DESCRIPTION OF THE TAX PROVISIONS OF PUBLIC LAW 116-136, THE CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY (“CARES”) ACT

Prepared by the Staff
of the
JOINT COMMITTEE ON TAXATION

April 22, 2020
JCX-12-20

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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, describes the tax provisions of the Coronavirus Aid, Relief, and Economic Security ("CARES") Act (the "Act").[2]

For each provision, this document includes a description of present law, a description of the provision, and the effective date. Unless otherwise noted, the description of present law with respect to each provision 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.

The Act includes two Divisions, A and B. Division B consists of emergency appropriations for coronavirus health response and agency operations. All the provisions described in this document are in Division A (Keeping Workers Paid and Employed, Health Care System Enhancements, and Economic Stabilization).[3]

Section references are to the Internal Revenue Code of 1986, as amended (the "Code"), unless otherwise stated. References to the Secretary are to the Secretary of the Treasury, unless otherwise stated.

A table[4] that shows the estimated revenue effects of the CARES Act and that was published after the Senate passed the Act and the House of Representatives scheduled debate on the Act is included in the appendix.

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[1] This document may be cited as follows: Joint Committee on Taxation, *Description of the Tax Provisions of Public Law 116-136, the Coronavirus Aid, Relief, and Economic Security ("CARES") Act* (JCX-12-20), April 22, 2020.

[2] Public Law 116-136. On March 25, 2020, the Senate passed an amendment in the nature of a substitute to H.R. 748. On March 27, 2020, the House passed the bill and the President signed the bill. Neither the Senate amendment nor the House bill has contemporaneous legislative history such as a committee report or a technical explanation.

[3] On April 21, 2020, the Senate by unanimous consent passed an amendment in the nature of a substitute to H.R. 266, the "Paycheck Protection Program and Health Care Enhancement Act." That bill provides $484 billion in additional funding with respect to amounts authorized and appropriated for commitments under the CARES Act and for other purposes. The House is expected to approve the legislation on April 23 (the day after the publication of this document). The pending legislation makes no amendments to the Code.

[4] Joint Committee on Taxation, *Estimated Revenue Effects of the Revenue Provisions Contained in an Amendment in the Nature of a Substitute to H.R. 748, the "Coronavirus Aid, Relief, And Economic Security ('CARES') Act," as Passed by the Senate on March 25, 2020, and Scheduled for Consideration by the House of Representatives on March 27, 2020* (JCX-11-20), March 2020.

TITLE II – ASSISTANCE FOR AMERICAN WORKERS, FAMILIES, AND BUSINESSES

A. Rebates and Other Individual Provisions (Subtitle B)

1. 2020 Recovery Rebates for Individuals (sec. 2201 of the Act and sec. 6428 of the Code)

Present Law

In general

A United States citizen or resident alien generally is subject to the U.S. individual income tax on his or her worldwide taxable income. Taxable income equals the taxpayer's total gross income less certain exclusions, exemptions, and deductions. In determining taxable income, an individual may claim either a standard deduction or itemized deductions.

An individual's income tax liability is determined by computing his or her regular income tax liability (including additional tax liabilities such as self-employment taxes or household employment taxes) and, if applicable, alternative minimum tax liability. After computing income tax liability, all withholding and estimated tax payments as well as other available credits are applied to determine whether there is a balance due (*i.e.*, tax owed for that year) or an overpayment that may be refunded for that taxable year.

There is no permanent provision under present law that authorizes rebates to individuals during a taxable year. As part of the Economic Stimulus Act of 2008, Congress enacted a temporary stimulus provision under former section 6428. Former section 6428 is described below.

Income tax liability

Regular income tax liability is determined by applying the regular income tax rate schedules (or tax tables) to the individual's taxable income. The regular income tax rate schedules are divided into several ranges of income, known as income brackets, and the statutory tax rate on an additional dollar of income (referred to as the "marginal tax rate") increases as the individual's income increases from one bracket to the next. The income bracket amounts are adjusted annually for inflation. Separate rate schedules apply based on filing status: single individuals (other than heads of households and surviving spouses), heads of households, married individuals filing joint returns (including surviving spouses), married individuals filing separate returns, and estates and trusts.

Lower rates may apply to capital gains and certain dividends ("qualified dividends") than the rates generally applicable to wages and other so-called "ordinary income." Additional taxes not based on the income brackets may also be owed by the individual for the taxable year, such as self-employment tax or household employment taxes.

Refunds and refundable tax credits

An individual may reduce his or her income tax liability by available tax credits. In some instances, a credit is wholly or partially refundable. That is, if the amount of a taxpayer's refundable credits exceeds tax liability (net of other nonrefundable credits), credits create an overpayment, which may generate a refund. A refund is authorized for a taxable year only if an overpayment exists (*i.e.*, if the amounts paid or deemed paid exceed the tax liability for that year). The refundable tax credits that may generate a refund include (i) actual remittances or withheld taxes and (ii) credits that deem payments to have been made.[5] Two major refundable credits are the child tax credit and the earned income tax credit.

All other credits are nonrefundable in that they may reduce or eliminate income tax liability but may not cause this liability to decrease below zero. Even if an overpayment exists for a year, a refund may be withheld to offset against tax liabilities from other taxable periods[6] or against certain nontax debts.[7]

Child tax credit

An individual may claim a tax credit of $2,000 for each qualifying child under the age of 17.[8] Generally, under section 152, a qualifying child must have the same principal place of abode as the taxpayer for more than half of the taxable year, must not provide over half of his or her own support for the taxable year, must not file a joint return for the taxable year, and must satisfy a relationship test.[9] To satisfy the relationship test, the child must be the taxpayer's son, daughter, stepson, stepdaughter, brother, sister, stepbrother, stepsister, eligible foster child, or a descendant of any such individual. The credit is phased out and reduced to zero at higher-income levels. A child who is not a citizen, national, or resident of the United States may not be a qualifying child.

No credit is allowed unless the individual includes the name and Social Security Number ("SSN") of each qualifying child on the individual's income tax return.[10] For this purpose, as described in section 24(h)(7), the SSN must be issued by the Social Security Administration before the due date of the return (including extensions) and must be issued 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.

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[5] Secs. 31-37.

[6] Sec. 6402(a) allows such offset at the discretion of the Secretary.

[7] Sec. 6402(c), (d), (e), and (f).

[8] Sec. 24.

[9] Sec. 152(c).

[10] Sec. 24(e) and (h)(7).

To the extent the child tax credit exceeds the taxpayer's tax liability, the taxpayer is eligible for a refundable credit (the additional child tax credit) equal to 15 percent of earned income in excess of $2,500,[11] not to exceed $1,400 per child in 2020. The maximum amount of the refundable portion of the credit is indexed for inflation.

Tax treatment of the U.S. territories

Citizens of the United States are generally subject to U.S. income tax on their worldwide income whether they live in one of the 50 States, the District of Columbia, a U.S. territory, or another country. Residents of the U.S. territories are generally subject to the Federal income tax system based on their status as U.S. citizens or residents in the territories, with certain special rules for determining residence and source of income specific to the territory. Broadly, a *bona fide* individual resident of a territory is exempt from U.S. tax on income derived from sources within that territory but may be subject to U.S. tax on U.S.-source and non-territory-source income.[12]

The application of the Federal income tax rules to the territories varies from one territory to another. Three territories, Guam, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands, are referred to as mirror Code territories because the Code serves as the internal tax law of those territories (substituting the particular territory for the United States wherever the Code refers to the United States). A resident of one of those territories generally files a single tax return only with the territory of which the individual is a resident, and not with the United States. American Samoa and Puerto Rico, by contrast, have their own internal tax laws and are referred to as non-mirror Code territories. A resident of either American Samoa or Puerto Rico may be required to file income tax returns with both the territory of residence and the United States (if, for example, the individual has income from both the territory of residence and the United States).

