

**TECHNICAL EXPLANATION OF
THE HOUSE WAYS AND MEANS COMMITTEE
CHAIRMAN'S DISCUSSION DRAFT OF THE
"TAX TECHNICAL AND CLERICAL CORRECTIONS ACT"**

Prepared by the Staff
of the
JOINT COMMITTEE ON TAXATION



January 2, 2019
JCX-1-19

CONTENTS

| | <u>Page</u> |
|--|-------------|
| INTRODUCTION | 1 |
| DESCRIPTION OF THE DISCUSSION DRAFT OF THE TAX TECHNICAL AND CLERICAL CORRECTIONS ACT | 2 |
| ESTIMATED REVENUE EFFECT OF THE DISCUSSION DRAFT | 17 |

INTRODUCTION

This document,¹ prepared by the staff of the Joint Committee on Taxation, provides a technical explanation of the House Ways and Means Committee Chairman’s discussion draft of the “Tax Technical and Clerical Corrections Act.” This document is prepared at the request of House Ways and Means Committee Chairman Kevin Brady.

¹ This document may be cited as follows: Joint Committee on Taxation, *Technical Explanation of the House Ways and Means Committee Chairman’s Discussion Draft of the “Tax Technical and Clerical Corrections Act”* (JCX-1-19), January 2, 2019. This document is available on the Joint Committee on Taxation website at www.jct.gov.

DESCRIPTION OF THE DISCUSSION DRAFT OF THE TAX TECHNICAL AND CLERICAL CORRECTIONS ACT

The discussion draft includes technical, clerical, and deadwood-related corrections to recent tax legislation. Except as otherwise provided, the amendments made by the technical corrections contained in the discussion draft would take effect as if included in the original legislation to which each amendment relates.

Amendment to the Consolidated Appropriations Act, 2018, Division T

Deduction for qualified business income (sec. 101 of Division T of the Act).—As amended by the Act, section 199A(b)(7) requires any qualified trade or business of a patron of a specified agricultural or horticultural cooperative to reduce the deductible amount determined under section 199A(b)(2) for such trade or business by the lesser of (A) nine percent of the amount of qualified business income with respect to such trade or business that is properly allocable to qualified payments received from such cooperative, or (B) 50 percent of so much of the W-2 wages with respect to such trade or business as are so allocable. The provision clarifies that the amount described in section 199A(b)(7)(A) (“9 percent of so much of the qualified business income with respect to such trade or business as is properly allocable to qualified payments received from such cooperative”) cannot be less than zero.

Amendment relating to the Bipartisan Budget Act of 2018

Election for certain carbon capture equipment and facilities (Act sec. 41119).—The Act provides an election to treat as placed in service on the date of enactment of the Act certain carbon capture equipment or facilities that were placed in service before that date and that capture not less than 500,000 metric tons of qualified carbon oxide during the taxable year. The Act’s reference to the person that makes the election could be interpreted to impose unintended requirements. The provision strikes the reference and clarifies that the person that may elect is the person that owns the carbon capture equipment and that physically or contractually ensures the capture and disposal, utilization, or use as a tertiary injectant of such qualified carbon oxide.

Amendments relating to Pub. L. No. 115-97 (the Tax Cuts and Jobs Act of 2017)

Individual tax rates and kiddie tax election (Act sec. 11001).—The Act modifies the tax treatment of children with unearned income (known as the “kiddie tax”) by applying the ordinary and capital gains rates applicable to trusts and estates to the net unearned income of a child. The provision clarifies that the child’s tax liability is unrelated to that child’s parents’ tax situation by (1) eliminating the election to allow a child’s unearned income to be included on the child’s parent’s return, (2) removing the requirement that the parent provide to a child the taxpayer identification number of the parent and that the child include the number on the child’s tax return, (3) modifying the definition of net unearned income such that the deduction under section 199A is taken into account, the child’s standard deduction is taken into account only once, and none of the child’s unearned income is taxed as earned income, and (4) providing that the rate schedule applicable to trusts and estates applies to the portion of the child’s taxable income attributable to net unearned income and that the rate schedule otherwise applicable to the child applies to the portion of the taxable income of the child attributable to income other than net

unearned income. The provision also provides that the child's net capital gain is taxed at trust rates to the extent the gain does not exceed the child's net unearned income, and any net capital gain in excess of that amount is taxed at the child's rates.

Tax bracket rounding rule (Act secs. 11001).—The provision conforms the rounding rule for the income tax brackets applicable to heads of household to the rounding rule for the tax brackets applicable to unmarried individuals, which rounds amounts to the next lowest multiple of \$25.

Deduction for qualified business income (Act sec. 11011).—The Act provides that for taxable years beginning after 2017 and before 2026, an individual taxpayer generally may deduct 20 percent of qualified business income from a partnership, S corporation, or sole proprietorship, as well as 20 percent of aggregate qualified real estate investment trust (“REIT”) dividends and qualified publicly traded partnership income, under new section 199A. The provision makes a number of clarifications.

