[JOINT COMMITTEE ON TAXATION]

GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 117TH CONGRESS

PREPARED BY THE STAFF

OF THE

JOINT COMMITTEE ON TAXATION

DECEMBER 2023

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U.S. GOVERNMENT PUBLISHING OFFICE

53–965 WASHINGTON : 2023 JCS–1–23

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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 117th Congress.

For each provision, this document includes a description of present law, an explanation of the provision, and the 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. For a bill with a Committee report (or, in the absence of one, 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 report (or 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 (the "Code"), unless otherwise stated.

Part One is an explanation of the revenue provisions of the American Rescue Plan Act of 2021 (Pub. L. No. 117–2).

Part Two is an explanation of section 201 of the Surface Transportation Extension Act of 2021 (Pub. L. No. 117–44).

Part Three is an explanation of section 4 of the Further Surface Transportation Extension Act of 2021 (Pub. L. No. 117–52).

Part Four is an explanation of Division H of the Infrastructure Investment and Jobs Act (Pub. L. No. 117–58).

Part Five is an explanation of section 307 of Division P of the Consolidated Appropriations Act, 2022 (Pub. L. No. 117–103).

Part Six is an explanation of section 103 of the CHIPS Act of 2022 (Pub. L. No. 117–167).

Part Seven is an explanation of the revenue provisions of an Act to provide for reconciliation pursuant to Title II of S. Con. Res. 14 (Pub. L. No. 117–169).

Part Eight is an explanation of Division T (the "SECURE 2.0 Act of 2022") and section 4151 of the Consolidated Appropriations Act, 2023 (Pub. L. No. 117–328).

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

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

[1] This document may be cited as follows: Joint Committee on Taxation, *General Explanation of Tax Legislation Enacted in the 117th Congress* (JCS–1–23), December 2023.

PART ONE: AMERICAN RESCUE PLAN ACT OF 2021 (PUBLIC LAW 117–2) [2]

TITLE IX—COMMITTEE ON FINANCE

Subtitle A—Crisis Support for Unemployed Workers

1. Extension of limitation on excess business losses of non-corporate taxpayers (sec. 9041 of the Act and sec. 461(l) and (j) of the Code)

Present Law

Limitation on excess business losses of a taxpayer other than a corporation

In general

For taxable years beginning after December 31, 2020, and before January 1, 2026, an excess business loss of a taxpayer other than a corporation is not allowed for the taxable year.[3]

An excess business loss not allowed for a taxable year is treated as a net operating loss ("NOL") for the taxable year that is carried over to subsequent taxable years under the applicable NOL carryover rules.[4]

An excess business loss for the taxable year is the excess of aggregate deductions of the taxpayer attributable to trades or businesses of the taxpayer (determined without regard to the limitation of the provision) over the sum of aggregate gross income or gain attributable to trades or businesses of the taxpayer plus a threshold amount. The threshold amount is indexed for inflation for taxable years beginning after 2018. The threshold amount for a taxable year beginning in 2022 is $270,000 as indexed (or, in the case of a joint return, twice the otherwise applicable threshold amount, or $540,000 for 2022 as indexed).

The aggregate business deductions taken into account to determine the excess business loss of the taxpayer for the taxable year that are attributable to trades or businesses of the taxpayer are determined without regard to any deduction under section 172 (relating to NOLs) or 199A (relating to the deduction for qualified business income). For example, assume that a taxpayer has an NOL

[2] H.R. 1319. The bill was introduced in the House of Representatives on February 24, 2021 and was passed by the House on February 27, 2021. The Senate passed the bill with an amendment on March 6, 2021. The House agreed to the Senate amendment on March 10, 2021. The President signed the bill on March 11, 2021.

[3] Sec. 461(l), as modified in 2017 by section 11012 of Public Law 115–97, was applicable to taxable years beginning after December 31, 2017, and before January 1, 2026. Section 2304 of Division A of Public Law 116–136 further modified Code section 461(l) so that it does not apply for a taxable year beginning in 2018, 2019, or 2020. For a description of each of these section 461(l) modifications, see: Joint Committee on Taxation, *General Explanation of Public Law 115–97* (JCS–1–18), December 2018, page 38; and Joint Committee on Taxation, *General Explanation of the Tax Legislation Enacted in the 116th Congress* (JCS–1–22), February 2022, page 330.

[4] See generally sec. 172. The amount of a taxpayer's NOL (including any excess business loss that is not allowed for the taxable year) carried to a subsequent taxable year is limited to 80 percent of the taxable income (determined without regard to the NOL deduction and deductions under sections 199A and 250) for that subsequent taxable year. Sec. 172(a)(2). For a discussion of the changes made in 2017 to section 172, see the description of section 13302 of Public Law 115–97 (Modification of Net Operating Loss Deduction) in Joint Committee on Taxation, *General Explanation of Public Law 115–97* (JCS–1–18), December 2018, page 180. Changes made by section 2303 of the Division A of Public Law 116–136 to rules governing NOLs (section 172) are described in Joint Committee on Taxation, *General Explanation of the Tax Legislation Enacted in the 116th Congress* (JCS–1–22), February 2022, page 325.

carryover from a different taxable year to the current taxable year. Such NOL carryover is not part of the taxpayer's aggregate deductions attributable to trades or businesses for the current taxable year under section 461(l).

An excess business loss under section 461(l) does not take into account any deductions, gross income, or gains attributable to any trade or business of performing services as an employee.[5] For this purpose, the trade or business of performing services as an employee has the same meaning as it does under section 62(a)(1). For example, assume married taxpayers filing jointly for the taxable year have a loss from a trade or business conducted by one spouse as a sole proprietorship, as well as wage income of the other spouse from employment. The wage income is not taken into account in determining the amount of the deduction limited under section 461(l).

In the case of a partnership or S corporation, the provision applies at the partner or shareholder level. Each partner's distributive share and each S corporation shareholder's pro rata share of items of income, gain, deduction, or loss of a partnership or S corporation are taken into account in applying the limitation under the provision for the taxable year of the partner or S corporation shareholder. Regulatory authority is provided to require any additional reporting as the Secretary determines is appropriate to carry out the purposes of the provision (including with respect to any other passthrough entity to the extent necessary to carry out the purposes of the provision).

Section 461(l) applies after the application of certain other limitations on losses, namely, the passive activity loss limitation,[6] the at-risk limitation,[7] and in the case of a taxpayer who is a partner or S corporation shareholder, the rules limiting the taxpayer's distributive or pro rata share of loss for the taxable year to the taxpayer's adjusted basis in the partnership interest or in the Sµcorporation stock and debt.[8] Thus, for example, the amount of any income, deduction, gain, or loss from a passive activity that is taken into account under the passive activity loss limitation is not taken into account in determining whether a taxpayer has an excess business loss.

Treatment of capital losses

In the case of a taxpayer other than a corporation, section 1211(b) limits the deduction for losses from sales or exchanges of capital assets to gains from such sales or exchanges plus up to $3,000. Section 172(d)(2)(A), relating to NOLs, provides a similar limitation but without regard to the $3,000 additional amount. Be-

[5] See also the IRS explanation of "Excess business losses" at https://www.irs.gov/newsroom/excess-business-losses, which conforms to this rule. The rule was clarified in Public Law 116–136, Div. A, sec. 2304(b), effective as if included in section 11012 of Public Law 115–97 (*i.e.*, starting with the taxable year beginning after December 31, 2017; in addition, Public Law 116–136, Div. A, sec. 2304, provided that section 461(l) does not apply for a taxable year beginning in 2018, 2019, or 2020).

[6] Sec. 469.

[7] Sec. 465.

[8] Sec. 704(d) (for partners) and sec. 1366(d) (for S corporation shareholders). See sec. 461(l)(6) (applying section 461(l) after section 469), and Treas. Reg. sec. 1.469–2T(d)(6) (applying section 469 after sections 704(d), 1366(d), and 465). Note that other rules could potentially limit a taxpayer's loss (e.g., section 267). A discussion of all potential loss limitation rules is beyond the scope of the description of this provision.

cause capital losses cannot offset ordinary income under the NOL rules, any capital loss deductions are not taken into account in computing the section 461(l) limitation. Further, the amount of capital gain taken into account in calculating the section 461(l) limitation cannot exceed the lesser of capital gain net income from a trade or business or capital gain net income.

Excess farm losses

For taxable years beginning before January 1, 2018, and after December 31, 2025, a limitation on excess farm losses applies to taxpayers other than C corporations.[9] Thus, for taxable years beginning after December 31, 2017, and before January 1, 2026, the limitation relating to excess farm losses does not apply.

Under the limitation relating to excess farm losses, if a taxpayer other than a C corporation receives an applicable subsidy[10] for the taxable year, the amount of the excess farm loss is not allowed for the taxable year and is carried forward and treated as a deduction attributable to farming businesses in the next taxable year. An excess farm loss for a taxable year means the excess of aggregate deductions that are attributable to farming businesses over the sum of aggregate gross income or gain attributable to farming businesses plus the threshold amount. The threshold amount is the greater of (1) $300,000 ($150,000 for married individuals filing separately), or (2) for the five-consecutive-year period preceding the taxable year, the excess of the aggregate gross income or gain attributable to the taxpayer's farming businesses over the aggregate deductions attributable to the taxpayer's farming businesses.

Explanation of Provision

The provision extends for one year the limitation on excess business loss of a taxpayer other than a corporation (section 461(l)). Specifically, the section 461(l) limitation applies for taxable years beginning after December 31, 2020, and before January 1, 2027. The limitation on excess farm losses (section 461(j)) does not apply for taxable years beginning after December 31, 2017, and before January 1, 2027.

Effective Date

The provision is effective for taxable years beginning after December 31, 2025.

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[9] Sec. 461(j).

[10] For this purpose, an applicable subsidy means (A) any direct or counter-cyclical payment under title I of the Food, Conservation, and Energy Act of 2008, or any payment elected to be received in lieu of such payment, or (B) any Commodity Credit Corporation loan. Sec. 461(j)(3). Note that the Agricultural Act of 2014 repealed direct and counter-cyclical payments under the Food, Conservation, and Energy Act of 2008. See secs. 1101 and 1102 of Public Law 113–79. Thus, only Commodity Credit Corporation loans currently fall within the definition of an applicable subsidy for purposes of section 461(j).

2. Suspension of tax on portion of unemployment compensation (sec. 9042 of the Act and sec. 85 of the Code)

Present Law

A taxpayer's gross income means "all income whatever source derived" except for certain items specifically exempt or excluded.[11] An individual taxpayer's gross income includes unemployment compensation.[12] For purposes of this rule, "unemployment compensation" means any amount received under a law of the United States or of a State which is in the nature of unemployment compensation.[13]

Explanation of Provision

Under the provision, for taxable years beginning in 2020, up to $10,200 of unemployment compensation received by an individual taxpayer is excluded from gross income.[14]

For married individuals filing a joint return, the $10,200 limitation applies separately to each spouse. Accordingly, married individuals who file a joint return for 2020 may exclude from gross income up to $20,400 of unemployment compensation, if each individual receives at least $10,200 of unemployment compensation in 2020.

AGI limitation

The exclusion applies only to taxpayers with adjusted gross income ("AGI") of less than $150,000.[15] The AGI limitation is the same for all taxpayers regardless of filing status.[16]

AGI for purposes of this rule is determined after application of the rules for the inclusion of Social Security benefits;[17] the exclusion of interest on U.S. savings bonds used to pay higher education costs;[18] the exclusion of employer-provided adoption assistance;[19] the deduction for qualified retirement savings;[20] the deduction of interest on certain educational loans;[21] the deduction for qualified tuition and related expenses;[22] and the passive loss rules.[23]

In addition, AGI is determined without regard to the rule providing for the inclusion of unemployment compensation. Thus, all unemployment compensation is excluded for purposes of determining whether a taxpayer's AGI is under the $150,000 threshold.[24]

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[11] Sec. 61.
[12] Sec. 85(a).
[13] Sec. 85(b).
[14] Sec. 85(c)(1).
[15] *Ibid.*
[16] Consequently, if married individuals file separate returns and each individual has AGI of less than $150,000, the exclusion is allowed for each individual, even though the same couple filing a joint return may be ineligible for the exclusion.
[17] Sec. 86.
[18] Sec. 135.
[19] Sec. 137.
[20] Sec. 219
[21] Sec. 221.
[22] Sec. 222. This provision was repealed for taxable years beginning after December 31, 2020. Public Law 116–260, Div. EE, Sec. 104(b).
[23] Sec. 469.
[24] IRS, Fact Sheet 2020–21, *available at* https://www.irs.gov/pub/taxpros/fs-2022-21.pdf.

Other exclusions and deductions

The Code contains certain exclusions and deductions that are available only to taxpayers with AGI below certain thresholds, which were modified to provide that AGI is determined after application of the 2020 exclusion of unemployment compensation.[25]

Effective Date

The provision is effective for taxable years beginning after December 31, 2019.

Subtitle F—Preserving Health Benefits for Workers

1. Preserving health benefits for workers (sec. 9501 of the Act; sec. 4980B and new secs. 139I, 6432, and 6720C of the Code; and secs. 601 to 608 of ERISA)

Present Law

In general

Employment-based health plans (referred to as "group health plans")[26] generally are required to offer an employee, spouse, or dependent child covered by the plan the opportunity to continue coverage under the plan for a specified period of time after the occurrence of certain events that otherwise would have terminated the coverage ("qualifying events").[27] These continuation of coverage requirements are often referred to as "COBRA continuation coverage" or "COBRA" requirements.[28]

The Code imposes an excise tax on the failure of a group health plan to comply with the COBRA continuation coverage rules with respect to a qualified beneficiary (as defined below). The excise tax with respect to a qualified beneficiary generally is equal to $100 for each day in the noncompliance period with respect to the failure. A plan's noncompliance period generally begins on the date the failure first occurs and ends when the failure is corrected. Special rules limit the amount of the excise tax if the failure would not have been discovered despite the exercise of reasonable diligence or if the failure is due to reasonable cause and not willful neglect.

In the case of a multiemployer plan, the excise tax generally is imposed on the group health plan. A multiemployer plan is a plan to which more than one employer is required to contribute that is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and that satisfies such other requirements as the Secretary of Labor may prescribe by regulation. In the case of a plan other than a multiemployer plan (a "single employer plan"), the excise tax generally is imposed on the employer.

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[25] See sec. 9042(b) of the Act.

[26] A group health plan may include a health flexible spending arrangement, under which medical care expenses of an employee (and family members, if applicable) that are not covered by insurance may be paid or reimbursed.

[27] Sec. 4980B. Section 4980B(d) provides exceptions for plans maintained by employers with fewer than 20 employees, plans of governmental employers, and church plans.

[28] The COBRA requirements were originally enacted as part of the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99–272.

Plans subject to COBRA

A group health plan is defined as a plan of, or contributed to by, an employer (including a self-employed person) or an employee organization to provide health care (directly or otherwise) to its employees, former employees, the employer, others associated or formerly associated with the employer in a business relationship, or their families. A group health plan includes a self-insured plan. The term "group health plan" does not, however, include a plan under which substantially all of the coverage is for qualified long-term care services.

The following types of group health plans are not subject to the Code's COBRA rules: (1) a plan established and maintained for its employees by a church or by a convention or association of churches which is exempt from tax under section 501 (a "church plan"); (2) a plan established and maintained for its employees by the Federal government, by the government of any State or political subdivision thereof, or by any instrumentality of the foregoing (a "governmental plan");[29] and (3) a plan maintained by an employer that normally employed fewer than 20 employees on a typical business day during the preceding calendar year[30] (a "small employer plan").

Qualifying events and qualified beneficiaries

A "qualifying event" that gives rise to COBRA continuation coverage is, with respect to any covered employee, any of the following events which would result in a loss of coverage of a qualified beneficiary under a group health plan (but for COBRA continuation coverage): (1) death of the covered employee; (2) the termination (other than by reason of such employee's gross misconduct), or a reduction in hours, of the covered employee's employment; (3) divorce or legal separation of the covered employee; (4) the covered employee's becoming entitled to Medicare benefits under title XVIII of the Social Security Act; (5) a dependent child ceasing to be a dependent child under the generally applicable requirements of the plan; and (6) a proceeding in a case under the U.S. Bankruptcy Code commencing on or after July 1, 1986, with respect to the employer from whose employment the covered employee retired at any time.

A "covered employee" is an individual who is (or was) provided coverage under the group health plan on account of the performance of services by the individual for one or more persons maintaining the plan. A covered employee includes a self-employed individual. A "qualified beneficiary" means, with respect to a covered employee, any individual who on the day before the employee's qualifying event is a beneficiary under the group health plan as the spouse or dependent child of the employee. A qualified beneficiary also includes the covered employee in the case of a qualifying event that is a termination of employment or reduction in hours.

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[29] A governmental plan also includes certain plans established by an Indian tribal government.

[30] If the plan is a multiemployer plan, then each of the employers contributing to the plan for a calendar year must normally employ fewer than 20 employees during the preceding calendar year.

Continuation coverage requirements

Continuation coverage that must be offered to qualified beneficiaries pursuant to COBRA must consist of coverage which, as of the time coverage is provided, is identical to the coverage provided under the plan to similarly situated non-COBRA beneficiaries under the plan with respect to whom a qualifying event has not occurred. If coverage under a plan is modified for any group of similarly situated non-COBRA beneficiaries, the coverage must also be modified in the same manner for qualified beneficiaries. Similarly situated non-COBRA beneficiaries are covered employees, spouses of covered employees, or dependent children of covered employees who (i) are receiving coverage under the group health plan for a reason other than pursuant to COBRA, and (ii) are the most similarly situated to the qualified beneficiary immediately before the qualifying event, based on all of the facts and circumstances.

The minimum required period of continuation coverage for a qualified beneficiary (*i.e.*, the minimum period for which continuation coverage must be offered) depends upon a number of factors, including the specific qualifying event that gives rise to a qualified beneficiary's right to elect continuation coverage. In the case of a qualifying event that is the termination or reduction of hours of a covered employee's employment, the minimum period of coverage that must be offered to the qualified beneficiary is coverage for the period beginning with the loss of coverage on account of the qualifying event and ending on the date that is 18 months[31] after the date of the qualifying event. If coverage under a plan is lost on account of a qualifying event but the loss of coverage occurs on a date after the qualifying event, the minimum coverage period may be extended by the plan so that it is measured from the date when coverage is lost.

The minimum coverage period for a qualified beneficiary generally ends upon the earliest to occur of the following events: (1) the date on which the employer ceases to provide any group health plan to any employee, (2) the date on which coverage ceases under the plan by reason of a failure to make timely payment of any premium required with respect to the qualified beneficiary, and (3) the date on which the qualified beneficiary first becomes (after the date of election of continuation coverage) either (i) covered under any other group health plan (as an employee or otherwise) which does not include any exclusion or limitation with respect to any preexisting condition of such beneficiary or (ii) entitled to Medicare benefits under title XVIII of the Social Security Act. Mere eligibility for another group health plan or Medicare benefits is not sufficient to terminate the minimum coverage period. Instead, the qualified beneficiary must be covered by the other group health plan or must be enrolled in Medicare. Coverage under another group health plan or enrollment in Medicare does not terminate the minimum coverage period if such other coverage or Medicare

[31] In the case of a qualified beneficiary who is determined, under title II or XVI of the Social Security Act, to have been disabled during the first 60 days of continuation coverage, the 18-month minimum coverage period is extended to 29 months with respect to all qualified beneficiaries if notice is given before the end of the initial 18-month continuation coverage period. Sec. 4980B(f)(2)(B)(i)(VIII).

enrollment begins on or before the date on which continuation coverage is elected.

Election of continuation coverage

The COBRA rules specify a minimum election period under which a qualified beneficiary is entitled to elect continuation coverage. The election period begins no later than the date on which coverage under the plan terminates on account of the qualifying event, and ends no earlier than the later of 60 days or 60 days after notice is given to the qualified beneficiary of the qualifying event and the beneficiary's election rights.

Notice requirements

A group health plan is required to give notice of COBRA continuation coverage rights to employees and their spouses at the time of enrollment in the group health plan.

An employer is required to give notice to the plan administrator of certain qualifying events (including a loss of coverage on account of a termination of employment or reduction in hours) generally within 30 days of the qualifying event. A covered employee or qualified beneficiary is required to give notice to the plan administrator of certain qualifying events within 60 days after the event. The qualifying events giving rise to an employee or beneficiary notification requirement are the divorce or legal separation of the covered employee or a dependent child ceasing to be a dependent child under the terms of the plan. Upon receiving notice of a qualifying event from the employer, covered employee, or qualified beneficiary, the plan administrator is required to give notice of COBRA continuation coverage rights within 14 days to all qualified beneficiaries with respect to the event.

Premiums

A plan may require payment of a premium for any period of continuation coverage. The amount of such premium generally may not exceed 102 percent[32] of the "applicable premium" for such period, and the premium must be payable, at the election of the payor, in monthly installments.

The applicable premium for any period of continuation coverage means the cost to the plan for such period of coverage for similarly situated non-COBRA beneficiaries with respect to whom a qualifying event has not occurred, and it is determined without regard to whether the cost is paid by the employer or employee. The determination of any applicable premium is made for a period of 12 months (the "determination period") and is required to be made before the beginning of such 12-month period.

In the case of a self-insured plan, the applicable premium for any period of continuation coverage of qualified beneficiaries is equal to a reasonable estimate of the cost of providing coverage during such period for similarly situated non-COBRA beneficiaries, determined on an actuarial basis, and takes into account such factors as the Secretary prescribes in regulations. A self-insured plan may elect

[32] In the case of a qualified beneficiary whose minimum coverage period is extended to 29 months on account of a disability determination, the premium for the period of the disability extension may not exceed 150 percent of the applicable premium for the period.

to determine the applicable premium on the basis of an adjusted cost to the plan for similarly situated non-COBRA beneficiaries during the preceding determination period.

A plan may not require payment of any premium before the day which is 45 days after the date on which the qualified beneficiary made the initial election for continuation coverage. A plan is required to treat any required premium payment as timely if it is made within 30 days after the date the premium is due or within such longer period as applies to, or under, the plan.

Special rules relating to COVID–19

On May 4, 2020, the Department of Labor ("DOL") Employee Benefits Security Administration ("EBSA") and the Internal Revenue Service ("IRS") issued temporary relief in response to the COVID–19 pandemic.[33] This relief extended various COBRA time frames and was intended to help minimize the possibility that individuals would lose health insurance because they failed to comply with certain COBRA time frames during the COVID–19 pandemic. Specifically, the days from March 1, 2020 until 60 days after the announced end of the COVID–19 national emergency period[34] (or another date specified by the IRS and EBSA) cannot count toward identified COBRA-related time frames. These time frames include the 60-day COBRA election period, the date for making COBRA premium payments, and the date for notifying a plan administrator of a qualifying event. On February 26, 2021, EBSA and IRS announced that extensions of COBRA time frames may extend for up to one year from the date an individual was first eligible for relief.[35]

Other continuation coverage rules

Continuation coverage rules that are parallel to the Code's continuation coverage rules apply to group health plans under the Employee Retirement Income Security Act of 1974 ("ERISA").[36] ERISA generally permits the Secretary of Labor and group health plan participants to bring a civil action to obtain appropriate equitable relief to enforce the continuation coverage rules. In the case of a plan administrator who fails to give timely notice to a participant or beneficiary with respect to COBRA continuation coverage, a court may hold the plan administrator liable to the participant or beneficiary in the amount of up to $110 a day from the date of such failure.

Although the Federal government and State and local governments are not subject to the Code and ERISA's continuation coverage rules, other laws impose similar continuation coverage requirements with respect to plans maintained by such governmental

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[33] IRS and EBSA, "Extension of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID–19 Outbreak," 85 Fed. Reg. 26351, May 4, 2020.

[34] The COVID–19 national emergency refers to the "Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID–19) Outbreak," issued on March 13, 2020. See https://trumpwhitehouse.archives.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/.

[35] EBSA Disaster Relief Notice 2021–01 (Feb. 26, 2021). IRS issued further clarifying guidance regarding COBRA relief periods and the premium assistance available under this provision in Notice 2021–58, 2021–43 I.R.B. 660.

[36] Pub. L. No. 93–406, secs. 601 to 608.

employers.[37] In addition, many States have enacted laws or promulgated regulations that provide continuation coverage rights that are similar to COBRA continuation coverage rights in the case of a loss of group health coverage. Such State laws, for example, may apply in the case of a loss of coverage under a group health plan maintained by a small employer.

Federal employment taxes

Federal employment taxes (also known as payroll taxes) are imposed on wages paid to employees with respect to employment and include taxes levied under the Federal Insurance Contributions Act ("FICA"), the Federal Unemployment Tax Act ("FUTA"), and the Federal income tax.[38] In addition, tier 1 of the Railroad Retirement Tax Act ("RRTA") imposes a tax on compensation paid to railroad employees and representatives.[39]

FICA taxes have two components: Old-Age, Survivors, and Disability Insurance ("OASDI") taxes and Hospital Insurance ("HI") taxes. With respect to OASDI taxes, the applicable rate is 12.4 percent with half of such rate (6.2 percent) imposed on the employee and the remainder (6.2 percent) imposed on the employer.[40] The tax is assessed on covered wages up to the OASDI wage base ($142,800 in 2021).[41] The HI tax has two components: Medicare tax and Additional Medicare tax. Medicare tax is imposed on wages, as defined in section 3121(a), with respect to employment, as defined in section 3121(b), at a rate of 1.45 percent for the employer.[42] An equivalent 1.45 percent is withheld from employee wages.[43] Additional Medicare taxes are withheld from employee wages in excess of $200,000 at a rate of 0.9 percent.[44] There is no equivalent employer's share of Additional Medicare taxes. For purposes of this description, HI tax does not include Additional Medicare tax.

The employee portion of OASDI taxes must be withheld and remitted to the Federal government by the employer during the calendar quarter, as required by the applicable deposit rules.[45] The employer is liable for the employee portion of OASDI taxes, in addition to its own share, whether or not the employer withholds the amount from the employee's wages.[46] OASDI and HI taxes are generally allocated by statute among separate trust funds: the OASDI

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[37] Continuation coverage rights similar to COBRA continuation coverage rights are provided to individuals covered by health plans maintained by the Federal government. 5 U.S.C. sec. 8905a. Group health plans maintained by a State that receives funds under Chapter 6A of Title 42 of the United States Code (the Public Health Service Act) are required to provide continuation coverage rights similar to COBRA continuation coverage rights for individuals covered by plans maintained by such State (and plans maintained by political subdivisions of such State and agencies and instrumentalities of such State or political subdivision of such State). 42 U.S.C. sec. 300bb–1.

[38] Secs. 3101, 3111, 3301, and 3401.

[39] Sec. 3221.

[40] Sec. 3101.

[41] Generally, the OASDI wage base rises based on increases in the national average wage index. Sec. 230 of the Social Security Act, 42 U.S.C. sec. 430.

[42] Sec. 3111(b).

[43] Sec. 3101(b)(1).

[44] Sec. 3101(b)(2).

[45] Sec. 3102(a) and Treas. Reg. sec. 31.3121(a)–2. See also sec. 6302.

[46] Sec. 3102(b).

Trust Funds, Medicare's Hospital Insurance Trust Fund, and the Supplementary Medical Insurance Trust Fund.[47]

Premium assistance for COBRA benefits

As part of the American Recovery and Reinvestment Act of 2009,[48] Congress provided temporary premium assistance for COBRA benefits to eligible individuals who had been terminated from employment. The premium assistance under this Act applied to 65 percent of a terminated employee's COBRA premium and was available for individuals who were eligible for COBRA between September 1, 2008 and December 31, 2009. Eligible individuals were treated as paying 100 percent of the premium required for COBRA continuation coverage if the individual paid 35 percent of the premium. Employers, plan administrators, or insurance companies to whom the premiums were payable were allowed a refundable credit against payroll tax liability for the portion of premiums not paid by individuals eligible for premium assistance.

Explanation of Provision

COBRA premium assistance

The provision provides that for a period of coverage during the period beginning on the first day of the first month beginning after the date of enactment and ending on September 30, 2021, an assistance eligible individual is treated as having paid in full any premium required for COBRA continuation coverage under a group health plan. (This is referred to as premium assistance.) An assistance eligible individual is any qualified beneficiary who, with respect to a period of coverage during the period beginning on the first day of the first month beginning after the date of enactment of this provision and ending on September 30, 2021, (1) is eligible for COBRA continuation coverage by reason of the termination of the covered employee's employment (except for a voluntary termination) or reduction of the covered employee's hours,[49] and (2) elects such coverage.

Under the provision, any premium assistance provided is excludible from the gross income of the assistance eligible individual.[50] In addition, if an assistance eligible individual pays the amount of a premium eligible for premium assistance that the individual would have been required to pay but for the assistance provided under the provision, the person to whom such payment is made must reimburse the individual for the amount paid.[51] Such reimbursement must occur no later than 60 days after the date that the individual made the premium payment.

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[47] Secs. 201 and 1817 of the Social Security Act, Pub. L. No. 74–271 as amended, 42 U.S.C. secs. 401 and 1395i.

[48] Pub. L. No. 111–5.

[49] The qualified beneficiary must be eligible by reason of a qualifying event specified in section 4980B(f)(3)(B), section 603(2) of ERISA, or section 2203(2) of the Public Health Service Act, Pub. L. No. 78–410, except for a voluntary termination. Terminations due to the employee's gross misconduct do not qualify the beneficiary for COBRA continuation coverage.

[50] The provision creates a new section 139I to provide the income exclusion.

[51] The person reimbursing the individual is eligible for a payroll credit (against the HI tax under section 3111(b)) for the amount of the reimbursement. See description of payroll tax credit below.

The continuation coverage that qualifies for premium assistance also includes continuation coverage offered by a State[52] program that provides comparable continuation coverage. It does not include coverage under a health flexible spending arrangement offered under a cafeteria plan.[53]

Plan enrollment option

A group health plan is permitted to provide a special plan enrollment option to assistance eligible individuals to allow them to change coverage options under the plan in conjunction with electing COBRA continuation coverage. Under this plan enrollment option, the assistance eligible individual may elect to enroll in different coverage within 90 days of the date of notice of the enrollment option. The individual must only be offered the option to change to a coverage option offered to similarly situated active employees, and the premium for such option must not exceed the premium for the individual's group health plan coverage as of the date of the qualifying event. If the individual elects a different coverage option under this plan enrollment right in conjunction with electing COBRA continuation coverage, that coverage must be provided for purposes of satisfying the COBRA continuation coverage requirement. The different coverage offered may not include: a coverage option that provides only excepted benefits;[54] a qualified small employer health reimbursement arrangement;[55] or a flexible spending arrangement.[56]

This plan enrollment option only allows a group health plan to offer additional coverage options to assistance eligible individuals and does not change the basic requirement that a group health plan must allow an individual to continue enrollment with the coverage in which the individual is enrolled as of the qualifying event. If different coverage is elected, under the COBRA rules it must generally be permitted to be continued for the applicable required period (generally 18 months or 36 months, absent an event that permits coverage to be terminated) even though the premium assistance may only apply for six months (or less).

Termination of eligibility for reduced premiums

The assistance eligible individual's eligibility for premium assistance generally terminates with the first month beginning on or after the earliest of (1) September 30, 2021, (2) the date following the expiration of the maximum required period of continuation coverage for the qualified beneficiary under the applicable COBRA continuation coverage provision, (3) the date following the expiration of the period of continuation coverage applicable under the special COBRA election opportunity described below, or (4) the first date that the assistance eligible individual becomes eligible for Medicare benefits under title XVIII of the Social Security Act or health coverage under another group health plan (including, for ex-

[52] For this purpose, "State" includes the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.
[53] Sec. 125.
[54] Excepted benefits include, for example, certain dental or vision benefits, long-term care, and coverage for on-site medical clinics. Sec. 9832(c); sec. 733(c) of ERISA; sec. 2791(c) of the PHSA.
[55] Sec. 9831(d)(2).
[56] Sec. 106(c)(2).

ample, a group health plan maintained by the new employer of the individual or a plan maintained by the employer of the individual's spouse). However, eligibility for coverage under another group health plan does not terminate eligibility for premium assistance if the other group health plan coverage consists only of excepted benefits; is a qualified small employer health reimbursement arrangement; or is a flexible spending arrangement.

If an assistance eligible individual receiving premium assistance for COBRA continuation coverage under the provision becomes eligible for coverage under another group health plan (except as described in the preceding paragraph) or Medicare, the provision requires the individual to notify the group health plan providing the COBRA continuation coverage of such eligibility. The notification must be provided in the time and manner specified by the Secretary of Labor. If an individual fails to provide this notification at the required time and in the required manner, a penalty of $250 is imposed unless it is shown that such failure is due to reasonable cause and not willful neglect.[57] In addition, if the failure is fraudulent, the individual must pay a penalty equal to the greater of $250 or 110 percent of the premium assistance provided after termination of eligibility.

Special COBRA election opportunity

The provision provides a special election period for a qualified beneficiary who either (1) does not have an election of COBRA continuation coverage in effect on the first day of the first month beginning after the date of enactment of the provision but who would be an assistance eligible individual were such an election in effect, or (2) elected COBRA continuation coverage and discontinued from such coverage before such first day of such first month. The special election period begins on the first day of the first month beginning after the date of the enactment of the provision and ends 60 days after the date on which notice is provided to the individual regarding the availability of premium assistance (see notice requirements described below). COBRA continuation coverage elected during this special election period commences (including for purposes of premium assistance and any cost-sharing requirements for items and services under a group health plan) with the first period of coverage beginning on or after the first day of the first month beginning after the date of enactment of this provision, and must not extend beyond the end of the period of COBRA continuation coverage that would have applied had the individual elected coverage under the COBRA rules (and not discontinued such coverage).

Payroll credit provided to person to whom premium is payable

The provision provides that the person[58] to whom continuation coverage premiums are payable is allowed a credit for each cal-

[57] The provision creates a new section 6720C with the penalty provision.

[58] For this purpose, "person" includes the government of any State or political subdivision thereof, any Indian tribal government (as defined in section 139E(c)(1)), any agency or instrumentality of any of the foregoing, and any agency or instrumentality of the Government of the United States that is described in section 501(c)(1) and exempt from taxation under section 501(a).

endar quarter against HI tax[59] or the equivalent amount of RRTA tax[60] in an amount equal to the premiums not paid by assistance eligible individuals for continuation coverage by reason of the provision with respect to such quarter.[61] Except as otherwise provided by the Secretary, the person to whom the premiums are payable is treated as being (1) the multiemployer group health plan; (2) in the case of a group health plan not described in (1) that is subject to COBRA continuation coverage requirements and under which some or all of the coverage is not provided by insurance, the employer maintaining the plan; or (3) in the case of a group health plan not described in (1) or (2), the insurer providing coverage under an insured plan.

The credit allowed may not exceed the HI tax or the equivalent amount of RRTA tax imposed on the employer, reduced by any credits allowed against such taxes for paid sick leave and paid family leave[62] or for purposes of the employee retention credit[63] on the wages paid with respect to the employment of all employees of the employer. However, if for any calendar quarter the amount of the credit exceeds the HI tax or RRTA tax imposed on the employer, reduced as described in the prior sentence, such excess is treated as a refundable overpayment.[64]

Under the provision, the gross income of the person receiving the HI credit is increased by the amount of such credit for the taxable year that includes the last day of any calendar quarter with respect to which such credit is allowed. No credit is allowed under the provision with respect to any amount taken into account as qualified wages for purposes of the employee retention credit[65] or as qualified health plan expenses for purposes of the paid sick leave and paid family leave credits.[66]

The provision also extends the limit on the period of assessment of the credit from three years to five years after the filing date of the original return that includes the calendar quarter with respect to which such credit is determined.[67]

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[59] Sec. 3111(b).

[60] Sec. 3221(a).

[61] The provision creates new section 6432 to provide for the credit. Also, the provision does not include express language that "holds harmless" the Federal Hospital Insurance Trust Fund from any effects of the provision. Under present law, amounts appropriated and transferred to the trust fund include amounts equivalent to 100 percent of the taxes imposed by section 3111(b) with respect to applicable wages reported by the Secretary, determined by applying the rate to the reported wages. Sec. 1807 of the Social Security Act, 42 U.S.C. sec. 1395i. Because the provision does not affect either the rate under section 3111(b) or applicable wages, but only provides a credit against the amount of tax, the provision does not affect the trust fund, and no hold harmless language is needed.

[62] Secs. 3131 and 3132, as added by this Act. These credits are modifications of the credits for paid sick leave and paid family leave enacted under the Families First Coronavirus Response Act ("FFCRA"), Pub. L. No. 116–127, secs. 7001 and 7003, (later amended by the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), Pub. L. No. 116–136, and by the Consolidated Appropriations Act, 2021 ("CAA"), Pub. L. No. 116–260).

[63] Sec. 3134, as added by this Act. The employee retention credit was first enacted under the CARES Act, sec. 2301, and amended by the CAA.

[64] The excess is treated as an overpayment and refunded under sections 6402(a) and 6413(b). In addition, any amount that is due to an employer is treated in the same manner as a refund due from a credit provision. 31 U.S.C. 1324. Thus, amounts are appropriated to the Secretary for refunding such excess amounts.

[65] Sec. 3134 and sec. 2301 of the CARES Act, as amended by the CAA.

[66] Secs. 3131 and 3132, and secs. 7001 and 7003 of the FFCRA, as amended by the CARES Act and the CAA.

[67] For this purpose, the filing date is the later of the date such return is filed or the date such return is treated as filed under section 6501(b)(2).

Notice requirements

Under the provision, the notice of COBRA continuation coverage that a plan administrator is required to provide under present law to qualified beneficiaries with respect to a qualifying event must contain certain additional information if the notice is provided to an individual who becomes entitled to elect COBRA continuation coverage during the period beginning on the first day of the first month beginning after the date of enactment of the provision and ending on September 30, 2021. (Thus, this requirement applies generally to individuals who become entitled to elect COBRA continuation coverage during this time period, and not only those who were involuntarily terminated or had hours reduced.) The additional information that must be provided includes (1) information about the qualified beneficiary's right to premium assistance and any conditions on entitlement to that assistance; (2) a description of the option to enroll in different coverage if permitted; and (3) a description of the obligation of the qualified beneficiary to notify the group health plan of eligibility under another group health plan or eligibility for Medicare, and the penalty for failure to provide this notification.

The provision provides that notice must also be furnished to an assistance eligible individual or to an individual eligible for the special COBRA election opportunity described above if such individual became entitled to elect COBRA continuation coverage before the first day of the first month beginning after the date of enactment of the provision. In such case, the notice must provide the additional information that is required to be added to the notice described above and must be provided within 60 days of such first day of such first month. Failure to provide such a notice is treated as a failure to satisfy the notice rules under the COBRA continuation coverage requirements.

In the case of group health plans that are not subject to the notice provisions of the COBRA continuation coverage requirements of the Code, ERISA, or the Public Health Service Act,[68] the provision requires that notice be given to the relevant employees and beneficiaries as well, as specified by the Secretary of Labor (in consultation with the Secretary and the Secretary of Health and Human Services). Within 30 days after enactment, the Secretary of Labor is generally directed to provide model language for the additional notification required under the provision.

The provision also requires employers to provide assistance eligible individuals a written notice regarding the expiration of the period of premium assistance. Such notice must be provided no earlier than 45 days before the date of such expiration and no later than 15 days before such date. The notice must identify the date that the premium assistance will expire and explain that the individual may be eligible for COBRA continuation coverage without premium assistance or for coverage under a group health plan. Such notice is not required to be provided to an individual who is no longer eligible to receive premium assistance due to eligibility under a group health plan. The Secretary of Labor must prescribe

[68] Pub. L. No. 78–410.

model language for such notice within 45 days of the date of enactment.

Coordination with the HCTC

Under the provision, any assistance eligible individual who receives premium assistance under the provision for any month is not eligible with respect to such month for the health coverage tax credit ("HCTC").[69]

Regulatory authority

The provision provides authority to the Secretary and the Secretary of Labor to jointly prescribe such regulations or other guidance as may be necessary and appropriate to carry out the provision as it relates to the premium assistance, including the prevention of fraud and abuse.[70] In addition, the provision provides authority to the Secretary to issue regulations or other guidance as may be necessary or appropriate to carry out the rules relating to the HI credit for persons to whom the COBRA continuation coverage premium is payable, including (1) any reporting requirements or the establishment of other methods for verifying the correct amounts of reimbursements; (2) the application of the provision to a multiemployer group health plan; (3) to allow the advance payment of the HI credit; (4) to provide for the reconciliation of such advance payment with the amount of the credit at the time of filing the tax return for the applicable quarter or taxable year; and (5) to allow the credit to third party payors (including professional employer organizations, certified professional employer organizations, or agents[71]).

Implementation funding

The provision provides an appropriation of $10,000,000 to the Secretary of Labor (in addition to amounts otherwise made available, out of any funds in the Treasury not otherwise appropriated) for fiscal year 2021, to remain available until expended, for EBSA to carry out the provision.

Effective Date

The provision is generally effective on the date of enactment (March 11, 2021).

The rules relating to the HI credit for persons to whom COBRA continuation coverage premiums are payable apply to premiums to which premium assistance applies under the provision and to wages paid on or after April 1, 2021.

The exclusion from gross income of premium assistance for assistance eligible individuals, as well as a coordination rule with the HCTC, are effective for taxable years ending after the date of enactment.

[69] Sec. 35. In addition, such individual is not treated as a qualifying family member or certified individual for purposes of section 35 or section 7527 (providing for the advance payment of the HCTC).

[70] The provision grants the Secretary of Labor and the Secretary of Health and Human Services the authority to prescribe regulations or other guidance relating to the notices under the provision, in addition to the rules relating to outreach.

[71] As described in section 3504.

Subtitle G—Promoting Economic Security

1. 2021 recovery rebates to individuals (sec. 9601 of the Act and secs. 6428, 6428A, and new sec. 6428B of the Code)

Present Law

Dependents

Under section 152 of the Code, a taxpayer's dependents include both the taxpayer's qualifying children and the taxpayer's qualifying relatives.[72] A dependent must be a citizen, national,[73] or resident of the United States or of a country contiguous to the United States (*i.e.*, Canada or Mexico).[74]

Generally, a qualifying child of a taxpayer is any individual who (1) meets the age test,[75] and (2) is the taxpayer's son, daughter, stepson, stepdaughter, adopted child, foster child, brother, sister, stepbrother, stepsister, or a descendant of any such individual.[76] The individual also (3) must share the same principal place of abode as the taxpayer for more than one-half of the taxable year,[77] (4) may not have provided over one-half of one's own support for the taxable year,[78] and (5) may not file a joint return with a spouse.[79] The age test requires that the qualifying child must be younger than the taxpayer and either (1) under the age of 19 at the end of the calendar year, (2) under the age of 24 at the end of the calendar year and a full-time student,[80] or (3) permanently and totally disabled at any time during the calendar year, regardless of age.[81]

A qualifying relative of a taxpayer is any individual who (1) bears the appropriate relationship to the taxpayer,[82] (2) has gross income for the taxable year that does not exceed the personal exemption amount,[83] (3) receives over one-half of their support from the taxpayer,[84] and (4) is not a qualifying child of any taxpayer.[85]

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[72] Sec. 152.

[73] Noncitizen U.S. nationals include (i) individuals born in American Samoa or (ii) certain individuals born in the Commonwealth of the Northern Mariana Islands who have chosen to be U.S. nationals instead of U.S. citizens. See 8 U.S.C. sec. 1408; *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015); 48 U.S.C. sec. 1801 note, Article III.

[74] Sec. 152(b)(3). There is an exception for certain adopted children.

[75] Sec. 152(c)(1)(C), (c)(3).

[76] Sec. 152(c)(1)(A), (c)(2), (f)(1).

[77] Sec. 152(c)(1)(B).

[78] Sec. 152(c)(1)(D).

[79] Sec. 152(c)(1)(E); see also sec. 152(b)(2).

[80] Sec. 152(f)(2). To qualify as a full-time student, the individual must be, during five calendar months during a calendar year: (1) a full-time student at a school that has a regular teaching staff, course of study, and regular student body at the school, or (2) a student taking a full-time, on-farm training course given by a school described in (1), or a State, county, or local government. See also sec. 170(b)(1)(A)(ii).

[81] Sec, 152(c)(3)(B). An individual is permanently and totally disabled if the individual cannot engage in any substantial gainful activity because of a physical or mental condition and a doctor determines the condition has lasted or can be expected to last continuously for at least a year or can lead to death. See also sec. 22(e)(3).

[82] Sec. 152(d)(1)(A) and (2).

[83] Sec. 152(d)(1)(B). For taxable years beginning in 2018 through 2025, the reduction of the personal exemption amount to zero under section 151(d)(5) will not be taken into account in determining whether an individual is a qualifying relative under section 152(d)(1)(B). During these taxable years, the exemption amount referenced in section 152(d)(1)(B) will be treated as $4,150 (adjusted for inflation for taxable years beginning after 2018). See Prop. Treas. Reg. sec. 1.152–3(c)(3); Notice 2018–70, 2018–38 I.R.B. 441. The personal exemption amount for this purpose is $4,300 for taxable years beginning in 2021. Rev. Proc. 2020–45, 2020–46 I.R.B. 1016.

[84] Sec. 152(d)(1)(C).

[85] Sec. 152(d)(1)(D).

A qualifying relative who files a joint return with a spouse generally does not qualify as a dependent.[86]

For purposes of the definition of qualifying relative, an individual bears the appropriate relationship to the taxpayer if the individual is the taxpayer's lineal descendent or ancestor, brother, sister, aunt, uncle, niece, or nephew.[87] Some relations by marriage also qualify, including stepmothers, stepfathers, stepbrothers, stepsisters, sons-in-law, daughters-in-law, fathers-in-law, mothers-in-law, brothers-in-law, and sisters-in-law. In addition, an individual bears the appropriate relationship if the individual (other than the spouse) has the same principal place of abode as the taxpayer and is a member of the taxpayer's household.[88]

The taxation of the U.S. territories

Citizens of the United States are generally subject to Federal income tax on their U.S. and foreign income regardless of whether they live in a State, a foreign country, or a U.S. territory. Residents of the five U.S. territories[89] are generally subject to the Federal income tax system based on their status as U.S. citizens or residents of the territories, with certain special rules for determining residence and source of income specific to the territory. Broadly, a bona fide individual resident of a territory is exempt from U.S. tax on income derived from sources within that territory but is subject to U.S. tax on U.S.-source and non-territory-source income.[90] A bona fide resident of a territory for a taxable year is generally an individual (1) who is present for at least 183 days during the taxable year in the territory, and (2) who does not have either a tax home outside the territory or a closer connection to the United States or a foreign country than to the territory.[91]

The application of the Federal tax rules to the territories varies from one territory to another. Three territories—Guam, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands—are referred to as mirror Code territories because the Code serves as the internal tax law of those territories (substituting the particular territory for the United States wherever the Code refers to the United States).[92] Thus, for example, there is a mirror Code version of the earned income tax credit under the internal revenue laws of each mirror Code territory. A resident of one of those territories generally files a single tax return only with the territory of which the individual is a resident, and not with the United States.[93]

American Samoa and Puerto Rico, by contrast, are non-mirror Code territories. These two territories have their own internal tax laws, and a resident of either American Samoa or Puerto Rico may

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[86] Sec. 152(b)(2).

[87] Sec. 152(d)(2).

[88] Sec. 152(d)(2)(H).

[89] The Code refers to the territories as "possessions." The U.S. territories are American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands.

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

[91] Sec. 937.

[92] 48 U.SC. sec. 1397 (U.S. Virgin Islands); 48 U.S.C. sec. 1421i (Guam); 48 U.S.C. 1801 note, sec. 601 (Commonwealth of the Northern Mariana Islands).

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

be required to file income tax returns with both their territory of residence and the United States.

The non-mirror Code territories may offer individual refundable income tax credits to their residents under their own tax laws. In addition, residents of the territories may be entitled to individual refundable income tax credits from the U.S. Treasury under the Code.

2020 CARES Act recovery rebate

The Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") provides a one-year refundable income tax credit for 2020, referred to as the 2020 recovery rebate.[94] The credit is referred to as a rebate because it includes rules, described below, under which the Secretary makes an advance payment to a taxpayer for the amount of the credit (determined based on prior year filing characteristics or other information) before the taxpayer files a 2020 Federal income tax return.[95]

An eligible individual is allowed a refundable income tax credit for the first taxable year beginning in 2020 equal to the sum of:

- $1,200 ($2,400 in the case of a joint return), and
- $500 for each qualifying child of such individual.

An eligible individual is any individual other than (1) a nonresident alien, (2) an estate or trust, or (3) a dependent.[96] For these purposes, the child tax credit definition of a qualifying child applies (generally, a qualifying child as defined in section 152 who is under the age of 17).[97]

The amount of the credit is phased out at a rate of five percent of the amount of AGI above certain threshold amounts.[98] The threshold amount at which the credit begins phasing out is $150,000 of AGI for joint filers and surviving spouses,[99] $112,500 of AGI for head of household filers, and $75,000 of AGI for all other filers.[100] Thus, the credit is fully phased out (*i.e.*, reduced to zero) for joint filers with no children at $198,000 of AGI and for a single filer at $99,000 of AGI.

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[94] Sec. 6428. Pub. L. No. 116–136, sec. 2201, March 27, 2020. The CARES Act provision was subsequently amended by the Consolidated Appropriations Act, 2021 ("CAA"), and those amendments were given effect as if included in the CARES Act. See Pub. L. No. 116–260, Div. N, sec. 273, December 27, 2020. The CAA also added an additional 2020 recovery rebate (described below). *Id.*, sec. 272.

The two 2020 one-time rebates are similar in structure to a one-time rebate enacted in 2008 during a prior financial crisis, codified as section 6428 and later repealed. Economic Stimulus Act of 2008, Pub. L. No. 110–185, sec. 101, February 13, 2008. For a description of former section 6428, see Joint Committee on Taxation, *General Explanation of Tax Legislation Enacted in the 110th Congress* (JCS–1–09), March 2009, at 75–80.

[95] In total, Treasury disbursed 161.9 million advance payments worth $271.4 billion. IRS, "SOI Tax Stats—Coronavirus Aid, Relief, and Economic Security (CARES Act) Statistics," available at https://www.irs.gov/statistics/soi-tax-stats-coronavirus-aid-relief-and-economic-security-act-cares-act-statistics.

[96] Sec. 6428(d).

[97] Secs. 6428(a)(2) and 24(c).

[98] Sec. 6428(c).

[99] Under the CARES Act, the phaseout threshold for surviving spouses was $75,000 of AGI. The CAA amended the phaseout threshold for surviving spouses to be $150,000 of AGI.

[100] For example, a married couple that files jointly with two qualifying children and has an AGI below the phaseout range would be entitled to a recovery rebate credit of $3,400 ($2,400 + $500 + $500). If that couple's AGI were $175,000, the credit would be $2,150 ($3,400 .05 * ($175,000 $150,000)). The credit would be fully phased out for this taxpayer at $218,000 of AGI.

Identification number requirement

No credit is allowed to an individual who does not include a valid identification number on the individual's income tax return.[101] In the case of a joint return that does not include a valid identification number for either spouse, no credit is allowed. In the case of a joint return that includes a valid identification number for only one spouse, one-half of the joint return amount ($1,200) is allowed.[102] A qualifying child may not be taken into account in determining the amount of the credit unless valid identification numbers for the taxpayer (or for at least one spouse in the case of a joint return) and the child are included on the return.

For purposes of this requirement, a valid identification number is a social security number ("SSN") as defined for purposes of the child tax credit,[103] which means that it must be issued by the Social Security Administration ("SSA") before the due date of the return (including extensions) to a citizen of the United States or pursuant to a provision of the Social Security Act relating to the lawful admission for employment in the United States.[104] Two exceptions to this requirement are provided. First, an adoption identification number is considered a valid identification number in the case of a qualifying child who is adopted or placed for adoption. Second, when a married couple files a joint return and at least one spouse was a member of the Armed Forces of the United States during the taxable year for which the return is filed, a full $2,400 credit (subject to the income-based phaseout) is allowed even if the return includes a valid identification number for only one spouse.

The failure to provide a correct valid identification number is treated as a mathematical or clerical error. If a taxpayer claims an individual as a qualifying child, but based on the SSN provided the individual is too old to be a qualifying child, the provision of the SSN is treated as a mathematical or clerical error.[105]

Advance payment of the recovery rebate credit

A taxpayer may receive the recovery rebate credit as an advance refund in the form of a direct deposit to their bank account or as a check or prepaid debit card issued by the Secretary during calendar year 2020.[106] The amount of the advance refund is computed in the same manner as the recovery rebate credit, except that the calculation is made on the basis of the income tax return filed for 2019 (instead of 2020), if available, or otherwise on the basis of the income tax return filed for 2018.[107] Accordingly, the advance refund amount generally is based on a taxpayer's filing status, number of qualifying children, and AGI as reported for 2019 or 2018.

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[101] Sec. 6428(g).

[102] This valid identification number rule for joint returns was amended from the rule in the CARES Act by the CAA. Pub. L. No. 116–260, Div. N, sec. 273(a)(3). The CARES Act required that in the case of a joint return that does not include valid identification numbers for both spouses, no credit is allowed. Advance refunds were made on the basis of the CARES Act rule. Any additional amounts owed as a result of the amended rule can be claimed on a 2020 Federal income tax return.

[103] Sec. 24(h)(7).

[104] Sec. 205(c)(2)(B)(i)(I) (or that portion of subclause (III) that relates to subclause (I)) of the Social Security Act.

[105] Sec. 6213(g)(2)(L) and CARES Act, sec. 2201(b)(2).

[106] The Treasury Department referred to these advance refunds as "economic impact payments." See Rev. Proc. 2020–28, 2020–19 I.R.B. 792.

[107] Sec. 6428(f).

The Secretary is directed to issue advance refunds as rapidly as possible.

If a taxpayer has not filed an income tax return for 2019 or 2018, in administering the advance refund the Secretary may use information with respect to that taxpayer that is provided on a 2019 Form SSA–1099, Social Security Benefit Statement, or a 2019 Form RRB–1099, Social Security Equivalent Benefit Statement.[108] Recipients of these forms include Social Security retirement, disability, and survivor benefit recipients and railroad retirees who are not otherwise required to file a Federal income tax return. An individual in one of these categories is allowed a $1,200 payment per person without the necessity of a return filing or other action.[109]

Supplemental Security Income recipients and recipients of compensation and benefit payments from the Department of Veterans Affairs similarly are allowed $1,200 per-person payments automatically without the requirement of filing a return or taking other action.[110] Other taxpayers who do not have return-filing obligations in 2018 or 2019 could register to receive advance refunds using the "non-filer portal," a web tool developed by the IRS; alternatively they could use a simplified Federal income tax return filing procedure for taxable year 2019.[111]

In the case of any individual for which payment information is provided to the Secretary by the Commissioner of Social Security, the Railroad Retirement Board, or the Secretary of Veterans Affairs, the advance refund may be provided to the individual's representative payee or fiduciary.[112] The entire payment must be provided to the individual or used only for the benefit of the individual.[113] Enforcement provisions apply to prevent the misuse of the payment.[114]

The amount of the recovery rebate credit allowed on a taxpayer's 2020 income tax return (based on 2020 information) must be reduced by any advance refund received during 2020 (based on 2019

[108] Sec. 6428(f)(5)(B).

[109] IRS, "Economic impact payments: what you need to know," IR–2020–961 (March 30, 2020), available at https://www.irs.gov/newsroom/economic-impact-payments-what-you-need-to-know.

[110] IRS, "Supplemental Security Income recipients will receive automatic Economic Impact Payments," IR–2020–73 (April 15, 2020), available at https://www.irs.gov/newsroom/supplemental-security-income-recipients-will-receive-automatic-economic-impact-payments-step-follows-work-between-treasury-irs-social-security-administration; IRS, "Veterans Affairs recipients will receive automatic Economic Impact Payments," IR–2020–75 (April 17, 2020), available at https://www.irs.gov/newsroom/veterans-affairs-recipients-will-receive-automatic-economic-impact-payments-step-follows-work-between-treasury-irs-va.

[111] Rev. Proc. 2020–28, 2020–19 I.R.B. 792; IRS, "Treasury, IRS launch new tool to help nonfilers register for Economic Impact Payments," IR–2020–69 (April 10, 2020), available at https://www.irs.gov/newsroom/treasury-irs-launch-new-tool-to-help-non-filers-register-for-economic-impact-payments. Federal benefit recipients also could use the web tool for nonfilers to enter information regarding any qualifying children to claim the additional $500 per child payment as an advance refund. IRS, "IRS takes new steps to ensure people with children receive $500 economic impact payments," IR–2020–180 (August 14, 2020), available at https://www.irs.gov/newsroom/irs-takes-new-steps-to-ensure-people-with-children-receive-500-economic-impact-payments; IRS, "Register by Nov. 21 to get an Economic Impact Payment," IR–2020–260, November 19, 2020, available at https://www.irs.gov/newsroom/register-by-nov-21-to-get-an-economic-impact-payment-same-deadline-for-federal-beneficiaries-to-get-missed-500-per-child-payments.

Under the CARES Act, the Secretary (or the Secretary's delegate) is directed to conduct a public awareness campaign, in coordination with the Commissioner of Social Security and the heads of other relevant Federal agencies, to provide information regarding the availability of the recovery rebate credit, including information with respect to individuals who may not have filed a tax return for 2019 or 2018.

[112] Sec. 6428(f)(6)(A).

[113] *Ibid.*

[114] Sec. 6428(f)(6)(B).

or 2018 information).[115] If the recovery rebate amount less the advance refund is a positive number (because, for example, a qualifying child was born to the taxpayer during 2020), the taxpayer is allowed that difference as a refundable credit against 2020 income tax liability. If, however, the result is negative (because, for example, the taxpayer's AGI was higher in 2020 and was in the phase-out range), the taxpayer's 2020 tax liability is not increased by that negative amount. In addition, a taxpayer that does not receive an advance refund may claim the recovery rebate amount on a 2020 income tax return. A taxpayer's failure to reduce the recovery rebate amount by an advance refund is treated as a mathematical or clerical error. The advance refund is not includible in gross income.

The Secretary may not issue an advance refund after December 31, 2020.[116] Within 15 days of distribution of the advance refund the Secretary is required to send a notice by mail to the taxpayer's last known address that indicates the method by which the payment was made, the amount of such payment, and a phone number at the IRS to report any failure to receive such payment.[117]

Treatment of the U.S. territories

The CARES Act directs the Secretary to make payments to each mirror Code territory (Guam, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands) that relate to the cost (if any) of each territory's recovery rebate credit. The Secretary is further directed to make similar payments to each non-mirror Code territory (American Samoa and Puerto Rico).

The CARES Act requires the Secretary to pay to each mirror Code territory amounts equal to the aggregate amount of the credits allowable by reason of the CARES Act to that territory's residents against its income tax.[118] Such amounts are determined by the Secretary based on information provided by the government of the respective territory.

To each non-mirror Code territory, the CARES Act requires the Secretary to pay amounts estimated by the Secretary as being equal to the aggregate credits that would have been allowed to residents of that territory if a mirror Code tax system had been in effect in that territory.[119] Accordingly, the amount of each payment to a non-mirror Code territory is an estimate of the aggregate amount of the credits that would be allowed to the territory's residents if the credit provided by the CARES Act to U.S. residents were provided by the territory to its residents. This payment may not be made to any U.S. territory unless it has a plan that has been approved by the Secretary under which the territory will promptly distribute the payment to its residents.

No credit against U.S. income taxes is permitted under the CARES Act for any person to whom a credit is allowed against territory income taxes as a result of the CARES Act (for example, under that territory's mirror income tax). Similarly, no credit against U.S. income taxes is permitted for any person who is eligi-

[115] Sec. 6428(e).
[116] Sec. 6428(f)(3)(A).
[117] Sec. 6428(f)(7).
[118] CARES Act, sec. 2201(c)(1)(A).
[119] CARES Act, sec. 2201(c)(1)(B).

ble for a payment under a non-mirror Code territory's plan for distributing to its residents the payment described above from the U.S. Treasury.

Exception from reduction or offset

Any refund allowed or made to an individual as an advance refund or as a similar payment to a resident of the U.S. territories is not subject to reduction or offset by other assessed Federal taxes that would otherwise be subject to levy or collection. In addition, these overpayments generally are not subject to offset for other taxes or nontax debts owed to the Federal government or State governments.[120]

As an exception, an overpayment resulting from the advance refund is subject to the offset against overpayments of the amount of any past-due child support.[121] The term past-due child support means the amount of a delinquency, determined under a court order, or an order of an administrative process established under State law, for support and maintenance of a child (whether or not a minor), or of a child (whether or not a minor) and the parent with whom the child is living.[122] The State must have notified the Secretary of the taxpayer's delinquency in order for the offset to apply. If the offset applies, the Secretary remits the offset amount to the State collecting such support and notifies the taxpayer of the remittance. The offset of past-due child support applies before any other reductions allowed by law and before the crediting of the overpayment to the taxpayer's future tax liability.

An overpayment resulting from the recovery rebate credit may be subject to claims by the taxpayer's creditors under applicable State law or Federal bankruptcy law.

2020 additional recovery rebate

In general

The Consolidated Appropriations Act, 2021 ("CAA"), provides an additional one-year refundable income tax credit for 2020, referred to as the additional 2020 recovery rebate.[123] Like the first 2020 recovery rebate, the additional 2020 recovery rebate includes rules, described below, under which the Secretary makes an advance payment to a taxpayer for the amount of the credit (determined based on prior year filing characteristics or other information) before the taxpayer files a 2020 Federal income tax return. The additional 2020 recovery rebate has many of the same features as the first recovery rebate, with some modifications. These modifications are described below.

[120] Prior to amendment, the CARES Act prohibited refunds from recovery rebate credits and advance refunds from being subject to reduction or offset. This prohibition was amended to only apply to advance refunds. See Pub. L. No. 116–260, Div. N, sec. 273(b)(1).

[121] See Sec. 6402(c). Following distribution of a significant share of the advance payments, the IRS announced that it would issue catch-up payments to individuals where such individual's portion of the payment had been diverted to pay their spouse's past-due child support. IRS, "50,000 spouses to get catch-up Economic Impact Payments," IR–2020–192, August 25, 2020, available at, https://www.irs.gov/newsroom/irs-50000-spouses-to-get-catch-up-economic-impact-payments; IRS, "Economic Impact Payment Information Center—Topic D: Receiving My Payment," Q&A D2, available at, https://www.irs.gov/newsroom/questions-and-answers-about-the-first-economic-impact-payment-topic-d-receiving-my-payment.

[122] Sec. 464(c) of the Social Security Act, 42 U.S.C. sec. 664(c).

[123] Pub. L. No. 116–260, Div. N, sec. 272, December 27, 2020.

The additional 2020 recovery rebate is equal to the sum of:

- $600 ($1,200 in the case of a joint return), and
- $600 for each qualifying child of such individual.[124]

The phaseout thresholds and phaseout rate for the additional 2020 recovery rebate are the same as those of the first rebate, but because of the different amounts of the additional rebate, the additional rebate is fully phased out at different levels of AGI. Thus, the additional 2020 recovery rebate is fully phased out (*i.e.*, reduced to zero) for joint filers with no qualifying children at $174,000 of AGI and for a single filer at $87,000 of AGI.

Identification number requirement

The identification number requirements for the additional 2020 recovery rebate follow those for the first recovery rebate (as amended by the CAA) and described above. Because the amounts of the additional 2020 recovery rebate differ from the first rebate, several rules are affected. In the case of a joint return that includes a valid identification number for only one spouse, a $600 credit is allowed.[125] In the case of a joint return where at least one spouse was a member of the Armed Forces of the United States during the taxable year for which the return is filed, a full $1,200 credit (subject to the income-based phaseout) is allowed even if the return includes a valid identification number for only one spouse.[126]

Advance payments of the 2020 additional recovery rebate

Just as with the first recovery rebate, many taxpayers receive the additional 2020 recovery rebate automatically as an advance refund in the form of a direct deposit to their bank account or as a check or prepaid debit card issued by the Secretary.[127] The amount of the additional advance refund is calculated on the basis of the income tax return filed for 2019, if available (rather than 2018 or 2019 as with the first advance refund).[128] Accordingly, the amount of the additional advance refund generally is based on a taxpayer's filing status, number of qualifying children, and AGI as reported for 2019. The Secretary is directed to issue additional advance refunds as rapidly as possible, and no additional advance refund is to be made or allowed after January 15, 2021.[129]

If a taxpayer did not file an income tax return for 2019 at the time the Secretary makes a determination regarding payments, the Secretary may use information to administer the additional advance refund with respect to that taxpayer that is provided (1) in the case of a specified Social Security or Supplemental Security In-

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[124] Sec. 6428A(a).
[125] Sec. 6428A(g)(2)(A).
[126] Sec. 6428A(g)(5).
[127] The Treasury Department referred to these additional advance refunds as "second-round economic impact payments." See Rev. Proc. 2021–24, 2021–29 I.R.B. 19.

Payments started during the last week of December 2020 and continued into January 2021. Direct deposit payments were issued to individuals with valid routing and account information on file with the IRS. IRS, "Questions and Answers about the Second Economic Impact Payment," available at https://www.irs.gov/coronavirus/second-eip-faqs. In total, Treasury disbursed 146.5 million advance payments (second round economic impact payments) worth $141.5 billion. IRS, "SOI Tax Stats—Coronavirus Aid, Relief, and Economic Security (CARES Act) Statistics," available at https://www.irs.gov/statistics/soi-tax-stats-coronavirus-aid-relief-and-economic-security-act-cares-act-statistics.
[128] Sec. 6428A(f).
[129] In the case of a mirror Code territory, the additional advance refund can be made or allowed until September 30, 2021. Sec. 6428A(f)(3)(A)(ii).

come recipient, by the SSA, (2) in the case of a specified railroad retirement beneficiary, by the Railroad Retirement Board, and (3) in the case of a specified veterans beneficiary, by the Department of Veterans Affairs.[130] As with the first advance refund, payments for such specified individuals may be provided to the individual's representative payee or fiduciary.

For other individuals who did not have a return-filing obligation, the Secretary could utilize information provided by such individuals who either successfully registered for the first advance refund using the nonfiler portal, or submitted a simplified Federal income tax return to receive the advance refund.[131]

An individual who died before January 1, 2020, is not eligible to receive the additional advance refund.[132] If a married couple files a joint return and one spouse died before January 1, 2020, the surviving spouse is allowed (subject to other requirements) a $600 payment.[133] No payment may be issued with respect to qualifying children of a taxpayer who died before January 1, 2020 (or, in the case of joint return, if both taxpayers died before January 1, 2020).[134]

The rules regarding reconciliation of the second advance refund are the same as those for the first advance refund. The second advance refund similarly is not includible in gross income.

The Secretary is required to send a notice of the second advance refund that includes the same information as that required for the first advance refund. The Secretary is also required to carry out a public awareness campaign regarding the availability of the additional recovery rebate credit and the additional advance refund.

Treatment of the U.S. territories

The CAA directs the Secretary to make payments to each mirror Code territory that relate to the cost of each territory's additional recovery rebate and to make similar payments to each non-mirror Code territory.[135] The same rules as those that applied to territory payments for the first recovery rebate apply to territory payments for the additional recovery rebate.

Exception from reduction or offset

As with the first recovery rebate, any refund payable as an advance refund or as a similar payment to a resident of the U.S. territories is not subject to reduction or offset by other assessed Federal taxes that would otherwise be subject to levy or collection, by other taxes, or by nontax debts owed to the Federal government or State governments.

Unlike the first advance refund, the additional advance refund is not subject to reduction or offset for past-due child support.[136] The additional advance refund also is not subject to transfer, assign-

[130] Sec. 6428A(f)(5).
[131] IRS, "Treasury and IRS begin delivering second round of Economic Impact Payments to millions of Americans," IR–2020–280, December 29, 2020, available at https://www.irs.gov/newsroom/treasury-and-irs-begin-delivering-second-round-of-economic-impact-payments-to-millions-of-americans.
[132] Sec. 6428A(f)(2)(A).
[133] *Ibid.*
[134] Sec. 6428A(f)(2)(B).
[135] CAA, Div. N, sec. 272(c)(1).
[136] CAA, Div. N, sec. 272(d)(1).

ment, execution, levy, attachment, garnishment, or other legal process, or the operation of any bankruptcy or insolvency law.[137] The CAA directs the Secretary to encode payments that are paid electronically with a unique identifier that allows the financial institution maintaining the account to identify the payment as protected.

Explanation of Provision

In general

The provision provides a one-year refundable income tax credit for 2021, referred to as the 2021 recovery rebate. The rebate may be paid as an advance refund before the taxpayer files a 2021 income tax return.

An eligible individual is allowed a refundable income tax credit for the first taxable year beginning in 2021 equal to the sum of:

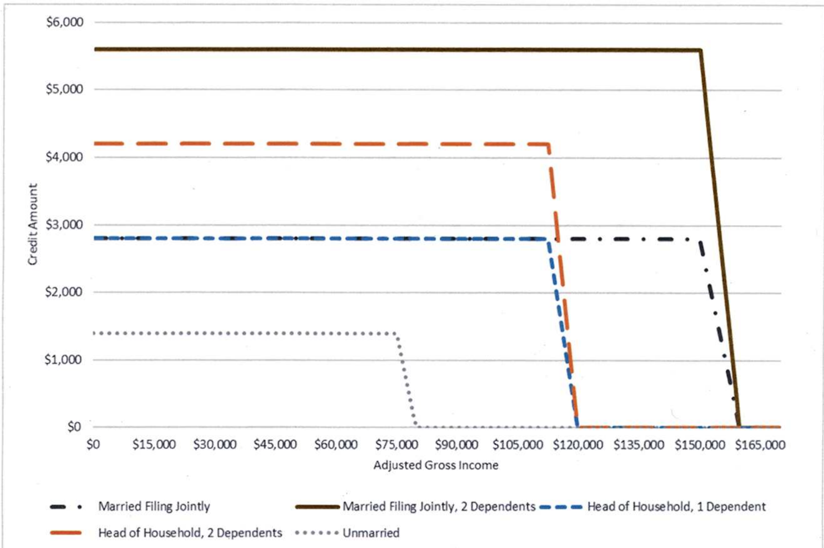
- $1,400 ($2,800 in the case of a joint return), and
- $1,400 for each dependent of the individual.[138]

An eligible individual is any individual other than: (1) a nonresident alien; (2) an estate or trust; or (3) a dependent.[139]

The amount of the credit is phased out above certain income levels.[140] For joint filers or a surviving spouse, the credit phases out ratably over a range beginning at $150,000 and ending at $160,000 of AGI. For heads of household, the credit phases out between $112,500 and $120,000 of AGI. For all other return filers, the credit phases out between $75,000 and $80,000 of AGI. Figure 1 illustrates the credit amount by AGI for selected filing status and dependent combinations.

[137] CAA, Div. N, sec. 272(d)(2).
[138] Sec. 6428B(b). A dependent is defined in section 152.
[139] Sec. 6428B(c).
[140] Sec. 6428B(d).

Figure 1–2021 Recovery Rebate Credit Amount by AGI for Selected Taxpayers



Identification number requirement

A credit is allowed for an individual—that is, the taxpayer, the taxpayer's spouse, or a dependent of the taxpayer—only if the income tax return on which the credit is claimed includes that individual's valid identification number.[141] Thus, in the case of a joint return that includes a valid identification for both spouses, a $2,800 credit is allowed. In the case of a joint return that includes a valid identification number for only one spouse, a $1,400 credit is allowed.[142] In the case of a joint return that includes a valid identification number for neither spouse, no credit is allowed for either spouse.[143] A $1,400 credit is allowed for each dependent for which the taxpayer provides a valid identification number even if the return does not include a valid identification number for the taxpayer or spouse. All credit amounts are subject to the income-based phaseout described above.

For purposes of this requirement, a valid identification number is an SSN issued by the SSA on or before the due date for filing the return for the taxable year (including extensions).[144] Unlike the 2020 recovery rebate and the 2020 additional recovery rebate, the 2021 recovery rebate credit does not require the SSN to be issued to a citizen or in relation to lawful admission for employment in the United States.[145] As with the 2020 recovery rebate and the

[141] Sec. 6428B(e)(2).
[142] Sec. 6428B(e)(2)(B).
[143] *Ibid.*
[144] Sec. 6428B(e)(2)(D)(i).
[145] SSNs that are not issued to a citizen or in relation to lawful admission for employment in the United States include (i) SSNs for claiming a benefit financed in whole or in part from Federal funds or (ii) SSNs to individuals that could have been but were not assigned SSNs for work or benefit purposes, if certain other conditions were met. See section 205(c)(2)(B)(i) of the Social Security Act, codified as 42 U.S.C. sec. 405(c)(2)(B)(i). Prior to 2003, the SSA issued SSNs

2020 additional recovery rebate, two exceptions to the identification number requirement are provided. First, an adoption identification number is considered a valid identification number in the case of a qualifying child who is adopted or placed for adoption.[146] Second, when a married couple files a joint return and at least one spouse is a member of the Armed Forces of the United States during the taxable year for which the return is filed, a full $2,800 credit (subject to the income-based phaseout) is allowed even if the return includes a valid identification number for only one spouse.[147]

The failure to provide a correct valid identification number is treated as a mathematical or clerical error.[148]

Advance payments of the 2021 recovery rebate

The provision provides that the 2021 recovery rebate may be paid as an advance refund in the form of a direct deposit to a taxpayer's bank account or as a check or prepaid debit card issued by the Secretary.[149] The amount of the advance refund is computed in the same manner as the 2021 recovery rebate, except that the calculation is made on the basis of the income tax return filed for 2019 or 2020 (instead of 2021), if available.[150] Accordingly, the amount of the advance refund generally is based on a taxpayer's filing status, number of dependents, and AGI as reported for 2019 or 2020. The Secretary is directed to issue advance refunds as rapidly as possible, consistent with efforts to make payments electronically where appropriate.[151] No advance refund is to be made or allowed after December 31, 2021.[152]

If a taxpayer files a 2020 income tax return and the return is processed before the additional payment determination date, the Secretary may make an additional payment to the taxpayer of any excess advance refund.[153] The excess advance refund is the advance refund based on 2020 return information less any advance refund that was paid based on 2019 return information. The additional payment determination date is the earlier of (i) 90 days after the 2020 filing deadline,[154] or (ii) September 1, 2021.

If a taxpayer did not file an income tax return for 2019 or 2020 (or if the return has been filed but is not yet processed by the IRS) at the time the Secretary makes a determination regarding payments of advance refunds, the Secretary may determine the eligibility of individuals and the advance refund amount that they may

to noncitizens for valid nonwork and nonbenefit reasons such as to obtain drivers' licenses or to open bank accounts; these SSNs are no longer issued, but previously issued SSNs for these purposes have not been rescinded. See 20 C.F.R. sec. 422.104(a)(3) (2002).

[146] Sec. 6428B(e)(2)(D)(ii).

[147] Sec. 6428B(e)(2)(E).

[148] Sec. 6428B(e)(2)(G).

[149] With respect to any payment made by the Secretary as a prepaid debit card, (1) the Secretary may not make the payment by increasing the balance of an existing prepaid debit card issued solely with respect to the 2020 recovery rebate or additional 2020 recovery rebate, but (2) may increase the balance of an existing prepaid debit card issued for other purposes (such as, e.g., a Direct Express card used to pay Federal benefits). Sec. 6428B(g)(8).

[150] Sec. 6428B(g).

[151] Sec. 6428B(g)(3).

[152] *Ibid.*

[153] Sec. 6428B(g)(5).

[154] The 2020 filing deadline is specified in section 6072(a) and is April 15, 2021. However, the 2020 filing deadline must be determined after taking into account any period disregarded under section 7508A if such disregard applies to substantially all 2020 income tax returns.

be paid on the basis of information available to the Secretary.[155] Payments for such individuals may be provided to the individual's representative payee or fiduciary for a Federal benefit program, on the condition that the entire payment is used for the benefit of the individual.[156]

An individual who died before January 1, 2021, is not eligible to receive the advance refund.[157] If a married couple files a joint return and one spouse died before January 1, 2021, the surviving spouse is allowed (subject to other requirements) a $1,400 payment (subject to the income-based phaseout).[158] No additional payment is issued with respect to dependents of a taxpayer who died before January 1, 2021 (or, in the case of joint return, if both taxpayers died before January 1, 2021).[159] When a married couple has filed a joint return and one spouse died before January 1, 2021 who was a member of the Armed Forces of the United States during the taxable year for which the return is filed, a $1,400 payment (subject to the income-based phaseout) is allowed if the return includes a valid identification number for the deceased spouse but no valid identification number for the other spouse.[160]

The amount of the recovery rebate credit allowed on a taxpayer's 2021 income tax return (based on 2021 information) must be reduced by any advance refund received during 2021 (based on 2019 or 2020 information).[161] If the 2021 recovery rebate less the advance refund is a positive number (because, for example, a qualifying child was born to the taxpayer during 2021), the taxpayer is allowed that difference as a refundable credit against 2021 income tax liability. If, however, the result is negative (because, for example, the taxpayer's AGI was higher in 2021 and was in the phaseout range), the taxpayer's 2021 tax liability is not increased by that negative amount. In addition, a taxpayer that does not receive an advance refund may claim the 2021 recovery rebate on a 2021 income tax return. Failure to reduce the 2021 recovery rebate by the advance refund is treated as a mathematical or clerical error.[162] The advance refund is not includible in gross income.[163]

The Secretary is required to carry out a robust and comprehensive outreach program to ensure that taxpayers for whom the Secretary might not otherwise have the necessary information to make an advance payment, such as nonfilers, are aware of their eligibility for advance refunds and the 2021 recovery rebates and are provided assistance in applying for such refunds and credits.[164]

The Secretary is provided regulatory authority as may be necessary or appropriate to carry out the purposes of the 2021 recov-

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[155] Sec. 6428B(g)(6).
[156] *Ibid.*
[157] Sec. 6428B(g)(2)(B).
[158] *Ibid.*
[159] *Ibid.*
[160] *Ibid.*
[161] Sec. 6428B(f).
[162] Sec. 6428B(f)(1).
[163] Under section 6409, the 2021 recovery rebate is disregarded in the administration of Federal programs and Federally assisted programs. Any refund due to the credit, including any advance payment of the credit, is not taken into account as income and is not taken into account as resources for a period of 12 months from receipt for purposes of determining eligibility for benefits or assistance under any Federal program or under any State or local program financed with Federal funds.
[164] Sec. 6428B(i).

ery rebate credit, including authority to allow taxpayers to provide the Secretary with information sufficient to make an advance refund to the taxpayer if such information is not otherwise available.[165] The Secretary also is provided specific regulatory authority to ensure that in determining the amount of the 2021 recovery rebate, an individual is not taken into account more than once, including by being claimed by different taxpayers or by reason of a change in filing status or dependent status between the tax year used to make the advance refund (2019 or 2020) and the tax year of eligibility for the 2021 recovery rebate (2021).

Treatment of the U.S. territories

Under the provision, the Secretary is directed to make payments to each mirror Code territory (Guam, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands) that relate to the cost (if any) of each territory's 2021 recovery rebate. The Secretary is further directed to make similar payments to each non-mirror Code territory (American Samoa and Puerto Rico).

The Secretary is directed to pay to each mirror Code territory amounts equal to the aggregate amount of the credits allowable by reason of the provision to that territory's residents against its income tax. These amounts are determined by the Secretary based on information provided by the government of the respective territory.[166]

To each non-mirror Code territory, the Secretary is required to pay amounts estimated by the Secretary as being equal to the aggregate credits that would have been allowed to residents of that territory if a mirror Code tax system had been in effect in that territory. Accordingly, the total amount of payments to a non-mirror Code territory is an estimate of the aggregate amount of the credits that would be allowed to the territory's residents if the credit provided by the provision to U.S. residents were provided by the territory to its residents. These payments will not be made to any U.S. territory unless it has a plan that has been approved by the Secretary under which the territory will promptly distribute the payment to its residents.[167]

No credit against U.S. income taxes is permitted under the provision for any person to whom a credit is allowed against territory income taxes as a result of the provision (*i.e.,* under that territory's mirror income tax). Similarly, no credit against U.S. income taxes is permitted for any person who is eligible for a payment under a non-mirror Code territory's plan for distributing to its residents the payments described above from the U.S. Treasury.[168]

The Secretary is directed to pay to each territory, in addition to the amounts described above, an amount equal to the territory's administrative expenses relating to the 2021 recovery rebate up to $10 million for Puerto Rico and $500,000 for each of the other territories. Such amounts are determined by the Secretary based on in-

[165] Sec. 6428B(h). In 2020, the Secretary established a nonfiler portal and provided a method to file a simplified Federal income tax return so that nonfilers could provide information to the Secretary to receive the advance refund with respect to the 2020 recovery rebate.
[166] Sec. 9601(b)(1) of the Act.
[167] Sec. 9601(b)(2) of the Act.
[168] Sec. 9601(b)(4) of the Act.

formation provided by the government of the respective territory.[169]

Exception from reduction or offset

Any refund payable as an advance refund or as a similar payment to a resident of the U.S. territories is not subject to reduction or offset by other assessed Federal taxes that would otherwise be subject to levy or collection. In addition, these refunds or payments are not subject to offset for other taxes or nontax debts owed to the Federal government or State governments.[170]

Effective Date

The provision is effective on the date of enactment (March 11, 2021).

2. Child tax credit improvements for 2021 (sec. 9611 of the Act and sec. 24 and new sec. 7527A of the Code)

Present Law

In general

Taxpayers are allowed a child tax credit of $2,000 for each qualifying child.[171] The aggregate amount of otherwise allowable child tax credit is phased out for taxpayers with income over a threshold amount of $400,000 for taxpayers filing jointly and $200,000 for all other taxpayers.[172] The otherwise allowable child tax credit amount is reduced by $50 for each $1,000 (or fraction thereof) of modified AGI over the applicable threshold amount. For purposes of this limitation, modified AGI means AGI increased by any amount excluded from gross income under section 911 (foreign earned income exclusion), 931 (exclusion of income for a bona fide resident of American Samoa), or 933 (exclusion of income for a bona fide resident of Puerto Rico).[173]

Generally, for purposes of the child tax credit, a qualifying child is a qualifying child, as defined in section 152(c), who is under the age of 17.[174] Only a child who is a U.S. citizen, national, or resident may be a qualifying child; citizens of contiguous countries are ineligible under the child tax credit definition of qualifying child.[175]

The name and social security number ("SSN") of the qualifying child must appear on the return, and the SSN must be issued before the due date for filing the return.[176] The SSN also must be issued to a citizen or national of the United States or pursuant to a provision of the Social Security Act relating to the lawful admis-

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[169] Sec. 9601(b)(2) of the Act.

[170] Sec. 9601(c)(2) of the Act.

[171] Sec. 24(a), (h)(2). For taxable years beginning after December 31, 2025, the amount of the credit is $1,000 for each qualifying child.

[172] Sec. 24(b) and (h)(3). For taxable years beginning after December 31, 2025, the modified AGI threshold amounts at which the credit begins to phase out are $75,000 for individuals who are not married, $110,000 for married individuals filing joint returns, and $55,000 for married individuals filing separate returns.

[173] Sec. 24(b)(1).

[174] Sec. 24(c)(1).

[175] Sec. 24(c)(2).

[176] Sec. 24(h)(7). For taxable years beginning after December 31, 2025, the child tax credit may be claimed if the taxpayer identification number ("TIN") of the qualifying child, rather than the SSN of the child, appears on the return. Sec. 24(e)(1).

sion for employment in the United States.[177] The TIN of the taxpayer must be issued on or before the due date for filing the return.[178]

Partial refundability and calculation of additional child tax credit

The child tax credit is generally a nonrefundable tax credit taken against income tax liability. The credit is allowable against both the regular tax and the alternative minimum tax.[179]

In some circumstances, all or a portion of the otherwise allowable credit is treated as a refundable credit (the "additional child tax credit").[180] The credit is treated as refundable in an amount equal to 15 percent of earned income in excess of $2,500 (the "earned income formula").[181] Earned income generally has the same definition as for purposes of the earned income tax credit ("EITC") and is defined as the sum of wages, salaries, tips, and other taxable employee compensation plus net self-employment earnings.[182] For purposes of the additional child tax credit, only items taken into account in computing taxable income are treated as earned income.[183] However, combat pay that is excluded from gross income under section 112 is also taken into account.

A taxpayer with three or more qualifying children may determine the additional child tax credit using the "alternative formula," if this results in a larger additional child tax credit than determined under the earned income formula. Under the alternative formula, the additional child tax credit equals the amount by which the taxpayer's Social Security taxes exceed the taxpayer's EITC.[184]

The maximum amount of the additional child tax credit per qualifying child ($1,400 for 2021)[185] is indexed for inflation, although the amount may not exceed the $2,000 amount of the nonrefundable child tax credit.[186]

Withholding

Chapter 24 of the Code provides rules for employers to deduct and withhold amounts from employee wages for the payment of income tax. Under rules determined by the Secretary, an employee may be entitled to a withholding allowance that reduces the amount of income tax withholding. A taxpayer's withholding allowances, pursuant to Section 3402(f)(1)(C), are entitled to take into

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[177] See sec. 205(c)(2)(B)(i)(I) (or that portion of subclause (III) that relates to subclause (I)) of the Social Security Act.

[178] Sec. 24(e)(2).

[179] Sec. 26(a).

[180] Sec. 24(d).

[181] Sec. 24(d)(1)(B)(i), (h)(6). For taxable years beginning after December 31, 2025, the earned income threshold for the refundable child tax credit is $3,000.

[182] Sec. 32(c)(2).

[183] Sec. 24(d)(1)(B)(i). For example, some ministers' parsonage allowances are considered self-employment income, see section 1402(a)(8), and thus are considered earned income for purposes of computing the EITC, but they are excluded from gross income for income tax purposes and thus are not considered earned income for purposes of the additional child tax credit.

[184] Sec. 24(d)(1)(B)(ii).

[185] Rev. Proc. 2020–45, 2020–46 I.R.B. 1016.

[186] Sec. 24(h)(5). For taxable years beginning after December 31, 2025, there is no separately stated maximum amount of the additional child tax credit; however, the refundable credit may not exceed the total amount of the credit of $1,000 for taxable years beginning after December 31, 2025.

account the number of children for whom it is reasonably expected that the taxpayer is allowed to claim a child tax credit.[187]

Credit for other dependents

An individual is allowed a $500 nonrefundable credit for each dependent of the taxpayer as defined in section 152, other than a qualifying child as defined for purposes of the child tax credit.[188]

Application of the child tax credit in the territories of the United States[189]

The three mirror Code territories (Guam, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands) have, under their mirror Codes, a child tax credit identical to that in the U.S. Code. A resident of one of these territories claims the child tax credit on the income tax return filed with the territory's revenue authority.

Residents of the territories with three or more qualifying children, under the alternative formula, receive the additional child tax credit under the U.S. Code. The U.S. Treasury makes payments to each territory other than Puerto Rico to cover the cost of this credit. Residents of Puerto Rico claim the additional child tax credit under the alternative formula by filing a Form 1040–SS or Form 1040–PR with the IRS.

Explanation of Provision

Temporary increase in credit amount and qualifying child age limit

Under the provision, the child tax credit is increased from $2,000 to $3,000 for 2021.[190] In the case of a qualifying child who has not attained the age of six as of the close of the calendar year, the credit is increased to $3,600.[191] In addition, the term "qualifying child" is broadened to include a qualifying child who has not attained the age of 18 (instead of 17).[192]

The child tax credit amount is subject to a new phaseout, which applies in addition to the phaseout under present law.[193] This additional phaseout applies to taxpayers with income above an applicable threshold amount. The applicable threshold amounts are lower than those under the present-law child tax credit phaseout: $150,000 for taxpayers filing jointly (as compared to $400,000 for the present-law phaseout), $150,000 for surviving spouses (as compared to $200,000), $112,500 for head of household taxpayers (as compared to $200,000), and $75,000 for all other taxpayers (as compared to $200,000). The amount of child tax credit is reduced by

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[187] Sec. 3402(f)(1)(C).

[188] An individual who is a qualifying child for purposes of the dependent rules under section 152, but not a qualifying child for purposes of the child tax credit (*e.g.*, a child who is age 17 or 18, or a full-time student under age 24) is eligible to be a qualifying dependent for purposes of the $500 nonrefundable credit for other dependents. For taxable years beginning after December 31, 2025, there is no tax credit for other dependents.

[189] A description of the present law taxation of the U.S. territories generally can be found in the section describing section 9601 of the Act.

[190] Sec. 24(i)(3). The provision applies for taxable years beginning in 2021.

[191] *Ibid.*

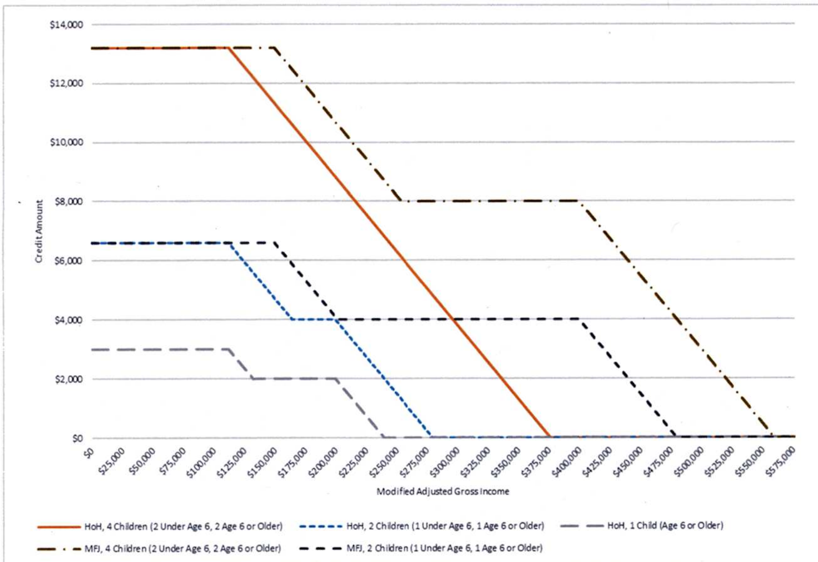
[192] Sec. 24(i)(2). Thus, for 2021, taxpayers may not claim a $500 credit for other dependents with respect to these taxpayers. Sec. 24(h)(4)(A); Sec. 24(i)(2)(B).

[193] Sec. 24(i)(4).

$50 for each $1,000 (or fraction thereof) of modified AGI over the applicable threshold amount. However, the additional phaseout is limited so that it only applies to the temporary increased child tax credit for 2021 ($1,600 per child under age six and $1,000 per child age six or older); it does not reduce the child tax credit amount provided to a taxpayer under present law.[194]

Figure 1 illustrates the child tax credit by modified AGI for selected combinations of filing status and number of qualifying children under the provision.

Figure 1—Child Tax Credit for 2021 by Modified AGI for Selected Taxpayers



Temporary full refundability

For 2021, the child tax credit is made fully refundable for taxpayers with a principal place of abode in the United States for

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[194] Under the provision, the reduction in credit due to the additional phaseout is limited to the lesser of (1) the applicable credit increase amount or (2) five percent of the applicable phaseout threshold range. Sec. 24(i)(4)(C). The applicable credit increase amount is the difference between (1) the aggregate child tax credit allowable under the provision and (2) the aggregate child tax credit allowable under the provision if the credit amount was not increased to $3,000 or $3,600 (from $2,000), both determined without application of any phaseout. The applicable phaseout threshold range is the difference between (1) the threshold amount for the taxpayer under present law and the (2) applicable threshold amount for the taxpayer under the provision, or $250,000 for taxpayers filing jointly, $87,500 for heads of households, $50,000 for surviving spouses, and $125,000 for all other taxpayers.

For example, a head of household with one child age seven and modified AGI of $140,000 would qualify for a $2,000 child tax credit in 2021 under present law. Under the provision, the base child tax credit amount for such child would increase to $3,000, but this amount would be reduced by the new phaseout. The reduction in credit would be $50 for each $1,000 (or fraction thereof) that modified AGI exceeds $112,500 or $1,400 ($50 * 28). However, the reduction is limited by the lesser of (1) the applicable credit increase amount of $1,000 ($3,000 $2,000) or (2) five percent of the applicable phaseout threshold range or $4,375 (.05 * $87,500). Thus, under the provision, the reduction is limited to $1,000 (not $1,400), and the child tax credit for this taxpayer is $2,000. How the credit amount varies across a range of modified AGI for such a head of household (with a child age 6 or older) is also illustrated in Figure 1.

more than one half of the taxable year.[195] Thus, the child tax credit is generally refundable up to $3,000 (or $3,600) per qualifying child, without regard to the earned income formula or the alternative formula. In the case of a joint return, at least one spouse must satisfy the principal place of abode requirement. Principal place of abode is determined as provided in section 32.[196]

The present-law AGI limitation on the credit still applies (regardless of refundability), and the $500 credit for dependents other than qualified children remains nonrefundable.

Temporary advance payments of the child tax credit

In general

The provision creates a new section 7527A, under which the Secretary is directed to establish a program to make periodic advance payments of the child tax credit to eligible taxpayers.[197] Generally, each periodic advance payment is an equal amount and must total to the annual advance amount.[198]

A taxpayer may receive an advance payment in the form of a direct deposit to their bank account or a debit card issued by the Secretary.[199]

Periodic advance payments are only to be made for periods between July 1, 2021 and December 31, 2021.[200]

Annual advance amount

The annual advance amount is 50-percent of the otherwise allowable amount of the child tax credit estimated by the Secretary using taxpayer status, AGI, and qualifying children[201] from a reference year.[202]

A taxpayer's annual advance amount for a calendar year is 50-percent of the taxpayer's estimated child tax credit for the taxable year beginning in such calendar year, but calculated based on a reference taxable year ("reference year").[203] For purposes of this calculation, (1) the taxpayer's principal place of abode is determined based on the reference year;[204] (2) the taxpayer's modified AGI for the reference year is used to determine any phaseout of credit; and (3) the taxpayer is treated as having only the number of qualifying children the taxpayer had in the reference year.[205] For purposes of this calculation, the age of any qualifying children and their status as qualifying children is determined by taking into

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[195] Sec. 24(i)(1). For purposes of the principal place of abode rule, the United States includes the States and the District of Columbia. Sec. 7701(a)(9).

[196] Thus, a member of the Armed Forces of the United States stationed outside the United States while serving on extended active duty is treated as having a principal place of abode in the United States.

[197] Sec. 7527A(a).

[198] See sec. 7527A(b)(3).

[199] Sec. 7527A(e). The advance payments generally must comply with the electronic payment requirements of 31 U.S.C. sec. 3332.

[200] Sec. 7527A(f).

[201] Sec. 7527A(b)(1).

[202] The reference taxable year means the taxpayer's prior taxable year, or in the case of a taxpayer that did not file a return in such year, the second preceding taxable year. Sec. 7527A(b)(2).

[203] Sec. 7527A(b).

[204] If the information on the taxpayer's tax return for the reference year is insufficient to determine the taxpayer's principal place of abode, the Secretary may make that determination based on other sources. Sec. 7527A(b)(4).

[205] Sec. 7527A(b)(1).

account the passage of time since the reference year. Thus, for example, a qualifying child who was 17 in the reference year would not be a qualifying child for purposes of the calculation. In addition, a qualifying child is not taken into account for the annual advance amount if the child is deceased as of the beginning of the calendar year for which the credit is determined.[206] Thus, for 2021, a child that is known to the Secretary as being deceased as of January 1, 2021 is not taken into account for the advance amount for taxable year 2021.

The reference year is the taxpayer's taxable year beginning in the previous calendar year or, if the taxpayer did not file a tax return for that year, the taxpayer's taxable year beginning in the second previous calendar year.[207] The Secretary may modify the advance annual amount for a calendar year to take into account a tax return filed by the taxpayer, including by treating the taxable year of the return as the new reference year.[208] The Secretary may also modify the advance annual amount to take into account any other information provided to the Secretary by the taxpayer that allows the Secretary to more closely determine the taxpayer's estimated child tax credit for the taxable year.[209] Finally, if the Secretary does modify the advance annual amount, the Secretary may increase or decrease subsequent advance payments in the calendar year in order to account for excessive or deficient prior advance payments based on the pre-modified advance annual amount.[210]

The Secretary is directed to create an online portal to allow taxpayers to provide information regarding (1) a change in the number of the taxpayer's qualifying children, including by reason of the birth of a qualifying child; (2) a change in the taxpayer's marital status; (3) a significant change in the taxpayer's income; and (4) any other factors that the Secretary may provide.[211] A taxpayer may also use the online portal to elect out of advance payments.[212]

Withholding and administrative provisions

The Secretary must take the receipt of advance payments of the child tax credit into account in determining the rules regarding withholding allowances.[213]

The Secretary must provide notice to the taxpayer of the aggregate amount of advance payments made to the taxpayer during the calendar year and other information as the Secretary determines appropriate by no later than January 31 of the calendar year following the year in which any such payments were made.[214]

Any advance payment is not subject to reduction or offset by other assessed Federal taxes that would otherwise be subject to levy or collection, by other taxes, or by nontax debts owed to the Federal government or State governments.[215]

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[206] Sec. 7527A(b)(5).
[207] Sec. 7527A(b)(2).
[208] Sec. 7527A(b)(3)(A).
[209] *Ibid.*
[210] Sec. 7527A(b)(3)(B).
[211] Sec. 7527A(c)(2).
[212] Sec. 7527A(c)(1).
[213] Sec. 3402(f)(1)(C).
[214] Sec. 7527A(d).
[215] Sec. 7527A(e)(3).

Reconciliation

The amount of the child tax credit allowed for any taxable year is reduced by the aggregate advance payments made during the taxable year.[216] A failure to reduce the credit is treated as a mathematical or clerical error.

If the taxpayer receives advance payments in excess of the taxpayer's allowable child tax credit during a taxable year, the taxpayer's tax liability for the taxable year is increased by the excess amount.[217] This increase in tax liability is not considered to be part of a taxpayer's regular tax liability.[218] However, for taxpayers that have modified AGI below certain thresholds, the excess amount may be reduced by a safe harbor amount, limiting the increase in tax liability and allowing the taxpayer to retain a portion of the excess amount. The safe harbor amount is $2,000 for each child taken into account in determining the advance payment amount that is subsequently not taken into account in determining the credit amount, subject to a phaseout based on taxpayer modified AGI.[219]

Regulatory authority

The Secretary is directed to issue regulations or other guidance the Secretary determines is necessary or appropriate to carry out the advance payment program, the temporary changes to the child tax credit, and the reconciliation of the child tax credit and advance payments.[220] This includes regulations or other guidance that provide for the application of these rules in cases where the filing status of the taxpayer changes between taxable years.

Application of the child tax credit in the territories of the United States

For 2021, the child tax credit is made fully refundable for taxpayers who are bona fide residents of Puerto Rico for the taxable year, claimed by filing a tax return with the IRS.[221] Thus, for bona fide residents of Puerto Rico, the child tax credit is generally refundable up to $3,000 (or $3,600) per qualifying child, without regard to the earned income formula or alternative formula, but subject to the modified AGI phaseouts.

The child tax credit advance payment program does not apply to Puerto Rico.[222] Mirror Code territories may elect to have the advance payment program apply.[223] American Samoa may include an

[216] Sec. 24(j)(1).
[217] Sec. 24(j)(2).
[218] See sec. 26(b). Because of this, the taxpayer may not use nonrefundable tax credits to offset the increase. Sec. 26(a).
[219] The safe harbor amount is $2,000 multiplied by the difference in number of qualifying children used to determine the advance amount and number of qualifying children used to determine the credit for the taxable year. The full safe harbor amount is allowed to taxpayers with modified AGI of up to $60,000 for married taxpayers filing jointly and surviving spouses, $50,000 for heads of households, and $40,000 for all other taxpayers. The safe harbor amount is reduced ratably over an interval equal to the modified AGI threshold amount for the respective filing status. Thus, the safe harbor is $0 as modified AGI equals or exceeds $120,000 for married taxpayers filing jointly and surviving spouses, $100,000 for heads of households, and $80,000 for all other taxpayers.
[220] Sec. 7527A(g).
[221] Sec. 24(i)(1).
[222] Sec. 7527A(e)(4).
[223] *Ibid.*

advance payment program in their plan approved by the Secretary to distribute payments to its residents.[224]

Additional rules for taxpayers in Puerto Rico, American Samoa, and the mirror Code territories are provided by section 9612 of the Act (described in the following section).

Effective Date

The provision applies to taxable years beginning after December 31, 2020.

3. Application of child tax credit in possessions (sec. 9612 of the Act and sec. 24 and new sec. 7527A of the Code)

Present Law

The present law rules for the child tax credit in the territories of the United States are described in the previous section describing section 9611 of the Act.

Explanation of Provision

Under the provision, the Secretary must make payments to each territory that relate to the cost or approximate cost of that territory's child tax credit or make payments of the credit directly to territory residents, as applicable.

Mirror Code territories

The provision directs the Secretary to make payments to each of Guam, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands in an amount equal to the loss in revenue by reason of the application of the child tax credit to the territory's mirror Code for the taxable year.[225] This amount is determined by the Secretary based on information provided by the government of the territory. Because of their mirror Codes, the changes to the child tax credit made by section 9611 of the Act (described in the preceding section) apply to these territories for 2021.

No child tax credit under the Internal Revenue Code is permitted for any resident of a mirror Code territory with respect to whom a child tax credit is allowed against income taxes of the territory.

Puerto Rico

For 2021, bona fide residents of Puerto Rico may claim a fully refundable child tax credit by filing a tax return with the IRS.[226]

For taxable years beginning after 2021, bona fide residents of Puerto Rico may claim an additional child tax credit up to the maximum amount[227] from the U.S. Treasury under the alternative formula, but determined without regard to the three-child limitation, by filing a return with the IRS.[228]

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[224] *Ibid.* See also the description of sec. 9612 of the Act for an explanation of plan requirements for American Samoa.

[225] Sec. 24(k)(1).

[226] Sec. 9611 of the Act (described in the preceding section).

[227] This amount is $1,500 for taxable years beginning in 2022. Rev. Proc. 2021–45, 2021–48 I.R.B. 764.

[228] Sec. 24(k)(2)(B).

American Samoa

The provision directs the Secretary to make payments to American Samoa in an amount estimated by the Secretary as being equal to the aggregate benefits that would have been provided to residents of American Samoa if the U.S. child tax credit had been in effect in American Samoa (and had been applied as if American Samoa were the United States) in that taxable year.[229] These amounts include, for 2021, amounts resulting from changes made by section 9611 of the Act (described in the preceding section).

The provision prohibits the Secretary from making these payments unless American Samoa has a plan approved by the Secretary to promptly distribute the payments to its residents. For years with respect to which American Samoa has an approved plan, no child tax credit under the Internal Revenue Code is permitted for any person who is eligible for a payment under the plan. If American Samoa does not have a plan in place for a taxable year, a bona fide resident of American Samoa may claim a child tax credit by filing a return with the IRS under rules similar to those for Puerto Rico, described above.

Effective Date

The provision applies to taxable years beginning after December 31, 2020.

4. Strengthening the earned income tax credit for individuals with no qualifying children (sec. 9621 of the Act and sec. 32 of the Code)

Present Law

In general

Low- and moderate-income workers may be eligible for the refundable earned income tax credit ("EITC"). The amount of the EITC is based on the presence and number of qualifying children in the worker's family, filing status, AGI, and earned income.[230]

The EITC generally equals a specified percentage of earned income.[231] Earned income for this purpose cannot exceed a maximum dollar amount, known as the earned income amount. The maximum EITC amount applies over a certain income range and then diminishes to zero over a specified phaseout range. For a taxpayer with earned income (or AGI, if greater) in excess of the beginning of the phaseout range, the maximum EITC amount is reduced by the phaseout percentage multiplied by the amount of earned income (or AGI, if greater) in excess of the beginning of the phaseout range. For a taxpayer with earned income (or AGI, if greater) in excess of the end of the phaseout range, no credit is allowed. The specified percentage, maximum dollar amount, and phaseout percentage and range vary with filing status and number of children. Four separate percentage schedules apply: one for taxpayers with no qualifying children, one for taxpayers with one qualifying child,

[229] Sec. 24(k)(3).
[230] Sec. 32.
[231] Sec. 32(a), (b).

one for taxpayers with two qualifying children, and one for taxpayers with three or more qualifying children.[232]

For an individual to be a qualifying child for purposes of the EITC, generally that individual must meet the relationship, age, and residency tests under section 152.[233]

The EITC may be claimed by a taxpayer if the taxpayer is a U.S. citizen or a resident alien.[234] An individual who is a nonresident alien for any portion of the taxable year is not eligible to claim the EITC unless an election is in effect for the year under section 6013(g) or (h) (relating to an individual who is married to a citizen or resident of the United States at the end of the year). In addition, individuals who claim the benefits of section 911 (relating to the income exclusion election available to U.S. citizens or resident aliens living abroad) are not eligible to claim the EITC.[235]

To claim the EITC, the taxpayer must include the taxpayer's valid social security number ("SSN") and valid SSN for the qualifying child (and, if married, the spouse's valid SSN) on his or her tax return.[236] For these purposes, a valid SSN is an SSN issued to an individual, other than an SSN issued to an individual solely for the purpose of applying for or receiving Federally funded benefits, on or before the due date for filing the return for the year.[237]

EITC for taxpayers with no qualifying children

A taxpayer with no qualifying children may claim a credit if the taxpayer is age 25 or older and below age 65, has a principal place of abode in the United States for more than half of the taxable year, and cannot be claimed as a dependent on anyone else's return.[238] For purposes of the principal place of abode requirement, a member of the Armed Forces of the United States stationed outside the United States while serving on extended active duty is treated as having a principal place of abode in the United States.[239]

For taxable years beginning in 2021, the credit is 7.65 percent of earned income up to an earned income amount $7,100, resulting in a maximum credit of $543.[240] The maximum credit is available for a taxpayer with earned income between $7,100 and $8,880 ($14,820 if married filing jointly). The credit begins to phase out at a rate of 7.65 percent of earned income above $8,880 ($14,820 if married filing jointly) resulting in a $0 credit at $15,980 of earned income ($21,920 if married filing jointly). Table 1 shows these parameters for the childless EITC in comparison to the EITC for taxpayers with different numbers of qualifying children.

[232] Sec. 32(b). All income thresholds are indexed for inflation annually.
[233] Sec. 32(c)(3)(A). See section 152(c)(1) for the definition of qualifying child. For purposes of the EITC the support test in section 152(c)(1)(D) is disregarded. The residency test in section 152(c)(1)(B) is satisfied only if the principal place of abode is in the United States.
[234] Sec. 32(c)(1)(D).
[235] Sec. 32(c)(1)(C).
[236] Sec. 32(c)(1)(E), (c)(3)(D), (m).
[237] Sec. 205(c)(2)(B)(i)(II) (and that portion of sec. 205(c)(2)(B)(i)(III) relating to it) of the Social Security Act.
[238] Sec. 32(c)(1)(A)(ii).
[239] Sec. 32(c)(4).
[240] The inflation adjusted amounts are provided in Revenue Procedure 2020–45, 2020–46 I.R.B. 1016.
[241] *Ibid.*

TABLE 1.—2021 EITC SCHEDULE [241]

	Credit pe centage	Earned income amount	Max mum c edit	Phaseout range (single, head of household)	Phaseout range (joint filers)	Phaseout percentage
Childless	7.65%	$7,100	$543	$8,880–$15,980	$14,820–$21,920	7.65%
1 qualifying child	34%	$10,640	$3,618	$19,520–$42,158	$25,470–$48,108	15.98%
2 qualifying children	40%	$14,950	$5,980	$19,520–$47,915	$25,470–$53,865	21.06%
3 or more qualifying children	45%	$14,950	$6,728	$19,520–$51,464	$25,470–$57,414	21.06%

Explanation of Provision

For taxable years beginning in 2021, the provision expands EITC eligibility and increases the amount of credit for taxpayers with no qualifying children.[242]

Temporary changes to minimum and maximum age

For taxable years beginning in 2021, in the case of the credit for a taxpayer with no qualifying children, the minimum age is reduced from 25 to 19.[243] However, if the individual is a specified student (or, in the case of a married individual, if both the individual and the individual's spouse are specified students), the minimum age is only reduced from 25 to 24.[244] A specified student means, with respect to a taxable year, an individual who is an eligible student during at least five calendar months during the year. An eligible student is defined in section 25A(b)(3) (relating to the American opportunity tax credit) as a student who, with respect to any academic period, meets the requirements of section 484(a)(1) of the Higher Education Act of 1965 and is carrying at least half the normal full-time work load for the course of study the student is pursuing.

The provision further reduces the minimum age to 18 for any qualified former foster youth or qualified homeless youth.[245] A qualified former foster youth is an individual who, at the age of 14 or older, was in foster care provided under the supervision or administration of an entity administering (or eligible to administer) a plan under part B [246] or part E [247] of Title IV of the Social Security Act. A qualified former foster youth must give the applicable entity consent to disclose to the Secretary information related to the taxpayer's status as a qualified former foster youth.

A qualified homeless youth is an individual who certifies, in a manner as provided by the Secretary, that such individual is either an unaccompanied youth who is a homeless child or youth, or is unaccompanied, at risk of homelessness, and self-supporting.

The provision also temporarily removes the upper age limit on the credit for taxpayers with no qualifying children.[248] Therefore,

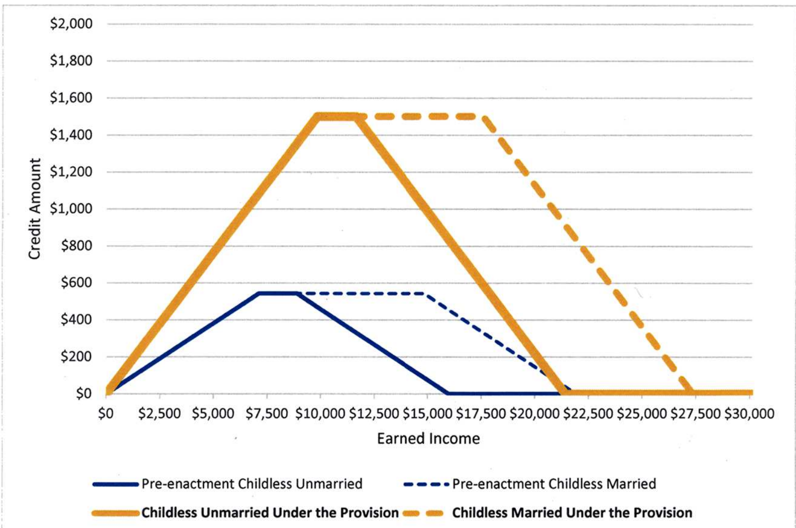
[242] Sec. 32(n).
[243] Sec. 32(n)(1)(A) and (B)(i).
[244] Sec. 32(n)(1)(A), (B)(ii). The provision requires the Secretary to develop and implement procedures for confirming a taxpayer's status as a specified student using information returns made with respect to such taxpayer under section 6050S (returns relating to higher education tuition and related expenses).
[245] Sec. 32(n)(1)(B)(iii), (D), (C).
[246] 42 U.S.C. secs. 621–628b.
[247] 42 U.S.C. secs. 670–679c.
[248] Sec. 32(n)(2).

taxpayers 65 and older without qualifying children may claim the credit in 2021.

Temporary changes to the credit percentage, earned income amount, and phaseout

For taxable years beginning in 2021, the provision increases the amount of the credit for taxpayers with no qualifying children.[249] The provision increases the credit percentage and phaseout percentage from 7.65 percent to 15.3 percent. In addition, the earned income amount is increased to $9,820, and the beginning of the phaseout range for non-joint filers is increased to $11,610 ($17,550 if married filing jointly). The maximum amount of the credit is $1,502. The changes to the EITC for taxpayers with no qualifying children as compared to pre-enactment law is shown in Figure 1.

Figure 1–Proposed EITC for 2021



Effective Date

The provision applies to taxable years beginning after December 31, 2020.

5. Taxpayer eligible for childless earned income credit in case of qualifying children who fail to meet certain identification requirements (sec. 9622 of the Act and sec. 32 of the Code)

Present Law

Any eligible taxpayer with at least one qualifying child who does not claim the EITC with respect to qualifying children due to failure to meet certain identification requirements with respect to such children (i.e., providing the name, age, and valid SSN of each of

[249] Sec. 32(n)(3), (4).

such children) may not claim the EITC for taxpayers without qualifying children.[250]

Explanation of Provision

The provision repeals the rule that an eligible taxpayer with at least one qualifying child who does not claim the EITC with respect to one or more qualifying children due to failure to meet the identification requirements—including the valid SSN requirement—with respect to such children may not claim the EITC for taxpayers with no qualifying children. Accordingly, such a taxpayer may claim the EITC for taxpayers with no qualifying children.

Effective Date

The provision applies to taxable years beginning after December 31, 2020.

6. Credit allowed in case of certain separated spouses (sec. 9623 of the Act and sec. 32 of the Code)

Present Law

An unmarried individual may claim the EITC if he or she files as a single filer or as a head of household. Married individuals generally may not claim the EITC unless they file jointly.[251] An exception to the joint return filing requirement applies to certain spouses who are separated.[252] Under this exception, a married taxpayer who is separated from his or her spouse for the last six months of the taxable year is not considered to be married (and, accordingly, may file a return as head of household and claim the EITC), provided that the taxpayer maintains a household that constitutes the principal place of abode for a dependent child (including a son, stepson, daughter, stepdaughter, adopted child, or a foster child) for over half the taxable year, and pays over half the cost of maintaining the household in which he or she resides with the child during the year.

Explanation of Provision

The provision changes the exception under which an otherwise married individual may claim the EITC on a separate return. Under the provision, an otherwise married individual separated from the individual's spouse is treated as not married for purposes of the EITC if a joint return is not filed if certain conditions are met. The exception applies only if the taxpayer lives with a qualifying child of the taxpayer for more than one-half of the taxable year and either (1) does not have the same principal place of abode as the individual's spouse during the last six months of the taxable year or (2) has a decree, instrument, or agreement (other than a decree of divorce) as described in section 121(d)(3)(C)[253] with re-

[250] Sec. 32(c)(1)(F).
[251] Sec. 32(d).
[252] Sec. 7703(b).
[253] Instruments under this provision include (1) a decree of separate maintenance or a written instrument written to such a decree; (2) a written separation agreement; and (3) a decree not described in (1) requiring a spouse to make payments for the support or maintenance of the other spouse.

spect to the individual's spouse and is not a member of the same household with the individual's spouse by the end of the taxable year.

Effective Date

The provision applies with respect to taxable years beginning after December 31, 2020.

7. Modification of disqualified investment income test (sec. 9624 of the Act and sec. 32 of the Code)

Present Law

An individual is not allowed the EITC if the aggregate amount of certain items of the individual's investment income ("disqualified income") for the taxable year exceeds a maximum amount.[254] The maximum amount, which is indexed for inflation, is $3,650 for taxable years beginning in 2021.[255] Disqualified income is the sum of: (1) interest (both taxable and tax exempt); (2) dividends; (3) net rent and royalty income (if greater than zero) not derived in the ordinary course of a trade or business; (4) capital gains net income; and (5) net passive income that is not self-employment income (if greater than zero).

Explanation of Provision

The provision raises the disqualified income maximum amount to $10,000 for taxable years beginning in 2021. The maximum amount, as increased, remains indexed for inflation for taxable years beginning after 2021.

Effective Date

The provision applies to taxable years beginning after December 31, 2020.

8. Application of earned income tax credits in possessions of the United States (sec. 9625 of the Act and sec. 32 of the Code)

Present Law

The three mirror Code territories (Guam, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands) have, under their respective mirror Codes, EITCs identical to that in the U.S. Code.[256] Puerto Rico has an EITC under its internal tax laws.[257] American Samoa does not have an EITC under its internal tax laws.[258] Each territory that has an EITC bears the cost of the credit.

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[254] Sec. 32(i).

[255] Sec. 32(i), (j). Rev. Proc. 2020–45, 2020–46 I.R.B. 1016.

[256] But see Northern Mariana Laws, Title 4, Division 1, Chapter 7, § 1709 (imposing an additional tax in the amount of any earned income tax credit); see also *Simpao v. Guam*, No. 04–00049 (D. Guam 2005) (holding that the mirror Code jurisdiction of Guam must either pay an earned income tax credit to its residents or change its tax code to a non-Mirror code).

[257] Section 1052.01 of the Puerto Rico Internal Revenue Code of 2011, as amended.

[258] Am. Samoa Code Ann. sec. 11.0530.

Explanation of Provision

Under the provision, the Secretary makes payments to the territories that relate to the cost to each territory of its EITC.

Puerto Rico

If Puerto Rico enacts changes to its EITC which increase the percentage of earned income allowed as a credit in a manner designed to substantially increase workforce participation, the provision requires the Secretary to pay to Puerto Rico each calendar year, starting in 2021, a specified matching amount.[259] The specified matching amount for a calendar year is the lesser of (1) the cost to Puerto Rico of the EITC for taxable years beginning in or with such calendar year over the base amount of such calendar year or (2) three times the base amount for such calendar year. The base amount is the greater of (1) the cost to Puerto Rico of the EITC for taxable years beginning in or with calendar year 2019 (rounded to the nearest multiple of $1 million) or (2) $200 million. The base amount is indexed for inflation for calendar years after 2021. For example, if Puerto Rico spends $210 million on the EITC in 2019 and projects spending $850 million on the EITC in 2021 (through an appropriate increase in the percentage of earned income allowed as a credit), the base amount is $210 million (the greater of $210 million and $200 million) and the specified matching amount is $630 million (the lesser of (1) $850 million $210 million = $640 million and (2) 3 * $210 million = $630 million). For each calendar year 2021 through 2025, the provision also directs the Secretary to pay to Puerto Rico the lesser of (1) Puerto Rico's expenditures for education efforts with respect to taxpayers and tax return preparers regarding the EITC or (2) $1 million.

Under the provision, the Secretary determines the cost of the EITC for Puerto Rico based on the laws of Puerto Rico, but, for purposes of this determination, the cost does not include administrative costs. The Secretary must make the payment described above after it receives information the Secretary requires to determine such payment and, if such information is provided, within a reasonable period of time before Puerto Rico's individual income tax filing due date. The Secretary may require the reporting of such information as the Secretary may require to carry out this subsection.

Mirror Code territories

The provision requires the Secretary to make payments to Guam, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands each calendar year starting in 2021.[260] The amount of the required annual payment to each territory is the cost to that territory of its EITC in that year. For each calendar year 2021 through 2025, the provision also directs the Secretary to pay to each territory an amount equal to the lesser of (1) the territory's expenditures for education efforts with respect to taxpayers and tax return preparers regarding the EITC or (2) $50,000. The Secretary determines the cost of the credit and provides payments with re-

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[259] Sec. 7530(a).
[260] Sec. 7530(b).

spect to each possession under rules similar to the rules described above for Puerto Rico.

American Samoa

The provision requires the Secretary to make a payment to American Samoa in each calendar year during which American Samoa has a refundable EITC designed to substantially increase workforce participation.[261] The amount of the annual payment is the lesser of (1) the cost to American Samoa of such credit each year or (2) $16 million, indexed for inflation. For each calendar year 2021 through 2025, the provision also directs the Secretary to pay the lesser of (1) American Samoa's expenditures in that year for education efforts with respect to taxpayers and tax return preparers regarding the EITC or (2) $50,000. The Secretary must determine the cost of the credit and must provide payments to American Samoa under rules similar to the rules described above for Puerto Rico.

Effective Date

The provision is effective on the date of enactment of the Act (March 11, 2021).

9. Temporary special rule for determining earned income for purposes of earned income tax credit (sec. 9626 of the Act and sec. 32 of the Code)

Present Law

Eligible taxpayers may claim an EITC and child tax credit. The amount of the EITC depends on the taxpayer's earned income.[262] The amount of the additional child tax credit, the refundable component of the child tax credit, generally depends on the taxpayer's earned income.[263]

In the Consolidated Appropriations Act, 2021, Congress enacted a provision that allows a taxpayer to elect to calculate the taxpayer's EITC and additional child tax credit for taxable years beginning in 2020 using 2019 rather than 2020 earned income, if the taxpayer's earned income in 2020 is less than in 2019.[264]

Explanation of Provision

The provision permits a taxpayer to elect to calculate the taxpayer's EITC for taxable years beginning in 2021 using 2019 rather

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[261] Sec. 7530(c).

[262] Sec. 32.

[263] Sec. 24(d).

[264] Pub. L. No. 116–260, sec. 211. In addition, Congress has at times, in response to natural disasters, allowed certain taxpayers whose principal place of abode was in the disaster zone or disaster area to elect to calculate their EITC and additional child tax credit for the taxable year on the basis of their earned income from the prior taxable year. See, *e.g.,* Pub. L. No. 116–94, sec. 204(c), December 20, 2019 (certain disasters occurring in 2018 and 2019); Pub. L. No. 115–123, sec. 20104(c), February 9, 2018 (certain California wildfires); Pub. L. No. 115–64, sec. 504(c), September 29, 2017 (hurricanes Harvey, Irma, Maria), former sec. 1400S(d) (hurricanes Katrina, Rita, and Wilma), repealed by Pub. L. No. 115–141, March 23, 2018.

than 2021 earned income, if the taxpayer's earned income in 2021 is less than in 2019.[265]

For purposes of the provision, in the case of a joint return, the earned income which is attributable to the taxpayer for 2019 is the sum of the earned income which is attributable to each spouse for 2019.

For administrative purposes, the incorrect use on a return of earned income pursuant to an election under this provision is treated as a mathematical or clerical error. An election under the provision is disregarded for purposes of calculating gross income in the election year.

The provision directs the Secretary to pay to the mirror Code territories (Guam, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands) an amount equal to the loss in revenue by reason of the application of the provision. This amount is determined by the Secretary based on information provided by the government of the territory.

The provision directs the Secretary to pay to the non-mirror Code territories (Puerto Rico and American Samoa) an amount estimated by the Secretary as being equal to the aggregate benefits that would have been provided to the residents of the territory from the provision if a mirror Code tax system had been in effect in the territory. The provision prohibits the Secretary from making these payments unless the territory has a plan approved by the Secretary to promptly distribute the payments to its residents.

Effective Date

The provision is effective on the date of enactment of the Act (March 11, 2021).

10. Refundability and enhancement of child and dependent care tax credit (sec. 9631 of the Act and sec. 21 of the Code)

Present Law

Under section 21, a taxpayer who has one or more qualifying individuals may claim a nonrefundable credit against income tax liability for employment-related expenses for child and dependent care. The credit is limited to 35 percent of such expenses, and may be reduced (but not below 20 percent)) based on the taxpayer's AGI.[266] For this purpose, employment-related expenses are expenses for household services and expenses for the care of a qualifying individual.[267] These expenses must be incurred to enable the taxpayer to be gainfully employed.

A taxpayer's employment-related child expenses for which the credit is allowed are limited to $3,000 if the taxpayer has one qualifying individual or $6,000 if the taxpayer has two or more qualifying individuals.[268] Thus, the maximum credit is $1,050 if

[265] The provision does not allow taxpayers to make an election with respect to the additional child tax credit. However, for taxable years beginning in 2021, section 9611 of the Act (discussed above) makes the child tax credit fully refundable, without regard to earned income.

[266] Sec. 21(a).

[267] Sec. 21(b)(2). Expenses do not include amounts paid for a camp where a qualifying individual stays overnight.

[268] Sec. 21(c).

there is one qualifying individual and $2,100 if there are two or more qualifying individuals.

The applicable dollar limit is reduced by any amount excluded from income under an employer-provided dependent care assistance program under section 129.[269] The 35-percent credit rate is reduced, but not below 20 percent, by one percentage point for each $2,000 (or fraction thereof) of AGI above $15,000.[270] Thus, for taxpayers with AGI above $43,000, the credit rate is 20 percent. The phaseout threshold and the amount of expenses eligible for the credit are not indexed for inflation.

Generally, a qualifying individual is: (1) a dependent of the taxpayer under section 152 who is under the age of 13, or (2) a dependent or spouse of the taxpayer if the dependent or spouse is physically or mentally incapable of caring for himself or herself and shares the same principal place of abode with the taxpayer for over one half the year.[271] Married taxpayers must file a joint return in order to claim the credit.

Employment-related expenses generally cannot exceed the taxpayer's earned income.[272] In the case of a joint return, expenses cannot exceed the earned income of the spouse with the least earned income.

A special rule applies in the case of a joint return, where one spouse is either (1) a full-time student or (2) physically or mentally incapable of caring for himself or herself and shares the same principal place of abode with the taxpayer for over one half of the year. Under this rule, for each month in which the student or incapacitated spouse qualifies, the spouse is deemed to have $250 of earned income in the case of one qualifying individual and $500 if there are two or more qualifying individuals.[273] Thus, if the spouse qualifies under the rule for 12 months, the spouse is deemed to have $3,000 in the case of one qualifying individual and $6,000 if there are two or more qualifying individuals, equal to the applicable limitations. Only one spouse may have deemed earned income under this rule.

Explanation of Provision

The provision temporarily expands the child and dependent care tax credit for taxable years beginning in 2021.[274] First, the provision makes the credit refundable for a taxpayer who has a principal place of abode in the United States for more than one half of the taxable year.[275] In the case of a joint return, refundability is allowed if at least one spouse satisfies the principal place of abode requirement. Principal place of abode is determined as provided in section 32.[276]

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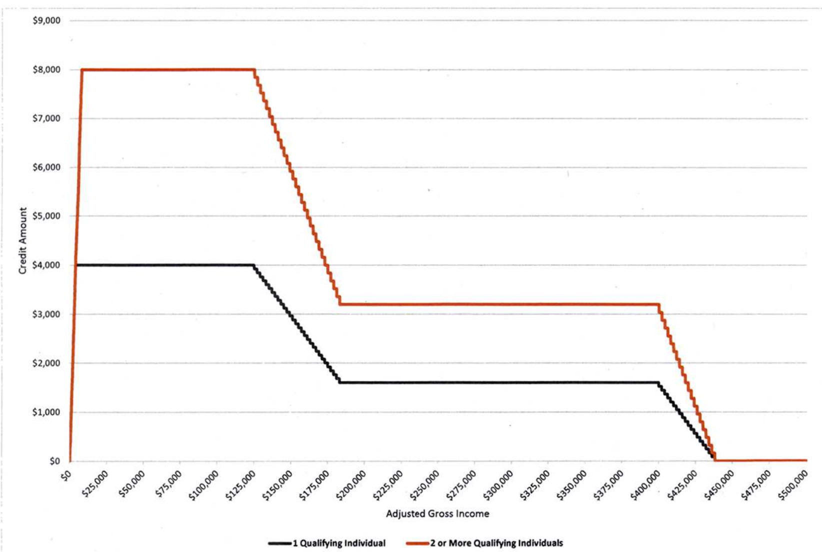
[269] *Ibid.*
[270] Sec. 21(a).
[271] Sec. 21(b)(1).
[272] Sec. 21(d). Earned income has the same definition as for purposes of the EITC. Treas. Reg. sec. 1.21–2(b)(3).
[273] Sec. 21(d)(2).
[274] Sec. 21(g).
[275] Sec. 21(g)(1).
[276] Thus, a member of the Armed Forces of the United States stationed outside the United States while serving on extended active duty is treated as having a principal place of abode in the United States.

In addition, the provision increases the maximum credit rate to 50 percent (from 35 percent) and increases the amount at which the maximum credit rate begins to phase down to $125,000 (from $15,000).[277] The limitation on employment-related child and dependent care expenses is increased to $8,000 (from $3,000) in the case of one qualifying individual and to $16,000 (from $6,000) if there are two or more qualifying individuals.[278] Thus, the maximum credit is $4,000 if there is one qualifying individual and $8,000 if there are two or more qualifying individuals.[279]

The provision applies a two-part phaseout to the 50-percent credit rate.[280] Under the first part, the 50-percent credit rate is reduced, but not below 20 percent, by one percentage point for each $2,000 (or fraction thereof) of AGI above $125,000. Under the second part, the 20-percent credit rate is reduced, but not below zero, by one percentage point for each $2,000 (or fraction thereof) of AGI above $400,000. Thus, for taxpayers with AGI between $183,000 and $400,000, the credit rate is 20 percent and, for taxpayers with AGI above $438,000, the credit is fully phased out. Figure 1 illustrates the credit amount by AGI for a taxpayer with one qualifying individual and for a taxpayer with two or more qualifying individuals, in each case assuming that the taxpayer has the maximum amount of employment-related expenses ($8,000 and $16,000, respectively).[281]

Figure 1–Child and Dependent Care Tax Credit for 2021 by AGI for Selected Taxpayers



[277] Sec. 21(g)(3).
[278] Sec. 21(g)(2).
[279] The provision does not change the special earned income rule that applies where one spouse is either (1) a full-time student or (2) physically or mentally incapable of caring for himself or herself and shares the same principal place of abode with the taxpayer for over one half of the year.
[280] Sec. 21(g)(4).
[281] Figure 1 assumes AGI and earned income are equal for these taxpayers.

Treatment of the U.S. territories

Under the provision, the Secretary is directed to make payments for taxable years beginning in 2021 to each mirror Code territory (Guam, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands) that relate to the cost to that territory of the child and dependent care tax credit. The Secretary is further directed to make similar payments for taxable years beginning in 2021 to each non-mirror Code territory (American Samoa and Puerto Rico).

The provision directs the Secretary to pay to each mirror Code territory amounts equal to the aggregate amount of the credits allowable by reason of the application of the provision. This amount is determined by the Secretary based on information provided by the government of the territory.[282]

The provision directs the Secretary to pay to each non-mirror Code territories amounts estimated by the Secretary as being equal to the aggregate benefits that would have been provided to the residents of the territory from the provision if a mirror Code tax system had been in effect in the territory.[283] The provision prohibits the Secretary from making these payments unless the territory has a plan approved by the Secretary to promptly distribute the payments to its residents.

No credit against U.S. income taxes is permitted under the provision for any person to whom a credit is allowed against territory income taxes as a result of the provision (i.e., under that territory's mirror Code).[284] Similarly, no credit against U.S. income taxes is permitted for any person who is eligible for a payment under a non-mirror Code territory's plan for distributing to its residents the payment described above from the Secretary.

Effective Date

The provision applies to taxable years beginning after December 31, 2020.

11. Increase in exclusion for employer-provided dependent care assistance (sec. 9632 of the Act and sec. 129 of the Code)

Present Law

An annual exclusion[285] from the gross income of an employee is allowed for employer-provided dependent care assistance in an amount up to $5,000 ($2,500 in the case of a separate return by a married individual) if such assistance is provided pursuant to a "dependent care assistance program." Among other requirements, a dependent care assistance program[286] must be a separate written plan of an employer for the exclusive benefit of the employer's employees to provide such employees with dependent care assistance that does not discriminate in favor of highly compensated employ-

[282] Sec. 21(h)(1).
[283] Sec. 21(h)(2).
[284] Sec. 21(h)(3).
[285] Sec. 129(a).
[286] Sec. 129(d).

ees or their dependents as to contributions, benefits, and eligibility.[287]

The amount excludable for any taxable year cannot exceed the earned income of the employee or, if the employee is married, the lesser of the earned income of the employee or the earned income of the employee's spouse.[288]

Amounts attributable to dependent care assistance that are excludible from gross income are also excludible from wages for employment tax purposes.[289]

A dependent care assistance program may be structured to allow contributions on a pre-tax basis through a cafeteria plan.[290] A cafeteria plan is a written plan maintained by an employer whereby all participants are employees who may choose among two or more benefits including qualified benefits and cash.[291] Qualified benefits provided under a cafeteria plan include dependent care assistance.

Explanation of Provision

The provision temporarily increases, for any taxable year beginning in 2021, the amount of the exclusion for employer-provided dependent care assistance. The provision increases such amount from $5,000 to $10,500 (and half of such dollar amount in the case of a separate return by a married individual).

The provision also provides that a plan that otherwise satisfies the requirements of a dependent care assistance program and cafeteria plan shall not fail to meet those requirements if the plan is amended to satisfy this provision and the amendment is retroactive if the following are satisfied (1) the amendment is adopted no later than the last day of the plan year in which the amendment is effective, and (2) the plan is operated consistently with the amendment terms beginning on the effective date of the amendment and ending on the date the amendment is adopted.

Effective Date

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

12. Extension of credits and other modifications (secs. 9641 to 9643 of the Act)

Present Law

The Families First Coronavirus Response Act ("FFCRA")[292] required certain employers with fewer than 500 employees to provide paid sick and expanded family and medical leave to employees unable to work or telework for specified reasons related to COVID–

[287] Sec. 129(d)(2) and (3). The exclusion applies if the contributions or benefits under the program do not discriminate in favor of highly compensated employees, within the meaning of section 414(q), or their dependents, and the program benefits employees under a classification established by the employer found not to be discriminatory in favor or such highly compensated employees or their dependents.

[288] Sec. 129(b). The provisions of section 21(d)(2) apply in determining the earned income of a spouse who is a student or incapable of caring for himself. Sec. 129(b)(2).

[289] Secs. 3121(a)(18), 3306(b)(13), 3401(b)(18).

[290] Sec. 125.

[291] Sec. 125(d).

[292] Pub. L. No. 116–127, March 18, 2020.

19. The paid sick leave requirements in the Emergency Paid Sick Leave Act,[293] and the expanded family and medical leave requirements in the Emergency Family and Medical Leave Expansion Act,[294] expired on December 31, 2020.

Paid sick leave and paid expanded family and medical leave: employees

An employer is allowed a credit against the Old-Age, Survivors and Disability Insurance ("OASDI") tax[295] or the equivalent amount of tax under the Railroad Retirement Tax Act ("RRTA") imposed on the employer for each calendar quarter in an amount equal to 100 percent of the qualified sick leave wages and qualified family leave wages paid by the employer with respect to that calendar quarter, subject to limitations.[296] Qualified sick leave wages are defined as wages[297] and compensation[298] paid by an employer which are required to be paid by reason of the Emergency Paid Sick Leave Act. Qualified sick leave wages also generally include wages and compensation that would have been required to be paid if the Emergency Paid Sick Leave Act had been effective until March 31, 2021.[299]

Qualified family leave wages are wages[300] and compensation[301] paid by an employer which are required to be paid by reason of the Emergency Family and Medical Leave Expansion Act.[302] Qualified family leave wages also generally include wages and compensation that would have been required to be paid if the Emergency Family and Medical Leave Expansion Act had been effective until March 31, 2021.[303] In addition to qualified sick leave wages and qualified family leave wages, the credit could be increased by certain health plan expenses of the employer.

Amount of credit for paid sick leave

Certain employers must provide an employee with up to 80 hours of paid sick time to the extent that (1) the employee is subject to a Federal, State, or local quarantine or isolation order related to

[293] Division E, FFCRA, Pub. L. No. 116–127.
[294] Division C, FFCRA, Pub. L. No. 116–127.
[295] The Federal Insurance Contributions Act ("FICA") imposes taxes on "wages," as defined in section 3121(a), with respect to "employment," as defined in section 3121(b). The term wages is defined for FICA purposes as all remuneration for employment, with certain specific exceptions. Employment is defined as any service, of whatever nature, performed by an employee for the person employing him, with certain specific exceptions. FICA taxes consist of the OASDI tax and the Hospital Insurance ("HI") tax. HI tax includes an employer's share imposed on wages at a rate of 1.45 percent under section 3111(b). The employee's share of HI tax is imposed on wages at a rate of 1.45 percent under section 3101(b). Unlike OASDI, there is no contribution limit on wages subject to HI tax.
[296] For IRS guidance, see Notice 2020–21, 2020–16 I.R.B. 660, April 13, 2020.
[297] Sec. 3121(a), determined without regard to paragraphs (1) through (22) of section 3121(b), and without regard to the rule under section 7005(a) of the FFCRA that provides that wages required to be paid to employees pursuant to the Emergency Paid Sick Leave Act or Emergency Family and Medical Leave Expansion Act before December 31, 2020 are not considered wages for purposes of OASDI tax.
[298] Sec. 3231(e), determined without regard to the sentence in paragraph (1) thereof which begins "Such term does not include remuneration" and without regard to the rule under section 7005(a) of the FFCRA that provides that compensation required to be paid to employees pursuant to the Emergency Paid Sick Leave Act or Emergency Family and Medical Leave Expansion Act before December 31, 2020 is not considered compensation for purposes of the RRTA tax.
[299] Sec. 7001 of Pub. L. No. 116–127, as amended by the CAA, Pub. L. No. 116–260, sec. 286.
[300] Sec. 3121(a).
[301] Sec. 3231(e).
[302] For IRS guidance, see Notice 2020–54, 2020–31 I.R.B. 226, July 27, 2020.
[303] Sec. 7001 of Pub. L. No. 116–127, as amended by the CAA, Pub. L. No. 116–260, sec. 286.

COVID–19; (2) the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID–19; (3) the employee is experiencing symptoms of COVID–19 and is seeking a medical diagnosis; (4) the employee is caring for an individual who is subject to a quarantine or isolation order or has been advised by a health care provider to self-quarantine; (5) the employee is caring for the employee's son or daughter if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable due to COVID–19 precautions; or (6) the employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary and the Secretary of Labor.[304]

The amount of qualified sick leave wages that may be taken into account for an employee for purposes of the credit is limited based on the circumstances under which qualified sick leave wages are paid. In the case of paid sick time qualifying under conditions (1), (2), or (3) above, the amount of qualified sick leave wages taken into account for purposes of the credit may not exceed $511 for any day (or portion thereof) when the individual is paid such sick time. In the case of paid sick time qualifying under conditions (4), (5), or (6) above, the amount of qualified sick leave wages taken into account may not exceed $200 for any day (or portion thereof) for which the individual is paid such sick time. In addition, the aggregate number of days that may be taken into account with respect to an individual under all six circumstances may not exceed the excess (if any) of 10 days over the aggregate number of days taken into account for all preceding calendar quarters.

Amount of credit for expanded family and medical leave

Certain employers must provide public health emergency leave to employees under the Family and Medical Leave Act of 1993 ("FMLA"), as amended by the Emergency Family and Medical Leave Expansion Act.[305] This requirement generally applies when an employee is unable to work or telework due to a need for leave to care for a son or daughter under age 18 because the school or place of care has been closed, or the child care provider is unavailable, due to a public health emergency. An employer with employees who are health care providers or emergency responders may elect to exclude such employees from this requirement to provide paid family leave. A public health emergency for this purpose is an emergency with respect to COVID–19 declared by a Federal, State, or local authority.

The first 10 days of public health emergency leave required under the Emergency Family and Medical Leave Expansion Act may consist of unpaid leave, after which paid leave is required for ten weeks until December 31, 2020. The amount of required paid leave is calculated based on: (a) an amount that is not less than two-thirds of an employee's regular rate of pay; and (b) the number of hours the employee would otherwise be normally scheduled to work. The paid leave mandated by the Emergency Family and

[304] Sec. 5102(a), Division E, FFCRA, Pub. L. No. 116–127.
[305] Sec. 3102, Division C, FFCRA, Pub. L. No. 116–127.

Medical Leave Expansion Act does not exceed $200 per day and $10,000 in the aggregate.

Employers are allowed a credit against OASDI taxes or the equivalent amount of RRTA taxes in an amount equal to 100 percent of qualified family leave wages paid by the employer during the quarter. Consistent with the mandate, the maximum amount of the qualified family leave wages eligible for the credit is $200 for any day (or portion thereof) for which the employee is paid qualified family leave wages, and in the aggregate with respect to all quarters, $10,000.[306] Employers are not allowed the credit in respect of unpaid leave.

Additional rules

The credit allowed for paid sick or paid family leave is increased by the employer's qualified health plan expenses that are properly allocable to the qualified sick or family leave wages for which the credit is allowed. Qualified health plan expenses are amounts paid or incurred by the employer to provide and maintain a group health plan,[307] but only to the extent such amounts are excluded from the employees' income as coverage under an accident or health plan.[308] Qualified health plan expenses are allocated to qualified sick or family leave wages in such manner as the Secretary (or the Secretary's delegate) may prescribe.[309] Except as otherwise provided by the Secretary, such allocations are treated as properly made if they are pro rata among covered employees and pro rata on the basis of periods of coverage (relative to the time periods of leave to which such wages relate).

The credit allowed may not exceed the OASDI tax or equivalent amount of RRTA tax imposed on the employer, reduced by any credits allowed for the employment of qualified veterans[310] and research expenditures of qualified small businesses[311] for that calendar quarter on the wages paid with respect to all the employer's employees. However, if for any calendar quarter the amount of the credit exceeds the OASDI tax or RRTA tax imposed on the employer, reduced as described in the prior sentence, such excess is treated as a refundable overpayment.[312] Employers may also receive an advance of the credit, under forms and instructions provided by the Secretary.

If a taxpayer claims a credit, the amount so claimed is included in gross income. Thus, the credit is not taken into account for purposes of determining any amount allowable as a payroll tax deduction or deduction for qualified sick leave wages or qualified family leave wages (or any amount capitalizable to basis).

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[306] Sec. 287 of the CAA, Pub. L. No. 116–260, provides that self-employed individuals may make an election to use prior year net earnings from self-employment in determining the average daily self-employment income for purposes of credits for paid sick and family leave.

[307] Sec. 5000(b)(1).

[308] Sec. 106(a).

[309] See IRS FAQs, available at https://www.irs.gov/newsroom/determining-the-amount-of-allocable-qualified-health-plan-expenses.

[310] Sec. 3111(e).

[311] Sec. 3111(f).

[312] The excess is treated as an overpayment and refunded under sections 6402(a) and 6413(b). In addition, any amount that is due to an employer is treated in the same manner as a refund due from a credit provision. 31 U.S.C. 1324. Thus, amounts are appropriated to the Secretary for refunding such excess amounts.

Any qualified sick leave wages taken into account for purposes of a credit are not taken into account for purposes of determining the section 45S general business credit for employer paid family and medical leave. Thus, the employer may not claim a credit under section 45S with respect to the qualified sick leave wages or qualified family leave wages paid but may be allowed a credit under section 45S with respect to any additional wages paid.

An employer may elect not to claim a tax credit for a calendar quarter for qualified sick leave wages or qualified family leave wages. Further, the credit allowed does not apply to the government of the United States, the government of any State or political subdivision thereof, or any agency or instrumentality of any of those entities. Employers in the U.S. territories may claim the credit by filing their quarterly Federal employment tax returns.

Any wages or compensation required to be paid to employees pursuant to the Emergency Paid Sick Leave Act or Emergency Family and Medical Leave Expansion Act before December 31, 2020, are not considered wages for purposes of OASDI tax or compensation for purposes of RRTA tax. In addition, or, in the case of wages or compensation paid after December 31, 2020 and before April 1, 2021, any wages or compensation with respect to which a credit is allowed, are not considered wages for purposes of OASDI tax or compensation for purposes of RRTA tax. As a result, no taxes are collected on these amounts from employers or employees.[313]

Paid sick leave and expanded family and medical leave: self-employed individuals

An eligible self-employed individual may claim an income tax credit for any taxable year for a qualified sick leave equivalent amount or qualified family leave equivalent amount. An eligible self-employed individual is defined as an individual who regularly carries on any trade or business[314] and who would be entitled to receive paid leave during the taxable year under the Emergency Paid Sick Leave Act or Emergency Family and Medical Leave Expansion Act, if the individual were an employee of an employer (other than himself or herself) that would be subject to the requirements of the Acts and as if the Acts were in effect through March 31, 2021.

The qualified sick leave equivalent amount with respect to an eligible self-employed individual is an amount equal to the number of days during the taxable year that the self-employed individual cannot perform services for which that individual would have been entitled to sick leave pursuant to the Emergency Paid Sick Leave Act[315] (if the individual were employed by an employer), multiplied by the lesser of two amounts: (1) $511 in the case of paid sick time described in conditions (1), (2), or (3) above with respect to section

[313] An amount equal to the reduction in revenues to the Treasury by reason of the FFCRA is appropriated to the OASDI Trust Funds and the Social Security Equivalent Benefit Account established under the Railroad Retirement Act of 1974. This amount is transferred from the general fund at such times and in such manner as to replicate to the extent possible the transfers that would have occurred to the OASDI Trust Funds or Social Security Equivalent Benefit Account had this provision not been enacted.

[314] Within the meaning of sec. 1402.

[315] Division E and C, FFCRA, Pub. L. No. 116–127.

5102(a) of the Emergency Paid Sick Leave Act ($200 in the case of paid sick time described in conditions (4), (5), or (6) above); or (2) 100 percent of the average daily self-employment income of the individual for the taxable year in the case of any day of paid sick time described in conditions (1), (2), or (3) above (67 percent in the case of paid sick time described in conditions (4), (5), or (6) above).

The number of days taken into account in determining the qualified sick leave equivalent amount may not exceed, with respect to any taxable year, 10 days, taking into account any days taken in all preceding taxable years. The individual's average daily self-employment income under the provision is an amount equal to the net earnings from self-employment for the taxable year divided by 260.

If an eligible self-employed individual receives qualified sick leave wages,[316] the individual's qualified sick leave equivalent amount determined under the provision is reduced (but not below zero) to the extent that the sum of the qualified sick leave equivalent amount and the qualified sick leave wages received exceeds $2,000 ($5,110 in the case of any day any portion of which is paid sick time described in condition (1), (2), or (3) above).

The qualified family leave equivalent amount with respect to an eligible self-employed individual is an amount equal to the number of days (up to 50) during the taxable year that the self-employed individual cannot perform services for which that individual would be entitled to paid leave pursuant to the Emergency Family and Medical Leave Expansion Act[317] (if the individual were employed by an employer), multiplied by the lesser of two amounts: (1) 67 percent of the average daily self-employment income of the individual for the taxable year, or (2) $200. The individual's average daily self-employment income under the provision is an amount equal to the individual's net earnings from self-employment for the year divided by 260.

The credit allowed for the qualified sick leave equivalent amount or qualified family leave equivalent amount is applied against federal income taxes and is a refundable credit.[318]

If an eligible self-employed individual receives qualified family leave wages,[319] the individual's qualified family leave equivalent amount determined under the provision is reduced (but not below zero) to the extent that the sum of the qualified family leave equivalent amount and the qualified family leave wages received exceeds $10,000.

Application of credit in certain territories

The Secretary is directed to make payments to each territory with a mirror Code tax system that relate to the cost (if any) of each territory's credits for sick leave or expanded family and medical leave for certain self-employed individuals. The Secretary is further directed to make similar payments to each non-mirror Code territory.

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[316] As defined by sec. 7001(c) of FFCRA, Pub. L. No. 116–127.
[317] Division C, FFCRA, Pub. L. No. 116–127.
[318] Any refund due to an individual is treated in the same manner as a refund due from a credit provision. 31 U.S.C. sec. 1324. Thus, amounts are appropriated to the Secretary (or the Secretary's delegate) for refunding such amounts.
[319] As defined by sec. 7003(c) of the FFCRA, Pub. L. No. 116–127.

With respect to mirror Code territories, the Secretary is required to make payments equal to the loss in revenue by reason of the application of the credit for sick leave or expanded family and medical leave for certain self-employed individuals to the territory's mirror Code. This amount is determined by the Secretary based on information provided by the governments of the respective territories.

With respect to the non-mirror Code territories (Puerto Rico and American Samoa), the Secretary is directed to make payments in an amount estimated by the Secretary as being equal to the aggregate benefits that would have been provided to the residents of each territory from the credit for sick leave or expanded family and medical leave for certain self-employed individuals if a mirror Code tax system had been in effect in such territory. The Secretary must not make these payments unless the territory has a plan approved by the Secretary to promptly distribute the payments to its residents.

The Secretary is directed to prescribe such regulations or other guidance as may be necessary to carry out the purposes of the provision, including (1) to effectuate the purposes of this Act, and (2) to minimize compliance and record-keeping burdens under the provision.

Explanation of Provision

Extension of credits

The provision extends the credit for qualified sick leave wages, qualified sick leave equivalent amount, qualified family leave wages, and qualified family leave equivalent amount by two calendar quarters through September 30, 2021.[320] The provision also makes certain changes described below, effective for wages paid with respect to the period beginning on April 1, 2021 (and ending on September 30, 2021).[321]

Reset of limitation on paid sick leave

The provision amends the overall limitation on the number of days that may be taken into account for purposes of the payroll credit for paid sick leave. The aggregate number of days for any calendar quarter that may be taken into account for paid sick leave may not exceed the excess (if any) of 10 over the aggregate number of days so taken into account in the preceding calendar quarters in such calendar year (other than the first quarter of calendar year 2021). The determination of the amount of paid sick time paid to an employee and remuneration counted as qualified sick leave wages are determined on a calendar year basis.[322] The same rule applies to paid sick leave for self-employed individuals and the number of days that may be taken into account for purposes of calculating the qualified sick leave equivalent amount.

[320] The provision also codifies the credits for qualified sick leave wages and qualified family leave wages in new sections 3131 to 3133.

[321] For IRS guidance on the credits, see https://www.irs.gov/newsroom/tax-credits-for-paid-leave-under-the-american-rescue-plan-act-of-2021-general-information.

[322] Section 5102 of the FFCRA provides that the amount of paid sick time to which an employee is entitled is 80 hours for full-time employees. For part-time employees, the maximum amount of paid sick leave is number of hours equal to the number of hours that such employee works, on average, over a two-week period.

The provision also coordinates these changes with the Emergency Paid Sick Leave Act. If the employer fails to comply with the terms of the Emergency Paid Sick Leave Act with respect to the paid sick leave, despite the expiration of the requirement to provide such paid leave after December 31, 2020, amounts paid by the employer for sick leave are not qualified sick leave wages.

Increase in limitations on credits for paid family leave

The provision increases the amount of qualified family leave wages that may be used for purposes of calculating the credit. The amount of qualified leave wages taken into account with respect to an individual may not exceed $200 for any day for which the individual is paid qualified family leave wages, or $12,000 (increased from $10,000 under present law) in the aggregate with respect to all calendar quarters. In addition, the provision removes the option for the first 10 days of family leave to be unpaid; thus, each day of family leave under the provision must be paid leave.

Similar to the modifications to the paid sick leave credit, the provision provides that if the employer fails to comply with the terms of the Emergency Family and Medical Leave Expansion Act with respect to paid family leave, despite the expiration of the requirement to provide such paid leave after December 31, 2020, amounts paid by the employer for family leave are not qualified family leave wages.

As a conforming amendment, the provision addresses the denial of a double benefit for self-employed individuals. In the case of an individual who receives wages [323] or compensation [324] paid by an employer consistent with the terms of the Emergency Family and Medical Leave Expansion Act, the qualified family leave equivalent amount is reduced (but not below zero) to the extent the sum of the amount and qualified leave wages exceeds $12,000 (increased from $10,000 under present law).

The provision also increases the qualified family leave equivalent amount for self-employed individuals. The term "qualified family leave equivalent amount" with respect to a self-employed individual is an amount equal to the product of: (1) the number of days not to exceed 60 (increased from 50 under present law) during the taxable year that the individual is unable to perform services in any trade or business referred to in section 1402 for a reason with respect to which such individual would be entitled to receive paid leave; and (2) the lesser of 67 percent of the average daily self-employment income of the individual for the taxable year, or $200.

Expansion of reasons for paid family leave credit

The provision amends the definition of qualified family leave wages and the qualified family leave equivalent amount by providing that such wages include those which would be required to be paid for any reason described in the six conditions that apply for purposes of eligibility for paid sick leave.[325]

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[323] Sec. 3121(a).

[324] Sec. 3231(e).

[325] Section 5102(a) of Division E, FFCRA, Pub. L. No. 116–127. The reasons for paid sick leave are that (1) the employee is subject to a Federal, State, or local quarantine or isolation order

Continued

Paid leave credits allowed for COVID–19 diagnosis and vaccination

The provision expands the definitions of qualified sick leave wages, qualified family leave wages, qualified sick leave equivalent amount, and qualified family leave equivalent amount to include time the employee or self-employed individual is unable to work (or telework) because the employee or self-employed individual is seeking or awaiting the results of a diagnosis of (or diagnostic test for) COVID–19 and has been exposed to COVID–19 or the employee's employer has requested such test or diagnosis (in the case of a self-employed individual, the individual is unable to work pending the results of such test or diagnosis). Such definitions are also expanded to include time the employee or self-employed individual is unable to work (or telework) because the individual is obtaining immunization related to COVID–19 or is recovering from any injury, disability, illness, or condition related to such immunization.

Application of non-discrimination rules

The provision adds a restriction that no credit is allowed for qualified sick leave wages or qualified family leave wages if, in the provision of qualified sick leave wages or qualified family leave wages, the employer discriminates in favor of highly compensated employees,[326] full-time employees, or employees on the basis of employment tenure with the employer.

Amounts paid under collectively bargained agreements

The provision increases the amount of the credit by the sum of the employer's collectively bargained defined benefit pension plan contributions and collectively bargained apprenticeship program contributions as are properly allocable to the qualified sick leave wages or qualified family leave wages for which the credit is allowed.

For this purpose, "collectively bargained defined benefit pension plan contributions" means, with respect to a calendar quarter, contributions that (1) are paid or incurred by an employer during the calendar quarter on behalf of its employees to a defined benefit plan;[327] (2) are made based on a pension contribution rate; and (3) are required to be made pursuant to the terms of a collective bargaining agreement in effect for that calendar quarter. "Pension contribution rate" means the contribution rate that the employer is obligated to pay on behalf of its employees under the terms of a collective bargaining agreement for benefits under a defined benefit

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related to COVID–19; (2) the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID–19; (3) the employee is experiencing symptoms of COVID–19 and is seeking a medical diagnosis; (4) the employee is caring for an individual who is subject to a quarantine or isolation order or has been advised by a health care provider to self-quarantine; (5) the employee is caring for the employee's son or daughter if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable due to COVID–19 precautions; or (6) the employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary and the Secretary of Labor.

[326] Sec. 414(q).

[327] As defined in section 414(j), which meets the requirements of section 401(a).

plan under such agreement, as such rate is applied to contribution base units.[328]

The provision defines "collectively bargained apprenticeship program contributions" as contributions (with respect to a calendar quarter) that (1) are paid or incurred by an employer on behalf of its employees with respect to the calendar quarter to a registered apprenticeship program; (2) are made based on an apprenticeship program contribution rate; and (3) are required to be made pursuant to the terms of a collective bargaining agreement in effect for that calendar quarter. The term "registered apprenticeship program" means an apprenticeship registered under the Act of August 16, 1937.[329] "Apprenticeship program contribution rate" means the contribution rate that the employer is obligated to pay on behalf of its employees under the terms of a collective bargaining agreement for benefits under a registered apprenticeship program under such agreement, as such rate is applied to contribution base units.

Under the provision, the amount of collectively bargained defined benefit pension plan contributions or collectively bargained apprenticeship program contributions allocable to qualified sick leave wages or qualified family leave wages is the product of (1) the pension contribution rate or the apprenticeship program contribution rate, as applicable (and expressed as an hourly rate) and (2) the number of hours for which qualified sick leave wages or qualified family leave wages (as applicable) were provided to employees covered under the collective bargaining agreement during the calendar quarter.

The provision also directs the Secretary to prescribe such regulations or other guidance as necessary with respect to the allocation, reporting, and substantiation of collectively bargained defined benefit pension plan contributions and collectively bargained apprenticeship program contributions.

Credits allowed against employer Hospital Insurance ("HI") tax

Under the provision, the credit is a credit against OASDI tax or an equivalent amount of RRTA tax as well as a credit against HI tax or an equivalent amount of RRTA tax.[330] The refundable credit against HI tax and the equivalent amount of RRTA tax applies to qualified sick leave wages and qualified family leave wages paid with respect to the period beginning on April 1, 2021 and ending on September 30, 2021. The credit for the qualified sick leave equivalent amount and qualified family leave equivalent amount

[328] See sec. 4001(a)(11) of the Employee Retirement Income Security Act of 1974, Pub. L. No. 93–406, September 2, 1974.

[329] Commonly known as the "National Apprenticeship Act," 50 Stat. 664. The program must also meet the standards of subpart A of part 29 and part 30 of title 29, Code of Federal Regulations.

[330] The provision does not include express language that "holds harmless" the Federal Hospital Insurance Trust Fund from any effects of the provision. Under current law, amounts appropriated and transferred to the trust fund include amounts equivalent to 100 percent of the taxes imposed by section 3111(b) with respect to applicable wages reported by the Secretary, determined by applying the rate to the reported wages. Sec. 1807 of the Social Security Act, 42 U.S.C. sec. 1395i. Because the provision does not affect either the rate under section 3111(b) or applicable wages, but only provides a credit against the amount of tax, the provision does not affect the trust fund, and no hold harmless language is needed.

similarly applies to the period beginning on April 1, 2021 and ending on September 30, 2021.

Application of credits to certain governmental employers

The provision adds an exception to the present-law rule that denies the credit to the U.S. government or any agency or instrumentality thereof. Under the provision, the credit is available to an organization described in section 501(c)(1) of the Code that is exempt from tax under section 501(a) of the Code. Thus, State governments and political subdivisions thereof are eligible for the credit.

Denial of double benefit

The employer's gross income, with respect to a taxable year in which the employer is allowed a credit under this provision, is increased by the amount of the credit. Also, in addition to providing that wages taken into account in determining the credit are not taken into account for purposes of determining the general business credit for employer paid family and medical leave, the provision provides that such wages are also not taken into account for purposes of the Indian employment credit, the wage credit for employees who are in active duty, the work opportunity credit, and the employee retention credit.[331]

Gross up of credit in lieu of exclusion from tax

The provision increases the credits for qualified sick leave wages and qualified family leave wages by the amount of the OASDI and HI taxes, and the equivalent portions of RRTA tax, respectively, on qualified sick leave wages and qualified family leave wages, for which a credit is allowed. The denial of a double benefit also applies to the increase in the amount of credits as described in the preceding sentence. Under this rule, the gross income of the employer, for purposes of chapter 1 of the Code, is increased by the amount of the credit. Any wages taken into account in determining the credits for paid sick or paid family leave are not taken into account for purposes of determining the employer's general business credit for paid family leave.[332]

Effective Date

The provision is generally effective for amounts paid with respect to calendar quarters after March 31, 2021. The provision is effective for purposes of the paid sick leave credit for self-employed individuals for taxable years beginning after December 31, 2020.

[331] Secs. 45S, 45A, 45P, 51, and new sec. 3134. With respect to the employee retention credit, a different rule applies to such credit as in effect under section 2301 of the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), Pub. L. No. 116–136 (new sec. 3134 is generally effective for wages paid after June 30, 2021 and before October 1, 2021). In the case of any credit allowed under section 2301 of the CARES Act with respect to wages taken into account under this provision, the credit allowed under this provision is reduced by the portion of the credit allowed under section 2301 that is attributable to such wages. A similar rule applies with respect to the credit for increasing research activities under section 41.

[332] Sec. 45S.

13. Extension of employee retention credit (sec. 9651 of the Act and new sec. 3134 of the Code)

Present Law

Employee retention credits against income taxes

Congress has at times enacted employee retention credits against employer income tax[333] in response to natural disasters.[334] These enactments generally provide a credit of 40 percent of the wages (up to a maximum of $6,000 in wages per employee) paid by certain employers harmed by the applicable disaster to employees employed in the applicable disaster zone during the period when the employer's business was inoperable due to the applicable disaster. The credits are treated as a current year business credit under section 38(b) and therefore subject to the Federal income tax liability limitations of section 38(c). Rules similar to those in sections 51(i)(1), 52, and 280C(a) apply to the credits.

Employee retention credit against payroll taxes

On March 27, 2020, the Coronavirus Aid, Relief, and Economic Security ("CARES") Act,[335] was signed into law. The CARES Act provided an employee retention credit for employers subject to closure due to COVID–19 (the "employee retention credit"), which was subsequently clarified, extended and modified by the Taxpayer Certainty and Disaster Relief Act of 2020 (the "Relief Act").[336] Under the employee retention credit as amended (*i.e.*, for calendar quarters beginning after 2020), an eligible employer may claim a credit against applicable employment taxes for each calendar quarter in an amount equal to 70 percent[337] of the qualified wages with respect to each employee of such employer for such calendar quarter. Applicable employment taxes are the OASDI tax imposed on the employer and so much of the RRTA tax imposed on the employer as is attributable to the rate in effect under section 3111(a). The amount of qualified wages with respect to any employee which may be taken into account in calculating the credit for any calendar quarter may not exceed $10,000.[338] The employee retention credit applies only to wages paid after March 12, 2020, and before July 1, 2021.

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[333] A description of the present law governing Federal employment taxes may be found above in the explanations of sections 9501 and 9641 to 9643 of the Act.

[334] See, *e.g.,* sec. 203 of Pub. L. No. 116–94, Div. Q (providing a credit in response to certain major disasters declared in 2018 and 2019); sec. 20103 of Pub. L. No. 115–123 (providing a credit in response to 2017 California wildfires); Sec. 503 of Pub. L. No. 115–63, as amended by sec. 20201(b) of Pub. L. No. 115–123 (providing a credit in response to Hurricanes Harvey, Irma, and Maria); and former sec. 1400R (providing a credit in response to Hurricanes Katrina, Rita, and Wilma).

[335] Pub. L. No. 116–136.

[336] Pub. L. No. 116–260. For a more detailed description of the CARES Act employee retention credit and the subsequent changes made by the Relief Act, see Joint Committee on Taxation, *General Explanation of Tax Legislation Enacted in the 116th Congress* (JCS–1–22), March 2022, pp. 311–319 and 523–527. See also Notice 2021–20, 2021–11 I.R.B. 922 (guidance on the employee retention credit for qualified wages paid after March 20, 2020, and before January 1, 2021); Notice 2021–23, 2021–16 I.R.B. 1113 (guidance on the employee retention credit for qualified wages paid after December 31, 2020, and before July 1, 2021); and Notice 2021–49, 2021–34 I.R.B. 316 (amplifying Notices 2021–20 and 2021–23).

[337] Fifty percent for calendar quarters after March 12, 2020, and before January 1, 2021.

[338] This was limited to $10,000 per employee for all calendar quarters after March 12, 2020, and before January 1, 2021.

The credit allowed with respect to any calendar quarter may not exceed the applicable employment taxes imposed on the eligible employer for that calendar quarter on the wages paid with respect to all of the employer's employees, reduced by any credits allowed for the employment of qualified veterans,[339] for research expenditures of a qualified small business,[340] for paid sick or family leave under sections 7001 and 7003 of the Families First Coronavirus Response Act ("FFCRA"), or for certain tax-exempt employers affected by qualified disasters under section 303(d) of the Relief Act. However, if for any calendar quarter the amount of the credit exceeds the applicable employment taxes imposed on the employer, reduced as described in the prior sentence, such excess is treated as a refundable overpayment.[341]

For example, assume that, for a calendar quarter, an eligible employer had applicable employment taxes prior to any credits of $10,000 and (1) a credit for research expenditures of a qualified small business of $4,000, (2) a $3,000 credit for paid sick leave under section 7001 of FFCRA, and (3) a $5,000 employee retention credit. The eligible employer's applicable employment taxes are reduced to $0, and the employer has a $2,000 refundable overpayment.[342]

Amounts are appropriated to the OASDI Trust Funds and the Social Security Equivalent Benefit Account established under the RRTA[343] equal to the reduction in revenues to the Treasury by reason of the credit. Such amounts are transferred from the general fund at such times and in such manner as to replicate to the extent possible the transfers that would have occurred to the Trust Funds or Account had the credit not been enacted.

Definition of eligible employer

An eligible employer is any employer which was carrying on a trade or business during the calendar quarter for which the credit is determined and which meets either of two tests.

Under the first test (the "governmental order test"), such employer is an eligible employer if it experiences a calendar quarter in which the operation of the trade or business is fully or partially suspended during the calendar quarter due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to COVID–19.

Under the second test (the "reduced gross receipts test"), such employer is an eligible employer if the gross receipts (within the meaning of section 448(c)) of such employer for such calendar quarter are less than 80 percent of the gross receipts of such employer for the same calendar quarter in calendar year 2019. For employers

[339] Sec. 3111(e).
[340] Sec. 3111(f).
[341] The excess is treated as an overpayment and refunded under sections 6402(a) and 6413(b). For purposes of section 1324 of Title 31, United States Code, any amount due to an employer under the provision is treated in the same manner as a refund due from the credits against applicable employment taxes described above. Thus, pursuant to that section, amounts are appropriated to the Secretary for refunding such excess amounts.
[342] The tax is reduced by the $4,000 research expenditures credit, the $3,000 paid sick leave credit, and $3,000 of the $5,000 employee retention credit. The $2,000 excess employee retention credit is treated as refundable.
[343] See sec. 15A(a) of the RRTA (45 U.S.C. sec. 231n–1(a)).

not in existence at the beginning of the relevant calendar quarter in 2019, this rule is applied by reference to the same calendar quarter in 2020 rather than 2019. Additionally, an employer may elect to compare the gross receipts of the immediately preceding calendar quarter to the gross receipts for the corresponding calendar quarter in calendar year 2019, rather than using the quarter for which the credit is claimed. For employers not in existence in 2019, the election permits the employer to compare the gross receipts of the immediately preceding calendar quarter to the corresponding calendar quarter in 2020.

An organization described in section 501(c) may qualify as an eligible employer under either test. The requirement that an eligible employer be carrying on a trade or business during the calendar quarter for which the credit is determined and the governmental order test are to be applied as if they referred to all operations of such organization, and not merely those which are treated as a trade or business. In the case of an organization described in section 501(c), any reference in the employee retention credit to gross receipts is treated as a reference to gross receipts within the meaning of section 6033.

Definition of qualified wages

The definition of qualified wages depends on the average number of full-time employees (within the meaning of section 4980H) of the eligible employer during 2019.[344] All persons treated as a single employer under subsection (a) or (b) of section 52 or subsection (m) or (o) of section 414 are treated as one employer for purposes of the employee retention credit.

For an eligible employer that had more than 500 such employees in 2019, qualified wages are wages paid by the eligible employer with respect to which an employee is not providing services due to circumstances that cause the eligible employer to meet either the governmental order test or the reduced gross receipts test.

For an eligible employer that had an average of 500 or fewer full-time employees in 2019, qualified wages are wages paid to any employee either during the time period in which such eligible employer meets the governmental order test or during a quarter in which the eligible employer meets the reduced gross receipts test.