2008 recovery rebates for individuals

As part of the Economic Stimulus Act of 2008,[13] Congress enacted a one-time recovery rebate income tax credit for 2008. The credit was refundable, and taxpayers could receive advance refunds before filing their 2008 Federal income tax returns.

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[11] Families with three or more children may determine the additional child tax credit by taking the greater of (1) the earned income formula, or (2) the alternative formula (*i.e.*, the amount by which the taxpayer's Social Security taxes exceed the taxpayer's earned income tax credit).

[12] See secs. 931, 932, 933, and 937; see also former sec. 935 (1986), which remains in effect pursuant to section 1277(b) of Pub. L. No. 99-514, the Tax Reform Act of 1986; and the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, sec. 601(c).

[13] Pub. L. No. 110-185, sec. 101 (Feb. 13, 2008). The provision was amended in Pub. L. No. 110-245, sec. 101(a) (June 17, 2008). The provision, codified as section 6428, was later repealed as deadwood in Pub. L. No. 113-295, sec. 221(a)(112)(A) (Dec. 19, 2014).

Eligibility for and computation of rebate credit

The credit was the sum of two components, a basic component and a qualifying child component. Eligible individuals[14] were allowed a basic component equal to the greater of:

- Net income tax liability, not to exceed $600 ($1,200 in the case of a joint return), or
- $300 ($600 in the case of a joint return) if the eligible individual had (1) qualifying income of at least $3,000 or (2) a net income tax liability of at least $1 and gross income greater than the sum of the applicable basic standard deduction amount and one personal exemption (two personal exemptions for a joint return).

For these purposes, "net income tax liability" was defined as the excess of the sum of the individual's regular tax liability and alternative minimum tax over the sum of all nonrefundable credits (other than the child tax credit). Qualifying income was defined as the sum of the eligible individual's: (a) earned income; (b) Social Security benefits;[15] and (c) veteran's payments.[16] The definition of earned income had the same meaning as the definition for purposes of the earned income tax credit at that time, except that it did not include net earnings from self-employment that are not taken into account in computing taxable income (*e.g.*, taxable income excludes from net earnings from self-employment an amount equal to half of applicable self-employment taxes).[17]

If an individual was eligible for any amount of the basic component, the individual also may have been eligible for the qualifying child component. The qualifying child component was $300 for each qualifying child of such individual. For these purposes, the child tax credit definition of a qualifying child applied.

The amount of the credit was phased out at a rate of five percent of adjusted gross income ("AGI") above certain income levels. The beginning point of this phaseout range was $75,000 of AGI ($150,000 in the case of joint returns).

To be eligible for the credit, taxpayers—including both married spouses filing a joint return—had to provide an SSN. There was a limited exception to the SSN requirement where one spouse was a member of the Armed Forces of the United States at any time during the taxable year. In addition, any qualifying child had to have an SSN to qualify for purposes of the qualifying child credit component. Any credit amount allowed for a qualifying child in the case of a taxpayer claiming an individual as a qualifying child but providing an SSN for the individual

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

[15] Within the meaning of section 86(d).

[16] Under Chapters 11, 13, or 15 of title 38 of the United States Code.

[17] Earned income for the earned income tax credit was defined as (1) wages, salaries, tips, and other employee compensation, but only if such amounts are includible in gross income, plus (2) the amount of the individual's net self-employment earnings. Sec. 32(c)(2) (2008).

associated with an individual too old to be a qualifying child was treated as a mathematical or clerical error.[18]

Advance payments of recovery rebate

Most taxpayers were allowed the recovery rebate credit in the form of an advance refund amount during 2008, issued either as a direct deposit or as a check from Treasury.[19] The amount of the advance refund was computed in the same manner as the credit, except that it was done on the basis of tax returns filed for 2007 (instead of 2008). Accordingly, the advance refund amount was based on a taxpayer's filing status, number of qualifying children, AGI, net income tax liability, and qualifying income as reported for 2007. Taxpayers that did not file a 2007 income tax return did not receive the advance refund amount but could claim the recovery rebate amount on their 2008 income tax returns.[20]

On their 2008 income tax returns, taxpayers could reconcile the recovery rebate amount (using 2008 information) with any advance refund amount received during 2008 (using 2007 information). If the recovery rebate amount less the advance refund amount was a positive number (because, for example, the taxpayer paid no tax in 2007 but paid tax in 2008), the taxpayer could claim that amount as a refundable credit against 2008 tax liability. If, however, the result was negative (because, for example, the taxpayer paid tax in 2007 but owed no tax for 2008), that negative amount did not increase the taxpayer's tax liability in 2008. Failure to reduce the recovery rebate amount by any advance refund amount was treated as a mathematical or clerical error.

Additional provisions

The Economic Stimulus Act of 2008 required Treasury to make payments to the U.S. territories to compensate them for the cost of the recovery rebate credit. To each mirror Code territory (*i.e.*, Guam, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands), Treasury was to make a payment in an amount equal to the aggregate amount of the credits allowable by reason of the provision to that territory's residents against its income tax, based on information provided by the government of the respective territory. To each non-mirror Code territory (*i.e.*, American Samoa and Puerto Rico), Treasury was to make a payment in an amount estimated by Treasury as being equal to the aggregate credits that would have been

[18] In the event of a mathematical or clerical error, the IRS may assess additional tax without issuance of a notice of deficiency as otherwise required. Sec. 6213(b).

[19] The IRS issued more than $96 billion in advance payments to more than 119 million individuals during 2008. In addition, it issued more than $8.5 billion in recovery rebate credits (claimed on taxpayers' 2008 tax returns) to almost 21 million taxpayers as of April 17, 2009. Treasury Inspector General for Tax Administration, "Evaluation of the Planning, Computation, and Issuance of the Recovery Rebate Credit" (Sept. 9, 2009), available at https://www.treasury.gov/tigta/auditreports/2009reports/200940129fr.pdf (last visited April 22, 2020).

[20] IRS Notice 2008-28 created a mechanism for certain individuals not otherwise required to file an income tax return to receive an advance refund amount. Such taxpayers were instructed to file a Form 1040A with specific information entered to allow the IRS to compute the advance refund amount. Revenue Procedure 2008-21 provided additional guidance as to how the partially completed Form 1040A could be electronically filed.

allowed to residents of that territory if a mirror Code tax system had been in effect in that territory. The payment was not made to any territory without a mirror Code unless that territory had a plan that had been approved by the Secretary under which the territory would promptly distribute the payment to its residents. A taxpayer who was allowed a credit, or received a payment under a credit-related plan, from the taxpayer's territory government was not allowed the recovery rebate credit under the Code.

The Economic Stimulus Act of 2008 did not alter any of the offset authority under the law in effect at the time. As such, any overpayment resulting from the recovery rebate credit was subject to the refund offset provisions for tax debts and for certain non-tax debts.[21]

Explanation of Provision

In general

The provision provides a recovery rebate income tax credit for 2020. The credit is refundable, and taxpayers may receive an advance refund before filing a 2020 income tax return.

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.[22]

An eligible individual is any individual other than: (1) a nonresident alien; (2) an estate or trust; or (3) a dependent.[23] For these purposes, the child tax credit definition of a qualifying child applies (*i.e.*, a qualifying child as defined in section 152 and under the age of 17). Unlike the 2008 recovery rebate credit, there are no eligibility requirements related to minimum levels of qualifying income, gross income, or net tax liability.