The provision coordinates the treatment of qualified REIT dividends and qualified publicly traded partnership income under section 199A with the investment interest deduction limitation of section 163(d). Under the provision, for purposes of section 199A, qualified REIT dividends and qualified publicly traded partnership income do not include any amounts taken into account as investment income under section 163(d)(4)(B).

If the sum of the deductible amounts for each qualified trade or business of the taxpayer in section 199A(b)(1)(A) is negative, the provision clarifies that the amount cannot be less than zero for purposes of section 199A(b)(1)(A).

The provision clarifies that qualified REIT dividends do not include dividends on stock that fails to satisfy the holding period rules of section 1(h)(11)(B)(iii).

The provision clarifies that, for determining the tentative minimum tax under section 55(b), (1) the amount of the deductions allowable under section 199A to determine alternative minimum taxable income is the same amount allowable for determining regular taxable income, and (2) for purposes of phasing out the AMT exemption amount under section 55(d)(2), alternative minimum taxable income is not reduced by any section 199A deduction.

Individuals may invest in stock of a REIT or interests in a publicly traded partnership indirectly through a regulated investment company (a “RIC,” sometimes referred to as a mutual fund). A RIC may receive amounts that would be treated as qualified REIT dividends or qualified publicly traded partnership income (see sec. 199A(b)(1)(B)) eligible for the section 199A deduction in the hands of individual RIC shareholders had those individuals directly held the REIT stock or the publicly traded partnership interests. The provision clarifies that an individual shareholder of a RIC takes into account, for purposes of calculating the individual's section 199A deduction, amounts reported by the RIC as qualified REIT dividends or qualified publicly traded partnership income.

The Act both enacted section 199A and repealed former section 199 for taxable years beginning after December 31, 2017. The provision confirms that any item taken into account in determining the combined qualified business income amount of the taxpayer under section 199A

cannot be taken into account in determining the qualified production activities income of the taxpayer under former section 199. For example, for an individual holding an interest in a fiscal-year partnership or S corporation, the taxable year of which began before January 1, 2018, and ends within or with the individual's 2018 calendar taxable year, the individual's share of any item from the partnership or S corporation that would otherwise be taken into account in determining qualified production activities income for the individual's 2018 taxable year (but for the repeal of section 199) is not eligible for the former section 199 deduction as such item is eligible for the section 199A deduction instead.

Limitation on losses for taxpayers other than corporations (Act sec. 11012).—The Act provides that, for any taxable year beginning after 2017 and before 2026, any excess business loss of a taxpayer other than a corporation is not allowed for the taxable year and excess business losses not allowed are carried forward and treated as part of the taxpayer's net operating loss ("NOL") carryover in subsequent taxable years as determined under the NOL rules (sec. 461(l)). The provision clarifies this rule using language applicable under the NOL rules, and provides that excess business losses not allowed for a taxable year are treated as a net operating loss for the taxable year that is carried over to subsequent taxable years under the applicable NOL carryover rules. The provision makes a number of additional clarifications.

The provision clarifies that 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 or 199A.

The provision clarifies that excess business loss does not take into account any deductions, gross income, or gains attributable to any trade or business of performing services as an employee. 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).

TIN required to claim child tax credit for dependents (Act sec. 11022).—As a general matter, no child tax credit is allowed with respect to a child unless the child's taxpayer identification number is included on the tax return. The Act specifies that this identification number must be a Social Security number. The Act adds a \$500 non-refundable tax credit for taxpayers with dependents other than qualifying children. The provision clarifies that a taxpayer identification number is necessary with respect to any non-child dependent for whom the \$500 non-refundable tax credit is claimed. The taxpayer identification number may be either a Social Security number or an individual taxpayer identification number.

In addition, the provision clarifies that the Social Security number required to claim the child tax credit with respect to a qualifying child be issued on or before the due date for filing the return.

Increased limitation for certain charitable contributions (Act sec. 11023).—The Act increases the charitable contribution percentage limit from 50 percent to 60 percent of the contribution base (generally adjusted gross income) for certain contributions of cash to public charities. The provision corrects the coordination of the 60-percent limit applicable to cash contributions and the 50-percent limit applicable to non-cash contributions. Under the provision, the 60-percent limit for cash contributions is reduced by the amount of certain non-cash contributions. Thus, the 50-percent limit applicable to non-cash contributions is not reduced by the amount of cash contributions allowed under the 60-percent limit. The provision also makes a related conforming change to the 30-percent limit applicable to certain charitable contributions to organizations that are not public charities.

Exclusion from income for death or disability discharge of student indebtedness (Act sec. 11031).—The provision clarifies the exclusion from income for discharges of student loans by including within the exclusion Parent Plus loans that are discharged on account of the death or disability of the student to which such loan relates.

Retention of gross income amount for non-child dependents (Act sec. 11041).—In order for an individual be a qualifying relative of a taxpayer (and, thus, a dependent of the taxpayer), the individual's gross income must be less than a threshold equal to the personal exemption amount. The Act, however, temporarily reduces the personal exemption amount to \$0. The provision clarifies that, as under 2017 law, an individual other than a child may qualify as a dependent of another taxpayer if such individual has gross income not in excess of \$4,150. This amount is indexed for inflation. The provision also conforms the rounding rule increment for purposes of section 6334(d)(4)(C) to \$50.