Qualified wages do not include any wages[345] or compensation[346] taken into account under sections 41 (research credit), 45A (Indian employment credit), 45P (employer wage credit for employees who are active-duty members of the uniformed services), 45S (employer credit for paid family and medical leave), 51 (work opportunity credit), 1396 (empowerment zone employment credit), and section 7001 or 7003 of FFCRA. Health plan expenses paid by the employer to provide and maintain a group health plan[347] are treated as wages potentially eligible for the credit, but only to the extent such amounts are excluded from the employees' income as coverage

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[344] In the case of any employer that was not in existence in 2019, the definition of qualified wages depends on the average number of full-time employees of the eligible employer during 2020.
[345] Sec. 3121(a).
[346] Sec. 3231(e).
[347] Group health plan for this purpose is defined in section 5000(b)(1).

under an accident or health plan.[348] The amount of such expenses per employee and per period shall be the amount properly allocable to such employee and such period under rules prescribed by the Secretary. Except as otherwise provided by the Secretary, an allocation of such expenses is proper if made on the basis of being pro rata among periods of coverage.

Other rules, definitions, and guidance

Taxpayers receiving a Paycheck Protection Program ("PPP") loan[349] may be eligible for the employee retention credit. Specifically, the definition of payroll costs that may give rise to loan forgiveness described in section 7A(b) of the Small Business Act[350] do not include qualified wages taken into account in determining the credit. An employer may elect not to take into account any amount of the employer's qualified wages for purposes of calculating the credit. However, such an election does not prevent payroll costs paid during the covered period from being treated as qualified wages of the eligible employer to the extent that a PPP loan, or PPP second draw loan,[351] is not forgiven by reason of a decision by the lender to deny forgiveness.

If a taxpayer claims a credit under this provision, rules similar to the rules of sections 51(i)(1) and 280C(a) apply. Thus, for example, an employee retention credit may not be generated by an individual employer hiring his or her children.

An employer may elect, at such time and in such manner as provided by the Secretary (or the Secretary's delegate), to have the credit not apply to so much of the qualified wages paid by an eligible employer as such employer elects. Further, the credit is not available to the Government of the United States, the government of any State or political subdivision thereof, or any agency or instrumentality of any of those entities unless such entity is (1) a college or university, (2) the principal purpose or function of such entity is providing medical or hospital care, or (3) the entity is described in section 501(c)(1) and exempt from tax under section 501(a).[352]

Any credit allowed under the provision is treated as a credit described in section 3511(d)(2) (relating to third party payors).[353]

Under rules provided by the Secretary,[354] an eligible employer, for which the average number of full-time and full-time-equivalent employees employed by such eligible employer during 2019 was not greater than 500, may elect for any calendar quarter to receive an advance payment of the credit for such quarter in an amount not

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[348] For the exclusion, see section 106(a).

[349] Referred to in the statute as a "small business interruption loan" and defined as a covered loan under paragraph (36) of section 7(a) of the Small Business Act (15 U.S.C. 636(a)), as added by section 1102 of the CARES Act, and also known as a Paycheck Protection Program loan.

[350] 15 U.S.C. sec. 631 et seq.

[351] 15 U.S.C. sec. 636(a)(37).

[352] With respect to the enumerated exceptions in section 2301(c)(5)(A) of the CARES Act, wages (as defined in section 3121(a)) are determined without regard to paragraphs (5), (6), (7), (10), and (13) of section 3121(b) (except with respect to services performed in a penal institution by an inmate thereof).

[353] For IRS guidance on special issues for employers' use of third party payors see IRS FAQs 87–92, available at https://www.irs.gov/newsroom/covid-19-related-employee-retention-credits-special-issues-for-employers-faqs.

[354] See IRS Form 7200, Advance Payment of Employer Credits Due to COVID–19, available at https://www.irs.gov/forms-pubs/about-form-7200.

to exceed 70 percent of the average quarterly wages paid by the employer in calendar year 2019.[355] If the employer was not in existence in 2019, the employer may apply these rules by reference to 2020 instead of 2019. The amount of the credit which would (but for the advance payment thereof) be allowed is reduced (but not below zero) by the aggregate payment allowed to the taxpayer. Any failure to so reduce the credit is treated as arising out of a mathematical or clerical error and assessed according to section 6213(b)(1). If the advance payments to a taxpayer for a calendar quarter exceed the credit allowed but for receipt of the advance payment, the tax imposed by chapters 21 (FICA) or 22 (RRTA) of the Code (whichever is applicable) are increased by the amount of such excess.

Under the employee retention credit, the Secretary (or the Secretary's delegate) is directed to waive any penalty under section 6656 for failure to make a deposit of applicable employment taxes if the Secretary (or the Secretary's delegate) determines that such failure was due to the reasonable anticipation of the credit allowed.

The Treasury Department and IRS have issued published guidance addressing the employee retention credit.[356]

Explanation of Provision

The provision codifies the employee retention credit in new section 3134 and extends and modifies it in the following ways.

The provision extends the credit to apply to wages paid before January 1, 2022, extending the credit by two calendar quarters. However, the provision changes the employee retention credit to only be allowed against the HI tax imposed on the employer and so much of the RRTA tax imposed on the employer as is attributable to the rate in effect under section 3111(b).[357]

The credit allowed with respect to any calendar quarter may not exceed the applicable employment taxes imposed on the eligible employer for that calendar quarter on the wages paid with respect to all of the employer's employees, reduced by any credits allowed for paid sick or family leave under sections 3131 and 3132.[358] How-

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[355] In the case of any employer who employs seasonal workers (as defined in section 45R(d)(5)(B)), the employer may elect for any calendar quarter to receive an advance payment of the credit for such quarter in an amount not to exceed 70 percent of the wages for the calendar quarter in 2019 which corresponds to the calendar quarter to which the election relates, rather than 70 percent of average quarterly wages for 2019.

[356] See Notice 2021–20, 2021–11 I.R.B. 922 (guidance on the employee retention credit for qualified wages paid after March 20, 2020, and before January 1, 2021); Notice 2021–23, 2021–16 I.R.B. 1113 (guidance on the employee retention credit for qualified wages paid after December 31, 2020, and before July 1, 2021); and Notice 2021–49, 2021–34 I.R.B. 316 (amplifying Notices 2021–20 and 2021–23). See also, Rev. Proc. 2021–33, 2021–34 I.R.B. 327 (providing a safe harbor to exclude certain items from gross receipts solely for purposes of determining eligibility to claim the employee retention credit).

[357] The provision does not include express language that "holds harmless" the Federal Hospital Insurance Trust Fund from any effects of the provision. Under current law, amounts appropriated and transferred to the trust fund include amounts equivalent to 100 percent of the taxes imposed by section 3111(b) with respect to applicable wages reported by the Secretary, determined by applying the rate to the reported wages. Sec. 1807 of the Social Security Act, 42 U.S.C. sec. 1395i. Because the provision does not affect either the rate under section 3111(b) or applicable wages, but only provides a credit against the amount of tax, the provision does not affect the trust fund, and no hold harmless language is needed.

[358] Such credits are similarly only allowed against the HI tax imposed on the employer and so much of the RRTA tax imposed on the employer as is attributable to the rate in effect under section 3111(b) and were codified as sections 3131 and 3132 by sec. 9641 of the Act, as described earlier.

ever, if for any calendar quarter the amount of the credit exceeds the applicable employment taxes imposed on the employer, reduced as described in the prior sentence, such excess is treated as a refundable overpayment.[359] For example, assume that, for a calendar quarter, an eligible employer had applicable employment taxes prior to any credits of $10,000 and (1) a credit for paid sick leave of $4,000, (2) a $3,000 credit for paid family leave, and (3) a $5,000 employee retention credit. The eligible employer's applicable employment taxes are reduced to $0 and the employer has a $2,000 refundable overpayment.[360]

The provision extends the credit to apply to recovery startup businesses. A recovery startup business is any employer which began carrying on any trade or business after February 15, 2020, for which the average annual gross receipts of such employer for the three-taxable-year period ending with the taxable year which precedes the calendar quarter for which the credit is determined does not exceed $1 million and, with respect to such calendar quarter, does not meet the governmental order test or the reduced gross receipts test. In the case of an eligible employer which is a recovery startup business, the amount of the credit for any calendar quarter may not exceed $50,000.

In the case of a severely financially distressed employer, the provision provides that qualified wages are wages paid by such employer with respect to an employee during any calendar quarter, regardless of the number of full-time employees in 2019. An employer is a severely financially distressed employer if it meets the reduced gross receipts test while substituting "less than 10 percent" for "less than 80 percent."

Under the provision, qualified wages do not include any wages[361] or compensation[362] taken into account under sections 41, 45A, 45P, 45S, 51, 1396, 3131, and 3132.

No credit is available under the provision with respect to qualified wages paid by an eligible employer that are taken into account as payroll costs in connection with a covered loan under section 7(a)(37) or 7A of the Small Business Act,[363] a grant under section 324 of the Economic Aid to Hard-Hit Small Businesses, Non-Profits, and Venues Act, or a restaurant revitalization grant under section 5003 of the Act.

If an eligible employer elects to receive an advance payment of the employee retention credit (as described above) and the advance payments to the taxpayer for a calendar quarter exceed the credit allowed but for receipt of the advance payment, the tax imposed

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[359] The excess is treated as an overpayment and refunded under sections 6402(a) and 6413(b). For purposes of section 1324 of Title 31, United States Code, any amount due to an employer under the provision is treated in the same manner as a refund due from the credits against applicable employment taxes described above. Thus, pursuant to that section, amounts are appropriated to the Secretary for refunding such excess amounts.

[360] The tax is reduced by the $4,000 paid sick leave credit, the $3,000 paid family leave credit, and $3,000 of the $5,000 employee retention credit. The $2,000 excess employee retention credit is treated as refundable.

[361] Sec. 3121(a).

[362] Sec. 3231(e).

[363] However, the credit may be available with respect to qualified wages to the extent that a covered loan of the taxpayer under section 7(a)(37) of the Small Business Act is not forgiven by reason of a decision under section 7(a)(37)(J) of such Act or a covered loan of the taxpayer under section 7A of the Small Business Act is not forgiven by reason of a decision under section 7A(g) of such Act.

under section 3111(b), or so much of the tax imposed under section 3221(a) as is attributable to the rate in effect under section 3111(b) (whichever is applicable), for the calendar quarter is increased by the amount of such excess.

In addition, the provision extends the limitation on the time period for assessment of any amount attributable to an employee retention credit from three years to five years.[364] Thus, under the provision, the limitation on the time period for assessment will not expire before the date that is five years after the later of (1) the date on which the original return which includes the calendar quarter with respect to which the employee retention credit is determined is filed, or (2) the date on which such return is treated as filed under section 6501(b)(2).[365]

The Treasury Department and IRS have issued published guidance addressing this provision.[366]

Effective Date

The provision is effective for calendar quarters beginning after June 30, 2021, for wages paid after June 30, 2021, and before January 1, 2022.

14. Improving affordability by expanding premium assistance for consumers (sec. 9661 of the Act and sec. 36B of the Code)

Present Law

In general

A refundable tax credit (the "premium assistance credit") is provided for eligible individuals and families to subsidize the purchase of "qualified health plans,"[367] health insurance plans offered through an American Health Benefit Exchange ("Exchange") created by the Patient Protection and Affordable Care Act ("PPACA").[368] In general, the Secretary makes advance payments with respect to the premium assistance credit during the year directly to the insurer, as discussed below.[369] However, eligible individuals may choose to pay their total health insurance premiums without advance payments and to claim the credit for the taxable year on a Federal income tax return.

The premium assistance credit is generally available for individuals (single or joint filers) with household incomes between 100 percent and 400 percent of the Federal poverty level ("FPL") for the

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[364] Under section 6501, income taxes are generally required to be assessed within three years after a taxpayer's return is filed, whether or not it was timely filed.

[365] Under section 6501(b)(2), a return of certain employment and withholding taxes (*i.e.*, a return of tax imposed by chapter 3, 4, 21, or 24) that is filed before the date it is due is deemed filed on the due date.

[366] See Notice 2021–49, 2021–34 I.R.B. 316 (amplifying Notices 2021–20 and 2021–23, and providing guidance on the employee retention credit under new section 3134). See also Rev. Proc. 2021–33, 2021–34 I.R.B. 327 (providing a safe harbor to exclude certain items from gross receipts solely for purposes of determining eligibility to claim the employee retention credit).

[367] Sec. 36B. Qualified health plans generally must meet certain requirements. Secs. 1301 and 1302 of the PPACA, 42 U.S.C. secs. 18021 and 18022.

[368] Pub. L. No. 111–148, March 23, 2010. The PPACA was modified by the Health Care and Education Reconciliation Act of 2010 ("HCERA"), Pub. L. No. 111–152, Title I, sec. 1001, March 30, 2010. PPACA and HCERA are referred to collectively as the Affordable Care Act ("ACA").

[369] Sec. 1412 of the PPACA, 42 U.S.C. sec. 18082.

applicable family size.[370] Household income is defined as the sum of (1) the individual's modified AGI, plus (2) the aggregate modified AGI of all other individuals taken into account in determining the individual's family size (but only if the other individuals are required to file tax returns for the taxable year).[371] Modified AGI is defined as AGI increased by (1) any amount excluded from gross income for citizens or residents living abroad,[372] (2) any tax-exempt interest received or accrued during the tax year, and (3) any portion of the individual's Social Security benefits not included in gross income.[373] To be eligible for the premium assistance credit, individuals who are married must file a joint return.[374] Individuals who are listed as dependents on a return are not eligible for the premium assistance credit.

An individual who is eligible for minimum essential coverage from a source other than the individual insurance market generally is not eligible for the premium assistance credit.[375] However, an individual who is offered minimum essential coverage under an employer-sponsored health plan may be eligible for the premium assistance credit if (1) the coverage is either unaffordable or does not provide minimum value, and (2) the individual declines the employer-offered coverage.[376] Thus, an individual who enrolls in an employer-sponsored health plan generally is ineligible for the premium assistance credit even if the coverage is considered unaffordable or does not provide minimum value. Coverage is considered unaffordable if an employee's share of the premium for self-only coverage under the plan exceeds 9.83 percent (for 2021)[377] of the employee's household income.[378] Coverage is considered to not provide minimum value if the plan's share of total allowed costs of plan benefits is less than 60 percent of such costs.

Amount of credit

The premium assistance credit amount is generally the lower of (1) the premium for the qualified health plan in which the individual or family enrolls, and (2) the premium for the second lowest cost silver plan in the rating area where the individual resides,[379]

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[370] Sec. 36B(c)(1). Federal poverty level refers to the most recently published poverty guidelines determined by the Secretary of Health and Human Services ("HHS"). Levels for 2021 and previous years are available at https://aspe.hhs.gov/prior-hhs-poverty-guidelines-and-federal-register-references.

Under sec. 36B(c)(1)(B), a taxpayer with household income less than 100 percent of FPL who is an alien lawfully present but is ineligible for Medicaid under title XIX of the Social Security Act by reason of such alien status may be treated as an applicable taxpayer with a household income equal to 100 percent of FPL.

[371] Sec. 36B(d)(2).

[372] Sec. 911.

[373] Under section 86, only a portion of an individual's Social Security benefits is included in gross income.

[374] Sec. 36B(c)(1)(C).

[375] Sec. 36B(c)(2). Minimum essential coverage is defined in section 5000A(f).

[376] Sec. 36B(c)(2)(C).

[377] Rev. Proc. 2020–36, 2020–32 I.R.B. 244.

[378] Employees and their family members who are provided a qualified small employer health reimbursement arrangement ("QSEHRA") that constitutes affordable coverage are not eligible for the premium assistance credit. Sec. 36B(c)(4)(C). The affordability determination for QSEHRAs is similar to the affordability determination for an employer-sponsored health plan. Specifically, a QSEHRA is treated as constituting affordable coverage for a month if an employee's share of the premium for self-only coverage under the second lowest cost silver plan offered in the relevant individual health insurance market does not exceed 9.83 percent (for 2021) of the employee's household income. A QSEHRA is defined in section 9831(d)(2).

[379] A "silver plan" refers to the level of coverage provided by the health plan. PPACA sec. 1302(d), 42 U.S.C. sec. 18022. Most health plans sold through an Exchange are required to meet

reduced by the individual's or family's share of premiums.[380] As shown in Table 1 below, an individual's or a family's share of premiums is a certain percentage of household income. For 2021, the share of premiums is 2.07 percent of household income up to 133 percent of FPL and is determined on a sliding scale in a linear manner up to 9.83 percent as household income rises from 133 percent of FPL to 400 percent of FPL.

TABLE 1.—HOUSEHOLD'S SHARE OF PREMIUMS (FOR 2021) [381]

Household income (expressed as a percent of PL)	Initial percentage of household income *	Final percentage of household income *
Less than 133%	2.07	2.07
133% up to 150%	3.10	4.14
150% up to 200%	4.14	6.52
200% up to 250%	6.52	8.33
250% up to 300%	8.33	9.83
300% up to and including 400%	9.83	9.83

* The initial percentage of household income corresponds to the bottom of the corresponding PL range, and the final pe centage of household income corresponds to the top of the cor esponding FPL range.

Advance payments of the premium assistance credit

As part of the process of enrollment in a qualified health plan through an Exchange, an individual may apply and be approved for advance payments with respect to a premium assistance credit ("advance payments").[382] The individual must provide information on income, family size, changes in marital or family status or income, and citizenship or lawful presence status.[383] Eligibility for advance payments is generally based on the individual's income for the taxable year ending two years prior to the enrollment period. This process is administered by HHS and includes a system through which information provided by the individual is verified using information from the IRS and certain other sources.[384] If an

actuarial value ("AV") standards, among other requirements. AV is a summary measure of a plan's generosity, expressed as a percentage of medical expenses estimated to be paid by the insurer for a standard population and set of allowed charges. Silver-level plans are designed to provide benefits that are actuarially equivalent to 70 percent of the full AV of the benefits provided under the plan. The premium assistance credit looks to the second lowest cost plan of all of the silver plans available in the relevant rating area.

An individual's "rating area" refers to the geographical unit within the State where the individual resides. Insurers may vary individual market premiums based on rating areas, among other factors. See PPACA sec. 1201, 42 U.S.C. 300gg.

[380] Sec. 36B(b). The amount of the premium assistance credit is determined on a monthly basis, and the amount of the credit for a year is the sum of the monthly amounts.

[381] Rev. Proc. 2020–36, 2020–32 I.R.B. 244. The percentages are indexed to the excess of premium growth over income growth for the preceding calendar year. After 2018, if the aggregate amount of premium assistance credits (and cost-sharing reductions under section 1402 of PPACA) exceeds 0.504 percent of the gross domestic product for that year, the percentage of household income is also adjusted to reflect the excess (if any) of premium growth over the rate of growth in the Consumer Price Index for the preceding calendar year. Such an adjustment was not required for 2021.

[382] Secs. 1411 and 1412 of PPACA, 42 U.S.C. secs. 18081 and 18082. Under section 1402 of PPACA, 42 U.S.C. sec. 18071, certain individuals eligible for advance payments also are eligible for a reduction in their share of medical costs, such as deductibles and copays, under the plan, referred to as reduced cost-sharing. Eligibility for reduced cost-sharing is also determined as part of the Exchange enrollment process. HHS is responsible for rules relating to Exchanges and the eligibility determination process.

[383] Under section 1312(f)(3) of PPACA, 42 U.S.C. sec. 18032(f)(3), an individual may not enroll in a qualified health plan through an Exchange if the individual is not a citizen or national of the United States or an alien lawfully present in the United States. Thus, such an individual is not eligible for the premium assistance credit.

[384] Under section 6103, returns and return information are confidential and may not be disclosed, except as authorized by the Code, by IRS employees, other Federal employees, State em-

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individual is approved for advance payments, the Secretary pays the advance amounts on a monthly basis directly to the issuer of the health plan in which the individual is enrolled. The individual then pays to the issuer of the plan any difference between the advance payment amount and the total premium charged for the plan.

An individual on whose behalf advance payments of the premium assistance credit for a taxable year are made is required to file an income tax return to reconcile the advance payments with the credit that the individual is allowed for the taxable year.[385]

If the advance payments of the premium assistance credit exceed the amount of credit that the individual is allowed, the excess ("excess advance payments") is treated as an additional tax liability on the individual's income tax return for the taxable year (is "recaptured"), subject to a limit on the amount of additional liability in some cases. For an individual with household income below 400 percent of FPL, recapture for a taxable year is limited to a specific dollar amount (the "applicable dollar amount") as shown in Table 2 below. One-half of the applicable dollar amount shown in Table 2 applies to an unmarried individual who is not a surviving spouse or filing as a head of household.

TABLE 2.—RECAPTURE LIMITS (FOR 2021)[386]

Household income (expressed as a pe cent of FPL)	Appl cable dollar amount
Less than 200%	$650
At least 200% but less than 300%	$1,600
At least 300% but less than 400%	$2,700

If the advance payments of the premium assistance credit for a taxable year are less than the amount of the credit that the individual is allowed, the additional credit amount is allowed when the individual files an income tax return for the year.

Enrollment in a qualified health plan

Generally, an individual may enroll in a qualified health plan through an Exchange during an annual open enrollment period.[387] The 2021 open enrollment period in most States ended December 15, 2020. An Exchange must provide for special enrollment periods during which an individual may enroll in a qualified health plan or change enrollment in a qualified health plan if the individual ex-

ployees, and certain others having access to such information. Under section 6103(l)(21), upon written request of the Secretary of HHS, the IRS is permitted to disclose certain return information for use in determining an individual's eligibility for advance payments, reduced cost-sharing, or certain other State health subsidy programs, including a State Medicaid program under title XIX of the Social Security Act, 42 U.S.C. secs. 1396w–1 through 1396w–5, a State's Children's Health Insurance Program under title XXI of the Social Security Act, 42 U.S.C. secs. 1397aa though 1397mm, and a Basic Health Program under section 1331 of PPACA, 42 U.S.C. sec. 18051.

[385] Treas. Reg. sec. 1.6011–8. Under section 36B(f)(3), an Exchange is required to report to the IRS and to the individual the months during a year for which the individual was covered by a qualified health plan purchased through the Exchange; the level of coverage; the name, address, and TIN of the primary insured and each individual covered by the policy; the total premiums paid by the individual; and, if applicable, advance payments made on behalf of the individual.

[386] Rev. Proc. 2020–45, 2020–46 I.R.B. 1016. The applicable dollar amounts are indexed to reflect cost-of-living increases, with the amount of any increase rounded down to the next lowest multiple of $50.

periences certain life events, including losing health coverage, getting married, or having a baby.[388] On January 28, 2021, the President issued an Executive Order ordering the Secretary of HHS to consider establishing a special enrollment period for the Federally Facilitated Marketplace in light of the exceptional circumstances caused by the on-going COVID–19 pandemic and the economic downturn.[389] In accordance with the Executive Order, HHS determined that it will provide a special enrollment period for the Federal Facilitated Marketplace from February 15, 2021 through May 15, 2021.[390] HHS strongly encouraged States operating their own marketplace platforms to establish similar enrollment opportunities.

Explanation of Provision

For taxable years beginning in 2021 and 2022, the provision reduces or eliminates an individual's or family's share of premiums used in determining the amount of the premium assistance credit. The provision also makes the premium assistance credit available to taxpayers with incomes above the present law limitation of 400 percent of FPL for the applicable family size.

Table 3 below shows an individual's or family's modified share of premiums applicable for 2021 and 2022 under the provision. The share of premiums is a certain percentage of household income, ranging from 0.0 percent of household income (up to 150 percent of FPL) up to 8.5 percent of household income, determined on a sliding scale in a linear manner.

TABLE 3.—HOUSEHOLD'S SHARE OF PREMIUMS

(FOR 2021 AND 2022)

Household income (expressed as a percent of PL)	Initial percentage of household income	Final percentage of household income
Less than 150%	0.0	0.0
150% up to 200%	0.0	2.0
200% up to 250%	2.0	4.0
250% up to 300%	4.0	6.0
300% up to 400%	6.0	8.5
400% and higher	8.5	8.5

Taxpayers may be able to take advantage of the COVID–19 related special enrollment period to receive the benefit of this temporary expansion.

Effective Date

The provision applies to taxable years beginning after December 31, 2020.

[387] PPACA sec. 1311, 42 U.S.C. 13031.
[388] 45 CFR 155.420.
[389] Joseph R. Biden, "Executive Order on Strengthening Medicaid and the Affordable Care Act," January 28, 2021, available at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/28/executive-order-on-strengthening-medicaid-and-the-affordable-care-act/. Pursuant to 45 C.F.R. 155.420(d)(9), an Exchange may allow a special enrollment period in the event of exceptional circumstances as determined by the Exchange in accordance with HHS guidelines.
[390] Centers for Medicare & Medicaid Services, "Fact Sheet: 2021 Special Enrollment Period in Response to the COVID–19 Emergency," January 28, 2021, available at https://www.cms.gov/newsroom/fact-sheets/2021-special-enrollment-period-response-covid-19-emergency.

15. Temporary modification of limitations on reconciliation of tax credits for coverage under a qualified health plan with advance payments of such credit (sec. 9662 of the Act and sec. 36B of the Code)

Present Law

A refundable tax credit (the "premium assistance credit") is provided for eligible individuals and families to subsidize the purchase of "qualified health plans,"[391] health insurance plans offered through an American Health Benefit Exchange ("Exchange") created by the Patient Protection and Affordable Care Act ("PPACA").[392] For background on the premium assistance credit, see the description of present law for section 9661 of the American Rescue Plan Act of 2021 (Pub. L. No. 117–2).

Advance payments of the premium assistance credit

As part of the process of enrollment in a qualified health plan through an Exchange, an individual may apply and be approved for advance payments with respect to a premium assistance credit ("advance payments").[393] The individual must provide information on income, family size, changes in marital or family status or income, and citizenship or lawful presence status.[394] Eligibility for advance payments is generally based on the individual's income for the taxable year ending two years prior to the enrollment period. This process is administered by HHS and includes a system through which information provided by the individual is verified using information from the IRS and certain other sources.[395] If an individual is approved for advance payments, the Secretary pays the advance amounts on a monthly basis directly to the issuer of the health plan in which the individual is enrolled. The individual then pays to the issuer of the plan any difference between the advance payment amount and the total premium charged for the plan.

An individual on whose behalf advance payments of the premium assistance credit for a taxable year are made is required to file an

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[391] Sec. 36B. Qualified health plans generally must meet certain requirements. Secs. 1301 and 1302 of the PPACA, 42 U.S.C. secs. 18021 and 18022.

[392] Pub. L. No. 111–148, March 23, 2010. The PPACA was modified by the Health Care and Education Reconciliation Act of 2010 ("HCERA"), Pub. L. No. 111–152, Title I, sec. 1001, March 30, 2010. PPACA and HCERA are referred to collectively as the Affordable Care Act ("ACA").

[393] Secs. 1411 and 1412 of PPACA, 42 U.S.C. secs. 18081 and 18082. Under section 1402 of PPACA, 42 U.S.C sec. 18071, certain individuals eligible for advance payments also are eligible for a reduction in their share of medical costs, such as deductibles and copays, under the plan, referred to as reduced cost-sharing. Eligibility for reduced cost-sharing is also determined as part of the Exchange enrollment process. HHS is responsible for rules relating to Exchanges and the eligibility determination process.

[394] Under section 1312(f)(3) of PPACA, 42 U.S.C. sec. 18032(f)(3), an individual may not enroll in a qualified health plan through an Exchange if the individual is not a citizen or national of the United States or an alien lawfully present in the United States. Thus, such an individual is not eligible for the premium assistance credit.

[395] Under section 6103, returns and return information are confidential and may not be disclosed, except as authorized by the Code, by IRS employees, other Federal employees, State employees, and certain others having access to such information. Under section 6103(l)(21), upon written request of the Secretary of HHS, the IRS is permitted to disclose certain return information for use in determining an individual's eligibility for advance payments, reduced cost-sharing, or certain other State health subsidy programs, including a State Medicaid program under title XIX of the Social Security Act, 42 U.S.C. secs. 1396w–1 through 1396w–5, a State's Children's Health Insurance Program under title XXI of the Social Security Act, 42 U.S.C. secs. 1397aa though 1397mm, and a Basic Health Program under section 1331 of PPACA, 42 U.S.C. sec. 18051.

income tax return to reconcile the advance payments with the credit that the individual is allowed for the taxable year.[396]

If the advance payments of the premium assistance credit exceed the amount of credit that the individual is allowed, the excess ("excess advance payments") is treated as an additional tax liability on the individual's income tax return for the taxable year (is "recaptured"), subject to a limit on the amount of additional liability in some cases. For an individual with household income below 400 percent of FPL, recapture for a taxable year is limited to a specific dollar amount (the "applicable dollar amount") as shown in Table 1 below. One-half of the applicable dollar amount shown in Table 1 applies to an unmarried individual who is not a surviving spouse or filing as a head of household.

TABLE 1.—RECAPTURE LIMITS (FOR 2021) [397]

Household income (exp essed as a percent of PL)	Appl cable dollar amount
Less than 200%	$650
At least 200% but less than 300%	$1,600
At least 300% but less than 400%	$2,700

If the advance payments of the premium assistance credit for a taxable year are less than the amount of the credit that the individual is allowed, the additional credit amount is allowed when the individual files an income tax return for the year.

Explanation of Provision

For a taxable year beginning in 2020, the provision removes the requirement that excess advance payments are treated as an additional tax liability on the individual's income tax return for the taxable year. Accordingly, under the provision no excess advance payment is subject to recapture. The provision applies to taxpayers who file a 2020 income tax return and reconcile any advance payment of the credit.[398]

Effective Date

The provision applies to taxable years beginning after December 31, 2019.

[396] Treas. Reg. sec. 1.6011–8. Under section 36B(f)(3), an Exchange is required to report to the IRS and to the individual the months during a year for which the individual was covered by a qualified health plan purchased through the Exchange; the level of coverage; the name, address, and TIN of the primary insured and each individual covered by the policy; the total premiums paid by the individual; and, if applicable, advance payments made on behalf of the individual.

[397] Rev. Proc. 2020–45, 2020–46 I.R.B. 1016. The applicable dollar amounts are indexed to reflect cost-of-living increases, with the amount of any increase rounded down to the next lowest multiple of $50.

[398] All taxpayers who receive the benefit of advance payments of the premium assistance credit are required to file an income tax return for the taxable year and reconcile the advance payments. Treas. Reg. sec. 1.6011–8. Advance payments of the premium assistance credit for 2020 are reported on Form 8962, *Premium Tax Credit (PTC)*, line 29, and on Form 1040, Schedule 2, *Additional Taxes*, line 2.

16. Application of premium tax credit in case of individuals receiving unemployment compensation during 2021 (sec. 9663 of the Act and sec. 36B of the Code)

Present Law

A refundable tax credit (the "premium assistance credit") is provided for eligible individuals and families to subsidize the purchase of "qualified health plans,"[399] health insurance plans offered through an American Health Benefit Exchange ("Exchange") created by the Patient Protection and Affordable Care Act ("PPACA").[400] For background on the premium assistance credit, see the description of present law for section 9661 of the American Rescue Plan Act of 2021 (Pub. L. No. 117–2).

Unemployment compensation

Unemployment compensation benefits are includible in gross income.[401] Unemployment compensation is defined as any amount received under a law of the United States or of a State which is in the nature of unemployment compensation.[402] The CARES Act temporarily expanded States' ability to provide unemployment insurance for many workers affected by the COVID–19 pandemic, including for workers who are not ordinarily eligible for unemployment benefits.[403] The CAA generally extended and reauthorized certain provisions of the CARES Act unemployment insurance expansion.[404]

Explanation of Provision

The provision provides a rule for the premium assistance credit in the case of a taxpayer who has received, or has been approved to receive, unemployment compensation for any week beginning during calendar year 2021.[405] Under the rule, for a taxable year beginning in 2021, (i) such a taxpayer is treated as an applicable taxpayer, and (ii) the taxpayer's household income is not taken into account to the extent it exceeds 133 percent of FPL for a family of the size involved. Accordingly, under the provision, a taxpayer receiving unemployment compensation during 2021 and whose household income exceeds 133 percent of FPL may receive a larger premium assistance credit and may by subject to lower recapture than under present law. In addition, a taxpayer receiving unemployment compensation during 2021 whose household income is less than 100 percent of FPL may be allowed a premium assistance credit.

The special rule does not affect the requirement that a married couple must file a joint return to claim the premium assistance credit. The special rule also does not apply to determinations of

[399] Sec. 36B. Qualified health plans generally must meet certain requirements. Secs. 1301 and 1302 of the PPACA, 42 U.S.C. secs. 18021 and 18022.
[400] Pub. L. No. 111–148, March 23, 2010. The PPACA was modified by the Health Care and Education Reconciliation Act of 2010 ("HCERA"), Pub. L. No. 111–152, Title I, sec. 1001, March 30, 2010. PPACA and HCERA are referred to collectively as the Affordable Care Act ("ACA").
[401] Sec. 85.
[402] Sec. 85(b); see also Treas. Reg. sec. 1.85–1(b)(1).
[403] Pub. L. No. 116–136, Div. A, Title II, subtitle A.
[404] Pub. L. No. 116–260, Div. N, Title II, subtitle A.
[405] Unemployment compensation has the meaning provided in section 85(b).

household income for purposes of determining the affordability of employer-sponsored health plans and QSEHRAs.

The provision applies to a taxpayer only if the taxpayer attests to receipt of or approval for unemployment compensation. The Secretary may prescribe documentation requirements to verify the taxpayer's receipt of or approval for unemployment compensation. These requirements could include information available to the Secretary from third-party information reporting.[406]

Taxpayers may be able to take advantage of the COVID–19 related special enrollment period to receive the benefit of this special rule.

Effective Date

The provision applies to taxable years beginning after December 31, 2020.

17. Repeal of worldwide allocation of interest election (sec. 9671 of the Act and sec. 864 of the Code)

Present Law

For purposes of computing the section 904 foreign tax credit limitation, a taxpayer must determine the amount of its taxable income from foreign sources. As part of this determination, the taxpayer must allocate and apportion deductions between U.S.-source gross income and foreign-source gross income in each limitation category.

The current rules generally treat interest expense as being properly attributable to all business activities and property of a taxpayer, regardless of any specific purpose for incurring a specific obligation on which interest is paid. For purposes of allocating and apportioning interest expense, all members of an affiliated group of corporations generally are treated as a single corporation (the so-called "one-taxpayer rule") and the allocation and apportionment of such expense must be made on the basis of assets, rather than gross income.[407] An affiliated group in this context generally is defined by reference to the rules for determining whether corporations are eligible to file consolidated returns.[408] As with the rules for filing a consolidated return, the definition of affiliated group for interest expense allocation and apportionment purposes generally also excludes foreign corporations.[409] Thus, while debt generally is

[406] See sec. 6050B (returns relating to unemployment compensation).

[407] Sec. 864(e)(1), (e)(2).

[408] Sec. 864(e)(5). For consolidation purposes, the term affiliated group is one or more chains of includible corporations connected through stock ownership with a common parent corporation that is an includible corporation, but only if: (1) the common parent owns directly stock possessing at least 80 percent of the total voting power and at least 80 percent of the total value of the stock of at least one other includible corporation; and (2) stock meeting the same voting power and value standards with respect to each includible corporation (excluding the common parent) is directly owned by one or more other includible corporations. Generally, an includible corporation is any domestic corporation except certain corporations exempt from tax under section 501 (for example, corporations organized and operated exclusively for charitable or educational purposes), certain life insurance companies, corporations electing application of the possession tax credit, regulated investment companies, real estate investment trusts, and domestic international sales corporations. A foreign corporation generally is not an includible corporation. Sec. 1504.

[409] Secs. 864(e)(5) and 1504(b)(3). An exception to this general rule excluding foreign corporations is that the affiliated group for interest allocation purposes includes a foreign corporation if more than 50 percent of its gross income for the taxable year is effectively connected with

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considered fungible among the assets of a group of domestic affiliated corporations, the same rules do not apply between the domestic and foreign members of a group.

For the first taxable year beginning after December 31, 2020,[410] section 864(f) provides that the common parent of a U.S. affiliated group may elect to allocate and apportion the interest expense of each member of its worldwide affiliated group[411] as if all domestic and foreign affiliates are a single corporation. The election is a one-time election, due with the filing of the first return beginning after December 31, 2020, in which a worldwide affiliated group exists and has at least one foreign corporation. It is irrevocable absent consent of the IRS. A result of this rule is that interest expense of foreign members of the worldwide affiliated group is taken into account in determining whether a portion of the interest expense of the domestic members of the group must be allocated to foreign-source income. An allocation to foreign-source income generally is required only if, in broad terms, the domestic members of the group are more highly leveraged, based on relative assets, than is the entire worldwide group.

Explanation of Provision

The provision repeals the provision permitting taxpayers to elect to allocate and apportion interest expense on a worldwide basis.

Effective Date

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

18. Clarification of tax treatment of targeted EIDL advances and restaurant revitalization grants (secs. 9672 and 9673 of the Act)

Present Law

Tax treatment relating to amounts excluded from income

Exclusions from income

Gross income means all income from whatever source derived.[412] Specific exclusions from income apply to certain otherwise includable amounts and payments, however. For example, income exclusions apply to qualified disaster relief payments and qualified disaster mitigation payments.[413]

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the conduct of a U.S. trade or business and at least 80 percent of the vote or value of all outstanding stock of the foreign corporation is owned directly or indirectly by members of the affiliated group (determined with regard to this sentence). Sec. 864(e)(5)(A).

[410] Section 864(f), added to the Code by section 401 of the American Jobs Creation Act, Pub. Law 108–357, in 2004, with delayed effective dates, most recently delayed until taxable years beginning in 2021. See Hiring Incentives to Restore Employment Act, Pub. L. No. 111–147, sec. 551(a).

[411] As defined in subsection 864(f)(1)(C), a worldwide affiliated group includes eligible members determined without regard to the limitations of section 1504(b)(2) (insurance companies subject to tax under section 801) and controlled foreign corporations if the members of the group in aggregate meet ownership requirements of section 1504(a)(2).

[412] Sec. 61; *U.S. v. Kirby Lumber Co.*, 284 U.S. 1 (1931).

[413] Sec. 139.

Tax treatment of forgiveness of loans

The forgiveness of a loan is generally treated as income from discharge of indebtedness.[414] As a simple example, if a taxpayer borrows $1,000 from a lender, and if the lender subsequently forgives the loan so the taxpayer does not repay it, the taxpayer has discharge of indebtedness income of $1,000 that is taken into account in determining income tax. However, limited exclusions apply to income from a discharge of certain student loans, indebtedness that occurs in a Title 11 case (generally, a bankruptcy case), or that occurs when the taxpayer is insolvent to the extent of the insolvency amount, or arises from the discharge of qualified farm indebtedness, certain real property business indebtedness, or certain qualified residence indebtedness.[415]

Effect of income exclusion on deductions, tax attributes, and basis

In general.—Several provisions limit deductions, tax attributes, or basis increases associated with excluded income. These provisions maintain accurate income measurement by preventing the reduction of taxable income for costs associated with untaxed income.

Limitations on deductions.—One such rule, section 265, disallows deductions that are allocable to a class of income wholly exempt from income tax.[416] Similarly, a pro rata limitation on interest deductions applies in the case of a financial institution with tax-exempt interest income.[417] An interest deduction limitation rule applies in the case of a life insurance contract, the death benefit under which is excludable from income by section 101(a).[418]

Reductions in tax attributes.—In the case of discharge of indebtedness income that is excluded from income,[419] rules for reduction of tax attributes apply.[420] The excluded amount is applied to reduce the tax attributes of the taxpayer in the order prescribed by statute: (1) net operating losses, (2) general business credit, (3) minimum tax credit, (4) capital loss carryovers, (5) basis of the taxpayer's property, (6) passive activity loss and credit carryovers, and (7) foreign tax credit carryovers.

Limitations on basis increases.—Limitations apply to otherwise allowable increases in the basis of property associated with excluded income. For example, in the case of qualified disaster mitigation payments that are excluded from income, no increase in the

[414] Sec. 61(a)(11).

[415] Sec. 108(a). For a discussion of changes made by the American Rescue Plan Act of 2021 (Pub. L. No. 117–2) to section 108 with respect to student loan forgiveness, see the description below of section 9675 of that Act.

[416] Sec. 265(a)(1). This rule applies with respect to exempt income other than interest; section 265 also disallows the deduction for interest expense on debt incurred or continued to purchase or carry obligations the interest income on which is wholly exempt from income tax (sec. 265(a)(2)), and disallows deductions otherwise allowable under section 212 for expenses for the production of interest income wholly exempt from income tax.

[417] The limitation ratio is (1) the average adjusted bases of certain types of tax-exempt obligations, to (2) average adjusted bases for all assets of the taxpayer (sec. 265(b)).

[418] Sec. 264(f). This pro rata interest deduction limitation permits no deduction for that portion of the taxpayer's interest expense determined by applying the ratio of (1) unborrowed policy cash values, to (2) the sum of all the taxpayer's average unborrowed policy cash values and average adjusted bases of all other assets (sec. 264(f)(1) and (2)).

[419] Sec. 108.

[420] Secs. 108(b) and 1017.

basis or adjusted basis of property is allowed for any amount so excluded.[421]

Circumstances in which limitations not imposed.—Limitations on deductions, tax attributes, or basis increases are not imposed in certain situations in which the policy of the exclusion may outweigh the income tax policy of accurate income measurement. For example, in the case of excludable parsonage and military housing allowances, no deduction is denied for mortgage interest or real property taxes on the taxpayer's home under the section 265 deduction limitation by reason of the receipt of the excludable amount.[422] As another example, the pro rata interest deduction limitation for financial institutions with exempt income generally does not apply in the case of tax-exempt obligations issued in 2009 or 2010.[423]

Tax treatment of partnerships.—A partnership generally is not subject to Federal income tax, but rather, income and gain of the partnership are generally taxed to partners. Items of partnership income (including tax exempt income), gain, loss, deduction, and credit pass through to partners.[424] Although loss (including capital loss) and deductions of the partnership pass through to partners, a partner is allowed a loss or deduction only to the extent of the adjusted basis of the partnership interest, generally measured at the end of the partnership year in which the loss occurs or the deduction arises.[425]

Tax exempt or excluded income items of the partnership can affect the partner's basis in the partnership interest. Adjustments are made to the basis of a partner's interest to account for the partner's distributive share of partnership items.[426] The basis in the partnership interest is increased by the partner's distributive share of partnership income, including income that is exempt from tax.[427] A partner's basis in the partnership interest generally is increased by an increase in the partner's share of partnership liabilities and is decreased by a decrease in the partner's share of liabilities.[428]

Tax treatment of S corporations.—Income of an S corporation is taxed to the S corporation shareholders. Each S corporation shareholder's pro rata share of S corporation income (including tax exempt income), gain, loss, deduction and credit is passed through to

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[421] Sec. 139(g)(3). See also section 139(h) (denial of double benefit rule). As another example, the basis of property is reduced to the extent of contributions to capital of a corporation excludable from gross income under section 118 (see sec. 362).

[422] Sec. 265(a)(6).

[423] Sec. 265(b)(7). This rule is subject to the proviso that the amount of such tax-exempt obligations does not exceed two percent of the taxpayer's average adjusted bases of tax-exempt obligations to which the interest limitation does apply. The years 2009 and 2010 followed the financial crisis of 2008.

[424] Secs. 701 and 702.

[425] Sec. 704(d). Other limitations may apply. See *e.g.,* secs. 465 and 469.

[426] The basis of a partner's interest that is acquired by contribution to the partnership is generally the amount of money and the adjusted basis of property contributed (sec. 722) and is adjusted under section 705. Section 705 provides that the basis of the partnership interest in increased by the sum of the partner's distributive share of taxable income, income exempt from tax, and the excess of depletion deductions over the basis of the depletable property. The basis of the partnership interest is decreased by distributions from the partnership and by the sum of the partner's distributive share of losses, expenditures that are not deductible in computing taxable income and not properly chargeable to capital account, and certain depletion deductions.

[427] Sec. 705(a)(1)(B). As noted in the preceding footnote, there are also other adjustments increasing or decreasing basis of a partner's interest.

[428] Sec. 752. An increase in a partner's share of partnership liabilities is treated as a contribution to the partnership (sec. 752(a)), and a decrease in a partner's share of partnership liabilities is treated as a distribution from the partnership (sec. 752(b)).

the shareholder.[429] The basis of an S corporation shareholder's stock is adjusted to account for the shareholder's pro rata share of S corporation income (including tax exempt income[430]), loss, deduction or credit. An S corporation shareholder's stock basis is not adjusted to take account of S corporation-level debt (unlike a partner's basis in its partnership interest).

Emergency EIDL grants and targeted EIDL advances under the CARES Act[431] and the Consolidated Appropriations Act, 2021[432]

Targeted EIDL advances that are not required to be repaid

Under 2020 legislation, an eligible entity that applies for a specified type of Small Business Act loan[433] may request an advance.[434] The advance generally may not exceed $10,000. The applicant is not required to repay the advance, even if the loan for which the applicant applied is subsequently denied.[435]

Tax treatment

An EIDL advance[436] that is not repaid[437] in whole or in part is not included in the income of the person that receives the advance, for Federal income tax purposes.[438] In the case of funding that is received relating to small business continuity, adaptation, and resiliency,[439] the funding is not included in the income of the person that receives the funding.[440]

Further, no deduction is denied, no tax attribute is reduced, and no basis increase is denied, by reason of the exclusion from income.[441] As a result, otherwise deductible costs remain deductible

[429] Secs. 1363(a) and 1366.
[430] Secs. 1367(a)(1)(A) and 1366(a)(1)(A).
[431] Pub. L. No. 116–136.
[432] Pub. L. No. 116–260.
[433] Economic Injury Disaster Loan ("EIDL"). This is a loan under section 7(b)(2) of the Small Business Act, 15 U.S.C. 636(b)(2) (redesignated by the CARES Act to another statutory location).
[434] CARES Act sec. 1110(e). A specific amount was appropriated to fund EIDL advances.
[435] CARES Act sec. 1110(e)(5).
[436] CARES Act sec. 1110(e).
[437] CARES Act sec. 1110(e)(5) provides that the advance is not required to be repaid.
[438] Sec. 278(b) of Division N of the Consolidated Appropriations Act, 2021 (Pub. L. N. 116–260). See also guidance in IRS Publication 525, *Taxable and Nontaxable Income*, "Reminders," page 2, rev. February 7, 2023, https://www.irs.gov/pub/irs-pdf/p525.pdf (stating, "gross income does not include any amount arising from the forgiveness of certain loans, emergency Economic Injury Disaster Loan (EIDL) grants, and certain loan repayment assistance, each as provided by the CARES Act, effective for tax years ending after March 27, 2020"). See also Joint Committee on Taxation, *General Explanation of the Tax Legislation Enacted in the 116th Congress* (JCS–1–22), page 389.
[439] This funding is provided in section 331 of the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act, which is in Division N of the Consolidated Appropriations Act, 2021 (Pub. L. No. 116–260). The total amount of such funding that a covered entity may receive is $10,000, and if a covered entity received an EIDL grant (advance) under section 1110(e) of the CARES Act, the amount of the grant under this section 331 is the difference between $10,000 and the amount of the previously received grant (sec. 331(b)). A covered entity for this purpose is generally defined as an entity that is eligible for a specified type of Small Business Administration loan, applies for such a loan during the period January 31, 2020, and ending December 31, 2021, is located in a low-income community, has suffered an economic loss of greater than 30 percent, and employs no more than 300 employees (sec. 331(a)(2)).
[440] Sec. 278(b) of Division N of the Act.
[441] Similar rules were enacted with respect to forgiven Paycheck Protection Program loans that were excluded from income. As background, the CARES Act established the Paycheck Protection Program and provided rules for covered loans, which were eligible for forgiveness and exclusion from income (Pub. L. No. 116–136, sec. 1106). After the CARES Act was enacted on March 27, 2020, the Treasury Department issued Notice 2020–32 providing that no deduction

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even though the costs are paid with the excluded income or are associated with the excluded amount. Similarly, because section 108 does not apply to the exclusion from income provided under the provision, no tax attribute is reduced by reason of the exclusion.[442] Further, an otherwise allowable increase in the basis of property remains allowable even if the expenditure giving rise to the basis increase is paid with the excluded income or is associated with the excluded amount.

For example, if a person engaged in a trade or business receives an EIDL advance or funding described in the provision and uses the proceeds to pay deductible wages of employees of the business, the section 162 deduction for the wages is not disallowed even though the advance or funding is excluded from income.

Partnerships and S corporations. If the person that receives the EIDL advance or funding is a partnership or S corporation, any amount excluded from income by reason of the provision is treated as tax exempt income for purposes of sections 705 (the determination of a partner's basis in the partnership interest) and 1366 (the passthrough of items to an S corporation shareholder). The provision also requires the Secretary of the Treasury (or the Secretary's delegate) to prescribe rules for determining a partner's distributive share of any amount treated as tax exempt income under the provision.

For example, assume that a partnership has two partners (A and B). The partnership is engaged in a trade or business, receives an EIDL advance of $10,000, and uses the proceeds to pay deductible wages of employees of the business. The section 162 deduction for the wages is not disallowed even though the advance is excluded from income. A's and B's aggregate basis in the partnership is increased by $10,000. Treasury guidance determines by how much each of A's and B's basis in their partnership interests, respectively, is increased.[443]

Reporting requirements

Information returns and payee statements in general

Information returns are required to be filed concerning a variety of transactions and payments.[444] A person that is required to file an information return generally is also required to furnish a statement to the other party to the transaction or the recipient of the payment.

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is allowed for an expense that is otherwise deductible if the payment of the expense results in the forgiveness of a covered loan under the Paycheck Protection Program and the income associated with the forgiveness is excluded from gross income (2020–21 I.R.B. 837). However, in the Consolidated Appropriations Act, 2021 (Pub. L. No. 116–260, Div. N, sec. 276, rules similar to the above rules for EIDL grants and targeted EIDL advances were enacted with respect to forgiven Paycheck Protection Program loans. These legislative rules reverse IRS Notice 2020–32. The IRS announced that IRS Notice 2020–32 is obsolete in Rev. Rul. 2021–2, January 6, 2021, https://www.irs.gov/pub/irs-drop/rr-21-02.pdf.

[442] Because the exclusion from income is allowed under section 278(b) of Division N of the Act, and not under Internal Revenue Code section 108, the tax attribute reduction requirements that relate to the income exclusion under sections 108 and 1017 do not apply.

[443] Rev. Proc. 2021–49, https://www.irs.gov/pub/irs-drop/rp-21-49.pdf. Section 4 of the Rev. Proc. addresses the determination of adjustments to a partner's basis in its interest.

[444] See Chapter 61 of the Code, relating to information and returns, which includes sections 6001–6117.

Reporting of cancellation of indebtedness income

Reporting of cancellation of indebtedness income on Form 1099–C or 1099–A generally is required if debt is discharged in whole or in part. A person required to report such income includes certain financial institutions and their affiliates and organizations engaged in a significant trade or business of lending, as well as certain governmental entities (and quasi-governmental entities, such as the FDIC, and their affiliates).[445]

In IRS Notice 2021–06,[446] the IRS waived the requirement to file certain information returns or furnish certain payee statements otherwise required by Chapter 61 of the Code with respect to certain amounts excluded from income by reason of certain provisions under the CARES Act[447] and the Consolidated Appropriations Act, 2021[448] (*e.g.,* amounts related to Emergency EIDL grants, targeted EIDL advances, and the Paycheck Protection Program).

Explanation of Provision

Targeted EIDL advances

In general

Additional funding with respect to targeted EIDL advances is provided in the Act, and program requirements are modified.[449]

Tax treatment

Amounts received from the Administrator of the Small Business Administration in connection with the additional funding and modified program requirements for EIDL in the form of a targeted EIDL advance are not included in the income of the person that receives the advance, for Federal income tax purposes.[450]

Further, no deduction is denied, no tax attribute is reduced, and no basis increase is denied, by reason of the exclusion from income. As a result, otherwise deductible costs remain deductible even though the costs are paid with the excluded income or are associated with the excluded amount. Similarly, because section 108 does not apply to the exclusion from income provided under the provision, no tax attribute is reduced by reason of the exclusion.[451] Further, an otherwise allowable increase in the basis of property remains allowable even if the expenditure giving rise to the basis in-

[445] Sec. 6050P. The reporting requirement applies when a debt is cancelled or when an identifiable event (described in guidance) occurs. Treas. Reg. 1.6050P–1 and –2; and see Instructions for Forms 1099–A and 1099–C, https://www.irs.gov/pub/irs-pdf/i1099ac.pdf, page 4 ("When a Debt is Cancelled").

[446] IRS Notice 2021–06, Waiver of Information Reporting Requirements with respect to Certain Amounts Excluded from Gross Income, January 19, 2021, https://www.irs.gov/pub/irs-drop/n-21-06.pdf.

[447] Pub. L. No. 116–136.

[448] Pub. L. No. 116–260.

[449] Sec. 5002 of the Act.

[450] Sec. 9672(1) of the Act. Thus, the provision provides the same treatment as under present law for previous EIDL advances. See also Rev. Proc. 2021–33, 2021–34 I.R.B. 327 (providing a safe harbor to exclude such amounts from gross receipts solely for purposes of determining eligibility to claim the employee retention credit; for a discussion of the employee retention credit and changes made by the Act, see the description of section 9651 of the Act earlier in this document).

[451] Because the exclusion from income is allowed under section 9672 of the Act, and not under Internal Revenue Code section 108, the tax attribute reduction requirements that relate to the income exclusion under sections 108 and 1017 do not apply.

crease is paid with the excluded income or is associated with the excluded amount.

For example, if a person engaged in a trade or business receives an EIDL advance and uses the proceeds to pay deductible wages of employees of the business, the section 162 deduction for the wages is not disallowed even though the advance or funding is excluded from income.

Partnerships and S corporations

If the person that receives the targeted EIDL advance is a partnership or S corporation, any amount excluded from income by reason of the provision is treated as tax exempt income for purposes of sections 705 (the determination of a partner's basis in the partnership interest) and 1366 (the passthrough of items to an S corporation shareholder). The provision also requires the Secretary of the Treasury (or the Secretary's delegate) to prescribe rules for determining a partner's distributive share of any amount treated as tax exempt income under the provision.

For example, assume that a partnership has two partners (A and B). The partnership is engaged in a trade or business, receives a targeted EIDL advance of $10,000, and uses the proceeds to pay deductible wages of employees of the business. The section 162 deduction for the wages is not disallowed even though the advance is excluded from income. A's and B's aggregate basis in the partnership is increased by $10,000. Treasury guidance determines by how much each of A's and B's basis in their partnership interests, respectively, is increased.[452]

Restaurant revitalization grants

In general

The Act provides for the establishment and funding of a Restaurant Revitalization Fund within the Treasury Department.[453] The Small Business Administration is directed to award grants from the Fund to eligible entities that apply and that provide the required certifications. The amount of the grant is to equal the pandemic-related revenue loss of the eligible entity. The aggregate grant amount for an eligible entity and affiliated businesses may not exceed $10,000,000, and is limited to $5,000,000 per physical location of the eligible entity. The eligible entity may use the grant funds for specified expenses incurred as a direct result of, or during, the COVID–19 pandemic that include payroll costs, payments of principal and interest on a mortgage, rent payments, utilities, maintenance expenses, certain supplies, food and beverage costs, and other specified expenses. An eligible entity means a restaurant, food stand, food truck, food cart, caterer, saloon, inn, tavern, bar, lounge, brewpub, tasting room, taproom, licensed facility or premise of a beverage alcohol producer where the public may taste, sample, or purchase products, or other similar place of business in which the public or patrons assemble for the primary purpose of being served food or drink, including those located in an

[452] Rev. Proc. 2021–49, https://www.irs.gov/pub/irs-drop/rp-21-49.pdf. Section 4 of the Rev. Proc. addresses the determination of adjustments to a partner's basis in its interest.
[453] Sec. 5003 of the Act.

airport terminal or that are a Tribally-owned concern. An eligible entity does not include any of the aforementioned businesses that (i) is a State or local government-operated business; (ii) as of March 13, 2020, owns or operates (together with any affiliated business) more than 20 locations, regardless of whether those locations do business under the same or multiple names; or (iii) has a pending application for or has received a grant under section 324 of the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act.[454] A publicly-traded company is also not an eligible entity.

Tax treatment

Amounts received from the Administrator of the Small Business Administration in the form of a restaurant revitalization grant are not included in the income of the person that receives the grant, for Federal income tax purposes.[455]

Further, no deduction is denied, no tax attribute is reduced, and no basis increase is denied, by reason of the exclusion from income. As a result, otherwise deductible costs remain deductible even though the costs are paid with the excluded income or are associated with the excluded amount. Similarly, because section 108 does not apply to the exclusion from income provided under the provision, no tax attribute is reduced by reason of the exclusion.[456] Further, an otherwise allowable increase in the basis of property remains allowable even if the expenditure giving rise to the basis increase is paid with the excluded income or is associated with the excluded amount.

Partnerships and S corporations

If the person that receives the restaurant revitalization grant is a partnership or S corporation, any amount excluded from income by reason of the provision is treated as tax exempt income for purposes of sections 705 (the determination of a partner's basis in the partnership interest) and 1366 (the passthrough of items to an S corporation shareholder). The provision also requires the Secretary of the Treasury (or the Secretary's delegate) to prescribe rules for determining a partner's distributive share of any amount treated as tax exempt income under the provision.[457]

Effective Date

The provisions are effective upon enactment (March 11, 2021).

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[454] Title III of Div. N of Pub. L. No. 116–260.

[455] Sec. 9673 of the Act. See also Rev. Proc. 2021–33, 2021–34 I.R.B. 327 (providing a safe harbor to exclude such amounts from gross receipts solely for purposes of determining eligibility to claim the employee retention credit; for a discussion of the employee retention credit and changes made by the Act, see the description of section 9651 of the Act earlier in this document).

[456] Because the exclusion from income is allowed under section 9673 of the Act, and not under Internal Revenue Code section 108, the tax attribute reduction requirements that relate to the income exclusion under sections 108 and 1017 do not apply.

[457] Rev. Proc. 2021–49, https://www.irs.gov/pub/irs-drop/rp-21-49.pdf. Section 4 of the Rev. Proc. addresses the allocation of deductions and of amounts treated as tax exempt income in the case of a partnership.

19. Modification of exceptions for reporting of third party network transactions (sec. 9674 of the Act and sec. 6050W of the Code)

Present Law

Present law requires persons to file information returns concerning certain transactions with other persons.[458] The person filing an information return is also required to provide the person for whom the information return is being filed with a written statement showing the information that was reported to the IRS, which generally includes aggregate payments made, and the contact information for the payor.[459] These returns are intended to assist taxpayers in preparing their income tax returns and to help the IRS determine whether such income tax returns are correct and complete.

Returns relating to payments made in settlement of payment card and third party network transactions

Starting in 2012 (for payments received in 2011), payment settlement entities are required to report to the IRS and to businesses that receive these payments the gross amount of payments made in settlement of payment card transactions and third party network transactions.[460]

Specifically, the statute requires any payment settlement entity making a payment to a participating payee in settlement of reportable payment transactions to 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 ("TIN") of the participating payees.[461] A "reportable payment transaction" means any payment card transaction and any third party network transaction.[462]

A "payment settlement entity" means, in the case of a payment card transaction, the merchant acquiring entity and, in the case of a third party network transaction, the third party settlement organization.[463] A "participating payee" means, in the case of a payment card transaction, any person who accepts a payment card as payment and, in the case of a third party network transaction, any person who accepts payment from a third party settlement organization in settlement of such transaction.[464] A "person" includes a governmental unit. A "person" generally does not include someone with a foreign address.[465]

Returns relating to payments made in settlement of payment card transactions

For purposes of the reporting requirement, the term "merchant acquiring entity" means the bank or other organization with the

[458] Secs. 6031 through 6060.
[459] Sec. 6041(d).
[460] Sec. 6050W; Pub. L. No. 110–289 (2008), sec. 3091(a) added sec. 6050W, effective generally for returns for calendar years beginning after December 31, 2010.
[461] Sec. 6050W(a).
[462] Sec. 6050W(c)(1).
[463] Sec. 6050W(b).
[464] Sec. 6050W(d)(1).
[465] Sec. 6050W(d)(1)(B), (C).

contractual obligation to make payment to participating payees in settlement of payment card transactions.[466] A "payment card transaction" means any transaction in which a payment card is accepted as payment.[467] A "payment card" is defined as any card (e.g., a credit card or debit card) which is issued pursuant to an agreement or arrangement which provides for: (1) one or more issuers of such cards; (2) a network of persons unrelated to each other, and to the issuer, who agree to accept such cards as payment; and (3) standards and mechanisms for settling the transactions between the merchant acquiring entities and the persons who agree to accept such cards as payment.[468] Thus, under the provision, a bank that enrolls a business to accept credit cards and contracts with the business to make payment on credit card transactions is required to report to the IRS the business's gross credit card transactions for each calendar year on a Form 1099–K, *Payment Card and Third Party Network Transactions*. The bank also is required to provide a copy of the information report to the business.

Returns relating to payments made in settlement of third party network transactions

The statute also requires reporting on a third party network transaction. The term "third party network transaction" means any transaction which is settled through a third party payment network.[469] A "third party payment network" is defined as any agreement or arrangement: (1) that involves the establishment of accounts with a central organization by a substantial number of persons (*e.g.*, more than 50) who are unrelated to such organization, provide goods or services, and agree to settle transactions for the provision of such goods or services pursuant to such agreement or arrangement; (2) that provides for standards and mechanisms for settling such transactions; and (3) that guarantees persons providing goods or services pursuant to such agreement or arrangement will be paid for providing such goods or services.[470]

In the case of a third party network transaction, the payment settlement entity is the third party settlement organization, which is defined as the central organization which has the contractual obligation to make payment to participating payees of third party network transactions.[471] Thus, an organization generally is required to report if it provides a network enabling buyers to transfer funds to sellers who have established accounts with the organization and have a contractual obligation to accept payment through the network. However, an organization operating a network which merely processes electronic payments (such as wire transfers, electronic checks, and direct deposit payments) between buyers and sellers, but does not have contractual agreements with sellers to use such network, is not required to report. Similarly, an agree-

[466] Sec. 6050W(b)(2).
[467] For this purpose, the acceptance as payment of any account number or other indicia associated with a payment card also qualifies a payment card transaction.
[468] Sec. 6050W(d)(2).
[469] Sec. 6050W(c)(3).
[470] Sec. 6050W(d)(3).
[471] Sec. 6050W(b)(3).

ment to transfer funds between two demand deposit accounts will not, by itself, constitute a third party network transaction.

A third party payment network does not include any agreement or arrangement that provides for the issuance of payment cards as defined by the provision.[472] In addition, there is a reporting exception for *de minimis* payments that applies to payments made by third party settlement organizations but not to payments made by merchant acquiring entities. A third party settlement organization is not required to report unless the aggregate value of third party network transactions with respect to a participating payee for the year exceeds $20,000 and the aggregate number of such transactions with respect to a participating payee exceeds 200.[473] If a payment of funds is made to a third party settlement organization by means of a payment card (i.e., as part of a payment card transaction), the $20,000 and 200 transaction de minimis rule continues to apply to any reporting obligation with respect to payment of such funds to a participating payee by the third party settlement organization made as part of a third party network transaction.

For example, if a business that provides a web-based rental platform for short-term travelers is considered a third party settlement organization, it does not have to provide a Form 1099–K to property owners participating on their web-based site who have received payments of $20,000 or less. On the other hand, if a company is considered a merchant acquiring entity, it would have to issue a Form 1099–K to all participating payees who have received payments of any amount starting with the first dollar.

Rules regarding reporting requirements

There are also reporting requirements on intermediaries who receive payments from a payment settlement entity and distribute such payments to one or more participating payees.[474] Such intermediaries are treated as participating payees with respect to the payment settlement entity and as payment settlement entities with respect to the participating payees to whom the intermediary distributes payments. Thus, for example, in the case of a corporation that receives payment from a bank for credit card sales conducted at the corporation's independently owned franchise stores, the bank is required to report to the corporation and to the IRS the gross amount of reportable payment transactions settled with respect to the corporation (notwithstanding the fact that the corporation does not accept payment cards and would not otherwise be treated as a participating payee). In turn, the corporation, as an intermediary, would be required to report the gross amount of reportable payment transactions allocable to each franchise store. The bank has no reporting obligation with respect to payments made by the corporation to its franchise stores.

Another rule provides that if a payment settlement entity contracts with a third party facilitator to settle reportable payment transactions on behalf of the payment settlement entity, the third

[472] Sec. 6050W(d)(3).
[473] Sec. 6050W(e).
[474] Sec. 6050W(b)(4).

party facilitator is required to file the annual information return in lieu of the payment settlement entity.[475]

The payment settlement entity is required to file information returns to the IRS on or before February 28 (March 31 if filing electronically) of the year following the calendar year for which the returns must be filed.[476] The statements are required to be furnished to the participating payees on or before January 31st of the year following the calendar year for which the return was required to be made.[477]

The Secretary has exercised authority under these rules to issue guidance to implement the reporting requirement, including rules to prevent the reporting of the same transaction more than once.[478]

The reportable payment transactions subject to information reporting generally are subject to backup withholding requirements. In addition, the information reporting penalties apply for any failure to file a correct information return or furnish a correct payee statement with respect to the reportable payment transactions. Any person who is required to file an information return or furnish a payee statement but who fails to do so on or before the prescribed due date is subject to a penalty that varies based on when, if at all, the correct information return is filed or furnished. Penalties are imposed for failure to file the information return,[479] or furnish payee statements.[480] No penalty is imposed if the failure is due to reasonable cause.[481] Both the failure to file and failure to furnish penalties are adjusted annually to account for inflation.

Explanation of Provision

The provision lowers and modifies the threshold below which a third party settlement organization is not required to report payments to participants in its network. Under the provision, for any calendar year, a third party settlement organization is required to report third party network transactions with any participating payee that exceed a minimum threshold of $600 in aggregate payments, regardless of the aggregate number of such transactions.

Third party network transactions include any transactions settled through a third party payment network. The provision also clarifies that third party network transactions only include transactions for the provision of goods or services (*i.e.*, personal gifts, charitable contributions, and reimbursements are excluded).

For example, an individual who registers for a mobile payment service and uses such service to reimburse friends or relatives for expenses, or on occasion sells a used item to another person, would not be engaging in transactions that are subject to reporting re-

[475] Sec. 6050W(b)(4)(B); Treas. Reg. sec. 1.6050W–1(d)(2).

[476] Treas. Reg. sec. 1.6050W–1(g). Taxpayers that file these information returns that report reportable payment transactions are entitled to a 30-day automatic extension of time to file. Treas. Reg. sec. 1.6081–8(a) (effective for requests for extension of time to file certain information returns due after December 31, 2016).

[477] Sec. 6050W(f); Treas. Reg. sec. 1.6050W–1(h).

[478] Treas. Reg. sec. 1.6050W–1(a)(4)(ii).

[479] Sec. 6721.

[480] Sec. 6722. Note that there is also a penalty provided in the Code under section 6723 for failure to comply timely with a specified information reporting requirement. However, this penalty applies in narrow circumstances and is unlikely to apply to payment settlement entities under section 6050W. See Treas. Reg. sec. 301.6723–1(a)(4).

[481] Sec. 6724.

quirements.[482] However, if that individual registers with such mobile payment service for the purposes of providing goods or services through use of that service, the mobile payment service is required to report on transactions exceeding $600 in the aggregate under the provision.

Effective Date

The part of the provision that lowers and modifies the reporting threshold is effective for returns for calendar years beginning after December 31, 2021.[483]

The part of the provision that clarifies that reporting is not required on transactions which are not for goods or services is effective for transactions after the date of enactment (March 11, 2021).

20. Modification of treatment of student loan forgiveness (sec. 9675 of the Act and sec. 108 of the Code)

Present Law

Gross income generally includes the amount of a taxpayer's indebtedness that is discharged. An amount that otherwise would be includible in gross income as a result of the discharge of a taxpayer's indebtedness may be excluded from gross income under one of several exceptions. Under one exception, an individual's gross income does not include any amount from the forgiveness (in whole or in part) of the individual's student loan (under the definition described below) if the forgiveness is made under a provision of the loan according to which all or a part of the individual's indebtedness will be discharged if the individual works for a certain period of time in certain professions for any of a broad class of employers.[484]

A loan is a student loan in respect of which the exclusion is allowed if it satisfies the following requirements.[485] A loan must be made to an individual to assist the individual in attending an educational organization that normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of students in attendance at the place where its educational activities are regularly carried on. A loan may qualify if the proceeds are used for tuition and required fees or for room and board expenses. The loan must be made by (1) the United States (or an instrumentality or agency thereof), (2) a State, territory, or possession of the United States, or the District of Columbia, or any political subdivision thereof, (3) a tax-exempt public benefit corporation that controls a State, county, or municipal hospital and whose employees

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[482] An individual who generally uses a mobile payment service for personal transactions such as those described has generally not entered an agreement with the third party payment network for the settlement of transactions for the provision of goods and services as described in section 6050W(d)(3)(A)(iii) and (C).

[483] Note, however, that the IRS has provided that for calendar years beginning before January 1, 2023, a third party settlement organization is not required to report payments (and penalties will not be asserted for failing to file or furnish forms) unless the gross amount of aggregate payments to be reported exceeds $20,000 and the number of such transactions with that participating payee exceeds 200. For returns for calendar years beginning after December 31, 2022, a third party settlement organization is required to report payments that exceed $600 in aggregate payments, regardless of the number of such transactions. Notice 2023–10, 2023–3 I.R.B. 403, January 17, 2023.

[484] Sec. 108(f)(1).

[485] Sec. 108(f)(2).

have been deemed to be public employees under State law, or (4) an educational organization that originally received the funds from which the loan was made from the United States, a State, territory, or possession of the United States, or the District of Columbia, or any political subdivision thereof, or a tax-exempt public benefit corporation. The exclusion from gross income for the discharge of a loan made by an educational organization described in the last prong applies only if the discharge is not on account of services performed for the organization.[486]

An individual's gross income also does not include an amount from the forgiveness of a loan made by an educational organization (or, in the case of a refinancing loan, an organization exempt from tax under section 501(a)) out of private, nongovernmental funds if the proceeds of such loans are used to pay costs of attendance at an educational institution or to refinance any outstanding student loans (not just loans made by educational organizations) and the student is not employed by the lender organization. In the case of such loans made or refinanced by educational organizations (or refinancing loans made by certain tax-exempt organizations), cancellation of the student loan must be contingent on the student working in an occupation or area with unmet needs and such work must be performed for, or under the direction of, a tax-exempt charitable organization or a governmental entity.

An amount paid by a person other than the taxpayer in repayment of the taxpayer's indebtedness generally is included in the taxpayer's gross income. An individual's gross income does not, however, include any loan repayment amount received under the National Health Service Corps Loan Repayment Program (the "NHSC Loan Repayment Program"), a qualifying State loan repayment program, or a qualifying State loan repayment or loan forgiveness program that is intended to provide for the increased availability of health care services in underserved or health professional shortage areas (as determined by the State).[487]

A temporary provision excludes from an individual's gross income an otherwise includible amount from the discharge of a qualifying loan on account of a student's death or total and permanent disability.[488] An amount from the discharge of a loan qualifies for this exclusion if the loan is (1) a student loan (under the requirements for student loans described previously) or (2) a private education loan.[489] This temporary exclusion applies to a discharge after December 31, 2017 and before January 1, 2026.

[486] Sec. 108(f)(3).

[487] Sec. 108(f)(4). The NHSC Loan Repayment Program offers loan repayment to certain health care professionals who provide medical services for a certain number of years at an approved service site in an area identified as having a shortage of health care professionals.

[488] Sec. 108(f)(5). The provision makes specific reference to those provisions of the Higher Education Act of 1965 that discharge William D. Ford Federal Direct Loan Program loans, Federal Family Education Loan Program loans, and Federal Perkins Loan Program loans in the case of death and total and permanent disability. See section 108(f)(5)(A)(i) and (ii). The provision also includes a general exclusion for a discharge on account of the death or total and permanent disability of the student. See section 108(f)(5)(A)(iii).

[489] Sec. 108(f)(5)(B). For this purpose a private education loan is defined in section 140(7) of the Consumer Credit Protection Act (15 U.S.C. sec. 1650(7)).

Explanation of Provision

The provision expands the temporary exclusion from gross income for amounts from the discharge of student loan or private education loan indebtedness. This expansion applies to discharges of loans (in whole or in part) after December 31, 2020 and before January 1, 2026.

Under the expanded exclusion, an amount from the discharge of indebtedness is excluded from gross income irrespective of whether the discharge is on account of a student's death or total and permanent disability.

The expanded exclusion applies to a broader category of loans than does the present law rule for discharges on account of death or disability. This broader category includes any loan provided expressly for postsecondary educational expenses, regardless of whether provided through the educational institution or directly to the borrower, if the loan was made, insured, or guaranteed by one of the categories of lenders in respect of which the present law exclusion is allowed (for example, the United States or a State) or by an eligible educational institution as defined in section 25A, a category of educational institution that includes nearly all public, nonprofit, and for-profit postsecondary institutions.

Effective Date

The provision applies to discharges of loans after December 31, 2020.

Subtitle H—Pensions

1. Temporary delay of designation of multiemployer plans as in endangered, critical, or critical and declining status (sec. 9701 of the Act, sec. 432 of the Code, and sec. 305 of ERISA)

Present Law

Multiemployer plans

A multiemployer plan is a plan to which more than one unrelated employer contributes, that is established pursuant to one or more collective bargaining agreements, and which meets such other requirements as specified by the Secretary of Labor.[490] Multiemployer plans are governed by a board of trustees consisting of an equal number of employer and employee representatives, referred to as the plan sponsor. In general, the level of contributions to a multiemployer plan is specified in the applicable collective bargaining agreements, and the level of plan benefits is established by the plan sponsor.

Like other private defined benefit plans,[491] multiemployer defined benefit plans are subject to minimum funding requirements under the Code and the Employee Retirement Income Security Act

[490] Sec. 414(f) and ERISA section 2(37). All section references herein are to the Internal Revenue Code of 1986, as amended (herein "Code"), unless otherwise stated.

[491] Sec. 414(j).

of 1974 ("ERISA").[492] An excise tax may be imposed on the employers maintaining the plan if the funding requirements are not met.[493] However, the excise tax does not apply for a taxable year with respect to a multiemployer plan if, for the plan years ending with or within the taxable year, the plan is in critical status (as defined below).[494]

General funding requirements for multiemployer plans

Employer contributions to a defined benefit plan are generally subject to minimum funding requirements, the details of which depend on whether the plan is a single employer plan or a multiemployer plan. Unless a funding waiver is obtained, an employer may be subject to a two-tier excise tax if the funding requirements are not met.

In general, the annual deduction limit on employer contributions to a multiemployer defined benefit plan for a year is the excess of (1) 140 percent of the plan's current liability (the present value of all benefits earned under the plan), over (2) the value of plan assets. However, the deduction limit is never less than the amount of contributions required under the funding rules. If contributions exceed the amount deductible, the employers that contribute to the multiemployer plan are generally subject to an excise tax.

General funding requirements apply to all multiemployer plans. Additional funding requirements apply to plans in endangered or critical status, as defined below. An employer that withdraws from a multiemployer plan is generally liable to the plan for a portion of the plan's unfunded vested benefits, referred to as withdrawal liability. Various provisions limit the amount of an employer's withdrawal liability.

Under the general funding requirements, a multiemployer defined benefit plan maintains a funding standard account, to which charges (such as for benefit accruals and negative plan experience) and credits (such as for positive plan experience and contributions) are made. The minimum required contribution for a plan year is the amount, if any, needed to balance accumulated credits and accumulated charges to the funding standard account. If required contributions are not made, causing the funding standard account to have a negative balance, an accumulated funding deficiency results.

A multiemployer plan is required to use an acceptable actuarial cost method (referred to as the plan's funding method) to determine the elements included in its funding standard account for a year, including normal cost and supplemental cost. Normal cost generally represents the cost of future benefits allocated to the year under the plan's funding method. The supplemental cost for a plan year is the cost of future benefits that would not be met by future normal costs, future employer contributions, or plan assets. Supplemental costs may be attributable to past service liability or to

[492] Secs. 412 and 431, and ERISA secs. 302 and 304. Additional rules apply to multiemployer plans that are insolvent under section 418E and ERISA section 4245. Certain changes were made to the funding requirements for multiemployer plans by the Pension Protection Act of 2006 ("PPA"), Pub. L. No. 109–280 and by the Multiemployer Pension Reform Act of 2014 ("MPRA"), Pub. L. No. 113–235, Division O.

[493] Sec. 4971.

[494] Sec. 4971(g)(1).

worse than expected plan experience. Supplemental costs are amortized (that is, recognized for funding purposes) over a specified number of years (generally 15 years) by annual charges to the funding standard account over that period. Factors that result in a supplemental loss can alternatively result in a gain that is recognized by annual credits to the funding standard account over a 15-year amortization period (in addition to a credit for contributions made for the plan year).

Actuarial assumptions used under the multiemployer plan funding rules must be reasonable. The interest rate (which represents the expected return on plan assets over time) and mortality assumptions used in funding computations are subject to these general standards; the funding rules do not specify the interest rate or mortality tables that need to be used. For funding purposes, the actuarial value of plan assets may be used, rather than fair market value, subject to certain conditions.

Additional requirements relating to plans in endangered or critical status

Additional funding-related requirements apply to a multiemployer defined benefit pension plan that is in endangered or critical status. In connection with the endangered and critical rules, not later than the 90th day of each plan year, the actuary for any multiemployer plan must certify to the Secretary and to the plan sponsor whether or not the plan is in endangered or critical status for the plan year. In the case of a plan which is in a funding improvement period or rehabilitation period, the actuary must also certify whether or not the plan is making its scheduled progress in meeting the requirements of its funding improvement or rehabilitation plan. If a plan is certified as being in endangered or critical status, notice of endangered or critical status must be provided within 30 days after the date of certification to plan participants and beneficiaries, the bargaining parties, the Pension Benefit Guaranty Corporation ("PBGC"), and the Secretary of Labor. Additional notice requirements apply in the case of a plan certified as being in critical status.

Failure of the plan's actuary to certify the status of the plan is treated as a failure to file the annual report (thus, an ERISA penalty in 2021 of up to $2,233 per day applies).

Various requirements apply to a plan in endangered or critical status, including adoption of and compliance with (1) a funding improvement plan in the case of a multiemployer plan in endangered status, and (2) a rehabilitation plan in the case of a multiemployer plan in critical status. In addition, restrictions on certain plan amendments, benefit increases, and reductions in employer contributions apply during certain periods.

A multiemployer plan generally is in endangered status if the plan is not in critical status and, as of the beginning of the plan year, (1) the plan's funded percentage for the plan year is less than 80 percent, or (2) the plan has an accumulated funding deficiency for the plan year or is projected to have an accumulated funding deficiency in any of the six succeeding plan years (taking into account amortization extensions).[495] A plan's funded percentage is the percentage determined by dividing the value of plan assets by the accrued liability of the plan. A plan that meets the requirements of both (1) and (2) is treated as in seriously endangered status.

A multiemployer plan is in critical status for a plan year if, as of the beginning of the plan year, it meets any of the following definitions:

- The funded percentage of the plan is less than 65 percent and the sum of (1) the market value of plan assets, plus (2) the present value of reasonably anticipated employer and employee contributions for the current plan year and each of the six succeeding plan years (assuming that the terms of the collective bargaining agreements continue in effect) is less than the present value of all benefits projected to be payable under the plan during the current plan year and each of the six succeeding plan years (plus administrative expenses);
- The plan has (1) an accumulated funding deficiency for the current plan year, not taking into account any amortization period extensions, or (2) the plan is projected to have an accumulated funding deficiency for any of the three succeeding plan years (four succeeding plan years if the funded percentage of the plan is 65 percent or less), not taking into account any amortization period extensions;
- The plan's (1) normal cost for the current plan year, plus interest for the current plan year on the amount of unfunded benefit liabilities under the plan as of the last day of the preceding year, exceeds the present value of the reasonably anticipated employer contributions for the current plan year, (2) the present value of vested (that is, nonforfeitable) benefits of inactive participants is greater than the present value of vested benefits of active participants, and (3) the plan has an accumulated funding deficiency for the current plan year, or is projected to have an accumulated funding deficiency for any of the four succeeding plan years (not taking into account amortization period extensions); or
- The sum of (1) the fair market value of plan assets, plus (2) the present value of the reasonably anticipated employer contributions for the current plan year and each of the four succeeding plan years (assuming that the terms of the collective bargaining agreements continue in effect) is less than the present value of all benefits projected to be payable under the plan during the current plan year and each of the four succeeding plan years (plus administrative expenses).[496]

The first plan year for which the plan is in critical status is referred to as the "initial critical year," and governs the timing of certain requirements and periods.

In making the determinations and projections applicable in determining and certifying endangered or critical status (or neither), the plan actuary must follow certain statutory standards. The actuary's projections generally must be based on reasonable actuarial estimates, assumptions, and methods that offer the actuary's best

[495] Sec. 432(b)(1) and ERISA sec. 305(b)(1).
[496] Sec. 432(b)(2) and ERISA sec. 305(b)(2).

estimate of anticipated experience under the plan.[497] In addition, the plan actuary must make projections for the current and succeeding plan years of the current value of the assets of the plan and the present value of all liabilities to participants and beneficiaries under the plan for the current plan year as of the beginning of the year. The projected present value of liabilities as of the beginning of the year must be based on the most recent actuarial statement required with respect to the most recently filed annual report or the actuarial valuation for the preceding plan year. Any projection of activity in the industry or industries covered by the plan, including future covered employment and contribution levels, must be based on information provided by the plan sponsor, which must act reasonably and in good faith.

In the case of a multiemployer plan in critical status, additional required contributions (referred to as employer surcharges) apply until the adoption of a collective bargaining agreement that is consistent with the rehabilitation plan. In addition, employers are relieved of liability for minimum required contributions under the otherwise applicable funding rules (and the related excise tax), provided that a rehabilitation plan is adopted and followed.[498] Moreover, subject to notice requirements, some benefits that would otherwise be protected from elimination or reduction may be eliminated or reduced in accordance with the rehabilitation plan.[499]

In the case of a failure to meet the requirements applicable to a multiemployer plan in endangered or critical status, the plan actuary, plan sponsor, or employers required to contribute to the plan may be subject to an excise tax under the Code or a civil penalty under ERISA.[500]

Explanation of Provision

Under the provision, the sponsor of a multiemployer defined benefit pension plan may, for an applicable plan year, elect to treat the plan's status the same as the plan's status[501] for the preceding plan year for purposes of the additional funding rules applicable to multiemployer plans in endangered[502] or critical status. The applicable plan year is either the first plan year beginning during the period beginning on March 1, 2020, and ending on February 28, 2021, or the next succeeding plan year, as designated by the plan sponsor. Thus, for example, a calendar year plan that is not in critical or endangered status for 2020 may elect to retain its non-critical and non-endangered status for 2021, and a calendar year plan

[497] Under section 432(j)(8) and ERISA section 305(j)(8), for purposes of the endangered and critical rules, various actuarial computations are based upon the unit credit funding method, regardless of whether it is the funding method used in applying the general funding requirements to the plan.

[498] Sec. 4971(g)(1)(A).

[499] The rules for multiemployer plans in critical status include the elimination or reduction of "adjustable benefits," which include some benefits that would otherwise be protected from elimination or reduction under the anti-cutback rules under section 411(d)(6) and ERISA section 204(g).

[500] Sec. 4971(g) and ERISA sec.502(c)(8). In addition, certain failures are treated as a failure to file an annual report with respect to the multiemployer plan, subject to a civil penalty under ERISA.

[501] For purposes of sec. 432 and sec. 305 of ERISA.

[502] Notice 2021–57, 2021–44 I.R.B. 706, November 1, 2021 provides guidance on such elections.

that was in either critical or endangered status for 2020 may elect to retain such status for 2021.

An election under the provision may only be made at such time and in such manner as the Secretary may prescribe and may only be revoked with the consent of the Secretary. Special notice provisions apply with respect to the election and the notification of participants, the bargaining parties, PBGC, and the Secretary of Labor.

In the case of a plan that elects to retain its endangered or critical status, the plan is not required to update its funding improvement or rehabilitation plan and schedules (as applicable) until the plan year that follows the applicable plan year. If an election is made by a plan under the provision and, without regard to the election, the plan is certified by the plan's actuary for the applicable plan year to be in critical status, the plan is treated as a plan in critical status for purposes of the special rules that relieve contributing employers from liability for minimum required contributions (that would apply under the otherwise applicable minimum funding rules) and the excise tax that applies in the case of a failure to make such contributions.

Effective Date

The provision is effective on the date of enactment (March 11, 2021).

2. Temporary extension of the funding improvement and rehabilitation periods for multiemployer pension plans in critical and endangered status for 2020 or 2021 (sec. 9702 of the Act, sec. 432 of the Code, and sec. 305 of ERISA)

Present Law

General funding requirements for multiemployer plans

General funding requirements apply to all multiemployer plans. Background on such requirements may be found in the description of present law for section 9701 of the Act.

Funding improvement and rehabilitation plans and periods

Additional funding rules apply to a multiemployer defined benefit pension plan that is in endangered or critical status.[503] These rules require the adoption of and compliance with (1) a funding improvement plan in the case of a multiemployer plan in endangered status, and (2) a rehabilitation plan in the case of a multiemployer plan in critical status.

The funding improvement period is the 10-year period beginning on the first day of the first plan year beginning after the earlier of (1) the second anniversary of the date of adoption of the funding improvement plan, or (2) the expiration of collective bargaining agreements that were in effect on the due date for the actuarial certification of endangered status for the initial determination year and covering, as of such date, at least 75 percent of the plan's ac-

[503] Sec. 432.

tive participants. The period ends if the plan is no longer in endangered status or if the plan enters critical status. Generally, in the case of a "seriously endangered plan," the funding improvement period is 15 years, rather than 10 years. The rehabilitation period is the 10-year period beginning on the first day of the first plan year following the earlier of (1) the second anniversary of the date of adoption of the rehabilitation plan or (2) the expiration of collective bargaining agreements that were in effect on the due date for the actuarial certification of critical status for the initial critical year and covering at least 75 percent of the active participants in the plan as of such due date. The rehabilitation period ends if the plan emerges from critical status.

Explanation of Provision

Under the provision, a plan sponsor of a multiemployer defined benefit pension plan that is in endangered or critical status for a plan year beginning in 2020 or 2021 may elect to extend the plan's otherwise applicable funding improvement or rehabilitation period by five years, from 10 to 15 years.[504] If a multiemployer defined benefit pension plan is in seriously endangered status for a plan year beginning in 2020 or 2021, the plan sponsor may elect to extend the plan's otherwise applicable funding improvement period by five years, from 15 to 20 years.

The election is to be made at such time, and in such manner and form, as the Secretary, or the Secretary's delegate, may prescribe in consultation with the Secretary of Labor.[505]

Effective Date

The provision is effective for plan years beginning after December 31, 2019.

3. Adjustments to funding standard account rules (sec. 9703 of the Act, sec. 431 of the Code, and sec. 304 of ERISA)

Present Law

Defined benefit pension plans generally are subject to minimum funding rules under the Code that require the sponsoring employer to periodically make contributions to fund plan benefits. Similar rules apply to plans under ERISA.

The minimum funding rules for single employer and multiemployer plans are different.[506] A single employer plan is a plan that is not a multiemployer plan. A multiemployer plan is generally a

[504] In Notice 2021–57, 2021–44 I.R.B. 706, November 1, 2021, Treasury provided guidance on the application of this provision if the plan had already extended the period pursuant to section 205 of the Worker, Retiree, and Employer Recovery Act of 2008 ("WRERA"), Pub. L. No. 110–343, by providing, "[I]f the plan's funding improvement period (as determined taking into account an election under section 205 of WRERA) ends on the last day of the 2022 plan year (assuming the plan does not change from endangered status at an earlier date).and the plan sponsor timely elects to extend the funding improvement period in accordance with section 9702 of the ARP, then the funding improvement period is extended so that it ends on the last day of the 2027 plan year (assuming that the plan does not change from endangered status at an earlier date).

[505] Notice 2021–57, 2021–44 I.R.B. 706, November 1, 2021 provides guidance on such elections.

[506] The Pension Protection Act of 2006, Pub. L. No. 109–280, modified the minimum funding rules for multiemployer defined benefit pension plans. These modifications are generally effective for plan years beginning after 2007.

plan to which more than one employer is required to contribute and which is maintained pursuant to a collective bargaining agreement.[507]

Funding standard account

A multiemployer defined benefit pension plan is required to maintain a special account called a "funding standard account" to which charges and credits (such as credits for plan contributions) are made for each plan year. If, as of the close of the plan year, charges to the funding standard account exceed credits to the account, the plan has an "accumulated funding deficiency" equal to the amount of such excess charges. For example, if the balance of charges to the funding standard account of a plan for a year would be $200,000 without any contributions, then a minimum contribution equal to that amount is required to meet the minimum funding standard for the year to prevent an accumulated funding deficiency. If credits to the funding standard account exceeds charges, a "credit balance" results. The amount of the credit balance, increased with interest, can be used to reduce future required contributions.

Amortization periods

A plan is required to use an acceptable actuarial cost method to determine the elements included in its funding standard account for a year. Generally, an acceptable actuarial cost method breaks up the cost of benefits under the plan into annual charges consisting of two elements for each plan year. These elements are referred to as the: (1) normal cost and (2) amortization of supplemental cost. The normal cost for a plan for a plan year generally represents the cost of future benefits allocated to the plan year under the funding method used by the plan for current employees. The supplemental cost for a plan year is the cost of future benefits that would not be met by future normal costs, future employee contributions, or plan assets, such as a net experience loss. Supplemental costs are amortized (*i.e.,* recognized for funding purposes) over a specified number of years, depending on the source. The amortization period applicable to a multiemployer plan for most credits and charges is 15 years.[508] Past service liability under the plan is amortized over 15 years;[509] past service liability due to plan amendments is amortized over 15 years; and experience gains and losses resulting from a change in actuarial assumptions are amortized over 15 years. Experience gains and losses and waived funding deficiencies are also amortized over 15 years.

The Secretary, upon receipt of an application, is required to grant an extension of the amortization period for up to five years with respect to any unfunded past service liability, investment loss,

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[507] Sec. 414(f) and sec. 3(37) of ERISA.

[508] Sec. 431(b)(2) and sec. 304(b)(2) of ERISA. Prior to the effective date of PPA, the amortization period was 30 years for past service liability, past service liability due to plan amendments, and losses and gains resulting from a change in actuarial assumptions.

[509] In the case of a plan in existence on January 1, 1974, past service liability under the plan on the first day on which the plan was first subject to ERISA was amortized over 40 years. In the case of a plan which was not in existence on January 1, 1974, past service liability under the plan on the first day on which the plan was first subject to ERISA was amortized over 30 years. Past service liability due to plan amendments was amortized over 30 years.

or experience loss.[510] There must be included with the application a certification by the plan's actuary that: (1) absent the extension, the plan would have an accumulated funding deficiency in the current plan year and any of the nine succeeding plan years; (2) the plan sponsor has adopted a plan to improve the plan's funding status; (3) taking into account the extension, the plan is projected to have sufficient assets to timely pay its expected benefit liabilities and other anticipated expenditures; and (4) required notice has been provided. The Secretary may also grant an additional extension of such amortization periods for an additional five years, using the same standards for determining whether such an extension may be granted as under the pre-Pension Protection Act of 2006 ("PPA 2006")[511] minimum funding rules.[512]

Actuarial assumptions

In applying the funding rules, all costs, liabilities, interest rates, and other factors are required to be determined on the basis of actuarial assumptions and methods, each of which must be reasonable (taking into account the experience of the plan and reasonable expectations), or which, in the aggregate, result in a total plan contribution equivalent to a contribution that would be obtained if each assumption and method were reasonable. In addition, the assumptions are required to offer the actuary's best estimate of anticipated experience under the plan.

Valuation of plan assets

In determining the charges and credits to be made to the plan's funding standard account for a multiemployer plan, the value of plan assets may be determined on the basis of any reasonable actuarial method of valuation which takes into account fair market value and which is permitted under regulations prescribed by the Secretary.[513] Thus, the actuarial value of a plan's assets under a reasonable actuarial valuation method may be used instead of fair market value. A reasonable actuarial valuation method generally may include a smoothing methodology that takes into account reasonable expected investment returns and average values of the plan assets, so long as the smoothing or averaging period does not exceed the five most recent plan years, including the current plan year.[514] In addition, in order to be reasonable, any actuarial valuation method used by the plan is required to result in a value of plan assets that is not less than 80 percent of the current fair market value of the assets and not more than 120 percent of the current fair market value.[515] In determining plan funding under an acceptable actuarial cost method, a plan's actuary generally makes certain assumptions regarding the future experience of a plan.

[510] Sec. 431(d)(1) and sec. 304(d)(1) of ERISA.
[511] Pub. L. No. 109–280.
[512] Sec. 431(d)(2) and sec. 304(d)(2) of ERISA.
[513] Sec. 431(c)(2) and sec. 304(c)(2) of ERISA.
[514] The limitation to five years is part of the rules for automatic approval of a change in funding method, not a requirement for all funding methods.
[515] Treas. Reg. sec. 1.412(c)(2)–1(b). Rev. Proc. 2000–40, 2000–2 CB 357, generally indicates that the IRS will only approve a change to funding method if the averaging period does not exceed five years. The revenue procedure also indicates that for a funding valuation method to be approved, the asset value determined under the method must be adjusted to be no greater than 120 percent and no less than 80 percent of the fair market value.

The actuarial valuation method is considered to be part of the plan's funding method. The same method must be used each plan year. If the valuation method is changed, the change is only permitted to take effect if approved by the Secretary.[516]

Additional funding rules for plans in endangered or critical status

Additional funding rules apply to a multiemployer defined benefit pension plan that is in endangered or critical status.[517] These rules require the adoption of and compliance with: (1) a funding improvement plan in the case of a multiemployer plan in endangered status; and (2) a rehabilitation plan in the case of a multiemployer plan in critical status. In the case of a plan in critical status, additional required contributions and benefit reductions apply and employers are relieved of liability for minimum required contributions under the otherwise applicable funding rules, provided that a rehabilitation plan is adopted and followed.

Failure to comply with minimum funding rules

In the event of a failure to comply with the minimum funding rules, the Code imposes a two-level excise tax on the plan sponsor.[518] The initial tax is five percent of the plan's accumulated funding deficiency for multiemployer plans. An additional tax is imposed if the failure is not corrected before the date that a notice of deficiency with respect to the initial five percent tax is mailed to the employer by the IRS or the date of assessment of the initial tax. The additional tax is equal to 100 percent of the unpaid contribution or the accumulated funding deficiency, whichever is applicable. Before issuing a notice of deficiency with respect to the excise tax, the Secretary must notify the Secretary of Labor and provide the Secretary of Labor with a reasonable opportunity to require the employer responsible for contributing to, or under, the plan to correct the deficiency or comment on the imposition of the tax.

Explanation of Provision[519]

Special funding relief rules

A plan sponsor of a multiemployer plan that meets a solvency test (described below) is permitted to use either one or both of two special funding relief rules which apply generally for the first two plan years ending after February 29, 2020. The special relief is not available to a plan to which special financial assistance is granted.[520]

Amortization of net investment losses

The first special funding relief rule allows the plan sponsor to treat the portion of its experience loss attributable to the net in-

[516] Sec. 412(d)(1) and sec. 302(d)(1) of ERISA.
[517] Sec. 432. Parallel rules apply under ERISA.
[518] Sec. 4971. Special rules apply under section 4971 for multiemployer plans in endangered or critical status.
[519] Treasury released guidance on this provision in Notice 2021–57, 2021–44 I.R.B. 706, November 1, 2021.
[520] Pursuant to section 4262 of ERISA, as added by Part D of this provision.

vestment losses (if any), as well as any other losses related to the virus SARS–CoV–2 or coronavirus disease 2019 ("COVID–19") (including experience losses related to reductions in contributions, reductions in employment, and deviations from anticipated retirement rates, as determined by the plan sponsor), incurred in either or both of the first two plan years ending after February 29, 2020, as an item separate from other experience losses, to be amortized in equal annual installments (until fully amortized) over the period beginning with the plan year in which such portion is first recognized in the actuarial value of assets and ending with the last plan year in the 30-plan-year period beginning with the plan year in which the net investment loss was incurred. If this treatment is used for a plan year, the plan sponsor is not eligible for an extension of this amortization period for this separate item, and if an extension was granted before electing this treatment of net investment losses, such extension must not result in such amortization period exceeding 30 years.

A plan sponsor is required to determine its net investment losses in the manner described by the Secretary, on the basis of the difference between actual and expected returns (including any difference attributable to any criminally fraudulent investment arrangement).[521]

Expanded smoothing period and asset valuation corridor

Under the other special funding relief rule, a multiemployer plan may change its asset valuation method in a manner which spreads the difference between the expected returns and actual returns for either or both of the first two plan years ending after February 29, 2020, over a period of not more than 10 years. However, as under present law, spreading the difference between expected and actual returns under a plan's asset valuation method is only permitted if it does not result in a value of plan assets, when compared to the current fair market value of the plan assets, to be at any time outside an asset valuation corridor.

Under this special funding relief rule, the asset valuation corridor is expanded so that, for either or both of the first two plan years beginning after February 29, 2020, the plan's asset value must be adjusted under the valuation method being used so the value of plan assets is not less than 80 percent of the current fair market value of the assets and not more than 130 percent of the current fair market value (rather than 120 percent). This expanded valuation corridor is available whether or not the plan sponsor increases the period for spreading the difference between expected and actual returns under its asset valuation method.

If a plan sponsor uses either or both of the options (extending the spreading period and the expanded asset valuation corridor) under this special relief rule for one or both of these plan years, the Secretary shall not treat the asset valuation method of the plan as unreasonable solely because of such change and the change will be deemed to be approved by the Secretary.

[521] The determination as to whether an arrangement is a criminally fraudulent investment arrangement is made under rules substantially similar to the rules prescribed by the Secretary for purposes of section 165.

Amortization of reduction in unfunded accrued liability

To the extent a plan sponsor uses either of the two special funding relief rules for any plan year, the plan is required to treat any resulting reduction in the plan's unfunded accrued liability as a separate experience amortization base. This separate experience amortization base is amortized in annual installments (until fully amortized) over a period of 30 plan years (rather than the otherwise applicable amortization period).

Solvency test

The solvency test is satisfied only if the plan actuary certifies that the plan is projected to have sufficient assets to timely pay expected benefits and anticipated expenditures over the amortization period, taking into account the changes in the funding standard account under the special funding relief rule elected.

Benefit restriction

If a plan sponsor of a multiemployer plan applies either of the special funding relief rules under this provision, then, in addition to any other applicable restrictions on benefit increases, the following limit also applies. A plan amendment increasing benefits may not go into effect during either of the two plan years immediately following any plan year to which such election first applies unless one of the following conditions is satisfied: either (1) the plan actuary certifies that such increase is paid for out of additional contributions not allocated to the plan immediately before the election was made, and the plan's funded percentage and projected credit balances for such two plan years are reasonably expected to be generally at the same levels as such percentage and balances would have been if the benefit increase had not been adopted, or (2) the amendment is required to maintain the plan's status as a qualified retirement plan under the applicable provisions of the Code or to comply with other applicable law.

Reporting

A plan sponsor of a multiemployer plan that uses one or both of these special funding relief rules must give notice to participants and beneficiaries of its use of the relief and must inform PBGC of its use of the relief in such form and manner as the Director of the PBGC may prescribe.

Effective Date

The provision takes effect as of the first day of the first plan year ending on or after February 29, 2020. However, if a plan sponsor uses either (or both) of the special funding relief provisions and such use affects the plan's funding standard account for the first plan year beginning after February 29, 2020, the use of the rule is disregarded for purposes of applying the provisions for additional funding rules for multiemployer plans in endangered or critical status to such plan year.

The restriction on plan amendments increasing benefits is effective on the date of enactment of this provision.

4. Special financial assistance program for financially troubled multiemployer plans (sec. 9704 of the Act, sec. 432 of the Code, and secs. 4005, 4006, and 4262 of ERISA)

Present Law

Multiemployer plans

A multiemployer plan is a plan to which more than one unrelated employer contributes, that is established pursuant to one or more collective bargaining agreements, and which meets such other requirements as specified by the Secretary of Labor.[522] Multiemployer plans are governed by a board of trustees consisting of an equal number of employer and employee representatives, referred to as the plan sponsor. In general, the level of contributions to a multiemployer plan is specified in the applicable collective bargaining agreements, and the level of plan benefits is established by the plan sponsor.

Like other private defined benefit plans,[523] multiemployer defined benefit plans are subject to minimum funding requirements under the Code and ERISA.[524] An excise tax may be imposed on the employers maintaining the plan if the funding requirements are not met.[525] However, the excise tax does not apply for a taxable year with respect to a multiemployer plan if, for the plan years ending with or within the taxable year, the plan is in critical status (as defined below).[526]

General funding requirements for multiemployer plans

Employer contributions to a defined benefit plan are generally subject to minimum funding requirements, the details of which depend on whether the plan is a single employer plan or a multiemployer plan. Unless a funding waiver is obtained, an employer may be subject to a two-tier excise tax if the funding requirements are not met.

In general, the annual deduction limit on employer contributions to a multiemployer defined benefit plan for a year is the excess of (1) 140 percent of the plan's current liability (the present value of all benefits earned under the plan), over (2) the value of plan assets. However, the deduction limit is never less than the amount of contributions required under the funding rules. If contributions exceed the amount deductible, the employers that contribute to the multiemployer plan are generally subject to an excise tax.

General funding requirements apply to all multiemployer plans. Additional funding requirements apply to plans in endangered or critical status, as defined below. An employer that withdraws from a multiemployer plan is generally liable to the plan for a portion of the plan's unfunded vested benefits, referred to as withdrawal li-

[522] Sec. 414(f) and ERISA section 2(37).
[523] Sec. 414(j).
[524] Secs. 412 and 431, and ERISA secs. 302 and 304. Additional rules apply to multiemployer plans that are insolvent under section 418E and ERISA section 4245. Certain changes were made to the funding requirements for multiemployer plans by the Pension Protection Act of 2006 ("PPA"), Pub. L. No. 109–280 and by the Multiemployer Pension Reform Act of 2014 ("MPRA"), Pub. L. No. 113–235, Division O.
[525] Sec. 4971.
[526] Sec. 4971(g)(1).

ability. Various provisions limit the amount of an employer's withdrawal liability.

Under the general funding requirements, a multiemployer defined benefit plan maintains a funding standard account, to which charges (such as for benefit accruals and negative plan experience) and credits (such as for positive plan experience and contributions) are made. The minimum required contribution for a plan year is the amount, if any, needed to balance accumulated credits and accumulated charges to the funding standard account. If required contributions are not made, causing the funding standard account to have a negative balance, an accumulated funding deficiency results.

A multiemployer plan is required to use an acceptable actuarial cost method (referred to as the plan's funding method) to determine the elements included in its funding standard account for a year, including normal cost and supplemental cost. Normal cost generally represents the cost of future benefits allocated to the year under the plan's funding method. The supplemental cost for a plan year is the cost of future benefits that would not be met by future normal costs, future employer contributions, or plan assets. Supplemental costs may be attributable to past service liability or to worse than expected plan experience. Supplemental costs are amortized (that is, recognized for funding purposes) over a specified number of years (generally 15 years) by annual charges to the funding standard account over that period. Factors that result in a supplemental loss can alternatively result in a gain that is recognized by annual credits to the funding standard account over a 15-year amortization period (in addition to a credit for contributions made for the plan year).

Actuarial assumptions used under the multiemployer plan funding rules must be reasonable. The interest rate (which represents the expected return on plan assets over time) and mortality assumptions used in funding computations are subject to these general standards; the funding rules do not specify the interest rate or mortality tables that need to be used. For funding purposes, the actuarial value of plan assets may be used, rather than fair market value, subject to certain conditions.

Additional requirements relating to plans in endangered or critical status

Additional funding-related requirements apply to a multiemployer defined benefit pension plan that is in endangered or critical status. In connection with the endangered and critical rules, not later than the 90th day of each plan year, the actuary for any multiemployer plan, must certify to the Secretary and to the plan sponsor whether or not the plan is in endangered or critical status for the plan year.[527] In the case of a plan which is in a funding improvement period or rehabilitation period, the actuary must also certify whether or not the plan is making its scheduled progress in meeting the requirements of its funding improvement or rehabilitation plan. If a plan is certified as being in endangered or critical

[527] This is only part of the certification required by section 432(b)(3)(A)(i). For example, the certification must also reflect whether the plan will be in critical status in any of the following five years.

status, notice of endangered or critical status must be provided within 30 days after the date of certification to plan participants and beneficiaries, the bargaining parties, the Pension Benefit Guaranty Corporation (PBGC), and the Secretary of Labor. Additional notice requirements apply in the case of a plan certified as being in critical status.

Failure of the plan's actuary to certify the status of the plan is treated as a failure to file the annual report (thus, an ERISA penalty in 2021 of up to $2,233 per day applies).

Various requirements apply to a plan in endangered or critical status, including adoption of and compliance with (1) a funding improvement plan in the case of a multiemployer plan in endangered status, and (2) a rehabilitation plan in the case of a multiemployer plan in critical status. In addition, restrictions on certain plan amendments, benefit increases, and reductions in employer contributions apply during certain periods.

A multiemployer plan is generally in endangered status if the plan is not in critical status and, as of the beginning of the plan year, (1) the plan's funded percentage for the plan year is less than 80 percent, or (2) the plan has an accumulated funding deficiency for the plan year or is projected to have an accumulated funding deficiency in any of the six succeeding plan years (taking into account amortization extensions).[528] A plan's funded percentage is the percentage determined by dividing the value of plan assets by the accrued liability of the plan. A plan that meets the requirements of both (1) and (2) is treated as in seriously endangered status.

A multiemployer plan is in critical status for a plan year if, as of the beginning of the plan year, it meets any of the following definitions:

- The funded percentage of the plan is less than 65 percent and the sum of (1) the market value of plan assets, plus (2) the present value of reasonably anticipated employer and employee contributions for the current plan year and each of the six succeeding plan years (assuming that the terms of the collective bargaining agreements continue in effect) is less than the present value of all benefits projected to be payable under the plan during the current plan year and each of the six succeeding plan years (plus administrative expenses);
- The plan (1) has an accumulated funding deficiency for the current plan year, not taking into account any amortization period extensions, or (2) the plan is projected to have an accumulated funding deficiency for any of the three succeeding plan years (four succeeding plan years if the funded percentage of the plan is 65 percent or less), not taking into account any amortization period extensions;
- The plan's (1) normal cost for the current plan year, plus interest for the current plan year on the amount of unfunded benefit liabilities under the plan as of the last day of the preceding year, exceeds the present value of the reasonably anticipated employer contributions for the current plan year, (2) the present value of vested (that is, nonforfeitable) benefits of inac-

[528] Sec. 432(b)(1) and ERISA sec. 305(b)(1).

tive participants is greater than the present value of vested benefits of active participants, and (3) the plan has an accumulated funding deficiency for the current plan year, or is projected to have an accumulated funding deficiency for any of the four succeeding plan years (not taking into account amortization period extensions); or

- The sum of (1) the market value of plan assets, plus (2) the present value of the reasonably anticipated employer contributions for the current plan year and each of the four succeeding plan years (assuming that the terms of the collective bargaining agreements continue in effect) is less than the present value of all benefits projected to be payable under the plan during the current plan year and each of the four succeeding plan years (plus administrative expenses).[529]

The first plan year for which the plan is in critical status is referred to as the "initial critical year," and governs the timing of certain requirements and periods.

In making the determinations and projections applicable in determining and certifying endangered or critical status (or neither), the plan actuary must follow certain statutory standards. The actuary's projections generally must be based on reasonable actuarial estimates, assumptions, and methods that offer the actuary's best estimate of anticipated experience under the plan.[530] In addition, the plan actuary must make projections for the current and succeeding plan years of the current value of the assets of the plan and the present value of all liabilities to participants and beneficiaries under the plan for the current plan year as of the beginning of the year. The projected present value of liabilities as of the beginning of the year must be based on the most recent actuarial statement required with respect to the most recently filed annual report or the actuarial valuation for the preceding plan year. Any projection of activity in the industry or industries covered by the plan, including future covered employment and contribution levels, must be based on information provided by the plan sponsor, which must act reasonably and in good faith.

In the case of a multiemployer plan in critical status, additional required contributions (referred to as employer surcharges) apply until the adoption of a collective bargaining agreement that is consistent with the rehabilitation plan. In addition, employers are relieved of liability for minimum required contributions under the otherwise applicable funding rules (and the related excise tax), provided that a rehabilitation plan is adopted and followed.[531] Moreover, subject to notice requirements, some benefits that would otherwise be protected from elimination or reduction may be eliminated or reduced in accordance with the rehabilitation plan.[532]

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[529] Sec. 432(b)(2) and ERISA sec. 305(b)(2).

[530] Under section 432(j)(8) and ERISA section 305(j)(8), for purposes of the endangered and critical rules, various actuarial computations are based upon the unit credit funding method, regardless of whether it is the funding method used in applying the general funding requirements to the plan.

[531] Sec. 4971(g)(1)(A).

[532] The rules for multiemployer plans in critical status include the elimination or reduction of "adjustable benefits," which include some benefits that would otherwise be protected from elimination or reduction under the anti-cutback rules under section 411(d)(6) and ERISA section 204(g).

In the case of a failure to meet the requirements applicable to a multiemployer plan in endangered or critical status, the plan actuary, plan sponsor, or employers required to contribute to the plan may be subject to an excise tax under the Code or a civil penalty under ERISA.[533]

Anti-cutback exceptions for multiemployer plans

Under the anti-cutback rules, generally applicable to defined benefit plans, a plan amendment generally may not reduce accrued benefits or reduce or eliminate an optional form of benefit, early retirement benefit, or retirement-type subsidy with respect to accrued benefits. Amendments are generally permitted only to reduce future rates of accrual, eliminate optional forms of benefit, or eliminate or reduce early retirement benefits or retirement-type subsidies only with respect to future accruals; and, in those cases, notice must be provided.

In the case of a multiemployer defined benefit plan that is in critical status[534] or critical and declining status,[535] or is insolvent,[536] subject to notice and other procedural requirements, certain plan benefits that would otherwise be protected under the anti-cutback rules are required or permitted to be reduced or eliminated.

In the case of a multiemployer plan in critical status, payments in excess of a single life annuity (plus any social security supplement, if applicable) may not be made to a participant or beneficiary who begins receiving benefits after notice that the plan is in critical status is provided and payments may not be made for the purchase of an irrevocable commitment from an insurer to pay benefits. In addition, the plan sponsor may reduce certain benefits ("adjustable benefits") that the plan sponsor deems appropriate, but not for a participant or beneficiary who began to receive benefits before receiving notice that the plan is in critical status. Adjustable benefits generally include disability benefits not in pay status, early retirement benefits or retirement-type subsidies, and most benefit payment options, but not the amount of an accrued benefit payable at normal retirement age.

In general, a multiemployer plan is insolvent when its available resources in a plan year are not sufficient to pay the plan benefits for that plan year. In that case, benefits must be reduced to the level that can be covered by the plan's assets, but not below the level of benefits that are eligible for guarantee under the PBGC's multiemployer plan program. If plan assets are insufficient to pay benefits at the guarantee level, PBGC provides financial assistance to the plan in the form of loans.

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[533] Sec. 4971(g) and ERISA sec. 502(c)(8). In addition, certain failures are treated as a failure to file an annual report with respect to the multiemployer plan, subject to a civil penalty under ERISA.

[534] Sec. 432(b)(2) and sec. 305(b)(2) of ERISA.

[535] Sec. 432(b)(6) and sec. 305(b)(6) of ERISA.

[536] Sec. 418E of ERISA and sec. 4245 of ERISA.

Suspension of benefits in multiemployer plans that are in critical and declining status

A multiemployer plan is in critical and declining status [537] if the plan (1) is in critical status and (2) is projected to become insolvent [538] during the current plan year or any of the 14 succeeding plan years (19 succeeding plan years if either the ratio of inactive plan participants to active plan participants is more than two to one or the plan's funded percentage is less than 80 percent). In that case, subject to certain conditions, limitations, and procedural requirements, including the appointment of a retiree representative in some cases and approval by the Secretary of the Treasury, previously earned benefits may be reduced (referred to as benefit suspensions), including benefits of some participants and beneficiaries in pay status.

Benefit suspensions are permitted only if the plan actuary certifies that, taking the benefit suspensions into account, the plan is projected to avoid insolvency, and the plan sponsor determines that, despite all reasonable measures to avoid insolvency, the plan is projected to become insolvent unless benefits are suspended.

The plan sponsor generally determines the amount of the benefit suspensions and how the suspensions apply to plan participants and beneficiaries. However, benefits cannot be reduced below 110 percent of the monthly PBGC guarantee level; disability benefits cannot be suspended; benefit reductions for a participant or beneficiary between the ages of 75 and 80 are limited; benefit reductions are not permitted for a participant or beneficiary age 80 or over; and benefit suspensions in the aggregate must be at the level reasonably estimated to achieve, but not materially exceed, the level that is necessary to avoid insolvency.

Partition

On application by the plan sponsor of an eligible multiemployer plan for a partition of the plan, PBGC may order a partition of the plan. Not later than 30 days after submitting an application to PBGC for partition of a plan, the plan sponsor must notify the participants and beneficiaries of the application, in the form and manner prescribed by PBGC regulations.

For purposes of the provision, a multiemployer plan is an eligible multiemployer plan if—

- the plan is in critical and declining status (as described above),
- PBGC determines, after consultation with the Participant and Plan Sponsor Advocate,[539] that the plan sponsor has taken (or is taking concurrently with an application for partition) all reasonable measures to avoid insolvency, including maximum benefit suspensions permitted in the case of a critical and declining plan, if applicable,
- PBGC reasonably expects that a partition of the plan will reduce the PBGC's expected long-term loss with respect to the plan and is necessary for the plan to remain solvent,

[537] Sec. 432(b)(6) and sec. 305(b)(6) of ERISA.
[538] As defined in sec. 418E and sec. 4245 of ERISA.
[539] Established under section 4004 of ERISA.

- PBGC certifies to Congress that PBGC's ability to meet existing financial assistance obligations to other plans (including any liabilities associated with multiemployer plans that are insolvent or that are projected to become insolvent within 10 years) will not be impaired by the partition, and
- the cost to PBGC arising from the proposed partition is paid exclusively from the fund for basic benefits guaranteed for multiemployer plans.[540]

PBGC must make a determination regarding a partition application not later than 270 days after the application is filed (or, if later, the date the application is completed) in accordance with PBGC regulations. Not later than 14 days after a partition order, PBGC must provide notice thereof to the House Committees on Education and the Workforce and Ways and Means and the Senate Committees on Finance and Health, Education, Labor, and Pensions, as well as to any affected participants or beneficiaries.

The plan sponsor and the plan administrator of the eligible multiemployer plan (the "original" plan) before the partition are the plan sponsor and plan administrator of the plan created by the partition order (the "new" plan). For purposes of determining benefits eligible for guarantee by PBGC, the new plan is a successor plan with respect to the original plan.

PBGC's partition order is to provide for a transfer to the new plan the minimum amount of the original plan's liabilities necessary for the original plan to remain solvent. The provision does not provide for the transfer to the new plan of any assets of the original plan.

It is expected that the liabilities transferred to the new plan will be liabilities attributable to benefits of specific participants and beneficiaries (or a specific group or groups of participants and beneficiaries) as requested by the plan sponsor of the original plan and approved by PBGC, up to the PBGC guarantee level applicable to each participant or beneficiary. Thus, benefits for such participants and beneficiaries up to the guarantee level will be paid by the new plan. For each month after the effective date of the partition that such a participant or beneficiary is in pay status, the original plan will pay a monthly benefit to the participant or beneficiary in the amount by which (1) the monthly benefit that would be paid to the participant or beneficiary under the terms of the original plan if the partition had not occurred (taking into account any benefit suspensions and any plan amendments after the effective date of the partition) exceeds (2) the amount of the participant's or beneficiary's benefit up to the PBGC guarantee level.

During the 10-year period following the effective date of the partition, the original plan must pay the PBGC premiums due for each year with respect to participants whose benefits were transferred to the new plan. The original plan must pay an additional amount to PBGC if it provides a benefit improvement (as defined under the rules for plans in critical and declining status, described above) that takes effect after the effective date of the partition. Specifically, for each year during the 10-year period following the effective

[540] Thus, other Federal funds, including funds from the PBGC single employer plan program, may not be used for this purpose.

date of the partition, the original plan must pay PBGC an annual amount equal to the lesser of (1) the total value of the increase in benefit payments for the year that is attributable to the benefit improvement, or (2) the total benefit payments from the new plan for the year. This payment must be made to PBGC at the time of, and in addition to, any other PBGC premium due from the original plan.

If an employer withdraws from the original plan within 10 years after the date of the partition order, the employer's withdrawal liability will be determined by reference to both the original plan and the new plan. If the withdrawal occurs more than 10 years after the date of the partition order, withdrawal liability will be determined only by reference to the original plan and not with respect to the new plan.

Withdrawal liability

An employer that withdraws from a multiemployer plan in a complete or partial withdrawal is generally liable to the plan in the amount determined to be the employer's withdrawal liability.[541] In general, a "complete withdrawal" means the employer has permanently ceased operations under the plan or has permanently ceased to have an obligation to contribute. A "partial withdrawal" generally occurs on the last day of a plan year if, for such plan year, there is a 70-percent contribution decline or there is a partial cessation of the employer's contribution obligation.

When an employer withdraws from a multiemployer plan, the plan sponsor is required to determine the amount of the employer's withdrawal liability, notify the employer of the amount of the withdrawal liability, and collect the amount of the withdrawal liability from the employer. In order to determine an employer's withdrawal liability, a portion of the plan's unfunded vested benefits is first allocated to the employer, generally in proportion to the employer's share of plan contributions for a previous period.[542] The amount of unfunded vested benefits allocable to the employer is then subject to various reductions and adjustments. An employer's withdrawal liability is generally payable, with interest, in level annual installments. However, the amount of the annual installments is limited, based on the amount of the employer's previous contributions to the plan, and the period over which installments are paid is limited to 20 years. An employer's withdrawal liability is the amount determined after application of these limits. In addition, the plan sponsor and the employer may agree to settle an employer's withdrawal liability obligation for a different amount.

If a multiemployer plan is in critical status, payments in excess of a single life annuity (plus any social security supplement, if applicable) may not be made and reductions in adjustable benefits are permitted. If a plan is in critical and declining status, benefit suspensions are permitted, including with respect to participants and beneficiaries in pay status. The elimination of any prohibited forms of distribution and reductions in adjustable benefits are disregarded in determining a plan's unfunded vested benefits for pur-

[541] ERISA secs. 4201–4225.

[542] Under 29 C.F.R. sec. 4211.2, for this purpose, unfunded vested benefits are the amount by which the value of vested benefits under the plan exceeds the value of plan assets.

poses of determining an employer's withdrawal liability. In addition, suspensions of benefits made under a multiemployer plan in critical and declining status are disregarded in determining the plan's unfunded vested benefits for purposes of determining an employer's withdrawal liability unless the withdrawal occurs more than 10 years after the effective date of the benefit suspension.

Multiemployer Plan Program of the Pension Benefit Guaranty Corporation

PBGC provides an insurance program for benefits under most defined benefit plans maintained by private employers. PBGC is administered by a director. Its board of directors consists of the Secretary of the Treasury, the Secretary of Labor, and the Secretary of Commerce.

PBGC is financed through the payment of premiums by covered defined benefit plans, assets from terminated single employer defined benefit plans trusteed by PBGC, and investment income on PBGC assets. PBGC insures pension benefits under separate programs for single employer and multiemployer defined benefit plans.

In the case of a multiemployer plan, flat-rate premiums apply at a rate of $31 per participant for 2021. PBGC provides financial assistance to insolvent multiemployer plans in the amount needed to pay benefits at the guarantee limit, which is the sum of 100 percent of the first $11 of monthly benefits plus 75 percent of the next $33 of monthly benefits multiplied by the participant's years of service.

Termination of a multiemployer defined benefit pension plan can occur as a result of (1) the adoption of a plan amendment providing that participants receive no credit under the plan for any purpose for service with any employer after a date specified in the amendment (referred to as "freezing accruals"), (2) the adoption of a plan amendment causing the plan to become a defined contribution plan, or (3) the withdrawal of every employer from the plan or the cessation of the obligation of all employers to contribute to the plan (referred to as "mass withdrawal").[543]

If a terminated multiemployer plan becomes insolvent and plan assets are not sufficient to pay benefits at the level guaranteed by PBGC, PBGC will provide financial assistance as needed to pay benefits at the guarantee level, as described above.[544] If a multiemployer plan that has not terminated becomes insolvent, similar rules apply, including the provision by PBGC of financial assistance in an amount needed to provide benefits at the guarantee level.

Explanation of Provision

Special financial assistance

PBGC will provide special financial assistance to an eligible multiemployer plan upon the application of the plan sponsor in accord-

[543] ERISA sec. 4041A. Unlike the termination of a single employer plan (and except in the case of multiemployer plan terminations occurring before 1981), termination of a multiemployer plan does not of itself result in the end of the operation of the plan or in PBGC's taking over the plan. Instead, the plan sponsor continues to administer the plan.

[544] ERISA secs. 4261 and 4281.

ance with the following requirements.[545] A plan receiving such financial assistance will not be subject to repayment obligations with respect to such special financial assistance.

Eligible multiemployer plan

A multiemployer defined benefit pension plan is eligible to apply for special financial assistance[546] if:

- The plan is in critical and declining status[547] in any plan year beginning in 2020 through 2022;
- A suspension of benefits has been approved with respect to the plan as of the date of enactment;[548]
- In any plan year beginning in 2020 through 2022, the plan is certified by the plan actuary to be in critical status,[549] has a modified funded percentage of less than 40 percent,[550] and has a ratio of active to inactive participants which is less than two to three; or
- The plan became insolvent[551] after December 16, 2014, has remained insolvent, and has not been terminated as of the date of enactment of the provision, March 11, 2021.[552]

Application for special financial assistance

The provision requires PBGC to, within 120 days of the date of enactment, issue regulations or guidance setting forth the requirements for special financial assistance applications[553] that:

- Limit the materials required to be submitted for a special financial assistance application to the minimum necessary to make a determination on the application;
- Specify the effective dates for transfers of special financial assistance following approval of an application, based on the effective date of the supporting actuarial analysis and the date on which the application is submitted; and
- Provide for an alternate application for special financial assistance which may be used by a plan that has been approved for a partition[554] before the date of enactment.

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[545] Pursuant to a new section 4262 of ERISA. Section 432 is also amended by adding sec. 432(a)(4) which provides that if a plan is an eligible multiemployer plan applying for or receiving special financial assistance under section 4262 of ERISA, the requirements of new section 432(k) apply to the plan. Section 432(k) has parallel requirements to section 4262 of ERISA. Section 432(a)(7) provides that if an eligible multiemployer plan receiving special financial assistance under section 4262 of ERISA meets the requirements of section 432(k)(2), the plan is deemed to be in critical status for plan years beginning with the plan year in which the effective date for such assistance occurs and ending with the last plan year ending in 2051.

[546] See sec. 432(k)(3) and sec. 4262(b) of ERISA.

[547] Within the meaning of section 432(b)(6) and section 305(b)(6) of ERISA.

[548] Sec. 432(e)(9) and sec. 305(e)(9) of ERISA.

[549] Within the meaning of section 432(b)(2) and sec. 305(b)(2) of ERISA.

[550] As noted above, for determining critical status for purposes of section 432 and section 305 of ERISA, assets and liabilities are generally both determined at their actuarial value for purposes of calculating the funded percentage, but for purposes of determining which plans are eligible multiemployer plans, the modified funded percentage means the percentage equal to a fraction the numerator of which is the current value of plan assets as defined in ERISA section 3(26) (fair market value if available and otherwise the fair value as determined in good faith by a trustee or named fiduciary pursuant to the terms of the plan and in accordance with regulations of the Secretary, assuming an orderly liquidation at the time of such determination) and the denominator of which is current liabilities (as defined in section 431(c)(6)(D) and section 304(c)(6)(D) of ERISA).

[551] For purposes of section 418E.

[552] Pursuant to section 4041A of ERISA.

[553] Sec. 4262(c) of ERISA.

[554] Sec. 4233 of ERISA.

Temporary priority consideration of applications

PBGC may also provide in regulations or guidance that during a period no longer than the first two years following the date of enactment, applications may not be filed by an eligible multiemployer plan unless:

- The plan is insolvent, or is likely to become insolvent within five years of the date of enactment;
- PBGC projects the plan to have a present value of financial assistance payments [555] that exceeds $1,000,000,000 if the special financial assistance is not ordered;
- The plan has implemented benefit suspensions [556] as of the date of enactment; or
- PBGC determines it appropriate based on other similar circumstances.

Actuarial assumptions

For purposes of determining eligibility for special financial assistance, the provision requires PBGC [557] to accept assumptions incorporated in the eligible multiemployer plan's determination that it is in critical status or critical and declining status for certifications completed before January 1, 2021, unless such assumptions are clearly erroneous. For certifications of plan status completed after December 31, 2020, a plan determines whether it is in critical or critical and declining status for purposes of eligibility for special financial assistance by using the assumptions that the plan used in its most recently completed certification of plan status before January 1, 2021, unless such assumptions (excluding the plan's interest rate) are unreasonable.

Assumptions used in determination of amount of financial assistance

In determining the amount of financial assistance, an eligible multiemployer plan in its application must use the interest rate used by the plan in its most recently completed certification of plan status before January 1, 2021, provided that such interest rate does not exceed the interest rate limit.[558] The interest rate limit is the third segment rate [559] for the month in which the application for special financial assistance is filed by the eligible multiemployer plan ("specified rate") or the three preceding months, with such specified rate increased by 200 basis points. For other assumptions, the plan should use the assumptions that the plan used in its most recently completed certification of plan status before January 1, 2021, unless such assumptions are unreasonable.

If a plan determines that use of one or more prior assumptions is unreasonable, the plan may propose to change such assumptions in its application, provided that the plan discloses such changes in its application and describes the reasons why such assumptions are no longer reasonable. PBGC [560] must accept such changed assump-

[555] As defined in sec. 4261 of ERISA.
[556] As described in sec. 432(e)(9) and sec. 305(e)(9) of ERISA.
[557] Sec. 4262(e) of ERISA. See also sec. 432(k)(1)(C) for parallel Code provisions.
[558] Sec. 4262(e)(2) of ERISA and sec. 432(k)(1)(C).
[559] Sec. 430(h)(2)(C)(iii) and 303(h)(2)(C)(iii) of ERISA disregarding modifications made under clause (iv) of such section.
[560] In consultation with the Secretary of Treasury. See secs. 432(k)(4) and 4262(n) of ERISA.

tions unless it determines the changes are unreasonable individually or in the aggregate. The plan may not propose a change to the interest rate that is otherwise required to be used (as described above) for eligibility or determining the financial assistance amount.

Deadline for submitting application

Any application by a plan for special financial assistance must be submitted to PBGC no later than December 31, 2025, and any revised application must be submitted no later than December 31, 2026.

Determinations on applications

A plan's application for special financial assistance that is timely filed in accordance with the regulations or guidance issued by PBGC is deemed to be approved unless the corporation notifies the plan within 120 days of the filing of the application that the application is incomplete, any proposed change or assumption is unreasonable, or the plan is ineligible. Such notice must specify the reasons the plan is ineligible for special financial assistance, any proposed change or assumption is unreasonable, or information is needed to complete the application. If a plan is denied special financial assistance, the plan may submit a revised application. Any revised application for special financial assistance submitted by a plan is to be deemed approved unless PBGC notifies the plan within 120 days of the filing of the revised application that the application is incomplete, any proposed change or assumption is unreasonable, or the plan is ineligible for such assistance.

Amount and manner of payment of special financial assistance

Special financial assistance issued by PBGC to an eligible multiemployer plan is effective on a date determined by PBGC but no later than 1 year after a plan's special financial assistance application is approved, or deemed approved, by PBGC. The special financial assistance must be paid by PBGC to an eligible multiemployer plan as a single lump sum payment as soon as practicable upon approval of the application by PBGC. PBGC may not make any special financial assistance payments to an eligible multiemployer plan after September 30, 2030.[561]

The special financial assistance to be transferred to the eligible multiemployer plan is the amount necessary as demonstrated by the plan sponsor in its application. Such amount is the amount needed by the eligible multiemployer plan to be able to pay all benefits due during the period beginning on the date of payment of the special financial assistance and ending on the last day of the plan year ending in 2051,[562] with no reduction in a participant's or beneficiary's accrued benefit as of the date of enactment of this pro-

[561] In the case of a plan to which section 432(k)(1)(D) applies (plans applying for priority consideration) the application must also be submitted to the Secretary no later than December 31, 2025, and any revised application for special financial assistance must be submitted no later than December 31, 2026.

[562] The funding projections will be performed on a deterministic basis.

vision, except to the extent of benefit adjustments[563] adopted prior to the plan's application for special financial assistance, and taking into account the reinstatement of benefit suspensions (required as described below). The amount of special financial assistance is not capped by the PBGC multiemployer plan benefit guarantee.[564]

Reinstatement of suspended benefits

An eligible multiemployer plan that receives special financial assistance must reinstate any benefits that were suspended[565] in accordance with guidance issued by the Secretary,[566] effective as of the first month in which the effective date for the special financial assistance occurs, for participants and beneficiaries as of such month. The eligible multiemployer plan will provide payments to any participant or beneficiary in pay status as of the effective date of the special financial assistance, payable, as determined by the eligible multiemployer plan, either (1) as a lump sum within three months of the effective date of the special financial assistance; or (2) in equal monthly installments over a period of five years, commencing within three months of the effective date, with no adjustment for interest.

Restrictions on use of special financial assistance by eligible multiemployer plans

Special financial assistance received by an eligible multiemployer plan, and any earnings, may be used by such plan to make benefit payments and pay plan expenses. Special financial assistance and any earnings must be segregated from other plan assets and are to be invested by plans in investment-grade bonds or other investments, as permitted by PBGC.

PBGC, in consultation with the Secretary, may impose, by regulation or other guidance, reasonable conditions on an eligible multiemployer plan that receives special financial assistance relating to increases in future accrual rates and any retroactive benefit improvements, allocation of plan assets, reductions in employer contribution rates, diversion of contributions to, and allocation of expenses to, other benefit plans, and withdrawal liability.

PBGC may not impose conditions on an eligible multiemployer plan as a condition of, or following the receipt of, special financial assistance, relating to:

- Any prospective reduction in plan benefits, including adjustable benefits;[567]
- Plan governance, including selection of, removal of, and terms of contracts with, trustees, actuaries, investment managers, and other service providers; or
- Any funding rules relating to the plan receiving special financial assistance.

[563] Made in accordance with section 432(e)(8) and section 305(e)(8) of ERISA.
[564] Sec. 4022A of ERISA.
[565] Sec. 305(e)(9) or sec. 4245(a) of ERISA.
[566] Pursuant to sec. 432(k)(1)(B). Treasury released such guidance in Notice 2021–38, 2021–30 I.R.B. 155, July 26, 2021.
[567] Sec. 432(e)(8) and sec. 305(e)(8) of ERISA.

Other conditions on plans receiving special financial assistance

An eligible multiemployer plan receiving financial assistance:

- That subsequently becomes insolvent,[568] will become subject to the current rules and guarantee for insolvent plans;
- Is not eligible to apply for a new suspension of benefits; and
- Is deemed to be in critical status until the last plan year ending in 2051.

Coordination between PBGC and Treasury[569]

In prescribing the application process for eligible multiemployer plans to receive special financial assistance and reviewing applications of such plans, PBGC must coordinate with the Secretary of the Treasury in the following manner:

Plans with suspended benefits

In the case of a plan which has suspended benefits:[570]

- In determining whether to approve the application for special financial assistance, PBGC must consult with the Secretary regarding the plan's proposed method of reinstating benefits, as described in the plan's application and in accordance with guidance issued by the Secretary, and
- PBGC must consult with the Secretary regarding the amount of special financial assistance needed based on the projected funded status of the plan as of the last day of the plan year ending in 2051, whether the plan proposes to repay benefits over five years or as a lump sum,[571] and any other relevant factors, as determined by PBGC in consultation with the Secretary of the Treasury, to ensure the amount of assistance is sufficient to meet such requirement and is sufficient to pay benefits.

Plans proposing to change assumptions

In the case of any plan which proposes in its application to change the assumptions used, PBGC must consult with the Secretary of the Treasury regarding such proposed change in assumptions.

Plans requesting temporary priority consideration

If PBGC specifies in regulations or guidance that temporary priority consideration is available for plans which are insolvent[572] or likely to become so insolvent or for plans which have suspended benefits, or that availability is otherwise based on the funded status of the plan, PBGC must consult with the Secretary of the Treasury regarding any granting of priority consideration to such plans.

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[568] As described in sec. 418E and sec. 4245 of ERISA.
[569] Sec. 432(k)(4) and sec. 4262(n) of ERISA.
[570] Under sec. 432(e)(9) and sec. 305(e)(9) of ERISA.
[571] As required by sec. 432(k)(2).
[572] Within the meaning of sec. 418E.

Appropriations

The provision establishes an eighth fund at PBGC for special financial assistance to multiemployer plans and to pay for PBGC's necessary administrative and operating expenses relating to such special financial assistance.

Amounts are appropriated from the general fund of the Treasury to the eighth fund as are necessary to meet the costs of providing special financial assistance to eligible multiemployer plans and the necessary administrative and operating expenses of PBGC. The provision requires such amounts to be credited to the eighth fund from time to time as the Secretary of the Treasury, in conjunction with the Director of the PBGC, determines appropriate but in no case may such transfers occur after September 30, 2030.

Pension Benefit Guaranty Corporation premiums

An eligible multiemployer plan receiving special financial assistance will continue to pay all premiums due for the plan for participants and beneficiaries in the plan.

Premium rate increase

In the case of a multiemployer plan, for plan years beginning after December 31, 2030, the flat rate PBGC premium will increase to $52 for each individual who is a participant in such plan during the applicable year.

The premium will be adjusted for inflation for each plan year beginning in a calendar year after 2031. If the amount of the adjustment is not a multiple of $1, the amount will be rounded to the nearest multiple of $1.

Effective Date

The provision is effective on the date of enactment (March 11, 2021).

5. Extended amortization for single employer plans (sec. 9705 of the Act, sec. 430 of the Code, and sec. 303 of ERISA)

Present Law

Minimum funding rules

A defined benefit plan maintained by a single employer is subject to minimum funding rules that generally require the sponsoring employer to make a certain level of contribution for each plan year to fund plan benefits.[573] The minimum funding rules for single employer defined benefit plans were substantially revised by the Pension Protection Act of 2006 ("PPA").[574]

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[573] Secs. 412 and 430; secs. 302–303 of ERISA. For purposes of whether a plan is maintained by a single employer, certain related entities, such as the members of a controlled group, are treated as a single employer. Different funding rules apply to multiemployer and certain multiple-employer defined benefit plans, which are types of plans maintained by two or more unrelated employers. A number of exceptions to the minimum funding rules apply. For example, governmental plans (within the meaning of section 414(d)) and church plans (within the meaning of section 414(e)) are generally not subject to the minimum funding rules. Under section 4971, an excise tax applies if the minimum funding requirements are not satisfied.

[574] Pub. L. No. 109–280. The PPA minimum funding rules for single employer plans are generally effective for plan years beginning after December 31, 2007. Subsequent changes were

Minimum required contributions

In general

The minimum required contribution for a plan year for a single employer defined benefit plan generally depends on a comparison of the value of the plan's assets, reduced by any prefunding balance or funding standard carryover balance ("net value of plan assets"),[575] with the plan's funding target and target normal cost. The plan's funding target for a plan year is the present value of all benefits accrued or earned as of the beginning of the plan year. A plan's target normal cost for a plan year is generally the present value of benefits expected to accrue or to be earned during the plan year. In the case of a plan funded below a certain level, referred to as an "at-risk" plan, specified assumptions must be used in determining the plan's funding target and target normal cost.[576]

If the net value of plan assets is less than the plan's funding target, such that the plan has a funding shortfall (discussed further below), the minimum required contribution is the sum of the plan's target normal cost and the shortfall amortization charge for the plan year (determined as described below).[577] If the net value of plan assets is equal to or exceeds the plan's funding target, the minimum required contribution is the plan's target normal cost, reduced by the amount, if any, by which the net value of plan assets exceeds the plan's funding target.

made by the Worker, Retiree, and Employer Recovery Act of 2008 ("WRERA"), Pub. L. No. 110–458; the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010 ("PRA 2010"), Pub. L. No. 111–192; the Moving Ahead for Progress in the 21st Century Act, the Highway and Transportation Funding Act of 2014, and the Bipartisan Budget Act of 2015, discussed further herein.

[575] The value of plan assets is generally reduced by any prefunding balance or funding standard carryover balance in determining minimum required contributions. A prefunding balance results from plan contributions that exceed the minimum required contributions. A funding standard carryover balance results from a positive balance in the funding standard account that applied under the funding requirements in effect before PPA. Subject to certain conditions, a prefunding balance or funding standard carryover balance may be credited against the minimum required contribution for a year, reducing the amount that must be contributed.

[576] For an at-risk plan, the specified assumptions generally are as follows: all employees who are not otherwise assumed to retire as of the valuation date but who will be eligible to elect benefits during the plan year and the next 10 plan years must be assumed to retire at the earliest retirement date under the plan but not before the end of the plan year for which the "at-risk funding target" and "at-risk normal cost" are being determined. Also, all employees must be assumed to elect the retirement benefit available under the plan at the assumed retirement age (determined as above) that would result in the highest present value of benefits. The at-risk funding target is the present value of all benefits accrued or earned under the plan as of the beginning of the plan year using the actuarial assumptions set forth in the Code and regulations for single employer plans, with the addition of a loading factor which arises when the plan has been in at-risk status for at least two of the four preceding plan years. This loading factor is equal to the sum of (1) $700 multiplied by the number of participants in the plan and (2) four percent of the funding target (determined without regard to the definition of at-risk funding target). The at-risk normal cost for a plan year generally represents the excess of the sum of (1) the present value of all benefits which are expected to accrue or to be earned under the plan during the plan year using the at-risk assumptions described above plus (2) the amount of plan related expenses expected to be paid from plan assets during the plan year, over (3) the amount of mandatory employee contributions expected to be made during the plan year. In addition, where the plan has been in at-risk status for at least two of the four preceding plan years, a loading factor is added, which is equal to four percent of the target normal cost (the excess of the sum of (1) the present value of all benefits which are expected to accrue or to be earned under the plan during the plan year plus (2) the amount of plan-related expenses expected to be aid from plan assets during the plan year, over (3) the amount of mandatory employee contributions expected to be made during the plan year) with respect to the plan for the plan year.

[577] If the plan has obtained a waiver of the minimum required contribution (a funding waiver) within the past five years, the minimum required contribution also includes the related waiver amortization charge, that is, the annual installment needed to amortize the waived amount in level installments over the five years following the year of the waiver.

Shortfall amortization charge

The shortfall amortization charge for a plan year is the sum of the annual shortfall amortization installments attributable to the shortfall bases for that plan year and the six previous plan years. Generally, if a plan has a funding shortfall for the plan year, a shortfall amortization base must be established for the plan year.[578] A plan's funding shortfall is the amount by which the plan's funding target exceeds the net value of plan assets. The shortfall amortization base for a plan year is: (1) the plan's funding shortfall, minus (2) the present value, determined using the segment interest rates (discussed below), of the aggregate total of the shortfall amortization installments that have been determined for the plan year and any succeeding plan year with respect to any shortfall amortization bases for the six previous plan years. The shortfall amortization base is amortized in level annual installments ("shortfall amortization installments") over a seven-year period beginning with the current plan year and using the segment interest rates (discussed below).[579]

The shortfall amortization base for a plan year may be positive or negative, depending on whether the present value of remaining installments with respect to amortization bases for previous years is more or less than the plan's funding shortfall. If the shortfall amortization base is positive (that is, the funding shortfall exceeds the present value of the remaining installments), the related shortfall amortization installments are positive. If the shortfall amortization base is negative, the related shortfall amortization installments are negative. The positive and negative shortfall amortization installments for a particular plan year are netted when adding them up in determining the shortfall amortization charge for the plan year, but the resulting shortfall amortization charge cannot be less than zero (that is, negative amortization installments may not offset normal cost).

If the net value of plan assets for a plan year is at least equal to the plan's funding target for the year, so the plan has no funding shortfall, any shortfall amortization bases and related shortfall amortization installments are eliminated.[580] As indicated above, if the net value of plan assets exceeds the plan's funding target, the excess is applied against target normal cost in determining the minimum required contribution.

Interest rate used to determine target normal cost and funding target

The minimum funding rules for single employer plans also specify the interest rates that must be used in determining the present

[578] If the value of plan assets, reduced only by any prefunding balance if the employer elects to apply the prefunding balance against the required contribution for the plan year, is at least equal to the plan's funding target, no shortfall amortization base is established for the year.

[579] Under PRA 2010, employers were permitted to elect to use one of two alternative extended amortization schedules for up to two "eligible" plan years during the period 2008–2011. The use of an extended amortization schedule has the effect of reducing the amount of the shortfall amortization installments attributable to the shortfall amortization base for the eligible plan year. However, the shortfall amortization installments attributable to an eligible plan year may be increased by an additional amount, an "installment acceleration amount," in the case of employee compensation exceeding $1 million, extraordinary dividends, or stock redemptions within a certain period of the eligible plan year.

[580] Any amortization base relating to a funding waiver for a previous year is also eliminated.

value of benefits for purposes of a plan's target normal cost and funding target. Present value is generally determined using three interest rates ("segment" rates), each of which applies to benefit payments expected to be made from the plan during a certain period.[581]

The first segment rate applies to benefits reasonably determined to be payable during the five-year period beginning on the plan's annual valuation date;[582] the second segment rate applies to benefits reasonably determined to be payable during the 15-year period following the initial five-year period; and the third segment rate applies to benefits reasonably determined to be payable after the end of the 15-year period. Under the funding rules as enacted in PPA ("PPA" rules), each segment rate is a single interest rate determined monthly by the Secretary, on the basis of a corporate bond yield curve, taking into account only the portion of the yield curve based on corporate bonds maturing during the particular segment rate period. The corporate bond yield curve used for this purpose reflects the average, for the 24-month period ending with the preceding month, of yields on investment grade corporate bonds with varying maturities and that are in the top three quality levels available.[583] The Internal Revenue Service ("IRS") publishes the segment rates each month.

Under the Moving Ahead for Progress in the 21st Century Act ("MAP–21"), the Highway and Transportation Funding Act of 2014 ("2014 Highway Act"), and the Bipartisan Budget Act of 2015 ("2015 Bipartisan Budget Act"),[584] for plan years beginning after December 31, 2011, a segment rate determined under the PPA rules is adjusted if it falls outside a specified percentage range of the average segment rates for a preceding period. In particular, if a segment rate determined under the PPA rules is less than the applicable minimum percentage in the specified range, the segment rate is adjusted upward to match the minimum percentage. If a segment rate determined under the PPA rules is more than the applicable maximum percentage in the specified range, the segment rate is adjusted downward to match the maximum percentage. For this purpose, an average segment rate is the average of the segment rates determined under the PPA rules for the 25-year period ending September 30 of the calendar year preceding the calendar year in which the plan year begins. The Secretary is to determine average segment rates on an annual basis and may prescribe equivalent rates for any years in the 25-year period for which segment rates determined under the PPA rules are not available. The Secretary is directed to publish the average segment rates each month.

The specified percentage range (that is, the range from the applicable minimum percentage to the applicable maximum percentage)

[581] Sec. 430(h)(2) and ERISA sec. 303(h)(2).

[582] Subject to an exception for small plans with no more than 100 participants, the annual valuation date for a plan must be the first day of the plan year.

[583] Solely for purposes of determining minimum required contributions, in lieu of the segment rates, an employer may elect to use interest rates on a yield curve based on the yields on investment grade corporate bonds for the month preceding the month in which the plan year begins (that is, without regard to the 24-month averaging described above) ("monthly yield curve"). If an election to use a monthly yield curve is made, it cannot be revoked without IRS approval.

[584] Pub. L. Nos. 112–141, 113–159, and 114–74.

for a plan year is determined by reference to the calendar year in which the plan year begins as follows:

- 90 percent to 110 percent for 2012 through 2020,
- 85 percent to 115 percent for 2021,
- 80 percent to 120 percent for 2022,
- 75 percent to 125 percent for 2023, and
- 70 percent to 130 percent for 2024 or later.

Annual funding notice

The plan administrator of a single employer defined benefit plan must provide an annual funding notice to each participant and beneficiary, each labor organization representing participants or beneficiaries, and PBGC.[585] In addition to the information required to be provided in all funding notices, in the case of a single employer defined benefit plan, the notice must include (1) the plan's funding target attainment percentage for the plan year to which the notice relates and the two preceding plan years, (2) the value of the plan's assets and benefit liabilities (that is, the present value of benefits owed under the plan) for the plan year and the two preceding years, determined in the same manner as under the funding rules, and (3) the value of the plan's assets and benefit liabilities as of the last day of the plan year to which the notice relates, determined using the fair market value of plan assets (rather value determined under the funding rules) and, in computing benefit liabilities, the interest rates used in computing variable-rate PBGC premiums.[586]

Additional information must be included in a single employer plan's annual funding notice in the case of an applicable plan year. For this purpose, an applicable plan year is any plan year beginning after December 31, 2011, and before January 1, 2023, for which (1) the plan's funding target, determined using segment rates as adjusted to reflect average segment rates ("adjusted" segment rates), is less than 95 percent of the funding target determined without regard to adjusted segment rates, (2) the plan has a funding shortfall, determined without regard to adjusted segment rates, greater than $500,000, and (3) the plan had 50 or more participants on any day during the preceding plan year. Specifically, the notice must include (1) a statement that MAP–21, the 2014 Highway Act, and the 2015 Bipartisan Budget Act modified the method for determining the interest rates used to determine the actuarial value of benefits earned under the plan, providing for a 25-year average of interest rates to be taken into account in addition to a two-year average, (2) a statement that, as a result of MAP–21, the 2014 Highway Act, and the 2015 Bipartisan Budget Act, the plan sponsor may contribute less money to the plan when interest rates are at historical lows, and (3) a table showing, for the applicable plan year and each of the two preceding plan years, the

[585] ERISA sec. 101(f). Annual funding notice requirements, with some differences, apply also to multiemployer and multiple-employer plans.

[586] In applying the funding rules, the value of plan assets may be determined on the basis of average fair market values over a period of up to 24 months. PBGC variable-rate premiums are based on a plan's unfunded vested benefit liabilities, computed using the first, second and third segment rates as determined under the PPA rules (without the adjustments applicable for funding purposes), but based on a monthly corporate bond yield curve, rather than a yield curve reflecting average yields for a 24-month period.

plan's funding target attainment percentage, funding shortfall, and the employer's minimum required contribution, each determined both using adjusted segment rates and without regard to adjusted segment rates.

Explanation of Provision [587]

Under the provision, with respect to plan years beginning after December 31, 2021, (or, at the election of the plan sponsor, plan years beginning after December 31, 2018, December 31, 2019, or December 31, 2020) the shortfall amortization bases for all plan years preceding the first plan year beginning after December 31, 2021 (or, after whichever earlier date is elected pursuant to this provision), and all shortfall amortization installments determined with respect to such bases, are reduced to zero. In addition, the shortfall amortization installments of the plan for plan years beginning after December 31, 2021 (or, if elected, after December 31, 2018, December 31, 2019 or December 31, 2020) are determined over a 15-year period, rather than a 7-year period.

Effective Date

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

6. Extension of pension funding stabilization percentages for single employer plans (sec. 9706 of the Act, sec. 430 of the Code, and secs. 101 and 303 of ERISA)

Present Law

Minimum funding rules

A defined benefit plan maintained by a single employer is subject to minimum funding rules that generally require the sponsoring employer to make a certain level of contribution for each plan year to fund plan benefits.[588] Background on such contribution rules may be found in the description of present law for section 9705 of this Act.

Explanation of Provision [589]

The provision revises the specified percentage ranges (that is, the range from the applicable minimum percentage to the applicable maximum percentage of average segment rates) for determining whether a segment rate must be adjusted upward or downward. Under the provision, the specified percentage range for a plan year

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[587] Treasury released guidance on this provision in Notice 2021–48, 2021–33 I.R.B. 305, August 16, 2021.

[588] Secs. 412 and 430; secs. 302–303 of ERISA. For purposes of whether a plan is maintained by a single employer, certain related entities, such as the members of a controlled group, are treated as a single employer. Different funding rules apply to multiemployer and certain multiple-employer defined benefit plans, which are types of plans maintained by two or more unrelated employers. A number of exceptions to the minimum funding rules apply. For example, governmental plans (within the meaning of section 414(d)) and church plans (within the meaning of section 414(e)) are generally not subject to the minimum funding rules. Under section 4971, an excise tax applies if the minimum funding requirements are not satisfied.

[589] Treasury released guidance on this provision in Notice 2021–48, 2021–33 I.R.B. 305, August 16, 2021.

is determined by reference to the calendar year in which the plan year begins as follows:

- 90 percent to 110 percent for 2012 through 2019,
- 95 percent to 105 percent for 2020 through 2025,
- 90 percent to 110 percent for 2026,
- 85 percent to 115 percent for 2027,
- 80 percent to 120 percent for 2028,
- 75 percent to 125 percent for 2029, and
- 70 percent to 130 percent for 2030 or later.

The provision further provides that if the average of the first, second or third segment rate for any 25-year period is less than five percent, such average shall be deemed to be five percent.

In addition, for purposes of the additional information that must be provided in a funding notice for an applicable plan year, an applicable plan year includes any plan year that begins after December 31, 2011, and before January 1, 2029, and that otherwise meets the definition of applicable plan year.

Effective Date

The provision applies to plan years beginning after December 31, 2019.

A plan sponsor may elect not to have the amendments made by this provision apply to any plan year beginning before January 1, 2022, either (as specified in the election): (A) for all purposes for which such amendments apply, or (b) solely for purposes of determining the adjusted funding target attainment percentage[590] for such plan year. A plan shall not be treated as failing to meet the requirements of the rules relating to the decrease of accrued benefits through an amendment to a plan[591] solely by reason of an election under this provision.

7. Modification of special rules for minimum funding standards for community newspaper plans (sec. 9707 of the Act, sec. 430 of the Code, and sec. 303 of ERISA)

Present Law

Minimum funding rules

A defined benefit plan maintained by a single employer is subject to minimum funding rules that generally require the sponsoring employer to make a certain level of contribution for each plan year to fund plan benefits.[592] For background relating to these rules, see the description of present law for section 9705 of the Act.

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[590] Under sec. 436 and sec. 206(g) of ERISA.

[591] Under sec. 411(d)(6) and sec. 204(g) of ERISA.

[592] Secs. 412 and 430; secs. 302–303 of ERISA. For purposes of whether a plan is maintained by a single employer, certain related entities, such as the members of a controlled group, are treated as a single employer. Different funding rules apply to multiemployer and certain multiple-employer defined benefit plans, which are types of plans maintained by two or more unrelated employers. A number of exceptions to the minimum funding rules apply. For example, governmental plans (within the meaning of section 414(d)) and church plans (within the meaning of section 414(e)) are generally not subject to the minimum funding rules. Under section 4971, an excise tax applies if the minimum funding requirements are not satisfied.

Special rules for community newspaper plans

Under the Setting Every Community Up for Retirement Enhancement Act of 2019 ("SECURE Act"), Congress enacted special funding rules that apply to community newspaper plans.[593] An employer maintaining a community newspaper plan (as defined below) under which no participant has had the participant's accrued benefit increased (whether because of service or compensation) after December 31, 2017, may elect to apply certain alternative funding rules to the plan and any other plan sponsored by any member of the controlled group.[594] An election to apply the alternative funding rules must be made at such time and in such manner as prescribed by the Secretary, and once made with respect to a plan year, applies to all subsequent years unless revoked with the consent of the Secretary.[595]

Under the alternative funding rules, an interest rate of eight percent is used to determine a plan's funding target and target normal cost, rather than the first, second, and third segment rates. However, if new benefits are accrued or earned under a plan for a plan year in which the election is in effect, the present value of such benefits must be determined on the basis of the U.S. Treasury obligation yield curve for the day that is the valuation date of such plan for such plan year. In addition, if the value of plan assets is less than the plan's funding target, such that the plan has a funding shortfall, the shortfall is required to be funded by contributions, with interest, over 30 years, rather than over seven years. The shortfall amortization bases determined[596] for all plan years preceding the first plan year to which the election applies (and all related shortfall amortization installments) are reduced to zero. Further, the assumptions applicable to an "at-risk" plan do not apply.

For purposes of these rules, a "community newspaper plan" is a plan[597] that is maintained by an employer that, as of December 31, 2017:

- publishes and distributes daily, either electronically or in printed form, one or more community newspapers (as defined below) in a single State;[598]
- is not a company the stock of which is publicly traded on a stock exchange or in an over-the-counter market, and is not controlled, directly or indirectly, by such a company;
- is controlled, directly or indirectly (a) by one or more persons residing primarily in the State in which the community newspaper is published; (b) for at least 30 years by individuals who are members of the same family; (c) by a trust created or organized in the State in which the community newspaper is published, the sole trustees of which are persons described in (a) or (b); (d) by an entity described in section 501(c)(3) and ex-

[593] Sec. 430(m), as added by the SECURE Act, Pub. L. No. 116–94, Div. O.

[594] For this purpose, the controlled group means all persons treated as a single employer under subsection (b), (c), (m), or (o) of section 414 as of the date of enactment of the SECURE Act.

[595] The IRS has provided guidance on such elections in Notice 2020–60, 2020–36 I.R.B. 514, August 31, 2020.

[596] Under section 430(c)(3).

[597] The plan must also be a plan to which section 430(m) applies.

[598] Under ERISA, a community newspaper plan includes one that publishes and distributes daily, either electronically or in printed form, either a community newspaper or one or more community newspapers in the same State. Sec. 303(m)(4)(A)(i).

empt from tax under section 501(a) that is organized and operated in the State in which the community newspaper is published, and the primary purpose of which is to benefit communities in the State; or (e) by a combination of persons described in (a), (c), or (d); and

- does not control, directly or indirectly, any newspaper in any other State.

A "community newspaper" means a newspaper that primarily serves a metropolitan statistical area, as determined by the Office of Management and Budget, with a population of not less than 100,000. A person (the "first" person) is treated as controlled by another person if the other person possesses, directly or indirectly, the power to direct or cause the direction and management of the first person (including the power to elect a majority of the members of the board of directors of the first person) through the ownership of voting securities.

Explanation of Provision

The provision modifies the eligibility rules that apply to the special rules for minimum funding standards for community newspaper plans. Under the provision, an eligible newspaper plan sponsor of a plan under which no participant has had the participant's accrued benefit increased (whether because of service or compensation) after April 2, 2019, may elect to apply the alternative funding rules to the plan. An eligible newspaper plan sponsor is defined in the provision as the plan sponsor of any community newspaper plan or any other plan sponsored, as of April 2, 2019, by a member of the same controlled group of a plan sponsor of a community newspaper plan if such member is in the trade or business of publishing one or more newspapers.

The provision revises the definition of community newspaper plan to mean any plan maintained as of December 31, 2018, by an employer that:

- maintains the plan on behalf of participants and beneficiaries with respect to employment in the trade or business of publishing one or more newspapers which were published by the employer at any time during the 11-year period ending on December 20, 2019;
- either (a) is not a company the stock of which is publicly traded (on a stock exchange or in an over-the-counter market), and is not controlled, directly or indirectly, by such a company, or (b) is controlled, directly or indirectly, during the entire 30-year period ending on December 20, 2019 by individuals who are members of the same family, and does not publish or distribute a daily newspaper that is carrier-distributed in printed form in more than five States; and
- is controlled, directly or indirectly (a) by one or more persons residing primarily in a State in which the community newspaper has been published on newsprint or carrier-distributed; (b) during the entire 30-year period ending on December 20, 2019 by individuals who are members of the same family; (c) by one or more trusts, the sole trustees of which are persons described in (a) or (b); or (d) by a combination of persons described in (a), (b), or (c).

The provision removes the definition of "community newspaper" from the eligibility rules, but defines "newspaper" as not including any newspaper to which any of the following apply: (a) the newspaper is not in general circulation; (b) the newspaper is published (on newsprint or electronically) less frequently than three times per week; (c) the newspaper has not ever been regularly published on newsprint; and (d) the newspaper does not have a bona fide list of paid subscribers.[599]

Effective Date

The provision applies to plan years ending after December 31, 2017.

8. Expansion of limitation on excessive employee remuneration (sec. 9708 of the Act and sec. 162(m) of the Code)

Present Law

In general

An employer generally may deduct reasonable compensation for personal services as an ordinary and necessary business expense. Section 162(m) provides an explicit limitation on the deductibility of compensation expenses in the case of publicly traded corporate employers.[600] The otherwise allowable deduction for compensation with respect to a covered employee of a publicly held corporation is limited to no more than $1 million per year.[601] The deduction limitation applies when the deduction attributable to the compensation would otherwise be taken.

Definition of publicly held corporation

For purposes of the deduction disallowance of section 162(m), a publicly held corporation means any corporation which is an issuer of securities required to be registered under section 12 of the Securities Exchange Act of 1934[602] ("Exchange Act"), or any issuer that is required to file reports under section 15(d) of such Act.[603] All U.S. publicly traded companies, including their foreign affiliates, and foreign companies publicly traded through American depository receipts are subject to the registration requirement of section 12 of the Exchange Act. An issuer that is required to file reports under section 15(d) of the Exchange Act may also include certain additional corporations that are not publicly traded, such as large private C corporations or S corporations.

[599] The IRS has issued guidance on this provision in Notice 2022–31, 2022–29 I.R.B. 85, July 18, 2022.

[600] Public Law 115–97 modified section 162(m) for taxable years beginning after December 31, 2017 (with a transition rule for renumeration provided pursuant to a binding contract which was in effect on November 2, 2017, and which was not modified in any material respect on or after such date). For a detailed description of prior law and the changes made by Public Law 115–97, see Joint Committee on Taxation, *General Explanation of Public Law No. 115–97* (JCS–1–18), December 2018, pp. 257–263.

[601] Sec. 162(m).

[602] Pub. L. No. 73–291; 15 U.S.C. sec. 78a, *et seq*.

[603] Sec. 162(m)(2). See also Treas. Reg. sec. 1.162–33(c)(1).

Covered employees

Section 162(m) defines a covered employee as (1) the principal executive officer or principal financial officer of the corporation (or an individual acting in such capacity) at any time during the taxable year, (2) any employee whose total compensation is required to be reported to shareholders under the Exchange Act by reason of being among the corporation's three most highly compensated officers for the taxable year (other than the principal executive officer or principal financial officer), and (3) any individual who was a covered employee with respect to the corporation for any preceding taxable year beginning after December 31, 2016.[604]

Remuneration subject to the deduction limitation

Unless specifically excluded, the deduction limitation applies to all remuneration for services, including cash and the cash value of all remuneration (including benefits) paid in a medium other than cash. If an individual is a covered employee for a taxable year, the deduction limitation applies to all compensation not explicitly excluded from the deduction limitation, regardless of whether the compensation is for services as a covered employee and regardless of when the compensation was earned. The $1 million cap is reduced by excess parachute payments (as defined in section 280G), and the excise tax on specified stock compensation (imposed by section 4985) that are not deductible by the corporation.[605] In addition, compensation does not fail to be compensation with respect to a covered employee and thus subject to the deduction limit for a taxable year merely because the compensation is includible in the income of, or paid to, another individual, such as compensation paid to a beneficiary after the employee's death.[606]

Certain types of compensation are not subject to the deduction limit and are not taken into account in determining whether other compensation exceeds $1 million. The following types of compensation are not taken into account: (1) payments to a tax-favored retirement plan (including salary reduction contributions), (2) amounts that are excludable from the employee's gross income (such as employer-provided health benefits and miscellaneous fringe benefits), and (3) any remuneration payable under a written binding contract which was in effect on February 17, 1993.[607] In addition, commissions and performance-based compensation paid pursuant to a written binding contract that was in effect on November 2, 2017, and which was not materially modified on or after such date, is not subject to the deduction limit.[608]

Explanation of Provision

The provision expands the definition of "covered employee" to include the next five highest-compensated employees of the corpora-

[604] Sec. 162(m)(3). See also Treas. Reg. sec. 1.162–33(c)(2).
[605] Sec. 162(m)(4)(D) and (E). See also Treas. Reg. sec. 1.162–33(e) and (f).
[606] Sec. 162(m)(4)(F). See also Treas. Reg. sec. 1.162–33(c)(3)(i).
[607] Sec. 162(m)(4)(B) and (C). See also Treas. Reg. sec. 1.162–33(c)(3)(iii).
[608] Sec. 13601(e)(2) of Pub. L. No. 115–97, December 22, 2017. For a detailed discussion of these grandfathered compensation arrangements, see Joint Committee on Taxation, *General Explanation of Public Law No. 115–97* (JCS–1–18), December 2018, pp. 261–263. See also Treas. Reg. secs. 1.162–33(g) (transition rules) and 1.162–27 (prior law).

tion (regardless of whether they are officers), resulting in at least 10 covered employees for each taxable year. However, these additional covered employees will only be covered employees for the taxable year(s) in which they are among the five highest compensated employees of the corporation, other than the five officers whose compensation is subject to the deduction limitation.

Effective Date

The provision applies to taxable years beginning after December 31, 2026.

PART TWO: SURFACE TRANSPORTATION EXTENSION ACT OF 2021 (PUBLIC LAW 117–44) [609]

TITLE II—TRUST FUNDS

1. Extension of expenditure authority for Highway Trust Fund, Sport Fish Restoration and Boating Trust Fund, and Leaking Underground Storage Tank Trust Fund (sec. 201 of the Act and secs. 9503, 9504, and 9508 of the Code)

Present Law

Dedication of excise tax revenues to the Highway Trust Fund, the Sport Fish Restoration and Boating Trust Fund, and the Leaking Underground Storage Tank Trust Fund and expenditures from the such trust funds are governed by the Code.[610] The Code authorizes expenditures (subject to appropriations) from the Highway Trust Fund, Sport Fish Restoration and Boating Trust Fund trust funds through September 30, 2021, for the purposes provided in authorizing legislation, as such legislation was in effect on the date of enactment of the Continuing Appropriations Act, 2021 and Other Extensions Act.

Explanation of Provision

The Act extends expenditure authority through October 31, 2021, for the Highway Trust Fund, Sport Fish Restoration and Boating Trust Fund, and the Leaking Underground Storage Tank Trust Fund.

The Act further provides that upon the date of enactment of H.R. 3864 (117th Congress), the amendments made by this section of the Act will cease to be effective and the text will revert back to as read before the date of enactment of this Act.[611] The amendments made by H.R. 3864 will be executed as if the amendment made by this section of the Act had not been enacted.

[609] H.R. 5354. The bill was introduced in the House of Representatives on September 30, 2021 and was passed by the House on October 1, 2021. The Senate passed the bill without amendment by unanimous consent on October 2, 2021. The President signed the bill on October 2, 2021.

[610] Secs. 9503, 9504, and 9508.

[611] H.R. 3864, the Infrastructure Investment and Jobs Act was later enacted on November 15, 2021 (Pub. L. No. 117–58).

Effective Date

The provision is effective on the date of enactment (October 2, 2021).

PART THREE: FURTHER SURFACE TRANSPORTATION EXTENSION ACT OF 2021 (PUBLIC LAW 117–52) [612]

TITLE II—TRUST FUNDS

1. Extension of expenditure authority for Highway Trust Fund, Sport Fish Restoration and Boating Trust Fund, and Leaking Underground Storage Tank Trust Fund (sec. 4 of the Act and secs. 9503, 9504, and 9508 of the Code)

Present Law

Dedication of excise tax revenues to the Highway Trust Fund, the Sport Fish Restoration and Boating Trust Fund, and the Leaking Underground Storage Tank Trust Fund and expenditures from the such trust funds are governed by the Code.[613] The Code authorizes expenditures (subject to appropriations) from the Highway Trust Fund, Sport Fish Restoration and Boating Trust Fund trust funds through October 31, 2021, for the purposes provided in authorizing legislation, as such legislation was in effect on the date of enactment of the Surface Transportation Extension Act of 2021.

Explanation of Provision

The Act extends expenditure authority through December 3, 2021, for the Highway Trust Fund, Sport Fish Restoration and Boating Trust Fund, and the Leaking Underground Storage Tank Trust Fund.

The Act further provides that upon the date of enactment of H.R. 3864 (117th Congress), the amendments made by section 201 of the Surface Transportation Extension Act of 2021 and this provision will cease to be effective and the text will revert back to as read before the date of enactment of this Act. The amendments made by H.R. 3864 will be executed as if the amendment made by section 201 of the Surface Transportation Extension Act of 2021 and this provision had not been enacted.

As a conforming amendment, the provision strikes paragraph (d) of section 201 of the Surface Transportation Extension Act of 2021 (relating to special rules for execution of amendments on the date of enactment of H.R. 3864).

Effective Date

The provision is effective on the date of enactment (October 31, 2021).

[612] H.R. 5763. The bill was introduced in and passed by the House of Representatives on October 28, 2021. The Senate passed the bill without amendment by unanimous consent the same day. The President signed the bill on October 31, 2021.

[613] Secs. 9503, 9504, and 9508.

PART FOUR: INFRASTRUCTURE INVESTMENT AND JOBS ACT (PUBLIC LAW 117–58) [614]

DIVISION H—REVENUE PROVISIONS

1. Extension of Highway Trust Fund expenditure authority (sec. 80101 of the Act and secs. 9503, 9504, and 9508 of the Code)

Present Law

In general

The Code authorizes expenditures (subject to appropriations) from the Highway Trust Fund through December 3, 2015, for the purposes provided in authorizing legislation, as such legislation was in effect on the date of enactment of the Further Surface Transportation Extension Act of 2021.