The amount of the credit is phased out at a rate of five percent of AGI above certain income levels.[24] The beginning point of this phase out range is $150,000 of AGI for joint filers,

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[21] The Economic Stimulus Act of 2008 included a provision that any recovery rebate credit or refund allowed or made to an individual (including to any resident of a U.S. territory) was not taken into account as income and was not taken into account as resources for the month of receipt and the following two months for purposes of determining eligibility of such individual or any other individual for benefits or assistance, or the amount or extent of benefits or assistance, under any Federal program or under any State or local program financed in whole or in part with Federal funds. A similar provision applicable to all tax refunds, including advance payments of refundable credits, was subsequently codified as section 6409. See *infra* footnote 35.

[22] Sec. 6428(a).

[23] Sec. 6428(d).

[24] Sec. 6428(c).

$112,500 of AGI for head of household filers, and $75,000 of AGI for all other filers.[25] 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.

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.[26] In the case of a joint return that does not include valid identification numbers for both spouses, no credit is allowed. In addition, a qualifying child shall not be taken into account in determining the amount of the credit if a valid identification number for the child is not included on the return. For purposes of this requirement, a valid identification number is an SSN as defined for purposes of the child tax credit in section 24(h)(7), which means that it must be issued by the Social Security Administration before the due date of the return (including extensions) and must be issued 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.[27] 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, in the case of a joint return, only one spouse is required to provide a valid identification number 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.

The failure to provide a correct valid identification number is treated as a mathematical or clerical error. Any credit amount allowed for a qualifying child in the case of a taxpayer claiming an individual as a qualifying child but providing an SSN for the individual associated with an individual too old to be a qualifying child is treated as a mathematical or clerical error.

Advance payments 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 issued by Treasury during calendar year 2020.[28] 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

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[25] 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 was $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.

[26] Sec. 6428(g).

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

[28] To the extent practicable, Treasury is expected to use individuals' most recent direct deposit information to expedite delivery of these amounts rather than mailing the rebate checks. Treasury has created an online portal for individuals to provide direct deposit information to the IRS for this purpose where the IRS may not have such information. IRS, "Economic impact payments: what you need to know," IR-2020-61 (March 30, 2020), available at https://www.irs.gov/newsroom/economic-impact-payments-what-you-need-to-know (last visited April 22, 2020).

2020), if available, or otherwise on the basis of the income tax return filed for 2018.[29] 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.

If a taxpayer has not filed an income tax return for 2019 or 2018, in administering the advance refund Treasury 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.[30] 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. Such recipients automatically will receive a $1,200 payment per person but will not receive an additional amount for any qualifying children.[31] Treasury is directed to issue advance refund amounts as rapidly as possible.

In addition, Supplemental Security Income (SSI) recipients and recipients of compensation and benefit payments from the Department of Veterans Affairs (VA) will receive $1,200 payments automatically, despite not having filed an income tax return for 2019 or 2018.[32] Other taxpayers who do not have a return-filing obligation may register to receive the advance refund amount using a web tool developed by the IRS or may use a simplified Federal income tax return filing procedure for taxable year 2019.[33]

On the 2020 income tax return, a taxpayer may reconcile the recovery rebate amount (using 2020 information) with any advance refund amount received during 2020 (using 2019 or

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[29] Sec. 6428(f).

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

[31] IRS, "Economic impact payments: what you need to know," IR-2020-61.

[32] 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 (last visited April 22, 2020); 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 (last visited April 22, 2020).

[33] Rev. Proc. 2020-28; IRS, "Treasury, IRS launch new tool to help non-filers 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 (last visited April 22, 2020). Recipients of Social Security benefits, railroad retirement benefits, SSI benefits, and VA benefits also may use the web tool for non-filers to enter information regarding any qualifying children to claim the additional $500 per child payment as an advance refund if they do so prior to the issuance of the $1,200 payment.

Under the provision, 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.

2018 information).[34] If the recovery rebate amount less the advance refund amount is a positive number (because, for example, a qualifying child was born to the taxpayer during 2020), the taxpayer could claim that amount 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 any advance refund amount may claim the recovery rebate amount on his or her 2020 income tax return. Failure to reduce the recovery rebate amount by any advance refund amount is treated as a mathematical or clerical error. Otherwise, the advance refund amount has no effect on income tax returns filed for 2020; the amount is not includible in gross income, and it does not reduce withholding by employers on wages.[35]

Treasury may not issue an advance refund amount after December 31, 2020. Within 15 days of distribution of the advance refund amount Treasury 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.

Treatment of the U.S. territories

Under the provision, Treasury is directed to make payments to each mirror Code territory (*i.e.*, 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. Treasury is further directed to make similar payments to each non-mirror Code territory (*i.e.*, American Samoa and Puerto Rico).

Mirror Code territories

Treasury will 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. Such amounts will be determined by Treasury based on information provided by the government of the respective territory.

Non-mirror Code territories

To each non-mirror Code territory, Treasury will pay amounts estimated by Treasury 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 amount of each payment to a non-mirror Code territory will be 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.

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[34] Sec. 6428(e).

[35] Under section 6409, the recovery rebate credit 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.

residents were provided by the territory to its residents. This payment 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.

General rules

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 (*e.g.*, 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 payment described above from the U.S. Treasury.

Exception from refund or offset

Any overpayment resulting from the recovery rebate credit or from related payments to 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, such overpayments are not subject to offset for other taxes or non-tax debts owed to the Federal government or State governments, except for certain claims for delinquent child support payments.

Effective Date

The provision is effective on the date of enactment.

2. Special Rules for Use of Retirement Funds (sec. 2202 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 individual retirement arrangement (an "IRA") generally is included in income for the year distributed.[36] These plans are referred to collectively as "eligible retirement plans."[37] In addition, unless an exception applies, a distribution from a qualified retirement plan, a

[36] 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.

[37] Sec. 402(c)(8)(B). Eligible retirement plans also include annuity plans described in section 403(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.[38]

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.[39]

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.

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.[40] 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.

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

[39] 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.

[40] Sec. 72(p).

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.[41]

Explanation of Provision

Distributions and recontributions

The provision allows an exception to the 10-percent early withdrawal tax for a "coronavirus-related distribution" from a qualified retirement plan, a section 403(b) plan, or an IRA.[42] The provision also allows a taxpayer to include income attributable to a coronavirus-related distribution ratably over three years and to recontribute the amount of the distribution to an eligible retirement plan within three years.

A "coronavirus-related 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 January 1, 2020, and before December 31, 2020, to an individual (1) who was diagnosed with the virus SARS-CoV-2 or with coronavirus disease 2019 ("COVID-19") by a test approved by the Centers for Disease Control and Prevention; (2) whose spouse or dependent[43] is diagnosed with such virus or disease by such a test; or (3) who experiences adverse financial consequences as a result of being quarantined; being furloughed or laid off, or having work hours reduced due to such virus or disease; being unable to work due to lack of child care due to such virus or disease; closing or reducing hours of a business owned or operated by the individual due to such virus or disease; or other factors as determined by the Secretary (or the Secretary's delegate).[44] The administrator of the plan may rely on the individual's certification that he or she satisfies the conditions described in clauses (1), (2), or (3) in determining whether any distribution is a coronavirus-related distribution.

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[41] 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); and former sec. 1400Q (providing relief in response to Hurricanes Katrina, Rita, and Wilma). 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 115th Congress* (JCS–2–19), October 2019, pp. 22-26.

[42] 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).

[43] Dependent is defined in section 152.

[44] A coronavirus-related distribution is subject to income tax withholding unless the recipient elects otherwise. Mandatory 20-percent withholding does not apply.

A plan is not treated as violating any Code requirement merely because it treats a distribution as a coronavirus-related distribution, provided that the aggregate amount of such distributions from plans maintained by the employer and members of the employer's controlled group or affiliated service group does not exceed $100,000. Thus, a plan is not treated as violating any Code requirement merely because an individual might receive total distributions in excess of $100,000, taking into account distributions from plans of other employers or IRAs. A plan is not required to treat a distribution as a coronavirus-related distribution.

