definition of a specified agricultural or horticultural cooperative

A specified agricultural or horticultural cooperative is an organization to which part I of subchapter T applies that is engaged in (a) the manufacturing, production, growth, or extraction in whole or significant part of any agricultural or horticultural product, or (b) the marketing of agricultural or horticultural products that its patrons have so manufactured, produced, grown, or extracted.[453]

Allocation of the cooperative's deduction to patrons

Any patron that receives a qualified payment from a specified agricultural or horticultural cooperative is allowed as a deduction for the taxable year in which such payment is received an amount equal to the portion of the cooperative's deduction for qualified production activities income that is (i) allowed with respect to the portion of the qualified production activities income to which such payment is attributable, and (ii) identified by the cooperative in a writ-

[449] For this purpose, agricultural or horticultural products also include fertilizer, diesel fuel, and other supplies used in agricultural or horticultural production that are manufactured, produced, grown, or extracted by the cooperative. See Treas. Reg. sec. 1.199–6(f).
[450] Sec. 199(d)(3)(D) and Treas. Reg. sec. 1.199–6(d).
[451] See Treas. Reg. sec. 1.199–3(e)(1).
[452] See sec. 199(d)(3)(C) and Treas. Reg. sec. 1.199–6(c).
[453] Sec. 199(d)(3)(F). For this purpose, agricultural or horticultural products also include fertilizer, diesel fuel and other supplies used in agricultural or horticultural production that are manufactured, produced, grown, or extracted by the cooperative. See Treas. Reg. sec. 1.199–6(f).

ten notice mailed to the patron during the payment period described in section 1382(d).[454] A qualified payment is any amount that (i) is described in paragraph (1) or (3) of section 1385(a) (*i.e.*, patronage dividends and per-unit retain allocations), (ii) is received by an eligible patron from a specified agricultural or horticultural cooperative, and (iii) is attributable to qualified production activities income with respect to which a deduction is allowed to such cooperative.[455]

The cooperative cannot reduce its income under section 1382 for any deduction allowable to its patrons under this rule (*i.e.*, the cooperative must reduce its deductions allowed for certain payments to its patrons in an amount equal to the section 199 deduction allocated to its patrons).[456]

Treatment of taxpayers other than corporations, in general

Individual income tax rates

To determine regular tax liability, an individual taxpayer generally must apply the tax rate schedules (or the tax tables) to his or her 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 increases. Separate rate schedules apply based on an individual's filing status (*i.e.*, single, head of household, married filing jointly, or married filing separately). For 2018, the regular individual income tax rate schedule provides rates of 10, 12, 22, 24, 32, 35, and 37 percent.

Partnerships

Partnerships generally are treated for Federal income tax purposes as pass-through entities not subject to tax at the entity level.[457] 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 regardless of whether the income is distributed to the partners).[458] A partner's deduction for partnership losses is limited to the partner's adjusted basis in its partnership interest.[459] 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 distribu-

[454] Sec. 199(d)(3)(A) and Treas. Reg. sec. 1.199–6(a). The written notice must be mailed by the cooperative to it patrons no later than the 15th day of the ninth month following the close of the taxable year. The cooperative must report the amount of the patron's section 199 deduction on Form 1099–PATR, "Taxable Distributions Received From Cooperatives," issued to the patron. Treas. Reg. sec. 1.199–6(g).

[455] Sec. 199(d)(3)(E). For this purpose, patronage dividends and per-unit retain allocations include any advances on patronage and per-unit retains paid in money during the taxable year. Treas. Reg. sec. 1.199–6(e).

[456] Sec. 199(d)(3)(B) and Treas. Reg. sec. 1.199–6(b).

[457] Sec. 701.

[458] Sec. 702(a).

[459] 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.

tive share of losses allowed as a deduction and certain nondeductible expenditures, and (2) any partnership distributions to the partner.[460] Partners generally may receive distributions of partnership property without recognition of gain or loss, subject to some exceptions.[461]

Partnerships may allocate items of income, gain, loss, deduction, and credit among the partners, provided the allocations have substantial economic effect.[462] 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.[463]

State laws of every State provide for limited liability companies[464] ("LLCs"), which are neither partnerships nor corporations under applicable State law, but which are generally treated as partnerships for Federal tax purposes.[465]

A publicly traded partnership generally is treated as a corporation for Federal tax purposes.[466] For this purpose, a publicly traded partnership means any partnership if interests in the partnership are traded on an established securities market or interests in the partnership are readily tradable on a secondary market (or the substantial equivalent thereof).[467]

An exception from corporate treatment is provided for certain publicly traded partnerships, 90 percent or more of whose gross income is qualifying income.[468]

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[460] Sec. 705.

[461] 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).

[462] Sec. 704(b)(2).

[463] Treas. Reg. sec. 1.704–1(b)(2).

[464] The first LLC statute was enacted in Wyoming in 1977. All States (and the District of Columbia) now have an LLC statute, though the tax treatment of LLCs for State tax purposes may differ.

[465] Any domestic nonpublicly traded unincorporated entity with two or more members generally is treated as a partnership for federal income tax purposes, while any single-member domestic unincorporated entity generally is treated as disregarded for Federal income tax purposes (*i.e.*, treated as not separate from its owner). Instead of the applicable default treatment, however, an LLC may elect to be treated as a corporation for Federal income tax purposes. Treas. Reg. sec. 301.7701–3 (known as the "check-the-box" regulations).

[466] Sec. 7704(a).

[467] Sec. 7704(b).

[468] Sec. 7704(c)(2). Qualifying income is defined to include interest, dividends, and gains from the disposition of a capital asset (or of property described in section 1231(b)) that is held for the production of income that is qualifying income. Sec. 7704(d). Qualifying income also includes rents from real property, gains from the sale or other disposition of real property, and income and gains from the exploration, development, mining or production, processing, refining, transportation (including pipelines transporting gas, oil, or products thereof), or the marketing of any mineral or natural resource (including fertilizer, geothermal energy, and timber), industrial source carbon dioxide, or the transportation or storage of certain fuel mixtures, alternative fuel, alcohol fuel, or biodiesel fuel. Qualifying income also includes income and gains from commodities (not described in section 1221(a)(1)) or futures, options, or forward contracts with respect to such commodities (including foreign currency transactions of a commodity pool) where a principal activity of the partnership is the buying and selling of such commodities, futures, options, or forward contracts. However, the exception for partnerships with qualifying income does not apply to any partnership resembling a mutual fund (*i.e.*, that would be described in section 851(a) if it were a domestic corporation), which includes a corporation registered under the Investment Company Act of 1940 (Pub. L. No. 76–768 (1940)) as a management company or unit investment trust. Sec. 7704(c)(3).

S corporations

For Federal income tax purposes, an S corporation[469] generally is not subject to tax at the corporate level.[470] Items of income (including tax-exempt income), gain, loss, deduction, and credit of the S corporation are taken into account by the S corporation shareholders in computing their income tax liabilities (based on the S corporation's method of accounting and regardless of whether the income is distributed to the shareholders). A 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.[471]

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.

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.[472] Only individuals (other than nonresident aliens), certain tax-exempt organizations, and certain trusts and estates are permitted shareholders of an S corporation.

Sole proprietorships

Unlike a C corporation, partnership, or S corporation, a business conducted as a sole proprietorship is not treated as an entity distinct from its owner for Federal income tax purposes.[473] Rather, the business owner is taxed directly on business income, and files Schedule C (sole proprietorships generally), Schedule E (rental real estate and royalties), or Schedule F (farms) with his or her individual tax return. Furthermore, transfer of a sole proprietorship is treated as a transfer of each individual asset of the business. Nonetheless, a sole proprietorship is treated as an entity separate from

[469] An S corporation is so named because its Federal tax treatment is governed by subchapter S of the Code.

[470] Secs. 1363 and 1366.

[471] 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).

[472] Sec. 1361. For this purpose, a husband and wife and all members of a family are treated as one shareholder. Sec. 1361(c)(1).

[473] A single-member unincorporated entity is disregarded for Federal income tax purposes, unless its owner elects to be treated as a Corporation. Treas. Reg. sec. 301.7701–3(b)(1)(ii). Sole proprietorships often are conducted through legal entities for nontax reasons. While sole proprietorships generally may have no more than one owner, a married couple that files a joint return and jointly owns and operates a business may elect to have that business treated as a sole proprietorship under section 761(f).

its owner for employment tax purposes,[474] for certain excise taxes,[475] and certain information reporting requirements.[476]

Taxpayers other than corporations with qualified business income [477]

For taxable years beginning after December 31, 2017, and before January 1, 2026, an individual taxpayer 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 REIT dividends, qualified cooperative dividends, and qualified publicly traded partnership income.[478] Limitations based on W–2 wages and capital investment phase in above a threshold amount of taxable income.[479] A disallowance of the deduction on income of specified service trades or businesses also phases in above the threshold amount of taxable income.

Qualified business income

In general

Qualified business income is determined for each qualified trade or business of the taxpayer. For any taxable year, qualified business income means the net amount of qualified items of income, gain, deduction, and loss with respect to the qualified trade or business of the taxpayer. 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.

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.[480] In the case of an individual with qualified business income from sources within the Commonwealth of Puerto Rico, if all such income for the taxable year is taxable under section 1 (income tax rates for individuals), then the term "United States" is considered to include Puerto Rico for purposes of determining the individual's qualified business income.[481]

Certain items are not qualified items of income, gain, deduction, or loss.[482] Specifically, qualified items of income, gain, deduction, and loss do not include (1) any item taken into account in determining net capital gain or net capital loss, (2) dividends, income equivalent to a dividend, or payments in lieu of dividends, (3) interest income other than that which is properly allocable to a trade or business, (4) the excess of gain over loss from commodities trans-

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[474] Treas. Reg. sec. 301.7701–2(c)(2)(iv).

[475] Treas. Reg. sec. 301.7701–2(c)(2)(v).

[476] Treas. Reg. sec. 301.7701–2(c)(2)(vi).

[477] 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.

[478] Sec. 199A. Eligible taxpayers also include fiduciaries and beneficiaries of trusts and estates with qualified business income.

[479] For this purpose, taxable income is computed without regard to the 20-percent deduction. Sec. 199A(e)(1).

[480] 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).

[481] Sec. 199A(f)(1)(C).

[482] See sec. 199A(c)(3)(B).

actions other than (i) those entered into in the normal course of the trade or business or (ii) with respect to stock in trade or property held primarily for sale to customers in the ordinary course of the trade or business, property used in the trade or business, or supplies regularly used or consumed in the trade or business, (5) the excess of foreign currency gains over foreign currency losses from section 988 transactions other than transactions directly related to the business needs of the business activity, (6) net income from notional principal contracts other than clearly identified hedging transactions that are treated as ordinary (*i.e.,* not treated as capital assets), and (7) any amount received from an annuity that is not received in connection with the trade or business. Qualified items do not include any item of deduction or loss properly allocable to any of the preceding items.

If the net amount of qualified business income from all qualified trades or businesses during the taxable year is a loss, then such loss is carried forward and in the next taxable year is treated as a loss from a qualified trade or business.[483] Any deduction that would otherwise be allowed in a subsequent taxable year with respect to the taxpayer's qualified trades or businesses is reduced by 20 percent of any carryover qualified business loss.

Reasonable compensation and guaranteed payments

Qualified business income does not include any amount paid by an S corporation that is treated as reasonable compensation of the taxpayer.[484] Similarly, qualified business income does not include any guaranteed payment for services rendered with respect to the trade or business,[485] and, to the extent provided in regulations, does not include any amount paid or incurred by a partnership to a partner, acting other than in his or her capacity as a partner, for services.[486]

Qualified trade or business

A qualified trade or business means any trade or business other than a specified service trade or business and other than the trade or business of performing services as an employee.[487]

Specified service trade or business

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.[488] For this purpose the terms "security" and a "commodity" have the meanings provided in the rules

[483] Sec. 199A(c)(2).
[484] Sec. 199A(c)(4).
[485] Described in sec. 707(c).
[486] Described in sec. 707(a).
[487] Sec. 199A(d)(1).
[488] Sec. 199A(d)(2).

for the mark-to-market accounting method for dealers in securities (section 475(c)(2) and (e)(2), respectively).

The exclusion from the definition of a qualified trade or business for specified service trades or businesses phases in for a taxpayer with taxable income in excess of a threshold amount. The threshold amount is $157,500 (200 percent of that amount, or $315,000, in the case of a joint return) (together, the "threshold amount"), adjusted for inflation in taxable years beginning after 2018.[489] The exclusion from the definition of a qualified trade or business for specified service trades or businesses is fully phased in for a taxpayer with taxable income in excess of the threshold amount plus $50,000 ($100,000 in the case of a joint return).[490]

Tentative deductible amount for a qualified trade or business

In general

For a taxpayer with taxable income below the threshold amount, the deductible amount for each qualified trade or business is equal to 20 percent of the qualified business income with respect to the trade or business.[491] 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 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.[492]

Limitations based on W–2 wages and capital

The wage and capital limitations phase in for a taxpayer with taxable income in excess of the threshold amount.[493] The wage and capital limitations apply fully for a taxpayer with taxable income in excess of the threshold amount plus $50,000 ($100,000 in the case of a joint return).

W–2 wages are the total wages subject to wage withholding,[494] elective deferrals,[495] and deferred compensation[496] paid by the qualified trade or business with respect to employment of its employees during the calendar year ending during the taxable year of the taxpayer.[497] In the case of a taxpayer who is an individual with

[489] Sec. 199A(e)(2).
[490] See sec. 199A(d)(3).
[491] Sec. 199A(b)(3).
[492] Sec. 199A(b)(2).
[493] See sec. 199A(b)(3)(B).
[494] Defined in sec. 3401(a).
[495] Within the meaning of sec. 402(g)(3).
[496] Deferred compensation includes compensation deferred under section 457, as well as the amount of any designated Roth contributions (as defined in section 402A).
[497] Sec. 199A(b)(4). In the case of a taxpayer with a short taxable year that does not contain a calendar year ending during such short taxable year, the following amounts are treated as the W–2 wages of the taxpayer for the short taxable year: (1) wages paid during the short taxable year to employees of the qualified trade or business; (2) elective deferrals (within the meaning of section 402(g)(3)) made during the short taxable year by employees of the qualified trade or business; and (3) compensation actually deferred under section 457 during the short taxable year with respect to employees of the qualified trade or business. Amounts that are treated as

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otherwise qualified business income from sources within the Commonwealth of Puerto Rico, if all the income for the taxable year is taxable under section 1 (income tax rates for individuals), the determination of W–2 wages with respect to the taxpayer's trade or business conducted in Puerto Rico is made without regard to any exclusion under the wage withholding rules[498] for remuneration paid for services in Puerto Rico. W–2 wages do not include any amount that is not properly allocable to qualified business income as a qualified item of deduction.[499] In addition, W–2 wages do not include any amount that was not properly included in a return filed with the Social Security Administration on or before the 60th day after the due date (including extensions) for such return.[500]

Qualified property means tangible property of a character subject to depreciation under section 167 that is held by, and available for use in, the qualified trade or business at the close of the taxable year, which is used at any point during the taxable year in the production of qualified business income, and for which the depreciable period has not ended before the close of the taxable year.[501] The depreciable period with respect to qualified property of a taxpayer means the period beginning on the date the property is first placed in service by the taxpayer and ending on the later of (a) the date that is 10 years after the date the property is first placed in service, or (b) the last day of the last full year in the applicable recovery period that would apply to the property under section 168 (determined without regard to section 168(g)).

Partnerships and S corporations

In the case of a partnership or S corporation, the section 199A deduction is determined at the partner or shareholder level. Each partner in a partnership takes into account the partner's allocable share of each qualified item of income, gain, deduction, and loss, and is treated as having W–2 wages and unadjusted basis of qualified property for the taxable year equal to the partner's allocable share of W–2 wages and unadjusted basis of qualified property of the partnership. The partner's allocable share of W–2 wages and unadjusted basis of qualified property are required to be determined in the same manner as the partner's allocable share of wage expenses and depreciation, respectively. Similarly, each shareholder of an S corporation takes into account the shareholder's pro rata share of each qualified item of income, gain, deduction, and loss of the S corporation, and is treated as having W–2 wages and unadjusted basis of qualified property for the taxable year equal to the shareholder's pro rata share of W–2 wages and unadjusted basis of qualified property of the S corporation.

W–2 wages for a taxable year are not treated as W–2 wages of any other taxable year. See Conference Report to accompany H.R. 1, Tax Cuts and Jobs Act, H.R. Rep. No. 115–466, December 15, 2017, p. 217.

[498] As provided in sec. 3401(a)(8).

[499] Sec. 199A(b)(4)(B).

[500] Sec. 199A(b)(4)(C).

[501] Sec. 199A(b)(6).