Deduction for State and local taxes (Act sec. 11042).—The Act limits the deduction for taxes in the case of an individual for taxable years beginning after 2017 and before 2026. The provision clarifies that the aggregate amount of the deductions allowed to a taxpayer for a taxable year under chapter 1 (not solely under section 164) on account of taxes described in paragraph (1), (2), or (3) of section 164(a) or paragraph (5) of section 164(b) may not exceed \$10,000 (\$5,000 in the case of a married individual filing a separate return). Thus, for example, the deduction under section 216(a)(1) is subject to limitation. The treatment of business and investment taxes remains unchanged.

The provision clarifies that a prepayment of income tax in taxable years beginning in 2017 is treated as paid (and thus subject to limitation) on the last day of the taxable year for which the tax is imposed.

Suspension of exclusion for qualified bicycle commuting reimbursement (Act sec. 11047).—For taxable years beginning after 2017 and before 2026, the Act suspends the exclusion from income for any qualified bicycle commuting reimbursement, which is one of the items considered a qualified transportation fringe under section 132(f)(1). The provision corrects the language to restore qualified bicycle commuting reimbursements within the definition of qualified transportation fringes and to instead strike qualified bicycle commuting reimbursements from the list of qualified transportation fringes eligible for income exclusion.

Minimum tax credit of corporations (Act sec. 12002).—Effective for taxable years beginning after 2021, the provision provides that the limitation under section 383 on certain credits following a corporate ownership change does not apply to corporate minimum tax credits. Similarly, the provision eliminates a related rule providing for the treatment of credits under section 381(c)(25). In connection with the Act’s repeal of the corporate minimum tax, corporate minimum tax credits are utilized in taxable years beginning before 2022 under a schedule provided in section 53; consequently, a section 381 carryover and a section 383 limit on these credits do not have any effect for taxable years beginning after 2021.

Modifications of rules for expensing depreciable business assets (Act sec. 13101).—As amended by the Act, section 179(e) (as redesignated in Pub. L. No. 115-141) permits taxpayers to elect section 179 expensing for any of the following improvements to nonresidential real property placed in service after the date such property was first placed in service: roofs; heating, ventilation, and air-conditioning property; fire protection and alarm systems; and security systems. The provision clarifies that such improvements must be made by the taxpayer in order to constitute qualified real property eligible for section 179 expensing.

Temporary 100-percent expensing for certain business assets (Act sec. 13201).—The Act provides a transition rule that permits a taxpayer to elect to apply a 50-percent allowance instead of the 100-percent allowance for a taxpayer’s first taxable year ending after September 27, 2017 (see sec. 168(k)(10)). The provision clarifies that, as a result of the phase-down percentages provided in section 168(k)(6) and (8), the transition rule is only available for qualified property acquired after September 27, 2017, and placed in service by the taxpayer during the first taxable year ending after such date and beginning before January 1, 2018.

The applicable percentages of prior-law section 168(k)(6) were the subject of a technical correction in the Consolidated Appropriations Act, 2018 (sec. 101(d)(3) of Pub. L. No 115-141). As a replacement for section 168(k)(6), section 168(k)(8) was enacted in section 13201 of the Act, and relates to the “applicable percentage” for certain qualified property acquired before September 28, 2017, and placed in service after September 27, 2017. However, the effective date of section 13201 of the Act is incomplete and provides that the provision applies to qualified property both acquired and placed in service after September 27, 2017 (see sec. 13201(h)(1) of the Act), and to specified plants planted or grafted after such date (see sec. 13201(h)(2) of the Act). The provision corrects the effective date of section 13201 of the Act by also providing (in a new sec. 13201(h)(3)) that the rules of present-law section 168(k)(8) apply to property acquired before September 28, 2017, and placed in service after September 27, 2017. For this purpose, property is not treated as acquired after the date on which a written binding contract is entered into for such acquisition.

The Act excludes from the definition of qualified property eligible for the 100-percent allowance any property (i) which is primarily used in a trade or business described in section 163(j)(7)(A)(iv) (e.g., a regulated public utility), or (ii) used in a trade or business that has had floor plan financing indebtedness (as defined in section 163(j)(9)), if the floor plan financing interest related to such indebtedness was taken into account under section 163(j)(1)(C) (see sec. 168(k)(9)). The provision clarifies that this exclusion for certain businesses not subject to the interest limitation applies to property placed in service in taxable years beginning after December 31, 2017.

Applicable recovery period for real property (Act sec. 13204).—The Act inadvertently omits language in section 168(e)(3)(E) and (g) providing a recovery period for qualified improvement property for cost recovery purposes. The provision clarifies that qualified improvement property is 15-year property under the modified accelerated cost recovery system (“MACRS”) and 20-year property under the alternative depreciation system (“ADS”).

The provision clarifies that the 15-year MACRS (or 20-year ADS) recovery period only applies if the qualified improvement property is made by the taxpayer.