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

Any portion of a coronavirus-related distribution may, at any time during the three-year period beginning the day after the date on which the distribution was received, be recontributed in one or more contributions to an eligible retirement plan to which a rollover can be made. Any amount recontributed within the three-year period is treated as a rollover and thus is not includible in income.

For example, if an individual receives a coronavirus-related 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 coronavirus-related 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 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.

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[45] during the 180-day period beginning on the date of enactment is the lesser of the present value of the nonforfeitable accrued benefit of the employee under the plan or $100,000.[46] For this purpose, qualified individual has the same meaning as under the rules for coronavirus-related distributions.

In the case of a qualified individual with an outstanding loan from a qualified employer plan on or after the date of enactment, the provision delays by one year the due date for any repayment with respect to such loan, if the due date for the repayment otherwise would fall during the period beginning on the date of enactment and ending on December 31, 2020. Under the provision, any subsequent repayment dates are appropriately adjusted to reflect the delay in

[45] For this purpose, qualified employer plan is defined in section 72(p)(4).

[46] See sec. 72(p)(2)(A).

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.

Plan amendments

A plan amendment made under the provision (or a regulation interpreting the provision) may be retroactively effective if, in addition to the requirements described below, the amendment is made on or before the last day of the first plan year beginning on or after January 1, 2022 (or in the case of a governmental plan, January 1, 2024), or a later date prescribed by the Secretary. The provision treats the plan as being operated in accordance with plan terms during the period beginning with the date the provision or regulation takes effect (or the date specified by the plan if the amendment is not required by the provision or regulation) and ending on the last permissible date for the amendment to be made (or, if earlier, the date the amendment is adopted). For an amendment to be treated as retroactively effective, it must apply retroactively for that period, and the plan must be operated in accordance with the amendment during that period.

Effective Date

The provision is effective on the date of enactment.

3. Temporary Waiver of Required Minimum Distribution Rules for Certain Retirement Plans and Accounts (sec. 2203 of the Act and secs. 401 and 402 of the Code)

Present Law

Required minimum distributions

Employer-provided qualified retirement plans and IRAs are subject to required minimum distribution rules. 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.[47] An employer-provided qualified retirement plan that is a defined contribution plan is a plan that provides (1) an individual account for each participant and (2) for benefits based on the amount contributed to the participant's account and any income, expenses, gains, losses, and forfeitures of accounts of other participants which may be allocated to such participant's account.[48]

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

[47] The required minimum distribution rules also apply to section 457(b) plans maintained by tax-exempt employers other than governmental employers.

[48] Sec. 414(i).

begin was 70½.[49] Thus, for individuals who attained age 70½ before January 1, 2020, required minimum distributions generally must begin by April 1 of the calendar year following the calendar year in which the individual attained age 70½. 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.

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.[50] The distribution period is generally derived from the Uniform Lifetime Table.[51] 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). There are special rules in the case of annuity payments from an insurance contract.

If an individual dies before the individual's entire interest is distributed, and the individual has a designated beneficiary, unless the designated beneficiary 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.[52]

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 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;

[49] The Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, increased the age after which required minimum distribution 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.

[50] Treas. Reg. sec. 1.401(a)(9)-5.

[51] Treas. Reg. sec. 1.401(a)(9)-9.

[52] The Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, added section 401(a)(9)(H) to the Code, providing special rules for required minimum distributions for defined contribution plans (including, for this purpose, IRAs), generally effective with respect to individuals who die after December 31, 2019 (later effective dates apply to governmental plans and collectively bargained plans). For additional information, including rules applicable to defined contribution plans before the effective date of Pub. L. No 116-94, see Joint Committee on Taxation, *Description of the Chairman's Amendment in the Nature of a Substitute to H.R. 1994, the "Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019"* (JCX-13-19), April 2019, pp. 86-94.

(3) disabled; (4) chronically ill; or (5) not more than 10 years younger than the individual.[53] If the eligible 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. 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.[54] Special rules apply in the case of trusts for disabled or chronically ill beneficiaries.[55]

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.[56] 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.[57]

A special after-death rule applies for an IRA if the beneficiary of the IRA is the surviving spouse. The surviving 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, rather than a beneficiary.[58]

Roth IRAs are not subject to the minimum distribution rules during the IRA owner's lifetime. However, Roth IRAs are 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.

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.[59] The tax may be waived if the failure to distribute is reasonable error and reasonable steps are taken to remedy the violation.[60]

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[53] Sec. 401(a)(9)(E)(ii).

[54] Treas. Reg. sec. 1.401(a)(9)-5, A-5.

[55] Sec. 401(a)(9)(H)(iv).

[56] Treas. Reg. sec. 1.401(a)(9)-5, A-5(a).

[57] Treas. Reg. sec. 1.401(a)(9)-3, Q&As 1, 2.

[58] Treas. Reg. sec. 1.408-8, Q&A 5.

[59] Sec. 4974(a).

[60] Sec. 4974(d).

Eligible rollover distributions

With certain exceptions, distributions from an employer-provided qualified retirement plan are eligible to be rolled over tax free into another employer-provided qualified retirement plan or an IRA. This can be achieved by contributing the amount of the distribution to the other plan or IRA within 60 days of the distribution, or by a direct payment by the plan to the other plan or IRA (referred to as a "direct rollover"). Distributions that are not eligible for rollover include (i) any distribution that is one of a series of periodic payments generally for a period of 10 years or more (or a shorter period for distributions made for certain life expectancies) and (ii) any distribution to the extent that the distribution is a required minimum distribution.[61]

For any distribution that is eligible for rollover, an employer-provided qualified retirement plan must offer the distributee the right to have the distribution made in a direct rollover.[62] Before making the distribution, the plan administrator must provide the distributee with a written explanation of the direct rollover right and related tax consequences.[63] Unless a distributee elects to have the distribution made in a direct rollover, the distribution is generally subject to mandatory 20-percent income tax withholding.[64]

Explanation of Provision

Under the provision, no minimum distribution is required for calendar year 2020 from an IRA or from an employer-provided qualified retirement plan that is a defined contribution plan[65] that is a tax-qualified plan described in section 401(a), an employee retirement annuity described in section 403(a), a tax-sheltered annuity described in section 403(b), or a plan described in section 457(b) that is maintained by a governmental employer. The next required minimum distributions for these plans will be for calendar year 2021. The provision waives the 2020 minimum distribution requirement for lifetime distributions to employees and IRA owners and for after-death distributions to beneficiaries.

In the case of an individual whose required beginning date is April 1, 2020 (because, for example, the individual attained age 70½ in 2019), the provision waives the minimum distribution requirement with respect to a distribution that would have been required to be made in 2020 on account of the distribution not having been made in 2019.

In the case of an individual whose required beginning date is April 1, 2021 (because, for example, the individual attains age 72 in 2020), the first year for which a minimum distribution

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[61] Sec. 402(c)(4). Distributions that are not eligible rollover distributions also include distributions made upon hardship of the employee.

[62] Sec. 401(a)(31).

[63] Sec. 402(f).

[64] Sec. 3405(c). This mandatory withholding does not apply to a distributee that is a beneficiary other than a surviving spouse of an employee.

[65] Defined contribution plan is defined in section 414(i).

would have been required is 2020. Under the provision, no distribution is required for 2020, and thus, no distribution will be required to be made by April 1, 2021. However, the provision does not change the individual's required beginning date for purposes of determining the required minimum distribution for calendar years after 2020. Thus, for an individual whose required beginning date is April 1, 2021, the required minimum distribution for 2021 will be required to be made no later than December 31, 2021. If the individual dies on or after April 1, 2021, the required minimum distribution for the individual's beneficiary will be determined using the rule for death on or after the individual's required beginning date.