Qualified REIT dividends, cooperative dividends, and publicly traded partnership income

A deduction is allowed for 20 percent of the taxpayer's aggregate amount of qualified REIT dividends, qualified cooperative dividends, and qualified publicly traded partnership income for the taxable year.[502]

Qualified REIT dividends do not include any portion of a dividend received from a REIT that is a capital gain dividend[503] or a qualified dividend.[504]

A qualified cooperative dividend means any patronage dividend,[505] per-unit retain allocation,[506] qualified written notice of allocation,[507] or any other similar amount, provided such amount is includible in gross income and is received from either (1) a tax-exempt organization described in section 501(c)(12)[508] or a taxable or tax-exempt cooperative that is described in section 1381(a), or (2) a taxable cooperative governed by tax rules applicable to cooperatives before the enactment of subchapter T of the Code in 1962.[509]

Qualified publicly traded partnership income means (with respect to any qualified trade or business of the taxpayer) the sum of (a) the net amount of the taxpayer's allocable share of each qualified item of income, gain, deduction, and loss of the partnership from a publicly traded partnership not treated as a corporation,[510] and (b) gain recognized by the taxpayer on disposition of its interest in such partnership that is treated as ordinary income (for example, by reason of section 751).[511]

Determination of the taxpayer's deduction

The taxpayer's deduction for qualified business income for the taxable year is equal to the sum of (1) the lesser of (a) the combined qualified business income amount for the taxable year, or (b) an amount equal to 20 percent of taxable income (reduced by any net capital gain[512] and qualified cooperative dividends), plus (2) the lesser of (a) 20 percent of qualified cooperative dividends, or (b) taxable income (reduced by net capital gain). This sum may not exceed the taxpayer's taxable income for the taxable year (reduced by net capital gain).[513] The combined qualified business income amount for the taxable year is the sum of the deductible amounts determined for each qualified trade or business carried on by the

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[502] See sec. 199A(a) and (b).
[503] Defined in sec. 857(b)(3).
[504] Defined in sec. 1(h)(11). See sec. 199A(e)(3).
[505] Defined in sec. 1388(a).
[506] Defined in sec. 1388(f).
[507] Defined in sec. 1388(c).
[508] Organizations described in section 501(c)(12) are benevolent life insurance associations of a purely local character, mutual ditch or irrigation companies, mutual or cooperative telephone companies, or like organizations; but only if 85 percent or more of the income consists of amounts collected from members for the sole purpose of meeting losses and expenses. Sec. 501(c)(12)(A).
[509] Sec. 199A(e)(4).
[510] Such items must be effectively connected with a U.S. trade or business, be included or allowed in determining taxable income for the taxable year, and not constitute excepted enumerated investment-type income. Such items do not include the taxpayer's reasonable compensation, guaranteed payments for services, or (to the extent provided in regulations) section 707(a) payments for services.
[511] Sec. 199A(e)(5).
[512] Defined in sec. 1(h).
[513] Sec. 199A(a).

taxpayer and 20 percent of the taxpayer's qualified REIT dividends and qualified publicly traded partnership income.[514]

The taxpayer's deduction for qualified business income is not allowed in computing adjusted gross income; instead, the deduction is allowed in computing taxable income.[515] The deduction is available to both individuals who do itemize their deductions and individuals who do not itemize their deductions.[516]

Treatment of cooperatives and their patrons

In general

Certain corporations are eligible to be treated as cooperatives and taxed under the special rules of subchapter T of the Code.[517] In general, the subchapter T rules apply to any corporation operating on a cooperative basis (except mutual savings banks, insurance companies, most tax-exempt organizations, and certain utilities).

For Federal income tax purposes, a cooperative subject to the cooperative tax rules of subchapter T generally computes its income as if it were a taxable corporation, except that, in determining its taxable income, the cooperative does not take into account amounts paid for the taxable year as (1) patronage dividends, to the extent paid in money, qualified written notices of allocation,[518] or other property (except nonqualified written notices of allocation)[519] with respect to patronage occurring during such taxable year, and (2) per-unit retain allocations, to the extent paid in money, qualified per-unit retain certificates,[520] or other property (except nonqualified per-unit retain certificates)[521] with respect to marketing occurring during such taxable year.[522]

Patronage dividends are amounts paid to a patron (1) on the basis of quantity or value of business done with or for such patron, (2) under an obligation of the cooperative to pay such amount that existed before the cooperative received the amount so paid, and (3) that are determined by reference to the net earnings of the cooperative from business done with or for its patrons.[523] Per-unit retain allocations are allocations to a patron with respect to products marketed for him, the amount of which is fixed without reference to the net earnings of the organization pursuant to an agreement between the organization and the patron.[524]

Because a patron of a cooperative that receives patronage dividends or per-unit retain allocations generally must include such

[514] Sec. 199A(b)(1).
[515] Sec. 62(a).
[516] Sec. 63(b) and (d).
[517] Secs. 1381–1388.
[518] As defined in sec. 1388(c).
[519] As defined in sec. 1388(d).
[520] As defined in sec. 1388(h).
[521] As defined in sec. 1388(i).
[522] Sec. 1382(b)(1) and (3). In determining its taxable income, the cooperative also does not take into account amounts paid in money or other property in redemption of a nonqualified written notice of allocation which was paid as a patronage dividend during the payment period for the taxable year during which the patronage occurred, or in redemption of a nonqualified per-unit retain certificate which was paid as a per-unit retain allocation during the payment period for the taxable year during which the marketing occurred. Sec. 1382(b)(2) and (4).
[523] Sec. 1388(a).
[524] Sec. 1388(f).

amounts in gross income,[525] excluding patronage dividends and per-unit retain allocations paid by the cooperative from the cooperative's taxable income in effect allows the cooperative to be a conduit with respect to profits derived from transactions with its patrons.

Specified agricultural or horticultural cooperatives with qualified business income

For taxable years beginning after December 31, 2017, and before January 1, 2026, a deduction is allowed to any specified agricultural or horticultural cooperative equal to the lesser of (a) 20 percent of the excess (if any) of the cooperative's gross income over the qualified cooperative dividends paid during the taxable year for the taxable year, or (b) the greater of 50 percent of the W–2 wages paid by the cooperative with respect to its trade or business or the sum of 25 percent of the W–2 wages of the cooperative with respect to its trade or business plus 2.5 percent of the unadjusted basis immediately after acquisition of qualified property of the cooperative.[526] The cooperative's section 199A(g) deduction may not exceed its taxable income [527] for the taxable year.

A specified agricultural or horticultural cooperative is an organization to which part I of subchapter T applies that is engaged in (a) the manufacturing, production, growth, or extraction in whole or significant part of any agricultural or horticultural product, (b) the marketing of agricultural or horticultural products that its patrons have so manufactured, produced, grown, or extracted, or (c) the provision of supplies, equipment, or services to farmers or organizations described in the foregoing.

Explanation of Provision

Treatment of specified agricultural or horticultural cooperatives

Deduction for qualified production activities income under section 199A

The provision modifies the deduction for qualified business income of a specified agricultural or horticultural cooperative under section 199A(g) to instead provide a deduction for qualified production activities income of a specified agricultural or horticultural cooperative that is similar to the deduction for qualified production activities income under former section 199.

The provision provides a deduction from taxable income that is equal to 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(g) deduction and any deduction allowable under section 1382(b) and (c) (relating to patronage dividends, per-unit retain allocations, and nonpatronage distributions)) for the taxable year. The amount of the deduction for a taxable year is limited to 50 percent of the W–2 wages paid by the cooperative during the calendar year that ends in such taxable year.

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[525] Sec. 1385(a)(1) and (3).

[526] Sec. 199A(g).

[527] For this purpose, taxable income is computed without regard to the cooperative's deduction under section 199A(g).

For this purpose, W–2 wages are determined in the same manner as under the other provisions of section 199A, except that such wages do not include any amount that is not properly allocable to domestic production gross receipts.[528]

In the case of oil related qualified production activities income, the provision provides that the section 199A(g) deduction is reduced by three percent of the least of the cooperative's oil related qualified production activities income, qualified production activities income, or taxable income (determined without regard to the cooperative's section 199A(g) deduction and any deduction allowable under section 1382(b) and (c) (relating to patronage dividends, per-unit retain allocations, and nonpatronage distributions)) for the taxable year. For this purpose, oil related qualified production activities income for any taxable year is the portion of qualified production activities income attributable to the production, refining, processing, transportation, or distribution of oil, gas, or any primary product thereof[529] during the taxable year.

In general, qualified production activities income is equal to domestic production gross receipts reduced by the sum of: (1) the cost of goods sold that are allocable to such receipts;[530] and (2) other expenses, losses, or deductions that are properly allocable to such receipts.[531] Domestic production gross receipts generally are gross receipts of the cooperative that are derived from any lease, rental, license, sale, exchange, or other disposition of any agricultural or horticultural product[532] that was manufactured, produced, grown, or extracted by the cooperative in whole or in significant part within the United States.[533] The cooperative is treated as having manufactured, produced, grown, or extracted in whole or significant part any agricultural or horticultural products marketed by the cooperative if such items were manufactured, produced, grown, or extracted in whole or significant part by its patrons.

Domestic production gross receipts do not include any gross receipts of the cooperative derived from property leased, licensed, or

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[528] Under the provision, because Puerto Rico is not treated as part of the United States for purposes of determining domestic production gross receipts under section 199A(g), W–2 wages do not include any remuneration paid for services in Puerto Rico.

[529] Within the meaning of section 927(a)(2)(C) as in effect before its repeal.

[530] For this purpose, any item or service brought into the United States is treated as acquired by purchase, and its cost is treated as not less than its value immediately after it entered the United States. A similar rule applies in determining the adjusted basis of leased or rented property where the lease or rental gives rise to domestic production gross receipts. In addition, for any property exported by the cooperative for further manufacture, the increase in cost or adjusted basis may not exceed the difference between the value of the property when exported and the value of the property when brought back into the United States after the further manufacture.

[531] In computing qualified production activities income, the section 199A(g) deduction itself is not an allocable deduction. As under former section 199, the cooperative's qualified production activities income is determined without regard to any deduction allowable under section 1382(b) and (c) (relating to patronage dividends, per-unit retain allocations, and nonpatronage distributions). See Treas. Reg. sec. 1.199–6(c).

[532] Consistent with former section 199, it is intended that agricultural or horticultural products also include fertilizer, diesel fuel, and other supplies used in agricultural or horticultural production that are manufactured, produced, grown, or extracted by the cooperative. See Treas. Reg. sec. 1.199–6(f).

[533] Consistent with former section 199, it is intended that domestic production gross receipts include gross receipts of a cooperative derived from any sale, exchange, or other disposition of agricultural products with respect to which the cooperative performs storage, handling, or other processing activities (other than transportation activities) within the United States, provided such products are consumed in connection with, or incorporated into, the manufacturing, production, growth, or extraction of agricultural or horticultural products (whether or not by the cooperative). See Treas. Reg. sec. 1.199–3(e)(1).

rented by the taxpayer for use by any related person.[534] In addition, domestic production gross receipts do not include gross receipts that are derived from the lease, rental, license, sale, exchange, or other disposition of land.

Definition of specified agricultural or horticultural cooperative

The provision limits the definition of specified agricultural or horticultural cooperative to organizations to which part I of subchapter T applies that (1) manufacture, produce, grow, or extract in whole or significant part any agricultural or horticultural product, or (2) market any agricultural or horticultural product that their patrons have so manufactured, produced, grown, or extracted in whole or significant part.[535] The definition no longer includes a cooperative solely engaged in the provision of supplies, equipment, or services to farmers or other specified agricultural or horticultural cooperatives.

Special rules

All members of an expanded affiliated group[536] are treated as a single corporation and the deduction is allocated among the members of the expanded affiliated group in proportion to each member's respective amount, if any, of qualified production activities income. In addition, for purposes of determining domestic production gross receipts, if all of the interests in the capital and profits of a partnership are owned by members of a single expanded affiliated group at all times during the taxable year of such partnership, the partnership and all members of such group are treated as a single taxpayer during such period.

In the case of a specified agricultural or horticultural cooperative that is a partner in a partnership, rules similar to the rules applicable to a partner in a partnership under section 199A(f)(1) apply.

For a tax-exempt cooperative subject to tax on its unrelated business taxable income by section 511, the provision is applied by substituting unrelated business taxable income for taxable income where applicable.

The section 199A(g) deduction is determined by only taking into account items that are attributable to the actual conduct of a trade or business.

Allocation of the cooperative's deduction to patrons

The provision provides that an eligible patron that receives a qualified payment from a specified agricultural or horticultural cooperative is allowed as a deduction for the taxable year in which such payment is received an amount equal to the portion of the co-

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[534] For this purpose, a person is treated as related to another person if such persons are treated as a single employer under subsection (a) or (b) of section 52 or subsection (m) or (o) of section 414, except that determinations under subsections (a) and (b) of section 52 are made without regard to section 1563(b).

[535] Consistent with former section 199, it is intended that agricultural or horticultural products also include fertilizer, diesel fuel, and other supplies used in agricultural or horticultural production that are manufactured, produced, grown, or extracted by the cooperative. See Treas. Reg. sec. 1.199–6(f).

[536] For this purpose, an expanded affiliated group is an affiliated group as defined in section 1504(a) determined (i) by substituting "more than 50 percent" for "more than 80 percent" each place it appears, and (ii) without regard to paragraphs (2) and (4) of section 1504(b).

operative's deduction for qualified production activities income that is (i) allowed with respect to the portion of the qualified production activities income to which such payment is attributable, and (ii) identified by the cooperative in a written notice mailed to the patron during the payment period described in section 1382(d).[537]

The patron's deduction of such amount may not exceed the 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)). A qualified payment is any amount that (i) is described in paragraph (1) or (3) of section 1385(a) (*i.e.,* patronage dividends and per-unit retain allocations), (ii) is received by an eligible patron from a specified agricultural or horticultural cooperative, and (iii) is attributable to qualified production activities income with respect to which a deduction is allowed to such cooperative. An eligible patron is (i) a taxpayer other than a corporation,[538] or (ii) another specified agricultural or horticultural cooperative.

Finally, the cooperative cannot reduce its income under section 1382 for any deduction allowable to its patrons under this rule (*i.e.,* the cooperative must reduce its deductions allowed for certain payments to its patrons in an amount equal to the section 199A(g) deduction allocated to its patrons).

Regulatory authority

Specific regulatory authority is provided for the Secretary of the Treasury to promulgate necessary regulations under section 199A(g), including regulations that prevent more than one cooperative taxpayer from being allowed a deduction with respect to the same activity (*i.e.,* the same lease, rental, license, sale, exchange, or other disposition of any agricultural or horticultural product that was manufactured, produced, grown, or extracted in whole or in significant part within the United States). In addition, regulatory authority is provided to address the proper allocation of items of income, deduction, expense, and loss for purposes of determining qualified production activities income. The provision provides that the regulations be based on the regulations applicable to cooperatives and their patrons under former section 199 (as in effect before its repeal).[539]

Treatment of cooperative patrons

Repeal of special deduction for qualified cooperative dividends

The provision repeals the special deduction for qualified cooperative dividends. In addition, the provision repeals the rule that excludes qualified cooperative dividends from qualified business income of a qualified trade or business. The provision also clarifies that items of income excluded from qualified items of income, and thus excluded from qualified business income, do not include any

[537] Consistent with the allocation of the cooperative's deduction to its patrons under former section 199 and consistent with the requirements for the payment of patronage dividends in section 1388(a)(1), the cooperative's section 199A(g) deduction is allocated among its patrons on the basis of the quantity or value of business done with or for such patron by the cooperative.

[538] For this purpose, corporation does not include an S corporation.

[539] See Treas. Reg. secs. 1.199–1 through –9.

amount described in section 1385(a)(1) (*i.e.,* patronage dividends). Accordingly, qualified business income of a qualified trade or business includes any patronage dividend,[540] per-unit retain allocation,[541] qualified written notice of allocation,[542] or any other similar amount received from a cooperative, provided such amount is otherwise a qualified item of income, gain, deduction, or loss (*i.e.,* such amount is (i) effectively connected with the conduct of a trade or business within the United States, and (ii) included or allowed in determining taxable income for the taxable year).[543]

Reduced deduction for qualified payments received from a specified agricultural or horticultural cooperative

In the case of any qualified trade or business of a patron of a specified agricultural or horticultural cooperative, the deductible amount determined under section 199A(b)(2) for such trade or business is reduced by the lesser of (1) nine percent of the amount of qualified business income with respect to such trade or business as is properly allocable to qualified payments received from such specified agricultural or horticultural cooperative, or (2) 50 percent of the amount of W–2 wages with respect to such qualified trade or business that are properly allocable to such amount.