As amended by the Act, section 168(g)(8) requires a real property trade or business (as defined in section 163(j)(7)(B)) electing out of the interest limitation under section 163(j) to use ADS to depreciate any of its nonresidential real property, residential rental property, and qualified improvement property. The provision clarifies that an electing real property trade or business is also required to use ADS for any of its qualified leasehold improvement property, qualified restaurant property, and qualified retail improvement property (as such terms are defined in section 168(e) before the enactment of the Act) that was placed in service before 2018.

Research and experimental expenditures (Act sec. 13206).—The Act requires specified research or experimental expenditures to be capitalized and amortized ratably over a five-year period, effective for amounts paid or incurred in taxable years beginning after December 31, 2021. The provision makes conforming changes to the alternative minimum tax rules for individuals and to the rules for making adjustments to basis.

Limitation on deduction for interest (Act sec. 13301).—The Act provides new interest deduction limitation rules under section 163(j) that limit taxpayers’ ability to deduct business interest in certain cases. In the case of a partnership, section 163(j)(4) applies the interest limitation at the partnership level and provides carryforward rules in the event the partnership has disallowed business interest, as well as rules permitting augmentation of a partner’s business interest limitation in the event the partnership’s business interest income or adjusted taxable income exceeds the amount necessary to fully offset the partnership’s business interest for the taxable year.

First, the provision clarifies the operation of the rules applicable to partnerships and S corporations under section 163(j)(4). The provision clarifies the rules applicable to business interest income of a partnership, generally providing that such income may not be double-counted for purposes of calculating both the partner’s business interest limitation and the partnership’s business interest limitation, but also providing that any business interest income of the partnership which is not used to offset partnership business interest or previously disallowed business interest attributable to the partnership may augment the partners’ business interest limitations for the taxable year. The provision also clarifies that a partner in a partnership may deduct disallowed business interest allocated to the partner by the partnership against excess taxable income and excess business interest income allocated to the partner by the partnership, but not against other income. Furthermore, the amount of disallowed business interest a partner may deduct against excess taxable income allocated to the partner by the partnership is not reduced in the event the partner has negative adjusted taxable income before augmentation by excess taxable income of the partnership. The provision provides allocation rules with respect to

the calculation of the partners' distributive shares of disallowed business interest, excess taxable income, and excess business interest income.

Second, the provision clarifies that the interest limitation applies before the limitations imposed under sections 465 (relating to at-risk rules) and 469 (relating to passive activity loss rules).

Modification of net operating loss (NOL) deduction (Act sec. 13302).—The Act limits the NOL deduction to 80 percent of taxable income (determined without regard to the NOL deduction) and provides generally that NOL carryovers may be carried forward indefinitely.

The provision clarifies that the taxable income limitation in section 172(a)(2) is calculated without regard to the deductions allowable under sections 172, 199A, and 250.

The provision clarifies the operation of the rules relating to the taxable years to which losses may be carried back and carried forward.

The provision clarifies the operation of the 80-percent limitation with respect to taxpayers with NOL carryovers both from taxable years beginning before January 1, 2018, and from taxable years beginning after December 31, 2017. Specifically, the provision calculates the 80-percent limitation after reduction of taxable income by pre-2018 NOL carryovers. The provision also clarifies the method for calculating NOL carrybacks and carryovers under section 172(b)(2)(C) to ensure proper coordination with the taxable income limitation of section 172(a)(2).

The provision makes conforming changes to the rules regarding the determination of taxable income of holders of residual interests in REMICs.

The provision clarifies that the amendments relating to NOL carryovers and carrybacks apply to NOLs arising in taxable years beginning after December 31, 2017.

The provision also clarifies that the amendments relating to the 80-percent taxable income limitation apply to taxable years to which NOLs arising in taxable years beginning after December 31, 2017, may be carried.

Limitation on deduction by employers of expenses for fringe benefits and increase in unrelated business taxable income for disallowed fringe benefits (Act secs. 13304 and 13703).—The Act disallows deductions for expenses associated with providing qualified transportation fringes under section 274(a). The Act also increases unrelated business taxable income of a tax-exempt organization to the extent that a deduction is not allowable by reason of section 274 for any item with respect to qualified transportation fringe benefits or any parking facility used in connection with qualified parking.

The prior law exception under subsection 274(e)(2) for expenses properly treated as compensation to employees is intended to apply also to qualified transportation fringes. Accordingly, the provision corrects the list of items eligible for the exception under subsection (e)(2) to include qualified transportation fringes.

In addition, the provision conforms the language relating to the deduction disallowance for items with respect to qualified transportation fringes and parking facilities used in connection with qualified parking with the language of section 512(a)(7) relating to the increase in unrelated business taxable income of a tax-exempt organization in connection with such items. This includes conforming language relating to regulations or other guidance that the Secretary shall issue, as necessary or appropriate, to carry out the changes made by the Act, including regulations or other guidance to provide for the appropriate allocation of depreciation and other costs with respect to facilities used for parking.

The Act disallows deductions for expenses associated with entertainment, amusement, or recreation activities, and facilities used in connection with such activities (collectively, “entertainment expenses”), under section 274(a). Certain exceptions under prior law are retained, but not those for entertainment expenses under subsection (e)(5) directly related to business meetings of a taxpayer’s employees, stockholders, agents, or directors, or under subsection (e)(6) directly related and necessary to attendance at business meetings or conventions of organizations described in section 501(c)(6) and exempt from taxation under section 501(a). The provision clarifies the language consistent with Congress’ intent to disallow a deduction for such entertainment expenses (while retaining the 50 percent deduction for meal expenses under these particular exceptions).