In the case of an individual who dies and whose interest is required to be distributed within five years,[66] under the provision, the five-year period is determined without regard to calendar year 2020. For example, for an account with respect to an individual who died in 2018, the five-year period ends in 2024 instead of 2023.

If as a result of the provision all or a portion of a 2020 distribution that would have been a required minimum distribution is instead an eligible rollover distribution, the distribution (or portion thereof) is not treated as an eligible rollover distribution for purposes of the direct rollover requirement, the requirement for notice and written explanation of the direct rollover requirement, or the mandatory 20-percent income tax withholding for eligible rollover distributions. Thus, for example, if an employer-provided qualified retirement plan distributes an amount to an individual during 2020 that is an eligible rollover distribution but would have been a required minimum distribution for 2020, the plan is permitted but not required to offer the employee a direct rollover of that amount and to provide the employee a written explanation of the requirement, and the plan is not required to withhold 20 percent from the distribution. The employee, in turn, may roll over the distribution by contributing it to an eligible retirement plan within 60 days of the distribution.

Effective Date

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

4. Allowance of Partial Above-the-Line Deduction for Charitable Contributions (sec. 2204 of the Act and sec. 62 of the Code)

Present Law

Adjusted gross income and taxable income of an individual

Adjusted gross income

Under the Code, gross income means "income from whatever source derived" except for certain items specifically exempt or excluded by statute.[67] An individual's AGI is determined by subtracting certain "above-the-line" deductions from gross income. These deductions include

[66] See sec. 401(a)(9)(B)(ii).

[67] Sec. 61.

trade or business expenses, losses from the sale or exchange of property, contributions to a qualified retirement plan by a self-employed individual, contributions to certain IRAs, certain moving expenses for members of the Armed Forces, and certain education-related expenses.[68]

Taxable income

To determine taxable income, an individual reduces AGI by the applicable standard deduction or his or her itemized deductions,[69] and by the deduction for qualified business income.[70]

A taxpayer may reduce AGI by the amount of the applicable standard deduction to arrive at taxable income. The basic standard deduction varies depending on a taxpayer's filing status. For 2020, the amount of the standard deduction is $12,400 for a single individual and for a married individual filing separately, $18,650 for a head of household, and $24,800 for married taxpayers filing jointly and for a surviving spouse. An additional standard deduction is allowed with respect to any individual who is elderly (*i.e.*, above age 64) and/or blind.[71] The amounts of the basic standard deduction and the additional standard deductions are indexed annually for inflation.

In lieu of taking the applicable standard deduction, an individual may elect to itemize deductions. The deductions that may be itemized include personal State and local income, property, and sales taxes (up to $10,000 annually ($5,000 for married taxpayers filing separately)), home mortgage interest (on mortgages up to certain specified dollar amounts), charitable contributions, certain investment interest, medical expenses (in excess of 7.5 percent of AGI), and casualty and theft losses attributable to Federally declared disasters (in excess of 10 percent of AGI and in excess of $100 per loss).

Itemized deduction for charitable contributions

An income tax deduction is permitted for charitable contributions, subject to certain limitations that depend on the type of taxpayer, the property contributed, and the recipient organization.[72] For individuals, the deduction for charitable contributions is available only to a taxpayer who elects to itemize deductions.

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[68] Sec. 62. In addition, alimony payments are generally deductible by the payor spouse for divorce and separation instruments executed before January 1, 2019.

[69] Sec. 63(a) and (b).

[70] Secs. 63(b)(3), (d)(3), and 199A.

[71] For 2020, the additional amount is $1,300 for married taxpayers (for each spouse meeting the applicable criterion) and surviving spouses. The additional amount for single individuals and heads of households is $1,650. If an individual is both elderly and blind, the individual is entitled to two additional standard deductions, for a total additional amount (for 2020) of $2,600 or $3,300, as applicable.

[72] Sec. 170.

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

For individuals, in any taxable year, the amount deductible as a charitable contribution is limited to a percentage of the taxpayer's contribution base. The applicable percentage of the contribution base varies depending on the type of recipient organization and property contributed. The contribution base is defined as the taxpayer's adjusted gross income computed without regard to any net operating loss carryback.[73]

Charitable contributions that exceed the applicable percentage limit generally may be carried forward for up to five years.[74] In general, contributions carried over from a prior year are taken into account after contributions for the current year that are subject to the same percentage limit.

Explanation of Provision

The provision permits an eligible individual to claim an above-the-line deduction in an amount not to exceed $300 for qualified charitable contributions made during a taxable year that begins in 2020.[75] The above-the-line deduction is not available for contributions made during a taxable year that begins after 2020. An eligible individual is an individual who does not elect to itemize deductions.[76] Thus, a taxpayer taking the standard deduction, who absent the provision would not be able to deduct any charitable contributions, may claim an above-the-line deduction for qualified charitable contributions.

A qualified charitable contribution is a cash contribution for which a deduction is allowable under section 170 (determined without regard to the percentage limitations under section 170(b)) that is paid to a charitable organization described in section 170(b)(1)(A), other than contributions to (i) a supporting organization described in section 509(a)(3) or (ii) for the establishment of a new, or maintenance of an existing, donor advised fund (as defined in section 4966(d)(2)).[77] Contributions of noncash property, such as securities, are not qualified contributions. Under the provision, qualified contributions must be to an organization described in section 170(b)(1)(A); thus, contributions to, for example, a charitable remainder trust

[73] Sec. 170(b)(1)(H).

[74] Sec. 170(b)(1)(G)(ii) and (d).

[75] Sec. 62(a)(22).

[76] Sec. 62(f)(1). The $300 limit applies to the tax-filing unit. Thus, for example, married taxpayers who file a joint return and do not elect to itemize deductions are allowed to deduct up to a total of $300 in qualified charitable contributions on the joint return.

[77] Sec. 62(f)(2).

generally are not qualified contributions, unless the charitable remainder interest is paid in cash to an eligible charity during the applicable time period. A qualified charitable contribution does not include an amount that is treated as a contribution in the taxable year by reason of being carried forward from a prior contribution year under section 170(b)(1)(G) or (d)(1).

Effective Date

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

5. Modification of Limitations on Charitable Contributions during 2020 (sec. 2205 of the Act and sec. 170 of the Code)

Present Law

In general

An income tax deduction is permitted for charitable contributions, subject to certain limitations that depend on the type of taxpayer, the property contributed, and the recipient organization.[78]

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

Percentage limitations

Contributions by individuals

For individuals, in any taxable year, the amount deductible as a charitable contribution is limited to a percentage of the taxpayer's contribution base. The contribution base is defined as the taxpayer's AGI computed without regard to any net operating loss carryback. The applicable percentage of the contribution base varies depending on the type of recipient organization and property contributed.

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

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[78] Sec. 170.

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

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

Contributions by corporations

For corporations, in any taxable year, charitable contributions are not deductible to the extent the aggregate contributions exceed 10 percent of the corporation's taxable income computed with certain modifications.

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

Carryforwards of excess contributions

Charitable contributions that exceed the applicable percentage limitation may be carried forward for up to five years.[79] The amount that may be carried forward from a taxable year ("contribution year") to a succeeding taxable year may not exceed the applicable percentage of the contribution base for the succeeding taxable year less the sum of contributions made in the succeeding taxable year plus contributions made in taxable years prior to the contribution year and treated as paid in the succeeding taxable year under this rule.