Highway Trust Fund expenditure purposes

The Highway Trust Fund has a separate account for mass transit, the Mass Transit Account.[615] The Highway Trust Fund and the Mass Transit Account are funding sources for specific programs.

Highway Trust Fund expenditure purposes have been revised with each authorization Act enacted since establishment of the Highway Trust Fund in 1956. In general, expenditures authorized under those Acts (as the Acts were in effect on the date of enactment of the most recent such authorizing Act) are specified by the Code as Highway Trust Fund expenditure purposes. The Code provides that the authority to make expenditures from the Highway Trust Fund expires after December 3, 2015. Thus, no Highway Trust Fund expenditures may occur after December 3, 2015, without an amendment to the Code.

Section 9503 of the Code appropriates to the Highway Trust Fund amounts equivalent to the taxes received from the following: the taxes on diesel, gasoline, kerosene and special motor fuel, the tax on tires, the annual heavy vehicle use tax, and the tax on the retail sale of heavy trucks and trailers.[616] Section 9601 provides that amounts appropriated to a trust fund pursuant to sections 9501 through 9511, are to be transferred at least monthly from the General Fund of the Treasury to such trust fund on the basis of estimates made by the Secretary of the Treasury of the amounts referred to in the Code section appropriating the amounts to such trust fund. The Code requires that proper adjustments be made in amounts subsequently transferred to the extent prior estimates were in excess of, or less than, the amounts required to be transferred.

[614] H.R. 3684. The bill was introduced in the House of Representatives on June 4, 2021 and passed by the House on July 1, 2021. The Senate passed the bill with an amendment on August 10, 2021. The House agreed to the Senate amendment on November 5, 2021. The President signed the bill on November 15, 2021.

[615] Sec. 9503(e)(1).

[616] Sec. 9503(b)(1).

Explanation of Provision

The Act provides for expenditure authority through September 30, 2026.[617] The Code provisions governing the purposes for which monies in the Highway Trust Fund may be spent are updated to include the Infrastructure Investment and Jobs Act.

Effective Date

The provision is effective on the date of enactment (November 15, 2021).

2. Extension of highway-related taxes (sec. 80102 of the Act and secs. 4041, 4051, 4071, 4081, 4221, 4481, 4483, and 6412 of the Code)

Present Law

In general

Six separate excise taxes are imposed to finance the Federal Highway Trust Fund program. Three of these taxes are imposed on highway motor fuels. The remaining three are a retail sales tax on heavy highway vehicles, a manufacturers' excise tax on heavy vehicle tires, and an annual use tax on heavy vehicles. A substantial majority of the revenues produced by the Highway Trust Fund excise taxes are derived from the taxes on motor fuels. The annual use tax on heavy vehicles expires October 1, 2023. Except for 4.3 cents per gallon of the Highway Trust Fund fuels tax rates, the remaining taxes are scheduled to expire after October 1, 2022. The 4.3-cents-per-gallon portion of the fuels tax rates is permanent.[618] The six taxes are summarized below.

Highway motor fuels taxes

The Highway Trust Fund motor fuels tax rates are as follows:[619]

Gasoline	18.3 cents per gallon
Diesel fuel and kerosene	24.3 cents per gallon
Alternative fuels	18.3 or 24.3 cents per gallon generally[620]

Non-fuel Highway Trust Fund excise taxes

In addition to the highway motor fuels excise tax revenues, the Highway Trust Fund receives revenues produced by three excise taxes imposed exclusively on heavy highway vehicles or tires. These taxes are:

[617] Cross-references to the reauthorization Act in the Code provisions governing the Sport Fish Restoration and Boating Trust Fund are also updated to include the Infrastructure Investment and Jobs Act. In addition, the date references in the Code provisions governing the Leaking Underground Storage Tank Trust Fund, and the Sport Fish Restoration and Boating Trust Fund are also updated.

[618] This portion of the tax rates was enacted as a deficit reduction measure in 1993. Receipts from it were retained in the General Fund until 1997 legislation provided for their transfer to the Highway Trust Fund.

[619] Secs. 4081(a)(2)(A)(i), 4081(a)(2)(A)(iii), 4041(a)(2), 4041(a)(3), and 4041(m). Some of these fuels also are subject to an additional 0.1-cent-per-gallon excise tax to fund the Leaking Underground Storage Tank Trust Fund (secs. 4041(d) and 4081(a)(2)(B)).

[620] See secs. 4041(a)(2), 4041(a)(3), and 4041(m).

1. A 12-percent excise tax imposed on the first retail sale of heavy highway vehicles, tractors, and trailers (generally, trucks having a gross vehicle weight in excess of 33,000 pounds and trailers having such a weight in excess of 26,000 pounds);[621]
2. An excise tax imposed on highway tires with a rated load capacity exceeding 3,500 pounds, generally at a rate of 0.945 cents per 10 pounds of excess;[622] and
3. An annual use tax imposed on highway vehicles having a taxable gross weight of 55,000 pounds or more.[623] (The maximum rate for this tax is $550 per year, imposed on vehicles having a taxable gross weight over 75,000 pounds.)

The taxable year for the annual use tax is from July 1st through June 30th of the following year. For the period July 1, 2023, through September 30, 2023, the amount of the annual use tax is reduced by 75 percent.[624]

Explanation of Provision

The provision generally extends present-law taxes through September 30, 2028. The heavy vehicle use tax is extended through September 30, 2029.

Effective Date

The provision is effective October 1, 2021.

3. Further additional transfers to the Highway Trust Fund (sec. 80103 of the Act and sec. 9503 of the Code)

Present Law

Public Law No. 110–318, "an Act to amend the Internal Revenue Code of 1986 to restore the Highway Trust Fund balance" transferred, out of money in the Treasury not otherwise appropriated, $8,017,000,000 to the Highway Trust Fund effective September 15, 2008. Public Law No. 111–46, "an Act to restore sums to the Highway Trust Fund and for other purposes," transferred, out of money in the Treasury not otherwise appropriated, $7 billion to the Highway Trust Fund effective August 7, 2009. The Hiring Incentives to Restore Employment Act transferred, out of money in the Treasury not otherwise appropriated, $14,700,000,000 to the Highway Trust Fund and $4,800,000,000 to the Mass Transit Account in the Highway Trust Fund.[625] The HIRE Act provisions generally were effective as of March 18, 2010.

Moving Ahead for Progress in the 21st Century ("MAP–21")[626] provided that, out of money in the Treasury not otherwise appropriated, the following transfers were to be made from the General Fund to the Highway Trust Fund:

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[621] Sec. 4051.
[622] Sec. 4071.
[623] Sec. 4481.
[624] Sec. 4482(c)(4) and (d).
[625] The Hiring Incentives to Restore Employment Act (the "HIRE" Act), Pub. L. No. 111–147, sec. 442.
[626] Moving Ahead for Progress in the 21st Century Act ("MAP–21"), Pub. L. No. 112–141, sec. 40201(a)(2), and sec. 40251.

	FY 2013	FY 2014
Highway Account	$6.2 billion	$10.4 billion
Mass Transit Account		$2.2 billion

MAP–21 also transferred $2.4 billion from the Leaking Underground Storage Tank Trust Fund to the Highway Account in the Highway Trust Fund.

The Highway and Transportation Funding Act of 2014 transferred $7.765 billion from the General Fund to the Highway Account of the Highway Trust Fund, $2 billion from the General Fund to the Mass Transit Account of the Highway Trust Fund, and $1 billion from the Leaking Underground Storage Tank Trust Fund to the Highway Account of the Highway Trust Fund.[627] The provisions were effective on August 8, 2014.

The Surface Transportation and Veterans Health Care Choice Improvement Act of 2015, provided, out of money not otherwise appropriated, the following transfers from the General Fund to the Highway Trust Fund: $6.068 billion to the Highway Account, and $2 billion to the Mass Transit Account. The provision was effective July 31, 2015.

The Fixing America's Surface Transportation (FAST) Act transferred $51,900,000,000 to the Highway Account and $18,100,000,000 to the Mass Transit account.[628]

Explanation of Provision

The provision provides that out of money in the Treasury not otherwise appropriated, the following transfers are to be made from the General Fund to the Highway Trust Fund: $90,000,000,000 to the Highway Account and $28,000,000,000 to the Mass Transit account.

Effective Date

The provision is effective on the date of enactment (November 15, 2021).

4. Extension and modification of certain Superfund excise taxes (sec. 80201 of the Act and secs. 4661, 4671, and 4672 of the Code)

Present Law

Among other amounts, amounts equivalent to the taxes received in the Treasury under sections 4661 and 4671 (the "Superfund chemicals taxes") are dedicated to the Hazardous Substance Superfund.[629] The Superfund chemicals taxes expired on December 31, 1995.

Prior to expiration, section 4661 imposed a tax on sales of taxable chemicals. The tax was imposed at rates ranging from 22 cents to $4.87 per ton for the chemical as listed in the statute. The Code provides special rules, exemptions, and refunds or credit for certain uses and exports.

[627] Highway and Transportation Funding Act of 2014, Pub. L. No. 113–159, sec. 2002.
[628] Fixing America's Surface Transportation (FAST) Act, Pub. L. No. 114–94, sec. 31201.
[629] Sec. 9507(b)(1).

Section 4671 imposed a tax on sales or uses of imported taxable substances that use one or more taxable chemicals in their manufacture or production. In general, the amount of the tax was the amount that would have been imposed under section 4661 on the taxable chemicals used in the manufacture or production of such substances if such taxable chemicals had been sold in the United States for an equivalent use. If an importer failed to provide the Secretary with sufficient information to determine the amount of the tax, the amount of the tax imposed on such taxable substance was five percent of the appraised value of such substance as of the time of entering into the United States for consumption, use or warehousing.

A "taxable substance" means a substance which at the time of its sale or use by the importer was listed as a taxable substance. In addition to the statutory list, a substance was to be listed if the Secretary determines, in consultation with the Administrator of the Environmental Protection Agency and the Commissioner of U.S. Customs and Border Protection, that taxable chemicals constitute more than 50 percent of the weight (or more than 50 percent of the value) of the materials used to produce such substance. An importer or exporter may request a determination on whether a substance should be added to or removed from the list of taxable substances.

Explanation of Provision

The provision reinstates the Superfund chemical taxes as of July 1, 2022, at double the tax rates of prior law. The tax on taxable chemicals ranges from 44 cents to $9.74 cents per ton under the provision.

For taxable substances, if an importer fails to provide sufficient information to the Secretary, the provision increases the rate of tax from five percent to 10 percent of the appraised value of such substance. The provision lowers the threshold for the determination to list a taxable substance from more than 50 percent to more than 20 percent of the weight (or more than 20 percent of the value). Except as determined otherwise by the Secretary, any substance that was determined to be a taxable substance prior to the date of enactment, will continue to be a taxable substance after such date. The Secretary is required to publish an initial list of taxable substances by January 1, 2022.[630]

Effective Date

The provision takes effect on July 1, 2022.

5. Private activity bonds for qualified broadband projects (sec. 80401 of the Act and secs. 141 and 142 of the Code)

Present Law

Interest paid on bonds issued by State and local governments generally is excluded from gross income for Federal income tax purposes. Because of the income exclusion, investors generally are

[630] Such list was published in Notice 2021–66, 2021–52 I.R.B. 901, December 27, 2021.

willing to accept a lower interest rate on tax-exempt bonds than they might otherwise accept on a taxable investment. This, in turn, lowers the borrowing costs for the beneficiaries of such financing.

Bonds issued by State and local governments may be classified as either governmental bonds or private activity bonds. Governmental bonds are bonds the proceeds of which are primarily used to finance governmental functions or which are repaid with governmental funds. Private activity bonds are bonds in which the State or local government serves as a conduit providing financing to nongovernmental persons (e.g., private businesses or individuals). The exclusion from income for interest paid on State and local bonds does not apply to private activity bonds unless the bonds are issued for certain permitted purposes ("qualified private activity bonds") and other Code requirements are met.

Qualified private activity bonds are tax-exempt private activity bonds issued to provide financing for specified privately used facilities. The definition of a qualified private activity bond includes an exempt facility, qualified mortgage, veterans' mortgage, small issue, redevelopment, 501(c)(3), or student loan bond.[631]

Exempt facility bonds are often used to finance infrastructure projects. To qualify as an exempt facility bond, 95 percent of the net proceeds must be used to finance an eligible facility.[632] Facilities eligible for this financing include the following:

- Airports,
- Ports (docks and wharves),
- Mass commuting facilities,
- Facilities for the furnishing of water,
- Sewage facilities,
- Solid waste disposal facilities,
- Qualified residential rental projects,
- Facilities for the local furnishing of electric energy or gas,
- Local district heating or cooling facilities,
- Qualified hazardous waste facilities,
- High-speed intercity rail facilities,
- Environmental enhancements of hydroelectric generating facilities,
- Qualified public educational facilities,
- Qualified green building and sustainable design projects, and
- Qualified highway or surface freight transfer facilities.[633]

Generally, qualified private activity bonds are subject to eligibility restrictions that do not apply to governmental bonds. For example, the aggregate volume of most qualified private activity bonds is restricted by annual State volume limitations (the "State volume cap").[634] For calendar year 2022, the State volume cap,

[631] Sec. 141(e).
[632] Sec. 142(a).
[633] Sec. 142(a)(1)–(15).
[634] The following private activity bonds are not subject to the State volume cap: qualified 501(c)(3) bonds, exempt facility bonds for airports, docks and wharves, environmental enhancements of hydroelectric generating facilities, and exempt facility bonds for solid waste disposal facilities that are to be owned by a governmental unit. The State volume cap does not apply to 75 percent of exempt facility bonds issued for high-speed intercity rail facilities (100 percent if the high-speed intercity rail facility is to be owned by a governmental unit). Qualified veterans mortgage bonds and exempt facility bonds for qualified public educational facilities, qualified green building and sustainable design projects, and qualified highway or surface freight transfer

which is indexed for inflation, equals $110 per resident of the State, or $335,115,000, if greater.[635]

Explanation of Provision

The provision adds a new category of exempt facility bonds for qualified broadband projects. "Qualified broadband project" means any project which (1) is designed to provide broadband service solely to 1 or more census block groups in which more than 50 percent of residential households do not have access to fixed, terrestrial broadband service which delivers at least 25 megabits per second downstream and at least 3 megabits service upstream, and (2) results in internet access to residential locations, commercial locations, or a combination of residential and commercial locations at speeds not less than 100 megabits per second for downloads and 20 megabits for second for uploads, but only if at least 90 percent of the locations provided such access under the project are locations where, before the project, a broadband service provider (a) did not provide service, or (b) did not provide service meeting the minimum speed requirements described in clause (1).

A project shall not be treated as a qualified broadband project unless, before the issue date of any issue the proceeds of which are to be used to fund the project, the issuer (1) notifies each broadband service provider providing broadband service in the area within which broadband services are to be provided under the project of the project and its intended scope, (2) includes in such notice a request for information from each such provider with respect to the provider's ability to deploy, manage, and maintain a broadband network capable of providing gigabit capable Internet access to residential or commercial locations, and (3) allows each such provider at least 90 days to respond to such notice and request.

The State volume cap does not apply to 75 percent of exempt facility bonds issued for qualified broadband projects (100 percent if the qualified broadband project is to be owned by a governmental unit).

Effective Date

The provision applies to obligations issued in calendar years beginning after the date of enactment (November 15, 2021).

6. Carbon dioxide capture facilities (sec. 80402 of the Act and secs. 141 and 142 of the Code)

Present Law

Interest paid on bonds issued by State and local governments generally is excluded from gross income for Federal income tax purposes. Because of the income exclusion, investors generally are willing to accept a lower interest rate on tax-exempt bonds than they might otherwise accept on a taxable investment. This, in turn, lowers the borrowing costs for the beneficiaries of such financing.

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facilities also are not subject to the State volume cap, but the Code subjects such bonds to volume limitations specific to the category of bonds.

[635] Rev. Proc. 2021–45, 2021–48 I.R.B. 764, p. 770, November 29, 2021.

Bonds issued by State and local governments may be classified as either governmental bonds or private activity bonds. Governmental bonds are bonds the proceeds of which are primarily used to finance governmental functions or which are repaid with governmental funds. Private activity bonds are bonds in which the State or local government serves as a conduit providing financing to nongovernmental persons (e.g., private businesses or individuals). The exclusion from income for interest paid on State and local bonds does not apply to private activity bonds unless the bonds are issued for certain permitted purposes ("qualified private activity bonds") and other Code requirements are met.

Qualified private activity bonds are tax-exempt private activity bonds issued to provide financing for specified privately used facilities. The definition of a qualified private activity bond includes an exempt facility, qualified mortgage, veterans' mortgage, small issue, redevelopment, 501(c)(3), or student loan bond.[636]

Exempt facility bonds are often used to finance infrastructure projects. To qualify as an exempt facility bond, 95 percent of the net proceeds must be used to finance an eligible facility.[637] Facilities eligible for this financing include the following:

- Airports,
- Ports (docks and wharves),
- Mass commuting facilities,
- Facilities for the furnishing of water,
- Sewage facilities,
- Solid waste disposal facilities,
- Qualified residential rental projects,
- Facilities for the local furnishing of electric energy or gas,
- Local district heating or cooling facilities,
- Qualified hazardous waste facilities,
- High-speed intercity rail facilities,
- Environmental enhancements of hydroelectric generating facilities,
- Qualified public educational facilities,
- Qualified green building and sustainable design projects, and
- Qualified highway or surface freight transfer facilities.[638]

Generally, qualified private activity bonds are subject to eligibility restrictions that do not apply to governmental bonds. For example, the aggregate volume of most qualified private activity bonds is restricted by annual State volume limitations (the "State volume cap").[639] For calendar year 2022, the State volume cap,

[636] Sec. 141(e).
[637] Sec. 142(a).
[638] Sec. 142(a)(1)–(15).
[639] The following private activity bonds are not subject to the State volume cap: qualified 501(c)(3) bonds, exempt facility bonds for airports, docks and wharves, environmental enhancements of hydroelectric generating facilities, and exempt facility bonds for solid waste disposal facilities that are to be owned by a governmental unit. The State volume cap does not apply to 75 percent of exempt facility bonds issued for high-speed intercity rail facilities (100 percent if the high-speed intercity rail facility is to be owned by a governmental unit). Qualified veterans mortgage bonds and exempt facility bonds for qualified public educational facilities, qualified green building and sustainable design projects, and qualified highway or surface freight transfer facilities also are not subject to the State volume cap, but the Code subjects such bonds to volume limitations specific to the category of bonds.

which is indexed for inflation, equals $110 per resident of the State, or $335,115,000, if greater.[640]

Explanation of Provision

The provision adds a new category of exempt facility bonds for qualified carbon dioxide capture facilities.

"Qualified carbon dioxide capture facility" means (1) the eligible components of an industrial carbon dioxide facility, and (2) a direct air capture facility (as defined in section 45Q(e)(1)). "Eligible component" means any equipment which is installed in an industrial carbon dioxide facility that satisfies the additional requirements described below and which is (1) used for the purpose of capture, treatment and purification, compression, transportation, or on-site storage of carbon dioxide produced by the industrial carbon dioxide facility, or (2) integral or functionally related and subordinate to a process which converts a solid or liquid product from coal, petroleum residue, biomass, or other materials which are recovered for their energy or feedstock value into a synthesis gas composed primarily of carbon dioxide and hydrogen for direct use or subsequent chemical or physical conversion. "Biomass" means any (1) agricultural or plant waste, (2) byproduct of wood or paper mill operations, including lignin in spent pulping liquors, and (3) other products of forestry maintenance; "biomass" does not include paper which is commonly recycled. "Coal" means anthracite, bituminous coal, subbituminous coal, lignite, and peat.

Except as otherwise described in the next sentence, the term "industrial carbon dioxide facility" means a facility that emits carbon dioxide (including from any fugitive emissions source) that is created as a result of any of the following processes: (1) fuel combustion, (2) gasification, (3) bioindustrial, (4) fermentation, and (5) any manufacturing industry relating to (a) chemicals, (b) fertilizers, (c) glass, (d) steel, (e) petroleum residues, (f) forest products, (g) agriculture, including feedlots and dairy operations, and (h) transportation grade liquid fuels. An industrial carbon dioxide facility does not include (1) any geological gas facility, or (2) any air separation unit that (a) does not qualify as gasification equipment, or (b) is not a necessary component of an oxy-fuel combustion process. "Petroleum residue" means the carbonized product of high-boiling hydrocarbon fractions obtained in petroleum processing. "Geological gas facility" means a facility that (1) produces a raw product consisting of gas or mixed gas and liquid from a geological formation, (2) transports or removes impurities from such product, or (3) separates such product into its constituent parts.

Generally, the eligible components of an industrial carbon dioxide facility must also be designed to have a capture and storage percentage that is equal to or greater than 65 percent. In the case of an industrial carbon dioxide facility designed with a capture and storage percentage that is less than 65 percent, the percentage of the cost of the eligible components installed in such facility that may be financed with tax-exempt bonds may not be greater than the designed capture and storage percentage. Generally, the "capture and storage percentage" is an amount, expressed as a percent-

[640] Rev. Proc. 2021–45, 2021–48 I.R.B. 764, p. 770, November 29, 2021.

age, equal to the quotient of (1) the total metric tons of carbon dioxide designed to be annually captured, transported, and injected into (a) a facility for geologic storage, or (b) an enhanced oil or gas recovery well followed by geologic storage, divided by (2) the total metric tons of carbon dioxide which would otherwise be released into the atmosphere each year as industrial emission of greenhouse gas if the eligible components were not installed in the industrial carbon dioxide facility. In the case of eligible components that are designed to capture carbon dioxide solely from specific sources of emissions or portions thereof within an industrial carbon dioxide facility, the capture and storage percentage is determined based only on such specific sources of emissions or portions thereof.

The State volume cap does not apply to 75 percent of exempt facility bonds issued for qualified carbon dioxide capture facilities.

For purposes of subsection 141(b) of the Code, the sale of carbon dioxide produced by a qualified carbon dioxide capture facility which is owned by a governmental unit does not constitute private business use.

Additionally, the provision modifies section 45Q such that the amount of the credit determined under subsection (a) of such section with respect to any project for any taxable year is reduced by the amount which is the product of the amount so determined for such year and the lesser of ½ or a fraction (1) the numerator of which is the sum, for the taxable year and all prior taxable years, of the proceeds from an issue used to provide financing for qualified carbon dioxide capture facilities for the project the interest on which is exempt from tax under section 103, and (2) the denominator of which is the aggregate amount of additions to the capital account for the project for the taxable year and all prior taxable years. The amounts under the preceding sentence for any taxable year are determined as of the close of the taxable year.

Effective Date

The provision applies to obligations issued after December 31, 2021.

7. Increase in national limitation amount for qualified highway or surface freight transportation facilities (sec. 80403 of the Act and secs. 141 and 142 of the Code)

Present Law

Interest paid on bonds issued by State and local governments generally is excluded from gross income for Federal income tax purposes. Because of the income exclusion, investors generally are willing to accept a lower interest rate on tax-exempt bonds than they might otherwise accept on a taxable investment. This, in turn, lowers the borrowing costs for the beneficiaries of such financing.

Bonds issued by State and local governments may be classified as either governmental bonds or private activity bonds. Governmental bonds are bonds the proceeds of which are primarily used to finance governmental functions or which are repaid with governmental funds. Private activity bonds are bonds in which the State or local government serves as a conduit providing financing to nongovernmental persons (*e.g.*, private businesses or individuals). The exclusion from income for interest paid on State and local bonds does not apply to private activity bonds unless the bonds are issued for certain permitted purposes ("qualified private activity bonds") and other Code requirements are met.

Qualified private activity bonds are tax-exempt private activity bonds issued to provide financing for specified privately used facilities. The definition of a qualified private activity bond includes an exempt facility, qualified mortgage, veterans' mortgage, small issue, redevelopment, 501(c)(3), or student loan bond.[641]

Exempt facility bonds are often used to finance infrastructure projects. To qualify as an exempt facility bond, 95 percent of the net proceeds must be used to finance an eligible facility.[642] Facilities eligible for this financing include, among others, qualified highway or surface freight transfer facilities.[643]

Generally, qualified private activity bonds are subject to eligibility restrictions that do not apply to governmental bonds. Exempt facility bonds for qualified highway or surface freight transfer facilities are subject to a national volume limitation of $15,000,000,000.[644]

Explanation of Provision

The provision increases the national volume limitation applicable to exempt facility bonds for qualified highway or surface freight transfer facilities to $30,000,000,000.

Effective Date

The provision applies to bonds issued after the date of enactment (November 15, 2021).

8. Modification of automatic extension of certain deadlines in the case of taxpayers affected by Federally declared disasters (sec. 80501 of the Act and sec. 7508A of the Code)

Present Law

General time limits for filing tax returns and paying estimated tax

Individuals generally must file their Federal income tax returns by April 15 of the year following the close of a taxable year.[645] Present law also provides that the Secretary may grant reasonable extensions of time for filing such returns.[646] Treasury regulations provide, upon application on the proper form, an automatic six-month extension (until October 15 for calendar-year individuals) for any individual timely filing that form and paying the amount of tax estimated to be due.[647]

In general, individuals must make quarterly estimated tax payments by April 15, June 15, September 15, and January 15 of the

[641] Sec. 141(e).
[642] Sec. 142(a).
[643] Sec. 142(a)(15).
[644] Sec. 142(m)(2)(A).
[645] Sec. 6072.
[646] Sec. 6081.
[647] Treas. Reg. sec. 1.6081–4.

following taxable year. Wage withholding is considered to be a payment of estimated taxes.

Suspension of time periods

In general, the Secretary may specify a period of up to one year that may be disregarded for performing various acts under the Code, such as filing tax returns, paying taxes, or filing a claim for credit or refund of tax, for any taxpayer determined by the Secretary to be affected by a Federally declared disaster or a terroristic or military action with respect to any tax liability of the taxpayer.[648] In addition, the period specified by the Secretary may be disregarded in determining the amount of any interest, penalty, additional amount, or addition to tax, and the amount of any credit or refund.

There are special rules provided for pensions and other employee benefit plans. The Secretary may prescribe a period of up to one year which may be disregarded in determining the date by which any action by a pension or other employee benefit plan, or by any sponsor, administrator, participant, beneficiary, or other person with respect to such plan, affected by a Federally declared disaster or a terroristic or military action would be required or permitted to be completed. A plan is not treated as operating in a manner inconsistent with its terms or in violation of its terms merely due to disregarding any such periods.

The suspension of time may apply to a wide variety of acts, including the (1) filing of any return of income, estate, gift, employment, or excise tax; (2) payment of any income, estate, gift, employment, or excise tax; (3) allowance of a credit or refund of any tax; (4) assessment of any tax; (5) collection of the amount of any liability in respect of any tax; and (6) any other act required or permitted under the internal revenue laws specified by the Secretary of the Treasury. The types of acts for which time may be suspended are identified in a related provision and incorporated by reference.[649]

For a tax-related deadline to be postponed under this authority, the IRS generally will publish, as soon as practicable after the declaration of the disaster or occurrence of a terroristic or military action, a revenue ruling, revenue procedure, notice, announcement, news release, or other guidance authorizing the postponement and describing the acts postponed, the postponement period, and the covered disaster area.[650]

Current 60-day suspension

Currently, in the case of a Federally declared disaster, qualified taxpayers have a mandatory 60-day period that is disregarded in

[648] Sec. 7508A.

[649] Sec. 7508(a)(1)(A) through (K). Under Treasury regulations, additional acts were added to this list with respect to affected pension plans and affected taxpayers with respect to such plans: Making contributions to a qualified retirement plan (within the meaning of section 4974(c)) under section 219(f)(3), 404(a)(6), 404(h)(1)(B), or 404(m)(2); making distributions under section 408(d)(4); recharacterizing contributions under section 408A(d)(6); or making a rollover under section 402(c), 403(a)(4), 403(b)(8), or 408(d)(3). Treas. Reg. sec. 301.7508A–1(c)(1)(iii). In addition, Revenue Procedure 2018–58, 2018-50 I.R.B. 990, supplements the list of postponed acts in section 7508(a)(1) and Treasury Regulation section 301.7508A–1(c)(1) with an additional list of time-sensitive acts.

[650] Treas. Reg. sec. 301.7508A–1(e).

determining whether the acts listed above were performed in the time prescribed; the amount of any interest, penalty, additional amount, or addition to tax; and the amount of any credit or refund. The 60-day period begins on the earliest incident date specified in the declaration to which the relevant disaster area relates and ends on the date which is 60 days after the latest incident date so specified. A disaster area is the geographic area of a Federally declared disaster, which is any disaster subsequently determined by the President to warrant assistance by the Federal government under the Stafford Act.[651]

Qualified taxpayers are (1) any individual whose principal residence is located in a disaster area, (2) any taxpayer if the taxpayer's principal place of business (other than the business of performing services as an employee) is located in a disaster area, (3) any individual who is a relief worker affiliated with a recognized government or philanthropic organization and who is assisting in a disaster area, (4) any taxpayer whose records necessary to meet a deadline for the acts listed above are maintained in a disaster area, (5) any individual visiting a disaster area who was killed or injured as a result of the disaster, and (6) solely with respect to a joint return, any spouse of an individual who is a qualified taxpayer.

The mandatory 60-day period provided is in addition to, or concurrent with, any period of suspension provided by the Secretary.

Explanation of Provision

The provision states that the period shall end 60 days after the later of (1) such earliest incident date or (2) the date such declaration was issued.

The provision specifies that the 60-day period shall be disregarded in determining under the internal revenue laws, in respect of any tax liability of a qualified taxpayer, whether any of the specified acts to which the extension applies were performed within the time prescribed (without regard to any extensions otherwise provided for periods after the 60-day period).

The provision modifies the definition of "disaster area" to mean an area in which a major disaster occurs for which the President provides financial assistance under the Robert T. Stafford Disaster Relief and Emergency Assistance Act. In the case of multiple declarations, the provision provides that a separate 60-day period shall be calculated with respect to each declaration.

Effective Date

The provision applies to Federally declared disasters declared after the date of enactment (November 15, 2021).

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[651] Sec. 165(i)(5).

9. Modification of rules for postponing certain acts by reason of service in combat zone or contingency operation (sec. 80502 of the Act and sec. 7508 of the Code)

Present Law

In computing the time within which they must complete an action required or prescribed by the Code,[652] persons who serve in the United States Armed Forces or in support of the Armed Forces are entitled to disregard their period of service while in designated combat zones[653] or serving overseas in a contingency operation designated as such by the Secretary of Defense,[654] and the 180 days succeeding such period. For this purpose, periods of hospitalization as a result of such service are included in the time that may be disregarded.

In addition to determining the timeliness of an action taken by the taxpayer, the period that may be disregarded is also disregarded in determining the amount of any interest, penalty, additional amount, or addition to tax, and the amount of any credit or refund.

The Code specifies the following actions as actions within the scope of those actions for which the specified periods of time may be disregarded:

A. Filing any return of income, estate, gift, employment, or excise tax;

B. Payment of any income, estate, gift, employment, or excise tax or any installment thereof or of any other liability to the United States in respect thereof;

C. Filing a petition with the United States Tax Court ("Tax Court") for redetermination of a deficiency, or for review of a decision rendered by the Tax Court;

D. Allowance of a credit or refund of any tax;

E. Filing a claim for credit or refund of any tax;

F. Bringing suit upon any such claim for credit or refund;

G. Assessment of any tax;

H. Giving or making any notice or demand for the payment of any tax, or with respect to any liability to the United States in respect of any tax;

I. Collection of the amount of any liability in respect of any tax; and

J. Bringing suit by the United States in respect of any liability in respect of any tax.

In addition, the statute includes a residuary clause that permits the Secretary to designate any other act required or permitted under the internal revenue laws as within the scope of section 7508(a).[655]

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[652] Secs. 6072 (prescribing deadlines for filing income tax returns) and 6081 (authorization of extensions of time to file, provided tax estimated to be due is paid with the application for extension).

[653] Sec. 112.

[654] Sec. 7508.

[655] Sec. 7508(a)(1)(A) through (K). Under Treasury regulations, additional acts were added to this list with respect to affected pension plans and affected taxpayers with respect to such plans: Making contributions to a qualified retirement plan (within the meaning of section 4974(c)) under section 219(f)(3), 404(a)(6), 404(h)(1)(B), or 404(m)(2); making distributions under section 408(d)(4); recharacterizing contributions under section 408A(d)(6); or making a rollover under section 402(c), 403(a)(4), 403(b)(8), or 408(d)(3). Treas. Reg. sec. 301.7508A–1(c)(1)(iii). In addi-

Explanation of Provision

The provision makes two changes to the description of specified acts listed in section 7508(a)(1) for which certain periods of time may be disregarded in determining whether the acts were performed timely.

First, the provision amends subparagraph (C) (related to Tax Court filings) to clarify that the subparagraph is not limited to filing of items with the Tax Court, but instead covers both the filing of a petition with the Tax Court as well as the filing of a notice of appeal from a decision of the Tax Court.

Second, the provision amends subparagraph (J) (related to suits), describing the time within which certain suits may be brought, to include suits with respect to erroneous refunds.

Effective Date

The provision applies to any period for performing an act which has not expired before the date of enactment (November 15, 2021).

10. Tolling of time within which to file a Tax Court petition (sec. 80503 of Act and sec. 7451 of the Code)

Present Law

The Tax Court is organized as a court of record under the Code,[656] as authorized under Article I of the Constitution. The Code prescribes authority to consider a variety of specific tax controversies identified in the Code and its predecessor statutes.[657] The subjects of these grants of authority comprise the subject matter jurisdiction of the Tax Court.

Among the earliest of these grants was the authority to review statutory notices of deficiency.[658] The grant of jurisdiction to redetermine a deficiency requires both a valid notice of deficiency and a timely petition, filed within the 90-day period prescribed in the same grant.[659] The Tax Court is authorized to exercise its jurisdiction to the extent authorized by Congress, and cannot enlarge statutory grants of jurisdiction.[660]

The Tax Court extended that reasoning to later grants of jurisdiction, including the collection due process cases, holding that statutory deadlines for filing established under the Code as part of a statutory grant of authority create jurisdictional limitations and are not claims-processing rules. As a result, the Tax Court held it is deprived of jurisdiction if a petition is untimely.[661] In a later case, *Guralnik v. Commissioner*, adhered to its longstanding position that time deadlines included within its grants of jurisdiction

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tion, Revenue Procedure 2018–58 supplements the list of postponed acts in section 7508(a)(1) and Treasury Regulation section 301.7508A–1(c)(1) with an additional list of time-sensitive acts.

[656] Sec. 7441 (status as a court of record).

[657] Sec. 7442 (initial grant of jurisdiction).

[658] Secs. 6211 through 6216 (provisions detailing the requirements for deficiency proceedings).

[659] Sec. 6213(b), requiring that a petition be filed within 90 days from the date of the notice of deficiency. Block v. Commissioner, 2 T.C. 761 (1943) (Tax Court jurisdiction to redetermine a deficiency requires both a valid notice of deficiency and a timely petition).

[660] *Judge v. Commissioner*, 88 T.C. 1175, 118081 (1987); *McCrory v. Commissioner*, 156 T.C. 90, 93 (2021).

[661] *Gray v. Commissioner*, 723 F.3d 790, 793 (7th Cir. 2013), aff'g 138 T.C. 295, 299 (2012); *Guralnik v. Commissioner*, 147 T.C. 230 (2016).

preclude a grant of equitable relief in a collection due process case but fashioned an exception that it distinguished from equitable tolling, based on the rules applicable in Federal district courts.[662] Under those rules, a Federal Court may extend the deadline for taking action if, on the final date on which such action is otherwise required, the Court itself is inaccessible.[663]

In 2022, the United States Supreme Court unanimously reversed and remanded a collection due process case to the Tax Court in *Boechler, P.C. v. United States*[664] to determine whether equitable tolling was warranted on the facts of that case, having concluded that the statutory grant of jurisdiction did not clearly express an intention to create a temporal jurisdictional condition that would preclude equitable relief in all cases. In reaching that conclusion, the Supreme Court noted in support of its conclusion that other contemporaneously enacted provisions did establish jurisdictional limitations.[665]

Explanation of Provision

The provision prescribes a method for extending a filing period if the filing location is unavailable to the general public on the otherwise applicable due date for such petitions. If the filing location is inaccessible on the due date as determined under the general rule, the tolling provision permits the petition to be considered timely if filed within 14 days after the filing locations are again accessible to the public. As a result, the tolling period includes the original due date and subsequent days during which the unavailability continued, plus 14 days.

"Filing location" is defined as the Office of the Clerk of the Court or, in the case of electronic filing, an online portal provided by the Court for such purposes. The tolling provisions specify that periods during which filing locations are unavailable include periods of unavailability due to lapses of appropriations requiring closure of government facilities.

Effective Date

The provision is effective for petitions required to be timely filed (without regard to this provision) after date of enactment (November 15, 2021).

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[662] The Court's rationale was that neither the Code nor Rule 25(a) of the Tax Court's Rules of Practice and Procedures on filing of petitions specifically addressed how to compute time and determine the last date of the 30-day period under Code section 6330(d) when it fell on a date on which the Tax Court was inaccessible due to a winter storm that forced the closure of Federal government offices in the District of Columbia, including the Tax Court.

[663] Rule 6(a)(3)(A) of Federal Rules of Civil Procedure allows the Court to determine that the next date on which the Court is accessible may be the deemed due date, if it is not a Saturday, a Sunday nor a holiday.

[664] *Boechler, P.C. v. United States*, 142 S. Ct. 1493 (April 21, 2022).

[665] *Boechler PC v. United States*, pp. 1497–1498. The Court also rejected the United States argument that section 6330(e) limitations on the Tax Court injunction can be read as a clarification of the deadline and jurisdiction grant in section 6330(d). *Ibid.*, pp. 1499–1500. Note that the Tax Court has not adopted the *Boechler* rationale to deficiency cases, but at least one Circuit has done so, in *Culp v. Commissioner*, 75 F.4th 196 (3d Cir. 2023).

11. Authority to postpone certain tax deadlines by reason of significant fires (sec. 80504 of the Act and sec. 7508A of the Code)

Present Law

General time limits for filing tax returns and paying estimated tax

Individuals generally must file their Federal income tax returns by April 15 of the year following the close of a taxable year.[619]Present law also provides that the Secretary may grant reasonable extensions of time for filing such returns.[666] Treasury regulations provide, upon application on the proper form, an automatic six-month extension (until October 15 for calendar-year individuals) for any individual timely filing that form and paying the amount of tax estimated to be due.[667]

In general, individuals must make quarterly estimated tax payments by April 15, June 15, September 15, and January 15 of the following taxable year. Wage withholding is considered to be a payment of estimated taxes.

Suspension of time periods

In general, the Secretary may specify a period of up to one year that may be disregarded for performing various acts under the Code, such as filing tax returns, paying taxes, or filing a claim for credit or refund of tax, for any taxpayer determined by the Secretary to be affected by a Federally declared disaster or a terroristic or military action with respect to any tax liability of the taxpayer.[668] In addition, the period specified by the Secretary may be disregarded in determining the amount of any interest, penalty, additional amount, or addition to tax, and the amount of any credit or refund. The types of acts for which time may be suspended are identified in a related provision and incorporated by reference.[669] The suspension of time may apply to a wide variety of acts, including the (1) filing of any return of income, estate, gift, employment, or excise tax; (2) payment of any income, estate, gift, employment, or excise tax; (3) allowance of a credit or refund of any tax; (4) assessment of any tax; (5) collection of the amount of any liability in respect of any tax; and (6) any other act required or permitted under the internal revenue laws specified by the Secretary of the Treasury.

For a tax-related deadline to be postponed under this authority, the IRS generally will publish, as soon as practicable after the declaration of the disaster or occurrence of a terroristic or military action, a revenue ruling, revenue procedure, notice, announcement,

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[666] Sec. 6081.

[667] Treas. Reg. sec. 1.6081–4.

[668] Sec. 7508A.

[669] Sec. 7508(a)(1)(A) through (K). Under Treasury regulations, additional acts were added to this list with respect to affected pension plans and affected taxpayers with respect to such plans: Making contributions to a qualified retirement plan (within the meaning of section 4974(c)) under section 219(f)(3), 404(a)(6), 404(h)(1)(B), or 404(m)(2); making distributions under section 408(d)(4); recharacterizing contributions under section 408A(d)(6); or making a rollover under section 402(c), 403(a)(4), 403(b)(8), or 408(d)(3). Treas. Reg. sec. 301.7508A–1(c)(1)(iii). In addition, Revenue Procedure 2018–58 supplements the list of postponed acts in section 7508(a)(1) and Treasury Regulation section 301.7508A–1(c)(1) with an additional list of time-sensitive acts.

news release, or other guidance authorizing the postponement and describing the acts postponed, the postponement period, and the covered disaster area.[670]

Current 60-day suspension

Currently, in the case of a Federally declared disaster, qualified taxpayers have a mandatory 60-day period that is disregarded in determining whether the acts listed above were performed in the time prescribed; the amount of any interest, penalty, additional amount, or addition to tax; and the amount any of credit or refund. The 60-day period begins on the earliest incident date specified in the declaration to which the relevant disaster area relates and ends on the date which is 60 days after the latest incident date so specified. A disaster area is the geographic area of a Federally declared disaster, which is any disaster subsequently determined by the President to warrant assistance by the Federal government under the Stafford Act.[671]

Qualified taxpayers are (1) any individual whose principal residence is located in a disaster area, (2) any taxpayer if the taxpayer's principal place of business (other than the business of performing services as an employee) is located in a disaster area, (3) any individual who is a relief worker affiliated with a recognized government or philanthropic organization and who is assisting in a disaster area, (4) any taxpayer whose records necessary to meet a deadline for the acts listed above are maintained in a disaster area, (5) any individual visiting a disaster area who was killed or injured as a result of the disaster, and (6) solely with respect to a joint return, any spouse of an individual who is a qualified taxpayer.

Explanation of Provision

The Secretary may specify a period of up to one year that may be disregarded for performing various acts under the Internal Revenue Code for any taxpayer determined by the Secretary to be affected by (1) a Federally declared disaster or (2) a terroristic or military action with respect to any tax liability of the taxpayer.[672] This provision adds a "significant fire" to that list, and provides that a significant fire means any fire with respect to which assistance is provided under the Robert T. Stafford Disaster Relief and Emergency Assistance Act.

Effective Date

The provision applies to fires for which assistance is provided after November 15, 2021.

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[670] Treas. Reg. sec. 301.7508A–1(e).
[671] Sec. 165(i)(5).
[672] Sec. 7508A.

12. Modification of tax treatment of contributions to the capital of a corporation (sec. 80601 of the Act and sec. 118 of the Code)

Present Law

In general

The gross income of a corporation does not include any contribution to its capital.[673] For purposes of this rule, a "contribution to capital" does not include (1) any contribution in aid of construction (without exception) or any other contribution as a customer or potential customer, and (2) any contribution by any governmental entity or civic group (other than a contribution made by a shareholder as such).[674] Thus, for example, a municipal tax abatement for locating a business in a particular municipality is not considered a contribution to capital of the corporation. Section 118 applies only to corporations.

If property is acquired by a corporation as a contribution to capital and is not contributed by a shareholder as such, the adjusted basis of the property is zero.[675] If the contribution consists of money, the corporation must first reduce the basis of any property acquired with the contributed money within the following 12-month period and then reduce the basis of other property held by the corporation.[676]

Prior law

Before the enactment of Public Law 115–97 (the "2017 Act"),[677] a regulated public utility that provided water or sewerage disposal services was allowed to treat any amount of money or property received from any person as a tax-free contribution to its capital so long as such amount was a contribution in aid of construction and was not included in the utility's rate base for rate-making purposes. A contribution in aid of construction did not include amounts paid as service charges for starting or stopping services. No deduction or credit was allowed for, or by reason of, any expenditure that was a contribution in aid of construction, and the basis of any property acquired with a contribution in aid of construction was zero.

If the contribution was property other than water or sewerage disposal facilities, such contribution was not includible in the utility's gross income so long as: (1) an amount at least equal to the amount of the contribution was expended for the acquisition or construction of tangible property that was used predominantly in the trade or business of furnishing utility services; (2) the expenditure occurred before the end of the second taxable year after the year that the contribution was received; and (3) certain records were kept with respect to the contribution and the expenditure. In addition, the statute of limitations for the assessment of deficiencies was extended in the case of these contributions.

These rules were repealed by the 2017 Act. Thus, after the 2017 Act, the receipt by a utility of a contribution in aid of construction

[673] Sec. 118(a).
[674] Sec. 118(b).
[675] Sec. 362(c)(1).
[676] Sec. 362(c)(2). See also Treas. Reg. sec. 1.362–2.
[677] December 22, 2017.

was includible in the gross income of the utility, and the basis of property received or constructed pursuant to the contribution was not reduced.

Explanation of Provision

The provision generally restores and modifies the contribution in aid of construction provisions that were repealed by the 2017 Act for regulated public utilities that provide water or sewerage disposal services.

Under the provision, any amount of money or other property received from any person (whether or not a shareholder) by a regulated public utility that provides water or sewerage disposal services is treated as a tax-free contribution to the capital of the utility if (1) such amount is either a contribution in aid of construction, or a contribution to the capital of such utility by a governmental entity providing for the protection, preservation, or enhancement of drinking water or sewerage disposal services; (2) in the case of a contribution in aid of construction which is property other than water or sewerage disposal facilities, an expenditure rule is met; and (3) the amount of the contribution (or any property acquired or constructed with such amount) is not included in the utility's rate base for ratemaking purposes.

For this purpose, the term "contribution in aid of construction" is to be defined by Treasury regulations, except that such term does not include amounts paid as service charges for starting or stopping services. The term "regulated public utility" has the meaning given such term by section 7701(a)(33), except that the term does not include any utility that is not required to provide water or sewerage disposal services to members of the general public in its service area.

The expenditure rule applicable to contributions in aid of construction of property (including cash) other than water or sewerage disposal service facilities is met if (1) an amount equal to the amount of the contribution is expended by the utility for the acquisition or construction of tangible property described in section 1231(b) for which the contribution was made (or is the same type of such property) and the property is used by the utility predominantly[678] in the trade or business of furnishing water or sewerage disposal services; (2) the expenditure occurs before the end of the second taxable year after the year that the contribution was received; and (3) accurate records are kept by the utility with respect to the amount, timing, and identification of the contribution and the related expenditures.

No deduction or credit is allowed for, or by reason of, any expenditure that constitutes a contribution in aid of construction. The adjusted basis of any property acquired with a contribution in aid of construction is zero.

The statute of limitations for the assessment of deficiencies is extended in the case of amounts that are contributions in aid of construction that the taxpayer treats as contributions to its capital.

[678] For this purpose, "predominantly" means 80 percent or more. New sec. 118(c)(3)(B).

Effective Date

The provision applies to contributions made after December 31, 2020.

13. Extension of interest rate stabilization (sec. 80602 of the Act, sec. 430 of the Code, and secs. 101 and 303 of ERISA)

Present Law

Minimum funding rules

A defined benefit plan maintained by a single employer is subject to minimum funding rules that generally require the sponsoring employer to make a certain level of contribution for each plan year to fund plan benefits.[679] Background on such contribution rules may be found in the description of present law for sections 9705 and 9706 of the American Rescue Plan Act of 2021 (Public Law 117–2).

Explanation of Provision

The provision revises the specified percentage ranges (that is, the range from the applicable minimum percentage to the applicable maximum percentage of average segment rates) for determining whether a segment rate must be adjusted upward or downward.[680] Under the provision, the specified percentage range for a plan year is determined by reference to the calendar year in which the plan year begins as follows:

- 90 percent to 110 percent for 2012 through 2019,
- 95 percent to 105 percent for 2020 through 2030,
- 90 percent to 110 percent for 2031,
- 85 percent to 115 percent for 2032,
- 80 percent to 120 percent for 2033,
- 75 percent to 125 percent for 2034, and
- 70 percent to 130 percent for 2035 or later.

In addition, for purposes of the additional information that must be provided in a funding notice for an applicable plan year, an applicable plan year includes any plan year that begins after December 31, 2011, and before January 1, 2034, and that otherwise meets the definition of applicable plan year.

Effective Date

The provision applies to plan years beginning after December 31, 2021.

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[679] Secs. 412 and 430; secs. 302–303 of ERISA. For purposes of whether a plan is maintained by a single employer, certain related entities, such as the members of a controlled group, are treated as a single employer. Different funding rules apply to multiemployer and certain multiple-employer defined benefit plans, which are types of plans maintained by two or more unrelated employers. A number of exceptions to the minimum funding rules apply. For example, governmental plans (within the meaning of section 414(d)) and church plans (within the meaning of section 414(e)) are generally not subject to the minimum funding rules. Under section 4971, an excise tax applies if the minimum funding requirements are not satisfied.

[680] Section 9706 of the American Rescue Plan Act of 2021, Pub. L. No. 117–2 modified the specified percentage ranges which are further modified by this provision.

14. Information reporting for brokers and digital assets (sec. 80603 of the Act and secs. 6045, 6045A, and 6050I of the Code)

Present Law

In general

The IRS gathers independent information about income received and taxes withheld to verify self-reported income and tax liability reported on tax returns. The use of reliable and objective third-party verification of income increases the probability of tax evasion being detected and increases the cost of evasion to the taxpayer, thereby decreasing the overall level of tax evasion by taxpayers. Ample empirical evidence shows that the introduction of third-party information reporting in tax administration leads to more accurate reports of income on tax returns.

Information reporting assists taxpayers receiving such reports to prepare their income tax returns and helps the IRS determine whether such returns are correct and complete. The reporting of most relevance to the determination of individual income tax generally falls under one of two types. First, there are reports and disclosures required from taxpayers about themselves.[681] Second, there are reports required to be reported to the IRS with respect to transactions with other persons, including employers, known as third-party information reporting.[682] Third-party information reporting rules had predecessors in early tax statutes. The first third-party information reporting requirement in the Internal Revenue Code of 1986, as amended, regarding payments by persons engaged in a trade or business of $600 or more in the course of the payor's trade or business, is a successor to an almost identical provision in the 1939 Code,[683] as is the provision requiring reporting of dividends and corporate earnings and profits.[684]

Third-party information reporting has expanded significantly since then, addressing numerous types of payments. These include reporting with respect to advance payments of credit for health insurance costs;[685] gross proceeds paid to an attorney;[686] substitute payments in lieu of dividends or tax-exempt interest;[687] and payments by a Federal executive agency for services.[688] Congress continues to expand third-party information reporting, reflecting the importance of IRS access to reliable and objective third-party verification of payments in detecting noncompliance.

Persons required to submit such returns generally must furnish a statement that includes the information contained on such return to the person whose information was reported to the IRS. If a reporter prepares 250 returns or more, the reporter must do so elec-

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681 Secs. 6031 through 6040.
682 Secs. 6041 through 6060.
683 Sec. 6041(a); Treas. Reg. secs. 1.6041–1 and –2. Section 6041 is the successor to section 147(b)(2) of the 1939 Code. See Joint Committee on Taxation, *Derivations of Code Sections of the Internal Revenue Codes of 1939 and 1954* (JCS–1–92), January 21, 1992.
684 Sec. 6042; 1939 Code sec. 148.
685 Sec. 6050T.
686 Sec. 6045(f).
687 Sec. 6045(d).
688 Sec. 6041A(d)(3).

tronically.[689] The scope of reporting encompasses brokers of a variety of transactions, including securities, real estate, and barter transactions, but to date, no regulations under section 6045 have been issued to address transactions involving digital assets.

Broker reporting

Section 6045(a) requires brokers to file with the IRS annual information returns showing the gross proceeds realized by customers from various sale transactions, when required by the Secretary to do so. A return must provide such details regarding gross proceeds realized by customers from various sale transactions and other information as required by the Secretary.[690] Brokers are required to furnish to every customer written statements with the same gross proceeds information that is included in the returns filed with the IRS for that customer.[691] These written statements are required to be furnished by February 15 of the year following the calendar year for which the return under section 6045(a) is required to be filed.

Because gross proceeds constitute income only to the extent that they exceed the seller's adjusted basis, reliable recordkeeping of original basis and necessary adjustments are required. In 2008, the reporting requirements for brokers were revised to provide that every broker that is required to file a return under section 6045(a) reporting the gross proceeds from the sale of a covered security must include in the return (1) the customer's adjusted basis in the security and (2) whether any capital gain or loss with respect to the security is long-term or short-term.[692] Specific rules for determining a customer's adjusted basis are provided.

Covered securities

A covered security is any specified security acquired on or after an applicable date if the security was (1) acquired through a transaction in the account in which the security is held or (2) transferred to that account from an account in which the security was a covered security, but only if the transferee broker received a statement under section 6045A (described below) with respect to the transfer. Under this rule, certain securities acquired by gift or inheritance are not covered securities.

A specified security is any share of stock in a corporation (including stock of a regulated investment company); any note, bond, debenture, or other evidence of indebtedness; any commodity, or a contract or a derivative with respect to the commodity, if the Secretary determines that adjusted basis reporting is appropriate; and any other financial instrument with respect to which the Secretary determines that adjusted basis reporting is appropriate.

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[689] Sec. 6011(e)(5) establishes the applicable number to be used as the threshold for regulatory requirement that a taxpayer file electronically. See generally https://www.irs.gov/forms-pubs/e-filing-thresholds-remain-unchanged-until-further-notice. Treasury and the IRS have proposed regulations under section 6011 that lower the threshold to 100 returns for returns required to be filed during calendar year 2022 and to 10 returns for returns required to be filed in calendar years after 2022. See 86 Fed. Reg. 39910 (July 23, 2021), available at https://public-inspection.federalregister.gov/2021-15615.pdf.

[690] Sec. 6045(a).

[691] Sec. 6045(b).

[692] Sec. 6045(g).

For stock in a corporation (other than stock for which an average basis method is permissible under section 1012), the applicable date of section 6045(g) is January 1, 2011. For any stock for which an average basis method is permissible under section 1012, the applicable date is January 1, 2012. Consequently, the applicable date for certain stock acquired through a dividend reinvestment plan and for stock in a regulated investment company is January 1, 2012. A regulated investment company is permitted to elect to treat as a covered security any stock in the company acquired before January 1, 2012. For any specified security other than stock in a corporation or stock for which an average basis method is permitted, the applicable date is January 1, 2013, or a later date determined by the Secretary. Consequently, for a note, bond, debenture, or other evidence of indebtedness, or for a commodity or a contract or derivative with respect to the commodity, or for any other financial instrument treated as a specified security, the applicable date is January 1, 2013, or a later date determined by the Secretary.

Time for providing statements to customers

February 15 of the year following the calendar year reporting period is the deadline for furnishing certain written statements to customers, including (1) statements showing gross proceeds (under section 6045(b)) or substitute payments (under section 6045(d)) and (2) statements with respect to reportable items (including, but not limited to, interest, dividends, and royalties) that are furnished with consolidated reporting statements (as defined in regulations). The term "consolidated reporting statement" refers to annual account statements that brokerage firms customarily provide to their customers and that include tax-related information.

To enable brokers to comply with these requirements, section 6045A provides for broker-to-broker reporting under which a broker or applicable person within the scope of section 6045 that transfers to a broker a security that is a covered security when held by that transferor broker must furnish to the transferee broker a written statement that allows the transferee broker to satisfy the basis and holding period reporting requirements under section 6045. Section 6045B requires the issuer of a covered security to file a return describing any organizational action (such as a stock split or a merger or acquisition) that affects the basis of the specified security, the quantitative effect on the basis of that specified security, and any other information required by the Secretary, and to provide copies of that return to holders of specified securities and nominees like brokers.

Penalties for failure to comply with information reporting requirements

A person who is required to file information returns but who fails to do so by the due date for the returns, includes on the returns incorrect information, or files incomplete returns generally is subject to a penalty of $250 for each return with respect to which such a failure occurs, up to a maximum of $3,000,000 in any calendar year, adjusted for inflation.[693] Similar penalties, also with a $3,000,000 calendar-year maximum, apply to failures to furnish correct written statements to recipients of payments for which information reporting is required.[694] Brokers may be subject to such penalties for failure to file the returns required under section 6045,[695] or for failure to provide statements to others as required by section 6045A.[696]

Cash received in trade or business

Section 6050I requires any person engaged in a trade or business to report any transaction (or two or more related transactions) in which the person receives more than $10,000 in cash. For this purpose, cash includes foreign currency and, to the extent provided by the Secretary, any monetary instrument (whether or not in bearer form) with a face amount of not more than $10,000. Returns required under section 6050I parallel reports required from merchants and services providers under the Bank Secrecy Act. Failure to file such returns and failure to provide customers with copies of such returns are subject to the penalties under sections 6721 and 6722, respectively.[697]

Current guidance on digital assets

Most of the statutory provisions requiring third-party information reporting predate the advent of digital assets and none expressly addresses its treatment. In 2014, the IRS published its first guidance[698] on digital assets in a Notice in the form of frequently asked questions. The Notice refers to "virtual currency," defined as property that is "a digital representation of value that functions as a medium of exchange, a unit of account, and/or a store of value." The Notice further identifies a subset of virtual currency ("convertible virtual currency") as the only digital asset within the scope of the guidance. The Notice defines convertible virtual currency as virtual currency which has an equivalent value in real currency or acts as a substitute for real currency.

The Notice stated that "a payment made using virtual currency is subject to information reporting to the same extent as any other payment made in property." The Notice refers to the need for reporting on a Form 1099–MISC, *Miscellaneous Income*, if a payment of fixed and determinable income is made in the course of a trade or business using convertible virtual currency with a fair market value of $600 or more. This requirement parallels the requirements under section 6041 and the regulatory guidance thereunder, which provide that payments made in property rather than money must be reported by including the fair market value of the property

[693] Sec. 6721. These amounts are adjusted annually to account for inflation. For tax year 2021, the penalty amount is $260, up to a maximum of $3,193,000 per year. The penalties are reduced if the failure is corrected within a specific amount of time. Sec. 6721(b). The penalties are waived if a person establishes that any failure was due to a reasonable cause and not a willful neglect. Sec. 6724(a).

[694] Sec. 6722. These amounts are also subject to inflation adjustments under section 6722(f). The penalties are reduced if the failure is corrected within a specific amount of time. Sec. 6722(b). The penalites are waived if a person establishes that any failure was due to reasonable cause and not willful neglect. Sec. 6724a.

[695] Secs. 6724(d)(1)(B)(iii) and (2)(H).

[696] Sec. 6724(d)(2)(I).

[697] Sec. 6724(d)(1)(B)(vi) and (2)(N).

[698] Notice 2014–21, 2014–16 I.R.B. 938 (Apr. 14, 2014).

paid.[699] As the use of digital assets has developed, the G–7 Finance ministers have committed to developing common standards and principles to guide the public policy and regulatory issues, while recognizing the potential benefits of the market.[700]

Explanation of Provision

The provision amends section 6045(c)(1) so that the definition of broker[701] expressly includes any person who (for consideration) is responsible for regularly providing any service effectuating transfers of digital assets on behalf of another person. The change clarifies present law to resolve uncertainty over whether certain market participants are brokers. The change is not intended to limit the Secretary's authority to interpret the definition of broker.

In addition, the provision specifies that the definition of specified security includes a digital asset, which, except as provided by the Secretary, is defined as any digital representation of value which is recorded on a cryptographically secured distributed ledger or any similar technology as specified by the Secretary. A digital asset acquired through a broker on or after January 1, 2023, is a covered security subject to basis reporting under section 6045(g). The change is not intended to limit the Secretary's authority to interpret the definition of specified security or covered security.

In section 6045A(a), the provision strikes the words "a security which is" which makes clear that broker-to-broker reporting applies to all transfers of covered securities within the meaning of section 6045(g)(3), including digital assets. The provision also adds new section 6045A(d), which generally applies to transfers by a broker to a person that is not a broker. Section 6045A(d) requires a broker to file a return with the IRS for a calendar year, with respect to any transfer (which is not part of a sale or exchange executed by the broker) during the calendar year of a covered security which is a digital asset from an account maintained by the broker to an account which is not maintained by, or an address not associated with, a person that the broker knows or has reason to know is also a broker. The return will be in such form as determined by the Secretary, showing the information otherwise required to be furnished with respect to transfers subject to section 6045A(a).

The reporting requirement in new section 6045A(d) is limited to transfers that are not otherwise subject to reporting under section 6045 (because those transactions are already reported to the IRS, for example, in the case of a transfer that is part of a sale effectuated by a broker) or under section 6045A(a) (because those transactions are already reported to transferee brokers, for example, in the case of a direct broker-to-broker transfer of a digital asset). The return required under the provision is added to the definition of information return for purposes of section 6724 and related failure to file penalties under section 6721.

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[699] Treas. Reg. sec. 1.6041–1(g); Notice 2014–21.

[700] Department of the Treasury press release, "G–7 Finance Ministers and Central Bank Governors' Communique," pars. 17 and 18, June 5, 2021, available at https://home.treasury.gov/news/press-releases/jy0215.

[701] A broker is any person (other than a person who is required to report a transaction under section 6043 (dealing with corporate liquidations)), U.S. or foreign, that, in the ordinary course of a trade or business during the calendar year, stands ready to effect sales to be made by others. Treas. Reg. sec. 1.6045–1(a)(1).

The provision expands the definition of cash solely for purposes of section 6050I to include any digital asset (as defined under amended section 6045(g)(3)). No inference is intended that digital assets are treated as cash for any other purpose.

Nothing in the provision or the amendments made by the provision is to be construed to create any inference, for any period prior to the effective date of the amendments, with respect to whether any person is a broker under section 6045(c)(1) or whether any digital asset is property which is a specified security under section 6045(g)(3)(B).

Effective Date

The provision applies to returns required to be filed, and statements required to be furnished, after December 31, 2023.

15. Termination of employee retention credit for employers subject to closure due to COVID–19 (sec. 80604 of the Act and sec. 3134 of the Code)

Present Law

Background for and a description of the employee retention credit that the provision modifies may be found above in the explanation of section 9651 of the American Rescue Plan Act of 2021.[702]

Explanation of Provision

The provision amends the applicability of the employee retention credit to apply only to wages paid before October 1, 2021 (or, in the case of wages paid by an eligible employer which is a recovery startup business, January 1, 2022). Thus, the provision terminates the employee retention credit for employers other than recovery startup businesses for wages paid after the third calendar quarter of 2021.

The provision also modifies the definition of recovery startup business to include employers that experience a calendar quarter in which the operation of the trade or business is fully or partially suspended during the calendar quarter due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to COVID–19, as well as employers whose gross receipts (within the meaning of section 448(c)) for such calendar quarter are less than 80 percent of the gross receipts of such employer for the same calendar quarter in calendar year 2019. Accordingly, for the fourth calendar quarter of 2021, a recovery startup business can otherwise be an eligible employer due to a full or partial suspension of operations or a decline in gross receipts.

The Treasury Department and IRS have issued published guidance addressing this provision.[703]

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[702] Pub. L. No. 117–2.

[703] See Notice 2021–65, 2021–51 I.R.B. 880 (modifying Notice 2021–49, 2021–34 I.R.B. 316, and Notice 2021–24, 2021–18 I.R.B. 1122).

Effective Date

The provision is effective for calendar quarters beginning after September 30, 2021.

PART FIVE: CONSOLIDATED APPROPRIATIONS ACT, 2022 (PUBLIC LAW 117–103) [704]

DIVISION P—HEALTH PROVISIONS

1. Exemption for telehealth services (sec. 307 of Division P of the Act and sec. 223 of the Code)

Present Law

Health savings accounts

An individual is eligible to contribute to a health savings account (an "HSA") only if the individual is covered under a plan that meets the requirements for a high deductible health plan, as described below. In general, HSAs provide tax-favored treatment for current medical expenses, as well as the ability to save on a tax-favored basis for future medical expenses. In general, an HSA is a tax-exempt trust or custodial account created exclusively to pay for the qualified medical expenses of the account holder and his or her spouse and dependents.

Within limits,[705] contributions to an HSA made by or on behalf of an eligible individual are deductible by the individual. Contributions to an HSA are excludible from income and employment taxes if made by the employer. Earnings in HSAs are not taxable. Distributions from an HSA for qualified medical expenses are not includible in gross income. Distributions from an HSA that are not used for qualified medical expenses are includible in gross income and are subject to an additional tax of 20 percent. The 20-percent additional tax does not apply if the distribution is made after death, disability, or the individual attains the age of Medicare eligibility (age 65).

High deductible health plans

A high deductible health plan is a health plan that has an annual deductible which is not less than $1,400 (for 2020 and 2021) for self-only coverage (twice this amount for family coverage), and for which the sum of the annual deductible and other annual out-of-pocket expenses (other than premiums) for covered benefits does not exceed $6,900 (for 2020) and $7,000 (for 2021) for self-only coverage (twice this amount for family coverage).[706] These dollar

[704] H.R. 2471. The bill was introduced in the House of Representatives on April 13, 2021 and was passed by the House on June 29, 2021. The Senate passed the bill with an amendment on January 13, 2022. The House agreed to the Senate amendment with amendment on March 9, 2022. The Senate agreed to the House amendment the next day. The President signed the bill on March 15, 2022.

[705] For 2020, the basic limit on annual contributions that can be made to an HSA is $3,550 ($3,600 for 2021) in the case of self-only coverage and $7,100 ($7,200 for 2021) in the case of family coverage. The basic annual contributions limits are increased by $1,000 for individuals who have attained age 55 by the end of the taxable year (referred to as "catch-up" contributions).

[706] Sec. 223(c)(2).

thresholds are subject to inflation adjustment, based on chained CPI.[707]

An individual who is covered under a high deductible health plan is eligible to contribute to an HSA, provided that while such individual is covered under the high deductible health plan, the individual is not covered under any health plan that (1) is not a high deductible health plan and (2) provides coverage for any benefit (subject to certain exceptions) covered under the high deductible health plan.[708]

Various types of coverage are disregarded for this purpose, including coverage of any benefit provided by permitted insurance, coverage (whether through insurance or otherwise) for accidents, disability, dental care, vision care, or long-term care, as well as certain limited coverage through health flexible spending arrangements.[709] Permitted insurance means insurance under which substantially all of the coverage provided relates to liabilities incurred under workers' compensation laws, tort liabilities, liabilities relating to ownership or use of property, or such other similar liabilities as specified by the Secretary under regulations. Permitted insurance also means insurance for a specified disease or illness and insurance paying a fixed amount per day (or other period) of hospitalization.[710]

Under a safe harbor, a high deductible health plan is permitted to provide coverage for preventive care (within the meaning of section 1861 of the Social Security Act, except as otherwise provided by the Secretary) before satisfaction of the minimum deductible.[711] IRS guidance provides a safe harbor of the types of coverage that constitute preventive care for this purpose.[712]

For plan years beginning on or before December 31, 2021, a high deductible health plan is permitted to provide telehealth and other remote care services without satisfaction of the plan's minimum deductible. Thus, a health plan will not fail to be treated as a high deductible health plan merely by reason of failing to require a deductible for telehealth and other remote care services for plan years beginning on or before December 31, 2021, and an individual who is covered under such a plan may contribute to an HSA.[713]

Explanation of Provision

The provision extends the exemption for telehealth services to include months beginning after March 31, 2022, and before January 31, 2023.

[707] Sec. 223(g).
[708] Sec. 223(c)(1).
[709] Sec. 223(c)(1)(B).
[710] Sec. 223(c)(3).
[711] Sec. 223(c)(2)(C).
[712] Notice 2004–23, 2004–1 C.B. 725. See also Notice 2004–50, 2004–33 I.R.B. 196, August 16, 2004, Q & A's 26 and 27; Notice 2008–59, 2008–29 I.R.B. 123, July 21, 2008; Notice 2013–57, 2013–40 I.R.B. 293, September 30, 2013; and Notice 2019–45, 2019–32 I.R.B. 593, August 5, 2019.
[713] In Notice 2020–29, 2020–22 I.R.B. 864, May 12, 2020, the IRS provides that this standard applies with respect to services provided on or after January 1, 2020.

Effective Date

The provision is effective on the date of enactment (March 15, 2022).

PART SIX: CHIPS ACT OF 2022 (PUBLIC LAW 117–167, DIVISION A) [714]

1. Advanced manufacturing investment credit (sec. 107 of the Act and new sec. 48D of the Code)

Present Law

The investment credit [715] is composed of the rehabilitation credit,[716] the energy credit,[717] the qualifying advanced coal project credit,[718] the qualifying gasification project credit,[719] and the qualifying advanced energy project credit.[720] These credits are part of the general business credit [721] and are calculated as a percentage of the basis of eligible property placed in service. The percentage rates and the types of qualifying property vary depending on the requirements of each credit.

No investment or other credit is specifically designed under present law to encourage the manufacturing of semiconductors or semiconductor manufacturing equipment.

Explanation of Provision

In general

The provision establishes a new 25 percent investment credit for qualified investments in an advanced manufacturing facility by an eligible taxpayer for property the construction of which begins prior to January 1, 2027. An advanced manufacturing facility is a facility the primary purpose of which is the manufacturing of semiconductors or semiconductor manufacturing equipment. A qualified investment for any taxable year is the basis of any qualified property placed in service by the taxpayer during such taxable year which is part of an advanced manufacturing facility. Qualified property is tangible, depreciable (or amortizable) property that is constructed, reconstructed, or erected by the taxpayer, or acquired for original use by the taxpayer, that is integral to the operation of an advanced manufacturing facility. Qualified property includes buildings and their structural components other than those buildings or portions of such used for offices, administrative services, or other functions unrelated to manufacturing.

An eligible taxpayer is a taxpayer that is not a foreign entity of concern (as defined in section 9901(6) of the William M. (Mac)

[714] H.R. 4346. The bill was introduced in the House of Representatives on July 1, 2021 and was passed by the House on July 28, 2021. The Senate agreed to an amendment in the nature of a substitute on June 22, 2022. The House agreed to the Senate amendment with amendment on June 24, 2022. The Senate agreed to the House amendment with an amendment on July 27, 2022. The House agreed to the Senate amendment on July 28, 2022. The President signed the bill on August 9, 2022.

[715] Sec. 46.

[716] Sec. 47.

[717] Sec. 48.

[718] Sec. 48A.

[719] Sec. 48B.

[720] Sec. 48C.

[721] Sec. 38.

Thornberry National Defense Authorization Act for Fiscal Year 2021), and has not made an "applicable transaction." An applicable transaction means, with respect to any "applicable taxpayer," any significant transaction (as determined by the Secretary in coordination with the Secretary of Commerce and the Secretary of Defense) involving the material expansion of semiconductor manufacturing capacity of such applicable taxpayer in the People's Republic of China or a foreign country of concern (as defined in section 9901(7) of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021). The term does not include any transaction which primarily involves the expansion of manufacturing capacity for legacy semiconductors (as defined in section 9902(a)(6) of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021). An applicable taxpayer is any taxpayer who has been allowed a credit under the provision for any prior taxable year. Credits allowed to applicable taxpayers with respect to applicable transactions are subject to recapture during the 10-year period from the date the qualified property has been placed in service. Credits will not be recaptured if the applicable taxpayer demonstrates to the satisfaction of the Secretary that the applicable transaction has been creased or abandoned within 45 days of a determination and notice by the Secretary.

The credit is part of the general business credit. The progress expenditure rules and the rules in section 50 apply to the provision. The credit calculation does not include the basis of any property which is attributable to qualified rehabilitation expenditures (as defined under section 47(c)(2)).

Elective payment

The provision permits taxpayers to elect a direct payment in lieu of the advanced manufacturing credit (at such time and in such manner as the Secretary may provide). If an election is made, the direct payment is generally treated as a payment against the tax imposed by subtitle A for the taxable year with respect to which the credit was determined, and the amount of the credit is reduced by the direct payment amount. In the case of a partnership or S-corporation, elections and direct payments are made at the entity level (*i.e.*, by and to the partnership or S corporation). The payment is treated as tax exempt income for purposes of sections 705 (the determination of a partner's basis in the partnership interest) and 1366 (the passthrough of items to an S corporation shareholder). For partnerships, a partner's distributive share of the payment is based on the partner's distributive share of the credit. Finally, for partnerships and S corporations, the reduction of the credit by the amount of the direct payment is done at the partnership or S corporation level.

A direct payment election is irrevocable and must be made no later than the due date (including extensions of time) for the tax return for the taxable year for which the election is made, but in no event earlier than 270 days after the date of enactment of the provision (August 9, 2022). A direct payment is treated as made on the later of the due date (determined without regard to extensions) of the tax return for the taxable year or the date on which such return is filed.

As a condition of and prior to any direct payment, the Secretary may require such information or registration as the Secretary deems necessary or appropriate to prevent duplication, fraud, improper payments, or excessive payments under the provision. If the Secretary determines that a payment made to a taxpayer was an excessive payment (*i.e.*, in excess of the amount otherwise allowable as a credit for the taxable year) that did not result from reasonable cause, the taxpayer's income tax for the taxable year for which such determination is made will be increased by the amount of the excessive payment plus 20 percent of such amount.

In the case of any possession of the United States with a mirror tax system (as defined in section 24(k)), the direct payment election shall not be treated as part of the income tax laws of the United States for purposes of determining the income tax law of such possession unless such possession elects to have it be so treated.

Rules similar to the basis reduction and recapture rules of section 50 apply to any amount treated as a direct payment. In addition, the provision directs the Secretary to issue such regulations or other guidance as may be necessary or appropriate to carry out direct payments, including regulation or guidance providing rules for determining a partner's distributive share of certain tax exempt income and guidance to ensure that the amount of any direct payment is commensurate with the amount of credit that would otherwise be allowable (determined without regard to any limitation based on the amount of tax under the general business credit).

Direct payments under the provision are exempt from being reduced (sequestered) under the Balanced Budget and Emergency Deficit Control Act of 1985.

Effective Date

Generally, the provision applies to property placed in service after December 31, 2022. For property the construction of which begins prior to January 1, 2023, the provision applies only to the extent of the basis of such property attributable to the construction, reconstruction, or erection after August 9, 2022 (the date of enactment). The portion of the provision exempting direct payments from sequestration is effective for any sequestration order issued under the Balanced Budget and Emergency Deficit Control Act of 1985 on or after December 31, 2022.

PART SEVEN: AN ACT TO PROVIDE FOR RECONCILIATION PURSUANT TO TITLE II OF S. CON. RES. 14 (PUBLIC LAW 117–169) [722]

TITLE I—COMMITTEE ON FINANCE

Subtitle A—Deficit Reduction

1. Corporate alternative minimum tax (secs. 10101 and 13904(a) of the Act; secs. 38, 55, and 6655; and new secs. 56A and 59(k) and (l) of the Code)

Present and Prior Law

In general

A domestic corporation generally is subject to Federal income tax at a rate of 21 percent.[723] Certain corporations whose annual gross receipts meet or exceed certain thresholds are subject to an additional tax under section 59A (the base erosion and anti-abuse tax).

A foreign corporation is taxable (at rates provided in sections 11 and, if applicable, 59A) on its taxable income that is effectively connected with the conduct of a trade or business within the United States [724] and on certain other amounts received from U.S. sources (including interest, dividends, rents, and other fixed or determinable annual or periodical gains, profits, and income).[725]

Whereas foreign activities of foreign corporations generally are not subject to Federal income tax, foreign activities of domestic corporations often are. In general, income earned directly by a U.S. person from the conduct of a foreign trade or business is taxed currently,[726] while income earned indirectly through controlled foreign corporations ("CFCs") [727] is taxed in the year earned or not at all. Indirect earnings of CFCs generally are taxable in one of two ways. First, the earnings may constitute income to U.S. shareholders under the traditional anti-deferral regime of subpart F, which applies to certain passive income and certain other related-party income that is readily movable from one jurisdiction to another.[728] Second, the earnings may be subject to section 951A, which applies to most foreign-source income of a CFC that is not subpart F income (referred to as global intangible low-taxed income ("GILTI")). Subpart F income is taxed at full rates with related foreign taxes generally eligible for the foreign tax credit; GILTI is taxed at preferential rates with additional limitations on the use of related foreign taxes. Both subpart F income and GILTI are included by the

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[722] H.R. 5376. The bill was introduced in the House of Representatives on September 27, 2021, and was passed by the House on November 19, 2021. The Senate passed the bill with an amendment on August 7, 2022. The House agreed to the Senate amendment on August 12, 2022. The President signed the bill on August 16, 2022.

[723] Sec. 11.

[724] Sec. 882(a)(1). A bilateral income tax treaty may modify this standard.

[725] Sec. 881(a).

[726] Such income is called foreign branch income.

[727] A CFC generally is defined as any foreign corporation in which U.S. persons own (directly, indirectly, or constructively) more than 50 percent of the corporation's stock (measured by vote or value), taking into account only "U.S. shareholders," that is, U.S. persons that own at least 10 percent of the stock (measured by vote or value). Secs. 951(b), 957, and 958.

[728] Subpart F comprises sections 951 through 965.

U.S. shareholder without regard to whether the earnings are distributed by the CFC.

Corporate alternative minimum tax (prior law)

In taxable years beginning before 2018, a domestic corporation was subject to an alternative minimum tax ("AMT" or "corporate AMT") to the extent the corporation's tentative minimum tax exceeded its regular tax.[729] This tentative minimum tax generally was 20 percent of the alternative minimum taxable income above a $40,000 exemption amount. The exemption amount phased out by an amount equal to 25 percent of the amount of the corporation's alternative minimum taxable income exceeding $150,000.

Alternative minimum taxable income was the taxpayer's taxable income increased by certain preference items and adjusted by determining the tax treatment of certain items in a manner that negated the deferral of income resulting from the regular tax treatment of those items. Except as discussed below for taxable years beginning in 1987 through 1989, there was not an adjustment to taxable income for corporate AMT purposes with respect to net income as reported on the corporation's financial statements.

A corporation with average gross receipts of less than $7.5 million for the prior three taxable years was exempt from the corporate AMT. For a corporation's first three-taxable year period, the $7.5 million threshold was reduced to $5 million.

If a corporation was subject to AMT in any year, the amount of AMT was allowed as an AMT credit in a subsequent taxable year to the extent the corporation's regular tax liability exceeded its tentative minimum tax in the subsequent year. In the years since the repeal of the corporate AMT, corporate AMT credits were allowed to offset the entire regular tax liability for a taxable year.[730] In addition, the corporate AMT credit was allowable and refundable for taxable years beginning after 2017 and before 2020.[731]

For purposes of the general business credit, only certain "specified credits" could be taken against the corporate AMT.[732]

Business untaxed reported profits (prior law)

In computing alternative minimum taxable income for taxable years beginning after 1986 and before 1990, alternative minimum taxable income was increased by one-half of the amount by which the corporation's pre-tax book income exceeded the corporation's alternative minimum taxable income (determined without regard to this adjustment and without regard to net operating losses).[733] For this purpose, book income generally was the amount that the cor-

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[729] The corporate AMT was repealed for taxable years beginning after December 31, 2017, by section 12001 of Public Law 115–97. For a detailed discussion of prior law, see Joint Committee on Taxation, *General Explanation of Public Law 115–97* (JCS–1–18), December 2018.

[730] See generally section 12002 of Public Law 115–97 and related discussion in Joint Committee on Taxation, *General Explanation of Public Law 115–97* (JCS–1–18), December 2018.

[731] Sec. 53(e). See also section 2305 of the Coronavirus Aid, Relief, and Economic Security ("CARES") Act, Public Law 116–136, and related discussion in Joint Committee on Taxation, *General Explanation of Legislation Enacted in the 116th Congress* (JCS–1–22), February 2022.

[732] See sec. 39(c)(4). The same limitation applies currently for purposes of the AMT for individuals, trusts, and estates.

[733] See section 701 of Public Law 99–514, the Tax Reform Act of 1986. The Omnibus Reconciliation Act of 1990 repealed the adjustment for book income as part of the repeal of expired or obsolete provisions. See section 11801(a)(3) of Public Law 101–508.

poration disclosed on its financial statements prepared for creditors, shareholders, regulatory purposes, and so forth.[734]

Explanation of Provision

In general

The provision adds a new corporate AMT (the "book minimum tax"), which is based on financial statement income ("book income") and applies to certain corporations that satisfy relevant thresholds ("applicable corporations"). The book minimum tax is imposed in addition to any other Federal income tax imposed and applicable corporations are required to make estimated tax payments with respect to any liability under the book minimum tax.[735]

An applicable corporation (sometimes, the "taxpayer") must pay a book minimum tax amount equal to the excess (if any) of (1) the tentative minimum tax for the taxable year, over (2) the regular tax (as defined in section 55(c)) for the taxable year plus the tax imposed by section 59A for the taxable year.[736]

An applicable corporation's tentative minimum tax for a taxable year is the excess of (i) 15 percent of the adjusted financial statement income ("AFSI") (as reduced by certain financial statement net operating losses, described below) for the taxable year, over (ii) the book minimum tax foreign tax credit for such taxable year.[737] In the case of any corporation that is not an applicable corporation, the tentative minimum tax for the taxable year is zero.[738]

The base of the book minimum tax is AFSI. AFSI is book income with adjustments intended to reflect certain policy choices and to eliminate certain book-tax differences.

Beyond the base of the book minimum tax, however, AFSI (with certain modifications) is used to answer a threshold question: when is a corporation an applicable corporation subject to the book minimum tax? General AFSI modifications apply for all corporations and all tests used to determine applicable corporation status. Additional modifications apply for corporations that are members of a foreign-parented multinational group for a certain applicable corporation test. Both sets of modifications generally increase AFSI for purposes of determining applicable corporation status.

Accordingly, there are two related but distinct determinations with respect to AFSI. The first is for the purpose of determining whether a corporation is an applicable corporation subject to the book minimum tax. The second is for the purpose of determining the base of the book minimum tax itself and, thus, book minimum tax liability. The two determinations with respect to the AFSI of the taxpayer may differ depending on the purpose, with the former generally being broader than the latter.

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[734] See generally the discussion of section 701 of Public Law 99–514 (the provision enacting the corporate AMT adjustment for book income) in Joint Committee on Taxation, *General Explanation of the Tax Reform Act of 1986* (JCS–10–87), May 1987.

[735] Sec. 6655(e)(2) and (g)(1)(A), as amended by section 10101(a)(4)(G) and (H) of the Act.

[736] See sec. 55(a), as amended by section 10101(a)(3) and (4)(A) of the Act.

[737] Sec. 55(b)(2), as amended by section 10101(a)(1) of the Act.

[738] Sec. 55(b)(2)(B), as amended by section 10101(a)(1) of the Act.

Adjusted financial statement income ("AFSI")

New section 56A sets forth the general definition of AFSI, which is used for purposes of determining book minimum tax liability (and, with certain modifications provided in new section 59(k) and discussed below, for purposes of determining the threshold question of whether a corporation is an applicable corporation subject to the book minimum tax). AFSI is the net income or loss of the taxpayer set forth on the taxpayer's applicable financial statement for such taxable year, adjusted as described below.[739] The only adjustments are those described below and others to be prescribed by the Secretary. For purposes of the provision, an applicable financial statement is, with respect to any taxable year, an applicable financial statement (as defined in section 451(b)(3)[740] or as specified by the Secretary in regulations or other guidance) which covers such taxable year.[741] Thus, for example, in the case of a taxpayer that files a 10–K with the SEC, the starting point for determining AFSI is the net income or loss reported on such applicable financial statement (unless the Secretary requires the use of a different financial statement).[742]

General adjustments

Statements covering different taxable years.—In any case in which an applicable financial statement covers a period other than the taxable year, appropriate adjustments are to be made in computing AFSI.[743]

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[739] New sec. 56A(a).

[740] Under section 451(b)(3), an applicable financial statement is (A) a financial statement which is certified as being prepared in accordance with generally accepted accounting principles ("GAAP") and which is (i) a 10–K (or successor form), or annual statement to shareholders, required to be filed by the taxpayer with the United States Securities and Exchange Commission ("SEC"), (ii) an audited financial statement of the taxpayer which is used for (I) credit purposes, (II) reporting to shareholders, partners, or other proprietors, or to beneficiaries, or (III) any other substantial nontax purpose, but only if there is no statement of the taxpayer described in clause (i), or (iii) filed by the taxpayer with any other Federal agency for purposes other than Federal tax purposes, but only if there is no statement of the taxpayer described in clause (i) or (ii), (B) a financial statement which is made on the basis of international financial reporting standards ("IFRS") and is filed by the taxpayer with an agency of a foreign government which is equivalent to the SEC and which has reporting standards not less stringent than the standards required by the SEC, but only if there is no statement of the taxpayer described in subparagraph (A), or (C) a financial statement filed by the taxpayer with any other regulatory or governmental body specified by the Secretary, but only if there is no statement of the taxpayer described in subparagraph (A) or (B). See also Treas. Reg. sec. 1.451–3(a)(5). Consistent with Treas. Reg. sec. 1.451–3(a)(5)(i), references to GAAP are to U.S. GAAP.

[741] New sec. 56A(b).

[742] The Financial Accounting Standards Board ("FASB") establishes and interprets the financial accounting standards that govern U.S. GAAP and are used by publicly traded companies in compiling their annual reports filed with the SEC. U.S. GAAP generally distinguishes between revenues, expenses, gains, and losses that are reported in net income versus those that are recorded in stockholders' equity as other comprehensive income. See FASB Accounting Standards Codification ("ASC") 220–10–20 (defining other comprehensive income as "[r]evenues, expenses, gains, and losses that under generally accepted accounting principles (GAAP) are included in comprehensive income but excluded from net income" and defining net income as "[a] measure of financial performance resulting from the aggregation of revenues, expenses, gains, and losses that are not items of other comprehensive income"). Other comprehensive income is recorded directly to the equity section of a company's balance sheet and does not impact a company's reported net income. AFSI generally is intended to include items that are or have been included in other comprehensive income only when such items are reclassified into or reported in net income (and appropriately adjusted as described below, if applicable). As previously noted, if audited U.S. GAAP financial statements are not available, a taxpayer may use financial statements described above or as specified by the Secretary in regulations or other guidance, including certain financial statements prepared in accordance with IFRS. Like U.S. GAAP, IFRS distinguishes between items reported in net income versus other comprehensive income, although the recognition and classification of specific items may differ under U.S. GAAP and IFRS. See IFRS 9 and International Accounting Standard 1.

[743] New sec. 56A(c)(1).

Special rules for related entities

(1) *Consolidated financial statements.*—If the financial results of a taxpayer are reported on the applicable financial statement for a group of entities, rules similar to the rules of section 451(b)(5) apply.[744] Section 451(b)(5) provides that, if the financial results of a taxpayer are reported on the applicable financial statement for a group of entities, such statement is treated as the applicable financial statement of the taxpayer.

(2) *Consolidated returns.*—Except as provided in regulations prescribed by the Secretary, if the taxpayer is part of an affiliated group of corporations filing a consolidated return for any taxable year, AFSI for such group for such taxable year takes into account items on the group's applicable financial statement which are properly allocable to members of such group.[745]

(3) *Nonconsolidated corporations.*—In the case of any corporation in which the taxpayer owns stock but which is not included on a consolidated return with the taxpayer, AFSI of the taxpayer with respect to the other corporation is determined by taking into account only the dividends received from such other corporation (reduced to the extent provided by the Secretary in regulations or other guidance) and other amounts which are includible in gross income or deductible as a loss under chapter 1 of subtitle A of the Code (other than amounts required to be included pursuant to sections 951 and 951A or such other amounts as provided by the Secretary) with respect to such other corporation.[746]

(4) *Partnerships.*—Except as provided by the Secretary, if the taxpayer is a partner in a partnership, AFSI of the taxpayer with respect to such partnership is adjusted to take into account only the taxpayer's distributive share of AFSI of such partnership.[747] The AFSI of a partnership is the partnership's net income or loss set forth on such partnership's applicable financial statement (adjusted under rules similar to the rules regarding the determination of AFSI for a corporation).[748]

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[744] New sec. 56A(c)(2)(A).

[745] New sec. 56A(c)(2)(B).

[746] New sec. 56A(c)(2)(C). In general, the intent of the modification is to provide a single method to account for stock investments with respect to corporations (both foreign and domestic) that do not consolidate with the taxpayer for Federal income tax purposes (thus, "nonconsolidated" corporations). Instead of following the accounting treatment (which may differ for different taxpayers), the modification generally looks to dividends, other distributions, and gains and losses from stock of the nonconsolidated corporations (other than from transactions between the taxpayer and the nonconsolidated corporation that do not involve stock of the nonconsolidated corporation) includable in income or deductible as a loss under chapter 1 of the Code with respect to the nonconsolidated corporation. Except as otherwise provided by the Secretary, deductions that are not "loss" deductions that might offset such income for Federal income tax purposes (e.g., dividends-received deductions or the section 250 deduction) do not apply in calculating AFSI. CFCs fall under both this rule and the rule in new section 56A(c)(3), discussed below. The intent is not to include the same amounts twice; there should not be double counting. See new sec. 56A(c)(15)(A).

[747] New sec. 56A(c)(2)(D)(i). As discussed below, this distributive share adjustment is disregarded for purposes of determining whether a corporation is an applicable corporation when a partnership is controlled by one or more corporations and the partnership and corporations are treated as a single employer under section 52. The effect is that all AFSI of such a controlled partnership is included in the AFSI of the taxpayer for purposes of the $1 billion average annual AFSI test, even if the taxpayer and its controlled affiliates do not wholly own the partnership. This distributive share adjustment is intended to apply in all other cases, including for purposes of determining whether a corporation is an applicable corporation when a partnership is not controlled by that corporation or any of its affiliates. A technical correction may be necessary to reflect this intent.

[748] New sec. 56A(c)(2)(D)(ii).

All partnerships are thus treated the same for purposes of determining book minimum tax liability,[749] regardless of how the partner reports the partnership investment on its applicable financial statement, with AFSI in all cases including the taxpayer's distributive share of the partnership's AFSI. The distributive share rule provides a substitute for the otherwise applicable financial reporting conventions.

Adjustments to take into account certain items of foreign income.—In the case of a taxpayer that is a U.S. shareholder of one or more CFCs, the AFSI of such taxpayer with respect to such CFC is adjusted also (in addition to the adjustments described above with respect to nonconsolidated corporations) to take into account such taxpayer's pro rata share[750] of items taken into account in computing the net income or loss set forth on the CFC's applicable financial statement (as adjusted under rules similar to those that apply in determining AFSI).[751] Thus, the AFSI of a taxpayer with respect to its CFCs generally takes into account the taxpayer's pro rata share of such net income or loss of each CFC without regard to the Federal income tax treatment (including with respect to, e.g., exclusions and losses). The aggregate amount of such net income or loss determines the adjustment to AFSI for the taxable year.

A secondary rule provides what is in effect a carryover for net CFC losses. In any case in which the adjustment described immediately above results in a negative adjustment for the taxable year with respect to the taxpayer's CFCs, no adjustment is made with respect to the CFCs for the taxable year.[752] Instead, the amount of the adjustment determined for the succeeding taxable year is reduced by an amount equal to the negative adjustment for the prior taxable year. Thus, for example, if the taxpayer's pro rata share of loss from a CFC exceeds the taxpayer's pro rata share of net income from a second CFC, the excess loss does not reduce the taxpayer's AFSI, but rather is carried forward to the succeeding taxable year (and may reduce the taxpayer's pro rata share of aggregate net income from such CFCs in that next year).

Effectively connected income.—To determine AFSI of a foreign corporation, the principles of section 882 apply.[753] In general, AFSI of a foreign corporation includes only AFSI that is effectively connected with a U.S. trade or business conducted by the foreign corporation.

Adjustments for certain taxes.—AFSI is appropriately adjusted to disregard any Federal income taxes, or income, war profits, or excess profits taxes (within the meaning of section 901) with respect to a foreign country or possession of the United States, which are taken into account on the taxpayer's applicable financial statement.[754] To the extent provided by the Secretary, the preceding

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[749] For purposes of determining the threshold question of whether a corporation is an applicable corporation subject to the book minimum tax, all partnerships are not treated the same. See discussion below.

[750] Determined under rules similar to the rules under section 951(a)(2).

[751] New sec. 56A(c)(3)(A).

[752] New sec. 56A(c)(3)(B).

[753] New sec. 56A(c)(4). In general, section 882 provides for the Federal income taxation of a foreign corporation on its taxable income that is effectively connected with the conduct of a trade or business within the United States during the taxable year.

[754] New sec. 56A(c)(5). In determining AFSI, items that are stated net of tax in the taxpayer's applicable financial statement are intended to be adjusted to disregard certain taxes. For example, assume that the taxpayer reported $190 of net income on its applicable financial statement.

sentence does not apply to income, war profits, or excess profits taxes (within the meaning of section 901) that are imposed by a foreign country or possession of the United States and taken into account on the taxpayer's applicable financial statement if the taxpayer does not choose to have the benefits of the foreign tax credit for the taxable year.[755]

The Secretary is directed to prescribe such regulations or other guidance as may be necessary and appropriate to provide for the proper treatment of current and deferred taxes for purposes of the adjustment described here, including the time at which such taxes are properly taken into account.

Adjustment with respect to disregarded entities.—AFSI is adjusted to take into account any AFSI of a disregarded entity owned by the taxpayer.[756]

Special rule for cooperatives.—In the case of a cooperative to which section 1381 applies, AFSI (determined without regard to the adjustment described here) is reduced by the amounts referred to in section 1382(b) (relating to patronage dividends and per-unit retain allocations) to the extent such amounts are not otherwise taken into account in determining AFSI.[757]

Rules for Alaska native corporations.—AFSI is appropriately adjusted to allow (A) cost recovery and depletion attributable to property the basis of which is determined under section 21(c) of the Alaska Native Claims Settlement Act,[758] and (B) deductions for amounts payable made pursuant to section 7(i) or 7(j) of such Act[759] in the same taxable year as the deductions are allowed for tax purposes.[760]

Amounts attributable to elections for direct payment of certain credits.—AFSI is appropriately adjusted to disregard any amount treated as a payment against any Federal income tax imposed pursuant to an election under section 48D(d) or 6417 (providing for direct payments of certain credits), to the extent such amount is not otherwise taken into account under the adjustments described above in "Adjustments for certain taxes."[761]

Consistent treatment of mortgage servicing income of taxpayer other than a regulated investment company.—AFSI is adjusted so as not to include any item of income in connection with a mortgage servicing contract any earlier than when such income is included in gross income under any other provision of chapter 1 of subtitle A of the Code.[762] The Secretary is directed to provide regulations

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In calculating net income, the taxpayer reduced net income by $20 of State income tax expense and $45 of Federal income tax expense. In addition, the taxpayer reported a net income item from discontinued operations of $55, which is comprised of $70 of income from discontinued operations less $15 of Federal income tax expense. Assuming there are no other adjustments to net income required under new section 56A, the taxpayer's AFSI is $250 ($190 of net income + $45 of Federal income tax expense + $15 of Federal income tax expense on income from discontinued operations).

[755] See discussion infra of new sec. 59(l) with respect to the book minimum tax foreign tax credit.

[756] New sec. 56A(c)(6).

[757] New sec. 56A(c)(7).

[758] 43 U.S.C. 1620(c).

[759] 43 U.S.C. 1606(i) and (j).

[760] New sec. 56A(c)(8).

[761] New sec. 56A(c)(9); see also new sec. 56A(c)(5).

[762] New sec. 56A(c)(10). In general, income from "normal" mortgage servicing rights (*i.e.*, reasonable compensation with respect to a mortgage servicing contract) is included in income upon

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to prevent the avoidance of taxes imposed by chapter 1 of subtitle A of the Code with respect to amounts not representing reasonable compensation (as determined by the Secretary) with respect to a mortgage servicing contract.

Adjustment with respect to defined benefit pensions.—Except as otherwise provided in rules prescribed by the Secretary in regulations or other guidance, AFSI is (i) adjusted to disregard any amount of income, cost, or expense that would otherwise be included on the applicable financial statement in connection with any covered benefit plan; (ii) increased by any amount of income in connection with any such covered benefit plan that is included in the gross income of the corporation under any other provision of chapter 1 of subtitle A of the Code; and (iii) reduced by deductions allowed under any other provision of chapter 1 of subtitle A of the Code with respect to any such covered benefit plan.[763]

For this purpose, a covered benefit plan is (i) a defined benefit plan (other than a multiemployer plan described in section 414(f)) if the trust which is part of such plan is an employees' trust described in section 401(a) which is exempt from tax under section 501(a), (ii) any qualified foreign plan (as defined in section 404A(e)), or (iii) any other defined benefit plan which provides post-employment benefits other than pension benefits.[764]

Tax-exempt entities.—In the case of an organization subject to tax under section 511, AFSI is appropriately adjusted to take into account only the items reported in net income that are derived from (A) an unrelated trade or business (as defined in section 513) of such organization, or (B) debt-financed property (as defined in section 514).[765] Such items are taken into account only to the extent that the net income from such unrelated trade or business or debt-financed property gives rise to unrelated business taxable income.[766]

Depreciation.—AFSI is (A) reduced by depreciation deductions allowed under section 167 with respect to property to which section 168 applies[767] to the extent of the amount allowed as deductions

the earlier of when earned or received under the all events test of section 451 (*i.e.*, not averaged over the life of the mortgage). See Rev. Rul. 70–142, 1970–1 C.B. 115. Income from "excess" mortgage servicing rights (*i.e.*, income in excess of reasonable compensation with respect to a mortgage servicing contract) is treated as income from stripped coupons under section 1286 and therefore subject to the original issue discount ("OID") rules. See Rev. Rul. 91–46, 1991–2 C.B. 358, and Rev. Proc. 91–50, 1991–2 C.B. 778.

[763] New sec. 56A(c)(11)(A). As discussed below, and like the distributive share adjustment for partnerships discussed above, this pension adjustment is disregarded for purposes of determining whether a corporation is an applicable corporation when the pension is reported by a controlled affiliate of such corporation and the corporation and affiliate are treated as a single employer under section 52.

[764] New sec. 56A(c)(11)(B).

[765] New sec. 56A(c)(12).

[766] The modifications to unrelated business taxable income found in section 512(b) apply in calculating AFSI.

[767] Section 168 generally requires the use of the modified accelerated cost recovery system ("MACRS") to determine the depreciation deduction under section 167 for tangible property placed in service after 1986. See section 168(f) for the types of property to which section 168 does not apply. MACRS includes a general depreciation system and an alternative depreciation system, as well as an additional first-year depreciation deduction for qualified property (commonly referred to as "bonus depreciation"). Qualified property eligible for bonus depreciation generally includes (in addition to certain tangible property) certain intangible property, i.e., computer software other than computer software covered by section 197, and a qualified film, television, or live theatrical production for which a deduction otherwise would have been allowable under section 181 without regard to the dollar limitations or termination of such section. See sec. 168(k)(2). For a description of MACRS, including bonus depreciation, see Joint Committee on Taxation, *Tax Incentives for Domestic Manufacturing* (JCX–15–21), March 12, 2021. How-

in computing taxable income for the taxable year,[768] and (B) appropriately adjusted (i) to disregard any amount of depreciation expense that is taken into account on the taxpayer's applicable financial statement with respect to such property, and (ii) to take into account any other item specified by the Secretary to provide that such property is accounted for in the same manner as it is accounted for under chapter 1 of subtitle A of the Code.[769]

Qualified wireless spectrum.—AFSI is (i) reduced by amortization deductions allowed under section 197 with respect to qualified wireless spectrum to the extent of the amount allowed as deductions in computing taxable income for the taxable year, and (ii) appropriately adjusted (I) to disregard any amount of amortization expense that is taken into account on the taxpayer's applicable financial statement with respect to such qualified wireless spectrum, and (II) to take into account any other item specified by the Secretary in order to provide that such qualified wireless spectrum is accounted for in the same manner as it is accounted for under chapter 1 of subtitle A of the Code.[770]

For this purpose, qualified wireless spectrum is wireless spectrum which (i) is used in the trade or business of a wireless telecommunications carrier, and (ii) was acquired after December 31, 2007, and before August 16, 2022 (the date of enactment of the provision).[771]

Secretarial authority to adjust items.—The Secretary is directed to issue regulations or other guidance to provide for such adjustments to AFSI as the Secretary determines necessary to carry out the purposes of this provision,[772] including adjustments (A) to pre-

ever, if a taxpayer elects out of bonus depreciation under section 168(k)(7) for a class of property that is not depreciable under section 168 if bonus depreciation is not claimed (e.g., a qualified film production), then AFSI is not adjusted for any depreciation deductions with respect to such property for the taxable year because section 168 does not apply to such property.

[768] The depreciation deductions allowed for a taxable year are the depreciation deductions claimed for such year in computing taxable income on a return and allowed under subtitle A of the Code, to the extent they reduce the taxpayer's income taxes for such year. See sec. 1016(a)(2); Treas. Reg. sec. 1.1016–3(a)(1); and Rev. Rul. 58–62, 1958–1 C.B. 513. Section 263A and the regulations thereunder require certain indirect costs incurred by a taxpayer, such as depreciation, to be capitalized and included in the basis of property produced or acquired for resale by the taxpayer, with the capitalized costs recovered through cost of goods sold, depreciation, amortization, or by an adjustment to the basis of the property when it is used, sold, placed in service, or otherwise disposed of by the taxpayer. See sec. 263A; Treas. Reg. sec. 1.263A–1(c)(3)–(5) and (e)(3)(ii)(I). While cost of goods sold is a reduction to gross income rather than a deduction, it is intended that in situations in which, *e.g.*, depreciation is capitalized to inventory, that such depreciation constitutes a deduction allowed for a taxable year to the extent that it reduces the taxpayer's gross income for such year (*i.e.*, to the extent included in cost of goods sold for such year). See Treas. Reg. sec. 1.61–3(a). See also AM 2008–12 (Dec. 19, 2008), which holds that environmental remediation and workers compensation costs that are allocated to inventory under section 263A and recovered through cost of goods sold constitute specified liability losses under section 172 to the extent they are taken into account in computing a net operating loss for the taxable year. (Note that Public Law 115–97 repealed the special carryback provisions for specified liability losses for taxable years beginning after December 31, 2017.) Because of the complexity and additional recordkeeping burdens that may result in some cases when depreciation is not fully recovered through cost of goods sold in a single taxable year, the Secretary may find it appropriate to prescribe guidance that eases compliance.

[769] New sec. 56A(c)(13). For example, if an item is expensed in net income for applicable financial statement purposes but is capitalized and depreciated under section 168 for Federal income tax purposes, then, in calculating AFSI, the intent is to disregard the amount expensed in net income with respect to such item and instead to account for the tax depreciation expense allowed as a deduction in computing taxable income for the taxable year.

[770] New sec. 56A(c)(14)(A).

[771] New sec. 56A(c)(14)(B).

[772] New sec. 56A(c)(15); see also new sec. 56A(e) (discussed below). For example, under new section 56A(c)(15) and (e), the Secretary is intended to exercise authority to provide that gains and losses with respect to derivative contracts used to manage business risks are to be included

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vent the omission or duplication of any item,[773] and (B) to carry out the principles of the Code relating to corporate liquidations, corporate organizations and reorganizations, and partnership contributions and distributions.

Deduction for financial statement net operating loss

AFSI (determined after the general adjustments described above and without regard to the deduction described here) is reduced by an amount equal to the lesser of (A) the aggregate amount of financial statement net operating loss carryovers to the taxable year, or (B) 80 percent of AFSI computed without regard to any allowance for such net operating loss carryovers.[774] However, as discussed below, AFSI is not reduced by any financial statement net operating loss carryover for purposes of determining whether the taxpayer is an applicable corporation (i.e., a deduction of a financial statement net operating loss from AFSI is allowed only for purposes of determining book minimum tax liability).

A financial statement net operating loss for any taxable year is a financial statement net operating loss carryover to each taxable year following the taxable year of the loss.[775] The portion of such loss which is carried to subsequent taxable years is the amount of such loss remaining (if any) after the application of the deduction described above.[776]

For purposes of this deduction, a financial statement net operating loss is the amount of the net loss (if any) set forth on the corporation's applicable financial statement (determined after the general adjustments described above and without regard to the deduction described here) for taxable years ending after December 31, 2019.[777]

Regulations and other guidance

The Secretary is directed to provide for such regulations and other guidance as necessary to carry out the purposes of the provision, including regulations and other guidance relating to the effect of the rules of the provision on partnerships with income taken into account by an applicable corporation.[778]

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in AFSI when such gains and losses are recognized for regular Federal income tax purposes. For example, AFSI would be appropriately adjusted to disregard any unrealized gains and losses that are taken into account on the taxpayer's applicable financial statement with respect to such derivatives.

[773] The delegation of authority here applies to income, expenses, gains, and losses. The general principle here, as generally across the Code, is that items are not to be counted twice. Similarly, the adjustments to AFSI are to be interpreted in such a way that no item of income, expense, gain, or loss is excluded, if such exclusion would be contrary to the purposes of this provision. Differences between the timing of when an item is taken into account in book income and when that item is taken into account in regular taxable income (*i.e.*, timing differences) do not give rise to duplications or omissions, even those that originate in a taxable year before the effective date of the provision and reverse afterwards in a subsequent taxable year. *See, e.g., CSX Corp. v. United States*, 124 F.3d 643 (4th Cir. 1997), rev'g 929 F.Supp. 223 (E.D. Va. 1996).

[774] New sec. 56A(d)(1).

[775] New sec. 56A(d)(2).

[776] A financial statement net operating loss (as defined in new section 56A(d)(3)) generated before a corporation becomes an applicable corporation is reduced by positive AFSI generated after the taxable year in which the financial statement net operating loss arises and before the first taxable year in which the corporation becomes an applicable corporation. See new sec. 56A(d)(2).

[777] New sec. 56A(d)(3).

[778] New sec. 56A(e). Section 7805 provides authority for the Secretary to issue guidance as necessary or appropriate on all issues arising under the book minimum tax, including transition issues and anti-abuse issues. Nonetheless, general regulatory grants of authority, such as new

Applicable corporation

As discussed, new section 56A defines AFSI, which is relevant for determining the base of the book minimum tax itself and, with certain modifications provided in new section 59(k), for purposes of determining whether a corporation is an applicable corporation. In addition, special aggregation rules apply solely for purposes of determining whether a corporation is an applicable corporation.[779] For purposes of that determination, the special aggregation rules generally increase the AFSI that is attributed to a taxpayer, as discussed below.

For a corporation that is not part of a foreign-parented multinational group, applicable corporation status depends on whether the corporation has average annual AFSI exceeding $1 billion over a given period (the "general average annual AFSI test" (defined below)). For purposes of this test, certain aggregation rules apply to treat AFSI of persons controlled by, or that control, the corporation as AFSI of the corporation. Certain other modifications to AFSI adjust the amounts so included.

For a corporation that is part of a foreign-parented multinational group, additional rules apply for purposes of the general average annual AFSI test, including additional aggregation rules and a rule that modifies AFSI of foreign corporations to include AFSI that is not effectively connected with a U.S. trade or business. Further, a corporation that is part of a foreign-parented multinational group is subject to an additional ($100 million) average annual AFSI test that relies on the same AFSI aggregation rules that apply to a corporation that is not part of a foreign-parented multinational group.

In general

An applicable corporation is, with respect to any taxable year, any corporation (other than an S corporation, a regulated investment company, or a real estate investment trust) that meets the general average annual AFSI test (discussed below) and, if applicable, the additional ($100 million) average annual AFSI test for one or more taxable years which (i) are prior to such taxable year (including the prior taxable years of any predecessor of such corporation[780]), and (ii) end after December 31, 2021.[781] Therefore, for purposes of determining whether a corporation is an applicable corporation in the current taxable year, a corporation looks to prior taxable years (starting with the first taxable year ending after December 31, 2021) to see if it satisfies the general average annual AFSI test and, if applicable, the additional ($100 million) average annual AFSI test with respect to any such prior year.

In general, once a corporation is an applicable corporation subject to the book minimum tax, the corporation remains so for subsequent taxable years. Notwithstanding this general rule, a corporation that otherwise is an applicable corporation ceases to be one if:

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section 56A(e), have become standard. Further, in light of increased challenges to Treasury regulations in recent years, new section 56A includes many additional, specific grants of authority to foreclose the arguments on which such challenges may rely.

[779] New sec. 59(k)(1)(D).

[780] New sec. 59(k)(1)(E)(iii).

[781] New sec. 59(k)(1)(A); see also new sec. 59(k)(1)(B) (setting forth the average annual AFSI test) and (D) (providing special aggregation rules and adjustments to AFSI for purposes of determining whether a corporation is an applicable corporation).

(i) such corporation

(I) has a change in ownership, or

(II) has a specified number (to be determined by the Secretary and, as appropriate, taking into account the facts and circumstances of the taxpayer) of consecutive taxable years, including the most recent taxable year, in which the corporation does not meet the general average annual AFSI test and, if applicable, the additional ($100 million) average annual AFSI test; and

(ii) the Secretary determines that continuing to treat such corporation as an applicable corporation would not be appropriate.[782]

Following application of this exception, a corporation may later again become an applicable corporation. A corporation that is excluded pursuant to a determination by the Secretary under the exception described above once again is an applicable corporation if the corporation meets the general average annual AFSI test, and if applicable the additional ($100 million) average annual AFSI test, for any taxable year beginning after the first taxable year for which such determination applies.

General average annual AFSI test

In general, a corporation meets the general average annual AFSI test for a taxable year if the general average annual AFSI of such corporation (determined without regard to the deduction for a financial statement net operating loss[783]) for the three-taxable-year period ending with such taxable year exceeds $1 billion (the "general average annual AFSI test").[784] Any taxable year included in the average annual AFSI calculation that is a year of less than 12 months must be annualized.[785] If the corporation (or any predecessor of such corporation) was not in existence for all three of the taxable years to be used in the calculation, average annual AFSI is calculated for the period during which such corporation (or predecessor) was in existence.[786]

Aggregation for determining applicable corporation status

Solely for purposes of determining whether a corporation is an applicable corporation, all AFSI of persons treated as a single employer with such corporation under section 52(a) or (b) is treated

[782] New sec. 59(k)(1)(C). The intent is that a taxpayer should remain an applicable corporation if there is a reasonable expectation that the corporation will return to being an applicable corporation in the future or if the reason the taxpayer no longer would be an applicable corporation is because of tax planning or structured transactions a principal purpose of which is no longer being an applicable corporation.

[783] See discussion above of new section 56A(d). While financial statement net operating loss deductions may reduce AFSI for purposes of determining a taxpayer's liability under the book minimum tax, such deductions do not reduce AFSI for purposes of determining applicable corporation status.

[784] New sec. 59(k)(1)(B)(i).

[785] New sec. 59(k)(1)(E)(ii).

[786] New sec. 59(k)(1)(E)(i). If a corporation has been in existence for less than three taxable years, the average annual AFSI tests are applied to that corporation on the basis of the period during which that corporation was in existence. New section 59(k)(1)(E)(iii) provides that a reference in new section 59(k)(1)(E) to a corporation includes a reference to any predecessor of such corporation. Accordingly, whether a corporation was in existence for less than three taxable years and, if so, the period on the basis of which the AFSI tests are applied to that corporation include the period(s) of existence of any predecessor(s) of such corporation.

as AFSI of such corporation, and certain adjustments to AFSI are disregarded.[787]

Aggregation under section 52.—The controlled group rules under section 52 generally treat groups of corporations and other entities under common control as a single employer.[788] Under section 52(a), all corporations in the same controlled group of corporations are treated as a single employer.[789] Under section 52(b), all organizations, including sole proprietorships, partnerships, trusts, estates, and corporations, that are trades or businesses under common control are treated as a single employer.[790]

The regulations under section 52 generally apply a vote or value ownership test whereby a parent-subsidiary group, a brother-sister group, or a combined group is treated as a single employer.[791] In broad terms, a parent-subsidiary group requires the group to be linked through greater-than-50-percent direct or indirect ownership interests. A brother-sister group generally exists only in the case of a closely held group. Finally, a combined group requires both a parent-subsidiary group and a brother-sister group.[792]

Accordingly, to determine whether a corporation meets the general average annual AFSI test for a taxable year, the AFSI of all members of a group under common control is aggregated. For a multinational group with a corporate parent (whether foreign or domestic), such group includes all controlled corporations, partnerships, and other affiliates (whether foreign or domestic). Thus, for such a multinational group, the general average annual AFSI test generally is a test of the AFSI of the entire worldwide group.

There are two different applications of the aggregation rules: a general rule for all corporations and a special rule for corporations

[787] New sec. 59(k)(1)(D), as added by section 10101(a)(2) of the Act and amended by section 13904(a) of the Act.

[788] The controlled group rules under section 52 (originally designed for purposes of what is now the work opportunity tax credit) are applied by many other Code provisions. Those other Code provisions are in some cases themselves cross-referenced, broadening the reach of the section 52 controlled group rules. For example, the small business exception in section 163(j)(3) refers to section 448 and, thus, requires the application of the controlled group rules of section 52 to determine whether a taxpayer is subject to the business interest expense limitation of section 163(j)(3). For examples of the application of the section 52 controlled group rules to various ownership structures, taking into account the different ownership interests under section 52(a)(1), see Treas. Reg. sec. 1.1563–1(a)(2)(ii), (3)(iii), and (4)(ii).

[789] Section 52(a) defines a controlled group of corporations by reference to section 1563(a), with certain modifications. For this purpose, ownership takes into account the application of certain attribution rules.

[790] Section 52(b) applies using principles similar to the principles of section 52(a). See also Treas. Reg. sec. 1.52–1(b).

[791] See Treas. Reg. sec. 1.52–1.

[792] Section 10101 of the Act includes two modifications to the application of section 52 for this purpose that were struck by an amendment that appears in section 13904(a) of the Act. The first modification provides that section 52(a) is to be applied by substituting "component members" for "members." (Section 1563(a) does not mention component members; the definition appears in section 1563(b). In general, a component member of a controlled group is a member of the group at the end of the year and not an excluded member. Excluded members include, *e.g.*, certain insurance companies and foreign corporations without income effectively connected with a U.S. trade or business.) The first modification provides that component members (for this purpose) include all excluded members. Thus, the first modification is an attempt to clarify (not change) the meaning of "members" in section 52(a). No inference with respect to current law is intended by the striking of this first modification by section 13904(a) of the Act.

The second modification provides that, for purposes of applying section 52(b), the term "trade or business" generally includes any activity treated as a trade or business under section 469(c)(5) or (6). Thus, pursuant to the modification, a trade or business under section 52(b) includes (1) any activity involving research or experimentation, and (2) any activity in connection with a trade or business or with respect to which expenses are allowable as a deduction under section 212. No inference with respect to current law is intended by the striking of this second modification by section 13904(a) of the Act. The authority of the Secretary under section 52(b) remains unchanged.

that are members of a foreign-parented multinational group that applies only for purposes of the special ($1 billion) average annual AFSI test (described below). In both cases, the aggregated group is the worldwide group under section 52. In the latter case, however, the scope of AFSI is generally increased to include the AFSI of foreign members of the foreign-parented multinational group that is not effectively connected with a U.S. trade or business.[793]

Determination of AFSI for purposes of applicable corporation status

The purpose of aggregation is to identify what AFSI of an affiliate a taxpayer must include in its own AFSI. In general, the rule is based on control (as described above). The definition of AFSI itself, however, requires a taxpayer to include AFSI with respect to affiliates (both controlled and noncontrolled).[794] As described below, the rules for determining applicable corporation status may result in the taxpayer including a different amount of AFSI for this purpose than otherwise would be included for the general purpose of determining book minimum tax liability.

General rule for corporations that are not members of a foreign-parented multinational group.—For purposes of determining applicable corporation status, AFSI is determined without regard to two adjustments otherwise required pursuant to new section 56A(c), one with respect to partnerships and one with respect to certain defined benefit plans.[795]

(1) *Partnerships*.—If the taxpayer (or members of its group) controls a partnership, AFSI of the taxpayer with respect to such controlled partnership is not limited to the taxpayer's distributive share of AFSI of the partnership (as it is for purposes of determining book minimum tax liability) and instead includes all AFSI of the partnership (*i.e.*, the partnership's net income or loss set forth on the partnership's applicable financial statement).[796]

(2) *Certain defined benefit plans*.—The effect of disregarding certain adjustments in the case of certain defined benefit plans is similar. For purposes of the general average annual AFSI test, AFSI of the taxpayer includes amounts included in the net income or loss of the taxpayer or any member of its group in connection with any covered benefit plan (defined above) as set forth on the applicable financial statement of any member of the group.

As described above, AFSI is financial statement income subject to numerous adjustments. The modifications to the two adjustments described immediately above, however, are the only two

[793] In general, the book minimum tax is intended to apply to a corporation that has (after application of the general aggregation rules described below) AFSI of at least $1 billion. The additional ($100 million) average annual AFSI test for corporations that are members of a foreign-parented multinational group is intended to limit the application of the book minimum tax to corporations with (after application of the special aggregation rules described below) AFSI of at least $100 million.

[794] See discussion above of new section 56A(c)(2) and (3).

[795] New sec. 59(k)(1)(D), as added by section 10101(a)(2) of the Act and amended by section 13904(a) of the Act. The adjustment for partnerships is in new section 56A(c)(2)(D)(i) and the adjustment for certain defined benefit plans is in new section 56A(c)(11).

[796] The intent is that the treatment of partnerships not controlled by the taxpayer (or members of its group) remains unchanged, with AFSI of the taxpayer or of a member of the group with respect to a noncontrolled partnership reflecting its distributive share of AFSI of the partnership. A technical correction may be necessary for clarity. In no case is the income (or loss) of a noncontrolled partnership disregarded. That holds for purposes of determining applicable corporation status and book minimum tax liability.

modifications to AFSI for purposes of the general average annual AFSI test. So, for example, the adjustments with respect to CFCs[797] and with respect to all foreign corporations[798] continue to apply.

The computation of AFSI (with the two modifications described above) applies to the general average annual AFSI test for a corporation that is not a member of a foreign-parented multinational group and (as described below) to the additional ($100 million) average annual AFSI test for a corporation that is a member of a foreign-parented multinational group. In both cases, the aggregation rules and the method for computing AFSI are the same; only the relevant dollar threshold is different.

Special rule for members of a foreign-parented multinational group

A corporation that is a member of a foreign-parented multinational group is an applicable corporation only if the corporation meets both of two tests: (1) a special ($1 billion) average annual AFSI test and (2) an additional ($100 million) average annual AFSI test.[799]

Special ($1 billion) average annual AFSI test.—First, the average annual AFSI of the corporation (determined by applying the special aggregation rules discussed above) for the three-taxable-year period ending with such taxable year must exceed $1 billion.[800] For purposes of this special test applicable only to corporations that are members of a foreign-parented multinational group, AFSI is determined without regard to certain adjustments with respect to partnerships, U.S. shareholders' share of income of CFCs, effectively connected income, and certain defined benefit plans.[801]

In other words, for purposes of the special rule for corporations that are members of a foreign-parented multinational group, the modifications to AFSI described above with respect to partnerships and certain defined benefit plans continue to apply. The second and third adjustments referred to above with respect to U.S. shareholders' share of income of CFCs and effectively connected income, however, which generally are not disregarded for purposes of the general average annual AFSI test, are disregarded in this context. Thus, for purposes of the special rule for corporations that are members of a foreign-parented multinational group, AFSI of a taxpayer with respect to foreign corporations controlled by the taxpayer (or members of its group) is not limited to the pro rata share (in the case of a CFC) or the principles of the rules governing effectively connected income (in the case of any foreign corporation). Accordingly, all AFSI of those foreign corporations is treated as AFSI of the taxpayer.

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[797] New sec. 56A(c)(3). See discussion above.

[798] New sec. 56A(c)(4). See discussion above.

[799] New sec. 59(k)(1)(B)(ii).

[800] New sec. 59(k)(1)(B)(ii) and (2). The definition of group under section 52 is the same for all groups (including foreign-parented multinational groups). Under section 52, all groups include all members controlled by or controlling the taxpayer; the domicile of the ultimate parent is not relevant. For that reason, the reference in the special rule for a foreign-parented multinational group to "all members" of the group may not be necessary. See new sec. 59(k)(2)(A). A technical correction may be necessary for clarity.

[801] New sec. 59(k)(2)(A); see also new sec. 56A(c)(2)(D)(i), (3), (4), and (11).

Additional ($100 million) average annual AFSI test.—Second, the average annual AFSI of the corporation (determined by applying the aggregation rules that apply to corporations that are not members of a foreign-parented multinational group and without regard to the deduction for a financial statement net operating loss [802]) for the three-taxable-year period ending with such taxable year must equal or exceed $100 million.[803]

Definition of foreign-parented multinational group.—For this purpose, a foreign-parented multinational group is, with respect to any taxable year, two or more entities if (i) at least one entity is a domestic corporation and another entity is a foreign corporation, (ii) such entities are included in the same applicable financial statement with respect to such year, and (iii) either (I) the common parent of such entities is a foreign corporation, or (II) if there is no common parent, the entities are treated as having a common parent which is a foreign corporation under certain rules to be prescribed by the Secretary (described in the following paragraph).[804]

The Secretary is directed to prescribe rules, applying the principles of the provision, for the application of this special rule for foreign-parented multinational groups, including rules for the determination of (i) the entities (if any) which are to be to be treated (under the rule described above) as having a common parent which is a foreign corporation, (ii) the entities to be included in a foreign-parented multinational group, and (iii) the common parent of a foreign-parented multinational group.[805]

For purposes of this special rule, if a foreign corporation is engaged in a trade or business within the United States, such trade or business is treated as a separate domestic corporation that is wholly owned by the foreign corporation.[806]

Regulations and other guidance

The Secretary is directed to provide regulations or other guidance for the purposes of carrying out the rules relating to the determination of whether a corporation is an applicable corporation, including regulations or other guidance (A) providing a simplified method for determining whether a corporation meets the requirements of the general average annual AFSI test, and (B) addressing the application of the rules to a corporation that experiences a change in ownership.[807]

Computation of book minimum tax liability

In general

The determination of book minimum tax liability requires the computation of the tentative minimum tax, which includes (1) com-

[802] See discussion above of new section 56A(d).

[803] New sec. 59(k)(1)(B)(ii)(II). Any taxable year included in the average annual AFSI calculation which is a year of less than 12 months must be annualized. New sec. 59(k)(1)(E)(ii). If the corporation (or any predecessor of such corporation) was not in existence for all three of the taxable years to be used in the calculation, average annual AFSI is calculated for the period during which such corporation (or predecessor) was in existence. New sec. 59(k)(1)(E)(i).

[804] New sec. 59(k)(2)(B). There are thus two aggregation rules that apply foreign-parented multinational groups: there is aggregation under section 52 and there is aggregation by reason of being included in the same applicable financial statement.

[805] New sec. 59(k)(2)(D).

[806] New sec. 59(k)(2)(C).

[807] New sec. 59(k)(3).

puting the base (*i.e.*, AFSI, reduced by financial statement net operating loss carryovers (but not exceeding 80 percent of AFSI)); (2) multiplying the base by 15 percent; and (3) offsetting the result (in whole or in part) by such corporation's book minimum tax foreign tax credits (if any). If an applicable corporation has a tentative minimum tax for such year, the taxpayer is liable for the book minimum tax to the extent such amount exceeds the sum of such taxpayer's regular Federal income tax liability for the year and its tax liability under section 59A for the year. Any book minimum tax liability is in addition to any other Federal income tax liability; the sum of those two amounts, which may be reduced by a percentage of the general business credit, is the taxpayer's Federal income tax liability for such year.

Book minimum tax foreign tax credit

As stated above, the tentative minimum tax for an applicable corporation for the taxable year is the excess of (i) 15 percent of the AFSI for the taxable year (as reduced by certain financial statement net operating losses), over (ii) the book minimum tax foreign tax credit for the taxable year. In a case in which, for regular Federal income tax purposes for a taxable year, a taxpayer elects to claim a credit for foreign income taxes paid, the taxpayer is entitled to claim the book minimum tax foreign tax credit for purposes of the book minimum tax for the taxable year.

The book minimum tax foreign tax credit for the taxable year of the applicable corporation is an amount equal to the sum of two amounts.

The first amount, relating to indirect foreign taxes, is equal to the lesser of (i) the aggregate of the applicable corporation's pro rata share (as described under "Adjustments to take into account certain items of foreign income") of the amount of income, war profits, and excess profits taxes[808] imposed by any foreign country or possession of the United States which are (I) taken into account on the applicable financial statement of each CFC with respect to which the applicable corporation is a U.S. shareholder, and (II) paid or accrued (for Federal income tax purposes) by each such CFC, or (ii) the product of the amount of the adjustment described above in "Adjustment to take into account certain items of foreign income" and 15 percent.

The second amount, relating to direct foreign taxes, is the amount of income, war profits, and excess profits taxes[809] imposed by any foreign country or possession of the United States to the extent such taxes are (i) taken into account on the applicable corporation's applicable financial statement, and (ii) paid or accrued (for Federal income tax purposes) by the applicable corporation.[810] The second amount is relevant only for domestic corporations.

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[808] Within the meaning of section 901.
[809] Within the meaning of section 901.
[810] New sec. 59(l)(1). Income, war profits, and excess profits taxes (within the meaning of section 901) imposed by any foreign country or possession of the United States must satisfy two conditions to be eligible for the book minimum tax foreign tax credit (*i.e.*, that the foreign tax be taken into account on the applicable financial statement and be paid or accrued for Federal tax purposes), but the two conditions need not be satisfied in the same taxable year. Any such taxes are eligible in the taxable year in which the second (*i.e.*, later in time) of the two conditions (whichever condition that might be) is satisfied. The Secretary has the authority to address

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The determination of an applicable corporation's book minimum tax foreign tax credit for the taxable year takes into account (1) certain foreign income taxes paid or accrued by a domestic corporation, and (2) the applicable corporation's pro rata share of certain foreign income taxes paid or accrued by each CFC with respect to which such corporation is a U.S. shareholder ("creditable CFC taxes"). The latter, however, unlike the former, is subject to limitation (*i.e.*, the lesser of (i) the corporation's pro rata share of such taxes paid or accrued or (ii) 15 percent of the aggregate amount of the applicable corporation's pro rata share of the AFSI of its CFCs). As a result, for purposes of determining the book minimum tax foreign tax credit for a particular year, the aggregate amount of the applicable corporation's creditable CFC taxes may not exceed 15 percent of the aggregate of such corporation's pro rata share of AFSI of such CFCs.

A secondary rule provides what is in effect a carryover of book minimum tax foreign tax credits. If, for any taxable year for which an applicable corporation chooses to have the benefits of the foreign tax credit, the 15-percent limitation on foreign income taxes paid or accrued by CFCs applies, the excess of the amount of the creditable CFC taxes over the amount of such limitation increases the amount of the creditable CFC taxes in any of the first five succeeding taxable years to the extent not taken into account in a prior taxable year.[811]

The Secretary is directed to provide for such regulations or other guidance as necessary to carry out the purposes of the book minimum tax foreign tax credit.[812]

Treatment of general business credits

In the case of a corporation, for any taxable year, the general business credit (which is the sum of the various business credits (including, *e.g.*, the research credit)) generally may not exceed the excess of the taxpayer's net income tax[813] over 25 percent of the taxpayer's net income tax as exceeds $25,000.[814] Thus, general business credits generally may offset up to approximately 75 percent of the sum of a corporation's regular income tax (less certain credits) and book minimum tax. Any general business credit in excess of this limitation generally may be carried back one year and forward up to 20 years.[815] The ability to claim a general business credit against the book minimum tax is not limited to specified

situations in which the general rule may not be appropriate (*e.g.*, when section 905(c)(2) applies). In addition, under new section 56A(c)(5), the Secretary has the authority to provide for the proper treatment of current and deferred taxes, including the time at which such taxes are properly taken into account.

[811] New sec. 59(l)(2). This carryover applies to taxes paid by the CFC (indirect taxes, covered by new section 59(l)(1)(A)) and not taxes (*e.g.*, withholding taxes) paid by the taxpayer (direct taxes, covered by new section 59(l)(1)(B)). Thus, indirect taxes are allowed a carryover (but remain subject to the 15-percent limitation) while direct taxes are not allowed a carryover (but are not subject to the 15-percent limitation).

[812] New sec. 59(l)(3). Section 7805 provides authority for the Secretary to issue guidance as necessary or appropriate on all issues arising under the book minimum tax foreign tax credit, including transition issues and anti-abuse issues. Nonetheless, general regulatory grants of authority, such as new section 59(l)(3), have become standard.

[813] The term "net income tax" means the sum of the regular tax liability and the book minimum tax, reduced by the credits allowable under sections 21 through 30D. Sec. 38(c)(1).

[814] Sec. 38(c)(6)(E), as amended by section 10101(d) of the Act.

[815] Sec. 39(a)(1).

credits; all credits that comprise the general business credit may be taken.[816]

Credit for prior year minimum tax liability

In general, an applicable corporation is entitled for any taxable year to a credit against its Federal income tax in an amount equal to the minimum tax credit for such taxable year.[817]

The minimum tax credit for any taxable year is the excess (if any) of (1) the net minimum tax for all prior taxable years beginning after 2022, over (2) the amount allowable as a minimum tax credit for such prior taxable years. Net minimum tax is the tax imposed by section 55 (*i.e.*, with respect to applicable corporations, the book minimum tax).

The credit allowable for any taxable year cannot exceed the excess (if any) of (1) the regular tax liability of the taxpayer for the taxable year (increased by the amount of tax imposed under section 59A for the taxable year) reduced by the sum of certain credits allowable, over (2) the tentative minimum tax for the taxable year.

Published guidance

The Treasury Department and IRS have issued published guidance addressing this provision.[818]

Effective Date

The provision applies to taxable years beginning after December 31, 2022.

2. Excise tax on repurchase of corporate stock (sec. 10201 of the Act and new sec. 4501 of the Code)

Present Law

A corporation that repurchases its stock for cash from its shareholders generally must capitalize the associated costs and reduce its earnings and profits accordingly.[819] Further, a corporation recognizes no gain or loss on the receipt of money or other property in any subsequent exchange for the stock (now treasury stock).[820]

The tax consequences for shareholders are determined under section 301 or 302. In general, to be treated as an exchange in part or full payment for the stock that results in recovery of basis (and usually in capital gain or loss) and not as a distribution under section 301 (*i.e.*, a dividend to the extent of the corporation's current and accumulated earnings and profits), the repurchase must be a

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[816] New sec. 38(c)(6)(E)(i), as added by section 10101(d) the Act.

[817] Sec. 53(a), (b)(1), (c)(1), and (e), as amended by sections 10101(a) and (e) of the Act.

[818] See Notice 2023–7, 2023–3 I.R.B. 390, December 27, 2022 (providing initial guidance regarding the application of the book minimum tax, including a safe harbor method for determining applicable corporation status); and Notice 2023–20, 2023–10 I.R.B. 523, February 17, 2023 (providing interim guidance regarding certain insurance related issues for determining AFSI); and Notice 2023–42, 2023–26 I.R.B. 1085, June 7, 2023 (providing estimated tax penalty relief for corporations who did not pay estimated taxes in connection with the book minimum tax for taxable years beginning after 2022 and before 2024).

[819] See secs. 162(k) and 312(a) and (n)(7).

[820] See sec. 1032(a).

redemption under section 317(b)[821] and either (1) not be essentially equivalent to a dividend, (2) be substantially disproportionate with respect to the shareholders, (3) completely terminate the shareholder's interest in the corporation, or (4) be from a noncorporate shareholder in partial liquidation of the corporation.[822] In practice, non *pro rata* redemptions by public companies (*i.e.*, typical open market repurchases) generally result in distributions treated as exchanges under section 302.

Explanation of Provision

The provision imposes on a covered corporation a one-percent excise tax on the fair market value of any of its stock that the covered corporation repurchases during the taxable year.[823] For purposes of the provision, a covered corporation is any domestic corporation the stock of which is traded on an established securities market (within the meaning of section 7704(b)(1)[824]).[825] The amount subject to the excise tax is reduced by the fair market value of any stock issued by the covered corporation during the taxable year, including the fair market value of any stock issued or provided to employees of the covered corporation or employees of a specified affiliate (defined below) of the covered corporation during the taxable year, whether or not such stock is issued or provided in response to the exercise of an option to purchase such stock.[826] No deduction is allowed for the excise tax.[827]

Repurchases

For purposes of the provision, a repurchase is (A) a redemption within the meaning of section 317(b) with regard to the stock of a covered corporation and (B) any transaction determined by the Secretary to be economically similar to a transaction described in (A).[828]

Purchases by specified affiliates

The acquisition of stock of a covered corporation by a specified affiliate of the covered corporation, from a person other than the covered corporation or a specified affiliate of such covered corporation, is treated as a repurchase of the stock of the covered corpora-

[821] Section 317(b) states: "For purposes of this part [Part I of Subchapter C], stock shall be treated as redeemed by a corporation if the corporation acquires its stock from a shareholder in exchange for property, whether or not the stock so acquired is cancelled, retired, or held as treasury stock."

[822] Sec. 302(a) and (b)(1)–(4).

[823] New sec. 4501(a).

[824] Under section 7704(b)(1), an established securities market includes (1) a national securities exchange registered under section 6 of the Securities Exchange Act of 1934 (15 U.S.C. 78f); (2) a national securities exchange exempt from registration under section 6 of the Securities Exchange Act of 1934 (15 U.S.C. 78f) because of the limited volume of transactions; (3) a foreign securities exchange that, under the law of the jurisdiction where it is organized, satisfies regulatory requirements that are analogous to the regulatory requirements under the Securities Exchange Act of 1934 described in Treas. Reg. sec. 1.7704–1(b)(1) or (2) (such as the London International Financial Futures Exchange; the Marche a Terme International de France; the International Stock Exchange of the United Kingdom and the Republic of Ireland, Limited; the Frankfurt Stock Exchange; and the Tokyo Stock Exchange); (4) a regional or local exchange; and (5) an interdealer quotation system that regularly disseminates firm buy or sell quotations by identified brokers or dealers by electronic means or otherwise. Treas. Reg. sec. 1.7704–1(b).

[825] New sec. 4501(b).

[826] New sec. 4501(c)(3).

[827] Sec. 275(a)(6), as amended by the Act.

[828] New sec. 4501(c)(1).

tion by the covered corporation.[829] For purposes of the provision, with respect to any corporation, a specified affiliate is (i) any corporation more than 50 percent of the stock of which is owned (by vote or by value), directly or indirectly, by the corporation, and (ii) any partnership more than 50 percent of the capital interests or profits interests of which is held, directly or indirectly, by the corporation.[830]

Special rules for foreign corporations

General rule

In the case of an acquisition of stock of an applicable foreign corporation by a specified affiliate of such corporation (other than a foreign corporation or a foreign partnership (unless such partnership has a domestic entity as a direct or indirect partner)) from a person who is not the applicable foreign corporation or a specified affiliate of such applicable foreign corporation, for purposes of the provision (A) such specified affiliate is treated as a covered corporation with respect to such acquisition, (B) such acquisition is treated as a repurchase of stock of a covered corporation by such covered corporation, and (C) the adjustment with respect to stock issued to employees during the taxable year (described above) is determined only with respect to stock issued or provided by such specified affiliate to employees of the specified affiliate.[831]

An applicable foreign corporation is any foreign corporation the stock of which is traded on an established securities market (within the meaning of section 7704(b)(1)).[832]

Special rule for surrogate foreign corporations

In the case of a repurchase of stock of a covered surrogate foreign corporation by such covered surrogate foreign corporation, or an acquisition of stock of a covered surrogate foreign corporation by a specified affiliate of such corporation, for purposes of the provision (A) the expatriated entity with respect to such covered surrogate foreign corporation is treated as a covered corporation with respect to such repurchase or acquisition, (B) such repurchase or acquisition is treated as a repurchase of stock of a covered corporation by such covered corporation, and (C) the adjustment with respect to stock issued to employees during the taxable year (described above) is determined only with respect to stock issued or provided by such expatriated entity to employees of the expatriated entity.[833]

A covered surrogate foreign corporation is any surrogate foreign corporation (as determined under section 7874(a)(2)(B) by substituting “September 20, 2021” for “March 4, 2003” each place it appears) the stock of which is traded on an established securities market (within the meaning of section 7704(b)(1)), but only with respect to taxable years which include any portion of the applicable

[829] New sec. 4501(c)(2)(A).
[830] New sec. 4501(c)(2)(B).
[831] New sec. 4501(d)(1).
[832] New sec. 4501(d)(3)(A).
[833] New sec. 4501(d)(2).

period with respect to such corporation under section 7874(d)(1).[834] Expatriated entity has the meaning given such term by section 7874(a)(2)(A).[835] The intent is to apply the new excise tax only to surrogate foreign corporations that became surrogate foreign corporations after the initial public release of the provision in what became the House-passed version of the Build Back Better Act.[836]

Exceptions

The excise tax does not apply (1) to the extent that the repurchase is part of a reorganization (within the meaning of section 368(a)) and no gain or loss is recognized on such repurchase by the shareholder under chapter 1 of the Code by reason of such reorganization,[837] (2) in any case in which the stock repurchased is, or an amount of stock equal to the value of the stock repurchased is, contributed to an employer-sponsored retirement plan, employee stock ownership plan, or similar plan, (3) in any case in which the total value of the stock repurchased during the taxable year does not exceed $1,000,000, (4) under regulations prescribed by the Secretary, in cases in which the repurchase is by a dealer in securities in the ordinary course of business, (5) to repurchases by a regulated investment company (as defined in section 851) or a real estate investment trust (as defined in section 856), or (6) to the extent that the repurchase is treated as a dividend for purposes of the Code.[838]

Regulations and guidance

The Secretary is directed to prescribe such regulations and other guidance as are necessary or appropriate to carry out, and to prevent the avoidance of, the purposes of the provision, including regulations and other guidance (1) to prevent the abuse of the exceptions described above, (2) to address special classes of stock and preferred stock, and (3) for the application of the rules for foreign corporations (described above).[839]

The Treasury Department and IRS have issued published guidance addressing this provision.[840]

Effective Date

The provision applies to repurchases (as described above) of stock after December 31, 2022.

[834] New sec. 4501(d)(3)(B). In general, section 7874 provides rules governing the tax treatment of expatriated entities and their foreign parents.

[835] New sec. 4501(d)(3)(C).

[836] Rules Committee Print 117–18, H.R. 5376.

[837] For example, if such a shareholder received other property or money under section 356(a)(1)(B) in exchange for target corporation stock as part of a reorganization described in section 368(a)(2)(E), and the distribution of such property or money did not have the effect of a dividend distribution, the exchange would be treated as a repurchase.

[838] New sec. 4501(e).

[839] New sec. 4501(f).

[840] See Notice 2023–2, 2023–3 I.R.B. 374 (providing interim guidance until publication of forthcoming proposed regulations regarding the excise tax on the repurchase of corporate stock); and Announcement 2023–18, released June 29, 2023 (announcing that taxpayers will not be required to report or pay the excise tax until Treasury and the IRS publish the forthcoming regulations).

Subtitle B—Prescription Drug Pricing Reform

1. Excise tax imposed on drug manufacturers during noncompliance periods (sec. 11003 of the Act and sec. 5000D of the Code)

Present Law

Annual fee on branded prescription pharmaceutical manufacturers and importers

An annual fee is imposed on covered entities engaged in the business of manufacturing or importing branded prescription drugs for sale to any specified government program or pursuant to coverage under any such program.[841]

The aggregate annual fee imposed on all covered entities is $2.8 billion for calendar year 2022.[842] The aggregate fee is apportioned among the covered entities each year based on their relative market share of branded prescription drug sales taken into account during the previous calendar year. More specifically, a covered entity's annual fee equals an amount that bears the same ratio to the aggregate annual fee of $2.8 billion as the entity's branded prescription drug sales taken into account during the preceding calendar year bear to the aggregate branded prescription drug sales of all covered entities taken into account during the preceding calendar year.[843] Sales taken into account during any calendar year with respect to a covered entity are: (1) zero percent of sales not more than $5 million; (2) 10 percent of sales over $5 million but not more than $125 million; (3) 40 percent of sales over $125 million but not more than $225 million; (4) 75 percent of sales over $225 million but not more than $400 million; and (5) 100 percent of sales over $400 million.[844]

A covered entity is any manufacturer or importer with gross receipts from branded prescription drug sales. All persons treated as a single employer under section 52(a) or (b) or under section 414(m) or (o) are treated as a single covered entity. Thus, for example, corporations that are members of the same controlled group of corporations under section 52(a) are treated as a single covered entity. In applying the single employer rules under sections 52(a) and (b), foreign corporations are not excluded. If more than one person is liable for payment of the fee, all such persons are jointly and severally liable for payment of such fee.

"Branded prescription drug sales" are sales of branded prescription drugs made to any specified government program, or pursuant to coverage under any such program.[845] The term "branded prescription drugs" includes any drug which is subject to section 503(b) of the Federal Food, Drug, and Cosmetic Act[846] and for

[841] Sec. 9008 of the Patient Protection and Affordable Care Act ("PPACA"), Pub. L. No. 111–148, as amended by section 1404 of the Health Care and Education Reconciliation Act of 2010 ("HCERA"), Pub. L. No. 111–152; see also Treas. Reg. sec. 51.1–51.11.

[842] Sec. 90008(b)(4) of the PPACA. The aggregate annual fee amount for each year is set by statute; for calendar year 2019 and thereafter the amount is $2.8 billion. *Ibid.*

[843] Sec. 9008(b) of the PPACA.

[844] Sec. 9008(b)(2) of the PPACA.

[845] Sec. 9008(e)(1) of the PPACA.

[846] 21 U.S.C. sec. 353(b).

which an application was submitted under section 505(b)[847] of such Act.[848] Branded prescription drugs also include any biological product the license for which was submitted under section 351(a)[849] of the Public Health Service Act.[850] Branded prescription drug sales do not include sales of any drug or biological product with respect to which a tax credit was allowed for any taxable year under section 45C (the "orphan drug credit").[851] The exclusion for orphan drug sales does not apply to any drug or biological product after such drug or biological product is approved by the Food and Drug Administration for marketing for any indication other than the rare disease or condition with respect to which the orphan drug credit was allowed.[852]

Specified government programs include:[853] (1) the Medicare Part D program ("Medicare Part D")[854]; (2) the Medicare Part B program ("Medicare Part B");[855] (3) the Medicaid program ("Medicaid")[856]; (4) any program under which branded prescription drugs are procured by the Department of Veterans Affairs; (5) any program under which branded prescription drugs are procured by the Department of Defense; or (6) the TRICARE retail pharmacy program.[857]

The fees are treated in the same manner as those excise taxes identified in subtitle F of the Code, "Procedure and Administration," for which the only avenue for judicial review is a civil action for refund.[858] Thus, the fees may be assessed and collected using the procedures in subtitle F without regard to the restrictions on assessment in section 6213.

The fee is required to be paid no later than an annual payment date determined by the Secretary of the Treasury, but in no event later than September 30th of each calendar year.[859]

Finally, the fee is considered to be a nondeductible tax for purposes of section 275 and therefore is not deductible against income taxes.[860]

Manufacturers excise taxes

Chapter 32 of the Code imposes excise taxes on sales by manufacturers of certain articles.[861] Articles subject to the manufacturers excise tax include certain gas guzzler automobiles, tires, fuels, coal, vaccines, sporting goods, and firearms. In general, uniform rules related to imposition, payment, reporting, and claiming of

[847] 21 U.S.C. sec. 355(b).
[848] Sec. 9008(e)(2) of the PPACA.
[849] 42 U.S.C. sec. 262(a).
[850] Sec. 9008(e)(2) of the PPACA.
[851] Sec. 9008(e)(3) of the PPACA.
[852] *Ibid.*
[853] See sec. 9008(e)(4) of the PPACA.
[854] Part D of title XVIII of the Social Security Act ("SSA").
[855] Part B of title XVIII of the SSA.
[856] Title XIX of the SSA.
[857] 10 U.S.C. sec. 1074g.
[858] Sec. 9008(f)(1) of the PPACA.
[859] Sec. 9008(a) of the PPACA.
[860] Sec. 9008(f)(2) of the PPACA.
[861] Secs. 4064–4227. The tax may also be imposed on producers and importers. Generally, the use of an article subject to tax by a manufacturer, producer, or importer of such article is treated as a sale for the purpose of imposing certain excise taxes. Sec. 4218.

credits or refunds apply to each of the excise taxes in Chapter 32.[862]

In general, manufacturers excise taxes are imposed on the sale of the applicable taxable article by the manufacturer, producer, or importer. A manufacturer is a person who produces a taxable article from new, raw, or used material (including scrap, salvage, or junk) by processing, manipulating, or changing the form of an article, or by combining or assembling two or more articles.[863] An importer of a taxable article is any person who brings such an article into the United States from a source outside the United States, or who withdraws such an article from a customs bonded warehouse for sale or use in the United States.[864]

Taxable vaccines are among the articles currently subject to a manufacturers excise tax.[865] However, prescription drugs currently are not subject to a manufacturers excise tax.

Explanation of Provision

The provision creates a new Drug Price Negotiation Program (the "program") that is established and administered by the Secretary of Health and Human Services ("HHS").[866] Failure to meet certain requirements of the program results in an excise tax on drug sales during periods of noncompliance.[867]

Drug price negotiation program

Many terms of the program apply with respect to initial price applicability years ("IPAYs") which are years 2026 and later.[868] Under the program, HHS selects and publishes a list of certain drugs (the "selected drug list") with respect to each IPAY. The selected drug list is published by a "selected drug publication date," which is February 1 of the year that begins two years prior to the IPAY (with the exception of IPAY 2026), for which the selected drug publication date is September 1, 2023).[869]

Qualifying single source drugs, negotiation-eligible drugs, and selected drugs

The program applies to certain "qualifying single source drugs." Qualifying single source drugs for which there are high expenditures under Medicare Part D and Medicare Part B are "negotiation-eligible drugs."[870] Negotiation-eligible drugs are ranked based on "total expenditures" under Medicare,[871] with the highest ranked

[862] Secs. 4216–4227, 6416.
[863] Treas. Reg. sec. 48.0–2(a)(4)(i).
[864] *Ibid.*
[865] Sec. 4131.
[866] Part E of Title XI of the SSA, secs. 1191–1198 of the SSA, 42 U.S.C. secs. 1320f–1320f–7 enacted by the Act.
[867] Chapter 50A of the Code, Sec. 5000D, enacted by the Act.
[868] Sec. 1191(b)(1) of the SSA, 42 U.S.C. sec. 1320f(b)(1).
[869] Sec. 1191(a)(1), (b)(3) of the SSA; Sec. 1192(a) of the SSA, 42 U.S.C. sec. 1320f–1(a).
[870] Sec. 1192(d) of the SSA.
[871] The term "total expenditures" includes, in the case of expenditures with respect to Medicare Part D, the total gross covered prescription drug costs (as defined in section 1860D–15(b)(3) of the SSA), 42 U.S.C. sec. 1395w–115(b)(3). The term "total expenditures" excludes, in the case of expenditures with respect to Medicare Part D, expenditures for a drug or biological product that are bundled or packaged into the payment for another service. Sec. 1191(c)(6) of the SSA.

drugs selected and published on the selected drug list.[872] These published drugs are "selected drugs" with respect to an IPAY and each subsequent year during the "price applicability period." The price applicability period is, with respect to a qualifying single source drug, the period beginning with the first IPAY with respect to which such drug is a selected drug and ending with the last year during which the drug is a selected drug.[873] Manufacturers of selected drugs are subject to the negotiation requirements of the program. The terms "qualifying single source drug," "negotiation-eligible drug," and "selected drug" are defined in more detail below.

"Qualifying single source drugs" are certain drugs or biological products[874] that are either covered part D drugs under Medicare Part D[875] or are drugs or biological products for which payment may be made under Medicare Part B.[876]

A drug is a qualifying single source drug if it is a drug approved under section 505(c) of the Federal Food, Drug, and Cosmetic Act[877] and is marketed pursuant to such approval, but only if, as of the relevant selected drug publication date, at least seven years have elapsed since the date of such approval.[878] However, a drug is not a qualifying single source drug if there is a generic drug approved by the U.S. Food and Drug Administration ("FDA"), and marketed pursuant to such approval, for which the selected drug is the listed drug.[879]

A biological product is a qualifying single source drug if it is a biological product that is licensed under section 351(a) of the Public Health Service Act[880] and is marketed under that section, but only if, as of the relevant selected drug publication date, at least 11 years have elapsed since the date of such licensure.[881] However, a biological product is not a qualifying single source drug if there is a biosimilar product licensed by the FDA, and marketed pursuant to such licensure, for which the selected drug is the reference drug.[882]

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[872] Sec. 1192(b) of the SSA.

[873] Sec. 1191(b)(2) of the SSA.

[874] In certain cases, the drug or biological product may be treated, along with a related authorized generic drug, as one qualifying single source drug. See sec. 1192(e)(2) of the SSA.

[875] As defined under Medicare Part D in sec. 1860D–2(e) of the SSA, 42 U.S.C. sec. 1395w–102(e).

[876] Sec. 1192(e)(1) of the SSA.

[877] 21 U.S.C. sec. 355(c).

[878] Sec. 1192(e)(1)(A)(i), (ii) of the SSA.

[879] Sec. 1192(e)(1)(A)(iii) of the SSA. Specifically, a drug is not a qualifying single source drug if the drug is the listed drug for another drug that is approved and marketed under section 505(j) of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. sec. 355(j).

[880] 42 U.S.C. sec. 262(a).

[881] Sec. 1192(e)(1)(B)(i), (ii) of the SSA.

[882] Sec. 1192(e)(1)(B)(iii) of the SSA. Specifically, a biological product is not a qualifying single source drug if the drug is the reference product for another biological product that is licensed and marketed under section 351(k) of the Public Health Service Act, 42 U.S.C. sec. 262(k).

Qualifying single source drugs do not include certain orphan drugs,[883] low-spend Medicare drugs with respect to the relevant IPAY,[884] or plasma derived products.[885]

A "negotiation-eligible drug" is a qualifying single source drug that is either among the 50 qualifying single source drugs with the highest total expenditures under Medicare Part D or among the highest total expenditures under Medicare Part B (the latter only for IPAYs 2028 and later).[886] The determination of total expenditures is made for the most recent 12-month period for which data is available prior to the selected drug publication date.[887] For IPAYs 2026 and 2027, negotiation eligible drugs consist only of the 50 qualifying single source drugs with the highest total expenditures under Medicare Part D (and not under Medicare Part B).[888]

Negotiation-eligible drugs do not include drugs that are already selected drugs (as defined below).[889] Thus, a drug may not be published on the selected drug list more than once. In addition, with respect to IPAYs 2026, 2027, and 2028, negotiation-eligible drugs do not include certain small biotech drugs.[890]

A "selected drug" is a negotiation-eligible drug that is included on the selected drug list with respect to an IPAY.[891] The number of drugs on the selected drug list is capped, limiting the number of selected drugs for an IPAY.[892] For IPAY 2026, HHS will select up to 10 negotiation-eligible Part D drugs to be included on the selected drug list.[893] HHS will select up to 15 Part D negotiation-eligible drugs for 2027, up to 15 Part B or D negotiation-eligible drugs for 2028, and up to 20 Part B or Part D negotiation-eligible drugs for 2029 and thereafter.[894]

The selection of drugs for the selected drug list is determined by reference to Medicare Part D and Medicare Part B expenditures, as applicable. HHS ranks negotiation-eligible drugs according to total expenditures under Medicare Part D and Medicare Part B, as applicable.[895] The determination of total expenditures is the same

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[883] Specifically, a drug is not a qualifying single source drug if it is designated as a drug for only one rare disease or condition under section 526 of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. sec. 360bb, and for which the only approved indication (or indications) is for such disease or condition. Sec. 1192(e)(3)(A) of the SSA.

Section 526 of the Federal Food, Drug, and Cosmetic Act is also relevant to section 45C of the Code, under which taxpayers may claim a tax credit with respect to the cost of qualified clinical testing expenses associated with developing orphan drugs, as defined under section 526 of the Federal Food, Drug, and Cosmetic Act.

[884] A drug or biological product is a "low spend Medicare drug" with respect to an IPAY if total expenditures under Medicare Part D and Medicare Part B with respect to the drug or biological product for a specified 12-month period are less than $200 million. Sec. 1192(e)(3)(B) of the SSA. For IPAYs after 2026, the threshold is indexed to inflation by reference to the consumer price index. *Ibid.*

[885] A "plasma derived product" is a biological product that is derived from human whole blood or plasma. Sec. 1192(e)(3)(C) of the SSA.

[886] Sec.1192(d)(1) of the SSA.

[887] *Ibid.* The period can end no later than the October 31 of the year prior to the year of such selected drug publication date. *Ibid.* For IPAY 2026, the determination of total expenditures is made for the period from June 1, 2022 through May 31, 2023. Sec. 1191(d)(3)(A) of the SSA.

[888] Sec. 1192(a)(1), (a)(2), and (d)(1) of the SSA.

[889] Sec. 1192(d)(3)(A) of the SSA.

[890] Sec. 1192(d)(2) and (3)(A)(ii) of the SSA.

[891] Sec. 1192(b), (c) of the SSA.

[892] Sec. 1192(a), (d)(1) of the SSA. If the number of negotiation-eligible drugs for the IPAY is less than the cap, all such negotiation-eligible drugs are included as selected drugs.

[893] Sec. 1192(a) of the SSA.

[894] *Ibid.*

[895] Sec. 1192(b)(1)(A) of the SSA. For IPAYs 2026 and 2027, only Medicare Part D expenditures are taken into account. Sec. 1192(b)(2) of the SSA.

as that used for the determination of negotiation-eligible drugs.[896] HHS then selects from the ranked drugs the negotiation-eligible drugs with the highest rankings. In certain cases, biological products are removed from the rankings before selection and publication if HHS determines that, within a certain time period, there is a high likelihood that a biosimilar biological product (for which the selected drug is the reference drug) will be licensed by the FDA and marketed pursuant to such licensure.[897]

A negotiation-eligible drug on the selected drug list is a selected drug for the IPAY and remains a selected drug for each subsequent year during a price applicability period.[898] However, the drug ceases to be a selected drug on the first year that begins at least nine months after HHS determines that a generic or biosimilar drug has been approved (or licensed, if applicable) by the FDA and marketed pursuant to such approval (or licensure, if applicable).[899]

Drug price negotiation program

The following describes the schedule for the drug price negotiation program. A different negotiation schedule applies to IPAY 2026 than for subsequent IPAYs.[900]

The selected drug publication date is February 1 of the year that is two years prior to the relevant IPAY (with the exception of IPAY 2026, for which the selected drug publication date is September 1, 2023).[901] Thus, for IPAY 2027, HHS will select and publish the selected drug list on February 1, 2025.[902]

By February 28 of the year in which the selected drug list is published, with respect to the relevant IPAY, (with the exception of IPAY 2023, for which this date is October 1, 2023) manufacturers[903] of the selected drug must enter into a manufacturer agreement with HHS to negotiate a maximum fair price ("MFP") for the drug during the negotiation period.[904] The negotiation period begins on the date in which the manufacturer agreement is entered into and ends by November 1 of the same year (with the exception of IPAY 2026, for which the negotiation period ends on August 1, 2024).[905] Upon the conclusion of the negotiation period, all negotia-

[896] Sec. 1192(b)(1)(A) of the SSA. The determination of total expenditures is made for the most recent 12-month period for which data is available prior to the selected drug publication date. *Ibid*. The period can end no later than the October 31 of the year prior to the year of such selected drug publication date. *Ibid*.

[897] Sec. 1192(b)(1)(C), (f)(2) of the SSA.

[898] Sec. 1192(c)(1) of the SSA. However, if HHS determines, before or during the negotiation period for the initial price applicability year, that at least one generic drug or biosimilar biological product is available, as described above, the selected drug is not subject to the negotiation process, although the drug remains a selected drug. Sec. 1192(c)(2).

[899] Sec. 1192(c)(1) of the SSA. Specifically, the nine months are triggered after HHS determines that at least one drug or biological product is approved or licensed, as applicable, under section 505(j) of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. sec. 355(j), or under section 351(k) of the Public Health Service Act, 42 U.S.C. sec. 262(k), using the selected drug as the reference product, and the drug or biological product is marketed pursuant to such approval or licensure. *Ibid*.

[900] Sec. 1191(d) of the SSA.

[901] Secs. 1191(a)(1), (b)(3), (d) and 1192 of the SSA.

[902] Sec. 1191(b)(3), (d) of the SSA.

[903] See secs. 1847A(c)(6)(A) and 1927(k)(5) of the SSA, 42 U.S.C. secs. 1395w–3a(c)(6)(A) and 1396r–8(k)(5), for the definition of "manufacturer."

[904] Sec. 1193(a)(1) of the SSA, 42 U.S.C. sec. 1320f–2(a)(1). See also sec. 1194 of the SSA, 42 U.S.C. sec. 1320f–3 (setting forth the negotiation process).

[905] Sec. 1191(b)(4), (d) of the SSA.

tions between the manufacturer and HHS must end with respect to the selected drug for the IPAY.[906]

For a Part D selected drug, the manufacturer must provide access to the MFP to "MFP-eligible individuals" (defined below) who are dispensed such drugs by a pharmacy, mail order service, or another dispenser (and to pharmacies, mail order services, and other dispensers, with respect to such MFP-eligible individuals who are dispensed such drugs), during the price applicability period. For a Part B selected drug, the manufacturer must provide access to the MFP to hospitals, physicians, and other providers of services and suppliers furnishing or administering the selected drug to MFP-eligible individuals during the price applicability period.[907] "MFP-eligible individuals" include individuals: (1) enrolled under Medicare Part D or a Medicare Advantage Prescription Drug Plan under Medicare Part C,[908] in the case the selected drug is dispensed to the individual at a pharmacy, by a mail order service, or by another dispenser; or (2) enrolled under Medicare Part B, including an individual who is enrolled in a Medicare Advantage Plan under Medicare Part C,[909] in the case the selected drug is furnished or administered to the individual by a hospital, physician, or other provider of services or supplier, if payment may be made under Medicare Part B for such selected drug.[910] The provision provides procedures for negotiating the MFP for the IPAY,[911] which is capped by a ceiling amount determined under the program.[912]

By November 30 of the year in which the selected drug list is published (with the exception of IPAY 2026, for which this date is September 1, 2024), HHS publishes the MFP of each selected drug for the applicable IPAY.[913] The manufacturer is required to provide access to a price no higher than the MFP for each selected drug for MFP-eligible individuals during the price applicability period, the period beginning with the IPAY and ending with the last year during which the drug is a selected drug.[914] For years after the IPAY, the MFP is indexed to inflation by reference to the consumer price index.[915]

The program establishes rules for the renegotiation of MFPs under a manufacturer agreement, under which a new MFP is determined with respect to a price applicability period.[916] The program also establishes rules for information sharing between manufacturers and HHS under a manufacturer agreement.[917]

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[906] Sec. 1194(b)(2)(E) of the SSA.
[907] *Ibid.*
[908] Part C of title XVIII of the SSA.
[909] Part C of title XVIII of the SSA.
[910] Sec. 1191(c)(2) of the SSA.
[911] Sec. 1194 of the SSA.
[912] Sec. 1194(c) of the SSA.
[913] Sec. 1195(a)(1) of the SSA, 42 U.S.C. sec. 1320f–4(a)(1).
[914] Sec. 1191(b)(2), 1193(a) of the SSA.
[915] Sec. 1195(b)(1) of the SSA.
[916] Sec. 1194(f) of the SSA.
[917] Sec. 1194(b)(2)(A), (e) of the SSA.

Designated drug excise tax

Imposition of tax and noncompliance periods

The provision creates a new excise tax.[918] The tax is imposed on sales by a manufacturer, producer, or importer of a "designated drug" on a day during a noncompliance period.[919]

A designated drug is a negotiation-eligible drug[920] included on the selected drug list which is manufactured or produced in the United States[921] or entered into the United States for consumption, use, or warehousing.[922]

For IPAY 2027 and later years, a day is during a noncompliance period if it occurs:[923]

1. During the period beginning on the March 1 immediately following the date on which the designated drug is included on the selected drug list and ending on the first date on which the manufacturer of the designated drug has entered into a manufacturer agreement[924] with HHS;[925]
2. During the period beginning on the November 2 immediately following the March 1 date described above and ending on the first date on which the manufacturer and HHS have agreed to an MFP under the manufacturer agreement;[926]
3. In the case of a designated drug which is a selected drug[927] that HHS has selected for renegotiation,[928] the period beginning on the November 2 that begins two years prior to the first IPAY of the price applicability period for which the MFP established pursuant to such renegotiation applies and ending on the first date on which the manufacturer has agreed to a renegotiated MFP under the manufacturer agreement;[929]
4. With respect to information that is required to be submitted to the HHS under a manufacturer agreement,[930] the period beginning on the date on which such information is overdue and ending on the date that such information is submitted.[931]

Notwithstanding the preceding, the first three noncompliance periods (but not the fourth) end on the date HHS determines that a generic or biosimilar has been approved (or licensed, if applicable) by the FDA and marketed pursuant to such approval (or licensure, if applicable).[932]

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[918] Sec. 5000D in Chapter 50A of the Code, enacted by the Act.
[919] Sec. 5000D(a), (b).
[920] As defined under the drug price negotiation program.
[921] "United States" is as defined in section 4612(a)(4). Sec. 5000D(e)(2).
Rules similar to section 4132(c)(2) apply for purpose of the excise tax. Sec. 5000D(f)(1).
Excise tax paid on designated drugs produced in Puerto Rico or the U.S. Virgin Islands and shipped to the mainland United States is not subject to cover over under section 7652. Sec. 5000D(f)(1); see also sec. 4132(c)(4).
[922] Sec. 5000D(e)(1).
[923] Sec. 5000D(b).
[924] As defined under the program.
[925] Sec. 5000D(b)(1).
[926] Sec. 5000D(b)(2). MFP has the same meaning as under the program. Sec. 5000D(e)(3).
[927] As defined under the program.
[928] Under section 1194(f) of the SSA.
[929] Sec. 5000D(b)(3). IPAY and price applicability period have the same meanings as under the program. Sec. 5000D(e)(3).
[930] As defined under the program.
[931] Sec. 5000D(b)(4).
[932] As provided in Section 1192(c) of the SSA. Sec. 5000D(b)(1)(B), (2)(B), (3)(B). The first year that begins at least nine months after this date is the year in which the drug ceases to be a selected drug. Sec. 1192(c) of the SSA.

A different schedule applies in the case of IPAY 2026.[933] For this year, the March 1 date is changed to October 2, 2023, and the November 2 date is changed to August 2, 2024.

If the manufacturer of the designated drug takes certain actions, the excise tax is suspended and days are excluded from the noncompliance period.[934] This suspension begins (1) when HHS receives notification that the manufacturer has terminated all agreements under the Medicare coverage gap program under Medicare Part D,[935] the manufacturer discount program under Medicare Part D,[936] and the Medicaid rebate agreement program[937] (collectively, "applicable agreements") and (2) no drugs of the manufacturer are covered by the Medicare coverage gap program or the manufacturer discount program.[938] The suspension ends on the earlier of (1) the first day on which the manufacturer enters into any subsequent applicable agreement, or (2) the first day any drug of the manufacturer is covered by the Medicare coverage gap program or the manufacturer discount program.[939] Thus, the actions required by the manufacturer are not limited to the designated drug.

Amount of the tax and example

The amount of the tax is such that the applicable percentage is equal to the ratio of such tax divided by the sum of such tax and the price for which the selected drug is sold.[940] Or, in other words:

applicable percentage = tax (tax + price)

The applicable percentage is initially 65 percent.[941] It is increased by 10 percentage points each time the taxpayer aggregates 90 days of noncompliance.[942] The applicable percentage is capped at 95 percent.[943] Thus the tax rate equals:[944]

Applicable percentage	Tax exclusive tax rate (rounded to nea est whole number)
65 percent	186 percent
75 percent	300 percent
85 percent	567 percent
95 percent	1900 percent

For purposes of determining the increase in the applicable percentage, days from separate noncompliance periods are aggregated for the same drug, regardless of whether the days are consecutive.

The Secretary has authority under an anti-abuse rule to treat sales as occurring during a day in a noncompliance period if the

[933] Sec. 5000D(b).
[934] Sec. 5000D(c).
[935] Sec. 1860D–14A of the SSA, 42 U.S.C. sec. 1395w–114a.
[936] Sec. 1860D–14C of the SSA, 42 U.S.C. sec. 1395w–114c, enacted by the Act.
[937] Sec. 1927(b) of the SSA, 42 U.S.C. 1396r–8.
[938] Sec. 5000D(c)(1)(A), (c)(2).
[939] Sec. 5000D(c)(1)(B), (c)(2).
[940] Sec. 5000D(a).
[941] Sec. 5000D(d)(1).
[942] Sec. 5000D(d)(2)–(4).
[943] Sec. 5000D(d)(4).
[944] The tax rate equals applicable percentage/(1 applicable percentage).

manufacturer times such sales specifically for purposes of avoiding the excise tax.[945]

The following example illustrates the application of the excise tax: Manufacturer A produces Drug A, which HHS publishes on the selected drug list on February 1, 2025 with respect to IPAY 2027. Drug A is a designated drug. Manufacturer A fails to enter into a manufacturer agreement by February 28, 2025. Its sales of the drug on March 1 are sales made during a noncompliance period and are subject to the excise tax.

Assume that, prior to the imposition of the excise tax, Manufacturer A charged $100 for Drug A. If, after imposition of the excise tax, Manufacturer A reduces the price of Drug A to $35, Manufacturer A would owe excise tax of $65 for the first 90 days of noncompliance.[946] Alternatively, Manufacturer A could continue to sell Drug A for $100, in which case it would owe $186 in tax.[947]

Assume Manufacturer A enters into negotiations with HHS on March 6. For purposes of determining the applicable percentage, Manufacturer A has had five days of noncompliance. If, on the following November 1, Manufacturer A has not agreed to an MFP for Drug A, for purposes of determining the applicable percentage, November 2 would be the sixth day of noncompliance for Drug A, aggregating across the two noncompliance periods.

Other rules

Generally, designated drugs sold for export are not subject to the excise tax.[948]

The Secretary is directed to prescribe regulations and other guidance as may be necessary to carry out the excise tax.[949]

Finally, manufacturers are prohibited from deducting the excise tax payments against their income taxes.[950]

Non-tax provisions related to the excise tax

HHS is directed to share information with the Secretary as is required to determine the excise tax, including the suspension of the tax.[951] This information specifically includes the date on which HHS receives notification of the termination of any agreement under the Medicare coverage gap program, the manufacturer discount program, or the Medicaid rebate agreement program.[952]

Certain rules under Medicare Part D[953] and Medicaid[954] do not apply when the excise tax is suspended.