Transition rule relating to the repeal of section 199

The provision clarifies that the repeal of section 199 for taxable years beginning after December 31, 2017, does not apply to a qualified payment received by a patron from a specified agricultural or horticultural cooperative in a taxable year beginning after December 31, 2017, to the extent such qualified payment is attributable to qualified production activities income with respect to which a deduction is allowable to the cooperative under former section 199 for a taxable year of the cooperative beginning before January 1, 2018. Such qualified payment remains subject to former section 199 and any section 199 deduction allocated by the cooperative to its patrons related to such qualified payment may be deducted by such patrons in accordance with former section 199. In addition, no deduction is allowed under section 199A for such qualified payments.

Examples

The following examples illustrate the provision.

Example 1

Cooperative is a grain marketing cooperative with $5,250,000 in gross receipts during 2018 from the sale of grain grown by its patrons. Cooperative paid $4,000,000 to its patrons at the time the grain was delivered in the form of per-unit retain allocations and another $1,000,000 in patronage dividends after the close of the 2018 taxable year. Cooperative has other expenses of $250,000 during 2018, including $100,000 of W–2 wages.

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[540] Defined in sec. 1388(a).
[541] Defined in sec. 1388(f).
[542] Defined in sec. 1388(c).
[543] See sec. 199A(c)(3)(A).

Cooperative has domestic production gross receipts of $5,250,000 and qualified production activities income of $5,000,000[544] for 2018. Cooperative's section 199A(g) deduction is $50,000 and is equal to the least of nine percent of qualified production activities income ($450,000),[545] nine percent of taxable income ($450,000),[546] or 50 percent of W–2 wages ($50,000).[547] Cooperative passes through the entire section 199A(g) deduction to its patrons. Accordingly, Cooperative reduces its $5,000,000 deduction allowable under section 1382(b) and (c) (relating to the $1,000,000 patronage dividends and $4,000,000 per-unit retain allocations) by $50,000.

Patron's grain delivered to Cooperative during 2018 is two percent of all grain marketed through Cooperative during such year. During 2019, Patron receives $20,000 in patronage dividends and $1,000 of allocated section 199A(g) deduction from Cooperative related to the grain delivered to Cooperative during 2018.

Patron is a grain farmer with taxable income of $75,000 for 2019 (determined without regard to section 199A) and has a filing status of married filing jointly. Patron's qualified business income related to its grain trade or business for 2019 is $50,000, which consists of gross receipts of $150,000 from sales to an independent grain elevator, per-unit retain allocations received from Cooperative during 2019 of $80,000, patronage dividends received from Cooperative during 2019 related to Cooperative's 2018 net earnings of $20,000, and expenses of $200,000 (including $50,000 of W–2 wages).

The portion of the qualified business income from Patron's grain trade or business related to qualified payments received from Cooperative during 2019 is $10,000, which consists of per-unit retain allocations received from Cooperative during 2019 of $80,000, patronage dividends received from Cooperative during 2019 related to Cooperative's 2018 net earnings of $20,000, and properly allocable expenses of $90,000 (including $25,000 of W–2 wages).[548]

Patron's deductible amount related to the grain trade or business is 20 percent of qualified business income ($10,000)[549] reduced by the lesser of nine percent of qualified business income related to qualified payments received from Cooperative ($900)[550] or 50 percent of W–2 wages related to qualified payments received from Cooperative ($12,500),[551] or $9,100. As Patron does not have any other qualified trades or business, the combined qualified business income amount is also $9,100.

Patron's deduction under section 199A for 2019 is $10,100, which consists of the combined qualified business income amount of $9,100, plus Patron's deduction passed through from Cooperative of $1,000.

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[544] $5,250,000 gross receipts − $250,000 expenses = $5,000,000.

[545] $5,000,000 * 0.09 = $450,000.

[546] For this purpose, taxable income is $5,000,000 and is determined without regarding to the section 199A(g) deduction and without regard to the $5,000,000 deduction allowable under section 1382(b) and (c) relating to the $1,000,000 patronage dividends and $4,000,000 per-unit retain allocations.

[547] $100,000 * 0.50 = $50,000.

[548] Which expenses are properly allocable in a given case will depend on all the facts and circumstances. The example assumes that the fraction of properly allocable W–2 wages differs from the fraction of other properly allocable expenses.

[549] $50,000 * 0.20 = $10,000.

[550] $10,000 * 0.09 = $900.

[551] $25,000 * 0.50 = $12,500.

Example 2

Cooperative and Patron have the same facts as above for 2018 and 2019 except that Patron has expenses of $200,000 that include zero W–2 wages during 2019.

Patron's deductible amount related to the grain trade or business is 20 percent of qualified business income ($10,000) reduced by the lesser of nine percent of qualified business income related to qualified payments received from Cooperative ($900), or 50 percent of W–2 wages related to qualified payments received from Cooperative ($0), or $10,000.

Patron's deduction under section 199A for 2019 is $11,000, which consists of the combined qualified business income amount of $10,000, plus Patron's deduction passed through from Cooperative of $1,000.

The Treasury Department has issued proposed guidance addressing this provision.[552]

Effective Date

The provision is effective as if included in the amendments made by sections 11011 and 13305 of Public Law 115–97, that is, for taxable years beginning after December 31, 2017.

2. State housing credit ceiling and average income test for low-income housing credit (secs. 102 and 103 of Division T of the Act and sec. 42 of the Code)

Present Law

The low-income housing credit may be claimed over a 10-year credit period after each low-income building is placed in service. The amount of the credit for any taxable year in the credit period is the applicable percentage of the qualified basis of each qualified low-income building. A State housing credit ceiling applies to potential housing credits allocated by a State or local housing credit agency. For determining the current-year State dollar amount of the ceiling in any calendar year, the greater of (i) $1.75 multiplied by the State population, or (ii) $2,000,000, is taken into account. These amounts are indexed for inflation. For calendar year 2019, the amounts are $2.75625 and $3,166,875.

To be eligible for the low-income housing credit, a qualified low-income building must be part of a qualified low-income housing project. In general, a qualified low-income housing project is defined as a project that satisfies one of two tests at the election of the taxpayer. The first 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 (the "20–50 test"). The second test is met if 40 percent or more of the residential units in the project are both rent-restricted and occupied by individuals whose income is 60 percent or less of area median gross income (the "40–60 test"). A residential unit is rent-restricted if the gross rent from the unit does not exceed 30 percent of the imputed income limitation applicable to the unit.

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[552] See REG-118425-18, 84. Fed. Reg. 28668, June 19, 2019, and Notice 2019–27, June 18, 2019.

A unit occupied by individuals whose incomes rise above 140 percent of the applicable income limit shall continue to be treated as a low-income unit if the income of such occupants initially met such income limitation and such unit continues to be rent-restricted so long as the next available unit is occupied by a tenant whose income does not exceed such limitation. In the case of deep rent skewed projects, special rules apply. A deep rent skewed project is a project in which (i) 15 percent or more of the low-income units in the project are occupied by individuals whose incomes are 40 percent or less of area median gross income, (ii) the gross rent with respect to each low-income unit in the project does not exceed 30 percent of the applicable income limit that applies to individuals occupying the unit, and (iii) the gross rent with respect to each low-income unit in the project does not exceed half of the average gross rent with respect to units of comparable size that are not occupied by individuals who meet the applicable income limit.

Explanation of Provisions

State housing credit ceiling

The first provision provides an increase in the State housing credit ceiling for 2018, 2019, 2020, and 2021. In each of those calendar years, the dollar amounts in effect for determining the current-year ceiling (after any increase due to the applicable cost of living adjustment) are increased by multiplying the dollar amounts for that year by 1.125.

Average income test for qualified low-income housing project

The second provision adds a third optional test to the 20–50 and 40–60 tests for a qualified low-income housing project. A project meets the minimum requirements of the average income test 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 taxpayer designates the imputed income limitation. 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.

For purposes of the rental of the next available unit in a project with respect to which the taxpayer elects the average income test, if the income of the occupants of the unit increases above 140 percent of the greater of (i) 60 percent of area median gross income, or (ii) the imputed income limitation designated by the taxpayer with respect to the unit, then the unit ceases to be treated as a low-income unit if any residential rental unit in the building (of a size comparable to, or smaller than, such unit) is occupied by a new resident whose income exceeds the applicable imputed income limitation. In the case of a deep rent skewed project, 170 percent applies instead of 140 percent, and other special rules apply.

Effective Date

The provision relating to the State housing credit ceiling is effective for calendar years beginning after December 31, 2017, and before January 1, 2022.

The provision relating to the average income test is effective for elections made after the date of enactment.

TAX TECHNICAL CORRECTIONS ACT OF 2018

Division U of the Act includes technical corrections, other corrections, and clerical and deadwood corrections to recent tax legislation enacted before 2017. Except as otherwise provided, the amendments made by the technical corrections and other corrections contained in Division U of the Act take effect as if included in the original legislation to which each amendment relates.

A. Tax Technical Corrections

1. Amendments relating to Protecting Americans from Tax Hikes ("PATH") Act of 2015 (Division Q of the Consolidated Appropriations Act, 2016) (sec. 101 of Division U of the Act)

Earned income tax credit permanent rules (Act sec. 103).— The PATH Act made permanent the $5,000 increase in the phaseout amount for married couples filing joint returns. The Act retained rules providing for the indexation of the prior-law $3,000 amount (notwithstanding that this amount had been repealed). The provision deletes references to the prior law amount and consolidates the inflation adjustment in one subsection.

Transit parity (Act sec. 105).—Under section 132(f)(2) as in effect before the changes made by the PATH Act, the monthly limit on the fringe benefit exclusion for employer-provided parking was $175, and the monthly limit on employer-provided benefits for mass transit and van pooling combined was $100. These monthly limits were indexed under section 132(f)(6) using a base year determined by when the particular monthly limit became effective—a base year of 1998 for parking and 2001 for transit/vanpooling. Parity between the exclusions was provided on a temporary basis from 2009 through 2014. The PATH Act created permanent parity in the exclusions by changing the monthly transit/vanpooling limit in section 132(f)(2) to $175. However, the PATH Act failed to include a conforming change to repeal the base-year rule in section 132(f)(6) for transit/vanpooling. The provision repeals the transit/vanpooling base-year rule.

Research credit: not reinstate alternative incremental credit (Act sec. 121).—The alternative incremental credit expired in 2008. The provision clarifies that the alternative incremental credit is not reinstated by the PATH Act, and makes conforming changes.

Bonus depreciation (Act sec. 143).—The provision clarifies that, among the criteria enacted in the PATH Act defining certain property having a longer production period that is treated as qualified property, the requirement that the property be acquired pursuant to a written contract before 2020 requires that the contract be a written binding contract. This corrects an unintended error that changed prior law.

The provision clarifies that the preproductive period under section 168(k)(5)(B)(ii) is consistent with the preproductive period under section 263A(e)(3).

The provision amends section 168(k)(6), as in effect prior to the amendments made by section 13201 of Public Law 115–97, to provide the intended applicable percentages. Thus, the provision clarifies that in the case of longer production period property and certain aircraft acquired before September 28, 2017, and placed in service in 2018, the 50-percent applicable percentage applies to the entire adjusted basis, and if placed in service in 2019, the 40-percent applicable percentage applies to the entire adjusted basis.

The provision clarifies that if, for a taxable year, a taxpayer makes both an election under section 168(k)(7) not to claim bonus depreciation for all property in a particular class of property and an election under section 168(k)(4) to claim AMT credits in lieu of bonus depreciation, section 168(k)(4) does not apply to property in the particular class. This corrects an unintended error which changed prior law.

Election out of accelerated recovery periods for qualified Indian reservation property (Act sec. 167).—As amended by the PATH Act, section 168(j) permits taxpayers to elect out of the otherwise applicable accelerated recovery periods in the case of qualified Indian reservation property. In general, if section 168(j) applies, there is no AMT adjustment (see section 168(j)(3)). The provision clarifies that no AMT adjustment applies in the case of qualified Indian reservation property if the taxpayer makes the election out.

Failure to furnish correct payee statements (Act sec. 202).—The provision clarifies section 6722(c)(3)(A), relating to failure to furnish correct payee statements, to refer to the payee statement (rather than to information returns) that are furnished (rather than filed). A corresponding change in the effective date stated in the PATH Act refers to statements that are furnished (rather than provided). Similarly structured language in section 6721(c)(3)(A) is conformed so that it refers to the information return (rather than to any information return).

Requirements for the issuance of Individual Taxpayer Identification Numbers ("ITINs") (Act sec. 203).—The provision clarifies that community-based Certifying Acceptance Agents are among the entities that are available to individuals living abroad who wish to obtain ITINs for purposes of meeting their U.S. tax filing obligations.

The provision clarifies that the expiration of ITINs that have not been used for three consecutive taxable years is to occur on the date following the due date of the tax return for such third consecutive taxable year. For ITINs issued prior to January 1, 2013, the ITIN will expire on the applicable date, or if earlier, the day following the due date of the tax return for the third consecutive taxable year such ITIN was not used on a return. In the event that such an ITIN has not been used for three (or more) consecutive taxable years on the tax return due date for the 2015 taxable year, such ITIN shall expire on the day following that date.

The provision clarifies that the effective date of section 203 of the PATH Act, which provides that PATH Act section 203 is effective for ITIN applications made after the date of enactment, does not prevent the provision relating to outstanding ITINs from taking effect.

Retroactive claims of credits (Act secs. 204, 205, and 206).—The provision conforms a reference in section 24(e)(2) to the taxpayer identification number (not to the identifying number). The provisions remove special effective date rules in each of these PATH Act sections that have no practical effect.

Effective date for treatment of credits for certain penalties (Act sec. 209).—The PATH Act inadvertently failed to state the effective date for the rule providing a reasonable cause exception for erroneous claims for refund or credit. The provision states that the effective date is for claims filed after the date of enactment of the PATH Act.

Making American Opportunity Tax Credit permanent (Act secs. 102, 206, 207, 208, and 211).—The provision reflects the permanent extension of the American Opportunity Tax Credit by eliminating deadwood and consolidating the provisions of section 25A.

Section 529 programs and qualified ABLE programs (Act secs. 302(b)).—Among other changes made by the PATH Act to section 529 qualified tuition programs, the PATH Act repealed the rules providing that section 529 accounts must be aggregated for purposes of calculating the amount of a distribution that is included in a taxpayer's income. Though PATH Act section 303 modified certain rules for qualified ABLE programs, it did not make a parallel change to the rules for distributions from ABLE accounts. The provision makes a parallel change that conforms the treatment of multiple distributions during a taxable year from an ABLE account in Code section 529A to the treatment of multiple distributions during a taxable year from a section 529 account.

Restriction on tax-free distributions involving Real Estate Investment Trusts ("REITs") (Act sec. 311).—The provision clarifies that, for purposes of section 355(h)(2)(B)(iii), control of a partnership means ownership of at least 80 percent of the profits interests and at least 80 percent of the capital interests. That is, control of a partnership for purposes of section 355(h)(2)(B)(iii) does not require exactly 80-percent ownership of the profits interests and 80-percent ownership of the capital interests of the partnership.

Ancillary personal property of a REIT (Act sec. 318).—Section 856(c)(9) treats ancillary personal property as a real estate asset for purposes of the REIT 75-percent asset test to the extent that rents attributable to such ancillary personal property are treated, under a separate provision, as rents from real property. The provision makes two conforming changes with respect to the REIT income tests. First, the provision treats gain from the sale or disposition of such ancillary personal property as gain from the sale or disposition of a real estate asset for purposes of the REIT income tests. Second, the provision treats gain from the sale or disposition of certain obligations secured by mortgages on both real property and personal property as gain from the sale or disposition of real property for purposes of the REIT income tests.

Exception from Foreign Investment in U.S. Real Property Tax Act ("FIRPTA") for certain stock of REITs (Act sec. 322).—The provision restates provisions of section 897(k) as amended, makes clerical conforming changes, and strikes a modification to a repealed provision.

Further, under section 897(k) as amended, the provision addresses the definition of a qualified collective investment vehicle that is eligible for benefits of a comprehensive income tax treaty with the United States that includes an exchange of information program. Specifically, the provision clarifies that the definition can be met only if the dividends article in the treaty imposes conditions on the benefits allowable in the case of dividends paid by a REIT.

The provision clarifies the effective date for the determination of domestic control by stating that the rule applies with respect to each testing period ending on or after the date of enactment (not that the rule takes effect on the date of enactment).

FIRPTA exception for qualified foreign pension funds (Act sec. 323).—Section 897(l)(1) provides that section 897 does not apply (i) to any United States real property interest held directly (or indirectly through one or more partnerships) by, or (ii) to any distribution received from a REIT by, a qualified foreign pension fund or an entity all the interests of which are held by a qualified foreign pension fund. The provision clarifies that, for purposes of section 897, a qualified foreign pension fund is not treated as a nonresident alien individual or as a foreign corporation; in other words, in determining the U.S. income tax of a qualified foreign pension fund, section 897 does not apply. The provision provides that, also for that purpose, an entity all the interests of which are held by a qualified foreign pension fund is treated as such a fund.