Contributions of food inventory

A taxpayer's deduction for charitable contributions of inventory generally is limited to the taxpayer's basis (typically, cost) in the inventory, or, if less, the fair market value of the inventory. For certain contributions of inventory, however, a C corporation may claim an enhanced deduction equal to the lesser of (1) basis plus one-half of the item's appreciation (*i.e.*, basis plus one-half of fair market value in excess of basis) or (2) two times basis.[80]

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[79] Sec. 170(d).

[80] Sec. 170(e)(3).

Any taxpayer engaged in a trade or business, whether or not a C corporation, is eligible to claim the enhanced deduction for donations of food inventory.[81] The enhanced deduction for food inventory is available only for food that qualifies as "apparently wholesome food." Apparently wholesome food is defined as food intended for human consumption that meets all quality and labeling standards imposed by Federal, State, and local laws and regulations even though the food may not be readily marketable due to appearance, age, freshness, grade, size, surplus, or other conditions.

For taxpayers other than C corporations, the total deduction for donations of food inventory in a taxable year generally may not exceed 15 percent of the taxpayer's net income for such taxable year from all sole proprietorships, S corporations, or partnerships (or other non-C corporation trades or businesses) from which contributions of apparently wholesome food are made. For C corporations, these contributions are made subject to a limitation of 15 percent of taxable income (as modified). The general 10-percent limitation for a C corporation does not apply to these contributions, but the 10-percent limitation applicable to other contributions is reduced by the amount of these contributions. Qualifying food inventory contributions in excess of these 15-percent limitations may be carried forward and treated as qualifying food inventory contributions in each of the five succeeding taxable years in order of time.

Disaster relief

Congress has at times liberalized the charitable contribution limitations for contributions made in response to certain natural disasters.[82]

Explanation of Provision

Under the provision, in the case of an individual, the deduction for qualified contributions is allowed up to the amount by which the taxpayer's contribution base (AGI computed without regard to any net operating loss carryback) exceeds the deduction for other charitable contributions. Contributions in excess of this amount are carried over to succeeding taxable years as contributions described in section 170(b)(1)(G), subject to the limitations of section 170(b)(1)(G)(ii).

In the case of a corporation, the deduction for qualified contributions is allowed up to 25 percent of the corporation's taxable income. Contributions in excess of this amount are carried over to succeeding taxable years, subject to the limitations of section 170(d)(2).

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[81] Sec. 170(e)(3)(C).

[82] See, *e.g.*, sec. 20104(a) of Pub. L. No. 115-123 (increasing limits in response to 2017 California wildfires); sec. 504(a) of Pub. L. No. 115-63 (increasing limits in response to Hurricanes Harvey, Irma, and Maria); and former sec. 1400S (increasing limits in response to Hurricanes Katrina, Rita, and Wilma). For a more detailed description of the most recently enacted provision (related to the 2017 California wildfires), see Joint Committee on Taxation, *General Explanation of Certain Tax Legislation Enacted in the 115th Congress* (JCS-2-19), October 2019, pp. 27-29.

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

Qualified contributions are cash contributions paid during calendar year 2020 to a charitable organization described in section 170(b)(1)(A), other than contributions (i) to a supporting organization described in section 509(a)(3) or (ii) for the establishment of a new, or maintenance of an existing, donor advised fund (as defined in section 4966(d)(2)). Contributions of noncash property, such as securities, are not qualified contributions. Under the provision, qualified contributions must be to an organization described in section 170(b)(1)(A); thus, contributions to, for example, a charitable remainder trust generally are not qualified contributions, unless the charitable remainder interest is paid in cash to an eligible charity during the applicable time period. A taxpayer must elect to have contributions treated as qualified contributions.

For charitable contributions of food inventory that are made during 2020 and which qualify for the enhanced deduction, the 15-percent limitations described above are increased to 25 percent.

Effective Date

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

6. Exclusion for Certain Employer Payments of Student Loans (sec. 2206 of the Act and secs. 127, 3121, 3306, and 3401 of the Code)

Present Law

Employer-provided educational assistance programs

Under section 127, an employee may exclude from gross income for income tax purposes[83] and from wages for employment tax purposes[84] up to $5,250 annually of educational assistance provided by the employee's employer. For the exclusion to apply, certain requirements must be satisfied: (1) the educational assistance must be provided pursuant to a separate written plan of the employer; (2) the employer's educational assistance program must not discriminate in favor of highly compensated employees; (3) no more than five percent of the amounts paid or incurred by the employer during the year for educational assistance under a qualified educational assistance program may be provided for the class of individuals consisting of (i) more than five-percent owners of the employer and (ii) the spouses or dependents of such owners.

For purposes of the exclusion, "educational assistance" means the payment by an employer of expenses incurred by or on behalf of the employee for education of the employee including, but not limited to, tuition, fees and similar payments, books, supplies, and equipment.

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[83] See also sec. 3401(a)(18).

[84] Secs. 3121(a)(18) and 3306(b)(13).

Educational assistance also includes the provision by the employer of courses of instruction for the employee, including books, supplies, and equipment. Educational assistance does not include payment for or the provision of (1) tools or supplies that may be retained by the employee after completion of a course, (2) meals, lodging, or transportation, or (3) any education involving sports, games, or hobbies. The education need not be job-related or part of a degree program.[85] Educational assistance qualifies for the exclusion only if the employer does not give the employee a choice between educational assistance and other remuneration includible in the employee's income.

The exclusion for employer-provided educational assistance applies only with respect to education provided to the employee. The exclusion does not apply, for example, to assistance provided to the spouse or a child of the employee.

The employer's costs for providing such educational assistance are generally deductible as a trade or business expense.[86]

In the absence of the specific exclusion for employer-provided educational assistance under section 127, employer-provided educational assistance is excludable from gross income for income tax purposes[87] and wages for employment tax purposes[88] only if the education expenses qualify as a working condition fringe benefit under section 132(d) or as a qualified tuition reduction under section 117(d). In general, education qualifies as a working condition fringe benefit if the employee could have deducted the education expenses under section 162 if the employee paid for the education.[89] In general, education expenses are deductible by an individual under section 162 if the education (1) maintains or improves a skill required in a trade or business currently engaged in by the taxpayer, or (2) meets the express requirements of the taxpayer's employer, applicable law, or regulations imposed as a condition of continued employment.[90] However, education expenses are generally not deductible if they relate to certain minimum educational requirements or to education or training that enables a taxpayer to begin working in a new trade or business.[91]

[85] Treas. Reg. sec. 1.127-2(c)(4).

[86] See sec. 162.

[87] See also sec. 3401(a)(19).

[88] Secs. 3121(a)(20) and 3306(b)(16).

[89] Sec. 132(d).

[90] Treas. Reg. sec. 1.162-5.

[91] For taxable years beginning before January 1, 2026, trade or business expenses relating to the trade or business of the performance of services by the taxpayer as an employee are disallowed miscellaneous itemized deductions. Secs. 62(a)(1), 67(g), and 162(a).

Section 117(d) provides an exclusion from gross income and wages for qualified tuition reductions for certain education provided to employees of certain educational organizations, and to the spouses and dependents of such employees.

Employer payment of employee student loans

In general, gross income includes all income from whatever source derived, such as compensation for services, fringe benefits, and similar items, absent an exclusion.[92] The exclusion from income for educational assistance does not apply to payments of principal or interest made by an employer to or on behalf of its employee on an education loan incurred by an employee of the employer. Because the educational assistance exclusion does not apply to these payments of education loans, the amount of these payments is includible in the employee's taxable wages. These amounts are generally deductible by the employer as a trade or business expense.[93]

Deduction for student loan interest

Under section 221, certain individual taxpayers may claim an above-the-line deduction for interest paid on student loans.[94] Only interest paid on a "qualified education loan" is eligible for the deduction.