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[945] Sec. 5000D(f)(2).

[946] In other words, $65/($65 + $35) equals 65 percent. The tax-exclusive rate is $65/$35 or 186 percent.

[947] In other words, $186/($186 + $100) equals 65 percent. The tax-exclusive rate is $186/$100 or 186 percent.

[948] For purposes of this provision, rules similar to the rules of section 4662(e), with the exception of section 4662(e)(2)(A)(ii)(II), apply. Sec. 5000D(g).

[949] Sec. 5000D(h).

[950] Sec. 275(a)(6), as amended by the Act.

[951] Sec. 1196(a)(6) of the SSA, 42. U.S.C. sec. 1320f–5(a)(6).

[952] *Ibid.*

[953] See sec. 1860D–43(c)(2) of the SSA, 42 U.S.C. sec. 1395w–153(c)(2), added by the Act.

[954] See sec. 1927(a)(3) of the SSA, 42 U.S.C. sec. 1396r–8(a)(3), amended by the Act.

Timelines

General timeline

The following is a timeline for IPAY 2027 and later years of the excise tax[955] and related provisions of the program:

By February 1 of year: HHS selects and publishes the selected drug list with respect to an IPAY two years later.

By February 28 of year: The manufacturer of a designated drug on the selected drug list must enter into a manufacturer agreement with HHS.

Starting March 1 of year: If the manufacturer fails to enter into a manufacturer agreement with HHS, the excise tax applies until the manufacturer enters into an agreement, a generic or biosimilar or interchangeable drug has entered the market, or the tax is suspended.

By March 1 of the year: The manufacturers must submit certain information to HHS.

By November 1 of year: The manufacturer and HHS must agree to an MFP under the manufacturer agreement.

Starting November 2 of year: If the manufacturer fails to agree with HHS with respect to an MFP under the manufacturer agreement, the excise tax applies until the manufacturer agrees to an MFP, a generic or biosimilar has been approved (or licensed, if applicable) by the FDA and marketed pursuant to such approval (or licensure, if applicable), or the tax is suspended.

By November 30 of year: HHS publishes the MFPs of selected drugs.

January 1 of year two years after: The IPAY begins, and the MFPs are effective for the selected drugs. In the case of Part D selected drugs, manufacturers of the selected drugs must provide access to the MFPs to MFP-eligible individuals in the case such drugs are dispensed to them by a pharmacy, mail order service, or another dispenser and to pharmacies, mail order services, and other dispensers, with respect to such MFP-eligible individuals who are dispensed such drugs. In the case of Part B selected drugs, manufacturers of the selected drugs must provide access to the MFPs to hospitals, physicians, and other providers of services and suppliers furnishing or administering the selected drugs to MFP-eligible individuals. (Note that the earliest that manufacturers must provide access to MFPs for Part B selected drugs is IPAY 2028 because that is the earliest IPAY for which Part B drugs may be selected for negotiation.)

If HHS has selected the drug for renegotiation, starting November 2 of the year that begins two years prior to the IPAY for a renegotiated MFP: If the manufacturer fails to agree with HHS with respect to a renegotiated MFP, the excise tax applies until the manufacturer and HHS agree to the renegotiated MFP, a generic or biosimilar has been approved (or licensed, if applicable) by the FDA and marketed pursuant to such approval (or licensure, if applicable), or the tax is suspended.

If the manufacturer is required to submit information to HHS under a manufacturer agreement: If the information is

[955] The dates that start a noncompliance period are underlined.

overdue, the excise tax applies until the information is submitted or the tax is suspended.

Timeline for IPAY 2026

The following is the timeline of the excise tax and related provisions of the program for IPAY 2026:

By September 1, 2023: HHS selects and publishes the selected drug list with respect to IPAY 2026.

By October 1, 2023: The manufacturer of a designated drug on the selected drug list must enter into a manufacturer agreement with HHS.

Starting October 2, 2023: If the manufacturer fails to enter into a manufacturer agreement with HHS, the excise tax applies until the manufacturer enters into such an agreement, a generic or has been approved (or licensed, if applicable) by the FDA and marketed pursuant to such approval (or licensure, if applicable), or the tax is suspended.

By August 1, 2024: The manufacturer and HHS must agree to an MFP under the manufacturer agreement.

Starting August 2, 2024: If the manufacturer fails to agree with HHS with respect to an MFP under the manufacturer agreement, the excise tax applies until the manufacturer agrees to an MFP, a generic or biosimilar has been approved (or licensed, if applicable) by the FDA and marketed pursuant to such approval (or licensure, if applicable), the tax is suspended.

By September 1, 2024: HHS publishes the MFPs of selected drugs.

January 1, 2026: IPAY 2026 begins, and the MFPs are effective for selected drugs. The manufacturers of the selected drugs must provide access to the MFPs to MFP-eligible individuals in the case such drugs are dispensed to them by a pharmacy, mail order service, or another dispenser and to pharmacies, mail order services, and other dispensers, with respect to such MFP-eligible individuals who are dispensed such drugs.

The drug renegotiation and information sharing rules apply as described in the preceding section.

Effective Date

The provision applies to sales made after the date of enactment of the Act.

2. Safe harbor for absence of deductible for insulin (sec. 11408 of the Act and sec. 223 of the Code)

Present Law

Health savings accounts

An individual may establish and contribute to a health savings account (an "HSA") only if the individual is covered under a plan that meets the requirements for a high deductible health plan, as described below. In general, HSAs provide tax-favored treatment for current medical expenses, as well as the ability to save on a tax-favored basis for future medical expenses. Generally, an HSA is a tax-exempt trust or custodial account created exclusively to pay for the qualified medical expenses of the account holder and his or her spouse and dependents.[956]

Within limits,[957] contributions to an HSA made by or on behalf of an eligible individual are deductible by the individual.[958] Contributions to an HSA are excludible from income and employment taxes of the eligible individual if they are made by the employer.[959] Excess contributions to an HSA generally are subject to a 6 percent excise tax.[960] Earnings in HSAs are not taxable.[961] Distributions from an HSA used exclusively for qualified medical expenses are not includible in gross income.[962] Distributions from an HSA that are not used for qualified medical expenses are includible in gross income and are subject to an additional tax of 20 percent.[963] The 20-percent additional tax does not apply if the distribution is made after death, disability, or the individual attains the age of Medicare eligibility (age 65).[964]

High deductible health plans

A high deductible health plan is a health plan that has an annual deductible which is not less than $1,400 for 2022 for self-only coverage (twice this amount for family coverage), and for which the sum of the annual deductible and other annual out-of-pocket expenses (other than premiums) for covered benefits does not exceed $7,050 for 2022 for self-only coverage (twice this amount for family coverage).[965] These dollar thresholds are subject to inflation adjustment.[966]

An individual who is covered under a high deductible health plan is eligible to establish and contribute to an HSA, provided that while such individual is covered under the high deductible health plan, the individual is not covered under any health plan that (1) is not a high deductible health plan and (2) provides coverage for any benefit (subject to certain exceptions) covered under the high deductible health plan.[967]

Various types of coverage are disregarded for this purpose, including coverage of any benefit provided by permitted insurance, coverage (whether through insurance or otherwise) for accidents, disability, dental care, vision care, or long-term care, as well as certain limited coverage through health flexible savings arrangements.[968] Permitted insurance means insurance under which substantially all of the coverage provided relates to liabilities incurred under workers' compensation laws, tort liabilities, liabilities relating to ownership or use of property, or such other similar liabilities

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[956] Sec. 223(d).
[957] Rev. Proc. 2021–25, 2021–21 I.R.B. 1161. For 2022, the basic limit on annual contributions that can be made to an HSA is $3,650 in the case of self-only coverage and $7,300 in the case of family coverage. The basic annual contributions limits are increased by $1,000 for individuals who have attained age 55 by the end of the taxable year (referred to as "catch-up" contributions).
[958] Sec. 223(a).
[959] Sec. 106(d).
[960] Sec. 4973(g).
[961] Sec. 223(e)(1).
[962] Sec. 223(f)(1).
[963] Sec. 223(f)(2) and (4).
[964] Sec. 223(f)(4).
[965] Sec. 223(c)(2); Rev. Proc. 2021–25, 2021–21 I.R.B. 1161.
[966] Sec. 223(g).
[967] Sec. 223(c)(1).
[968] Sec. 223(c)(1)(B).

as specified by the Secretary under regulations. Permitted insurance also means insurance for a specified disease or illness and insurance paying a fixed amount per day (or other period) of hospitalization.[969]

Under a safe harbor, a high deductible health plan is permitted to provide coverage for preventive care (within the meaning of section 1861 of the Social Security Act, except as otherwise provided by the Secretary) before satisfaction of the minimum deductible.[970] IRS guidance provides safe harbors for the types of coverage that constitute preventive care for this purpose.[971] For individuals who have been diagnosed with diabetes, insulin and other glucose-lowering agents are treated as preventive care.[972]

Explanation of Provision

The provision provides that a high deductible health plan is permitted to cover selected insulin products without satisfaction of the plan's minimum deductible. Selected insulin products are any dosage form (such as vial, pump, or inhaler dosage forms) of any different type of insulin (such as rapid-acting, short-acting, intermediate-acting, long-acting, ultra long-acting, and premixed insulin). Thus, under the provision, a health plan will not fail to be treated as a high deductible health plan merely by reason of failing to require a deductible for selected insulin products for plan years beginning after December 31, 2022, and an individual who is covered under such a plan may contribute to an HSA.

Effective Date

The provision is effective for plan years beginning after December 31, 2022.

Subtitle C—Affordable Care Act Subsidies

1. Improve affordability and reduce premium costs of health insurance for consumers (sec. 12001 of the Act and sec. 36B of the Code)

Present Law

In general

A refundable tax credit (the "premium assistance credit") is provided for eligible individuals and families to subsidize the purchase of "qualified health plans,"[973] health insurance plans offered through an American Health Benefit Exchange ("Exchange") created by the Patient Protection and Affordable Care Act

[969] Sec. 223(c)(3).
[970] Sec. 223(c)(2)(C).
[971] Notice 2004–23, 2004–15 I.R.B. 725, April 12, 2004. See also Notice 2004–50, 2004–33 I.R.B. 1, August 9, 2004; Notice 2008–59, 2008–29 I.R.B. 123, July 21, 2008; Notice 2013–37, 2013–40 I.R.B. 293, September 30, 2013; and Notice 2019–45, 2019–32 I.R.B. 593, August 5, 2019.
[972] Notice 2019–45, 2019–32 I.R.B. 593, Appendix, August 5, 2019.
[973] Sec. 36B. Qualified health plans generally must meet certain requirements. Secs. 1301 and 1302 of the PPACA, 42 U.S.C. secs. 18021 and 18022.

("PPACA").[974] In general, the Secretary makes advance payments with respect to the premium assistance credit during the year directly to the insurer, as discussed below.[975] However, eligible individuals may choose to pay their total health insurance premiums without advance payments and to claim the credit for the taxable year on a Federal income tax return.

The premium assistance credit is generally available for individuals (single or joint filers) with household incomes between 100 percent and 400 percent of the Federal poverty level ("FPL") for the applicable family size.[976] Household income is defined as the sum of (1) the individual's modified AGI, plus (2) the aggregate modified AGI of all other individuals taken into account in determining the individual's family size (but only if the other individuals are required to file tax returns for the taxable year).[977] Modified AGI is defined as AGI increased by (1) any amount excluded from gross income for citizens or residents living abroad,[978] (2) any tax-exempt interest received or accrued during the tax year, and (3) any portion of the individual's Social Security benefits not included in gross income.[979] To be eligible for the premium assistance credit, individuals who are married must file a joint return.[980] Individuals who are listed as dependents on a return are not eligible for the premium assistance credit.

An individual who is eligible for minimum essential coverage from a source other than the individual insurance market generally is not eligible for the premium assistance credit.[981] However, an individual who is offered minimum essential coverage under an employer sponsored health plan may be eligible for the premium assistance credit if (1) the coverage is either unaffordable or does not provide minimum value, and (2) the individual declines the employer-offered coverage.[982] Thus, an individual who enrolls in an employer sponsored health plan generally is ineligible for the premium assistance credit even if the coverage is considered unaffordable or does not provide minimum value. Coverage is considered unaffordable if an employee's share of the premium for self-only coverage under the plan exceeds 9.61 percent (for 2022)[983] of the employee's household income.[984] Coverage is considered not to

[974] Pub. L. No. 111–148, March 23, 2010. The PPACA was modified by the Health Care and Education Reconciliation Act of 2010 ("HCERA"), Pub. L. No. 111–152, Title I, sec. 1001, March 30, 2010. PPACA and HCERA are referred to collectively as the Affordable Care Act ("ACA").

[975] Sec. 1412 of the PPACA, 42 U.S.C sec. 18082.

[976] Sec. 36B(c)(1). Federal poverty level refers to the most recently published poverty guidelines determined by the Secretary of Health and Human Services ("HHS"). Levels for 2022 and previous years are available at https://aspe.hhs.gov/prior-hhs-poverty-guidelines-and-federal-register-references. Under sec. 36B(c)(1)(B), a taxpayer with household income less than 100 percent of FPL who is an alien lawfully present but is ineligible for Medicaid under title XIX of the Social Security Act by reason of such alien status may be treated as an applicable taxpayer with a household income equal to 100 percent of FPL.

[977] Sec. 36B(d)(2).

[978] Sec. 911.

[979] Under section 86, only a portion of an individual's Social Security benefits is included in gross income.

[980] Sec. 36B(c)(1)(C).

[981] Sec. 36B(c)(2). Minimum essential coverage is defined in section 5000A(f).

[982] Sec. 36B(c)(2)(C).

[983] Rev. Proc. 2021–36, 2021–35 I.R.B. 357.

[984] Employees and their family members who are provided a qualified small employer health reimbursement arrangement ("QSEHRA") that constitutes affordable coverage are not eligible for the premium assistance credit. Sec. 36B(c)(4)(C). The affordability determination for QSEHRAs is similar to the affordability determination for an employer-sponsored health plan.

Continued

provide minimum value if the plan's share of total allowed costs of plan benefits is less than 60 percent of such costs.

Beginning in 2023, Treasury regulations provide that coverage affordability is determined separately for employees and family members of employees. Affordability is determined (1) for the employee, based on the employee's share of the premium for self-only coverage, and (2) for the family members of the employee, based on the employee's share of the premium for covering the employee and those family members (*i.e.*, family coverage).[985]

Amount of credit

The premium assistance credit amount is generally the lower of (1) the premium for the qualified health plan in which the individual or family enrolls, and (2) the premium for the second lowest cost silver plan in the rating area where the individual resides,[986] reduced by the individual's or family's share of premiums.[987]

Section 9661 of the American Rescue Plan Act of 2021 (Pub. L. No. 117–2), described in Part One of this document, reduces or eliminates for 2021 and 2022 an individual's or family's share of premiums used in determining the amount of the premium assistance credit. The premium assistance credit is also made available to taxpayers with incomes above the limitation of 400 percent of FPL for the applicable family size.

Table 1 below shows an individual's or family's share of premiums applicable for 2021 and 2022. The share of premiums is a certain percentage of household income, ranging from 0.0 percent of household income (up to 150 percent of FPL) up to 8.5 percent of household income, determined on a sliding scale in a linear manner.

TABLE 1.—HOUSEHOLD'S SHARE OF PREMIUMS[988]

(FOR 2021 AND 2022)

Household income (expressed as a pe cent of FPL)	Initial percentage of household income *	Final percentage of household income
Less than 150%	0.0	0.0
150% up to 200%	0.0	2.0
200% up to 250%	2.0	4.0
250% up to 300%	4.0	6.0
300% up to 400%	6.0	8.5

Specifically, a QSEHRA is treated as constituting affordable coverage for a month if an employee's share of the premium for self-only coverage under the second lowest cost silver plan offered in the relevant individual health insurance market does not exceed 9.61 percent (for 2022) of the employee's household income. A QSEHRA is defined in section 9831(d)(2).

[985] T.D. 9968, 87 Fed. Reg. 61979, October 13, 2022.

[986] A "silver plan" refers to the level of coverage provided by the health plan. PPACA sec. 1302(d), 42 U.S.C. sec. 18022. Most health plans sold through an Exchange are required to meet actuarial value ("AV") standards, among other requirements. AV is a summary measure of a plan's generosity, expressed as a percentage of medical expenses estimated to be paid by the insurer for a standard population and set of allowed charges. Silver-level plans are designed to provide benefits that are actuarially equivalent to 70 percent of the full AV of the benefits provided under the plan. The premium assistance credit looks to the second lowest cost plan of all the silver plans available in the relevant rating area.

An individual's "rating area" refers to the geographical unit within the State where the individual resides. Insurers may vary individual market premiums based on rating areas, among other factors. See PPACA sec. 1201, 42 U.S.C. 300gg.

[987] Sec. 36B(b). The amount of the premium assistance credit is determined on a monthly basis, and the amount of the credit for a year is the sum of the monthly amounts.

TABLE 1.—HOUSEHOLD'S SHARE OF PREMIUMS [988]—Continued

(FOR 2021 AND 2022)

Household income (expressed as a pe cent of FPL)	Initial percentage of household income *	Final percentage of household income
400% and higher	8.5	8.5

* The initial percentage of household income corresponds to the bottom of the corresponding PL range, and the final pe centage of household income corresponds to the top of the cor esponding FPL range.

Explanation of Provision

For taxable years beginning after 2022, the provision extends through 2025 the reduction or elimination of an individual's or family's share of premiums used in determining the amount of the premium assistance credit. The provision also extends through 2025 the rule to make the premium assistance credit available to taxpayers with incomes above the limitation of 400 percent of FPL for the applicable family size.

Effective Date

The provision applies to taxable years beginning after December 31, 2022.

Subtitle D—Energy Security

1. Extension and modification of credit for electricity produced from certain renewable resources (sec. 13101 of the Act and secs. 45 and 48 of the Code)

Present Law

Renewable electricity production credit

A 1.5 cent/kilowatt-hour income tax credit is allowed for electricity produced from qualified energy resources at qualified facilities (the "renewable electricity production credit") and sold to an unrelated person.[989] 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. The credit rate is adjusted annually for inflation and rounded to the nearest one-tenth of a cent.

Facilities that rely on certain renewable resources have their credit rate reduced by 50 percent; these facilities are those that rely on open-loop biomass, municipal solid waste, qualified hydropower, and marine and hydrokinetic resources. The amount of the credit is also phased out as the market price of electricity exceeds certain threshold levels. The renewable electricity production credit is reduced over a three-cent phaseout range to the extent the annual average contract price per kilowatt-hour of electricity sold in the prior year from the same qualified energy resource exceeds

[988] Sec. 36B(b)(3)(A)(iii).

[989] Sec. 45. In addition to the renewable electricity production credit, section 45 also provides income tax credits for the production of Indian coal at qualified facilities through December 31, 2021.

eight cents (adjusted for inflation; 14.4 cents for 2022). The credit is also reduced by reason of grants, tax-exempt bonds, subsidized energy financing, and other credits, but the reduction cannot exceed 50 percent of the otherwise allowable credit.

SUMMARY OF CREDIT FOR ELECTRICITY PRODUCED FROM CERTAIN RENEWABLE RESOURCES

Eligible electr city production activity (sec. 45)	C edit amount for 2022 [1] (cents per kilowatt-hour)	Expiration [2]
Wind	2.7	December 31, 2021
Closed-loop biomass	2.7	December 31, 2021
Open-loop biomass (including agricultural livestock waste nutrient facilities).	1.4	December 31, 2021
Geothermal	2.7	December 31, 2021
Municipal solid waste (including landfill gas facilities and trash combustion facilities).	1.4	December 31, 2021
Qualified hydropower	1.4	December 31, 2021
Marine and hydrokinetic	1.4	December 31, 2021

[1] Credit rates a e adjusted annually for inflat on. See 87 Fed. Reg. 22286, April 14, 2022. In general, the c edit is available for electr city produced during the first 10 years after a facility has been placed in se v ce. The credit for wind power is subject to certain phase-out rules.
[2] Expires for property the construct on of wh ch 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 which is part of a qualified renewable electricity production facility 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 began in calendar year 2017, by 40 percent for facilities the construction of which begins in calendar years 2018, 2020, and 2021, 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.

Extended sunset date for offshore wind facilities

An extended sunset date applies for property used in qualified offshore wind facilities. Such property the construction of which begins before January 1, 2026, is eligible for a 30-percent investment credit and is not subject to the phasedown applicable to other wind facilities. Qualified offshore wind facilities are wind facilities that are located in the inland navigable waters of the United States or in the coastal waters of the United States. Offshore wind facilities include property owned by the taxpayer necessary to condition electricity for use on the grid such as subsea cables and voltage transformers. For this purpose, coastal waters include the waters of the Great Lakes, the territorial seas, the exclusive economic zone, and the outer continental shelf, but only if such waters are treated as within the United States or a possession of the United States for purposes of section 45(e)(1). The extended sunset date and phasedown exemption do not apply to the offshore wind facilities that claim the renewable electricity production credit.

Explanation of Provision

In general

The provision extends the renewable electricity production credit for three years, allowing a credit for electricity produced at qualified facilities the construction of which begins before December 31, 2024. The provision applies this extension to electricity produced from solar energy, which had expired at the end of 2005. The provision also extends through December 31, 2024, the election to claim a credit in lieu of the production tax credit for these facilities; in the case of offshore wind facilities, the extended period for making such an election is changed such that offshore wind elections must also elect by December 31, 2024. For facilities placed in service after December 31, 2021, the provision eliminates the phasedown rules for both the production credit and the investment credit election in lieu of the production credit.[990] The provision also eliminates the fifty-percent credit rate reduction for qualified hydroelectric production and marine and hydrokinetic renewable energy.

Modifications to credit rates

The provision modifies the credit rate structure, creating a base credit rate and an increased credit rate. The base credit rate is 0.3 cents per kilowatt hour (prior to any inflation adjustments). The increased credit rate is 1.5 cents per kilowatt hour (prior to any inflation adjustments). The increased credit rate is available with respect to facilities that have a maximum output of less than one megawatt of electricity (as measured in alternating current) or that satisfy certain prevailing wage and apprenticeship requirements described below (or for which the construction begins prior to the date that is 60 days after the Secretary publishes guidance relating to such wage and apprenticeship requirements). In applying the inflation adjustment to the base credit rate, the inflation-adjusted rate is rounded to the nearest one-twentieth of a cent.

Prevailing wages

A taxpayer can meet the prevailing wage requirements if it ensures that prevailing wages are paid to any laborers and mechanics employed by the taxpayer or any contractor or subcontractor in the construction of a qualified facility, and for the repair of such facility during the 10-year credit-eligible production period. Prevailing wages are wages paid at rates not less than the prevailing wage rates for construction, alteration, or repair of a similar character in the locality as determined by the Secretary of Labor, in accordance with subchapter IV of chapter 31, of title 40, United States Code.

A taxpayer that fails to pay prevailing wages may bring a facility into compliance with respect to the prevailing wage requirement,

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[990] For facilities placed in service before this date, the present law phase-down rules remain (as well as the exemption from the phase-down rules for offshore wind facilities for which an election has been made to claim the energy credit in lieu of the renewable electricity production credit).

and thus remain eligible for the increased credit rate, by paying any affected workers the difference between the actual compensation paid to such workers and the wages required to be paid to those workers to meet prevailing wage requirements, plus any applicable interest. This amount is multiplied by three in the case of intentional disregard of the requirements. In addition, such taxpayer must pay a penalty to the IRS equal to $5,000 per affected worker. The penalty is increased to $10,000 per affected worker in the case of intentional disregard of the requirements. The deficiency procedures do not apply with respect to the assessment or collection of these penalties, and payment must be made with 180 days of the penalty's determination.

Apprenticeship requirements

To be eligible for the enhanced credit, a taxpayer must also ensure that certain qualified apprenticeship requirements are satisfied during the construction of a qualified facility by ensuring that not less than 15 percent (10 percent for projects the construction of which begins before calendar year 2023 and 12.5 percent for projects beginning in calendar year 2023) of the total labor hours of construction, alteration, or repair work on any applicable project are performed by qualified apprentices (including such work performed by any contractor or subcontractor). Labor hours are the total number of hours devoted to construction, alteration, or repair work by employees of the contractor or subcontractor and excludes certain hours worked by managers, owners, or certain other bona fide executives, administrators, or professionals. A qualified apprentice is an employee of the contractor or subcontractor who is participating in a registered apprenticeship program. In addition, the ratio of apprentice-to-journeyworker must meet the standard set by the Department of Labor or applicable State apprenticeship agency.

Each taxpayer, contractor, or subcontractor who employs four or more individuals to perform construction, alteration, or repair work with respect to the construction of a qualified facility must employ one or more qualified apprentices to perform such work. Exceptions from these requirements are provided for taxpayers that make a good faith effort to comply with the requirements of the provision by requesting qualified apprentices from a registered apprenticeship program but where such request is denied or where the registered apprenticeship program fails to respond to a request within five business days.

A taxpayer that fails to satisfy the apprenticeship requirements can come into compliance and thus remain eligible for the increased rate by paying a penalty in the amount of $50 per missing apprenticeship labor hour. In the case of intentional disregard of the apprenticeship rules, this amount is increased to $500 per labor hour.

Domestic content bonus

The provision increases the section 45 credit by 10 percent (calculated without regard to the application of the energy communities bonus described below) with respect to facilities that meet certain domestic content requirements. To meet these requirements, a taxpayer must certify to the Secretary that any steel, iron, or manufactured product which is a component of a qualified facility (upon completion of construction) was produced in the United States. For purposes of steel and iron, this requirement shall be applied consistent with section 661.5 of title 49, Code of Federal Regulations. Manufactured products which are components of a qualified facilities are deemed to have been produced in the United States if not less than 40 percent (20 percent in the case of offshore wind facilities) of the total costs of all manufactured products of such facility are attributable to manufactured products (including components) which are mined, produced, or manufactured in the United States.

Reduction of elective payment if domestic content rules are not satisfied

As provided for in section 6417, which is created by section 13801 of the Act (described below), certain taxpayers may elect to have the credit paid directly to the extent there is insufficient income tax liability to absorb the credit. The current provision contains a rule reducing the amount of this direct payment by 10 percent if the domestic content requirements described above for the domestic content bonus are not satisfied. This rule applies only to facilities having a maximum net output of at least one megawatt (as measured in alternating current) whose construction begins after December 31, 2023. An exception to the rule applies if the Secretary determines that the inclusion of steel, iron, or manufactured products which are produced in the United States increases the overall costs of construction of qualified facilities by more than 25 percent, or if the relevant steel, iron, or manufactured products are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality. This waiver does not apply for purposes of determining the availability of the domestic content bonus described above.

Energy communities bonus

The provision increases the renewable electricity production tax credit rate by 10 percent (calculated without regard to the domestic content bonus described above) with respect to facilities located in an "energy community." An energy community is defined as: (1) a brownfield site; (2) a metropolitan statistical area or non-metropolitan area with an unemployment rate at or above the national average for the previous year which has (or had after 2009) 0.17 percent or greater direct employment or 25 percent or greater local tax revenues related to the extraction, processing, transport, or storage of coal, oil, or natural gas; or (3) a census tract (or directly adjoining tract) in which, in the period since 1999, a coal mine has closed, or, in the period since 2009, a coal-fueled power plant has been retired.

Credit reduced for tax-exempt bonds

The provision modifies the credit reduction for grants, tax-exempt bonds, subsidized energy financing, and other credits. As modified, the credit is only reduced for facilities financed with tax-exempt bonds. With respect to such bond-financed facilities, the credit is reduced by the lesser of 15 percent or a percentage calculated using as the numerator the amount of tax-exempt financing with respect to a facility (for the taxable year and all prior years) and as the denominator the aggregate amount of additions to the capital account for such facility (for the taxable year and all prior years). For purposes of this calculation, the numerator includes bond proceeds that are used for capital expenditures of qualified facilities but does not include proceeds that are used for other purposes, such as reserve funds.

Effective Date

The provision is generally effective for facilities placed in service after December 31, 2021. The portion of the provision relating to tax-exempt bond financing applies to facilities the construction of which begins after the date of enactment of the Act. The domestic content and energy communities bonuses, the special rule reducing direct payments, and the increased credit rates for qualified hydroelectric and marine and hydrokinetic renewable energy are effective for facilities placed in service after December 31, 2022.

2. Extension and modification of energy credit (sec. 13102 of the Act and sec. 48 of the Code)

Present Law

In general

A permanent nonrefundable 10-percent business energy credit[991] is allowed for the cost of new property that is equipment that either (1) uses solar energy to generate electricity, to heat or cool (or provide hot water for use in) 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 (but not including) the electric transmission stage. Property used to generate energy 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 the construction of which begins 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.[992] An unused general business credit generally may be carried back one year and carried forward 20 years.[993] The taxpayer's basis in the property is reduced by one-half of the amount of the credit claimed.[994] 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. Public utilities must normalize

[991] Sec. 48.
[992] Sec. 38(b)(1).
[993] Sec. 39.
[994] Sec. 50(c)(3).

the energy credit.[995] 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, 2024, 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, 2021, and 2022 and that is placed in service by the end of calendar year 2025, the credit rate for otherwise eligible solar energy property is 26 percent. For property the construction of which begins in calendar year 2023 and that is placed in service by the end of calendar year 2025, the credit rate for otherwise eligible solar energy property is 22 percent. For property the construction of which begins after calendar year 2023 or that does not meet the 2025 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 (subject to a phase-down rule) for property the construction of which begins prior to January 1, 2024. Under the phase-down rule, the credit rate is reduced to 26 percent for property the construction of which begins in calendar year 2020, 2021, and 2022 and to 22 percent for property the construction of which begins in calendar year 2023. Eligible property must be placed in service before January 1, 2026.

Fuel cells and microturbines

The energy credit applies to qualified fuel cell power plants, but only for the construction of which begins prior to January 1, 2024. The credit rate is 30 percent and is subject to the same phase-down rule as fiber optic solar property (described above).

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, 2026. 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,

[995] Sec. 50(d)(2).

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 nameplate capacity of less than 2,000 kilowatts.

Geothermal heat pump property

The energy credit applies to qualified geothermal heat pump property the construction of which begins prior to January 1, 2024. 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 the construction of which begins prior to January 1, 2024. The credit rate is 30 percent and is subject to the same phase-down rule as fiber optic solar property (described above). 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 the construction of which begins prior to January 1, 2024. 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 (or a combination thereof), 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 five-percent credit).

Waste energy recovery property

The energy credit applies to waste energy recovery property, but only for the construction of which begins prior to January 1, 2024. The credit rate is 30 percent and is subject to the same phase-down rule as fiber optic solar property (described above).

Waste energy recovery property is property that generates electricity solely from heat from buildings or equipment if the primary purpose of such building or equipment is not the generation of electricity. Qualified property does not include any property which has a capacity in excess of 50 megawatts. In the case of property that qualifies as both waste energy recovery property and CHP system property, no double benefit is permitted but a taxpayer may elect to claim the higher credit. The credit rate for waste energy recovery property is initially 30 percent, subject to the same phase-down and sunset rules as fiber optic solar property, fuel cell property, and small wind energy property.

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, 2022, 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, 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 years 2018, 2020, and 2021, and by 60 percent for facilities the construction of which begins in calendar year 2019.

A special rule applies for elections made with respect to property used in qualified offshore wind facilities.[996] Qualified offshore wind facilities are qualified wind facilities (within the meaning of the section 45 renewable electricity production credit, without regard to any sunset date) that are located in the inland navigable waters of the United States or in the coastal waters of the United States, and include property owned by the taxpayer necessary to condition electricity for use on the grid such as subsea cables and voltage transformers. For this purpose, coastal waters include the waters of the Great Lakes, the territorial seas, the exclusive economic zone, and

[996] Sec. 48(a)(5)(F).

the outer continental shelf, but only if such waters are treated as within the United States or a possession of the United States for purposes of section 45(e)(1).[997] Such property the construction of which begins before January 1, 2026, is eligible for a 30 percent investment credit and is not subject to the phasedown applicable to other wind facilities.

SUMMARY OF INVESTMENT TAX CREDITS FOR ENERGY PROPERTY

Qualif ed Energy Property (sec. 48)	C edit Rate	Max mum Credit	Expirat on [4]
Equipment to produce energy from a geothermal deposit (geothermal energy property).	30% (in lieu of production tax credit).	None	January 1, 2022
	10%	None	None
Equipment to use ground or ground water for heating or cooling (geothermal heat pumps).	10%	None	January 1, 2024
Equipment that uses fiber-optics to distribute sunlight inside a structure (fiber optic solar property).	30%	None	January 1, 2020
	26%		January 1, 2023
	22%		January 1, 2024
Microturbine property (<2 megawatt electrical generation power plants of ≥26% efficiency).	10%	$200 per kilowatt of capacity.	January 1, 2024
Combined heat and power property (simultaneous production of electrical/mechanical power and useful heat >60 percent efficiency).	10%	None	January 1, 2024
Solar electric or solar hot water property	30%	None	January 1, 2020
	26%		January 1, 2023
	22%		January 1, 2024
	10%		None.
Fuel cell property (generates electricity through electrochemical process).	30%	$1,500 for each ½ kilowatt of capacity.	January 1, 2020
	26%		January 1, 2023
	22%		January 1, 2024
Small (<100 kilowatt capacity) wind electrical generation property.	30%	None	January 1, 2020
	26%		January 1, 2023
Waste energy recovery property	26%	None	January 1, 2023
	22%		January 1, 2024
Wind, biomass, municipal solid waste, qualified hydropower, and marine and hydrokinetic property.	30% (in lieu of production tax credit).	None	January 1, 2022 January 1, 2026, in the case of offshore wind facilities [5]

[4] For all eligible property, construct on of the p operty must begin befo e the expiration date, except where otherwise noted. For credits subject to a rate phase down, except where noted, construction must begin before the dates listed and placed in serv ce before January 1, 2026.
[5] In the case of wind facilit es other than offshore wind facilit es, the available investment tax credit is reduced by 20 pe cent for facilit es the construction of wh ch begins in 2017, by 40 percent for facilit es the construct on of which begins in 2018, by 60 percent for facilities the construct on of wh ch begins in 2019, and by 40 pe cent for facilit es the construct on of wh ch begins after 2019.

Explanation of Provision

In general

The provision generally extends the temporary portions of the energy credit for one year, through December 31, 2024, except for geothermal heat pump property, which is extended through December 31, 2034.[998] The provision also adds a credit for energy storage technology, qualified biogas property, and microgrid controller property and modifies the eligibility requirements of certain other qualified property (described in more detail below).

[997] A technical correction may be necessary to clarify the meaning of this term.
[998] The provision does not extend the expiration dates under section 48(a)(5), relating to energy credits claimed in lieu of the renewable electricity production credit. Those expiration dates are extended by section 13101 of the Act, described above.

The provision modifies the credit rate structure, creating a base credit rate and an increased credit rate. The base credit rate is six percent (two percent in the case of microturbine property). The increased credit rate is 30 percent (10 percent in the case of microturbine property). The increased credit rate is available with respect to energy projects that have a maximum output of less than one megawatt of electrical (as measure in alternating current) or thermal energy and for energy projects that meet certain prevailing wage and apprenticeship requirements (or for which construction began more than 60 days before the Secretary publishes guidance with respect to such prevailing wage and apprenticeship requirements).

The provision also modifies the credit rate phase-down rules. In the case of qualified fuel cell property, qualified small wind property, qualified solar energy property, and qualified solar fiber optic property the credit rate is 26 percent for property the construction of which begins after December 31, 2019, that is placed in service before January 1, 2022. For geothermal heat pump property, the base credit rate phases down to 5.2 for property the construction of which begins in calendar year 2033 and to 4.4 percent for property the construction of which begins in calendar year 2024. The increased credit rates for geothermal heat pump property during the phase-down period are 26 percent for property the construction of which begins in calendar year 2033 and 22 percent for property the construction of which begins in calendar year 2034.

The provision gives the Secretary authority to issue regulations and other guidance necessary to carry out the purposes of the provision, including those that require recordkeeping or information reporting.

Wage and apprenticeship requirements

The prevailing wage and apprenticeship requirements follow a structure similar to that set forth in section 45(b)(7) and 45(b)(8), as modified by section 13101 of the Act. Generally, the prevailing wage rules require that the taxpayer ensure that any laborers and mechanics employed by the taxpayer or any contractor or subcontractor in the construction, alteration, or repair of a project are paid wages at a rate not less than the prevailing wage rates for construction, alteration, or repair of a similar character in the locality where the project is located as determined by the Secretary of Labor, in accordance with subchapter IV of chapter 31, of title 40, United States Code. The apprenticeship requirements require that, generally during the construction of a qualified facility, not less than a certain percentage of total labor hours of the construction, alteration, or repair work (including work performed by any contractor of subcontractor) on a project must be performed by qualified apprentices.[999]

Energy storage technology

As mentioned above, the provision adds a credit for energy storage technology. Energy storage technology consists of either (1)

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[999] See the explanation of section 13101 of the Act for a more detailed description of these requirements, including procedural rules and penalties.

property (other than property primarily used in the transportation of goods or individuals and not for the production of electricity) which receives, stores, and delivers energy for conversion to electricity (or, in the case of hydrogen, which stores energy), and has a nameplate capacity of not less than five kilowatt-hours, and (2) thermal energy storage property. Property placed in service before the date of enactment of the provision that is modified to increase its capacity to at least five kilowatts (or if already having a capacity of at least five kilowatts, increases its capacity by at least an additional five kilowatts), is treated as qualifying property except that the basis of any existing property prior to such modification is not taken into account.

Thermal energy storage property is property comprising a system which (1) is directly connected to a heating, ventilation, or air conditioning system, (2) removes heat from, or adds heat to, a storage medium for subsequent use, and (3) provides energy for the heating or cooling of the interior of a residential or commercial building. Thermal energy property does not include a swimming pool, combined heat and power system property, or a building or its structural components.

The provision modifies section 50 to allow public utilities to elect not to normalize energy credits resulting from energy storage technology, unless prohibited by a State or political subdivision, by any agency or instrumentality of the United States, or by a public service or public utility commission or other similar body of any State or political subdivision that regulates public utilities. Such an election must be made separately with respect to each energy storage technology by the due date (including extensions) of the Federal tax return for the taxable year in which the energy storage technology is placed in service by the taxpayer. Once made, an election may only be revoked with the consent of the Secretary. An election may only be made with respect to energy storage technology that has a maximum capacity of greater than 500 kilowatt-hours.[1000]

Generally, any contract or arrangement between a service provider and a service recipient with respect to energy storage technology that purports to be a service contract shall be treated as such and not as a lease of property under section 7701(e).

Energy storage property includes property co-located with a facility claiming an electricity production credit to the extent it is separable from such facility.

Energy storage technology does not include any property the construction of which begins after December 31, 2024.

Qualified biogas property

As mentioned above, the provision adds a credit for qualified biogas property. Qualified biogas property is property comprising a system that converts biomass (as defined in section 45K(c)(3))[1001] into a gas which consists of not less than 52 percent methane by volume, or is concentrated by such system into a gas which consists of not less than 52 percent methane, and which captures such gas

[1000] This modification to section 50 also permits public utilities to make a similar election under the clean electricity investment credit established by section 13702 of the Act. A technical correction may be necessary to reflect this intent.

[1001] As in effect on the date of enactment of the provision.

for sale or productive use, and not for disposal via combustion. Qualified biogas property includes any property which is part of such system which cleans or conditions such gas. Gas produced using qualified biogas property (for which an energy credit has been allowed) may not be used to generate credits under the section 45 renewable electricity production credit.

Qualified biogas property does not include any property the construction of which begins after December 31, 2024.

Microgrid controllers

As mentioned above, the provision adds a credit for microgrid controllers. The term "microgrid controller" means equipment which is part of a qualified microgrid that is designed and used to monitor and control the energy resources and loads on such microgrid. A qualified microgrid is an electrical system that includes equipment which (1) is capable of generating not less than four kilowatts and not greater than 20 megawatts of electricity, (2) is capable of operating in connection with the electrical grid, and as a single controllable entity with respect to such grid, as well as independently (and disconnected) from such grid, and (3) is not part of a bulk-power system (as defined in section 215 of the Federal Power Act (16 U.S.C. sec. 824o)).

The term "microgrid controller" does not include any property the construction of which begins after December 31, 2024.

Fuel cells using electromechanical processes

The provision modifies the definition of qualified fuel cell property to include linear generator assemblies. Linear generator assemblies generate electricity using an electromechanical process. Linear generator assemblies do not include any assembly which contains rotating parts.

Dynamic glass

The provision modifies the definition of fiber optic solar property to include electrochromic glass, which uses electricity to change its light transmittance properties in order to heat or cool a structure.

Coordination with low-income housing credit

The provision modifies the energy credit's basis reduction rule such that it does not apply for purposes of determining eligible basis under the section 42 low-income housing credit.

Interconnection property

The provision provides that qualified energy property includes amounts paid or incurred by a taxpayer for qualified interconnection property in connection with the installation of certain energy property (as defined in section 48(a)(3)). The rule only applies to energy property that has a maximum output of not greater than five megawatts (as measured in alternating current). In addition, the interconnection property must be used to provide for the transmission or distribution of the electricity produced or stored by such energy property and be properly chargeable to a taxpayer's capital account.

Qualified interconnection property is, with respect to an energy project which is not a microgrid controller, tangible property that is part of an addition, modification, or upgrade to a transmission or distribution system, and which is required at or beyond the point where the energy project interconnects to such transmission or distribution system in order to accommodate such interconnection. Qualified interconnection property must be built or funded by the taxpayer and the original use of such property, pursuant to an interconnection agreement, must commence with a utility.

An interconnection agreement is an agreement with a utility for the purposes of interconnecting the taxpayer's energy property to the utility's transmission or distribution system. For this purpose, a utility is the owner or operator of an electrical transmission or distribution system that is subject to the regulatory authority of a State or political subdivision thereof, any agency or instrumentality of the United States, a public service or public utility commission or other similar body of any State or political subdivision thereof, or the governing or ratemaking body of an electric cooperative.

In the case of expenses paid or incurred for interconnection property, amounts otherwise chargeable to a capital account with respect to such expenses must be reduced under rules similar to the rules of section 50(c) (which reduces the basis of energy property for which a credit has been allowed).

Domestic content bonus

Where certain domestic content requirements are satisfied, the provision increases the energy credit rate by two percentage points (ten percentage points where the wage and apprenticeship requirements are met). The domestic content requirements are similar to those provided for in section 45(b)(9).[1002]

Reduction of elective payment if domestic content rules are not satisfied

As provided for in section 6417, which is created by section 13801 of the Act, certain taxpayers may elect to have the credit paid directly to the extent there is insufficient income tax liability to absorb the credit. The current provision contains a special rule reducing the amount of this direct payment by 10 percent if the domestic content requirements described above for the domestic content bonus are not satisfied. This rule is similar to those provided in section 45(b)(10).[1003]

Credit reduced for tax-exempt bonds

The energy credit is reduced when the qualified property is financed using tax-exempt bonds. The rules governing this reduction are similar to those provided in section 45(b)(3).[1004]

[1002] See description in explanation of section 13101 of the Act. For purposes of the domestic content and the energy communities bonuses, a qualified facility includes a facility for which an election under section 48(a)(5) has been made to claim in an investment credit in lieu of a production credit.

[1003] *Ibid.*

[1004] *Ibid.*

Energy communities bonus

If energy property is placed in service in an "energy community," the provision increases the energy credit rate by two percentage points (10 percentage points where the wage and apprenticeship requirements are met). The definition of energy community is the same as that set forth in section 45(b)(11).[1005]

Effective Date

In general, the provision is effective for property placed in service after December 31, 2021, including the modified credit rate for geothermal heat pump property. For the new types of qualified property (energy storage technology, qualified biogas property, microgrid controllers, linear generator assemblies, dynamic glass, and interconnection property) and related rules, the provision is effective for property placed in service after December 31, 2022. The domestic content and energy communities bonuses and the special rule reducing direct payments are also effective for property placed in service after December 31, 2022. The portion of the provision relating to tax-exempt bond financing applies to facilities the construction of which begins after the date of enactment of the Act.

3. Increase in energy credit for solar and wind facilities placed in service in connection with low-income communities (sec. 13103 of the Act and sec. 48 of the Code)

Present Law

A summary of present law may be found above in the description of sections 13101 and 13102 of the Act.

Explanation of Provision

The provision modifies the section 48 energy credit to add a bonus for certain qualified solar and wind facilities placed in service in connection with low-income communities. Qualified solar and wind facilities are facilities that generate electricity solely from solar or wind property,[1006] have a maximum net output of less than five megawatts (as measured in alternating current), and are either (1) located in a low-income community (as defined in section 45D(e)) or on Indian land (as defined in section 2601(2) of the Energy Policy Act of 1992 (25 U.S.C. sec. 3501(2))) or (2) part of a qualified low-income residential building project or a qualified low-income economic benefit project. In the case of facilities located in a low-income community or on Indian land, the bonus rate is 10 percentage points. In the case of facilities that are part of a qualified low-income residential building project or a qualified low-income economic benefit project, the bonus rate is 20 percentage points.

A facility is treated as part of a qualified low-income residential building project if the facility is installed on a residential rental

[1005] *Ibid.*

[1006] Eligible property includes energy storage technology installed in connection with such energy property. In the case of wind facilities, either the facilities must be small wind facilities under section 48(a)(3)(A)(vi) or an election for an investment credit in lieu of a production credit must have been made under section 48(a)(5).

building[1007] which participates in a covered housing program (as defined in section 41411(a) of the Violence Against Women Act of 1994 (34 U.S.C. 12491(a)(3)), a housing assistance program administered by the Department of Agriculture under title V of the Housing Act of 1949, a housing program administered by a tribally designated housing entity (as defined in section 4(22) of the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4103(22))) or such other affordable housing programs as the Secretary may provide, and the financial benefits of the electricity produced by such facility are allocated equitably among the occupants of the dwelling units of such building.

A facility is treated as part of a qualified low-income economic benefit project if at least 50 percent of the financial benefits of the electricity produced by such facility are provided to households with income of (1) less than 200 percent of the poverty line (as defined in section 36B(d)(3)(A)) applicable to a family of the size involved or (2) less than 80 percent of area median gross income (as determined under section 142(d)(2)(B)). For purposes of determining whether a facility is part of a qualified low-income residential building project or a qualified low-income economic benefit project, electricity acquired at a below-market rate shall be taken into account as a financial benefit.

The bonus under this provision is subject to an annual capacity limitation of 1.8 gigawatts for each of calendar years 2023 and 2024 and zero thereafter. The Secretary is required to establish (within 180 days after the date of the provision's enactment) a program to allocate the capacity limitation to qualified solar and wind facilities. In establishing such program, the Secretary must provide procedures to allow for an efficient allocation process, including, when appropriate, consideration of multiple projects in a single application if such projects will be placed in service by a single taxpayer.

Facilities that have been awarded credits must be placed in service within four years of the date such facilities have been allocated electricity generation capacity by the Secretary. If a facility is not placed in service within this four-year period, the electric generation capacity allocated to such facility may be reallocated by the Secretary. In addition, if the annual capacity limitation for 2023 is not fully allocated, the unallocated portion is added to the amount available in calendar year 2024.

The bonus is subject to recapture if the property to which it relates ceases to meet the applicable requirements, notwithstanding the fact such property still qualifies for the energy credit under section 50(a).

Effective Date

The provision is effective beginning January 1, 2023.

[1007] For this purpose, a facility installed next to a building or in a building complex's common area may be treated as installed on a residential building.

4. Extension and modification of credit for carbon oxide sequestration (sec. 13104 of the Act and sec. 45Q of the Code)

Present Law

In general

A credit is available for the capture and sequestration of carbon oxide and carbon dioxide. Significant changes to the credit rate and structure were made in 2018 by the Bipartisan Budget Act of 2018 ("BBA").[1008] These changes were effective for taxable years beginning after December 31, 2017.

Carbon dioxide captured using equipment placed in service before February 9, 2018 (pre-BBA)

For carbon dioxide captured using equipment placed in service before February 9, 2018, 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.[1009]

For carbon dioxide captured in taxable years beginning after December 31, 2017, using equipment placed in service before February 9, 2018, a credit of $10 per metric ton is also available for carbon dioxide that is "utilized" by a taxpayer 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 which 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.[1010]

Finally, for carbon dioxide captured using equipment placed in service before February 9, 2018, 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 or utilized by a taxpayer in a prescribed manner.

All three credit amounts are adjusted for inflation using 2008 as the base year. For 2022, as adjusted for inflation, the $10 credit is increased to $12.53 per metric ton and the $20 credit is increased to $25.07 per metric ton of carbon dioxide.[1011]

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 deter-

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[1008] Pub. L. 115–123, sec. 41119.
[1009] Sec. 45Q(a)(2).
[1010] Sec. 45Q(f)(5).
[1011] Notice 2022–38, 2022–39 I.R.B. 239, September 26, 2022.

mining adequate security measures for the secure geological storage of carbon dioxide such that the carbon dioxide does not escape into the atmosphere.[1012]

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. Only qualified carbon dioxide captured and disposed of, used, or utilized within the United States or a possession of the United States is taken into account.

In general, a qualified facility is any industrial facility or direct air capture facility located in the United States or a possession of the United States the construction of which begins before January 1, 2026, and the construction of carbon capture equipment begins before such date or is integrated into the original planning and design of the facility.

Qualified facilities also must capture a minimum amount of carbon oxide. For electricity generation facilities that emit 500,000 metric tons or more of carbon oxide in a taxable year, the facility must capture at least 500,000 metric tons of carbon oxide. For facilities that emit less than 500,000 metric tons of carbon oxide or non-power facilities that emit at least 500,000 metric tons of carbon oxide, the facility must generally capture at least 100,000 metric tons of carbon oxide per taxable year. However, where the carbon oxide is captured at a facility that emits less than 500,000 metric tons of carbon oxide and is being utilized for commercial purposes, this minimum amount is reduced to 25,000 metric tons of carbon oxide. Direct air capture facilities (described below) must also capture at least 100,000 metric tons of carbon oxide per taxable year to be qualified facilities.

Credits are generally attributable to the person that captures and physically or contractually ensures the disposal, utilization, or use as a tertiary injectant, of the qualified carbon dioxide. Such persons may elect to transfer the credit to the taxpayer that disposes of, utilizes, or uses (as a tertiary injectant) the qualified carbon dioxide.

Credits are subject to recapture with respect to any qualified carbon dioxide that ceases to be captured, disposed of, or used as a tertiary injectant in a manner consistent with the credit rules.[1013] 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 taken into account for purposes

[1012] Final Treasury regulations for section 45Q were published in the Federal Register on January 15, 2021. T.D. 9944, 86 Fed. Reg. 4728, January 15, 2021.
[1013] Sec. 45Q(f)(4).

of the credit. As of May 11, 2018, the credit had been claimed for 72,087,903 tons of qualified carbon dioxide.[1014]

Carbon oxide captured using equipment placed in service on or after February 9, 2018 (post-BBA)

For carbon captured using equipment placed in service on or after February 9, 2018, the definition of qualified carbon is expanded to include all carbon oxides, not just carbon dioxide. In addition, qualified carbon is no longer limited to carbon capture from industrial sources, but includes carbon captured directly from the ambient air at direct air capture facilities (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 oxide utilization, the credit rate for carbon oxide captured using equipment placed in service on or after February 9, 2018, is $12.83 per metric ton in 2017, increasing linearly each calendar year to $35 per metric ton by December 31, 2026, and adjusted for inflation thereafter. For qualified carbon oxide disposed of in secure geological storage, the credit rate is $22.66 per metric ton in 2017, increasing linearly each calendar year to $50 per metric ton by December 31, 2026, and adjusted for inflation thereafter. For 2022, the credit rates are $25.15 and $37.85 respectively.[1015]

Carbon oxide captured using equipment placed in service on or after February 9, 2018, is not subject to the 75 million metric ton cap applicable to the pre-February 9, 2018 credit rules. 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, 2026.[1016]

In general, a qualified facility has the same definition as a pre-BBA qualified facility, except that it is placed in service on or after February 9, 2018. Special rules apply for additional carbon capture equipment installed on or after February 9, 2018, at a pre-BBA qualified facility. The credit is reduced for certain tax-exempt bonds.[1017]

Explanation of Provision

In general

The provision extends and modifies the section 45Q credit for carbon oxide sequestration. The provision extends the credit so that it is available with respect to qualified facilities the construction of which begin before January 1, 2033. The provision also modifies the credit rates.

[1014] Notice 2020–40, 2020–25 I.R.B. 954, June 15, 2020. This is the most recent assessment published by the I.R.S.
[1015] Treas. Reg. sec. 1.45Q–1(d).
[1016] Sec. 45Q(d).
[1017] Sec. 45Q(f)(3).

Modification of credit rates

The provision modifies the base tax credit rate. In the case of facilities and equipment originally placed in service after December 31, 2022, or with respect to additional carbon capture equipment installed after such date at a facility placed in service before such date, the base credit rate is reduced to $17 (adjusted for inflation after 2026) per metric ton for qualified carbon oxide captured by the taxpayer using carbon capture equipment which is disposed of by the taxpayer in secure geological storage without being first used for EOR uses. The provision also reduces the base credit to $12 (adjusted for inflation after 2026) per metric ton where the captured carbon oxide is first used for EOR uses or utilized in a manner prescribed by section 45Q.

In the case of carbon oxide captured at direct air capture facilities placed in service after December 31, 2022, or with respect to additional carbon capture equipment installed after such date at such facilities placed in service before such date, the credit amounts described above are increased to $36 and $26 per ton, respectively.

Modification of definition of qualified facility

The provision also modifies the definition of qualified facility for facilities or equipment the construction of which begins after the date of enactment of the Act. In the case of a direct air capture facility, the minimum amount of carbon oxide that must be captured for a facility to qualify is reduced to 1,000 metric tons per taxable year.

In the case of an electricity generating facility, the minimum amount is reduced to 18,750 metric tons per taxable year; any carbon capture equipment associated with the applicable electric generating unit at such facility must have a capture design capacity of not less than 75 percent of the baseline carbon oxide production of such unit. For this purpose, an applicable electric generating unit means the principal electric generating unit for which the carbon capture equipment is originally planned and designed.

In the case of an applicable electric generating unit originally placed in service more than one year prior to the date on which construction of the carbon capture equipment begins, the baseline carbon oxide production is generally the average annual carbon oxide production, by mass, from such unit during the three years with the highest annual carbon oxide production during the 12-year period preceding the date on which construction of such carbon capture equipment began. In the case of an applicable generating unit that was originally placed in service more than one year but not more than three years prior to the date on which construction of the carbon capture equipment begins, the baseline is measured using the period beginning on the date such unit was placed in service and ending on the date on which construction of such carbon capture equipment began. Where construction of the carbon capture equipment begins either before or not more than one year after the applicable electric generating unit is originally[1018] placed in service, the baseline carbon oxide production is the designed an-

[1018] A technical correction may be necessary to reflect this intent.

nual carbon oxide production, by mass, as determined based on an assumed capacity factor of 60 percent.

Increased credit amount for qualified facilities and carbon capture equipment

The total amount of credit is multiplied by five for qualified facilities or carbon capture equipment that meet certain prevailing wage and apprenticeship requirements.

The prevailing wage and apprenticeship requirements generally follow the structure established in section 13101 of the Act, which modifies the renewable electricity production credit. Generally, the prevailing wage rules require that the taxpayer ensure that any laborers and mechanics employed by the taxpayer or any contractor or subcontractor in the construction, alteration, or repair of a project are paid wages at a rate not less than the prevailing wage rates for construction, alteration, or repair of a similar character in the locality where the project is located as determined by the Secretary of Labor, in accordance with subchapter IV of chapter 31, of title 40, United States Code. The apprenticeship requirements require that, generally during the construction of a qualified facility, not less than a certain percentage of total labor hours of the construction, alteration, or repair work (including work performed by any contractor of subcontractor) on a project must be performed by qualified apprentices, similar to the rules of section 45(b)(8).[1019]

Credit reduced for tax-exempt bonds

The provision changes the rules for reducing the credit when a carbon oxide capture project is financed using tax-exempt bonds. The rules governing this reduction are similar to those provided in section 13101 of the Act, which modifies the renewable electricity production credit (described above).

Modification of the expiration of the credit for facilities placed in service before the enactment of the BBA

The provision modifies the credit termination rules for facilities placed in service before the enactment of the BBA. Under the provision, even if the Secretary has not certified that 75 million metric tons of qualified carbon dioxide have been taken into account for purposes of the credit by December 31, 2022, the credit terminates on January 1, 2023.

Election for certain facilities located in an area affected by a Federally declared disaster

In the case of qualified carbon oxide captured using carbon capture equipment which is originally placed in service at a qualified facility on or after the date of enactment of the Bipartisan Budget Act of 2018 (February 9, 2018), the taxpayer may elect, at such time and in such manner as the Secretary may prescribe, to have the 12-year period begin on the first day of the first taxable year in which a credit is claimed so long as (1) no taxpayer claimed a credit with respect to such carbon capture equipment for any prior

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[1019] See the explanation of section 13101 for a more detailed description of these requirements, including procedural rules and penalties.

taxable year, (2) the qualified facility at which such carbon capture equipment is placed in service is located in an area affected by a Federally declared disaster (as defined by section 165(i)(5)(A)) after the carbon capture equipment is originally placed in service, and (3) such Federally declared disaster results in a cessation of the operation of the qualified facility or the carbon capture equipment after such equipment is originally placed in service.

Regulatory authority

The provision expands the Secretary's specific regulatory authority to issue regulations or other guidance for the purpose of adjusting the baseline carbon oxide production with respect to any applicable electric generating unit at any electricity generating facility if, after the date on which the carbon capture equipment is placed in service, modifications which are chargeable to capital account are made to such unit that result in a significant increase or decrease in carbon oxide production.

Effective Date

The provision is generally effective for facilities and equipment placed in service after December 31, 2022. The rules modifying the definition of a qualified facility are effective for facilities and equipment the construction of which begins after the date of enactment of the Act. The modification of the expiration of the credit for facilities placed in service before the enactment of the Bipartisan Budget Act of 2018 is effective on the date of enactment of the Act. The election for certain facilities located in an area affected by a Federally declared disaster is effective for carbon oxide captured and disposed of after December 31, 2021.

5. Zero-emission nuclear power production credit (sec. 13105 of the Act and new sec. 45U 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.[1020] 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 that uses nuclear power to produce electricity, the reactor design for which was approved after 1993 by the Nuclear Regulatory Commission. For this purpose, an 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 and is placed in service before January

[1020] 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 (14.4 cents for 2022).

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. To the extent any amount of the 6,000 megawatts of authorized capacity remains unutilized after December 31, 2020, the Secretary is required 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 placed-in-service sunset date of January 1, 2021, does not apply with respect to allocations of such unutilized national megawatt capacity.

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 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).

Qualified public entities may 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 1936.1021 An eligible project partner 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.

The credit is part of the general business credit.

[1021] 7 U.S.C. sec. 901 *et seq.*

Explanation of Provision

In general

The provision creates a new credit for the production of nuclear power produced in the United States by the taxpayer at a qualified nuclear power facility and sold by the taxpayer to an unrelated person. A qualified nuclear power facility is any nuclear facility which (1) is owned by the taxpayer (including successor owner-taxpayers) and uses nuclear energy to produce electricity, (2) is not an advanced nuclear power facility under section 45J, and (3) is placed in service before the date of enactment of the provision.

The credit rate is 0.3 cents per kilowatt-hour of nuclear power production. The total credit for the taxable year is reduced (but not below zero) by a "reduction amount" equal to 16 percent of the excess of the gross receipts from any electricity produced by such facility (including any electricity services or products provided in conjunction with the electricity produced by such facility) and sold to an unrelated person during the taxable year, over the number of kilowatts sold to unrelated persons times 2.5 cents. In calculating the reduction amount, gross receipts generally include payments with respect to a qualified nuclear power facility as a result of any Federal, State or local government program for, in whole or in part, the zero-emission, zero-carbon, or air quality attributes of any portion of the electricity produced by such facility. However, such payments are excluded from gross receipts for purposes of the reduction amount calculation if the full amount of the credit is used to reduce such payments. The 0.3 cent and 2.5 cent amounts are adjusted for inflation using calendar year 2023 as the base year.

The credit is part of the general business credit. The provision expires for taxable years beginning after December 31, 2032.

Increased credit amount for qualified nuclear power facilities

The total amount of the credit is multiplied by five for qualified nuclear power facilities that meet certain prevailing wage requirements.

The prevailing wage requirements generally follow the structure established in section 13101 of the Act, which modifies the renewable electricity production credit. Generally, the prevailing wage rules require that the taxpayer ensure that any laborers and mechanics employed by the taxpayer or any contractor or subcontractor in the alteration or repair of a facility are paid wages at a rate not less than the prevailing wage rates for alteration or repair of a similar character in the locality where the project is located as determined by the Secretary of Labor, in accordance with subchapter IV of chapter 31, of title 40, United States Code.[1022]

Effective Date

The provision applies to electricity produced and sold after December 31, 2023, in taxable year beginning after such date.

[1022] See the explanation of section 13101 for a more detailed description of these requirements, including procedural rules and penalties. Because qualified nuclear power facilities must be placed in service prior to the date of enactment of the provision, the prevailing wage rules for such facilities relate only to alteration or repair, not construction.

6. Extension of incentives for biodiesel, renewable diesel and alternative fuels (sec. 13201 of the Act and secs. 40A, 6426, and 6427 of the Code)

Present Law

Biodiesel

Present law provides an income tax credit for biodiesel fuels (the "biodiesel fuels credit"). 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, 2022.

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 which 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 does not apply to any sale or use for any period after December 31, 2022. 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, 2022.

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 an 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 do not apply to renewable diesel sold or used after December 31, 2022.

Alternative fuel

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"),[1023] compressed or liquefied gas derived from biomass, or liquid fuel derived from biomass. Such term does not include ethanol, methanol, or biodiesel. "Alternative fuel" also does not include fuel (including lignin, wood residues, or spent pulping liquors) derived from the production of paper or pulp.

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 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. For purposes of the alternative fuel mixture credit, alternative fuel does not include liquefied petroleum gas, compressed or liquefied natural gas, or compressed or liquefied gas derived from biomass. 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 do not apply to fuel sold or used after December 31, 2021.

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. The payment provision for alternative fuel expired after December 31, 2021.

[1023] 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.

Explanation of Provision

The provision extends the incentives for biodiesel, renewable diesel, and alternative fuel, and related mixtures, through December 31, 2024.

The provision creates a special rule to address claims regarding excise tax credits and claims for payment for alternative fuel sold or used during the period beginning on January 1, 2022, through the close of the last calendar quarter beginning before the date of enactment (June 30, 2022). 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 those periods. 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.

Effective Date

The provision is effective for fuel sold or used after December 31, 2021.

7. Extension of second generation biofuel incentives (sec. 13202 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, 2021.

"Qualified second generation biofuel production" is any second generation biofuel which is produced by the taxpayer and which, 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).[1024] Special rules apply for fuel derived from algae.

"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

[1024] In addition, for fuels derived from algae, cyanobacteria, 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.

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 with the 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 purposes 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. Under section 87, the credit is included in gross income.

Explanation of Provision

The provision extends the credit through December 31, 2024.

Effective Date

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

8. Sustainable aviation fuel credit (sec. 13203 of the Act and new sec. 40B of the Code)

Present Law

Renewable diesel for aviation

Renewable diesel 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 certain provisions in the Code, renewable diesel is generally treated the same as biodiesel. In the case of renewable diesel that is aviation fuel meeting the requirements above, the renewable diesel incentives are applied with respect to such fuel by treating kerosene as though it were diesel fuel for purposes of a qualified renewable diesel mixture. Like the biodiesel incentive, the renewable diesel incentive may be taken as an excise tax credit against section 4081 liability, and, to the extent the excise tax credit exceeds the claimant's section 4081 liability, then the excess may be claimed either as a payment from the Secretary under section 6427(e) or as a refundable income tax credit under section 34. Alternatively, the renewable diesel incentive may be taken as a nonrefundable income tax credit under section 40A, which is included in gross income under section 87. The incentive for renewable diesel is $1.00 per gallon. There is no small producer credit for renewable diesel. The incentives for renewable diesel expire after December 31, 2022.

Explanation of Provision

The provision creates a new general business credit, the sustainable aviation fuel credit under section 40B, and adds related excise tax credit and payment rules under section 6426(k) and 6427(e)(1). For this purpose, "sustainable aviation fuel" is a liquid fuel, the portion of which is not kerosene, that (1) meets the requirements of either ASTM International Standard D7566 or the Fischer Tropsch provisions of ASTM International Standard D1655, Annex A1, (2) is not derived from coprocessing an applicable material (or materials derived from an applicable material) with a feedstock that is not biomass,[1025] (3) is not derived from palm fatty acid distillates or petroleum, and (4) has been certified, as provided by the provision, to achieve at least a 50-percent lifecycle greenhouse gas reduction percentage in comparison with petroleum-based jet fuel.

Calculation of the credit

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

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

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

Certification requirements and registration

No credit shall be allowed unless the sustainable aviation fuel has been certified to achieve at least a 50-percent lifecycle greenhouse gas reduction in comparison with petroleum-based jet fuel. For purposes of certification, the certification must be in accordance with (1) the most recent Carbon Offsetting and Reduction Scheme for International Aviation that has been adopted by the International Civil Aviation Organization ("ICAO") with the agreement of the United States, or (2) any similar methodology which satisfies the criteria under section 211(o)(1)(H) of the Clean Air Act (42 U.S.C. 7545(o)(1)(H)) as in effect on the date of enactment of this section.

[1025] "Applicable material" means monoglycerides, diglycerides, and triglycerides, free fatty acids, and fatty acid esters. The term "biomass" has the same meaning given such term in section 45K(c)(3) (meaning any organic material other than—(A) oil and natural gas (or any product thereof), and (B) coal (including lignite) or any product thereof).

No credit shall be allowed with respect to any sustainable aviation fuel unless the producer or importer of such fuel is registered with the Secretary and provides certification (in such form and manner as the Secretary shall prescribe) from an unrelated party demonstrating compliance with (1) any general requirements, supply chain traceability requirements, and information transmission requirements under the Carbon Offsetting and Reduction Scheme for International Aviation, or similar requirements in the case of a similar methodology established as described above, and (2) such other information with respect to such fuel as the Secretary may require for purposes of carrying out this provision.

Inclusion in gross income

The sustainable aviation fuel income tax credit under section 40B is included in gross income under section 87.

Excise tax credit and payment provisions and coordination rules

The sustainable aviation fuel credit under section 6426(k) may be used to offset section 4081 tax liability or if there is insufficient section 4081 tax liability, the taxpayer may claim a payment under section 6427(e) or a refundable income tax credit under section 34 for the excess credit. The registration requirements and definitions for the income tax credit also apply for this purpose.

Under rules prescribed by the Secretary, the amount of the section 40B income tax credit with respect to any sustainable aviation fuel is to be reduced to account for any benefit provided with respect to such sustainable aviation fuel under the related excise tax and payment provisions. Additionally, section 40A(d)(1) excludes sustainable aviation fuel from the definition of biodiesel and therefore sustainable aviation fuel cannot qualify for the biodiesel incentives.

Sunset

The sustainable aviation fuel credit (income tax credit, excise tax credit and outlay payments) does not apply to any sale or use after December 31, 2024.

Renewable diesel credit for aviation eliminated

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

Effective Date

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

9. Clean hydrogen (sec. 13204 of the Act and new sec. 45V of the Code)

Present Law

The Code provides a credit of 50 cents per gallon of alternative fuel (or gasoline gallon equivalents 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. For this purpose, liquefied hydrogen is an alternative fuel. The alternative fuel credit expired December 31, 2021.[1026]

Explanation of Provision

Credit for production of clean hydrogen

The provision creates a new credit for hydrogen, the "clean hydrogen production credit."[1027] For any taxable year, the credit is an amount equal to the product of (1) the kilograms of qualified clean hydrogen produced in that year by the taxpayer at a qualified clean hydrogen production facility during the ten-year period beginning on the date such facility was originally placed in service by (2) the applicable amount.

The "applicable amount" is equal to the applicable percentage of $0.60 (or $3.00 in the case of the increased credit described below), rounded to the nearest 0.1 cent.[1028] The "applicable percentage" is

- 20 percent in the case of qualified clean hydrogen which is produced through a process that results in a lifecycle greenhouse gas emissions rate of not greater than four kilograms of CO_2e per kilogram of hydrogen and not less than 2.5 kilograms of CO2e per kilogram of hydrogen
- 25 percent in the case of qualified clean hydrogen which is produced through a process that results in a lifecycle greenhouse gas emissions rate of less than 2.5 kilograms of CO_2e per kilogram of hydrogen and not less than 1.5 kilograms of CO_2e per kilogram of hydrogen
- 33.4 percent in the case of qualified clean hydrogen which is produced through a process that results in a lifecycle greenhouse gas emissions rate of less than 1.5 kilograms of CO_2e per kilogram of hydrogen and not less than 0.45 kilograms of CO_2e per kilogram of hydrogen
- 100 percent in the case of qualified clean hydrogen which is produced through a process that results in a lifecycle greenhouse

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[1026] Section 13201 of the Act extends the alternative fuel credit through December 31, 2024.

[1027] The Department of Energy has noted that "[h]ydrogen purification and enrichment are key technology needs that cross-cut hydrogen production options. The quality of the hydrogen produced must meet the hydrogen quality requirements as described in Appendix C." Appendix C, regarding hydrogen quality, provides that the hydrogen fuel index (*i.e.,* mole fraction of a fuel mixture that is hydrogen) must be at least 99.97 percent. Department of Energy, *Hydrogen and Fuel Cell Technologies Office Multi-Year Research, Development and Demonstration Plan* (June 2015) at p. 3.1–5, and Appendix C at p. C–2 https://www.energy.gov/sites/default/files/2015/06/f23/fcto_myrdd_production.pdf and https://www.energy.gov/sites/prod/files/2014/03/f12/appendix_c.pdf.

[1028] The $0.60 amount (or the $3.00 in the case of the enhanced credit) is indexed for inflation by multiplying such amount by the inflation adjustment factor (as determined under section 45(e)(2) by substituting 2022 for 1992 in subparagraph (B) thereof) for the calendar year in which the qualified hydrogen is produced. If any amount as adjusted is not a multiple of 0.1 cent, such amount is rounded to the nearest multiple of 0.1 cent.

gas emissions rate of less than 0.45 kilograms of CO_2e per kilogram of hydrogen.

Definitions

The term "lifecycle greenhouse gas emissions" has the same meaning given such term under subparagraph (H) of section 211(o)(1) of the Clean Air Act as in effect on the date of enactment of the Act. However, such term only includes emissions through the point of production (well-to-gate) as determined under the most recent Greenhouse Gases, Regulated Emissions, and Energy Use in Transportation model ("GREET") developed by the Argonne National Laboratory or a successor model (as determined by the Secretary).

"Qualified clean hydrogen" means hydrogen that is produced through a process that results in a lifecycle greenhouse gas emissions rate of not greater than 4 kilograms of CO_2e [1029] per kilogram of hydrogen. The hydrogen must be produced in the United States or a possession of the United States in the ordinary course of a trade or business of the taxpayer for sale or use. The production and sale or use of such hydrogen must be verified by an unrelated party. In the case of any hydrogen for which a lifecycle greenhouse gas emissions rate has not been determined, a taxpayer producing such hydrogen may file a petition with the Secretary for determination of the lifecycle greenhouse gas emissions rate with respect to such hydrogen.

A "qualified clean hydrogen production facility" is a facility owned by the taxpayer that produces qualified clean hydrogen and the construction of which begins before January 1, 2033. To qualify for the increased credit amount, a qualified clean hydrogen production facility must also satisfy certain prevailing wage and apprenticeship requirements described below.

Regulations

Not later than one year after the date of enactment, the Secretary is to issue regulations or other guidance to carry out the purposes of this provision, including regulations or other guidance for determining lifecycle greenhouse gas emissions.[1030]

Special rules

For facilities owned by more than one taxpayer, rules similar to the rules of section 45(e)(3) apply for purposes of the provision. Rules similar to the rule under section 45(b)(3) (credit reduced for tax-exempt bonds) apply for purposes of the provision. No credit is allowed with respect to qualified clean hydrogen produced at a facility which includes carbon capture equipment for which a credit is allowed to any taxpayer under section 45Q for the taxable year or any prior taxable year. Thus, a facility is disqualified for pur-

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[1029] "CO_2e" or "CO_2 equivalent" is the measure of greenhouse gas emissions "where the mass values of for all greenhouse gases are adjusted to account for their relative global warming potential." 42 U.S.C. sec. 7545(o)(1)(H).

[1030] In the floor debate of this provision in the Senate, the Senators expressed an intent that the Secretary have discretion in determining lifecycle greenhouse gas emissions, including determining the appropriate treatment of renewable electricity credits, environmental attribute agreements, and other such agreements. See, 168 Cong. Rec. S4165–S4166 (daily ed. August 22, 2022) (colloquy between Senators Carper and Wyden regarding section 13204 of the Inflation Reduction Act of 2022).

poses of section 45V, if a section 45Q credit is claimed for the taxable year or any prior taxable year with respect to such facility containing carbon capture equipment.

Modification of existing facilities

A special placed-in-service rule applies for existing facilities modified to produce qualified clean hydrogen. In the case of any facility that was originally placed in service before January 1, 2023, and prior to the modification, did not produce qualified clean hydrogen, and after the date such facility was originally placed in service is (1) modified to produce clean hydrogen, and (2) the amounts paid or incurred with respect to such modification are properly chargeable to the capital account of the taxpayer, such facility is deemed to have been originally placed in service as of the date that the property required to complete the modification is placed in service.

Increased credit amount for qualified clean hydrogen production facilities

In the case of a qualified clean hydrogen production facility that satisfies certain prevailing wage and apprenticeship requirements, the amount of credit determined with respect to qualified clean hydrogen is multiplied by five. A facility meets these requirements if it is either (1) a facility, the construction of which begins prior to the date that is 60 days after the Secretary publishes guidance with respect to the prevailing wage and apprenticeship requirements and, meets the prevailing wage requirements with respect to the alteration or repair of such facility that occurs after such date; or (2) a facility that satisfies the prevailing wage and apprenticeship requirements.

Prevailing wage requirements

A taxpayer can meet the prevailing wage requirements if it ensures that prevailing wages are paid to any laborers and mechanics employed by the taxpayer or any contractor or subcontractor in the construction of a qualified clean hydrogen production facility, and for the alteration or repair of such facility during the 10-year credit-eligible production period. Prevailing wages are wages paid at rates not less than the prevailing wage rates for construction, alteration, or repair of a similar character in the locality as determined by the Secretary of Labor, in accordance with subchapter IV of chapter 31, of title 40, United States Code. For purposes of determining an increased credit amount for a taxable year, the alteration and repair requirement is applied to such taxable year in which the alteration or repair of the qualified facility occurs. Rules similar to the rules set forth in section 45(b)(7)(B) of the renewable electricity production credit apply regarding penalties for failing to satisfy the prevailing wage requirements.[1031]

[1031] See the explanation of section 13101 of the Act for a more detailed description of these procedural rules and penalties.

Apprenticeship requirements

To be eligible for the enhanced credit, a taxpayer also must ensure that certain qualified apprenticeship requirements are satisfied. The apprenticeship requirements generally require that, during the construction of a qualified facility, not less than a certain percentage of total labor hours of the construction, alternation, or repair work (including work performed by any contractor or subcontractor) on a project must be performed by qualified apprentices, similar to the rules of section 45(b)(8).[1032]

Guidance

The Secretary shall publish regulations or other guidance to carry out the purposes of the provision, including regulations or other guidance which provides for requirements for recordkeeping or information reporting.

Credit for electricity produced from renewable resources allowed if electricity is used to produce clean hydrogen

The provision permits a taxpayer to receive both the section 45 credit for electricity produced from renewable resources and the credit for production of clean hydrogen. The electricity will be treated as sold to an unrelated person if such electricity is used at a qualified clean hydrogen production facility to produce clean hydrogen and such use and production is verified (in such form or manner as the Secretary may prescribe). A similar rule applies for purposes of the "zero-emission nuclear power production credit" (under section 45U).

Election to treat clean hydrogen production facilities as energy property

In lieu of the clean hydrogen production credit, the provision permits a taxpayer to elect to treat specified clean hydrogen facilities (or any portion of such facility) as energy property. The energy percentage with respect to such property ranges from 1.2 percent to six percent depending on the type of qualified clean hydrogen that the facility is designed and reasonably expected to produce. No credit is allowed under section 45V or section 45Q for any taxable year with respect to any specified clean hydrogen production facility or any carbon capture equipment included at such facility. A "specified clean hydrogen production facility" is a qualified clean hydrogen production facility (1) that is placed in service after December 31, 2022, (2) with respect to which no credit has been allowed under sections 45V or 45Q, and the taxpayer makes an irrevocable election to have this provision apply, and (3) for which an unrelated third party has verified (in such form or manner as the Secretary may prescribe) that such facility produces hydrogen through a process which results in lifecycle greenhouse gas emissions that are consistent with the hydrogen that such facility was designed and expected to produce.

The Secretary is to issue such regulations or other guidance as the Secretary determines necessary to carry out the purposes of

[1032] For more detail, see the description of section 13101 of the Act, which explains such apprenticeship requirements.

this section, including regulations or other guidance which recaptures so much of any credit allowed under this provision as exceeds the amount of the credit that would have been allowed if the expected production were consistent with the actual verified production (or all of the credit so allowed in the absence of such verification).

Termination of excise tax credit for hydrogen

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

Credit monetization

In lieu of the clean hydrogen production credit, certain taxpayers may elect a direct payment or transfer credits. See discussion *infra*, sections 13801 and 13802 of the Act relating to credit monetization.

Effective Date

The provision as it relates to the clean hydrogen production credit applies to hydrogen produced after December 31, 2022. The provision as it relates to the credit reduced for tax-exempt bonds applies to facilities the construction of which begins after the date of enactment. The rule regarding modification of existing facilities applies to modifications made after December 31, 2022.

The provision as it relates to renewable electricity used to produce clean hydrogen applies to electricity produced after December 31, 2022.

The provision as it relates to the energy property election for clean hydrogen production facilities applies to property placed in service after December 31, 2022, and for any property the construction of which begins prior to January 1, 2023, only to the extent of the basis thereof attributable to the construction, reconstruction, or erection after December 31, 2022.

The termination of the alternative fuel excise tax credit incentives for hydrogen applies to fuel sold or used after December 31, 2022.

10. Extension, increase, and modifications of nonbusiness energy property credit (sec. 13301 of the Act and sec. 25C of the Code)

Present Law

A 10-percent credit is available to individuals for the purchase of qualified energy efficiency improvements to existing homes.[1033] 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, and unused credits may not be carried forward to future tax years.

[1033] Sec. 25C.

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) the version 6.0 Energy Star program requirements, in the case of an exterior window, a skylight, 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,[1034] in the case of any other component.

Building envelope components are (1) insulation materials or systems which 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 of such dwelling unit.

Additionally, credits are available for the amount of the residential energy property expenditures paid or incurred by the taxpayer during the taxable year. Residential energy property expenditures are expenditures made by the taxpayer for qualified energy property (1) that is installed on or in connection with a dwelling unit located in the United States and owned and used by the taxpayer as the taxpayer's principal residence; and (2) the original use of which commences with the taxpayer. Unlike qualified energy efficiency improvements, residential energy efficiency improvements include both qualified energy property and expenditures for labor costs properly allocable to the onsite preparation, assembly, or original installation of the qualified energy property. The allowable credit for the purchase of certain qualified energy 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 which 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 which yields a Uniform Energy Factor of at least 2.2 in the standard Department of Energy test procedure, (2) an electric heat pump which achieves the highest efficiency tier established by the Consortium for Energy Efficiency, as in effect on January 1, 2009,[1035] (3) a central air conditioner which achieves the highest efficiency tier established by the Consortium for Energy Ef-

[1034] Pub. L. No. 111–5.

[1035] 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.

ficiency, as in effect on January 1, 2009,[1036] and (4) a natural gas, propane, or oil water heater which has a Uniform Energy Factor of at least 0.82 or thermal efficiency of at least 90 percent.

Generally, the credit is available for property placed in service prior to January 1, 2022. 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 the 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 which 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

In general

The provision extends the section 25C credit for nonbusiness energy property for 11 years, through December 31, 2032, and renames the credit the "energy efficient home improvement credit." The provision also increases from 10 percent to 30 percent the credit rate for qualified energy efficient improvements. The provision replaces the lifetime credit limitation with an annual limitation of $1,200. The credit limit with respect to any item of qualified property is generally limited to $600. For windows, the limit is $600 for all exterior windows and skylights combined. In the case of doors, the limit is $250 for any exterior door and $500 for all exterior doors combined. In the case of heat pumps, heat pump water heaters, biomass stoves, and boilers, the annual limit is $2,000 for all such property combined, applied separately from the $1,200 limit described above. The effect of these limits is thus that the maximum possible credit for a taxpayer in a given year is $3,200.

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

The provision eliminates roofs as building envelope components for purposes of the credit but clarifies that air sealing materials or systems can qualify.

[1036] 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.

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

Qualified energy property

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

I. An electric heat pump water heater;
II. An electric heat pump;
III. A central air conditioner;
IV. A natural gas, propane, or oil water heater; or
V. A natural gas, propane, or oil furnace or hot water boiler.

Qualified energy property also includes a biomass stove or boiler which (i) uses the burning of 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 a dwelling unit, and (ii) has a thermal efficiency rating of at least 75 percent (measured by the higher heating value of the fuel).

The provision also provides a second way for oil furnaces and hot water boilers to be qualified energy property. For property placed in service after 2022 and before 2027, an oil furnace or hot water boiler can qualify if it meets or exceeds 2021 Energy Star efficiency criteria, and is rated by the manufacturer for use with fuel blends at least 20 percent of the volume of which consists of an eligible fuel. For such property placed in service after 2022, it can qualify if it achieves an annual fuel utilization efficiency rate of not less than 90, and is rated by the manufacturer for use with fuel blends at least 50 percent of the volume of which consists of an eligible fuel. For this purpose, an eligible fuel means biodiesel and renewable diesel (within the meaning of section 40A) and second generation biofuel (within the meaning of section 40).

Finally, qualified energy property includes any improvement to, or replacement of, a panelboard, sub-panelboard, branch circuits, or feeders that is installed in a manner consistent with the National Electric Code, has a load capacity of at least 200 amps, and is installed in conjunction with (and is necessary for the installation and use of) any qualified energy efficiency improvements or any qualified energy property.

Home energy audits

The provision also adds a 30-percent credit, up to $150, for the amount paid or incurred by the taxpayer during the taxable year for home energy audits. For this purpose, as home energy audit means an inspection and written report with respect to a dwelling unit located in the United States owned or used by the taxpayer as the taxpayer's principal residence that (1) identifies the most significant and cost-effective energy efficiency improvements with respect to such dwelling unit, including an estimate of the energy and cost savings with respect to each such improvement, and (2) is conducted and prepared by a home energy auditor that meets the certification or other requirements specified by the Secretary.

Compliance rules

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

Effective Date

The modifications to section 25C generally apply to property placed in service after December 31, 2022. The extension of the section 25C credit applies to property placed in service after December 31, 2021. The product identification number requirement is effective for property placed in service after December 31, 2024.

11. Residential clean energy credit (sec. 13302 of the Act and sec. 25D of the Code)

Present Law

In general

An income tax credit is available to individuals for the purchase of qualified solar electric property and qualified solar water heating property that is used exclusively for purposes other than heating swimming pools and hot tubs.[1037] 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, qualified biomass fuel 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, but unused tax credits may be carried forward to future tax years. 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, 2023. The credit rate is reduced to 26 percent for property placed in service in calendar years 2021 and 2022 and to 22 percent for property placed in service in calendar year 2023.

Qualified property

Qualified solar electric property is property that uses solar energy to generate electricity for use in a dwelling unit located in the United States and used as a residence by the taxpayer. 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 resi-

[1037] Sec. 25D.

dence by the taxpayer 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 of electricity using an electrochemical process. 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 connection with a dwelling unit located in the United States and used as a residence by the taxpayer.

Qualified geothermal heat pump property means any equipment which (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 which 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.

Qualified biomass fuel property is property which uses the burning of 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 a dwelling unit, and which has a thermal efficiency rating of at least 75 percent. The term "biomass fuel" means any plant-derived fuel available on a renewable or recurring basis.

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, and for piping and wiring to interconnect such property to the dwelling unit, 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 nonbusiness purposes, only that portion of expenditures that is used for nonbusiness purposes is taken into account.

Explanation of Provision

The provision extends for 11 years, through December 31, 2034, the section 25D residential energy efficient property credit, which is renamed the "residential clean energy credit." The provision also modifies the rate phasedown rules. For property placed in service in calendar years 2021, the credit rate remains 26 percent, as under present law. For property placed in service after December 31, 2021 and before January 1, 2033, the credit rate is 30 percent. For property placed in service in calendar year 2033, the credit rate is reduced to 26 percent, and for property placed in service in calendar year 2034, the credit rate is reduced to 22 percent.

The provision removes from section 25D the credit for biomass fuel property expenditures and adds a credit for expenditures for battery storage technology having a capacity of at least three kilowatts that is installed in connection with a dwelling unit located in the United States and used as a residence by the taxpayer.

Effective Date

The provision is generally effective for expenditures made after December 31, 2021. The removal from the credit of biomass fuel property expenditures and the addition of battery storage technology expenditures is effective for expenditures made after December 31, 2022.

12. Energy efficient commercial buildings deduction (sec. 13303 of the Act and sec. 179D of the Code)

Present Law

In general

Section 179D permits a taxpayer an immediate deduction equal to energy-efficient commercial building property expenditures ("EECBP") made by the taxpayer up to a statutory limit. Energy-efficient commercial building property is defined as depreciable or amortizable property (1) which is installed on or in any building located in the United States that meets the applicable building standard of the American Society of Heating, Refrigerating, and Air Conditioning Engineers and the Illuminating Engineering Society of North America ("ASHRAE/IESNA"), (2) which is 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) which is 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 which meets the applicable building standard. The applicable building standard is the most recent ASHRAE/IESNA standard 90.1 that has been published and affirmed by the Secretary in consultation with Secretary of Energy, at least two years prior to the date that construction begins on the property for which the deduction will be claimed. Similarly, the provision requires that the Treasury regulations based on the provisions of the 2005 California Nonresidential Alternative Calculation Method Approval Manual be updated to conform with the most recent such manual as in effect and affirmed by the Secretary in consultation with the Secretary of Energy, at least two years prior to the date that construction begins on the property for which the deduction will be claimed.

For each building, the deduction is limited to an amount equal to $1.80 per square foot[1038] of the property for which such expenditures are made. The deduction is allowed in the year in which the property is placed in service.

[1038] Adjusted for inflation using 2019 as the base year; $1.88 for 2022. Rev. Proc. 2021–45, Int. Rev. Bul. 2021–48, p. 770, November 29, 2021.

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 most recent California Nonresidential Alternative Calculation Method Approval Manual in effect (as affirmed by the Secretary in consultation with the Secretary of Energy, at least two years prior to the date that construction begins on the property for which the deduction will be claimed).

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.[1039] Individuals qualified to determine compliance shall only be those recognized by one or more organizations certified by the Secretary for such purposes.[1040]

For energy-efficient commercial building property expenditures made by a Federal, State, or local government or a political subdivision thereof, such as a public school, the deduction may be allocated to the person primarily responsible for designing the energy efficient commercial building property in lieu of the government or political subdivision thereof.

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

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 EECBP and which is certified by a qualified individual[1041] 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 systems, (2) the heating, cooling, ventilation and hot water systems, and (3) the building envelope. The maximum allow-

[1039] 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.

[1040] The IRS has specified that only a "qualified individual" (as defined in section 5.05 of IRS Notice 2008–52) can certify that EECBP has met the requirements of the section 179D deduction. A qualified individual is an individual who (1) is not related (within the meaning of section 45(e)(4)) to the taxpayer claiming the deduction under section 179D; (2) is an engineer or contractor that is properly licensed as a professional engineer or contractor in the jurisdiction in which the building is located; and (3) has represented in writing to the taxpayer that the qualified individual has the requisite qualifications to provide the certification required or to perform the inspection and testing required by IRS Notice 2008–40.

[1041] *Ibid.*

able deduction is $0.60 per square foot for each separate system.[1042]

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.[1043] However, in the case of lighting system retrofits, until 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

In general

The provision modifies the section 179D energy efficient commercial buildings deduction. Under the provision, the maximum energy efficient commercial buildings deduction is changed to an amount equal $0.50 per square foot increased (but not above $1.00) by $0.02 for each percentage point by which the total annual energy and power costs for the building are certified to be reduced by a percentage greater than 25 percent. This maximum amount represents the total 179D deduction that may be claimed for a building with respect to the current taxable year plus the three preceding taxable years. These amounts are adjusted for inflation after 2022.

The provision also eliminates the partial allowance deduction under section 179D.

Enhanced deduction where certain wage and apprenticeship requirements are met

If certain prevailing wage and apprenticeship requirements are met, the maximum energy efficient commercial buildings deduction is increased to an amount equal $2.50 per square foot increased (but not above $5.00) by $0.10 for each percentage point by which the total annual energy and power costs for the building are certified to be reduced by a percentage greater than 25 percent. In the case of any energy efficient commercial building property, energy

[1042] Adjusted for inflation; $0.63 for 2022. Rev. Proc. 2021–45, Int. Rev. Bul. 2021–48, p. 775, November 29, 2021.

[1043] IRS Notice 2008–40, *supra*, 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 interior lighting systems 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 interior lighting systems and 15 percent with respect to the heating, cooling, ventilation and hot water systems, 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.

efficient building retrofit property, or property installed pursuant to a qualified retrofit plan, such property qualifies for these increased credit amounts if the installation of such property begins prior to the date that is 60 days after the Secretary publishes guidance with respect to prevailing wages or apprenticeships. If the installation begins after such date, the prevailing wage and apprenticeship requirements must be satisfied to qualify for the increased credit amounts.

The prevailing wage and apprenticeship requirements follow a structure similar to that set forth in section 45(b)(7) and 45(b)(8), as modified by section 13101 of the Act. Generally, the prevailing wage rules require that the taxpayer ensure that any laborers and mechanics employed by the taxpayer or any contractor or subcontractor in the construction, alteration, or repair of a project are paid wages at a rate not less than the prevailing wage rates for construction, alteration, or repair of a similar character in the locality where the project is located as determined by the Secretary of Labor, in accordance with subchapter IV of chapter 31, of title 40, United States Code. The apprenticeship requirements require that, generally during the construction of a qualified facility, not less than a certain percentage of total labor hours of the construction, alteration, or repair work (including work performed by any contractor of subcontractor) on a project must be performed by qualified apprentices.[1044]

Modification of efficiency standards

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

The provision also modifies the standard used to calculate the energy efficiency of the reference building. Under the modified rule, the reference standard with respect to any property is the more recent of Standard 90.1–2007 or the most recent Reference Standard 90.1 published by the American Society of Heating, Refrigerating, and Air Conditioning Engineers and the Illuminating Engineering Society of North America ("ASHRAE/IESNA") for which the Department of Energy has issued a final determination and which has been affirmed by the Secretary, after consultation with the Secretary of Energy, not later than the date that is four years before such property is placed in service.

Allocation of deduction by certain tax-exempt entities

The provision clarifies and expands the list of entities that may allocate their section 179D deductions to the person primarily responsible for designing the qualifying property. Under the expanded definition, the following entities may make such an allocation: the United States, any State or political subdivision thereof, any possession of the United States, or any agency or instrumentality of any of the foregoing, an Indian tribal government or Alaska Native Corporation, and any organization exempt from tax.

[1044] See the explanation of section 13101 of the Act for a more detailed description of these requirements, including procedural rules and penalties.

Alternative deduction for energy efficient building retrofit property

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

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

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

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

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

The term "energy use intensity" means the annualized, measured site energy use intensity determined in accordance with such regulations and other guidance as the Secretary may provide and measured in British thermal units. The baseline energy use intensity means the energy use intensity certified by a qualified professional prior to the retrofit. The energy intensity comparison may be adjusted to take into account weather under such rules as the Secretary may provide.[1045]

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

Application to real estate investment trust earnings and profits

The provision modifies the calculation of earnings and profits[1046] to provide that, in the case of a corporation that is a real estate

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[1045] For purposes of calculating energy use intensity, the Environmental Protection Agency's Energy Star Portfolio Manager may be used to create a benchmark.

[1046] Sec. 312.

investment trust, any amount that is deductible under section 179D is allowed an earnings and profits adjustment in the year in which the property giving rise to such deduction is placed in service (or, in the case of energy efficient building retrofit property, the year in which the qualifying final certification is made).

Effective Date

The provision is generally effective for taxable years beginning after December 31, 2022. The rules regarding the alternative deduction for energy efficient building retrofit property are effective for property placed in service after December 31, 2022 (in taxable years ending after such date) if such property is placed in service pursuant to a qualified retrofit plan established after such date.

13. New energy efficient home credit (sec. 13304 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 is $2,000 in the case of a new home that meets the 50-percent standard. The credit is $1,000 for a new manufactured home that meets the 30-percent standard.

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 all other applicable criteria are met.

The basis of any property associated with the new energy efficient homes credit is reduced by the amount of any such credit allowed under section 45L.

The credit is part of the general business credit. The credit applies to homes that are purchased prior to January 1, 2022.

Explanation of Provision

The provision extends and modifies the section 45L credit for new energy efficient homes. The provision extends the credit for 11 years, through December 31, 2032. As described below, the provision replaces the existing credit amounts with a $2,500 credit for new homes that meet certain energy efficiency standards, but which are not certified zero-energy ready, and with a $5,000 credit for new homes that are certified as zero-energy ready homes. For multifamily dwelling units that are part of a building eligible to participate in the Energy Star Multi-family New Construction Program the credit is $500 for new units that meet certain energy efficiency standards, but which are not certified as zero-energy ready, and $1,000 for dwelling units that are certified as zero-energy ready.

For single-family homes, to be eligible for the $2,500 credit, a dwelling unit must meet the following standards, as applicable: (1) in the case of a dwelling unit acquired before January 1, 2025, the Energy Star Single-Family New Homes National Program Requirements 3.1, and (2) in the case of dwelling unit acquired after December 31, 2024, the Energy Star Single-Family New Homes National Program Requirements 3.2. In addition, such dwelling unit must meet the most recent Energy Star Single-Family New Homes Program Requirements applicable to the location of such dwelling unit (as in effect on the latter of January 1, 2023, or January 1 of two calendar years prior to the date such dwelling unit is acquired). In the case of a manufactured home, a dwelling unit is eligible for the $2,500 credit if it meets the most recent Energy Star Manufactured Home National program requirements as in effect on the latter of January 1, 2023, or January 1 of two calendar years prior to the date such dwelling unit is acquired.

A multifamily dwelling unit is eligible for the $500 credit if such unit (1) meets the most recent Energy Star Multifamily New Construction National Program Requirements (as in effect on the latter of January 1, 2023, or January 1 of three calendar years prior to the date such dwelling unit was acquired), and (2) meets the most recent Energy Star Multifamily New Construction Regional Program Requirements applicable to the location of such dwelling unit (as in effect on the latter of January 1, 2023, or January 1 of two calendar years prior to the date such dwelling unit is acquired).

For the $5,000 credit ($1,000 in the case of multifamily housing), a dwelling unit must be certified as a zero-energy ready home under the zero-energy ready home program of the Department of Energy as in effect on January 1, 2023 (or any successor program determined by the Secretary of the Treasury).

Enhanced credit amount for multifamily housing where certain wage requirements are met

If certain prevailing wage requirements are met, the credit for qualifying multifamily dwelling units is increased to $2,500 per unit for those that are not zero-energy ready and to $5,000 per unit for those that are zero-energy ready. In general, to satisfy the prevailing wage requirements, the taxpayer must ensure that any laborers and mechanics employed by the taxpayer or any contractor or subcontractor in the construction of such residence shall be paid wages at a rate not less than the prevailing wage rates for construction, alteration, or repair of a similar character in the locality as determined by the Secretary of Labor, in accordance with subchapter IV of chapter 31, of title 40, United States Code. Rules similar to the rules set forth in section 45(b)(7)(B) of the renewable electricity production credit apply regarding penalties for failing to satisfy the prevailing wage requirements.[1047]

Modification of basis adjustment rule

The provision modifies the basis reduction rule to clarify that the basis reduction is not taken into account for purposes of determining the amount of the section 42 low-income housing tax credit. For other purposes, the basis reduction rule is retained.

Effective Date

In general, the provision is effective for dwelling units acquired after December 31, 2022. The extension of the credit applies to dwelling units acquired after December 31, 2021.

14. Clean vehicle credit (sec. 13401 of the Act and sec. 30D of the Code)

Present Law

In general

Present law allows a credit for each new qualified plug-in electric drive motor vehicle placed in service (the "EV credit"). A "new qualified plug-in electric drive motor vehicle" is a motor vehicle the original use of which commences with the taxpayer, is acquired for use or lease and not for resale, is made by a manufacturer,[1048] has a gross vehicle weight rating of less than 14,000 pounds, is treated as a motor vehicle for purposes of title II of the Clean Air Act, and is propelled to a significant extent by an electric motor drawing electricity from a battery (1) with at least four kilowatt-hours of capacity and (2) which is capable of being recharged from an external source of electricity.[1049]

EV credit amount

The base amount of the plug-in electric drive motor vehicle credit is $2,500 and the credit is increased by $417 for each kilowatt-hour of battery capacity in excess of four kilowatt-hours. The maximum credit for a qualified vehicle is $7,500.[1050]

[1047] See the explanation of section 13101 of the Act for a more detailed description of these procedural rules and penalties.

[1048] Manufacturer is defined in regulations prescribed by the Administrator of the Environmental Protection Agency for purposes of the administration of title II of the Clean Air Act (42 U.S.C. 7521 *et seq.*). Sec. 30D(d)(3).

[1049] Sec. 30D(d)(1).

[1050] Sec. 30D(b).

Manufacturer limitation and phaseout

For each manufacturer, once a total of 200,000 new qualified plug-in electric drive motor vehicles have been sold for use in the United States after December 31, 2009, the credit phases out over four calendar quarters. The phaseout period begins in the second calendar quarter following the quarter during which the vehicle cap has been reached. Taxpayers may claim one-half of the otherwise allowable credit during the first two calendar quarters of the phaseout period and twenty-five percent of the otherwise allowable credit during the next two quarters. After this, no credit is available.[1051]

Other rules

In general, the credit is available to the vehicle owner, including the lessor of a vehicle subject to lease. If the qualified vehicle is used by certain tax-exempt organizations, governments, or foreign persons and is not subject to a lease, the seller of the vehicle may claim the credit so long as the seller clearly discloses to the user in a document the amount that is allowable as a credit.[1052]

A vehicle that is predominantly used outside the United States does not qualify for the credit.[1053] A vehicle must meet certain emissions and safety standards in order to qualify for the credit.[1054]

The basis of any qualified vehicle is reduced by the amount of the credit.[1055] The portion of the credit attributable to vehicles of a character subject to an allowance for depreciation is treated as part of the general business credit; the nonbusiness portion of the credit is allowable to the extent of the excess of the regular tax and the alternative minimum tax (reduced by certain other credits) for the taxable year.[1056]

Explanation of Provision

In general

The provision modifies the section 30D credit to apply to new clean vehicles (the “CV credit”).

A new clean vehicle is a motor vehicle the original use of which commences with the taxpayer, is acquired for use or lease and not for resale, is made by a qualified manufacturer,[1057] has a gross vehicle weight rating of less than 14,000 pounds, is treated as a motor vehicle for purposes of title II of the Clean Air Act, and is propelled to a significant extent by an electric motor drawing electricity from a battery (1) with at least seven kilowatt-hours of capacity and (2) which is capable of being recharged from an external source of electricity.[1058] The person who sells the vehicle must pro-

[1051] Sec. 30D(e).
[1052] Sec. 30D(f)(3).
[1053] Sec. 30D(f)(4).
[1054] Sec. 30D(f)(7).
[1055] Sec. 30D(f)(1).
[1056] Sec. 30D(c).
[1057] A qualified manufacturer must be a manufacturer as defined in regulations prescribed by the Administrator of the Environmental Protection Agency for purposes of the administration of title II of the Clean Air Act (42 U.S.C. 7521 *et seq.*) and must provide periodic written reports to the Secretary which include vehicle identification numbers. Sec. 30D(d)(3).
[1058] Sec. 30D(d)(1).

vide a report to the taxpayer and Secretary that includes the name and taxpayer identification number of the taxpayer, the vehicle identification number of the vehicle, the battery capacity of the vehicle, verification that original use of the vehicle commences with the taxpayer, and the maximum credit allowable to the taxpayer with respect to the vehicle.[1059] A new clean vehicle must have final assembly occur within North America.[1060]

New qualified fuel cell motor vehicles[1061] which have final assembly within North America and for which sellers provide a report, as described above, are new clean vehicles for purposes of the credit.[1062]

Vehicles with any applicable critical minerals in the battery that are extracted, processed, or recycled by a foreign entity of concern that are placed in service after December 31, 2024 or vehicles with any components contained in the battery of the vehicle that are manufactured or assembled by a foreign entity of concern that are placed in service after December 31, 2023 do not qualify for the credit.[1063]

Manufacturer limitation

The proposal eliminates the credit's limitation on the number of new qualified plug-in electric drive motor vehicles each manufacturer can sell.[1064]

CV credit amount

The base amount and additional battery capacity amount of the credit are replaced with two $3,750 amounts for satisfying certain criteria. One $3,750 amount is allowed if certain critical minerals requirements for the battery are met.[1065] Another $3,750 amount is allowed if certain battery components requirements are met.[1066] Therefore, under the provision, a new clean vehicle is eligible for a maximum credit of $7,500 if both critical minerals and battery components requirements are met.

Critical minerals requirement

To satisfy the critical minerals requirement, a new clean vehicle's battery (from which the electric motor draws electricity) must have a percentage of the value of applicable critical minerals[1067] that were (1) extracted or processed in the United States or a country that has a free trade agreement with the United States or (2) recycled in North America equal to or greater than an applicable percentage.[1068]

For this purpose the applicable percentage is 40 percent for a vehicle placed in service before January 1, 2024. The applicable percentage is 50 percent for a vehicle placed in service during calendar

[1059] Sec. 30D(d)(1)(H).
[1060] Sec. 30D(d)(1)(G).
[1061] As defined in section 30B(b)(3).
[1062] Sec. 30D(d)(6).
[1063] Sec. 30D(d)(7).
[1064] Sec. 13401(d) of the Act.
[1065] Sec. 30D(b)(2).
[1066] Sec. 30D(b)(3).
[1067] Critical minerals as defined in sec. 45X(c)(6).
[1068] Sec. 30D(e)(1)(A).

year 2024, 60 percent for 2025, 70 percent for 2026, and 80 percent after 2026.[1069]

Battery components requirement

To satisfy the battery components requirement, a new clean vehicle's battery (from which the electric motor draws electricity) must have a percentage of the value of components that were manufactured or assembled in North America equal to or greater than an applicable percentage.[1070]

For this purpose the applicable percentage is 50 percent for a vehicle placed in service before January 1, 2024. The applicable percentage is 60 percent for a vehicle placed in service during calendar year 2024 or 2025, 70 percent for 2026, 80 percent for 2027, 90 percent for 2028, and 100 percent after 2028.[1071]

Regulations and guidance

The Secretary is directed to issue regulations or other guidance to carry out the critical mineral and battery component requirements and must issue proposed guidance no later than December 31, 2022.[1072]

Vehicle price and AGI limitations

The provision requires that the manufacturer's suggested retail price ("MSRP") of a new clean vehicle purchased by the taxpayer not exceed certain limitations. That is, the credit amount is $0 if the MSRP for the vehicle exceeds the applicable limitation. This limitation is $80,000 in the case of a van, sport utility vehicle, or pickup truck, and $55,000 in the case of any other vehicle. The Secretary is directed to release regulations or guidance to characterize vehicles into the appropriate category by applying rules similar to those employed by the Environmental Protection Agency ("EPA") and the Department of Energy to determine vehicle class and size.[1073]

Additionally, no credit is allowed if the taxpayer's income exceeds $300,000 in the case of a joint return or surviving spouse, $225,000 in the case of a head of household, or $150,000 in the case of any other taxpayer.[1074] For purposes of this limitation, the taxpayer's income is the lesser of modified AGI of the current taxable year or modified AGI of the preceding taxable year.[1075]

Transfer of credit

A taxpayer who has purchased or leased a vehicle may elect to transfer the credit to an eligible entity, subject to regulations or guidance the Secretary deems necessary. The eligible entity is then treated as the taxpayer with respect to the credit.[1076] The Secretary is directed to establish a program to provide advance pay-

[1069] Sec. 30D(e)(1)(B).
[1070] Sec. 30D(e)(2)(A). This requirement is intended to incentivize the manufacturing or assembly of high-value battery components, such as battery cells, in North America.
[1071] Sec. 30D(e)(2)(B).
[1072] Sec. 30D(e)(3).
[1073] Sec. 30D(f)(11).
[1074] Sec. 30D(f)(10).
[1075] Modified AGI is AGI increased by any amount excluded from gross income under section 911, 931, or 933. Sec. 30D(f)(10)(C).
[1076] Sec. 30D(g)(1).

ments of these credit amounts to eligible entities.[1077] An election to transfer the credit must be made on or before the date of vehicle purchase.[1078]

An eligible entity is a dealer[1079] which meets the following requirements: First, the dealer must be registered with the Secretary. Second, prior to the election of transfer, the dealer must disclose information to the buyer on the MSRP price of the vehicle, value of the credit or other incentives available, and the amount provided by the dealer as a condition of an election to transfer. Third, the dealer must pay the taxpayer for the amount of the credit allowable. Finally, the dealer must ensure that the availability or use of any other available manufacturer or dealer incentive does not limit the ability of the taxpayer to make an election and that the election will not limit the value or use of any such incentive.[1080] The Secretary may revoke the registration of dealers that fail to comply with these requirements.[1081]

The payment made by dealers to buyers in connection with a credit transfer election is not includable in the gross income of the taxpayer and is not deductible to the dealer.[1082]

The tax liability of a taxpayer that does not meet the AGI requirements for the credit, that elects to transfer a credit, and that receives a payment in connection with such credit transfer, is increased by the amount of such payment.[1083]

Transition rule

Taxpayers who entered into written binding contracts to purchase new qualified plug-in electric drive motor vehicles[1084] after December 31, 2021 and before the date of enactment of the Act (August 16, 2022), that place a vehicle in service on or after the date of enactment may treat such vehicle as being placed in service on the day before the date of enactment.[1085] That is, such vehicles will qualify under rules of section 30D prior to the amendments made by this Act.

Other rules

Only one credit is allowed for each vehicle and a taxpayer must include the vehicle identification number of the vehicle on a tax return to claim the credit.[1086]

Expiration

No credit is allowed for any vehicle placed in service after December 31, 2032.[1087]

[1077] Sec. 30D(g)(7).
[1078] Sec. 30D(g)(3).
[1079] A dealer is a person licensed by a State, territory of the United States, Indian tribal government, or Alaska Native Corporation to engage in the sale of vehicles. Sec. 30D(g)(8).
[1080] Sec 30D(g)(2).
[1081] Sec. 30D(g)(4).
[1082] Sec. 30D(g)(5).
[1083] Sec. 30D(g)(10).
[1084] A new qualified plug-in electric drive motor vehicle is defined in section 30D(d)(1) as in effect before the date of enactment of the Act (August 16, 2022).
[1085] Sec. 13401(l) of the Act.
[1086] Sec. 30D(f)(8) and (9).
[1087] Sec. 30D(h).

Effective Date

The requirement that final assembly occurs in North America is effective for vehicles sold after the date of enactment (August 16, 2022).

The changes to the credit amount and related critical mineral and battery component requirements apply to vehicles placed in service after the date proposed guidance is issued (no later than December 31, 2022).

The changes relating to the transfer of credit to dealers are effective for vehicles placed in service after December 31, 2023.

All other changes apply to vehicles placed in service after December 31, 2022.

15. Credit for previously owned clean vehicles (sec. 13402 of the Act and new sec. 25E of the Code)

Present Law

No credit exists specifically for previously owned electric vehicles. For a description of the credit for new qualified plug-in electric drive motor vehicles see the description of present law for section 13401 of the Act.

Explanation of Provision

In general

The provision creates a credit for previously owned clean vehicles (the "previously owned CV credit") placed in service by a qualified buyer. A "previously owned clean vehicle" is a motor vehicle with a model year at least two years earlier than the calendar year in which the taxpayer acquires the vehicle, the original use of which commences with a person other than the taxpayer, which has a gross vehicle weight rating of less than 14,000 pounds,[1088] and which is acquired by the taxpayer in a qualified sale.

A qualified sale is a sale by a dealer[1089] that is the first transfer since the date of enactment of this section to a qualified buyer other than the person with whom the original use of such vehicle commenced.[1090] A qualified sale does not include a transfer to a qualified buyer made after the vehicle has been used and owned by a person other than the person with whom the original use of such vehicle commenced, even if such use and ownership was not by a qualified buyer.[1091]

Additionally, a previously owned clean vehicle must be an electric vehicle or a fuel-cell vehicle that satisfies certain criteria. Specifically, a previously-owned clean vehicle must also either (1) be propelled to a significant extent by an electric motor drawing electricity from a battery (a) with at least seven kilowatt-hours of capacity and (b) which is capable of being recharged from an external source of electricity, made by a qualified manufacturer, treated as a motor vehicle for purposes of title II of the Clean Air Act, and

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[1088] Sec. 25E(c)(1).

[1089] A dealer is a person licensed by a State, territory of the United States, Indian tribal government, or Alaska Native Corporation to engage in the sale of vehicles. Sec. 30D(g)(8).

[1090] Sec. 25E(c)(2).

[1091] A technical correction may be needed to reflect this intent.

with respect to which the person who sells the vehicle provide a report to the taxpayer and Secretary that includes the name and taxpayer identification number of the taxpayer, the vehicle identification number of the vehicle, the battery capacity of the vehicle, and the maximum credit allowable to the taxpayer with respect to the vehicle,[1092] or (2) be propelled by power derived from one or more cells which convert chemical energy directly into electricity by combining oxygen with hydrogen fuel stored on board the vehicle and which has received certain emissions-standard certification.[1093]

A qualified buyer is an individual who purchases a vehicle for use and not resale, who cannot be claimed as a dependent, and during the three-year period prior to such purchase, has not made any purchases for which a previously owned CV credit was claimed.

Previously owned CV credit amount

The amount of the credit is the lesser of (1) $4,000 or (2) 30 percent of the sale price of the vehicle.[1094]

The provision requires that the sale price of a previously owned clean vehicle purchased by the taxpayer not exceed $25,000.[1095] That is, the credit amount is $0 if the sale price for the vehicle exceeds this amount.

Additionally, no credit is allowed if the taxpayer's income exceeds $150,000 in the case of a joint return or surviving spouse, $112,500 in the case of a head of household, or $75,000 in the case of any other taxpayer.[1096] For purposes of this limitation, the taxpayer's income is the lesser of modified AGI of the current taxable year or modified AGI of the preceding taxable year.[1097]

Other rules

In general, the credit is available to the vehicle owner, including the lessor of a vehicle subject to lease. A vehicle must be used predominantly in the United States to qualify for the credit and the basis of any qualified vehicle is reduced by the amount of the credit.[1098] A vehicle must meet certain emissions and safety standards in order to qualify for the credit.[1099]

Only one credit is allowed for each vehicle and a taxpayer must include the vehicle identification number of the vehicle on a tax return to claim the credit.[1100]

Transfer of credit

A taxpayer may elect to transfer the credit to an eligible entity under rules similar to those for the transfer of the clean vehicle credit.[1101] These rules are explained in the description of section 13401 of the Act.

[1092] Sec. 25E(c)(1)(D)(i).
[1093] Sec. 25E(c)(1)(D)(ii). Fuel cell vehicles must satisfy the requirements of section 30B(b)(3)(A) and (B).
[1094] Sec. 25E(a).
[1095] Sec. 25E(c)(2)(B).
[1096] Sec. 25E(b).
[1097] Modified AGI is AGI increased by any amount excluded from gross income under section 911, 931, or 933. Sec. 25E(b)(3).
[1098] Secs. 25E(e) and 30D(f)(1) and (4).
[1099] Secs. 25E(e) and 30D(f)(7).
[1100] Sec. 25E(d).
[1101] Sec. 25E(f).

Expiration

No credit is allowed for any vehicle placed in service after December 31, 2032.[1102]

Effective Date

The provision applies to vehicles acquired after December 31, 2022.

The changes relating to the transfer of credit to dealers are effective for vehicles placed in service after December 31, 2023.

16. Qualified commercial clean vehicles (sec. 13403 of the Act and new sec. 45W of the Code)

Present Law

No credit exists specifically for electric vehicles with a gross vehicle weight rating of 14,000 pounds or more. The present-law credit for new qualified plug-in electric drive motor vehicles (with a gross vehicle weight rating of less than 14,000 pounds) is described in the section describing section 13401 of the Act.

Explanation of Provision

The provision creates a credit for qualified commercial clean vehicles originally[1103] placed in service by a taxpayer. A qualified commercial clean vehicle is a vehicle made by a qualified manufacturer,[1104] acquired for use or lease by the taxpayer and not for resale, that either (1) is manufactured primarily for use on public streets, roads, and highways,[1105] or (2) is mobile machinery,[1106] and of a character subject to the allowance of depreciation.[1107] A qualified commercial clean vehicle must also meet certain emissions standards.[1108]

Additionally, a qualified commercial clean vehicle must be an electric vehicle or a fuel-cell vehicle that satisfies certain criteria. Specifically, a qualified commercial clean vehicle must also either (1) be propelled to a significant extent by an electric motor drawing electricity from a battery (a) with at least 15 kilowatt-hours of capacity (or seven kilowatt-hours for a vehicle with a gross vehicle weight rating of less than 14,000 pounds) and (b) which is capable of being recharged from an external source of electricity[1109] or (2) be propelled by power derived from one or more cells which convert chemical energy directly into electricity by combining oxygen with hydrogen fuel stored on board the vehicle and which has received certain emissions-standard certification.[1110]

[1102] Sec. 25E(g).

[1103] A technical correction may be necessary to reflect this intent.

[1104] Qualified manufacturer has the same meaning as in section 30D. For more detail see the section describing section 13401 of the Act, the clean vehicle credit.

[1105] Vehicles operated exclusively on a rail or rails are excluded.

[1106] This is mobile machinery as defined in section 4053(8) and includes vehicles not designed to perform a function of transporting a load over public highways.

[1107] Sec. 45W(c).

[1108] Sec. 45W(d)(1).

[1109] Sec. 45W(c)(3)(A).

[1110] Sec. 45W(c)(3)(B). Fuel cell vehicles must satisfy the requirements of sections 30B(b)(3)(A) and (B).

A taxpayer must include the vehicle identification number of the vehicle on a tax return to claim the credit.[1111] Only one credit is allowed per vehicle, determined by such vehicle identification number.[1112]

Qualified commercial CV credit amount

A qualified commercial clean vehicle qualifies for a credit equal to the lesser of (1) 15 percent of the basis of such vehicle (30 percent if the vehicle is not powered by a gasoline or diesel internal combustion engine) or (2) the incremental cost of the vehicle.[1113] The credit is limited to $40,000 ($7,500 for a vehicle with a gross vehicle weight rating of less than 14,000 pounds).[1114]

The incremental cost of the vehicle is the amount by which the purchase price of the vehicle exceeds the purchase price of a comparable vehicle (one powered solely by gasoline or a diesel internal combustion engine which is comparable in size and use).[1115]

Other rules

The basis of any qualified vehicle is reduced by the amount of the credit.[1116] No credit is allowed for any vehicle for which a new clean vehicle credit is allowed.[1117]

The requirement that a qualified clean commercial vehicle is of a character subject to the allowance of depreciation does not apply to vehicles that are not subject to a lease and which are placed in service by certain tax-exempt entities.[1118]

A vehicle must be used predominantly in the United States to qualify for the credit.[1119]

Regulations and guidance

The Secretary is directed to issue regulations or other guidance relating to determining the incremental cost of any qualified commercial clean vehicle in addition those necessary to carry out this provision.[1120]

Expiration

No credit is allowed for any vehicle placed in service after December 31, 2032.[1121]

Effective Date

The provision applies to vehicles acquired after December 31, 2022.

[1111] Sec. 45W(e).
[1112] Secs. 45W(d)(1) and 30D(f)(8).
[1113] Sec. 45W(b)(1).
[1114] Sec. 45W(b)(4).
[1115] Secs. 45W(b)(2) and (3).
[1116] Secs. 45W(d)(1) and 30D(f)(1).
[1117] Sec. 45W(d)(3).
[1118] Sec. 45W(d)(2).
[1119] Secs. 45W(d)(1) and 30D(f)(4).
[1120] Sec. 45W(f).
[1121] Sec. 45W(g).

17. Alternative fuel refueling property credit (sec. 13404 of the Act and sec. 30C of the Code)

Present Law

In general

Present law allows a credit of 30 percent of the cost of any qualified alternative fuel vehicle refueling property placed in service. Qualified alternative fuel refueling property is property (not including a building and its structural components) of a character subject to the allowance of depreciation (unless installed on property used as the principal residence of the taxpayer) the original use of which begins with the taxpayer. Additionally, qualified alternative fuel refueling property is property (1) for the storage or dispensing of a clean-burning fuel into the fuel tank of a motor vehicle propelled by such fuel but only if the storage or dispensing of fuel is at the point where such fuel is delivered into the fuel tank of the motor vehicle or (2) for the recharging of motor vehicles propelled by electricity, but only if the property is located at the point where the motor vehicles are recharged.[1122]

For this purpose a clean-burning fuel is (1) any fuel which is at least 85 percent by volume of one or more of ethanol, natural gas, compressed natural gas, liquified natural gas, liquified petroleum gas, or hydrogen, (2) any mixture consisting of two or more of biodiesel, diesel fuel, or kerosene and with at least 20 percent volume of biodiesel determined without regard to any kerosene in such mixture, or (3) electricity.[1123]

The credit amount per location is limited to $30,000 in the case of property of a character subject to an allowance for depreciation and $1,000 in any other case.[1124]

Other rules

The basis of any qualified alternative fuel refueling property is reduced by the amount of the credit.[1125] The portion of the credit attributable to property of a character subject to an allowance for depreciation is treated as part of the general business credit; the nonbusiness portion of the credit is allowable to the extent of the excess of the regular tax and the alternative minimum tax (reduced by certain other credits) for the taxable year.[1126]

For qualified property used by certain tax-exempt organizations, governments, or foreign persons and that is not subject to a lease, the seller of the property may claim the credit so long as the seller clearly discloses to the user in a document the amount that is allowable as a credit.[1127] Property that is predominantly used outside the United States does not qualify for the credit.[1128]

[1122] Secs. 30(c)(1) and 179A(d), as in effect immediately before repeal.
[1123] Sec. 30C(c)(2).
[1124] Sec. 30C(b).
[1125] Sec. 30C(e)(1).
[1126] Sec. 30C(d).
[1127] Sec. 30C(e)(2).
[1128] Sec. 30C(e)(3).

Termination

The credit does not apply to property placed in service after December 31, 2021.

Explanation of Provision

In general

The provision modifies and extends, through 2032, the credit for qualified alternative fuel refueling property. First, the present-law version of the credit is extended to include property placed in service after December 31, 2021. For property placed in service after December 31, 2022, all the following changes described below apply.

For depreciable property, the credit is extended at a reduced rate equal to 20 percent of the rate currently available under present law. Thus, for depreciable property placed in service in calendar years 2022 through 2031, the credit rate is six percent. The credit rate remains unchanged at 30 percent for nondepreciable property. The provision also modifies the credit limitation for certain fuel refueling property.

Modified limitation and location requirements

The provision modifies the limitation on the credit so that it no longer applies per location, instead it applies per item. The new per item limitation is $100,000 for depreciable property and $1,000 in any other case.

Additionally, qualified alternative fuel vehicle refueling property must not be located in an urban area or must be located in a low-income community.[1129] An urban area is a census tract which has been designated as an urban area by the Secretary of Commerce, according to the most recent decennial census.[1130] A low-income community is a census tract with either (1)a poverty rate of at least 20 percent or (2) median family income which does not exceed 80 percent of the greater of metropolitan area median family income or statewide median family income (for a nonmetropolitan census tract, generally does not exceed 80 percent of statewide median family income).[1131]

Modification of qualified alternative fuel vehicle refueling property definition

The provision modifies the definition of qualified alternative fuel vehicle refueling property to include property that can charge the battery of a motor vehicle propelled by electricity and allows discharging electricity from such battery to an electric load external to the motor vehicle.[1132] In addition, qualified alternative fuel vehicle refueling property is modified to include depreciable property designed to charge two- and three-wheeled motor vehicles manufac-

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[1129] Sec. 30C(c)(3).

[1130] Sec. 30C(c)(3)(B)(ii).

[1131] Sec. 30C(c)(3)(B)(i). Low-income community has the same meaning as in section 45D(e).

[1132] Sec. 30C(c)(2).

tured for primary use on public streets, roads, or highways that are propelled by electricity.[1133]

Enhanced credit rate where certain prevailing wage and apprenticeship requirements are met

The credit rate is increased to 30 percent for any depreciable qualified alternative fuel refueling property that is part of a qualified alternative fuel vehicle refueling project.[1134] A qualified alternative fuel vehicle refueling project is a project (1) that meets certain prevailing wage and apprenticeship requirements or (2) for which the construction begins prior to the date that is 60 days after the Secretary publishes guidance on such requirements.[1135] The Secretary is directed to issue regulations or other guidance deemed necessary to administer these requirements.[1136]

The prevailing wage requirements are that the taxpayer must ensure that any laborers and mechanics employed by the taxpayer or any contractors or subcontractors in the construction of any qualified alternative fuel vehicle refueling property which is part of a project are paid wages at a rate not less than the prevailing wage rates for construction, alteration, or repair of a similar character in the locality where the project is located as determined by the Secretary of Labor, in accordance with subchapter IV of chapter 31, of title 40, United States Code.[1137] Additionally, correction and penalty procedures for failure to satisfy wage requirements, similar to the rules in section 45(b)(7)(B), apply.[1138]

The apprenticeship requirements are that generally during the construction of a qualified facility not less than a certain percentage of total labor hours of the construction, alteration, or repair work (including work performed by any contractor of subcontractor) on a project must be performed by qualified apprentices, similar to the rules of section 45(b)(8).[1139]

Alternative fuel refueling property credit termination

No credit is allowed for any property placed in service after December 31, 2032.

Effective Date

Generally, the provision is effective for property placed in service after December 31, 2022.

The change to the termination date of the credit applies to property placed in service after December 31, 2021.

[1133] Sec. 30C(f).
[1134] Sec. 30C(g)(1)(A). A project consists of one or more properties.
[1135] Sec. 30C(g)(1)(C).
[1136] Sec. 30C(g)(4).
[1137] Sec. 30C(g)(2)(A).
[1138] Sec. 30C(g)(2)(B). For more detail, see the description of section 13101 of the Act explaining such correction and penalties related to failure to satisfy wage requirements.
[1139] Sec. 30C(g)(3). For more detail, see the description of section 13101 of the Act explaining apprenticeship requirements.

18. Extension of the advanced energy project credit (sec. 13501 of the Act and sec. 48C of the Code)

Present Law

In general

Present law provides a 30-percent credit for investment in qualified property used in a qualifying advanced energy project. Credits are allocated by the Secretary and are capped at $2.3 billion. All credits have been fully allocated.

Qualifying advanced energy projects

A qualifying advanced energy project is a project that re-equips, expands, or establishes a manufacturing facility for the production of: (1) property designed to be used to produce energy from the sun, wind, or geothermal deposits, or other renewable resources; (2) fuel cells, microturbines, or an energy storage system for use with electric or hybrid-electric motor vehicles; (3) electric grids to support the transmission of intermittent sources of renewable energy, including storage of such energy; (4) property designed to capture and sequester carbon dioxide emissions; (5) property designed to refine or blend renewable fuels (but not fossil fuels [1140]) or to produce energy conservation technologies (including energy-conserving lighting technologies and smart grid technologies); (6) new qualified plug-in electric drive motor vehicles or components which are designed specifically for use with such vehicles, including electric motors, generators, and power control units; or (7) other advanced energy property designed to reduce greenhouse gas emissions as may be determined by the Secretary.[1141]

Qualified property must be depreciable (or amortizable) property used in a qualifying advanced energy project. Only tangible personal property and other tangible property (not including a building or its structural components) are credit eligible. The basis of qualified property must be reduced by the amount of credit received.[1142]

Certification

Credits are available only for projects certified by the Secretary, in consultation with the Secretary of Energy. The Secretary has established a certification program for this purpose and has allocated $2.3 billion in credits. No credit is allowed for any qualified investment that is allowed a credit under sections 48, 48A, or 48B.[1143]

In selecting projects, the Secretary may consider only those projects where there is a reasonable expectation of commercial viability. In addition, the Secretary must consider other selection criteria, including which projects (1) will provide the greatest domestic job creation, (2) will provide the greatest net impact in avoiding or reducing air pollutants or anthropogenic emissions of greenhouse gases, (3) have the greatest potential for technological innovation and commercial deployment, (4) have the lowest levelized

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[1140] Sec. 48C(c)(1)(B).
[1141] Sec. 48C(c)(1)(A).
[1142] Sec. 50(c).
[1143] Sec. 48C(e).

cost of generated or stored energy, or of measured reduction in energy consumption or greenhouse gas emission, and (5) have the shortest project time from certification to completion.[1144]

Each project application must be submitted during the two-year period beginning on the date the certification program was established. An applicant for certification has one year from the date the Secretary accepts the application to provide the Secretary with evidence that the requirements for certification have been met. Upon certification, the applicant has three years from the date of issuance of the certification to place the project in service.[1145] The Secretary has redistributed credits that were not used in earlier application rounds and all credits have been fully allocated.

Explanation of Provision

In general

The provision modifies the 30-percent credit for investment in qualified property used in a qualifying advanced energy project and provides an additional $10 billion to be allocated as credits.

Qualifying advanced energy projects

The definition of a qualifying advanced energy project is modified by the provision. Under the provision, a qualifying advanced energy project is a project, certified by the Secretary, that re-equips, expands, or establishes an industrial or manufacturing facility for the production or recycling of: (1) property designed to be used to produce energy from the sun, water, geothermal deposits, or other renewable resources; (2) fuel cells, microturbines, or energy storage systems and components; (3) electric grid modernization equipment or components; (4) property designed to remove, use, or sequester carbon oxide emissions; (5) equipment designed to refine, electrolyze, or blend any fuel, chemical, or product which is (a) renewable or (b) low-carbon and low-emission; (6) property designed to produce energy conservation technologies (including for residential, commercial, and industrial applications); (7) electric or fuel cell vehicles, (a) technologies, components, or materials for such vehicles, and (b) associated charging or refueling infrastructure; (8) hybrid vehicles with a gross vehicle weight rating of not less than 14,000 pounds as well as technologies, components, or materials for such vehicles; or (9) other advanced energy property designed to reduce greenhouse gas emissions as may be determined by the Secretary.[1146]

Additionally, a qualifying advanced energy project includes a project, certified by the Secretary, that re-equips an industrial or manufacturing facility with equipment designed to reduce greenhouse gas emissions by at least 20 percent by installing: (1) low- or zero-carbon process heat systems; (2) carbon capture, transport, utilization and storage systems; (3) energy efficiency and reduction in waste from industrial processes; or (4) any other industrial tech-

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[1144] Sec. 48C(d)(3).
[1145] Sec. 48C(d)(2).
[1146] Sec. 48C(c)(1)(A)(i).

nology designed to reduce greenhouse gas emissions as determined by the Secretary.[1147]

Finally, a qualifying advanced energy project also includes a project, certified by the Secretary, that re-equips, expands, or establishes an industrial facility for the processing, refining, or recycling of critical materials.[1148]

A qualifying advanced energy project does not include any portion of a project that produces property used in refining or blending of transportation fuel (other than renewable fuel).[1149]

Certification

Credits are available only for projects certified by the Secretary. The Secretary must establish a certification program no later than 180 days after August 14, 2022, the date of enactment of this provision.[1150] The provision provides an additional allocation of $10 billion in credits, of which not more than $6 billion may be allocated to projects that are not in a census tract that is (1) an energy community (as described in section 45(b)(11)(B)(iii)) and (2) prior to August, 16, 2022, the date of enactment of this provision, had no projects that received a certification or allocation of credits under section 48C(d).[1151] The selection criteria for projects is not modified by the provision. No credit is allowed for any qualified investment that was allowed a credit under sections 45Q, 45V, 48, 48A, 48B, or 48E.[1152]

Each project application must be submitted according to the timeline established by the Secretary. An applicant for certification has two years from the date the Secretary accepts the application to provide the Secretary with evidence that the requirements for certification have been met. Upon certification, the applicant has two years from the date of issuance of the certification to place the project in service. An applicant's certification is invalid if the project is not placed in service in the required time period or if the Secretary determines the project has been placed in a location materially different than the location specified in the application for such project. For each certification, the Secretary must publicly disclose the credit amount allocated to and the identity of each applicant.[1153]

Credit rate and wage and apprenticeship requirements

The base credit rate is reduced to 6 percent for investment in qualified property used in a qualifying advanced energy project.[1154] The credit rate is increased to 30 percent if certain prevailing wage and apprenticeship requirements are met.[1155]

The prevailing wage requirements are that the taxpayer must ensure that any laborers and mechanics employed by the taxpayer or any contractors or subcontractors in the re-equipping, expansion,

[1147] Sec. 48C(c)(1)(A)(ii).
[1148] Sec. 48C(c)(1)(A)(iii). Critical materials have the same meaning as in 30 U.S.C. sec. 1606(a).
[1149] Sec. 48C(c)(1)(B).
[1150] Sec. 48C(e)(1).
[1151] Sec. 48C(e)(2).
[1152] Sec. 48C(f).
[1153] Sec. 48(e)(7).
[1154] Sec. 48(c)(4)(A).
[1155] Sec. 48(c)(4)(B).

or establishment of a manufacturing facility are paid wages at a rate not less than the prevailing wage rates for construction, alteration, or repair of a similar character in the locality where the project is located as determined by the Secretary of Labor, in accordance with subchapter IV of chapter 31, of title 40, United States Code.[1156] Additionally, correction and penalty procedures for failure to satisfy wage requirements, similar to the rules in section 45(b)(7)(B), apply.[1157]

The apprenticeship requirements are that generally during the construction of a qualified facility not less than a certain percentage of total labor hours of the construction, alteration, or repair work (including work performed by any contractor of subcontractor) on a project must be performed by qualified apprentices, similar to the rules of section 45(b)(8).[1158]

Effective Date

The provision is effective on January 1, 2023.

19. Advanced manufacturing production credit (sec. 13502 of the Act and new sec. 45X of the Code)

Present Law

An allocated 30-percent credit for investment in qualified property used in a qualifying advanced energy project is allowed under section 48C. Qualifying advanced energy projects include projects that re-equip, expand, or establish a manufacturing facility for the production of, among other items, property designed to produce energy from the sun, wind, or other renewable resources and components designed specifically for use in new qualified plug-in electric drive motor vehicles.[1159] The credits have been fully allocated under present law.

Additionally, a 25-percent investment credit for qualified investments in an advanced manufacturing facility is allowed under section 48D. An advanced manufacturing facility is a facility the primary purpose of which is the manufacturing of semiconductors or semiconductor manufacturing equipment.[1160]

Finally, a production credit for electricity produced from certain renewable resources is allowed under section 45. This credit provides various cents per kilowatt-hour amounts for electricity produced from wind, biomass, geothermal, municipal solid waste, and qualified hydropower for a period of 10 years after a facility has been placed in service.[1161]

No production credit is specifically designed under present law to encourage the production of eligible components in the United States.

[1156] Sec. 48C(e)(5)(A).

[1157] Sec. 48C(e)(5)(B). For more detail, see the description of section 13101 of the Act which explains such correction and penalties related to failure to satisfy wage requirements.

[1158] Sec. 48C(e)(6). For more detail, see the description of section 13101 of the Act which explains such apprenticeship requirements.

[1159] For more detail, see the description of section 13501 of the Act which provides a summary of current section 48C.

[1160] For more detail, see the description of section 107 of Pub. L. No. 117–167 which provides a summary of current section 48D.

[1161] For more detail, see the description of section 13101 of the Act which provides a summary of current section 45.

Explanation of Provision

In general

The provision provides credits for eligible components that are produced by the taxpayer and sold to an unrelated person during the taxable year.[1162] Eligible components include any solar energy component (solar modules, photovoltaic cells, photovoltaic wafers, solar grade polysilicon, torque tubes or structural fasteners, and polymeric backsheets), any wind energy component (blades, nacelles, towers, offshore wind foundations, and related offshore wind vessels), certain inverters (central, commercial, distributed wind, microinverter, residential, and utility), any qualifying battery component (electrode active materials, battery cells, and battery modules), and any applicable critical mineral.[1163] The production and sale of eligible components must be in the trade of business of the taxpayer.[1164]

An eligible component that is integrated, incorporated, or assembled into another eligible component which is then sold to an unrelated person is treated having been sold to an unrelated person for purposes of this credit.[1165]

A taxpayer can sell components to a related person and still qualify for the credit if the related person sells such components to an unrelated person or the taxpayer makes an election and meets certain requirements the Secretary deems necessary to prevent duplication, fraud, or any improper or excessive amount of credit.[1166] Likewise, a vertically integrated manufacturer that produces eligible components and integrates, incorporates, or assembles them as part of a product that is sold to an unrelated person may qualify for the credit.

Credit amounts

Table 3 shows the credit amount for certain eligible components.[1167]

TABLE 3.—CREDIT AMOUNT FOR CERTAIN ELIGIBLE COMPONENTS

Eligible Component	Credit Amount
Thin film photovoltaic cell or crystalline photovoltaic cell	4 cents times the capacity of the cell (per direct current watt basis)
Photovoltaic wafer	$12 per square meter
Solar grade polysilicon	$3 per kilogram
Polymeric backsheet	40 cents per square meter
Solar module	7 cents times the capacity of the module (per direct current watt basis)
Torque tube	87 cents per kilogram
Structural fastener	$2.28 per kilogram
Central inverter	25 cents times the capacity of the inverter (per alternating current watt basis)

[1162] Sec. 45X(a)(1).
[1163] Sec. 45X(c)(1)(A). Any property produced by a facility that has received a credit under section 48C after the date of enactment (August 16, 2022) is not an eligible component. Sec. 45X(c)(1)(B). Any property produced by a facility that is co-located with a facility that has received a credit under section 48C may be an eligible component if such facilities are separable.
[1164] Sec. 45X(a)(2).
[1165] Sec. 45X(d)(4).
[1166] Sec. 45X(a)(3).
[1167] Sec. 45X(b)(1).

TABLE 3.—CREDIT AMOUNT FOR CERTAIN ELIGIBLE COMPONENTS —Continued

Eligible Component	Credit Amount
Utility inverter	1.5 cents times the capacity of the inverter (per alternating current watt basis)
Commercial inverter	2 cents times the capacity of the inverter (per alternating current watt basis)
Residential inverter	6.5 cents times the capacity of the inverter (per alternating current watt basis)
Microinverter or distributed wind inverter	11 cents times the capacity of the inverter (per alternating current watt basis)

The credit for a related offshore wind vessel is 10 percent of the sales price of the vessel.[1168] Table 4 presents the rates for other wind energy components. For this purpose, total rated capacity relates to the completed wind turbine for which the component is designed.[1169]

TABLE 4.—CREDIT AMOUNT FOR CERTAIN WIND ENERGY COMPONENTS [1170]

Wind Energy Component	Credit Amount
Blade	2 cents times the total rated capacity (per watt basis)
Nacelle	5 cents times the total rated capacity (per watt basis)
Tower	3 cents times the total rated capacity (per watt basis)
Offshore wind foundation using a fixed platform	2 cents times the total rated capacity (per watt basis)
Offshore wind foundation using a floating platform	4 cents times the total rated capacity (per watt basis)

[1170] Sec. 45X(b)(1)(F)(ii) and (b)(2)(A).

The credit for electrode active minerals and applicable critical minerals is 10 percent of the costs incurred by the taxpayer with respect to production of the minerals.[1171]

The credit for a battery cell is $35 times the capacity of the cell (kilowatt-hour basis). The credit for a battery module is $10 ($45 if the battery module does not use battery cells) times the capacity of the battery module (kilowatt-hour basis).[1172] For both battery cells and modules, the capacity taken into account for the credit cannot exceed a ratio of such capacity to maximum discharge of 100 to 1.[1173]

Applicable critical minerals

Generally, applicable critical minerals are certain minerals converted to other forms or purified to a certain minimum purity by mass.[1174] These minerals are listed in table 5.

TABLE 5.—CERTAIN MINERALS [1175]

Aluminum	Antimony	Barite	Beryllium	Cerium
Cesium	Chromium	Cobalt	Dysprosium	Europium
Fluorspar	Gadolinium	Germanium	Graphite	Indium
Lithium	Manganese	Neodymium	Nickel	Niobium
Tellurium	Tin	Tungsten	Vanadium	Yttrium

[1168] Sec. 45X(b)(1)(F)(i).
[1169] Sec. 45X(b)(1)(F)(ii)(II).
[1171] Sec. 45X(b)(1)(J) and (M).
[1172] Sec. 45X(b)(1)(K) and (L).
[1173] Sec. 45X(b)(4).
[1174] Sec. 45X(c)(6).
[1175] *Ibid.*

TABLE 5.—CERTAIN MINERALS [1175]—Continued

Arsenic	Bismuth	Erbium	Gallium	Hafnium
Holmium	Iridium	Lanthanum	Lutetium	Magnesium
Palladium	Platinum	Praseodymium	Rhodium	Rubidium
Ruthenium	Samarium	Scandium	Tantalum	Terbium
Thulium	Titanium	Ytterbium	Zinc	Zirconium

Credit phaseout

The credit begins to phase out in 2030.[1176] Specifically, for eligible components sold during calendar years 2030, 2031, and 2032, the otherwise allowable amount of credit is reduced by 25 percent, 50 percent, and 75 percent, respectively. This phasedown does not apply to applicable critical minerals.[1177]

The credit is fully phased out for all eligible components after 2032; that is, no credit is allowed for any eligible component after December 31, 2032.[1178]

Special rules

The credit only applies to sales where the eligible components are produced within the United States or U.S. territories.1179 This requirement is not intended to apply to subcomponents or materials used to produce eligible components.

Rules for common control and estates and trusts similar to those of section 52(b) and (d) apply.[1180]

Effective Date

The provision is effective for components produced and sold after December 31, 2022.

20. Reinstatement of Superfund (sec. 13601 of the Act and sec. 4611 of the Code)

Present Law

The Superfund program addresses cleanup activity of hazardous substances at contaminated sites. Before January 1, 1996, an excise tax on domestic crude oil and imported petroleum products (the "Hazardous Substance Superfund financing rate") was imposed at the rate of 9.7 cents per barrel.[1181] The Hazardous Substance Superfund financing rate ceased to apply after December 31, 1995.

Explanation of Provision

The Hazardous Substance Superfund financing rate is reinstated at 16.4 cents per barrel. The tax is annually indexed for inflation beginning with calendar year 2024.

[1176] Sec. 45X(b)(3).
[1177] Sec. 45X(b)(3)(C).
[1178] A technical correction may be necessary to reflect this intent.
[1179] Sec. 45X(d)(2).
[1180] Sec. 45X(d)(1) and (3).
[1181] Sec. 4611(c)(2)(A).

Effective Date

The provision is effective January 1, 2023.

21. Clean electricity production credit (sec. 13701 of the Act and new sec. 45Y of the Code)

Present Law

See the explanation of section 13101 of the Act (which extends and modifies the section 45 renewable electricity production credit) for a description of present law.

Explanation of Provision

In general

The provision creates a new credit for electricity produced by the taxpayer at a qualified facility and sold to an unrelated person during the taxable year. The credit is also available where such electricity is consumed or stored by the taxpayer during the taxable year and there is no third-party sale, but only if the qualified facility is equipped with a metering device owned and operated by an unrelated person. The credit is available for electricity produced during the 10-year period beginning when the qualified facility is originally placed in service. Consumption, sales, or storage are only taken into account with respect to electricity produced within the United States or a possession of the United States.

The base credit rate is 0.3 cents per kilowatt-hour. This amount is increased to 1.5 cents per kilowatt-hour for facilities with a maximum output of less than one megawatt of electricity (as measured in alternating current) and for facilities that meet certain prevailing wage and apprenticeship requirements (or for which construction began more than 60 days before the Secretary publishes guidance with respect to such prevailing wage and apprenticeship requirements). These amounts are adjusted for inflation in a manner similar to the inflation adjustment under section 45(b)(2),[1182] with the credit adjusted using 1992 as the base year and increased in increments of one-twentieth of a cent for the base credit and one-tenth of a cent for the enhanced credit. The inflation adjustments must be published annually by the Secretary no later than April 1 of each calendar year.

A qualified facility is an electricity generation facility owned by the taxpayer that is placed in service after December 31, 2024, and for which the greenhouse gas emissions rate is not greater than zero. With respect to a facility placed in service before January 1, 2025, a qualified facility includes new units and additions to capacity placed in service after December 31, 2024. A qualified facility does not include any facility for which a credit is allowed under sections 45, 45J, 45Q, 45U, 48, 48A, or 48E for the taxable year or any prior taxable year.

The greenhouse gas emissions rate means the amount of greenhouse gases emitted into the atmosphere by a facility in the production of electricity, expressed as grams of carbon dioxide equivalents per kilowatt-hour ("CO_2e per KWh"; see definitions below for

[1182] As amended by section 13101 of the Act.

how this is measured). In the case of a facility which produces electricity through combustion or gasification, the greenhouse gas emissions rate for such facility shall be equal to the net rate of greenhouse gasses emitted into the atmosphere by such facility (taking into account lifecycle greenhouse gas emissions, as described in section 211(o)(1)(H) of the Clean Air Act) in the production of electricity, expressed as grams of CO_2e per KWh.

The provision directs the Secretary to publish annually greenhouse gas emissions rates for types or categories of facilities, for use by taxpayers to determine whether a facility qualifies. In the case of any facility for which an emissions rate has not been established by the Secretary, a taxpayer which owns such a facility may file a petition with the Secretary for a determination of the emissions rate with respect to such facility.

The amount of greenhouse gases emitted into the atmosphere by a facility in the production of electricity does not include any qualified carbon dioxide that is captured by the taxpayer and sequestered in secure geological storage under rules similar to the rules applicable under section 45Q(f) or utilized by the taxpayer in a manner described in section 45Q(f)(5).[1183]

The credit is part of the general business credit.

Phaseout of credit

The credit begins to phase out in the "applicable year," which is defined as the later of 2032 or the calendar year in which the Secretary determines that the annual greenhouse gas emissions from the production of electricity in the United States are equal to or less than 25 percent of the annual greenhouse gas emissions from the production of electricity in the United States for calendar year 2022. The credit is reduced by 25 percent for a facility the construction of which begins during the second calendar year following the applicable year, by 50 percent for a facility the construction of which begins during the third calendar year following the applicable year, and by 100 percent for a facility the construction of which begins during any subsequent calendar year.

Wage and apprenticeship requirements

The prevailing wage and apprenticeship requirements follow a structure similar to that set forth in section 45(b)(7) and 45(b)(8), as modified by section 13101 of the Act. Generally, the prevailing wage rules require that the taxpayer ensure that any laborers and mechanics employed by the taxpayer or any contractor or subcontractor in the construction, alteration, or repair of a project are paid wages at a rate not less than the prevailing wage rates for construction, alteration, or repair of a similar character in the locality where the project is located as determined by the Secretary of Labor, in accordance with subchapter IV of chapter 31, of title 40, United States Code. The apprenticeship requirements require that, generally during the construction of a qualified facility, not less than a certain percentage of total labor hours of the construc-

[1183] Thus, in addition to zero emission facilities that generate electricity from solar, wind, geothermal, and nuclear energy, facilities that generate electricity using a combustion technology could also theoretically qualify if sufficient carbon oxides are captured and sequestered or utilized.

tion, alteration, or repair work (including work performed by any contractor of subcontractor) on a project must be performed by qualified apprentices.[1184]

Definitions and guidance

Under the provision, CO_2e per KWh means, with respect to any greenhouse gas, the equivalent carbon dioxide (as determined based on global warming potential) per kilowatt hour of electricity produced. The term greenhouse gas has the same meaning given such term under section 211(o)(1)(G) of the Clean Air Act, as in effect on the date of the provision's enactment. Qualified carbon dioxide means carbon dioxide captured from an industrial source which (1) would otherwise be released into the atmosphere as industrial emission of greenhouse gas, (2) is measured at the source of capture and verified at the point of disposal or utilization, and (3) is captured and disposed or utilized within the United States or a possession of the United States.

The Secretary is required to issue guidance regarding implementation of the provision no later than January 1, 2025, including guidance on the calculation of greenhouse gas emission rates for qualified facilities and the determination of clean electricity production credits.

Combined heat and power system property

For purposes of determining the clean electricity production credit, the kilowatt hours of electricity produced by a taxpayer at a qualified facility include any production in the form of useful thermal energy by any combined heat and power system property within such facility, and the amount of greenhouse gases emitted into the atmosphere by such facility in the production of such useful thermal energy is included for purposes of determining the greenhouse gas emissions rate for such facility. For this purpose the term combined heat and power system property has the same meaning given such term for purposes of the section 48 energy credit, without regard to the sunset date, capacity limitations, or special biomass rule. The amount of kilowatt-hours of electricity produced in the form of useful thermal energy equals the total useful thermal energy produced by the combined heat and power system property within the qualified facility divided by the heat rate for such facility. For this purpose, the heat rate means the amount of energy used by the qualified facility to generate one kilowatt-hour of electricity, expressed as British thermal units per net kilowatt-hour generated.

Energy communities bonus

In the case of any qualified facility which is located in an energy community (as defined in section 45(b)(11)(B), as amended by the Act),[1185] the credit amount is increased by 10 percent.

[1184] See the explanation of section 13101 of the Act for a more detailed description of these requirements, including procedural rules and penalties.

[1185] See description of section 13101 of the Act.

Credit reduced for tax-exempt bonds

The credit is reduced for tax-exempt bonds under rules similar to the rules of section 45(b)(3), as amended by the Act.[1186]

Domestic content bonus

The provision increases the credit by 10 percent (calculated without regard to the energy communities bonus) if certain domestic content requirements are met. The domestic content requirements are generally the same as those set forth in section 45(b)(9), as amended by the Act,[1187] except that the percentage of content that must be domestically produced with respect to manufactured products is different. For the clean electricity production credit, except with respect to offshore wind facilities, the percentage is 40 percent for a facility the construction of which begins before January 1, 2025, 45 percent for a facility the construction of which begins in calendar year 2025, 50 percent for a facility the construction of which begins in calendar year 2026, and 55 percent for a facility the construction of which begins after December 31, 2026. For offshore wind facilities, the percentage is 20 percent for a facility the construction of which begins before January 1, 2025, 27.5 percent for a facility the construction of which begins in calendar year 2025, 35 percent for a facility the construction of which begins in calendar year 2026, and 45 percent for a facility the construction of which begins in calendar year 2027, and 55 percent for a facility the construction of which begins after December 31, 2027.

Reduction of elective payment if domestic content rules are not satisfied

As provided for in section 13801 of the Act (described below), certain taxpayers may elect to have the credit paid directly to the extent there is insufficient tax liability to absorb the credit. The current provision contains a special rule reducing the amount of this direct payment if the domestic content requirements described above for the bonus are not satisfied. This rule is similar to that provided in section 45(b)(10), as modified by 13101 of the Act, except that the payment is reduced by 10 percent if construction of the facility begins in calendar year 2024, by 15 percent if construction the facility begins in calendar year 2025, and by 100 percent if the construction of the facility begins after December 31, 2025.

As with the rule set forth in section 45(b)(10), an exception applies if the Secretary determines that the inclusion of steel, iron, or manufactured products which are produced in the United States increases the overall costs of construction of qualified facilities by more than 25 percent, or if the relevant steel, iron, or manufactured products are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality.

Special rules

In the case of a qualified facility in which more than one person has an ownership interest, except to the extent provided in regulations prescribed by the Secretary, production from the facility shall

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[1186] *Ibid.*
[1187] *Ibid.*

be allocated among such persons in proportion to their respective ownership interests in the gross sales from such facility.

Persons shall be treated as related to each other if such persons would be treated as a single employer under the regulations prescribed under section 52(b). In the case of a corporation which is a member of an affiliated group of corporations filing a consolidated return, such corporation shall be treated as selling electricity to an unrelated person if such electricity is sold to such a person by another member of such group.

With respect to trusts and estates, under rules prescribed by the Secretary, rules similar to the rules of section 52(d) apply, which for any taxable year apportion the amount of a credit between an estate or trust and its beneficiaries on the basis of the income of the estate or trust allocable to each.

In the case of agricultural cooperatives, rules similar to the rules of section 45(e)(11) apply, which allocates credits to patrons of such cooperatives.

Effective Date

The provision applies to facilities placed in service after December 31, 2024.

22. Clean electricity investment credit (sec. 13702 of the Act and new sec. 48E of the Code)

Present Law

See the explanation of section 13102 of the Act (which modifies the energy credit) for a description of present law.

Explanation of Provision

In general

The provision creates a clean electricity investment credit equal to the applicable percentage of qualified investment for any taxable year with respect to any qualified facility and any energy storage technology. The base rate is 6 percent. This base rate is increased to 30 percent (the "alternative rate") for facilities with a maximum output of less than one megawatt of electricity (as measured in alternating current) and for facilities that meet certain prevailing wage and apprenticeship requirements (or for which construction began more than 60 days before the Secretary publishes guidance with respect to such prevailing wage and apprenticeship requirements).

The credit is part of the general business credit. Except where specifically provided, the rules applicable to investment credits apply to the clean electricity investment credit.[1188]

Qualified investment with respect to a qualified facility

For purposes of determining the amount of the credit, a qualified investment with respect to any qualified facility for the taxable year is the sum of the basis of any qualified property placed in

[1188] See sec. 50. A technical correction may be necessary to clarify that, similar to the energy credit, the limitation on property used for lodging described in section 50(b)(2), does not apply to clean electricity investment credit property.

service by the taxpayer during such taxable year which is part of a qualified facility, plus the amount of any expenditures that are paid or incurred by the taxpayer for qualified interconnection property. The qualified interconnection property must be properly chargeable to a capital account of the taxpayer and placed in service during the taxpayer's taxable year in connection with a qualified facility that has a maximum net output of no more than five megawatts (as measured in alternating current).

Qualified property is tangible personal property or other tangible property (not including a building or its structural components), but only if such property is used as an integral part of a qualified facility. In addition, such property must consist of depreciable or amortizable property that is either built by the taxpayer or the original use of which begins with the taxpayer.

A qualified facility is an electricity generation facility owned by the taxpayer that is placed in service after December 31, 2024, and for which the greenhouse gas emissions rate is not greater than zero. With respect to a facility placed in service before January 1, 2025, a qualified facility includes new units and additions to capacity placed in service after December 31, 2024. The greenhouse gas emissions rate is determined using rules similar to the rules set forth in section 45Y(b)(2) and the terms "greenhouse gas," "greenhouse gas emissions rate," and "CO2e per KWh" have the same meaning given such terms under section 45Y.[1189]

A qualified facility does not include any facility for which a credit is allowed under sections 45, 45J, 45Q, 45U, 45Y, 48, or 48A for the taxable year or any prior taxable year. The qualified investment with respect to any qualified facility for any taxable year does not include that portion of the basis of any property which is attributable to qualified rehabilitation expenditures (as defined in section 47(c)(2)).

Qualified interconnection property has the meaning given such term in section 48(a)(8)(B), as modified by section 13102 of the Act.

Qualified investment with respect to energy storage technology

The qualified investment with respect to energy storage technology for any taxable year is the basis of any energy storage technology placed in service by the taxpayer during such taxable year. The term "energy storage technology" has the meaning given such term in section 48(c)(6) (except that subparagraph (D) of such section shall not apply), as modified by section 13102 of the Act.

Wage and apprenticeship requirements

The prevailing wage and apprenticeship requirements follow the structure established in sections 48(a)(10) and 45(b)(8), respectively, as modified by sections 13101 and 13102 of the Act. Generally, the prevailing wage rules require that the taxpayer ensure that any laborers and mechanics employed by the taxpayer or any contractor or subcontractor in the construction, alteration, or repair of a project are paid wages at a rate not less than the prevailing wage rates for construction, alteration, or repair of a similar char-

[1189] See description of section 13701 of the Act.

acter in the locality where the project is located as determined by the Secretary of Labor, in accordance with subchapter IV of chapter 31, of title 40, United States Code. The apprenticeship requirements require that, generally during the construction of a qualified facility, not less than a certain percentage of total labor hours of the construction, alteration, or repair work (including work performed by any contractor of subcontractor) on a project must be performed by qualified apprentices, similar to the rules of section 45(b)(8).[1190]

Certain progress expenditure rules made applicable

Rules similar to the rules of subsections (c)(4) and (d) of section 46 (as in effect on the day before the date of the enactment of the Revenue Reconciliation Act of 1990) apply.

Credit reduced for tax-exempt bonds

The credit is reduced for tax-exempt bonds under rules similar to the rules of section 45(b)(3), as amended by the Act.[1191]

Phaseout of credit

The credit phases out under rules similar to the rules set forth in section 45Y(d)(3), as set forth in section 13701 of the Act.

Recapture of the credit

If the Secretary determines that the greenhouse gas emissions rate for a qualified facility is greater than 10 grams of CO_2e per KWh, any property for which a credit was allowed under this section with respect to such facility ceases to be investment credit property in the taxable year in which the determination is made and such credit is subject to recapture under the rules of section 50.

Energy communities bonus

If energy property is placed in service in an "energy community," the provision increases the base rate by two percentage points and the alternative rate by ten percentage points. The definition of energy community is the same as that set forth in section 45(b)(11)(B), as modified by section 13101 of the Act.

Domestic content bonus

An additional credit amount is available for property that meets certain domestic content requirements similar to those used in section 48 but applying the adjusted percentage set forth in section 45Y(g)(11)(C).[1192]

Reduction of elective payment if domestic content rules are not satisfied

In the case of a taxpayer making an election under section 6417 with respect to a credit under this section, rules similar to the rules of section 45Y(g)(12) apply.

[1190] See the explanations of sections 13101 and 13102 of the Act for more detailed descriptions of these requirements, including procedural rules and penalties.
[1191] *Ibid.*
[1192] A technical correction may be necessary to reflect this intent.

Special rules for certain facilities placed in service in connection with low-income communities

The provision creates a bonus credit amount for certain qualified facilities placed in service in connection with low-income communities. The bonus is an allocated credit and follows rules similar to the rules set forth in section 48(e), as modified by section 13103 of the Act. Under the clean electricity investment credit, the annual capacity limitation is 1.8 gigawatts of direct current capacity for each calendar year beginning on January 1, 2025, and ending on December 31 of the applicable year (as defined by section 45Y(d)(3)),[1193] and zero thereafter. Certain carryover rules apply with respect to unused limitation amounts.

Effective Date

The provision applies to property placed in service after December 31, 2024.

23. Cost recovery for qualified facilities, qualified property, and energy storage technology (sec. 13703 of the Act and sec. 168(e)(3)(B) 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.[1194] The period for depreciation or amortization generally begins when the asset is placed in service by the taxpayer.[1195] Tangible property generally is depreciated under the modified accelerated cost recovery system ("MACRS"), which determines depreciation for different types of property based on an assigned applicable depreciation method, recovery period, and placed in service convention.[1196] For some assets, the recovery period for the asset is provided in section 168.[1197] In other cases, the recovery period of an asset is generally set forth in Revenue Procedure 87–56.[1198]

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

[1193] See description of section 13701 of the Act.

[1194] 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.

[1195] 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).

[1196] Sec. 168.

[1197] See sec. 168(e) and (g).

[1198] 1987–2 C.B. 674 (as clarified and modified by Rev. Proc. 88–22, 1988–1 C.B. 785). Exercising authority granted by Congress, the Secretary issued Rev. Proc. 87–56, 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.

200-percent and 150-percent declining balance methods,[1199] 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. The recovery periods for most real property are 39 years for nonresidential real property, 27.5 years for residential rental property, and 15 years for qualified improvement property. The straight line depreciation method is required for the aforementioned real property.

Five-year cost recovery for certain energy property

A five-year MACRS recovery period is generally provided for certain energy investment credit property,[1200] qualified biomass property,[1201] and ocean thermal energy property.[1202]

Energy investment credit property eligible for the five-year recovery period includes (i) equipment using solar or wind energy to generate electricity (*e.g.*, solar panels), to heat or cool (or provide hot water for use in) a structure, or to provide solar (or wind) process heat (except for property used to generate energy to heat a swimming pool); (ii) equipment using solar energy to illuminate the inside of a structure using fiber-optic distributed sunlight or electrochromic glass using electricity to change its light transmittance properties in order to heat or cool a structure;[1203] (iii) equipment used to produce, distribute, or use energy derived from a geothermal deposit; (iv) qualified fuel cell or microturbine property;[1204] (v) combined heat and power system property;[1205] (vi) qualified small wind energy property;[1206] (vii) equipment using the ground or ground water as a thermal energy source (or sink) to heat (or cool) a structure;[1207] (viii) waste energy recovery property;[1208] (ix) energy storage technology;[1209] (x) qualified biogas

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[1199] 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.

[1200] Secs. 168(e)(3)(B)(vi)(I) and 48(a)(3)(A).

[1201] Secs. 168(e)(3)(B)(vi)(II) and 48(l)(15) (as in effect on the day before the date of the enactment of the Revenue Reconciliation Act of 1990).

[1202] Secs. 168(e)(3)(B)(vi)(III) and 48(l)(3)(A)(ix) (as in effect on the day before the date of the enactment of the Revenue Reconciliation Act of 1990).

[1203] But only with respect to property the construction of which begins before January 1, 2025. Sec. 48(a)(3)(A)(ii), as modified by sec. 13102 of the Act (described above).

[1204] But only with respect to property the construction of which begins before January 1, 2025. Sec. 48(a)(3)(A)(iv), (c)(1)(E), and (c)(2)(D), as modified by sec. 13102 of the Act (described above).

[1205] But only with respect to property the construction of which begins before January 1, 2025. Sec. 48(a)(3)(A)(v) and (c)(3)(A)(iv), as modified by sec. 13102 of the Act (described above).

[1206] But only with respect to property the construction of which begins before January 1, 2025. Sec. 48(a)(3)(A)(vi) and (c)(4)(C), as modified by sec. 13102 of the Act (described above).

[1207] But only with respect to property the construction of which begins before January 1, 2035. Sec. 48(a)(3)(A)(vii), as modified by sec. 13102 of the Act (described above).

[1208] But only with respect to property the construction of which begins before January 1, 2025. Sec. 48(a)(3)(A)(viii) and (c)(5)(D), as modified by sec. 13102 of the Act (described above).

[1209] But only with respect to property the construction of which begins before January 1, 2025. Sec. 48(a)(3)(A)(ix) and (c)(6)(D), as added by sec. 13102 of the Act (described above).

property;[1210] and (xi) microgrid controllers.[1211] The five-year recovery period also generally applies to public utility property that otherwise qualifies as energy investment credit property, notwithstanding any other provision of law.[1212]

Qualified biomass property eligible for the five-year recovery period includes property with a power production capacity of not greater than 80 megawatts that also qualifies as certain biomass property, including (i) a boiler, the primary fuel for which will be an alternate substance; (ii) a burner (including necessary on-site equipment to bring the alternate substance to the burner) for a combustor other than a boiler if the primary fuel for such burner will be an alternate substance; (iii) equipment for converting an alternate substance into a qualified fuel; (iv) certain pollution control equipment; or (v) equipment used for the unloading, transfer, storage, reclaiming from storage, and preparation (including, but not limited to, washing, crushing, drying, and weighing) at the point of use of an alternative substance for use in equipment described in (i), (ii), or (iii).[1213] The five-year recovery period also generally applies to public utility property that otherwise qualifies as qualified biomass property, notwithstanding any other provision of law.[1214]

Ocean thermal energy property eligible for the five-year recovery period includes equipment that converts ocean thermal energy into usable energy at one of two locations designated by the Secretary of the Treasury after consultation with the Secretary of Energy.[1215]

Explanation of Provision

The provision provides a five-year MACRS recovery period for any qualified facility,[1216] any qualified property[1217] which is a qualified investment,[1218] and any energy storage technology,[1219] as those terms are defined purposes of the clean electricity production and clean electricity investment credits described above.[1220]

Effective Date

The provision applies to facilities and property placed in service after December 31, 2024.

[1210] But only with respect to property the construction of which begins before January 1, 2025. Sec. 48(a)(3)(A)(x) and (c)(7)(C), as added by sec. 13102 of the Act (described above).

[1211] But only with respect to property the construction of which begins before January 1, 2025. Sec. 48(a)(3)(A)(xi) and (c)(8)(C), as added by sec. 13102 of the Act (described above).

[1212] Sec. 168(e)(3)(B) flush language.

[1213] Secs. 168(e)(3)(B)(vi)(II) and 48(l)(15) (as in effect on the day before the date of enactment of the Revenue Reconciliation Act of 1990). For this purpose, the term "alternative substance" means any substance other than (i) oil and natural gas, (ii) any product of oil and natural gas, (iii) any inorganic substance, and (iv) coal (including lignite) or any product of such coal. Sec. 48(l)(15)(B) (as in effect on the day before the date of enactment of the Revenue Reconciliation Act of 1990). The term "qualified fuel" means (i) any synthetic solid fuel, and (ii) alcohol for fuel purposes if the primary source of energy for the facility producing the alcohol is not oil or natural gas or a product of oil or natural gas. Sec. 48(l)(15)(C) (as in effect on the day before the date of enactment of the Revenue Reconciliation Act of 1990).

[1214] Sec. 168(e)(3)(B) flush language.

[1215] Secs. 168(e)(3)(B)(vi)(III) and 48(l)(3)(A)(ix) (as in effect on the day before the date of the enactment of the Revenue Reconciliation Act of 1990).

[1216] See new sec. 45Y(b)(1)(A).

[1217] See new sec. 48E(b)(2).

[1218] See new sec. 48E(b)(1).

[1219] See new sec. 48E(c)(2).

[1220] See new clause (viii) of sec. 168(e)(3)(B).

24. Clean fuel production credit (sec. 13704 of the Act and new sec. 45Z of the Code)

Present Law

Present law contains an assortment of income tax credit, excise tax credit and payment provisions for various biofuels and other alternative fuels when sold or used as a fuel. These include incentives for biodiesel, renewable diesel, several different alternative fuels, as well as second generation biofuel.[1221]

Explanation of Provision

Clean fuel production credit

For transportation fuel, the provision creates a new general business credit, the "Clean Fuel Production Credit." "Transportation fuel" is a fuel suitable for use as a fuel in a highway vehicle or aircraft, has a lifecycle greenhouse gas emissions rate which is not greater than 50 kilograms of CO_2e per mmBTU, and is not derived from coprocessing an applicable material (or material derived from an applicable material) with a feedstock which is not biomass.[1222]

The credit is the product of (1) the applicable amount per gallon (or gallon equivalent) of transportation fuel produced and sold by the taxpayer under specified circumstances and (2) the emissions factor for such fuel. To qualify for the credit, the transportation fuel must be produced at a qualified facility and sold by the taxpayer to an unrelated person (1) for use by such person in the production of a fuel mixture, (2) for use by such person in a trade or business, or (3) who sells such fuel at retail into the fuel tank of another person.

The "applicable amount" is either a "base amount" or an "alternative amount" depending on whether certain requirements are met. The base amount is 20 cents per gallon for transportation fuel produced at a qualified facility that does not satisfy certain prevailing wage and apprenticeship requirements. For transportation fuel produced at a qualified facility that does satisfy those requirements, the alternative amount is $1.00 per gallon. For transportation fuel that is sustainable aviation fuel, the base amount is 35 cents, and the alternative amount is $1.75. "Sustainable aviation fuel" means liquid fuel, the portion of which is not kerosene, which is sold for use in an aircraft, and which meets the requirements of either ASTM International Standard D7566, or the Fischer Tropsch provisions of ASTM International Standard D1655, Annex A1; and is not derived from palm fatty acid distillates or petroleum.

Fuel must be produced at a qualified facility

A "qualified facility" is a facility used for the production of transportation fuels and does not include any facility for which one of the following credits is allowed under section 38 for the taxable year: section 45V (the credit for production of clean hydrogen), section 46 to the extent that such credit is attributable to the energy

[1221] See secs. 40(b)(6), 40A, 6426 and 6427(e).

[1222] "Applicable material" means monoglycerides, diglycerides, and triglycerides, free fatty acids, and fatty acid esters. The term "biomass" has the same meaning given such term in section 45K(c)(3).

credit determined under section 48 with respect to any specified clean hydrogen production facility for which an election has been made under section 48(a)(15), or section 45Q (the credit for carbon oxide sequestration).

Emissions factor calculation and establishment by the Secretary

The emissions factor of a transportation fuel is an amount equal to the quotient of (1) 50 kilograms of CO_2e per mmBTU minus the emissions rate for such fuel, divided by (2) 50 kilograms of CO_2e per mmBTU.[1223]

The Secretary is required to publish a table that sets forth the emission rate for similar types and categories of transportation fuels based on the amount of lifecycle greenhouse gas emissions (as described in section 211(o)(1)(H) of the Clean Air Act (42 U.S.C. 7545(o)(1)(H)) as in effect on the date of enactment of this section) for such fuels, expressed as kilograms of CO_2e per mmBTU, which a taxpayer shall use for the purposes of this provision.