Section 897(l)(2) establishes a five-prong definition of the term "qualified foreign pension fund." The provision revises the second prong of the definition to clarify that a government-established fund to provide public retirement or pension benefits may qualify, as well as a fund established by more than one employer to provide retirement or pension benefits to their employees, such as a multiple-employer or multiemployer plan. In addition, the provision makes clarifying changes to the fourth and fifth prongs of the definition.

Election of certain small insurance companies to be taxed only on taxable investment income (Act sec. 333).—Section 831(b) requires that an otherwise eligible electing insurance company meet one of two diversification requirements. The first requires that no more than 20 percent of the company's net (or if greater, direct) written premiums for the taxable year is attributable to any one policyholder. The second, applicable if the first is not met, requires that no person holds (directly or indirectly) aggregate interests in the company that constitute a percentage of the entire interest in the company that is more than a *de minimis* percentage higher than the percentage of interests in specified assets with respect to the company held (directly or indirectly) by a specified holder.

The provision clarifies the first diversification rule to provide a look-through rule with respect to an intermediary (for example, an aggregate fund). Specifically, the provision provides that in the case of reinsurance or any fronting, intermediary, or similar arrangement, a policyholder means each policyholder of the underlying direct written insurance with respect to the reinsurance or arrangement.

The provision clarifies the determination of percentages under the second diversification rule by making the determination with respect to relevant specified assets. They are defined (with respect to any specified holder with respect to any insurance company) to mean the aggregate amount of the specified assets, with respect to the insurance company, any interest in which is held directly or indirectly by a spouse or specified relation. A specified relation is a lineal descendent (including by adoption) of an individual who holds, directly or indirectly, an interest in the insurance company, and the lineal descendant's spouse. Thus, for example, a specified relation of an individual includes the individual's step-children. The provision further clarifies that relevant specified assets do not include any specified asset that was acquired by the spouse or specified relation by bequest, devise, or inheritance from a decedent for a two-year period.

A specified holder is defined to include a lineal descendent (including by adoption) of an individual who holds, directly or indirectly, an interest in the insurance company, and the lineal descendant's spouse. Thus, a specified holder includes an individual's step-children. A specified holder is defined also to include a non-U.S.-citizen spouse of an individual who holds, directly or indirectly, an interest in the specified assets with respect to the insurance company. A non-U.S.-citizen spouse would generally not be an eligible recipient for purposes of the unified estate and gift tax marital deduction, for example, and so assets passing to such a spouse from such an individual would not be deductible for estate and gift tax purposes. By contrast, a U.S.-citizen spouse could receive assets from the individual without giving rise to estate tax or gift tax with respect to those assets.

Treasury Department guidance under the provision may provide that factors such as ownership, premiums, gross revenue, and factors taken into account under applicable State law for assessing risk are taken into account, to the extent this is consistent with the purpose of the provision to accurately determine percentages based on the real economic arrangement among the parties.

2. Amendment relating to Consolidated Appropriations Act, 2016 (sec. 102 of Division U of the Act)

Treatment of transportation costs of independent refiners (Act sec. 305).—The provision clarifies that section 199(c)(3)(C) applies for purposes of calculating qualified production activities income under section 199(c) and for purposes of calculating oil related qualified production activities income under section 199(d)(9), as in effect before the repeal of section 199 as part of Public Law 115–97.

The provision clarifies that an independent refiner may elect to apply section 199(c)(3)(C) to its oil transportation costs for purposes of calculating its deduction under section 199 (*i.e.,* it is not required to apply the provision to its oil transportation costs). It is anticipated that the Secretary will issue guidance prescribing the manner in which such election shall be made.

3. Amendments relating to Fixing America's Surface Transportation Act (2015) (sec. 103 of Division U of the Act)

Revocation or denial of passport in case of certain unpaid taxes (Act sec. 32101).—The Fixing America's Surface Transportation Act (2015) provides for judicial review of the Secretary's certification that an individual has a seriously delinquent tax debt, either in a U.S. district court or in the Tax Court. The provision clarifies that the party against whom a Tax Court petition is filed is the Commissioner of Internal Revenue. The provision also provides a tie-breaker rule clarifying that the court first acquiring jurisdiction over the action has sole jurisdiction, and corrects a cross reference.

4. Amendments relating to Surface Transportation and Veterans Health Care Choice Improvement Act of 2015 (sec. 104 of Division U of the Act)

Consistent value for transfer and income tax purposes (Act sec. 2004).—Section 1014(f) generally requires that an heir who acquires property from a decedent (whether or not reported on an estate tax return) claim a basis no greater than the final value of the property for estate tax purposes. Section 6662(b)(8) imposes a penalty in the case of an inconsistent estate basis. Under the provision, the term “inconsistent estate basis” means any portion of an underpayment attributable to the failure to comply with section 1014(f). The penalty could have been viewed as applying when an heir claims a basis higher than the final estate tax value by reason of making basis adjustments relating to post-acquisition events (e.g., improvements to the property). This result is not intended. The provision modifies the definition of inconsistent estate basis to avoid this unintended result.

Mass Transit Account (“MTA”) financing (Act sec. 2008).—The Surface Transportation and Veterans Health Care Choice Improvement Act of 2015 changes the taxation of liquefied natural gas (LNG) and liquefied petroleum gas (LPG) from a per-gallon basis to an energy-equivalent basis. That is, it provides that the tax is based on the LNG energy equivalent to a gallon of diesel (DGE) (24.3 cents per DGE, which is 6.06 pounds of LNG), and on the LPG energy equivalent to a gallon of gasoline (GGE) (18.3 cents per GGE, which is 5.75 pounds of LPG). Section 9503(e)(2) allocates 1.86 cents per gallon of LNG and 2.13 cents per gallon of LPG to the MTA of the Highway Trust Fund, but it does not specifically conform the per-gallon basis to an energy-equivalent basis for purposes of the allocation. The provision conforms the per-gallon basis in section 9503(e)(2) to the energy-equivalent basis, using DGE for LNG and GGE for LPG, to reflect the energy-equivalent basis used for the taxes imposed on LNG and LPG.

5. Amendments relating to Stephen Beck, Jr., ABLE Act of 2014 (sec. 105 of Division U of the Act)

Inflation adjustment for certain civil penalties under the Internal Revenue Code of 1986 (Act sec. 208).—An annual inflation adjustment is provided for fixed-dollar civil tax penalties in the case of: (i) section 6651(a), failure to file a tax return; (ii) section 6652(c), failure to file or disclose information returns by exempt organizations and certain trusts, (iii) section 6695, preparation of tax returns for other persons, (iv) section 6698, failure to file a partnership return, (v) section 6699, failure to file an S corporation return, (vi) section 6721, failure to file correct information returns, and (vii) section 6722, failure to furnish correct payee statements. The provision clarifies that the effective date of the annual inflation adjustments added to these civil penalties generally is for returns required to be filed, and statements required to be furnished, after December 31, 2014, and in the case of the annual inflation adjustment for penalties relating to preparation of tax returns for other persons, is for returns or claims for refund filed after December 31, 2014.

6. Amendment relating to American Taxpayer Relief Act of 2012 (sec. 106 of Division U of the Act)

Reference in definition of a deficiency to American Opportunity Tax Credit (Act sec. 104).—The provision conforms a reference in section 6211(b)(4)(A), relating to the definition of a deficiency, to a provision of the American Opportunity Tax Credit that was renumbered by the American Taxpayer Relief Act of 2012.

7. Amendment relating to United States–Korea Free Trade Agreement Implementation Act (2011) (sec. 107 of Division U of the Act)

Increase in penalty on paid preparers who fail to comply with earned income tax credit due diligence requirements (Act sec. 501).—The provision clarifies that the effective date of the section 6695(g) penalty increase is for documents prepared (not returns required to be filed) after December 31, 2011.

8. Amendment relating to SAFETEA–LU (sec. 108 of Division U of the Act)

Penalty relating to signs (Act sec. 1125).—Persons engaged in distilled spirits operations are required to place and keep conspicuously on the outside of such place of business a sign showing the name of such person and denoting the business, or businesses, in which engaged. Section 5681 imposes penalties for failure to post a required sign and posting or displaying a false sign. Under section 5681(b), a wholesale dealer in liquors may display a distilled spirits operations sign only if that person has paid the special occupational tax applicable to those wholesalers, payment of the tax being the indication that such person was eligible to post such a sign. SAFETEA–LU repealed the special occupational taxes, but did not make a conforming change to the penalty provision under 5681(b). The provision corrects the outdated reference in the penalty for displaying a false sign. Specifically, the provision modifies section 5681(b) to provide that a wholesale dealer in liquors may post a sign indicating that it is engaged in distilled spirits operations only if that person has complied with the recordkeeping requirements required by section 5121(a) and the registration requirements under section 5124.

9. Amendments relating to the American Jobs Creation Act of 2004 ("AJCA") (sec. 109 of Division U of the Act)

Treatment of certain trusts as shareholder of S corporation (Act sec. 233).—AJCA amended Code section 1361 to permit a trust that is an IRA or ROTH IRA to be a shareholder of a bank that is an S corporation, but only to the extent of bank stock held by the trust on enactment (October 22, 2004). The provision clarifies that only the individual for whose benefit the trust is created is treated as "the shareholder."

Rural electric cooperatives (Act sec. 319).—Section 501(c)(12) provides an income tax exemption for rural electric cooperatives if at least 85 percent of the cooperative's income consists of amounts collected from members for the sole purpose of meeting losses and expenses of providing service to its members. The Energy Policy Act of 2005 made permanent a rule to exclude from the 85 percent test income from transactions related to open access transmission if approved by the Federal Energy Regulatory Commission ("FERC"). FERC regulates transmission lines in all States except Alaska, Hawaii, and most of Texas. Because of an oversight, only transmission systems in Texas received the treatment accorded to FERC-regulated electric cooperatives. Electric cooperatives in Alaska are regulated by the Regulatory Commission of Alaska ("RCA"). Regulated utilities in Alaska with an RCA-approved open access transmission tariff modeled after FERC should have received the same tax treatment as their similarly-situated counterparts in the other States. The provision clarifies that that such utilities in Alaska and Hawaii are treated the same as those in Texas for purposes of the exclusion from the 85-percent test.

B. Technical Corrections Related to Partnership Audit Rules

The provisions correct and clarify provisions relating to the partnership audit rules enacted in the Bipartisan Budget Act of 2015, as amended by the PATH Act of 2015, to express the intended rule. Section and chapter references are to the Internal Revenue Code of 1986 unless otherwise indicated.

1. Scope of adjustments subject to partnership audit rules (sec. 201 of Division U of the Act and secs. 6241(2) and (9), 6501(c), 6221, 6225, 6226, 6227, 6231, 6234, and 7485 of the Code)

The provision clarifies the scope of the partnership audit rules. The provision eliminates references to adjustments to partnership income, gain, loss, deduction, or credit, and instead refers to partnership-related items, defined as any item or amount with respect to the partnership that is relevant in determining the income tax liability of any person, without regard to whether the item or amount appears on the partnership's return and including an imputed underpayment and an item or amount relating to any transaction with, basis in, or liability of, the partnership. Thus, these partnership audit rules are not narrower than the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA") partnership audit rules, but rather, are intended to have a scope sufficient to address those items described as partnership items, affected items, and computational items in the TEFRA context in TEFRA-related Treasury Regulations sections 301.6231(a)(3), 301.6231(a)(5), and 301.6231(a)(6), as well as any other items meeting the statutory definition of a partnership-related item.

For example, because a partnership-related item includes an item or amount relating to any transaction with the partnership, an item or amount relating to a partner's transaction with a partnership other than in his capacity as a member of the partnership (which is considered as occurring between the partnership and one who is not a partner under section 707) is a partnership-related item. As another example, because a partnership-related item includes an item or amount relating to basis in the partnership, an item or amount relating to the determination of the adjusted basis of a partner's interest in the partnership or relating to the basis of the partnership in partnership property is a partnership-related item. As a further example, because a partnership-related item includes an item or amount relating to liability of the partnership, an item or amount relating to the determination of partnership liabilities is a partnership-related item. Similarly, an item or amount relating to the effect on a partner of a decrease or increase in a partner's share of partnership liabilities is a partnership-related item.

The provision clarifies that the partnership audit rules do not apply to taxes imposed, or to amounts required to be deducted or withheld, under Code chapters 2 (tax on self-employment income) or 2A (tax on net investment income), 3 (withholding tax on nonresident alien individuals or foreign corporations), or 4 (withholding tax for certain foreign accounts), except as otherwise specifically provided. However, any partnership adjustment determined under the income tax is taken into account for purposes of determining and assessing tax under these chapters of the Code to the extent that the partnership adjustment is relevant to the determination. Further, a timing rule applies in the case of chapters 3 and 4.

For example, if a partnership adjustment results in a change in the amount of income of an individual from a partnership, the change is reflected as required under the rules of chapter 2 in the calculation of the individual's net earnings from self-employment with respect to the partnership, and the chapter 2 tax may be collected through a process that is outside the partnership audit rules.

The period for assessing any tax under chapter 2 or 2A that is attributable to a partnership adjustment does not expire before the date that is one year after (1) in the case of an adjustment pursuant to the decision of a court in a proceeding brought under section 6234, such decision becomes final, or (2) in any other case, 90 days after the date on which the notice of final partnership adjustment is mailed under section 6231.

The provision applies a specific timing rule in the case of any tax imposed, including any amount that is required to be deducted or withheld, under chapter 3 (withholding tax on nonresident alien individuals or foreign corporations) or 4 (withholding tax for certain foreign accounts). In these cases, the tax is determined with respect to the reviewed year. The tax is imposed with respect to the adjustment year; similarly, the amount required to be deducted or withheld is deducted or withheld with respect to the adjustment year. The reviewed year and the adjustment year are defined in section 6225(d). For example, assume that a partnership has foreign partners, and that following an audit of the partnership, an adjustment is made to the amount of the partnership's effectively connected taxable income. The adjustment results in an increase of $100x of such income that is allocable to foreign partners with respect to the reviewed year. Pursuant to section 1446, assume that the amount of withholding tax that the partnership is required to pay with respect to this income allocable to the foreign partners is $35x. The $35x is required to be paid by the partnership with respect to the adjustment year (as defined in section 6225(d)(2)). As a further example, assume that a partnership, P, with foreign partners is not the audited partnership, but rather, is an upper-tier partner of an audited partnership that has elected to push out under section 6226. Partnership P has received a statement pursuant to section 6226, described below. The amount of withholding tax partnership P is required to pay is determined with respect to the reviewed year of the audited partnership, as it affects the relevant taxable year of partnership P. The amount of withholding tax is required to be paid by partnership P for the partnership taxable year that is the adjustment year, in this case, the adjustment year of the audited partnership (sec. 6225(d)). The due date for partnership P's payment of the withholding tax is no later than the due date (including allowable extensions) for the return for the adjustment year of the audited partnership.

In determining the amount of any deficiency, adjustments to partnership-related items are made only as provided under the partnership audit rules (Subchapter C of Chapter 63 of the Code), except to the extent otherwise provided. Conforming references to partnership-related items are made in several other provisions, including the provision relating to the scope of judicial review of a partnership adjustment (sec. 6234(c)).

Thus, it is clarified that the court has jurisdiction to determine all partnership-related items of the partnership for the partnership taxable year to which the notice of final partnership adjustment relates, the proper allocation of such items among the partners, and the applicability of any penalty, addition to tax, or additional amount for which the partnership may be liable under subchapter C of chapter 63 of the Code. For example, because partnership-related items include items or amounts with respect to (a) section 707 transactions, (b) liabilities of the partnership and the partners' shares of the liabilities, and (c) the basis of a partnership interest or of partnership property, determination of these items or amounts is within the scope of judicial review.

2. Netting in the determination of imputed underpayments (sec. 202 of Division U of the Act and sec. 6225(a) and (b) of the Code)

When the Secretary makes adjustments to any partnership-related item with respect to the reviewed year of a partnership, if the adjustments result in an imputed underpayment, the partnership pays an amount equal to the imputed underpayment, and if the adjustments do not result in an imputed underpayment, the adjustments are taken into account by the partnership in the adjustment year and passed through to the adjustment year partners. The provision clarifies this rule by conforming the language referring to partnership-related items and by striking erroneous references to separately stated income or loss.

The provision clarifies the manner of netting items to determine the amount of an imputed underpayment of a partnership. The provision clarifies that items of different character (capital or ordinary), for example, are not netted together in determining the amount of an imputed underpayment. Rather, an imputed underpayment of a partnership with respect to a reviewed year is determined by the Secretary by appropriately netting partnership adjustments for that year and by applying the highest rate of tax in effect for the reviewed year under section 1 or 11.