A qualified education loan generally is defined as any indebtedness incurred to pay for the costs of attendance at an eligible educational institution on at least a half-time basis.[95] The payments may be for attendance of the taxpayer, the taxpayer's spouse, or any dependent of the taxpayer as of the time the indebtedness was incurred. Eligible educational institutions are (1) post-secondary educational institutions and certain vocational schools defined by reference to section 481 of the Higher Education Act of 1965, and (2) institutions conducting internship or residency programs leading to a degree or certificate from an institution of higher education, a hospital, or a health care facility conducting postgraduate training.[96] Additionally, to qualify as an eligible educational institution, an institution must be eligible to participate in Department of Education student aid programs

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[92] Sec. 61.

[93] See sec. 162.

[94] Sec. 62(a)(17), 221; see also sec. 163(h)(2)(F).

[95] Secs. 221(d)(1)-(3); see also sec. 25A(b)(3).

[96] Secs. 25A(f)(2) and 221(d)(2).

The maximum allowable deduction per year is $2,500. The deduction is phased out and reduced to zero at higher-income levels.[97] Dependents are ineligible to claim the deduction.

Explanation of Provision

The provision expands the definition of the term "educational assistance" excludible from income and from wages to include payments of principal or interest made by an employer on a qualified education loan incurred by an employee of the employer.[98] The term "qualified education loan" is defined in section 221(d)(1). The loan must be incurred for the education of the employee. The exclusion applies to payments made to the employee or a lender. The provision does not apply to payments made on or after January 1, 2021.

Payments made under this provision are subject to the general requirements of section 127, including the $5,250 cap, the requirement that assistance be provided pursuant to a separate written plan of the employer, and the nondiscrimination requirement.

The provision also provides that the employee may not claim a deduction under section 221 for interest paid on student loans on an amount for which an exclusion is allowable under the provision.[99]

Effective Date

The provision is effective for payments made after the date of enactment.

[97] For 2020, the phaseout range is for modified adjusted gross income between $140,000 to $170,000 for married taxpayers filing a joint return and between $70,000 and $85,000 for other taxpayers. Sec. 221(b)(2)(B); Rev. Proc. 2019-44, 2019-47 I.R.B. 1093.

[98] Sec. 127(c)(1)(B), as amended by the Act.

[99] Sec. 221(e)(1), as amended by the Act.

B. Business Provisions (Subtitle C)

1. Employee Retention Credit for Employers Subject to Closure due to COVID-19 (sec. 2301 of the Act)

Present Law

In general

Federal employment taxes and OASDI Trust Funds

Federal employment 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 Federal income tax.[100] In addition, tier 1 of the Railroad Retirement Tax Act ("RRTA") imposes a tax on compensation paid to railroad employees and representatives.[101]

FICA taxes are comprised of two components: Old-Age, Survivors, and Disability Insurance ("OASDI") taxes and Hospital Insurance ("Medicare") taxes.[102] 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.[103] The tax is assessed on covered wages up to the OASDI wage base ($137,700 in 2020). Generally, the OASDI wage base rises based on increases in the national average wage index.[104]

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.[105] 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.[106] OASDI and Medicare taxes are generally allocated by statute among separate trust funds: the OASDI

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

[101] Sec. 3221.

[102] The Hospital Insurance ("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. Sec. 3101(b)(1). An equivalent 1.45 percent is withheld from employee wages. Sec. 3111(b)(1). For purposes of this description, Medicare tax does not include Additional Medicare tax. Additional Medicare taxes are withheld from employee wages in excess of $200,000 at a rate of 0.9 percent. Sec. 3101(b)(2). There is no equivalent employer's share of Additional Medicare taxes.

[103] Sec. 3101.

[104] Sec. 230 of the Social Security Act (42 U.S.C. sec. 430).

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

[106] Sec. 3102(b).

Trust Funds, Medicare's Hospital Insurance Trust Fund, and Supplementary Medical Insurance Trust Fund.[107]

Generally, the term "wages" for OASDI tax purposes means all remuneration for "employment," including the cash value of all remuneration (including benefits) paid in any medium other than cash, with certain exceptions.[108] The name given to the remuneration for employment is immaterial. OASDI wages includes salaries, vacation allowances, bonuses, deferred compensation, commissions, and fringe benefits. The term "employment" is generally defined for FICA tax purposes as any service, of whatever nature, performed by an employee for the person employing him or her, with certain specific exceptions.

The taxes related to the OASDI program collected from FICA are deposited into two separate OASDI Trust Funds: (1) the Old-Age and Survivors Insurance ("OASI") Trust Fund, which pays retirement and survivor benefits, and (2) the Disability Insurance ("DI") Trust Fund, which pays disability benefits.[109] The major sources of income to the OASDI Trust Funds are FICA taxes and taxes under the Self-Employment Contributions Act ("SECA"). The OASDI Trust Funds are financial accounts in the U.S. Treasury. The only purposes for which these trust funds can be used are to pay benefits and program administrative costs. A fixed proportion (dependent on the allocation of tax rates by trust fund) of the taxes received under FICA and SECA is deposited in the OASI Trust Fund to the extent that such taxes are not needed immediately to pay expenses.

Railroad retirement program

Railroad workers do not participate in the OASDI system. Compensation subject to RRTA tax is exempt from FICA taxes.[110] The RRTA imposes a tax on compensation paid by covered employers to employees in recognition for the performance of services.[111] The term "compensation" means any form of money remuneration paid to an individual for services rendered as an employee to one or more employers, with certain exceptions.[112] Employees whose compensation is subject to RRTA tax are generally eligible for railroad retirement benefits under a two-tier structure. Rail employees and employers pay tier 1 taxes at the same

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

[108] Sec. 3121(a).

[109] 42 U.S.C. sec. 401.

[110] Sec. 3121(b)(9).

[111] Secs. 3201 through 3233. Instead of FICA taxes, railroad employers and employees are subject, under the RRTA, to taxes equivalent to the Social Security and Medicare taxes under FICA. Under the RRTA, employers and employees are also subject to an additional tax, referred to as the "tier 2" tax, on compensation up to a certain amount.

[112] Sec. 3231(e).

rate as other employment taxes.[113] In addition, rail employees and employers both pay tier 2 taxes, which are used to finance railroad retirement benefits above Social Security benefit levels.[114] Tier 2 benefits are similar to a private defined benefit pension.

Employment tax in the U.S. territories

Employers and employees in the U.S. territories are generally subject to FICA payroll tax obligations.[115] In contrast, employers and employees in the territories are generally not subject to withholding at the source for Federal income tax, although they are subject to withholding of local taxes.[116] These payroll obligations of the employers are generally applicable to Federal agencies with personnel in the territory. Employers in the territories file quarterly tax returns with the Federal government to report and pay FICA taxes for employees in the respective territories.

Employee retention credits against income taxes

Congress has at times enacted employee retention credits against employer income tax in response to natural disasters.[117] 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 sections 51(i)(1), 52, and 280C(a) apply to the credits.[118]

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[113] 7.65 percent, consisting of 6.2 percent for retirement on earnings up to $137,700 in 2020, and 1.45 percent for Medicare hospital insurance on all earnings. An additional 0.9 percent in Medicare taxes are withheld from employees on earnings above $200,000.

[114] In 2020, the tier 2 tax rate on earnings up to $102,300 is 4.9 percent for employees and 13.1 percent for employers.

[115] See sec. 3121(b) and (e) and Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Sec. 601(c). The U.S. territories referred to in this document are American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, and the U.S. Virgin Islands.

[116] Under section 3401(a)(8), most wages paid to U.S. persons for services performed in one of the territories are exempt from Federal income tax withholding if the payments are subject to withholding by the territory, or, in the case of Puerto Rico, the payee is a bona fide resident of the territory for the full year.