Attorneys’ fees in cases involving nondisclosure agreements (Act sec. 13307).—New section 162(q), as added by the Act, could be read to prohibit both defendants and plaintiffs from deducting attorneys’ fees related to a settlement or payment relating to a claim of sexual harassment or sexual abuse that is subject to a nondisclosure agreement. The provision clarifies that section 162(q) does not apply to plaintiffs and therefore does not affect the deductibility of plaintiffs’ attorneys’ fees.

Recharacterization of certain gains in the case of partnership profits interests held in connection with performance of investment services (carried interest) (Act sec. 13309).—New section 1061, as added by the Act, provides for a three-year holding period in the case of certain net long-term capital gain with respect to any applicable partnership interest held by the taxpayer. The provision supplies a definition of a related person for purposes of the rule defining an applicable partnership interest in section 1061(c)(1), which is a related person within the meaning of section 267(b) or 707(b). The provision provides that partner services in an applicable trade or business (as defined in section 1061(c)(2)) are attributed to the partnership in which he or she is a partner.

Employer credit for paid family and medical leave (Act. Sec. 13403).—The Act allows eligible employers to claim a general business credit for certain wages paid in taxable years beginning after 2017 and before 2020 to qualifying employees for family and medical leave. Among other requirements, an “eligible employer” must have in place a written policy that meets certain requirements. As enacted, all persons treated as a single employer under an aggregated group (as defined in section 52(a) and (b)) are treated as a single taxpayer. The provision instead treats all members of such an aggregated group as a single employer (rather than a single taxpayer). However, it permits an employer who has a written policy in place to otherwise qualify for the credit notwithstanding that all members of the aggregated group do not have a written policy in place, as long as the terms (such as the offer or the actual benefit) of the

employer's paid leave are not discriminatory based on taking into account all employees of all employers otherwise treated as a single employer.

The provision also corrects the language regarding the limitation on the credit to clarify that it applies to wages taken into account with respect to the normal hourly wage rate of an employee for which the family and medical leave is taken.

Net operating losses of life insurance companies (Act sec. 13511).—The provision corrects obsolete references to the prior-law term “loss from operations” and substitutes the term “net operating losses.” The provision also corrects cross references.

Repeal of small life insurance company deduction (Act sec. 13512).—The provision clarifies that the prior-law rule that provides that the principles of section 1503(c) (relating to limitations on losses in consolidation) apply with respect to losses from noninsurance businesses is retained. Thus, the provision applies the rule (formerly in section 806(b)(3)(C)) for purposes of determining life insurance company taxable income in section 801(b). The provision also makes conforming changes reflecting the Act's repeal of the definition of the term tentative life insurance company taxable income (a term formerly defined in section 806).

Computation of life insurance tax reserves (Act sec. 13517).—The provision corrects a reference in section 817A(e)(2) (relating to modified guaranteed contracts) which incorrectly refers to an interest rate in prior-law section 807(d)(2)(B) (relating to life insurance tax reserves). Under the provision, the reference is to section 808(g), which is where prior-law interest rates have been moved.

Percentages for capitalization of certain policy acquisition expenses (Act sec. 13519).—The Act amends the capitalization percentages for policy acquisition expenses with respect to specified insurance contracts described in section 848. The percentages are 2.09 percent for annuity contracts, 2.45 percent for group life insurance contracts, and 9.2 percent for other specified insurance contracts. The provision corrects erroneous references in the new language. The Act's transition rule continuing the amortization period for expenses first capitalized in a pre-2018 year is clarified to refer to the 120-month amortization period or the 60-month amortization period, as the case may be.

Modification of discounting rules for property and casualty insurance companies (Act sec. 13523).—The Act extends the 10-year period under the reserve discounting rules applicable to property and casualty insurance companies. The provision clarifies that the lines of business to which the 10-year period, with any extensions, applies include reinsurance and international lines of business, and provides a rule similar to prior law permitting the Treasury Department to determine payment patterns for international and reinsurance lines of business based on the combined losses for all lines of business to which the 10-year period applies.

Modification of treatment of S corporation conversions to C corporations (Act sec. 13543).—The Act provides that cash distributions by an eligible terminated S corporation after the post-termination transition period are treated as made from the accumulated adjustments account (“AAA”) and are chargeable to accumulated earnings and profits (“E&P”) in the same ratio that the AAA bears to the accumulated E&P. The provision clarifies that a corporation may

elect out of this treatment. The provision clarifies that the Secretary has authority to prescribe rules for allocating between the AAA and E&P in the case of former C corporations with both current and accumulated E&P.

Excise tax on excess tax-exempt organization executive compensation (Act sec. 13602).—The Act imposes an excise tax on certain compensation paid to a covered employee by an applicable tax-exempt organization. The term applicable tax-exempt organization is defined to include certain governmental organizations that exclude income from gross income under section 115. The provision clarifies that all State colleges and universities described in section 511(a)(2)(B) are applicable tax-exempt organizations for purposes of the new excise tax.