In the case of partners' distributive shares, like items within categories under section 702(a)(1)–(8) are separately netted. For example, netting within categories of items that are netted for purposes of reporting to partners on Schedule K–1 pursuant to section 702 may be considered as appropriately netting.

In determining an imputed underpayment, any adjustment that reallocates the distributive share of any item from one partner to another is taken into account by disregarding any part of the adjustment that results in a decrease in the amount of the imputed underpayment. For example, this rule could be implemented by disregarding the decrease in any item of income or gain and disregarding the increase in any item of deduction, loss, or credit.

Limitations that would apply at the direct or indirect partner level are treated as applying, unless otherwise determined. Under the provision, if an adjustment would decrease the imputed underpayment, and could be subject to a limitation or not be allowed against ordinary income if the adjustment were taken into account by any person, then the adjustment is not taken into account in determining the imputed underpayment of the partnership, except to the extent the Secretary otherwise provides.

For example, if an adjustment would increase the amount of a partnership loss allocable to partners, but the loss could be subject to the passive loss rule of section 469 in the hands of direct and indirect partners of the partnership, then the Secretary does not take into account the adjustment increasing the loss in determining the amount of the partnership's imputed underpayment, unless the Secretary provides otherwise. For example, the Secretary may provide otherwise if the partnership supplies accurate information that all direct and indirect partners of the partnership are publicly-traded domestic C corporations not subject to the passive loss rule.

Adjustments to credits are separately determined and netted as appropriate. Adjustments to credits are not multiplied by the tax rate, but rather, adjustments to items of credit are taken into account as an increase or decrease in determining the amount of the imputed underpayment.

It is intended that an imputed underpayment may be modified under procedures described in section 6225(c).

3. Alternative procedure to filing amended returns for purposes of modifications to imputed underpayments (secs. 202(b) and (c)(2), 203, and 206(b) of Division U of the Act and secs. 6225(c) and 6201(a)(1) of the Code)

The provision clarifies the modification rules of section 6225(c) to better carry out their function as intended by Congress, that is, to determine the amount of tax due as closely as possible to the tax due if the partnership and partners had correctly reported and paid while at the same time to implement the most efficient and prompt assessment and collection of tax attributable to the income of the partnership and partners.

The provision clarifies the procedures under section 6225(c)(2) that permit a partnership to seek modification of an imputed underpayment. These procedures allow reviewed-year partners to take adjustments into account so that the partnership's imputed underpayment can be determined by the Secretary without regard to that portion of the adjustments. Like other modification procedures in section 6225(c), these procedures take place within the period ending 270 days after the date the notice of proposed partnership adjustment is mailed, unless the period is extended with the consent of the Secretary, as provided in section 6225(c)(7).

Amended returns of partners

The provision clarifies the requirements for reviewed-year partners filing amended returns with payment of any tax due. First, the amended return procedure requires the partner to file returns for the taxable year of the partner that includes the end of the partnership's reviewed year, as well as for any taxable year with respect to which any tax attribute of the partner is affected by reason of any adjustment to a reviewed-year partnership-related item. Second, the amended returns are required to take into account all such adjustments that are properly allocable to the partner, as well as the effect of the adjustments on any tax attributes. Third, payment of any tax due is required to be included with the amended returns. As is the case for other amended returns, the Secretary may require the payment of interest, penalties, and additions to tax (for example, by billing the partner as under present practice).

If the requirements are satisfied, then the partnership's imputed underpayment amount is determined without regard to the portion of the adjustments taken into account by such partners. The amended return modification procedure does not require the participation of all reviewed-year partners of the partnership. Direct and indirect reviewed-year partners may participate. The amended return procedure is not intended to cover adjustments to items on an amended return of a partner that do not correspond to adjustments to a reviewed-year partnership-related item and the effect of the adjustments on tax attributes.

Alternative procedure to filing amended returns (pull-in)

The provision sets forth an alternative procedure to filing amended returns. The alternative procedure is referred to as the pull-in procedure. Under the pull-in procedure, the Secretary determines the partnership's imputed underpayment as reduced by the portion of the adjustments to partnership-related items that direct and indirect reviewed-year partners take into account and with respect to which those partners pay the tax due, provided the requirements of the pull-in procedure are met.

Under pull-in, reviewed-year partners pay the tax that would be due with amended returns, make binding changes to their tax attributes for subsequent years, and provide the Secretary with the information necessary to substantiate that the tax was correctly computed and paid. However, the partners file no amended returns. Thus, there are generally no corollary effects on the partners' returns beyond the effects on tax attributes, in other taxable years, of the adjustments to partnership-related items.

Pull-in, as well as the amended return modification procedure, is available generally to direct and indirect reviewed-year partners, in the case of tiered partnerships. The pull-in procedure generally does not require the participation of all direct and indirect reviewed-year partners of the partnership.

Pull-in requires the participating partner to pay the tax that would be due under the amended return filing procedure. The partner is responsible for remitting the payment unless the Secretary provides that another person, such as the partnership or a third party, may remit the payment on the partner's behalf. Payment is due within the period ending 270 days after the date the notice of proposed partnership adjustment is mailed (unless the period is extended with the Secretary's consent).

Pull-in requires that the partner agree to take into account, in the form and manner required by the Secretary, the adjustments and the effects on the partner's tax attributes of the adjustments to partnership-related items properly allocable to the partner.

Pull-in requires that the partner provide, in the form and manner specified by the Secretary, such information as the Secretary may require to carry out the pull-in procedure. This requirement can include information in the same form as on an amended return, if the Secretary so specifies. The information is to be provided within the period ending 270 days after the date the notice of proposed partnership adjustment is mailed (unless the period is extended with the Secretary's consent).

If all of the requirements are satisfied, the imputed underpayment can be modified. In the event that a partner provides the required information, but does not make the required payment, for example, the imputed underpayment of the partnership is not modified with respect to those adjustments.

For the administrative convenience of taxpayers and the Secretary, it is intended that partner payments and partner information may be collected centrally and remitted to the Secretary under the pull-in procedure. This centralization could be administered by the Secretary, by the partnership representative, or by a third party. For example, the procedure may permit a third party such as an accounting or law firm designated by the partnership representative to collect partner information required under the procedure and tally partner payments before remitting this information to the Secretary. Such a practice may be useful both to facilitate centralized tracking and collection of the information and payments, and to address privacy concerns partners may have in sharing information with the partnership representative. Particularly in the case of partnerships with numerous partners or direct and indirect partners, such a practice may alleviate the administrative burdens on the Secretary and taxpayers, consistently with the Congressional intent for the centralized partnership audit system to improve the efficiency, promptness, and accuracy of collection of partners' taxes due with respect to partnership-related items.

Assessment authority with respect to payments under the pull-in procedure is provided under section 6201.

Rules applicable both to the amended returns of partners and to the pull-in procedure

If an adjustment involves reallocation of an item from one partner to another, the opportunity to modify the imputed underpayment under amended return procedure (sec. 6225(c)(2)(A)) or pull-in procedures (sec. 6225(c)(2)(B)) is available only if the requirements of one or the other of the amended return or pull-in procedures are satisfied with respect to all partners affected by the adjustment involving reallocation.

For purposes of the amended return and pull-in procedures, tax relating to adjustments to a reviewed-year partnership-related item and the effect of the adjustments on tax attributes may be determined and assessed without regard to the otherwise applicable statute of limitations of sections 6501 and 6511. For example, if a notice of proposed partnership adjustment is mailed to a partnership by the Secretary more than three years after a partner filed his or her return for the year including the end of the reviewed year, the three-year statute of limitations under section 6501 or 6511 does not preclude the filing of an amended return, the assessment and payment of the partner's tax due for that year, or the proper crediting or refund of an amount paid by a partner, but these results apply only with respect to adjustments to partnership-related items for the reviewed year (and the effect of such adjustments on any tax attributes).

In the case of adjustments taken into account on an amended return of a partner or in a pull-in with respect to a partner, the effects of these adjustments on tax attributes are binding. This binding effect applies for the taxable year of the partner that includes the end of the reviewed year of the partnership and any taxable year for which a tax attribute is affected by such an adjustment. Any failure to take into account the effects of adjustments on tax attributes is treated for all Federal tax purposes in the same manner as a failure by a partner to treat a partnership-related item consistently with the treatment of the item on the partnership return (as provided in section 6222). For example, if a partner who files an amended return or provides information in a pull-in fails to take into account in other taxable years the effect on tax attributes of adjustments to partnership-related items that are properly allocable to the partner, any underpayment attributable to the failure may be assessed under math error procedures as provided in section 6222(b).

The provision clarifies the rules applicable in the case of partnerships and S corporations in tiered structures when a partner files an amended return and pays, or provides information to the Secretary and pays in a pull-in. Specifically, in the case of any partnership, any partner of which is a partnership, the amended return and pull-in rules of section 6225(c)(2)(A) and (B) apply with respect to any partner (the "relevant partner") in the chain of ownership of such partnerships, provided that certain requirements are met. As a practical matter, this rule generally permits the filing of amended returns even if some, but not all, of the partners (or S corporation shareholders treated as partners for this purpose) file amended returns. Similarly, this rule generally permits some but not all partners to participate in a pull-in, provided requirements are met.

Requirements applicable to both the amended return procedure and the pull-in procedure include the requirement that such information as the Secretary may require be furnished to the Secretary for purposes of administering the amended return or pull-in rules in the case of tiered structures. In this context, the Secretary may require information with respect to any chain of ownership of the relevant partner. The Secretary may require that each partnership in the chain of ownership between the relevant partner and the audited partnership must satisfy the requirements for filing amended returns or for participating in the pull-in, so that all partnerships in the chain of ownership between the relevant partner and the audited partnership either meets the requirement of filing an amended return, or meets the requirements for supplying information in a pull-in.

For example, an audited partnership has three partners, A, B, and C, each of which is a partnership. Partnership B in turn has two partners, D and E, each of which is a partnership. Partnerships A, C, D, and E each have only five partners. Individual Q is a partner in partnership E, and agrees to participate in a pull-in, pay the tax due, and provide information as required by the Secretary (including information similar to information that would be supplied on an amended return of Q, and information with respect to the chain of ownership between Q as the relevant partner and the audited partnership). The provision does not contemplate that the Secretary may require Q to supply information about the chain of ownership between the audited partnership and upper-tier partners of partnerships A, C, or D. However, partners of A, C, or D that file amended returns or participate in the pull-in may be required to supply information on the chain of ownership between themselves and the audited partnership, as well as information on their own chains of ownership should they be partnerships or S corporations.

Other modification procedures: references to adjustments

The provision clarifies the operation of modification procedures under sections 6225(c)(3) (relating to tax-exempt partners), 6225(c)(4) (relating to applicable highest tax rates), and 6225(c)(5) (relating to certain passive losses of publicly traded partnerships). In each of these modification procedures, the provision clarifies that the determination of the imputed underpayment is made without regard to the adjustment or portion of the adjustment being described (not without regard to a portion of the imputed underpayment).

Other modification procedures: adjustment not resulting in an imputed underpayment

The provision states specifically that the modification procedures are available if adjustments to partnership-related items do not result in an imputed underpayment. Under section 6225(c)(9), information relating to a modification may be offered by the partnership in the case of adjustments that do not result in an imputed underpayment, and such adjustments may be modified by the Secretary as the Secretary determines appropriate.

4. Push-out treatment of passthrough partners in tiered structures (sec. 204 of Division U of the Act and sec. 6226 of the Code)

The provision addresses the situation of a partnership (or an S corporation, which is treated similarly to a partnership under this rule) that is a direct or indirect partner of an audited partnership that has elected to push out adjustments of partnership-related items to partners (or S corporation shareholders, which are treated similarly to partners under this rule) under section 6226. The provision sets forth requirements applicable to such partners and the time frame for satisfying these requirements.

If a partner that receives a statement in a push-out is a partnership, that partner must satisfy two requirements. First, the partner must file with the Secretary a partnership adjustment tracking report that includes information required by the Secretary. For example, the required information may include identifying the partner's own partners or shareholders, describing and quantifying adjustments necessary to determine partnership-related items or the equivalent in the hands of those partners or shareholders, or other information necessary or appropriate to assessment and collection from tiers of partners in a push-out.

Second, that partner is required to furnish statements to its partners under rules similar to section 6226(a)(2), or, if no such statements are furnished, to compute and pay its imputed underpayment under rules similar to section 6225 (other than certain modification-related rules). That is, the partnership must push out the adjustments to its partners, or if not, it must compute and pay its imputed underpayment. If such a partnership computes and pays its imputed underpayment, the rules of section 6225 apply (other than the modifications provided in sections 6225(c)(2) (amended returns and pull-in), 6225(c)(7) (270-day period for modifications), and 6225(c)(9) (modification of adjustment not resulting in imputed underpayment)). The imputed underpayment of the partnership is determined by appropriately netting all partnership adjustments on the statement (taking into account limitations to which adjustments that decrease the imputed underpayment could be subject) and applying the highest rate of tax in effect for the reviewed year under section 1 or 11, as provided in section 6225. The partnership pays its imputed underpayment as so determined.

The due date for the payment of the imputed underpayment or furnishing of partner statements and the filing of the partnership adjustment tracking report is the return due date (including allowable extensions) for the adjustment year of the audited partnership. That is, the partnership adjustment tracking report must be filed with the Secretary, and the imputed underpayment paid or statements furnished to partners or S corporation shareholders (or if not so furnished, an imputed underpayment must be paid), not later than the return due date for the adjustment year of the audited partnership. In the case of a partner that is not a partnership or an S corporation and that receives a statement in a push-out, the partner's tax is increased for the partner's taxable year that includes the date of the statement, as provided in section 6226(b). In the case of a partner that is a trust and that receives a statement in a push-out, regulatory authority to provide any necessary rules is set forth.

The provision defines an audited partnership for purposes of the push-out treatment of passthrough partners in tiered structures under section 6226(b)(4). With respect to a partner that is a partnership or an S corporation and that receives a statement in a push-out, the audited partnership is the partnership in the chain of ownership originally electing the application of section 6226.

5. Treatment of failure of partnership or S corporation to pay imputed underpayment and assessment and collection authority with respect to imputed underpayments (sec. 205 of Division U of the Act and secs. 6232 and 6501(c)(4)(a) of the Code)

Under the provision, if, following an assessment, a partnership fails to pay an imputed underpayment within 10 days after the date of notice and demand by the Secretary, the applicable interest rate increases, and assessment and collection against adjustment-year partners for their proportionate shares may be made. The interest rate under the provision is the underpayment rate as modified, that is, the rate is the sum of the Federal short-term rate (determined monthly) plus five percentage points. An S corporation and its shareholders are treated like a partnership and its partners under the provision.

The provision applies if, within 10 days of notice and demand for payment, a partnership fails to pay an imputed underpayment under section 6225 or any interest or penalties under section 6233. For example, the increased interest rate applies and assessment and collection from adjustment-year partners may be made in the case in which a partnership that has not elected under section 6226 to push out adjustments to partners nevertheless fails to pay within 10 days of notice and demand.

The provision also applies if any specified similar amount (or interest or penalties with respect to the amount) have not been paid. A specified similar amount arises if a partner that is an upper-tier partnership or S corporation in a push-out fails to pay an imputed underpayment under section 6226(b)(4)(A)(ii) (including any failure to furnish statements that is treated as a failure to pay an imputed underpayment under section 6651(i)). A specified similar amount also includes an amount required to be paid by former partners (including partners that are themselves partnerships) of a partnership that has ceased to exist or terminated as well as interest or penalties with respect to the amount.

The date of the notice and demand for payment initiates a two-year period in which the Secretary may assess against the adjustment-year partners (or former partners). The two-year period of limitations also applies to a proceeding begun in court without assessment with respect to a partner. The period may be extended by agreement.

The provision expands the present-law section 6501(c)(4) rule permitting extension by agreement between the Secretary and the taxpayer of the time period for assessment. As a result, that rule permitting extension by agreement is not limited to assessment periods prescribed in section 6501, but rather, applies more broadly to assessment periods and in particular applies to the period for assessment against partners in the case of failure of a partnership to pay an imputed underpayment after notice and demand under section 6232(f).

If a partnership has ceased to exist or terminated within the meaning of section 6241(7), the provision applies with respect to the former partners of the partnership. For example, the former partners of the partnership may be the partners for the most recent period before the partnership ceased to exist or terminated, such as the partners for purposes of the last return filed by the partnership.

A partner is liable for no more than the partner's proportionate share of the imputed underpayment, interest, and penalties, measured as the Secretary determines on the basis of the partner's distributive share of items. For example, the distributive shares set forth in the partnership agreement, or as determined for purposes of Schedule K–1, may serve as a measure of a partner's proportionate share. The Secretary is required to determine partners' proportionate shares so that the aggregate proportionate shares so determined total 100 percent. Thus, no partner is required to pay more than the partner's proportionate share of the imputed underpayment, interest, and penalties.

Partner payments under this provision reduce the partnership's liability to pay. The partnership's liability is not reduced by partner payments if such payments are made after the date on which the partnership pays, however. For example, if a partnership's liability is $100, and partner payments aggregating $60 before July 15 reduce the partnership's liability to $40, and the partnership pays $40 on July 15, a partner payment of $40 on August 1 does not reduce the partnership's liability. The partnership may not receive a credit or refund for any part of the partner payment of $40; the partner, however, may.

The Secretary may assess the tax, interest, and penalties on the proportionate share of each partner (as of the close of the adjustment year) of the partnership without regard to the deficiency procedures generally applicable to income tax. Under the provision, assessment may not be made (or proceeding in court begun without assessment) after the date that is two years after the date on which the Secretary provides notice and demand.

6. Amendment of statements (Schedules K–1) to partners (sec. 206(a) of Division U of the Act and sec. 6031(b) of the Code)

The provision clarifies that a partnership that has validly elected out of the partnership audit rules under section 6221(b), and therefore is not subject to the partnership audit rules, may amend partner statements (Schedules K–1) after the due date of the partnership return to which the statements relate.

7. Partnership adjustment tracking report and administrative adjustment request not treated as amended return (sec. 206(b) of Division U of the Act and sec. 6225(c)(2) of the Code)

The provision clarifies that neither the partnership adjustment tracking report required to be filed in a push-out, nor an administrative adjustment request submitted under section 6227, is treated as a return for purposes of modifying an imputed underpayment of a partnership through partner amended return filings and payments under section 6225(c)(2)(A). Only a return of a partner satisfies the requirement under the partner amended return filing modification procedure.

8. Authority to require e-filing of materials (sec. 206(c) of Division U of the Act and sec. 6241(10) of the Code)

Authority is provided for the Secretary to require electronic filing or submission of anything that has to be filed or submitted in connection with procedures for modifying the imputed underpayment amount under section 6225(c). Authority is also provided for the Secretary to require electronic filing or furnishing of anything that has to be furnished to or filed with the Secretary in connection with the push-out procedures under section 6226.

9. Clarification of assessment authority in a push-out (sec. 206(d) of Division U of the Act and sec. 6226 of the Code)

The provision clarifies that, in the case of a partnership that has validly elected under section 6226 (push-out) in the manner that the Secretary provides, no assessment of tax, levy, or proceeding in court for the collection of the imputed underpayment is to be made against the audited partnership.

10. Treatment of partnership adjustments that result in decrease in tax in push-out (sec. 206(e) of Division U of the Act and sec. 6226(b) of the Code)

As an alternative to partnership payment of the imputed underpayment in the adjustment year, the audited partnership may elect to furnish to the Secretary and to each partner of the partnership for the reviewed year a statement of the partner's share of any adjustments to partnership-related items as determined by reference to the final determination with respect to the adjustment. In this situation section 6225, requiring the audited partnership to pay the imputed underpayment, does not apply. Instead, each reviewed-year partner takes the adjustments into account for the taxable year that includes the date of the statement and pays the tax as provided in section 6226 (taking into account section 6226(b)(4)).

The provision provides that in taking into account adjustments to determine a partner's tax in a push-out, decreases as well as increases in the partner's tax are taken into account. The provision clarifies that in a push-out, the partner's tax for the taxable year that includes the date of the statement is adjusted by the aggregate of the correction amounts (not adjustment amounts).

The correction amount for a particular taxable year of a partner takes into account both decreases and increases. That is, the correction amount for the partner's taxable year that includes the end of the reviewed year is the amount by which the income tax would increase or decrease if the partner's share of adjustments were taken into account for that year. Similarly, the correction amount for any taxable year of the partner after that year, and before the year that includes the date of the statement, is the amount by which the income tax would increase or decrease if the partner's share of adjustments were taken into account for that year. The present-law treatment of mathematical or clerical errors applies with respect to correction amounts and aggregate correction amounts.

11. Coordination with adjustments related to foreign tax credits (sec. 206(f) of Division U of the Act and sec. 6227(d) of the Code)

The provision clarifies that the Secretary is to issue regulations or other guidance providing for the proper coordination of section 6227, relating to administrative adjustment requests by the partnership, with the rule of section 905(c), relating to foreign tax credits and redetermination of the amount of tax in certain circumstances.

12. Clarification of assessment of imputed underpayments (sec. 206(g) of Division U of the Act and sec. 6232(a) and (b) of the Code)

The provision clarifies that the assessment of any imputed underpayment is not subject to the deficiency procedures of subchapter B of chapter 63. Rather, they are assessed and collected in accordance with the rules of subchapter C of chapter 63. Any imputed underpayment (including an imputed underpayment under section 6226(b)(4)(A)(ii) of a partnership or S corporation that is a direct or indirect partner of an audited partnership in a push-out) is assessable under the provision.

The provision clarifies that in the case of an administrative adjustment request to which section 6227(b)(1) applies, the underpayment must be paid, and may be assessed, when the request is filed.

A reference in section 6232(b) to the assessment of a deficiency is corrected to refer to the assessment of an imputed underpayment. Generally, then, an imputed underpayment of a partnership may not be assessed or collected before the close of the 90th day after the day on which a notice of final partnership adjustment was mailed, and if a petition is filed under section 6234 with respect to the notice, the decision of the court has become final.

However, the restrictions on assessment and collection of an imputed underpayment provided generally under section 6232(b) do not apply in the case of any specified similar amount within the meaning of section 6232(f)(2). A specified similar amount includes not only the amount described in section 6226(b)(4)(A)(ii)(II) in the case of a pushout, but also includes any failure to furnish statements to partners or S corporation shareholders that is treated as a failure to pay that amount under section 6651(i). As a result, the restrictions on assessment and collection do not apply to the imputed underpayment of a partner that is a partnership or S corporation, or, in the case of a partnership that has ceased to exist, to an amount required to be paid by the former partners. For example, the restrictions do not apply to assessment and collection of an imputed underpayment of a partnership or S corporation that receives a statement in a push-out and neither timely furnishes statements to its partners or shareholders nor pays its imputed underpayment.

13. Time limit for notice of proposed partnership adjustment (sec. 206(h) of Division U of the Act and sec. 6231(a) and (b) of the Code)

The provision clarifies that a notice of proposed partnership adjustment must be mailed within the applicable period of limitations on making adjustments under the partnership audit rules (subchapter C of chapter 63 of the Code). The notice of proposed partnership adjustment cannot be relied upon to revive an otherwise expired limitations period under section 6235. For purposes of determining whether a notice of proposed partnership adjustment is timely, the applicable limitations period is determined under section 6235, determined without regard to section 6235(a)(2) (relating to the period for modification of an imputed underpayment under section 6225(c)(7)), and without regard to section 6235(a)(3) (relating to the 330-day period (or the period as extended) for making an adjustment after the date of a notice of proposed partnership adjustment).

The provision does not alter the section 6231(b)(2) prohibition against mailing any notice of final partnership adjustment earlier than 270 days after the date on which the notice of proposed partnership adjustment is mailed (except to the extent the partnership elects to waive the prohibition).

14. Deposit to suspend interest on imputed underpayment (sec. 206(i) of Division U of the Act and sec. 6233 of the Code)

The provision clarifies that, before the due date for payment of an imputed underpayment, a partnership (or, in the case of a partner payment pursuant to an election under section 6226, a partner) may make a cash deposit to suspend the running of interest as provided under present-law rules in section 6603. The deposit is not treated as a tax payment.

15. Deposit to meet jurisdictional requirement (sec. 206(j) of Division U of the Act and sec. 6234(b) of the Code)

The provision clarifies that the amount of the jurisdictional deposit that the partnership must make in order to file a readjustment petition in court is the amount of (as of the date of the filing of the petition) the imputed underpayment, penalties, additions to tax, and additional amounts with respect to the imputed underpayment (not just the imputed underpayment amount).

16. Period of limitations on making adjustments (sec. 206(k) of Division U of the Act and sec. 6235 of the Code)

The provision clarifies several rules relating to the period of limitations on making adjustments. The provision makes clear that the period of limitations on making adjustments under subchapter C of chapter 63 does not limit the period for notification of the Secretary and redetermination of tax under section 905(c). The provision corrects a cross reference so that it refers to subchapter C of chapter 63 (rather than to a nonexistent subpart). The provision clarifies a reference to the penalty for substantial omission of income to incorporate a reference to constructive dividends, not just to other omitted items. The provision clarifies that the time for making any adjustment under subchapter C of chapter 63 with respect to any tax return, event, or period does not expire before the date determined under section 6501(c)(8) (relating to the failure to notify the Secretary of certain foreign transfers), that is, generally, the date that is three years after the date on which the Secretary is furnished the information required to be reported. The provision clarifies that the time for making any adjustment under subchapter C of chapter 63 with respect to a listed transaction described in section 6501(c)(10) does not expire on the date determined under section 6501(c)(10), that is, generally, the date that is one year after the earlier of the date on which the Secretary is furnished the information required to be reported or the date on which a material advisor meets certain applicable requirements. The provision is clarified by striking section 6235(d), a provision included in prior law that has no effect under subchapter C of chapter 63.

17. Treatment of special enforcement matters (sec. 206(l) of Division U of the Act and sec. 6241(10) of the Code)

The provision provides regulatory authority similar to that under the prior-law TEFRA partnership audit rules. It provides that in the case of partnership-related items involving special enforcement matters, the Secretary may prescribe guidance under which the partnership audit rules (or any portion of the rules) do not apply, and the special enforcement items are subject to special rules, including rules related to assessment and collection that are needed for effective and efficient enforcement. Special enforcement matters mean: failure to comply with the requirements of section 6226(b)(4)(A)(ii) to pay the imputed underpayment if the requirement to furnish statements has not been satisfied, termination and jeopardy assessments, criminal investigations, indirect methods of proof of income, foreign partners or partnerships, and other matters presenting special enforcement considerations.

18. United States shareholders and certain other persons treated as partners (sec. 206(m) of Division U of the Act and sec. 6241(12) of the Code)

The provision clarifies the treatment under the rules of subchapter C of chapter 63 of United States shareholders and certain other persons treated as partners. Except as otherwise provided in guidance promulgated by the Secretary, in the case of a controlled foreign corporation (defined in section 957 or 953(c)(1)) that is a partner of a partnership, each United States shareholder is treated under subchapter C of chapter 63 as a partner in the partnership. For this purpose, except as otherwise provided by the Secretary, the distributive share with respect to the partnership equals the United States shareholder's pro rata share with respect to the controlled foreign corporation, determined under rules similar to the rules for determining its pro rata share of subpart F income under section 951(a)(2).

The provision also makes clear the treatment under subchapter C of chapter 63 of a passive foreign investment company ("PFIC") that is a partner in a partnership and that is a qualified electing fund with respect to a taxpayer pursuant to the taxpayer's election under section 1295. In the case of such a taxpayer, for purposes of the foregoing rule treating the taxpayer as a partner in the partnership, the taxpayer's distributive share with respect to the partnership equals the taxpayer's pro rata share with respect to the PFIC, determined under rules similar to the rules for determining the taxpayer's pro rata share under section 1293(b) (relating to pro rata share for purposes of current taxation of income from qualified electing funds).

Under the provision, authority for Treasury regulations or other guidance is provided as is necessary or appropriate to carry out the legislative purpose or to apply the rule treating persons as partners in similar circumstances or with respect to similarly-situated persons.

19. Penalties relating to administrative adjustment requests and partnership adjustment tracking reports (sec. 206(n) of Division U of the Act and secs. 6651, 6696, 6698, and 6702 of the Code)

The provision clarifies existing penalty provisions to ensure that they address compliance with the partnership audit rules. A partnership adjustment tracking report required to be filed pursuant to a section 6226 election is treated as a return for purposes of penalties relating to failure to file a partnership return, frivolous position submissions, and preparation of tax returns for other persons. A failure to comply with section 6226(b)(4)(A)(ii)(II), relating to the requirement to furnish statements in a push-out, is treated as a failure to pay an imputed underpayment for purposes of the penalty relating to failure to file a tax return or to pay tax. An administrative adjustment request under section 6227 is treated as a return for purposes of penalties relating to frivolous position submissions and the preparation of tax returns for other persons. Section 206(b) of Division U of the amendment, however, clarifies that neither an administrative adjustment request under section 6227 nor a partnership adjustment tracking report under section 6226(b)(4)(A) is treated as a return for purposes of the partner amended return modification procedure of section 6225(c)(2)(A).

20. Statements to partners (adjusted Schedules K–1) treated as payee statements (sec. 206(o) of Division U of the Act and sec. 6724 of the Code)

The provision clarifies that for purposes of the penalty for failure to furnish correct payee statements and the penalty for failure to file correct information returns, statements required to be furnished to partners in a push-out under section 6226(a)(2), or statements required to be furnished to partners under rules similar to section 6226(a)(2), are treated as payee statements. Statements required to be furnished to partners under rules similar to section

6226(a)(2) include statements furnished to partners pursuant to an administrative adjustment request under section 6227.

21. Clerical corrections relating to partnership audit rules (sec. 206(p) of Division U of the Act)

The provision makes clerical corrections to the partnership audit rules.

C. Other Corrections

1. Amendment relating to the Bipartisan Budget Act of 2015 (sec. 301 of Division U of the Act)

Electronic filing of partnership returns.—Section 6011 requires that, under regulations, a person may be required to file returns electronically if the person is required to file at least 250 returns during the calendar year. Regulations provide that for purposes of determining the 250-return threshold, returns filed within one calendar year by a corporation include any type, including information returns (*e.g.*, Forms W–2, Forms 1099), income tax returns, employment tax returns, and excise tax returns. However, partnerships having more than 100 partners are required to file returns electronically. For partnerships only, the provision phases in reductions in the number of returns and statements during a calendar year that can subject the partnership to a regulatory requirement to file returns electronically. Specifically, the provision provides that under regulations, partnerships are required to file returns electronically if the partnership is required to file at least 200 returns for calendar year 2018, 150 returns for calendar year 2019, 100 returns for calendar year 2020, 50 returns for calendar year 2021, or 20 returns for calendar years after 2021. The provision is effective as if included with the partnership audit provisions of section 1101 of the Bipartisan Budget Act of 2015.

2. Amendment relating to the Energy Policy Act of 2005 (sec. 302 of Division U of the Act)

Qualifying small power production facility (Act sec. 1253(b)(1)).—A provision of the MACRS depreciation rules, originally enacted in 1986 (sec. 168(e)(3)(B)(vi)(II)), refers to a provision of the Federal Power Act, as then in effect, defining a "qualifying small power production facility" as a facility that is "small" (*i.e.*, power production capacity not greater than 80 megawatts) and not owned by an electric utility (as determined by FERC). The ownership limitation was repealed by the Energy Policy Act of 2005 (the "2005 Act"). Since that 2005 repeal, the determination is made by relying on FERC to determine whether a facility was a "qualifying small power production facility" as that term was defined prior to the 2005 Act, a determination no longer relevant to FERC (see, *e.g.*, Private Letter Ruling 201539024). The provision adds to the Code the language of FERC's definition of a qualifying small power production facility (retaining the power production capacity not greater than 80 megawatts) without the electric utility ownership prohibition. The effect of the provision is that such a power production facility is five-year property for purposes of section

168(e)(3)(B)(vi)(II), not 15-year property. The provision is effective for property placed in service after the date of enactment.

D. Clerical Corrections and Deadwood

1. Clerical corrections and deadwood-related provisions (sec. 401 of Division U of the Act)

The provision includes clerical corrections and deadwood-related provisions.

PART FIVE: AIRPORT AND AIRWAY EXTENSION ACT OF 2018, PART II (PUBLIC LAW 115–250) [553]

1. Expenditure authority from the Airport and Airway Trust Fund and extension of taxes funding the Airport and Airway Trust Fund (secs. 4 and 5 of the Act and secs. 4081, 4083, 4261, 4271, and 9502 of the Code)

Present Law

Taxes dedicated to the Airport and Airway Trust Fund

Excise taxes are imposed on amounts paid for commercial air passenger and freight transportation and on fuels used in commercial and noncommercial (*i.e.*, transportation that is not "for hire") aviation to fund the Airport and Airway Trust Fund.[554] The present aviation excise taxes are as follows:

Tax (and Code section)	Tax Rates
Domestic air passengers (sec. 4261)	7.5 percent of fare, plus $4.10 (2018) per domestic flight segment generally [555]
International air passengers (sec. 4261)	$18.30 (2018) per arrival or departure [556]
Amounts paid for right to award free or reduced rate passenger air transportation (sec. 4261) .	7.5 percent of amount paid (and the value of any other benefit provided) to an air carrier (or any related person)
Air cargo (freight) transportation (sec. 4271)	6.25 percent of amount charged for domestic transportation; no tax on international cargo transportation
Aviation fuels (sec. 4081): [557]	
Commercial aviation	4.3 cents per gallon
Noncommercial (general) aviation:.	
Aviation gasoline	19.3 cents per gallon
Jet fuel	21.8 cents per gallon
Fractional aircraft fuel surtax (sec. 4043)	14.1 cents per gallon

The Airport and Airway Trust Fund excise taxes (except for 4.3 cents per gallon of the taxes on aviation fuels and the 14.1 cents per gallon fractional aircraft fuel surtax) are scheduled to expire after September 30, 2018. The 4.3-cents-per-gallon fuels tax rate is permanent. The fractional aircraft fuel surtax expires after September 30, 2021.

Airport and Airway Trust Fund expenditure provisions

The Airport and Airway Trust Fund was established in 1970 to finance a major portion of national aviation programs (previously funded entirely with General Fund revenues). Operation of the Trust Fund is governed by parallel provisions of the Code and au-

[553] H.R. 6897. The House passed H.R. 6897 on September 26, 2018. The Senate passed the bill without amendment on September 28, 2018. The President signed the bill on September 29, 2018.

[554] Air transportation through U.S. airspace that neither lands in nor takes off from a point in the United States (or the "225-mile zone") is exempt from the aviation excise taxes, but the transportation provider is subject to certain "overflight fees" imposed by the Federal Aviation Administration pursuant to section 45301 of Title 49 of the United States Code. The "225 mile zone" is defined as "that portion of Canada or Mexico which is not more than 225 miles from the nearest point in the continental United States." Sec. 4262(c)(2).

[555] The domestic flight segment portion of the tax is adjusted annually (effective each January 1) for inflation.

[556] The international arrival and departure tax rate is adjusted annually for inflation. Under a special rule for Alaska and Hawaii, the tax only applies to departures at a rate of $9.10 per departure for 2018.

[557] Like most other taxable motor fuels, aviation fuels are subject to an additional 0.1-cent-per-gallon excise tax to fund the LUST Trust Fund.

thorizing statutes.[558] The Code provisions govern deposit of revenues into the Trust Fund and approve expenditure purposes in authorizing statutes as in effect on the date of enactment of the latest authorizing Act. The authorizing Acts provide for specific Trust Fund expenditure programs.

No expenditures are permitted to be made from the Airport and Airway Trust Fund after September 30, 2018. The purposes for which Airport and Airway Trust Fund monies are permitted to be expended are fixed as of the date of enactment of the Airport and Airway Extension Act of 2018; therefore, the Code must be amended in order to authorize new Airport and Airway Trust Fund expenditure purposes.[559] The Code contains a specific enforcement provision to prevent expenditure of Trust Fund monies for purposes not authorized under section 9502.[560] This provision provides that, should such unapproved expenditures occur, no further aviation excise tax receipts will be transferred to the Trust Fund. Rather, the aviation taxes will continue to be imposed, but the receipts will be retained in the General Fund.

Explanation of Provisions

The Airport and Airway Extension Act of 2018, Part II extends through October 7, 2018, the taxes and expenditure authority that were scheduled to expire on September 30, 2018.

Effective Date

The provisions are effective on the date of enactment (September 29, 2018).

[558] Sec. 9502 and 49 U.S.C. sec. 48101, et seq.
[559] Sec. 9502(d).
[560] Sec. 9502(e)(1).

PART SIX: FAA REAUTHORIZATION ACT OF 2018 (PUBLIC LAW 115–254) [561]

1. Expenditure authority from the Airport and Airway Trust Fund and extension of taxes funding the Airport and Airway Trust Fund (secs. 801 and 802 of the Act and secs. 4081, 4083, 4261, 4271, and 9502 of the Code)

Present Law

Taxes dedicated to the Airport and Airway Trust Fund

Excise taxes are imposed on amounts paid for commercial air passenger and freight transportation and on fuels used in commercial and noncommercial (*i.e.*, transportation that is not "for hire") aviation to fund the Airport and Airway Trust Fund.[562] The present aviation excise taxes are as follows:

Tax (and Code section)	Tax Rates
Domestic air passengers (sec. 4261)	7.5 percent of fare, plus $4.10 (2018) per domestic flight segment generally.[563]
International air passengers (sec. 4261)	$18.30 (2018) per arrival or departure.[564]
Amounts paid for right to award free or reduced rate passenger air transportation (sec. 4261)	7.5 percent of amount paid (and the value of any other benefit provided) to an air carrier (or any related person).
Air cargo (freight) transportation (sec. 4271)	6.25 percent of amount charged for domestic transportation; no tax on international cargo transportation.
Aviation fuels (sec. 4081): [565]	
Commercial aviation	4.3 cents per gallon
Noncommercial (general) aviation:.	
Aviation gasoline	19.3 cents per gallon
Jet fuel	21.8 cents per gallon
Fractional aircraft fuel surtax (sec. 4043)	14.1 cents per gallon

The Airport and Airway Trust Fund excise taxes (except for 4.3 cents per gallon of the taxes on aviation fuels and the 14.1 cents per gallon fractional aircraft fuel surtax) are scheduled to expire after October 7, 2018. The 4.3-cents-per-gallon fuels tax rate is permanent. The fractional aircraft fuel surtax expires after September 30, 2021.

Airport and Airway Trust Fund expenditure provisions

The Airport and Airway Trust Fund was established in 1970 to finance a major portion of national aviation programs (previously funded entirely with General Fund revenues). Operation of the Trust Fund is governed by parallel provisions of the Code and au-

[561] H.R. 302. The House passed H.R. 302 on January 9, 2017. Senate passed H.R. 302 with an amendment on September 6, 2018. On September 26, 2018, the House agreed to the Senate amendment with an amendment. Senate agreed to the House amendment to the Senate amendment to H.R. 302 on October 3, 2018. The President signed the bill on October 5, 2018.

[562] Air transportation through U.S. airspace that neither lands in nor takes off from a point in the United States (or the "225-mile zone") is exempt from the aviation excise taxes, but the transportation provider is subject to certain "overflight fees" imposed by the Federal Aviation Administration pursuant to section 45301 of Title 49 of the United States Code. The "225 mile zone" is defined as "that portion of Canada or Mexico which is not more than 225 miles from the nearest point in the continental United States." Sec. 4262(c)(2).

[563] The domestic flight segment portion of the tax is adjusted annually (effective each January 1) for inflation.

[564] The international arrival and departure tax rate is adjusted annually for inflation. Under a special rule for Alaska and Hawaii, the tax only applies to departures at a rate of $9.10 per departure for 2018.

[565] Like most other taxable motor fuels, aviation fuels are subject to an additional 0.1-cent-per-gallon excise tax to fund the LUST Trust Fund.

thorizing statutes.[566] The Code provisions govern deposit of revenues into the Trust Fund and approve expenditure purposes in authorizing statutes as in effect on the date of enactment of the latest authorizing Act. The authorizing Acts provide for specific Trust Fund expenditure programs.

No expenditures are permitted to be made from the Airport and Airway Trust Fund after October 7, 2018. The purposes for which Airport and Airway Trust Fund monies are permitted to be expended are fixed as of the date of enactment of the Airport and Airway Extension Act of 2018, Part II; therefore, the Code must be amended in order to authorize new Airport and Airway Trust Fund expenditure purposes.[567] The Code contains a specific enforcement provision to prevent expenditure of Trust Fund monies for purposes not authorized under section 9502.[568] This provision provides that, should such unapproved expenditures occur, no further aviation excise tax receipts will be transferred to the Trust Fund. Rather, the aviation taxes will continue to be imposed, but the receipts will be retained in the General Fund.

Explanation of Provision

The FAA Reauthorization Act of 2018 extends through September 30, 2023, all of the taxes dedicated to, and the expenditure authority for, the Airport and Airway Trust Fund.

Effective Date

The provisions are effective on the date of enactment (October 5, 2018).

[566] Sec. 9502 and 49 U.S.C. sec. 48101, et seq.
[567] Sec. 9502(d).
[568] Sec. 9502(e)(1).

PART SEVEN: PROTECTING ACCESS TO THE COURTS FOR TAXPAYERS ACT (PUBLIC LAW 115–332) [569]

1. Transfer of certain cases (sec. 2 of the Act)

Present Law

Certain Federal courts [570] are authorized to transfer civil actions and appeals to other of these courts when (1) the transferor court lacks jurisdiction, (2) the transferee court would have had jurisdiction at the time the original complaint or appeal was filed, and (3) the transfer would serve the interests of justice.[571] The United States Tax Court (the "Tax Court") is not included in the definition of courts for this purpose. Accordingly, the courts cannot transfer to the Tax Court a case over which the Tax Court has jurisdiction.

Explanation of Provision

The provision amends section 1631 of Title 28 of the United States Code to enable Federal courts to transfer cases within the jurisdiction of the Tax Court to that court.

Effective Date

The provision is effective on the date of enactment (December 19, 2018).

[569] H.R. 3996. The House passed H.R. 3996 on March 14, 2018. The Senate passed the bill without amendment on December 11, 2018. The President signed the bill on December 19, 2018.
[570] Section 610 of Title 28 of the United States Code provides that "courts" includes the court of appeals and district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, the United States Court of Federal Claims, and the Court of International Trade.
[571] 28 U.S.C. sec. 1631.

APPENDIX: ESTIMATED BUDGET EFFECTS OF CERTAIN TAX LEGISLATION ENACTED IN THE 115TH CONGRESS

APPENDIX:
ESTIMATED BUDGET EFFECTS OF TAX LEGISLATION ENACTED IN THE 115TH CONGRESS [1]

Fiscal Years 2018- 2028

[Millions of Dollars]

Provision	Effective	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2018-28
PART ONE: DISASTER TAX RELIEF AND AIRPORT AND AIRWAY EXTENSION ACT OF 2017 (Public Law 115-63, signed into law by the President on September 29, 2017)													
Title II. Aviation Revenue Provisions													
1. Expenditure authority from Airport and Airway Trust Fund (sunset 3/31/18)	DOE	*No Revenue Effect*											
2. Extension of taxes funding Airport and Airway Trust Fund (sunset 3/31/18)	DOE	*No Revenue Effect*											
Title V. Tax Relief for Hurricanes Harvey, Irma, and Maria [2]													
1. Special disaster-related rules for use of retirement funds	DOE	-47	-14	6	6	[3]	-1	-1	-1	-1	-1	---	-53
2. Employee retention credit for employers affected by Hurricane Harvey, Hurricane Irma, and Hurricane Maria	wpoif 8/23/17, 9/4/17, or 9/16/17 through 1/1/18	-216	-273	-84	-41	-24	-16	-11	-11	-6	[4]	---	-681
3. Additional disaster-related tax relief provisions:													
a. Temporary suspension of limitations on charitable contributions	[5]	-3,310	1,627	511	298	203	119	---	---	---	---	---	-552
b. Special rules for qualified disaster-related personal casualty losses	lao/a 8/23/17, 9/4/17, or 9/16/17	-2,992	-798	-199	[4]	---	---	---	---	---	---	---	-3,989
c. Special rule for determining earned income [6]	tyba 12/31/16	-61	-37	-16	---	---	---	---	---	---	---	---	-115
d. Payments to United States Virgin Islands and Puerto Rico [6][7]	tyba 12/31/16	-239	---	---	---	---	---	---	---	---	---	---	-239
TOTAL OF PART ONE		**-6,865**	**505**	**218**	**263**	**179**	**102**	**-12**	**-12**	**-7**	**-1**	**---**	**-5,629**
PART TWO: FOURTH CONTINUING APPROPRIATIONS FOR FISCAL YEAR 2018, FEDERAL REGISTER PRINTING SAVINGS, HEALTHY KIDS, HEALTH-RELATED TAXES, AND BUDGETARY EFFECTS (Public Law 115-120, signed into law by the President on January 22, 2018)													
Division D - Suspension of Certain Health-Related Taxes													
1. Extension of moratorium on medical device excise tax (sunset 12/31/19)	sa 12/31/17	-1,373	-1,900	-481	---	---	---	---	---	---	---	---	-3,753
2. Delay in implementation of excise tax on high cost employer-sponsored health coverage [6][8]	tyba 12/31/21	---	---	-3,705	-7,449	-3,634	---	---	---	---	---	---	-14,788

Provision	Effective	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2018-28
3. Suspension of annual fee on health insurance providers (sunset 12/31/19)	cyba 12/31/18	---	-12,712	---	---	---	---	---	---	---	---	---	-12,712
TOTAL OF PART TWO		**-1,373**	**-14,612**	**-4,186**	**-7,449**	**-3,634**	---	---	---	---	---	---	**-31,253**
PART THREE: BIPARTISAN BUDGET ACT OF 2018 (Public Law 115-123, signed into law by the President on February 9, 2018)													
Division B - Further Additional Supplemental Appropriations For Disaster Relief Requirements Act, 2018													
Subdivision 2 - Tax Relief and Medicaid Changes Relating to Certain Disasters													
I. Tax Relief for California Wildfires [9]													
1. Special disaster-related rules for use of retirement funds	DOE	*Negligible Revenue Effect*											
2. Employee retention credit for employers affected by California wildfires	wpoif 10/8/17 through 1/1/18	-2	-3	-1	[4]	[4]	[4]	[4]	[4]	[4]	[4]	---	-7
3. Additional disaster-related tax relief provisions:													
a. Temporary suspension of limitations on charitable contributions	[11]	-259	120	44	24	17	10	---	---	---	---	---	-45
b. Special rules for qualified disaster-related personal casualty losses	lao/a 10/8/17	-202	-21	---	---	---	---	---	---	---	---	---	-223
c. Special rule for determining earned income [6]	tyba 12/31/16	-131	-33	---	---	---	---	---	---	---	---	---	-164
II. Tax Relief for Hurricanes Harvey, Irma, and Maria [12]													
1. Special disaster-related rules for use of retirement funds	[13]	*Negligible Revenue Effect*											
2. Employee retention credit for employers affected by Hurricane Harvey and Hurricane Irma	wpoif 8/23/17 or 9/4/17 through 1/1/18	[4]	[4]	[4]	[4]	[4]	[4]	[4]	[4]	[4]	[4]	---	[4]
3. Additional disaster-related tax relief provisions:													
a. Temporary suspension of limitations on charitable contributions	[14]	*Negligible Revenue Effect*											
b. Special rules for qualified disaster-related personal casualty losses	lao/a 8/23/17 or 9/4/17	-7	-1	---	---	---	---	---	---	---	---	---	-8
c. Special rule for determining earned income [6]	tyba 12/31/16	-7	-2	---	---	---	---	---	---	---	---	---	-9
Total of Division B - Further Additional Supplemental Appropriations For Disaster Relief Requirements Act, 2018		-608	60	43	24	17	10	[4]	[4]	[4]	[4]	---	-456
Division D - Revenue Measures													
I. Extension of Expiring Provisions													
A. Tax Relief for Families and Individuals													
1. Extension of exclusion from gross income of discharge of indebtedness on qualified principal residence indebtedness (sunset 12/31/17)	doia 12/31/16	-2,400	---	---	---	---	---	---	---	---	---	---	-2,400
2. Extension of mortgage insurance premiums treated as qualified residence interest (sunset 12/31/17)	apoaa 12/31/16	-1,079	---	---	---	---	---	---	---	---	---	---	-1,079
3. Extension of above-the-line deduction for qualified tuition and related expenses (sunset 12/31/17)	tyba 12/31/16	-357	---	---	---	---	---	---	---	---	---	---	-357

Provision	Effective	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2018-28
B. Incentives for Growth, Jobs, Investment, and Innovation													
1. Extension of Indian employment tax credit (sunset 12/31/17)	tyba 12/31/16	-49	-9	---	---	---	---	---	---	---	---	---	-57
2. Extension of railroad track maintenance credit (sunset 12/31/17)	epoii tyba 12/31/16	-194	-22	---	---	---	---	---	---	---	---	---	-215
3. Extension of mine rescue team training credit (sunset 12/31/17)	tyba 12/31/16	-1	[4]	[4]	[4]	[4]	[4]	[4]	---	---	---	---	-2
4. Extension of classification of certain race horses as 3-year property (sunset 12/31/17)	ppisa 12/31/16	-37	-10	5	8	11	11	8	3	---	---	---	-2
5. Extension of 7-year recovery period for motorsports entertainment complexes (sunset 12/31/17)	ppisa 12/31/16	-13	-10	-7	-4	-3	-3	-2	[3]	1	1	---	-40
6. Extension of accelerated depreciation for business property on an Indian reservation (sunset 12/31/17)	ppisa 12/31/16	-164	-42	4	23	39	31	14	-2	-8	-6	---	-112
7. Extension of election to expense mine safety equipment (sunset 12/31/17)	ppisa 12/31/16	-6	2	1	1	1	1	1	1	[3]	[3]	---	---
8. Extension of special expensing rules for certain film, television, and live theatrical productions (sunset 12/31/17)	pca 12/31/16	-1,339	282	317	176	123	106	88	70	70	70	---	-37
9. Extension of deduction allowable with respect to income attributable to domestic production activities in Puerto Rico (sunset 12/31/17)	tyba 12/31/16	-67	---	---	---	---	---	---	---	---	---	---	-67
10. Extension of special rate for certain timber gain (sunset 12/31/17)	tyba 12/31/16	-32	---	---	---	---	---	---	---	---	---	---	-32
11. Extension of empowerment zone tax incentives (sunset 12/31/17)	tyba 12/31/16	-205	-26	1	[3]	-1	-2	-3	-4	-5	-5	---	-252
12. Extension of American Samoa economic development credit (sunset 12/31/17)	tyba 12/31/16	-11	---	---	---	---	---	---	---	---	---	---	-11
C. Incentives for Energy Production and Conservation													
1. Extension of credit for section 25C nonbusiness energy property (sunset 12/31/17)	ppisa 12/31/16	-533	-5	-4	---	---	---	---	---	---	---	---	-542
2. Extension and modification of credit for residential energy efficient property (sunset 12/31/21)	ppisa 12/31/16	-1,132	-155	-208	-478	-458	-420	-179	-105	-40	---	---	-3,174
3. Extension of alternative motor vehicle credit for qualified fuel cell motor vehicles (sunset 12/31/17)	ppa 12/31/16	-4	---	---	---	---	---	---	---	---	---	---	-4
4. Extension of credit for alternative fuel vehicle refueling property (sunset 12/31/17)	ppisa 12/31/16	-49	-4	-3	-3	-3	-3	-2	[4]	[3]	[3]	---	-67
5. Extension of credit for two-wheeled plug-in electric vehicles (sunset 12/31/17)	vaa 12/31/16	[4]	[4]	[4]	[4]	[4]	---	---	---	---	---	---	-1
6. Extension of second generation biofuel producer credit (sunset 12/31/17)	fpa 12/31/16	-11	---	---	---	---	---	---	---	---	---	---	-11
7. Extension of biodiesel and renewable diesel incentives - extend present-law income tax credits, excise tax credit, and outlay payments (sunset 12/31/17)	fsoua 12/31/16	-3,250	---	---	---	---	---	---	---	---	---	---	-3,250
8. Extension of production credit for Indian coal facilities (sunset 12/31/17)	cpa 12/31/16	-22	-4	-3	-3	-3	-3	-1	[4]	---	---	---	-38

Provision	Effective	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2018-28
9. Extension of beginning-of-construction date for non-wind renewable power facilities eligible to claim the electricity production credit or investment credit in lieu of the production credit (sunset 12/31/17)	1/1/17	-123	-24	-1	-12	-20	-25	-30	-35	-39	-21	---	-330
10. Extension of credit for construction of energy-efficient new homes (sunset 12/31/17)	haa 12/31/16	-173	-29	-21	-21	-21	-21	-11	-2	---	---	---	-299
11. Extension and phaseout of the section 48 energy investment tax credit (sunset 12/31/21)	ppisa 12/31/16	-145	-137	-212	-226	-237	-152	-73	-58	-46	-38	---	-1,323
12. Five-year cost recovery for certain energy property (sunset 12/31/21)	ppisa 12/31/16	-13	-15	-19	-22	-21	-14	-7	-3	1	3	---	-110
13. Extension of special depreciation allowance for second generation biofuel plant property (sunset 12/31/17)	ppisa 12/31/16	-10	3	2	1	1	1	1	[3]	[3]	[3]	---	[4]
14. Extension of energy efficient commercial buildings deduction (sunset 12/31/17)	ppisa 12/31/16	-79	2	2	1	1	1	1	1	1	1	---	-69
15. Extension of special rule for sales or dispositions to implement Federal Energy Regulatory Commission ("FERC") or State electric restructuring policy for qualified electric utilities (sunset 12/31/17)	da 12/31/16	-150	24	24	24	24	24	24	8	---	---	---	---
16. Extension of excise tax credits and outlay payments for alternative fuel, and excise tax credits for alternative fuel mixtures (sunset 12/31/17)	fsoua 12/31/16	-555	---	---	---	---	---	---	---	---	---	---	-555
17. Extension of Oil Spill Liability Trust Fund financing rate (sunset 12/31/18)	fcmba DOE	No Revenue Effect											
D. Modifications of Energy Incentives													
1. Modifications of credit for production from advanced nuclear power facilities	DOE & tyba DOE	---	[4]	-1	-1	-1	-1	-91	-180	-180	-180	---	-637
II. Miscellaneous Provisions													
1. Extension of temporary increase in limit on cover over of rum excise tax revenues (from $10.50 to $13.25 per proof gallon) to Puerto Rico and the Virgin Islands (sunset 12/31/21) [6][15]	dsbiUSa 12/31/16	-273	-143	-143	-97	-20	---	---	---	---	---	---	-676
2. Extend the limitations period with respect to excluding amounts received by wrongfully incarcerated individuals	DOE	[4]	[4]	---	---	---	---	---	---	---	---	---	[4]
3. Individuals held harmless on improper levy on retirement plans	laaitrtia 12/31/17	Negligible Revenue Effect											
4. Modification of user fee requirements for installment agreements	aeiooatdti 60da DOE	[3]	2	3	4	5	6	6	6	7	7	---	47
5. Simplified filing requirements for individuals 65 years of age and older	tyba DOE	No Revenue Effect											
6. Unify the tax treatment of awards to whistleblowers	tyba 12/31/17	-10	-15	-15	-16	-16	-17	-17	-17	-12	-10	---	-143
7. Clarification of whistleblower awards [6]	[16]	-1	-3	-4	-4	-4	-4	-6	-7	-9	-10	---	-52
8. Excise tax on investment income of private colleges and universities limited to institutions with at least 500 tuition paying students	tyba 12/31/17	-2	-2	-2	-2	-2	-2	-2	-2	-2	-2	---	-22
9. Exception to private foundation excess business holding tax for independently-operated philanthropic business holdings	tyba 12/31/17	[3]	[3]	[3]	[3]	[3]	[3]	[3]	[3]	[3]	[3]	---	[3]

Provision	Effective	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2018-28
10. State beverage alcohol regulation (sunset 12/31/19)...........	generally 1/1/18						*No Revenue Effect*						
11. Simplification of rules regarding records, statements, and returns (sunset 12/31/19)...	cqba DOE						*Negligible Revenue Effect*						
12. Modification of rules relating to hardship withdrawals from cash or deferred arrangements....................................	pyba 12/31/18	---	37	80	95	92	83	70	53	30	6	---	546
13. Modification of rules governing hardship distributions.......	pyba 12/31/18						*Estimate Included in Part Four, Division D, Item II.12.*						
15. All Puerto Rico low-income communities treated as qualified opportunity zone..	[17]	-106	-145	-143	-147	-136	-132	-132	-140	709	236	---	-137
16. Treatment of citizens or residents of the United States living abroad in support of Armed Forces in combat zone..	tyba 12/31/17	-93	-93	-92	-90	-85	-79	-72	-65	-58	-51	---	-779
17. Treatment of foreign persons for returns relating to payments made in settlement of payment card and third party network transactions..	rf cyba 12/31/17	-1	-1	-1	-1	-1	-1	-1	-1	-1	-1	---	-10
18. Repeal the eight percent increase in the amount of any required installment of corporate estimated tax otherwise due in July, August, or September of 2020 for corporations with assets of at least $1 billion..	DOE	---	---	-3,355	3,355	---	---	---	---	---	---	---	---
19. Enhancement of carbon dioxide sequestration credit..........	tyba 12/31/17	-9	-11	-19	-33	-55	-85	-102	-113	-124	-137	---	-689
Total of Division D - Revenue Measures..		-12,697	-552	-3,813	2,529	-789	-699	-517	-591	296	-136	---	-16,980
TOTAL OF PART THREE		**-13,305**	**-491**	**-3,769**	**2,553**	**-772**	**-689**	**-517**	**-591**	**296**	**-136**	**---**	**-17,436**
PART FOUR: CONSOLIDATED APPROPRIATIONS ACT, 2018 (Public Law 115-141, signed into law by the President on March, 23, 2018)													
Division M - Extensions													
Title I - The "Airport and Airway Extension Act of 2018"													
Subtitle B - Aviation Revenue Provisions													
1. Expenditure authority from Airport and Airway Trust Fund (sunset 9/30/18)...	DOE						*No Revenue Effect*						
2. Extension of taxes funding Airport and Airway Trust Fund (sunset 9/30/18)...	DOE						*No Revenue Effect*						
Total of Title I - The "Airport and Airway Extension Act of 2018"...							*No Revenue Effect*						
Division T - Revenue Provisions													
1. Modification of deduction for qualified business income of a cooperative and its patrons (sunset 12/31/25)..................	tyba 12/31/17	4	9	13	13	14	14	15	15	12	---	---	108
2. Increase in State housing credit ceiling for 2018, 2019, 2020, and 2021..	cyba 12/31/17 & before 1/1/22	-6	-46	-119	-212	-310	-374	-404	-415	-417	-417	---	-2,718
3. Average income test for low-income housing credit...........	ema DOE	[4]	-4	-6	-9	-13	-14	-14	-16	-16	-16	---	-109
Total of Division T - Revenue Provisions...		-2	-41	-112	-208	-309	-374	-403	-416	-421	-433	---	-2,719
Division U - The "Tax Technical Corrections Act of 2018"...............	[18]						*No Revenue Effect*						
TOTAL OF PART FOUR		**-2**	**-41**	**-112**	**-208**	**-309**	**-374**	**-403**	**-416**	**-421**	**-433**	**---**	**-2,719**

Provision	Effective	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2018-28
PART FIVE: AIRPORT AND AIRWAY EXTENSION ACT OF 2018, PART II (Public Law 115-250, signed into law by the President on September 29, 2018)													
1. Expenditure authority from Airport and Airway Trust Fund (sunset 10/7/23)	DOE	---					*No Revenue Effect*						
2. Extension of taxes funding Airport and Airway Trust Fund (sunset 10/7/23)	DOE	---					*No Revenue Effect*						
TOTAL OF PART FIVE		---					***No Revenue Effect***						
PART SIX: FAA REAUTHORIZATION ACT OF 2018 (Public Law 115-254, signed into law by the President on October 5, 2018)													
Division B - FAA Reauthorization Act of 2018													
Title VIII - Aviation Revenue Provisions													
1. Expenditure authority from Airport and Airway Trust Fund (sunset 9/30/23)	DOE	---					*No Revenue Effect*						
2. Extension of taxes funding Airport and Airway Trust Fund (sunset 9/30/23)	DOE	---					*No Revenue Effect*						
TOTAL OF PART SIX		---					***No Revenue Effect***						
PART SEVEN: PROTECTING ACCESS TO THE COURTS FOR TAXPAYERS ACT (Public Law 115-332, signed into law by the President on December 19, 2018)													
1. Transfer of certain cases	DOE	---					*Negligible Revenue Effect*						
TOTAL OF PART SEVEN		---					***Negligible Revenue Effect***						

Joint Committee on Taxation

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NOTE: Details may not add to totals due to rounding.

Legend for "Effective" column:

aciooatdti = agreements entered into on or after the date that is
apoaa = amounts paid or accrued after
cpa = coal produced after
cyba = calendar years beginning after
cqba = calendar quarter beginning after
da = dispositions after
dsbiUSa = distilled spirits brought into the United States after
DOE = date of enactment
doia = discharge of indebtedness after
ema = elections made after
epoii = expenditures paid or incurred in
fcmba = first calendar month beginning after
fpa = fuel produced after
fsoua = fuel sold or used after
lao/a = losses arising on or after
haa = homes acquired after
pca = productions commencing after
ppa = property purchased after
ppisa = property placed in service after
pyba = plan years beginning after
rf = returns for
sa = sales after
tyba = taxable years beginning after
vaa = vehicles acquired after
wpoif = wages paid or incurred from
60da = 60 days after
wpoif = wages paid or incurred from

[Footnotes for the Appendix appear on the following page]

Provision	Effective	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2018-28

Footnotes for the Appendix:

[1] For detailed explanations and estimates of the provisions contained in Public Law 115-97, please see: Joint Committee on Taxation, *General Explanation of Public Law No. 115-97,* (JCS-1-18), December 2018.

[2] a. The term "Hurricane Harvey disaster zone" means that portion of Hurricane Harvey disaster area determined by the President to warrant individual or individual and public assistance from the Federal government under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, by reason of Hurricane Harvey. The term "Hurricane Harvey disaster area" means an area with respect to which a major disaster has been declared by the President before September 21, 2017, under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, by reason of Hurricane Harvey.

b. The term "Hurricane Irma disaster zone" means that portion of the Hurricane Irma disaster area determined by the President to warrant individual or individual and public assistance from the Federal government under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, by reason of Hurricane Irma. The term "Hurricane Irma disaster area" means an area with respect to which a major disaster has been declared by the President before September 21, 2017, under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, by reason of Hurricane Irma.

c. The term "Hurricane Maria disaster zone" means that portion of the Hurricane Maria disaster area determined by the President to warrant individual or individual and public assistance from the Federal government under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, by reason of Hurricane Maria. The term "Hurricane Maria disaster area" means an area with respect to which a major disaster has been declared by the President before September 21, 2017, under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, by reason of Hurricane Maria.

[3] Gain of less than $500,000.

[4] Loss of less than $500,000.

[5] Effective for contributions made during the period beginning on August 23, 2017, and ending on December 31, 2017.

[6] Estimate includes the following outlay effects for the relevant provision:

	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2018-28
Special rule for determining earned income	24	12	5	---	---	---	---	---	---	---	---	42
Payments to United States Virgin Islands and Puerto Rico	239	---	---	---	---	---	---	---	---	---	---	239
Delay in implementation of excise tax on high cost employer-sponsored health coverage	---	---	-619	-1,003	-316	---	---	---	---	---	---	-1,937
Special rule for determining earned income (CA wildfires)	94	23	---	---	---	---	---	---	---	---	---	117
Special rule for determining earned income (Hurricanes Harvey and Irma)	5	1	---	---	---	---	---	---	---	---	---	6
Extension of temporary increase in limit on cover over of rum excise tax revenues	273	143	143	97	20	---	---	---	---	---	---	676
Clarification of IRS whistleblower awards	1	3	4	4	4	4	6	7	9	10	---	52

[7] This estimate assumes that all payments to the Commonwealth of Puerto Rico and the U.S. Virgin Islands will be made by the U.S. Treasury Department in fiscal year 2018. The legislation does not specify the timing of these payments.

[8] Estimate includes the following budget effects:

	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2018-28
Total Revenue Effect	---	---	-3,705	-7,449	-3,634	---	---	---	---	---	---	-14,788
On-budget effects	---	---	-3,033	-6,249	-3,241	---	---	---	---	---	---	-12,523
Off-budget effects	---	---	-672	-1,200	-393	---	---	---	---	---	---	-2,265

[9] The term "California wildfire disaster zone" means that portion of the California wildfire disaster area determined by the President to warrant individual or individual and public assistance from the Federal government under the Robert T. Stafford Disaster Relief and Emergency Assistance Act by reason of wildfires in California. The term "California wildfire disaster area" means an area with respect to which between January 1, 2017, through January 18, 2018, a major disaster has been declared by the President under section 401 of such Act, by reason of wildfires in California.

[11] Effective for contributions made during the period beginning on October 8, 2017, and ending on December 31, 2018.

[12] a. The term "Hurricane Harvey disaster zone" means that portion of Hurricane Harvey disaster area determined by the President to warrant individual or individual and public assistance from the Federal government under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, by reason of Hurricane Harvey. The term "Hurricane Harvey disaster area" means an area with respect to which a major disaster has been declared by the President before October 17, 2017, under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, by reason of Hurricane Harvey.

b. The term "Hurricane Irma disaster zone" means that portion of the Hurricane Irma disaster area determined by the President to warrant individual or individual and public assistance from the Federal government under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, by reason of Hurricane Irma. The term "Hurricane Irma disaster area" means an area with respect to which a major disaster has been declared by the President before October 17, 2017, under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, by reason of Hurricane Irma.

[13] Effective as if included in the 'Disaster Tax Relief and Airport and Airway Extension Act of 2017,' which was enacted September 29, 2017.

[14] Effective for contributions made during the period beginning on August 23, 2017, and ending on December 31, 2017.

[Footnotes for the Appendix continue on the following page]

Footnotes for the Appendix continued:

[15] Estimate provided by the Congressional Budget Office.
[16] Effective for information provided before, on, or after the date of enactment with respect to which a final determination has not been made before such date.
[17] Effective as if included in Public Law 115-97.
[18] Generally effective as if included in the section of the Public Law to which the technical correction applies.