In the case of transportation fuel that is not sustainable aviation fuel, the lifecycle greenhouse gas emissions of such fuel shall be based on the most recent determinations under the Greenhouse Gases, Regulated Emissions, and Energy Use in Transportation model ("GREET") developed by Argonne National Laboratory, or a successor model (as determined by the Secretary).

In the case of transportation fuel that is sustainable aviation fuel, the lifecycle greenhouse gas emissions of such fuel shall be determined in accordance with (1) the most recent Carbon Offsetting and Reduction Scheme for International Aviation that has been adopted by the International Civil Aviation Organization ("ICAO") with the agreement of the United States, or (2) any similar methodology which satisfies the criteria under section 211(o)(1)(H) of the Clean Air Act (42 U.S.C. 7545(o)(1)(H)) as in effect on the date of enactment of this provision.

The Secretary may round the emissions rates for purposes of the table to the nearest five kilograms of CO_2e per mmBTU. However, in the case of an emissions rate that is between 2.5 kilograms of CO_2e per mmBTU and 2.5 kilograms CO_2e per mmBTU, the Secretary may round such rate to zero.

Petition for provisional emissions rate

In the case of any transportation fuel for which an emissions rate has not been established by the Secretary, a taxpayer producing such fuel may file a petition with the Secretary for determination of the emissions rate with respect to such fuel.

Inflation adjustment

In the case of calendar years beginning after 2024, the 20-cent amount, \$1.00 amount, 35 cent amount and \$1.75 amount are adjusted by multiplying such amount by the inflation adjustment factor for the calendar year in which the sale or use of the transportation fuel occurs. If any amount as increased is not a multiple of

[1223] An emissions rate for a fuel could be a negative number, which would result in a fraction greater than one.

one cent, such amount is to be rounded to the nearest one cent. The inflation adjustment factor is the inflation adjustment factor determined and published by the Secretary under the new clean electricity production credit (section 45Y), determined by substituting “calendar year 2022” for “calendar year 1992.”

Guidance and special rules

Not later than January 1, 2025, the Secretary is required to issue guidance with regard to the implementation of the provision, including the calculation of emissions factors for transportation fuel, the required table of emissions rates, and the determination of clean fuel production credits under the provision.

To be entitled to the clean fuel production credit, the taxpayer must be registered with the IRS as a producer of clean fuel at the time of production. Such fuel must be produced in the United States. In addition, in the case of any transportation that is sustainable aviation fuel, the taxpayer must provide certification (in such form and such manner as the Secretary prescribes) from an unrelated party demonstrating compliance with (1) any general requirements, supply chain traceability requirements, and information transmission requirements established under the Carbon Offsetting and Reduction Scheme for International Aviation or similar methodology which satisfies the criteria under section 211(o)(1)(H) of the Clean Air Act as in effect on the date of enactment of this provision.

In the case of a facility in which more than one person has an ownership interest, except to the extent provided in Treasury regulations, production from such facility shall be allocated among such persons in proportion to their respective ownership interests in the gross sales from such facility.

Persons shall be treated as related to each other if such persons would be treated as a single employer under the regulations prescribed under section 52(b). In the case of a corporation which is a member of an affiliated group of corporations filing a consolidated return, such corporation shall be treated as selling fuel to an unrelated person if such fuel is sold to such a person by another member of such group.

In the case of estates and trusts, under regulations prescribed by the Secretary, rules similar to the rules of section 52(d) shall apply. In the case of agricultural cooperatives, an election may be made to apportion the credit determined among the patrons of the cooperative on the basis of business done by the patrons during the taxable year.

Prevailing wage and apprenticeship requirements for purposes of the alternative amount

To obtain the alternative amount, the transportation fuel must be produced at a qualified facility that satisfies the prevailing wage and apprenticeship requirements. Rules similar to the rules of section 45(b)(7) (prevailing wage requirements) apply.

A special rule applies for facilities placed in service before January 1, 2025. For those facilities, section 45(b)(7)(A)(i) (related to the construction of such facility) does not apply. In addition, section 45(b)(7)(A)(ii) is to be applied to alteration and repairs of a qualified facility with respect to a taxable year beginning after December 31, 2024, for which a clean fuel production credit is allowed.[1224]

Rules similar to section 45(b)(8) (relating to apprenticeship requirements) apply for the purpose of the clean fuel production credit.

Termination

The provision does not apply to transportation fuel sold after December 31, 2027.

Effective Date

The provision is effective for transportation fuel produced after December 31, 2024.

25. Elective payment for energy property and electricity produced from certain renewable resources, etc. (sec. 13801 of the Act and sec. 39 and new secs. 6417 and 6418 of the Code)

Present Law

Present law does not permit taxpayers to elect payments for general business credits. Some credit provisions allow taxpayers to elect to transfer credits to persons that have some connection with the activities giving rise to the credits. For example, the advanced nuclear power credit allows certain public entities to elect to transfer credits to certain eligible project partners,[1225] and the carbon oxide sequestration credit allows taxpayers to transfer credits to persons that (1) dispose of, (2) utilize, or (3) use as a tertiary injectant the qualified carbon oxide.[1226] Present law does not allow for the transfer of credits to unrelated persons having no connections to a specific project or enterprise.

Explanation of Provision

In general

The provision creates to two new elections. The first is an elective payment of applicable credits. The second is an election to transfer certain credits. The provision also extends the carryback period for certain credits.

Elective payment of applicable credits

In general

In the case of an applicable entity making an election (at such time and in such manner as the Secretary may provide) with respect to any applicable credit determined with respect to such entity, such entity is treated as making a payment against the tax imposed by subtitle A of the Code (for the taxable year with respect

[1224] A technical correction may be required to apply this special rule to the apprenticeship requirements.
[1225] Sec. 45J(e).
[1226] Sec. 45Q(f)(3)(B).

to which such credit was determined) equal to the entire amount of such credit (a "direct payment").[1227]

The applicable credits are: (1) the business credit portion of the alternative fuel vehicle refueling property credit,[1228] (2) the renewable electricity production credit (to the extent attributable to qualified facilities originally placed in service after December 31, 2022),[1229] (3) the carbon oxide sequestration credit (to the extent attributable to carbon capture equipment which is originally placed in service after December 31, 2022),[1230] (4) the zero-emission nuclear power production credit,[1231] (5) the clean hydrogen production credit (to the extent attributable to qualified clean hydrogen production facilities that are originally placed in service after December 31, 2012),[1232] (6) in the case of a tax-exempt entity described in clause (i), (ii), or (iv) of section 168(h)(2)(A), the credit for qualified commercial vehicles determined under section 45W by reason of subsection (d)(2) thereof, (7) the credit for advanced manufacturing production,[1233] (8) the clean electricity production credit,[1234] (9) the clean fuel production credit,[1235] (10) the energy credit,[1236] (11) the qualifying advanced energy project credit,[1237] and (12) the clean electricity investment credit.[1238]

In general, an applicable entity is (1) any tax-exempt organization, (2) any State or political subdivision thereof,[1239] (3) the Tennessee Valley Authority, (4) any Indian tribal government, (5) any Alaska Native Corporation, or (6) any corporation operating on a cooperative basis which is engaged in furnishing electric energy to persons in rural areas.[1240] With certain limitations, entities not included in this list ("nonlist entities") may make an election and be treated as an applicable entity with respect to the section 45V qualified clean hydrogen production credit, the section 45Q carbon oxide sequestration credit, and the section 45X advanced manufacturing production credit. No election by a taxpayer that is a nonlist entity may be made with respect to any taxable year beginning after December 31, 2032.

An election with respect to sections 45V, 45Q, and 45X by a taxpayer that is a nonlist entity generally remains in effect for the election year and for each of the four succeeding taxable years ending before January 1, 2033.[1241] A taxpayer may prospectively revoke this election one time during that period but may not subsequently re-elect.

[1227] Because the payment is treated as a payment against tax, it is not income for income tax purposes.
[1228] Sec. 30C.
[1229] Sec. 45.
[1230] Sec. 45Q.
[1231] Sec. 45U.
[1232] Sec. 45V.
[1233] Sec. 45X.
[1234] Sec. 45Y.
[1235] Sec. 45Z.
[1236] Sec. 48.
[1237] Sec. 48C.
[1238] Sec. 48E.
[1239] Eligible entities include State agencies and instrumentalities, such as tax-exempt State universities, State hospitals, and community action agencies. A technical correction may be necessary to clarify this point.
[1240] Sec. 6417(d)(1).
[1241] Only one such election may be made by a taxpayer. A technical correction may be necessary to clarify this intent.

Special rules

In the case of an applicable credit determined with respect to any facility or property held directly by a partnership or S corporation, the election is made at the partnership level or by the S corporation, in such manner as the Secretary may provide. In the event of such an election, any amount received by a partnership or S corporation as an elective payment is treated as tax-exempt income for purposes of sections 705 and 1366, and a partner's distributive share of such tax-exempt income is based on such partner's distributive share of the otherwise applicable credit for each taxable year.

Limitations in section 50(b)(3) and (4)(A)(i), relating to property used by tax-exempt and government entities, do not apply with respect to any applicable credit for which an election for a direct payment has been made. In addition, any such property is treated as used in a trade or business of the applicable entity.

An election by a taxpayer must generally be made by the due date (including extensions of time) for the tax return for the taxable year for which the election is made, but in no event earlier than 180 days after the date of enactment of the provision.[1242] In the case of any government or political subdivision for which no return is required, the Secretary shall determine the appropriate date.

For the section 45 renewable electricity production credit, the section 45Q credit for carbon oxide sequestration, the section 45V credit for clean hydrogen production, and the section 45Y clean electricity production credit, any election for a direct payment is applied separately with respect to each qualified facility.

As a condition of, and prior to, any amount being treated as a payment which is made by an applicable entity under the provision, the Secretary may require such information or registration as the Secretary deems necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments under this section.

Excessive payments are subject to recapture and penalty, in the absence of reasonable cause. An excessive payment is, generally, the excess of the amount of the direct payment over the amount of the credit which would otherwise be allowable for the taxable year. In the case of an excessive payment, the tax is increased in the year in which the Secretary makes a determination that an excessive payment exists.[1243]

In general, if a nonlist entity makes an election for a direct payment no election may be made to transfer the credits under the rules described below.

If an election is made for a direct payment, the underlying applicable credit for which an election is made is reduced to zero and, for any other Code purposes, is deemed allowed to such entity for the taxable year. In other words, the credit determined with re-

[1242] The Joint Committee on Taxation's refund review function only applies with respect to income taxes that have been assessed. For this reason, direct payments with respect to elections made on originally filed returns are not subject to review by the Joint Committee under section 6405.

[1243] A technical correction may be necessary to clarify the timing of the tax increase for an excessive payment.

spect to the applicable entity is treated as a credit for all purposes, but after it is applied against income tax liability, it is reduced to zero to prevent any double benefit (such as claiming the credit twice).

The direct payment rules do not apply to any possession of the United States with a mirror code tax system unless the possession elects to have them apply.

Rules similar to the rules of section 50 apply, without regard to certain limitations applicable to government and tax-exempt entities.

Beginning in fiscal year 2023 and each fiscal year thereafter, the portion of any payment for which a direct payment election has been made, or any amount treated as a such a payment and that is direct spending is increased by 6.0445 percent. This is intended to offset any reduction due to Federal budget sequestration.

Transfer of certain credits

In general

The provision permits an eligible taxpayer to elect to transfer all or a portion of an eligible credit determined with respect to such taxpayer for any taxable year to an unrelated taxpayer (the "transferee taxpayer"). Payments to the taxpayer by the transferee taxpayer must be made in cash. Such payments are not includible in the gross income of the taxpayer nor are they deductible by the transferee taxpayer. The transferee taxpayer has no basis in any transferred credit, and the fact that the credit amount may exceed the transfer payment does not give rise to any income to the transferee. Such payments are similarly ignored when determining the existence or character of income for other tax purposes. Taxpayers may only transfer credits to which they are entitled, after the application of any limitations (such as the limitation on projects financed by tax-exempt bonds).

The list of eligible credits is the same as the list of applicable credits under the direct payment rules described above, except for the credit for qualified commercial vehicles determined under section 45W by reason of subsection (d)(2) thereof. An eligible credit does not include any business credit carryforward or business credit carryback. In the case of an eligible credit under sections 45, 45Q, 45V, and 45Y, an election may be made separately with respect to each facility for which such credit is determined and for each taxable year during the 10-year period beginning on the date such facility was originally placed in service (or in the case of a credit under section 45Q, the 12-year period beginning on the date the carbon capture equipment was originally placed in service at such facility).

An eligible taxpayer is any taxpayer other than a tax-exempt organization, a State or political subdivision thereof, the Tennessee Valley Authority, an Indian tribal government, an Alaska Native Corporation, or a corporation operating on a cooperative basis which is engaged in furnishing electric energy to persons in rural areas.[1244]

[1244] Sec. 6418(f)(2); see also sec. 6417(d)(1)(A).

In the case of any facility or property held directly by a partnership or S corporation, a credit transfer election must be made at the partnership or S corporation level. If a partnership or S corporation makes an election to transfer credits under the provision, any amount received as consideration for a transfer described is treated as tax-exempt income for purposes of sections 705 and 1366, and a partner's distributive share of such tax-exempt income is based on such partner's distributive share of the otherwise eligible credit for each taxable year.

Transferred credits must be taken into account in the first taxable year of the transferee taxpayer ending with, or after, the taxable year of the eligible taxpayer with respect to which the credit was determined.

An election to transfer any portion of an eligible credit must made not later than the due date (including extensions of time) for the tax return for the taxable year for which the credit is determined, but in no event earlier than 180 days after the date of the enactment of the provision. Any such election, once made, is irrevocable and no additional election may be made by a transferee taxpayer with respect to any credits received under the provision.

Special rules

As a condition of, and prior to, any transfer of any portion of an eligible credit, the Secretary may require such information (including, in such form or manner as is determined appropriate by the Secretary, such information returns) or registration as the Secretary deems necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments under this section.

Absent reasonable cause, in the event of an excessive credit transfer, the transferee taxpayer is liable for tax in the amount of the excessive credit transfer plus 20-percent penalty. For this purpose, an excessive credit transfer is, generally, the excess of the amount of the credit claimed by the transferee taxpayer over the amount of the credit which would otherwise be allowable for the taxable year without the application of section 6418 (in other words, the amount of the credit properly determine with respect to such facility or property for such taxable year in the hands of the eligible taxpayer).

In the case of transferred credits associated with investment credit property, the basis of such property must be reduced under the rules of section 50. In addition, if, during any taxable year, the underlying property that gave rise to a transferred credit is disposed of or otherwise ceases to be investment credit property with respect to the eligible taxpayer before the close of the section 50 recapture period, such eligible taxpayer must notify the transferee taxpayer of the recapture event and the transferee taxpayer must notify the eligible taxpayer of the recapture amount. The transferee, filling in as the taxpayer once the transfer is complete, is responsible for any amounts subject to recapture.

No transfer election may be made with respect to progress expenditures.

Section 50(d) is modified to allow real estate investment trusts to benefit from credit transfers.

Three-year carryback for applicable credits

The provision modifies section 39 to permit taxpayers to carry applicable credits (as defined above) back three years, instead of just one year under present law.

Effective Date

The provision applies to taxable years beginning after December 31, 2022.

26. Permanent extension of tax rate to fund Black Lung Disability Trust Fund (sec. 13901 of the Act and sec. 4121 of the Code)

Present Law

Before January 1, 2022, coal extracted from mines was taxed at either $1.10 per ton if from an underground mine or $0.55 per ton if from a surface mine. The total amount of tax was not to exceed 4.4 percent of the price at which such ton of coal was sold by the producer.

After December 31, 2021, the "temporary increase termination date," the tax rates declined to rates of $0.50 for underground mines and $0.25 for surface mines. After the temporary increase termination date, the total amount of tax is not to exceed two percent of the price at which such ton of coal is sold by the producer.

Explanation of Provision

The provision eliminates the "temporary increase termination date" and makes permanent the higher rates of $1.10 per ton (for underground mines) and $0.55 per ton (for a surface mine). The total amount of tax is not to exceed 4.4 percent of the price at which such ton of coal was sold by the producer.

Effective Date

The provision applies to sales in calendar quarters beginning after the date which is one day after the date of enactment.

27. Increase in research credit against payroll tax for small businesses (sec. 13902 of the Act and secs. 41(h) and 3111(f) of the Code)

Present Law

Research credit

General rule

A taxpayer may generally claim a research credit equal to 20 percent of the amount by which the taxpayer's qualified research expenses for a taxable year exceed its base amount for that year (the "research credit").[1245] Thus, the research credit is generally available with respect to incremental increases in qualified re-

[1245] Sec. 41(a)(1).

search. An alternative simplified credit (with a 14-percent rate and a different base amount) may be claimed in lieu of this credit.[1246]

A 20-percent research credit also is available with respect to the excess of (1) 100 percent of corporate cash expenses (including grants or contributions) paid for basic research conducted by universities (and certain nonprofit scientific research organizations) over (2) the sum of (a) the greater of two minimum basic research floors plus (b) an amount reflecting any decrease in nonresearch giving to universities by the corporation as compared to such giving during a fixed-base period, as adjusted for inflation.[1247] This separate credit computation commonly is referred to as the "basic research credit."

Finally, a 20-percent research credit is available for a taxpayer's expenditures on research undertaken by an energy research consortium for energy research.[1248] This separate credit computation commonly is referred to as the "energy research credit." Unlike the other research credits, the energy research credit applies to all qualified expenditures, not just those in excess of a base amount.

Computation of research credit

The research credit applies only to the extent that the taxpayer's qualified research expenses for the current taxable year exceed its base amount. The base amount for the current year generally is computed by multiplying the taxpayer's fixed-base percentage by the average amount of the taxpayer's gross receipts for the four preceding years. If a taxpayer both incurred qualified research expenses and had gross receipts during each of at least three years from 1984 through 1988, then its fixed-base percentage is the ratio that its total qualified research expenses for the 1984–1988 period bears to its total gross receipts for that period (subject to a maximum fixed-base percentage of 16 percent). Special rules apply to all other taxpayers (so called start-up firms).[1249] In computing the research credit, a taxpayer's base amount cannot be less than 50 percent of its current-year qualified research expenses.

Alternative simplified credit

The alternative simplified credit is equal to 14 percent of qualified research expenses that exceed 50 percent of the average qualified research expenses for the three preceding taxable years.[1250] The rate is reduced to 6 percent if a taxpayer has no qualified research expenses in any one of the three preceding taxable

[1246] Sec. 41(c)(4).

[1247] Sec. 41(a)(2) and (e). The base period for the basic research credit generally extends from 1981 through 1983.

[1248] Sec. 41(a)(3).

[1249] The Small Business Job Protection Act of 1996 expanded the definition of start-up firms under section 41(c)(3)(B)(i) to include any firm if the first taxable year in which such firm had both gross receipts and qualified research expenses began after 1983. A special rule (enacted in 1993) is designed to gradually recompute a start-up firm's fixed-base percentage based on its actual research experience. Under this special rule, a start-up firm is assigned a fixed-base percentage of three percent for each of its first five taxable years after 1993 in which it incurs qualified research expenses. A start-up firm's fixed-base percentage for its sixth through tenth taxable years after 1993 in which it incurs qualified research expenses is a phased-in ratio based on the firm's actual research experience. For all subsequent taxable years, the taxpayer's fixed-base percentage is its actual ratio of qualified research expenses to gross receipts for any five years selected by the taxpayer from its fifth through tenth taxable years after 1993. Sec. 41(c)(3)(B).

[1250] Sec. 41(c)(4)(A).

years.[1251] An election to use the alternative simplified credit applies to all succeeding taxable years unless revoked with the consent of the Secretary.[1252]

Eligible expenses

Qualified research expenses eligible for the research credit consist of: (1) in-house expenses of the taxpayer for wages and supplies attributable to qualified research; (2) certain time-sharing costs for computer use in qualified research; and (3) 65 percent of amounts paid or incurred by the taxpayer to certain other persons for qualified research conducted on the taxpayer's behalf (so-called contract research expenses).[1253] Notwithstanding the limitation for contract research expenses, qualified research expenses include 100 percent of amounts paid or incurred by the taxpayer to an eligible small business, university, or Federal laboratory for qualified energy research.

To be eligible for the credit, the research not only has to satisfy the requirements of section 174, but also must be undertaken for the purpose of discovering information that is technological in nature, the application of which is intended to be useful in the development of a new or improved business component of the taxpayer, and substantially all of the activities of which constitute elements of a process of experimentation for functional aspects, performance, reliability, or quality of a business component.[1254] Research does not qualify for the credit if substantially all of the activities relate to style, taste, cosmetic, or seasonal design factors.[1255] In addition, research does not qualify for the credit if: (1) conducted after the beginning of commercial production of the business component; (2) related to the adaptation of an existing business component to a particular customer's requirements; (3) related to the duplication of an existing business component from a physical examination of the component itself or certain other information; (4) related to certain efficiency surveys, management function or technique, market research, market testing, or market development, routine data collection or routine quality control; (5) related to software developed primarily for internal use by the taxpayer; (6) conducted outside the United States, Puerto Rico, or any U.S. possession; (7) in the social sciences, arts, or humanities; or (8) funded by any grant, contract, or otherwise by another person (or government entity).[1256]

Relation to amortization deduction

If a taxpayer's research credit under section 41 for a taxable year beginning after 2021 exceeds the amount allowed as an amortization deduction under section 174 for such taxable year, the amount

[1251] Sec. 41(c)(4)(B).
[1252] Sec. 41(c)(4)(C).
[1253] Under a special rule, 75 percent of amounts paid to a research consortium for qualified research are treated as qualified research expenses eligible for the research credit (rather than 65 percent under the general rule under section 41(b)(3) governing contract research expenses) if (1) such research consortium is a tax-exempt organization that is described in section 501(c)(3) (other than a private foundation) or section 501(c)(6) and is organized and operated primarily to conduct scientific research, and (2) such qualified research is conducted by the consortium on behalf of the taxpayer and one or more persons not related to the taxpayer. Sec. 41(b)(3)(C).
[1254] Sec. 41(d)(1) and (3)(A).
[1255] Sec. 41(d)(3)(B).
[1256] Sec. 41(d)(4).

chargeable to capital account under section 174 for such taxable year must be reduced by that excess amount.[1257] A taxpayer may alternatively elect to claim a reduced research credit amount under section 41 in lieu of reducing its section 174 expenditures for the taxable year.[1258] If such an election is made, the research credit is reduced by an amount equal to that credit multiplied by the highest corporate tax rate.

Research credit allowed against alternative minimum tax for eligible small businesses

In the case of an eligible small business,[1259] the research credit determined under section 41 is a specified credit. Thus, the research credits of an eligible small business may offset both regular tax and alternative minimum tax liabilities.

Payroll tax credit for qualified small businesses

FICA taxes

The Federal Insurance Contributions Act ("FICA") imposes tax on employers and employees based on the amount of wages (as defined for FICA purposes) paid to an employee during the year, often referred to as "payroll" taxes.[1260] The tax imposed on the employer and on the employee is each composed of two parts: (1) the Social Security or old age, survivors, and disability insurance ("OASDI") tax equal to 6.2 percent of covered wages up to the taxable wage base ($147,000 for 2022); and (2) the Medicare or hospital insurance ("HI") tax equal to 1.45 percent of all covered wages.[1261] The employee portion of the FICA tax generally must be withheld and remitted to the Federal government by the employer.

An employer generally files quarterly employment tax returns showing its liability for FICA taxes with respect to its employees' wages for the quarter, as well as the employee FICA taxes and income taxes withheld from the employees' wages.

Payroll tax credit

A qualified small business may elect for any taxable year to claim a certain amount of its research credit as a payroll tax credit against its employer OASDI liability, rather than against its income tax liability (the "payroll tax credit").[1262] If a taxpayer makes an election, the amount so elected is treated as a research credit for purposes of section 280C.[1263]

A qualified small business is defined, with respect to any taxable year, as a corporation (including an S corporation) or partnership

[1257] Sec. 280C(c)(1).

[1258] Sec. 280C(c)(2).

[1259] Defined in section 38(c)(5)(A), after application of rules similar to the rules of section 38(c)(5)(B).

[1260] Secs. 3101–3128.

[1261] The employee portion of the HI tax under FICA (not the employer portion) is increased by an additional tax of 0.9 percent on wages received in excess of a threshold amount. The threshold amount is $250,000 in the case of a joint return, $125,000 in the case of a married individual filing a separate return, and $200,000 in any other case.

[1262] Sec. 41(h).

[1263] Thus, taxpayers either reduce their section 174 expenditures by the amount by which the research credit for the taxable year exceeds the section 174 amortization deduction for the taxable year, or elect a reduced research credit amount. The election is not taken into account for purposes of determining any amount allowable as a payroll tax deduction.

(1) with gross receipts of less than $5 million for the taxable year,[1264] and (2) that did not have gross receipts for any taxable year before the five taxable year period ending with the taxable year. An individual carrying on one or more trades or businesses also may be considered a qualified small business if the individual meets the conditions set forth in (1) and (2), taking into account its aggregate gross receipts received with respect to all trades or businesses. A qualified small business does not include an organization exempt from income tax under section 501.

The payroll tax credit is the least of (1) an amount specified by the taxpayer that does not exceed $250,000, (2) the research credit determined for the taxable year, or (3) in the case of a qualified small business other than a partnership or S corporation, the amount of the business credit carryforward under section 39 from the taxable year (determined before the application of this rule to the taxable year).

All members of the same controlled group or group under common control are treated as a single taxpayer.[1265] The $250,000 amount is allocated among the members in proportion to each member's expenses on which the research credit is based. Each member may separately elect the payroll tax credit, but not in excess of its allocated dollar amount.

A taxpayer may make an annual election under this section,[1266] specifying the amount of its research credit not to exceed $250,000 that may be used as a payroll tax credit, on or before the due date (including extensions) of its originally filed return.[1267] A taxpayer may not make an election for a taxable year if it has made such an election for five or more preceding taxable years. An election to apply the research credit against OASDI liability may not be revoked without the consent of the Secretary. In the case of a partnership or S corporation, an election to apply the credit against its OASDI liability is made at the entity level.

The payroll tax credit is allowed against the qualified small business's employer OASDI tax liability for the first calendar quarter beginning after the date on which the qualified small business files its income tax or information return for the taxable year.[1268] The credit may not exceed the OASDI tax liability for a calendar quarter on the wages paid with respect to all employees of the qualified small business.[1269]

If the payroll tax credit exceeds the qualified small business's OASDI tax liability for a calendar quarter, the excess is allowed as

[1264] For this purpose, gross receipts are determined under the rules of section 448(c)(3), without regard to subparagraph (A) thereof.

[1265] For this purpose, all persons or entities treated as a single taxpayer under section 41(f)(1) are treated as a single person.

[1266] See IRS Notice 2017–23, 2017–16 I.R.B. 1100, and IRS Form 6765, Credit for Increasing Activities, for guidance on making the election.

[1267] In the case of a qualified small business that is a partnership, this is the return required to be filed under section 6031. In the case of a qualified small business that is an S corporation, this is the return required to be filed under section 6037. In the case of any other qualified small business, this is the return of tax for the taxable year.

[1268] Sec. 3111(f). See also IRS Form 8974, Qualified Small Business Payroll Tax Credit for Increasing Research Activities, which must be completed and attached to the employment tax return.

[1269] The credit does not apply against its employer HI liability or against the employee portion of FICA taxes the employer is required to withhold and remit to the government.

a credit against the OASDI liability for the following calendar quarter.

Explanation of Provision

The provision increases by $250,000 the amount of the research credit that a qualified small business may elect for any taxable year to claim against its payroll tax liability, rather than against its income tax liability.[1270] Thus, the payroll tax credit is the least of (1) an amount specified by the taxpayer that does not exceed $500,000,[1271] (2) the research credit determined for the taxable year, or (3) in the case of a qualified small business other than a partnership or S corporation, the amount of the business credit carryforward under section 39 from the taxable year (determined before the application of this rule to the taxable year).

As under present law, the payroll tax credit that is allowed as a credit against the qualified small business's employer OASDI tax liability for the applicable calendar quarter may not exceed $250,000.[1272] Under the provision, the additional $250,000 amount is allowed as a credit against the taxpayer's HI tax liability for the applicable calendar quarter.[1273] Thus, a taxpayer may claim up to $250,000 of its payroll tax credit against its employer OASDI liability, and any remaining amount of such credit against its employer HI liability, for the applicable calendar quarter.

In the case of members of the same controlled group or group under common control treated as a single taxpayer for purposes of section 41(h), each $250,000 election limitation amount is allocated among members in proportion to each member's expenses on which the research credit is based.[1274]

If the payroll tax credit exceeds the qualified small business's employer share of the OASDI and HI tax liabilities for a calendar quarter, the excess is allowed as a credit against such taxpayer's employer share of OASDI and HI tax liabilities for the following calendar quarter (*i.e.*, the payroll tax credit is not refundable if it exceeds the taxpayer's employer share of the OASDI and HI tax liabilities for a calendar quarter, but such excess may be carried forward and applied against such liabilities in succeeding calendar quarters).[1275]

Effective Date

The provision applies to taxable years beginning after December 31, 2022.

[1270] Sec. 41(h)(4)(B)(i)(II), as amended by the Act.
[1271] Sec. 41(h)(4)(B)(i), as amended by the Act.
[1272] Secs. 41(h)(4)(B)(i)(I) and 3111(f)(1)(A) and (f)(2), as amended by the Act.
[1273] Secs. 41(h)(4)(B)(i)(II) and 3111(f)(1)(B) and (f)(2), as amended by the Act.
[1274] Sec. 41(h)(5)(B)(ii), as amended by the Act.
[1275] Sec. 3111(f)(3), as amended by the Act.

28. Extension of limitation on excess business losses of noncorporate taxpayers (sec. 13903(b) of the Act and sec. 461(l) and (j) of the Code)

Present Law

Limitation on excess business losses of a taxpayer other than a corporation

In general

For taxable years beginning after December 31, 2020, and before January 1, 2027, an excess business loss of a taxpayer other than a corporation is not allowed for the taxable year.[1276]

An excess business loss not allowed for a taxable year is treated as an NOL for the taxable year that is carried over to subsequent taxable years under the applicable NOL carryover rules.[1277]

An excess business loss for the taxable year is the excess of aggregate deductions of the taxpayer attributable to trades or businesses of the taxpayer (determined without regard to the limitation of the provision)[1278] over the sum of aggregate gross income or gain attributable to trades or businesses of the taxpayer plus a threshold amount. The threshold amount is indexed for inflation for taxable years beginning after 2018. The threshold amount for a taxable year beginning in 2022 is $270,000 as indexed (or, in the case of a joint return, twice the otherwise applicable threshold amount, or $540,000 for 2022 as indexed).

The aggregate business deductions taken into account to determine the excess business loss of the taxpayer for the taxable year that are attributable to trades or businesses of the taxpayer are determined without regard to any deduction under section 172 (relating to NOLs) or 199A (relating to the deduction for qualified business income). For example, assume that a taxpayer has an NOL carryover from a prior taxable year to the current taxable year. Such NOL carryover is not part of the taxpayer's aggregate deductions attributable to the trade or business for the current taxable year under section 461(l).

[1276] A one-year extension of section 461(l) (extending it to taxable years beginning before January 1, 2027) was enacted in section 9041 of Pub. L. No 117–2 and is described elsewhere in this document. As further background, section 461(l), as modified in 2017 by section 11012 of Public Law 115–97, was applicable to taxable years beginning after December 31, 2017, and before January 1, 2026. Section 2304 of Division A of Public Law 116–136 further modified Code section 461(l) so that it does not apply for a taxable year beginning in 2018, 2019, or 2020. For a description of both of these section 461(l) modifications, see: Joint Committee on Taxation, *General Explanation of Public Law 115–97 (JCS–1–18)*, December 2018, page 38; and Joint Committee on Taxation, *General Explanation of the Tax Legislation Enacted in the 116th Congress* (JCS–1–22), February 2022, page 330.

[1277] See generally sec. 172. The amount of the taxpayer's NOL (including any excess business loss that is not allowed for the taxable year) carried to a subsequent taxable year is limited to 80 percent of the taxable income (determined without regard to the NOL deduction and deductions under sections 199A and 250) for that subsequent taxable year. Sec. 172(a)(2). For a discussion of the changes made in 2017 to section 172, see the description of section 13302 of Public Law 115–97 (Modification of Net Operating Loss Deduction) in Joint Committee on Taxation, *General Explanation of Public Law 115–97* (JCS–1–18), December 2018, page 180. Changes made by section 2303 of Division A of Public Law 116–136 to rules governing NOLs (section 172) are described in Joint Committee on Taxation, *General Explanation of the Tax Legislation Enacted in the 116th Congress* (JCS–1–22), February 2022, page 325.

[1278] Aggregate deductions (for purposes of section 461(l)) do not include the amount of any NOL carryback or carryover under section 172 that is attributable to such trades or businesses from a different taxable year.

An excess business loss under section 461(l) does not take into account any deductions, gross income, or gains attributable to any trade or business of performing services as an employee.[1279] For this purpose, the trade or business of performing services as an employee has the same meaning as it does under section 62(a)(1). For example, assume married taxpayers filing jointly for the taxable year have a loss from a trade or business conducted by one spouse as a sole proprietorship, as well as wage income of the other spouse from employment. The wage income is not taken into account in determining the amount of the deduction limited under section 461(l).

In the case of a partnership or S corporation, the provision applies at the partner or shareholder level. Each partner's distributive share and each S corporation shareholder's pro rata share of items of income, gain, deduction, or loss of a partnership or S corporation are taken into account in applying the limitation under the provision for the taxable year of the partner or S corporation shareholder. Regulatory authority is provided to require any additional reporting as the Secretary determines is appropriate to carry out the purposes of the provision (including with respect to any other passthrough entity to the extent necessary to carry out the purposes of the provision).

Section 461(l) applies after the application of certain other limitations on losses, namely, the passive activity loss limitation,[1280] the at-risk limitation,[1281] and in the case of a taxpayer who is a partner or S corporation shareholder, the rules limiting the taxpayer's distributive or pro rata share of loss for the taxable year to the taxpayer's adjusted basis in the partnership interest or in the S corporation stock and debt.[1282] Thus, for example, the amount of any income, deduction, gain, or loss from a passive activity that is taken into account under the passive activity loss limitation is not taken into account in determining whether a taxpayer has an excess business loss.

Treatment of capital losses

In the case of a taxpayer other than a corporation, section 1211(b) limits the deduction for losses from sales or exchanges of capital assets to gains from such sales or exchanges plus up to $3,000. Section 172(d)(2)(A), relating to NOLs, provides a similar limitation but without regard to the $3,000 additional amount. Because capital losses cannot offset ordinary income under the NOL rules, any capital loss deductions are not taken into account in computing the section 461(l) limitation. Further, the amount of capital gain taken into account in calculating the section 461(l) lim-

[1279] See also the IRS explanation of "Excess business losses" at https://www.irs.gov/newsroom/excess-business-losses, which conforms to this rule. The rule was clarified in Pub. L. No. 116–136, Div. A, sec. 2304(b), effective as if included in section 11012 of Public Law 115–97 (that is, starting with the taxable year beginning after December 31, 2017; Pub. L. No 116–136, Div. A, sec. 2304, however, later provided that section 461(l) does not apply for a taxable year beginning in 2018, 2019, or 2020.)

[1280] Sec. 469.

[1281] Sec. 465.

[1282] Sec. 704(d) (for partners) and sec. 1366(d) (for S corporation shareholders). See sec. 461(l)(6) (applying section 461(l) after section 469), and Treas. Reg. sec. 1.469–2T(d)(6) (applying section 469 after sections 704(d), 1366(d), and 465). Note that other rules could potentially limit a taxpayer's loss (*e.g.*, section 267). A discussion of all potential loss limitation rules is beyond the scope of the description of this provision.

itation cannot exceed the lesser of capital gain net income from a trade or business or capital gain net income.

Excess farm losses

For taxable years beginning before January 1, 2018, and after December 31, 2026, a limitation on excess farm losses applies to taxpayers other than C corporations.[1283] Thus, for taxable years beginning after December 31, 2017, and before January 1, 2027, the limitation relating to excess farm losses does not apply.

Under the limitation relating to excess farm losses, if a taxpayer other than a C corporation receives an applicable subsidy[1284] for the taxable year, the amount of the excess farm loss is not allowed for the taxable year and is carried forward and treated as a deduction attributable to farming businesses in the next taxable year. An excess farm loss for a taxable year means the excess of aggregate deductions that are attributable to farming businesses over the sum of aggregate gross income or gain attributable to farming businesses plus the threshold amount. The threshold amount is the greater of (1) $300,000 ($150,000 for married individuals filing separately), or (2) for the five-consecutive-year period preceding the taxable year, the excess of the aggregate gross income or gain attributable to the taxpayer's farming businesses over the aggregate deductions attributable to the taxpayer's farming businesses.

Explanation of Provision

The provision extends for two years the limitation on excess business loss of a taxpayer other than a corporation (section 461(l)). Specifically, the section 461(l) limitation applies for taxable years beginning after December 31, 2020, and before January 1, 2029. The limitation on excess farm losses (section 461(j)) does not apply for taxable years beginning after December 31, 2017, and before January 1, 2029.

Effective Date

The provision is effective for taxable years beginning after December 31, 2026.

29. Removal of harmful small business taxes; extension of limitation on deduction for state and local, etc., taxes (secs. 13904 and 10101 of the Act and secs. 55 and 59 of the Code)

For a description of the amendment made in section 13904(a) of the Act, see the description of section 10101 of the Act (Corporate alternative minimum tax).

The amendment made in section 13904(b) of the Act (a one-year extension of the limitation on deduction for state and local, etc.,

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[1283] Sec. 461(j).

[1284] For this purpose, an applicable subsidy means (A) any direct or counter-cyclical payment under title I of the Food, Conservation, and Energy Act of 2008, or any payment elected to be received in lieu of such payment, or (B) any Commodity Credit Corporation loan. Sec. 461(j)(3). Note that the Agricultural Act of 2014 repealed direct and counter-cyclical payments under the Food, Conservation, and Energy Act of 2008. See secs. 1101 and 1102 of Pub. L. No. 11–9, February 7, 2014. Thus, only Commodity Credit Corporation loans currently fall within the definition of an applicable subsidy for purposes of section 461(j).

taxes) was reversed by the amendment made in section 13903(a) of the Act.[1285]

PART EIGHT: CONSOLIDATED APPROPRIATIONS ACT, 2023 (PUBLIC LAW 117–328)[1286]

DIVISION T—SECURE 2.0 ACT OF 2022

TITLE I—EXPANDING COVERAGE AND INCREASING RETIREMENT SAVINGS

1. Expanding automatic enrollment in retirement plans (sec. 101 of the Act and sec. 414 of the Code)

Present Law

Section 401(k) plans

A section 401(k) plan is a type of profit-sharing or stock bonus plan that contains a qualified cash or deferred arrangement. Such arrangements are subject to the rules generally applicable to qualified defined contribution plans. In addition, special rules apply to such arrangements. Employees who participate in a section 401(k) plan may elect to have contributions made to the plan (referred to as "elective deferrals") rather than receive the same amount as current compensation.[1287] The maximum annual amount of elective deferrals that can be made by an employee for a year is $20,500 (for 2022) or, if less, the employee's compensation.[1288] For an employee who attains age 50 by the end of the year, the dollar limit on elective deferrals is increased by $6,500 (for 2022) (called "catch-up contributions").[1289] An employee's elective deferrals (and the earnings on those amounts) must be fully vested. A section 401(k) plan may also provide for employer matching and nonelective contributions.

Section 403(b) plans

Tax-deferred annuity plans (referred to as section 403(b) plans) are generally similar to qualified defined contribution plans, but may be maintained only by (1) tax-exempt charitable organizations,[1290] and (2) educational institutions of State or local governments (that is, public schools, including colleges and univer-

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[1285] Section 13904 was an amendment proposed by Senator Thune. Section 13903 was a subsequent amendment proposed by Senator Warner.

[1286] H.R. 2617. The bill was introduced in the House of Representatives on April 16, 2021, and was passed by the House with amendments on September 28, 2021. The Senate passed the bill with amendments on November 15, 2022. The House agreed to certain Senate amendments on December 14, 2022, and the Senate concurred in the House amendment to the Senate amendment on December 22, 2022. The House agreed to the Senate amendment to the House amendment to the Senate amendment on December 23, 2022. The President signed the bill on December 29, 2022.

[1287] Elective deferrals generally are made on a pre-tax basis and distributions attributable to elective deferrals are includible in income. However, a section 401(k) plan is permitted to include a "qualified Roth contribution program" that permits a participant to elect to have all or a portion of the participant's elective deferrals under the plan treated as after-tax Roth contributions. Certain distributions from a designated Roth account are excluded from income, even though they include earnings not previously taxed.

[1288] Secs. 402(g); 415.

[1289] Sec. 414(v).

[1290] These are organizations exempt from tax under section 501(c)(3). Section 403(b) plans of private, tax-exempt employers may be subject to ERISA as well as the requirements of section 403(b).

sities).[1291] Section 403(b) plans may provide for employees to make elective deferrals (in pre-tax or designated Roth form), including catch-up contributions, or other after-tax employee contributions, and employers may make nonelective or matching contributions on behalf of employees. Contributions to a section 403(b) plan are generally subject to the same contribution limits applicable to qualified defined contribution plans, including the limits on elective deferrals.

Automatic enrollment

Section 401(k) plans and section 403(b) plans must provide each eligible employee with an effective opportunity to make or change an election to make elective deferrals at least once each plan year.[1292] Whether an employee has an effective opportunity is determined based on all the relevant facts and circumstances, including the adequacy of notice of the availability of the election, the period of time during which an election may be made, and any other conditions on elections.

Section 401(k) plans, and section 403(b) plans that have salary reduction arrangements, are generally designed so that an employee will receive cash compensation unless the employee affirmatively elects to make elective deferrals to the plan. Alternatively, such plans may provide that elective deferrals are made at a specified rate (when the employee becomes eligible to participate) unless the employee elects otherwise (i.e., affirmatively elects not to make contributions or to make contributions at a different rate). This alternative plan design is referred to as automatic enrollment.

Nondiscrimination test and automatic enrollment safe harbor

An annual nondiscrimination test, called the actual deferral percentage test (the “ADP” test) applies to elective deferrals under a section 401(k) plan.[1293] The ADP test generally compares the average rate of deferral for highly compensated employees to the average rate of deferral for non-highly compensated employees and requires that the average deferral rate for highly compensated employees not exceed the average rate for non-highly compensated employees by more than certain specified amounts. If a plan fails to satisfy the ADP test for a plan year, the plan is permitted to distribute deferrals to highly compensated employees (“excess deferrals”) in a sufficient amount to correct the failure. The distribution of the excess deferrals must be made by the close of the following plan year.[1294]

The ADP test is deemed to be satisfied if a section 401(k) plan includes certain minimum matching or nonelective contributions under either of two plan designs (a “section 401(k) safe harbor plan”), as well as certain required rights and features, and satisfies a notice requirement.[1295] One type of section 401(k) safe harbor plan includes automatic enrollment.

[1291] Sec. 403(b).
[1292] Treas. Reg. secs. 1.401(k)–1(e)(2)(ii); 1.403(b)–5(b)(2).
[1293] Sec. 401(k)(3).
[1294] Sec. 401(k)(8).
[1295] Sec. 401(k)(12) and (13). If certain additional requirements are met, matching contributions under a section 401(k) safe harbor plan may also satisfy a nondiscrimination test applicable under section 401(m).

An automatic enrollment section 401(k) safe harbor plan must provide that, unless an employee elects otherwise, the employee is treated as electing to make elective deferrals at a default rate equal to a percentage of compensation as stated in the plan and at least (1) three percent of compensation for the first year the deemed election applies to the participant, (2) four percent during the second year, (3) five percent during the third year, and (4) six percent during the fourth year and thereafter. Although an automatic enrollment section 401(k) safe harbor plan generally may provide for default rates higher than these minimum rates, the default rate cannot exceed 15 percent for any year (10 percent for the first year).

Eligible automatic contribution arrangements

Plans that include eligible automatic contribution arrangements may allow participants to withdraw certain elective contributions ("permissive withdrawals").[1296] For this purpose, an eligible automatic contribution arrangement is an arrangement under an employer plan[1297] that meets the following conditions: (1) a participant under the arrangement may elect to have the employer make payments as contributions under the plan on behalf of the participant, or to the participant directly in cash; (2) the participant is treated as having elected to have the employer make such contributions in an amount equal to a uniform percentage of compensation provided under the plan until the participant specifically elects not to have such contributions made (or specifically elects to have such contributions made at a different percentage); and (3) the administrator of the plan meets certain notice requirements described below.[1298]

A permissive withdrawal is an election by the employee to withdraw elective contributions described in clause (2) above (and earnings attributable thereto). Such a withdrawal is includible in the employee's gross income for the taxable year in which the distribution is made, and are not subject to the 10-percent additional tax[1299] on early distributions from a retirement plan. The employee's election to make a permissive withdrawal must be made no later than 90 days after the date of the employee's first elective contribution under the arrangement.

Under the notice requirements, the administrator must, within a reasonable period before each plan year, give to each employee to whom the eligible automatic contribution arrangement applies a notice of the employee's rights and obligations under the arrangement which (1) is sufficiently accurate and comprehensive to apprise the employee of such rights and obligations, and (2) is written in a manner calculated to be understood by the average employee to whom the arrangement applies. The notice must describe the

[1296] For this purpose, elective contributions are elective deferrals under section 402(g) or contributions to certain governmental plans (as described in Treas. Reg. sec. 1.457–2(f)) that would be elective contributions if they were made under a qualified plan. Treas. Reg. sec. 1.414(w)–1(e)(4).

[1297] The employer plan must be one of the following: a plan qualified under section 401(a); a section 403(b) plan; a governmental section 457(b) plan; a SEP plan under section 408(k)(6) that provides for a salary reduction arrangement; or a SIMPLE IRA, as defined in section 408(p).

[1298] Sec. 414(w)(4).

[1299] Under section 72(t).

level of the default electronic contributions that will be made on the employee's behalf if the employee does not make an affirmative election.[1300] It also must include an explanation of the employee's right under the arrangement to elect not to have elective contributions made on the employee's behalf (or to elect to have a different percentage of compensation or a different amount of contribution made to the plan on his or her behalf),[1301] as well as an explanation of how contributions made under the arrangement will be invested in the absence of any investment election by the employee. If the plan allows permissive withdrawals, it must explain the employee's right to make such a withdrawal and describe the procedures to elect such a withdrawal. In addition, the employee must have a reasonable period of time after receipt of the notice and before the first elective contribution is made to make an election with respect to such contributions.[1302]

Explanation of Provision

The provision generally requires newly established section 401(k) plans and section 403(b) plans with salary reduction agreements to provide for automatic enrollment.[1303] Such plans must include an eligible automatic contribution arrangement that allows employees to make permissive withdrawals,[1304] and that meets requirements relating to the minimum contribution percentage and the investment of the employee's contributions.

Under the minimum contribution percentage requirements, the eligible automatic contribution arrangement must provide that the uniform percentage of compensation contributed by the participant during the first year of participation is at least three percent, and that such percentage increases by one percentage point each year to at least 10 percent (but no more than 15 percent), unless the participant specifically elects not to have such contributions made or to have them made at a different percentage. For a plan other than a section 401(k) safe harbor plan, the percentage of compensation contributed under the eligible automatic contribution arrangement (other than due to a participant's election to change such percentage) may not be greater than 10 percent in any plan year ending before January 1, 2026 (and 15 percent in a plan year ending after that date).[1305]

The percentage increase under the eligible automatic contribution arrangement must be effective as of the first day of the first plan year commencing after the completion of each year of participation. In addition, under the investment requirements, amounts contributed pursuant to such arrangement for which no investment is elected by the participant must be invested consistent with certain Department of Labor ("DOL") regulations under which a participant is treated as exercising control over the assets in the participant's account with respect to certain default investments.[1306]

[1300] Treas. Reg. sec. 1.414(w)–1(b)(3)(ii).

[1301] Treas. Reg. sec. 1.414(w)–1(b)(3)(ii)(B).

[1302] Sec. 414(w)(4).

[1303] SIMPLE section 401(k) plans (section 401(k)(11)) are not subject to the requirements of this provision.

[1304] As defined in section 414(w)(2).

[1305] A technical correction may be needed to reflect this intent.

[1306] 29 C.F.R. sec. 2550.404c–5, or any successor regulations.

Certain plans are exempt from the requirements of the provision. First, the provision does not apply to plans established before the date of enactment. However, this grandfathering rule does not apply in the case of an employer adopting a multiple employer plan after the date of enactment (and the provision will apply to that employer as if it were adopting its own new plan).[1307] Second, governmental plans[1308] and church plans[1309] are exempt from the provision. Third, the provision does not apply to a plan while the employer maintaining the plan has been in existence for less than three years. And fourth, the provision does not apply to a plan earlier than the date that is one year after the close of the first taxable year with respect to which the employer maintaining the plan normally employed more than 10 employees. In the case of a multiple employer plan, the exemptions relating to new employers and to small employers apply separately with respect to each employer.

Effective Date

The provision is effective for plan years beginning after December 31, 2024.

2. Modification of credit for small employer pension plan start-up costs (sec. 102 of the Act and sec. 45E of the Code)

Present Law

Present law provides a nonrefundable income tax credit equal to 50 percent of the qualified start-up costs paid or incurred during the taxable year by an eligible employer[1310] that adopts a new eligible employer plan,[1311] provided that the plan covers at least one non-highly compensated employee.[1312] Qualified start-up costs are expenses connected with the establishment or administration of the plan and retirement-related education of employees with respect to the plan. The amount of the credit for any taxable year is limited to the greater of (1) $500 or (2) the lesser of (a) $250 multiplied by the number of non-highly compensated employees of the eligible employer who are eligible to participate in the plan or (b) $5,000. The credit applies for up to three consecutive taxable years beginning with the taxable year the plan is first effective, or, at the election of the employer, with the year preceding the first plan year.

An eligible employer is an employer that, for the preceding year, had no more than 100 employees, each with compensation of $5,000 or more. In addition, the employer must not have had a qualified employer plan covering substantially the same employees as the new plan with respect to which contributions were made or

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[1307] In contrast, the grandfathering rule applies in the case of a multiemployer plan. A technical correction may be needed to reflect this intent.

[1308] Within the meaning of section 414(d).

[1309] Within the meaning of section 414(e).

[1310] An eligible employer has the meaning given such term by section 408(p)(2)(C)(i).

[1311] An eligible employer plan means a qualified employer plan within the meaning of section 4972(d) and includes a section 401(a) qualified retirement plan, a section 403 annuity, any SEP plan within the meaning of section 408(k), and any simple retirement account ("SIMPLE") within the meaning of section 408(p). An eligible employer plan does not include a plan maintained by a tax-exempt employer or a governmental plan, as defined in section 414(d).

[1312] A non-highly compensated employee is an employee who is not a highly compensated employee as defined under section 414(q).

benefits were accrued during the three years preceding the first year for which the credit would apply.[1313] Members of controlled groups and affiliated service groups are treated as a single employer for purposes of these requirements.[1314] All eligible employer plans of an employer are treated as a single plan.[1315]

No deduction is allowed for the portion of qualified start-up costs paid or incurred for the taxable year equal to the amount of the credit.[1316]

Explanation of Provision

The provision increases from 50 percent to 100 percent of qualified start-up costs the amount of the nonrefundable income tax credit allowed to an eligible employer with no more than 50 employees.

The provision also increases the credit allowed to an eligible employer[1317] by an amount equal to the applicable percentage of employer contributions (not including any elective deferrals) by the employer to an eligible employer plan (not including a defined benefit plan). The credit is limited to $1,000 per employee, and no contributions with respect to any employee who receives wages[1318] from the employer for the taxable year in excess of $100,000 (adjusted for inflation) may be taken into account in determining the dollar amount of the credit for that taxable year.

The applicable percentages are as follow:

Taxable Year	Appl cable Percentage
Taxable year in which the plan is established	100
1st taxable year after the taxable year in which the plan is established	100
2nd taxable year after the taxable year in which the plan is established	75
3rd taxable year after the taxable year in which the plan is established	50
4th taxable year after the taxable year in which the plan is established	25
Any taxable years thereafter	0

In the case of an eligible employer which had more than 50 employees in the year preceding the taxable year in which the plan is established, the amount of the additional credit is reduced by an amount equal to two percent for each employee above 50 employees. The amount of the credit is zero for employers with 100 or more employees.

No deduction is allowed for the portion of qualified start-up costs paid or incurred or for the portion of employer contributions for the taxable year equal to the increased amounts of the credit.

Effective Date

The provision applies to taxable years beginning after December 31, 2022.

[1313] Sec. 45E(c)(2).
[1314] Sec. 52(a) or (b) and 414(m) or (o).
[1315] Sec. 45E(e)(1).
[1316] Sec. 45E(e)(2).
[1317] For purposes of determining whether an employer is eligible, the rule that the employer must not have had a qualified employer plan covering substantially the same employees in the prior three years (see section 45E(c)(2)) only applies to the taxable year that the plan is established.
[1318] As defined in section 3121(a).

3. Saver's match (sec. 103 of the Act and new sec. 6433 of the Code)

Present Law

Eligible individuals may claim a nonrefundable income tax credit (the "saver's credit") for qualified retirement savings contributions to certain retirement accounts.[1319] Subject to adjusted gross income (or "AGI") limits, the credit is available to individuals who are age 18 or older, other than individuals who are full-time students or claimed as a dependent on another taxpayer's return.[1320] The maximum amount of the contribution that may be taken into account is $2,000 with a maximum credit of $1,000 per eligible individual.[1321]

The amount of the credit is based on the taxpayer's AGI and filing status.[1322] For purposes of the provision, AGI is determined without regard to sections 911, 931, and 933.[1323] The credit is a percentage of the taxpayer's qualified retirement savings contributions with a percentage of 10 percent, 20 percent, or 50 percent, as shown in the table below. The credit is in addition to any deduction or exclusion that would otherwise apply with respect to the contribution. The credit offsets alternative minimum tax liability as well as regular tax liability.[1324]

TABLE 1.—CREDIT RATES FOR SAVER'S CREDIT (FOR 2022) [1325]

Joint Filers (AGI)	Heads of Households (AGI)	All Other Filers [1] (AGI)	C edit Rate (%)
$0–$41,000	$0–$30,750	$0–$20,500	50
$41,001–$44,000	$30,751–$33,000	$20,501–$22,000	20
$44,001–$68,000	$33,001–$51,000	$22,001–$34,000	10
more than $68,000	more than $51,000	more than $34,000	0

Note: AGI amounts are indexed for inflat on.
[1] Includes single, marr ed filing separately, and qualifying widow or widower.

Eligible contributions for purposes of the credit include (1) contributions to traditional and Roth individual retirement arrangements ("IRAs"); (2) elective deferrals to a section 401(k) plan, a section 403(b) plan, a governmental section 457(b) plan, a savings incentive match plan for employees ("SIMPLE IRA") or a simplified employee pension ("SEP") plan; (3) voluntary after-tax employee contributions to a qualified retirement plan or annuity or a section 403(b) plan; and (4) contributions to a section 501(c)(18) plan.[1326] Under changes enacted by Public Law 115–97, eligible contributions for purposes of the credit also include contributions to Achieving a Better Life Experience ("ABLE") accounts for which the tax-

[1319] Sec. 25B.
[1320] Sec. 25B(c)(1), (2). See also sec. 151 (the allowance for dependents) and sec. 152(f)(2) (definition of "student").
[1321] Sec. 25B(a), (b)(1).
[1322] Sec. 25B(b).
[1323] Sec. 25B(e).
[1324] Sec. 26(a).
[1325] Notice 2021–61, 2021–47 I.R.B. 738, Nov. 22, 2021; see also IRS, Retirement Savings Contributions Credit (Saver's Credit), available at https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-savings-contributions-savers-credit (accessed Jan. 24, 2023).
[1326] Sec. 25B(d)(1).

payer is a designated beneficiary.[1327] ABLE accounts are savings accounts utilized by individuals with disabilities.[1328] A credit for such contributions is available for contributions made in calendar years 2018 through 2025.

The amount of any contribution eligible for the credit is reduced by distributions received by the taxpayer (or by the taxpayer's spouse if the taxpayer files a joint return with the spouse) from any retirement plan or IRA to which eligible contributions can be made during the taxable year for which the credit is claimed, during the two taxable years prior to the year the credit is claimed, and during the period after the end of the taxable year for which the credit is claimed and prior to the due date for filing the taxpayer's return for the year.[1329] Distributions that are rolled over to another retirement plan or IRA do not affect the credit.

Explanation of Provision

The Act replaces the saver's credit with a new provision, the saver's match.[1330] Under the provision, an eligible individual is allowed a matching contribution of up to $1,000, equal to a percentage of qualified retirement savings contributions made by the individual to a retirement account (the "saver's matching contribution").[1331] The saver's matching contribution is generally allowable as a credit that is payable by the Secretary of the Treasury ("the Secretary") as a contribution to the eligible individual's applicable retirement savings vehicle, as designated by the individual.[1332] The saver's matching contribution must be made as soon as practicable after the eligible individual files a tax return making a claim for the saver's matching contribution.[1333]

Qualified retirement savings contributions

The maximum percentage of qualified retirement savings contributions eligible for the saver's matching contribution is 50 percent (identical to the saver's credit), and the maximum amount of qualified retirement savings contributions that may be taken into account is $2,000 (identical to the saver's credit).[1334] This amount is not indexed for inflation. The saver's matching contribution percentage is reduced from 50 percent to 0 percent beginning at the applicable dollar amount of modified AGI and extending over a phaseout range.[1335] For eligible married individuals who file a joint tax return and for surviving spouses,[1336] the applicable dollar amount is $41,000 of modified AGI, indexed for inflation, and the phaseout range is the next $30,000 of modified AGI.[1337] For eligible individuals who file as head of household, the applicable dollar

[1327] Sec. 25B(d)(1)(D), enacted by Pub. L. No. 115–97, sec. 11024 (Dec. 22, 2017).
[1328] Sec. 529A.
[1329] Sec. 25B(d)(2).
[1330] New sec. 6433, added by the Act. See also sec. 103(e)(1) of the Act (conforming amendment to section 25B).
[1331] New sec. 6433(a).
[1332] New sec. 6433(a)(2)(A).
[1333] *Ibid.*
[1334] New sec. 6433(a), (b)(1).
[1335] New sec. 6433(b)(2). The percentage is reduced by the number of percentage points which bears the same ratio to 50 percentage points as the excess of the taxpayer's modified AGI for the taxable year over the applicable dollar amount bears to the phaseout range.
[1336] See sec. 2(a) (definition of surviving spouse).
[1337] New sec. 6433(b)(3), (h).

amount and phaseout range are 75 percent of those in effect for joint return filers.[1338] For all other taxpayers, the applicable dollar amount and phaseout range are 50 percent of the amounts in effect for joint return filers.[1339] Modified AGI is determined as AGI without regard to sections 911, 931, and 933, and without regard to any exclusion or deduction allowed for any qualified retirement savings contribution made during the taxable year.[1340]

Taxpayers who are eligible for a saver's matching contribution of less than $100 but more than $0 may elect to have the saver's matching contribution treated as a refundable income tax credit.[1341] Thus, for these electing taxpayers, the saver's matching contribution will either reduce income tax liability or be paid to the individual as a refund.[1342]

As with the saver's credit, for purposes of the saver's matching contribution, eligible individuals are individuals who are age 18 or older, other than individuals who are full-time students or claimed as a dependent on another taxpayer's return.[1343] A nonresident alien is generally ineligible for the saver's matching contribution.[1344]

As under the saver's credit, qualified retirement savings contributions[1345] are the sum of the amounts of: (1) contributions to traditional and Roth IRAs; (2) elective deferrals to a section 401(k) plan, a section 403(b) plan, a governmental section 457(b) plan, a SIMPLE IRA, or a SEP plan; (3) voluntary after-tax employee contributions to a qualified retirement plan or annuity or a section 403(b) plan; and (4) contributions to a section 501(c)(18) plan. However, unlike the saver's credit, contributions to ABLE accounts are not included.[1346]

The amount of qualified retirement savings contributions is reduced (but not below zero) by the aggregate distributions received by the individual during the testing period from any entity of a type to which the foregoing contributions may be made.[1347] For purposes of determining distributions received by an individual, any distribution received by a spouse of such individual is treated as received by such individual if such individual and spouse file a joint return for such taxable year and for the taxable year during which the spouse receives the distribution.[1348]

The testing period is the period that includes the taxable year plus the two preceding taxable years and the period after such taxable year and before the due date (including extensions) for filing

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[1338] *Ibid.*
[1339] *Ibid.*
[1340] New sec. 6433(f)(1).
[1341] New sec. 6433(a)(2)(B).
[1342] See secs. 37, 6401.
[1343] New sec. 6433(c)(1), (2). See also sec. 151 (the allowance for dependents) and sec. 152(f)(2) (definition of "student").
[1344] New sec. 6433(c)(3). However, if a nonresident alien is treated as a resident for a taxable year due to an election under either section 6103(g) or (h), then the resident is eligible for the saver's matching contribution for the taxable year.
[1345] See new sec. 6433(d).
[1346] Under present law, the saver's credit for contributions to ABLE accounts expires on December 31, 2026, before the effective date for this provision (taxable years beginning after December 31, 2026). A conforming amendment under the provision modifies the saver's credit under section 25B so that as of the effective date, qualified retirement savings contributions include only contributions to ABLE accounts (the credit for which expires before the effective date of this provision).
[1347] New sec. 6433(d)(2)(A).
[1348] New sec. 6433(d)(2)(D).

the tax return for such taxable year.[1349] Certain distributions made during the testing period are not taken into account for purposes of the reduction, such as any portion of a distribution transferred or paid in a rollover contribution.[1350]

Payment of saver's matching contribution

As previously noted, the saver's matching contribution generally will be paid in the form of a contribution to the individual's applicable retirement savings vehicle.

The applicable retirement savings vehicle is an account or plan elected by the individual.[1351] In order to receive the saver's matching contribution, an eligible individual must elect to have the contribution made to an account or plan (or portion thereof) which is a section 401(k) plan, section 403(b) plan with a salary reduction agreement, governmental section 457(b) plan, or IRA, other than a qualified Roth contribution program or Roth IRA (as applicable). The account or plan must also (1) be for the benefit of the eligible individual; (2) accept contributions made under this provision, and (3) be designated by such individual, in such form and manner as the Secretary may provide, on the tax return for the taxable year.[1352]

A saver's matching contribution is treated as an elective deferral made by the individual or as an IRA contribution (as applicable), except as provided by the Secretary under regulations.[1353] Thus, the amount will be taxable to the distributee when it is distributed from the retirement plan or IRA. The contribution is generally not taken into account with respect to retirement plan and IRA limitations.[1354]

Any saver's matching contribution that was erroneously paid, including a payment that is not made to an applicable retirement saving vehicle, is treated as an underpayment of tax for the taxable year in which the Secretary determines that the payment was erroneous.[1355] In the case of an erroneously paid saver's matching contribution, the distribution of such contribution is excluded from income,[1356] and the 10 percent additional tax on early distributions[1357] does not apply to the distribution of such contribution or income attributable to such contribution, if the distribution of such amounts is received no later than the due date (including extensions) for filing the individual's tax return.[1358] Any plan or ar-

[1349] New sec. 6433(d)(2)(B).

[1350] As defined in sections 402(c), 403(a)(4), 403(b)(8), 408A(e), or 457(e)(16). Also not taken into account for purposes of the reduction are distributions under sections 72(p), 401(k)(8), 401(m)(6), 402(g)(2), 404(k), or 408(d)(4), or distributions to which sections 408(d)(3) or 408A(d)(3) apply. New sec. 6433(d)(2)(C).

[1351] New sec. 6433(e)(1).

[1352] New sec. 6433(e)(2).

[1353] New sec. 6433(f)(2)(A).

[1354] New sec. 6433(f)(2)(B). The limitations are those imposed by sections 402(g)(1), 403(b), 408(a)(1), 408(b)(2)(B), 408A(c)(2), 414(v)(2), 415(c), or 457(b)(2). Also, such contributions are disregarded for purposes of sections 401(a)(4), 401(k)(3), 401(k)(11)(B)(i), and 416. Finally, the saver's matching contribution shall not be treated as an amount that may be paid, made available, or distributable to the participant under sections 401(k)(2)(B)(i)(IV), 403(b)(7)(A)(i)(V), or 457(d)(1)(A)(iii). New sec. 6433(f)(2)(C).

[1355] New sec. 6433(f)(4)(A). Such a payment shall not be treated as an underpayment of tax for purposes of Part II of subchapter A of Chapter 68.

[1356] New sec. 6433(f)(4)(B). Sections 402(a), 403(a)(1), 403(b)(1), 408(d)(1), and 457(a)(1) do not apply to the distribution of the contribution.

[1357] Under section 72(t).

[1358] New sec. 6433(f)(4)(B).

rangement to which a contribution is made under this provision, or from which a distribution is made, is not treated as violating the requirements applicable to such plan solely by reason of such contribution or distribution.[1359]

The saver's matching contribution is not subject to certain reductions or offsets under section 6402 [1360] and is not reduced or offset by other assessed Federal taxes that would otherwise be subject to levy or collection.[1361]

Specified early distributions and saver's matching contribution recovery payments

In certain cases, if the eligible individual takes early distributions from the applicable retirement savings vehicle that exceed the amount of the saver's matching contributions to the individual's account in such vehicle, an additional tax applies. Specifically, if the eligible individual receives a specified early distribution from the applicable retirement savings vehicle during the taxable year, and the aggregate amount of saver's matching contributions for the taxable year exceeds the account balance of the applicable retirement savings vehicle at the end of the taxable year, the tax imposed by chapter 1 is increased by an amount equal to the excess.[1362] The tax is reduced by the amount of the 10 percent additional tax on early distributions [1363] that applies to such distribution.[1364]

A specified early distribution is a distribution (1) which is from such applicable retirement savings vehicle to which a saver's matching contribution has been made; (2) which is includible in gross income, and (3) to which the 10 percent additional tax on early distributions applies.[1365]

The eligible individual may reduce the additional tax (but not below zero) by making additional contributions to an applicable retirement savings vehicle.[1366] The tax is reduced to the extent of the additional contributions, and such contributions must be made by the due date (including extensions) of the return for the taxable year in which the additional tax would otherwise be owed.[1367]

An individual who elects to make such additional contributions may make one or more contributions to an applicable retirement savings vehicle in an aggregate amount not to exceed the amount of the specified early distribution to which the election relates and to which a rollover contribution of such distribution could be made.[1368] To qualify for such an election, the individual must be eligible to make contributions to the retirement savings vehicle other than the additional contributions specified under this provi-

[1359] *Ibid*. The plan is not treated as violating secs. 401, 403, or 457.

[1360] New sec. 6433(f)(5). Specifically, the saver's matching contribution is not subject to reduction or offset under section 6402(c) (offset of past-due support against overpayments), (d) (collection of debts owed to Federal agencies), (e) (collection of past-due, legally enforceable State income tax obligations) or (f) (collection of unemployment compensation debts).

[1361] *Ibid*.

[1362] New sec. 6433(f)(6)(A).

[1363] Under section 72(t).

[1364] *Ibid*.

[1365] New sec. 6433(f)(6)(B).

[1366] New sec. 6433(f)(6)(C).

[1367] New sec. 6433(f)(6)(C)(i).

[1368] Under sections 402(c), 403(b)(8), 408(d)(3), or 457(e)(16), as the case may be. New sec. 6433(f)(6)(C)(ii).

sion.[1369] The aggregate amount of such additional contributions made by an individual to any applicable retirement savings vehicle which is not an individual retirement plan may not exceed the aggregate amount of specified early retirement distributions which are made from such retirement savings vehicle to such individual.[1370] If a contribution is made with respect to a specified early distribution from an applicable retirement savings vehicle other than an individual retirement plan, then the taxpayer shall, to the extent of the amount of the contribution, be treated as having received such distribution in an eligible rollover distribution[1371] and as having transferred the amount to the retirement savings vehicle in a direct trustee to trustee transfer within 60 days of the distribution.[1372] If a contribution is made with respect to a specified early distribution from an individual retirement plan, then, to the extent of the amount of the contribution, such distribution shall be treated as a rollover contribution[1373] transferred to the applicable retirement savings vehicle in a direct trustee to trustee transfer within 60 days of the distribution.[1374]

The Secretary is directed to prescribe rules as may be appropriate to reduce the additional tax under this provision to properly account for the extent to which any portion of the excess to which such tax applies is allocable to investment loss in the applicable retirement savings vehicle.[1375]

The additional tax may not be offset by the nonrefundable personal income tax credits.[1376]

Information related to payment of saver's matching contribution

The Secretary is required to amend the reporting requirements for retirement plans and IRAs to require separate reporting of the aggregate amount of saver's matching contributions received by the plan during the year from the Secretary pursuant to this provision.[1377]

If an eligible individual elects to have the saver's matching contribution made to an account or plan, the Secretary must provide general guidance applicable to the custodian of the account or the plan sponsor, as the case may be, detailing the treatment of such contribution and reporting requirements with respect to the contribution.[1378]

Treatment of the U.S. territories

The Secretary must pay to each territory of the United States that has a mirror Code tax system—the U.S. Virgin Islands, Commonwealth of the Northern Mariana Islands, and Guam—amounts equal to the loss (if any) to that territory by reason of amendments

[1369] New sec. 6433(f)(6)(C)(iii).
[1370] *Ibid.*
[1371] Sec. 402(c)(4).
[1372] New sec. 6433(f)(6)(C)(iv).
[1373] Sec. 408(d)(3).
[1374] New sec. 6433(f)(6)(C)(v).
[1375] New sec. 6433(f)(6)(D).
[1376] Secs. 21–26. A technical correction may be required to fully reflect this intent.
[1377] Sec. 103(c)(2) of the Act. The Secretary is required to amend the reporting requirements under section 6058.
[1378] Under section 6058, including as modified by this provision. New sec. 6433(g).

made by this provision.[1379] Such amounts will be determined by the Secretary based on information provided by the government of the territory. With respect to any United States territory, a mirror Code tax system means the income tax system of such territory if the income tax liability of the residents of such territory is determined by reference to the income tax laws of the United States as if that territory were the United States.[1380]

For territories that do not have a mirror Code—Puerto Rico and American Samoa—the Secretary will pay amounts estimated by the Secretary as being equal to the aggregate benefits (if any) that would have been provided to residents of that territory by reason of the amendments made by this provision if the territory had a mirror Code.[1381] In order to receive these payments, the respective territory must have a process, which has been approved by the Secretary, under which the territory promptly transfers the payments directly on behalf of eligible residents to a retirement savings vehicle established under the laws of such possession or the United States that is or is substantially similar to a qualified retirement plan, an IRA, a section 403(a) annuity plan, a section 403(b) plan, or a governmental section 457(b) plan,[1382] and the restrictions on distributions from such retirement savings vehicle are substantially similar to the testing period rules of the provision. Any person for whom such a payment transfer is made (or who is eligible for such a payment) may not receive a saver's matching contribution under the Code.[1383]

Effective Date

The amendments made by this provision apply to taxable years beginning after December 31, 2026.

4. Promotion of saver's match (sec. 104 of the Act)

Present Law

For a description of the saver's match, see the description of section 103 of the Act.

Explanation of Provision

Under the provision, the Secretary must take such steps as the Secretary determines are necessary and appropriate to increase public awareness of the benefits provided under new section 6433 (the "saver's match") and shall, not later than July 1, 2026, provide a report to Congress summarizing anticipated promotion efforts. The report must include a description of plans for the development and distribution of digital and print materials; the translation of such materials into the 10 most commonly spoken languages after English as determined by data from the U.S. Census Bureau, American Community Survey; and communicating the adverse consequences of early withdrawal from an applicable retirement sav-

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[1379] Sec. 103(b)(1) of the Act.
[1380] Sec. 103(b)(4) of the Act.
[1381] Sec. 103(b)(2) of the Act.
[1382] A plan described in clause (iii), (iv), (v), or (vi) of section 402(c)(8)(B) or an individual retirement plan.
[1383] Sec. 103(b)(3) of the Act.

ings vehicle to which a matching contribution has been paid, including the operation of the Saver's Match Recovery Payment rules and associated early withdrawal tax.

Effective Date

The provision is effective on the date of enactment (December 29, 2022).

5. Pooled employer plans modification (sec. 105 of the Act and section 3(43) of ERISA)

Present Law

Pooled employer plans

Section 101 of the SECURE Act introduced the concept of a "pooled" multiple employer plan ("MEP") for purposes of the Code and ERISA.[1384]

Pooled employer plans under ERISA

A pooled employer plan is treated for purposes of ERISA as a single plan that is a MEP. A "pooled employer plan" is a qualified defined contribution plan that is established or maintained for the purpose of providing benefits to the employees of two or more employers, that meets certain requirements in order to be treated for purposes of ERISA as a single plan.[1385] A pooled employer plan does not include a plan maintained by employers that have a common interest other than having adopted the plan.

The term "pooled employer plan" does not include a multiemployer plan. Such term also does not include a plan established before the date of enactment of the SECURE Act (December 20, 2019) unless the plan administrator elects to have the plan treated as a pooled employer plan and the plan meets the ERISA requirements applicable to a pooled employer plan established on or after such date.

Under present law, a pooled employer plan must designate one or more trustees (other than an employer in the plan) meeting the requirements of a bank[1386] to be responsible for collecting contributions to, and holding the assets of, the plan and require such trustees to implement written contribution collection procedures that are reasonable, diligent and systematic.[1387]

Explanation of Provision

The provision clarifies that the named fiduciary (other than an employer in the plan) that is designated under the plan terms of

[1384] See the description of section 101 of the "Setting Every Community Up for Retirement Enhancement Act of 2019" on pages 86–98 of Joint Committee on Taxation, *General Explanation of Tax Legislation Enacted in the 116th Congress* (JCS–1–22), February 2022.

[1385] Sec. 3(43) of ERISA.

[1386] Such a bank must meet the requirements of section 408(a)(2), *i.e.*, a bank as defined in section 408(n) or such other person who demonstrates to the satisfaction of the Secretary that the manner in which such other person will administer the trust will be consistent with the requirements of that section. A "bank" is defined in section 408(n) as: any bank as defined in section 581, an insured credit union within the meaning of section 101, paragraph (6) or (7) of the Federal Credit Union Act, and a corporation which, under the laws of the State of its incorporation, is subject to supervision and examination by the Commissioner of Banking or other officer of such State in charge of the administration of the banking laws of such State.

[1387] Section 3(43)(B)(ii) of ERISA.

a pooled employer plan to be responsible for collecting contributions to the plan and that is required to implement written contribution collection procedures that are reasonable, diligent and systematic need not be a bank.

Effective Date

The provision applies to plan years beginning after December 31, 2022.

6. Multiple employer 403(b) plans (sec. 106 of the Act and secs. 403(b), 6057, and 6058 of the Code and secs. 3(43) and 3(44) of ERISA)

Present Law

Retirement savings under the Code and ERISA [1388]

The Code provides tax-favored treatment for various types of retirement plans, including employer-sponsored plans and IRAs. Code provisions are generally within the jurisdiction of the Secretary, through his or her delegate, the Internal Revenue Service ("IRS").

The most common type of tax-favored employer-sponsored retirement plan is a qualified retirement plan,[1389] which may be a defined contribution plan or a defined benefit plan. Under a defined contribution plan, separate individual accounts are maintained for participants, to which accumulated contributions, earnings, and losses are allocated, and participants' benefits are based on the value of their accounts.[1390] Defined contribution plans commonly allow participants to direct the investment of their accounts, usually by choosing among investment options offered under the plan. Under a defined benefit plan, benefits are determined under a plan formula and paid from general plan assets, rather than individual accounts.[1391] Besides qualified retirement plans, certain tax-exempt employers and public schools may maintain tax-deferred annuity plans.[1392]

An IRA is generally established by the individual for whom the IRA is maintained.[1393] However, in some cases, an employer may

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[1388] See also the description of section 101 of the SECURE Act on pages 86–98 of Joint Committee on Taxation, *General Explanation of Tax Legislation Enacted in the 116th Congress* (JCS–1–22), February 2022. This document can be found on the Joint Committee on Taxation website at www.jct.gov.

[1389] Sec. 401(a). A qualified annuity plan under section 403(a) is similar to and subject to requirements similar to those applicable to qualified retirement plans.

[1390] Sec. 414(i). Defined contribution plans generally provide for contributions by employers and may include a qualified cash or deferred arrangement under a section 401(k) plan, under which employees may elect to have their employer contribute to the plan in lieu of cash compensation.

[1391] Sec. 414(j).

[1392] Sec. 403(b). Private and governmental employers that are exempt from tax under section 501(c)(3), including tax-exempt private schools, may maintain tax-deferred annuity plans (discussed further below). State and local governmental employers may maintain another type of tax-favored retirement plan, an eligible deferred compensation plan under section 457(b).

[1393] Sections 219, 408 and 408A provide rules for IRAs. Under section 408(a)(2) and (n), only certain entities are permitted to be the trustee of an IRA. The trustee of an IRA generally must be a bank, an insured credit union, or a corporation subject to supervision and examination by the Commissioner of Banking or other officer in charge of the administration of the banking laws of the State in which it is incorporated. Alternatively, an IRA trustee may be another person who demonstrates to the satisfaction of the Secretary that the manner in which the person will administer the IRA will be consistent with the IRA requirements.

establish IRAs on behalf of employees and provide retirement contributions to the IRAs.[1394] In addition, IRA treatment may apply to accounts maintained for employees under a trust created by an employer (or an employee association) for the exclusive benefit of employees or their beneficiaries, provided that the trust complies with the relevant IRA requirements and separate accounting is maintained for the interest of each employee or beneficiary (referred to herein as an "IRA trust").[1395] In that case, the assets of the trust may be held in a common fund for the account of all individuals who have an interest in the trust.

Tax-sheltered annuities ("section 403(b) plans")

Section 403(b) plans are a form of tax-favored employer-sponsored plan that provide tax benefits similar to qualified retirement plans. Section 403(b) plans may be maintained only by (1) charitable tax-exempt organizations, and (2) educational institutions of State or local governments (that is, public schools, including colleges and universities).

Many of the rules that apply to section 403(b) plans are similar to the rules applicable to qualified retirement plans, including section 401(k) plans. Non-elective and matching contributions under a section 403(b) plan are generally subject to the minimum coverage and nondiscrimination rules that apply to qualified defined contribution plans. However, as in the case of a qualified retirement plan, a governmental section 403(b) plan is not subject to the nondiscrimination rules.

Contributions to section 403(b) plans

Employers may make nonelective or matching contributions to section 403(b) plans on behalf of their employees, and the plan may provide for employees to make pre-tax elective deferrals, designated Roth contributions (held in designated Roth accounts)[1396] or other after-tax contributions.

Section 403(b) annuity contracts

Generally, section 403(b) plans provide for contributions toward the purchase of annuity contracts for providing retirement benefits for their employees. The employee's rights under the annuity contract are nonforfeitable, except for a failure to pay future premiums.[1397] Section 403(b) generally provides that amounts contributed by an employer for an annuity contract are excluded from the gross income of the employee for the taxable year if certain requirements are satisfied.

Section 403(b) custodial accounts

Alternatively, such contributions may be held in custodial accounts established for each employee if those accounts satisfy certain requirements.

[1394] SEP plans under section 408(k) and SIMPLE IRA plans under section 408(p) are employer-sponsored retirement plans funded using IRAs for employees.
[1395] Sec. 408(c).
[1396] Sec. 402A.
[1397] Sec. 403(b)(1)(C).

Contributions to a section 403(b) plan that are held in a custodial account are treated as contributions to an annuity contract[1398] if the assets (1) are held by a bank[1399] or another person who demonstrates, to the satisfaction of the Secretary, that the manner in which the assets will be held is consistent with the requirements for a qualified retirement plan[1400] and (2) are invested in regulated investment company stock[1401] or in a group trust intended to satisfy IRS guidance.[1402]

Retirement income accounts

Assets of a section 403(b) plan generally must be invested in annuity contracts or mutual funds.[1403] However, the restrictions on investments do not apply to a retirement income account, which is a type of section 403(b) plan that is a defined contribution program established or maintained by a church, or a convention or association of churches, to provide benefits under the plan to employees of a religious, charitable or similar tax-exempt organization.[1404]

Certain rules prohibiting discrimination in favor of highly compensated employees, which apply to section 403(b) plans generally, do not apply to a plan maintained by a church or qualified church-controlled organization.[1405] For this purpose, church means a church, a convention or association of churches, or an elementary or secondary school that is controlled, operated, or principally supported by a church or by a convention or association of churches, and includes a qualified church-controlled organization. A qualified church-controlled organization is any church-controlled tax-exempt organization other than an organization that (1) offers goods, services, or facilities for sale, other than on an incidental basis, to the general public, other than goods, services, or facilities that are sold at a nominal charge substantially less than the cost of providing the goods, services, or facilities, and (2) normally receives more than 25 percent of its support from either governmental sources, or receipts from admissions, sales of merchandise, performance of services, or furnishing of facilities, in activities that are not unrelated trades or businesses, or from both. Church-controlled organi-

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[1398] Sec. 403(b)(7).

[1399] A "bank" is defined as any bank as defined in section 581, an insured credit union within the meaning of section 101, paragraph (6) or (7) of the Federal Credit Union Act, and a corporation which, under the laws of the State of its incorporation, is subject to supervision and examination by the Commissioner of Banking or other officer of such State in charge of the administration of the banking laws of such State. Sec. 408(n).

[1400] Sec. 401(f)(2) and Treas. Reg. sec. 1.401(f)–1. A custodial account that satisfies the requirements of section 401(f)(2) is treated as an organization described in section 401(a) solely for purposes of subchapter F of chapter 1 of Subtitle A (secs. 501–530) and subtitle F (pertaining to procedure and administration) with respect to amounts received by the account and with respect to any income from the investment of those amounts.

[1401] Sec. 403(b)(7) and Treas. Reg. sec. 1.403(b)–8(d)(2)(i).

[1402] Section 128 of the Act provides that contributions to a section 403(b) plan that are held in a custodial account are treated as contributions to an annuity contract if the assets are to be held in that custodial account and invested in regulated investment company stock or a group trust intended to satisfy the requirements of current or future IRS guidance.

[1403] Sec. 403(b)(1)(A) and (7).

[1404] Sec. 403(b)(9)(B), referring to organizations exempt from tax under section 501(c)(3). For this purpose, a church or a convention or association of churches includes an organization described in section 414(e)(3)(A), that is, an organization, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, provided that the organization is controlled by, or associated with, a church or a convention or association of churches.

[1405] Sec. 403(b)(1)(D) and (12).

zations that are not qualified church-controlled organizations are generally referred to as "nonqualified church-controlled organizations."

Church plans

A church plan is a plan established and maintained for employees (or their beneficiaries) by the church or by a convention or association of churches that is exempt from tax.[1406] Church plans include plans maintained by an organization, whether a civil law corporation or otherwise, that has as its principal purpose or function the administration or funding of a plan or program for providing retirement or welfare benefits for the employees of the church or convention or association of churches, provided the organization is associated with or controlled by a church or convention or association of churches.[1407]

ERISA

Retirement plans of private employers, including qualified retirement plans and tax-deferred annuity plans, are generally subject to requirements under the Employee Retirement Income Security Act of 1974 ("ERISA").[1408] A plan covering only business owners (or business owners and their spouses)—that is, it covers no other employees—is exempt from ERISA.[1409] Thus, a plan covering only self-employed individuals is exempt from ERISA. Tax-deferred annuity plans that provide solely for salary reduction contributions by employees may be exempt from ERISA.[1410] IRAs are generally exempt from ERISA.

The provisions of Title I of ERISA are under the jurisdiction of the Secretary of Labor.[1411] Many of the requirements under Title I of ERISA parallel Code requirements for qualified retirement plans. Under ERISA, in carrying out provisions relating to the same subject matter, the Secretary and the Secretary of Labor are required to consult with each other and develop rules, regulations, practices, and forms that, to the extent appropriate for efficient administration, are designed to reduce duplication of effort, duplication of reporting, conflicting or overlapping requirements, and the burden of compliance by plan administrators, employers, and participants and beneficiaries.[1412] In addition, interpretive jurisdiction over parallel Code and ERISA provisions relating to retirement plans is divided between the two Secretaries by an Executive Order, referred to as the Reorganization Plan No. 4 of 1978.[1413]

1406 Sec. 414(e).

1407 Sec. 414(e)(3)(A). With respect to certain provisions (e.g., the exemption for church plans from nondiscrimination rules applicable for tax-sheltered annuities), the more limited definition of church under the employment-tax rules applies (secs. 3121(w)(3)(A) and (B)).

1408 ERISA applies to employee welfare benefit plans, such as health plans, of private employers, as well as to employer-sponsored retirement (or pension) plans. Employer-sponsored welfare and pension plans are both referred to under ERISA as employee benefit plans. Under ERISA sec. 4(b)(1) and (2), governmental plans and church plans are generally exempt from ERISA.

1409 29 C.F.R. sec. 2510.3–3(b)–(c).

1410 29 C.F.R. sec. 2510.3–2(f).

1411 The provisions of Title I of ERISA are codified at 29 U.S.C. 1001–1191c. Under Title IV of ERISA, defined benefit plans of private employers are generally covered by PBGC's pension insurance program.

1412 ERISA sec. 3004.

1413 43 Fed. Reg. 47713 (October 17, 1978).

Certain church plans are exempt from the coverage, vesting, funding, and fiduciary requirements of ERISA ("non-electing" churches). Church plans may waive this exemption by election.[1414] Electing plans become subject to all section 401(a) qualification requirements, Title I of ERISA, and the excise tax on prohibited transactions.[1415] Such plans participate in the termination insurance program administered by the Pension Benefit Guaranty Corporation ("PBGC").

Fiduciary and bonding requirements

Among other requirements, ERISA requires a plan to be established and maintained pursuant to a written instrument (that is, a plan document) that contains certain terms.[1416] The terms of the plan must provide for one or more named fiduciaries that jointly or severally have authority to control and manage the operation and administration of the plan.[1417] Among other required plan terms are a procedure for the allocation of responsibilities for the operation and administration of the plan and a procedure for amending the plan and for identifying the persons who have authority to amend the plan. Among other permitted terms, a plan may also provide that any person or group of persons may serve in more than one fiduciary capacity with respect to the plan (including service both as trustee and administrator) and that a person who is a named fiduciary with respect to the control or management of plan assets may appoint an investment manager or managers to manage plan assets.

In general, a plan fiduciary is responsible for the investment of plan assets. However, a special rule applies in the case of a defined contribution plan that permits participants to direct the investment of their individual accounts.[1418] Under the special rule, if various requirements are met, a participant is not deemed to be a fiduciary by reason of directing the investment of the participant's account and no person who is otherwise a fiduciary is liable for any loss, or by reason of any breach, that results from the participant's investments. Defined contribution plans that provide for participant-directed investments commonly offer a set of investment options among which participants may choose. The selection of investment options to be offered under a plan is subject to ERISA fiduciary requirements.

Under ERISA, any plan fiduciary or person that handles plan assets is required to be bonded, generally for an amount not to exceed $500,000.[1419] In some cases, the maximum bond amount is $1 million, rather than $500,000.

[1414] Section 4(b)(2) of ERISA excepts a church plan (as defined in section 3(3) of ERISA) with respect to which no election has been made under Code section 410(d) from the provisions of Title I of ERISA (including the fiduciary, participation and vesting, and funding rules).

[1415] Sec. 4975.

[1416] ERISA sec. 402.

[1417] Fiduciary is defined in ERISA section 3(21), and named fiduciary is defined in ERISA section 402(a)(2).

[1418] ERISA sec. 404(c). Under ERISA, a defined contribution plan is also referred to as an individual account plan.

[1419] ERISA sec. 412.

Tax-sheltered annuity plans under ERISA

ERISA generally applies to section 403(b) plans maintained by tax-exempt organizations. However, there is an exception from ERISA for certain tax-sheltered annuity programs established by tax-exempt entities which consist of a program for the purchase of an annuity contract or the establishment of a custodial account pursuant to salary reduction agreements or agreements to forego an increase in salary where the tax-exempt entity has very limited involvement. Under the program: (1) participation is completely voluntary for employees, (2) all rights under the annuity contract or custodial account are enforceable solely by the employee, (3) the employer's sole involvement in the program is limited, for example, to the following: (a) permitting annuity contractors to publicize their products to employees, (b) requesting information concerning proposed funding, media, products, or annuity contracts, (c) summarizing or otherwise compiling information provided, (d) collecting annuity or custodial account contributions, or (e) holding in the employer's name, one or more group annuity contracts covering the employees, and (4) the employer receives no direct or indirect consideration or compensation.[1420]

Section 403(b) plans sponsored by governmental and public education employers are generally not subject to ERISA.

Similarly, non-electing church plans funded through section 403(b) annuities are generally not subject to ERISA.[1421]

Multiple employer plans under the Code

In general

Qualified retirement plans, either defined contribution or defined benefit plans, are categorized as single employer plans or multiple employer plans ("MEPs"). A single employer plan is a plan maintained by one employer. For this purpose, businesses and organizations that are members of a controlled group of corporations, a group under common control, or an affiliated service group are treated as one employer (referred to as "aggregation").[1422]

A MEP generally is a single plan maintained by two or more unrelated employers (that is, employers that are not treated as a single employer under the aggregation rules).[1423] MEPs are commonly maintained by employers in the same industry and are used also by professional employer organizations ("PEOs") to provide qualified retirement plan benefits to employees working for PEO clients.[1424] The Setting Every Community Up for Retirement En-

[1420] 29 C.F.R. sec. 2510.3–2(f).

[1421] However, whether or not they are maintained by a church, plans that are funded through tax-deferred custodial accounts are subject to annual reporting requirements and to the duty to report distributions of $600 or more. This is because such an account constitutes a "funded plan of deferred compensation described in part I of subchapter D of chapter 1." Secs. 6058 and 6041; Treas. Reg. sec. 301.6058–1(a)(2).

[1422] Sec. 414(b), (c), (m) and (o).

[1423] Sec. 413(c). Multiple employer status does not apply if the plan is a multiemployer plan. Multiemployer plans are different from single employer plans and MEPs. A multiemployer plan is defined under section 414(f) as a plan maintained pursuant to one or more collective bargaining agreements with two or more unrelated employers and to which the employers are required to contribute under collective bargaining agreement(s). Multiemployer plans are also known as Taft-Hartley plans.

[1424] Rev. Proc. 2003–86, 2003–2 C.B. 1211, and Rev. Proc. 2002–21, 2002–1 C.B. 911, address the application of the MEP rules to qualified defined contribution plans maintained by PEOs.

hancement Act of 2019 (the “SECURE Act”)[1425] provided special rules that applied to such a plan that has a pooled plan provider.[1426]

There is no specific provision in the Code that provides for section 403(b) plans maintained by more than one employer.[1427]

Application of Code requirements to MEPs

Some requirements are applied to a MEP on a plan-wide basis.[1428] For example, all employees covered by the plan are treated as employees of all employers participating in the plan for purposes of the exclusive benefit rule. Similarly, an employee’s service with all participating employers is taken into account in applying the minimum participation and vesting requirements. In applying the limits on contributions and benefits, compensation, contributions, and benefits attributable to all employers are taken into account.[1429] Other requirements are applied separately, including the minimum coverage requirements, nondiscrimination requirements (both the general requirements and the special tests for section 401(k) plans), and the top-heavy rules.[1430]

“One bad apple” rule

The qualified status of the plan as a whole is determined with respect to all employers maintaining the plan, and the failure by one employer (or by the plan itself) to satisfy an applicable qualification requirement may result in disqualification of the plan with respect to all employers (sometimes referred to as the “one bad apple” rule).[1431]

The SECURE Act provided relief from the “one bad apple” rule under the Code for certain MEPs.[1432] MEPs that satisfy certain requirements (referred to herein as a “covered MEP”) may avoid the consequences of the “one bad apple rule.” A “covered MEP” is a multiple employer qualified defined contribution plan[1433] or a plan maintained by more than one employer that consists of IRAs (referred to herein as an “IRA plan”), including under an IRA trust,[1434] that either (1) is maintained by employers which have a common interest other than having adopted the plan, or (2) in the case of a plan not described in (1), has a pooled plan provider (re-

[1425] Sec. 101 of Div. O. of Pub. L. No. 116–94, the Further Consolidated Appropriations Act, 2020, December 20, 2019.

[1426] Sec. 413(e).

[1427] Section 413(c) provides rules governing MEPs subject to sections 401(a), 410(a) and 411, in other words tax-qualified retirement plans, but does not apply those rules to section 403(b) plans. Section 413(e) provides rules governing MEPs that have a pooled plan provider and which are subject to sections 401(a) or 408, but does not apply those rules to section 403(b) plans.

[1428] Sec. 413(c).

[1429] Treas. Reg. sec. 1.415(a)–1(e).

[1430] Treas. Reg. secs. 1.413–2(a)(3)(ii)–(iii) and 1.416–1, G–2.

[1431] Treas. Reg. sec. 1.413–2(a)(3)(iv).

[1432] With respect to plans described under section 413(e)(1)(A), other than providing relief from the “one bad apple” rule if certain requirements are met and adding certain reporting requirements, the provision generally did not change present law and related guidance applicable to such MEPs under the Code or ERISA.

[1433] To which section 413(c) applies.

[1434] In applying the exclusive benefit requirement under section 408(c) to an IRA plan with an IRA trust covering employees of unrelated employers, all employees covered by the plan are treated as employees of all employers participating in the plan.

ferred to herein as a "pooled provider plan"),[1435] and which meets certain other requirements as described below.

Relief from the "one bad apple" rule does not apply to a plan unless the terms of the plan provide that, in the case of any employer in the plan failing to take required actions (referred to herein as a "noncompliant employer"):

- Plan assets attributable to employees of the noncompliant employer (or beneficiaries of such employees) will be transferred to a plan maintained only by that employer (or its successor) to a tax-favored retirement plan for each individual whose account is transferred,[1436] or to any other arrangement that the Secretary determines is appropriate, unless the Secretary determines it is in the best interests of the employees of the noncompliant employer (and beneficiaries of such employees) to retain the assets in the plan, and
- The noncompliant employer (and not the plan with respect to which the failure occurred or any other employer in the plan) is, except to the extent provided by the Secretary, liable for any plan liabilities attributable to employees of the noncompliant employer (or beneficiaries of such employees).

MEP status under ERISA

Like the Code, ERISA contains rules for multiple employer retirement plans. However, a different concept of MEP applies under ERISA.

Under ERISA, an employee benefit plan (whether a pension plan or a welfare plan) must be sponsored by an employer, by an employee organization, or by both.[1437] The definition of employer is any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan, and includes a group or association of employers acting for an employer in such capacity.[1438]

Historically, these definitional provisions of ERISA have been interpreted as only permitting a MEP to be established or maintained by a cognizable, bona fide group or association of employers, acting in the interests of its employer members to provide benefits to their employees.[1439] This approach is based on the premise that the person or group that maintains the plan is tied to the employers and employees that participate in the plan by some common economic or representational interest or genuine organizational relationship unrelated to the provision of benefits. Based on the facts and circumstances, the employers that participate in the benefit program must, either directly or indirectly, exercise control over that program, both in form and in substance, in order to act as a bona fide employer group or association with respect to the program, or the plan is sponsored by one or more employers as defined

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[1435] Sec. 413(e)(1).

[1436] For this purpose, a tax-favored retirement plan means an eligible retirement plan as defined in section 402(c)(8)(B), that is, an IRA, a qualified retirement plan, a tax-deferred annuity plan under section 403(b), or an eligible deferred compensation plan of a State or local governmental employer under section 457(b).

[1437] ERISA secs. 3(1) and (2).

[1438] ERISA sec. 3(5).

[1439] See, *e.g.,* Department of Labor Advisory Opinions 2012–04A, 2003–17A, 2001–04A, and 1994–07A, and other authorities cited therein.

in section 3(5) of ERISA.[1440] However, an employer association does not exist where several unrelated employers merely execute participation agreements or similar documents as a means to fund benefits, in the absence of any genuine organizational relationship between the employers. In that case, each participating employer establishes and maintains a separate employee benefit plan for the benefit of its own employees, rather than a MEP.

DOL MEP regulations

On July 31, 2019, DOL issued final regulations[1441] pursuant to Executive Order 13847[1442] which had directed DOL to consider within 180 days whether to issue a notice of proposed rulemaking, other guidance, or both, that would clarify when a group or association of employers or other appropriate business or organization could be an "employer" under ERISA.[1443] The final regulation focuses its scope on MEPs sponsored by either a group or association of employers or by a PEO and is limited to defined contribution plans.[1444] The final regulation does not deal with pooled employer plans.

The final regulation recognizes that a bona fide group or association of employers may establish a MEP if such group or association meets the following requirements: (1) the primary purpose of the group or association may be to provide MEP coverage to its employer members and their employees, but there must also be at least one substantial business purpose unrelated to offering and providing MEP coverage or other employee benefits to the employer members and their employees; (2) each employer member of the group or association is a person acting directly as an employer of at least one employee who is a participant covered under the plan; (3) the group or association has a formal organizational structure with a governing body and has by-laws or other similar indications of formality; (4) the functions and activities of the group or association are controlled by its employer members, and the group's or association's employer members that participate in the plan control (in form and in substance) the plan; (5) the employer members have a commonality of interest; (6) plan participation is only permitted to employees and former employees of employer members, and their beneficiaries; and (7) the group or association is not a bank or trust company, insurance issuer, broker-dealer or other similar financial services firm. Under the final regulation, a bona fide PEO may establish a MEP. Certain "working owners" may also establish a MEP.

[1440] See, *e.g.,* Department of Labor Advisory Opinion 2017–02AC.

[1441] 84 Fed. Reg. 37508, July 31, 2019. DOL noted in the preamble to the final regulations that these final regulations differ significantly from the legislative proposals introduced in Congress, including the SECURE Act which "makes comprehensive changes to ERISA and the Code to facilitate open MEPs." DOL indicates that the final rule is significantly more limited in scope because it relies solely on the Department's authority to promulgate regulations administering Title I of ERISA and unlike Congress, DOL does not have the authority to make statutory changes to ERISA and other areas of law that govern retirement savings such as the Code.

[1442] 83 Fed. Reg. 45321, September 6, 2018. The Executive Order was issued on August 31, 2018.

[1443] Within the meaning of ERISA sec. 3(5).

[1444] As defined in section 3(34) of ERISA.

Section 403(b) plans under ERISA

There is no specific provision in ERISA that provides for section 403(b) plans maintained by more than one employer.[1445]

“Pooled” MEPs under the Code and ERISA

As described above, section 101 of the SECURE Act provided relief from the “one bad apple” rule under the Code for certain MEPs. Section 101 of the SECURE Act also introduced the concept of a “pooled” MEP for purposes of the Code and ERISA. Various requirements apply to a “pooled provider plan” under the Code, with similar, but not identical, requirements applying under ERISA.

Pooled provider plan

A “pooled provider plan” is a qualified defined contribution plan that is established or maintained for the purpose of providing benefits to the employees of a MEP administered by a “pooled plan provider.” A pooled provider plan does not include a plan maintained by employers that have a common interest other than having adopted the plan.

In the case of a pooled provider plan, if the pooled plan provider does not perform substantially all the administrative duties required of the provider (as described below) for any plan year, the Secretary may provide that the determination as to whether the plan meets the Code requirements for tax-favored treatment will be made in the same manner as would be made without regard to the relief under the provision.

Pooled plan provider under the Code

A “pooled plan provider”[1446] with respect to a plan means a person that:

- Is designated by the terms of the plan as a named fiduciary under ERISA,[1447] as the plan administrator, and as the person responsible to perform all administrative duties (including conducting proper testing with respect to the plan and the employees of each employer in the plan) that are reasonably necessary to ensure that the plan meets the Code requirements for tax-favored treatment and the requirements of ERISA and to ensure that each employer in the plan takes actions as the Secretary or the pooled plan provider determines necessary for the plan to meet Code and ERISA requirements, including providing to the pooled plan provider any disclosures or other information that the Secretary may require or that the pooled plan provider otherwise determines are necessary to administer the plan or to allow the plan to meet Code and ERISA requirements,
- Registers with the Secretary as a pooled plan provider and provides any other information that the Secretary may require before beginning operations as a pooled plan provider,

[1445] ERISA section 210 provides rules related to MEPs. Section 29 C.F.R. sec. 2530.210(c) defines the term “multiple employer plan” to mean a MEP within the meaning of sections 413(b) and (c) of the Code and the regulations thereafter, and as previously noted, those rules are applicable to plans subject to sections 401(a), 410(a) and 411.

[1446] Sec. 413(e)(3).

[1447] Within the meaning of ERISA section 402(a)(2).

- Acknowledges in writing its status as a named fiduciary under ERISA and as the plan administrator, and
- Is responsible for ensuring that all persons who handle plan assets or are plan fiduciaries are bonded in accordance with ERISA requirements.

The Secretary may perform audits, examinations, and investigations of pooled plan providers as may be necessary to enforce and carry out the purposes of the statute.

In addition, in determining whether a person meets the requirements to be a pooled plan provider with respect to any plan, all persons who perform services for the plan and who are treated as a single employer[1448] are treated as one person.

Plan sponsor

Except with respect to the administrative duties (as a named fiduciary, as the plan administrator, and as the person responsible for the performance of all administrative duties) for which the pooled plan provider is responsible as described above, each employer in a plan which has a pooled plan provider is treated as the plan sponsor with respect to the portion of the plan attributable to that employer's employees (or beneficiaries of such employees).

Guidance

Section 101 of the SECURE Act directs the Secretary to issue guidance (that the Secretary determines appropriate) (1) to identify the administrative duties and other actions required to be performed by a pooled plan provider, (2) that describes the procedures to be taken to terminate a plan that fails to meet the requirements to be a covered MEP, including the proper treatment of, and actions needed to be taken by, any employer in the plan and plan assets and liabilities attributable to employees of that employer (or beneficiaries of such employees), and (3) to identify appropriate cases in which corrective action will apply with respect to noncompliant employers. For purposes of (3), the Secretary is to take into account whether the failure of an employer or pooled plan provider to provide any disclosures or other information, or to take any other action, necessary to administer a plan or to allow a plan to meet the Code requirements for tax-favored treatment, has continued over a period of time that demonstrates a lack of commitment to compliance. An employer or pooled plan provider is not treated as failing to meet a requirement of guidance issued by the Secretary if, before the issuance of such guidance, the employer or pooled plan provider complies in good faith with a reasonable interpretation of the provisions to which the guidance relates.

The Secretary is directed to publish model plan language that meets the Code and ERISA requirements and that may be adopted in order for the plan to be treated as a pooled employer plan under ERISA.

The Secretary (or the Secretary's delegate) has the authority to provide for the proper treatment of a failure to meet any Code requirement with respect to any employer (and its employees) in a MEP.

[1448] Under subsection (b), (c), (m), or (o) of section 414.

Pooled employer plans under ERISA

In general

A pooled employer plan is treated for purposes of ERISA as a single plan that is a MEP. A "pooled employer plan" is a qualified defined contribution plan that is established or maintained for the purpose of providing benefits to the employees of two or more employers, that meets certain requirements in order to be treated for purposes of ERISA as a single plan.[1449] A pooled employer plan does not include a plan maintained by employers that have a common interest other than having adopted the plan.

In order for a plan to be a pooled employer plan, the plan terms must:

- Designate a pooled plan provider and provide that the pooled plan provider is a named fiduciary of the plan;
- Designate one or more trustees (other than an employer in the plan)[1450] to be responsible for collecting contributions to, and holding the assets of, the plan, and require the trustees to implement written contribution collection procedures that are reasonable, diligent, and systematic;
- Provide that each employer in the plan retains fiduciary responsibility for the selection and monitoring, in accordance with ERISA fiduciary requirements, of the person designated as the pooled plan provider and any other person who is also designated as a named fiduciary of the plan, and, to the extent not otherwise delegated to another fiduciary by the pooled plan provider (and subject to the ERISA rules relating to self-directed investments), the investment and management of the portion of the plan's assets attributable to the employees of that employer (or beneficiaries of such employees) in the plan;
- Provide that employers in the plan, and participants and beneficiaries, are not subject to unreasonable restrictions, fees, or penalties with regard to ceasing participation, receipt of distributions, or otherwise transferring assets of the plan in accordance with applicable rules for plan mergers and transfers;
- Require the pooled plan provider to provide to employers in the plan any disclosures or other information that the Secretary of Labor may require, including any disclosures or other information to facilitate the selection or any monitoring of the pooled plan provider by employers in the plan, and require each employer in the plan to take any actions that the Secretary of Labor or pooled plan provider determines are necessary to administer the plan or to allow for the plan to meet the ERISA and Code requirements applicable to the plan, including providing any disclosures or other information that the Secretary of Labor may require or that the pooled plan provider otherwise determines are necessary to administer the

[1449] Sec. 3(43) of ERISA.

[1450] A trustee must meet the requirements under the Code to be an IRA trustee. Section 105 of the SECURE 2.0 Act of 2022 modifies this requirement to provide that a "named fiduciary" other than an employer in the plan that is designated to be responsible for collecting contributions to the plan and to implement written contribution collection procedures need not be a trustee that meets the Code requirements to be an IRA trustee. For a description of the provision, see the description of section 105 of the Act.

plan or to allow the plan to meet such ERISA and Code requirements; and

- Provide that any disclosure or other information required to be provided as described above may be provided in electronic form and will be designed to ensure only reasonable costs are imposed on pooled plan providers and employers in the plan.

In the case of a fiduciary of a pooled employer plan or a person handling assets of a pooled employer plan, the maximum bond amount under ERISA is $1 million.

The term "pooled employer plan" does not include a multiemployer plan. Such term also does not include a plan established before the date of enactment of the SECURE Act (December 20, 2019) unless the plan administrator elects to have the plan treated as a pooled employer plan and the plan meets the ERISA requirements applicable to a pooled employer plan established on or after such date.

Pooled plan provider

The definition of pooled plan provider for ERISA purposes is generally similar to the definition under the Code, described above.[1451] The ERISA definition requires a person to register as a pooled plan provider with the Secretary of Labor and provide any other information that the Secretary of Labor may require before beginning operations as a pooled plan provider.

The Secretary of Labor may perform audits, examinations, and investigations of pooled plan providers as may be necessary to enforce and carry out the purposes of the statute.

Plan sponsor

Except with respect to the administrative duties (as a named fiduciary, as the plan administrator, and as the person responsible for the performance of all administrative duties) for which the pooled plan provider is responsible as described above, each employer in a pooled employer plan will be treated as the plan sponsor with respect to the portion of the plan attributable to that employer's employees (or beneficiaries of such employees).

Guidance

Section 101 of the SECURE Act also directs the Secretary of Labor to issue guidance that he or she determines appropriate (1) to identify the administrative duties and other actions required to be performed by a pooled plan provider,[1452] and (2) that requires, in appropriate cases of a noncompliant employer, plan assets attributable to employees of the noncompliant employer (or beneficiaries of such employees) to be transferred to a plan maintained only by that employer (or its successor), to a tax-favored retirement plan for each individual whose account is transferred, or to any other arrangement that the Secretary of Labor determines in the

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[1451] Sec. 3(44) of ERISA. In determining whether a person meets the requirements to be a pooled plan provider with respect to a plan, all persons who perform services for the plan and who are treated as a single employer under subsection (b), (c), (m), or (o) of section 414 are treated as one person.

[1452] DOL has issued guidance on registering as a pooled plan provider. See 85 Fed. Reg. 72934, November 16, 2020. (29 C.F.R. sec. 2510.3–44).

guidance is appropriate,[1453] and the noncompliant employer (and not the plan with respect to which the failure occurred or any other employer in the plan) to be liable for any plan liabilities attributable to employees of the noncompliant employer (or beneficiaries of such employees), except to the extent provided in the guidance. For purposes of (2), the Secretary of Labor is to take into account whether the failure of an employer or pooled plan provider to provide any disclosures or other information, or to take any other action, necessary to administer a plan or to allow a plan to meet the requirements of ERISA and the Code requirements for tax-favored treatment, has continued over a period of time that demonstrates a lack of commitment to compliance. An employer or pooled plan provider is not treated as failing to meet a requirement of guidance issued by the Secretary if, before the issuance of such guidance, the employer or pooled plan provider complies in good faith with a reasonable interpretation of the provisions to which the guidance relates.

Form 5500 reporting

Under the Code, an employer maintaining a qualified retirement plan generally is required to file an annual return containing information required under regulations with respect to the qualification, financial condition, and operation of the plan.[1454] ERISA requires the plan administrator of certain pension and welfare benefit plans to file annual reports disclosing certain information to DOL.[1455] These filing requirements are met by filing a completed Form 5500, Annual Return/Report of Employee Benefit Plan. Forms 5500 are filed with DOL, and information from Forms 5500 is shared with the IRS.[1456]

In the case of a MEP (including a pooled employer plan), the Form 5500 filing must include a list of participating employers in the plan; a good faith estimate of the percentage of total contributions made by the participating employers during the plan year; and the aggregate account balances attributable to each employer in the plan (determined as the sum of the account balances of the employees of each employer (and the beneficiaries of such employees)); and with respect to a pooled employer plan, the identifying information for the person designated under the terms of the plan as the pooled plan provider. The Secretary of Labor may prescribe simplified reporting for a MEP that covers fewer than 1,000 partici-

[1453] The Secretary of Labor may waive the requirement to transfer assets to another plan or arrangement in appropriate circumstances if the Secretary of Labor determines it is in the best interests of the employees of the noncompliant employer (and the beneficiaries of such employees) to retain the assets in the pooled employer plan.

[1454] Sec. 6058. In addition, under section 6059, the plan administrator of a defined benefit plan subject to the minimum funding requirements is required to file an annual actuarial report. Under section 414(g) and ERISA section 3(16), plan administrator generally means the person specifically so designated by the terms of the plan document. In the absence of a designation, the plan administrator generally is (1) in the case of a plan maintained by a single employer, the employer, (2) in the case of a plan maintained by an employee organization, the employee organization, or (3) in the case of a plan maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties that maintain the plan. Under ERISA, the party described in (1), (2), or (3) is referred to as the "plan sponsor."

[1455] ERISA secs. 103 and 104. Under ERISA section 4065, the plan administrator of certain defined benefit plans must provide information to PBGC.

[1456] Information is shared also with PBGC, as applicable. Form 5500 filings are also publicly released in accordance with section 6104(b) and Treas. Reg. sec. 301.6104(b)–1 and ERISA sections 104(a)(1) and 106(a).

pants, but only if no single employer in the plan has 100 or more participants covered by the plan.

Explanation of Provision

Section 403(b) MEPs under the Code

In general

The provision clarifies that a section 403(b) plan may be established and maintained as a MEP. Specifically, it provides that, except in the case of a church plan, section 403(b) annuity contracts and 403(b) custodial accounts [1457] do not fail to qualify as section 403(b) plans solely by reason of such contracts being purchased or accounts being established under a plan maintained by more than one employer.

For purposes of this provision, a section 403(b) plan includes such a plan sponsored by (1) a tax-exempt entity (described in section 501(c)(3) which is exempt from tax under section 501(a)) and (2) a public school (including state colleges and universities).

Relief from "one bad apple" rule

Under the provision, as long as such a section 403(b) plan maintained by more than one employer satisfies rules similar to certain rules that apply to qualified MEPs,[1458] the section 403(b) plan will not fail to be treated as such merely because one or more employers of employees covered by the plan fail to meet the requirements of section 403(b). The rules applicable to qualified retirement MEPs require that where one or more employers of employees covered by the MEP fails to meet the applicable qualification requirements:

- The assets of the plan attributable to employees of such employer (or beneficiaries of such employees) will be transferred to a plan maintained only by such employer (or its successor), to an eligible retirement plan [1459] for each individual whose account is transferred, or to any other arrangement that the Secretary determines is appropriate, unless the Secretary determines it is in the best interests of the employees of such employer (and the beneficiaries of such employees) to retain the assets in the plan, and
- Such employer (and not the plan with respect to which the failure occurred or any other employer in such plan) will, except to the extent provided by the Secretary, be liable for any liabilities with respect to such plan attributable to employees of such employer (or beneficiaries of such employees).

In addition, in the case of a section 403(b) MEP plan maintained by tax-exempt entities, such plan must also meet either the com-

[1457] Sec. 403(b)(7) provides that amounts paid by a tax-exempt employer to a custodial account which satisfies the requirements of section 401(f)(2) are treated as amounts contributed by him for an annuity contract for his employee if the amounts are to be invested in regulated investment company stock to be held in that custodial account. Section 128 of the Act expands that provision by providing that contributions to a section 403(b) plan that are held in a custodial account are treated as contributions to an annuity contract if the assets are invested in either regulated investment company stock or a group trust intended to satisfy the requirements of current or future IRS guidance.

[1458] Under section 413(e)(2).

[1459] As defined in section 402(c)(8)(B).

monality rule[1460] or have a pooled plan provider.[1461] This requirement does not apply to such plans maintained by governmental employers.

Section 403(b) MEPs under ERISA

The provision amends the definition of pooled employer plan under ERISA[1462] to include a section 403(b) MEP that is maintained for the benefit of the employees of more than one employer, that consists of annuity contracts described in section 403(b), and that has a pooled plan provider; however, the definition does not include a non-electing church plan excepted from coverage under ERISA.[1463]

Disclosure rules

Special disclosure rules for tax-exempt employers joining a section 403(b) MEP

As noted above, there is an exception from ERISA for certain tax-sheltered annuity programs established by tax-exempt entities which consist of a program for the purchase of annuity contracts or the establishment of custodial accounts pursuant to salary reduction agreements or agreements to forego an increase in salary where the tax-exempt entity has very limited involvement in the program. However, if a tax-exempt employer who had participated in such a non-ERISA program decides to become a participating employer in a section 403(b) MEP, that employer will become subject to ERISA because of the fiduciary responsibilities imposed on each employer in a section 403(b) MEP.

To ensure that such tax-exempt employers are aware of their ERISA fiduciary duties, the provision imposes additional disclosures to such employers. First, the provision directs the Secretary (or the Secretary's delegate), in consultation with the Secretary of Labor, to modify the model plan language applicable to qualified retirement MEPs[1464] to include language which requires participating employers to be notified that the plan is subject to ERISA and that such employer is a plan sponsor with respect to its employees participating in the MEP, and, as such, has certain fiduciary duties with respect to the plan and the employees. Second, Treasury must undertake necessary education and outreach efforts to tax-exempt employers to increase awareness that MEPs are subject to ERISA, and that such employers are plan sponsors with respect to their employees participating in the MEP and, as such, have certain fiduciary duties with respect to the plan and to its employees.

Other disclosures

The provision also provides that the Secretary (or the Secretary's delegate), in consultation with the Secretary of Labor, must publish model plan language similar to the model plan language published

[1460] Sec. 413(e)(1)(A).
[1461] Sec. 413(e)(1)(B).
[1462] Sec. 3(43)(A) of ERISA.
[1463] Under section 4(b)(2) of ERISA.
[1464] Sec. 413(e)(5).

for qualified plan MEPs [1465] for section 403(b) MEPs sponsored by nongovernmental employers.

Reporting requirements for section 403(b) MEPs

In the case of any annuity contract described in section 403(b) to which this provision applies, and that is held in a MEP, such MEP is treated as a single plan for purposes of the reporting requirements under the Code relating to the annual registration statement and the annual return for certain plans.[1466] As a result, the plan can file a single Form 8955–SSA, Annual Registration Statement Identifying Separated Participants With Deferred Vested Benefits, and a single Form 5500, Annual Return/Report of Employee Benefit Plan, rather than having each participating employer in the section 403(b) MEP file their own form. These filing requirements only apply to tax-exempt employers (because governmental employers are not subject to these reporting requirements under ERISA).

Regulations

The Secretary (or the Secretary's delegate) must prescribe such regulations as may be necessary to clarify the treatment of an employer departing a section 403(b) MEP in connection with such employer's failure to meet section 403(b) MEP requirements.[1467]

Nothing in the amendments made by the general rule is to be construed as limiting the authority of the Secretary or the Secretary's delegate (determined without regard to such amendment) to provide for the proper treatment of a failure to meet any requirement applicable under the Code with respect to one employer (and its employees) in the case of a section 403(b) MEP.[1468]

No inference with respect to church plans

The provision provides that regarding any application of section 403(b) to an annuity contract purchased under a church plan [1469] maintained by more than one employer, or any application of rules similar to the rules that apply to qualified retirement MEPs [1470] to such a plan, no inference is to be made from the rules applicable to section 403(b) MEPs (as added by the Act) not applying to such plans.

Effective Date

The provision is generally effective for plan years beginning after December 31, 2022.

[1465] Under section 413(e)(5).

[1466] The reporting requirement relating to the annual registration statement is under section 6057, and the requirement relating to the annual return is under 6058. These requirements only apply in the case of a section 403(b) plan that is otherwise subject to such requirements.

[1467] As described in section 403(b)(15).

[1468] As described in section 403(b)(15).

[1469] As defined in section 414(e).

[1470] Sec. 413(e).

7. Increase in age for required beginning date for mandatory distributions (sec. 107 of the Act and sec. 401(a)(9) of the Code)

Present Law

In general

Employer-provided qualified retirement plans and IRAs are subject to required minimum distribution rules.[1471] Employer-sponsored retirement plans are of two general types: defined benefit plans, under which benefits are determined under a plan formula and paid from general plan assets, rather than individual accounts; and defined contribution plans, under which benefits are based on a separate account for each participant, to which are allocated contributions, earnings and losses. A qualified retirement plan for this purpose means a tax-qualified plan described in section 401(a) (such as a defined benefit pension plan or a section 401(k) plan), an employee retirement annuity described in section 403(a), a tax-sheltered annuity described in section 403(b), and a plan described in section 457(b) that is maintained by a governmental employer.[1472]

In general, under the minimum distribution rules, distribution of minimum benefits must begin to an employee (or IRA owner) no later than a required beginning date and a minimum amount must be distributed each year (sometimes referred to as "lifetime" minimum distribution requirements). These lifetime requirements do not apply to a Roth IRA.[1473] Minimum distribution rules also apply to benefits payable with respect to an employee (or IRA owner) who has died (sometimes referred to as "after-death" minimum distribution requirements). The regulations provide a methodology for calculating the required minimum distribution from an individual account under a defined contribution plan or from an IRA.[1474] In the case of annuity payments under a defined benefit plan or an annuity contract, the regulations provide requirements that the stream of annuity payments must satisfy.

Failure to make a required minimum distribution triggers a 50-percent excise tax, payable by the individual or the individual's beneficiary. The tax is imposed during the taxable year that begins with or within the calendar year during which the distribution was required.[1475] The tax may be waived if the failure to distribute is

[1471] Secs. 401(a)(9) and 408(a)(6). Roth IRAs, however, are not subject to minimum distribution rules during the owner's lifetime. The IRS published proposed regulations under section 401(a)(9). 87 FR 10504, Feb. 24, 2022 (corrected March 21, 2022). The amendments to Treas. Reg. sections 401(a)(9)–1 through 1.401(a)(9)–9 were proposed to apply for purposes of determining required minimum distributions for calendar years beginning on or after January 1, 2022. Notice 2023–54, 2023–31 I.R.B. 382, July 31, 2023 provides that the final regulations would apply for calendar years beginning no earlier than January 1, 2024.

[1472] The required minimum distribution rules also apply to section 457(b) plans maintained by tax-exempt employers other than governmental employers.

[1473] Sec. 408A(c)(4). Roth IRAs are, however, subject to the post-death minimum distribution rules that apply to traditional IRAs. For Roth IRAs, the IRA owner is treated as having died before the individual's required beginning date.

[1474] Reflecting the directive in section 823 of the Pension Protection Act of 2006 (Pub. L. No. 109–280), pursuant to Treas. Reg. sec. 1.401(a)(9)–1, A–2(d), a governmental plan within the meaning of section 414(d) or a governmental eligible deferred compensation plan is treated as having complied with the statutory minimum distribution rules if the plan complies with a reasonable and good faith interpretation of those rules.

[1475] Sec. 4974(a).

reasonable error and reasonable steps are taken to remedy the violation.[1476]

Required beginning date

Required minimum distributions generally must begin by April 1 of the calendar year following the calendar year in which the individual (employee or IRA owner) reaches age 72. Prior to January 1, 2020, the age after which required minimum distributions were required to begin was 70½.[1477] In the case of an employer-provided qualified retirement plan, the required minimum distribution date for an individual who is not a five-percent owner of the employer maintaining the plan may be delayed to April 1 of the year following the year in which the individual retires, if the plan provides for this later distribution date. For all subsequent years, including the year in which the individual was paid the first required minimum distribution by April 1, the individual must take the required minimum distribution by December 31.

Lifetime rules

While an employee (or IRA owner) is alive, distributions of the individual's interest are required to be made (in accordance with regulations) over the life of the employee (or IRA owner) or over the joint lives of the employee (or IRA owner) and a designated beneficiary (or over a period not extending beyond the life expectancy of such employee (or IRA owner) or the life expectancy of such employee (or IRA owner) and a designated beneficiary).[1478] For IRAs and defined contribution plans, the required minimum distribution for each year generally is determined by dividing the account balance as of the end of the prior year by the number of years in the distribution period.[1479] The distribution period is generally derived from the Uniform Lifetime Table.[1480] This table is based on the joint life expectancies of the individual and a hypothetical beneficiary 10 years younger than the individual. For an individual with a spouse as designated beneficiary who is more than 10 years younger, the joint life expectancy of the couple is used (because the couple's remaining joint life expectancy is longer than the length provided in the Uniform Lifetime Table). The distribution period for annuity payments under a defined benefit plan or annuity contract (to the extent not limited to the life of the employee (or IRA owner) or the joint lives of the employee (or IRA owner) and a designated beneficiary) is generally subject to the same limitations as apply to individual accounts.[1481]

After-death rules for defined contributions plans and IRAs

In the case of a defined contribution plan or IRA, if an individual dies before the individual's entire interest is distributed, and the individual has a designated beneficiary, unless the designated ben-

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[1476] Sec. 4974(d).
[1477] Section 114 of the SECURE Act increased the age after which required minimum distributions must begin from 70½ to 72, effective for distributions required to be made after December 31, 2019, with respect to individuals who attain age 70½ after that date.
[1478] Sec. 401(a)(9)(A).
[1479] Treas. Reg. sec. 1.401(a)(9)–5.
[1480] Treas. Reg. sec. 1.401(a)(9)–9.
[1481] Treas. Reg. sec. 1.401(a)(9)–6.

eficiary is an eligible designated beneficiary, the individual's entire account must be distributed within 10 years after the individual's death. This rule applies regardless of whether the individual dies before or after the individual's required beginning date. A designated beneficiary is an individual designated as a beneficiary under the plan or IRA.[1482]

In the case of an eligible designated beneficiary, the remaining required minimum distributions are distributed over the life of the beneficiary (or over a period not extending beyond the life expectancy of such beneficiary). Such distributions generally must begin no later than December 31 of the calendar year immediately following the calendar year in which the individual dies. An eligible designated beneficiary is a designated beneficiary who is (1) the surviving spouse of the individual; (2) a child of the individual who has not reached majority; (3) disabled; (4) chronically ill; or (5) not more than 10 years younger than the individual.[1483] The required minimum distribution for each year is determined by dividing the account balance as of the end of the prior year by a distribution period, which is determined by reference to the beneficiary's life expectancy.[1484] Special rules apply in the case of trusts for disabled or chronically ill beneficiaries.[1485]

In the case of an individual who does not have a designated beneficiary, if an individual dies on or after the individual's required beginning date, the distribution period for the remaining required minimum distributions is equal to the remaining years of the deceased individual's single life expectancy, using the age of the deceased individual in the year of death.[1486] If an individual dies before the required beginning date, the individual's entire account must be distributed no later than December 31 of the calendar year that includes the fifth anniversary of the individual's death.[1487]

After-death rules for defined benefit plans

In the case of a defined benefit plan, if an individual dies before the individual's entire interest is distributed, the minimum distribution rules vary depending on whether or not the individual dies before or after the required beginning date. If the individual dies after distributions have begun, the remaining interest must be distributed at least as rapidly as under the method of distribution prior to death.[1488] If the individual dies before distributions have begun, the entire account must be distributed within five years after the individual's death, unless any portion is payable to a designated beneficiary.[1489] If any portion is payable to a designated beneficiary, the remaining required minimum distributions are distributed over the life of the beneficiary (or over a period not extend-

[1482] Sec. 401(a)(9)(E)(i); Treas. Reg. sec. 1.401(a)(9)–4, Q&A–1. The individual need not be named as long as the individual is identifiable under the terms of the plan (or IRA). However, the fact that an interest under a plan or IRA passes to a certain individual under a will or otherwise under State law does not make that individual a designated beneficiary unless the individual is designated as a beneficiary under the plan or IRA.

[1483] Sec. 401(a)(9)(E)(ii).

[1484] Treas. Reg. sec. 1.401(a)(9)–5, A–5.

[1485] Sec. 401(a)(9)(H)(iv).

[1486] Treas. Reg. sec. 1.401(a)(9)–5, A–5(a).

[1487] Treas. Reg. sec. 1.401(a)(9)–3, Q&As 1, 2.

[1488] Sec. 401(a)(9)(B)(i).

[1489] Sec. 401(a)(9)(B)(ii), (iii).

ing beyond the life expectancy of such beneficiary). Such distributions generally must begin no later than December 31 of the calendar year immediately following the calendar year in which the individual dies.

Annuity distributions

The regulations provide rules for the amount of annuity distributions from a defined benefit plan, or from an annuity purchased by the plan from an insurance company, that are paid over life (or a period not extending beyond life expectancy). Annuity distributions are generally required to be nonincreasing over time with certain exceptions, which include, for example, (i) increases to the extent of certain specified cost-of-living indices, (ii) a constant percentage increase (for a qualified defined benefit plan, the constant percentage must be less than five percent per year), (iii) certain accelerations of payments, and (iv) increases to reflect when an annuity is converted to a single life annuity after the death of the beneficiary under a joint and survivor annuity or after termination of the survivor annuity under a qualified domestic relations order.[1490] If distributions are in the form of a joint and survivor annuity and the survivor annuitant both is an individual other than the surviving spouse and is younger than the employee (or IRA owner), the survivor annuity benefit must be limited to a percentage of the life annuity benefit for the employee (or IRA owner). The survivor benefit as a percentage of the benefit of the primary annuitant is required to be smaller (but is not required to be less than 52 percent) as the difference in the ages of the primary annuitant and the survivor annuitant becomes greater.

Special rules for spouses

If the designated beneficiary is the individual's spouse, commencement of distributions is permitted to be delayed until December 31 of the calendar year in which the deceased individual would have attained age 72. If the surviving spouse dies before distributions to such spouse begin, the after-death rules apply after the death of the spouse as though the spouse were the employee (or IRA owner).

In the case of an IRA, if the beneficiary is the surviving spouse, the spouse is permitted to choose to calculate required minimum distributions both while the surviving spouse is alive and after death as though the surviving spouse is the IRA owner.[1491]

Explanation of Provision

The provision changes the age on which the required beginning date for required minimum distributions is based, from the calendar year in which the employee or IRA owner attains age 72 to the calendar year in which the employee or IRA owner attains age 73, for individuals who attain age 72 after December 31, 2022, and who attain age 73 before January 1, 2033. In addition, the provi-

[1490] Treas. Reg. sec. 1.401(a)(9)–6, A–14.
[1491] Treas. Reg. sec. 1.408–8, Q&A 5.

sion changes such age from 73 years to 75 years, for individuals who attain age 73 [1492] after December 31, 2032.

Effective Date

The provision applies to distributions required to be made after December 31, 2022, with respect to individuals who attain age 72 after that date.

8. Indexing IRA catch-up limit (sec. 108 of the Act and sec. 219 of the Code)

Present Law

There are two general types of IRAs: traditional IRAs and Roth IRAs.[1493] The total amount that an individual may contribute to one or more IRAs for a year is generally limited to the lesser of: (1) a dollar amount that is indexed for inflation ($6,000 for 2022); and (2) the amount of the individual's compensation that is includible in gross income for the year.[1494] In the case of an individual who has attained age 50 by the end of the taxable year, the dollar amount is increased by $1,000 (referred to as a "catch-up contribution"). In the case of a married couple, contributions can be made up to the dollar limit for each spouse if the combined compensation of the spouses that is includible in gross income is at least equal to the contributed amount.

An individual may make contributions to a traditional IRA (up to the contribution limit) without regard to his or her adjusted gross income (in contrast to a Roth IRA, as described below). An individual may deduct his or her contributions to a traditional IRA if neither the individual nor the individual's spouse is an active participant in an employer-sponsored retirement plan. If an individual or the individual's spouse is an active participant in an employer-sponsored retirement plan, the deduction is phased out for taxpayers with adjusted gross income over certain levels.[1495]

Individuals with adjusted gross income below certain levels may make contributions to a Roth IRA (up to the contribution limit).[1496] Contributions to a Roth IRA are not deductible.

Explanation of Provision

Under the provision, the $1,000 amount that may be contributed as a catch-up contribution by individuals who attain age 50 by the end of the taxable year is increased for cost-of-living adjustments for taxable years beginning in a calendar year after 2023.

Effective Date

The provision applies to taxable years beginning after December 31, 2023.

[1492] A technical correction may be needed to reflect this intent.
[1493] Secs. 408 and 408A.
[1494] Sec. 219(b)(1) and (5), as referenced in secs. 408(a)(1) and (b)(2)(B) and 408A(c)(2). Under section 4973, IRA contributions in excess of the applicable limit are generally subject to an excise tax of six percent per year until withdrawn.
[1495] Sec. 219(g).
[1496] Sec. 408A(c)(3).

9. Higher catch-up limit to apply at age 60, 61, 62, and 63 (sec. 109 of the Act and sec. 414(v) of the Code)

Present Law

Under certain types of employer-sponsored retirement plans, including section 401(k) plans, section 403(b) plans, SIMPLE IRAs,[1497] and governmental section 457(b) plans, an employee may elect to have contributions (elective deferrals) made to the plan, rather than receive the same amount in cash. The maximum annual amount of elective deferrals that can be made by an employee for a year is $20,500 for 2022 ($14,000 in the case of a SIMPLE IRA or SIMPLE section 401(k) plan)[1498] or, if less, the employee's compensation.[1499] For individuals who will attain age 50 by the end of the taxable year, this limit is increased to allow additional "catch-up contributions."[1500]

A section 401(k) plan, section 403(b) plan, governmental section 457(b) plan, and SARSEP plan.[1501] may generally permit catch-up contributions up to $6,500 in 2022 (indexed for inflation). A SIMPLE IRA or SIMPLE section 401(k) plan may permit catch-up contributions up to $3,000 in 2022. If elective deferrals and catch-up contributions are made to both a section 401(k) plan and a section 403(b) plan for the same employee, a single limit applies to the elective deferrals under both plans. Catch-up contributions cannot exceed the participant's compensation for the year over any other elective deferrals made by the participant for the year.[1502] Special contribution limits apply to certain employees under a section 403(b) plan maintained by a church. In addition, under a special catch-up rule, an increased elective deferral limit applies under a section 403(b) plan maintained by an educational organization, hospital, home health service agency, health and welfare service agency, church, or convention or association of churches in the case of employees who have completed 15 years of service. In this case, the limit is increased by the least of (1) $3,000, (2) $15,000, reduced by the employee's total elective deferrals in prior years, and (3) $5,000 times the employee's years of service, reduced by the employee's total elective deferrals in prior years.

The section 457(b) plan limits apply separately from the combined limit applicable to section 401(k) and section 403(b) plan contributions, so that an employee covered by a governmental section 457(b) plan and a section 401(k) or section 403(b) plan can contribute the full amount to each plan. In addition, under a special catch-up rule, for one or more of the participant's last three years before normal retirement age, the otherwise applicable limit is increased to the lesser of (1) two times the normal annual limit ($41,000 for 2022) or (2) the sum of the otherwise applicable limit

[1497] Sec. 408(p).
[1498] Sec. 401(k)(11).
[1499] Secs. 402(g); 457(c). This limit applies to total elective deferrals under all of a participant's section 401(k) plans and section 403(b) plans but applies separately to any governmental section 457(b) plan.
[1500] Sec. 414(v).
[1501] Sec. 408(k)(6). The Code only permits SARSEP plans established before December 31, 1996. Sec. 408(k)(6)(H).
[1502] Sec. 414(v)(2)(A)(ii).

for the year plus the amount by which the limit applicable in preceding years of participation exceeded the deferrals for that year.

Catch-up contributions are not subject to any other contribution limits and are not taken into account in applying other contribution limits. In addition, such contributions are not subject to applicable nondiscrimination rules. However, a plan fails to meet the applicable nondiscrimination requirements under section 401(a)(4) with respect to benefits, rights, and features unless the plan allows all eligible individuals participating in the plan to make the same election with respect to catch-up contributions. For purposes of this rule, all plans of related employers are treated as a single plan. In addition, the special nondiscrimination rule for mergers and acquisitions applies for this purpose.[1503]

An employer is permitted to make matching contributions with respect to catch-up contributions. Any such matching contributions are subject to the normally applicable rules.

Explanation of Provision

Under the provision, the limit on catch-up contributions is increased for individuals who would attain age 60, 61, 62, or 63 (but who are not older than age 63), by the end of the taxable year. A section 401(k) plan (including a SIMPLE section 401(k) plan), section 403(b) plan, governmental section 457(b) plan, SARSEP plan, or SIMPLE IRA may increase the limit on catch-up contributions for such individuals to the lesser of (1) the adjusted dollar amount or (2) the participant's compensation for the year reduced by any other elective deferrals of the participant for the year.[1504] The adjusted dollar amount is the greater of $10,000 ($5,000 in the case of a SIMPLE 401(k) plan or SIMPLE IRA) or 150 percent of the limit on catch-up contributions that applies in 2025[1505] to individuals who are not age 60, 61, 62, or 63 by the end of that taxable year. Both the $10,000 amount and the $5,000 amount are indexed for inflation beginning in 2026.

Effective Date

The provision applies to taxable years beginning after December 31, 2024.

10. Treatment of student loan payments as elective deferrals for purposes of matching contributions (sec. 110 of the Act and secs. 401(m), 403(b), 408(p), and 457(b) of the Code)

Present Law

Section 401(k) plans

A section 401(k) plan is a type of profit-sharing or stock bonus plan that contains a qualified cash or deferred arrangement. Such arrangements are subject to the rules generally applicable to qualified defined contribution plans. In addition, special rules apply to

[1503] Secs. 410(b)(6)(C); 414(v)(4)(B).

[1504] This increase also applies to catch-up contributions under a simplified employee pension under section 408(k) that includes a salary reduction arrangement.

[1505] A technical correction may be needed to reflect this intent.

such arrangements. Employees who participate in a section 401(k) plan may elect to have contributions made to the plan (referred to as "elective deferrals") rather than receive the same amount as current compensation.[1506] The maximum annual amount of elective deferrals that can be made by an employee for a year is the lesser of $20,500 (for 2022) or the employee's compensation.[1507] For an employee who attains age 50 by the end of the year, the dollar limit on elective deferrals is increased by $6,500 (for 2022) (called "catch-up contributions").[1508] An employee's elective deferrals, and income on those deferrals, must be fully vested. A section 401(k) plan may also provide for employer matching and nonelective contributions.

In order to constitute a qualified cash or deferred arrangement, no benefit under the arrangement may be conditioned, directly or indirectly, on the employee electing to have the employer make or not make contributions in lieu of receiving cash.[1509] However, matching contributions are exempt from this rule.

Nondiscrimination test

Actual deferral percentage test

An annual nondiscrimination test, called the actual deferral percentage test (the "ADP" test) applies to elective deferrals under a section 401(k) plan.[1510] The ADP test generally compares the average rate of deferral for highly compensated employees to the average rate of deferral for non-highly compensated employees. The average deferral rate for highly compensated employees must not exceed the average rate for non-highly compensated employees by more than certain specified amounts. If a plan fails to satisfy the ADP test for a plan year, the plan is permitted to distribute deferrals to highly compensated employees ("excess deferrals") in a sufficient amount to correct the failure. The distribution of the excess deferrals must be made by the close of the following plan year.[1511]

The ADP test is deemed to be satisfied if a section 401(k) plan includes certain minimum matching or nonelective contributions under either of two plan designs ("401(k) safe harbor plans"), described below, as well as certain required rights and features. The plan also must satisfy a notice requirement.[1512]

Section 401(k) safe harbor contributions

Under one type of section 401(k) safe harbor plan ("basic 401(k) safe harbor plan"), the plan either (1) satisfies a matching contribution requirement ("matching contribution basic 401(k) safe harbor

[1506] Elective deferrals generally are made on a pre-tax basis and distributions attributable to elective deferrals are includible in income. However, a section 401(k) plan is permitted to include a "qualified Roth contribution program" that permits a participant to elect to have all or a portion of the participant's elective deferrals under the plan treated as after-tax Roth contributions. Certain distributions from a designated Roth account are excluded from income, even though they include earnings not previously taxed.

[1507] Sec. 402(g).

[1508] Sec. 414(v).

[1509] Sec. 401(k)(4)(A).

[1510] Sec. 401(k)(3). Certain long-term part-time workers may be excluded from this and other nondiscrimination tests. Secs. 401(k)(2)(D); 401(k)(15)(B)(i).

[1511] Sec. 401(k)(8).

[1512] Sec. 401(k)(12) and (13). If certain additional requirements are met, matching contributions under 401(k) safe harbor plan may also satisfy a nondiscrimination test applicable under section 401(m).

plan”) or (2) provides for the employer to make a nonelective contribution to a defined contribution plan of at least three percent of an employee’s compensation on behalf of each non-highly compensated employee who is eligible to participate in the plan (“nonelective basic 401(k) safe harbor plan”). The matching contribution basic 401(k) safe harbor requires a matching contribution equal to at least 100 percent of elective contributions of the employee for contributions not in excess of three percent of compensation, and 50 percent of elective contributions for contributions that exceed three percent of compensation but do not exceed five percent, for a total matching contribution of up to four percent of compensation. The required matching contributions and the three percent nonelective contribution under the basic 401(k) safe harbor must be immediately nonforfeitable (that is, 100 percent vested) when made.

Another safe harbor applies for a section 401(k) plan that includes automatic enrollment (“automatic enrollment 401(k) safe harbor”). Under an automatic enrollment 401(k) safe harbor, unless an employee elects otherwise, the employee is treated as electing to make elective deferrals equal to a percentage of compensation as stated in the plan, not in excess of 15 percent (10 percent in the first year) and at least (1) three percent of compensation for the first year the deemed election applies to the participant, (2) four percent during the second year, (3) five percent during the third year, and (4) six percent during the fourth year and thereafter. The matching contribution requirement under this safe harbor is 100 percent of elective contributions of the employee for contributions not in excess of one percent of compensation, and 50 percent of elective contributions for contributions that exceed one percent of compensation but do not exceed six percent, for a total matching contribution of up to 3.5 percent of compensation (“matching contribution automatic enrollment 401(k) safe harbor”). Alternatively, the plan can provide that the employer will make a nonelective contribution of three percent, as under the basic 401(k) safe harbor (“nonelective contribution automatic enrollment 401(k) safe harbor”). However, under both of the automatic enrollment 401(k) safe harbors, the matching and nonelective contributions are allowed to become 100 percent vested after two years of service (rather than being required to be immediately vested when made).

Matching contribution nondiscrimination test

Employer matching contributions are also subject to a special nondiscrimination test, the “ACP test,” which compares the average actual contribution percentages (“ACPs”) of matching contributions (and after-tax employee contributions) for the highly compensated employee group and the non-highly compensated employee group. The plan generally satisfies the ACP test if the ACP of the highly compensated employee group for the current plan year is either (1) not more than 125 percent of the ACP of the non-highly compensated employee group for the prior plan year, or (2) not more than 200 percent of the ACP of the non-highly compensated employee group for the prior plan year and not more than two percentage points greater than the ACP of the non-highly compensated employee group for the prior plan year.

A safe harbor section 401(k) plan that provides for matching contributions is deemed to satisfy the ACP test ("401(m) safe harbor") with respect to matching contributions if, in addition to meeting the safe harbor contribution and notice requirements under section 401(k), (1) matching contributions are not provided with respect to elective deferrals in excess of six percent of compensation, (2) the rate of matching contribution does not increase as the rate of an employee's elective deferrals increases, and (3) the rate of matching contribution with respect to any rate of elective deferral of a highly compensated employee is no greater than the rate of matching contribution with respect to the same rate of deferral of a non-highly compensated employee.[1513]

SIMPLE IRA plan

A small employer that employs no more than 100 employees who earned $5,000 or more during the prior calendar year can establish a simplified tax-favored retirement plan, which is called the SIMPLE IRA plan. A SIMPLE IRA plan is generally a plan under which contributions are made to an IRA for each employee.[1514] A SIMPLE IRA plan allows employees to make elective deferrals to a SIMPLE IRA, subject to a limit of $14,000 (for 2022). An individual who has attained age 50 before the end of the taxable year may also make catch-up contributions under a SIMPLE IRA plan up to a limit of $3,000 (for 2022).

In the case of a SIMPLE IRA plan, the group of eligible employees generally must include any employee who has received at least $5,000 in compensation from the employer in any two preceding years and is reasonably expected to receive $5,000 in the current year. A SIMPLE IRA plan is not subject to the nondiscrimination rules generally applicable to qualified retirement plans.

Employer contributions to a SIMPLE IRA must satisfy one of two contribution formulas. Under the matching contribution formula, the employer is generally required to match 100 percent of employee elective contributions up to three percent of the employee's compensation. The employer can elect a lower percentage matching contribution for all employees (but not less than one percent of each employee's compensation); however, a lower percentage cannot be elected for more than two years out of any five-year period. Alternatively, for any year, an employer is permitted to elect, in lieu of making matching contributions, to make a nonelective contribution of two percent of compensation on behalf of each eligible employee with at least $5,000 in compensation for such year, whether or not the employee makes an elective contribution.

The employer must provide each employee who is eligible to make elective deferrals under a SIMPLE IRA plan (1) a 60-day election period before the beginning of the calendar year and (2) a notice at the beginning of the 60-day period explaining the employee's choices under the plan.[1515]

No contributions other than employee elective contributions, required employer matching contributions, or employer nonelective

[1513] Sec. 401(m)(11); 401(m)(12).

[1514] Sec. 408(p). These small employers may also establish SIMPLE section 401(k) plans. Sec. 401(k)(11).

[1515] Notice 98–4, 1998–1 C.B. 269, January 12, 1998.

contributions can be made to a SIMPLE IRA plan, and the employer may not maintain any other qualified retirement plan.

Section 403(b) and governmental 457(b) plans

Tax-deferred annuity plans ("section 403(b) plans") are generally similar to qualified defined contribution plans, but may be maintained only by (1) tax-exempt charitable organizations[1516] and (2) educational institutions of State or local governments (that is, public schools, including colleges and universities).[1517] Section 403(b) plans may provide for employees to make elective deferrals (in pretax or designated Roth form), including catch-up contributions, or other after-tax employee contributions, and employers may make nonelective or matching contributions on behalf of employees. Contributions to a section 403(b) plan are generally subject to the same contribution limits applicable to qualified defined contribution plans, including the limits on elective deferrals.

Contributions to a section 403(b) plan and income thereon must be fully vested. The minimum coverage and general nondiscrimination requirements applicable to a qualified retirement plan generally apply to a section 403(b) plan, as well as employer matching and nonelective contributions and after-tax employee contributions to the plan.[1518] If a section 403(b) plan provides for elective deferrals, the plan is subject to a "universal availability" requirement under which all employees must be given the opportunity to make deferrals of more than $200.[1519] In applying this requirement, nonresident aliens, students, and employees who normally work less than 20 hours per week may be excluded.[1520]

An eligible deferred compensation plan of a governmental employer ("governmental section 457(b) plan") is generally similar to a qualified cash or deferred arrangement under a section 401(k) plan in that it consists of elective deferrals, that is, contributions (in pre-tax or designated Roth form) made at the election of an employee, including catch-up contributions. Deferrals under a governmental section 457(b) plan are generally subject to the same limits as elective deferrals under a section 401(k) plan or a section 403(b) plan.

Explanation of Provision

The provision modifies the definition of matching contribution[1521] for purposes of section 401(k) plans to include employer contributions made to the plan on behalf of an employee on account of a qualified student loan payment. For this purpose, a qualified student loan payment is a payment made by an employee in repay-

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[1516] These are organizations exempt from tax under section 501(c)(3). Section 403(b) plans of private, tax-exempt employers may be subject to ERISA as well as the requirements of section 403(b).

[1517] Sec. 403(b).

[1518] These requirements do not apply to a governmental section 403(b) plan or a section 403(b) plan maintained by a church or a qualified church-controlled organization as defined in section 3121(w).

[1519] Sec. 403(b)(12)(A)(ii).

[1520] For this purpose, nonresident alien has the meaning in section 410(b)(3)(C), and student has the meaning in section 3121(b)(10). The universal availability requirement does not apply to a section 403(b) plan maintained by a church or a qualified church-controlled organization.

[1521] Under section 401(m)(4)(A)(iii), as added by this provision.

ment of a qualified education loan[1522] incurred by the employee to pay qualified higher education expenses. However, this definition applies only to the extent such payments in the aggregate for the year do not exceed the amount of elective deferrals that the employee would be permitted to contribute under the Code[1523] (reduced by elective deferrals made by the employee for the year). Qualified higher education expenses are defined as the cost of attendance at an eligible educational institution.[1524] In addition, in order for a student loan payment to qualify, the employee must certify annually to the employer making the matching contribution the amount of the loan payments that have been made during the year. The employer is permitted to rely on this certification.

In order for an employer contribution made on account of a qualified student loan payment to be treated as a matching contribution under the provision, the plan must satisfy certain requirements. The plan must provide matching contributions on account of elective deferrals at the same rate as contributions on account of qualified student loan payments. The plan must provide matching contributions on account of qualified student loan payments only on behalf of employees otherwise eligible to receive matching contributions on account of elective deferrals (and, similarly, employees eligible to receive matching contributions on account of elective deferrals must also be eligible to receive matching contributions on account of qualified student loan payments). The plan must also provide that matching contributions on account of qualified student loan payments vest in the same manner as matching contributions on account of elective deferrals.

Under the provision, for purposes of certain nondiscrimination rules and minimum coverage requirements,[1525] matching contributions on account of qualified student loan payments do not fail to be treated as available to an employee solely because such employee does not have debt incurred under a qualified education loan. In addition, the provision provides that a qualified student loan payment is generally not treated as a plan contribution. However, a plan may treat a qualified student loan payment as an elective deferral or an elective contribution (as applicable) for purposes of the matching contribution requirement under a basic safe harbor 401(k) plan and the automatic enrollment safe harbor 401(k) plan,

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[1522] As defined in section 221(d)(1), a qualified education loan is generally any indebtedness incurred by the taxpayer solely to pay qualified higher education expenses (1) which are incurred on behalf of the taxpayer, the taxpayer's spouse, or any dependent of the taxpayer as of the time the indebtedness was incurred; (2) which are paid or incurred within a reasonable period of time before or after the indebtedness is incurred; and (3) which are attributable to education furnished during a period during which the recipient was an eligible student.

[1523] The limitation applicable under section 402(g) for the year ($20,500 for 2022), or, if less, the employee's compensation as defined in section 415(c)(3) for the year.

[1524] "Eligible educational institution" is defined in section 221(d)(2) of the Code. "Cost of attendance" for this purpose is defined in section 472 of the Higher Education Act of 1965, as in effect on the day before the enactment of the Taxpayer Relief Act of 1997. The provision thus defines "qualified higher education expenses" differently than the definition of such term under section 221(d)(2).

[1525] This rule applies for purposes of section 401(a)(4), section 410(b), and the rule under the provision that all employees eligible to receive matching contributions on account of elective deferrals be eligible to receive matching contributions on account of qualified student loan payments.

as well as for purposes of the section 401(m) safe harbors.[1526] A plan is also permitted to apply the ADP test separately to employees who receive matching contributions on account of qualified student loan payments.

The provision also contains similar rules allowing matching contributions to be made on account of qualified student loan payments in the case of SIMPLE IRAs, section 403(b) plans, and section 457(b) plans. In the case of SIMPLE IRAs, the provision provides that a SIMPLE IRA does not fail to meet the matching contribution requirement applicable to such arrangements solely because the arrangement treats qualified student loan payments as elective employer contributions to the extent such payments do not exceed the amount of elective employer contributions the employee is permitted to contribute under the Code[1527] (reduced by elective employer contributions contributed by the employee for the year). As under a section 401(k) plan, in order for the student loan payment to qualify, the employee must certify annually to the employer making the matching contribution the amount of loan payments that have been made during the year.[1528] In addition, matching contributions on account of qualified student loan payments must be provided only on behalf of employees otherwise eligible to make elective employer contributions, and all employees otherwise eligible to participate in the arrangement must be eligible to receive matching contributions on account of qualified student loan payments.

In the case of a section 403(b) plan, under the provision, the fact that the employer offers matching contributions on account of qualified student loan payments[1529] is not taken into account in determining whether the plan satisfies the universal availability requirement.[1530] Similarly, in the case of a governmental 457(b) plan, the provision provides that a plan is not treated as failing to meet the requirements applicable to such plans[1531] solely because the plan, or another qualified plan[1532] or section 403(b) plan maintained by the employer provides for matching contributions on account of qualified student loan payments.[1533]

The provision directs the Secretary to prescribe regulations for purposes of implementing the provision, including regulations:

- Permitting a plan to make matching contributions for qualified student loan payments[1534] at a different frequency than matching contributions are otherwise made under the plan, provided that the frequency is not less than annually;
- Permitting employers to establish reasonable procedures for employees to claim matching contributions for such qualified student loan payments under the plan, including an an-

[1526] This rule applies for purposes of sections 401(k)(12)(B) and (13)(D), and sections 401(m)(11)(B) and (12). It also applies to SIMPLE section 401(k) plans under section 401(11)(B)(i)(II).

[1527] The limitation applicable under section 408(p)(2)(E) for the year, including permitted catch-up contributions under section 414(v), or, if less, the employee's compensation as defined in section 415(c)(3) for the year.

[1528] A technical correction may be needed to reflect this intent.

[1529] As described in section 401(m)(13), as added by this provision.

[1530] Sec. 403(b)(12)(A)(ii).

[1531] Under section 457(b).

[1532] Under section 401(a).

[1533] As described in section 401(m)(13), as added by this provision.

[1534] As defined in sections 401(m)(4)(D) and 408(p)(2)(F), as added by this provision.

nual deadline (not earlier than three months after the close of each plan year) by which a claim must be made; and

- Promulgating model amendments which plans may adopt to implement matching contributions on qualified student loan payments.[1535]

Effective Date

The provision is effective for contributions made for plan years beginning after December 31, 2023.

11. Application of credit for small employer pension plan start-up costs to employers which join an existing plan (sec. 111 of the Act and sec. 45E of the Code)

Present Law

For background on, and modifications to, the credit for small employer pension plan start-up costs, see the present law and explanation of provision description of section 102 of the Act.

Explanation of Provision

The provision clarifies that the first credit year is the taxable year which includes the date that the eligible employer plan to which such costs relate becomes effective with respect to the eligible employer.

Effective Date

The provision is effective as if included in the enactment of section 104 of the SECURE Act.

12. Military spouse retirement plan eligibility credit for small employers (sec. 112 of the Act and new sec. 45AA of the Code)

Present Law

Currently, there are no credits available for small employers specifically related to the provision of retirement benefits to military spouses.

Explanation of Provision

The provision allows eligible small employers to take a new nonrefundable income tax credit with respect to each individual who is married to a member of the uniformed services serving on active duty and who self-certifies as such (referred to as a military spouse), who is an employee of the employer, who participates in an eligible defined contribution plan of the employer, and who is a non-highly compensated employee.[1536] The credit is determined as the sum of $200 for each such employee plus the amount of the contributions (not including elective deferrals) made to all eligible defined contribution plans by the employer with respect to the em-

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[1535] For purposes of sections 401(m), 408(p), 403(b), and 457(b).

[1536] A non-highly compensated employee is an employee who is not a highly compensated employee as defined under section 414(q).

ployee up to a maximum of $300 for each such employee. The credit is available for up to three consecutive years beginning with the first taxable year in which the individual begins participating in the plan.

An eligible small employer is an employer that, for the preceding year, had no more than 100 employees who received at least $5,000 of compensation from the employer. Members of controlled groups and affiliated service groups are treated as a single employer for purposes of these requirements.[1537]

An eligible defined contribution plan is a plan in which military spouses are eligible to participate within two months of beginning employment, and in which military spouses who are eligible to participate, (1) are immediately eligible to receive employer contributions in amounts not less than those received by similarly situated nonmilitary spouses with two years of service, and (2) have an immediate, nonforfeitable right to accrued benefits derived from employer contributions under the plan.

Effective Date

The provision applies to taxable years beginning after the date of enactment (December 29, 2022).

13. Small immediate financial incentives for contributing to a plan (sec. 113 of the Act and secs. 401(k), 403(b), and 4975 of the Code)

Present Law

Section 401(k) plans

A section 401(k) plan is a type of profit-sharing or stock bonus plan that contains a qualified cash or deferred arrangement. Such arrangements are subject to the rules generally applicable to qualified defined contribution plans. In addition, special rules apply to such arrangements. Employees who participate in a section 401(k) plan may elect to have contributions made to the plan (elective deferrals) rather than receive the same amount as current compensation.[1538] The maximum annual amount of elective deferrals that can be made by an employee for a year is $20,500 (for 2022) or, if less, the employee's compensation.[1539] For an employee who attains age 50 by the end of the year, the dollar limit on elective deferrals is increased by $6,500 (for 2022) (called "catch-up contributions").[1540] An employee's elective deferrals and income on those deferrals must be fully vested. A section 401(k) plan may also provide for employer matching and nonelective contributions.

In order to constitute a qualified cash or deferred arrangement, no benefit under the arrangement may be conditioned, directly or indirectly, on the employee electing to have the employer make or

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[1537] Sec. 414(b), (c), (m) and (o).

[1538] Elective deferrals generally are made on a pre-tax basis and distributions attributable to elective deferrals are includible in income. However, a section 401(k) plan is permitted to include a "qualified Roth contribution program" that permits a participant to elect to have all or a portion of the participant's elective deferrals under the plan treated as after-tax Roth contributions. Certain distributions from a designated Roth account are excluded from income, even though they include earnings not previously taxed.

[1539] Sec. 402(g).

[1540] Sec. 414(v).

not make contributions under the arrangement in lieu of receiving cash.[1541] However, matching contributions are exempt from this rule.

Tax-sheltered annuities (section 403(b) plans)

Section 403(b) plans are a form of tax-favored employer-sponsored plan that provide tax benefits similar to qualified retirement plans. Section 403(b) plans may be maintained only by (1) charitable tax-exempt organizations, and (2) educational institutions of State or local governments (that is, public schools, including colleges and universities). Many of the rules that apply to section 403(b) plans are similar to the rules applicable to qualified retirement plans, including section 401(k) plans. Employers may make nonelective or matching contributions to such plans on behalf of their employees, and the plan may provide for employees to make pre-tax elective deferrals, designated Roth contributions (held in designated Roth accounts)[1542] or other after-tax contributions. Generally, section 403(b) plans provide for contributions toward the purchase of annuity contracts or provide for contributions to be held in custodial accounts for each employee. In the case of contributions to custodial accounts under a section 403(b) plan, the amounts must be invested only in regulated investment company stock.[1543]

Contributions to a section 403(b) plan and income thereon must be fully vested. The minimum coverage and general nondiscrimination requirements applicable to a qualified retirement plan generally apply to a section 403(b) plan and to employer matching and nonelective contributions and after-tax employee contributions to the plan.[1544] If a section 403(b) plan provides for elective deferrals, the plan is subject to a "universal availability" requirement under which all employees must be given the opportunity to make deferrals of more than $200. In applying this requirement, nonresident aliens, students, and employees who normally work less than 20 hours per week may be excluded.[1545]

Prohibited transactions

In general

The Code and ERISA[1546] prohibit certain transactions ("prohibited transaction") between a qualified retirement plan and a disqualified person (referred to as a "party in interest" under

[1541] Sec. 401(k)(4)(A).
[1542] Sec. 402A.
[1543] Sec. 403(b)(7).
[1544] These requirements do not apply to a governmental section 403(b) plan or a section 403(b) plan maintained by a church or a qualified church-controlled organization as defined in section 3121(w).
[1545] For this purpose, nonresident has the meaning in section 410(b)(3)(C), and student has the meaning in section 3121(b)(10). The universal availability requirement does not apply to a section 403(b) plan maintained by a church or a qualified church-controlled organization.
[1546] Pub. L. No. 93-406, September 2, 1974.

ERISA).[1547] The prohibited transaction rules under the Code apply also to IRAs, Archer MSAs, HSAs, and Coverdell ESAs.[1548]

Disqualified persons include a fiduciary of the plan; a person providing services to the plan; an employer with employees covered by the plan; an employee organization any of whose members are covered by the plan; certain owners, officers, directors, highly compensated employees, family members, and related entities.[1549] A fiduciary includes any person who (1) exercises any discretionary authority or discretionary control respecting management of the plan or exercises any authority or control respecting management or disposition of the plan's assets, (2) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of the plan, or has any authority or responsibility to do so, or (3) has any discretionary authority or discretionary responsibility in the administration of the plan.[1550]

Prohibited transactions include the following transactions, whether direct or indirect, between a plan and a disqualified person:

- The sale or exchange or leasing of property,
- The lending of money or other extension of credit,
- The furnishing of goods, services, or facilities,
- The transfer to, or use by or for the benefit of, the income or assets of the plan,
- In the case of a fiduciary, an act dealing with the plan's income or assets in the fiduciary's own interest or for the fiduciary's own account, and
- The receipt by a fiduciary of any consideration for the fiduciary's own personal account from any party dealing with the plan in connection with a transaction involving the income or assets of the plan.[1551]

Exemptions from prohibited transaction treatment

Certain transactions are statutorily exempt from prohibited transaction treatment, for example, certain loans to plan participants and arrangements with a disqualified person for legal, ac-

[1547] Sec. 4975; ERISA sec. 406. The prohibited transaction rules of the Code and ERISA are very similar; however, some differences exist between the two sets of rules. As mentioned above, ERISA generally does not apply to governmental plans or church plans. The prohibited transaction rules under the Code also generally do not apply to governmental plans or church plans. However, under section 503, the trust holding assets of a governmental or church plan may lose its tax-exempt status in the case of a prohibited transaction listed in section 503(b). Before the enactment of ERISA in 1974, section 503 applied to qualified retirement plans generally. In connection with the enactment of section 4975 by ERISA, section 503 was amended to apply only to governmental and church plans.

[1548] These are included in the definition of "plan" under section 4975(e)(1).

[1549] Sec. 4975(e)(2). Party in interest is defined similarly under ERISA section 3(14) with respect to an employee benefit plan. Under ERISA, employee benefit plans, defined in ERISA section 3(3), consist of two types: pension plans (that is, retirement plans), defined in ERISA section 3(2), and welfare plans, defined in ERISA section 3(1).

[1550] Sec. 4975(d)(3); ERISA sec. 3(21)(A). Under ERISA, a fiduciary also includes any person designated under ERISA section 405(c)(1)(B) by a named fiduciary (that is, a fiduciary named in the plan document) to carry out fiduciary responsibilities.

[1551] Sec. 4975(c)(1)(A)–(F) and ERISA sec. 406(a)(1)(A)–(D) and (b)(1) and (3). Under ERISA section 406(a)(1), a plan fiduciary is prohibited from causing the plan to engage in a transaction described in paragraphs (A)–(D). ERISA section 406(b)(2) also prohibits a plan fiduciary, in the fiduciary's individual capacity or any other capacity, from acting in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of plan participants or beneficiaries. ERISA section 406(a)(1)(E) and (a)(2) relate to limitations under ERISA section 407 on a plan's acquisition or holding of employer securities and real property.

counting or other services necessary for the establishment or operation of a plan if no more than reasonable compensation is paid for the services.[1552]

Sanctions for violations

Under the Code, if a prohibited transaction occurs, the disqualified person who participated in the transaction is generally subject to a two-tiered excise tax. The first-tier tax is 15 percent of the amount involved in the transaction. The second-tier tax, imposed if the prohibited transaction is not corrected within a certain period, is 100 percent of the amount involved. In the case of an IRA, HSA, Archer MSA or Coverdell ESA, if the individual for whose benefit the account is established (or the beneficiary) engages in the prohibited transaction, the sanction on that person is the loss of tax-favored status, rather than an excise tax. A private right of action is not available for a Code violation.

Under ERISA, DOL may assess a civil penalty against a person who engages in a prohibited transaction, other than a transaction with a plan covered by the prohibited transaction rules of the Code.[1553] The penalty may not exceed five percent of the amount involved in the transaction for each year or part of a year that the prohibited transaction continues. If the prohibited transaction is not corrected within 90 days after notice from DOL, the penalty can be up to 100 percent of the amount involved in the transaction. A prohibited transaction by a fiduciary may also be the basis for an action for a breach of fiduciary responsibility by DOL, a plan participant or beneficiary, or another plan fiduciary (as discussed above).

Explanation of Provision

The provision modifies the rule applicable to section 401(k) plans that prohibits the conditioning of benefits (other than matching contributions) on an employee's election to defer. As modified, the rule exempts, in addition to matching contributions, a de minimis financial incentive provided to employees who elect to make elective deferrals under the plan. Thus, a section 401(k) plan will not fail to include a qualified cash or deferred arrangement merely because it conditions a de minimis financial incentive on an employee's election to make an elective deferral. This exemption does not apply in the case of a de minimis financial incentive provided to employees who elect not to make elective deferrals under the plan. The de minimis financial incentive must not be paid for with plan assets.

Similarly, in the case of a section 403(b) plan, the provision provides that a plan does not fail to satisfy the universal availability requirement[1554] solely by reason of offering a de minimis financial incentive (not paid for with plan assets) to employees who elect to

[1552] Sec. 4975(d) and ERISA sec. 408. The Code and ERISA also provide for the grant of administrative exemptions, on either an individual or class basis, subject to a finding that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan.

[1553] ERISA sec. 502(i).

[1554] Sec. 403(b)(12)(A)(ii).

have the employer make contributions pursuant to a salary reduction agreement.

In addition, under the provision, the provision of such de minimis financial incentives under a section 401(k) plan or a section 403(b) plan is not treated as a prohibited transaction under the Code or ERISA.[1555]

Effective Date

The provision applies to plan years beginning after the date of enactment.

14. Deferral of tax for certain sales of employer stock to employee stock ownership plan sponsored by S corporation (sec. 114 of the Act and sec. 1042 of the Code)

Present Law

In general

An employee stock ownership plan ("ESOP") is a stock bonus plan that is designated as an ESOP and is designed to invest primarily in stock of the employer, referred to as "qualifying employer securities."[1556] An ESOP can be maintained by either a C corporation or an S corporation.[1557] For purposes of ESOP investments, a "qualifying employer security" is generally defined as: (1) common stock of the employer or a member of the same controlled group that is readily tradable on an established securities market; (2) if there is no such readily tradable common stock, common stock of the employer (or member of the same controlled group) that has both voting power and dividend rights at least as great as any other class of common stock; or (3) noncallable preferred stock that is convertible into common stock described in (1) or (2) and that meets certain requirements.[1558] In some cases, an employer may design a class of preferred stock that meets these requirements and that is held only by the ESOP.

An ESOP can be an entire plan or it can be a portion of a defined contribution plan. An ESOP may provide for different types of contributions, including employer nonelective contributions. For example, an ESOP may include a section 401(k) feature that permits employees to make elective deferrals. ESOPs are subject to additional requirements that do not apply to other plans that hold employer stock. For example, voting rights must generally be passed through to ESOP participants and employees must generally have the right to receive benefits in the form of stock. Certain of these requirements differ depending on whether the employer securities held by the ESOP are readily tradable on an established securities market. A security is considered readily tradable on an established securities market if the security is traded on a national securities

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[1555] Sec. 4975 and ERISA sec. 408.

[1556] Sec. 4975(e)(7). Participant accounts in other types of defined contribution plans can also be invested in employer stock.

[1557] A C corporation is so named because its tax treatment is governed by subchapter C of the Code. An S corporation is so named because its tax treatment is governed by subchapter S of the Code. An S corporation is a passthrough entity for income tax purposes. That is, income tax does not apply at the S corporation level. Rather, items of income, gain, or loss are taken into account for tax purposes by the S corporation shareholders on their own tax returns.

[1558] Sec. 409(l).

exchange that is registered under section six of the Securities Exchange Act of 1934 or the security is traded on a foreign national securities exchange that is officially recognized, sanctioned, or supervised by a governmental authority and the security is deemed by the Securities and Exchange Commission ("SEC") as having a "ready market."[1559]

Diversification requirements

ESOPs are subject to a requirement that a participant who has attained age 55 and who has at least 10 years of participation in the plan must be permitted to diversify the investment of the participant's account in assets other than employer securities.[1560] The diversification requirement applies to a participant for six years, starting with the year in which the individual first meets the eligibility requirements (*i.e.,* age 55 and 10 years of participation). The participant must be allowed to elect to diversify up to 25 percent of the participant's account (50 percent in the sixth year), reduced by the portion of the account diversified in prior years.

The participant must be given 90 days after the end of each plan year in the election period to make the election to diversify. In the case of participants who elect to diversify, the plan satisfies the diversification requirement if: (1) the plan distributes the applicable amount to the participant within 90 days after the election period; (2) the plan offers at least three alternative investment options and, within 90 days of the election period, invests the applicable amount in accordance with the participant's election; or (3) the applicable amount is transferred within 90 days of the election period to another qualified defined contribution plan of the employer providing investment options in accordance with (2).[1561]

Valuation requirements

If employer securities are not readily tradable on an established securities market, valuations with respect to activities carried out by the plan must be by an independent appraiser.[1562] Valuations must be made in good faith and based on all relevant factors for determining the fair market value of securities.[1563] In the case of a transaction between a plan and a disqualified person, value must be determined as of the date of the transaction. An independent appraisal will not in itself be a good faith determination of value in the case of a transaction between a plan and a disqualified person.