Reduced rate of excise tax on certain wine (Act sec. 13804).—The provision clarifies that wine producers are allowed to transfer the wine credit in the case of a transfer of wine in bond during the years that the modifications made to the wine credit by the Act are in effect.

Opportunity zones (Act sec. 13823).—The Act provides for temporary deferral of inclusion in gross income for capital gains reinvested in a qualified opportunity fund, and permanent exclusion of capital gains from the sale or exchange of an investment in the qualified opportunity fund. The provision clarifies that opportunity zone benefits under section 1400Z-2 apply with respect to capital gains (not gains).

The provision also clarifies that only new or substantially improved property qualifies as opportunity zone business property.

Deduction for foreign-source portion of dividends received by domestic corporations from specified 10-percent owned foreign corporations (Act sec. 14101).—The Act provides a 100-percent dividends-received deduction to a domestic corporation for the foreign-source portion of dividends received from a specified 10-percent owned foreign corporation (the “section 245A DRD”). For purposes of the corporate alternative minimum tax (“AMT”) (which the Act repealed for taxable years beginning after December 31, 2017) as applicable to certain fiscal-year taxpayers for their 2017 taxable year, the provision clarifies that a section 245A DRD is not a noncash deduction that would result in an adjusted current earnings (ACE) adjustment for corporate AMT purposes.

Under section 245A(e), no section 245A DRD is allowed for any hybrid dividend. The provision clarifies that a hybrid dividend is any dividend received from a CFC for which the CFC received a deduction or other tax benefit.

The provision clarifies how the section 245A DRD works in the case of tiered foreign corporations. Under the provision, a corporate U.S. shareholder of a CFC that receives a dividend from a specified 10-percent owned foreign corporation is allowed the section 245A DRD with respect to the subpart F inclusion attributable to such dividend in the same manner as if such subpart F inclusion were a dividend received directly from the specified 10-percent owned foreign corporation.

In general, under section 951(a), a U.S. shareholder of a CFC currently includes in gross income its pro rata share of the CFC’s subpart F income. However, only a U.S. shareholder that

owns stock (directly or indirectly) in the foreign corporation on the last day, in the foreign corporation's taxable year, on which the foreign corporation is a CFC is required to include such amounts. The U.S. shareholder generally includes its pro rata share of section 951(a) items for the entire portion of the year during which the foreign corporation is a CFC. The U.S. shareholder's pro rata share is reduced, however, by dividends during the year to another owner of the same CFC stock, but only to the extent those dividends do not exceed the subpart F income attributable on a pro rata basis to the period that the U.S. shareholder did not own the stock. The provision modifies the pro rata share rules by allocating section 951(a) items in certain cases to a U.S. shareholder with respect to stock the shareholder does not hold as of the last day, in the foreign corporation's taxable year, on which the foreign corporation is a CFC. Specifically, the provision allocates section 951(a) items to a U.S. shareholder to the extent such U.S. shareholder received a distribution of current earnings and profits that: (1) would give rise to a deduction under section 245A(a), or (2) in the case of a dividend paid directly or indirectly to a CFC with respect to stock owned by the shareholder within the meaning of section 958(a)(2), would not result in subpart F income to the CFC by reason of section 954(b)(4), (c)(3), or (c)(6). Consistent with current law, the provision allocates the remaining section 951(a) items to U.S. shareholders in proportion to their ownership on the last day, in the foreign corporation's taxable year, on which the foreign corporation is a CFC.

Special rules relating to sales or transfers involving specified 10-percent owned foreign corporations (Act sec. 14102).—Under section 964(e)(1), if a CFC sells or exchanges stock in any other foreign corporation, gain recognized on such sale or exchange is included in the gross income of such CFC as a dividend to the same extent that it would have been so included under section 1248(a) if such CFC were a U.S. person. (Under section 1248(a), if a U.S. person sells or exchanges stock in a foreign corporation with respect to which the U.S. person is a U.S. shareholder, gain recognized on such sale or exchange generally is included in the income of such U.S. person as a dividend.) Section 964(e)(4) coordinates the general rule described above with section 245A. In general, under section 964(e)(4)(A), the foreign-source portion of the dividend is treated as subpart F income of the selling CFC, and a U.S. shareholder with respect to the selling CFC includes in gross income an amount equal to its pro rata share of the amount treated as subpart F income. The provision clarifies that the amount included in gross income by the U.S. shareholder is treated as a dividend to which section 245A applies.

In addition, the provision clarifies that, if an amount treated as a dividend under section 964(e)(1) is a hybrid dividend (under section 245A(e)(4)), then the rules of section 964(e)(4)(A) (described above) do not apply.

Treatment of deferred foreign income on transition to participation exemption system (Act sec. 14103).—Section 965(b)(4)(B) provides that to the extent a specified earnings and profits deficit of an E&P deficit foreign corporation is allocated to a deferred foreign income corporation, the earnings and profits of the E&P deficit foreign corporation are increased with respect to the tax year to which section 965 applies. The timing of this increase is relevant in determining whether any deemed paid foreign tax credits could arise with respect to a fiscal year

E&P deficit foreign corporation. The provision clarifies that the increase to earnings and profits does not occur for purposes of 902.