[117] See, *e.g.*, 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).

[118] For a more detailed description of the most recently enacted employee retention credit (related to the California wildfires), see Joint Committee on Taxation, *General Explanation of Certain Tax Legislation Enacted in the 115th Congress* (JCS–2–19), October 2019, pp. 26-27.

Refundable payroll tax credits for paid sick and paid family and medical leave

On March 18, 2020, the President signed into law the Families First Coronavirus Response Act,[119] Divisions C and E of which require certain employers to provide certain types of paid leave to certain employees affected by the outbreak of COVID-19. Sections 7001 and 7003 of Division G of that Act provide refundable credits against a portion of payroll tax liability for certain sick and family leave wages required to be paid under Divisions C and E.[120]

Paid sick leave credit

In general

An employer is allowed a credit against the OASDI tax or RRTA tax imposed on the employer for each calendar quarter in an amount equal to 100 percent of the qualified sick leave wages paid by the employer with respect to that calendar quarter, subject to the limits described below. The provision defines qualified sick leave wages as wages (as defined in section 3121(a)) and compensation (as defined in section 3231(e)) paid by an employer which are required to be paid by reason of Division E of the Families First Coronavirus Response Act. As described below, the credit may be increased by certain health plan expenses of the employer.

Division E requires certain employers to provide an employee with paid sick time to the extent that the employee is unable to work or telework due to a need for leave because: (1) the employee is subject to a Federal, State, or local quarantine or isolation order 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 seeking a medical diagnosis; (4) the employee is caring for an individual who is subject to an order described in clause (1) or has been advised as described in clause (2); (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 of the Treasury and the Secretary of Labor.[121]

Credit against employer OASDI tax and RRTA tax

The amount of the credit is limited in various ways depending on the circumstances under which qualified sick leave wages are paid. In the case of paid sick time qualifying under clauses (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 any portion thereof) for which the individual is paid such sick time. In the case of paid sick time qualifying under clauses (4), (5), or (6) above,

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[119] Pub. L. No. 116-127.

[120] For a full description of Division G, see Joint Committee on Taxation, *Technical Explanation of Division G, "Tax Credits for Paid Sick and Paid Family and Medical Leave," of H.R. 6201, the "Families First Coronavirus Response Act"* (JCX-10-20), March 2020.

[121] Division E of the Families First Coronavirus Response Act, sec. 5102(a).

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 taken into account for the calendar quarter with respect to an individual under all clauses may not exceed the excess (if any) of 10 over the aggregate number of days so taken into account for all preceding calendar quarters.

The credit allowed is increased by so much of the employer's qualified health plan expenses as are properly allocable to the qualified sick 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,[122] but only to the extent such amounts are excluded from the employees' income as coverage under an accident or health plan.[123] Qualified health plan expenses are allocated to qualified sick leave wages in such manner as the Secretary (or the Secretary's delegate) may prescribe. Except as otherwise provided by the Secretary (or the Secretary's delegate), such allocations are treated as properly made under the provision if made on the basis of being 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 RRTA tax imposed on the employer for that calendar quarter on the wages paid with respect to all the employer's employees, reduced by any credits allowed for the employment of qualified veterans[124] and research expenditures of a qualified small businesses.[125] 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.[126]

If an employer claims the credit, the amount so claimed is included in the employer's gross income. Thus, the credit is not taken into account for purposes of determining any amount allowable as a payroll tax deduction, deduction for qualified sick leave wages, or deduction for health plan expenses (or any amount capitalizable to basis). In addition, the employer's income tax deduction for any tax imposed by section 3111(a) or 3221(a), the employer's share of OASDI or RRTA tax, for such quarter will not be reduced.[127]

[122] Group health plan for this purpose is defined in section 5000(b)(1).

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

[124] Sec. 3111(e).

[125] Sec. 3111(f).

[126] 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.

[127] Note that the qualified sick leave wages paid are not subject to the tax imposed by section 3111(a) or 3221(a). Employers also receive an increase in the otherwise available credit in the amount of the tax imposed by section 3111(b) on qualified sick leave wages.

Any qualified sick leave wages taken into account for the credit are not taken into account for purposes of determining the employer credit for certain paid family and medical leave under section 45S. Thus, the employer may not claim a credit under section 45S with respect to the qualified sick leave wages paid, but may be able to take a credit under section 45S with respect to any additional wages paid, provided the requirements of section 45S are met with respect to the additional wages.

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 such employer for a calendar quarter. 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. Employers in the U.S. territories may claim the credit by filing their quarterly Federal employment tax returns.

The Secretary (or the Secretary's delegate) shall provide such regulations or other guidance as may be necessary to carry out the purposes of the credit, including regulations or other guidance: (1) to prevent the avoidance of the purposes of the limitations under this provision; (2) to minimize compliance and record-keeping burdens associated with the credit; (3) to provide for a waiver of penalties for failure to deposit amounts in anticipation of the allowance of the credit; (4) to recapture the benefit of the credit in cases where there is a subsequent adjustment to the credit; and (5) to ensure that the wages taken into account for the credit conform with the paid sick time required to be provided under Division E of the Families First Coronavirus Response Act.

Amounts are appropriated to the OASDI Trust Funds and the Social Security Equivalent Benefit Account established under the RRTA[128] 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 OASDI Trust Funds or Social Security Equivalent Benefit Account had the credit not been enacted.

Paid family leave credit

In general

An employer is allowed a credit against the OASDI tax or RRTA tax imposed on the employer for each calendar quarter in an amount equal to 100 percent of the qualified family leave wages paid by the employer with respect to that calendar quarter, subject to the limits described below. Qualified family leave wages are wages (within the meaning of section 3121(a)) and compensation (within the meaning of section 3231(e)) paid by an employer by reason of Division C of the Families First Coronavirus Response Act. As described below, the credit may be increased by certain health plan expenses of the employer.

[128] Sec. 15A(a) of the RRTA (45 U.S.C. sec. 231n-1(a)).

Division C requires certain employers to provide public health emergency leave to employees under the Family and Medical Leave Act of 1993 ("FMLA").[129] 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. The Families First Coronavirus Response Act defines a public health emergency as an emergency with respect to COVID-19 declared by a Federal, State, or local authority. An employer that is required to provide this additional family and medical leave is allowed a tax credit in respect of the leave.

The first 10 days of public health emergency leave required under Division C may consist of unpaid leave, after which paid leave is required. The paid leave is for the duration of the period provided in Division C, which is a maximum of 10 weeks. The amount of required paid leave is based on an amount not less than two-thirds of an employee's regular rate of pay and the number of hours the employee would otherwise be normally scheduled to work. Additional guidance is provided for employees with varying schedules. The paid leave mandated by Division C is not required to exceed $200 per day and $10,000 in the aggregate.

Credit against employer OASDI tax and RRTA tax

An employer is allowed a credit against OASDI tax or RRTA tax in an amount equal to 100 percent of qualified family leave wages paid by the employer during the quarter. Qualified family leave wages for purposes of the credit means wages[130] and compensation[131] paid by an employer which were required to be paid pursuant to Division C. The maximum amount of 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 calendar quarters, $10,000. The credit is not allowed with respect to unpaid leave.

The credit allowed is increased by so much of the employer's qualified health plan expenses as are properly allocable to the qualified family leave wages for which the credit is allowed. Qualified health plan expenses are defined as amounts paid or incurred by the employer to provide and maintain a group health plan,[132] but only to the extent such amounts are excluded from the employees' income as coverage under an accident or health plan.[133] Qualified health plan expenses are allocated to qualified family leave wages in such manner as the Secretary (or the Secretary's delegate) may prescribe. Except as otherwise provided by the Secretary (or the Secretary's delegate), such allocations are treated as properly made if made pro

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[129] