Joint Committee on Taxation
September 14, 1989
JCX-49-89

CHAIRMAN ROSTENKOWSKI'S MODIFICATION TO CERTAIN PROVISIONS OF THE CHAIRMAN'S MARK DATED JULY 18, 1989*

1. Excise tax on ozone-depleting chemicals

The proposed excise tax on ozone-depleting chemicals (JCX-31-89, p. 32) would be modified to provide the following base tax rates: for calendar year 1990, $1.25 per pound; for calendar year 1991, $1.25 per pound; for calendar year 1992, $1.60 per pound; and for calendar year 1993 and beyond, $3.40 per pound.

In addition, the provision would not apply to those chemicals not designated under the Montreal protocol. This would remove HCFC-22 (chlorodifluoromethane), carbon tetrachloride, methyl chloroform, and methylene chloride from the list of taxable chemicals. The provision provides that no chemical which is not currently specified under the Montreal protocol may be added to the list of taxed chemicals by regulatory action. The provision also provides that no chemical which is currently specified under the Montreal protocol may be deleted from the list of taxed chemicals by regulatory action, nor may any ozone-depleting factor which is currently specified under the Montreal protocol be altered by regulatory action.

For calendar year 1990, the provision would not apply in the case of the manufacture or sale of halons or the sale or use by a manufacturer of ozone-depleting chemicals for the purpose of manufacturing or selling rigid foam insulation, or the import into the United States of chemicals or products containing such chemicals for such purposes. For calendar years 1991, 1992, and 1993, a credit against the excise tax would be provided for halons and rigid foam insulation in a credit percentage that equates the tax per pound of qualifying chemical to a net tax of 25 cents per pound of ozone-depleting chemical, prior to any adjustment for inflation indexing.

A percentage of each producer's annual production of ozone-depleting chemicals equal to that percentage of the producer's 1986 production which was exported in 1986 will be exempt from the tax upon export. In addition, to conform

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* See Joint Committee on Taxation staff documents: JCX-31-89 (description of Chairman's proposal) and JCX-32-89 (revenue table).

with Environmental Protection Agency ("EPA") regulations implementing the Montreal protocol (see, 40 CFR part 82), any additional production allowance granted by the EPA under the condition that it be exported (see, sec. 82.9 of those regulations) will be exempt from the tax upon export.

The provision further clarifies that those quantities of ozone-depleting chemicals which are used as feedstock for the manufacture or production of other ozone-depleting or non-ozone-depleting chemicals will not be subject to the tax.

Opportunity would be provided to the Secretary of the Treasury to recommend changes in base tax rates and ozone-depleting factors in the future.

The provision would be effective for ozone-depleting chemicals produced in or imported into the United States after December 31, 1989. In addition, a floor stocks tax would be imposed on ozone-depleting chemicals held by a dealer for sale on January 1, 1990. However, collection of the tax would not begin until April 1, 1990.

2. Policyholder dividend deductions

The proposal relating to the treatment of policyholder dividends of mutual life insurance companies (JCX-31-89, p. 33) would be deleted.

3. Extension of telephone excise tax and collection period for air passenger transportation ticket excise tax

The proposals relating to the permanent extension of the telephone excise tax (JCX-31-89, p. 35) and the collection period for the excise tax on air passenger transportation tickets (JCX-31-89, p. 36) would be retained.

4. Payroll tax deposits

The system under which employers deposit income taxes withheld from employees' wages and FICA taxes would be modified. Under Treasury regulations, employers are required to deposit these taxes as frequently as eight times a month, provided that the amount to be deposited equals or exceeds $3,000. These deposits must be made within three banking days of the end of each eighth-monthly period.

Under the proposal, employers who are on this eighth-monthly system would be required to make a deposit by the close of the next banking day (instead of by the close of the third banking day) after any day on which the business accumulates an amount to be deposited equal to or greater than $800,000 (regardless of whether that day is the last day of an eighth-monthly period). This proposal would be effective for deposits required to be made after December 31, 1989, but the application of the rule would be phased in. Under the phase in, for deposits required to be made during 1990, 73 percent of the deposits otherwise required to be accelerated under the provision would actually be required to be accelerated. For 1991 and subsequent years, the provision would be fully effective.

5. Proposed modification of committee action relating to section 89 rules

A. Repeal of section 89

The section 89 nondiscrimination rules would be repealed effective as if they were not included in the Tax Reform Act of 1986.

B. New rule to preclude executive-only plans

A health plan is qualified only if the plan is made available on the same terms and conditions to a nondiscriminatory group of employees. This rule is designed to prevent inherently discriminatory practices, and is not intended to affect health plans offered to a broad group of employees.

C. Special rule for professional service organizations

1. A health plan offered by a professional service organization is qualified if:

(a) it satisfies the no executive-only plan rule, and

(b) the plan does not disproportionately benefit highly compensated employees based on actual participation.

2. As under H.R. 3150, a professional service organization would be an organization providing professional services in the field of health, law, engineering, architecture, accounting, actuarial science, financial services, or consulting, or in such other fields as the Secretary may prescribe.

D. Safe harbors

1. For employers with 100 employees or less there is a safe harbor under which a plan will generally meet the no executive-only plan rule if at least half of the employees to whom the plan is available are nonhighly compensated employees.

2. In the case of a plan maintained by a professional service organization or an employer with more than 100 employees, the safe harbor is generally satisfied if at least half of the employees to whom the plan is available are

nonhighly compensated employees and either (1) the plan is available to more than 25 percent of the employer's nonhighly compensated employees, or (2) the employer makes core health coverage available to a significant portion of its nonhighly compensated work force.

E. Failure to be a nondiscriminatory health plan

If a plan fails the nondiscrimination tests, then the cost of the coverage received by a highly compensated employee under that plan is includible in the income of the highly compensated employee. Cost would be determined as under H.R. 3150. As under H.R. 3150, the employer is to report the amount includible in income for failure to pass the tests on the employee's W-2.

F. Qualification rules

The writing, notice, and other qualification rules would be retained as under H.R. 3150. In addition, the exclusive benefit rule would not be violated merely because individuals with no service nexus to the employer participate in the plan on an after-tax basis.

G. Other provisions

1. Union plans.--Collectively bargained plans, including multiemployer plans, would not be subject to the no executive-only plan rule, unless more than a de minimis number of employees covered by the plan perform professional services. Professional services would be defined as in H.R. 3150. The definition of de minimis in the case of governmental plans would apply as in H.R. 3150. These exceptions would only apply to employees subject to the bargaining agreement.

2. Church plans.--As under H.R. 3150, health plans maintained by churches and certain church-controlled organizations for church employees are not subject to the nondiscrimination rules.

3. Plans other than health plans.--Plans other than health plans would not be subject to the nondiscrimination rules applicable to health plans, but would be subject to nondiscrimination rules as provided in H.R. 3150. The pre-Tax Reform Act nondiscrimination rules for benefits under cafeteria plans, which were repealed with the enactment of section 89, would be reinstated. Voluntary employee benefit associations (VEBAs) would be subject to the existing nondiscrimination rules for such plans (sec. 505).

4. Self-insured medical reimbursement plans.--Self-insured medical reimbursement plans would be subject to nondiscrimination rules as in effect prior to the

Tax Reform Act of 1986 (sec. 105(h)).

5. Former employees.--The nondiscrimination rules would be applied separately to former employees. Employees who separate from service before January 1, 1990, (and who are not reemployed on or after such date) are not subject to the rules.

6. Conforming changes.--Conforming changes would be made as necessary to reflect the repeal of section 89.

H. Effective date

Same as in H.R. 3150.

I. Examples of health benefit nondiscrimination rules

Example 1.--An employer that is not a professional service organization has 10 employees. It maintains a health plan which it makes available to 3 highly compensated and 3 nonhighly compensated employees on the same terms and conditions. The plan meets the safe harbor under the nondiscrimination test because at least 50 percent of those to whom it is available are nonhighly compensated employees.

Example 2.--An employer has 150 employees. It maintains only one health plan. The plan is available to 15 highly compensated and 15 nonhighly compensated employees. The plan does not meet the safe harbor under the nondiscrimination test because the employer has more than 100 employees and the plan is not offered to at least 25 percent of the employer's nonhighly compensated work force.

Example 3.--An employer that is not a professional service organization has a work force composed of 15 highly compensated employees and 200 nonhighly compensated employees. The employer maintains 5 health plans that provide meaningful core health coverage. One hundred and one nonhighly compensated employees have coverage available under one or more plans. One plan is available to all highly compensated employees and 40 nonhighly compensated employees. The plan meets the safe harbor under the nondiscrimination test because at least 50 percent of those to whom it is made available are nonhighly compensated employees and core health coverage is available to a significant portion of all nonhighly compensated employees.

Example 4.--An employer that is not a professional service organization has a work force composed of 50 highly compensated employees and 30 nonhighly compensated employees. The employer maintains a health plan that it makes available on the same terms and conditions to 5 highly compensated employees and 3 nonhighly compensated employees. Even though the plan does not meet the safe harbor under the nondiscrimination test, the plan is not discriminatory. This is because the percentage of highly compensated employees to whom the plan is available does not exceed the percentage of nonhighly compensated employees to whom the plan is available.

Example 5.--An employer's health plans have a waiting period of 6 months. However, executives of the company may participate in a health plan immediately. The plan in which the executives participate is discriminatory.

Example 6.--An employer maintains a health plan for all of its employees. It also maintains an executive physical program available only to certain highly compensated employees. The executive physical program is a discriminatory health plan.

Example 7.--A professional service organization maintains a health plan that is available to all employees. Even though this plan meets the safe harbor for the executive-only nondiscriminatory availability test, it may still be discriminatory if it is disproportionately elected by the employer's highly compensated employees.