The provision clarifies that in the case of an individual who is a U. S. shareholder of a deferred foreign income corporation, the section 965(c)(1) deduction is allowed in determining the individual's adjusted gross income and, as a consequence, such deduction is not subject to rules applicable to itemized deductions.

The provision amends section 965(g) to clarify that no credit is allowed under section 901 for foreign income taxes paid or accrued (or treated as paid or accrued) with respect to distributions of previously taxed amounts described in section 965(b)(4)(A).

The provision clarifies the term "net tax liability" for purposes of section 965(h) in two ways. First, net tax liability is the excess of total net income tax for the year over the net income tax for the year determined without regard to the section 965 inclusion and without regard to any income, deductions or credits properly attributable to a dividend received by a U.S. shareholder from a deferred foreign income corporation. Second, it clarifies that net tax liability that may be spread over installments does not include AMT tax liability.

The provision permits refunds and credits to taxpayers that elect to pay the net tax liability within the meaning of section 965(h) ("transition tax") in installments. First, for purposes of determining whether an overpayment exists within the meaning of section 6402, no installment for which the payment due date prescribed by section 965(h) has not yet occurred is taken into account as a tax liability. Similarly, for purposes of adjustments to estimated tax under section 6425 as well as penalties under sections 6654 and 6655 for failure to pay estimated tax, no installment under section 965(h) is considered a tax imposed by sections 1 and 11 or subchapter L of chapter 1. In addition, for installments for which the due date has not yet occurred, the provision suspends the requirement of section 6403 that a payment made with respect to a tax payable in installments in excess of the installment due be credited toward a future installment of the same tax. As a result of the above-described exceptions, an electing taxpayer may have an overpayment for a year in which total remittances exceed the tax liability for the year, exclusive of any portion of the transition tax for which the payment due date is not yet past, the outstanding liability for future installments of the transition tax that is not satisfied by such remittances for the year remains a liability for all other purposes, and the excess amount remitted may be refunded, credited or applied to other obligations of the taxpayer, whether or not arising in the same taxable year. Interest is not allowable or payable on overpayments that arise by reason of this provision and are paid or credited within 45 days after the date of enactment of this technical correction. For such overpayments paid or credited more than 45 days post-enactment, no interest is payable with respect to the period before the date of enactment of this technical correction.

The provision clarifies that the scope of section 965(k), which extends the limitations period for assessment of the transition tax, encompasses the period in which adjustments may be made with respect to partnership returns.

The provision clarifies that investors of a REIT electing under section 965(m) to defer recognition of the section 965 inclusion may not also make an election under section 965(h).

Subparagraph (B) of section 965(m)(2) is reorganized and a clerical correction is made to refer to subsection (h) (election to pay liability in installments) rather than subsection (g).

The provision clarifies that the taxpayer's election under section 965(n) applies to a taxpayer's current-year net operating loss as well as to net operating loss carryovers. For an electing taxpayer, deductions, whether for current year expenses or for a net operating loss carryover, cannot reduce taxable income below zero before taking into account the section 965(a) inclusion amount net of the section 965(c) deduction.

The provision also strikes an erroneous cross-reference to subsection (b) of section 960 in section 965(n)(2).

The provision also includes special rules for the treatment of extraordinary earnings and profits of a fiscal year controlled foreign corporation during the disqualified period beginning after the final measurement date (December 31, 2017) applicable to that foreign corporation for determination of its accumulated post-1986 deferred foreign income under section 965 and ending with the last day of such corporation's taxable year that immediately precedes the first taxable year to which section 951A applies. Such extraordinary earnings and profits from extraordinary dispositions during the disqualified period are treated as additional subpart F income of the foreign corporation for the year in which it reported its section 965 inclusion. The increased section 965 inclusion results in an additional income inclusion for U.S. shareholders that are domestic corporations. The U.S. shareholders may elect to defer assessment and payment of the net tax liability arising from such inclusion in income until the year in which a triggering event occurs. Several triggering events, such as loss of status as a controlled foreign corporation, are identified in the provision, which also authorizes the Secretary to identify in published guidance additional events that warrant treatment as triggering events. The resulting increased tax liability is assessed for the year in which the triggering event occurs and may be payable in installments upon election, with certain additional conditions.

Current year inclusion of global-intangible low-taxed income (GILTI) (Act sec. 14201).—The provision clarifies that the section 907(f) carryback and carryover rules for foreign oil and gas taxes do not apply to taxes paid or accrued with respect to GILTI.

The provision clarifies the section 951A(d)(2)(B) rules relating to the fraction of the adjusted basis in specified tangible property that should be included in qualified business asset investment when such property produces both tested and non-tested income. Specifically, the provision clarifies that the gross income measure in the numerator of the fraction is the gross income included in determining tested income (*i.e.*, not reduced by allocable deductions).

The provision moves the grant of regulatory authority under section 951A(d)(4) to new section 951A(g) to clarify that such authority is not limited to section 951A(d).