[1559] Treas. Reg. sec. 1.401(a)(35)–1(f)(5)(ii). "Ready market" is defined with reference to 17 CFR § 240.15c3–1. Under IRS guidance, this definition of readily tradable applies generally for purposes of the ESOP rules in the Code, including for purposes of sections 401(a)(22), 401(a)(28)(C), 409(h)(1)(B), 409(l), and 1042(c)(1)(A). Notice 2011–19, 2011–11 I.R.B. 550, March 14, 2011.

[1560] Sec. 401(a)(28). Under sec. 401(a)(35) and ERISA sec. 204(j), special diversification rules apply to ESOPs that hold publicly traded employer securities, which are employer securities that are readily tradable on an established securities market. However, such rules do not apply to an ESOP if (A) there are no contributions or earnings held in the ESOP that are subject to sections 401(k) or 401(m); and (B) the ESOP is a separate plan for purposes of section 414(l) with respect to any other defined benefit plan or defined contribution plan maintained by the same employer or employers. Sec. 401(a)(35)(E). ESOPs that are not subject to section 401(a)(35) are subject to diversification rules under section 401(a)(28).

[1561] Notice 88–56, 1988–1 C.B. 540, May 9, 1988, Q&A–16.

[1562] Sec. 401(a)(28)(C). For purposes of this section, "independent appraiser" means any appraiser meeting requirements similar to the requirements of the regulations prescribed under section 170(a)(1).

[1563] 26 CFR § 54.4975–11.

However, in other cases, an independent determination of fair market value based on at least an annual appraisal will be deemed to be a good faith determination of value.

Right to demand employer securities and put option

A participant who is entitled to a distribution from the plan has a right to demand that his benefits be distributed in the form of employer securities.[1564] If the employer securities are not readily tradable on an established market, a participant who is entitled to a distribution from the plan has a right to require that the employer repurchase employer securities under a fair valuation formula.[1565]

Prohibited allocations to an S corporation ESOP

In part to prevent interests in income attributable to employer stock of an S corporation held by an ESOP (and thus not subject to current taxation) from being concentrated in a small group of persons, such ESOP must not permit any portion of the plan assets attributable to (or allocable in lieu of) employer securities to be allocated to (or accrue for the benefit of) a disqualified person during a nonallocation year.[1566] A disqualified person is generally a person who has at least a 10-percent interest (or who are a member of a family group having at least a 20-percent interest) in the portion of the S corporation shares held by the ESOP, either by having shares of S corporation employer stock allocated to the person's account under the ESOP (or being treated as having a portion of unallocated shares), or by having an interest in the S corporation in the form of synthetic equity.[1567]

A "nonallocation year" is a plan year of an ESOP maintained by an S corporation in which disqualified persons own (directly or indirectly) at least 50 percent of the S corporation shares. For this purpose, a person's interest in the S corporation in the form of synthetic equity is treated as ownership of S corporation shares and is taken into account, but only if taking it into account causes a plan year to be a nonallocation year or a person to be a disqualified person.[1568] Thus, both determinations are done with and without synthetic equity.

[1564] Sec. 409(h)(1)(A).

[1565] Sec. 409(h)(1)(B).

[1566] Sec. 409(p).

[1567] Pursuant to section 409(p)(5) and (6)(C), and Treas. Reg. sec. 1.409(p)–1(f), "synthetic equity" is any stock option, warrant, restricted stock, deferred issuance stock right, or similar interest that gives the holder the right to acquire or receive stock of the S corporation in the future; a stock appreciation right, phantom stock unit, or similar right to a future cash payment based on the value of such stock or appreciation in such value; and rights to nonqualified deferred compensation (even though it is neither payable in, nor calculated by reference to, stock in the S corporation) and rights to acquire interests in certain related entities. A person can be a disqualified person, and a nonallocation year can occur, based solely on interests in the S Corporation in the form of synthetic equity, even if the person is not a participant in the ESOP. Synthetic equity is an interest in income attributable to employer stock held by an ESOP and reduces the ESOP's economic ownership of the S corporation. It is possible in certain circumstances to grant options or warrants for S corporation stock (or other synthetic equity) to a single person that, when combined with the outstanding shares of the S corporation, are options for up to 49 percent of the S corporation stock without causing a nonallocation year.

[1568] An ESOP maintained by an S corporation may be able prevent a nonallocation year (or a prohibited allocation during a nonallocation year) by transferring S corporation employer stock allocated to the account of disqualified persons (or persons expected to become disqualified persons) to a separate portion of the qualified plan (or another qualified retirement plan of the S corporation) that is not designated as an ESOP and allocate it to the accounts of those persons

If the ESOP fails to meet these requirements, a number of adverse tax consequences may apply. An amount allocated to or accrued for the benefit of a disqualified person during a nonallocation year is treated as distributed to the disqualified person; an excise tax equal to 50 percent of the amount of the prohibited allocation applies to the S corporation; the qualified plan ceases to be an ESOP; and there is a potential for disqualification of the plan.[1569]

Election to defer gain on sale to ESOP

A taxpayer may elect to defer the recognition of long-term capital gain on the sale of qualified securities to an ESOP if certain requirements are met.[1570] Nonrecognition applies to the extent that the taxpayer reinvests the sale proceeds in qualified replacement property within a specified replacement period. Qualified securities (discussed below) are certain securities issued by a C corporation. Thus, this rule does not apply to the sale of S corporation stock.

For a taxpayer to be eligible for nonrecognition treatment, (1) the qualified securities must be sold to an ESOP; (2) the ESOP must own, immediately after the sale, at least 30 percent of each class of outstanding stock, or the total value of all outstanding stock of the corporation issuing the qualified securities; and (3) the taxpayer must provide certain information to the Secretary. In addition, the taxpayer's holding period with respect to the qualified securities must be at least three years at the time of the sale.

The ESOP must preclude the allocation to certain individuals of assets attributable to the qualified securities received in the sale; an excise tax may apply in the case of a prohibited allocation.[1571] In addition, an excise tax may apply if the ESOP disposes of the qualified securities within three years of the date of the sale.[1572]

Qualified securities

Qualified securities are qualifying employer securities (as defined for ESOP purposes) that (1) are issued by a domestic C corporation that, for at least one year before and immediately after the sale, has no readily tradable securities outstanding (and no member of the C corporation's controlled group has readily tradable securities outstanding), and (2) have not been received by the seller as a distribution from a qualified plan or as a transfer pursuant to an option or similar right to acquire stock granted to an employee by an employer.

under the separate portion (or other plan). In that case, the qualified retirement plan is subject to UBIT with respect to those transferred shares of S corporation stock.

[1569] Secs. 409(p)(2); 4975(e)(7); 4979A.

[1570] Sec. 1042. Deferred recognition of gain may apply also to a sale of qualified securities to an eligible worker-owned cooperative. A sale of securities to an ESOP or eligible employee worker-owned cooperative by an underwriter in the ordinary course of the trade or business as an underwriter (whether or not guaranteed), or by a C corporation, is not eligible for nonrecognition treatment under section 1042. Special rules apply in the case of a sale of stock of an agricultural or horticultural refiner or processor to an eligible farmers' cooperative.

[1571] Secs. 409(n) and 4979A.

[1572] Sec. 4978.

Qualified replacement property

Qualified replacement property consists of any security[1573] issued by a domestic operating corporation, which did not, for the corporation's taxable year preceding the taxable year in which the security was purchased by the taxpayer seeking nonrecognition treatment, have passive investment income[1574] exceeding 25 percent of the corporation's gross receipts for such preceding taxable year. In addition, securities of the domestic corporation that issued the qualified securities (and of any member of a controlled group of corporations with such corporation) are not qualified replacement property.

The qualified replacement property must be purchased within a replacement period beginning on the date three months prior to the date the qualified securities are sold and ending twelve months after the date of the sale.

The basis of the taxpayer in qualified replacement property acquired during the replacement period is reduced by an amount not greater than the amount of gain realized on the sale that was not recognized pursuant to the taxpayer's election. If more than one item of qualified replacement property is acquired, an allocation rule applies to determine the taxpayer's basis in each item. Under the allocation rule, the basis of each item designated as qualified replacement property is reduced by an amount determined by multiplying the total gain eligible for nonrecognition treatment by a fraction. The numerator of the fraction is the cost of the item of replacement property and the denominator is the total cost of all such items.

Recapture of gain

If a taxpayer disposes of any qualified replacement property, notwithstanding any other provision of the Code, gain (if any) must be recognized to the extent of the gain that was not recognized on the sale of stock to the ESOP, subject to certain exceptions.[1575] Exceptions to recapture include transfers by gift or by reason of the death of the individual.

Additional special ESOP rules

Certain benefits are available to ESOPs that are not available to other types of qualified retirement plans that hold employer stock. Under an exception to the prohibited transaction rules, an employer maintaining an ESOP may lend money to the ESOP, or the employer may guarantee a loan made by a third-party lender to the ESOP, to finance the ESOP's purchase of employer securities.[1576]

[1573] Security is defined for this purpose as under section 165(g), *i.e.,* a share of stock in a corporation; a right to subscribe for, or to receive, a share of stock in a corporation; or a bond, debenture, note, or certificate, or other evidence of indebtedness, issued by a corporation or by a government or political subdivision thereof, with interest coupons or in registered form. Sec. 1042(c)(4)(D).

[1574] Passive investment income is defined for this purpose as under section 1362(d)(3)(C). Sec. 1042(c)(4)(A)(i).

[1575] Sec. 1042(e).

[1576] Sec. 4975(d)(3). To qualify for the loan exemption, the loan must be primarily for the benefit of participants and beneficiaries of the plan, the interest on the loan must be at a reasonable rate, and any collateral given to a disqualified person by the plan must consist only of qualifying employer securities.

An ESOP that borrows funds to acquire employer securities is generally called a leveraged ESOP.

In the case of an ESOP maintained by a C corporation, payments of principal on the ESOP loan are deductible to the extent permitted under the general deduction limits for contributions to qualified retirement plans (which generally limit the deduction for contributions to a defined contribution plan for a year to 25 percent of the participants' compensation), and interest payments are deductible without regard to the limitation.[1577] In addition, a C corporation may deduct dividends paid on employer stock held by an ESOP if the dividends are used to repay a loan, if they are distributed to plan participants, or if the plan gives participants the opportunity to elect either to receive the dividends or have them reinvested in employer stock under the ESOP and the dividends are reinvested at the participants' election.[1578] This deduction is also allowed without regard to the general deduction limits on contributions to qualified plans. Moreover, subject to certain requirements, a taxpayer may elect to defer the recognition of long-term capital gain on the sale of qualified securities to an ESOP maintained by a C corporation.[1579]

ESOPs maintained by S corporations are subject to special rules. Generally, if a tax-exempt entity, including a trust holding qualified retirement plan assets, holds S corporation stock, it is treated as holding an interest in an unrelated trade or business and is subject to unrelated business income tax ("UBIT").[1580] However, an ESOP holding employer securities issued by an S corporation is exempt from UBIT.

Explanation of Provision

The provision amends the definition of qualified securities to remove the requirement that the securities be issued by a C corporation. Thus, subject to the present-law requirements applicable with respect to the sale of qualified securities to an ESOP, a taxpayer may elect to defer the recognition of long-term capital gain on the sale of qualified securities of an S corporation to an ESOP. However, in the case of a sale of S corporation securities, the election to defer recognition of gain may not be made with respect to more than 10 percent of the amount realized on the sale. Such deferral must take into account the portion of adjusted basis that is properly allocable to the portion of the amount realized with respect to which the election is made.

Effective Date

This provision applies to sales after December 31, 2027.

[1577] Sec. 404(a)(9).

[1578] Sec. 404(k). If a dividend is paid with respect to stock allocated to a participant's account and is used to make a payment on an ESOP loan, the plan must allocate employer securities with a fair market value of not less than the amount of such dividend to the participant's account for the year in which such dividend would have been allocated to such participant. Distributions with respect to S corporation stock held in an ESOP may also be used to repay an ESOP loan under similar conditions, but the distribution is not deductible by the S corporation.

[1579] Sec. 1042.

[1580] Sec. 512(e). Section 511 imposes UBIT on a tax-exempt entity's income from an unrelated trade or business.

15. Withdrawals for certain emergency expenses (sec. 115 of the Act and sec. 72(t) of the Code)

Present Law

Distributions from tax-favored retirement plans

A distribution from a tax-qualified plan described in section 401(a) (a "qualified retirement plan"), section 403(a) annuity plan, section 403(b) plan, a governmental section 457(b) plan, or an IRA generally is included in income for the year distributed.[1581] These plans are referred to collectively as "eligible retirement plans."[1582] In addition, unless an exception applies, a distribution from a qualified retirement plan, a section 403(a) annuity 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.[1583]

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. IRS has the authority to waive the 60-day requirement if failure to waive the requirement would be against equity or good conscience, including in cases of casualty, disaster, or other events beyond the reasonable control of the individual.[1584]

The terms of a qualified retirement plan, section 403(b) plan, or governmental section 457(b) plan generally determine when distributions are permitted. However, for many types of plans, restrictions apply to distributions before an employee's termination of employment, referred to as "in-service" distributions or withdrawals. Despite such restrictions, an in-service distribution from a qualified retirement plan that includes a qualified cash-or-deferred arrangement (a "section 401(k) plan"), or a section 403(b) plan may be permitted in the case of financial hardship. Similarly, a governmental section 457(b) plan may permit distributions in the case of an unforeseeable emergency. Under a qualified retirement plan that is a pension plan (*i.e.,* defined benefit pension plan or money purchase pension plan), distributions generally may be made only in the event of retirement, death, disability, or other separation from service, although in-service distributions may be permitted after age 59½.[1585]

[1581] 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.

[1582] Sec. 402(c)(8)(B).

[1583] Sec. 72(t). The 10-percent early withdrawal tax does not apply to distributions from a governmental section 457(b) plan.

[1584] Secs. 402(c)(3)(B) and 408(d)(3)(I); Rev. Proc. 2020–46, 2020–45 I.R.B. 995, provides for a self-certification procedure (subject to verification on audit) that may be used by a taxpayer claiming eligibility for a waiver of the 60-day requirement with respect to a rollover into a plan or IRA in certain specified circumstances.

[1585] Sec. 401(a)(36); Treas. Reg. secs. 1.401–1(b)(1)(i) and 1.401(a)–1(b)(1)(i). Section 401(k) plans, section 403(b) plans, and governmental section 457(b) plans also may permit in-service distributions after age 59½.

Explanation of Provision

Under the provision, an exception to the 10-percent early withdrawal tax applies in the case of withdrawals from applicable eligible retirement plans for emergency personal expenses. In addition, such eligible distributions may be recontributed subject to certain requirements.

Eligible distributions for emergency personal expenses

An emergency personal expense distribution is a permissible distribution from an applicable eligible retirement plan which, for this purpose, includes qualified retirement plans (other than defined benefit plans), section 403(a) annuity plans, section 403(b) plans, governmental section 457(b) plans, and IRAs.[1586] Emergency personal expense distribution means any distribution from an applicable retirement plan to an individual for purposes of meeting unforeseeable or immediate financial needs relating to necessary personal or family emergency expenses. In making such a distribution, a plan administrator may rely on the employee's certification that the distribution is an eligible emergency personal expense distribution.[1587]

The maximum aggregate amount which may be treated as an emergency personal expense distribution by any individual in any calendar year cannot exceed the lesser of $1,000 or an amount equal to the excess of the individual's total nonforfeitable accrued benefit under the plan (the individual's total interest in the plan in the case of an IRA), determined as of the date of each such distribution, over $1,000. Not more than one emergency personal expense distribution may be made per calendar year per individual.

An employer plan is not treated as violating any Code requirement merely because it treats a distribution to an individual as an emergency personal expense distribution, provided that such distribution qualifies as an emergency personal expense distribution and the aggregate amount or number of such distributions to that individual from plans maintained by the employer and members of the employer's controlled group[1588] does not exceed the limits described above. Thus, under such circumstances an employer plan is not treated as violating any Code requirement merely because an individual might receive total emergency personal expense distributions in excess of the limits (pertaining to the aggregate amount or number of such distributions) as a result of emergency personal expense distributions from plans of other employers or IRAs.

Recontributions to applicable eligible retirement plans

Amounts distributed pursuant to this provision may be repaid under rules similar to the rules applicable to repayments in the case of a qualified birth or adoption distribution, under which amounts may be recontributed to an applicable eligible retirement

[1586] An emergency personal expense distribution is subject to income tax withholding unless the recipient elects otherwise. Mandatory 20-percent withholding does not apply.

[1587] The Secretary may provide by regulations for exceptions to this rule in cases where the plan administrator has actual knowledge to the contrary and for addressing cases of employee misrepresentation.

[1588] The term "controlled group" means any group treated as a single employer under subsection (b), (c), (m), or (o) of section 414.

plan to which a rollover can be made at any time during the three-year period beginning on the day after the date on which the distribution was received.[1589]

Limitation on subsequent distributions

If a distribution is treated as an emergency personal expense distribution, then no amount may be treated as such a distribution during the immediately following three calendar years unless the previous emergency personal expense distribution is fully recontributed, or the aggregate of the elective deferrals and employee contributions to the plan (the total amounts contributed in the case of an IRA) subsequent to such previous emergency personal expense distribution is at least equal to the amount of such previous distribution which has not been recontributed.

Effective Date

The provision is effective for distributions made after December 31, 2023.

16. Allow additional nonelective contributions to SIMPLE plans (sec. 116 of the Act and sec. 408(p) of the Code)

Present Law

Under present law, certain small businesses can establish a simplified retirement plan called the savings incentive match plan for employees ("SIMPLE") retirement plan. SIMPLE plans can be adopted by employers who employ 100 or fewer employees who received at least $5,000 in compensation during the preceding year and who do not maintain another employer-sponsored retirement plan (unless the other plan is for employees covered by collective bargaining agreement and the SIMPLE plan does not cover those employees). A SIMPLE plan can be either an IRA for each employee or part of a qualified cash or deferred arrangement (a section "401(k) plan").[1590] If established in IRA form, a SIMPLE plan is not subject to the nondiscrimination rules generally applicable to qualified retirement plans (including the top-heavy rules) and simplified reporting requirements apply. If established as part of a 401(k) plan, the SIMPLE does not have to satisfy the special nondiscrimination tests applicable to 401(k) plans and is not subject to the top-heavy rules. The other qualified retirement plan rules continue to apply. Within limits, contributions to a SIMPLE plan are not taxable until withdrawn.

Contributions to a SIMPLE plan (whether a SIMPLE IRA or SIMPLE 401(k)) may include employee salary reduction contributions ("elective deferrals"). Employers are also required to make either a matching contribution or a nonelective contribution each year. The matching contribution must generally be up to three percent of an employee's compensation, and the nonelective contribu-

[1589] See sec. 72(t)(2)(H)(v). A description of the standards applicable to repayments of qualified birth or adoption distributions may be found in the description of present law and explanation of provision for section 311 of the Act. The provision also includes a cross-reference to section 311 of the Act, which amends sec. 72(t)(2)(H)(v)(1) to limit repayment of such distributions to three years.

[1590] Sec. 408(p); 401(k)(11).

tion must be two percent of compensation (regardless of the employee's elective deferral).[1591] In the case of the nonelective contribution, it is only required to be provided to employees who are eligible to participate in the plan and who have at least $5,000 of compensation from the employer for the year. No other contributions are permitted. Contributions to a SIMPLE account must be fully vested.[1592]

There is an annual limit on the amount of an elective deferral that an employee may make to a SIMPLE plan (subject to cost-of-living adjustments). The elective deferrals under a SIMPLE plan count toward the overall annual limit on elective deferrals an employee may make to this and other plans permitting elective deferrals.[1593] For 2022, the annual contribution limit for SIMPLE plans is $14,000.[1594] If permitted by the SIMPLE plan, participants who are age 50 or above at the end of the calendar year may also make catch up contributions ($3,000 for 2022). In the case of a SIMPLE IRA, the contribution limit that otherwise applies to IRAs is increased to account for the limit on elective deferrals to a SIMPLE IRA and the required employer matching or nonelective contribution.[1595]

In the case of a SIMPLE IRA, if a participant receives a payment or distribution from the IRA during the first two years the individual participates in the plan, such payment or distribution is not treated as a rollover contribution if it is paid to an IRA or retirement plan, unless it is paid to another SIMPLE IRA.[1596] In addition, the 10-percent tax on early distributions from retirement plans is increased to 25 percent in the case of any such distributions that are subject to the early distribution tax.[1597]

Explanation of Provision

The provision expands the types of contributions that may be made to a SIMPLE IRA plan or a SIMPLE 401(k) plan by also permitting the employer to make nonelective contributions of a uniform percentage of up to 10 percent of compensation, but not to exceed $5,000 for the year. The $5,000 amount is indexed for inflation. As in the case of the two-percent nonelective contribution under present law, the nonelective contribution under the provision is only required to be provided to employees who are eligible to participate in the arrangement and who have at least $5,000 of compensation from the employer for the year.[1598] The provision also increases the IRA contribution limit as it applies to SIMPLE IRAs to account for the additional nonelective contribution permitted under the provision.

[1591] Sec. 408(p)(2)(A)(iii); (B)(i).
[1592] Secs. 401(k)(11)(A)(iii); 408(p)(3).
[1593] Secs. 401(a)(30); 402(g).
[1594] Secs. 401(k)(11)(B)(i)(I); 408(p)(2)(A)(ii).
[1595] Sec. 408(p)(8).
[1596] Sec. 408(d)(3)(G).
[1597] Sec. 72(t)(6).
[1598] Note that the $5,000 amount of compensation that applies to determine employee eligibility remains unindexed under the provision.

Effective Date

The provision applies to taxable years beginning after December 31, 2023.

17. Contribution limit for SIMPLE plans (sec. 117 of the Act and secs. 401(k), 408(p), and 414(v) of the Code)

Present Law

For present law, see the description of the present law for section 116 of the Act.

Explanation of Provision

The provision increases the limit on the amount of elective deferrals that an employee may contribute to a SIMPLE IRA or SIMPLE 401(k) plan in the case of certain employers. The increased limit equals 110 percent of the limit that otherwise applies for calendar year 2024. It applies to: (1) an employer that had no more than 25 employees who received at least $5,000 of compensation from the employer for the preceding year, and (2) an employer that is eligible to elect the higher limit, and so elects ("eligible electing employer").[1599] In the case of a plan to which this increased limit applies, the plan may also similarly permit catch-up contributions of up to 110 percent of the limit that otherwise applies for calendar year 2024. Both the increased deferral limit and the increased catch-up limit will be adjusted for inflation for taxable years beginning after 2024.

In order to qualify as, the employer (and any member of the employer's controlled group) must not have established or maintained, during the three preceding taxable years, a qualified retirement plan, section 403(a) annuity plan, or section 403(b) plan under which contributions were made, or benefits accrued, for substantially the same employees that are eligible to participate in the SIMPLE plan.

In the case of an eligible electing employer that elects to apply the increased elective deferral limit, such employer must provide an increased matching or nonelective contribution under the plan. If a matching contribution is provided, it must generally be four percent of compensation (rather than three percent),[1600] and if a nonelective contribution is provided, it must be three percent of compensation (rather than two percent).

The Secretary must, not later than December 31, 2024 and annually thereafter, report to the Committees on Finance and Health, Education, Labor, and Pensions of the Senate, and the Committees on Ways and Means and Education and Labor of the House of Representatives, the following data (together with any recommendations that the Secretary deems appropriate): (1) the number of

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[1599] In both cases the employer must be otherwise eligible to have a SIMPLE IRA plan. In the case of an employer described in (1), a two-year grace period applies for subsequent years in which the employer has more than 25 employees who receive at least $5,000 in compensation. Under the grace period rule, the employer is treated as having 25 employees who receive at least $5,000 in compensation for the 2 years following the last year the employer had not more than 25 such employees.

[1600] An employer is permitted to elect a lower matching contribution if certain requirements are met. Sec. 408(p)(2)(C)(ii)(II).

SIMPLE IRA and SIMPLE 401(k) plans that are maintained or established during a year; (2) the number of eligible participants for such plans for such year; (3) median contribution amounts; (4) the most common types of investments; and (5) the fee levels charged in connection with the maintenance of accounts under the plans. The provision requires such data to be collected separately for each type of plan. The Secretary may use such data as is otherwise available to the Secretary for publication and may use such approaches as are appropriate under the circumstances, including the use of voluntary surveys and collaboration on studies.

Effective Date

The provision applies to taxable years beginning after December 31, 2023.

18. Tax treatment of certain non-trade or business SEP contributions (sec. 118 of the Act and sec. 4972 of the Code)

Present Law

Tax on nondeductible contributions to qualified employer plans

A 10-percent excise tax applies to nondeductible contributions made to a qualified employer plan.[1601] The tax is imposed on the employer. For this purpose, nondeductible contributions generally are the sum of (1) the excess of the amount contributed for the taxable year by the employer over the amount allowable as a deduction[1602] for contributions to the plan, and (2) the amount determined as nondeductible[1603] for the preceding year, reduced by any portion returned to the employer and by the deductible portion for that year.[1604]

An exception to the application of the 10-percent excise tax applies in certain situations, including in the case of contributions to a SIMPLE IRA[1605] or to a SIMPLE 401(k) plan[1606] which are not deductible solely because the contributions are not made in connection with a trade or business (for example, the contributions are made with respect to a household employee).

The exception does not apply to contributions to a SEP plan.

SEP plans

A SEP plan is a type of employer-sponsored retirement plan whereby generally only the employer makes contributions to the plan.[1607] The amount of the contribution to the SEP plan is up to the lesser of 25 percent of the employee's compensation or the dollar limit applicable to contributions to a qualified defined contribution plan ($61,000 for 2022). A traditional IRA is set up for each eligible employee, and all contributions must be fully vested. Any

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[1601] Sec. 4972.
[1602] As determined under section 404 without regard to section 404(e).
[1603] Under section 4972(c).
[1604] As determined under section 404 without regard to section 404(e).
[1605] Within the meaning of section 408(p).
[1606] Within the meaning of section 401(k)(11).
[1607] Sec. 408(k). Certain grandfathered SEP plans may permit salary-reduction arrangements (if the SEP plan was in existence on December 31, 1996). Sec. 408(k)(6)(H).

employee must be eligible to participate in the SEP plan if the employee has (1) attained age 21, (2) performed services for the employer during at least three of the immediately preceding five years, and (3) received at least $650 (for 2022) in compensation from the employer for the year.[1608] Contributions to a SEP plan generally must bear a uniform relationship to compensation.

Explanation of Provision

The provision extends the exception from the 10-percent excise tax to contributions to a SEP plan which are not deductible solely because the contributions are not made in connection with a trade or business.

Effective Date

The provision is effective for taxable years beginning after the date of enactment (December 29, 2022).

In addition, no-inference language provides that nothing in the provision shall be construed to infer the proper treatment under section 4972(c)(6) of the Code of nondeductible contributions to which the provision does not apply.

19. Application of section 415 limit for certain employees of rural electric cooperatives (sec. 119 of the Act and sec. 415(b) of the Code)

Present Law

Limitations on benefits provided under a qualified defined benefit plan

Benefits that may be provided to a participant under a qualified defined benefit plan must not exceed certain specified limitations.[1609] Under a defined benefit plan, the maximum annual benefit payable to a participant at retirement cannot exceed the lesser of (1) 100 percent of the participant's average compensation for the participant's high three years ("the 100-percent compensation limitation"), or (2) a specified dollar amount, indexed for inflation ($245,000 for 2022).[1610] Other limits apply under certain circumstances.[1611] The dollar amount limit is actuarially reduced if benefits begin before age 62, and actuarially increased if benefits begin after age 65.[1612] These limits apply to amounts for or with respect to a limitation year, which is generally the calendar year unless the terms of the plan provide otherwise.[1613]

The 100-percent compensation limitation does not apply to governmental plans, multiemployer plans, and certain collectively bargained plans.[1614] In addition, this limitation does not apply to a participant in a plan maintained by certain church organizations, if that participant has never been a highly compensated em-

[1608] The annual compensation limit for SEP plans for 2022 is $305,000.
[1609] Sec. 415(b); Treas. Reg. sec. 1.415(b)–1.
[1610] Sec. 415(b)(1); Notice 2021–61, 2021–47 I.R.B. 738, Nov. 22, 2021.
[1611] See *e.g.,* Secs. 415(b)(4); 415(b)(5); 415(b)(7).
[1612] Secs. 415(b)(2)(C)–(D).
[1613] Treas. Reg. sec. 1.415(j)–1.
[1614] Secs. 415(b)(7) and 415(b)(11).

ployee.[1615] An employee is a "highly compensated employee" for the year if the employee was: (i) a five-percent owner at any time during the plan year or the preceding plan year, or (ii) had compensation for the preceding year from the employer in excess of a specified dollar amount, indexed for inflation ($135,000 for 2022).[1616]

For purposes of applying these limitations, in the case of a defined benefit plan, the term annual benefit means a benefit that is payable in the form of a straight life annuity. If a benefit is payable other than as an annual straight life annuity, then the benefit must be actuarially adjusted to an equivalent straight life annuity.[1617] The interest rate assumption for this adjustment is specified and cannot be less than the greater of five percent or the rate specified under the plan.[1618] If the benefit is payable in the form of a single sum distribution, then the benefit is adjusted using an interest rate that is not less than the greatest of: (i) 5.5 percent, (ii) the rate that provides a benefit of not more than 105 percent of the benefit that would be provided if the applicable interest rate[1619] were the interest rate assumption, or (iii) the rate specified under the plan.[1620]

Explanation of Provision

The provision exempts an employee who is a participant in an eligible rural electric cooperative's defined benefit plan from the 100-percent compensation limitation, except in the case of participant who was a highly compensated employee[1621] of an employer maintaining the plan for the earlier of the plan year in which the participant terminated employment with such employer or the plan year in which distributions commence under the plan with respect to the participant, or for any of the five plan years immediately preceding such earlier plan year.

For purposes of this provision, a plan is generally treated as an eligible rural electric cooperative plan if it is maintained by more than one employer and at least 85 percent of the employers are certain rural cooperatives that are engaged primarily in providing electric service, or an organization which is a national association of those organizations.[1622]

This provision is a permissible change and an employer participating in an eligible rural electric cooperative plan may choose to

[1615] Sec. 415(b)(11).

[1616] Sec. 414(q); Notice 2021–61. At the election of the employer, employees who are highly compensated based on compensation may be limited to the top 20 percent highest paid employees. A non-highly compensated employee is an employee other than a highly compensated employee.

[1617] Sec. 415(b)(2)(B); Treas. Reg. sec. 1.415(b)–1(c).

[1618] Sec. 415(b)(2)(E)(i).

[1619] As defined in section 417(e)(3).

[1620] Sec. 415(b)(2)(E)(ii).

[1621] Within the meaning of section 414(q).

[1622] Section 401(k)(7)(B) defines "rural cooperative" as any organization which is (i) engaged primarily in providing electric service on a mutual or cooperative basis, or engaged primarily in providing electric service to the public in its service area and which is exempt from tax or which is a State or local government (or an agency or instrumentality thereof), other than a municipality; (ii) a certain type of civic league or business league exempt from tax, 80 percent of the members of which are described in (i); (iii) a certain type of cooperative telephone company; (iv) a certain type of mutual irrigation or ditch company, or is a district organized under the laws of a State as a municipal corporation for the purpose of irrigation, water conservation, or drainage; and (v) a national association of the organizations described above. This provision is generally limited to non-highly compensated employees of rural cooperatives that provide electric service within the meaning of secs. 401(k)(7)(B)(i) or (ii).

keep the current limitation in its plan language. In addition, the Secretary is directed to prescribe rules to limit the application of this provision so that it does not result in increased benefits for highly compensated employees.[1623]

Effective Date

The provision is effective for limitation years ending after the date of enactment (December 29, 2022).

20. Exemption for certain automatic portability transactions (sec. 120 of the Act and sec. 4975 of the Code)

Present Law

Distributions and rollovers

A distribution from an employer-sponsored retirement plan is generally includible in income except for any portion attributable to after-tax contributions, which results in basis.[1624] Unless an exception applies, in the case of a distribution before age 59 from a qualified retirement plan or a section 403(b) plan, any amount included in income is subject to an additional 10 percent tax, referred to as the "early withdrawal" tax.[1625]

Rollovers

A distribution from a qualified retirement plan, section 403(b) plan, or a governmental section 457(b) plan that is an eligible rollover distribution may be rolled over to another such plan or an IRA. The rollover generally can be achieved by direct rollover (direct payment from the distributing plan to the recipient plan) or by contributing the distribution to the eligible retirement plan within 60 days of receiving the distribution ("60-day rollover").[1626] If the distribution from an employer-sponsored retirement plan consists of property, the rollover is accomplished by a transfer or contribution of the property to the recipient plan or IRA. Amounts that are rolled over are usually not included in gross income.[1627] Generally, any distribution of the balance to the credit of a participant is an eligible rollover distribution with exceptions, for example, for certain periodic payments, required minimum distributions, and hardship distributions.[1628]

[1623] For example, this provision is not intended to be used to provide large benefits to employees with low pay in order to avoid the impact of the nondiscrimination rules.

[1624] Secs. 402(a), 403(b)(1) and 457(a)(1). Under section 402A(d), a qualified distribution from a designated Roth account under an employer-sponsored plan is not includible in income.

[1625] Sec. 72(t).

[1626] Secs. 402(c), 402A(c)(3), 403(b)(8) and 457(e)(16). An exception to the 60-day rules applies to rollovers of qualified plan loan offset amounts. Sec. 402(c)(3)(C).

[1627] Distributions from qualified retirement plans, section 403(b) plans, and governmental section 457(b) plans may be rolled over into a Roth IRA. Distributions from these plans that are rolled over into a Roth IRA and that are not distributions from a designated Roth account must be included in gross income.

[1628] Sec. 402(c)(4). Treas. Reg. sec. 1.402(c)–2 identifies certain other payments that are not eligible for rollover, including, for example, certain corrective distributions, loans that are treated as deemed distributions under section 72(p), and dividends on employer securities as described in section 404(k). In addition, pursuant to section 402(c)(11), any distribution to a beneficiary of a deceased employee other than the participant's surviving spouse is only permitted to be rolled over to an IRA using a direct rollover; 60-day rollovers are not available to nonspouse beneficiaries.

Direct transfer of eligible rollover distributions

Qualified retirement plans, section 403(b) plans, and governmental section 457(b) plans are required to offer a direct rollover with respect to any eligible rollover distribution before paying the amount to the participant or beneficiary.[1629] If an eligible rollover distribution is not directly rolled over into an eligible retirement plan, the taxable portion of the distribution generally is subject to mandatory 20-percent income tax withholding.[1630] Participants who do not elect a direct rollover but who roll over eligible distributions within 60 days of receipt also defer tax on the rollover amounts; however, the 20 percent withheld will remain taxable unless the participant substitutes funds within the 60-day period.

However, a mandatory distribution,[1631] where the present value of the nonforfeitable accrued benefit of the participant (as determined under section 411(a)(11)) is in excess of $1,000 but does not exceed $5,000,[1632] must be directly rolled over to an IRA chosen by the plan administrator or the payor, unless a participant elects otherwise.

Prohibited transactions

In general

The Code and ERISA prohibit certain transactions ("prohibited transactions") between a qualified retirement plan and a disqualified person (referred to as a "party in interest" under ERISA).[1633] The prohibited transaction rules under the Code apply also to IRAs, Archer MSAs, HSAs, and Coverdell ESAs.[1634]

Disqualified persons include a fiduciary of the plan; a person providing services to the plan; an employer with employees covered by the plan; an employee organization any of whose members are covered by the plan; and certain owners, officers, directors, highly compensated employees, family members, and related entities.[1635] A fiduciary includes any person who (1) exercises any discretionary authority or discretionary control respecting management of the plan or exercises any authority or control respecting management or disposition of the plan's assets, (2) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of the plan, or has any authority or re-

[1629] Sec. 401(a)(31).

[1630] Treas. Reg. sec. 1.402(c)–2, Q&A–1(b)(3).

[1631] Under section 401(a)(31)(B).

[1632] Section 304 of the Act increased the $5,000 limit to $7,000. See the description of section 304 of the Act.

[1633] Sec. 4975 and ERISA sec. 406. The prohibited transaction rules of the Code and ERISA are very similar; however, some differences exist between the two sets of rules. As mentioned above, ERISA generally does not apply to governmental plans or church plans, and such plans are also exempt from section 4975 penalties. However, under section 503, the trust holding assets of a governmental or church plan may lose its tax-exempt status in the case of a prohibited transaction listed in section 503(b). Before the enactment of ERISA in 1974, section 503 applied to qualified retirement plans generally. In connection with the enactment of section 4975 by ERISA, section 503 was amended to apply only to governmental and church plans.

[1634] These are included in the definition of "plan" under section 4975(e)(1).

[1635] Sec. 4975(e)(2). The term "party in interest" is defined similarly under ERISA section 3(14) with respect to an employee benefit plan. Under ERISA, employee benefit plans, defined in ERISA section 3(3), consist of two types: pension plans (that is, retirement plans), defined in ERISA section 3(2), and welfare plans, defined in ERISA section 3(1).

sponsibility to do so, or (3) has any discretionary authority or discretionary responsibility in the administration of the plan.[1636]

Prohibited transactions include the following transactions, whether direct or indirect, between a plan and a disqualified person:

- The sale or exchange or leasing of property,
- The lending of money or other extension of credit,
- The furnishing of goods, services, or facilities,
- The transfer to, or use by or for the benefit of, the income or assets of the plan,
- In the case of a fiduciary, an act dealing with the plan's income or assets in the fiduciary's own interest or for the fiduciary's own account, and
- The receipt by a fiduciary of any consideration for the fiduciary's own personal account from any party dealing with the plan in connection with a transaction involving the income or assets of the plan.[1637]

Exemptions from prohibited transaction treatment

Certain transactions are statutorily exempt from prohibited transaction treatment, for example, certain loans to plan participants and arrangements with a disqualified person for legal, accounting or other services necessary for the establishment or operation of a plan if no more than reasonable compensation is paid for the services.[1638]

Sanctions for violations

Under the Code, if a prohibited transaction occurs, the disqualified person who participated in the transaction is generally subject to a two-tiered excise tax. The first tier tax is 15 percent of the amount involved in the transaction. The second tier tax, imposed if the prohibited transaction is not corrected within a certain period, is 100 percent of the amount involved. In the case of an IRA, HSA, Archer MSA or Coverdell ESA, if the individual for whose benefit the account is established (or the beneficiary) engages in the prohibited transaction, the sanction on that person is the loss of tax favored status, rather than an excise tax. A private right of action is not available for a Code violation.

Under ERISA, DOL may assess a civil penalty against a person who engages in a prohibited transaction, other than a transaction with a plan covered by the prohibited transaction rules of the Code.[1639] The penalty may not exceed five percent of the amount

[1636] Sec. 4975(e)(3); ERISA sec. 3(21)(A). Under ERISA, fiduciary also includes any person designated under ERISA section 405(c)(1)(B) by a named fiduciary (that is, a fiduciary named in the plan document) to carry out fiduciary responsibilities.

[1637] Sec. 4975(c)(1)(A)–(F) and ERISA sec. 406(a)(1)(A)–(D) and (b)(1) and (3). Under ERISA section 406(a)(1), a plan fiduciary is prohibited from causing the plan to engage in a transaction described in paragraphs (A)–(D). ERISA section 406(b)(2) also prohibits a plan fiduciary, in the fiduciary's individual capacity or any other capacity, from acting in any transaction involving the plan on behalf of a party (or representing a party) whose interests are adverse to the interests of the plan or the interests of plan participants or beneficiaries. ERISA section 406(a)(1)(E) and (a)(2) relate to limitations under ERISA section 407 on a plan's acquisition or holding of employer securities and real property.

[1638] Sec. 4975(d) and ERISA sec. 408. The Code and ERISA also provide for the grant of administrative exemptions on either an individual or class basis, subject to a finding that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan.

[1639] ERISA sec. 502(i).

involved in the transaction for each year or part of a year that the prohibited transaction continues. If the prohibited transaction is not corrected within 90 days after notice from DOL, the penalty can be up to 100 percent of the amount involved in the transaction. A prohibited transaction by a fiduciary may also be the basis for an action for a breach of fiduciary responsibility by DOL, a plan participant or beneficiary, or another plan fiduciary.

Explanation of Provision

The provision adds a new prohibited transaction exemption for any receipt of fees and compensation by an automatic portability provider for services provided in connection with an automatic portability transaction. An automatic portability provider is a person, other than an individual, who executes automatic portability transactions.

An automatic portability transaction is defined as a transfer of assets made from an individual retirement plan which is established on behalf of an individual and to which amounts were transferred as a result of a mandatory distribution [1640] ("the individual retirement plan") to an employer-sponsored retirement plan [1641] (other than a defined benefit plan) in which such individual is an active participant ("the employer sponsored retirement plan"), and after such individual has been given advance notice of the transfer and has not affirmatively opted out of such transfer.

The prohibited transaction exemption does not apply to an automatic portability transaction unless the following requirements are satisfied:

- The automatic portability provider must acknowledge in writing, at such time and in such format as the Secretary of Labor specifies, that the provider is a fiduciary with respect to the individual retirement plan;
- The fees and compensation received, directly or indirectly, by the automatic portability provider in connection with the automatic portability transaction (including any increase in such fees or compensation and any fees or compensation in connection with, but received before, the transaction) must not exceed reasonable compensation, and must be fully disclosed and approved in writing in advance of the transaction by a plan fiduciary of the employer-sponsored retirement plan that is independent of the automatic portability provider. In addition, an automatic portability provider must not receive any fees or compensation in connection with an automatic portability transaction involving a plan which is sponsored or maintained by the automatic portability provider;
- The automatic portability provider must not market or sell data relating to the individual retirement plan or the participants in the employer-sponsored plan;
- The automatic portability provider must offer an automatic portability transaction on the same terms to any employer-sponsored retirement plan;

[1640] Under sec. 401(a)(31)(B)(i).

[1641] A sec. 401(a) plan, a sec. 403(a) or sec. 403(b) plan, or an eligible deferred compensation plan under sec. 457(b) maintained by an eligible employer defined in sec. 457(e)(1)(A).

- At least 60 days in advance of an automatic portability transaction, the automatic portability provider must provide notice to the individual on whose behalf the individual retirement plan is established which includes:
    - ○ A description of the automatic portability transaction and a complete and accurate statement of all fees which will be charged and all compensation which will be received in connection with the transaction;
    - ○ A clear and prominent description of the individual's right to affirmatively elect not to participate in the transaction as well as the other available distribution options, the deadline by which the individual must make an election, the procedures for such an election, and a telephone number for the automatic portability provider that the individual may call to make such election;
    - ○ A description of the individual's right to designate a beneficiary and the procedures to do so; and
    - ○ Such other disclosures as the Secretary of Labor may require by regulation;
- Not later than three business days after an automatic portability transaction, the automatic portability provider must provide notice to the individual on whose behalf the individual retirement plan was established of:
    - ○ The actions taken by the automatic portability provider with respect to the individual's account;
    - ○ All relevant information regarding the location and amount of any transferred assets;
    - ○ A statement of fees charged against the account by the automatic portability provider or its affiliates in connection with the transfer;
    - ○ A telephone number at which the individual can contact the automatic portability provider; and
    - ○ Such other disclosures as the Secretary of Labor may require by regulation;
- The notices required under this prohibited transaction exemption must be written in a manner calculated to be understood by the average person and must not include inaccurate or misleading statements;
- The automatic portability provider must query on at least a monthly basis whether any individual with an individual retirement plan to which amounts were transferred as a result of a mandatory distribution has an account in an employer sponsored retirement plan;
- After liquidating the assets of the individual retirement plan to cash, an automatic portability provider must transfer the account balance of that plan as soon as practicable to the employer sponsored retirement plan;
- The automatic portability provider must neither have nor exercise discretion to affect the timing or amount of the transfer pursuant to an automatic portability transaction other than to deduct the appropriate fees, as described above;
- For not less than six years after the occurrence of the automatic portability transaction, an automatic portability provider must maintain the records sufficient to demonstrate that

the requirements of this prohibited transaction exemption are met. The automatic portability provider must make such records available to any authorized employee of Treasury or the Department of Labor within 30 calendar days of the date of a written request for such records;

- An automatic portability provider must conduct an annual audit of automatic portability transactions occurring during the calendar year, in accordance with regulations promulgated by the Secretary of Labor, to demonstrate compliance with the requirements of this prohibited transaction exemption, and any regulations thereunder; and to identify any instances of noncompliance. The audit must be submitted annually to the Secretary of Labor, in such form and manner as specified by the Secretary of Labor; and
- The automatic portability provider must maintain a website which contains (1) a list of recordkeepers for each employer-sponsored retirement plan with respect to which the provider carries out automatic portability transactions and (2) a list of all fees paid to the provider.

The provision authorizes the Secretary of Labor to promulgate regulations not later than 12 months after the date of enactment that:

1. Require the automatic portability provider to provide a notice to individuals on whose behalf an individual retirement plan to which amounts were transferred as a result of a mandatory distribution is established[1642] in advance of the notices required under the prohibited transaction exemption;
2. Require an automatic portability provider to disclose to employer-sponsored retirement plans information required to be provided by a covered service provider related to reasonable contracts or arrangements;[1643]
3. Require an employer-sponsored retirement plan to fully disclose fees related to an automatic portability transaction in its summary plan description or summary of material modifications, as relevant;
4. Require an employer-sponsored retirement plan to invest amounts received on behalf of a participant pursuant to an automatic portability transaction in the participant's current investment election under the plan or, if no election is made or permitted, in the plan's qualified default investment alternative[1644] or another investment selected by a fiduciary with respect to such plan;
5. Prohibit or restrict the receipt or payment of third party compensation (other than a direct fee paid by a plan sponsor that is in lieu of a fee imposed on an individual retirement plan owner) by an automatic portability provider in connection with an automatic portability transaction;
6. Prohibit exculpatory provisions in an automatic portability provider's contracts or communications with individuals disclaiming or limiting its liability in the event that an automatic portability transaction results in an improper transfer;

[1642] Described in section 4975(f)(12)(A)(i)(I).
[1643] Pursuant to 29 C.F.R. sec. 2550.408b–2(c).
[1644] Within the meaning of 29 C.F.R. sec. 2550.404c–5.

7. Require an automatic portability provider to take actions necessary to reasonably ensure that participant and beneficiary data is current and accurate;

8. Limit the use of data related to automatic portability transactions for any purpose other than the execution of such transactions or locating missing participants, except as permitted by the Secretary of Labor;

9. Provide for corrections procedures in the event an auditor determines the automatic portability provider was not in compliance with the requirements of this provision and related regulations, including deadlines, supplemental audits, and corrective actions which may include a temporary prohibition from relying on the exemption;

10. Ensure that the appropriate participants and beneficiaries, in fact, receive all the required notices and disclosures; and

11. Make clear that the prohibited transaction exemption applies solely to the automatic portability transactions described in this provision, and, to the extent the Secretary of Labor deems necessary or advisable, specify how the exemption relates to, or coordinates, with, the application of other statutory provisions, regulations, administrative guidance, or exemptions.

Reports to Congress

- Not later than two years after the date of the first audit report received by the Secretary of Labor from any automatic portability provider, and every three years thereafter, the Secretary of Labor must report to the Committees on Health, Education, Labor and Pensions and Finance of the Senate and the Committees on Education and Labor and Ways and Means of the House of Representatives on:
- The effectiveness of the prohibited transaction exemption for automatic portability transactions detailing—
    - The number of automatic cash outs from qualified plans to individual retirement plans,
    - The number of completed automatic portability transactions to employer-sponsored retirement plans,
    - The number of individual retirement plans which have been transferred to designated beneficiaries,
    - The number of individual retirement plans for which the automatic portability provider is searching for next of kin due to a deceased account holder without a designated beneficiary, and
    - The number of accounts that were reduced to a zero balance while in the automatic portability provider's custody;
- A summary of any consumer complaints submitted to the Employee Benefits Security Administration regarding automatic portability transactions;
- A summary of compliance issues found in the annual audit, if any, and their corrections;
- A summary of the fees individuals are charged in connection with automatic portability transactions, including whether those fees have increased since the last report;

- Recommendations of any necessary statutory changes to the exemption to improve the effectiveness of automatic portability transactions, including repeal of this provision in the event of a pattern of noncompliance; and
- Any other information the Secretary of Labor deems important.

The report is to be made publicly available.

In a separate report, not later than two years after the date of enactment, the Secretary must report to the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives on the adequacy of the notices relating to mandatory transfers.

Effective Date

The provision applies to transactions occurring on or after the date which is 12 months after the date of enactment (December 29, 2022).

21. Starter 401(k) plans for employers with no retirement plan (sec. 121 of the Act and new secs. 401(k)(16) and 403(b)(16) of the Code)

Present Law

Section 401(k) plans and tax-sheltered annuities ("section 403(b) plans")

Background on section 401(k) and section 403(b) plans may be found in the description of present law for section 101 of the Act.

Explanation of Provision

The provision establishes two new plan designs: a new type of section 401(k) plan, a "starter 401(k) deferral-only arrangement" and a new type of 403(b) plan, a "safe harbor deferral-only plan."

Starter 401(k) deferral-only plans

A "starter 401(k) deferral-only arrangement" is a cash or deferred arrangement maintained by an eligible employer that meets certain requirements relating to (1) automatic enrollment, (2) contributions, (3) eligibility, and (4) employee notices. It is treated as satisfying the actual deferral percentage test, or "ADP" nondiscrimination test.[1645]

Under the starter 401(k) deferral-only arrangement, each employee who is eligible to participate must be treated (unless the employee elects otherwise) as having elected to have the employer make elective contributions in an amount equal to the applicable qualified percentage of compensation. All employees of the employer must be eligible to participate in the arrangement other than those that do not meet the age and service requirements. Union employees and nonresident aliens with no earned income which constitutes income from sources within the United States may also be excluded.

[1645] Sec. 401(k)(3)(A)(ii).

The qualified percentage is determined under the terms of the arrangement, but must not be less than three percent or more than 15 percent and must be applied uniformly. The election to make elective deferrals at the qualified percentage ceases to apply to an employee if the employee makes an affirmative election not to contribute or to contribute at a different level.

Under the starter 401(k) deferral-only arrangement, the only contributions that may be permitted are elective contributions of employees eligible to participate. Thus, the employer may not make matching or nonelective contributions to the starter 401(k) deferral-only arrangement.

An employer is eligible to offer a starter 401(k) deferral-only arrangement if neither the employer nor a predecessor employer maintains another qualified plan for the year in which the determination is being made.[1646] There is a limited exception for an employer who maintains a plan in which the only participants are employees covered by a collective bargaining agreement. A transition rule applies in cases of an employer who fails to meet this requirement due to an acquisition, disposition, or other similar transaction during a specified transition period, if certain conditions are met.[1647]

The aggregate amount of any employee's elective contributions for a calendar year may not exceed the IRA contribution limit.[1648] Catch-up contributions are permitted (for an employee who attains age 50 by the end of the taxable year) up to $1,000, indexed for inflation.

The starter 401(k) deferral-only arrangement also must satisfy the notice requirement applicable to a matching contribution automatic enrollment section 401(k) safe harbor plan. Similar to section 401(k) safe harbor plans, starter 401(k) deferral-only arrangements are not treated as top-heavy plans.[1649]

Safe harbor deferral-only plan

The provision also establishes a new type of 403(b) plan, a "safe harbor deferral-only plan." Similar conditions to those described for starter 401(k) deferral-only arrangements apply for purposes of a safe harbor deferral-only plan. That is, a safe harbor deferral-only plan must also satisfy certain requirements that generally parallel the requirements described above.

All employees of the employer must be eligible to participate in a safe harbor deferral-only plan with certain limited exceptions.[1650] A safe harbor deferral-only plan is treated as satisfying the universal availability requirement applicable to 403(b) plans.

[1646] For this purpose, a qualified plan is a plan, contract, pension, account, or trust described in sec. 219(g)(5).

[1647] Rules similar to the rules of section 408(p)(10) apply.

[1648] The IRA contribution limit for 2022 is $6,000. Notice 2021–61, 2021–47 I.R.B. 738, Nov. 22, 2021. A technical correction may be necessary to reflect this intent.

[1649] Top-heavy requirements apply under the Code to limit the extent to which accumulated benefits or account balances under a qualified retirement plan can be concentrated with key employees. Sec. 416.

[1650] Sec. 403(b)(12)(A)(ii). Nonresident aliens, students, and employees who normally work less than 20 hours per week may be excluded.

Effective Date

The provision is effective for plan years beginning after December 31, 2023.

22. Certain securities treated as publicly traded in case of employee stock ownership plans (sec. 123 of the Act and sec. 401 of the Code)

Present Law

For background on ESOPs, see the description of section 114 of the Act.

Certain requirements that apply to ESOPs differ depending on whether the employer securities held by the ESOP are readily tradable on an established securities market. For example, if a participant in an ESOP is entitled to a distribution of employer securities that are not readily tradable on an established market, the ESOP must provide the participant with the right to require the employer to repurchase the distributed securities under a fair valuation formula.[1651] In addition, if an ESOP holds employer securities that are not readily tradable on an established market, all valuations of such securities with respect to activities carried on by the plan must be by an independent appraiser.[1652] Special diversification rules apply to certain defined contribution plans (including certain ESOPs) that hold publicly traded employer securities, which are defined as employer securities that are readily tradable on an established securities market.[1653]

Treasury regulations under the special diversification rules for certain defined contribution plans provide that a security is considered readily tradable on an established securities market if the security is traded on a national securities exchange that is registered under section 6 of the Securities Exchange Act of 1934 or the security is traded on a foreign national securities exchange that is officially recognized, sanctioned, or supervised by a governmental authority and the security is deemed by the Securities and Exchange Commission ("SEC") as having a "ready market."[1654] The IRS has interpreted this definition of readily tradable on an established securities market to apply generally for purposes of the ESOP rules in the Code, including for purposes of the right to require that the employer repurchase employer securities under a fair valuation formula, and the requirement that an independent appraiser conduct

[1651] Sec. 409(h)(1)(B). Section 409(h) refers to an "established market" rather than an "established securities market," but IRS guidance provides that the same definition of "readily tradable on an established securities market" applies to each. See footnote 4.

[1652] Sec. 401(a)(28)(C).

[1653] Sec. 401(a)(35). Section 401(a)(35) applies to applicable defined contribution plans, which are defined as defined contribution plans that hold publicly traded employer securities. However, such term does not include an ESOP if (A) there are no contributions or earnings held in the ESOP that are subject to sections 401(k) or 401(m); and (B) the ESOP is a separate plan for purposes of section 414(l) with respect to any other defined benefit plan or defined contribution plan maintained by the same employer or employers. Sec. 401(a)(35)(E). ESOPs that are not subject to section 401(a)(35) are subject to diversification rules under section 401(a)(28).

[1654] Treas. Reg. sec. 1.401(a)(35)–1(f)(5)(ii). "Ready market" is defined with reference to 17 CFR sec. 240.15c3–1.

valuations of employer securities that are not readily tradable on an established market.[1655]

Explanation of Provision

The provision modifies the special diversification rules that apply to certain defined contribution plans[1656] to provide that, in the case of an ESOP, an employer security is also treated as readily tradable on an established securities market if:

- the security is the subject of priced quotations by at least four dealers, published and made continuously available on an interdealer quotation system[1657] which has requested to be treated as an alternative trading system;
- the security is not a penny stock;[1658]
- the security is issued by a corporation which is not a shell company,[1659] a blank check company,[1660] or subject to bankruptcy proceedings;
- the security has a public float[1661] which has a fair market value of at least $1,000,000 and constitutes at least 10 percent of the total shares issued and outstanding;
- in the case of a security issued by a domestic corporation, the issuer publishes, not less frequently than annually, financial statements audited by an independent auditor registered with the Public Company Accounting Oversight Board established under the Sarbanes-Oxley Act of 2002; and
- in the case of a security issued by a foreign corporation, the security is represented by a depositary share,[1662] or is issued by a foreign corporation incorporated in Canada and readily tradable on an established securities market in Canada, and the issuer (1) is subject to, and in compliance with, the reporting requirements of section 13 or 15(d) of the Securities Exchange Act of 1934,[1663] (2) is subject to, and in compliance with, the reporting requirements of section 230.257 of title 17 of the Code of Federal Regulations, or (3) is exempt from the requirements in (1) and (2) under section 240.12g3–2(b) of title 17 of the Code of Federal Regulations.

Although the provision only modifies the definition of readily tradable on an established securities market with respect to the special diversification rules for certain defined contribution plans, it is intended that, consistent with IRS guidance applicable to ESOP rules before this provision was enacted,[1664] such definition applies with respect to other ESOP rules under the Code. For example, it is intended that this definition of readily tradable on an established securities market applies with respect to the right to

[1655] The IRS has interpreted this definition of "readily tradable on an established securities market" to apply for purposes of sections 401(a)(22), 401(a)(28)(C), 409(h)(1)(B), 409(l), and 1042(c)(1)(A). IRS Notice 2011–19, 2011–11 I.R.B. 550, March 14, 2011.

[1656] Under section 401(a)(35).

[1657] As such term is used in section 13 of the Securities Exchange Act of 1934 (15 U.S.C. 78m).

[1658] As defined in section 3(a)(51) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(51)).

[1659] As such term is used in section 4(d)(6) of the Securities Act of 1933 (15 U.S.C. 77d(d)(6)).

[1660] As defined in section 7(b)(3) of the Securities Act of 1933 (15 U.S.C. 77g(b)(3)).

[1661] As such term is used in 17 C.F.R. sec. 240.12b–2.

[1662] As defined in 17 C.F.R. sec. 240.12b–2.

[1663] 15 U.S.C. 78m or 78o(d).

[1664] IRS Notice 2011–19, 2011–11 I.R.B. 550, March 14, 2011.

require that the employer repurchase employer securities under a fair valuation formula,[1665] and the requirement that an independent appraiser conduct valuations of employer securities that are not readily tradable on an established market.[1666]

Effective Date

The amendments made by this provision apply to plan years beginning after December 31, 2027.

23. Modification of age requirement for qualified ABLE programs (sec. 124 of the Act and sec. 529A of the Code)

Present Law

Qualified ABLE programs

In general

Section 529A provides for a tax-favored savings program intended to benefit disabled individuals, known as a qualified ABLE program.

A qualified ABLE program is a program established and maintained by a State or agency or instrumentality thereof.[1667] A qualified ABLE program must meet the following conditions: (1) under the provisions of the program, contributions may be made to an account (an “ABLE account”), established for the purpose of meeting the qualified disability expenses of the designated beneficiary of the account;[1668] (2) the program must limit a designated beneficiary to one ABLE account;[1669] and (3) the program must meet the other requirements of section 529A.

Designated beneficiaries and eligible individuals

A designated beneficiary of an ABLE account is the owner of the ABLE account.[1670] A designated beneficiary must generally be an eligible individual at the time the ABLE account is established.[1671]

An ABLE account may be transferred to a successor designated beneficiary who is a member of the same family as the original designated beneficiary.[1672] For this purpose, a member of the family includes the original designated beneficiary’s brother, sister, stepbrother, or stepsister.[1673] In the case of such a transfer, the successor designated beneficiary must be an eligible individual at the time of transfer.[1674]

An eligible individual for a taxable year is an individual who meets one of two requirements for the taxable year:[1675]

[1665] Sec. 409(h).
[1666] Sec. 401(a)(28)(C).
[1667] Sec. 529A(b)(1).
[1668] Sec. 529A(b)(1)(A).
[1669] Sec. 529A(b)(1)(B).
[1670] Sec. 529A(e)(3).
[1671] *Ibid.*
[1672] Sec. 529A(c)(1)(C)(ii).
[1673] Sec. 152(d)(2)(B). For purposes of this definition, a rule similar to the adoption rule of section 152(f)(1)(B) applies.
[1674] Sec. 529A(c)(1)(C)(ii).
[1675] Sec. 529A(e)(1).

1. The individual is entitled to benefits based on blindness or disability under title II [1676] or Title XVI [1677] of the Social Security Act, and such blindness or disability occurred before the date on which the individual attained age 26.[1678]

2. A disability certification with respect to such individual is filed with the Secretary for such taxable year.[1679]

Tax treatment and additional requirements

A qualified ABLE program is generally exempt from income tax,[1680] but it may be subject to the taxes imposed on the unrelated business income of tax-exempt organizations.[1681]

Contributions to an ABLE account must be made in cash [1682] and are not deductible for Federal income tax purposes. Aggregate contributions to an ABLE account for a taxable year are generally limited to the gift tax annual exclusion.[1683] For contributions made before January 1, 2026, there is an increase to the contribution limit for certain designated beneficiaries who are employees.[1684] Contributions are treated as a completed gift to the designated beneficiary which is not a future interest in property.[1685] Finally, a qualified ABLE program must provide adequate safeguards to ensure that ABLE account contributions do not exceed the limit imposed on accounts under the section 529 program of the State maintaining the qualified ABLE program.[1686]

Excess contributions may be subject to a tax in an amount equal to 6 percent of the excess.[1687]

For taxable years beginning before January 1, 2026, a designated beneficiary who makes contributions to the beneficiary's ABLE account may be eligible for the credit under section 25B, the "Saver's Credit." [1688]

Distributions (including earnings) from an ABLE account are not includible in gross income if the distributions do not exceed the designated beneficiary's qualified disability expenses.[1689] Qualified disability expenses are any expenses related to the eligible individual's blindness or disability which are made for the benefit of an eligible individual who is the designated beneficiary.[1690] If distributions are not used to pay qualified disability expenses, then the

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[1676] 42 U.S.C. secs. 401–433.
[1677] 42 U.S.C. secs. 1381–1383f.
[1678] Sec. 529A(e)(1)(A).
[1679] Sec. 529A(e)(1)(B). Disability certification is defined in section 529A(e)(2).
[1680] Sec. 529A(a).
[1681] See sec. 511.
[1682] Sec. 529A(b)(2)(A).
[1683] See sec. 529A(b)(2)(B)(i). The amount of the exclusion is $16,000 for 2022. See sec. 2503(b); Rev. Proc. 2021–45, 2021–48 I.R.B. 764, November 29, 2021. This limitation does not apply to rollover contributions from another ABLE account or changes to the designated beneficiary. Sec. 529A(b)(2)(B).
[1684] Sec. 529A(b)(2)(B)(ii), (b)(7).
[1685] Sec. 529A(c)(2)(A)(i). Contributions are not treated as qualified transfers under section 2503(e). Sec. 529(c)(2)(A)(ii).
[1686] Sec. 529A(b)(6).
[1687] Sec. 4973.
[1688] Sec. 25B(d)(1)(D).
[1689] Sec. 529A(c)(1)(B)(i).
[1690] Sec. 529A(e)(5). Enumerated qualified disability expenses include: education, housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, funeral and burial expenses, and other expenses, which are approved by the Secretary under regulations and consistent with the purposes of this section. *Id.*

portion of the distribution based on earnings must generally be included in gross income.[1691]

Distributions includible in gross income are also generally subject to an additional 10 percent tax.[1692] Distributions from an ABLE account are not treated as a taxable gift.[1693]

A qualified ABLE program must provide for separate accounting for each designated beneficiary.[1694] The program must provide that any designated beneficiary may, directly or indirectly, direct the investment of any contributions to the program, or earnings thereon, not more than two times in any calendar year.[1695] The program must not allow any interest in the program or any portion thereof to be used as security for a loan.[1696] Qualified ABLE programs are subject to reporting requirements.[1697]

Qualified ABLE programs must provide adequate safeguards to prevent aggregate contributions on behalf of a designated beneficiary in excess of the limit established by the applicable State under the State's qualified tuition program.[1698]

Treatment of ABLE accounts under Federal programs

Amounts in an individual's ABLE account, contributions to the individual's ABLE account, and distributions from the individual's ABLE account for qualified disability expenses are disregarded for purposes of determining eligibility to receive Federal assistance or benefits, and for purposes of determining the amount of such assistance or benefits.[1699] However, in the case of the supplemental security income ("SSI") program,[1700] a distribution for housing expenses, and amounts in the individual's ABLE account in excess of $100,000, are not disregarded.[1701]

In the case where an individual's ABLE account balance exceeds $100,000, such individual's SSI benefits shall not be terminated, but instead shall be suspended until such time as the individual's resources fall below $100,000.[1702] However, such suspension shall not apply for purposes of Medicaid eligibility.[1703]

Treatment of ABLE accounts in bankruptcy

Property of a bankruptcy estate may not include certain amounts contributed to an ABLE account, if the designated beneficiary of such account was a child, stepchild, grandchild or step-grandchild of the debtor during the taxable year in which funds were placed in the account.[1704] Such funds shall be excluded from the bankruptcy estate only to the extent that they were contributed to an ABLE account at least 365 days prior to the filing of the title 11

[1691] Treas. Reg. sec. 1.529A–3. Amounts that are rolled over to another ABLE account within 60 days are not includible in gross income.
[1692] Sec. 529A(c)(3).
[1693] Sec. 529A(c)(2)(B).
[1694] Sec. 529A(b)(3).
[1695] Sec. 529A(b)(4).
[1696] Sec. 529A(b)(5).
[1697] See sec. 529A(d).
[1698] Sec. 529A(b)(6).
[1699] Pub. L. 113–295(a).
[1700] See Title XVI of the Social Security Act (the SSI program).
[1701] Pub. L. 113–295(a).
[1702] Pub. L. 113–295(b)(1).
[1703] Pub. L. 113–295(b)(2). See title XIX of the Social Security Act (the Medicare program).
[1704] 11 U.S.C. sec. 541(b)(10).

petition, are not pledged or promised to any entity in connection with any extension of credit, and are not excess contributions.[1705] In the case of funds contributed to an ABLE account that are contributed not earlier than 720 days (and not later than 365 days) prior to the filing of the petition, only up to $6,225 may be excluded.

Explanation of Provision

The provision modifies the definition of eligible individual for purposes of a qualified ABLE program. Under the provision, an individual may be an eligible individual if entitled to benefits based on blindness or disability, and such blindness or disability occurred before the date on which the individual attains the age of 46 (increased from 26).

Effective Date

The provision applies to taxable years beginning after December 31, 2025.

24. Improving coverage for part-time workers (sec. 125 of the Act, secs. 401(k) and 403(b) of the Code, and sec. 202 of ERISA)

Present Law

For background on section 401(k) plans and section 403(b) plans, see the present law description of section 101 of the Act.

General participation requirements

Qualified retirement plans[1706] (including section 401(k) plans), and section 403(b) plans that are subject to ERISA, generally can delay participation in the plan based on attainment of age or completion of years of service but not beyond the later of completion of one year of service (that is, a 12-month period with at least 1,000 hours of service) or attainment of age 21.[1707] A plan also cannot exclude an employee from participation (on the basis of age) when that employee has attained a specified age.[1708] Employees can be excluded from participation in a qualified retirement plan on other bases, such as job classification, as long as the other basis is not an indirect age or service requirement. If a section 403(b) plan provides for elective deferrals, the plan is subject to a "universal availability" requirement under which all employees must be given the opportunity to make deferrals of more than $200.[1709] In applying this requirement, nonresident aliens, students, and em-

[1705] As defined in section 4973(h).
[1706] Qualified under section 401(a).
[1707] These rules apply to qualified retirement plans under section 401(a)(3) and 410(a)(1). Parallel requirements generally apply to plans of private employers (including certain 403(b) plans) under section 202 of ERISA. Governmental plans under section 414(d) and church plans under section 414(e) are generally exempt from these Code requirements and from ERISA.
[1708] Sec. 410(a)(2); ERISA sec. 202(a)(2).
[1709] Sec. 403(b)(12)(A)(ii).

ployees who normally work less than 20 hours per week may be excluded.[1710]

Long-term part-time workers

Pursuant to the SECURE Act,[1711] effective for plan years beginning in 2021, section 401(k) plans generally must permit an employee to make elective deferrals if the employee has worked at least 500 hours per year with the employer for at least three consecutive years and has met the minimum age requirement (age 21) by the end of the three-consecutive-year period (a "long-term part-time employee").[1712] Thus, a long-term part-time employee may not be excluded from the plan merely because the employee has not completed a year of service. Once a long-term part-time employee meets the age and service requirements, such employee must be able to commence participation no later than the earlier of (1) the first day of the first plan year beginning after the date on which the employee satisfied the age and service requirements or (2) six months after the date on which the individual satisfied those requirements.

The plan is not required to provide that a long-term part-time employee is otherwise eligible to participate in the plan. Thus, the plan can continue to treat a long-term part-time employee as ineligible under the plan for employer nonelective and matching contributions based on not having completed a year of service. However, for a plan that does provide employer contributions for long-term part-time employees, the plan must credit, for each year in which such an employee worked at least 500 hours, a year of service for purposes of vesting in any employer contributions. If a long-term part-time employee under such a plan becomes a full-time employee, the plan must continue to credit the employee with any years of service earned under the special rule for long-term part-time employees.

Employers are permitted to exclude long-term part-time employees from nondiscrimination testing,[1713] including top-heavy vesting and top-heavy benefit requirements. However, the relief from the nondiscrimination rules ceases to apply to any employee who becomes a full-time employee (as of the first plan year beginning after the plan year in which the employee completes a 12-month period with at least 1,000 hours of service).

The long-term part-time employee rules are effective for plan years beginning after December 31, 2020, except that in determining whether the three-consecutive-year period has been met, 12-month periods beginning before January 1, 2021 are not taken into account.

Explanation of Provision

The provision modifies the rules that apply to long-time part-time employees under a section 401(k) plan to reduce the service

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[1710] For this purpose, nonresident alien has the meaning in section 410(b)(3)(C), and student has the meaning in section 3121(b)(10). The universal availability requirement does not apply to a section 403(b) plan maintained by a church or a qualified church-controlled organization.

[1711] Pub. L. No. 116–94, Division O, December 20, 2019, sec. 112

[1712] Sec. 401(k)(2)(D). The rule does not apply to collectively bargained plans.

[1713] Nondiscrimination testing relief applies to sections 401(a)(4), 401(k)(3), 401(k)(12), 401(k)(13), 401(m)(2), and 410(b).

requirement for such employees from three years to two years. The provision also expands the long-term part-time rules so that the requirements apply to a section 403(b) plan that is subject to ERISA.[1714] In particular, a section 403(b) plan that is subject to ERISA may not require, as a condition of participation in the plan, that an employee complete a period of service beyond the period described in the long-term part-time employee rules. Thus, under the provision, a section 401(k) plan or section 403(b) plan (subject to ERISA) generally must permit an employee to make elective deferrals if the employee has worked at least 500 hours per year with the employer for at least two consecutive years and has met the minimum age requirement (age 21) by the end of the two-consecutive-year period.

In addition, the provision clarifies the effective date of the long-term part-time employee rules that applied to section 401(k) plans under the SECURE Act. Under the provision, 12-month periods beginning before January 1, 2021 are not taken into account in determining a year of service for purposes of the rules applicable to the vesting of employer contributions. Thus, in addition to being disregarded for purposes of determining whether the employee has completed three consecutive years of service (as under present law), 12-month periods beginning before January 1, 2021 are disregarded for vesting purposes. With respect to section 403(b) plans, 12-month periods beginning before January 1, 2023 are similarly disregarded both for purposes of determining a year of service and for vesting.

Finally, the provision clarifies that a section 401(k) safe harbor plan that is eligible for an exemption from the top heavy rules[1715] does not fail to qualify for such exemption merely because the plan does not provide safe harbor matching contributions[1716] to long-term part-time employees.

Effective Date

The provision is generally effective for plan years beginning after December 31, 2024. However, the clarification of the vesting rule for section 401(k) plans and the top-heavy rule are effective as if included in the enactment of section 112 of the SECURE Act.

25. Special rules for certain distributions from long-term qualified tuition programs to Roth IRAs (sec. 126 of the Act and sec. 529 of the Code)

Present Law

Qualified tuition programs

In general

A qualified tuition program is a program established and maintained by a State or agency or instrumentality thereof, or by one

[1714] The provision modifies section 202 of ERISA and section 403(b)(12) to include rules relating to long-term part-time employees that are similar to those that apply to section 401(k) plans under section 401(k)(15). The rules under ERISA (added as a new section 202(c)) apply to both section 401(k) plans and section 403(b) plans.

[1715] Under section 416(g)(4)(H).

[1716] Secs. 401(m)(11) and (12).

or more eligible educational institutions, which satisfies certain requirements and under which a person may purchase tuition credits or certificates on behalf of a designated beneficiary that entitle the beneficiary to the waiver or payment of qualified higher education expenses of the beneficiary (a "prepaid tuition program").[1717] Section 529 provides specified income tax and transfer tax rules for the treatment of accounts and contracts established under qualified tuition programs.[1718] In the case of a program established and maintained by a State or agency or instrumentality thereof, a qualified tuition program also includes a program under which a person may make contributions to an account that is established for the purpose of satisfying the qualified higher education expenses of the designated beneficiary of the account, provided it satisfies certain specified requirements (a "savings account program" or "529 plan").[1719] Under both types of qualified tuition programs, a contributor establishes an account for the benefit of a particular designated beneficiary to provide for that beneficiary's higher education expenses.

In general, prepaid tuition contracts and tuition savings accounts established under a qualified tuition program involve prepayments or contributions made by one or more individuals for the benefit of a designated beneficiary. Decisions with respect to the contract or account are typically made by an individual who is not the designated beneficiary. Qualified tuition accounts or contracts generally require the designation of a person (generally referred to as an "account owner")[1720] whom the program administrator (oftentimes a third-party administrator retained by the State or by the educational institution that established the program) may look to for decisions, recordkeeping, and reporting with respect to the account established for a designated beneficiary. The person or persons who make the contributions to the account need not be the same person who is regarded as the account owner for purposes of administering the account. Under many qualified tuition programs, the account owner generally has control over the account or contract, including the ability to change designated beneficiaries and to withdraw funds at any time and for any purpose. Thus, in practice, qualified tuition accounts or contracts generally involve a contributor, a designated beneficiary, an account owner (who oftentimes is not the contributor or the designated beneficiary), and an administrator of the account or contract.

A qualified tuition program is generally exempt from income tax,[1721] but it may be subject to the taxes imposed on the unrelated business income of tax-exempt organizations.[1722]

[1717] Sec. 529(b)(1)(A)(i).

[1718] For purposes of this description, the term "account" is used interchangeably to refer to a prepaid tuition benefit contract or a tuition savings account established pursuant to a qualified tuition program.

[1719] Sec. 529(b)(1)(A)(ii).

[1720] Section 529 refers to contributors and designated beneficiaries, but it does not define or otherwise refer to the term "account owner," which is a commonly used term among qualified tuition programs.

[1721] Sec. 529(a).

[1722] See sec. 511.

Qualified higher education expenses

Distributions made by a qualified tuition program for the purpose of meeting the designated beneficiary's higher education expenses are generally not subject to tax.[1723] Qualified higher education expenses include (1) tuition, fees, books, supplies, and equipment required for the enrollment or attendance of a designated beneficiary at an eligible educational institution;[1724] (2) expenses for special needs services in the case of a special needs beneficiary that are incurred in connection with such enrollment or attendance;[1725] and (3) the purchase of any computer technology or equipment, or internet access or related services, if such technology or services were to be used primarily by the beneficiary during any of the years a beneficiary is enrolled at an eligible institution.[1726] Qualified higher education expenses generally also include room and board for students who are enrolled at least half-time.[1727]

If distributions are not used to pay qualified higher education expenses, then the portion of the distribution based on earnings must generally be included in gross income.[1728]

Contributions to qualified tuition programs

Contributions to a qualified tuition program must be made in cash.[1729] Section 529 does not impose a specific dollar limit on the amount of contributions, account balances, or prepaid tuition benefits relating to a qualified tuition account; however, the program is required to have adequate safeguards to prevent contributions in excess of amounts necessary to provide for the beneficiary's qualified higher education expenses.[1730] Contributions are not tax deductible for Federal income tax purposes, although they may be deductible for State income tax purposes. Amounts in the account accumulate on a tax-free basis (*i.e.*, income on accounts in the plan is not subject to current income tax).

Contributions generally are treated as a completed gift eligible for the gift tax annual exclusion.[1731] A contributor may be subject to gift tax on contributions in excess of the gift tax annual exclusion.[1732] However, a contributor whose contributions exceeds the annual exclusion may elect to treat the contributions for the year as made ratably over a five-year period beginning with the calendar year in which the contribution is made.[1733]

A qualified tuition program may not permit any contributor to, or designated beneficiary under, the program to direct (directly or indirectly) the investment of any contributions (or earnings thereon) more than two times in any calendar year, and must provide separate accounting for each designated beneficiary.[1734] A qualified

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[1723] Sec. 529(c)(3)(A).
[1724] Sec. 529(e)(3)(A)(i).
[1725] Sec. 529(e)(3)(A)(ii).
[1726] Sec. 529(e)(3)(A)(iii).
[1727] Sec. 529(e)(3)(B).
[1728] Treas. Prop. Reg. sec. 1.529–3.
[1729] Sec. 529(b)(2)
[1730] Sec. 529(b)(6).
[1731] Sec. 529(c)(2).
[1732] The amount of the exclusion is $16,000 for 2022. See sec. 2503(b); Rev. Proc. 2021–45, 2021–48 I.R.B. 764, November 29, 2021.
[1733] Sec. 529(c)(2)(B).
[1734] Sec. 529(b)(4).

tuition program may not allow any interest in an account or contract (or any portion thereof) to be used as security for a loan.[1735]

Roth IRA

There are two general types of IRAs: traditional IRAs and Roth IRAs.[1736] The total amount that an individual may contribute to one or more IRAs for a year is generally limited to the lesser of: (1) a dollar amount ($6,000 for 2022); and (2) the amount of the individual's compensation that is includible in gross income for the year.[1737] In the case of an individual who has attained age 50 by the end of the taxable year, the dollar amount is increased by $1,000 (referred to as a "catch-up contribution"). In the case of a married couple, contributions can be made up to the dollar limit for each spouse if the combined compensation of the spouses that is includible in gross income is at least equal to the contributed amount. An individual may make contributions to a traditional IRA (up to the contribution limit) without regard to his or her adjusted gross income.

An individual may deduct his or her contributions to a traditional IRA if neither the individual nor the individual's spouse is an active participant in an employer-sponsored retirement plan. If an individual or the individual's spouse is an active participant in an employer-sponsored retirement plan, the deduction is phased out for taxpayers with adjusted gross income over certain levels.[1738]

Individuals with adjusted gross income below certain levels may make contributions to a Roth IRA (up to the contribution limit).[1739] Contributions to a Roth IRA are not deductible.

Distributions from traditional IRAs are generally includible in income, except to the extent a portion of the distribution is treated as a recovery of the individual's basis (if any). Qualified distributions from a Roth IRA are excluded from income;[1740] other distributions from a Roth IRA are includible in income to the extent of earnings.

Distributions from IRAs are permitted to be rolled over tax-free to another IRA or any other eligible retirement plan. This may be accomplished by contributing the distribution to an eligible retirement plan within 60 days of receiving the distribution (a "60-day rollover"). The general 60-day rollover rule applies to IRA rollovers as well as rollovers from qualified retirement plans, section 403(b) annuities, and governmental section 457(b) plans. There is no provision for direct rollovers from an IRA, but direct payment to another eligible retirement plan (via a trustee-to-trustee transfer) generally satisfies the requirements. Distributions from an inherited IRA (except in the case of an IRA acquired by the surviving

[1735] Sec. 529(b)(5).

[1736] Secs. 408 and 408A.

[1737] Sec. 219(b)(2) and (5), as referenced in secs. 408(a)(1) and (b)(2)(B) and 408A(c)(2). Under section 4973, IRA contributions in excess of the applicable limit are generally subject to an excise tax of six percent per year until withdrawn.

[1738] Sec. 219(g).

[1739] Sec. 408A(c)(3).

[1740] A qualified distribution is a distribution that (1) is made after the five-taxable-year period beginning with the first taxable year for which the individual first made a contribution to a Roth IRA, and (2) is made after attainment of age 59½, on account of death or disability, or is made for first-time homebuyer expenses of up to $10,000. Sec. 408A(d)(2).

spouse by reason of the IRA owner's death) and required minimum distributions are not permitted to be rolled over.[1741] The portion of any distribution from an IRA that is not includible in gross income is only permitted to be rolled over to another IRA. Generally, distributions from a traditional IRA may only be rolled over tax-free to another IRA and distributions from a Roth IRA may only be rolled over tax-free to another Roth IRA. However, a distribution from a traditional IRA may be rolled over to a Roth IRA as a Roth conversion with the required income inclusion.[1742]

Explanation of Provision

The provision provides that a distribution from a qualified tuition program that is paid in a direct trustee-to-trustee transfer to a Roth IRA maintained for the benefit of the designated beneficiary of the qualified tuition program is excludible from the gross income, provided that certain requirements are met.[1743] In order to be eligible for the income exclusion, the account owner must have maintained the qualified tuition program for the 15-year period ending on the date of the distribution.[1744] The total amount of the distribution paid to the Roth IRA may not exceed the lesser of (1) the IRA contribution limit that applies to the individual for whom the Roth IRA is maintained, and (2) the aggregate amount contributed to the qualified tuition program (and earnings attributable thereto) before the five-year period ending on the date of the distribution.[1745] For this purpose, the IRA contribution limit that applies to the individual is the limit on IRA contributions that applies for that taxable year ($6,000 for 2022), minus the aggregate amount of contributions that the individual makes to all other IRAs (other than a SEP or SIMPLE IRA) for the taxable year.[1746] Distributions eligible for the exclusion are subject to an aggregate lifetime limit of $35,000 per beneficiary.[1747]

Under the Roth IRA rules, the distribution is treated as a qualified rollover distribution.[1748] The earnings and contributions of any qualified tuition program from which a qualified rollover contribution is made under the provision are treated in the same manner as earnings and contributions of a Roth IRA from which a qualified rollover contribution is made.[1749] However, unlike other qualified rollover distributions, the distribution is taken into account for purposes of the annual contribution limit.[1750] The distribution is not subject to the adjusted-gross-income limitation.[1751] Thus, bene-

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[1741] A trustee-to-trustee transfer between IRAs is not treated as a distribution and rollover. Thus, nonspouse beneficiaries of IRAs can move funds to another inherited IRA established as a beneficiary of the decedent IRA owner. In contrast, a surviving spouse is permitted to roll over a distribution to his or her own IRA.

[1742] Sec. 408A(d)(3).

[1743] New sec. 529(c)(3)(E).

[1744] New sec. 529(c)(3)(E)(i).

[1745] *Ibid.*

[1746] New sec. 529(c)(3)(E)(ii)(I). The contribution limit is provided in section 408A(c)(2). A technical correction may be needed to reflect this intent.

[1747] New sec. 529(c)(3)(E)(ii)(II).

[1748] New sec. 408A(e)(1)(C).

[1749] New sec. 408A(e)(1) (flush language).

[1750] New sec. 408A(c)(5)(B)(ii).

[1751] New sec. 408A(c)(3)(E).

ficiaries may use the provision regardless of their adjusted gross income.

The provision also adds a reporting requirement.[1752] In the case of any qualified rollover contribution from a qualified tuition program (as described in this provision), each officer or employee having control of the qualified tuition program, or their designee, must provide a report to the trustee of the Roth IRA to which the distribution is made. The report must be filed at such time and manner as the Secretary may require.

Effective Date

The provision applies with respect to distributions made after December 31, 2023.

26. Emergency savings accounts linked to individual account plans (sec. 127 of the Act, sec. 402A of the Code, and new secs. 801 to 804 of ERISA)

Present Law

Retirement plans are of two general types: defined contribution plans and defined benefit plans. A defined contribution plan (also referred to under ERISA as an individual account plan), is a plan that provides for an individual account for each participant and for benefits based solely on the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants that may be allocated to such participant's account.[1753] Defined benefit plans are defined as plans that are not defined contribution plans,[1754] but generally are characterized by benefits that are determined under a plan formula and paid from general plan assets, rather than individual accounts.

Defined contribution plans may themselves be of different types, specifically, profit-sharing plans, stock bonus plans, or money purchase plans, and may include special features, such as a qualified cash or deferred arrangement (section 401(k) plan) or an employee stock ownership plan. Defined contribution plans may provide for nonelective contributions and matching contributions by employers and pre-tax (that is, contributions are either excluded from income or deductible) or after-tax contributions by employees. Total contributions made to an employee's account for a year cannot exceed the lesser of $61,000 (for 2022) or the employee's compensation.[1755]

Under certain types of defined contribution plans, including section 401(k) plans, section 403(b) plans, and governmental section 457(b) plans, an employee may elect to have contributions (elective deferrals) made to the plan, rather than receive the same amount in cash. Generally, the maximum annual amount of elective deferrals that can be made by an employee for a year is $20,500 (for 2022) or, if less, the employee's compensation.[1756]

[1752] New sec. 529(d)(2).

[1753] Sec. 414(i); ERISA sec. 3(34).

[1754] Sec. 414(j); ERISA sec. 3(35). Under ERISA, certain defined benefit plans are treated as defined contribution plans. ERISA sec. 3(35).

[1755] Sec. 415(c).

[1756] Secs. 402(g); 457(c). This limit applies to total elective deferrals under all of a participant's section 401(k) plans and section 403(b) plans but applies separately to any governmental section

Continued

Elective deferrals generally cannot be distributed from the plan before the employee's severance from employment, death, disability or attainment of age 59 or in the case of hardship or plan termination.[1757] Distributions upon hardship are generally subject to a 10 percent early withdrawal tax.[1758] A defined contribution plan may also provide for loans to participants, subject to certain conditions on the amount of the loan and repayment terms.[1759]

Roth contributions

Elective deferrals are generally made on a pre-tax basis. However, certain retirement plans, such as section 401(k), section 403(b), and governmental section 457(b) plans, may include a qualified Roth contribution program under which elective deferrals are made on an after-tax basis (designated Roth contributions), and qualified distributions from a designated Roth account are excluded from income.[1760] A qualified distribution is a distribution that (1) is made after the five-taxable-year period beginning with the first taxable year for which the individual first made the contribution, and (2) is made after attainment of age 59, or on account of death or disability.[1761] The plan is required to establish a separate account (a designated Roth account), and maintain separate recordkeeping for a participant's designated Roth contributions (and earnings allocable thereto).[1762]

For additional background on section 401(k) plans and section 403(b) plans, see the present law description of section 110 of the Act. For background on retirement plan distribution requirements, see the present law description of section 115 of the Act.

Explanation of Provision

The provision permits certain retirement plans to include a new type of account, a "pension-linked emergency savings account." The account is intended to facilitate short-term savings and is a type of designated Roth account. In order to be eligible to include pension-linked emergency savings accounts, the plan must be a defined contribution plan that is subject to ERISA and must be eligible to include a qualified Roth contribution program. Under the provision, pension-linked emergency savings accounts are treated as designated Roth accounts, except as the rules applicable to such accounts are modified as described below. The pension-linked emergency savings account must also satisfy additional requirements, as described below.

General rules

With respect to eligibility, any individuals who meet the age, service, and other eligibility requirements of the plan, other than

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457(b) plan. Plans are also permitted to allow participants who have attained age 50 to make additional contributions ("catch-up contributions"), subject to certain limits. Sec. 414(v).

[1757] Secs. 401(k)(2)(B); 403(b)(7)(A)(i); 403(b)(11); and 457(d)(1)(A).

[1758] Sec. 72(t).

[1759] Sec. 72(p).

[1760] Sec. 402A. The following plans are eligible to include a qualified Roth contribution program: (1) a qualified plan under section 401(a); (2) a section 403(b) plan; and (3) a governmental section 457(b) plan. Sec. 402A(e)(1) (as codified prior to the amendments made by this provision).

[1761] Sec. 402A(d)(2)(A).

[1762] Sec. 402A(b)(2).

highly compensated individuals,[1763] are eligible to participate in a pension-linked emergency savings account. If a participant with a pension-linked emergency savings account becomes highly compensated, the participant may not make further contributions to the account but may continue to make withdrawals.

Pension-linked emergency savings accounts must not have a minimum contribution or account balance requirement. The individual account plan must separately account for contributions to the pension-linked emergency savings account and any allocable earnings and must maintain separate recordkeeping with respect to each account.[1764]

The pension-linked emergency savings account must be held in, as selected by the plan sponsor, (1) cash; (2) an interest-bearing deposit note; or (3) an investment product offered by a State or federally-regulated financial institution that is designed to maintain, over the term of the investment, the dollar value that is equal to the amount invested in the product and preserve principal and provide a reasonable rate of return, whether or not such return is guaranteed, consistent with the need for liquidity.[1765]

Distributions

The plan must allow participants to withdraw from the pension-linked emergency savings account, in whole or in part, at least once per month and must distribute such withdrawal as soon as practicable from the date the withdrawal is elected. The first four withdrawals in a plan year may not be subject to any fees or charges; subsequent withdrawals may be subject to reasonable fees or charges, including reasonable reimbursement for the incidental costs of handling paper checks. Distributions are treated as meeting the requirements of qualified distributions from a designated Roth account,[1766] in addition to certain other applicable distribution requirements relating to the timing of distributions.[1767] Distributions from the pension-linked emergency savings account are exempt from the 10% additional tax that applies to early distributions.[1768] Except in the cases of termination of employment or termination of the pension-linked emergency savings account (as described below), distributions from the pension-linked emergency savings account are not treated as eligible rollover distributions for purposes of (1) the direct transfer and mandatory distribution rules,[1769] (2) the requirement to provide a written explanation of rollover treatment,[1770] and (3) the mandatory withholding rules that apply to eligible rollover distributions.[1771]

[1763] As defined in section 414(q).

[1764] Contributions to the pension-linked emergency savings account also may be treated as a separate contract for purposes of section 72(d) (relating to determining recovery of the investment in the contract).

[1765] If the account meets these investment requirements, the participant is treated as exercising control over the account assets for purposes of section 404(c) of ERISA (relating to a fiduciary's duties where the plan permits the participant or beneficiary to exercise control over assets).

[1766] For purposes of section 402A(d).

[1767] The requirements of sections 401(k)(2)(B)(i), 403(b)(7)(A)(i), 403(b)(11), and 457(d)(1)(A).

[1768] Under section 72(t).

[1769] Sec. 401(a)(31).

[1770] Sec. 402(f).

[1771] Sec. 3405.

Contributions and automatic enrollment

Contributions to a pension-linked emergency savings account are subject to a cap. Specifically, contributions are permitted only to the extent the contribution would not cause the portion of the account balance representing the participant's contributions (not including earnings on such contributions) to exceed the lesser of (1) $2,500 (adjusted for inflation) or (2) an amount determined by the plan sponsor. However, in the case of a participant that has a Roth account under the plan (other than the pension-linked emergency savings account), to the extent that any contribution to the pension-linked emergency savings account causes the balance to exceed the applicable limit, the plan may permit the participant to elect to increase the contributions to the Roth account. In addition, the plan may provide that in the absence of such an election, the participant is deemed to have elected to increase contributions to the Roth account at the rate at which contributions were being made to the pension-linked emergency savings account.

The plan may not allow participants to transfer amounts into the pension-linked emergency savings account from another account under the plan. If, under the plan, any excess elective deferrals are distributed[1772] to a participant with a pension-linked emergency savings account, such deferrals are treated as first distributed from such account (before any other of the participant's accounts under the plan) to the extent the participant made contributions to the pension-linked emergency savings account for that taxable year.

Matching contributions

Under the provision, if an employer makes any matching contribution[1773] to a plan that includes a pension-linked emergency savings account, the employer must match a participant's contributions to a pension-linked emergency savings account at the same rate as any other matching contribution under the plan on elective deferrals contributed by the participant. The matching contributions must be contributed to the participant's account under the plan that is not a pension-linked emergency savings account. The matching contribution that is on behalf of participant contributions to a pension-linked emergency savings account may not exceed the limit applicable to contributions under the pension-linked emergency savings account. For purposes of the limitations that apply to matching contributions, any matching contribution made under the plan is treated first as attributable to elective deferrals other than those contributed to a pension-linked emergency savings account.

Automatic enrollment

Plans are permitted to automatically enroll eligible participants in a pension-linked emergency savings account. The plan may treat a participant as having elected to have the plan sponsor make elective contributions at a rate that is not more than three percent of compensation, unless the participant affirmatively elects to opt out of such contributions or elects to make such contributions at a dif-

[1772] Under section 402(g)(2)(A).
[1773] As defined in section 401(m)(4).

ferent rate or amount. The participant must be allowed to make such affirmative election at any time, subject to such reasonable advance notice as is required by the plan administrator. The plan sponsor may amend the default rate of contribution prior to the plan year in which the amendment would take effect, but not more than once annually.

Notice requirements

The provision also imposes notice requirements. Plans that include a pension-linked emergency savings account must provide notice to participants describing:

- The purpose of the account (which is for short-term emergency savings);
- The limits on, and tax treatment of, contributions to the account;
- Any fees, expenses, restrictions, or charges associated with the account;
- Procedures for electing to make contributions to or opting out of the account, and for making withdrawals from the account, including any limits on frequency;
- As applicable, the amount of the intended contribution to the account or the change in the percentage of the compensation of the participant of such contribution;
- The amount in the account and the amount or percentage of compensation that the participant has contributed to the account;
- The designated investment option for amounts contributed to the account;
- The options for transfer or distribution of the account balance after termination of employment or termination by the plan sponsor of the account; and
- The ability of a participant who becomes a highly compensated employee to withdraw from the account and the restriction on such participant on making further contributions.

Such notice must be sufficiently accurate and comprehensive to apprise the participant of his or her rights and obligations with respect to the pension-linked emergency savings account and must be written in a manner calculated to be understood by the average participant. It must be provided not less than 30 days and not more than 90 days before the date of the first contribution to the account (including any contribution under an automatic contribution arrangement), or the date of any adjustment to a contribution rate under an automatic contribution arrangement, and must be provided at least annually thereafter. The notice may be consolidated with any other notice required under ERISA,[1774] or with the notices required for safe harbor section 401(k) plans with automatic enrollment[1775] and for eligible automatic enrollment arrangements.[1776]

[1774] The provision specifies that such consolidation may include the notice relating to default investment arrangements under section 404(c)(5)(B) of ERISA and the notice relating to automatic contribution arrangements under section 514(e)(3) of ERISA.

[1775] Sec. 401(k)(13)(E).

[1776] Sec. 414(w)(4).

Termination of employment or account

The plan sponsor may terminate the pension-linked emergency savings account at any time, notwithstanding the anti-cutback rules.[1777] Upon termination of employment or termination by the plan sponsor of the pension-linked emergency savings account, if the participant has another designated Roth account under the plan (other than the pension-linked emergency savings account), the plan must permit the participant to transfer the account balance, in whole or in part, from the pension-linked emergency savings account to the other designated Roth account. Any amounts so transferred are treated as eligible rollover distributions when they are distributed from the designated Roth account, except for purposes of the mandatory distribution rules.[1778] Any amounts not transferred to another designated Roth account upon termination of employment or of the pension-linked emergency savings account must be made available to the participant within a reasonable time.

Anti-abuse rules and regulatory guidance

A plan with pension-linked emergency savings accounts may employ reasonable procedures to limit the frequency or amount of matching contributions with respect to contributions to such accounts, solely to the extent necessary to prevent manipulation of the requirements relating to the permitted amount and frequency of matching contributions. Plans with such accounts are not required to suspend matching contributions following a participant's withdrawal of contributions, including elective deferrals and employee contributions, whether or not matched and whether or not made pursuant to an automatic contribution arrangement.[1779] The provision requires the Secretary, in consultation with the Secretary of Labor, to issue regulations or other guidance on these rules not later than 12 months after the date of enactment of the Act (December 29, 2022).

The provision also authorizes the Secretary and the Secretary of Labor (or a delegate of either) to issue regulations or other guidance, and to coordinate in developing regulations or other guidance, to carry out the purposes of this provision, including: (1) adjustment of the $2,500 limitation on contributions to a pension-linked emergency savings account to account for inflation; (2) expansion of corrections programs, if necessary; (3) model plan language and notices relating to pension-linked emergency savings accounts; and (4) with regard to interactions with the rules relating to safe harbor section 401(k) plans with qualified automatic contribution arrangements.[1780]

Preemption of state anti-garnishment laws

The provision provides that the rules relating to pension-linked emergency savings accounts,[1781] notwithstanding any other provision of law, supersede any State law that would directly or indi-

[1777] Under section 411(d)(6).
[1778] Sec. 401(a)(31)(B).
[1779] As described in new section 402A(e)(4).
[1780] Under section 401(k)(13).
[1781] New part 8 under Title 1, subtitle B of ERISA.

rectly prohibit or restrict the use of an automatic contribution arrangement[1782] for a pension-linked emergency savings account. The Secretary of Labor may promulgate regulations to establish minimum standards that such an arrangement would be required to satisfy in order for this subsection to apply.

Reporting and disclosure requirements

The provision requires the Secretary of Labor to (1) prescribe such regulations as may be necessary to address reporting and disclosure requirements for pension-linked emergency savings accounts, and (2) seek to prevent unnecessary reporting and disclosure for such accounts, including for purposes of any reporting or disclosure related to pension plans required by Title I of ERISA or by the Code.

It further amends the reporting and disclosure requirements under ERISA[1783] provide that such requirements do not preclude the Secretary of Labor from providing, by regulations or otherwise, simplified reporting procedures or requirements regarding a pension-linked emergency savings account.

Report to Congress

The provision requires the Secretary and the Secretary of Labor to conduct a study on the use of emergency savings from individual account plan accounts, including emergency savings from a pension-linked emergency savings account regarding (1) whether the amount of the $2,500 dollar limitation is sufficient, (2) whether the limitation on the contribution rate for an automatic contribution arrangement is appropriate, and (3) the extent to which plan sponsors offer such accounts and participants participate in such accounts and the resulting impact on participant retirement savings, including the impact on retirement savings leakage and the effect of such accounts on retirement plan participation by low- and moderate-income households. The Secretary and the Secretary of Labor must submit a report on such findings to Congress not later than seven years after the date of enactment of this Act (thus, seven years after December 29, 2022).

Effective Date

The provision is effective for plan years beginning after December 31, 2023.

27. Enhancement of 403(b) plans (sec. 128 of the Act and sec. 403(b) of the Code)

Present Law

Tax-sheltered annuities ("section 403(b) plans")

Section 403(b) plans are a form of tax-favored employer-sponsored plan that provides tax benefits similar to qualified retirement

[1782] As described in new section 801(d)(2) of ERISA.

[1783] Under section 101 of ERISA. The provision also clarifies that that the rules permitting the Secretary of Labor to develop alternative methods of compliance with reporting and disclosure requirements for any pension plan or class of plans also applies to pension-linked emergency savings account features within a pension plan. Sec. 110(a) of ERISA (as modified by this provision).

plans. Section 403(b) plans may be maintained only by (1) charitable tax-exempt organizations, and (2) educational institutions of State or local governments (that is, public schools, including colleges and universities). Many of the rules that apply to section 403(b) plans are similar to the rules applicable to qualified retirement plans, including section 401(k) plans.

Contributions to 403(b) plans

Employers may make nonelective or matching contributions to such plans on behalf of their employees, and the plan may provide for employees to make pre-tax elective deferrals, designated Roth contributions (held in designated Roth accounts)[1784] or other after-tax contributions.

Annuity contracts

Generally, section 403(b) plans provide for contributions toward the purchase of annuity contracts. The employee's rights under the annuity contract are nonforfeitable, except for a failure to pay future premiums.[1785] Amounts contributed by an employer for an annuity contract are excluded from the gross income of the employee for the taxable year if certain requirements are satisfied.

Section 403(b) custodial accounts

Alternatively, such contributions may be held in custodial accounts established for each employee if those accounts satisfy certain requirements.

Contributions to a section 403(b) plan that are held in a custodial account are treated as contributions to an annuity contract[1786] if the assets are (1) held by a bank[1787] or another person who demonstrates, to the satisfaction of the Secretary, that the manner in which the assets will be held is consistent with the requirements for a qualified retirement plan[1788] and (2) invested only in regulated investment company stock.[1789]

In addition, assets of a section 403(b) custodial account cannot be commingled in a group trust with any assets other than those of a regulated investment company.[1790] Contributions to a custodial account are not permitted to be distributed before the employee dies, attains age 59, has a severance from employment, becomes disabled,[1791] or, in the case of elective deferrals, encounters financial hardship; or, with respect to lifetime income options, the date that is 90 days prior to the date such lifetime income investment no longer is held as an investment option and is distributed in the

[1784] Sec. 402A.

[1785] Sec. 403(b)(1)(C).

[1786] Sec. 403(b)(7). See also, sec. 401(f)(2).

[1787] For this purpose, a "bank" is defined as any bank as defined in section 581, an insured credit union within the meaning of section 101, paragraph (6) or (7) of the Federal Credit Union Act, and a corporation which, under the laws of the State of its incorporation, is subject to supervision and examination by the Commissioner of Banking or other officer of such State in charge of the administration of the banking laws of such State. Sec. 408(n).

[1788] Sec. 401(f)(2) and Treas. Reg. sec. 1.401(f)–1. A custodial account that satisfies the requirements of section 401(f)(2) is treated as an organization described in section 401(a) solely for purposes of subchapter F of chapter 1 of Subtitle A (secs. 501–530) and subtitle F (pertaining to procedure and administration) with respect to amounts received by the account and with respect to any income from the investment of those amounts.

[1789] Sec. 403(b)(7) and Treas. Reg. sec. 1.403(b)–8(d)(2)(i).

[1790] Treas. Reg. sec. 1.403(b)–8(d)(2)(i). See also Rev. Rul. 2011–1, 2011–2 I.R.B. 251.

[1791] Within the meaning of section 72(m)(7).

form of a qualified distribution.[1792] Finally, a custodial account must contain a written statement that the assets held in a custodial account cannot be used for, or diverted to, purposes other than for the exclusive benefit of plan participants and their beneficiaries.[1793]

Group trust

Under the Code, a trust created or organized in the United States and forming a part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of its employees or their beneficiaries constitutes a qualified trust if it provides that

"Contributions made to the trust by the applicable employer or employers, or both, are used for the purpose of distributing the corpus and income of the trust, in accordance with the terms of the plan, to such employees or their beneficiaries;"[1794]

A trust described in section 401(a) is exempt from income tax;[1795] and

"Under each trust instrument, it must be impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the plan and trust, for any part of the corpus or income of the trust to be used for or diverted to purposes other than for the exclusive benefit of the employees or their beneficiaries."

A group trust is an arrangement under which individual retirement plan trusts pool their assets in a group trust (usually created for the purpose of providing diversification of investments), where the trust is declared to be part of each participating retirement plan and the trust instruments creating both the participating and group trusts provide that amounts are transferred from one trust to the other at the direction of the trustee of the participating trust.[1796]

The tax status of the group trust is derived from the tax status of the entities participating in the group trust to the extent of the entities' equitable interests in such trust if the following requirements are satisfied:

- The group trust is itself adopted as a part of each adopting group trust retiree benefit plan;
- The group trust instrument expressly limits participation to pension, profit-sharing, and stock bonus trusts or custodial accounts qualifying under section 401(a) that are exempt under section 501(a); individual retirement accounts that are exempt under section 408(e); eligible governmental plan trusts or custodial accounts under section 457(b) that are exempt under section 457(g); custodial accounts under section 403(b)(7); retirement income accounts under section 403(b)(9); and section 401(a)(24) governmental plans;

[1792] In accordance with section 401(a)(38).
[1793] Treas. Reg. sec. 1.403(b)–8(d)(2)(iii).
[1794] Sec. 401(a)(1).
[1795] Sec. 501(a).
[1796] See Rev. Rul. 81–100, 1981–1 C.B. 326, as modified by Rev. Rul. 2004–67, 2004–2 C.B. 28; Rev. Rul. 2008–40, 2008–2 C.B. 166; Rev. Rul. 2011–1, 2011–2 I.R.B. 251 which was modified by Notice 2012–6, 2012–3 I.R.B. 293, January 17, 2012; and Rev. Rul. 2014–24, 2014–37 I.R.B. 529.

- The group trust instrument expressly prohibits any part of its corpus or income that equitably belongs to any adopting group trust retiree benefit plan from being used for, or diverted to, any purpose other than for the exclusive benefit of the participants and beneficiaries of the group trust retiree benefit plan;
- Each group trust retiree benefit plan that adopts the group trust is itself a trust, a custodial account, or a similar entity that is tax-exempt under section 408(e) or section 501(a) (or is treated as exempt under section 501(a));
- Each group trust retiree benefit plan that adopts the group trust expressly provides in its governing document that it is impossible for any part of the corpus or income of the group trust retiree benefit plan to be used for, or diverted to, purposes other than for the exclusive benefit of the plan participants and their beneficiaries;
- The group trust instrument expressly limits the assets that may be held by the group trust to assets that are contributed by, or transferred from, a group trust retiree benefit plan to the group trust (and the earnings thereon), and the group trust instrument expressly provides for separate accounting to reflect the interest that each adopting group trust retiree benefit plan has in the group trust, including separate accounting for contributions to the group trust from the adopting plan, disbursements made from the adopting plan's account in the group trust, and investment experience of the group trust allocable to that account;
- The group trust instrument expressly prohibits an assignment by an adopting group trust retiree benefit plan of any part of its equity or interest in the group trust; and
- The group trust is created or organized in the United States and is maintained at all times as a domestic trust in the United States.
- With respect to section 403(b)(7) custodial accounts, under IRS guidance, such an account fails to satisfy the requirements for a group trust if the assets of the account are invested other than in the stock of a regulated investment company, and any group trust in which the assets of a section 403(b)(7) custodial account is invested must comply with this restriction.[1797] As a result of this investment restriction, the assets of a custodial account under section 403(b)(7) generally will be commingled in a group trust that solely contains the assets of other section 403(b)(7) custodial accounts.

Explanation of Provision[1798]

The provision provides that contributions to a section 403(b) plan that are held in a custodial account are treated as contributions to an annuity contract if the assets are to be held in that custodial account and invested in regulated investment company stock or a

[1797] Rev. Rul. 2011–1, 2011–2 I.R.B. 251.

[1798] In order to permit section 403(b) plans to participate in a group trust, certain revisions to the securities laws may be required.

group trust intended to be treated as qualified under section 401(a) and tax exempt under section 501(a) under IRS guidance.[1799]

Effective Date

The provision applies to amounts invested after the date of enactment (December 29, 2022).

TITLE II—PRESERVATION OF INCOME

1. Remove required minimum distribution barriers for life annuities (sec. 201 of the Act and sec. 401(a)(9) of the Code)

Present Law

Required minimum distributions

For background on required minimum distributions under qualified retirement plans, see the present law description of section 107 of the Act.

Annuities

A qualified retirement plan will not fail to satisfy the minimum required distribution rules merely because distributions are made from an annuity contract which is purchased with the employee's benefit by the plan from an insurance company.[1800] Prior to the date that an annuity contract under an individual account plan commences benefits under the contract, the interest of the employee or beneficiary under that contract is treated as an individual account for purposes of the required minimum distribution requirements.[1801] Once distributions are required to begin (on the required beginning date), payments under the annuity contract will satisfy the required minimum distribution rules if distributions of the employee's entire interest are paid in the form of periodic annuity payments for the employee's life (or the joint lives of the employee and beneficiary) or over a period certain as defined in the regulations.[1802]

All annuity payments (whether paid over an employee's life, joint lives, or a period certain) must be nonincreasing, or only increase in accordance with certain exceptions.[1803]

Certain additional increases are permitted for annuity payments under annuity contracts purchased from insurance companies. If the total future payments expected to be made under the annuity contract ("future expected payments") exceed the "total value being annuitized," the payments under the annuity contract will not fail to satisfy the nonincreasing payment requirement merely because the payments (1) are increased by a constant percentage, applied

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[1799] See Rev. Rul. 81–100 or any successor guidance.

[1800] Treas. Reg. sec. 1.401(a)(9)–6, A–4.

[1801] Treas. Reg. sec. 1.401(a)(9)–6, A–12(a).

[1802] Treas. Reg. sec. 1.401(a)(9)–6, A–1, –3 and –4. If the annuity contract is purchased after the required beginning date, the first payment interval must begin on or before the purchase date and the payment for one payment interval must be made no later than the end of that payment interval. Payment intervals are the periods for which payments are received, *e.g.,* bimonthly, monthly, semi-annually, or annually.

[1803] Treas. Reg. sec. 1.401(a)(9)–6, A–14(a). The exceptions include eligible cost of living increases, increased benefits resulting from a plan amendment, and lump sum distributions made to a beneficiary upon the death of the employee.

not less frequently than annually; (2) provide for a final payment upon the death of the employee that does not exceed the excess of the total value being annuitized over the total of payments before the death of the employee; (3) are increased as a result of dividend payments or other payments that result from actuarial gains but only if actuarial gain is measured no less frequently than annually and the resulting payments are either paid no later than the year following the year for which the actuarial experience is measured or paid in the same form as the payment of the annuity over the remaining period of the annuity; and (4) are increased for certain accelerations of payment.[1804] However, in operation, it may be difficult for a contract to meet this actuarial test (especially in a low-interest rate environment). Accordingly, a contract may not be able to provide certain guarantees in life annuities such as certain guaranteed annual increases, return of premium death benefits and period certain guarantees for participating annuities.

Explanation of Provision

The provision amends the minimum required distribution rules to permit commercial annuities[1805] that are issued in connection with any eligible retirement plan[1806] to provide one or more of the following types of payments on or after the annuity starting date:

- Annuity payments that increase by a constant percentage, applied not less frequently than annually, at a rate that is less than five percent per year;
- A lump sum payment that results in a shortening of the payment period with respect to an annuity, or a full or partial commutation of the future annuity payments, provided that such a lump sum is determined using reasonable actuarial methods and assumptions, determined in good faith by the issuer of the contract;
- A lump sum payment that accelerates the receipt of annuity payments that are scheduled to be received within the ensuing 12 months, regardless of whether such acceleration shortens the payment period with respect to the annuity, reduces the dollar amount of benefits to be paid under the contract, or results in a suspension of annuity payments during the period being accelerated;
- Dividends or similar distributions provided that the issuer of the contract determines the amount using reasonable actuarial methods and assumptions, as determined in good faith by the issuer of the contract, when calculating the initial annuity payments and the issuer's experience with respect to those factors; or
- A lump sum return of premium death benefits that does not exceed the excess of the total amount of the consideration paid for the annuity payments, less the aggregate amount of prior distributions or payments from or under the contract.

[1804] Treas. Reg. sec. 1.401(a)(9)–6, A–14(c).
[1805] Within the meaning of section 3405(e)(6).
[1806] Within the meaning of section 402(c)(8)(B), other than a defined benefit plan.

Effective Date

The provision applies to calendar years ending after the date of enactment (December 29, 2022).

2. Qualifying longevity annuity contracts (sec. 202 of the Act and sec. 401(a)(9))

Present Law

Required minimum distributions

For background on required minimum distributions ("RMDs") under qualified retirement plans, see the present law description of section 107 of the Act.

Qualifying longevity annuity contracts

A qualifying longevity annuity contract ("QLAC") is a deferred annuity contract that is purchased from an insurance company for an employee that is generally scheduled to commence payments at an advanced age (but no later than age 85)[1807] and which satisfies each of the following requirements:[1808]

- Premiums for the QLAC do not exceed the lesser of a dollar or percentage limitation. The dollar limitation is (1) $125,000 (as adjusted) ($145,000 for 2022) over (2) the sum of (a) the premiums previously paid with respect to the contract and (b) the premiums previously paid with respect to any other QLAC that is purchased for the employee under the plan, or any other plan of the employer.[1809] The percentage limitation is 25 percent of the employer's account balance under the plan (including the value of any QLAC held under the plan for the employee) over the previously paid premiums with respect to the contract or with respect to any other QLAC that is purchased for the employee under the plan, or any other plan of the employer.
- The QLAC provides that distributions under the contract must commence not later than the first day of the month following the individual's attainment of age 85.
- The QLAC provides that once distributions begin under the contract, the distributions satisfy the minimum required distribution rules, except for the rule that annuity payments commence on or before the required beginning date.
- The contract does not make available any commutation benefit, cash surrender right, or other similar feature.
- No benefits are provided under the contract after the death of the employee other than those provided for in the regulations.
- When the contract is issued, the contract (or a rider or endorsement) states that it is intended to be a QLAC.

[1807] Because under section 401(a)(9), required minimum distributions ("RMDs") must generally begin no later than the April 1 of the year following the year in which the individual attains age 72, without these special rules, QLACs would violate the requirements of section 401(a)(9). See the description of section 107 of the Act which provides for an increase in the age for the required beginning date for RMDs.

[1808] Treas. Reg. sec. 401(a)(9)–6, Q&A–17.

[1809] Including any other plan, annuity, or account described in sections 401(a), 403(a), 403(b), or 408, or an eligible governmental plan under section 457(b).

- The contract is not a variable contract, an indexed contract or a similar contract, except as provided in guidance.

Recently, proposed Treasury regulations were issued relating to required minimum distributions from qualified plans; section 403(b) annuity contracts, custodial accounts, and retirement income accounts; individual retirement accounts and annuities; and eligible deferred compensation plans [1810] to address the required minimum distribution requirements [1811] and to update the regulations to reflect the amendments made to such distributions by sections 114 and 401 of the SECURE Act. With respect to QLACs, the definition of a QLAC in the proposed regulations is the same as in the current regulations, except that the proposed regulations would permit a QLAC to have a commutation benefit or cash surrender right prior to the required beginning date.[1812]

Explanation of Provision

Under the provision, no later than 18 months after the date of enactment, the Secretary (or the Secretary's delegate) is directed to amend the minimum required distribution regulations which apply to QLACs: [1813]

- To eliminate the requirement that premiums for QLACs be limited to 25 percent (or any other percentage) of an individual's account balance;
- To increase the dollar limitation on premiums for QLACs from $125,000 to $200,000, and to provide that, in the case of calendar years beginning on or after January 1 of the second year following the year of enactment, the $200,000 dollar limitation will be adjusted at the same time and in the same manner as the limits are adjusted under section 415(d), except that the base period will be the calendar quarter beginning July 1 of the year of enactment, and any increase to such dollar limitation which is not a multiple of $10,000 will be rounded to the next lowest multiple of $10,000;
- To provide that in the case of a QLAC purchased with joint and survivor annuity benefits for the individual and his or her spouse that were permissible under the regulations at the time the contract was originally purchased, a divorce occurring after the original purchase and before the annuity payments commence under the contract does not affect the permissibility of the joint and survivor annuity benefits or other benefits under the contract, or require any adjustment to the amount or duration of benefits payable under the contract, pro-

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[1810] Under section 457.

[1811] 87 Fed. Reg. 10504, February 24, 2022 (corrected March 21, 2022). The amendments to Treas. Reg. sections 1.401(a)(9)–1 through 1.401(a)(9)–9 are proposed to apply for purposes of determining RMDs for calendar years beginning on or after January 1, 2022. For the 2021 distribution calendar year, taxpayers must apply the existing regulations, but by taking into account a reasonable, good faith interpretation of the amendments made by sections 114 ("Increase in age for required beginning date for mandatory distributions") and 401 ("Modification of required distribution rules for designated beneficiaries") of the SECURE Act. A description of sections 114 and 401 of the SECURE Act can be found in the *General Explanation of Tax Legislation Enacted in the 116th Congress* (JCS–1–22), February 2022 which document can be found on the Joint Committee on Taxation website at www.jct.gov. Compliance with the proposed regulations satisfy that requirement. However, these proposed regulations do not reflect any further changes to section 401(a)(9) made by this, or any other, section of the Act.

[1812] See Prop. Treas. Reg. sec.1.401(a)(9)–6(q).

[1813] Treas. Reg. sec. 1.401(a)(9)–6 and 1.408–8 (or any successor regulations).

vided that any qualified domestic relations order,[1814] or in the case of an arrangement not subject to the qualified domestic relations order provisions in the Code or ERISA,[1815] any divorce or separation instrument (1) provides that the former spouse is entitled to the survivor benefits under the contract; (2) provides that the former spouse is treated as a surviving spouse for purposes of the contract; (3) does not modify the treatment of the former spouse as the beneficiary under the contract who is entitled to the survivor benefits; or (4) does not modify the treatment of the former spouse as the measuring life for the survivor benefits under the contract. For purposes of this provision, the term "divorce or separation instrument" means (1) a decree of divorce or separate maintenance or a written instrument incident to such a decree; (2) a written separation agreement; or (3) a decree (not described in (1)) requiring a spouse to make payments for the support or maintenance of the other spouse; and

- To ensure that the regulation does not preclude a contract from including a provision under which an employee may rescind the purchase of the contract within a period not exceeding 90 days from the date of purchase (the "short free look period").

Regulatory successor provision

Any reference to a regulation is treated as including a reference to any successor regulation for purposes of the provision.

Effective Date

The provision is generally effective with respect to contracts purchased or received in an exchange on or after the date of enactment (December 29, 2022). The changes with respect to joint and survivor annuities and the short free look period are effective with respect to contracts purchased or received in an exchange on or after July 2, 2014.

Prior to the date the Secretary issues final regulations, the Secretary (or the Secretary's delegate) shall administer and enforce the law in accordance with the effective dates above, and taxpayers may rely upon their reasonable good faith interpretations of the law prior to this provision becoming effective.

3. Insurance-dedicated exchange-traded funds (sec. 203 of the Act and sec. 817(h) of the Code)

Present Law

Income exclusion and deferred tax treatment for life insurance and annuity contracts

An exclusion from gross income is provided for amounts received under a life insurance contract paid by reason of the death of the insured.[1816] Further, no Federal income tax generally is imposed on a policyholder with respect to the earnings under a life insur-

[1814] Within the meaning of section 414(p).
[1815] Sec. 414(p) or sec. 206(d) of ERISA.
[1816] Sec. 101(a).

ance contract ("inside buildup"). Distributions from a life insurance contract (other than a modified endowment contract [1817]) that are made prior to the death of the insured generally are includible in income only to the extent that the amounts distributed exceed the taxpayer's investment in the contract.[1818] Such distributions generally are treated first as a tax-free recovery of the investment in the contract, and then as income. Present law provides a definition of life insurance designed to limit the investment orientation of the contract.[1819]

No Federal income tax is generally imposed on a deferred annuity contract holder who is a natural person with respect to the earnings on the contract (inside buildup) in the absence of a distribution under the contract. Annuity distributions generally are treated as partially excludable return of basis and partially ordinary income under an "exclusion ratio" (the ratio of the investment in the contract to the expected return under the contract as of that date).[1820] Other distributions (which for this purpose include loans) are treated as income first, then as a tax-free return of basis.[1821] An additional 10-percent tax is imposed on the income portion of distributions made before age 59½, and in certain other circumstances.[1822] An annuity contract must provide for certain required distributions if the holder dies before the entire interest in the contract has been distributed.[1823] No dollar limit is imposed on the amount that may be paid into an annuity contract (that is not a pension plan contract) for Federal income tax purposes.

Variable contracts

A variable contract is generally an annuity or life insurance contract whose death benefit, payout, or premium amounts are based on the return on and market value of underlying assets. For tax purposes, a variable contract is defined by statute.[1824] Under the statutory criteria, all or part of the amounts received for the contract (premiums) must be allocated to a segregated asset account of the insurer. The contract must provide for the payment of annuities, must be a life insurance contract, [1825] or must fund insurance on retired lives. [1826] The contract must reflect the investment return and the market value of the segregated asset account, or in the case of a life insurance contract, the amount of the death benefit or period of coverage must be adjusted on the basis of the investment return and the market value of the segregated asset account. The segregated asset accounts for variable contracts generally are invested in a variety of investment funds.

[1817] Sec. 7702A. A modified endowment contract is generally a life insurance contract funded more rapidly than in seven level annual premiums. Distributions (including loans) from a modified endowment contract are generally treated as income first, then as a tax-free return of basis. Sec. 72(e)(10).
[1818] Sec. 72(e).
[1819] Sec. 7702.
[1820] Sec. 72(b).
[1821] Sec. 72(e).
[1822] Sec. 72(q).
[1823] Sec. 72(s).
[1824] Sec. 817(d).
[1825] As defined for Federal tax purposes in section 7702.
[1826] As described in section 807(c)(6) (governing life insurer reserve deductions).

Diversification requirements

The investment assets held in the segregated asset account for a variable contract must be adequately diversified.[1827] If the assets are not adequately diversified, the variable contract is not treated as an annuity or life insurance contract.[1828] As a result, otherwise tax-deferred or excluded income on the contract is treated as ordinary income received or accrued by the contract holder during the taxable year.[1829]

When the diversification requirement for variable contracts was added in 1984,[1830] the Conference Report stated, "[i]n authorizing Treasury to prescribe diversification standards, the conferees intend that standards be designed to deny annuity or life insurance treatment for investments that are publicly available to investors and investments that are made, in effect, at the direction of the investor."[1831]

The regulatory diversification requirements impose investment concentration limits based on percentages of the total value of the assets in the segregated asset account.[1832] A safe harbor is provided for a segregated asset account holding a regulated investment company ("RIC" or mutual fund) that is at least as diversified as is required under the RIC rules of section 851(b)(4) and no more than 55 percent of the value of whose assets is in cash, cash items, government securities, and securities of other RICs.[1833]

The diversification requirements provide a look-through rule for assets held through a RIC, real estate investment trust ("REIT"), partnership, or certain trusts such as a grantor trust. This look-through rule provides that the RIC, REIT, partnership or trust is not treated as a single investment of the segregated asset account, but rather, a pro rata portion of each of its assets is treated as an asset of the account.[1834]

However, the look-through rule imposes requirements.[1835] All the beneficial interests in the RIC, REIT, partnership, or trust generally must be held by a segregated asset account. Public access to the RIC, REIT, partnership, or trust must generally be available exclusively through the purchase of a variable contract. For exam-

[1827] Sec. 817(h).

[1828] The investor control doctrine can also apply in some fact situations. This two-pronged doctrine generally treats a contract as not a life insurance contract or not an annuity contract if the contract holder has significant incidents of ownership with respect to the investments in the insurer segregated asset account, or if segregated asset account assets are publicly available for purchase (i.e, not exclusively available through purchase of the variable contract). See Rev. Rul. 81–225, 1981–2 C.B. 12, October 13, 1981, as modified by Rev. Proc. 99–44, 1992–2 C.B. 598, November 29, 1999, and as clarified and amplified by Rev. Rul. 2007–7, 2007–1 C.B. 468, February 12, 2007; *Christofferson v. U.S.*, 749 F.2d 513 (8th Cir. 1984); *Webber v. Commissioner*, 144 T. C. 324 (2015).

[1829] Secs. 72 and 7702, and Treas. Reg. sec. 1.817–5(a).

[1830] Deficit Reduction Act of 1984, Pub. L. No. 98–369, sec. 201, July 18, 1984.

[1831] H.R. Conf. Rep. No. 861, 98th Cong., 2d Sess. (1984), page 1055. Similarly, the Blue Book for the 1984 Act states that the diversification requirements were enacted "to discourage the use of tax-preferred variable annuities and variable life insurance primarily as investment vehicles. The Congress believed that a limitation on a customer's ability to select specific investments underlying a variable contract will help ensure that a customer's primary motivation in purchasing the contract is more likely to be the traditional economic protections provided by annuities and life insurance." Joint Committee on Taxation, *General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984*, Pub. L. No. 98–369, JCS–41–84, December 31, 1984, page 607.

[1832] Treas. Reg. sec. 1.817–5(b).

[1833] Treas. Reg. sec. 1.817–5(b)(2).

[1834] Treas. Reg. sec. 1.817–5(f)(1).

[1835] Treas. Reg. sec. 1.817–5(f)(2) and (3).

ple, if an investment fund's interests are held by a market maker or by a financial institution that, as a participant in a clearing agency, is permitted to purchase and redeem shares directly from the fund and sell them to third parties, then the fund does not satisfy this requirement of the look-through rule.

Explanation of Provision

Diversification requirements

The provision directs the Secretary to revise the regulations setting forth diversification requirements with respect to variable contracts under section 817(h) to facilitate the use of ETFs under variable contracts. The provision directs that the look-through rule requirements in the regulations be amended so that satisfaction of those requirements with respect to an ETF is not prevented by reason of beneficial interests in an investment fund being held by one or more authorized participants or market makers. Thus, the regulatory revisions are intended to allow ETFs to be held in life insurance companies' segregated asset accounts for variable insurance contracts, provided that doing so does not violate the investor control doctrine limiting public availability of, and investor control over, investment funds held by such accounts. The Secretary is directed to revise the regulations by the date that is seven years after the date of enactment of the provision (thus, seven years after December 29, 2022).

Under the provision, an ETF means a RIC, partnership, or trust that is registered with the SEC as an open-end investment company or unit investment trust, and the shares of which can be purchased or redeemed directly from the fund only by an authorized participant, and the shares of which are traded throughout the day on a national stock exchange at market prices that may or may not be the same as the net asset value of the shares. An authorized participant means a financial institution that is a member or participant in a clearing agency registered under section 17A(b) of the Securities Exchange Act of 1934 that contracts with an ETF to permit the financial institution to purchase or redeem shares of the ETF and to sell the shares to third parties, provided that the financial institution is precluded from purchasing the shares for its own investment purposes and from selling the shares to persons that are not market makers. A market maker means a financial institution that is a registered broker or dealer under section 15(b) of the Securities Exchange Act of 1934 and that maintains liquidity for an ETF on a national stock exchange by always being ready to buy and sell shares, provided that the financial institution is precluded from buying or selling shares to or from persons who are not authorized participants or who are persons not permitted to buy or sell shares under the look-through rule in the regulations.

Effective Date

The provision relating to the amendments to the regulatory diversification requirements is effective for segregated asset account investments made on or after the date that is seven years after the date of enactment (thus, seven years after December 29, 2022).

4. Eliminating a penalty on partial annuitization (sec. 204 of the Act and Treas. Reg. secs. 1.401(a)(9)–5 and –6)

Present Law

Required minimum distributions

Background on required minimum distributions under qualified retirement plans may be found in the description of present law for section 107 of the Act. Proposed regulations relating to required minimum distributions from qualified plans were recently issued [1836] to update the regulations to reflect the amendments made to such distributions by the SECURE Act.[1837]

Annuity distributions

Additional background on annuity distributions from a qualified plan may be found in the description of present law for section 201 of the Act.

For IRAs and defined contribution plans, the required minimum distribution for each year generally is determined by dividing the account balance as of the end of the prior year by the number of years in the distribution period.[1838] A plan will not fail to satisfy the minimum required distribution rules merely because distributions are made from an annuity contract which is purchased with the employee's benefit by the plan from an insurance company.[1839] Prior to the date that an annuity contract under an individual account plan commences benefits under the contract, the interest of the employee or beneficiary under that contract is treated as an individual account for purposes of the required minimum distribution requirements.[1840]

Once distributions are required to begin (on the required beginning date), payments under the annuity contract will satisfy the required minimum distribution rules if distributions of the employee's entire interest are paid in the form of periodic annuity payments for the employee's life (or the joint lives of the employee and beneficiary) or over a period certain as defined in the regulations.[1841] However, if a portion of the employee's account balance under a defined contribution plan is used to purchase an annuity contract (while another portion stays in the account), the remaining account balance under the plan must be distributed in accordance with the required minimum distribution rules for defined contribution plans, and the annuity payments under the annuity contract must satisfy the required minimum distribution rules applica-

[1836] 87 Fed. Reg. 10504, Feb. 24, 2022 (corrected March 21, 2022, 87 Fed. Reg. 30845). Notice 2023–54, 2023–31 I.R.B. 382, July 31, 2023 provides that the final regulations would apply for calendar years beginning no earlier than January 1, 2024.

[1837] Sections 114 and 401 of the SECURE Act, Pub. L. No. 116–94, Div. O.

[1838] Treas. Reg. sec. 1.401(a)(9)–5.

[1839] Treas. Reg. sec. 1.401(a)(9)–6, A–4.

[1840] Treas. Reg. sec. 1.401(a)(9)–6, A–12(a).

[1841] Treas. Reg. sec. 1.401(a)(9)–6, A–1, –3 and –4. If the annuity contract is purchased after the required beginning date, the first payment must begin on or before the purchase date and the payment required must be made no later the end of that required period.

ble to defined benefit plans and annuity contracts.[1842] The proposed regulations generally retain this rule.[1843]

Explanation of Provision

The provision directs the Secretary (or the Secretary's delegate) to amend the required minimum distribution rules for defined contribution plans so that partial annuity payments can be taken into account for purposes of satisfying the required minimum distribution rules for those plans.

Under the provision, if an employee's benefit is in the form of an individual account under a defined contribution plan, the plan may allow the employee to elect to have the required distribution amount from such account for a year be calculated as the excess of the total required amount for such year over the annuity amount for such year. The total required amount means the amount required to be distributed from a defined contribution plan under the rules applicable to such plans[1844] for a year determined by treating the account balance as of the last valuation date in the immediately preceding calendar year as including the value on that date of all annuity contracts that were purchased with a portion of the account and from which payments are made under the required distribution rules applicable to annuities.[1845] Annuity amount for the year means the total amount distributed in the year from all annuity contracts purchased from the individual account.

The provision also directs the Secretary to issue conforming amendments for the distribution rules applicable to a section 403(b) plan, a governmental section 457(b) plan, and an IRA. Under these amendments, any IRA or section 403(b) plan that an individual holds as the owner, or which an individual holds as a beneficiary of the same decedent, are treated as one plan for purposes of determining the required minimum distributions.

Effective Date

The modifications and amendments required by this provision are deemed to have been made (and laws applied as if the actions the Secretary is required to take have been taken) as of the date of enactment (December 29, 2022). Prior to the date such actions are taken, taxpayers may rely upon their reasonable, good faith interpretations of the law.

[1842] Treas. Reg. sec. 1.401(a)(9)–8, A–2(a)(3). If a partial annuity is purchased, then the rules require the remaining account balance in the defined contribution plan to satisfy the required minimum distribution rules applicable to defined contribution plans. The annuity payments under the annuity contract must satisfy the rules applicable to defined benefit plans and annuity contracts.

[1843] Prop. Treas. Reg. sec. 1.401(a)(9)–5. The proposed regulations specify that if an annuity is purchased the plan will satisfy the required minimum distribution rules only if, in the year of purchase, distributions from the individual account satisfy the rules applicable to defined contribution plans, and for calendar years following the year of purchase, payments under the annuity contract are made in accordance with the rules applicable to defined benefit plans and annuity contracts. Payments under the annuity contract during the year in which the annuity contract is purchased are treated as distributions from the individual account for purposes of determining whether the distributions from the individual account satisfy the required minimum distribution rules in the calendar year of purchase.

[1844] Treas. Reg. sec. 1.401(a)(9)–5.

[1845] Treas. Reg. sec. 1.401(a)(9)–6.

TITLE III—SIMPLIFICATION AND CLARIFICATION OF RETIREMENT PLAN RULES

1. Recovery of retirement plan overpayments (sec. 301 of the Act, secs. 402 and 414 of the Code, and sec. 206 of ERISA)

Present Law

Employee Plans Compliance Resolution System

The IRS has established the Employee Plans Compliance Resolution System ("EPCRS"), which is a comprehensive system of correction programs for sponsors of retirement plans and annuities that are intended, but have failed, to satisfy the applicable requirements under the Code.[1846] EPCRS permits employers to correct compliance failures and continue to provide their employees with retirement benefits on a tax-favored basis.

The IRS designed EPCRS to (1) encourage operational and formal compliance, (2) promote voluntary and timely correction of compliance failures, (3) provide sanctions for compliance failures identified on audit that are reasonable in light of the nature, extent, and severity of the violation, (4) provide consistent and uniform administration of the correction programs, and (5) permit employers to rely on the availability of EPCRS in taking corrective actions to maintain the tax-favored status of their retirement plans and annuities.

The basic elements of the programs that comprise EPCRS are self-correction, voluntary correction with IRS approval, and correction on audit. The Self-Correction Program ("SCP") generally permits a plan sponsor that has established practices and procedures (formal or informal) reasonably designed to promote and facilitate overall compliance in form and operation with applicable Code requirements to correct certain insignificant failures at any time (including during an audit) and certain significant failures within a two-year period, without payment of any fee or sanction. The Voluntary Correction Program ("VCP") permits an employer, at any time before an audit, to pay a limited fee and receive IRS approval of a correction. For a failure that is discovered on audit and corrected, the Audit Closing Agreement Program ("Audit CAP") provides for a sanction that bears a reasonable relationship to the nature, extent, and severity of the failure and that takes into account the extent to which correction occurred before audit.

SCP, VCP and Audit CAP are not available to correct failures relating to the diversion or misuse of plan assets.[1847] With respect to the SCP program, in the event that the plan or the plan sponsor has been a party to an abusive tax avoidance transaction, SCP is not available to correct any operational failure that is directly or indirectly related to the abusive tax avoidance transaction.[1848]

[1846] The requirements under sections 401(a), 403(a), or 403(b), as applicable. Rev. Proc. 2021–30, 2021–31 I.R.B. 172, August 2, 2021.

[1847] Sec. 4.11 of Rev. Proc. 2021–30.

[1848] Sec. 4.12 of Rev. Proc. 2021–30.

SEP and SIMPLE plans

SCP and VCP[1849] under EPCRS are available to a SEP or SIMPLE plan.[1850] SCP is only available to such a plan to correct insignificant operational failures,[1851] and only if the SEP or SIMPLE plan is established and maintained on a document approved by the IRS.

Section 457(b) plans

EPCRS does not apply to section 457(b) plans. However, the IRS will accept submissions relating to section 457(b) plans on a provisional basis outside of EPCRS through standards that are similar to those that apply to VCP filings.[1852]

Recoupment of overpayments

Under EPCRS, an overpayment is defined as a qualification failure due to a payment being made to a participant or beneficiary that exceeds the amount payable to such individual under the terms of the plan or that exceeds a limitation provided in the Code or regulations.[1853] Overpayments include both payments from a defined benefit plan and from a defined contribution plan (either not made from the individual's account under the plan or not permitted to be paid under the Code, the regulations, or the terms of the plan).

Overpayments from defined benefit plans

In general, subject to certain conditions, an overpayment from a defined benefit plan may be corrected by adopting a retroactive amendment to conform to the plan's operation, by the return of overpayment correction method, the adjustment of future payments correction method, the funding exception correction method, or the contribution correction method.[1854] Depending on the nature of the overpayment, other appropriate correction methods may be used. Any other correction method used must satisfy the EPCRS correction principles and other requirements set forth in the EPCRS guidance.[1855]

Under the funding exception correction method, corrective payments are not required for certain underfunded defined benefit plans which are subject to certain benefit limitations,[1856] provided that the plan's certified or presumed adjusted funding target attainment percentage ("AFTAP") that is applicable to the plan at the date of correction is equal to at least 100 percent (or, in the case of a multiemployer plan, the plan's most recent annual funding certification indicates that the plan is not in critical, critical

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[1849] Sec. 6.11 of Rev. Proc. 2021–30.

[1850] Secs. 1.01 and 1.02 of Rev. Proc. 2021–30. A SEP is a plan intended to satisfy the requirements of Code section 408(k); a SIMPLE plan is a plan intended to satisfy the requirements of Code section 408(p). Secs. 5.06 and 5.07 of Rev. Proc. 2021–30.

[1851] Sec. 4.01(c) of Rev. Proc. 2021–30.

[1852] Sec. 4.09 of Rev. Proc. 2021–30.

[1853] Sec. 5.01(3)(c) and 5.02(4) of Rev. Proc. 2021–30, 2021–31 I.R.B. 172, August 2, 2021.

[1854] Sec. 6.06(3) and sec. 2.05 of Appendix B of Rev. Proc. 2021–30. The funding exception correction method and the contribution credit correction method were added to EPCRS by Rev. Proc. 2021–30.

[1855] Sec. 6.02 of Rev. Proc. 2021–30.

[1856] Under sec. 436.

and declining, or endangered status,[1857] determined at the date of correction). Future benefit payments to an overpayment recipient must be reduced to the correct benefit payment amount. No further corrective payments from an overpayment recipient or any other party are required or permitted and no further reductions to future benefit payments to an overpayment recipient, or any spouse or beneficiary of an overpayment recipient, are permitted.

Under the contribution credit correction method, the amount of overpayments required to be repaid to the plan is the amount of the overpayments reduced (but not below zero) by: (A) the cumulative increase in the plan's minimum funding requirements attributable to the overpayments (including the increase attributable to the overstatement of liabilities, whether funded through cash contributions or through the use of a funding standard carryover balance, prefunding balance, or funding standard account credit balance), beginning with (1) the plan year for which the overpayments are taken into account for funding purposes, through (2) the end of the plan year preceding the plan year for which the corrected benefit payment amount is taken into account for funding purposes; and (B) certain additional contributions in excess of minimum funding requirements paid to the plan after the first of the overpayments was made. This reduction is referred to as a "contribution credit." Future benefit payments to an overpayment recipient must be reduced to the correct benefit payment amount. For purposes of EPCRS, if the amount of the overpayments is reduced to zero after the contribution credit is applied, no further corrective payments from any party are required, no further reductions to future benefit payments to an overpayment recipient, or any spouse or beneficiary of an overpayment recipient, are permitted, and no further corrective payments from an overpayment recipient, or any spouse or beneficiary of an overpayment recipient, are permitted. However, if a net overpayment remains after the application of the contribution credit, the plan sponsor or another party must take further action to reimburse the plan for the remainder of the overpayment.

Overpayments from defined contribution plans

An overpayment from a defined contribution plan or section 403(b) plan is generally corrected by plan amendment to conform the plan to the plan's operation, subject to the requirements of EPCRS.[1858] If the overpayment is not corrected by plan amendment, the plan sponsor may correct the overpayment in accordance with the return of overpayment correction method.[1859] Depending on the nature of the overpayment, other appropriate correction methods may be used. An appropriate correction method may include using rules similar to those described in EPCRS, but having the employer or another person contribute the amount of the overpayment (with the appropriate interest) to the plan instead of seeking recoupment from an overpayment recipient. Any other correc-

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[1857] As defined in sec. 432.
[1858] See secs. 6.06(4) and 2.04 of Appendix B of Rev. Proc. 2021–30.
[1859] Sec. 6.06(4)(c) of Rev. Proc. 2021–30.

tion method used must satisfy the correction principles [1860] and any other applicable EPCRS rules.

The employer must generally notify the employee that the overpayment is not eligible for favorable tax treatment accorded to distributions from an eligible retirement plan (and specifically, is not eligible for tax-free rollover).

However, if the total amount of an overpayment to a participant or beneficiary is $250 or less, the plan sponsor is not required to seek the return of the overpayment from the participant or beneficiary and the plan sponsor is not required to notify the participant or beneficiary that the overpayment is not eligible for favorable tax treatment accorded to distributions from the plan (and specifically, is not eligible for tax-free rollover).

PBGC overpayment recoupment policy

Private defined benefit plans are covered by the PBGC insurance program, under which PBGC guarantees the payment of certain plan benefits, and plans are required to pay annual premiums to PBGC.[1861] Single-employer and multiple employer plans, including CSEC plans, are subject to the same PBGC premium requirements, consisting of flat-rate, per participant premiums and variable rate premiums, based on the unfunded vested benefits under the plan. For 2022, flat-rate premiums are $88 per participant, and variable rate premiums are $48 for each $1,000 of unfunded vested benefits, subject to a limit of $598 multiplied by the number of plan participants.[1862] For this purpose, unfunded vested benefits under a plan for a plan year are the excess (if any) of (1) the plan's funding target for the plan year, determined by taking into account only vested benefits and using specified interest rates, over (2) the fair market value of plan assets.

If at any time, PBGC determines that net benefits paid to a participant in a PBGC-trusteed plan exceed the total amount to which the participant or beneficiary is entitled up to that time under Title IV of ERISA, and the participant or beneficiary is, as of the plan termination date, entitled to receive future benefits, PBGC will recoup the net overpayment by calculating a monthly account balance for each month ending after the termination date. PBGC will subtract from the account balance the amount of overpayments made in that month. Only overpayments made on or after the latest of the proposed termination date, the termination date, or, if no notice of intent to terminate was issued, the date on which proceedings to terminate the plan are instituted by PBGC are taken into account.

PBGC will recoup net overpayments of benefits by reducing the amount of each future benefit payment to which the participant or beneficiary is entitled by a fraction which is determined by dividing the amount of the net overpayment by the present value of the benefit payable with respect to the participant or beneficiary under Title IV of ERISA. PBGC will reduce benefits to a participant or beneficiary by no more than the greater of (1) 10 percent per month

[1860] As set forth in sec. 6.02 of Rev. Proc. 2021–30.

[1861] Title IV of ERISA.

[1862] These premium rates have been increased several times by legislation since 2005 and are subject to automatic increases to reflect inflation (referred to as "indexing").

or (2) the amount of benefit per month in excess of the maximum guaranteed benefit payable under ERISA, determined without adjustment for age and benefit form. Before making a benefit reduction, PBGC will notify the participant or beneficiary in writing of the amount of the net overpayment and of the amount of the reduced benefit. PBGC may, in its discretion, decide not to recoup net overpayments that it determines to be de minimis.

Explanation of Provision

Overpayments under the Code

Under the provision, a plan will not fail to be treated as a qualified plan, section 403(a) annuity, section 403(b) tax sheltered annuity or a governmental plan[1863] (and will not fail to be treated as satisfying the requirements of section 401 or 403) merely because (1) the plan fails to obtain payment from any participant, beneficiary, employer, plan sponsor, fiduciary, or other party on account of any inadvertent benefit overpayment made by the plan or (2) the plan sponsor amends the plan to increase past, or decrease future, benefit payments to affected participants and beneficiaries in order to adjust for prior inadvertent benefit overpayments. Notwithstanding the foregoing, the plan may instead reduce future benefit payments to the correct amount provided for under the terms of the plan or seek recovery from the person or persons responsible for the overpayment. Even if an employer decides not to recover an overpayment, nothing in this provision relieves that employer of any obligation imposed upon it to make contributions to a plan to satisfy the minimum funding requirements[1864] or to prevent or restore an impermissible forfeiture.[1865] In addition, the plan must observe any salary, compensation, or benefit limitations imposed upon it,[1866] and may enforce such limitations using any method approved by the Secretary for recouping benefits previously paid or allocations previously made in excess of such limitations.

The Secretary may issue regulations or other guidance of general applicability specifying how benefit overpayments and their recoupment or non-recoupment from a participant or beneficiary are to be taken into account for purposes of satisfying any requirement applicable to such a plan.

Rollovers

In the case of an inadvertent benefit overpayment from a plan which is transferred to an eligible retirement plan by or on behalf of a participant or beneficiary, (1) the portion of the overpayment with respect to which recoupment is not sought on behalf of the plan will be treated as having been paid in an eligible rollover distribution if the payment would have been an eligible rollover distribution but for being an overpayment, and (2) the portion of such overpayment with respect to which recoupment is sought on behalf of the plan will be permitted to be returned to the plan, and in such case, will be treated as an eligible rollover distribution trans-

[1863] Under section 219(g)(5)(A)(i), (ii), (iii) or (iv).
[1864] Under sections 412 and 430.
[1865] In accordance with section 411.
[1866] Secs. 401(a)(17) and 415.

ferred to such plan by the participant or beneficiary who received the overpayment (and the plans making and receiving such transfer will be treated as permitting such transfer).

Overpayments under ERISA

Fiduciary duties

Under the provision, in the case of an inadvertent benefit overpayment by any pension plan, the responsible plan fiduciary will not be considered to have failed to comply with its fiduciary responsibilities merely because such fiduciary determines, in the exercise of its fiduciary discretion, not to seek recovery of all or part of such overpayment from:

- Any participant or beneficiary;
- Any plan sponsor of, or contributing employer to, (a) an individual account plan, provided that the amount needed to prevent or restore any impermissible forfeiture from any participant's or beneficiary's account arising in connection with the overpayment is, separately from and independently of the overpayment, allocated to such account pursuant to the nonforfeitability requirements of ERISA[1867] (for example, out of the plan's forfeiture account, additional employer contributions, or recoveries from those responsible for the overpayment), or (b) a defined benefit pension plan subject to the funding rules of ERISA,[1868] unless the responsible plan fiduciary determines, in the exercise of its fiduciary discretion, that failure to recover all or a part of the overpayment faster than required under such funding rules would materially affect the plan's ability to pay benefits due to other participants and beneficiaries; or
- Any fiduciary of the plan, other than a fiduciary (including a plan sponsor or contributing employer acting in a fiduciary capacity) whose breach of its fiduciary duties resulted in such overpayment, provided that if the plan has established prudent procedures to prevent and minimize overpayment of benefits and the relevant plan fiduciaries have followed such procedures, an inadvertent benefit overpayment will not give rise to a breach of fiduciary duty. Notwithstanding the foregoing, the responsible plan fiduciary may instead reduce future benefit payments to the correct amount provided for under the terms of the plan or seek recovery from the person or persons responsible for the overpayment.

Even if an employer decides not to recover an overpayment, nothing in this provision relieves that employer of any obligation imposed upon it to make contributions to a plan to satisfy the minimum funding requirements[1869] or to prevent or restore an impermissible forfeiture.[1870]

Conditions imposed upon recoupment

If the responsible plan fiduciary, in the exercise of its fiduciary discretion, decides to seek recoupment from a participant or bene-

[1867] Sec. 203 of ERISA.
[1868] In part 3 of subtitle B of ERISA.
[1869] Under part 3 of Subtitle B of Title I of ERISA.
[1870] In accordance with section 203 of ERISA.

ficiary of all or part of an inadvertent benefit overpayment made by the plan to such participant or beneficiary, it may do so, subject to the following conditions:

1. No interest or other additional amounts (such as collection costs or fees) are sought on overpaid amounts;

2. If the plan seeks to recoup past overpayments of a non-decreasing annuity

- By reducing future benefit payments:
  - The reduction ceases after the plan has recovered the full dollar amount of the overpayment;
  - The amount recouped each calendar year does not exceed 10 percent of the full dollar amount of the overpayment; and
  - Future benefit payments are not reduced to below 90 percent of the periodic amount otherwise payable under the terms of the plan;
- Or, alternatively, by reducing future benefit payments through one or more installment payments:
  - The sum of such installment payments in any calendar year does not exceed the sum of the reductions that would be permitted in such year by reducing future benefits;

3. If the plan seeks to recoup past overpayments of a benefit other than a non-decreasing annuity, the plan satisfies requirements developed by the Secretary of Labor;

4. Efforts to recoup overpayments are (1) not accompanied by threats of litigation, unless the responsible plan fiduciary makes a determination that there is a reasonable likelihood of success to recover an amount greater than the cost of recovery, and (2) not made through a collection agency or similar third party, unless the participant or beneficiary ignores or rejects efforts to recoup the overpayment following either a final judgment in Federal or State Court or a settlement between the participant or beneficiary and the plan, in either case authorizing such recoupment;

5. Recoupment of past overpayments to a participant is not sought from any beneficiary of the participant, including a spouse, surviving spouse, former spouse, or other beneficiary;

6. Recoupment may not be sought if the first overpayment occurred more than three years before the participant or beneficiary is first notified in writing of the error, except in the case of fraud or misrepresentation by the participant;

7. A participant or beneficiary from whom recoupment is sought is entitled to contest all or part of the recoupment pursuant to the plan's claims and appeals procedures to the extent the plan's claims procedures are consistent with ERISA;[1871]

8. In the case of an inadvertent benefit overpayment that is transferred to another eligible retirement plan[1872] by or on behalf of a participant or beneficiary, that plan will notify the plan receiving the rollover of the dispute, the plan receiving the rollover will retain the overpayment on behalf of the participant or beneficiary (and will be entitled to treat the overpayment as plan assets) pend-

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[1871] Under section 503 of ERISA.
[1872] As defined in section 402(c)(8)(B).

ing the outcome of the procedures, and the portion of such overpayment with respect to which recoupment is sought on behalf of the plan will be permitted to be returned to the plan that made the overpayment if it is determined to be an overpayment (and the plans making and receiving such transfer are treated as permitting such transfer); and

9. In determining the amount of recoupment to seek, the responsible plan fiduciary may take into account the hardship that recoupment likely would impose on the participant or beneficiary.

Conditions (1) through (6) do not apply to protect a participant or beneficiary who is culpable. For purposes of this rule, a participant or beneficiary is culpable if the individual bears responsibility for the overpayment (such as through misrepresentations or omissions that led to the overpayment) or if the individual knew that the benefit payment or payments were materially in excess of the correct amount. Notwithstanding the preceding sentence, an individual is not culpable merely because the individual believed the benefit payment or payments were or might be in excess of the correct amount if the individual raised that question with an authorized plan representative and was told the payment or payments were not in excess of the correct amount.

Effective Date

The provision applies as of the date of enactment (December 29, 2022).

Plans, fiduciaries, employers, and plan sponsors are entitled to rely on (1) a reasonable good faith interpretation of then existing administrative guidance for inadvertent benefit overpayment recoupments and recoveries that commenced before the date of enactment and (2) determinations made before the date of enactment by the responsible plan fiduciary, in the exercise of its fiduciary discretion, not to seek recoupment or recovery of all or part of an inadvertent benefit overpayment.

In the case of a benefit overpayment that occurred prior to the date of enactment, any installment payments by the participant or beneficiary to the plan or any reduction in periodic benefit payments to the participant or beneficiary, which were made in recoupment of such overpayment and which commenced prior to such date, may continue after such date. Nothing in this subsection relieves a fiduciary from responsibility for an overpayment that resulted from a breach of its fiduciary duties.

2. Reduction in excise tax on certain accumulations in qualified retirement plans (sec. 302 of the Act and sec. 4974 of the Code)

Present Law

For background on required minimum distributions under qualified retirement plans, see the present law description of section 107 of the Act.

The Code imposes an excise tax on an individual if the amount distributed to an individual during a taxable year is less than the required minimum distribution under the plan for that year.[1873] The excise tax is equal to 50 percent of the shortfall (that is, 50 percent of the amount by which the required minimum distribution exceeds the actual distribution). However, the Secretary may waive the tax if the individual establishes that the shortfall was due to reasonable error and reasonable steps are taken to remedy the error.

Explanation of Provision

The provision reduces the excise tax that generally applies to the failure to take required minimum distributions from 50 percent of the shortfall to 25 percent.

In addition, the provision further reduces the excise tax to 10 percent in the case of a taxpayer who receives a distribution during the correction window of the amount which resulted in the imposition of the excise tax from the same plan to which the excise tax relates, and who submits a return during the correction window reflecting the 10 percent excise tax. The correction window is defined as the time period beginning on the date on which the excise tax is imposed with respect to a shortfall of distributions from a qualified retirement plan or eligible deferred compensation plan,[1874] and ending on the earliest of (1) the date of mailing a notice of deficiency[1875] with respect to the excise tax imposed under this section, (2) the date on which the excise tax imposed under this section is assessed, or (3) the last day of the second taxable year that begins after the end of the taxable year in which the excise tax is imposed.

Effective Date

The provision applies to taxable years beginning after the date of enactment (December 29, 2022).

3. Retirement savings lost and found (sec. 303 of the Act and new sec. 523 of ERISA)

Present Law

Pension Benefit Guaranty Corporation Missing Participants Program

When a defined benefit pension plan (maintained by a single employer and subject to the plan termination insurance program under Title IV of ERISA) terminates under a standard termination, the plan administrator generally must purchase annuity contracts from a private insurer to provide the benefits to which participants are entitled and distribute the annuity contracts to the participants.

If the plan administrator of a terminating single employer plan cannot locate a participant after a diligent search (has a "missing participant"), the plan administrator may satisfy the distribution requirement only by purchasing an annuity from an insurer or transferring the participant's designated benefit to PBGC. PBGC

[1873] Sec. 4974.
[1874] As defined in section 457(b).
[1875] Pursuant to section 6212.

holds the benefit of the missing participant as trustee until PBGC locates the missing participant and distributes the benefit.[1876]

Pursuant to the Pension Protection Act of 2006,[1877] PBGC prescribed rules for terminating multiemployer plans similar to the missing participant rules applicable to terminating single employer plans subject to Title IV of ERISA. In addition, plan administrators of certain types of plans not otherwise subject to the PBGC termination insurance program are permitted, but not required, to elect to transfer missing participants' benefits to PBGC upon plan termination. Specifically, the provision extends the missing participants program (in accordance with regulations) to defined contribution plans,[1878] defined benefit pension plans that have no more than 25 active participants and are maintained by professional service employers, and the portion of defined benefit pension plans that provide benefits based upon the separate accounts of participants and therefore are treated as defined contribution plans under ERISA.

On December 22, 2017, PBGC established the PBGC Defined Contribution Missing Participants Program ("Missing Participants Program") to hold retirement benefits for missing participants and beneficiaries in most terminated defined contribution plans and to help those participants and beneficiaries find and receive those benefits.[1879]

Department of Labor

A fiduciary safe harbor[1880] may apply with respect to distributions from terminated individual account plans[1881] and abandoned plans[1882] on behalf of participants and beneficiaries who fail to make an election regarding a form of benefit distribution, including "missing participants." The safe harbor generally requires that distributions be rolled over to an individual retirement account or annuity (IRA), although in limited circumstances fiduciaries may make distributions to certain bank accounts or to a state unclaimed property fund. If the conditions of the safe harbor are met, a fiduciary (including a Qualified Termination Administrator ("QTA") in the case of an abandoned plan) is deemed to have satisfied the requirements of section 404(a) of ERISA with respect to distributing benefits, selecting a transferee entity, and investing funds in connection with the distribution.

DOL consulted with PBGC during PBGC's development of its Missing Participants Program. As noted in the preamble to the final rule adopting the Missing Participants Program, DOL may revise its fiduciary safe harbor regulation so that transfers to the PBGC by terminating individual account plans would be eligible for relief under the safe harbor.

[1876] Sec. 4041(b)(3)(A); sec. 4050 of ERISA.

[1877] Pub. L. No. 109–280, August 17, 2006.

[1878] The Missing Participants program for Defined Contribution plans covers common types of defined contribution pension plans; specifically section 401(k) plans, profit sharing plans, money purchase plans, target benefit plans, employee stock ownership plans, stock bonus plans, and section 403(b)(7) plans subject to Title I of ERISA. Some examples of plans not covered are governmental plans, church plans, and plans that cannot pay benefits to PBGC in cash. See 29 C.F.R. sec. 4050.201.

[1879] 29 C.F.R. sec. 4050.201–207.1.

[1880] 29 C.F.R. sec. 2550.404a–3.

[1881] Sec. 3(34) of ERISA.

[1882] As described in 29 C.F.R. sec. 2578.1.

On January 12, 2021, DOL issued Field Assistance Bulletin 2021–01[1883] in which it announced that pending further guidance, DOL will not pursue fiduciary violations against either responsible plan fiduciaries of terminating defined contribution plans or QTAs of abandoned plans[1884] in connection with the transfer of a missing or non-responsive participant's or beneficiary's account balance to PBGC in accordance with the PBGC's missing participant regulations (rather than to an IRA, certain bank accounts, or to a state unclaimed property fund),[1885] if the plan fiduciary or QTA complies with the guidance in the Bulletin and has acted in accordance with a good faith, reasonable interpretation of the fiduciary rules under ERISA[1886] with respect to matters not specifically addressed in the guidance.

Mandatory rollovers

If a qualified retirement plan participant ceases to be employed by the employer that maintains the plan, the plan may distribute the participant's nonforfeitable accrued benefit without the consent of the participant and, if applicable, the participant's spouse, if the present value of the benefit does not exceed $5,000.[1887] If such an involuntary distribution occurs and the participant subsequently returns to employment covered by the plan, then service taken into account in computing benefits payable under the plan after the return need not include service with respect to which a benefit was involuntarily distributed unless the employee repays the benefit.

Generally, a participant may roll over an involuntary distribution from a qualified plan to an IRA or to another qualified plan. Before making a distribution that is eligible for rollover, a plan administrator must provide the participant with a written explanation of the ability to have the distribution rolled over directly to an IRA or another qualified plan and the related tax consequences.

A direct rollover is the default option for involuntary distributions that exceed $1,000 and that are eligible rollover distributions from qualified retirement plans. The distribution must be rolled over automatically to a designated IRA, unless the participant affirmatively elects to have the distribution transferred to a different IRA or a qualified plan or to receive it directly. The written explanation provided by the plan administrator is required to explain that an automatic direct rollover will be made unless the participant elects otherwise. The plan administrator is also required to notify the participant in writing (as part of the general written explanation or separately) that the distribution may be transferred without cost to another IRA.

Under the fiduciary rules of ERISA, in the case of an automatic direct rollover, the participant is treated as exercising control over the assets in the IRA upon the earlier of: (1) the rollover of any portion of the assets to another IRA or (2) one year after the automatic rollover.

[1883] Field Assistance Bulletin 2021–01 can be found at: https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2021-01.

[1884] As described in 29 C.F.R. sec. 2578.1.

[1885] As specified in 29 C.F.R. sec. 2550.404a–3.

[1886] Sec. 404 of ERISA.

[1887] Section 304 of the Act increased the dollar amount from $5,000 to $7,000. A description of that provision may be found in section 304 of this Act.

Lost and Found

Under present law, there is not a "Lost and Found" database to collect information on benefits owed to missing, lost, or non-responsive participants and beneficiaries in tax-qualified retirement plans (other than terminated plans) and to assist such plan participants and beneficiaries in locating those benefits.

Explanation of Provision

Establishment of the Lost and Found

Under the provision, not later than two years after the date of enactment, the Secretary of Labor, in consultation with the Secretary, will establish an online searchable database to be managed by the Secretary of Labor, to be known as the Retirement Savings Lost and Found (the "Lost and Found"), containing information on plans that are subject to the vesting standards under ERISA,[1888] as well as certain additional information related to the location of certain unclaimed vested benefits of missing, lost, and non-responsive participants and beneficiaries in such plans.[1889]

Purposes of the Lost and Found

The Lost and Found will (1) allow an individual to search for information that enables the individual to locate the administrator of any plan which is subject to the vesting requirements under ERISA[1890] with respect to which the individual is or was a participant or beneficiary, and provide contact information for the administrator of any such plan, (2) allow the Secretary of Labor to assist such an individual in locating any such plan of the individual, and (3) allow the Secretary to make any necessary changes to contact information on record for the administrator based on any changes to such plans including those arising due to merger or consolidation of the plan with any other plan, division of the plan into two or more plans, bankruptcy, termination, change in name of the plan, change in name or address of the administrator, or other causes.

Administration

The Lost and Found shall provide individuals only with the ability to search for information that enables the individual to locate the administrator[1891] and contact information for the administrator of any plan with respect to which the individual is or was a participant or beneficiary, sufficient to allow the individual to locate the individual's plan in order to make a claim for benefits owing to the individual under the plan.

Safeguarding participant privacy and security

In establishing the Lost and Found, the Secretary of Labor, in consultation with the Secretary, must take all necessary and proper precautions to (1) ensure that individuals' plan and personal information maintained by the Lost and Found is protected and (2)

[1888] Sec. 203 of ERISA.
[1889] Tax-qualified defined benefit and defined contribution plans (as set forth in 29 C.F.R. sec. 4050.201) that are subject to the vesting standards contained in section 203 of ERISA.
[1890] Section 203 of ERISA.
[1891] Administrator is defined in section 3(16)(A) of ERISA.

allow any individual to contact the Secretary of Labor to opt out of inclusion in the Lost and Found.

Information collection from plans

Under the provision, effective with respect to plan years beginning after the second December 31 occurring after the date of enactment, the administrator of a plan to which the vesting standards of ERISA apply [1892] must submit to the Secretary of Labor, at such time and in such form and manner as prescribed in regulations: [1893]

- The name of the plan;
- The name and address of the plan administrator;
- Any change in the name of the plan;
- Any change in the name or address of the plan administrator;
- The termination of the plan;
- The merger or consolidation of the plan with any other plan or its division into two or more plans;
- The name and taxpayer identifying number of each participant or former participant in the plan:
    - Who, during the current plan year or any previous plan year, was reported to IRS [1894] as a separated participant with a deferred vested benefit that had not been paid as of the end of the previous plan year, and with respect to whom such benefit was fully paid during the plan year;
    - With respect to whom any amount was distributed as a mandatory distribution during the plan year; or
    - With respect to whom a deferred annuity contract was distributed during the plan year;
- In the case of a participant or former participant whose benefit was distributed as a mandatory distribution during the plan year, the name and address of the designated trustee or issuer and the account number of the individual retirement plan to which the amount was distributed; and
- In the case of a participant or former participant to whom a deferred annuity contract was distributed during the plan year, the name and address of the issuer of such annuity contract and the contract or certificate number.

Use of information collected

The Secretary of Labor may only use or disclose such information collected from plans for the purposes of assisting an individual in locating the individual's plan (using the Lost and Found). The Secretary of Labor may disclose such information only to such employees of the Department of Labor whose official duties relate to such purposes.

[1892] Sec. 203 of ERISA.

[1893] Because this reporting begins approximately two years after the date of enactment, unless the Office of the Lost and Found prescribes otherwise, this information will only be provided to the Office of the Lost and Found prospectively.

[1894] Under sec. 6057.

Program integrity audit

On an annual basis for each of the first five years beginning one year after the establishment of the Lost and Found and every five years thereafter, the Inspector General of the Department of Labor must:

- Conduct an audit of the administration of the Lost and Found; and
- Submit a report on such audit to the Committee on Health, Education, Labor and Pensions and the Committee on Finance of the Senate, and the Committee on Ways and Means and the Committee on Education and Labor of the House of Representatives.

Effective Date

The provision is generally effective on the date of enactment (December 29, 2022).

4. Updating the dollar limit for mandatory distributions (sec. 304 of the Act, sec. 401(a)(31) of the Code, and sec. 203(e)(1) of ERISA)

Present Law

Mandatory distributions

If a qualified retirement plan participant ceases to be employed by the employer that maintains the plan, the plan may distribute the participant's nonforfeitable accrued benefit without the consent of the participant and, if applicable, the participant's spouse, provided that the present value of the benefit does not exceed $5,000. If such an involuntary distribution occurs and the participant subsequently returns to employment covered by the plan, then service taken into account in computing benefits payable under the plan after the return need not include service with respect to which a benefit was involuntarily distributed unless the employee repays the benefit.

Generally, a participant may roll over an involuntary distribution from a qualified plan to an IRA or to another qualified plan. Before making a distribution that is eligible for rollover, a plan administrator must provide the participant with a written explanation of the ability to have the distribution rolled over directly to an IRA or another qualified plan and the related tax consequences.

A direct rollover is the default option for involuntary distributions that exceed $1,000 and that are eligible rollover distributions from qualified retirement plans. The distribution must be rolled over automatically to a designated IRA, unless the participant affirmatively elects to have the distribution transferred to a different IRA or a qualified plan or to receive it directly. The written explanation provided by the plan administrator is required to explain that an automatic direct rollover will be made unless the participant elects otherwise. The plan administrator is also required to notify the participant in writing (as part of the general written explanation or separately) that the distribution may be transferred without cost to another IRA.

Under the fiduciary rules of ERISA, in the case of an automatic direct rollover, the participant is treated as exercising control over the assets in the IRA upon the earlier of: (1) the rollover of any portion of the assets to another IRA or (2) one year after the automatic rollover.

Explanation of Provision

The provision increases the limit for a mandatory distribution from $5,000 to $7,000.[1895]

Effective Date

The provision applies to distributions made after December 31, 2023.

5. Expansion of Employee Plans Compliance Resolution System (sec. 305 of the Act, and secs. 401, 403, and 408 of the Code)

Present Law

Employee Plans Compliance Resolution System

For background on the Employee Plans Compliance Resolution System ("EPCRS"), see the present law description of section 301 of the Act.

Loans

EPCRS is available for plan loans that do not comply with one or more Code requirements[1896] (for example, the amount of the loan must not exceed the lesser of 50 percent of the participant's account balance or $50,000[1897] (generally taking into account outstanding balances of previous loans)); the terms of the loan must provide for a repayment period of not more than five years[1898] and provide for level amortization of loan payments (with payments not less frequently than quarterly); and the terms of the loan must be legally enforceable) and such errors may be corrected through VCP or Audit CAP.[1899]

Unless correction is made, a deemed distribution[1900] in connection with a failure relating to a loan to a participant made from a plan must be reported[1901] with respect to the affected participant and any applicable income tax withholding amount that was required to be paid in connection with the failure must be paid by

[1895] Section 120 of this Act which provides an exemption for certain automatic portability transactions, also modifies section 401(a)(31).

[1896] See sec. 72(p)(2).

[1897] There are certain exceptions to these rules for loans, for example, individuals eligible to receive a coronavirus-related distribution under section 2202 of the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116–136, March 27, 2020, may take a loan during a specified period of time equal to the lesser of the present value of the nonforfeitable accrued benefit of the employee under the plan or $100,000 and certain other rules apply to such loans. Special rules for loans also apply for certain individuals impacted by specified disasters, see, *e.g.*, section 302 of Div. EE of the Consolidated Appropriations Act, 2021, Pub. L. No. 116–260, December 27, 2020. Also see the description of section 331 of the Act, "Special rules for use of retirement funds in connection with qualified federally declared disasters."

[1898] Loans specifically for home purchases may be repaid over a longer period.

[1899] Sec. 6.07 of Rev. Proc. 2021–30.

[1900] Under section 72(p)(1).

[1901] On IRS Form 1099-R.

the employer. As part of VCP and Audit CAP, the deemed distribution may be reported with respect to the affected participant for the year of correction (instead of the year of the failure) if the plan sponsor requests such reporting relief. Where certain requirements in EPCRS are met, no reporting may be required but this relief applies only if the plan sponsor requests the relief and provides an explanation supporting the request.

Voluntary Fiduciary Correction Program

DOL also has a correction program entitled the Voluntary Fiduciary Correction Program ("VFCP"),[1902] under ERISA[1903] designed to encourage the voluntary correction of fiduciary violations under Title I of ERISA. VFCP also provides for the correction of certain participant loan failures including situations where participant loans exceed the Code section 72(p) limitations on amount or duration.

IRAs

The current EPCRS program does not provide corrections for individual IRAs although it does provide for certain corrections for SIMPLE and SEP plans. SCP and VCP[1904] are available to a SEP or SIMPLE plan.[1905] SCP is only available to such a plan to correct insignificant operational failures,[1906] and only if the SEP or SIMPLE plan is established and maintained on a document approved by the IRS.

Explanation of Provision

In general

Under the provision, except as otherwise set forth in the Code, regulations or other guidance prescribed by the Secretary (or the Secretary's delegate), any eligible inadvertent failure to comply with the rules applicable to certain tax-qualified retirement plans[1907] may be self-corrected under EPCRS,[1908] except to the extent that (1) such failure was identified by the Secretary prior to any actions which demonstrate a specific commitment by the plan to implement a self-correction with respect to such failure or (2) the self-correction is not completed within a reasonable period after such failure is identified. As of the date of the enactment of this Act, EPCRS is deemed amended to provide that the correction period[1909] for an eligible inadvertent failure, except as otherwise provided under the Code or in regulations prescribed by the Secretary, is indefinite and has no last day (other than with respect to failures identified by the Secretary prior to any actions as noted in (1) and (2) above).[1910]

[1902] 71 Fed. Reg. 20261, April 19, 2006.
[1903] Pub. L. No. 93–406, Sept. 2, 1974.
[1904] Sec. 6.11 of Rev. Proc. 2021–30, 2021–31 I.R.B. 172, August 2, 2021.
[1905] Secs. 1.01 and 1.02 of Rev. Proc. 2021–30. A SEP is a plan intended to satisfy the requirements of Code section 408(k); a SIMPLE plan is a plan intended to satisfy the requirements of Code section 408(p). Secs. 5.06 and 5.07 of Rev. Proc. 2021–30.
[1906] Sec. 4.01(c) of Rev. Proc. 2021–30.
[1907] Under sections 401(a), 403(a), 403(b), 408(p), or 408(k).
[1908] For purposes of this provision, references to corrections under EPCRS refer to those described under Rev. Proc. 2021–30 or any successor guidance.
[1909] Under sec. 9.02 of Rev. Proc. 2021–30 or any successor guidance.
[1910] See Notice 2023–43, 2023–24 I.R.B. 919, June 12, 2023.

Loan errors

Under this provision, in the case of an eligible inadvertent plan loan error:

- Such failure may be self-corrected according to the rules of EPCRS,[1911] including the provisions related to whether a deemed distribution must be reported on Form 1099-R (rather than being corrected in VCP or Audit CAP);
- The Secretary of Labor must treat any such failure which is self-corrected under this provision as meeting the requirements of VFCP if, with respect to the violation of the fiduciary standards of ERISA, there is a similar loan error eligible for correction under EPCRS and the loan error is corrected in such manner; and
- The Secretary of Labor may impose reporting or other procedural requirements with respect to parties that intend to rely on VFCP for the self-correction.

IRAs

The provision also directs the Secretary to expand EPCRS to allow custodians of IRAs[1912] to address eligible inadvertent failures with respect to an IRA, including, but not limited to:

- Waivers of the excise tax[1913] that would otherwise apply to certain accumulations in an IRA where the amount distributed during a taxable year of a participant or beneficiary is less than the minimum required distribution for such taxable year; and
- Rules permitting a nonspouse beneficiary to return distributions to an inherited individual IRA[1914] where, due to an inadvertent error by a service provider, the beneficiary had reason to believe that the distribution could be rolled over without inclusion in income of any part of the distributed amount.

Correction methods for eligible inadvertent failures

The Secretary is directed to issue guidance on correction methods that are required to be used to correct eligible inadvertent failures, including general principles of correction if a specific correction method is not specified by the Secretary.

The Secretary (or the Secretary's delegate) must revise the current EPCRS guidance[1915] (or any successor guidance) to take into account the changes made by this provision not later than the date which is two years after the date of enactment.

Definition of eligible inadvertent failure

An eligible inadvertent failure means a failure that occurs despite the existence of practices and procedures which either (1) satisfy the standards set forth in EPCRS[1916] or (2) satisfy similar

[1911] According to the rules of section 6.07 of Rev. Proc. 2021–30 (or any successor guidance).
[1912] As defined in section 7701(a)(37).
[1913] Sec. 4974.
[1914] As described in section 408(d)(3)(C).
[1915] Rev. Proc. 2021–30.
[1916] Sec. 4.04 of Rev. Proc. 2021–30 (or any successor guidance). Section 4.04 provides that the plan sponsor or plan administrator has established practices and procedures in place which

Continued

standards in the case of an individual retirement plan. However, an eligible inadvertent failure does not include any failure which is egregious, relates to the diversion or misuse of plan assets, or is directly or indirectly related to an abusive tax avoidance transaction.

This provision does not apply to any such failure unless the correction is made in conformity with the general principles that apply to corrections of such failures under the Code, including regulations, or other guidance issued thereunder and including those principles and corrections set forth in EPCRS.

Effective Date

The provision is effective on the date of enactment (December 29, 2022).

6. Eliminate the "first day of the month" requirement for governmental section 457(b) plans (sec. 306 of the Act and sec. 457(b) of the Code)

Present Law

Section 457(b) plans

Among the various types of tax-favored retirement plans under present law are eligible deferred compensation plans under section 457(b). A section 457(b) plan is a plan maintained by a State or local government or a tax-exempt organization that meets certain requirements. Generally, the maximum amount that can be deferred under a section 457(b) plan by an individual during any taxable year is limited to the lesser of 100 percent of the participant's includible compensation or the applicable dollar amount for the taxable year. The applicable dollar amount for 2022 is $20,500 and is indexed for inflation. For an employee who attains age 50 by the end of the year, the dollar limit on deferrals is increased by $6,500 (for 2022) (called catch-up contributions).[1917] A participant's includible compensation means the compensation of the participant from the eligible employer for the taxable year.

One of the requirements to be an eligible deferred compensation plan under section 457(b) is that a participant's compensation is deferred for any calendar month only if an agreement providing for such deferral has been entered into before the beginning of such month.[1918]

Explanation of Provision

The provision provides that compensation is deferred under a governmental section 457(b) plan only if an agreement providing for such deferral has been entered into before the compensation is currently available to the individual, consistent with the rule for section 401(k) and 403(b) plans. In the case of a section 457(b) plan maintained by a tax-exempt organization, the provision provides

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are reasonably designed to promote and facilitate overall compliance in form and operation with applicable Code provisions and such practices and procedures have been in place and are routinely followed.

[1917] Sec. 414(v).

[1918] Sec. 457(b)(4).

that compensation is deferred under the plan for a calendar month only if an agreement providing for such deferral has been entered into before the beginning of such month.

Effective Date

The provision applies to taxable years beginning after the date of enactment (December 29, 2022).

7. One-time election for qualified charitable distribution to split-interest entity; increase in qualified charitable distribution limitation (sec. 307 of the Act and sec. 408(d)(8) of the Code)

Present Law

In general

If an amount withdrawn from a traditional individual retirement arrangement ("IRA") or a Roth IRA is donated to a charitable organization, the rules relating to the tax treatment of withdrawals from IRAs apply to the amount withdrawn, and the charitable contribution is subject to the normally applicable limitations on deductibility of such contributions. An exception applies in the case of a qualified charitable distribution.

Charitable contributions

In computing taxable income, an individual taxpayer who itemizes deductions generally is allowed to deduct the amount of cash and up to the fair market value of property contributed to the following entities: (1) a charity described in section 170(c)(2); (2) certain veterans' organizations, fraternal societies, and cemetery companies;[1919] and (3) a Federal, State, or local governmental entity, but only if the contribution is made for exclusively public purposes.[1920] The deduction also is allowed for purposes of calculating alternative minimum taxable income.

The amount of the deduction allowable for a taxable year with respect to a charitable contribution of property may be reduced depending on the type of property contributed, the type of charitable organization to which the property is contributed, and the income of the taxpayer.[1921]

A taxpayer who takes the standard deduction (i.e., who does not itemize deductions) generally may not take a separate deduction for charitable contributions.[1922]

A payment to a charity (regardless of whether it is termed a "contribution") in exchange for which the donor receives an economic benefit is not deductible, except to the extent that the donor can demonstrate, among other things, that the payment exceeds the fair market value of the benefit received from the charity. To facilitate distinguishing charitable contributions from purchases of goods or services from charities, present law provides that no charitable contribution deduction is allowed for a separate contribution

[1919] Secs. 170(c)(3)–(5).
[1920] Sec. 170(c)(1).
[1921] Secs. 170(b) and (e).
[1922] Sec. 170(a).

of $250 or more unless the donor obtains a contemporaneous written acknowledgement of the contribution from the charity indicating whether the charity provided any good or service (and an estimate of the value of any such good or service provided) to the taxpayer in consideration for the contribution.[1923] In addition, present law requires that any charity that receives a contribution exceeding $75 made partly as a gift and partly as consideration for goods or services furnished by the charity (a "quid pro quo" contribution) is required to inform the contributor in writing of an estimate of the value of the goods or services furnished by the charity and that only the portion exceeding the value of the goods or services may be deductible as a charitable contribution.[1924]

Under present law, total deductible contributions of an individual taxpayer to public charities, private operating foundations, and certain types of private nonoperating foundations generally may not exceed 50 percent of the taxpayer's contribution base, which is the taxpayer's adjusted gross income for a taxable year (disregarding any net operating loss carryback). To the extent a taxpayer has not exceeded the 50-percent limitation, (1) contributions of capital gain property to public charities generally may be deducted up to 30 percent of the taxpayer's contribution base, (2) contributions of cash to most private nonoperating foundations and certain other charitable organizations generally may be deducted up to 30 percent of the taxpayer's contribution base, and (3) contributions of capital gain property to private foundations and certain other charitable organizations generally may be deducted up to 20 percent of the taxpayer's contribution base. For taxable years beginning after December 31, 2017, and before January 1, 2026, the 50-percent limit is increased to 60 percent for contributions of cash.[1925]

Contributions by individuals in excess of the applicable limits generally may be carried over and deducted over the next five taxable years, subject to the relevant percentage limitations on the deduction in each of those years.

In general, a charitable deduction is not allowed for income, estate, or gift tax purposes if the donor transfers an interest in property to a charity (e.g., a remainder) while also either retaining an interest in that property (e.g., an income interest) or transferring an interest in that property to a noncharity for less than full and adequate consideration.[1926] Exceptions to this general rule are provided for, among other interests, remainder interests in charitable remainder trusts (discussed below), pooled income funds, and present interests in the form of a guaranteed annuity or a fixed percentage of the annual value of the property.[1927] For such interests, a charitable deduction is allowed to the extent of the present value of the interest designated for a charitable organization.

[1923] Sec. 170(f)(8). For any contribution of a cash, check, or other monetary gift, no deduction is allowed unless the donor maintains as a record of such contribution a bank record or written communication from the donee charity showing the name of the donee organization, the date of the contribution, and the amount of the contribution. Sec. 170(f)(17).

[1924] Sec. 6115.

[1925] Sec. 170(b)(1)(G).

[1926] Secs. 170(f), 2055(e)(2), and 2522(c)(2).

[1927] Sec. 170(f)(2).

Charitable remainder trusts and charitable gift annuities

Charitable remainder trusts and charitable gift annuities are arrangements under which a taxpayer contributes assets to charity (directly or through a trust) but retains an interest. As part of these arrangements, a stream of payments is guaranteed to one or more noncharitable beneficiaries (possibly including the taxpayer) over a period of time, with the remaining interest passing to charity. The taxpayer generally claims a charitable deduction for the portion of the transfer attributable to the charitable interest.

Charitable remainder trusts

A charitable remainder annuity trust is a trust that is required to pay, at least annually, a fixed dollar amount of at least five percent of the initial value of the trust to a noncharity for the life of an individual or for a period of 20 years or less, with the remainder passing to charity. A charitable remainder unitrust is a trust that generally is required to pay, at least annually, a fixed percentage of at least five percent of the fair market value of the trust's assets determined at least annually to a noncharity for the life of an individual or for a period of 20 years or less, with the remainder passing to charity.[1928]

A trust does not qualify as a charitable remainder annuity trust if the annuity for a year is greater than 50 percent of the initial fair market value of the trust's assets. A trust does not qualify as a charitable remainder unitrust if the percentage of assets that are required to be distributed at least annually is less than five percent or greater than 50 percent. A trust does not qualify as a charitable remainder annuity trust or a charitable remainder unitrust unless the present value of the remainder interest in the trust (determined at the time of the transfer to the trust under section 7520) is at least 10 percent of the value of the assets contributed to the trust.

Distributions from a charitable remainder annuity trust or charitable remainder unitrust are treated in the following order as: (1) ordinary income to the extent of the trust's current and previously undistributed ordinary income for the trust's year in which the distribution occurred, (2) capital gains to the extent of the trust's current capital gain and previously undistributed capital gain for the trust's year in which the distribution occurred, (3) other income (e.g., tax-exempt income) to the extent of the trust's current and previously undistributed other income for the trust's year in which the distribution occurred, and (4) corpus.[1929]

In general, distributions to the extent they are characterized as income are includible in the income of the beneficiary for the year that the annuity or unitrust amount is required to be distributed

[1928] Sec. 664(d). Charitable remainder annuity trusts and charitable remainder unitrusts are exempt from Federal income tax for a tax year unless the trust has any unrelated business taxable income for the year (including certain debt financed income). A charitable remainder trust that loses its exemption from income tax for a taxable year is taxed as a complex trust. As such, the trust is allowed a deduction in computing taxable income for amounts required to be distributed in a taxable year, not to exceed the amount of the trust's distributable net income for the year. Taxes imposed on the trust are required to be allocated to corpus. Treas. Reg. sec. 1.664–1(d)(2).

[1929] Sec. 664(b).

even though the annuity or unitrust amount is not distributed until after the close of the trust's taxable year.[1930]

Charitable gift annuities

A charitable gift annuity is similar in concept to a charitable remainder annuity trust, except that, under a contract between the taxpayer and a charity, the assets are transferred to the charity (not to a separate trust) in exchange for the charity's promise to make fixed annuity payments for life to the donor or to the donor and one other person.

Charitable gift annuities are not treated as commercial-type insurance for purposes of section 501(m), under which an organization is not described in section 501(c)(3) if a substantial part of its activities consists of providing commercial-type insurance.[1931]

IRA rules

Within limits, individuals may make deductible and nondeductible contributions to a traditional IRA. Amounts in a traditional IRA are includible in income when withdrawn (except to the extent the withdrawal represents a return of nondeductible contributions). Certain individuals also may make nondeductible contributions to a Roth IRA (deductible contributions cannot be made to a Roth IRA). Qualified withdrawals from a Roth IRA are excludable from gross income. Withdrawals from a Roth IRA that are not qualified withdrawals are includible in gross income to the extent attributable to earnings. Includible amounts withdrawn from a traditional IRA or a Roth IRA before attainment of age 59½ are subject to an additional 10-percent early withdrawal tax unless an exception applies. Under present law, minimum distributions are required to be made from tax-favored retirement arrangements, including IRAs. Minimum required distributions from a traditional IRA must generally begin by April 1 of the calendar year following the year in which the IRA owner attains age 72, but those rules do not apply to a Roth IRA prior to the death of the owner.[1932]

If an individual has made nondeductible contributions to a traditional IRA, a portion of each distribution from an IRA is nontaxable until the total amount of nondeductible contributions has been received. In general, the amount of a distribution that is nontaxable is determined by multiplying the amount of the distribution by the ratio of the remaining nondeductible contributions to the account balance. In making the calculation, all traditional IRAs of an individual are treated as a single IRA, all distributions during any taxable year are treated as a single distribution, and the value of the contract, income on the contract, and investment in the contract are computed as of the close of the calendar year.

In the case of a distribution from a Roth IRA that is not a qualified distribution, in determining the portion of the distribution attributable to earnings, contributions and distributions are deemed to be distributed in the following order: (1) regular Roth IRA con-

[1930] Treas. Reg. sec. 1.664–1(d)(4).
[1931] Sec. 501(m)(3)(E) and (5).
[1932] A separate provision modifies the age at which required minimum distributions must begin. See the description of section 107 of the Act. Minimum distribution rules also apply in the case of distributions after the death of a traditional or Roth IRA owner.

tributions; (2) taxable conversion contributions;[1933] (3) nontaxable conversion contributions; and (4) earnings. In determining the amount of taxable distributions from a Roth IRA, all Roth IRA distributions in the same taxable year are treated as a single distribution, all regular Roth IRA contributions for a year are treated as a single contribution, and all conversion contributions during the year are treated as a single contribution.

Distributions from an IRA (other than a Roth IRA) are generally subject to withholding unless the individual elects not to have withholding apply.[1934] Elections not to have withholding apply are to be made in the time and manner prescribed by the Secretary.

Qualified charitable distributions

Otherwise-taxable IRA distributions from a traditional or Roth IRA are excluded from gross income to the extent they are qualified charitable distributions.[1935] The exclusion may not exceed $100,000 per taxpayer per taxable year.

An individual who receives a deduction for a contribution to a traditional IRA for years ending on or after age 70½ is not eligible to exclude such amount from income as a qualified charitable distribution. Thus, the amount of qualified charitable distributions otherwise excludable from an individual's gross income for a taxable year is reduced (but not below zero) by the excess of (i) the aggregate amount of deductions allowed to the taxpayer for contributions to a traditional IRA for taxable years ending on or after the individual attains age 70½, over (ii) the aggregate amount of reductions for all taxable years preceding the current year.

Special rules apply in determining the amount of an IRA distribution that is otherwise taxable. The otherwise applicable rules regarding taxation of IRA distributions and the deduction of charitable contributions continue to apply to distributions from an IRA that are not qualified charitable distributions. A qualified charitable distribution is taken into account for purposes of the minimum distribution rules applicable to traditional IRAs to the same extent the distribution would have been taken into account under such rules had the distribution not been directly distributed under the qualified charitable distribution provision. An IRA does not fail to qualify as an IRA as a result of qualified charitable distributions being made from the IRA.

A qualified charitable distribution is any distribution from an IRA directly by the IRA trustee to an organization described in section 170(b)(1)(A) (generally, public charities) other than a supporting organization (as described in section 509(a)(3)) or a donor advised fund (as defined in section 4966(d)(2)). Distributions are eligible for the exclusion only if made on or after the date the IRA owner attains age 70½ and only to the extent the distribution would be includible in gross income (without regard to this provision).

[1933] Conversion contributions refer to conversions of amounts in a traditional IRA to a Roth IRA.

[1934] Sec. 3405.

[1935] Sec. 408(d)(8). The exclusion does not apply to distributions from employer-sponsored retirement plans, including SIMPLE IRAs and SEP plans.

The exclusion applies only if a charitable contribution deduction for the entire distribution otherwise would be allowable (under present law), determined without regard to the generally applicable percentage limitations. Thus, for example, if the deductible amount is reduced because of a benefit received in exchange, or if a deduction is not allowable because the donor did not obtain sufficient substantiation, the exclusion is not available with respect to any part of the IRA distribution.

If the IRA owner has any IRA that includes nondeductible contributions, a special rule applies in determining the portion of a distribution that is includible in gross income (but for the qualified charitable distribution provision) and thus is eligible for qualified charitable distribution treatment. Under the special rule, the distribution is treated as consisting of income first, up to the aggregate amount that would be includible in gross income (but for the qualified charitable distribution provision) if the aggregate balance of all IRAs having the same owner were distributed during the same year. In determining the amount of subsequent IRA distributions includible in income, proper adjustments are to be made to reflect the amount treated as a qualified charitable distribution under the special rule.

Distributions that are excluded from gross income by reason of the qualified charitable distribution provision are not taken into account in determining the deduction for charitable contributions under section 170.

Explanation of Provision

First, the provision indexes the annual $100,000 exclusion limit for inflation for taxable years beginning after 2023.

Second, the provision allows a taxpayer to elect for a taxable year to treat certain distributions from an IRA to a split-interest entity as if the contributions were made directly to a qualifying charity for purposes of the exclusion from gross income for qualified charitable distributions. Such an election may not have been in effect for a preceding taxable year; thus, the election may be made for only one taxable year during the taxpayer's lifetime. The aggregate amount of distributions of the taxpayer with respect to the election may not exceed $50,000 (indexed for inflation for taxable years beginning after 2023).

A split-interest entity means: (1) a charitable remainder annuity trust (as defined in section 664(d)(1)); (2) a charitable remainder unitrust (as defined in section 664(d)(2)); or (3) a charitable gift annuity (as defined in section 501(m)). In each case, the trust or arrangement must be funded exclusively by qualified charitable distributions. In the case of a charitable gift annuity, fixed payments of five percent or greater must commence not later than one year from the date of funding.

In the case of a distribution from an IRA to a charitable remainder annuity trust or charitable remainder unitrust, the distribution qualifies for the one-time election only if a charitable deduction for the entire value of the charitable remainder interest would be allowable under section 170 (determined without regard to this provision or the charitable deduction percentage limits under section 170(b)). In the case of a distribution to a charitable gift annuity, the distribution qualifies for the one-time election only if a charitable deduction in an amount equal to the amount of the distribution reduced by the value of the annuity[1936] would be allowable under section 170 (determined without regard to this provision or the charitable deduction percentage limits under section 170(b)).

In addition, a distribution from an IRA to a split-interest entity qualifies for the one-time election only if: (1) no person holds an income interest in the split-interest entity other than the individual for whose benefit such account is maintained, the spouse of such individual, or both; and (2) the income interest in the split-interest entity is nonassignable.

In the case of a charitable remainder annuity trust or a charitable remainder unitrust that is funded by qualified charitable distributions, distributions are treated as ordinary income in the hands of a beneficiary to whom an annuity or unitrust payment is made. A qualified charitable distribution made to fund a charitable gift annuity is not treated as an investment in the contract for purposes of section 72(c).

Effective Date

The provision is effective for distributions made in taxable years beginning after the date of enactment (December 29, 2022).

8. Distributions to firefighters (sec. 308 of the Act and sec. 72(t) of the Code)

Present Law

Distributions from tax-favored retirement plans

A distribution from a qualified retirement plan,[1937] 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 IRA generally is included in income for the year distributed.[1938] 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.[1939]

[1936] The annuity must be described in section 501(m)(5)(B), which provides that the annuity is described in section 514(c)(5), determined as if the amount paid in cash for the issuance of the annuity were property. Section 514(c)(5), in turn, describes when an obligation to pay an annuity is not treated as “acquisition indebtedness” for purposes of the section 514 debt-financed income rules. Under that section, the obligation to pay the annuity: (1) generally must be the sole consideration issued in exchange for property if, at the time of the exchange, the value of the annuity is less than 90 percent of the value of the property received in exchange; (2) is payable over the life of one individual or the lives of two individuals in being at such time; and (3) does not guarantee a minimum amount of payments or specify a maximum amount of payments and does not provide for any adjustment of the amount of the annuity payments by reference to the income received from the transferred property or any other property. Sec. 514(c)(5).

[1937] Qualified under section 401(a).

[1938] 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.

[1939] Sec. 72(t). Under present law, the 10-percent early withdrawal tax does not apply to distributions from a governmental section 457(b) plan.

Qualified public safety employees in governmental plans

An exception to the early withdrawal tax applies if a distribution is made to an employee after separation from service after attainment of age 55.[1940] Under a special rule for distributions to qualified public safety employees in a governmental plan,[1941] this exception applies to distributions made after separation from service after attainment of age 50 ("age 50 exception").[1942] For this purpose, a qualified public safety employee means (1) any employee of a State or a political subdivision of a State who provides police protection, firefighting services, or emergency medical services for any area within the State or political subdivision's jurisdiction; or (2) any Federal law enforcement officer,[1943] any Federal customs and border protection officer,[1944] any Federal firefighter,[1945] any Federal employee who is an air traffic controller[1946] or nuclear materials courier,[1947] any member of the United States Capitol Police, any member of the Supreme Court Police, or any diplomatic security special agent of the Department of State.

Explanation of Provision

The provision amends the age 50 exception for qualified public safety employees in governmental plans so that the exception also apples to distributions from certain non-governmental plans that are made to employees who provide firefighting services. Specifically, the exception applies to distributions from a qualified retirement plan, a section 403(a) annuity, or section 403(b) plan. Thus, the provision expands the age 50 exception to also apply to private-sector firefighters who are plan participants receiving distributions from qualified retirement plans, section 403(a) annuities, or section 403(b) plans.

Effective Date

The provision is effective for distributions made after the date of enactment.

9. Exclusion of certain disability-related first responder retirement payments (sec. 309 of the Act and new sec. 139C of the Code)

Present Law

Qualified retirement plans (and other tax-favored employer-sponsored retirement plans) are accorded special tax treatment and fall into two categories: defined benefit plans and defined contribution plans. A defined contribution plan is a type of qualified retirement plan whereby contributions, earnings, and losses are allocated to a separate account for each participant. Defined contribution plans may provide for nonelective contributions and matching contribu-

[1940] Sec. 72(t)(2)(A)(v).
[1941] As defined in section 414(d).
[1942] Sec. 72(t)(10).
[1943] As defined in 5 U.S.C. secs. 8331(20) or 8401(17).
[1944] As defined in 5 U.S.C. secs. 8331(31) or 8401(36).
[1945] As defined in 5 U.S.C. secs. 8331(21) or 8401(14).
[1946] As defined in 5 U.S.C. secs. 8331(30) or 8401(35).
[1947] As defined in 5 U.S.C. secs. 8331(27) or 8401(33).

tions by employers and pre-tax (that is, contributions that are either excluded from income or deductible) or after-tax contributions by employees.

Disability-related payments

Amounts received under worker's compensation acts as compensation for personal injuries or sickness ("disability payments") generally are excluded from the gross income of the recipients.[1948] The exclusion from gross income includes compensation for personal injuries or sickness received under a statute in the nature of a worker's compensation act, and also extends such exclusion to survivors of the affected worker. However, these exclusions generally do not apply to amounts received as a retirement pension or annuity (including retirement disability payments) to the extent that the amounts are determined by reference to the employee's age, length of service, or prior contributions. Such retirement payments, which may be distributed from a section 401(a) qualified retirement plan, a section 403(a) or (b) tax-sheltered annuity plan, or an eligible deferred compensation plan of a State or local government employer under section 457(b) ("retirement distributions"), generally are included in income for the year distributed.

Explanation of Provision

The provision adds Section 139C to the Code to address the tax treatment of certain disability-related retirement distributions to qualified first responders. An individual's gross income does not include qualified first responder retirement payments for any taxable year to the extent such payments do not exceed an annualized excludable disability amount. A qualified first responder retirement payment that is excluded from gross income is any pension or annuity that would otherwise be includible in gross income, is received in connection with the individual's qualified first responder service, and is paid from a section 401(a) qualified trust, a section 403(a) annuity plan, a governmental deferred compensation plan under section 457(b), or a section 403(b) plan.[1949] Also, for this purpose, qualified first responder service means services performed as a law enforcement officer, firefighter, paramedic, or emergency medical technician. The provision does not limit the exclusion from gross income to individuals who provide such services in a public capacity or to individuals who address only emergency situations.

The portion of the retirement distributions which is exempted from the gross income is the "annualized excludable disability amount." The annualized excludable disability amount means, with respect to any individual, the "service-connected excludable disability amounts" which are properly attributable to the 12-month period immediately preceding the date on which the individual attains retirement age. A service-connected excludable disability amount means periodic payments received by an individual which are not includible in the individual's gross income because they are amounts received under workmen's compensation acts as com-

[1948] Sec. 104(a)(1).

[1949] These plans are described in clauses (iii), (iv), (v), and (vi) of section 402(c)(8)(B), respectively.

pensation for personal injuries or sickness,[1950] are received in connection with the individual's qualified first responder service, and terminate when the individual attains retirement age.

The provision also provides that for an individual who only receives service-connected excludable disability amounts which are properly attributable to a portion of the 12-month period, the annualized excludable disability amount is determined by multiplying the service-connected excludable disability amounts by the ratio of 365 to the number of days in such period to which such amounts were properly attributable.

Unlike worker's compensation payments, the exclusion under the provision that is applicable to eligible first responders does not extend to surviving spouses or other survivors once the eligible individual is deceased.

Effective Date

The provision is effective for amounts received with respect to taxable years beginning after December 31, 2026.

10. Application of top-heavy rules to defined contribution plans covering excludable employees (sec. 310 of the Act and sec. 416 of the Code)

Present Law

Top-heavy requirements

Top-heavy requirements apply to limit the extent to which accumulated benefits or account balances under a qualified retirement plan can be concentrated with key employees.[1951] Whereas the general nondiscrimination requirements are designed to test annual contributions or benefits for highly compensated employees compared to those of non-highly compensated employees, the top-heavy rules test the portion of the total plan contributions or benefits that have accumulated for the benefit of key employees as a group. If a plan is top-heavy, minimum contributions or benefits must be provided for non-key employees and, in some cases, faster vesting is required. In general, for a defined contribution plan, this minimum contribution is three percent of the participant's compensation; however, such contribution is limited by the percentage at which contributions are made for the key employee with the highest percentage of contributions.[1952]

For this purpose, a key employee is an officer with annual compensation greater than $200,000 (for 2022), a five-percent owner, or a one-percent owner with compensation in excess of $150,000.[1953] A defined benefit plan generally is top-heavy if the present value of cumulative accrued benefits for key employees exceeds 60 percent of the cumulative accrued benefits for all employees.[1954] A defined contribution plan is top-heavy if the aggregate of accounts for key employees exceeds 60 percent of the aggregate accounts for all employees. As a result, plans of large businesses with many em-

[1950] Sec. 104(a)(1).
[1951] Secs. 401(a)(10)(B) and 416.
[1952] Sec. 416(c)(2).
[1953] Sec. 416(i)(1).
[1954] Sec. 416(g)(1)(A).

ployees are less likely to be top-heavy than plans of smaller employers in which the owners participate.

Minimum coverage requirements

As part of the general nondiscrimination requirements, a qualified retirement plan must satisfy the minimum coverage requirement.[1955] Under the minimum coverage requirement, the plan's coverage of employees must be nondiscriminatory. This is determined by calculating the plan's ratio percentage, that is, the ratio of the percentage of non-highly compensated employees (of all non-highly compensated employees in the workforce) covered under the plan over the percentage of highly compensated employees covered. If the plan's ratio percentage is 70 percent or greater, the plan satisfies the minimum coverage requirement. If the plan's ratio percentage is less than 70 percent, a multi-part test applies.[1956] In addition, the average benefit percentage test must be satisfied. Under the average benefit percentage test, the average rate of contributions or benefit accruals for all non-highly compensated employees in the workforce (taking into account all plans of the employer) must be at least 70 percent of the average contribution or accrual rate of all highly compensated employees.

The minimum coverage and general nondiscrimination requirements apply annually on the basis of the plan year.[1957] Employees who have not satisfied minimum age and service conditions under the plan, certain nonresident aliens, and employees covered by a collective bargaining agreement are generally disregarded.[1958] However, a plan that covers employees with less than a year of service or who are under age 21 ("otherwise excludable employees") must generally include those employees in any nondiscrimination test for the year but can test the plan for nondiscrimination in two parts: (1) by separately testing the portion of the plan covering otherwise excludable employees and treating all such employees as the only employees of the employer; and (2) then testing the rest of the plan taking into account the rest of the employees of the employer and excluding the otherwise excludable employees.[1959]

Explanation of Provision

Under the provision, if a top-heavy defined contribution plan covers employees who do not meet the minimum age or service requirements under the Code, such employees may be excluded from consideration in determining whether any plan of the employer satisfies the top-heavy minimum contribution requirement.

[1955] Sec. 410(b).

[1956] The plan must cover a group (or classification) of employees that is reasonable and established under objective business criteria, such as hourly or salaried employees (referred to as a reasonable classification), and the plan's ratio percentage must be at or above a specific level specified in the regulations.

[1957] Treas. Reg. sec. 1.410(b)–2(a).

[1958] Sec. 410(b)(3). Qualified plans generally cannot delay an employee's participation in the plan beyond the later of completion of one year of service (*i.e.,* a 12-month period with at least 1,000 hours of service) or attainment of age 21. Sec. 410(a)(1). A plan or portion of a plan covering collectively bargained employees is generally deemed to satisfy the nondiscrimination requirements.

[1959] Sec. 410(b)(4).

Effective Date

The provision applies to plan years beginning after December 31, 2023.

11. Repayment of qualified birth or adoption distributions limited to three years (sec. 311 of the Act and sec. 72(t) 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 IRA generally is included in income for the year distributed.[1960] 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.[1961]

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 IRS 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, 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.

Distributions in the event of a qualified birth or adoption

An exception to the 10-percent early withdrawal tax applies in the case of a qualified birth or adoption distribution from an applicable eligible retirement plan (as defined). In addition, qualified birth or adoption distributions may be recontributed to an individual's applicable eligible retirement plans, subject to certain requirements.

A qualified birth or adoption distribution is a permissible distribution from an applicable eligible retirement plan which, for this purpose, encompasses eligible retirement plans other than defined

[1960] 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.

[1961] Sec. 72(t). Under present law, the 10-percent early withdrawal tax does not apply to distributions from a governmental section 457(b) plan.

benefit plans, including qualified retirement plans, section 403(b) plans, governmental section 457(b) plans, and IRAs.[1962]

A qualified birth or adoption distribution is a distribution from an applicable eligible retirement plan to an individual if made during the one-year period beginning on the date on which a child of the individual is born or on which the legal adoption by the individual of an eligible adoptee is finalized. An eligible adoptee means any individual (other than a child of the taxpayer's spouse) who has not attained age 18 or is physically or mentally incapable of self-support. The name, age, and taxpayer identification number of the child or eligible adoptee to which any qualified birth or adoption distribution relates must be provided on the tax return of the individual taxpayer for the taxable year.

The maximum aggregate amount which may be treated as qualified birth or adoption distributions by any individual with respect to a birth or adoption is $5,000 per taxpayer. Therefore, each spouse separately may receive a maximum aggregate amount of $5,000 of qualified birth or adoption distributions (with respect to a birth or adoption) from applicable eligible retirement plans in which each spouse participates or holds accounts.

An employer plan is not treated as violating any Code requirement merely because it treats a distribution (that would otherwise be a qualified birth or adoption distribution) to an individual as a qualified birth or adoption distribution, provided that the aggregate amount of such distributions to that individual from plans maintained by the employer and members of the employer's controlled group[1963] does not exceed $5,000. Under such circumstances an employer plan is not treated as violating any Code requirement merely because an individual might receive total distributions in excess of $5,000 as a result of distributions from plans of other employers or IRAs.

Recontributions to applicable eligible retirement plans

Generally, any portion of a qualified birth or adoption distribution may, at any time after the date on which the distribution was received, be recontributed to an applicable eligible retirement plan to which a rollover can be made. Such a recontribution is treated as a rollover and thus is not includible in income. If an employer adds the ability for plan participants to receive qualified birth or adoption distributions from a plan, the plan must permit an employee who has received qualified birth or adoption distributions from that plan to recontribute only up to the amount that was distributed from that plan to that employee, provided the employee otherwise is eligible to make contributions (other than recontributions of qualified birth or adoption distributions) to that plan. Any portion of a qualified birth or adoption distribution from an individual's applicable eligible retirement plans (whether employer plans or IRAs) may be recontributed to an IRA held by such an individual which is an applicable eligible retirement plan to which a rollover can be made.

[1962] A qualified birth or adoption distribution is subject to income tax withholding unless the recipient elects otherwise. Mandatory 20-percent withholding does not apply.

[1963] The term "controlled group" means any group treated as a single employer under subsection (b), (c), (m), or (o) of section 414.

Explanation of Provision

Under the provision, a recontribution of any portion of a qualified birth or adoption distribution, may, at any time during the three-year period beginning on the day after the date on which the distribution was received, be made to an applicable eligible retirement plan to which a rollover can be made.

Effective Date

Except as provided in the next sentence, the provision is applicable to distributions made after the date of enactment (December 29, 2022). In the case of a qualified birth or adoption distribution made on or before the date of enactment, the general rule related to the amount contributed that may be repaid [1964] will apply to such distribution by substituting "after such distribution and before January 1, 2026" for "during the 3-year period beginning on the day after the date on which such distribution was received."

12. Employer may rely on employee certifying that deemed hardship distribution conditions are met (sec. 312 of the Act and secs. 401(k), 403(b), and 457(b) of the Code)

Present Law

Section 401(k) plan and section 403(b) plan hardship distributions

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.[1965]

In addition to the employee's elective deferrals, a hardship distribution from a section 401(k) plan may include qualified matching contributions, qualified nonelective contributions, and earnings on any of these amounts.[1966] A hardship distribution from a section 403(b) plan may include elective deferrals, but not earnings on those deferrals.[1966] Qualified matching contributions and qualified nonelective contributions to a section 403(b) plan that are in a custodial account are not eligible to be distributed on account of hardship.[1968] A distribution under a section 401(k) plan is not treated as failing to be on account of hardship solely because the employee does not take any available plan loan. Distributions on account of

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[1964] Under section 72(t)(2)(H)(v)(I).

[1965] Secs. 401(k)(2)(B)(i)(IV) and 403(b)(7)(A)(i)(V) and (11)(B). Other types of contributions may also be subject to this restriction.

[1966] Sec. 401(k)(14). Qualified matching contributions (as defined in section 401(k)(3)(D)(ii)(I)) and qualified nonelective contributions (as defined in section 401(m)(4)(C)) may be used to enable the plan to satisfy certain nondiscrimination tests, to prevent discrimination in favor of highly compensated employees.

[1967] Sec. 403(b)(11).

[1968] Treas. Reg. sec. 1.403(b)–6(c).

hardship may be subject to an additional 10-percent early withdrawal tax.[1969]

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 financial need.[1970] Generally, the determination of whether an employee has an immediate and heavy financial need is based on the relevant facts and circumstances. However, a distribution is deemed to be made on account of an immediate and heavy financial need if it is for: (1) generally, deductible expenses for medical care;[1971] (2) costs directly related to the purchase of a principal residence for the employee (excluding mortgage payments); (3) payment of tuition, related educational fees, and room and board expenses, for up to the next 12 months of post-secondary education for the employee, the employee's spouse, child, or dependent,[1972] or for a primary beneficiary under the plan; (4) payments necessary to prevent the eviction of the employee from the employee's principal residence or foreclosure on the mortgage on that residence; (5) payments for burial or funeral expenses for the employee's deceased parent, spouse, child, or dependent, or for a deceased primary beneficiary under the plan; (6) expenses for the repair of damage to the employee's principal residence that would qualify for the casualty deduction;[1973] or (7) expenses and losses (including loss of income) incurred by the employee on account of a federally-declared disaster.[1974]

A distribution is treated as necessary to satisfy a financial need under the Treasury regulations only to the extent that the amount of the distribution does not exceed the amount required to satisfy the financial need. In addition, in order to be treated as necessary to satisfy the financial need, the following requirements must be met: (1) the employee has obtained all other currently available distributions under all plans of the employer; (2) the employee has provided to the plan administrator a written representation that he or she has insufficient cash or other liquid assets reasonably available to satisfy the need; and (3) the plan administrator does not have actual knowledge contrary to the representation.[1975]

Governmental section 457(b) plan distributions upon unforeseeable emergency

An eligible deferred compensation plan of a governmental employer (referred to as a "governmental section 457(b) plan") is generally similar to a qualified cash or deferred arrangement under a

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[1969] Sec. 72(t).

[1970] Treas. Reg. secs. 1.401(k)–1(d)(3); 1.403(b)–6(d)(2).

[1971] Expenses for (or necessary to obtain) medical care that would be deductible under section 213(d), determined without regard to the limitations in section 213(a) (relating to the applicable percentage of adjusted gross income and the recipients of the medical care) provided that, if the recipient of the medical care is not listed in section 213(a), the recipient is a primary beneficiary under the plan.

[1972] As defined in section 152 without regard to section 152(b)(1), (b)(2), and (d)(1)(B).

[1973] Under section 165 (determined without regard to section 165(h)(5) and whether the loss exceeds 10 percent of adjusted gross income).

[1974] A disaster declared by the Federal Emergency Management Agency ("FEMA") under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 100–707, provided that the employee's principal residence or principal place of employment at the time of the disaster was located in an area designated by FEMA for individual assistance with respect to the disaster.

[1975] Treas. Reg. sec. 1.401(k)–1(d)(3)(iii).

section 401(k) plan in that it consists of elective deferrals made at the election of an employee. Such deferrals generally may not be distributed from the plan before the occurrence of one or more specified events, including when the participant is faced with an unforeseeable emergency.[1976] Distributions from a governmental section 457(b) plan are not subject to the 10-percent early withdrawal tax.[1977]

Under Treasury regulations, the unforeseeable emergency must be defined in the plan as a severe financial hardship of the participant or beneficiary resulting from an illness or accident of the participant or beneficiary, or the participant's or beneficiary's spouse or dependent;[1978] loss of the participant's or beneficiary's property due to casualty;[1979] or other similar extraordinary and unforeseeable circumstances arising as a result of events beyond the control of the participant or the beneficiary.[1980] The Treasury regulations provide the following as examples of unforeseeable emergencies: (1) the imminent foreclosure of or eviction from the participant's or beneficiary's primary residence; (2) the need to pay for medical expenses, including non-refundable deductibles, as well as for the cost of prescription drug medication; and (3) the need to pay for the funeral expenses of a spouse or a dependent of a participant or beneficiary. The purchase of a home and the payment of college tuition are not unforeseeable emergencies, unless such expenses otherwise qualify.

In general, under the regulations, whether a participant or beneficiary is faced with an unforeseeable emergency permitting a distribution is to be determined based on the relevant facts and circumstances of each case, but, in any case, a distribution on account of an unforeseeable emergency may not be made to the extent that such emergency is or may be relieved through reimbursement or compensation from insurance or otherwise, by liquidation of the participant's assets, to the extent the liquidation of such assets would not itself cause severe financial hardship, or by cessation of deferrals under the plan. Distributions on account of an unforeseeable emergency must be limited to the amount reasonably necessary to satisfy the emergency need.

Explanation of Provision

Under the provision, in determining whether a distribution is due to an employee hardship, the plan administrator of a section 401(k) plan or a section 403(b) plan[1981] may rely on the employee's written certification that the distribution is on account of a financial need of a type that is deemed in Treasury regulations to be an immediate and heavy financial need. Thus, if the employee certifies that the financial need for the hardship distribution is one of the types of deemed immediate and heavy financial needs that are de-

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[1976] Sec. 457(d)(1)(A)(iii).

[1977] Secs. 72(t)(1); 4974(c).

[1978] As defined in section 152, and, for taxable years beginning on or after January 1, 2005, without regard to section 152(b)(1), (b)(2), and (d)(1)(B).

[1979] This includes the need to rebuild a home following damage to a home not otherwise covered by homeowner's insurance, such as damage that is the result of a natural disaster.

[1980] Treas. Reg. sec. 1.457–6(c)(2).

[1981] In the case of a section 403(b) plan, the provision provides similar rules for both custodial accounts and annuity contracts.

scribed in the Treasury regulations,[1982] such as funeral expenses for the employee's deceased parent, the distribution is treated as being made on account of an immediate and heavy financial need. In addition, under the provision, the plan administrator may rely on the employee's written certification that the distribution is not in excess of the amount required to satisfy the financial need, and that the employee has no alternative means reasonably available to satisfy such financial need.

Similarly, with respect to a governmental section 457(b) plan, in determining whether a participant's distribution is made when the participant is faced with an unforeseeable emergency, a plan administrator may rely on the participant's written certification that the distribution is on account of an unforeseeable emergency of a type that is specifically described in Treasury regulations as an unforeseeable emergency,[1983] that the distribution does not exceed the amount required to satisfy the emergency need, and that the participant has no alternative means reasonably available to satisfy such financial need.

In the case of each of these types of plans, the provision provides that the Secretary may by regulation provide for exceptions to the plan administrator's ability to rely on a participant's certification where the plan administrator has actual knowledge to the contrary. The Secretary may also by regulation adopt procedures to address misrepresentation.

Effective Date

The provision is effective for plan years beginning after the date of enactment.

13. Individual retirement plan statute of limitations for excise tax on excess contributions and certain accumulations (sec. 313 of the Act and sec. 6501 of the Code)

Present Law

Excise taxes

If an individual makes excess contributions to an individual retirement account[1984] or individual retirement annuity,[1985] an excise tax in an amount equal to six percent of the amount of the excess contributions to such individual's IRAs (determined as of the close of the taxable year) is imposed for each taxable year as long as the amount of the excess contributions remain in the plan.[1986] However, the amount of the tax for any taxable year is limited so that it does not exceed six percent of the value of the account or annuity (determined as of the close of the taxable year).

An "excess contribution" generally means the excess (if any) of the amount of contributions made to the individual's IRAs (other than a Roth IRA) for the taxable year over the amount allowable

[1982] Treas. Reg. sec. 1.401(k)–1(d)(3)(ii)(B), or any successor regulation.
[1983] Treas. Reg. sec. 1.457–6(c)(2)(i), or any successor regulation.
[1984] Sec. 408(a).
[1985] Sec. 408(b).
[1986] Sec. 4973.

as a deduction for such contributions.[1987] For 2022, the total contributions an individual may make to his or her traditional and Roth IRAs is the lesser of $6,000 ($7,000 if the participant was age 50 or older) or the individual's taxable compensation for the year.[1988]

In addition, an excise tax on "certain accumulations" applies if the amount distributed during a taxable year of a participant or beneficiary of a qualified retirement plan,[1989] or any eligible deferred compensation plan,[1990] is less than the minimum required distribution for such taxable year. The excise tax is equal to 50 percent of the amount by which such minimum required distribution exceeds the actual amount distributed during the taxable year and is imposed on the individual required to take the distribution. The Secretary may waive the excise tax where the taxpayer establishes (to the satisfaction of the Secretary) that the failure is due to reasonable error and reasonable steps are taken to remedy the shortfall.

Statute of limitations

In general, the statute of limitations with respect to a tax liability begins to run when the return is filed and the amount of the tax imposed must be assessed within three years after the return is filed.[1991] The term "return" means the return required to be filed by the taxpayer relating to the particular type of tax (and does not include a return of any person from whom the taxpayer has received an item of income, gain, loss, deduction, or credit). With respect to the excise taxes imposed on excess contributions and certain accumulations,[1992] Form 5329, Additional Taxes on Qualified Plans (Including IRAs) and Other Tax-Favored Accounts, is the return that needs to be filed to start the statute of limitations.[1993] Unless Form 5329 is filed (either with the Form 1040 or separately), the statute of limitations will not begin to run.[1994]

Explanation of Provision

The provision provides that for purposes of any excise tax imposed on excess contributions or on certain accumulations in connection with an IRA, the return referred to for purposes of the rules on the statute of limitations[1995] generally includes the income tax return filed by the person on whom the tax is imposed for the year in which the act (or failure to act) giving rise to the

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[1987] Under section 219.

[1988] Notice 2021–61, 2021–47 I.R.B. 738, November 22, 2021.

[1989] As defined in section 4974(d) and including a section 401(a) qualified plan, a section 403(a) annuity plan, a section 403(b) tax-sheltered annuity, and an IRA (a section 408 individual retirement account or annuity). Section 4974(a) was also modified by section 302 of the Act to reduce the excise tax on certain accumulations in qualified retirement plans.

[1990] As defined in section 457(b).

[1991] Sec. 6501(a).

[1992] Secs. 4973 and 4974, respectively.

[1993] Internal Revenue Service, Internal Revenue Manual, Forms Reporting More Than One Item of Tax, Ch. 25.6, sec. 25.6.1.9.4.3 (Oct. 1, 2021).

[1994] *Ibid.* at 25.6.1.9.4.3(6)(b). "The period of limitations on assessment for the miscellaneous excise taxes does not begin with the filing of the Form 1040. The other miscellaneous excise taxes carry their own period of assessment based on when the Form 5329 is received for assessment." See also, *Robert K. Paschall, et ux. v. Commissioner*, 137 T.C. 8 (2011). "We hold that the filing of the Forms 1040 did not start the statute of limitations running for purposes of the section 4973 excise tax in the absence of accompanying Forms 5329."

[1995] Section 6501(l).

liability for such tax occurred. The filing of Form 5329 will generally no longer be required to start the three-year statute of limitations.

In the case of a person who is not required to file an income tax return for such year, (1) the relevant return is the income tax return that such person would have been required to file but for the fact that such person was not required to file such return, and (2) the three-year statute of limitations period is deemed to begin on the date by which the return would have been required to be filed (excluding any extension thereof).

In any case in which the return with respect to a tax imposed on excess contributions to certain tax-favored accounts and annuities [1996] is the individual's income tax return, a six-year statute of limitations will be substituted for the generally applicable three-year statute of limitations. In the case of any such tax that is attributable to acquiring property for less than fair market value, the Form 5329 continues to be required to begin the statute of limitations and the three-year statute of limitations will apply.

Effective Date

The provision is effective on the date of enactment (December 29, 2022).

14. Penalty-free withdrawals from retirement plans for individuals in case of domestic abuse (sec. 314 of the Act and sec. 72(t) of the Code)

Present Law

Distributions from tax-favored retirement plans

A distribution from a tax-qualified plan described in section 401(a) (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 IRA generally is included in income for the year distributed.[1997] These plans are referred to collectively as "eligible retirement plans." [1998] 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.[1999]

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 IRS has the authority to waive the 60-day requirement if failure to waive the requirement would be against equity or good

[1996] Under section 4973.

[1997] 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.

[1998] Sec. 402(c)(8)(B). Eligible retirement plans also include annuity plans described in section 403(a).

[1999] Sec. 72(t). The 10-percent early withdrawal tax does not apply to distributions from a governmental section 457(b) plan.

conscience, including cases of casualty, disaster, or other events beyond the reasonable control of the individual.[2000]

The terms of a qualified retirement plan, section 403(b) plan, or governmental section 457(b) plan generally determine when distributions are permitted. However, for many types of plans, restrictions apply to distributions before an employee's termination of employment, referred to as "in-service" distributions or withdrawals. Despite such restrictions, an in-service distribution from a qualified retirement plan that includes a qualified cash-or-deferred arrangement (a "section 401(k) plan") or a section 403(b) plan may be permitted in the case of financial hardship. Similarly, a governmental section 457(b) plan may permit distributions in the case of an unforeseeable emergency. Under a qualified retirement plan that is a pension plan (*i.e.*, defined benefit pension plan or money purchase pension plan), distributions generally may be made only in the event of retirement, death, disability, or other separation from service, although in-service distributions may be permitted after age 59½.[2001]

Explanation of Provision

Under the provision, an exception to the 10-percent early withdrawal tax applies in the case of an eligible distribution to a domestic abuse victim. In addition, such eligible distributions may be recontributed to applicable eligible retirement plans, subject to certain requirements.

Eligible distributions to a domestic abuse victim

The provision provides that an eligible distribution to a domestic abuse victim is a distribution from an applicable eligible retirement plan to an individual if made during the one-year period beginning on a date on which the individual is a victim of domestic abuse by a spouse or domestic partner. Domestic abuse is defined under the provision as physical, psychological, sexual, emotional, or economic abuse, including efforts to control, isolate, humiliate, or intimidate the victim, or to undermine the victim's ability to reason independently, including by means of abuse of the victim's child or another family member living in the household. In making such a distribution, a plan administrator may rely on the participant's certification that the distribution is an eligible distribution to a domestic abuse victim.

An applicable eligible retirement plan, for this purpose, generally includes eligible retirement plans other than defined benefit plans, including qualified retirement plans, section 403(b) plans, governmental section 457(b) plans, and IRAs. It does not include a plan that is subject to requirements relating to providing joint and survivor annuities and preretirement survivor annuities.[2002]

[2000] Rev. Proc. 2020–46, 2020–45 I.R.B. 995, provides for a self-certification procedure (subject to verification on audit) that may be used by a taxpayer claiming eligibility for a waiver of the 60-day requirement with respect to a rollover into a plan or IRA in certain specified circumstances.

[2001] Sec. 401(a)(36); Treas. Reg. secs. 1.401–1(b)(1)(i) and 1.401(a)–1(b)(1)(i). Section 401(k) plans, section 403(b) plans, and governmental section 457(b) plans also may permit in-service distributions after age 59½.

[2002] Secs. 401(a)(11) and 417.

The maximum aggregate amount that may be treated as an eligible distribution to a domestic abuse victim by an individual is the lesser of $10,000 or 50 percent of the present value of the employee's account under the plan.[2003] The $10,000 amount is adjusted for inflation. An eligible distribution to a domestic abuse victim is treated as meeting requirements relating to the timing of distributions under a section 401(k) plan, section 403(b) plan, or governmental section 457(b) plan.[2004]

Under the provision, an employer plan is not treated as violating any Code requirement merely because it treats a distribution to an individual (that would otherwise be an eligible distribution to a domestic abuse victim) as an eligible distribution to a domestic abuse victim, provided that the aggregate amount of such distributions to that individual from plans maintained by the employer and members of the employer's controlled group[2005] does not exceed the lesser of $10,000 or 50 percent of the present value of the employee's accounts under the plans of the employer's controlled group. Thus, under such circumstances an employer plan is not treated as violating any Code requirement merely because an individual might receive, for example, total distributions in excess of $10,000 as a result of distributions from plans of other employers or IRAs.

Recontributions to applicable eligible retirement plans

The provision provides that any portion of an eligible distribution to a domestic abuse victim may, during the three-year period beginning on the day after the date the distribution was received, be recontributed to an applicable eligible retirement plan to which a rollover can be made.[2006] Such a recontribution is treated as a rollover and thus is not includible in income. In the case of a recontribution to an applicable eligible retirement plan that is not an IRA, the individual may not recontribute an amount greater than the amount of eligible distributions made from such plan to the individual. In addition, the individual in that case must be eligible to contribute to the plan (other than with respect to the recontribution of the eligible distribution).

Effective Date

The provision is effective for distributions made after December 31, 2023.

[2003] 50 percent of the present value of the nonforfeitable accrued benefit of the employee under the plan.

[2004] An eligible distribution to a domestic abuse victim is subject to income tax withholding unless the recipient elects otherwise. Mandatory 20-percent withholding does not apply.

[2005] The term "controlled group" means any group treated as a single employer under subsection (b), (c), (m), or (o) of section 414.

[2006] The provision provides that rules similar to the rules under section 72(t)(2)(H)(v) (relating to repayment of distributions in the case of birth of a child or adoption) apply.

15. Reform of family attribution rule (sec. 315 of the Act and sec. 414 of the Code)

Present Law

Nondiscrimination requirements

A qualified retirement plan is prohibited from discriminating in favor of highly compensated employees, referred to as the nondiscrimination requirements. These requirements are intended to ensure that a qualified retirement plan provides meaningful benefits to an employer's rank-and-file employees as well as highly compensated employees so that qualified retirement plans achieve the goal of retirement security for both lower-paid and higher-paid employees. The nondiscrimination requirements consist of a minimum coverage requirement and general nondiscrimination requirements.[2007] For purposes of these requirements, an employee generally is treated as highly compensated if the employee (1) was a five-percent owner of the employer at any time during the year or the preceding year, or (2) had compensation for the preceding year in excess of $135,000 (for 2022).[2008]

The minimum coverage and general nondiscrimination requirements apply annually on the basis of the plan year. In applying these requirements, as discussed below, employees of all members of a controlled group or affiliated service group are treated as employed by a single employer. Employees who have not satisfied minimum age and service conditions under the plan, certain nonresident aliens, and employees covered by a collective bargaining agreement are generally disregarded.[2009] However, a plan that covers employees with less than a year of service or who are under age 21 must generally include those employees in any nondiscrimination test for the year but can test the plan for nondiscrimination in two parts: (1) by separately testing the portion of the plan covering employees who have not completed a year of service or are under age 21 and treating all of the employer's employees with less than a year of service or under age 21 as the only employees of the employer; and (2) then testing the rest of the plan taking into account the rest of the employees of the employer and excluding the employees described in (1). If a plan does not satisfy the nondiscrimination requirements on its own, it may in some circumstances be aggregated with another plan, and the two plans tested together as a single plan.

Aggregation rules for groups under common control

In general, in applying the requirements for tax-favored treatment for retirement plans, employees of employers (including corporations and other entities) that are members of a group under common control are treated as employed by a single employer (re-

[2007] Sections 401(a)(3) and 410(b) address the minimum coverage requirement; section 401(a)(4) describes the general nondiscrimination requirements, with related rules in section 401(a)(5). Detailed regulations implement the statutory requirements. Governmental plans are generally exempt from these requirements.

[2008] Sec. 414(q). At the election of the employer, employees who are highly compensated based on compensation may be limited to the top 20 percent highest paid employees. A non-highly compensated employee is an employee other than a highly compensated employee.

[2009] A plan or portion of a plan covering collectively bargained employees is generally deemed to satisfy the nondiscrimination requirements.

ferred to as aggregation rules).[2010] For example, in applying the nondiscrimination requirements, the employees of all the members of a group, and the benefits provided under plans maintained by any member of the group, are generally taken into account. In the case of taxable entities, common control is generally based on the percentage of equity ownership with a general threshold of 80 percent ownership. Other tests apply for entities that do not involve ownership. Employees of the members of an affiliated service group are similarly treated as employed by a single employer.[2011]

Family attribution rules

The family attribution rules address the scenarios in which a person is treated as having an ownership interest in a business based upon a family relationship.[2012] For example, an individual is generally attributed the individual's spouse's ownership unless certain criteria are satisfied.[2013]

One exception to spousal attribution is for individuals who are legally separated under a divorce decree.[2014] Other exceptions include (1) spouses who do not directly own any stock in the business during the taxable year; (2) a spouse who is neither an employee or director nor participates in the management of the business at any time during the year; (3) where no more than 50 percent of the business' gross income derives from passive investments, and (4) where the stock is transferable (*i.e.*, is not subject to restrictions in favor of the individual or his or her minor children (e.g., the business owner cannot be required to offer a right of first refusal to his or her spouse or their children before selling the business to a third party)).[2015]

A parent is generally attributed the ownership of a minor child under the age of 21 and is attributed the ownership of an adult child, age 21 or older, if the parent owns more than 50 percent of the business. A minor child is attributed the ownership of a parent, while an adult child is attributed the ownership of a parent only if the adult child owns more than 50 percent of the business.[2016] There is no exception to the application of the family attribution rules for a minor child of individuals who are separated or divorced. For example, ownership of a business may be attributed to a divorced spouse through his or her minor child.

The application of the family attribution rules is also impacted by the laws on familial property ownership in community property

[2010] Sec. 414(c) and the regulations thereunder provide for aggregation of groups under common control. Section 414(b), (m) and (o) also provide aggregation rules for a controlled group of corporations and affiliated service groups. Under section 414(t), the aggregation rules apply also for purposes of various benefits other than retirement benefits. In addition, other provisions incorporate the aggregation rules by reference, such as section 4980H, generally providing that certain employers that do not offer health coverage to full-time employees will be liable for an excise tax.

[2011] Sec. 414(m).

[2012] Family attribution can address interests owned between spouses or among parents and children or grandparents and grandchildren.

[2013] Sec. 1563(e)(5). For example, if a husband and wife each owned 25 percent of a business, generally both spouses would be treated as owning 50 percent of that business.

[2014] Sec. 1563(e).

[2015] Sec. 1563(e)(5).

[2016] Sec. 1563(e)(6).

States.[2017] In such a State, spouses may be deemed to own half of the property acquired during a marriage, except under limited circumstances. Accordingly, spouses in community property states may fail to satisfy the criteria that a spouse does not directly own any stock in the business during the taxable year.

Explanation of Provision

The provision modifies the aggregation rules to address family attribution and to disregard community property laws in determining whether an employer is a member of a controlled group of corporations for purposes of certain qualified plan rules, such as the nondiscrimination rules.[2018] For purposes of applying the attribution rules,[2019] community property laws are disregarded for purposes of determining ownership. In addition, in the case of stock of an individual that is not attributed to the individual's spouse under the spousal attribution rules[2020] (for example, due to the spouses' legal separation), such stock is not attributed to such spouse by reason of a minor child's ownership of an option to acquire such stock.[2021] And, except as provided by the Secretary, stock in different corporations that is attributed to a minor child from each parent,[2022] but that is not attributed to such parents as spouses,[2023] shall not by itself result in such corporations being members of the same controlled group.

Similar rules apply in the case of affiliated service groups.[2024]

Under the provision, if these modifications cause two or more entities to be a controlled group or an affiliated service group, or to no longer be in a controlled group or affiliated service group, such change is treated as a transaction to which the special minimum coverage rule for certain dispositions or acquisitions applies.[2025]

Effective Date

The provision applies to plan years beginning after December 31, 2023.

16. Amendments to increase benefit accruals under plan for previous plan year allowed until employer tax return due date (sec. 316 of the Act and sec. 401(b) of the Code)

Present Law

Present law provides a remedial amendment period during which, under certain circumstances, a retirement plan may be

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[2017] For a broader discussion of community property laws, see *"Internal Revenue Manual—25.18.1 Basic Principles of Community Property Law"*, *available at* https://www.irs.gov/irm/part25/irm_25-018-001 (accessed June 15, 2022). Community property rules exist in nine states (Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, Washington and Wisconsin) and two territories (Guam and Puerto Rico). *Id.*

[2018] Section 414((b) aggregation rules apply for purposes of sections 401, 408(k), 408(b), 410, 411, 415, and 416.

[2019] Under section 318 (with respect to affiliated service groups) and section 1563 (with respect to controlled groups).

[2020] Sec. 1563(e)(5).

[2021] Ownership of the individual's stock is not attributed to the individual's spouse by reason of the combined application of sections 1563(e)(1) and 1563(e)(6)(A).

[2022] Under section 1563(e)(6)(A).

[2023] Under section 1563(e)(5).

[2024] Sec. 414(m)(6)(b).

[2025] Sec. 410(b)(6)(C).

amended retroactively in order to comply with the tax qualification requirements.[2026] In general, plan amendments to reflect changes in the law must be made by the time prescribed by law for filing the income tax return of the employer for the employer's taxable year in which the change in law occurs (including extensions). Discretionary amendments must be adopted by the end of the plan year.[2027] The Secretary may extend the date by which plan amendments need to be made.

Section 201 of the SECURE Act[2028] provides that if an employer adopts a qualified retirement plan after the close of a taxable year but before the time prescribed by law for filing the return of tax of the employer for the taxable year (including extensions thereof), the employer may elect to treat the plan as having been adopted as of the last day of the taxable year.

Explanation of Provision

Under the provision, if an employer amends a stock bonus, pension, profit-sharing, or annuity plan to increase benefits accrued under the plan effective as of any date during the immediately preceding plan year (other than increasing the amount of matching contributions),[2029] the amendment would not otherwise cause the plan to fail to meet any of the qualification requirements, and the amendment is adopted before the time prescribed by law for filing the return of the employer for the taxable year (including extensions) which includes the effective date of the amendment (i.e., a date during the immediately preceding plan year), the employer may elect to treat such amendment as having been adopted as of the last day of the plan year in which the amendment is effective.

Effective Date

The provision applies to plan years beginning after December 31, 2023.

17. Retroactive first year elective deferrals for sole proprietors (sec. 317 of the Act and sec. 401(b) of the Code)

Present Law

Present law provides a remedial amendment period during which, under certain circumstances, a retirement plan may be amended retroactively in order to comply with the tax qualification requirements.[2030] Plan amendments to reflect changes in the law generally must be made by the time prescribed by law for filing the income tax return of the employer for the employer's taxable year in which the change in law occurs (including extensions). The Secretary may extend the time by which plan amendments need to be made.

[2026] Sec. 401(b).
[2027] Rev. Proc. 2016–37, 2016–29 I.R.B. 136, July 18, 2016.
[2028] Sec. 201 of Div. O. of the Further Consolidated Appropriations Act, 2020, Pub. L. No. 116–94, December 20, 2019.
[2029] As defined in subsection 401(m)(4)(A).
[2030] Sec. 401(b).

Section 201 of the SECURE Act [2031] provides that if an employer adopts a qualified retirement plan after the close of a taxable year but before the time prescribed by law for filing the return of tax of the employer for the taxable year (including extensions thereof), the employer may elect to treat the plan as having been adopted as of the last day of the taxable year. That provision permits employers to establish and fund a qualified plan by the due date for filing the employer's return for the preceding plan year. However, that provision does not override rules requiring certain plan provisions to be in effect during a plan year, such as the provision for elective deferrals under a qualified cash or deferral arrangement (generally referred to as a "section 401(k) plan").[2032]

Under present law, if a section 401(k) plan is established by a sole proprietor after the end of the individual's taxable year, then the plan can be funded with employer contributions as of the due date for the business's return (including extensions), However, any election to make an elective deferral must be made by the end of the individual's taxable year (i.e., generally by December 31 of the prior year). In contrast, an individual who contributes to an IRA is deemed to have made a contribution to the IRA for a taxable year if it is contributed after the taxable year has ended but is made "on account of" that year and before the due date for filing the IRA owner's tax return for that year without extensions (generally, April 15).[2033]

Explanation of Provision

Under the provision, in the case of an individual who owns the entire interest in an unincorporated trade or business, and who is the only employee of such trade or business, any elective deferral [2034] under a section 401(k) plan to which the election under section 201 of the SECURE Act applies which is made by such individual is treated as having been made before the end of the plan's first plan year if the election to make the elective deferral is made before the time for filing the return of such individual (determined without regard to any extensions) for the taxable year ending after or with the end of the plan's first plan year. This extension of time would only apply to the first plan year the section 401(k) plan is established.

Effective Date

The provision is effective for plan years beginning after the date of enactment (December 29, 2022).

[2031] Sec. 201 of Div. O. of the Further Consolidated Appropriations Act, 2020, Pub. L. No. 116–94, December 20, 2019.

[2032] Treas. Reg. sec. 1.401(k)–1(e)(2)(ii).

[2033] Sec. 219(f)(3). For taxpayers affected by a federally declared disaster, the IRS has the authority to postpone various tax deadlines for a period of up to one year. Sec. 7508A and ERISA sec. 518.

[2034] As defined in section 402(g)(3).

18. Performance benchmarks for asset allocation funds (sec. 318 of the Act and sec. 404 of ERISA)

Present Law

Fiduciary rules under ERISA

ERISA contains general fiduciary duty standards that apply to all fiduciary actions, including investment decisions. ERISA requires that a plan fiduciary generally discharge its duties solely in the interests of participants and beneficiaries and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.[2035] With respect to plan assets, ERISA requires a fiduciary to diversify the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so.

Special rule for participant control of assets

ERISA provides a special rule in the case of a defined contribution plan that permits participants to exercise control over the assets in their individual accounts. Under the special rule, if a participant exercises control over the assets in his or her account (as determined under regulations), the participant is not deemed to be a fiduciary by reason of such exercise, and no person who is otherwise a fiduciary is liable for any loss, or by reason of any breach, that results from the participant's exercise of control.[2036]

Regulations issued by the Department of Labor describe the requirements that must be met in order for a participant to be treated as exercising control over the assets in his or her account. With respect to investment options, the regulations provide in part:

- the plan must provide at least three different investment options, each of which is diversified and has materially different risk and return characteristics;
- the plan must allow participants to give investment instructions with respect to each investment option under the plan with a frequency that is appropriate in light of the reasonably expected market volatility of the investment option (the general volatility rule);
- at a minimum, participants must be allowed to give investment instructions at least every three months with respect to at least three of the investment options, and those investment options must constitute a broad range of options (the three-month minimum rule);
- participants must be provided with detailed information about the investment options, information regarding fees, investment instructions and limitations, and copies of financial data and prospectuses; and
- specific requirements must be satisfied with respect to investments in employer stock to ensure that employees' buying, selling, and voting decisions are confidential and free from employer influence.

[2035] Sec. 404(a)(1) of ERISA.
[2036] Sec. 404(c)(1) of ERISA.

Under the regulations,[2037] the plan administrator (or person designated by the plan administrator to act on its behalf), based on the latest information available, must furnish to each participant or beneficiary on or before the date on which he or she can first direct his or her investments and at least annually thereafter, the following information (as well as certain other information), with respect to each designated investment alternative offered under the plan:

- *Identifying information* including the name of each designated investment alternative and the type or category of the investment (*e.g.*, money market fund, balanced fund (stocks and bonds), large-cap stock fund, employer securities);
- *Performance data* including:
  - for designated investment alternatives with respect to which the return is not fixed, the average annual total return of the investment for one, five, and 10 calendar year periods (or for the life of the alternative, if shorter) ending on the date of the most recently completed calendar year; as well as a statement indicating that an investment's past performance is not necessarily an indication of how the investment will perform in the future; and
  - for designated investment alternatives with respect to which the return is fixed or stated for the term of the investment, both the fixed or stated annual rate of return and the term of the investment. If, with respect to such a designated investment alternative, the issuer reserves the right to adjust the fixed or stated rate of return prospectively during the term of the contract or agreement, the current rate of return, the minimum rate guaranteed under the contract, if any, and a statement advising participants and beneficiaries that the issuer may adjust the rate of return prospectively and how to obtain (*e.g.,* telephone or website) the most recent rate of return required under this section.
- *Benchmarks.* For designated investment alternatives with respect to which the return is not fixed, the name and returns of an appropriate broad-based securities market index over the one, five, and 10 calendar year periods (or for the life of the alternative, if shorter) comparable to the performance data periods provided for designated investment alternatives with respect to which the return is not fixed, and which is not administered by an affiliate of the investment issuer, its investment adviser, or a principal underwriter, unless the index is widely recognized and used.

If these and the other requirements under the regulations are met, a plan fiduciary may be liable for the investment options made available under the plan, but not for the specific investment decisions made by participants. However, the regulations currently do not provide guidance as to a designated investment alternative which contains a mix of asset classes.

[2037] 29 C.F.R. sec. 2550.404a–5(d).

Explanation of Provision

Not later than two years after the date of enactment, the provision requires that the Secretary of Labor (or such Secretary's delegate) promulgate regulations on fiduciary duties[2038] to provide that, in the case of a designated investment alternative that contains a mix of asset classes, a plan administrator may, but is not required to, use a benchmark which is a blend of different broad-based securities market indices if:

- the blend is reasonably representative of the asset class holdings of the designated investment alternative;
- for purposes of determining the blend's returns for one, five, and 10 calendar-year periods (or for the life of the alternative, if shorter), the blend is modified at least once per year if needed, to reflect changes in the asset class holdings of the designated investment alternative;
- the blend is furnished to participants and beneficiaries in a manner that is reasonably calculated to be understood by the average plan participant; and
- each securities market index that is used for an associated asset class would separately satisfy the requirements of such regulations for such asset class.

Not later than three years after the applicability date of regulations issued under this provision, the Secretary of Labor must deliver a report to the Committees on Finance and Health, Education, Labor, and Pensions of the U.S. Senate and the Committees on Ways and Means and Education and Labor of the House of Representatives regarding the utilization, and participants' understanding, of the benchmarking requirements under the provision.

Effective Date

The provision is effective on the date of enactment of the Act (December 29, 2022).

19. Review and report to Congress relating to reporting and disclosure requirements (sec. 319 of the Act)

Present Law

Under the Code and ERISA, plans must satisfy requirements relating to reporting and disclosure of plan information. These requirements include information required to be reported to IRS, DOL, and PBGC, as well as to participants and beneficiaries.[2039] For example, plan administrators generally must file an annual return with the IRS, an annual report with DOL, and certain information annually with PBGC. Form 5500, which consists of a primary form and various schedules, includes the information required to be filed with all three agencies. The plan administrator satisfies the reporting requirement with respect to each agency by filing the Form 5500 with DOL. Other information required to be reported to the IRS includes plan distributions, excise taxes imposed on the plan, and separated participants with deferred vested

[2038] Under section 404 of ERISA.

[2039] In certain cases, plan information also must be provided to other interested parties such as unions (in the case of multiemployer plans).

benefits.[2040] Defined benefit plans must report certain information to PBGC, including information relating to funding, terminations, and reportable events.

With respect to participants and beneficiaries, the reporting and disclosure requirements include the provision of a summary plan description, which describes the plan's eligibility requirements for participation and benefits, vesting provisions, procedures for claiming benefits under the plan, and other information.[2041] Plans must also furnish participants and beneficiaries with periodic benefit statements that indicate the total benefits accrued and the nonforfeitable benefits (or the earliest date on which benefits become nonforfeitable).[2042] Certain information is required to be provided upon certain events, such as termination of employment,[2043] plan termination,[2044] reduction in future benefit accruals,[2045] or a plan distribution that is eligible for rollover treatment.[2046] Certain requirements also apply depending on the type of plan. For example, section 401(k) plans and section 403(b) plans must advise employees of opportunities to make or change elective deferrals under the plan,[2047] and section 401(k) safe harbor plans and plans with automatic enrollment features have special notice requirements.[2048] Certain notices must be provided to participants and beneficiaries in individual account plans who are permitted to exercise control over account assets.[2049] In the case of defined benefit plans, notices relating to plan funding, such as an annual funding notice, must be furnished to participants and beneficiaries.[2050]

Explanation of Provision

The provision requires the Secretary, the Secretary of Labor, and the Director of PBGC to review the reporting and disclosure requirements that apply to pension plans[2051] under Title I of ERISA and that apply to qualified retirement plans[2052] under the Code. Such review must take place as soon as practicable after the date of enactment, and, no later than three years after such date, after consultation with a balanced group of participant and employer representatives, the agencies must report on the effectiveness of the reporting and disclosure requirements and make certain recommendations, as described below, to the Committee on Education and Labor and the Committee on Ways and Means of the House of Representatives, and the Committee on Health, Education,

[2040] This information is reported on the Form 1099–R (plan distributions), Form 5330 (excise tax), and Form 8955–SSA (separated participants with deferred vested benefits).

[2041] ERISA sec. 102; 29 C.F.R. sec. 2520.102–2 and –3. Plans must also provide summaries of material modifications to the plan. ERISA sec. 102.

[2042] ERISA sec. 105.

[2043] ERISA sec. 209.

[2044] 29 C.F.R. sec. 2550.404a–3 (relating to termination of individual account plans); ERISA sec. 4041(a)(2) (relating to termination of single-employer defined benefits plans). Single employer defined benefit plans also must report plan termination to PBGC.

[2045] Sec. 4980F; ERISA sec. 204(h).

[2046] Sec. 402(f).

[2047] Treas. Reg. sec. 1.401(k)–1(e)(2)(ii); Treas. Reg. sec. 1.403(b)–5(b)(2). This requirement also applies to SIMPLE plans. Sec. 408(p)(5)(C).

[2048] Sec. 401(k)(12)(D); sec. 401(k)(13)(E); sec. 414(w)(4).

[2049] ERISA sec. 404(c).

[2050] ERISA sec. 101. Certain notices related to plan funding also must be provided to PBGC.

[2051] ERISA sec. 3(2).

[2052] For this purpose, qualified retirement plans include plans qualified under section 401(a), annuity plans described in section 403(a), and section 403(b) plans. Sec. 4974(c)(1), (2), and (3).

Labor, and Pensions and the Committee on Finance of the Senate. The agencies must conduct appropriate surveys and data collection to obtain any needed information.

The report must include the following:

- Recommendations as may be appropriate to consolidate, simplify, standardize, and improve such requirements so as to simplify reporting for, and disclosure from, such plans and ensure that plans can furnish and participants and beneficiaries timely receive and better understand the information they need to monitor their plans, plan for retirement, and obtain the benefits they have earned; and
- To assess the effectiveness of the applicable reporting and disclosure requirements, an analysis of how participants and beneficiaries are providing preferred contact information, the methods by which plan sponsors and plans are furnishing disclosures, and the rate at which participants and beneficiaries are receiving, accessing, understanding, and retaining disclosures.

Effective Date

The provision is effective on the date of enactment.

20. Eliminating unnecessary plan requirements related to unenrolled participants (sec. 320 of the Act and sec. 414 of the Code)

Present Law

Background on the reporting and disclosure requirements that apply to plans under the Code and ERISA may be found in the description of present law of section 319 of the Act.

Explanation of Provision

The provision generally exempts defined contribution plans[2053] from requirements under the Code and ERISA to provide disclosures, notices, and other plan documents to unenrolled participants, provided that the unenrolled participant receives: (1) an annual reminder notice of the participant's eligibility to participate in the plan and any applicable election deadlines, and (2) any document the participant requests that the participant would be entitled to if not for this provision.

Under the provision, the annual reminder notice must be furnished in connection with the plan's annual open season election period (or, if there is no such period, within a reasonable period prior to the beginning of each plan year), and must notify the participant of (1) the participant's eligibility to participate in the plan, and (2) the key benefits and rights under the plan, with a focus on employer contributions and vesting provisions. The annual reminder notice must be provided in accordance with DOL regulations relating to disclosure.[2054] The notice must provide the re-

[2053] Under ERISA, the term is "an individual account plan."
[2054] 29 C.F.R. sec. 2520.104(b)–1 (or any successor regulation).

quired information in a prominent manner calculated to be understood by the average participant.

The provision defines "unenrolled participant" as an employee who (1) is eligible to participate in a defined contribution plan; (2) has been furnished the summary plan description and any other notices related to eligibility under the plan that are required to be furnished under the Code or ERISA in connection with the participant's initial eligibility to participate in the plan; (3) is not participating the plan; and (4) satisfies such other criteria as the Secretary and the Secretary of Labor may determine is appropriate, as prescribed in guidance in consultation with each other. For this purpose, any eligibility to participate in the plan following any period of ineligibility is treated as initial eligibility.

Effective Date

The provision is effective for plan years beginning after December 31, 2022.

21. Review of pension risk transfer interpretive bulletin (sec. 321 of the Act and sec. 404(a) of ERISA)

Present Law

Under present law, fiduciaries of an employee benefit plan[2055] must discharge their duties with respect to such a plan solely in the interest of the participants and beneficiaries.[2056] In addition, the fiduciary must act for the exclusive purpose of providing benefits to the participants and beneficiaries and defraying reasonable plan administration expenses.[2057] A fiduciary is also required to act with the care, skill, prudence and diligence under the prevailing circumstances that a prudent person acting in a like capacity and familiar with such circumstances would use.[2058]

With respect to the application of such fiduciary responsibilities where a plan selects an annuity provider for purposes of a pension plan benefit distribution, whether upon separation of service or retirement of a participant or beneficiary, or upon the termination of the retirement plan itself, DOL issued an interpretive bulletin regarding the appropriate process for choosing an annuity provider to whom the pension plan intends to transfer liability for benefits.[2059] DOL explains that fiduciaries must take steps calculated to obtain the safest annuity available, unless under the circumstances, it would be in the interests of participants and beneficiaries to do otherwise. Plan fiduciaries must conduct an objective, thorough and analytical search for the purpose of identifying and selecting providers from which to purchase annuities. Among the factors to be considered by plan fiduciaries in making the selection are: the quality and diversification of the annuity provider's investment

[2055] Defined in section 4(a) of ERISA (and not exempted under section 4(b) such as governmental plans and church plans) other than certain plans such as an unfunded plan maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees.
[2056] Section 404(a)(1) of ERISA.
[2057] Section 404(a)(1)(A) of ERISA.
[2058] Section 404(a)(1)(B) of ERISA.
[2059] See 29 C.F.R. 2509.95–1, Interpretive bulletin relating to the fiduciary standards under ERISA when selecting an annuity provider for a defined benefit pension plan.

portfolio, the size of the insurer relative to the proposed contract, the level of the insurer's capital and surplus, the lines of business of the annuity provider and other indications of an insurer's exposure to liability, the structure of the annuity contract and guarantees supporting the annuities, and the availability of additional protection through state guaranty associations and the extent of their guarantees.

Explanation of Provision

Under the provision, not later than one year after the date of enactment, DOL is directed to review its current interpretive bulletin governing fiduciary standards under ERISA when selecting an annuity provider for defined benefit pension plan risk transfers, and to consult with the Advisory Council on Employee Welfare and Pension Benefit Plans[2060] to determine whether amendments to the interpretive bulletin are warranted and to report its findings to Congress, including the assessment of any risk to participants.

Effective Date

The provision is effective on the date of enactment (December 29, 2022).

22. Tax treatment of IRA involved in a prohibited transaction (sec. 322 of the Act and sec. 408 of the Code)

Present Law

For background on prohibited transactions, see the present law description of section 113 of the Act.

Disqualification of IRA in certain prohibited transactions

If an individual for whose benefit an IRA is established (or such individual's beneficiary) engages in a prohibited transaction with respect to the IRA, the IRA loses its tax-favored status and ceases to be an IRA as of the first day of the taxable year in which the prohibited transaction occurs.[2061] In such case, the IRA is treated as distributing to the individual on the first day of that taxable year the fair market value of all of the assets in the account. If the fair market value of the IRA assets exceeds the individual's basis, the individual has taxable gain that is includible in gross income.[2062] If the individual is under age 59½, the individual may also be subject to the 10-percent tax on early distributions.[2063] The individual and the individual's beneficiaries are exempt, however, from the excise tax that otherwise applies to prohibited transactions.[2064]

Explanation of Provision

Under the provision, for purposes of the rule that an IRA loses its tax-favored status and ceases to be an IRA if the IRA owner or

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[2060] Established under section 512 of ERISA.
[2061] Sec. 408(e)(2). "Prohibited transaction" means a transaction prohibited by section 4975.
[2062] Sec. 408(d)(1); 72(e)(3).
[2063] Sec. 72(t).
[2064] Sec. 4975(c)(3).

beneficiary engaged in a prohibited transaction, each individual retirement plan of the individual is treated as a separate contract. Thus, if an individual has multiple IRAs, only the IRA (or IRAs) with respect to which the individual engaged in a prohibited transaction is disqualified on account of such prohibited transaction.

The provision specifies that it may not be construed to infer the proper treatment of IRAs as one contract under any other provision of the Code.

Effective Date

The provision applies to taxable years beginning after date of enactment (December 29, 2022).

23. Clarification of substantially equal periodic payment rule (sec. 323 of the Act and sec. 72(t) and (q) of the Code)

Present Law

Recapture of the early withdrawal tax for substantially equal periodic payments

Distributions from a qualified retirement plan

Additional background on distributions from tax-favored retirement plans may be found in the description of present law for section 115 of the Act.

A distribution from a qualified retirement plan (which, for this purpose, includes a plan qualified under section 401(a), a section 403(a) annuity 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 unless an exception applies.[2065] One exception to the early withdrawal tax is for distributions made as a series of substantially equal periodic payments (not less frequently than annually) that are made for the life or life expectancy of the employee or the joint lives or life expectancies of the employee and their designated beneficiary.[2066]

However, if the series of payments is terminated or modified before the end of the five-year period beginning on the date of the first payment, or before the employee attains age 59½, then the entire series of distributions is subject to the 10-percent early withdrawal tax.[2067] In that case, the 10-percent early withdrawal tax is imposed for the first taxable year in which the payments were modified and is the same amount as would have been imposed had the exception not applied (plus interest for the deferral period).[2068]

Payments are considered to be substantially equal periodic payments for purposes of the exception to the 10-percent early withdrawal tax if they are made in accordance with one of three per-

[2065] Sec. 72(t). The 10-percent early withdrawal tax does not apply to distributions from a governmental section 457(b) plan. Qualified retirement plan is defined in section 72(t)(1), by reference to section 4974(c).

[2066] Sec. 72(t)(2)(A)(iv).

[2067] Sec. 72(t)(4). Modification due to death or disability, or by reason of distribution to a qualified public safety employee from a governmental plan is permitted without penalty. Sec. 72(t)(10).

[2068] Sec. 72(t)(4)(A)(ii).

missible calculation methods.[2069] An individual who begins distributions as a series of substantially equal periodic payments using one method can, in certain circumstances, make a one-time modification to the required minimum distribution method to determine the payment for the year of the change and all subsequent years without triggering the application of the 10-percent early withdrawal tax.[2070] However, because all three calculation methods for substantially equal periodic payments are calculated using an account balance as of a specified valuation date, a modification is considered to have occurred (and the 10-percent early withdrawal tax would then apply) if, after that first valuation date, there is (1) any addition to the account balance other than gains or losses, (2) any transfer of a portion of the account balance to another retirement plan, or (3) a rollover of the amount received by the taxpayer to another account.[2071]

Distributions from annuity contracts

Similarly, if a taxpayer receives any amount under a non-qualified annuity contract, the taxpayer's income is increased by 10 percent of the amount received which is includible in gross income.[2072] There are also exceptions to this 10-percent additional tax, one of which is for a series of substantially equal periodic payments.[2073] The rules applying this exception are generally parallel to the rules described above, including the recapture of the 10-percent additional tax if the series of substantially equal periodic payments is subsequently modified.[2074] In addition, the same principles described with respect to distributions from a qualified retirement plan apply when determining whether a change in substantially equal periodic payments will be treated as a modification for purposes of the 10-percent additional tax.[2075]

Tax reporting

Information reporting on distributions from qualified plans and annuity contracts is required from certain persons, such as employers, plan administrators, and trustees.[2076] Failure to comply with those reporting requirements can result in penalties.[2077] These penalties may be waived in certain circumstances, including with respect to any failure due to reasonable cause and not willful neglect.[2078]

Explanation of Provision

If a series of substantially equal periodic payments are being made from a qualified retirement plan then, under the provision,

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[2069] Notice 2022–6, 2022–5 I.R.B. 460, January 31, 2022. The three methods are based on the methods described in Rev. Proc. 2002–62, 2002–42 I.R.B. 710, and include the required minimum distribution method, the fixed amortization method, and the fixed annuitization method.

[2070] Notice 2022–6, 2022–5 I.R.B. 460. Once this one-time change in method is made, any further modification will result in application of the 10-percent early withdrawal tax.

[2071] Notice 2022–6, 2022–5 I.R.B. 460.

[2072] Sec. 72(q)(1).

[2073] Sec. 72(q)(2)(D).

[2074] Sec. 72(q)(3).

[2075] Notice 2022–6, 2022–5 I.R.B. 460.

[2076] Secs. 408(i); 6047(d).

[2077] Secs. 6721; 6722.

[2078] Sec. 6724.

the transfer or a rollover from such qualified retirement plan of all or a portion of the taxpayer's benefit under the plan that is made to a subsequent qualified plan is not considered a modification for purposes of the 10-percent early withdrawal tax provided that the transfer or rollover results in distributions that otherwise satisfy the series of substantially equal period payment exception. Compliance with this exception is determined based on the combined distributions from both plans as if the payments had been made only from the transferor plan. Similar relief is available following the tax-free exchange of all or a portion of a non-qualified annuity contract for another contract.

The provision also adds a safe harbor for annuity payments specifying that periodic payments do not fail to be treated as substantially equal for purposes of the exception to the 10-percent early withdrawal tax merely because they are amounts received as an annuity. Such payments are deemed substantially equal if they are payable over the time periods set forth in the exception to the 10-percent early withdrawal tax for substantially equal periodic payments and satisfy the required minimum distribution rules applicable to annuity payments.

The provision also provides relief from the penalties associated with the applicable reporting requirements for distributions by permitting reliance on a certification from the taxpayer that the transfer or rollover meets the requirements needed for purposes of the exception to the 10-percent additional tax, absent knowledge to the contrary.

Effective Date

The provision is effective for transfers, rollovers, and exchanges occurring after December 31, 2023. The safe harbor for annuity payments applies to distributions commencing on or after the date of enactment (December 29, 2022). Nothing in the amendments made by this provision may be construed to create an inference with respect to the law in effect prior to the effective date.

24. Treasury guidance on rollovers (sec. 324 of the Act and secs. 402(c) and 408(d) of the Code)

Present Law

In general

A distribution from an employer-sponsored retirement plan or IRA is generally includible in income except for any portion attributable to after-tax contributions, which result in basis.[2079] Unless an exception applies, in the case of a distribution before age 59½, any amount included in income is generally subject to an additional 10-percent tax, referred to as the "early withdrawal" tax.[2080]

[2079] Secs. 402(a), 403(b)(1), 408(d)(1), and 457(a)(1). Under sections 402A(d) and 408A(d), a qualified distribution from a designated Roth account under an employer-sponsored plan and from a Roth IRA is not includible in income.

[2080] Sec. 72(t). The early withdrawal tax does not apply to a section 457(b) plan.

Rollovers from employer-sponsored retirement plans

A distribution from a qualified retirement plan, section 403(b) plan, or a governmental section 457(b) plan that is an eligible rollover distribution may be rolled over to another such plan or an IRA. The rollover generally can be achieved by direct rollover (direct payment from the distributing plan to the recipient plan) or by contributing the distribution to the eligible retirement plan within 60 days of receiving the distribution ("60-day rollover").[2081] If the distribution from an employer-sponsored retirement plan consists of property, the rollover is accomplished by a transfer or contribution of the property to the recipient plan or IRA. Amounts that are rolled over are usually not included in gross income.[2082] Generally, any distribution of the balance to the credit of a participant is an eligible rollover distribution with exceptions, for example, for certain periodic payments, required minimum distributions, and hardship distributions.[2083]

Direct transfer of eligible rollover distributions

Qualified retirement plans, section 403(b) plans, and governmental section 457(b) plans are required to offer a direct rollover with respect to any eligible rollover distribution before paying the amount to the participant or beneficiary.[2084] If an eligible rollover distribution is not directly rolled over into an eligible retirement plan, the taxable portion of the distribution generally is subject to mandatory 20-percent income tax withholding.[2085] Participants who do not elect a direct rollover but who roll over eligible distributions within 60 days of receipt also defer tax on the rollover amounts; however, the 20 percent withheld will remain taxable unless the participant substitutes funds within the 60-day period.

Rollovers from IRAs

Distributions from IRAs are permitted to be rolled over tax-free to another IRA or any other eligible retirement plan. The general 60-day rollover rule (discussed above) applies to IRA rollovers as well as rollovers from qualified retirement plans, section 403(b) annuities, and governmental section 457(b) plans. There is no provision for direct rollovers from an IRA, but direct payment to another eligible retirement plan (via a trustee-to-trustee transfer) generally satisfies the requirements. Distributions from an inherited IRA (except in the case of an IRA acquired by the surviving spouse by reason of the IRA owner's death) and required minimum distributions

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[2081] Secs. 402(c), 402A(c)(3), 403(b)(8) and 457(e)(16). An exception to the 60-day rules applies to rollovers of qualified plan loan offset amounts. Sec. 402(c)(3)(C).

[2082] Distributions from qualified retirement plans, section 403(b) plans, and governmental section 457(b) plans may be rolled into a Roth IRA. Distributions from these plans that are rolled over into a Roth IRA and that are not distributions from a designated Roth account must be included in gross income.

[2083] Sec. 402(c)(4). Treas. Reg. sec. 1.402(c)–1 identifies certain other payments that are not eligible for rollover, including, for example, certain corrective distributions, loans that are treated as deemed distributions under section 72(p), and dividends on employer securities as described in section 404(k). In addition, pursuant to section 402(c)(11), any distribution to a beneficiary of a deceased employee other than the participant's surviving spouse is only permitted to be rolled over to an IRA using a direct rollover; 60-day rollovers are not available to nonspouse beneficiaries.

[2084] Sec. 401(a)(31).

[2085] Treas. Reg. sec. 1.402(c)–2, Q&A–1(b)(3).

are not permitted to be rolled over.[2086] The portion of any distribution from an IRA that is not includible in gross income is only permitted to be rolled over to another IRA. Generally, distributions from a traditional IRA may only be rolled over tax-free to another IRA and distributions from a Roth IRA may only be rolled over tax-free to another Roth IRA. However, a distribution from a traditional IRA may be rolled over to a Roth IRA as a Roth conversion with the required income inclusion.[2087]

Explanation of Provision

The provision requires the Secretary (or the Secretary's delegate), no later than January 1, 2025, to develop and issue guidance in the form of sample forms (including relevant procedures and protocols) for (1) rollovers of eligible rollover distributions from a qualified retirement plan to an eligible retirement plan,[2088] and (2) trustee-to-trustee transfers of amounts from one IRA to another. The purpose of such forms is to simplify, standardize, facilitate, and expedite the completion of rollovers from eligible retirement plans and trustee-to-trustee transfers from IRAs. The sample forms must be written in a manner calculated to be understood by the average person and must apply to both the distributing retirement plans or transferring IRAs and the receiving retirement plans or IRAs. In developing the sample forms, the Secretary (or the Secretary's delegate) must obtain relevant information from participants and plan sponsor representatives and consider potential coordination with sections 319 (relating to reports to Congress on reporting and disclosure requirements) and 336 (relating to report to Congress on section 402(f) notices) of this Act.

Effective Date

The provision is effective on the date of enactment (December 29, 2022).

25. Roth plan distribution rules (sec. 325 of the Act and sec. 402A(d) of the Code)

Present Law

Qualified Roth contribution programs

An applicable retirement plan[2089] may include a qualified Roth contribution program that permits a participant to elect to have all or a portion of the participant's elective deferrals[2090] under the plan treated as designated Roth contributions.[2091] Designated Roth contributions are elective deferrals that the participant designates as not excludable from the participant's gross income.[2092] The plan

[2086] Sec. 402(c)(4) and (c)(9). A trustee-to-trustee transfer between IRAs is not treated as a distribution and rollover. Thus, nonspouse beneficiaries of IRAs can move funds to another inherited IRA established as a beneficiary of the decedent IRA owner. Sec. 402(c)(11). In contrast, a surviving spouse is permitted to roll over a distribution to his or her own IRA. Sec. 402(c)(9).
[2087] Sec. 408A(d)(3).
[2088] As defined in section 402(c)(8)(B).
[2089] As defined in section 402A(e)(1).
[2090] As defined in section 402A(e)(2).
[2091] Sec. 402A(a).
[2092] Sec. 402A(c). The amount of elective deferrals an employee may so designate is limited (sec. 402A(c)(2)).

is required to establish a separate account (a designated Roth account), and maintain separate recordkeeping, for a participant's designated Roth contributions (and earnings allocable thereto).[2093]

A qualified distribution from a participant's designated Roth account generally is not includible in the participant's gross income.[2094]

Roth IRA distributions

There are two basic types of IRAs. In the case of traditional IRAs,[2095] contributions in excess of the deductible amount are not permitted,[2096] and distributions are includible in the gross income of the payee or distributee.[2097]

In the case of Roth IRAs, only nondeductible (after-tax) contributions may be made.[2098] For a Roth IRA, if certain requirements are satisfied, distributions are not includible in gross income.[2099]

Exceptions to certain distribution requirements for Roth IRAs

Distributions from a participant's designated Roth account under a qualified Roth contribution program are subject to pre-death minimum distribution rules as well as incidental death benefit requirements.

However, under an exception, the pre-death minimum distribution rules that generally apply to IRAs[2100] do not apply to Roth IRAs. In addition, the incidental death benefit rules do not apply to Roth IRAs.[2101]

Explanation of Provision

The provision adds an exception in the case of a designated Roth account. Under the exception, the pre-death minimum distribution rules[2102] and the incidental death benefit requirements[2103] do not apply to a designated Roth account under a qualified Roth contribution program.

Effective Date

The provision is effective generally for taxable years beginning after December 31, 2023.

However, under a transition rule, the provision does not apply to distributions which are required with respect to years beginning before January 1, 2024, but are permitted to be paid on or after that date.

[2093] Sec. 402A(b)(2).

[2094] Sec. 402A(d). Qualified distributions are defined in section 402A(d)(2). In general, qualified distributions do not include distributions made within a five-year nonexclusion period and do not include distributions of certain excess deferrals or excess contributions, or income thereon. Rules are provided for the treatment of excess designated Roth contributions (sec. 402A(d)(3)) and rollovers (secs. 402A(c)(3) and (4)).

[2095] Sec. 408.

[2096] Sec. 219.

[2097] Sec. 408(d).

[2098] Sec. 408A.

[2099] Sec. 408A(d).

[2100] Secs. 408(a)(6) and (b)(3).

[2101] Secs. 408A(c)(4) and 401(a).

[2102] Secs. 401(a)(9)(A).

[2103] Sec. 401(a).

26. Exception to penalty on early distributions from qualified plans for individuals with a terminal illness (sec. 326 of the Act and sec. 72(t) of the Code)

Present Law

Distributions from tax-favored retirement plans

Background on distributions from tax-favored retirement plans may be found in the description of present law for section 115 of the Act.

Explanation of Provision

Under the provision, an exception to the 10-percent early withdrawal tax applies in the case of a distribution made to an employee who is a terminally ill individual on or after the date on which such employee has been certified by a physician as having a terminal illness.

For purposes of this provision, terminally ill individual means an individual who has been certified by a physician as having an illness or physical condition that can reasonably be expected to result in death in 84 months or less after the date of the certification.[2104] An employee will not be considered terminally ill unless sufficient evidence is provided in a form and manner to be determined by the Secretary. Amounts distributed pursuant to this provision may be repaid under rules similar to the rules applicable to repayments in the case of a qualified birth or adoption distribution, under which amounts may be recontributed to an applicable eligible retirement plan to which a rollover can be made at any time during the three-year period beginning on the day after the date on which the distribution was received.[2105]

Effective Date

The provision is effective for distributions made after the date of enactment.

27. Surviving spouse election to be treated as employee (sec. 327 of the Act and sec. 401(a)(9) of the Code)

Present Law

For a description of present law see the description of section 107 of the Act.

Explanation of Provision

In the case of an employee who dies before the distribution of required minimum distributions has begun under the plan, and who has designated a spouse as sole beneficiary, the provision permits the spouse to elect to be treated as the employee for purposes of determining the distribution period. The provision further directs

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[2104] This definition has the same meaning given such term under sec. 101(g)(4)(A) (pertaining to the treatment of certain accelerated death benefits) except that "84 months" is substituted for "24 months."

[2105] See sec. 72(t)(2)(H)(v). A description of the rules applicable to repayments of qualified birth or adoption distributions may be found in the description of present law and explanation of provision for section 311 of the Act.

the Secretary to amend the regulations to provide that the distribution period for the spouse in such case is determined using the Uniform Life Table.[2106] Thus, the provision allows a designated beneficiary who is a surviving spouse to receive a similar distribution period for lifetime distributions under an employer-sponsored retirement plan as is permitted under present law in an IRA for a surviving spouse.

The provision also permits the spouse to elect whether to apply the present-law rule that treats the spouse as the employee for purposes of determining the distribution period in cases where the spouse dies before distributions have begun.

The provision provides for the elections to be made in such time and manner as prescribed by the Secretary. The election must include a timely notice to the plan administrator, and once made it may not be revoked except with the consent of the Secretary.

Effective Date

The provision is effective for calendar years beginning after December 31, 2023.

28. Repeal of direct payment requirement on exclusion from gross income of distributions from governmental plans for health and long-term care insurance (sec. 328 of the Act and sec. 402(l)(5)(A) of the Code)

Present Law

Under present law, a distribution from a qualified retirement plan is generally includible in income.[2107] Under an exception to this general rule, certain distributions from an eligible retirement plan used to pay for qualified health insurance premiums are excludible from income, up to a maximum exclusion of $3,000 annually. An eligible retirement plan includes a governmental qualified retirement or annuity plan, a section 403(b) annuity, or a governmental section 457 plan. The exclusion applies with respect to eligible retired public safety officers who make an election to have qualified health insurance premiums deducted from amounts distributed from an eligible retirement plan and paid directly to the insurer. An eligible retired public safety officer is an individual who, by reason of disability or attainment of normal retirement age, is separated from service as a public safety officer[2108] with the employer who maintains the eligible retirement plan from which pension distributions are made.

Qualified health insurance premiums include premiums for accident or health insurance or qualified long-term care insurance contracts covering the taxpayer, the taxpayer's spouse, or the taxpayer's dependents. The qualified health insurance premiums do not have to be for a plan sponsored by the employer; however, the exclusion does not apply to premiums paid by the employee and reimbursed with pension distributions. Amounts excluded from in-

[2106] Treas. Reg. sec. 1.401(a)(9)–5, Q&A 5(a), or any successor regulation.

[2107] Secs. 402(a), 403(a), 403(b), 408(d), and 457(a).

[2108] The term "public safety officer" has the same meaning as under section 1204(9)(A) of the Omnibus Crime Control and Safe Streets Act of 1986 as in effect immediately before the enactment of the National Defense Authorization Act for Fiscal Year 2013.

come under the provision are not taken into account in determining the itemized deduction for medical expenses under section 213 or the deduction for health insurance of self-employed individuals under section 162.

The exclusion applies to a distribution only if payment of the premiums is made directly to the provider of the accident or health plan or qualified long-term care insurance contract by deduction from a distribution from the eligible retirement plan. For this purpose, all eligible retirement plans of an employer are treated as a single plan.[2109]

Explanation of Provision

The provision provides that the exclusion for distributions used to pay for qualified health insurance premiums applies to a distribution without regard to whether payment of the premiums is made directly to the provider of the accident or health plan or qualified long-term care insurance contract by deduction from a distribution from the eligible retirement plan, or is made to the employee.

The provision requires reporting in the case of a payment made to the employee. The employee is required to include with the tax return for the taxable year of the distribution an attestation that the distribution does not exceed the amount paid by the employee for qualified health insurance premiums for that taxable year.

Effective Date

The provision applies to distributions made after the date of enactment (December 29, 2022).

29. Modification of eligible age for exemption from early withdrawal penalty (sec. 329 of the Act and sec. 72(t) of the Code)

Present Law

For background on the early withdrawal tax and the rules that apply to qualified public safety employees, see the present law description of section 308 of the Act.

Explanation of Provision

The provision modifies the exception from the early withdrawal tax that applies to distributions made to a qualified public safety employee after separation from service after age 50 to also apply if the employee separates after 25 years of service under the plan regardless of age. Thus, a distribution from a governmental plan that is made to a qualified public safety employee after separation from service after attainment of age 50 or 25 years of service under the plan (whichever is earlier) is exempt from the early withdrawal tax.

[2109] Sec. 402(l)(5)(B).

Effective Date

The provision is effective for distributions made after the date of enactment.

30. Exemption from early withdrawal penalty for certain State and local government corrections employees (sec. 330 of the Act and sec. 72(t) of the Code)

Present Law

For background on the early withdrawal tax and the rules that apply to qualified public safety employees, see the present law description of section 308 of the Act.

For purposes of the exception to the early withdrawal tax that applies to certain distributions made to a qualified public safety employee, a qualified public safety employee means (1) any employee of a State or a political subdivision of a State who provides police protection, firefighting services, or emergency medical services for any area within the State or political subdivision's jurisdiction; or (2) any Federal law enforcement officer,[2110] any Federal customs and border protection officer,[2111] any Federal firefighter,[2112] any Federal employee who is an air traffic controller[2113] or nuclear materials courier,[2114] any member of the United States Capitol Police, any member of the Supreme Court Police, or any diplomatic security special agent of the Department of State.

A Federal law enforcement officer means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States, including an employee engaged in this activity who is transferred to a supervisory or administrative position. "Detention" for this purpose includes the duties of (1) employees of the Bureau of Prisons and Federal Prison Industries, Incorporated; (2) employees of the Public Health Service assigned to the field service of the Bureau of Prisons or of the Federal Prison Industries, Incorporated; (3) employees in the field service at Army or Navy disciplinary barracks or at confinement and rehabilitation facilities operated by any of the armed forces; and (4) employees of the Department of Corrections of the District of Columbia, its industries and utilities; whose duties in connection with individuals in detention suspected or convicted of offenses against the criminal laws of the United States or of the District of Columbia or offenses against the punitive articles of the Uniformed Code of Military Justice require frequent direct contact with these individuals in their detention, direction, supervision, inspection, training, employment, care, transportation, or rehabilitation.

[2110] As defined in 5 U.S.C. secs. 8331(20) or 8401(17).
[2111] As defined in 5 U.S.C. secs. 8331(31) or 8401(36).
[2112] As defined in 5 U.S.C. secs. 8331(21) or 8401(14).
[2113] As defined in 5 U.S.C. secs. 8331(30) or 8401(35).
[2114] As defined in 5 U.S.C. secs. 8331(27) or 8401(33).

Explanation of Provision

The provision modifies the definition of qualified public safety employee to also include any employee of a State or political subdivision of a State who provides services as a corrections officer or as a forensic security employee providing for the care, custody, and control of forensic patients. Thus, a distribution from a governmental plan that is made to such a corrections officer or forensic security employee after separation from service after attainment of age 50 is exempt from the early withdrawal tax.

Effective Date

The provision is effective for distributions made after the date of enactment.

31. Special rules for use of retirement funds in connection with qualified Federally declared disasters (sec. 331 of the Act and sec. 72 of the Code)

Present Law

Distributions from tax-favored retirement plans

A distribution from a tax-qualified plan described in section 401(a) (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 IRA generally is included in income for the year distributed.[2115] These plans are referred to collectively as "eligible retirement plans."[2116] In addition, unless an exception applies, a distribution from a qualified retirement plan, a section 403(b) plan, or an IRA received before age 59 is subject to a 10-percent additional tax (referred to as the "early withdrawal tax") on the amount includible in income.[2117]

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 IRS 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, disaster, or other events beyond the reasonable control of the individual.[2118]

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 employ-

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[2115] 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.

[2116] Sec. 402(c)(8)(B). Eligible retirement plans also include annuity plans described in section 403(a).

[2117] Sec. 72(t). The 10-percent early withdrawal tax does not apply to distributions from a governmental section 457(b) plan.

[2118] Rev. Proc. 2016–47, 2016–37 I.R.B. 346, provides for a self-certification procedure (subject to verification on audit) that may be used by a taxpayer claiming eligibility for a waiver of the 60-day requirement with respect to a rollover into a plan or IRA in certain specified circumstances.

ment, referred to as "in-service" distributions. Despite such restrictions, an in-service distribution may be permitted under certain types of plans in the case of financial hardship or an unforeseeable emergency.

Loans from tax-favored retirement plans

Employer-sponsored retirement plans are permitted, but not required, to 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 (1) the loan amount must not exceed the lesser of 50 percent of the participant's account balance or $50,000 (generally taking into account outstanding balances of previous loans) and (2) 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.[2119] 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 a 10-percent early withdrawal tax, if applicable. A deemed distribution is not eligible for rollover to another eligible retirement plan. The rules generally do not limit the number of loans an employee may obtain from a plan except to the extent that any additional loan would cause the aggregate loan balance to exceed limitations.

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.

Disaster relief

Congress has at times liberalized the plan distribution and loan provisions for individuals affected by certain natural disasters.[2120]

Congress has also provided relief from the plan distribution and loan provisions for individuals affected by COVID–19.[2121]

Explanation of Provision

Distributions and recontributions

The provision allows an exception to the 10-percent early withdrawal tax for a "qualified disaster recovery distribution" from a

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[2119] Sec. 72(p).

[2120] See, e.g., sec. 20102 of Pub. L. No. 115–123 (providing relief in response to 2017 California wildfires); sec. 502 of Pub. L. No. 115–63 (providing relief in response to Hurricanes Harvey, Irma, and Maria); former sec. 1400Q (providing relief in response to Hurricanes Katrina, Rita, and Wilma); sec. 202 of Div. Q of Pub. L. No. 116–94; and secs. 301 and 302 of Div. EE of Pub. L. No. 116–260. For a more detailed description of the most recently enacted provision, see Joint Committee on Taxation, General Explanation of Certain Tax Legislation Enacted in the 116th Congress (JCS–1–22), March 8, 2022, pp. 243–247.

[2121] See sec. 2202 of Pub. L. No. 116–136 (providing relief for "coronavirus-related distributions").

qualified retirement plan, a section 403(b) plan, or an IRA.[2122] The provision also allows a taxpayer to include income attributable to a qualified disaster recovery distribution ratably over three years and to recontribute the amount of the distribution to an eligible retirement plan within three years.

A "qualified disaster recovery distribution" is any distribution from a qualified retirement plan, section 403(b) plan, governmental section 457(b) plan, or an IRA, made on or after the first day of the incident period of a qualified disaster and before the date which is 180 days after the applicable date with respect to such disaster, to an individual whose principal place of abode at any time during the incident period is located in the qualified disaster area and who has sustained an economic loss by reason of such disaster.[2123]

The "applicable date" means the latest of: (1) the date of enactment, (2) the first day of the incident period with respect to the qualified disaster, or (3) the date of the disaster declaration with respect to the qualified disaster.

A "qualified disaster" means[2124] any disaster with respect to which a major disaster has been declared by the President under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act after December 27, 2020. A "qualified disaster area" means, with respect to any qualified disaster, the area with respect to which the major disaster was declared under the Robert T. Stafford Disaster Relief and Emergency Assistance Act; however, the term does not include any area which is a qualified disaster area solely by reason of section 301 of the Taxpayer Certainty and Disaster Tax Relief Act of 2020.[2125] The term "incident period" means, with respect to any qualified disaster, the period specified by the Federal Emergency Management Agency as the period during which such disaster occurred.

A plan is not treated as violating any Code requirement merely because it treats a distribution as a qualified disaster recovery 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[2126] does not exceed $22,000 in all taxable years with respect to each qualified disaster. The total amount of distributions to an individual from all eligible retirement plans that may be treated as qualified disaster recovery distributions with respect to each qualified disaster is $22,000. Thus, a plan is not treated as violating any Code requirement merely because an individual might receive total distributions in excess of $22,000, taking into account distributions from plans of other employers or IRAs.

[2122] This exception also applies to an annuity plan described in section 403(a). The 10-percent early withdrawal tax generally does not apply to section 457 plans. Sec. 72(t)(1).

[2123] A qualified disaster recovery distribution is subject to income tax withholding unless the recipient elects otherwise. Mandatory 20-percent withholding does not apply.

[2124] With respect to this provision and sec. 72(t)(8), as amended by this provision.

[2125] Section 301 covered any area with respect to which a major disaster was declared, during the period beginning on January 1, 2020, and ending on the date which is 60 days after the date of the enactment of the Act (December 27, 2020) by the President under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act if the incident period of the disaster with respect to which such declaration is made began on or after December 28, 2019, and on or before the date of the enactment of the Act.

[2126] As defined in secs. 414(b), (c), (m) and (o).

Any amount required to be included in income as a result of a qualified disaster recovery distribution is included in income ratably over the three-taxable year period beginning with the year of distribution unless the individual elects not to have ratable inclusion apply.[2127]

Any portion of a qualified disaster recovery distribution may, at any time during the three-year period beginning on the day after the date on which the distribution was received, be recontributed in one or more contributions (not to exceed the amount of such distribution) to an eligible retirement plan of which such individual is a beneficiary and to which a rollover can be made.[2128] 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 disaster recovery distribution in 2020, that amount is included in income, generally ratably over the year of the distribution and the following two years and is not subject to the 10-percent early withdrawal tax. If, in 2022, the amount of the qualified disaster recovery distribution is recontributed to an eligible retirement plan, the individual may file amended returns to claim a refund of the tax attributable to the amounts 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.

For purposes of satisfying the requirements to offer a participant the right to have a direct trustee to trustee transfer of an eligible rollover distribution,[2129] to provide a written explanation to a recipient of distributions eligible for rollover treatment,[2130] and satisfying withholding requirements,[2131] a qualified disaster recovery distribution will not be treated as an eligible rollover distribution.

A qualified disaster recovery distribution will be treated as meeting the qualification requirements for distributions from section 401(k) plans, section 403(b) plans, and from eligible deferred compensation plans under section 457(b).[2132] In the case of a money purchase pension plan, a qualified disaster recovery distribution which is an in-service withdrawal will be treated as meeting the section 401(a) distribution requirements.

Recontributions of withdrawals for purchase of a home

Any individual who received a distribution from an IRA during the period beginning on the date which is 180 days before the first day of the incident period of a qualified disaster and ending on the date which is 30 days after the last day of such incident period, which was a qualified first-time homebuyer distribution and was to be used to purchase or construct a principal residence in a qualified disaster area, but which was not so used on account of the qualified disaster with respect to such area, may, during the "applicable period," make one or more contributions in an aggregate amount not

[2127] And rules similar to the special rules of subparagraph (E) of section 408A(d)(3) will apply to qualified disaster recovery distributions.
[2128] Under section 402(c), 403(a)(4), 403(b)(8), 408(d)(3), or 457(e)(16), as the case may be.
[2129] Sec. 401(a)(31).
[2130] Sec. 402(f).
[2131] Sec. 3405.
[2132] Secs. 401(k)(2)(B)(i), 403(b)(7)(A)(i), 403(b)(11), and 457(d)(1)(A).

to exceed the amount of such qualified distribution to an eligible retirement plan[2133] of which such individual is a beneficiary and to which a rollover contribution of such distribution could be made.[2134] The "applicable period" is, in the case of a principal residence in a qualified disaster area with respect to any qualified disaster, the period beginning on the first day of the incident period of such qualified disaster and ending on the date which is 180 days after the applicable date.

Any individual who received a qualified distribution from a tax-qualified retirement plan during the period beginning on the date which is 180 days before the first day of the incident period of a qualified disaster and ending on the date which is 30 days after the last day of such incident period, which was a hardship distribution,[2135] and was to be used to purchase or construct a principal residence in a qualified disaster area, but which was not so used on account of the qualified disaster with respect to such area, may, during the "applicable period," make one or more contributions in an aggregate amount not to exceed the amount of such qualified distribution to an eligible retirement plan[2136] of which such individual is a beneficiary and to which a rollover contribution of such distribution could be made.[2137] The "applicable period" is, in the case of a principal residence in a qualified disaster area with respect to any qualified disaster, the period beginning on the first day of the incident period of such qualified disaster and ending on the date which is 180 days after the applicable date.

Loans

The provision modifies the rules applicable to loans, providing that for a qualified individual, in order for the loan not to be treated as a distribution, the permitted maximum loan amount from a qualified employer plan[2138] during the applicable period is the lesser of the present value of the nonforfeitable accrued benefit of the employee under the plan or $100,000.[2139] For this purpose, "qualified individual" has the same meaning as persons eligible to receive qualified disaster recovery distributions and the definition of "applicable date" is the same as that used for qualified disaster recovery distributions. The "applicable period" with respect to any disaster is the period beginning on the applicable date with respect to such disaster and ending on the date that is 180 days after such applicable date.

In the case of a qualified individual (with respect to any qualified disaster) with an outstanding loan from a qualified employer plan (on or after the applicable date of such qualified disaster), the provision delays by one year the due date for any repayment with respect to such loan, if the due date for any repayment otherwise would fall during the period beginning on the first day of the incident period of such qualified disaster and ending on the date which is 180 days after the last day of such incident period. Under the

[2133] As defined in section 402(c)(8)(B).
[2134] Under sections 402(c), 403(a)(4), 403(b)(8), or 408(d)(3), as the case may be.
[2135] Described in section 401(k)(2)(B)(i)(IV), 403(b)(7)(A)(i)(V) or 403(b)(11)(B).
[2136] As defined in section 402(c)(8)(B).
[2137] Under sections 402(c), 403(a)(4), 403(b)(8), or 408(d)(3), as the case may be.
[2138] For this purpose, qualified employer plan is defined in section 72(p)(4).
[2139] See sec. 72(p)(2)(A).

provision, any subsequent repayments are appropriately adjusted to reflect the delay in the earlier repayment due date and any interest accruing during that delay. The repayment delay is disregarded for purposes of the requirement that a loan be repaid within five years.

GAO Report

The provision requires that the Comptroller General of the United States submit a report to the Committees on Finance and Health, Education, Labor and Pensions of the Senate and the Committees on Ways and Means and Education and Labor of the House of Representatives on taxpayer utilization of the retirement disaster relief permitted by this provision and prior legislation, including a comparison of utilization by higher and lower income taxpayers, and whether the $22,000 threshold on distributions provides adequate relief for taxpayers who suffer from a disaster.

Effective Date

With respect to qualified disaster recovery distributions and recontributions of withdrawals for home purchases, the provision is applicable to distributions with respect to disasters the incident period for which begins on or after 30 days after the date of enactment of the Taxpayer Certainty and Disaster Tax Relief Act, which is January 26, 2021.

With respect to plan loans from qualified plans, the provision applies to such loans made with respect to disasters the incident period for which begins on or after 30 days after the date of enactment of the Taxpayer Certainty and Disaster Tax Relief Act, which is January 26, 2021.

32. Employers allowed to replace SIMPLE retirement accounts with safe harbor 401(k) plans during a year (sec. 332 of the Act and secs. 72(t) and 408(p) of the Code)

Present Law

For a description of present law on section 401(k) plans, see the description of section 101 of the Act. For a description of present law on SIMPLE IRAs, see the description of section 116 of the Act.

Explanation of Provision

The provision permits an employer to elect (in such form and manner as the Secretary may provide) at any time during a year, to terminate a SIMPLE IRA and replace it with a section 401(k) safe harbor plan,[2140] provided certain requirements are met. First, the employer must establish and maintain the section 401(k) safe harbor plan as of the day after the termination date. In addition, the aggregate elective contributions of an employee under the terminated arrangement during its last plan year and under the sec-

[2140] For this purpose, a "section 401(k) safe harbor plan" includes a SIMPLE 401(k) plan, a basic 401(k) safe harbor plan, and an automatic enrollment 401(k) safe harbor plan. Secs. 401(k)(11), (12), and (13).

tion 401(k) safe harbor plan during its transition year[2141] may not exceed the sum of (1) the total elective contributions that the employee is eligible to contribute to the SIMPLE IRA for the last plan year, multiplied by a fraction equal to the number of days in such plan year divided by 365, and (2) the total elective contributions that the employee is eligible for under the section 401(k) safe harbor plan for the transition year, multiplied by a fraction equal to the number of days in such transition year divided by 365.[2142]

The provision also provides an exception to the rollover rules that apply to a distribution from a SIMPLE IRA for certain rollovers to a section 401(k) plan or 403(b) plan. Under the provision, if an employer terminates a SIMPLE IRA and establishes a section 401(k) plan or 403(b) plan, a payment by an individual of an amount distributed from the employer's SIMPLE IRA to the newly-established section 401(k) or 403(b) plan will not fail to qualify as a rollover contribution merely because it is paid to such plan within two years of the first date of the individual's participation in the SIMPLE IRA.

Effective Date

The provision applies to plan years beginning after December 31, 2023.

33. Elimination of additional tax on corrective distributions of excess contributions (sec. 333 of the Act and sec. 72(t) of the Code)

Present Law

Distributions from tax-favored retirement plans

A distribution from a tax-qualified plan described in section 401(a), a tax-sheltered annuity plan ("section 403(b) plan"), an eligible deferred compensation plan of a State or local government employer, or an IRA generally is included in income for the year distributed.[2143] In addition, unless an exception applies, a distribution from a qualified retirement plan, a section 403(a) annuity 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.[2144]

[2141] Defined as the period beginning after the termination date and ending on the last day of the calendar year during which the termination occurs.

[2142] In determining the total amount that may be contributed under either plan, catch up contributions are included. If this requirement is not satisfied, the terminating SIMPLE IRA plan is treated as violating the limit on elective contributions under section 408(p)(2)(A)(ii), and the section 401(k) safe harbor plan is treated as violating the limit on elective deferrals under section 401(a)(30).

[2143] 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 are subject to mandatory income tax withholding at a 20-percent rate unless the distribution is rolled over.

[2144] Sec. 72(t). The 10-percent early withdrawal tax does not apply to distributions from a governmental section 457(b) plan.

IRA rules

There are two basic types of IRAs: traditional IRAs,[2145] to which both deductible and nondeductible contributions may be made,[2146] and Roth IRAs, to which only nondeductible contributions may be made by certain individuals.[2147] For a traditional IRA, an eligible contributor may deduct the contributions made for the year, but distributions are includible in gross income to the extent attributable to earnings on the account and the deductible contributions. For a Roth IRA, all contributions are after-tax (that is, no deduction is allowed), but distributions are not includible in gross income if certain requirements are satisfied.[2148] Distributions from a Roth IRA that do not meet those requirements, however, are not qualified distributions and are includible in gross income to the extent attributable to earnings. Amounts that are includible in income that are withdrawn from a traditional IRA or a Roth IRA before attainment of age 59½ are subject to the 10-percent early withdrawal tax unless an exception applies.

An annual limit applies to contributions to IRAs. The contribution limit is coordinated so that the aggregate maximum amount that can be contributed to all of an individual's IRAs (both traditional and Roth) for a taxable year is the lesser of a certain dollar amount ($6,000 for 2022) or the individual's compensation. An eligible individual who has attained age 50 before the end of the taxable year may also make catch-up contributions to an IRA. For this purpose, the aggregate dollar limit is increased by $1,000.

To the extent that contributions to an IRA exceed the contribution limits, an excise tax equal to six percent of the excess amount applies.[2149] However, any amount contributed for a taxable year that is distributed with allocable income by the due date for the taxpayer's return for the year (including extensions) will be treated as though not contributed for the year.[2150] To receive this treatment, the taxpayer must not have claimed a deduction for the amount of the distributed contribution.

Although the amount contributed to the IRA is excluded from gross income (if distributed before the return due date), this rule does not address income earned on the contribution. Thus, the distribution of the income may be subject to the 10-percent early withdrawal tax in addition to income tax.

[2145] Sec. 408.

[2146] Secs. 219 and 408. An individual may make deductible contributions to a traditional IRA up to the IRA contribution limit if neither the individual nor the individual's spouse is an active participant in an employer-sponsored retirement plan. If an individual (or the individual's spouse) is an active participant in an employer-sponsored retirement plan, the deduction is phased out for taxpayers with modified adjusted gross income (or "AGI") for the taxable year over certain indexed levels. To the extent an individual cannot or does not make deductible contributions to a traditional IRA or contributions to a Roth IRA for the taxable year, the individual may make nondeductible contributions to a traditional IRA, subject to the same contribution limits as deductible contributions, including catch-up contributions.

[2147] Sec. 408A. Individuals with modified AGI below certain levels may make nondeductible contributions to a Roth IRA. The maximum annual contribution that can be made to a Roth IRA is phased out for taxpayers with AGI for the taxable year over certain indexed levels.

[2148] Sec. 408A(d).

[2149] Secs. 4973(b) and (f).

[2150] Sec. 408(d)(4).

Explanation of Provision

The provision expressly exempts from the 10-percent early withdrawal tax distribution amounts attributable to income on excess contributions to an IRA if those contribution amounts are distributed with the amount of attributable income by the due date for the taxpayer's return for the year (including extensions), provided the taxpayer did not claim a deduction for the amount of the distributed contribution.

Effective Date

The provision is effective for any determination of, or affecting, liability for taxes, interest or penalties that is made on or after the date of enactment (December 29, 2022) (without regard to whether the act or failure to act upon which the determination is based occurred before the date of enactment). Nothing in the amendments made by this provision may be construed to create an inference with respect to the law in effect prior to the effective date.

34. Long-term care contracts purchased with retirement plan distributions (sec. 334 of the Act and sec. 6724(d) and new secs. 72(t)(2)(N), 401(a)(39), 403(a)(6), and 6050Z of the Code)

Present Law

Background on the distribution rules that apply to retirement plans, including the 10-percent early withdrawal tax, may be found in the present law description of section 314 of the Act.

Qualified long-term care insurance contracts

Tax-favored treatment applies to premiums and benefits under a qualified long-term care insurance contract.[2151] The contract is treated as an accident and health insurance contract; thus, amounts received under the contract generally are excludable from income as amounts received for personal injuries or sickness.[2152]

An employer-sponsored health plan that provides employees with coverage under a qualified long-term care insurance contract generally is treated in the same manner as employer-provided health benefits. As a result, the employer's premium payments are generally excluded from income and wages,[2153] and benefits payable under the contract generally are excludable from the recipient's income. Long-term care insurance expenses of a self-employed individual are deductible under the self-employed health insurance deduction.[2154]

In addition, premiums paid for a qualified long-term care insurance contract and unreimbursed expenses for qualified long-term

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[2151] Sec. 7702B(a).

[2152] In the case of per diem contracts, the excludable amount is subject to a per-day dollar cap. If payments under such contracts exceed the dollar cap, then the excess is excludable only to the extent of actual costs in excess of the dollar cap that are incurred for long-term care services.

[2153] However, section 106(c) provides that gross income of an employee includes employer-provided coverage of qualified long-term care services to the extent such coverage is provided through a flexible spending or similar arrangement. Thus, the exclusion does not apply to qualified long-term care insurance provided under a cafeteria plan. See also sec. 125(f)(2).

[2154] Sec. 162(l).

care services are treated as medical expenses for purposes of the itemized deduction for medical care.[2155]

A qualified long-term care insurance contract is defined as any insurance contract that provides only coverage for qualified long-term care services and that meets additional requirements.[2156] Per diem-type and reimbursement-type contracts are permitted. Qualified long-term care services are necessary diagnostic, preventive, therapeutic, curing, treating, mitigating, and rehabilitative services, and maintenance or personal care services that are required by a chronically ill individual and that are provided pursuant to a plan of care prescribed by a licensed health care practitioner.[2157]

Explanation of Provision

Qualified long-term care distributions

The provision provides that a defined contribution plan may allow qualified long-term care distributions. Qualified long-term care distributions are so much of those distributions made during a taxable year that do not exceed the lesser of $2,500,[2158] or the amount (generally, premiums) paid by the plan participant during the taxable year for certain insurance coverage. The distributions must be includible in income.[2159]

This insurance coverage must be for the participant or the participant's spouse (or other family member of the participant as provided by the Secretary by regulation). This insurance coverage (referred to as certified long-term care insurance) is (1) a qualified long-term care insurance contract[2160] covering qualified long-term care services,[2161] (2) coverage of the risk that an insured individual would become a chronically ill individual,[2162] or (3) coverage of qualified long-term care services under a rider or other provision of a life insurance or annuity contract if the rider or provision is treated as a separate contract and meets specified consumer protection provisions.[2163]

The provision requires that, to meet the definition of certified long-term care insurance, coverage must provide meaningful financial assistance in the event the insured needs home-based or nurs-

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[2155] Under section 213(d)(10), premiums paid for long-term care coverage are deductible only to the extent that the premiums do not exceed a dollar cap measured by the insured's age at the end of the taxable year.

[2156] Sec. 7702B(b). For example, the contract is not permitted to provide for a cash surrender value or other money that can be paid, assigned or pledged as collateral for a loan, or borrowed (and any premium refunds must be applied as a reduction in future premiums or to increase future benefits).

[2157] Sec. 7702B(c)(1). A chronically ill individual is generally one who has been certified within the previous 12 months by a licensed health care practitioner as being unable to perform (without substantial assistance) at least two activities of daily living (ADLs) for at least 90 days due to a loss of functional capacity (or meeting other definitional requirements). Sec. 7702B(c)(2).

[2158] The $2,500 amount is indexed by the cost-of-living adjustment in section 1(f)(3) for taxable years beginning after December 31, 2024.

[2159] See new section 401(a)(39)(D), referring to section 402(l)(3). Section 401(a)(39)(D) also includes as a limit an amount equal to 10 percent of the present value of the nonforfeitable accrued benefit of the employee under the plan.

[2160] Defined in section 7702B(b).

[2161] Defined in section 7702B(c).

[2162] This is a chronically ill individual within the meaning of section 101(g)(4)(B)), under a rider or other provision of a life insurance contract which satisfies the requirements relating to chronically ill insureds in section 101(g)(3) (determined without regard to subparagraph (D) thereof, relating to periodic payments).

[2163] Qualified long-term care services are defined in section 7702B(c). Rules for the treatment of a rider or other provision of a life insurance or annuity contract as a separate contract are in section 7702B(e). The consumer protection provisions are defined in section 7702B(g).

ing home care. Providing meaningful financial assistance means that benefits must be adjusted for inflation and consumer protections must be provided, including protection in the event the coverage is terminated.

Qualified long-term care distributions are generally includible in income. However, the provision provides an exemption for such distributions from the 10-percent early withdrawal tax provided that applicable requirements are met.[2164] If the individual covered by the long-term care coverage to which the distribution relates is the spouse of the participant in the plan, this exclusion from the early withdrawal tax applies only if the participant and the participant's spouse file a joint return. A qualified long-term care distribution is not subject to mandatory withholding.[2165]

Reporting requirements

Long-term care premium statement

For a distribution to be a qualified long-term care distribution from a plan, a long-term care premium statement must be filed with the plan.[2166] The statement is to be provided by the issuer of the coverage upon request of the owner of the coverage. This statement must provide the name and TIN of the issuer, provide a statement that the coverage is certified long-term care insurance, identify the employee as the owner of the coverage, identify the insured individual and their relationship to the employee, state the amount of premiums for the coverage for the calendar year, and provide such other information as may be required by the Secretary. The long-term care premium statement can be accepted only if the issuer has completed a disclosure to the Secretary with respect to the product to which the long-term care premium statement relates.[2167] The disclosure must identify the issuer and type of coverage, and provide such other information as may be required by the Secretary which is included in the filing with respect to the product with the applicable State insurance regulatory authority.

Reporting rules

An issuer of certified long-term care insurance that provides a long-term care premium statement to any purchaser must make a return to the IRS no later than February 1 of the succeeding calendar year.[2168] On the return, the issuer is required to report the name and TIN of the issuer, provide a statement that the coverage is certified long-term care insurance, state the name of the owner of the coverage, identify the insured individual and their relationship to the owner, state the amount of premiums for the coverage for the calendar year, and provide such other information as may be required by the Secretary.

In addition, the issuer must furnish a written statement to each individual whose name is required to be reported on the return.

[2164] ew sec. 72(t)(2)(N).
[2165] New sec. 72(t)(2)(N) and sec. 3405.
[2166] New sec. 401(a)(39)(E).
[2167] New sec. 401(a)(39)(E)(iii). The Secretary (or the Secretary's delegate) must issue such forms and guidance as are necessary to collect the filing required by new section 401(a)(39)(E)(iii) (see sec. 334(f) of the Act).
[2168] New section 6050Z.

The written statement is to be furnished on or before January 31 of the year following the calendar year for which the return was required to be made.[2169] The written statement is to show the name and contact information of the issuer and the aggregate premiums and charges under the coverage for the calendar year.

Applicable penalties

The filing of the return and the furnishing of the written statement are subject to penalties for failure to file correct information returns and to furnish correct payee statements.[2170]

Effective Date

The provision is effective for distributions made after the date that is three years after the date of enactment (December 29, 2022).

35. Corrections of mortality tables (sec. 335 of the Act and sec. 430(h) of the Code)

Present Law

Minimum funding standards apply to certain plans, generally defined benefit plans.[2171]

A defined benefit plan maintained by a single employer is generally subject to minimum funding rules[2172] that were substantially revised by the Pension Protection Act of 2006 ("PPA 2006").[2173] Under these rules, the plan must satisfy a number of requirements including, for example, calculating and making a certain level of contribution for each plan year to fund plan benefits ("the minimum required contribution").[2174] As part of the calculation of the minimum required contribution, the plan must determine "the target normal cost" of the plan for the plan year.[2175] The target normal cost is equal to the sum of (1) the present value of all benefits which are expected to accrue or to be earned under the plan during the plan year, plus (2) the amount of plan-related ex-

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[2169] New section 6050Z(b). An individual to whom a written statement must be furnished may request the written statement at any time before the close of the calendar year, and the person required to furnish the return must comply with the request and also furnish a copy of the written statement to the Secretary.

[2170] The present-law penalties for failure to file correct information returns and to furnish correct payee statements apply with respect to new section 6050Z. See sections 6721and 6722, as well as sections 6724(d)(1) and (2) as modified by the provision.

[2171] Secs. 412 and 430–433 and ERISA secs. 301–306. Unless a funding waiver is obtained, an employer may be subject to a two-tier excise tax under section 4971 if the funding requirements are not met. Different funding rules apply to single employer, multiemployer and certain multiple-employer defined benefit plans, the latter two of which are types of plans maintained by two or more unrelated employers. A number of exceptions to the minimum funding rules apply. For example, governmental plans (within the meaning of section 414(d)) and church plans (within the meaning of section 414(e)) are generally not subject to the minimum funding rules.

[2172] Sec. 430(a).

[2173] Pub. L. No. 109–280, August 17, 2006. The PPA 2006 minimum funding rules for single-employer plans are generally effective for plan years beginning after December 31, 2007. Subsequent changes were made by the Worker, Retiree, and Employer Recovery Act of 2008 ("WRERA"), Pub. L. No. 110–458, Dec. 23, 2008; the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010 ("PRA 2010"), Pub. L. No. 111–192, June 25, 2010; the Moving Ahead for Progress in the 21st Century Act ("MAP–21"), Pub. L. No. 112–141, July 6, 2012; the Highway and Transportation Funding Act of 2014, Pub. L. No. 113–159, Aug. 8, 2014; the Bipartisan Budget Act of 2015, Pub. L. No. 114–74, Nov. 2, 2015; the American Rescue Plan Act of 2021, Pub. L. No. 117–2, March 11, 2021; and the Infrastructure Investment and Jobs Act, Pub. L. No. 117–58, Nov. 15, 2021.

[2174] Sec. 430(a).

[2175] Sec. 430(b).

penses expected to be paid from plan assets during the plan year over (3) the amount of mandatory employee contributions expected to be made during the plan year. The determination of any present value (including that required in computing the target normal cost of the plan for the plan year) or other computation under the funding rules must be based on actuarial assumptions and methods, each of which is reasonable, taking into account the experience of the plan and reasonable expectations, and which in combination, offer the actuary's best estimate of anticipated experience under the plan.[2176] Among these actuarial assumptions are the mortality tables.[2177]

Mortality tables prescribed by the Secretary and periodically revised

The minimum funding rules direct the Secretary to prescribe by regulation the mortality tables to be used in determining present value or making any computation under the funding rules.[2178] Such tables are to be based on the actual experience of pension plans and projected trends in such experience. In prescribing tables, the Secretary is to take into account results of available independent studies of mortality of individuals covered by pension plans. Final regulations were issued in 2017 (the "2017 regulations").[2179] The mortality tables included in the 2017 regulations are based on the mortality tables included in the *"Society of Actuaries RP–2014 Mortality Tables Report"* ("RP–2014 Report")[2180] which was released by the Retirement Plan Experience Committee ("RPEC") of the Society of Actuaries ("SOA") in October 2014 (as revised in November 2014) and a set of mortality improvement rates (the "Scale MP–2016 rates") as released by RPEC.[2181]

The Secretary is required (at least every 10 years) to revise any table in effect to reflect the actual experience of pension plans and projected trends in such experience.[2182]

Substitute mortality tables

As an alternative to the general mortality tables, a plan sponsor may request approval by the Secretary to use substitute mortality tables that reflect the mortality experience of the plan's population.[2183] A plan sponsor must submit a substitute mortality table to the Secretary for approval at least seven months before the first day of the period for which the table is to be used. A mortality table submitted to the Secretary for approval is treated as in effect as of the first day of the period unless the Secretary, during the 180-day period beginning on the date of the submission, disapproves of the table and provides the reasons that the table fails to meet the applicable criteria. The 180-day period is to be ex-

[2176] Sec. 430(h)(1).
[2177] Sec. 430(h)(3).
[2178] Sec. 430(h)(3)(A). Sec. 430(h)(3)(C) and (D) provide certain exceptions to the general rule.
[2179] TD 8926, 82 Fed. Reg. 46388, October 5, 2017. See Treas. Reg. sec. 1.430(h)(3)–1 and –2.
[2180] The RP–2014 Report is available at: https://www.soa.org/globalassets/assets/files/research/exp-study/research-2014-rp-report.pdf.
[2181] The Scale MP–2016 rates are available at: https://www.soa.org/globalassets/assets/Files/Research/Exp-Study/mortality-improvement-scale-mp-2016.pdf.
[2182] Sec. 430(h)(3)(B).
[2183] Sec. 430(h)(3)(C).

tended upon mutual agreement of the Secretary and the plan sponsor.

Separate mortality tables are required to be used with respect to disabled participants.[2184]

Probability of benefit payments in the form of lump-sums or other optional forms

In determining any present value or making any computation, the probability that future benefits will be paid in optional forms of benefit provided under the plan must be taken into account (including the probability of lump-sum distributions determined on the basis of the plan's experience and other related assumptions).[2185] The assumptions used to determine optional forms of benefit under a plan may differ from the assumptions used to determine present value for purposes of the funding rules under the provision. Differences in the present value of future benefit payments that result from the different assumptions used to determine optional forms of benefit under a plan must be taken into account in determining any present value or making any computation for purposes of the funding rules.

Multiemployer and CSEC plans

The preamble to the 2017 regulations provides that the same mortality assumptions that are used for single employer plans are used to determine a plan's current liability for purposes of applying the full-funding limitation rules in the case of a multiemployer plan[2186] and in the case of a cooperative and small employer charity ("CSEC") pension plan.[2187]

PBGC variable rate premiums

Background on the variable rate premium may be found in the present law description of section 349 of the Act.

The variable rate premium is based on a plan's unfunded vested benefits. Unfunded vested benefits under a plan generally means the excess, if any, of (1) the premium funding target under the plan,[2188] over (2) the fair market value of the plan's assets.[2189]

In determining the premium funding target, the mortality tables under section 303(h)(3) of ERISA are used. These are the same

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[2184] Sec. 430(h)(3)(D).

[2185] Sec. 430(h)(4).

[2186] Sec. 431(c)(6).

[2187] Sec. 433(c)(7)(C). A cooperative and small employer charity (CSEC) pension plan is defined in section 414(y) as a defined benefit plan, other than a multiemployer plan, that is: (1) an eligible cooperative plan, as defined in section 104 of PPA 2006; (2) a plan that as of June 25, 2010, was maintained by more than one section 501(c)(3) organization; (3) a plan that as of June 25, 2010, was maintained by a single employer that was a section 501(c)(3) organization chartered under part B of subtitle II of title 36, United States Code, whose primary exempt purpose is to provide services with respect to children, and which has employees in at least 40 states; or any plan that as of January 1, 2000, was maintained by an employer that is a section 501(c)(3)organization, has been in existence since at least 1938, conducts medical research directly or indirectly through grant making, and has a primary exempt purpose to provide services with respect to mothers and children. The requirements of section 412 are determined as if all participants in a CSEC plan were employed by a single employer. See sec. 413(d)(1).

[2188] As determined under section 303(d) of ERISA.

[2189] See section 4006(a)(3)(E)(ii). See also, 29 C.F.R. 4006.3(b) and 4006.4.

mortality tables that the Secretary promulgates for purposes of the funding rules under section 430(h)(3).[2190]

Use of modified funding mortality tables for determination of lump sums

Accrued benefits under a defined benefit pension plan generally must be paid in the form of an annuity for the life of the participant unless the participant consents to a distribution in another form. Defined benefit pension plans generally provide that a participant may choose among other forms of benefit offered under the plan, such as a lump-sum distribution. These optional forms of benefit generally must be actuarially equivalent to the life annuity benefit payable to the participant.[2191] The mortality table to be used for this purpose means a mortality table modified as appropriate by the Secretary based on the mortality table specified for the plan year used for funding purposes.[2192]

Impact of COVID–19 on mortality tables

Proposed regulations issued in April 2022 set forth the methodology Treasury and the IRS intended to use to update the generally applicable mortality tables for determining present value or making any computation under section 430 (the "proposed regulations").[2193] These regulations were proposed to apply to plan years beginning on or after January 1, 2023. The preamble to those proposed regulations explains that the tables were based on the MP–2021 Rates (the mortality improvement scale in the MP–2021 Report) for valuation dates in the 2023 calendar year, which report was prepared in 2021 based on the most recent data available at that time.[2194] The MP–2021 Rates generally projected a reduction in mortality, i.e., indicated that individuals were, on average, expected to be living to an older age. In general, as mortality rates decrease, the costs to provide annuity benefits increase because benefits are paid out to participants and beneficiaries over a greater number of years. The mortality improvement tables (developed from the MP–2021 Rates) proposed in these regulations do not take into account any mortality experience in calendar years 2020 and 2021, which are the first years affected by the COVID–19 pan-

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[2190] Section 302 of ERISA sets forth funding rules that are parallel to those in section 412 of the Code and section 303 of ERISA sets forth additional funding rules for defined benefit plans (other than multiemployer plans) that are parallel to those in section 430 of the Code. Under section 101 of the Reorganization Plan No. 4 of 1978, 43 Fed. Reg. 47713, Oct. 17, 1978, and section 302 of ERISA, the Secretary has interpretive jurisdiction over section 303(h)(3) of ERISA as well as section 430(h)(3) of the Code. Thus, the regulations on mortality tables issued under section 430(h)(3) also apply for purposes of section 303(h)(3) of ERISA.

[2191] Section 417(e)(3).

[2192] Section 417(e)(3)(B) provides that the mortality table to be used for this purpose is based on the mortality table specified for the plan year under 430(h)(3)(A) (without regard to subparagraph (C) or (D) of such section). The rules relating to the development of these mortality tables are addressed in Rev. Rul. 2007–67, 2007–2 C.B. 1047.

[2193] 87 Fed. Reg. 25161, April 28, 2022.

[2194] The SOA Research Institute, "Mortality Improvement Scale MP–21" report is available at https://www.soa.org/globalassets/assets/files/resources/experience-studies/2021/2021-mp-scale-report.pdf. As noted on page 24 of that report, "the MP–2021 projection scale is based upon historical mortality information through calendar year 2019, before the COVID–19 pandemic. Accordingly, MP–2021 does not reflect any historical or potential future effects of COVID–19. The Committee discussed at length whether to include COVID–19 effects in the standard MP–2021 scale. The Committee decided that it would be best if the effects, if any, of COVID–19 on future mortality improvement for a particular pension population were an assumption chosen by individual practitioners."

demic.[2195] The preamble to the proposed regulations notes, however, that if there is a long-term higher mortality rate from COVID–19, the Treasury and the IRS expect that RPEC will reflect the long-term impact of COVID–19 in future mortality improvement scales, which could be specified for use in future guidance.

As noted in the preamble to the 2017 regulations, Treasury and IRS do compare the assumptions used by the Office of the Actuary within the Social Security Administration to those provided by RPEC in evaluating the RPEC rates.[2196] The Social Security Administration ("SSA") in preparing its annual agency FY 2020 financial report in November 2020, first noted that the COVID–19 pandemic impacted mortality. The report states:

> "The SSA office of the Chief Actuary has concluded that the COVID–19 pandemic is causing a significant deviation from the actuarial assumptions used in developing the estimates presented in the Statements of Social Insurance and the Statements of Changes in Social Insurance Amounts. The affected assumptions include not only the direct mortality-related effects of the pandemic, but also other factors related to demographics, economics and disability. At this time, with the current available information, we expect that reflecting the COVID–19 pandemic and its ensuing effects would decrease (that is, make more negative) the present value of future noninterest income less future cost for current and future participants (open group insurance) presented in the Statements of Social Insurance and Statements of Changes in Social Insurance Amounts by about $550 billion. We consider these effects to be material." [2197]

On November 24, 2020, in a memorandum to the Commissioner and Deputy Commissioner of SSA, SSA's Chief Actuary and his deputy stated, "Because we now know the effects of the pandemic and recession will be significant, we believe it would be misleading to provide estimates regarding the prospects for solvency of the trust funds for proposals now being considered without recognizing these effects." That memorandum updates SSA's mortality assumptions, increasing its intermediate assumptions for mortality by 12% for 2020, 6% for 2021, and 2% for 2022. Instead of assuming longer life expectancies, as under the proposed IRS mortality regulations,

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[2195] *Ibid.* at 25164. The preamble also states that "[i]n selecting their assumed long-term improvement rates, RPEC did not make any adjustments to take into account any effects of COVID–19 on mortality rates in the long term because there was no consensus on COVID–19's effect on expected future mortality experience."

[2196] *Ibid.* at 46391–46392. The preamble states, "Treasury and IRS carefully considered the assumptions used by Office of the Actuary within the Social Security Administration and compared it with the long-term assumptions currently recommended by RPEC. In evaluating the merits of each, Treasury and the IRS took into consideration the views of the Technical Panel of the Social Security Advisory Board. The Social Security Advisory Board is an independent federal government agency, and the Technical Panel, which is comprised of actuaries, economists and demographers, is charged by the Advisory Board with reviewing the assumptions and methods used in the annual report of the Board of Trustees of the Federal Old-Age, Survivors Insurance and Disability Insurance Trust Funds."

[2197] Social Security Administration, *The Social Security Administration's Agency Financial Report (AFR) for Fiscal Year (FY) 2020*, November 10, 2020, pg. 97 available at: https://www.ssa.gov/finance/2020/Full%20FY%202020%20AFR.pdf.

SSA was predicting a materially higher death rate for these three years.[2198]

The IRS also issued guidance on April 27, 2022[2199] that provides mortality tables that apply for valuation dates occurring during 2023 pursuant to the existing regulations and specifies a mortality improvement scale that applies under those regulations. The mortality improvement rates used in that Notice for valuation dates occurring during 2023 are the mortality improvement rates in the Mortality Improvement Scale MP–2021 Report (issued by the RPEC); these are the same rates that were used in the development of the tables in the proposed regulations.

On December 8, 2022, IRS announced it no longer planned to finalize the proposed regulations with an effective date during 2023.[2200] Therefore, IRS indicated that pursuant to existing regulations, the mortality tables provided in Notice 2022–22 apply for purposes of calculating minimum required contributions for a valuation date in 2023 for all plans.

Explanation of Provision

The provision requires the Secretary (or the Secretary's delegate) to amend the 2017 regulations (relating to "Mortality Tables for Determining Present Value Under Defined Benefit Pension Plans"). Under the amended regulations, for valuation dates occurring during or after 2024, mortality improvement rates must not assume, for years beyond the valuation date, future mortality improvements at any age which are greater than 0.78 percent. The current regulation is to be amended no later than 18 months after the date of enactment.

Further regulatory amendments are to be made to modify the 0.78 percent figure as necessary to reflect material changes in the overall rate of improvement projected by the SSA.

Effective Date

The required regulatory amendments are deemed to have been made as of the date of enactment (December 29, 2022), and as of such date all applicable laws apply in all respects as though the required actions of the Secretary (or the Secretary's delegate) had been taken.

36. Report to Congress on section 402(f) notices (sec. 336 of the Act)

Present Law

Section 402(f) requires the plan administrator of any plan, before making an eligible rollover distribution, to provide a written explanation to the recipient, known as the 402(f) notice. The 402(f) notice must explain rules that may apply to the distribution, such as rules relating to a direct transfer to an eligible retirement plan, the possible application of tax withholding to certain distributions,

[2198] See https://www.ssa.gov/oact/solvency/UpdatedBaseline_20201124.pdf.
[2199] Notice 2022–22, 2022–20 I.R.B. 1057, April 27, 2022.
[2200] IRS, Employee Plan News, Status of Proposed Regulations to Update Mortality Tables; Scope of Notice 2022–22 available at https://www.irs.gov/retirement-plans/employee-plans-news#2022.

rules for rollovers within 60 days, and other rules that could apply to the distribution.

In Notice 2020–62,[2201] the IRS provides updated safe harbor explanations that generally may be used by plan administrators and payors to satisfy section 402(f).

Explanation of Provision

The provision requires that the Comptroller General of the United States submit a report to the Committees on Finance and Health, Education, Labor, and Pensions of the Senate and the Committees on Ways and Means and Education and Labor of the House of Representatives on the notices provided by retirement plan administrators to plan participants under section 402(f). The report is to analyze the effectiveness of such notices and make recommendations, as warranted by the findings, to facilitate better understanding by recipients of different distribution options and corresponding tax consequences, including spousal rights.

The report is due not later than 18 months after the date of enactment.

Effective Date

The provision is effective on the date of enactment (December 29, 2022).

37. Modification of required minimum distribution rules for special needs trusts (sec. 337 of the Act and sec. 401(a)(9) of the Code)

Present Law

For a general description of present law on required minimum distributions see the description of section 107 of the Act.

Required minimum distribution rules in case of multiple beneficiaries and trusts

Treasury regulations include special rules for determining an employee's (or IRA owner's) designated beneficiary for purposes of calculating the distribution period for required minimum distributions in the case of multiple designated beneficiaries or in the case of a beneficiary that is a trust.

Generally, if an employee (or IRA owner) has more than one designated beneficiary, the designated beneficiary with the shortest life expectancy is the designated beneficiary for purposes of determining the distribution period.[2202] A designated beneficiary must be an individual.[2203] If a person other than an individual is designated as a beneficiary under the plan, the employee (or IRA owner) is generally treated as not having a designated beneficiary,

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[2201] Notice 2020–62, 2020–35 I.R.B. 476 (Aug. 10, 2020), provides guidance regarding 402(f) notices and updates previous 402(f) notice guidance, Notice 2018–74, 2018–40 I.R.B. 529 (Sept. 24, 2018), to reflect intervening legislation.

[2202] Treas. Reg. sec. 1.401(a)(9)–5, Q&A–7. Exceptions apply in the case of certain successor beneficiaries. The IRS recently published new proposed regulations under section 401(a)(9). 87 FR 10504, Feb. 24, 2022 (corrected March 21, 2022). Notice 2023–54, 2023–31 I.R.B. 382, July 31, 2023 provides that the final regulations would apply for calendar years beginning no earlier than January 1, 2024.

[2203] Sec. 401(a)(9)(E)(i).

even if there are other individuals who are designated as beneficiaries.[2204] However, a special rule applies to trusts.

If a trust is named as an employee's (or IRA owner's) beneficiary, the beneficiaries of the trust (and not the trust itself) are treated as designated beneficiaries of the employee or IRA owner if the following requirements are met: (1) the trust is a valid trust under state law, or would be but for the fact that there is no corpus, (2) the trust is irrevocable or will by its terms become irrevocable upon the employee's (or IRA owner's) death, (3) the trust beneficiaries who are beneficiaries with respect to the trust's interest in the employee's (or IRA owner's) benefit are identifiable from the trust instrument,[2205] and (4) certain documentation requirements[2206] are met.[2207]

Special rules for trusts benefiting disabled or chronically ill individuals

Special rules apply in the case of an applicable multi-beneficiary trust. An applicable multi-beneficiary trust is a trust (1) that has more than one beneficiary, (2) all of the beneficiaries of which are treated as designated beneficiaries for purposes of determining the required minimum distribution period, and (3) at least one of the beneficiaries of which is an eligible designated beneficiary who is disabled or chronically ill.[2208]

In the case of an applicable multi-beneficiary trust that under its terms is to be divided immediately upon the death of the employee (or IRA owner) into separate trusts for each beneficiary, the exception to the 10-year rule for eligible designated beneficiaries[2209] applies separately to any portion of the employee's (or IRA owner's) interest that is payable to a disabled or chronically ill eligible designated beneficiary.[2210] Thus, for example, if an applicable multi-beneficiary trust is to be divided immediately upon the death of the IRA owner into separate trusts for three beneficiaries, one of whom is a chronically ill eligible designated beneficiary, the exception to the 10-year rule will apply to the portion of the IRA owner's interest that is payable to the chronically ill eligible designated beneficiary's trust, and such portion will be distributable over the chronically ill. The portion of the IRA owner's interest that is payable to the trusts for the other two beneficiaries must then be distributed in accordance with the 10-year rule.

In the case of an applicable multi-beneficiary trust under the terms of which no individual other than a disabled or chronically ill eligible designated beneficiary has any right to the employee's (or IRA owner's) interest in the plan until the death of all such eligible designated beneficiaries with respect to the trust ("applicable remainder multi-beneficiary trust"), the exception to the 10-year

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2204 Treas. Reg. sec. 1.401(a)(9)–4, Q&A–3.

2205 The beneficiary must be identifiable within the meaning of Treas. Reg. sec. 1.401(a)(9)–4, Q&A–1.

2206 The documentation described in Treas. Reg. sec. 1.401(a)(9)–4, Q&A–6 must be provided to the plan administrator.

2207 Treas. Reg. sec. 1.401(a)(9)–4, Q&A–5.

2208 Sec. 401(a)(9)(H)(v).

2209 The distribution of an employee or IRA owner's account to a designated beneficiary must generally be over a 10-year period. An exception applies for eligible designated beneficiaries (for whom the distribution period is over the beneficiary's lifetime). Sec. 401(a)(9)(H)(i).

2210 Sec. 401(a)(9)(H)(iv).

rule applies to the distribution of the employee's (or IRA owner's) interest and any beneficiary who is not a disabled or chronically ill eligible designated beneficiary is treated as a beneficiary of the eligible designated beneficiary upon the death of such eligible designated beneficiary.[2211] Thus, the 10-year rule applies to any portion of the employee's (or IRA owner's) interest remaining after the death of the disabled or chronically ill eligible designated beneficiary (or beneficiaries).

Explanation of Provision

The provision modifies the rules that apply to an applicable remainder multi-beneficiary trust. Under the provision, a beneficiary of such trust that is a qualified charity[2212] is treated as a designated beneficiary for purposes of the requirements that apply to applicable multi-beneficiary trusts.[2213] Thus, the trust will not fail to be treated as an applicable multi-beneficiary trust merely because one of the beneficiaries is a person other than an individual, provided that the beneficiary is a qualified charity. As a result, an applicable remainder multi-beneficiary trust is not precluded from having a qualified charity as a remainder beneficiary.

Effective Date

The provision is effective for calendar years beginning after the date of enactment (December 29, 2022).

38. Requirement to provide paper statements in certain cases (sec. 338 of the Act and sec. 105 of ERISA)

Present Law

Pension benefit statement

ERISA requires plan administrators to periodically furnish participants and beneficiaries with statements describing the individual's benefit under the plan. Such requirements depend in part on the type of plan and the individual to whom the statement is provided.[2214]

In general, a benefit statement is required to indicate, on the basis of the latest available information: (1) the total benefits accrued; (2) the vested accrued benefit or the earliest date on which the accrued benefit will become vested; and (3) an explanation of any permitted disparity or floor-offset arrangement that may be applied in determining accrued benefits under the plan.[2215] With re-

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[2211] *Ibid.*

[2212] An organization described in section 408(d)(8)(B)(i), which are the rules that apply to qualified charitable distributions. Section 408(d)(8)(B)(i) applies to organizations described in section 170(b)(1)(A) (generally, public charities), other than any organization described in section 509(a)(3) (supporting organizations) or any fund or account described in section 4966(d)(2) (donor advised funds).

[2213] Sec. 401(a)(9)(H)(v).

[2214] ERISA sec. 105. The requirement does not apply to a one-participant retirement plan described in section 101(i)(8)(B) of ERISA.

[2215] ERISA sec. 105(a)(2)(A); sec. 401(l). Under the permitted disparity rules under section 401(l), contributions or benefits may be provided at a higher rate with respect to compensation above a specified level and at a lower rate with respect to compensation up to the specified level. In addition, benefits under a defined benefit plan may be offset by a portion of a participant's

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spect to information on vested benefits, the Secretary of Labor is required to provide that the requirements are met if, at least annually, the plan: (1) updates the information on vested benefits that is provided in the benefit statement; or (2) provides in a separate statement information as is necessary to enable participants and beneficiaries to determine their vested benefits. The benefit statement must be written in a manner calculated to be understood by the average plan participant.

If a plan administrator fails to provide a required benefit statement to a participant or beneficiary, the participant or beneficiary may bring a civil action to recover from the plan administrator $100 a day, within the court's discretion, or other relief that the court deems proper.[2216]

Requirements for defined contribution plans

The administrator of a defined contribution plan is required to provide a benefit statement (1) to a participant or beneficiary who has the right to direct the investment of the assets in his or her account, at least quarterly, (2) to any other participant or other beneficiary who has his or her own account under the plan, at least annually, and (3) to other beneficiaries, upon written request, but limited to one request during any 12-month period.[2217]

A benefit statement provided with respect to a defined contribution plan must include the value of each investment to which assets in the individual's account are allocated (determined as of the plan's most recent valuation date), including the value of any assets held in the form of employer securities (without regard to whether the securities were contributed by the employer or acquired at the direction of the individual).[2218] In at least one benefit statement provided during a 12-month period, the statement must include a lifetime income disclosure that sets forth the lifetime income stream equivalent of the total benefits accrued with respect to the participant or beneficiary.[2219]

A quarterly benefit statement provided to a participant or beneficiary who has the right to direct investments must also include: (1) an explanation of any limitations or restrictions on any right of the individual to direct an investment; (2) an explanation, written in a manner calculated to be understood by the average plan participant, of the importance, for the long-term retirement security of participants and beneficiaries, of a well-balanced and diversified investment portfolio, including a statement of the risk that holding more than 20 percent of a portfolio in the security of one entity

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expected social security benefits. Under a floor-offset arrangement, benefits under a defined benefit pension plan are reduced by benefits under a defined contribution plan.

[2216] ERISA secs. 502(a)(1)(A) and (c)(1).

[2217] ERISA sec. 105(a)(1).

[2218] ERISA sec. 105(a)(2)(B)(i).

[2219] ERISA sec. 105(a)(2)(B)(iii). The term "lifetime income stream equivalent of the total benefits accrued" means the amount of monthly payments the participant or beneficiary would receive if the total accrued benefits of such participant or beneficiary were used to provide lifetime income streams, based on assumptions specified in rules prescribed by the Secretary. ERISA sec. 105(a)(2)(D)(i). Lifetime income streams for this purpose are a qualified joint and survivor annuity (as defined in ERISA section 205(d)), based on assumptions specified in rules prescribed by the Secretary of Labor, including the assumption that the participant or beneficiary has a spouse of equal age, and a single life annuity. ERISA sec. 105(a)(2)(D)(ii). Such lifetime income streams may have a term certain or other features to the extent permitted under rules prescribed by the Secretary of Labor.

(such as employer securities) may not be adequately diversified; and (3) a notice directing the participant or beneficiary to DOL's website for sources of information on individual investing and diversification. [2220]

Requirements for defined benefit plans

The administrator of a defined benefit plan is required either: (1) to furnish a benefit statement at least once every three years to each participant who has a vested accrued benefit under the plan and who is employed by the employer at the time the benefit statements are furnished to participants; or (2) to furnish at least annually to each such participant notice of the availability of a benefit statement and the manner in which the participant can obtain it. The Secretary of Labor is authorized to provide that years in which no employee or former employee benefits under the plan need not be taken into account in determining the three-year period.[2221] Information in the benefit statement may be based on reasonable estimates determined under regulations prescribed by the Secretary of Labor in consultation with PBGC.

The administrator of a defined benefit pension plan is also required to furnish a benefit statement to a participant or beneficiary upon written request, limited to one request during any 12-month period.

Delivery of pension benefit statement

The pension benefit statement may be delivered in written, electronic, or other appropriate form to the extent such form is reasonably accessible to the recipient. DOL regulations provide guidance on the disclosure of the pension benefit statement, in addition to other required statements and information.[2222] Under the regulations, the general rule is that the plan administrator must use measures reasonably calculated to ensure actual receipt of the material by plan participants, beneficiaries, and other specified individuals ("delivery requirement"). The guidance includes two safe harbors pursuant to which an administrator may disclose information electronically and be treated as meeting this requirement.

2002 safe harbor

Under the first safe harbor, adopted by regulation in 2002 ("2002 safe harbor"), a plan administrator is treated as meeting the delivery requirement if the administrator takes appropriate and necessary measures reasonably calculated to ensure that the system for furnishing documents (1) results in actual receipt of transmitted information, and (2) protects the confidentiality of personal information relating to the individual's accounts and benefits.[2223] In addition, electronically-delivered documents must be prepared and furnished in a manner that is consistent with the style, format, and content requirements applicable to the particular document. Notice (either electronic or non-electronic) must also be provided at the time the document is furnished electronically that apprises the in-

[220] ERISA sec. 105(a)(2)(B)(ii).
[2221] ERISA secs. 105(a)(1)(B) and (3).
[2222] 29 C.F.R. sec. 2520.104b–1.
[2223] 29 C.F.R. sec. 2520.104b–1(c).

dividual of the significance of the document when it is not otherwise reasonably evident and of the right to request and obtain a paper version. The plan must provide any paper versions that are requested.

The 2002 safe harbor applies only to individuals who generally either (1) have the ability to effectively access electronic documents at work, and access to the employer or plan sponsor's electronic information system is an integral part of the individual's duties; or (2) have consented to receiving documents electronically, have not withdrawn such consent, and were provided a statement prior to consent that contains certain required disclosures regarding such consent. Additional information must be furnished upon certain changes to hardware or software requirements.

Alternative safe harbor

Under a safe harbor that is an alternative to the 2002 safe harbor ("alternative safe harbor"), adopted by regulation in 2020, a plan administrator is deemed to meet the delivery requirement with respect to covered documents if the plan administrator complies with certain notice, access, and other requirements described in the regulations.[2224] For this purpose, covered documents are generally documents that the plan administrator is required to furnish to participants and beneficiaries under ERISA, except documents required to be furnished only upon request.

In order to satisfy the alternative safe harbor, a notice of internet availability must be furnished at the time the covered document is made available on the website. Subject to certain additional rules, a notice of internet availability may be provided annually and apply to multiple covered documents. The notice must comply with certain content requirements and must be written in a manner reasonably calculated to be understood by the average plan participant. Certain requirements also apply to the website where the covered documents are posted.

If an individual requests a paper version of a covered document, under the alternative safe harbor, the plan administrator must promptly furnish such paper version free of charge. Additional requirements relating to the opting out of electronic delivery apply, including that individual must be able to globally opt out of electronic delivery. In addition, the plan administrator must furnish to each individual, prior to the administrator's reliance on the safe harbor, a paper notification that covered documents will be furnished electronically. Such paper notice must include certain information, including the electronic address that will be used for the individual and any necessary instructions. Special rules apply to separated participants.

Under the alternative safe harbor, a plan administrator is also permitted to satisfy the safe harbor by using an email address to furnish covered documents to an individual, provided certain requirements are met.

The alternative safe harbor applies only to participants, beneficiaries, and other individuals entitled to receive disclosures if the individual provides an electronic address at which the individual

[2224] 29 C.F.R. sec. 2520.104b–31; 29 CFR sec. 2520.104b–1(f).

may receive a written notice of internet availability or email of covered documents, or if the individual is assigned an electronic address for employment-related purposes.

Explanation of Provision

The provision modifies the requirement under ERISA relating to the delivery of pension benefit statements to generally require that, for a defined contribution plan, at least one such statement with respect to an individual must be provided on paper in written form for each calendar year. Similarly, for a defined benefit plan, at least one pension benefit statement with respect to an individual must be provided on paper every three years. An exception applies to (1) a plan that discloses documents using the 2002 safe harbor (subject to the modifications to this safe harbor described below); or (2) a plan that permits participants and beneficiaries to request electronic delivery of pension benefit statements, if the participant or beneficiary makes such a request and the statement is so delivered.

The provision also directs the Secretary of Labor to make certain amendments to its regulations. With respect to the 2002 safe harbor,[2225] the Secretary of Labor is directed to update the regulation no later than December 31, 2024 to provide that, with respect to participants who first become eligible to participate after December 31, 2025 (and beneficiaries who first become eligible for benefits after that date) a plan may furnish pension benefit statements[2226] electronically only if, in addition to meeting other requirements under the regulations, the plan (1) furnishes each participant and beneficiary a one-time initial paper notice, prior to the electronic delivery of any pension benefit statement, of the participant's right to request that all documents required to be disclosed under title I of ERISA be furnished on paper.

In addition, the Secretary must update guidance governing electronic disclosure (other than the 2002 safe harbor) no later than December 31, 2024 to the extent necessary to ensure the following, with respect to a plan that discloses required documents or statements electronically:

- A participant or beneficiary under such a plan is permitted the opportunity to request that any disclosure required to be delivered on paper under applicable guidance by DOL is furnished by electronic delivery;
- Each paper statement furnished under such a plan includes (1) an explanation of how to request that all such statements, and any other document required to be disclosed, be furnished by electronic delivery; and (2) contact information for the plan sponsor, including a telephone number;
- The plan may not charge any fee to a participant or beneficiary for the delivery of paper statements;
- Each document required to be disclosed that is furnished by electronic delivery includes an explanation of how to request that all such documents be furnished on paper; and

[2225] 29 C.F.R. sec. 2520.104b–1(c).

[2226] The pension benefit statement that is required to be provided on paper under the provision at least once per calendar year for a defined contribution plan and at least once every three years for a defined benefit plan.

• A plan is permitted to furnish a duplicate electronic statement in any case in which the plan furnishes a paper pension benefit statement.

Effective Date

The amendments to ERISA apply to plan years beginning after December 31, 2025.

39. Recognition of tribal government domestic relations orders (sec. 339 of the Act, sec. 414 of the Code, and sec. 206 of ERISA)

Present Law

Benefits provided under a qualified retirement plan for a participant may not be assigned or alienated to creditors of the participant, except in very limited circumstances. One exception to the prohibition on assignment or alienation rule is a qualified domestic relations order ("QDRO").[2227] A QDRO is a domestic relations order that creates or recognizes a right of an alternate payee to any plan benefit payable with respect to a participant, and that meets certain procedural requirements.[2228]

A domestic relations order is: a judgment, decree, or order (including the approval of a property settlement agreement) that is made pursuant to State domestic relations law (including community property law) and that relates to the provision of child support, alimony payments, or marital property rights for the benefit of a spouse, former spouse, child, or other dependent of a participant.[2229] A QDRO may be issued by any State agency or instrumentality with the authority to issue judgments, decrees, or orders, or to approve property settlement agreements, pursuant to State domestic relations law (including community property law).[2230] A State authority, generally a court, must actually issue a judgment, order, or decree or otherwise formally approve a property settlement agreement for the settlement to be treated as a QDRO.[2231]

A distribution from section 403(b) plan that is made pursuant to a QDRO is treated in the same manner as a distribution from a qualified plan.[2232] A distribution from a governmental plan, church plan, or governmental section 457(b) plan is treated as made pursuant to a QDRO if it is made pursuant to a domestic relations order that creates or recognizes a right of an alternate payee to any plan benefit payable with respect to a participant.[2233] These distributions are not required to meet the procedural requirements that apply with respect to distributions from qualified plans.

[2227] Sec. 401(a)(13)(B).
[2228] Sec. 414(p); sec. 206(d)(3) of ERISA.
[2229] Sec. 414(p)(1)(B); sec 206(d)(3)(B)(ii) of ERISA.
[2230] EBSA Advisory Opinion 2001–06A, June 1, 2001.
[2231] Sec. 414(p)(1)(B); secs. 206(d)(3)(B)(ii), 514(a), 514(b)(7) of ERISA; see also Employee Benefits Security Administration, "QDROs: The Division of Retirement Benefits Through Qualified Domestic Relations Orders," 2020, Q 1–2.
[2232] Sec. 414(p)(9). Section 403(b) plans are not subject to section 401(a)(13).
[2233] Sec. 414(p)(11).

Explanation of Provision

The provision provides that a QDRO may be a domestic relations order issued by an Indian tribal government, a subdivision of Indian tribal government, or an agency or instrumentality of either, in addition to domestic relations orders issued by State authorities.

Effective Date

The provision is effective regarding domestic relations orders received after December 31, 2022, including any QDRO which is submitted for reconsideration after such date.

40. Defined contribution plan fee disclosure improvements (sec. 340 of the Act and sec. 404 of ERISA)

Present Law

Under ERISA, general fiduciary duty standards apply to all fiduciary actions, including investment decisions.[2234] Fiduciaries must discharge their duties with respect to the plan prudently and solely in the interest of participants and beneficiaries. With respect to plan assets, a fiduciary must diversify the investments of the plan so as to minimize the risk of large losses unless under the circumstances it is clearly prudent not to do so.[2235] A plan fiduciary that breaches its fiduciary responsibilities is personally liable to make good to the plan any losses to the plan resulting from the breach. A special fiduciary rule applies to a defined contribution plan that permits participants to direct the investment of their accounts under the plan. Subject to certain conditions, under the special rule, a plan fiduciary is generally not liable for losses resulting from participants' investment decisions. In order for this rule to apply, the plan administrator must take steps to ensure that on a regular and periodic basis, participants and beneficiaries are made aware of their rights and responsibilities with respect to the investment of assets in their accounts and are provided sufficient information regarding the plan, including fees and expenses, and regarding designated investment alternatives, including fees and expenses attendant thereto, to make informed decisions with regard to management of their accounts.

DOL regulations provide guidance on the fee and expense information that must be provided to participants and beneficiaries.[2236] Specifically, the plan must provide the participant or beneficiary with an explanation of any fees or expenses for general plan administrative services (such as legal, accounting, or recordkeeping services), as well as individual expenses (such as processing fees for plan loans or qualified domestic relations orders, fees for investment advice, and transfer fees) that may be charged against the individual's account and are not reflected in the total annual operating expenses of a designated investment alternative.[2237] Fees are generally permitted to be expressed as a monetary amount, for-

[2234] ERISA sec. 404(a).
[2235] 29 C.F.R. sec. 2550.404a–5(a).
[2236] 29 C.F.R. sec. 2550.404a–5.
[2237] 29 C.F.R. sec. 2550.404a–5(c)(2).

mula, percentage of assets, or per capita charge.[2238] With respect to administrative fees, the explanation must include the basis on which charges will be allocated (for example, pro rata or per capita) to, or affect the balance of, each individual account. This information must be provided on or before the date on which the participant or beneficiary can first direct his or her investments and at least annually thereafter. If there is a change in such information, the plan generally must provide a description of such change at least 30 days but not more than 90 days before the effective date of the change. The plan must provide participants and beneficiaries with a quarterly statement explaining the fees and expenses charged during the preceding quarter.

In addition to information on plan-based fees and expenses, the plan must provide the participant or beneficiary with fee and expense information relating to designated investment alternatives.[2239] For a designated investment alternative with respect to which the return is not fixed, the information must include descriptions of shareholder-type fees (fees charged directly against a participant's or beneficiary's investment, such as commissions, sales loads, sales charges, deferred sales charges, redemption fees, surrender charges, exchange fees, account fees, and purchase fees, which are not included in the total annual operating expenses of any designated investment alternative) and a description of any restriction or limitation that may be applicable to a purchase, transfer, or withdrawal of the investment in whole or in part (such as round trip, equity wash, or other restrictions). The information must also include (1) the annual operating expenses of the investment expressed as a percentage; (2) the total annual operating expenses of the investment for a one-year period expressed as a dollar amount for a $1,000 investment; (3) a statement indicating that fees and expenses are only one of several factors that an individual should consider when making investment decisions; and (4) a statement that the cumulative effect of fees and expenses can substantially reduce the growth of a participant's or beneficiary's retirement account and that individuals can visit the Employee Benefit Security Administration's website for an example demonstrating the long-term effect of fees and expenses. For a designated investment alternative with respect to which the return is fixed for the term of the investment, the information must include an explanation of any shareholder-type fees and any restriction or limitation that may apply to a purchase, transfer, or withdrawal of the investment in whole or in part. Additional fee information is required in the case of designated investment alternatives that include annuities. Similar to the information on plan-based fees and expenses, this information must be provided on or before the date on which the participant or beneficiary can first direct his or her investments and at least annually thereafter.

Explanation of Provision

The provision requires the Secretary of Labor, not later than three years after the date of enactment of the Act (December 29,

[2238] 29 C.F.R. 2550.404a–5(e)(4).
[2239] 29 C.F.R. 2550.404a–5(d)(1)(iv).

2022), to (1) review DOL regulations relating to fiduciary requirements for disclosure in participant-directed individual account plans;[2240] (2) explore, through a public request for information or otherwise, how the contents and design of the disclosures described in such section may be improved to enhance participants' understanding of fees and expenses related to a defined contribution plan[2241] as well as the cumulative effect of such fees and expenses on retirement savings over time; and (3) report to the Committee on Health, Education, Labor, and Pensions of the Senate and the Committee on Education and Labor of the House of Representatives on the findings of the exploration described in paragraph (2), including beneficial education for consumers on financial literacy concepts as related to retirement plan fees and recommendations for legislative changes needed to address such findings.

Effective Date

The provision is effective on date of enactment (December 29, 2022).

41. Consolidation of defined contribution plan notices (sec. 341 of the Act, secs. 401(k) and 414(w) of the Code, and secs. 404(c) and 514(e) of ERISA)

Present Law

Additional background on notice requirements may be found in the present law description of section 319 of the Act.

Section 401(k) safe harbor plans and plans with automatic enrollment features have special notice requirements.[2242] The notice requirement specific to section 401(k) safe harbor plans includes content and timing rules, and the notice must be sufficiently accurate and comprehensive to apprise employees of their rights and obligations under the plan sponsor's particular arrangement.[2243]

Additionally, the notice requirements for section 401(k) plans with certain automatic enrollment features include additional content requirements and specific timing requirements. Information that must be provided to employees with respect to these arrangements includes the level of contributions that will be made on the employee's behalf absent an affirmative election, the employee's right to not have those contributions made, and how the contributions will be invested absent an investment election by the employee.[2244] Generally, these notices must be provided early enough so that the employee has a reasonable period of time after receipt of the notice to opt out.

Sections 404(c)(5) and 514(e)(3) of ERISA also include notice requirements that certain plan sponsors must satisfy to obtain fiduciary relief provided by those sections. Under these rules, plans that use qualified default investments must provide advance notice to participants and beneficiaries describing the circumstances

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[2240] 29 CFR 2550.404a–5.

[2241] As defined in ERISA sec. 3(34).

[2242] Secs. 401(k)(12)(D), 401(k)(13)(E), and 414(w)(4). Note that for plan years beginning in 2020 and later, the safe harbor notice requirement of section 401(k)(12)(D) does not apply to nonelective 401(k) safe harbor plans.

[2243] Sec. 401(k)(12)(D); Tres. Reg. sec. 1.401(k)–3(d).

[2244] Sec. 401(k)(13)(E) and 414(w)(4); Tres. Reg. secs. 1.401(k)–3(k)(4) and 1.414(w)–1(b)(3).

under which contributions or other assets will be invested on their behalf in a qualified default investment alternative, the investment objectives of the qualified default investment alternative, and the right of participants and beneficiaries to direct investments out of the qualified default investment alternative.[2245] In addition, a plan administrator of an automatic contribution arrangement must provide a notice to inform participants of their rights and obligations under the arrangement.[2246] The Department of Labor has indicated that use of IRS sample notices provided for certain section 401(k) plans with automatic enrollment features also satisfies the notice requirements under ERISA sections 404(c)(5) and 514(e)(3).[2247] Not all safe harbor 401(k) plans, however, can take advantage of this agency guidance.[2248]

Explanation of Provision

The provision requires the Secretary (or the Secretary's delegate) and the Secretary of Labor (or such Secretary's delegate) to adopt regulations, not later than two years after the date of enactment of the Act, providing that a plan may (but is not required to) consolidate into one combined notice two or more of the notices required under the Code or ERISA relating to section 401(k) safe harbor plans, automatic enrollment, or qualified default investment alternatives.[2249]

The combined notice must include the required content, clearly identify the relevant issues, and be furnished at the time and with the frequency required for each individual notice. The combined notice must also be presented in a manner that is reasonably calculated to be understood by the average plan participant and does not obscure or fail to highlight the primary information required for each notice.

Effective Date

The provision is effective on the date of enactment (December 29, 2022).

42. Information needed for financial options risk mitigation (sec. 342 of the Act and new sec. 113 of ERISA)

Present Law

Required minimum distributions

Employment-related tax-favored retirement plans are subject to required minimum distribution rules.[2250] In general, under these rules, the distribution of minimum benefits must begin to an em-

[2245] ERISA sec. 404(c)(5)(B); 29 C.F.R. sec. 2550.404c–5(d).

[2246] ERISA sec. 514(e)(3).

[2247] DOL Field Assistance Bulletin 2008–3, Question 8.

[2248] Ibid. Certain basic safe harbor 401(k) plans without an automatic enrollment feature (safe harbor plans under section 401(k)(12)) may not be able to consolidate notices.

[2249] Specifically, a plan may combine the notices required under sections 404(c)(5)(B) and 514(e)(3) of ERISA and sections 401(k)(12)(D), 401(k)(13)(E), and 414(w)(4) of the Code.

[2250] Secs. 401(a)(9), 403(b)(10), 408(a)(6), and 457(d)(2). Roth IRAs, however, are not subject to required minimum distribution rules during the owner's lifetime. The IRS recently published proposed regulations under section 401(a)(9). 87 Fed. Reg. 10504, February 24, 2022 (corrected March 21, 2022, 87 Fed. Reg. 30845). Notice 2023–54, 2023–31 I.R.B. 382, July 31, 2023 provides that the final regulations would apply for calendar years beginning no earlier than January 1, 2024.

ployee no later than a required beginning date. Additional background on required minimum distributions from tax-favored retirement plans may be found in the description of present law for section 107 of the Act.

An employee's entire interest may be distributed by the required beginning date.[2251] If the employee's entire interest is not distributed by the required beginning date, the entire interest must be distributed over the life of the employee or lives of the employee and a designated beneficiary (or a period not extending beyond the life expectancy of the employee or the life expectancy of the employee and a designated beneficiary), beginning not later than the required beginning date.[2252]

Absent an applicable exception, in order to satisfy this requirement, distributions of an employee's entire interest under a defined benefit plan must be paid in the form of periodic annuity payments for the employee's or beneficiary's life (or the joint lives of the employee and beneficiary) or over a period certain that is no longer than a period permitted under regulations.[2253] The regulations generally prohibit any change in the period or form of the distribution after it has commenced, except if certain conditions are met.[2254]

One exception is that annuity payments may be increased "[t]o pay increased benefits that result from a plan amendment."[2255] In addition, annuity payments may be increased "[t]o allow a beneficiary to convert the survivor portion of a joint and survivor annuity into a lump sum upon the employee's death."[2256]

Lump sum windows

Defined benefit plan sponsors are generally permitted to offer a "lump sum window" during which plan participants and beneficiaries may elect to receive the value of an accrued retirement benefit as a lump sum, as opposed to an annuity. Some defined benefit plans provide (or have been amended to provide) a limited period during which a retiree who is currently receiving lifetime annuity payments from the plan may elect to convert their annuity into a lump sum that is payable immediately. These arrangements are sometimes referred to as lump sum risk-transferring programs because longevity risk and investment risk are transferred from the plan to the retirees.[2257] Although the tax treatment of lump sum windows has not been addressed explicitly in regulations or generally applicable published guidance, the addition of a lump sum window to a plan has sometimes been treated as a permitted

[2251] Sec. 401(a)(9)(A)(i).
[2252] Sec. 401(a)(9)(A)(ii). Section 401(a)(9)(B) prescribes required minimum distribution rules that apply after the death of the employee.
[2253] Treas. Reg. sec. 1.401(a)(9)–6, A–1(a).
[2254] Treas. Reg. sec. 1.401(a)(9)–6, A–13.
[2255] Treas. Reg. sec. 1.401(a)(9)–6, A–14(a)(4).
[2256] Treas. Reg. sec. 1.401(a)(9)–6, A–14(a)(5). No similar rule is provided with respect to conversion of an employee's annuity benefit during an employee's life or conversion of a beneficiary's annuity other than upon the employee's death.
[2257] Notice 2015–49, 2015–30 I.R.B. 79, July 27, 2015. In Notice 2015–49, the IRS expressed its intent to issue rulemaking prohibiting this practice "in most cases". The IRS never issued the proposed rules, however, and rescinded Notice 2015–49 in notice 2019–18, 2019–13 I.R.B. 915, March 25, 2019.

increase in benefits, as explained above, so that the annuity payment period is permitted to change.[2258]

A 2015 GAO study advocated that DOL and the Treasury require plan sponsors to better inform participants and beneficiaries of the risks related to lump-sum windows.[2259] For example, the GAO noted that lifetime retail annuities purchased with lump sum payments often are less valuable than the foregone defined benefit annuity, and that participants and beneficiaries lose certain Federal protections if they elect to receive lump sum payments.

Explanation of Provision

The provision requires defined benefit pension plan administrators that amend a plan to offer a lump sum window to provide each plan participant and beneficiary included in the offer with additional information intended to allow participants and beneficiaries to compare between the annuity benefits offered under the plan and the lump sum. The required notification must be furnished to each participant or beneficiary offered the lump sum amount, in the manner in which the participant and beneficiary receives the lump sum offer, not later than 90 days prior to the first day on which the participant or beneficiary may make an election with respect to the lump sum.

The required notification must include:

- The available benefit options, including the estimated monthly benefit that the participant or beneficiary would receive at normal retirement age, whether there is a subsidized early retirement option or qualified joint and survivor annuity that is fully subsidized,[2260] the monthly benefit amount if payments begin immediately, and the lump sum amount available if the participant or beneficiary takes the option.
- An explanation of how the lump sum was calculated, including the interest rate, mortality assumptions, and whether any other plan benefits are included in the lump sum, such as early retirement subsidies;
- The relative value[2261] of the lump sum option for a terminated, vested participant compared to the value of (a) a single life annuity (or other standard form of benefit) or (b) a qualified joint and survivor annuity;[2262]
- A statement that a comparable commercial annuity may cost more than the amount of the lump sum amount and that it might be advisable to consult an advisor if the individual is considering purchasing a commercial annuity;
- The potential ramifications of accepting the lump sum, including the longevity risks, the loss of a potential PBGC guarantee (with an explanation of the monthly benefit amount that would be protected by PBGC if the plan is terminated with insufficient assets to pay benefits), the loss of protection from

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[2258] See Treas. Reg. sec. 1.401(a)(9)–6, A–14(a)(4).

[2259] GAO, Private Pensions: Participants Need Better Information When Offered Lump Sums That Replace Their Lifetime Benefits (GAO–15–74), January 27, 2015.

[2260] In accordance with section 417(a)(5).

[2261] In a manner consistent with the manner in which a written explanation is required under section 417(a)(3).

[2262] As defined in section 205(d)(1) of ERISA.

creditors, the loss of spousal protections, and the loss of other protections under ERISA;

- General tax rules related to accepting a lump sum, including rollover options and early distribution penalties, with a disclaimer that the plan does not provide tax, legal, or accounting advice, and a suggestion that participants and beneficiaries consult with their own tax, legal, and accounting advisors before determining whether to accept the offer;
- The manner in which a participant or beneficiary must accept or reject the offer, the deadline for making the decision, and whether spousal consent is required; and
- The plan contact from whom participants and beneficiaries may request additional information or to whom they may pose questions.

The provision requires that the notice be written in a manner calculated to be understood by the average plan participant and requires the Secretary of Labor to issue a model notice.

In addition, the provision also requires, not later than 30 days prior to the first day on which participants and beneficiaries may elect a lump sum, plan sponsors to submit a notice (an "initial notice") to the Secretary of Labor and PBGC including: the total number of participants and beneficiaries eligible for the lump sum option; the length of the limited period during which the lump sum is offered; an explanation of how the lump sum was calculated, including the interest rate, mortality assumptions, and whether any additional plan benefits were included in the lump sum, such as early retirement subsidies; and a sample of the notice provided to participants and beneficiaries, if otherwise required.

Not later than 90 days after the conclusion of the lump sum window, a plan sponsor is required to submit a report to the Secretary of Labor and the Director of PBGC that includes the number of participants and beneficiaries who accepted the lump sum offer and such other information as required by the Secretary of Labor (a "post-offer report").

The Secretary of Labor is required to make the information provided in the initial notice and in the post-offer report publicly available in a form that protects the confidentiality of the information provided. Additionally, not later than the last day of the second calendar year after the calendar year including the effective date of the final rules implementing this provision, and every two years thereafter, the Secretary of Labor is required to submit to Congress a report that summarizes any initial notices and post-offer reports.

The provision amends section 502 of ERISA to provide that either the Department of Labor or a participant or beneficiary may commence a civil suit against a plan sponsor to enforce the participant and beneficiary notification requirement and that the plan administrator may be personally liable to a participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal to provide the required notice.

The Secretary of Labor, in consultation with the Secretary, is required to issue regulations implementing this provision not earlier than one year after the date of enactment (December 29, 2022). Such regulations must be applicable not earlier than the issuance of a final rule and not later than one year after issuance of a final rule.

Effective Date

The provision applies upon the effective date of the regulations issued by the Secretary of Labor.

43. Defined benefit annual funding notices (sec. 343 of the Act and sec. 101 of ERISA)

Present Law

Under ERISA, the plan administrator of a defined benefit or defined contribution plan must file an annual report with the Secretary of Labor.[2263] The annual report must contain certain information about the plan, such as a statement of the plan's assets and liabilities and contributions made for the plan year.[2264]

Annual funding notices for defined benefit plans, in general

ERISA requires the plan administrator of a defined benefit plan that is subject to Title IV of ERISA to also provide an annual funding notice to each plan participant, beneficiary, and alternate payee, each labor organization representing participants or beneficiaries in a plan, the PBGC, and in the case of a multiemployer plan, each employer that is a party to a collective bargaining agreement that has an obligation to contribute to the plan.[2265]

Certain information must be included in any funding notice, regardless of the type of plan, that is, regardless of whether the plan is a single-employer, multiple employer or multiemployer plan. For example, each notice must include identifying information, including the name of the plan, the address and phone number of the plan administrator and the plan's principal administrative officer (if different from the plan administrator), each plan sponsor's name and employer identification number, and the plan number of the plan. In addition, the notice must contain certain demographic information including a statement of the number of participants and beneficiaries who, as of the end of the plan year to which the notice relates, are retired or separated from service and receiving benefits, retired or separated from service and entitled to future benefits (but currently not receiving benefits), or active participants under the plan. A general description of the benefits under the plan which are eligible to be guaranteed by PBGC along with an explanation of the limitations on the guarantee and the circumstances under which such limitations apply must also be included. The notice must also describe the funding and investment policy of the plan, as well as the asset allocation of investments under the plan (expressed as percentages of total assets) as of the end of the plan year to which the notice relates. An explanation

[2263] See sections 103 and 104 of ERISA.

[2264] Similar annual reporting requirements apply under the Code (sections 6058 and 6059), and, under section 4065 of ERISA, the plan administrator of a defined benefit plan must file an annual report with PBGC. A plan administrator complies with all of these Code and ERISA reporting requirements by filing an Annual Return/Report of Employee Benefit Plan, Form 5500 series, and providing the information as required on the form and related instructions.

[2265] Section 101(f) of ERISA, originally enacted by section 103 of the Pension Funding Equity Act of 2004, Pub. L. No. 108–218, Annual funding notice requirements.

containing specific information of any plan amendment, scheduled benefit increases or reductions, or other known events taking effect in the current plan year having a material effect on plan liabilities or assets for the year (as defined in regulations issued by the Secretary of Labor) must also be included in the notice as well as a statement that a person may obtain a copy of the plan's annual report upon request, through the Department of Labor website or through an Intranet website maintained by the applicable plan sponsor. Certain other information including any additional information which the plan administrator elects to include to the extent not inconsistent with regulations prescribed by the Secretary of Labor may also be included in the notice.

Funding notices must also include additional information that varies with the type of plan.

Single-employer defined benefit plans

In the case of a single-employer defined benefit plan, the annual funding notice must also include:

1. A statement as to whether the plan's funding target attainment percentage [2266] for the plan year to which the notice relates (the "notice year") and the two preceding plan years, is at least 100 percent (and if not, the actual percentages);
2. A statement of the total assets (separately stating the prefunding balance and the funding standard carryover balance) and liabilities for the plan year,[2267] as of the valuation date of the notice year and for each of the two preceding plan years, as reported in the annual report [2268] for each such preceding plan year (that is, the present value of benefits owed under the plan determined in the same manner as under the minimum funding rules); and
3. A statement of the value of the plan's assets and liabilities as of the last day of the notice year, determined using the fair market value of plan assets (rather than the value determined under the funding rules) and, in computing benefit liabilities, the interest rates used in computing variable-rate PBGC premiums.[2269]

The annual funding notice of a single employer plan must also include a statement that each contributing sponsor, and each member of the sponsor's controlled group, that was required to provide the information under section 4010 of ERISA for the notice year, provide a summary of the rules governing termination of a single-employer plan under Title IV of ERISA as well as certain information on the effect of segment rate stabilization on plan funding.

[2266] As defined in section 303(d)(2) of ERISA.

[2267] Determined in the same manner as under the minimum funding rules of section 303 of ERISA.

[2268] Filed under section 104 of ERISA

[2269] In applying the funding rules, the value of plan assets may be determined on the basis of average fair market values over a period of up to 24 months. PBGC variable-rate premiums are based on a plan's unfunded vested benefit liabilities, computed using the first, second and third segment rates as determined under the PPA rules (without adjustments under MAP–21, the Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112–141, July 6, 2012, the Highway and Transportation Funding Act of 2014, Pub. L. No. 113–159, August 8, 2014, the Bipartisan Budget Act of 2015, Pub. L. No. 114–74, November 2, 2015, the American Rescue Plan Act of 2021, Pub. L. No. 117–2, March 11, 2021, and the Infrastructure Investment and Jobs Act, Pub. L. No. 117–58, Nov. 15, 2021), but based on a monthly corporate bond yield curve, rather than a yield curve reflecting average yields for a 24-month period.

Multiemployer defined benefit plans

With respect to a multiemployer plan, the annual funding notice must include:

1. A statement as to whether the plan's funded percentage [2270] for the notice year, and for the two preceding plan years, is at least 100 percent (and if not, the actual percentages),
2. A statement of the value of the plan's assets [2271] and the value of the plan liabilities [2272] as of the valuation date of the notice year and for each of the two preceding plan years, and
3. A statement of the fair market value of plan assets as of the last day of the notice year,[2273] and as of the last day of each of the two preceding plan years as reported in the annual report for each such preceding plan year.

The annual funding notice of a multiemployer plan must also include a statement as to whether the plan was in endangered, critical or critical and declining status [2274] for the notice year and if so, certain additional information must be included, as well as a summary of the rules governing reorganization or insolvency, including the limitations on benefit payments.

Time and form for providing notice

The annual funding notice must be provided no later than 120 days after the end of the plan year to which the notice relates.[2275] The funding notice must be provided in a form and manner prescribed in regulations by the Secretary of Labor. Additionally, it must be written so as to be understood by the average plan participant and may be provided in written, electronic, or other appropriate form to the extent that it is reasonably accessible to persons to whom the notice is required to be provided.

A plan administrator that fails to provide the required notice to a participant or beneficiary may be liable to the participant or beneficiary in the amount of up to $110 a day from the time of the failure, up to a maximum of $1,100 per request and for such other relief as a court may deem proper.

Explanation of Provision

The provision modifies and clarifies the terminology used with respect to the information required to be included in the annual funding notice, as well as supplementing the information to be provided, to more clearly identify defined benefit pension plan funding issues in the annual funding notice.

With respect to the requirement that the annual funding notice contain a statement of the number of participants and beneficiaries who are retired or separated from service and receiving benefits, retired or separated from service who are entitled to future benefits

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[2270] As defined in section 305(j) of ERISA.

[2271] Determined in the same manner as under section 304(c)(2) of ERISA.

[2272] Determined in the same manner as under section 305(j)(8) of ERISA, using reasonable actuarial assumptions as required under section 304(c)(3) of ERISA.

[2273] As reported in the annual report filed under section 104(a) of ERISA.

[2274] Under section 305 of ERISA.

[2275] Section 101(f)(3)(A) of ERISA. In the case of a plan covering not more than 100 employees for the preceding year, the annual funding notice must be provided upon filing of the annual report with respect to the plan (i.e., within seven months after the end of the plan year unless the due date for the annual report is extended). Section 101(f)(3)(B) of ERISA.

(but currently not receiving benefits), and active participants under the plan, the provision provides that such information must be provided not only for the currently required plan year to which the notice relates, but also for the preceding two plan years.

The provision also requires that the annual funding notice must provide information related to the average return on plan assets in addition to the funding policy and asset allocation of investments under the plan as of the end of the plan year to which the notice relates.

With respect to a single-employer plan, rather than providing a statement as to whether the plan's target funding attainment percentage for the notice year and the preceding two plan years is at least 100 percent and the accompanying information on plan assets and liabilities as described above, the annual funding notice will need to provide:

1. A statement as to whether the plan's percentage of plan liabilities funded for the plan year (rather than the plan's funded percentage) for the notice year and the two preceding plan years, is at least 100 percent (and if not, the actual percentages);
2. A statement of the value of the plan's assets and liabilities as of the last day of the notice year *and for the preceding two plan years as of the last day of each such plan year*, determined using the fair market value of plan assets and, in computing benefit liabilities, the interest rates used in computing variable-rate PBGC premiums;
3. For purposes of the statement of the percentage of plan liabilities funded described in 1, the percentage of plan liabilities funded is calculated as the ratio between the value of the plan's assets and liabilities as determined in 2, for the notice year and for the two preceding plan years;
4. If the information described in 1 and 2 is presented in tabular form, a statement needs to be included in the notice that (1) describes that in the event of a plan termination, the corporation's calculation of plan liabilities may be greater and (2) references the section of the notice that describes the benefits under the plan that are eligible to be guaranteed by PBGC with an explanation of the limitations on the guarantee and the circumstances under which such limitations apply;
5. A statement as to whether the plan's funded status, based on the plan's liabilities for the notice year, and for the two preceding plan years, is at least 100 percent (and if not, the actual percentages) that includes—(a) the plan's assets as of the last day of the plan year and for the two preceding plan years, as determined under 2 above, (b) the plan's liabilities, as of the last day of the plan year and for the two preceding plan years, as determined under 2 above, and (c) the funded status of the plan determined as the ratio of the plan's assets and liabilities calculated under (a) and (b), for the notice year, and for the two preceding plan years; and
6. A statement that if plan assets are determined to be sufficient to pay vested benefits that are not guaranteed by PBGC, participants and beneficiaries may receive benefits in excess of the guaranteed amount, and such a determination generally

uses assumptions that result in a plan having a lower funded status as compared to the plan's funded status disclosed in the notice.

Effective Date

The provision is effective with respect to plan years beginning after December 31, 2023.

44. Report on pooled employer plans (sec. 344 of the Act and sec. 3(43) of ERISA)

Present Law

For a description of present law of pooled employer plans, see the present law description of sections 105 and 106 of the Act.[2276]

Under present law, there is no requirement that DOL conduct a study and report to Congress on certain aspects of pooled employer plans.

Explanation of Provision

The provision requires DOL to conduct a study on the pooled employer plan industry including on (1) the legal name and number of pooled employer plans; (2) the number of participants in such plans; (3) the range of investment options provided in such plans; (4) the fees assessed in such plans; (5) the manner in which employers select and monitor such plans; (6) the disclosures provided to participants in such plans; (7) the number and nature of any enforcement actions taken by the Secretary of Labor on such plans; (8) the extent to which such plans have increased retirement savings coverage in the United States; and (9) any additional information as the Secretary may determine is necessary.

Not later than five years after the date of enactment, and every five years thereafter, the Secretary of Labor will submit to Congress and make available on a publicly accessible DOL website, a report on the findings of the study, including recommendations on how pooled employer plans can be improved, through legislation, to serve and protect retirement plan participants.

Effective Date

The provision is effective on the date of enactment (December 29, 2022).

45. Annual audits for groups of plans (sec. 345 of the Act)

Present Law

An employer maintaining a qualified retirement plan generally is required to file an annual return containing information required under regulations with respect to the qualification, financial condition, and operation of the plan.[2277] ERISA requires the plan admin-

[2276] See also the description of section 101 of the SECURE Act on pages 86–98 of Joint Committee on Taxation, *General Explanation of Tax Legislation Enacted in the 116th Congress* (JCS–1–22), February 2022.

[2277] Sec. 6058. In addition, under section 6059, the plan administrator of a defined benefit plan subject to the minimum funding requirements is required to file an annual actuarial reistrator of certain pension and welfare benefit plans to file annual reports disclosing specified information to DOL.[2278] These filing requirements are met by filing a completed Form 5500, Annual Return/Report of Employee Benefit Plan.[2279] Forms 5500 are filed with DOL, and information from Forms 5500 is shared with the IRS.[2280] Before the enactment of the SECURE Act, a separate Form 5500 was required for each plan.

Section 202 of the SECURE Act[2281] directs the IRS and DOL to work together to modify Form 5500 so that all members of a group of plans may file a single consolidated Form 5500. Under the SECURE Act, in developing the consolidated Form 5500, the IRS and DOL may require members to include sufficient information for each plan in the group as the IRS and DOL determine is necessary or appropriate for the enforcement and administration of the Code and ERISA.

A group of plans is eligible for a consolidated Form 5500 if all the plans in the group (1) are defined contribution plans;[2282] (2) have the same trustee, the same named fiduciary (or named fiduciaries) under ERISA, and the same administrator and plan administrator; (3) use the same plan year; and (4) provide the same investments or investment options to participants and beneficiaries. A plan not subject to ERISA may be included in the group if the same person that performs each of the previous functions, as applicable, for all the other plans in the group performs each of the functions for the plan not subject to ERISA.

A Form 5500 for a defined contribution plan typically must contain an opinion from an independent qualified public accountant ("IQPA") regarding the plan's financial statements.[2283] Generally, however, no opinion is required for a plan covering fewer than 100 participants.[2284]

DOL proposed rules implementing section 202 of the SECURE Act which would have required a group of plans submitting a single consolidated Form 5500 to include an opinion from an IQPA for the consolidated trust for the group of plans, in addition to opinions for each plan with 100 or more participants.[2285] Subsequently,

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port. Under section 414(g) and ERISA section 3(16), "plan administrator" generally means the person specifically so designated by the terms of the plan document. In the absence of a designation, the plan administrator generally is (1) in the case of a plan maintained by a single employer, the employer; (2) in the case of a plan maintained by an employee organization, the employee organization; or (3) in the case of a plan maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties that maintain the plan. Under ERISA, the party described in (1), (2), or (3) is referred to as the "plan sponsor."

[2278] ERISA secs. 103 and 104. Under ERISA section 4065, the plan administrator of certain defined benefit plans must provide information to PBGC.

[2279] Small plans meeting certain requirements (generally plans with less than 100 employees) must file a Form 5500 SF. In addition, the Form 5500–EZ is generally used by "one participant plans" (plans in which the only participants are an individual and spouse who together own the business (whether or not incorporated) for which the plan is established) or certain foreign plans that are not subject to the requirements of ERISA section 104(a).

[2280] Information is shared also with PBGC, as applicable. Form 5500 filings are also publicly released in accordance with section 6104(b); Treas. Reg. sec. 301.6104(b)–1; and ERISA secs. 104(a)(1) and 106(a).

[2281] Div. O. of Pub. L. No. 116–94, the Further Consolidated Appropriations Act, 2020, December 20, 2019.

[2282] As defined in section 414(i) and section 3(34) of ERISA.

[2283] ERISA sec. 103(a)(3)(A).

[2284] 29 C.F.R. sec. 520.104–46.

[2285] DOL, Proposed Rule, "Annual Reporting and Disclosure," 86 Fed. Reg. 51284, Sept. 15, 2021; 29 C.F.R. sec. 2520.103–14(b)(2); see also DOL, IRS, and PBGC, Notice of Proposed Form

Continued

however, the Department of the Treasury, DOL, and PBGC indicated that the agencies were continuing to consider this issue in light of comments received, and this particular rule was not being finalized.[2286]

Explanation of Provision

This provision clarifies that plans filing under a group of plans generally need to submit an audit opinion only if they have 100 participants or more, and that reporting is not required at the consolidated trust level.

Effective Date

This provision is effective as of the date of enactment (December 29, 2022).

46. Cash balance (sec. 348 of the Act, sec. 411(b) of the Code, and sec. 204(b) of ERISA)

Present Law

Types of qualified plans in general

Qualified retirement plans are broadly classified into two categories, defined benefit pension plans and defined contributions plans, based on the nature of the benefits provided. In some cases, the qualification requirements apply differently depending on whether a plan is a defined benefit pension plan or a defined contribution plan.

Under a defined benefit pension plan, benefits are determined under a plan formula, generally based on compensation and years of service. For example, a defined benefit pension plan might provide an annual retirement benefit of two percent of final average compensation multiplied by total years of service completed by an employee. Benefits under a defined benefit pension plan are funded by the general assets of the trust established under the plan; individual accounts are not maintained for employees participating in the plan.

Employer contributions to a defined benefit pension plan are subject to minimum funding requirements under the Code and ERISA that are designed to accumulate plan assets that are sufficient to pay the benefits under the plan. An employer is generally subject to an excise tax for a failure to make required contributions. Such plans are also subject to specific accrued benefit requirements.[2287] Benefits under a defined benefit pension plan are generally guaranteed (within limits) by PBGC.

Benefits under defined contribution plans are based solely on the contributions (and earnings thereon) allocated to separate accounts maintained for each plan participant. Profit sharing plans and qualified cash or deferred arrangements (commonly called "401(k)

Revisions, "Proposed Revision of Annual Information Return/Reports," 86 Fed. Reg. 51488, 51495–96, Sept. 15, 2021 (explaining rationale for proposed rule regarding annual audits).

[2286] IRS, DOL, and PBGC, Final Forms Revisions, "Annual Information Return/Reports," 87 Fed. Reg. 31133, 31134–35, May 23, 2022.

[2287] Sec. 401(a)(7) and 411; ERISA sec. 204.

plans" after the section of the Code regulating such plans) are examples of defined contribution plans.

Cash balance plans

A cash balance plan is a defined benefit pension plan with benefits resembling the benefits associated with defined contribution plans. Cash balance plans are sometimes referred to as "hybrid" plans because they combine features of a defined benefit pension plan and a defined contribution plan. Other types of hybrid plans exist as well, such as pension equity plans.[2288]

Under a cash balance plan, benefits are defined by reference to a hypothetical account balance. An employee's hypothetical account balance is determined by reference to hypothetical annual allocations to the account ("pay credits"), for example, a certain percentage of the employee's compensation for the year, and hypothetical earnings on the account ("interest credits").

The method of determining interest credits under a cash balance plan is specified in the plan. Under one common plan design, interest credits are determined in the form of hypothetical interest on the account at a rate specified in the plan or based on a specified market index, such as the rate of interest on certain Treasury securities. Alternatively, interest credits are sometimes based on hypothetical assets held in the account, similar to earnings on an individual account under a defined contribution plan, which are based on the assets held in the individual account.[2289]

Cash balance plans are generally designed so that, when a participant receives a pay credit for a year of service, the participant also receives the right to future interest on the pay credit, regardless of whether the participant continues employment (referred to as "front-loaded" interest credits). That is, the participant's hypothetical account continues to be credited with interest after the participant stops working for the employer. As a result, if an employee terminates employment and defers distribution to a later date, interest credits will continue to be credited to that employee's hypothetical account.

Benefit accrual rules

The accrued benefit to which a participant is entitled under a defined benefit pension plan must be determined under a method (referred to as the plan's accrual method) that satisfies one of three accrual rules with respect to benefits accruing under the plan.[2290] These rules relate to the pattern in which a participant's normal retirement benefit (i.e., the benefit payable at normal retirement age under the plan's benefit formula) accrues over the participant's years of service, so that benefits are not "back-loaded" (i.e., delayed until years of service close to attainment of normal retirement

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[2288] Under pension equity plans (often called "PEPs"), benefits are generally described as a percentage of final average pay, with the percentage determined on the basis of points received for each year of service, which are often weighted for older or longer service employees. Pension equity plans commonly provide interest credits for the period between a participant's termination of employment and commencement of benefits.

[2289] The assets of the cash balance plan may or may not include the assets or investments on which interest credits are based. As in the case of other defined benefit pension plans, a plan fiduciary is responsible for making investment decisions with respect to cash balance plan assets.

[2290] Sec. 411(b); ERISA sec. 204(b).

age).[2291] The most commonly used rule for cash balance plans provides a plan's benefit accrual rate in any future year may not exceed the rate in the current or future year by more than 133⅓ percent.[2292] The statute provides that Social Security benefits and all other "relevant factors" used to compute benefits are treated as remaining constant as of the current plan year for all years after the current year.[2293] The IRS has interpreted the statute to include an interest crediting rate as a "relevant factor" for purposes of sec. 411(b)(1).[2294]

A participant's accrued benefit under a cash balance plan is determined by converting the participant's hypothetical account balance at normal retirement age to an actuarially equivalent annuity. Under a plan providing front-loaded interest credits, benefits attributable to future interest credits on a pay credit become part of the participant's accrued benefit when the participant receives the pay credit. Thus, for purposes of determining the accrued benefit, the participant's hypothetical account balance includes projected future pay credits for the period until normal retirement age. This has the effect of front-loading benefit accruals.

A defined benefit plan fails to comply with the benefit accrual rules if, under the plan, an employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age.[2295] A plan is not treated as failing to meet the requirements of that rule if a participant's accrued benefit, as determined as of any date under the terms of the plan, would be equal to or greater than that of any similarly situated, younger individual who is or could be a participant.[2296] For this purpose, the Code provides that the accrued benefit may, under the terms of the plan, be expressed as an annuity payable at normal retirement age, the balance of a hypothetical account, or the current value of the accumulated percentage of the employee's final average compensation. For purposes of satisfying this requirement, the Code provides that reference to the accrued benefit of a participant refers to the participant's benefit accrued to date.[2297]

An accrued benefit may not be decreased by amendment.[2298] The IRS regulations provide rules relating to this requirement for hybrid plans by providing that the right to interest credits in the future that are not conditioned on future service constitutes a protected benefit.[2299] If the terms of a statutory hybrid plan entitle the participant to future interest credits, a plan must comply with that requirement by protecting the old interest crediting rate for the accrued benefit (1) if the plan is amended to change the inter-

[2291] Sec. 411(b)(1).
[2292] Sec. 411(b)(1)(B).
[2293] Sec. 411(b)(1)(B)(iv).
[2294] Rev. Rul. 2008–7, I.R.B. 2008–7 419, February 19, 2008. The result for a cash balance plan that uses a market-based interest crediting rate is that the current or recent actual rate of return is assumed to be repeated in all future years. Because market rates are volatile and can be below zero in certain years, a cash balance plan that uses a market-based interest crediting rate must have flat or virtually flat pay credits to assure passing the test in all years. The practical effect is that plan sponsors who want to provide more than modestly larger pay credits for older, longer service workers cannot do so in a cash balance plan using a market-based interest crediting rate.
[2295] Sec. 411(b)(1)(H)(i).
[2296] Sec. 411(b)(5)(A).
[2297] Sec. 411(b)(5)(G).
[2298] Sec. 411(d)(6).
[2299] Treas. Reg. sec. 1.411(b)(5)–1(e)(3)(i).

est crediting rate and (2) under any circumstances where the revised rate could result in interest credits that are smaller than the interest credits that would be provided without regard to the amendment.

For purposes of determining the accrued benefit, a cash balance plan will be treated as failing to meet these requirements if the terms of the plan provide for an interest credit (or an equivalent amount) for any plan year at a rate that is greater than a market rate of return.[2300] A cash balance plan is not treated as having an above-market rate merely because the plan provides for a reasonable minimum guaranteed rate of return or for a rate of return that is equal to the greater of a fixed or variable rate of return.[2301] The Secretary is authorized to provide rules governing the calculation of a market rate of return for purposes of these rules and for permissible methods of crediting interest to the account (including fixed or variable interest rates) resulting in effective rates of return meeting the requirements of the statute.[2302]

Under IRS regulations, an interest crediting rate for a plan year is not in excess of a market rate of return if it is based on the rate of interest provided under one of several specified indices including (1) the rate of interest on long-term investment grade corporate bonds, (2) the interest rate on 30-year Treasury securities, (3) the interest rate on shorter term Treasuries, (4) certain cost-of-living indices, and (4) the first and second segment rates.[2303] The regulations provide that an interest crediting rate based on a specified index must be adjusted on at least an annual basis. The regulations also set forth certain interest crediting rates that satisfy the statutory market rate of return requirement but are not safe harbor rates. For example, in the case of indexed benefits,[2304] an interest crediting rate equal to the actual rate of return on the aggregate assets of the plan is not in excess of a market rate of return if the plan's assets are diversified so as to minimize the volatility of returns.[2305] The regulations further provide that the rate of return on an annuity contract for an employee issued by an insurance company licensed under the laws of a State is not in excess of a market rate of return, subject to an anti-abuse rule.

Explanation of Provision

The provision provides that in the case of a cash balance plan which provides variable interest crediting rates (as the market rate of return), the interest crediting rate that is treated as in effect and as the projected interest crediting rate must be a reasonable projection of such variable interest crediting rate, subject to a maximum of six percent.

[2300] Sec. 411(b)(5)(B)(i).
[2301] Sec. 411(b)(5)(B)(i)(I).
[2302] Sec. 411(b)(5)(B)(i)(III).
[2303] As defined in either sec. 417(e) or 430(h)(2)(C).
[2304] As described in sec. 411(b)(5)(E).
[2305] This requirement that plan assets be diversified so as to minimize the volatility of returns does not require greater diversification than is required under section 404(a)(1)(C) of ERISA with respect to defined benefit plans.

Effective Date

The provision is effective with respect to plan years beginning after the date of enactment (December 29, 2022).

47. Termination of variable rate premium indexing (sec. 349 of the Act and sec. 4006(a) of ERISA)

Present Law

PBGC

The minimum funding requirements permit an employer to fund defined benefit plan benefits over a period of time. Thus, it is possible that a plan may be terminated at a time when plan assets are not sufficient to provide all benefits accrued by employees under the plan. In order to protect plan participants from losing retirement benefits in such circumstances, PBGC, a corporation within the Department of Labor, was created in 1974 under ERISA to provide an insurance program for benefits under most defined benefit plans maintained by private employers.

PBGC premiums

In general

PBGC is funded by assets in terminated plans, amounts recovered from employers who terminate underfunded plans, premiums paid with respect to covered plans, and investment earnings. All covered single-employer plans are required to pay a flat per-participant premium and underfunded plans are subject to an additional variable rate premium based on the level of underfunding.[2306] Under present law, PBGC provides insurance protection for participants and beneficiaries under certain defined benefit pension plans by guaranteeing certain basic benefits under the plan in the event the plan is terminated with insufficient assets to pay benefits promised under the plan. The guaranteed benefits are funded in part by premium payments from employers who sponsor defined benefit pension plans.

PBGC premiums

The amount of the required annual PBGC premium for a single-employer plan is generally a flat rate premium ($88 per participant in 2022) and an additional variable-rate premium, if applicable.

The variable rate premium is based on a plan's unfunded vested benefits. Unfunded vested benefits under a plan generally means the excess, if any, of (1) the premium funding target under the plan over (2) the fair market value of the plan's assets.[2307] The amount of the variable rate premium is an amount equal to the "applicable dollar amount"[2308] for each $1,000 (or fraction thereof) of unfunded

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[2306] There is also an additional premium that is only assessed on certain terminated single-employer plans. See section 4006(a)(7) of ERISA.

[2307] See section 4006(a)(3)(E)(ii) of ERISA. See also, 29 C.F.R. 4006.3(b) and 4006.4.

[2308] As set forth in section 4006(a)(8) of ERISA. Section 40221(b)(2) of "The Moving Ahead for Progress in the 21st Century Act". Pub. L. No. 112–141, July 6, 2012, added an inflation adjustment to section 4006(a)(8)(B) which provides that,

"For each plan year beginning in a calendar year after 2012, there shall be substituted for the applicable dollar amount specified under subparagraph (A) an amount equal to the greater of——

vested benefits under the plan as of the close of the preceding plan year, up to a maximum amount, and is adjusted for inflation for each plan year beginning after a calendar year after 2012. For 2022, the variable rate premium is $48 per $1000 of unfunded vested benefits, capped at $598 times the number of participants.

Other special rules apply to the application of the variable premium.

Explanation of Provision

The provision replaces the present law rules for calculating the variable rate premium with a flat $52 for each $1,000 of unfunded vested benefits for plan years beginning after calendar year 2023, thereby effectively terminating indexing of the variable rate premium.

Effective Date

The provision is effective on the date of enactment (December 29, 2022).

48. Safe harbor for corrections of employee elective deferral failures (sec. 350 of the Act and sec. 414 of the Code)

Present Law

For a description of present law on automatic enrollment features in retirement plans, see the present law description of section 101 of the Act.

Employee Plans Compliance Resolution System

For background on the Employee Plans Compliance Resolution System ("EPCRS"), see the present law description of section 301 of the Act.

Special safe harbor correction method for failures related to automatic contribution features in a section 401(k) or section 403(b) plan

A safe harbor correction method is available for certain employee elective deferral failures associated with missed elective deferrals for eligible employees who are subject to an automatic contribution feature in a section 401(k) or 403(b) plan (including employees who made affirmative elections in lieu of automatic contributions but whose elections were not implemented correctly).[2309]

An "employee elective deferral failure"[2310] is a failure to implement elective deferrals correctly in a section 401(k) plan or 403(b)

(i) The product derived by multiplying such applicable dollar amount for plan years beginning in that calendar year by the ratio of——

(I) The national average wage index (as defined in section 209(k)(1) of the Social Security Act) for the first of the 2 calendar years preceding the calendar year in which such plan year begins, to

(II) The national average wage index (as so defined) for the base year; and

(ii) Such applicable dollar amount in effect for plan years beginning in the preceding calendar year.

If the amount determined under this subparagraph is not a multiple of $1, such product shall be rounded to the nearest multiple of $1."

[2309] Sec. .05(8) of Appendix A of Rev. Proc. 2021–30.

[2310] Sec. .05(10) of Appendix A of Rev. Proc. 2021–30.

plan, including elective deferrals pursuant to an affirmative election or pursuant to an automatic contribution feature under such a plan, and a failure to afford an employee the opportunity to make an affirmative election because the employee was improperly excluded from the plan. Automatic contribution features include automatic enrollment and automatic escalation features that are affirmatively elected.[2311]

If the failure to implement an automatic contribution feature for an affected eligible employee or the failure to implement an affirmative election of an eligible employee who is otherwise subject to an automatic contribution feature does not extend beyond the end of the nine and one-half month period after the end of the plan year of the failure (which is generally the filing deadline of the Form 5500 series return, including automatic extensions), no qualified nonelective contribution ("QNEC")[2312] for the missed elective deferrals is required, provided that the following conditions are satisfied:[2313]

1. Correct deferrals begin no later than the earlier of the first payment of compensation made on or after the last day of the nine and one-half month period after the end of the plan year in which the failure first occurred for the affected eligible employee or, if the plan sponsor was notified of the failure by the affected eligible employee, the first payment of compensation made on or after the end of the month after the month of notification;
2. Notice of the failure, that satisfies the content requirements described below, is given to the affected eligible employee not later than 45 days after the date on which correct deferrals begin; and
3. If the eligible employee would have been entitled to additional matching contributions had the missed deferrals been made, the plan sponsor makes a corrective allocation (adjusted for earnings) on behalf of the employee equal to the matching contributions that would have been required under the terms of the plan as if the missed deferrals had been contributed to the plan in accordance with the timing requirements under SCP for significant operational failures. This correction method provides an alternative safe harbor method for calculating earnings for Employee Elective Deferral Failures under section 401(k) plans or 403(b) plans.[2314]

Content of notice requirement

The required notice must include the following information:

1. General information relating to the failure, such as the percentage of eligible compensation that should have been deferred and the approximate date that the compensation should have

[2311] Sec. .05(10) of Appendix A of Rev. Proc. 2021–30.

[2312] A QNEC, as defined in Treas. Reg. sec. 1.401(k)–6 means "employer contributions, other than elective contributions or matching contributions, that, except as provided otherwise in § 1.401(k)–1(c) and (d), satisfy the requirements of § 1.401(k)–1(c) and (d) as though the contributions were elective contributions, without regard to whether the contributions are actually taken into account under the ADP test under § 1.401(k)–2(a)(6) or the ACP test under § 1.401(m)–2(a)(6). Thus, the nonelective contributions must satisfy the nonforfeitability requirements of § 1.401(k)–1(c) and be subject to the distribution limitations of § 1.401(k)–1(d) when they are allocated to participants' accounts."

[2313] Sec. .05(8) of Appendix A of Rev. Proc. 2021–30.

[2314] The plan may also use the earnings adjustment methods set forth in section 3 of Appendix B of Rev. Proc. 2021–30.

begun to be deferred. The general information need not include a statement of the dollar amounts that should have been deferred;

2. A statement that appropriate amounts have begun to be deducted from compensation and contributed to the plan (or that appropriate deductions and contributions will begin shortly);

3. A statement that corrective allocations relating to missed matching contributions have been made (or that corrective allocations will be made). Information relating to the date and the amount of corrective allocations need not be provided;

4. An explanation that the affected participant may increase his or her deferral percentage in order to make up for the missed deferral opportunity, subject to applicable limits for elective deferrals;[2315] and

5. The name of the plan and plan contact information (including name, street address, email address, and telephone number of a plan contact).

Sunset of safe harbor correction method

The safe harbor correction method is available for plans only with respect to failures that begin on or before December 31, 2023.

Explanation of Provision

Under the provision, a plan will not fail to be treated as a qualified plan, a section 403(b) tax sheltered annuity, an IRA or a section 457(b) plan solely by reason of a "corrected error."

Definition of a corrected error

For purposes of this provision, an error is a "corrected error" if:

1. The error is a reasonable administrative error which is either made:

    a. in implementing an automatic enrollment or automatic escalation feature with respect to an eligible employee (or an affirmative election made by an eligible employee covered by such feature), or

    b. by failing to afford an eligible employee the opportunity to make an affirmative election because such employee was improperly excluded from the plan; and

2. The error is corrected prospectively by implementing an automatic enrollment or automatic escalation feature with respect to an eligible employee (or an affirmative election made by an eligible employee) determined in accordance with the terms of an eligible automatic contribution arrangement,[2316] provided that:

    a. Such implementation error:

    - Is corrected not later than the date of the first payment of compensation made by the employer to the employee on or after the last day of the nine and one-half month period after the end of the plan year during which the error with respect to the employee first occurred; or
    - If earlier in the case of an employee who notifies the plan sponsor of such error, is corrected not later than the date of the first payment of compensation made by the em-

[2315] Under sec. 402(g).
[2316] As defined in section 414(w)(3).

ployer to the employee on or after the last day of the month following the month in which such notification was made;

b. In the case of an employee who would have been entitled to additional matching contributions had any missed elective deferral been made, the plan sponsor makes a corrective allocation, not later than the deadline specified by the Secretary in regulations or other guidance prescribed by this provision, of matching contributions on behalf of the employee in an amount equal to the additional matching contributions to which the employee would have been so entitled (adjusted to account for earnings had the missed elective deferrals been made);

c. Such implementation error is of a type which is so corrected for all similarly situated participants in a nondiscriminatory manner;

d. Notice of such error is given to the employee not later than 45 days after the date on which correct deferrals begin; and

e. The notice under (d) satisfies such regulations or other guidance as the Secretary prescribes under this provision.

Such correction may occur before or after the participant has terminated employment and may occur without regard to whether the error is identified by the Secretary.

No obligation for employer to restore missed elective deferrals

If the requirements for correction of a corrected error described above are satisfied, the employer will not be required to provide eligible employees with the missed amount of elective deferrals resulting from a reasonable administrative error through a QNEC, or otherwise.

Regulatory guidance required

The Secretary must issue regulations or other guidance of general applicability prescribing:

- The deadline for making a required corrective allocation of matching contributions;
- The manner in which the amount of the correction allocation is determined;
- The content of the required notice;
- The manner of adjustment to account for earnings on required matching contributions; and
- Such other rules as are necessary to carry out the purposes of this provision.

Effective Date

The provision applies to any errors with respect to which the date that is nine and one-half months after the end of the plan year during which the error occurred is after December 31, 2023. Prior to the application of any regulations or other guidance prescribed under this provision, taxpayers may rely upon their reasonable good faith interpretations of the provision.

TITLE IV—TECHNICAL AMENDMENTS

1. Amendments relating to Setting Every Community Up for Retirement Enhancement Act of 2019 (the "SECURE Act") (sec. 401 of the Act and secs. 401(k), 401(m), and 4973 of the Code)

Present Law

Safe harbor section 401(k) and 401(m) plans

The SECURE Act eliminated the safe harbor notice requirement with respect to nonelective 401(k) safe harbor plans.[2317] For a description of present law as it relates to section 401(k) plans, section 401(m) plans, and nondiscrimination requirements, see the description of section 110 of the Act.

Long-term part-time workers

The SECURE Act generally required section 401(k) plans to allow long-term part-time employees to make elective deferrals under the plan.[2318] For a description of present law, see the description of section 125 of the Act.

Difficulty of care payments

The SECURE Act also modified certain retirement contribution limits as they apply to "difficulty of care" payments.[2319] A difficulty of care payment is compensation for providing the additional care needed for certain qualified foster individuals.[2320] Such payments are excludable from gross income.

Generally, the amount that may be contributed to an IRA is limited by the compensation that is includible in an individual's gross income for the taxable year.[2321] The amount of such contributions to a traditional IRA that are deductible for a taxable year may not exceed the lesser of the "deductible amount" and the individual's compensation that is includible in gross income.[2322] The deductible amount is generally a statutory amount (adjusted each year for inflation; $6,000 in 2022)[2323] that is phased out for individuals who participate (or whose spouse participates) in an employer-sponsored retirement plan, depending on the income of such individuals.[2324] The amount of permissible nondeductible contributions to an IRA is generally equal to the amount allowable as a deduction for the year, without taking into account the phase-out for participating in a retirement plan, minus the amount allowable as a deduction for the year (taking into account such phase-out).[2325]

The SECURE Act modified the limit on nondeductible contributions to an IRA to generally allow an individual to contribute a dif-

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[2317] Sec. 103 of the SECURE Act.
[2318] Sec. 112 of the SECURE Act.
[2319] Sec. 116 of the SECURE Act.
[2320] Sec. 131(c).
[2321] Secs. 219(b), 408(o)(2), and 408A(c)(2).
[2322] Sec. 219(b)(1).
[2323] Sec. 219(b)(1)(5). This amount is increased to include catch-up contributions for individuals who are age 50 and older.
[2324] Sec. 219(g).
[2325] Sec. 408(o)(2).

ficulty of care payment.[2326] Under the SECURE Act, if the deductible amount exceeds the individual's compensation that is includible in gross income for the year, the individual may elect to increase the limit on nondeductible contributions by the amount of the difficulty of care payment (or, if less, the excess of the deductible amount over the amount of the individual's compensation for the year that is includible in gross income).

Excise tax on excess IRA contributions

To the extent that contributions to an IRA exceed the contribution limits, the individual is subject to an excise tax equal to six percent of the excess amount.[2327] This excise tax generally applies each year until the excess amount is distributed.

Explanation of Provision [2328]

The provision clarifies that, similar to a traditional section 401(m) safe harbor plan, a section 401(m) safe harbor plan with automatic enrollment must satisfy notice requirements, regardless of whether the plan includes safe harbor matching contributions or safe harbor nonelective contributions.[2329]

The provision also includes several clarifications to the rules relating to long-term part-time employees. First, it clarifies that in addition to excluding long-term part-time employees from nondiscrimination requirements that apply to safe harbor plans under section 401(k), an employer may also elect to exclude such employees from the nondiscrimination requirements that apply to safe harbor plans under section 401(m).[2330] Second, the provision clarifies that the vesting rules apply to the plan, and not only to the cash or deferred arrangement.[2331] Third, the provision clarifies that an employee ceases to be considered a long-term part-time employee (and is instead considered to be a full-time employee) when the employee satisfies the age and service requirements that apply under a section 401(k) plan to full-time employees.[2332]

The provision also clarifies that the excise tax on excess contributions to an IRA generally does not apply to difficulty of care payments contributed to an IRA.[2333]

[2326] Sec. 408(o)(5).

[2327] Secs. 4973(b) and (f).

[2328] In addition to the clarifications described below, the provision fixes clerical errors in sections 72(t), 401(k), 408, and 408A.

[2329] The plan must satisfy the notice requirements under section 401(k)(13)(E), regardless of whether it is an automatic enrollment 401(k) safe harbor plan that provides a matching contribution in accordance with section 401(k)(13)(D)(i)(I) or a nonelective contribution in accordance with section 401(k)(13)(D)(i)(II).

[2330] The requirements that apply under sections 401(m)(11) and (12).

[2331] Sec. 401(k)(15)(B)(iii).

[2332] The requirements under section 401(k)(2)(D)(i). Thus, the provision clarifies that the applicable age and service requirements are the requirements of section 410(a)(1), determined without regard to subparagraph (B)(i) thereof.

[2333] The excise tax does not apply to any designated nondeductible contribution to an IRA that does not exceed the limit on nondeductible contributions by reason of the individual's election to increase such limit to account for the difficulty of care payment. Sec. 4973(b) (as amended by this provision).

Effective Date

The amendments made by the provision are effective as if included in the section of the SECURE Act to which the amendment relates.

TITLE V—ADMINISTRATIVE PROVISIONS

1. Provisions relating to plan amendments (sec. 501 of the Act)

Present Law

Present law provides a remedial amendment period during which, under certain circumstances, a retirement plan may be amended retroactively in order to comply with tax qualification requirements.[2334] In general, plan amendments to reflect changes in the law must be made by the time prescribed by law for filing the income tax return of the employer for the employer's taxable year in which the change in law occurs (including extensions). The Secretary may extend the time by which plan amendments need to be made.

The Code and ERISA provide that, in general, accrued benefits cannot be reduced by a plan amendment.[2335] This prohibition on the reduction of accrued benefits is commonly referred to as the "anti-cut-back rule."

Explanation of Provision

The provision permits certain plan amendments made pursuant to the provisions of this Act, or regulations issued thereunder, to be retroactively effective. If a plan amendment meets the requirements of the provision, then the plan will be treated as being operated in accordance with its terms, and, except as provided by Secretary in guidance, the amendment will not violate the anti-cut-back rule. In order for this treatment to apply, the plan must be operated as if the plan amendment were in effect, and the amendment is required to be made on or before the last day of the first plan year beginning on or after January 1, 2025 (or such later date as the Secretary may prescribe). However, if the plan is a governmental plan or a collectively-bargained plan,[2336] the amendment is required to be made on or before the last day of the first plan year beginning on or after January 1, 2027 (or such later date as the Secretary may prescribe).

If the amendment is required to be made to retain qualified status as a result of the changes in the law (or regulations), the amendment is required to be made retroactively effective as of the date on which the change became effective with respect to the plan and the plan is required to be operated in compliance with the changes until the amendment is made. Amendments that are not required to retain qualified status but that are made pursuant to

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[2334] Sec. 401(b).
[2335] Code sec. 411(d)(6); ERISA sec. 204(g).
[2336] Defined for this purpose as a plan maintained by one or more collective bargaining agreements between employee representatives and one or more employers ratified before the date of enactment of this provision.

the provisions of this Act (or applicable regulations) may be made retroactively effective as of the amendment's effective date.

The provision also amends the deadlines for certain plan amendments made pursuant to the SECURE Act, the Coronavirus Aid, Relief, and Economic Security Act, and the Taxpayer Certainty and Disaster Relief Act to conform with the deadlines provided under this provision.[2337]

Effective Date

The provision is effective on the date of enactment (December 29, 2022).

TITLE VI—REVENUE PROVISIONS

1. SIMPLE and SEP Roth IRAs (sec. 601 of the Act and secs. 408(k) and 408(p) of the Code)

Present Law

An IRA is generally established by an individual for whom the IRA is maintained.[2338] In some cases, an employer may establish IRAs on behalf of employees and provide retirement contributions to the IRAs. In addition, IRA treatment may apply to accounts maintained for employees under a trust created by an employer (or an employee association) for the exclusive benefit of employees or their beneficiaries, provided that the trust complies with the relevant IRA requirements and separate accounting is maintained for the interest of each employee or beneficiary.[2339] In that case, the assets of the trust may be held in a common fund for the account of all individuals who have an interest in the trust.

There are two basic types of IRAs: traditional IRAs, to which deductible or nondeductible contributions can be made, and Roth IRAs, contributions to which are not deductible. The total contributions made to all IRAs for a year cannot exceed $6,000 (for 2022), plus an additional $1,000 in catch-up contributions for individuals age 50 or older.[2340] Certain individuals are not permitted to make deductible contributions to a traditional IRA or to make contributions to a Roth IRA, depending on their income.[2341]

Distributions from traditional IRAs are generally includible in income, except to the extent a portion of the distribution is treated as a recovery of the individual's basis (if any). Qualified distribu-

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[2337] The provision modifies the general deadlines for plan amendments under the SECURE Act, section 601, the deadlines for amendments relating to coronavirus-related distributions and the waiver of required minimum distributions under the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116–136, March 27, 2020, sections 2202 and 2203, and the deadlines for amendments under the Taxpayer Certainty and Disaster Relief Act of 2020, Pub. L. No. 116–260, Division EE, December 27, 2020, section 302.

[2338] Secs. 219, 408, and 408A provide the rules for IRAs. Under section 408(a)(2) and (n), only certain entities are permitted to be the trustee of an IRA. The trustee of an IRA generally must be a bank, an insured credit union, or a corporation subject to supervision and examination by the Commissioner of Banking or other officer in charge of the administration of the banking laws of the State in which it is incorporated. Alternatively, an IRA trustee may be another person who demonstrates to the satisfaction of the Secretary that the manner in which the person will administer the IRA will be consistent with the IRA requirements.

[2339] Sec. 408(c).

[2340] Sec. 219(b).

[2341] Sec. 219(g); 408A(c)(3).

tions from a Roth IRA are excluded from income;[2342] other distributions from a Roth IRA are includible in income to the extent of earnings. IRA distributions generally can be rolled over to another IRA or qualified retirement plan; however, a distribution from a Roth IRA generally can be rolled over only to another Roth IRA or a designated Roth account.

SIMPLE IRAs and SEP plans are special types of employer-sponsored retirement plans to which the employer makes contributions to IRAs established for each of the employer's employees in accordance with the Code requirements for each type of plan.[2343] SIMPLE IRAs and SEP plans may not be designated as Roth IRAs.[2344] Contributions to a SIMPLE IRA or SEP plan are not taken into account for purposes of the limit on contributions to a Roth IRA.[2345]

SIMPLE IRA plans

For background on SIMPLE IRA plans, see the present law description of section 116 of this Act.

In the case of a SIMPLE IRA, if a participant receives a payment or distribution from the IRA during the first two years the individual participates in the plan, such payment or distribution is not treated as a rollover contribution if it is paid to an IRA or retirement plan other than a SIMPLE IRA.[2346] In addition, the 10-percent tax on early distributions from retirement plans is increased to 25 percent in the case of any such distributions that are subject to the early distribution tax.[2347]

SEP plans

A SEP plan is a special type of employer-sponsored retirement plan whereby only the employer makes contributions to the plan.[2348] Unlike SIMPLE IRA plans, any size employer may establish a SEP plan. The amount of the contribution to the SEP plan is the lesser of 25 percent of the employee's compensation or the dollar limit applicable to contributions to a qualified defined contribution plan ($61,000 for 2022).[2349] A traditional IRA is set up for each eligible employee, and all contributions must be fully vested. Any employee must be eligible to participate in the SEP plan if the employee has (1) attained age 21, (2) performed services for the employer during at least three of the immediately preceding five years, and (3) received at least $650 (for 2022) in compensation

[2342] A qualified distribution is a distribution that (1) is made after the five-taxable-year period beginning with the first taxable year for which the individual first made a contribution to a Roth IRA, and (2) is made after attainment of age 59½, on account of death or disability, or is made for first-time homebuyer expenses of up to $10,000. Sec. 408A(d)(2).

[2343] Secs. 408(p), (k).

[2344] Sec. 408A(f)(1).

[2345] Sec. 408A(f)(2).

[2346] Sec. 408(d)(3)(G).

[2347] Sec. 72(t)(6).

[2348] Sec. 408(k). Before 1997, certain employers with no more than 25 employees could maintain a SARSEP plan under which employees could make elective deferrals. Sec. 408(k)(6). The SARSEP plan rules were generally repealed with the enactment of the SIMPLE plan rules, as part of the Small Business Job Protection Act of 1996, Pub. L. No. 104–188, August 20, 1996. However, contributions may continue to be made to SARSEP plans that were established before 1997.

[2349] Secs. 404(h)(1)(C); 415(c)(1)(A).

from the employer for the year.[2350] Contributions to a SEP plan generally must bear a uniform relationship to compensation.

Roth contributions

Elective deferrals are generally made on a pre-tax basis. However, certain retirement plans, such as section 401(k), section 403(b), and governmental 457(b) plans, may include a qualified Roth contribution program under which elective deferrals are made on an after-tax basis (designated Roth contributions), and attributable distributions are excluded from income.[2351] The annual dollar limit on a participant's designated Roth contributions is the same as the limit on elective deferrals, reduced by the participant's elective deferrals that are not designated Roth contributions. Designated Roth contributions are generally treated the same as any other elective deferral for certain purposes, including the restrictions on distributions.

Explanation of Provision

Under the provision, SEP and SIMPLE plans are permitted to be designated as Roth IRAs. Thus, contributions (including employer contributions as well as elective deferrals) to a SEP or SIMPLE plan that is designated as a Roth IRA are not excludable from gross income, and qualified distributions from such a Roth IRA are excludable from gross income. A Roth IRA may not be treated as a SEP or SIMPLE plan unless the employee elects for the IRA to be so treated (at such time and in such manner as the Secretary may provide).

Similar to the rules that apply to rollovers from SIMPLE IRAs that are traditional IRAs, if an individual receives a payment or distribution from a SIMPLE IRA that is a Roth IRA during the first two years the individual participates in the plan, such payment or distribution is not treated as a qualified rollover contribution[2352] if it is paid to an IRA or retirement plan other than a SIMPLE IRA. As under present law, contributions to a SIMPLE IRA or SEP plan are not taken into account for purposes of the limit on contributions to a Roth IRA.[2353]

Effective Date

The provision applies to taxable years beginning after December 31, 2022.

2. Hardship withdrawal rules for 403(b) plans (sec. 602 of the Act and sec. 403(b) of the Code)

Present Law

For a description of present law see the description of section 312 of the Act.

[2350] The annual compensation limit for SEP plans is $290,000.
[2351] Sec. 402A.
[2352] Under sec. 408A(e).
[2353] A technical correction may be needed to reflect this intent.

Explanation of Provision

The provision conforms the hardship distribution rules for section 403(b) plans to those of section 401(k) plans. Thus, the provision provides that in addition to elective deferrals, a section 403(b) plan may distribute on account of an employee's hardship qualified nonelective contributions,[2354] qualified matching contributions,[2355] and earnings on any of these contributions (including on elective deferrals). In addition, the provision provides that a distribution does not fail to qualify as a hardship distribution solely because the employee does not take any available loan under the plan.

Effective Date

The provision is effective for plan years beginning after December 31, 2023.

3. Elective deferrals generally limited to regular contribution limit (sec. 603 of the Act and sec. 414(v) of the Code)

Present Law

Defined contribution plan limits

A defined contribution plan is a type of qualified retirement plan whereby contributions, earnings, and losses are allocated to a separate account for each participant. Defined contribution plans may provide for nonelective contributions and matching contributions by employers and pre-tax (that is, contributions are either excluded from income or deductible) or after-tax contributions by employees. Total contributions made to an employee's account for a year cannot exceed the lesser of $61,000 (for 2022) or the employee's compensation.[2356]

Under certain types of defined contribution plans, including section 401(k) plans, section 403(b) plans, or governmental section 457(b) plans, an employee may elect to have contributions (elective deferrals) made to the plan, rather than receive the same amount in cash. The maximum annual amount of elective deferrals that can be made by an employee for a year is $20,500 (for 2022) or, if less, the employee's compensation.[2357] Elective deferrals generally cannot be distributed from the plan before the employee's severance from employment, death, disability or attainment of age 59½, or in the case of hardship or plan termination.[2358]

Catch-up contributions

Certain retirement plans may permit employees to make catch-up contributions, subject to certain limitations.[2359] Employees aged 50 or older ("eligible participants") generally may make annual catch-up contributions to section 401(k), section 403(b), and governmental 457(b) plans, up to $6,500 in 2022 (indexed for infla-

[2354] As defined in section 401(m)(4)(C).
[2355] As defined in section 401(k)(3)(D)(ii)(I).
[2356] Sec. 415(c).
[2357] Secs. 402(g); 457(c). This limit applies to total elective deferrals under all of a participant's section 401(k) plans and section 403(b) plans but applies separately to any governmental section 457(b) plan.
[2358] Secs. 401(k)(2)(B); 403(b)(7)(A)(i); 457(d)(1)(A).
[2359] Sec. 414(v).

tion).[2360] If elective deferral and catch-up contributions are made to both a qualified defined contribution plan and a section 403(b) plan for the same employee, a single limit applies to the elective deferrals under both plans.[2361] Special contribution limits apply to certain employees under a section 403(b) plan maintained by a church. In addition, under a special catch-up rule, an increased elective deferral limit applies under a plan maintained by an educational organization, hospital, home health service agency, health and welfare service agency, church, or convention or association of churches in the case of employees who have completed 15 years of service.[2362] In this case, the limit is increased by the least of (1) $3,000, (2) $15,000, reduced by the employee's total elective deferrals in prior years, or (3) $5,000 times the employee's years of service, reduced by the employee's total elective deferrals in prior years.[2363]

The section 457(b) plan limits apply separately from the combined limit applicable to section 401(k) and 403(b) plan contributions, so that an employee covered by a governmental section 457(b) plan and a section 401(k) or 403(b) plan can contribute the full amount to each plan. In addition, under a special catch-up rule, for one or more of the participant's last three years before normal retirement age, the otherwise applicable limit is increased to the lesser of (1) two times the normal annual limit ($41,000 for 2022) or (2) the sum of the otherwise applicable limit for the year plus the amount by which the limit applicable in preceding years of participation exceeded the deferrals for that year. If an employee has an increased limit on contributions under this special catch-up rule, then the regular catch-up rules do not apply. However, the amount of catch-up contributions permitted under the regular catch-up rules acts as a minimum for the amount of the special catch-ups.

Roth contributions

Elective deferrals are generally made on a pre-tax basis. However, certain retirement plans, such as section 401(k), section 403(b), and governmental section 457(b) plans, may include a qualified Roth contribution program under which elective deferrals are made on an after-tax basis (designated Roth contributions), and qualified distributions from a designated Roth account are excluded from income.[2364] A qualified distribution is a distribution that (1) is made after the five-taxable-year period beginning with the first taxable year for which the individual first made the contribution, and (2) is made after attainment of age 59½, or on account of death or disability.[2365]

[2360] In order to be eligible to make catch-up contributions, the participant must also be ineligible to otherwise make additional elective deferrals under the plan, due to the limits that apply to such deferrals under the Code or under the plan. Sec. 414(v)(5)(B).

[2361] Treas. Reg. sec. 1.402(g)–1(b).

[2362] Treas. Reg. sec. 1.403(b)–4(c)(3).

[2363] Because contributions to a defined contribution plan cannot exceed an employee's compensation, contributions for an employee are generally not permitted after termination of employment. However, under a special rule, a former employee may be deemed to receive compensation for up to five years after termination of employment for purposes of receiving employer nonelective contributions under a section 403(b) plan.

[2364] Sec. 402A.

[2365] Sec. 402A(d)(2)(A).

Excess deferrals treated as catch-up contributions

Under Treasury regulations, elective deferrals with respect to a catch-up eligible individual that exceed the applicable limits under the Code or the plan, or that would cause the plan to fail nondiscrimination testing,[2366] are treated as a catch-up contribution to the extent the elective deferral does not exceed the limits applicable to catch-up contributions.[2367]

Explanation of Provision

Under the provision, catch-up contributions continue to be permitted for taxable years beginning in 2024 or later, but with modified requirements.[2368] The provision provides that a section 401(a) qualified plan, section 403(b) plan, or governmental section 457(b) plan that permits an eligible participant to make catch-up contributions must require such catch-up contributions to be designated Roth contributions if the participant's wages for the preceding calendar year from the employer sponsoring the plan exceeded $145,000.[2369] In addition, if catch-up contributions are provided under a plan as designated Roth contributions for participants whose wages exceed $145,000, the plan must also permit catch-up contributions made by other eligible participants to be designated Roth contributions. The $145,000 amount is adjusted for inflation beginning in 2025. The provision does not apply to a SIMPLE IRA or SEP plan.

The provision further provides that the Secretary may provide by regulation that eligible participants may change their election to make catch-up contributions for a plan year if the participant's wages are determined to exceed $145,000 (as adjusted for inflation) after the initial election for the participant is made.

As a conforming amendment, in the case of a participant whose wages exceed $145,000 (as adjusted for inflation),[2370] the provision limits the applicability of the rule that applies to governmental section 457(b) plans under which the amount of the permitted catch-up contributions under the regular catch-up rule acts as a minimum for the amount permitted under the special catch-up rule. Under the provision, the minimum permitted catch-up contribution is the lesser of the amount of the permitted catch-up contributions under the regular catch-up rules and the amount of the participant's contributions that are designated Roth contributions.

Effective Date

The provision applies to taxable years beginning after December 31, 2023.

[2366] The actual deferral percentage (ADP) test under section 401(k)(3).

[2367] Treas. Reg. sec. 1.414(v)–1(c).

[2368] A technical correction may be needed to reflect this intent.

[2369] For this purpose, wages means wages subject to FICA (the Federal Insurance Contributions Act) under section 3101.

[2370] A technical correction may be needed to reflect this intent.

4. Optional treatment of employer matching and nonelective contributions as Roth contributions (sec. 604 of the Act and sec. 402A of the Code)

Present Law

Defined contribution plan contributions

Defined contribution plans may provide for nonelective contributions and matching contributions by employers and pre-tax (that is, contributions are either excluded from income or deductible) or after-tax contributions by employees. Total contributions made to an employee's account for a year cannot exceed the lesser of $61,000 (for 2022) or the employee's compensation. The deduction for employer contributions to a defined contribution plan for a year is generally limited to 25 percent of the participants' compensation. A participant must at all times be fully vested in his or her own contributions to a defined contribution plan and must vest in employer contributions under three-year cliff vesting or two-to-six-year graduated vesting.[2371]

Defined contribution plans can be further categorized into different types, such as profit-sharing plans, stock bonus plans, or money purchase plans, and may include special features, such as a qualified cash or deferred arrangement (section 401(k)) or an employee stock ownership plan ("ESOP"). Under a common type of retirement arrangement, a section 401(k) plan, an employee may elect to have contributions (elective deferrals) made to the plan, rather than receive the same amount in cash. For 2022, elective deferrals of up to $20,500 may be made, plus, for employees aged 50 or older, up to $6,500 in catch-up contributions. Elective deferrals generally cannot be distributed from the plan before the employee's severance from employment, death, disability, or attainment of age 59½ or in the case of hardship or plan termination.

Designated Roth contributions

Elective deferrals are generally made on a pre-tax basis. However, certain defined contributions plans, such as a section 401(k), 403(b), or governmental 457(b) plan, may include a qualified Roth contribution program under which elective deferrals are made on an after-tax basis (designated Roth contributions), but certain distributions ("qualified distributions"), including earnings, are excluded from income.[2372] A qualified distribution is a distribution that (1) is made after the five-taxable-year period beginning with the first taxable year for which the individual first made the contribution, and (2) is made after attainment of age 59½, or on account of death or disability.

Employer contributions

Employers generally are not required to make contributions to a defined contribution plan, but many employers make matching contributions or nonelective contributions. Matching contributions are

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[2371] Under the automatic enrollment 401(k) safe harbor, the matching and nonelective contributions are allowed to become 100 percent vested only after two years of service (rather than being required to be immediately vested when made).

[2372] Sec. 402A.

employer contributions that are made only if the employee makes contributions and can relate to pre-tax elective deferrals, designated Roth contributions, or other after-tax contributions.[2373] Matching contributions are generally based on a formula that is a percentage of the employee's contribution to the plan. Alternatively, matching contributions may be made by the employer to the plan that are a flat dollar amount up to a particular percentage of the employee's compensation.

In contrast, nonelective contributions are made without regard to whether the employee makes pre-tax or after-tax contributions. Nonelective contributions by an employer are based on a fixed or discretionary formula that could take into account the participant's years of service or age. Nonelective contributions could also generally be a flat dollar amount to the plan for each eligible employee.

The employer may not make matching or nonelective contributions on a Roth basis.

Explanation of Provision

Under the provision, a section 401(a) qualified plan, a section 403(b) plan, or a governmental 457(b) plan may permit an employee to designate matching contributions on account of employee contributions, elective deferrals, or qualified student loan payments and nonelective contributions as designated Roth contributions. In order for this rule to apply, the employee must be fully vested in the matching or nonelective contribution under the plan.

Effective Date

The provision applies to contributions made after the date of enactment (December 29, 2022).

5. Charitable conservation easements (sec. 605 of the Act and secs. 170, 6662, and 6664 of the Code)

Present Law

Charitable contributions generally

In general, a deduction is permitted for charitable contributions, subject to certain limitations that depend on the type of taxpayer, the property contributed, and the donee organization. The amount of deduction generally equals the fair market value of the contributed property on the date of the contribution. Charitable deductions are provided for income, estate, and gift tax purposes.[2374]

Substantiation of contributions

A donor who claims a deduction for a charitable contribution must maintain reliable written records regarding the contribution, regardless of the value or amount of the contribution.[2375] In the case of a charitable contribution of money, regardless of the

[2373] However, section 110 of the Act provides that matching contributions may be made on account of qualified student loan payments effective for plan years beginning after December 31, 2023.
[2374] Secs. 170, 2055, and 2522, respectively.
[2375] Sec. 170(f)(17).

amount, applicable recordkeeping requirements are satisfied only if the donor maintains as a record of the contribution a bank record or a written communication from the recipient showing the name of the recipient organization, the date of the contribution, and the amount of the contribution.

No charitable contribution deduction is allowed for a separate contribution of $250 or more unless the donor obtains a contemporaneous written acknowledgement of the contribution from the charity indicating whether the charity provided any good or service (and an estimate of the value of any such good or service) to the taxpayer in consideration for the contribution.[2376]

If the total charitable deduction claimed for noncash property is more than $500, no deduction is allowed unless the taxpayer attaches a completed Form 8283 (Noncash Charitable Contributions) to the taxpayer's return. A taxpayer is required to obtain a qualified appraisal for donated property with a claimed value of more than $5,000 and attach an appraisal summary to the tax return. For contributions with a claimed value of more than $500,000, the taxpayer must attach a copy of the qualified appraisal.[2377]

Qualified conservation contributions

Except where allowed by the Code, a taxpayer may not take a charitable deduction for a contribution of a partial interest in property (the "partial interest rule"). A qualified conservation contribution is one type of partial interest contribution for which a charitable deduction is allowed.[2378]

A qualified conservation contribution is a contribution of a qualified real property interest to a qualified organization exclusively for conservation purposes.[2379] A qualified real property interest is defined as: (1) the entire interest of the donor other than a qualified mineral interest; (2) a remainder interest; or (3) a restriction (granted in perpetuity) on the use that may be made of the real property.[2380] Qualified organizations include certain governmental units, public charities that meet certain public support tests, and certain supporting organizations.[2381] Conservation purposes include: (1) the preservation of land areas for outdoor recreation by, or for the education of, the general public; (2) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem; (3) the preservation of open space (including farmland and forest land) where such preservation will yield a significant public benefit and is either for the scenic enjoyment of the general public or pursuant to a clearly delineated Federal, State, or local governmental conservation policy; and (4) the preservation of an historically important land area or a certified historic structure.[2382]

The Treasury regulations provide rules relating to the valuation of a perpetual conservation easement for charitable deduction pur-

[2376] Such acknowledgement must include the amount of cash and a description (but not value) of any property other than cash contributed, whether the recipient provided any goods or services in consideration for the contribution, and a good faith estimate of the value of any such goods or services. Sec. 170(f)(8).

[2377] See sec. 170(f)(11).

[2378] Sec. 170(f)(3)(B)(iii) and 170(h).

[2379] Sec. 170(h)(1).

[2380] Sec. 170(h)(2).

[2381] See sec. 170(h)(3).

[2382] Sec. 170(h)(4).

poses. If there is a substantial record of sales of easements comparable to the donated easement, the fair market value of the easement is based on the sales prices of such comparable easements.[2383] If no such record exists, then the value of the donated easement is equal to the difference between the fair market value of the property it encumbers before the granting of the restriction and the fair market value of the encumbered property after the granting of the easement.[2384] Under this before-and-after method, the fair market value of the property before granting the easement must take into account not only the current use of the property but also an objective assessment of how immediate or remote the likelihood is that the property, absent the restriction, would in fact be developed, as well as any effect from zoning, conservation, or historic preservation laws that already restrict the property's potential highest and best use.[2385] Further, there may be instances where the grant of a conservation restriction may have no effect on, or may enhance (rather than reduce), the value of the encumbered property.[2386]

Preferential rules apply in determining the amount of a taxpayer's deduction for a qualified conservation contribution. These rules generally allow an individual taxpayer making a qualified conservation contribution to offset a higher percentage of her contribution base,[2387] and a corporate taxpayer making such a contribution to offset a higher percentage of its taxable income, than taxpayers making charitable contributions of other types of property.[2388]

IRS Notice 2017–10

On December 23, 2016, the IRS issued Notice 2017–10, which designates certain conservation easement transactions as listed transactions that are subject to certain disclosure and list maintenance requirements.[2389] According to the Notice, "[t]he Department of the Treasury . . . and the Internal Revenue Service . . . are aware that some promoters are syndicating conservation easement transactions that purport to give investors the opportunity to obtain charitable contribution deductions in amounts that significantly exceed the amount invested." The Notice generally provides that a transaction is a listed transaction under the Notice if an investor receives promotional materials that offer prospective investors in a pass-through entity the possibility of a charitable contribution deduction that equals or exceeds an amount that is two and one-half times the amount of the investor's investment. The investor purchases an interest in the pass-through entity that holds real property. The entity then contributes a conservation easement

[2383] Treas. Reg. sec. 1.170A–14(h)(3)(i).
[2384] *Ibid.*
[2385] Treas. Reg. sec. 1.170A–14(h)(3)(ii).
[2386] *Ibid.*
[2387] An individual taxpayer's contribution base is her adjusted gross income computed without regard to any net operating loss carrybacks to the taxable year under section 162. Secs. 170(b)(1)(H).
[2388] Sec. 170(b)(1)(E), (b)(2)(B), and (b)(2)(C).
[2389] Treas. Reg. secs. 1.6011–4 and 301.6111–3. See also sec. 6501(c)(10) (special limitations period for assessment of tax related to a listed transaction that was not properly disclosed).

encumbering the property to a tax-exempt organization and allocates a charitable contribution deduction to the investor.

Accuracy-related penalty (sec. 6662)

An accuracy-related penalty under section 6662 applies to the portion of any underpayment that is attributable to (1) negligence, (2) any substantial understatement of income tax, (3) any substantial valuation misstatement, (4) any substantial overstatement of pension liabilities, (5) any substantial estate or gift tax valuation understatement, (6) any disallowance of claimed tax benefits by reason of a transaction lacking economic substance, (7) any undisclosed foreign financial asset understatement, (8) any inconsistent estate basis, or (9) any overstatement of the deduction provided in section 170(p). If the correct income tax liability exceeds that reported by the taxpayer by the greater of 10 percent of the correct tax or $5,000, then a substantial understatement exists, and a penalty may be imposed equal to 20 percent of the underpayment of tax attributable to the understatement. In the case of corporations, a substantial understatement exists if the correct income tax liability exceeds that reported by the lesser of (a) 10 percent of the correct tax (or $10,000 if greater) or (b) $10 million.[2390]

The section 6662 penalty generally is not applicable (even with respect to tax shelters[2391]) in cases in which the taxpayer can demonstrate that there was "reasonable cause" for the underpayment and that the taxpayer acted in good faith and adequate disclosure is made.[2392] The relevant regulations provide that reasonable cause exists where the taxpayer "reasonably relies in good faith on [a professional] tax advisor's analysis of the pertinent facts and authorities [that] . . . unambiguously states that the tax advisor concludes that there is a greater than 50-percent likelihood that the tax treatment of the item will be upheld if challenged" by the IRS.[2393] However, if the underpayment is attributable to a reportable transaction, the standard for reasonable cause is more stringent,[2394] and applies only if (1) the treatment of the item is supported by substantial authority, or (2) facts relevant to the tax treatment of the item were adequately disclosed and there was a reasonable basis for its tax treatment. The Secretary may prescribe a list of positions that the Secretary believes do not meet the requirements for substantial authority under this provision.

With certain exceptions, section 6662 does not apply to any portion of an underpayment that is attributable to a reportable transaction understatement on which a penalty is imposed under section 6662A.[2395]

The 20-percent penalty is increased to 40 percent when there is a gross valuation misstatement involving a substantial valuation overstatement, a substantial overstatement of pension liabilities, a substantial estate or gift tax valuation understatement, or when a

[2390] Sec. 6662(d).

[2391] A tax shelter is defined for this purpose as a partnership or other entity, an investment plan or arrangement, or any other plan or arrangement if a significant purpose of such partnership, other entity, plan, or arrangement is the avoidance or evasion of Federal income tax. Sec. 6662(d)(2)(C).

[2392] Secs. 6662(d)(2)(B) and 6664(c).

[2393] Treas. Reg. sec. 1.6662–4(g)(4)(i)(B). See also Treas. Reg. sec. 1.6664–4(c).

[2394] Secs. 6664(d).

[2395] Sec. 6662(b) (flush language).

transaction lacking economic substance or a foreign financial asset is not properly disclosed.[2396] In the case of an overstatement of qualified charitable contributions, the 20-percent penalty is increased to 50 percent.[2397]

Supervisory approval to assess penalty

An addition to tax or penalty under the Code generally cannot be assessed without prior supervisory approval.[2398] Such approval requires that the initial determination of the penalty or addition to tax be approved in writing by the immediate supervisor of the person asserting the penalty. The Code authorizes the Secretary to designate a higher-level official to provide the supervisory approval. Certain penalties are exempt from the requirement for supervisory approval, including those penalties "automatically calculated through electronic means."[2399] Because the IRS bears the burden of producing evidence to support assessment of a penalty in any court proceeding, the Commissioner must produce evidence of compliance with the supervisory approval requirement, even if the IRS does not bear the burden of proof.[2400]

Explanation of Provision

Certain contributions not treated as qualified conservation contributions

General rule

Under the provision, certain charitable contributions made by a partnership (whether directly or as a distributive share of a contribution of another partnership) in a conservation easement transaction are not treated as qualified conservation contributions. The contribution is not so treated if the amount of the contribution exceeds two and one-half times the sum of each partner's relevant basis in such partnership (the "disallowance rule"). A partner's relevant basis is the portion of the partner's modified basis in the partnership[2401] that is allocable[2402] to the portion of the real property interest with respect to which the qualified conservation contribution is made.

Exceptions to the disallowance rule

The provision includes three exceptions to the disallowance rule. First, the disallowance rule does not apply to contributions made after a three-year holding period. The holding period is satisfied if

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[2396] Secs. 6662(h), (i), and (j).
[2397] Sec. 6662(l).
[2398] Sec. 6751(b).
[2399] Sec. 6751(b)(2). Other penalties excepted from the pre-approval requirement are penalties under sections 6651 (failure to file or pay taxes), 6654 (failure to pay estimated individual taxes), 6655 (failure to pay estimated corporate taxes), and section 6662(b)(9) (overstatement of the charitable deduction for nonitemizers provided in section 170(p)).
[2400] *Graev v. Commissioner*, 149 T.C. 485 (2017). Cf. *Chai v. Commissioner*, 851 F.3d 190 (2d Cir. 2017) (held that the Commissioner bears both the burden of production and burden of proof with respect to the penalty).
[2401] For this purpose, the partner's modified basis in the partnership means the partner's adjusted basis in the partnership as determined: (1) immediately before the contribution, (2) without regard to section 752 (relating to the treatment of certain liabilities), and (3) by the partnership after taking into account the adjustments described in (1) and (2) and such other adjustments as the Secretary may provide.
[2402] The allocable portion is determined under rules similar to the rules of section 755 (rules for allocation of basis).

such contribution is made at least three years after the latest of: (1) the last date on which the partnership that made the contribution acquired any portion of the real property with respect to which the contribution was made; (2) the last date on which any partner in the partnership that made the contribution acquired any interest in the partnership; and (3) if the interest in the partnership making the contribution is held through one or more partnerships, the last date on which any such partnership acquired any interest in any other such partnership and the last date on which any partner in any such partnership acquired any interest in such partnership. Second, the provision includes an exception for certain family partnerships. The disallowance rule does not apply with respect to a contribution made by a partnership if substantially all of the interests in the partnership are held, directly or indirectly, by an individual and members of the individual's family.[2403] Third, the disallowance rule does not apply to any qualified conservation contribution the conservation purpose of which is the preservation of any building which is a certified historic structure (as defined in section 170(h)(4)(C)).

Regulatory authority

Except as provided by the Secretary, rules similar to the rules in the provision relating to qualified conservation contributions of partnerships apply to S corporations and other pass-through entities. The Secretary is directed to prescribe such regulations or other guidance as may be necessary or appropriate to carry out or prevent avoidance of the purposes of the provision, including requiring reporting related to tiered partnerships and modified basis of partners.

Accuracy-related penalty (section 6662); supervisory approval not required

The provision makes several changes to the application of section 6662 accuracy related penalties in conservation easement cases. First, the provision applies the section 6662 accuracy-related penalty to any underpayment of tax attributable to the disallowance of a deduction by reason of the new limitation on qualified conservation contributions in this provision. In addition, any such disallowance is treated as a gross valuation misstatement, which increases the amount of the accuracy-related penalty from 20 percent to 40 percent of the underpayment of tax. No defense based on reasonable cause otherwise available to an accuracy-related penalty under section 6664(c) is available for any such underpayment. Finally, the requirement for supervisory approval of the penalty assessment under section 6751(b) does not apply.

Statute of limitation for syndicated conservation easement transactions

The provision also addresses the applicable statute of limitations for assessment of tax or penalties related to syndicated conserva-

[2403] For this purpose, with respect to an individual, "members of the family" means the individual's spouse and any individual who bears a relationship to such individual which is described in section 152(d)(2)(A) through (G) (relating to a qualifying relative under the definition of a dependent).

tion easement transactions. In the case of any contribution with respect to which a deduction was disallowed by reason of the provision, the contribution shall be treated as having been identified by the Secretary as a tax avoidance transaction within the meaning of section 6011 for purposes of the statute of limitations rule described in sections 6501(c)(10) and 6235(c)(6).

Reporting requirement for certain transactions involving certified historic structures

The provision amends the present-law charitable contribution substantiation requirements to add a new substantiation requirement for certain easement contributions involving certified historic structures. The requirement applies to a contribution: (1) the conservation purpose of which is the preservation of any building which is a certified historic structure (as defined in section 170(h)(4)(C)); (2) which is made by a partnership (whether directly or as a distributive share of a contribution of another partnership); and (3) the amount of which exceeds two and one-half times the sum of each partner's relevant basis (as defined above) in the partnership making the contribution. No charitable deduction is allowed for such a contribution unless the partnership making such contribution: (1) includes on its return for the taxable year in which the contribution is made a statement that the partnership made such a contribution; and (2) provides such other information about the contribution as the Secretary may require. Except as otherwise provided by the Secretary, the reporting rules apply to S corporations and other pass-through entities in the same manner as such rules apply to partnerships.

Notice of certain failures; correction procedure

The provision allows certain taxpayers an opportunity to correct certain defects in a deed that grants an easement. Within 120 days of the date of enactment, the Secretary (or the Secretary's delegate) is required to publish safe harbor deed language for extinguishment clauses and boundary line adjustments. During the 90-day period beginning on the date of publication of such language, a donor may amend an easement deed to substitute the safe harbor language for the corresponding language in the original deed if (1) the amended deed is signed by the donor and donee and recorded within the 90-day period and (2) the amendment is treated as effective as of the date of recording of the original easement deed.

This correction procedure is not available for a contribution: (1) that is part of a reportable transaction;[2404] (2) is described in IRS Notice 2017–10;[2405] (3) which, by reason of the disallowance rule described above is not treated as a qualified conservation contribution; (4) if a charitable deduction for the contribution has been disallowed by the Secretary, and the donee is contesting such dis-

[2404] As defined in section 6707A(c)(1).

[2405] In the preamble to recently released proposed regulations relating to syndicated conservation easement transactions, the IRS noted that taxpayers in certain cases have challenged in court the validity of listed transaction notices issued without following the notice-and-comment procedures of the Administrative Procedure Act. See 87 Fed. Reg. No. 235 (December 8, 2022), pp. 75190–75191. It is intended that a transaction described in IRS Notice 2017–10 does not qualify for the correction procedure regardless of the outcome of any litigation relating to the validity of such Notice.

allowance in a case which is docketed in a Federal court on a date before the date the amended deed is recorded by the donor; or (5) if a claimed charitable deduction resulted in an underpayment to which a penalty under section 6662 or 6663 applies, and either the penalty has been finally determined administratively or, if challenged in court, the judicial proceeding with respect to such penalty has been concluded by a decision or judgment which has become final.

Effective Date

The provision is generally effective for contributions made after the date of enactment (December 29, 2022).

No inference is intended as to (1) the appropriate treatment of contributions made in taxable years ending on or before such date or (2) as to any contribution for which a deduction is not disallowed by reason of the disallowance rule of the provision. Thus, for example, the provision is not intended to change the treatment of, or create a safe harbor for, a contribution where the amount of the contribution that is claimed does not exceed two and one-half times the sum of each partner's relevant basis in such partnership; such transactions continue to be governed by present-law principles. As a further example, the provision does not change the tax treatment of, or create a safe harbor for, a contribution that falls within one of the exceptions to the disallowance rule.

The portion of the provision that allows certain taxpayers to correct defects in a deed granting an easement is effective on the date of enactment (December 29, 2022).

6. Enhancing retiree health benefits in pension plans (sec. 606 of the Act and sec. 420 of the Code)

Present Law

Subject to various conditions, a qualified transfer of excess pension assets of a defined benefit plan may be made to a retiree medical account or life insurance account within the plan to fund retiree health benefits and group term life insurance benefits ("applicable retiree benefits").[2406] For this purpose, excess pension assets generally means the excess, if any, of the value of the plan's assets[2407] over 125 percent of the sum of the plan's funding target and target normal cost for the plan year.[2408] A qualified transfer does not result in plan disqualification, is not a prohibited transaction, and is not treated as a reversion. No deduction is allowed to the employer for (1) a qualified transfer, or (2) the payment of applicable retiree benefits out of transferred funds (and any income thereon).[2409]

In order for the transfer to be qualified, accrued retirement benefits under the plan generally must be 100-percent vested as if the

[2406] Sec. 420. Qualified transfers of excess assets are generally made within single-employer defined benefit plans, but are also permitted within multiemployer plans.

[2407] For this purpose, the value of the plan's assets is the lesser of (1) the fair market value of the plan's assets (reduced by the prefunding balance and funding standard carryover balance determined under section 430(f)), or (2) the value of plan assets determined under section 430(g)(3) after reduction under section 430(f). See sec. 420(e)(2).

[2408] As determined under the section 430 funding rules for single-employer plans.

[2409] Sec. 420(d).

plan terminated immediately before the transfer (or in the case of a participant who separated in the one-year period ending on the date of the transfer, immediately before the separation).[2410] In addition, at least 60 days before the date of a qualified transfer, the employer must notify the Secretary, the Secretary of Labor, employee representatives, and the plan administrator of the transfer, and the plan administrator must notify each plan participant and beneficiary of the transfer.[2411]

In addition, during the five-year period beginning with the year in which a qualified transfer is made ("the cost maintenance period"), the employer must provide health benefits or life insurance benefits at a cost that is the highest of the applicable employer costs for each of the two tax years immediately preceding the tax year in which the qualified transfer occurred.[2412] The applicable employer cost means with respect to any taxable year, the amount determined by dividing the qualified current retiree liabilities of the employer for each taxable year (determined separately with respect to applicable health benefits and applicable life insurance benefits), by the number of individuals to whom coverage was provided during such taxable year for the benefits with respect to which the determination is being made.

No more than one qualified transfer may be made in any taxable year. For this purpose, a transfer to a retiree medical account and a transfer to a retiree life insurance account in the same year are treated as one transfer. No qualified transfer may be made after December 31, 2025.

An employer maintaining a defined benefit plan (other than a multiemployer plan) may, in lieu of a qualified transfer, elect for any taxable year to have the plan make a "qualified future transfer." A qualified future transfer is a transfer which meets all of the requirements for a qualified transfer except for some modifications including, for example, that "120 percent" is substituted for "125 percent" in determining excess pension assets, as well as modifications to the limitation on amounts transferred and minimum cost requirements. The transfer period consists of a period of consecutive taxable years (not less than two) specified in the election which begins and ends during the 10-taxable year period beginning with the taxable year of the transfer.

Explanation of Provision

Under the provision, the expiration date for qualified transfers is extended to December 31, 2032. Thus, qualified transfers are permitted through that date.

The provision also includes a special rule for de minimis transfers.[2413] In the case of a transfer of an amount that is not more than 1.75 percent of the value of the pension assets of an applicable plan, the determination of excess plan assets is made by sub-

[2410] Sec. 420(c)(2).
[2411] Sec. 101(e) of ERISA.
[2412] Sec. 420(c)(3). A special rule applies to certain collectively bargained transfers under section 420(f)(2)(E)(i)(III).
[2413] This special rule for *de minimis* transfers is intended to apply to qualified transfers to cover future retiree costs under section 420(f)(1)(A), a "qualified future transfer." The use of the *de minimis* rule is at the election of the employer. A technical correction may be necessary to reflect this intent.

stituting "110 percent" for "125 percent."[2414] For purposes of this provision, a plan is an "applicable plan" if, as of any valuation date in each of the two plan years immediately preceding the plan year in which the transfer occurs, the value of the plan assets exceeds 110 percent of the sum of the funding target and target normal cost for each such plan year. In addition, with respect to a de minimis transfer, the cost maintenance period is seven years, rather than five years. This de minimis rule does not apply to collectively bargained plans.

Effective Date

The provision applies to transfers made after the date of enactment (December 29, 2022).

TITLE VII—TAX COURT RETIREMENT PROVISIONS

1. Provisions relating to judges of the Tax Court (sec. 701 of the Act and secs. 7447 and 7448 of the Code)

Present Law

In general

The United States Tax Court ("Tax Court") is established by Congress pursuant to Article I of the U.S. Constitution (an "Article I" court). The salary of a Tax Court judge is the same salary as received by a U.S. District Court judge.[2415] Some employee benefits for Tax Court judges, including certain retirement and survivor benefit programs, correspond to benefits provided to U.S. District Court judges.

Retirement and survivors' benefits

A Tax Court judge may be covered under the Federal Employees Retirement System ("FERS") or, depending on when the judge began Federal employment, the Civil Service Retirement System ("CSRS"). FERS and CSRS provide annuity benefits to a retired employee and, in some cases, to survivors of a deceased employee. Employees covered by FERS are also covered by the Social Security program.[2416] Federal employees covered by FERS and CSRS generally may contribute to the Thrift Savings Plan ("TSP"). Most Federal employees covered by FERS (but not CSRS) are also eligible for agency contributions (that is, nonelective contributions and matching contributions).[2417] Like other Federal employees, a Tax Court judge is eligible to contribute to the TSP.[2418] In contrast with other Federal employees who are covered by FERS, a Tax Court judge covered by FERS is not eligible for agency contributions.[2419]

An active Tax Court judge may elect at any time to be covered by a "retired pay" plan of the Tax Court rather than under another

[2414] In section 420(e)(2)(B).
[2415] Sec. 7443(c).
[2416] 5 U.S.C. sec. 8403.
[2417] 5 U.S.C. secs. 8432(c), 8351(b)(3).
[2418] Sec. 7447(j)(1)(A).
[2419] Sec. 7447(j)(3)(B).

Federal retirement program, such as FERS or CSRS.[2420] A Tax Court judge may also elect to participate in a plan providing annuity benefits for the judge's surviving spouse and dependent children (the "Tax Court survivors' annuity plan").[2421] Generally, benefits under the Tax Court survivors' annuity plan are payable only if the judge has performed at least five years of qualifying service and has made contributions to the plan for at least five years of service.[2422]

The rules governing the retired pay plan for Tax Court judges and the Tax Court survivors' annuity plan provide for coordination between CSRS and the retired pay or survivors' annuity plan when a judge covered by CSRS elects into those plans.[2423] For example, if a judge covered by CSRS elects retired pay, the accumulated CSRS contributions previously made by the judge are refunded to the judge with interest.[2424] However, the rules do not address coordination with FERS.

Limit on outside earned income of a judge receiving retired pay

Under the retired pay plan for Tax Court judges, retired judges generally receive retired pay equal to the salary of an active judge and must be available for recall to perform judicial duties as needed by the court for up to 90 days a year (unless the judge consents to a longer period). However, retired judges may elect to freeze the amount of their retired pay, and those who do so are not available for recall.[2425]

Retired Tax Court judges on recall are subject to the limitations on outside earned income that apply to active Federal employees under the Ethics in Government Act of 1978.[2426] Retired Tax Court judges who elect to freeze the amount of their retired pay (thus making themselves unavailable for recall) are not subject to the limitations on outside earned income.

Explanation of Provision

Thrift Savings Plan matching contributions

The provision allows a Tax Court judge who is covered by FERS to receive agency contributions to the TSP, similar to other employees covered by FERS. If a judge covered by FERS elects retired pay, rather than FERS benefits, the judge's retired pay is offset by the amount of previous TSP distributions attributable to agency contributions (without regard to earnings on the agency contributions) made during years of service as a Tax Court judge while covered by FERS. When such an offset would exceed 50 percent of the retired pay to be received in the first year, the offset may be divided equally over the first 2 years in which the individual receives the annuity. The provision also provides that tax court judges who

[2420] Sec. 7447(e).
[2421] Sec. 7448(b).
[2422] Sec. 7448(h).
[2423] Sec. 7447(g); 7448(r).
[2424] Sec. 7447(g)(2)(C).
[2425] Sec. 7447(f)(4).
[2426] U.S.C. App. 4 sec. 501 (subsequently codified at 5 U.S.C. sec. 13143).

have filed an election to receive retired pay are not eligible to receive agency contributions to the TSP.

Retirement and survivors' benefits

Under the provision, benefits under the survivors' annuity plan are payable if a Tax Court judge has performed at least 18 months of service and made contributions for at least 18 months (rather than five years). In addition, benefits under the survivors' annuity plan are payable if a Tax Court judge is assassinated before the judge has performed 18 months of service and made contributions for 18 months, in which case there shall be deducted from the annuities otherwise payable an amount equal to the amount of salary deductions that would have been made if such deductions had been made for 18 months prior to the death of the Tax Court judge. Furthermore, such an annuity will be paid notwithstanding a survivor's eligibility for or receipt of benefits under the Federal Employees' Compensation Act,[2427] except that the total benefits paid under this provision and chapter 81 of title 5 for any year may not exceed the current salary for that year of the office of the judge. Assassination means a killing of a judge or special trial judge motivated by the judge's performance of his or her official duties. A determination of assassination is made by the chief judge of the Tax Court and is reviewable only by the Tax Court. The head of any Federal agency that investigates the killing of a Tax Court judge shall provide to the chief judge of the Tax Court any information that would assist the chief judge in making such a determination.

The provision amends the rules governing the computation of the annuity for a Tax Court judge's surviving spouse under the Tax Court survivors' annuity plan by providing that, in the case of a Tax Court judge who has less than three years of qualifying service, the annuity is calculated similarly to annuities in the case of a Tax Court judge with at least three years of qualifying service, except that the annuity formula uses the Tax Court judge's average annual salary (or compensation for other allowable service) during the total period of the Tax Court judge's qualifying service multiplied by the sum of the Tax Court judge's years of qualifying service, instead of using the three consecutive years in which the judge had the highest salary or compensation.

The provision also amends the rules governing the retired pay plan for Tax Court judges and the Tax Court survivors' annuity plan to provide for coordination between FERS and those plans when a judge covered by FERS elects into those plans, similar to coordination with CSRS under present law.

Limit on outside earned income of a judge receiving retired pay

Under the provision, compensation earned by a retired Tax Court judge for teaching during a calendar year is not treated as outside earned income for purposes of limitations under the Ethics in Government Act of 1978, so long as the retired judge satisfies the recall

[2427] 5 U.S.C. sec. 8101, *et seq.*, relating to compensation for the work-related death or disability of a Federal employee.

duties described in section 7447(c) for the calendar year, as certified by the chief judge, or is permanently disabled.

Effective Date

The provision is generally effective on the date of enactment (December 29, 2022). The sub-provision relating to TSP contributions applies to basic pay earned while serving as a Tax Court judge on or after the date of enactment, and the sub-provision relating to outside earned income of a judge receiving retired pay applies to any individual serving as a retired Tax Court judge on or after the date of enactment.

2. Provisions relating to special trial judges of the Tax Court (sec. 702 of the Act and new sec. 7447A of the Code)

Present Law

The chief judge of the Tax Court may appoint special trial judges to handle certain cases.[2428] Special trial judges serve for an indefinite term. Special trial judges receive a salary of 90 percent of the salary of a Tax Court judge. Special trial judges do not have authority to impose punishment in the case of contempt of the authority of the Tax Court.

Special trial judges generally are covered by the benefit programs that apply to Federal executive branch employees, including CSRS or FERS (depending on when the judge began Federal employment). Special trial judges may contribute to TSP, and those covered by FERS are also eligible for agency contributions. Special trial judges covered by FERS are also covered by the Social Security program. Special trial judges may also elect to participate in the Tax Court survivors' annuity plan.[2429] An election into the Tax Court survivors' annuity plan must be made not later than six months after the later of the date the special trial judge takes office or the date the judge marries.

Special trial judges are required to be covered by a leave program under which they earn annual and sick leave during their period of employment. At termination of employment, a lump sum payment is made to the special trial judge for unused annual leave, and unused sick leave is credited as additional service for certain purposes under CSRS or FERS.

Explanation of Provision

Retirement plan for special trial judges

The provision establishes a new retirement plan under which a special trial judge may elect to receive retired pay under rules similar to those applicable to the regular judges of the Tax Court. A special trial judge generally must meet certain requirements to be eligible for retired pay. In general, the trial judge must attain age 65 with 15 years of service (or a greater age with a shorter period of service up through age 70 and 10 years of service) or must

[2428] Sec. 7443A.
[2429] Sec. 7448((b).

receive certification of permanent disability. A special trial judge who retires based on the age and service requirement receives reduced retired pay if the judge's service is less than 15 years. A special trial judge who retires based on permanent disability receives reduced retired pay if the judge's service is less than 10 years. The election to receive retired pay may be made only while an individual is a special trial judge, except that in the case of an individual who fails to be reappointed as a special trial judge, it may be made within 60 days after the individual leaves office as a special trial judge.

Recall of retired special trial judges

The provision requires that a special trial judge be available for recall to perform judicial duties as needed by the court for up to 90 days a year (unless the judge consents to a longer period) in the same manner as regular judges.

Effective Date

The provision is effective on the date of enactment (December 29, 2022), except that eligible special trial judges may elect to receive retired pay as of the date that is 180 days after the date of enactment. Special trial judges who retire on or after the date of enactment and before the date that is 180 days after such date may file an election not later than 60 days after the date that is 180 days after the date of enactment.

DIVISION FF—HEALTH AND HUMAN SERVICES

TITLE IV—MEDICARE PROVISIONS

Subtitle E—Health Care Tax Provisions

1. Extension of safe harbor for absence of deductible for telehealth (sec. 4151 of Division FF of the Act and sec. 223(c) of the Code)

Present Law

Health savings accounts

An individual may contribute to a health savings account (an "HSA") only if the individual is covered under a plan that meets the requirements for a high deductible health plan, as described below. In general, HSAs provide tax-favored treatment for current medical expenses, as well as the ability to save on a tax-favored basis for future medical expenses. In general, an HSA is a tax-exempt trust or custodial account created exclusively to pay for the qualified medical expenses of the account holder and his or her spouse and dependents.

Within limits,[2430] contributions to an HSA made by or on behalf of an eligible individual are deductible by the individual. Contribu-

[2430] For 2022, the basic limit on annual contributions that can be made to an HSA is $3,650 in the case of self-only coverage and $7,300 in the case of family coverage. Rev. Proc. 2021–25, 2021–21 I.R.B. 1161. The basic annual contribution limits are increased by $1,000 for individuals who have attained age 55 by the end of the taxable year (referred to as "catch-up" contributions). Sec. 223(b)(3).

tions to an HSA are excludible from income and employment taxes if made by the employer. Earnings on amounts in HSAs are not taxable. Distributions from an HSA for qualified medical expenses are not includible in gross income. Distributions from an HSA that are not used for qualified medical expenses are includible in gross income and are subject to an additional tax of 20 percent. The 20-percent additional tax does not apply if the distribution is made after death, disability, or the individual attains the age of Medicare eligibility (age 65).

High deductible health plans

A high deductible health plan is a health plan that has an annual deductible which is not less than $1,400 (for 2022) for self-only coverage (twice this amount for family coverage), and for which the sum of the annual deductible and other annual out-of-pocket expenses (other than premiums) for covered benefits does not exceed $7,050 (for 2022) for self-only coverage (twice this amount for family coverage).[2431] These dollar thresholds are subject to inflation adjustment.[2432]

An individual who is covered under a high deductible health plan is eligible to contribute to an HSA, provided that while such individual is covered under the high deductible health plan, the individual is not covered under any health plan that (1) is not a high deductible health plan and (2) provides coverage for any benefit (subject to certain exceptions) covered under the high deductible health plan.[2433]

Various types of coverage are disregarded for this purpose, including coverage of any benefit provided by permitted insurance, coverage (whether through insurance or otherwise) for accidents, disability, dental care, vision care, or long-term care, as well as certain limited coverage through health flexible spending arrangements.[2434] Permitted insurance means insurance under which substantially all of the coverage provided relates to liabilities incurred under workers' compensation laws, tort liabilities, liabilities relating to ownership or use of property, or such other similar liabilities as specified by the Secretary under regulations. Permitted insurance also means insurance for a specified disease or illness and insurance paying a fixed amount per day (or other period) of hospitalization.[2435]

Under a safe harbor, a high deductible health plan is permitted to provide coverage for preventive care (within the meaning of section 1861 of the Social Security Act, except as otherwise provided by the Secretary) before satisfaction of the minimum deductible.[2436] IRS guidance provides a safe harbor of the types of coverage that constitute preventive care for this purpose.[2437]

[2431] *Ibid.* Sec. 223(c)(2).
[2432] Sec. 223(g).
[2433] Sec. 223(c)(1).
[2434] Sec. 223(c)(1)(B).
[2435] Sec. 223(c)(3).
[2436] Sec. 223(c)(2)(C).
[2437] Notice 2004–23, 2004–1 C.B. 725. See also Notice 2004–50, 2004–33 I.R.B. 196, August 16, 2004, Q&As 26 and 27; Notice 2008–59, 2008–29 I.R.B. 123, July 21, 2008; Notice 2013–57, 2013–40 I.R.B. 293, September 30, 2013; and Notice 2019–45, 2019–32 I.R.B. 593, August 5, 2019.

For plan years beginning on or before December 31, 2021, a high deductible health plan is permitted to cover telehealth and other remote care services without satisfaction of the plan's minimum deductible.[2438] Thus, a health plan will not fail to be treated as a high deductible health plan merely by reason of failing to require a deductible for telehealth and other remote care services for plan years beginning on or before December 31, 2021, and an individual who is covered under such a plan may contribute to an HSA.[2439] Section 307 of Division P of the Consolidated Appropriations Act, 2022 extends the exemption for telehealth services to include months beginning after March 31, 2022, and before January 1, 2023.[2440]

Explanation of Provision

The provision extends the exemption for telehealth services to include plan years beginning after December 31, 2022, and before January 1, 2025.

Effective Date

The provision is effective for plan years beginning after December 31, 2022.

[2438] CARES Act, Pub. L. No. 116–136, sec. 3701, March 27, 2020.
[2439] Notice 2020–29, 2020–22 I.R.B. 864, provides that this standard applies with respect to services provided on or after January 1, 2020.
[2440] Pub. L. No. 117–103, March 15, 2022.

APPENDIX

ESTIMATED BUDGET EFFECTS OF TAX LEGISLATION ENACTED IN THE 117TH CONGRESS

APPENDIX:
ESTIMATED BUDGET EFFECTS OF TAX LEGISLATION ENACTED IN THE 117TH CONGRESS

Fiscal Years 2021 - 2032

[Millions of Dollars]

Provision	Effective	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2021-32
PART ONE: AMERICAN RESCUE PLAN ACT OF 2021 (Public Law 117-2, signed into law by the President on March 11, 2021)														
Title IX - Committee on Finance														
Subtitle A – Crisis Support for Unemployed Workers														
1 Extension of limitation on excess business losses of noncorporate taxpayers	tyba 12/31/25	---	---	---	---	---	18,737	12,439	-72	-48	-30	-19	---	31,008
2 Suspension of tax on $10,200 per recipient of unemployment compensation received in 2020 for taxpayers with AGI below $150,000	tyba 12/31/19	-24,962	---	---	---	---	---	---	---	---	---	---	---	-24,962
Subtitle F – Preserving Health Benefits for Workers (sunset 9/30/21) [1][2][3]	cpo/a 4/1/21 & tyea DOE [4]	-26,604	-8,606	116	[5]	[5]	[5]	[5]	---	---	---	---	---	-35,095
Subtitle G – Promoting Economic Security														
1 2021 recovery rebates to individuals - $1,400 for singles/ $2,800 for married filing jointly (SSN required for each taxpayer), and $1,400 per dependent (SSN required for each dependent), phaseout ranges by AGI $75,000–$80,000 for single, $112,500–$120,000 for head of household, $150,000–$160,000 for married filing jointly (fully phased out at larger amounts), payments to certain federal beneficiaries (sunset 12/31/21)	DOE	-393,714	-16,918	---	---	---	---	---	---	---	---	---	---	-410,632
2. Child tax credit improvements for 2021 (sunset 12/31/21), and application of child tax credit in possessions [3]	tyba 12/31/20	-25,826	-79,249	-710	-721	-725	-721	-307	-311	-316	-320	-323	---	-109,529
3 Strengthening the earned income tax credit for individuals with no qualifying children (sunset 12/31/21) [3]	tyba 12/31/20	-521	-11,361	---	---	---	---	---	---	---	---	---	---	-11,882
4 Taxpayer eligible for childless earned income credit in case of qualifying children who fail to meet certain identification requirements [3]	tyba 12/31/20	[6]	-12	-2	-1	-1	-1	-2	-2	-2	-2	-2	---	-26
5 Credit allowed in case of certain separated spouses [3]	tyba 12/31/20	-1	-20	-21	-22	-23	-25	-25	-27	-28	-30	-31	---	-252
6 Modification of disqualified investment income test [3]	tyba 12/31/20	-24	-330	-198	-200	-225	-229	-238	-233	-231	-240	-251	---	-2,399
7 Application of earned income tax credit in possessions of the United States [3]	DOE	---	-738	-746	-764	-781	-798	-814	-831	-849	-867	-885	---	-8,074
8 Temporary special rule for determining earned income for purposes of earned income tax credit (sunset 12/31/20) [3]	DOE	---	-3,185	---	---	---	---	---	---	---	---	---	---	-3,185

Provision	Effective	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2021-32
9 Refundability and enhancement of child and dependent care tax credit (sunset 12/31/21) [3]	tyba 12/31/20	-2,127	-5,837	---	---	---	---	---	---	---	---	---	---	-7,964
10 Increase in exclusion for employer-provided dependent care assistance (sunset 12/31/21) [7]	tyba 12/31/20	-78	-39	---	---	---	---	---	---	---	---	---	---	-117
11 Extension and modification of credits for paid sick and family leave (sunset 9/30/21) [3]	apwrt cqba 3/31/21 & DOE [8]	-4,506	-1,747	[5]	[5]	[5]	[5]	[5]	---	---	---	---	---	-6,253
12 Extension and modification of the employee retention credit (sunset 12/31/21) [3]	cqba 6/30/21	-3,076	-7,146	[5]	[5]	[5]	[5]	[5]	---	---	---	---	---	-10,222
13 Improving affordability by expanding premium assistance for consumers (sunset 12/31/22) [2][3][9]	tyba 12/31/20	-4,137	-22,234	-7,964	-536	23	---	---	---	---	---	---	---	-34,847
14 Temporary modification of limitations on reconciliation of tax credits for coverage under a qualified health plan with advance payments of such credit (sunset 12/31/20) [10]	tyba 12/31/19	-4,696	-1,565	---	---	---	---	---	---	---	---	---	---	-6,261
15 Application of premium tax credit in case of individuals receiving unemployment compensation during 2021 (sunset 12/31/21) [2][3][11]	tyba 12/31/20	-2,624	-1,660	-232	---	---	---	---	---	---	---	---	---	-4,516
16 Repeal of worldwide interest allocation rules	tyba 12/31/20	335	1,277	2,023	2,284	2,383	2,334	2,358	2,385	2,343	2,283	2,327	---	22,331
17 Clarification of tax treatment of targeted economic injury disaster loan advances and restaurant revitalization grants	---	Estimate to Be Provided By The Congressional Budget Office												
18 Modification of exceptions for reporting of third party network transactions [3][12]	[13]	---	146	1,081	751	789	829	870	913	959	1,007	1,057	---	8,403
19 Modification of treatment of student loan forgiveness (sunset 12/31/25)	tyba 12/31/20	-1	-8	-8	-9	-9	-9	[6]	[6]	---	---	---	---	-44
Subtitle H – Pensions														
1 Temporary delay of designation of multiemployer plans as in endangered, critical or critical and declining status	---	Estimate To Be Provided by the Congressional Budget Office												
2 Temporary extension of the funding improvement and rehabilitation periods for multiemployer pension plans in critical and endangered status for 2020 or 2021	---	Estimate To Be Provided by the Congressional Budget Office												
3 Adjustments to funding standard account rules	---	Estimate To Be Provided by the Congressional Budget Office												
4 Special financial assistance program for financially troubled multiemployer plans	---	Estimate To Be Provided by the Congressional Budget Office												
5 Extended amortization for single employer plans [3][14]	pyba 12/31/18	361	508	826	1,191	2,335	1,678	2,819	3,234	3,477	3,346	3,068	---	22,841
6 Extension of pension funding stabilization percentages for single employer plans [3][15]	pyba 12/31/19	Estimate Included In Item B 1 Above												
7 Modification of special rules for minimum funding standards for community newspaper plans [3][16]	pyea 12/31/17	25	19	24	27	28	31	33	33	32	30	30	---	311
8 Deny deduction of compensation in excess of $1 million for eight highest paid employees, plus the CEO or CFO, at publicly traded companies	tyba 12/31/26	---	---	---	---	---	11	839	1,693	1,724	1,754	1,785	---	7,805
TOTAL OF PART ONE		**-492,176**	**-158,705**	**-5,811**	**2,000**	**3,794**	**21,837**	**17,972**	**6,782**	**7,061**	**6,931**	**6,756**	**---**	**-583,561**

Provision	Effective	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2021-32
PART TWO: SURFACE TRANSPORTATION EXTENSION ACT Of 2021 (Public Law 117-44, signed into law by the President on October 2, 2021)														
Title II – Trust Funds														
1 Extension of expenditure authority for the Highway Trust Fund, the Sport Fish Restoration and Boating Trust Fund, and the Leaking Underground Storage Tank Trust Fund (sunset October 31, 2021)	DOE	---						*No Revenue Effect*						
TOTAL OF PART TWO		---						***No Revenue Effect***						
PART THREE: FURTHER SURFACE TRANSPORTATION EXTENSION ACT Of 2021 (Public Law 117-52, signed into law by the President on October 31, 2021)														
Title II – Trust Funds														
1 Extension of expenditure authority for the Highway Trust Fund, the Sport Fish Restoration and Boating Trust Fund, and the Leaking Underground Storage Tank Trust Fund (sunset December 3, 2021)	DOE	---						*No Revenue Effect*						
TOTAL OF PART THREE		---						***No Revenue Effect***						
PART FOUR: INFRASTRUCTURE INVESTMENT AND JOBS ACT (P.L. 117-58, signed into law by the President on November 15, 2021)														
Division H – Revenue Provisions														
1 Extension of Highway Trust Fund expenditure authority														
a Extension of Highway Trust Fund (sunset 9/30/26)	DOE	---						*No Revenue Effect*						
b Extension of the Sport Fish Restoration and Boating Trust Fund (sunset 9/30/26)	DOE	---						*No Revenue Effect*						
c Extension of the Leaking Underground Storage Tank Trust Fund (sunset 9/30/26)	DOE	---						*No Revenue Effect*						
2 Extension of highway-related taxes (generally sunset 9/30/28) [18]	10/1/21	---						*No Revenue Effect*						
3 Further additional transfers to the Highway Trust Fund - transfer from the General Fund $90,000,000,000 to the Highway Account in the Highway Trust Fund and $28,000,000,000 to the Mass Transit Account in the Highway Trust Fund	DOE	---						*No Revenue Effect*						
4 Extension and modification of certain Superfund excise taxes (sunset12/31/31)	pa 6/30/22	---	453	1,174	1,457	1,497	1,537	1,579	1,621	1,665	1,710	1,756	---	8,331
5 Private activity bonds for qualified broadband projects	on cyba DOE	---	-3	-14	-30	-45	-58	-69	-78	-85	-91	-95	---	-566
6 Carbon dioxide capture facilities	oia 12/31/21	---	-1	-2	-4	-7	-10	-12	-15	-18	-21	-25	---	-116
7 Increase in national limitation amount for qualified highway or surface freight transportation facilities	bia DOE	---	-2	-9	-19	-29	-41	-54	-68	-83	-97	-113	---	-516

Provision	Effective	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2021-32
8 Modification of automatic extension of certain deadlines in the case of taxpayers affected by Federally declared disasters	Fdddsa DOE	---						*Negligible Revenue Effect*						
9 Modifications of rules for postponing certain acts by reason of service in combat zone or contingency operation	[21]	---						*Negligible Revenue Effect*						
10 Tolling of time for filing a petition with the tax court	[22]	---						*Negligible Revenue Effect*						
11 Authority to postpone certain tax deadlines by reason of significant fires	[23]	---						*Negligible Revenue Effect*						
12 Modification of tax treatment of contributions to the capital of a corporation	cma 12/31/20	---	-286	-179	-158	-138	-120	-101	-85	-72	-61	-51	---	-1,251
13 Extension of interest rate stabilization [3][19][20]	wrtpyba 12/31/21	---	---	---	---	---	50	210	411	585	764	849	---	2,871
14 Information reporting for brokers and digital assets	rrtbf & srtbfa 12/31/23	---	---	---	1,526	2,862	3,349	3,559	3,797	4,013	4,282	4,582	---	27,970
15 Termination of employee retention credit for employers subject to closure due to COVID-19	cqba 9/30/21	---	8,220	---	---	---	---	---	---	---	---	---	---	8,220
TOTAL OF PART FOUR		**---**	**8,381**	**970**	**2,772**	**4,140**	**4,707**	**5,112**	**5,583**	**6,005**	**6,486**	**6,903**	**---**	**44,943**
PART FIVE: CONSOLIDATED APROPRIATIONS ACT, 2022 (P.L. 117-103, signed into law by the President on March 15, 2022)														
Division P - Health Provisions														
1 Extension of exemption for telehealth services (sunset 12/31/22) [24]	pybo/a 1/1/22	---	-22	-22	---	---	---	---	---	---	---	---	---	-44
TOTAL OF PART FIVE		**---**	**-22**	**-22**	**---**	**---**	**---**	**---**	**---**	**---**	**---**	**---**	**---**	**-44**
PART SIX: CHIPS ACT OF 2022 (P.L. 117-167, signed into law by the President on 2022)														
1 Advanced manufacturing investment credit	[25]	---	-3,143	-5,697	-6,606	-6,908	-2,337	118	65	19	7	7	---	-24,474
TOTAL OF PART SIX		**---**	**-3,143**	**-5,697**	**-6,606**	**-6,908**	**-2,337**	**118**	**65**	**19**	**7**	**7**	**---**	**-24,474**
PART SEVEN: REVENUE PROVISIONS OF AN ACT TO PROVIDE FOR RECONCILIATION PURSUANT TO TITLE II OF S. CON. RES. 14 THE INFLATION REDUCTION ACT OF 2022 (P.L. 117-169, signed into law by the President on August 16, 2022)														
Title I - Committee on Finance														
Subtitle A - Deficit Reduction														
1 Corporate alternative minimum tax	tyba 12/31/22	---	---	34,679	34,258	22,039	17,702	18,699	20,798	22,756	24,658	26,659	---	222,248
2 Excise Tax on Repurchase of Corporate Stock	rosa 12/31/22	---	---	5,697	7,875	8,070	8,581	8,882	8,838	8,603	8,500	8,641	---	73,686
Subtitle B - Prescription Drug Pricing Reform														
1 Excise tax imposed on drug manufacturers during noncompliance periods	sa DOE	---	---						*No Revenue Effect*					

Provision	Effective	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2021-32
2 Safe harbor for absence of deductible for insulin	pyba 12/31/22	---	---------- No Revenue Effect ----------											
Subtitle C - Affordable Care Act Subsidies														
1 Improve affordability and reduce premium cost of health insurance for consumers (sunset 12/31/25) [3][26]	tyba 12/31/22	---	---	-19,985	-22,209	-20,812	-2,769	361	132	53	5	---	---	-65,225
Subtitle D - Energy Security														
1 Extension and modification of credit for electricity produced from certain renewable resources (sunset 12/31/24) [3]	fpisa 12/31/21 & ftcowba DOE & fpisa 12/31/22	---	---	-1,562	-2,183	-3,317	-4,822	-6,428	-7,677	-8,232	-8,329	-8,511	---	-51,062
2 Extension and modification of energy credit (sunset 12/31/24) [3]	generally ppisa 12/31/21	---	---	-2,140	-1,559	-2,458	-5,367	-2,359	-48	-38	-9	15	---	-13,962
3 Increase in energy credit for solar facilities placed in service in connection with low-income communities	1/1/23	---	---------- Estimate Included in Items 1 and 2 Above ----------											
4 Extension and modification of credit for carbon oxide sequestration (sunset 12/31/32) [3]	foepisa 12/31/22 & cocadoa 12/31/21	---	---	-42	-303	-469	-495	-463	-429	-388	-343	-296	---	-3,229
5 Zero-emission nuclear power production credit (sunset 12/31/32) [3]	epasa 12/31/23 itybasd	---	---	---	-2,188	-3,524	-3,710	-3,838	-3,960	-4,050	-4,279	-4,452	---	-30,001
6 Extension of incentives for biodiesel, renewable diesel and alternative fuels (sunset 12/31/24)	[27]	---	---	-2,776	-1,780	-1,015	---	---	---	---	---	---	---	-5,571
7 Extension of second generation biofuel incentives (sunset 12/31/24)	qsgbpa 12/31/21	---	---	-24	-20	-10	---	---	---	---	---	---	---	-54
8 Sustainable aviation fuel credit (sunset 12/31/24)	fsoua 12/31/22	---	---	-10	-25	-14	---	---	---	---	---	---	---	-49
9 Credit for production of clean hydrogen (sunset 12/31/32) [3]	[28]	---	---	-131	-362	-610	-918	-1,251	-1,627	-2,082	-2,667	-3,518	---	-13,166
10 Extension, increase, and modifications of nonbusiness energy property credit (sunset 12/31/32)	[29]	---	---	-1,887	-1,348	-1,324	-1,345	-1,327	-1,277	-1,301	-1,314	-1,327	---	-12,451
11 Extension and modification of the residential energy efficient property credit (sunset 12/31/34)	ema 12/31/21 & ema 12/31/22	---	---	-459	-1,021	-2,692	-2,770	-2,850	-2,935	-3,019	-3,092	-3,185	---	-22,022
12 Energy efficient commercial buildings deduction	tyba 12/31/22 & ppisa 12/31/22 ityeasd	---	---	-62	-50	-46	-42	-38	-35	-32	-30	-28	---	-362
13 Extension, increase, and modifications of new energy efficient home credit (sunset 12/31/32)	duaa 12/31/21	---	---	-273	-193	-203	-216	-230	-241	-240	-229	-217	---	-2,043
14 Clean vehicle credit (sunset 12/31/32) [3]	generally vpisa 12/31/22	---	---	-85	-451	-557	-681	-854	-1,024	-1,155	-1,303	-1,429	---	-7,541
15 Credit for previously-owned clean vehicles (sunset 12/31/32) [3]	vaa 12/31/22	---	---	-99	-96	-120	-132	-146	-162	-179	-197	-215	---	-1,347
16 Credit for qualified commercial clean vehicles (sunset 12/31/32)	vaa 12/31/22	---	---	-189	-177	-228	-298	-388	-469	-539	-607	-687	---	-3,583
17 Alternative fuel refueling property credit (sunset 12/31/32)	ppisa 12/31/21	---	---	-138	-128	-145	-164	-184	-207	-231	-257	-284	---	-1,738
18 Extension of the advanced energy project credit [3]	1/1/23	---	---	-1,463	-1,377	-915	-926	-614	-442	-280	-196	-42	---	-6,255
19 Advanced manufacturing production credit (sunset 12/31/32) [3]	cpasa 12/31/22	---	---	-1,755	-2,503	-2,691	-3,165	-3,563	-3,938	-4,534	-4,562	-3,921	---	-30,632
20 Reinstatement of Superfund	1/1/23	---	---	902	1,230	1,271	1,304	1,336	1,368	1,402	1,436	1,470	---	11,719
21 Clean electricity production credit [3]	fpisa 12/31/24	---	---	---	---	---	-12	-45	-571	-1,864	-3,497	-5,215	---	-11,204
22 Clean electricity investment credit [3]	ppisa 12/31/24	---	---	---	---	-39	-57	-6,575	-10,315	-10,742	-11,264	-11,865	---	-50,858
23 Cost recovery for qualified facilities, qualified property, and energy storage technology	fappisa 12/31/24	---	---	---	---	---	---	-26	-83	-134	-171	-211	---	-624

Provision	Effective	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2021-32
24 Clean fuel production credit (sunset 12/31/27) [3]	tfpa 12/31/24	---	---	---	---	-641	-791	-1,177	-337	---	---	---	---	-2,946
25 Elective payment for energy property and electricity produced from certain renewable resources, etc and transfer of credits [3]	tyba 12/31/22	---	Estimates Contained in Relevant Items Above											
26 Permanent extension of tax rate to fund Black Lung Disability Trust Fund [30]	[31]	---	---	103	135	131	130	130	131	132	133	134	---	1,159
27 Increase in research credit against payroll tax for small businesses	tyba 12/31/22	---	---	-16	-13	-15	-16	-18	-21	-22	-23	-24	---	-168
28 Limitation on excess business losses of noncorporate taxpayers extended for two years	tyba 12/31/26	---	---	---	---	---	---	17,666	26,198	9,453	-274	-284	---	52,759
29 Removal of harmful small business taxes	tyba 12/31/22	---	Estimate Included in Item 1 A Above											
TOTAL OF PART SEVEN		---	---	**8,284**	**5,512**	**-10,334**	**-979**	**14,699**	**21,667**	**3,336**	**-7,913**	**-8,791**	---	**25,478**
PART EIGHT: THE CONSOLIDATED APPROPRIATIONS ACT, 2023 (P.L. 117-328, signed into law by the President on December 29, 2022)														
Division T - The "SECURE 2 0 Act of 2022"														
Title I - Expanding Coverage and Increasing Retirement Savings														
1 Expanding automatic enrollment in retirement plans [32]	pyba 12/31/24	---	---	---	---	-403	-643	-662	-666	-670	-675	-681	-687	-5,089
2 Modification of credit for small employer pension plan startup costs	tyba 12/31/22	---	---	-40	-135	-241	-323	-370	-389	-397	-402	-405	-409	-3,111
3 Saver's Match	tyba 12/31/26	---	---	---	---	---	---	---	-2,097	-1,907	-1,819	-1,807	-1,687	-9,318
4 Promotion of Saver's Match	DOE			-7	-15	-23	-32	-42	-53	-65	-78	-93	-108	-516
5 Pooled employer plans modification	pyba 12/31/22	---	Negligible Revenue Effect											
6 Multiple employer 403(b) plans [33]	pyba 12/31/22	---	---	-4	-8	-11	-15	-20	-24	-29	-34	-40	-46	-231
7 Increase in age for required beginning date for mandatory distributions	[34]	---	---	-615	-729	-693	-798	-795	-800	-789	-681	-613	-535	-7,047
8 Indexing IRA catch-up limit	tyba 12/31/23	---	---	---	-12	-16	-18	-36	-38	-38	-42	-58	-60	-318
9 Higher catch-up limit to apply at age 60, 61, 62, and 63	tyba 12/31/24	---	---	---	---	-11	-41	-94	-154	-226	-308	-398	-498	-1,730
10 Treatment of student loan payments as elective deferrals for purposes of matching contributions	cmf pyba 12/31/23	---	---	---	-127	-180	-207	-220	-229	-235	-239	-239	-227	-1,903
11 Application of credit for small employer pension plan startup costs to employers which join an existing plan	[35]	---	---	[6]	-5	-12	-18	-23	-26	-29	-31	-34	-37	-214
12 Military spouse retirement plan eligibility credit for small employers	tyba DOE	---	---	-13	-18	-19	-21	-22	-23	-23	-24	-25	-26	-214
13 Small immediate financial incentives for contributing to a plan	pyba DOE	---	Negligible Revenue Effect											
14 Deferral of tax for certain sales of employer stock to employee stock ownership plan sponsored by S corporation	sa 12/31/27	---	---	---	---	---	---	---	-142	-308	-440	-613	-832	-2,335
15 Withdrawals for certain emergency expenses	dma 12/31/23	---	---	---	3,773	2,500	848	-1,282	-1,493	-1,481	-1,471	-1,461	-1,450	-1,518

Provision	Effective	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2021-32
16 Allow additional nonelective contributions to SIMPLE plans [36]	tyba 12/31/23	---	---	---	-51	-71	-79	-82	-84	-86	-88	-90	-92	-723
17 Contribution limit for SIMPLE plans [37]	tyba 12/31/23	---	---	---	-59	-82	-92	-96	-98	-101	-103	-105	-108	-844
18 Tax treatment of certain nontrade or business SEP contributions	tyba DOE	---	---	-9	-10	-9	-9	-10	-11	-11	-11	-11	-11	-101
19 Application of section 415 limit for certain employees of rural electric cooperatives [38]	lyea DOE	---	---	-2	-3	-5	-7	-9	-11	-14	-17	-20	-24	-112
20 Exemption for certain automatic portability transactions	toooa 12ma DOE	---	---	---	[6]	-1	-1	-2	-2	-3	-3	-4	-4	-20
21 Starter 401(k) plans for employers with no retirement plan	pyba 12/31/23	---	---	---	-6	-13	-25	-37	-49	-63	-78	-95	-113	-479
22 Certain securities treated as publicly traded in case of employee stock ownership plans	pyba 12/31/27	---	---	---	---	-3	-6	-7	-40	-112	-203	-315	-447	-1,133
23 Modification of age requirement for qualified ABLE programs [3][19]	tyba 12/31/25	---	---	---	---	---	-10	-60	-120	-166	-238	-315	-406	-1,316
24 Improving coverage for part-time workers [39]	pyba 12/31/24 [40]	---	---	-10	-15	-18	-24	-29	-32	-35	-39	-43	-47	-292
25 Special rules for certain distributions from long-term qualified tuition programs to Roth IRAs	da 12/31/23	---	---	-6	-85	-166	-182	-215	-240	-255	-267	-280	-291	-1,986
26 Emergency savings accounts linked to individual account plans	pyba 12/31/23	---	---	---	360	632	954	1,261	1,450	1,610	1,780	1,976	2,204	12,228
27 Enhancement of 403(b) plans	aia DOE	---	Negligible Revenue Effect											
Title II - Preservation of Income														
1 Remove required minimum distribution barriers for life annuities	cyea DOE	---	---	-58	-119	-158	-215	-222	-191	-133	15	277	604	-200
2 Qualifying longevity annuity contracts	[41]	---	---	-52	-60	-58	-71	-86	-89	-97	-109	-110	-125	-857
3 Insurance-dedicated exchange-traded funds	[42]	---	---	---	---	---	---	---	---	---	-63	-197	-318	-578
4 Eliminating a penalty on partial annuitization	[43]	---	---	10	21	32	53	71	90	113	104	87	68	649
Title III - Simplification and Clarification of Retirement Plan Rules														
1 Recovery of retirement plan overpayments	DOE	---	---	130	100	40	90	70	20	-50	-100	-140	-180	-20
2 Reduction in excise tax on certain accumulations in qualified retirement plans	tyba DOE	---	---	-7	-8	-8	-8	-8	-9	-9	-9	-9	-10	-85
3 Retirement Savings Lost and Found	DOE	---	---	---	---	1	1	2	3	5	7	10	16	44
4 Updating dollar limit for mandatory distributions	dma 12/31/23	---	Negligible Revenue Effect											
5 Expansion of Employee Plans Compliance Resolution System	DOE	---	---	---	-5	-5	-6	-6	-6	-6	-6	-6	-6	-52
6 Eliminate the "first day of the month" requirement for governmental section 457(b) plans	tyba DOE	---	Negligible Revenue Effect											
7 One-time election for qualified charitable distribution to split-interest entity, increase in qualified charitable distribution limitation	dmi tyba DOE	---	---	-229	-897	-626	-125	-46	-42	-38	-34	-30	-25	-2,093
8 Distributions to firefighters	dma DOE	---	---	[5]	[5]	[5]	[5]	[5]	[5]	[5]	[6]	-1	-1	-2
9 Exclusion of certain disability-related first responder retirement payments	arwrt tyba 12/31/26	---	---	---	---	---	---	-319	-512	-545	-579	-615	-656	-3,226
10 Application of top heavy rules to defined contribution plans covering excludable employees	pyba 12/31/23	---	---	---	20	35	37	40	43	45	49	52	55	377

Provision	Effective	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2021-32
11 Repayment of qualified birth or adoption distribution limited to 3 years	dma DOE [44]	---	Negligible Revenue Effect											
12 Employer may rely on employee certifying that deemed hardship distribution conditions are met	pyba DOE	---	---	25	37	40	46	48	47	42	35	25	15	358
13 Individual retirement plan statute of limitations for excise tax on excess contributions and certain accumulations	DOE	---	---	-2	-1	-1	-1	[6]	[6]	-1	-1	-1	-1	-8
14 Penalty-free withdrawal from retirement plans for individual in case of domestic abuse	dma 12/31/23	---	---	---	-7	-8	-7	-7	-7	-6	-6	-6	-5	-59
15 Reform of family attribution rule [45]	pyba 12/31/23	---	---	---	-44	-74	-101	-124	-144	-164	-183	-199	-215	-1,248
16 Amendments to increase benefit accruals under plan for previous plan year allowed until employer tax return due date	pyba 12/31/23	---	Negligible Revenue Effect											
17 Retroactive first year elective deferrals for sole proprietors	pyba DOE	---	Negligible Revenue Effect											
18 Performance benchmarks for asset allocation funds	DOE	---	Negligible Revenue Effect											
19 Review and report to Congress relating to reporting and disclosure requirements	DOE	---	Negligible Revenue Effect											
20 Eliminating unnecessary plan requirements related to unenrolled participants	pyba 12/31/22	---	Negligible Revenue Effect											
21 Review of pension risk transfer interpretive bulletin	DOE	---	Negligible Revenue Effect											
22 Tax treatment of IRA involved in a prohibited transaction	tyba DOE	---	Negligible Revenue Effect											
23 Clarification of substantially equal periodic payment rule	[46]	---	Negligible Revenue Effect											
24 Treasury guidance on rollovers	DOE	---	Negligible Revenue Effect											
25 Roth plan distribution rules	tyba 12/31/23 [47]	---	---	---	-13	-18	-18	-19	-19	-19	-20	-20	-21	-167
26 Exception to penalty on early distributions from qualified plans for individuals with a terminal illness	dma DOE	---	---	15	17	17	18	17	15	12	6	2	-3	115
27 Surviving spouse election to be treated as employee	cyba 12/31/23	---	---	---	-24	-42	-68	-88	-115	-146	-176	-205	-236	-1,101
28 Repeal of direct payment requirement on exclusion from gross income of distributions from governmental plans for health and long-term care insurance	dma DOE	---	---	-19	-22	-26	-31	-35	-39	-44	-49	-53	-58	-377
29 Modification of eligible age for exemption from early withdrawal penalty	dma DOE	---	---	1	1	1	1	1	1	1	1	[5]	[6]	8
30 Exemption from early withdrawal penalty for certain State and local government corrections employees	dma DOE	---	---	3	3	3	2	2	2	1	1	1	1	19
31 Special rules for use of retirement funds in connection with qualified federally declared disasters	[48]	---	---	-672	-737	-330	400	-51	-113	-116	-118	-121	-123	-1,981
32 Employers allowed to replace SIMPLE retirement accounts with safe harbor 401(k) plans during a year	pyba 12/31/23	---	Negligible Revenue Effect											
33 Elimination of additional tax on corrective distributions of excess contributions	[49]	---	---	-30	-35	-36	-42	-44	-46	-47	-48	-49	-50	-426
34 Long-term care contracts purchased with retirement plan distributions	dmatdwi 3ya DOE	---	---	---	---	---	10	11	13	12	12	12	14	85
35 Corrections of mortality tables [50][51]	[52]	---	---	---	24	-13	17	9	20	36	49	64	81	287

Provision	Effective	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2021-32
36 Report to Congress on section 402(f) notices	DOE	---	*Negligible Revenue Effect*											
37 Modification of required minimum distribution rules for special needs trusts	cyba DOE	---	*Negligible Revenue Effect*											
38 Requirement to provide paper statements in certain cases	pyba 12/31/25	---	*Negligible Revenue Effect*											
39 Recognition of tribal government domestic relations orders	drora 12/31/22	---	*Negligible Revenue Effect*											
40 Defined contribution plan fee disclosure improvements	DOE	---	*Negligible Revenue Effect*											
41 Consolidation of defined contribution plan notices	DOE	---	*Negligible Revenue Effect*											
42 Information needed for financial options risk mitigation	DOE [53]	---	*Negligible Revenue Effect*											
43 Defined benefit annual funding notices	pyba 12/31/23	---	*Negligible Revenue Effect*											
44 Report on pooled employer plans	DOE	---	*Negligible Revenue Effect*											
45 Annual audits for group of plans.	DOE	---	*Negligible Revenue Effect*											
46 Cash balance	pyba DOE	---	*Negligible Revenue Effect*											
47 Termination of variable rate premium indexing [51][54]	DOE	---	---	---	2	-5	-16	-27	-24	-14	5	47	87	54
48 Safe harbor for corrections of employee elective deferral failures	[55]	---	---	---	37	62	63	65	66	68	70	72	74	577
Title IV - Amendments Relating the SECURE Act of 2019	[56]	---	*Negligible Revenue Effect*											
Title V - Administrative Provisions - Provisions Relating To Plan Amendments	DOE	---	*Negligible Revenue Effect*											
Title VI - Revenue Provisions														
1 SIMPLE and SEP Roth IRAs	tyba 12/31/22	---	---	24	39	51	69	76	90	102	115	126	140	832
2 Hardship withdrawal rules for 403(b) plans	pyba 12/31/23	---	---	10	24	38	46	55	66	70	73	73	75	530
3 Elective deferrals generally limited to regular contribution limit [57]	tyba 12/31/23	---	---	---	1,775	2,267	2,212	2,337	2,063	1,965	1,650	1,318	1,050	16,637
4 Optional treatment of employer matching or nonelective contributions as Roth contributions	cma DOE	---	---	620	835	1,018	1,386	1,619	1,509	1,678	1,706	1,701	1,580	13,652
5 Charitable conservation easements	cma DOE	---	---	333	1,224	903	812	500	511	522	533	544	555	6,435
6 Enhancing retiree health benefits in pension plans [58]	tma DOE	---	---	36	38	40	65	86	87	87	87	90	96	712
Title VII - Tax Court Retirement Provisions [51]														
1 Provisions relating to judges of the Tax Court	DOE [59]	---	---	-1	[6]	[6]	[6]	[6]	[6]	[6]	[6]	[6]	[6]	-3
2 Provisions relating to special trial judges of the Tax Court	DOE [60]	---	*Estimate Included in Item VII 1 Above*											
Title VIII - Interaction Effects	---	---	---	---	-1	-2	-14	-15	-30	-29	-29	-29	-29	-177

Provision	Effective	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2021-32
Division FF - Health and Human Services														
Title IV - Medicare Provisions														
Subtitle E- Health Care Tax Provisions														
1 Extension of Safe Harbor for Absence of Deductible for Telehealth (sunset 12/31/24) [61]	pyba 12/31/22	---	---	-55	-178	-65	---	---	---	---	---	---	---	-298
TOTAL OF PART EIGHT		**---**	**---**	**-624**	**4,899**	**4,225**	**3,856**	**1,059**	**-2,112**	**-2,136**	**-2,523**	**-3,057**	**-3,495**	**90**

Joint Committee on Taxation

NOTE Details may not add to totals due to rounding

Legend for "Effective" column

aia = amounts invested after
apwrt = amounts paid with respect to
arwrt = amounts received with respect to
bia = bonds issued after
cma = contributions made after
cmf = contributions made for
cocadoa = carbon oxide captured and disposed of after
cpasa = components produced and sold after
cpo/a = coverage period on or after
cqba = calendar quarters beginning after
cyba = calendar years beginning after
cyea = calendar years ending after
da = distributions after
dma = distributions made after
dmatdwi = distributions made after the date which is
dmi = distributions made in
DOE = date of enactment
drora = domestic relations orders received after
duaa = dwelling units acquired after

ema = expenditures made after
epasa = electricity produced and sold after
fappisa = facilities and property placed in service after
Fdddsa = Federally declared disasters declared after
foepisa = facilities or equipment placed in service after
fpisa = facilities placed in service after
fsoua = fuel sold or used after
ftcowba = facilities the construction of which begins after
itybasd = in taxable years beginning after such date
ityeasd = in taxable years ending after such date
lyea = limitation years ending after
ma = months after
oia = obligations issued after
oii = obligations issued in
pa = periods after
pia = penalties issued after
ppisa = property placed in service after
pyba = plan years beginning after

pybo/a = plan years beginning on or after
pyea = plan years beginning after
rosa = repurchases of stock after
qsgbpa = qualified second generation biofuel production after
rrtbf = returns required to be filed
sa = sales after
srtbfa = statements required to be furnished after
tfpa = transportation fuel produced after
tma = transfers made after
toa = transactions occurring after
toooa = transactions occurring on or after
tyba = taxable years beginning after
tyea = taxable years ending after
vaa = vehicles acquired after
vpisa = vehicles placed in service after
wrtpyba = with respect to plan years beginning after
ya = years after

[Footnotes for the Appendix appear on the following pages]

Footnotes for the Appendix:

	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2021-32
[1] Estimate includes the following budget effects													
Total Revenue Effect	-26,604	-8,606	116	[5]	[5]	[5]	[5]	---	---	---	---	---	-35,095
On-budget effects	-26,613	-8,576	129	[5]	[5]	[5]	[5]	---	---	---	---	---	-35,060
Off-budget effects	9	-30	-13	---	---	---	---	---	---	---	---	---	-34
[2] Estimate provided by the Joint Committee on Taxation staff in collaboration with the Congressional Budget Office													
[3] Estimates contain the following outlay effects	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2021-32
Preserving health benefits for workers	-1,374	-630	-74	---	---	---	---	---	---	---	---	---	-2,077
Child tax credit - improvements for 2021 (sunset 12/31/21), and application of child tax credit in possessions	19,169	65,186	710	721	725	721	307	311	316	320	323	---	88,809
Strengthening the earned income tax credit for individuals with no qualifying children (sunset 12/31/21)	---	9,278	---	---	---	---	---	---	---	---	---	---	9,278
Taxpayer eligible for childless earned income credit in case of qualifying children who fail to meet certain identification requirements	---	11	2	1	1	1	2	2	2	2	2	---	26
Credit allowed in case of certain separated spouses	---	18	18	19	20	21	21	22	23	24	24	---	210
Modification to disqualified investment income test	---	224	141	143	165	164	162	159	159	165	173	---	1,655
Application of earned income tax credit in possessions of United States	---	738	746	764	781	798	814	831	849	867	885	---	8,074
Refundability and enhancement of child and dependent care tax credit (sunset 12/31/21)	---	3,752	---	---	---	---	---	---	---	---	---	---	3,752
Extension and modification of credits for paid sick and family leave (sunset 9/30/21)	3,595	614	---	---	---	---	---	---	---	---	---	---	4,209
Extension and modification of the employee retention credit	1,124	1,014	---	---	---	---	---	---	---	---	---	---	2,138
Improving affordability by expanding premium assistance for consumers	2,725	14,306	5,203	450	---	---	---	---	---	---	---	---	22,684
Application of premium tax credit in case of individuals receiving unemployment compensation during 2020	1,351	926	149	---	---	---	---	---	---	---	---	---	2,426
Modification of exceptions for reporting of third party network transactions	---	---	40	42	44	46	49	51	54	56	59	---	442
Temporary special rule for determining earned income for purposes of earned income tax credit	---	2,866	---	---	---	---	---	---	---	---	---	---	2,866
Extended amortization for single employer plans [17]	-107	-144	-232	-353	-1,124	-93	-917	-1,156	-1,419	-1,643	-1,819	---	-9,007
Extension of pension funding stabilization percentages for single employer plans [17]	Outlay Effects Included In Item Above												
Modification of special rules for minimum funding standards for community newspaper plans [17]	-7	-7	-11	-15	-18	-21	-24	-27	-30	-32	-35	---	-227
Extended funding relief for single employer plans [19]	---	---	---	---	---	---	-16	-41	-77	-112	-158	---	-404
Improve affordability and reduce premium cost of health insurance for consumers (sunset 12/31/25) [2]	---	---	21,283	11,655	10,228	-8,661	-514	---	---	---	---	---	33,990
Extension and modification of credit for electricity produced from certain renewable resources (sunset 12/31/24)	---	Negligible Outlay Effect											
Extension and modification of energy credit (sunset 12/31/24)	---	Negligible Outlay Effect											
Extension and modification of credit for carbon oxide sequestration (sunset 12/31/32)	---	---	20	145	225	238	222	206	186	165	142	---	1,550
Zero-emission nuclear power production credit (sunset 12/31/32)	---	---	---	1,050	1,692	1,781	1,842	1,901	1,944	2,054	2,137	---	14,401
Credit for production of clean hydrogen (sunset 12/31/32)	---	---	59	149	244	364	498	657	851	1,086	1,410	---	5,317
Extension of the advanced energy project credit	---	Negligible Outlay Effect											
Clean vehicle credit (sunset 12/31/32)	---	Negligible Outlay Effect											
Credit for previously-owned clean vehicles (sunset 12/31/32)	---	Negligible Outlay Effect											

[Footnotes for the Appendix continue on the following pages]

Footnotes for the Appendix continued:

[3] Estimate includes the following outlay effects (continued)

	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2021-32
Advanced manufacturing production credit (sunset 12/31/32)	---	---	842	1,201	1,291	1,519	1,710	1,890	2,176	2,189	1,882	---	14,699
Clean electricity production credit	---	---	1	1	2	2	3	3	4	5	6	---	26
Clean electricity investment credit	--- Negligible Outlay Effect												
Clean fuel production credit	--- Negligible Outlay Effect												
Modification of age requirements for qualified ABLE programs	---	---	---	---	---	10	60	120	165	236	311	401	1,303

[4] The provision relating to the payroll tax credit applies to premiums to which premium assistance applies and to wages paid on or after April 1, 2021

[5] Gain of less than $500,000

[6] Loss of less than $500,000

[7] Estimate includes the following budget effects

	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2021-32
Total Revenue Effect	-78	-39	---	---	---	---	---	---	---	---	---	---	-117
On-budget effects	-27	-14	---	---	---	---	---	---	---	---	---	---	-41
Off-budget effects	-51	-25	---	---	---	---	---	---	---	---	---	---	-76

[8] With respect to the credit for self-employed individuals, only days occurring during the period beginning on April 1, 2021 and ending on September 30, 2021, may be taken into account for purposes of determining the qualified sick leave equivalent amount and the qualified family leave equivalent amount

[9] Estimate includes the following budget effects:

	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2021-32
Total Revenue Effect	-4,137	-22,234	-7,964	-536	23	---	---	---	---	---	---	---	-34,847
On-budget effects	-4,144	-22,310	-8,016	-546	23	---	---	---	---	---	---	---	-34,993
Off-budget effects	7	76	52	10	---	---	---	---	---	---	---	---	145

[10] The statute applies in the case of any taxable year beginning in 2020, so the sunset only applies to tax year 2020

[11] Estimate includes the following budget effects:

	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2021-32
Total Revenue Effect	-2,624	-1,660	-232	---	---	---	---	---	---	---	---	---	-4,516
On-budget effects	-2,731	-1,767	-257	---	---	---	---	---	---	---	---	---	-4,755
Off-budget effects	107	107	25	---	---	---	---	---	---	---	---	---	239

[12] Estimate includes the following budget effects

	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2021-32
Total Revenue Effect	---	146	1,081	751	789	829	870	913	959	1,007	1,057	---	8,403
On-budget effects	---	80	572	391	411	431	453	475	499	524	550	---	4,385
Off-budget effects	---	66	509	360	378	397	417	438	460	483	507	---	4,018

[13] The amended de minimis exception applies to returns for calendar years beginning after December 31, 2021 The clarification that reporting is not required on transactions which are not for goods or services applies to transactions after the date of enactment

[14] Estimate includes the following budget and outlay effects

	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2021-32
Total Revenue Effect	361	508	826	1,191	2,335	1,678	2,819	3,234	3,477	3,346	3,068	---	22,842
On-budget effects	229	312	731	689	973	1,272	1,522	1,644	1,611	1,329	975	---	11,055
Off-budget effects	25	53	95	150	238	312	380	434	447	374	273	---	2,781

[15] A plan sponsor may elect not to have the amendments made by this section apply to any plan year beginning before January 1, 2022 (either for all purposes or solely for purposes of determining the adjusted funding target attainment percentage)

[16] Estimate includes the following budget and outlay effects

	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2021-32
Total Revenue Effect	25	19	24	27	28	31	33	33	32	30	30	---	311
On-budget effects	16	10	11	9	8	8	6	4	[5]	-3	-5	---	63
Off-budget effects	2	2	3	3	3	3	3	2	1	1	[5]	---	21

[17] Estimated changes in premiums provided by the Congressional Budget Office Premiums rise due to higher plan underfunding, this reduces government spending (negative in footnote [3]) and has the same effect on the deficit as an increase in revenues (positive in main table)

[Footnotes for the Appendix continue on the following pages]

Footnotes for the Appendix continued:

[18] The tax on the use of certain heavy vehicles sunsets September 30, 2029

[19] Outlay effects estimated by the Congressional Budget Office

[20] Estimate includes the following budget effects	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2021-32
Total Revenue Effect	---	---	---	---	---	50	210	411	585	764	849	---	2,871
On-budget effects	---	---	---	---	---	45	170	315	425	532	556	---	1,998
Off-budget effects	---	---	---	---	---	5	25	55	84	120	135	---	419

[21] The amendments made by this section shall apply to any period for performing an act which has not expired before the date of the enactment

[22] The amendments made by this section shall apply to petitions required to be timely filed (determined without regard to the amendments made by this section) after the date of enactment

[23] The amendments made by this section shall apply to fires for which assistance is provided after the date of the enactment

[24] Estimate includes the following budget effects	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2021-32
Total Revenue Effect	---	-22	-22	---	---	---	---	---	---	---	---	---	-44
On-budget effects	---	-17	-17	---	---	---	---	---	---	---	---	---	-35
Off-budget effects	---	-5	-5	---	---	---	---	---	---	---	---	---	-10

[25] Generally effective for property placed in service, and elections for direct payments made, after December 31, 2022, and for any property the construction of which begins prior to January 1, 2023, to the extent of the basis thereof attributable to the construction, reconstruction, or erection after the date of enactment

[26] Estimate includes the following budget effects	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2021-32
Total Revenue Effect	---	---	-19,985	-22,209	-20,812	-2,769	361	132	53	5	---	---	-65,225
On-budget effects	---	---	-20,392	-22,934	-21,703	-3,285	269	141	57	5	---	---	-67,842
Off-budget effects	---	---	407	725	891	516	92	-9	-4	---	---	---	2,617

[27] Effective for fuel sold or used after December 31, 2022, for biodiesel and renewable diesel, and December 31, 2021 for alternative fuels

[28] Effective for hydrogen produced after December 31, 2022, at facilities for which construction commenced on or before December 31, 2032, for facilities the construction of which begins after December 31, 2022, for electricity produced after December 31, 2022, for property placed in service after December 31, 2022, and, for any property the construction of which begins prior to January 1, 2023, only to the extent of the basis thereof attributable to the construction, reconstruction, or erection after December 31, 2022, and for fuel sold or used after December 31, 2022

[29] Applies to property placed in service after December 31, 2022 Extension of credit shall apply to property placed in service after December 31, 2021 and identification number requirement shall apply to property placed ins service after December 31, 2024

[30] The temporary increase in the amount of tax on coal terminates for sales after December 31, 2025

[31] Applies to sales in calendar quarters beginning after the date of the enactment

[32] Estimate includes the following budget effects:	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2021-32
Total Revenue Effect	---	---	---	---	-403	-643	-662	-666	-670	-675	-681	-687	-5,089
On-budget effects	---	---	---	---	-363	-591	-611	-616	-621	-626	-633	-640	-4,702
Off-budget effects	---	---	---	---	-40	-52	-51	-51	-50	-49	-48	-47	-387

[33] Estimate includes the following budget effects	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2021-32
Total Revenue Effect	---	---	-4	-8	-11	-15	-20	-24	-29	-34	-40	-46	-231
On-budget effects	---	---	---	-1	-1	-1	-2	-2	-3	-3	-4	-4	-21
Off-budget effects	---	---	-4	-7	-10	-14	-18	-22	-26	-31	-36	-42	-210

[34] Effective for distributions required to be made after December 31, 2022, with respect to individuals who attain age 72 after such date

[35] Effective as if included in the enactment of section 104 of the SECURE Act of 2019

[36] Estimate includes the following budget effects	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2021-32
Total Revenue Effect	---	---	---	-51	-71	-79	-82	-84	-86	-88	-90	-92	-723
On-budget effects	---	---	---	-34	-48	-55	-58	-59	-61	-62	-64	-65	-506
Off-budget effects	---	---	---	-17	-23	-24	-24	-25	-25	-26	-26	-27	-217

[Footnotes for the Appendix continue on the following page]

Footnotes for the Appendix continued:

[37] Estimate includes the following budget effects	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2021-32
Total Revenue Effect	---	---	---	-59	-82	-92	-96	-98	-101	-103	-105	-108	-844
On-budget effects	---	---	---	-44	-62	-71	-75	-77	-79	-81	-83	-85	-657
Off-budget effects	---	---	---	-15	-20	-20	-21	-21	-22	-22	-23	-23	-187

[38] Estimate includes the following budget effects	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2021-32
Total Revenue Effect	---	---	-2	-3	-5	-7	-9	-11	-14	-17	-20	-24	-112
On-budget effects	---	---	-1	-2	-3	-5	-6	-8	-10	-12	-14	-17	-78
Off-budget effects	---	---	-1	-1	-2	-2	-3	-3	-4	-5	-6	-7	-34

[39] Estimate includes the following budget effects	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2021-32
Total Revenue Effect	---	---	-10	-15	-18	-24	-29	-32	-35	-39	-43	-47	-292
On-budget effects	---	---	-9	-14	-16	-22	-26	-29	-32	-35	-39	-42	-264
Off-budget effects	---	---	-1	-1	-2	-2	-3	-3	-3	-4	-4	-5	-28

[40] Subsections (d) and (e) are effective as if included in the enactment of section 112 of the SECURE Act of 2019

[41] Paragraphs (1) and (2) of subsection (a) are effective with respect to contracts purchased or received in an exchange on or after the date of enactment Paragraphs (3) and (4) of subsection (a) are effective with respect to contracts purchased or received in an exchange on or after July 2, 2014 Prior to the date on which the Secretary of the Treasury issues final regulations pursuant to subsection (a), the Secretary of Treasury (or delegate) will administer and enforce the law in accordance with subsection (a) and taxpayers may rely upon their reasonable good faith interpretations of subsection (a)

[42] Effective with respect to segregated asset account investments made on or after the date that is seven years after the date of enactment

[43] The modifications and amendments required under subsections (a) and (c) shall be deemed to have been made as of the date of the enactment, and as of such date all applicable laws shall be applied in all respects as though the actions which the Secretary of the Treasury (or delegate) is required to take under such subjections had been taken, and until such time as such actions are taken, taxpayers may rely upon their reasonable good faith interpretations of this section

[44] In the case of a qualified birth or adoption distribution made on or before the date of enactment of this Act, Code section 72(t)(2)(H)(v)(I) will be applied by substituting "after such distribution and before January 1, 2026" for "during the 3-year period beginning on the day after the date on which such distribution was received "

[45] Estimate includes the following budget effects	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2021-32
Total Revenue Effect	---	---	---	-44	-74	-101	-124	-144	-164	-183	-199	-215	-1,248
On-budget effects	---	---	---	-38	-63	-87	-107	-124	-140	-155	-168	-180	-1,062
Off-budget effects	---	---	---	-7	-11	-14	-17	-20	-24	-27	-31	-35	-186

[46] The amendment made by subsections (a), (b), and (c) shall apply to transfers, rollovers, and exchanges occurring after December 31, 2023 Amendments made by subsection (d) shall apply to distributions commencing on or after date of enactment

[47] The amendment made by this section shall not apply to distributions which are required with respect to years beginning before January 1, 2024, but are permitted to be paid on or after such date

[48] Applies to distributions, recontributions of withdrawals for home purchases, and loans made, with respect to disasters the incident period for which begins on or after the date which is 30 days after the date of enactment of the Taxpayer Certainty and Disaster Tax Relief Act of 2020

[49] The amendments made by this section shall apply to any determination of, or affecting, liability for taxes, interest, or penalties which is made on or after the date of the enactment, without regard to whether the act (or failure to act) upon which the determination is based occurred before such date of enactment

[50] Estimate includes the following budget effects:	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2021-32
Total revenue effect	---	---	---	24	-13	17	9	20	36	49	64	81	287
On-budget effects	---	---	---	23	70	78	63	68	79	84	91	102	656
Off-budget effects	---	---	---	1	6	8	8	11	15	17	21	25	114
Changes in outlays	---	---	---	---	-89	-69	-62	-59	-58	-52	-48	-46	-483

[Footnotes for the Appendix continue on the following page]

Footnotes for the Appendix continued:

[51] The Congressional Budget Office estimates the following changes in outlays for these items Increases in outlays have a negative budget effect, so are shown as negative elsewhere in this table

	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2021-32
III 35 Corrections of mortality tables	---	---	---	---	89	69	62	59	58	52	48	46	483
III 47 Termination of variable rate premiums.	---	---	---	---	14	33	51	62	71	80	75	67	453
VII Tax Court Retirement Provisions	---	---	1	[62]	[62]	[62]	[62]	[62]	[62]	[62]	[62]	[62]	3

[52] The amendments required under subsection (a) shall be deemed to have been made as of the date of the enactment, and as of such date all applicable laws shall be applied in all respects as though the actions which the Secretary of the Treasury (or delegate) is required to take under such subsection had been taken

[53] The requirements of section 113 of ERISA, as added by subsection (a), apply beginning on the applicable effective date specified in the final regulations promulgated pursuant to subsection (e)

[54] Estimate includes the following budget effects

	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2021-32
Total change	---	---	---	2	-5	-16	-27	-24	-14	5	47	87	54
Total revenue effect	---	---	---	---	1	2	3	6	9	15	23	31	90
On-budget effects	---	---	---	2	8	15	21	32	48	70	99	123	417
Off-budget effects	---	---	---	---	2	8	15	21	32	48	70	99	46
Changes in outlays	---	---	---	---	-14	-33	-51	-62	-71	-80	-75	-67	-453

[55] The amendment made by this section applies with respect to any errors with respect to which the date referred to in Code section 414(cc) (as added by this section) is after December 31, 2023 Prior to the application of any regulation or other guidance prescribed under paragraph (3) of section 414(cc) (as added by this section), taxpayers may rely upon their reasonable good faith interpretations of the provisions of such section

[56] Effective as if included in the section of the SECURE Act of 2019 to which the amendment relates

[57] Wages equal to or under $145,000 are exempt from this requirement

[58] Estimate includes the following budget effects

	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2021-32
Total Revenue Effect	---	---	36	38	40	65	86	87	87	87	90	96	712
On-budget effects	---	---	35	35	36	58	77	76	74	73	75	79	618
Off-budget effects	---	---	2	3	3	7	9	11	12	14	16	17	94

[59] Subsection (a) applies to basic pay earned while serving as a judge of the United States Tax Court on or after the date of enactment, and subsection (d) applies to any individual serving as a retired judge of the United States Tax Court on or after the date of enactment

[60] Paragraph (e) of Code section 7447A, as added by paragraph (a), is effective on the date that is 180 days after the date of enactment Special trial judges retiring on or after the date of enactment, and before the date that is 180 days after the date of such enactment, may file an election under such section not later than 60 days after such date

[61] Estimate includes the following budget effects.

	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2021-32
Total Revenue Effect	---	---	-55	-178	-65	---	---	---	---	---	---	---	-298
On-budget effects	---	---	-41	-132	-49	---	---	---	---	---	---	---	-222
Off-budget effects	---	---	-14	-46	-16	---	---	---	---	---	---	---	-75

[62] Indicates an increase in outlays of less than $500,000