The provision clarifies that the rules in section 960(c) that allow taxpayers to increase their foreign tax credit limitation when making distributions out of previously taxed earnings and profits apply to distributions out of earnings and profits that were previously taxed as GILTI.

The provision clarifies that 80 percent of foreign income taxes paid or accrued (or treated as paid or accrued) with respect to distributions out of income that was previously taxed as

GILTI are creditable under section 901, and that the amount not creditable is not deductible under section 901.

The provision clarifies that the rules in section 961(c) apply in determining the basis of stock and certain property and the recognition of gain for all purposes of the Code. The provision also clarifies that gain may be recognized by reason of sections 961(b) and (c) upon a distribution of previously taxed earnings and profits by a lower-tier CFC to an upper-tier CFC where the amount of the distribution exceeds the upper-tier CFC's basis in the stock of the lower-tier CFC.

Taxable income limitation to deduction for foreign-derived intangible income (FDII) and GILTI (Act sec. 14202).—Under the Act, the section 250 deduction has a taxable income limitation (section 250(a)(2)) in order to prevent the deduction from generating losses. The deduction applies to three items: FDII, GILTI, and the section 78 gross-up attributable to a GILTI inclusion. The provision clarifies that the taxable income limitation accounts for the section 78 gross-up in addition to FDII and GILTI. In addition, the provision clarifies that the section 250 deduction cannot be negative as a result of the operation of the taxable income limitation.

The provision adds the following items of income to the list of items excluded in determining deduction eligible income: any income received or accrued that is of a kind that would be foreign personal holding company income (as defined in section 954(c)); any amount included under section 1293; and any amount included in the gross income of a corporation with respect to any transaction if any amount could be excluded from the gross income of the corporation as a result of the benefit for extraterritorial income.

The provision clarifies that the taxable income limitation under section 613A(d) is calculated without regard to any deduction allowable under section 250.

Modification of stock attribution rules for determining CFC status (Act sec. 14213).—The Act repealed section 958(b)(4), thus requiring attribution of certain stock of a foreign corporation owned by a foreign person to a related U.S. person for purposes of determining whether the related U.S. person is a U.S. shareholder of the foreign corporation and, therefore, whether the foreign corporation is a CFC. The provision restores the language of section 958(b)(4) as a general rule but provides an exception for limited downward attribution that is consistent with the narrow intent of the Act. Under the provision, a U.S. person that would directly or indirectly own more than 50 percent of a foreign corporation if downward attribution is applied is taxable on the subpart F income of the foreign corporation as if such corporation were a controlled foreign corporation, and the foreign corporation is treated as a controlled foreign corporation of which the U.S. person is a U.S. shareholder for purposes of applying sections 951A and 965 to the U.S. person. The provision grants Treasury regulatory authority to determine when any such U.S. person or foreign corporation should be considered a U.S. shareholder or controlled foreign corporation, respectively, and to prescribe anti-avoidance measures consistent with the intent of the provision.

Modification of definition of U.S. shareholder (Act sec. 14214).—The Act modifies section 951(b) to expand the definition of U.S. shareholder to include 10-percent value

shareholders (in addition to 10-percent vote shareholders). The provision modifies section 1248 to apply the new definition of U.S. shareholder during periods in which that definition applies.

Repeal of section 902 indirect foreign tax credits and determination of section 960 credit on current year basis (Act sec. 14301).—The provision strikes the reference to section 960(b) in section 78 to clarify that foreign tax credits taken by reason of withholding tax imposed on a distribution of previously taxed income do not result in an additional section 78 gross-up.

The section 78 gross-up is generally treated as a dividend, and is not intended to benefit from the section 245A DRD. The provision providing that the section 78 gross-up is not treated as a dividend for purposes of section 245A is generally effective for taxable years of foreign corporations beginning after December 31, 2017. Section 245A, however, is effective for dividend distributions made after December 31, 2017. The provision clarifies that section 78 gross-up amounts are not eligible for the section 245A DRD in the case of fiscal year taxpayers for their 2017 taxable year.

The provision clarifies that the section 78 gross-up, including the section 78 gross-up attributable to GILTI, should be assigned to the category to which the taxes relate.

The provision clarifies that financial services income (as defined in section 904(d)(2)(D)) is not treated as passive category income but can be treated as general category, section 951A category, or foreign branch category income, as the case may be.

The provision amends section 953 to allow a corresponding section 960 deemed-paid credit in cases where the definition of CFC has been expanded.

The provision removes the parenthetical “other than section 960” in section 958(a)(1) to clarify that section 958(a) applies for purposes of section 960 when applying the new expanded U.S. shareholder definition under section 951(b).

Amendment relating to the Working Families Tax Relief Act of 2004

Age determination under child tax credit (Act sec. 204).—The provision clarifies that the time for determining the child’s age for purposes of the child tax credit is at the close of the taxable year.

Clerical and deadwood-related corrections

The discussion draft includes clerical corrections and deadwood-related corrections.

ESTIMATED REVENUE EFFECT OF THE DISCUSSION DRAFT

The discussion draft, which contains only technical, clerical, and deadwood-related corrections, has no revenue effect.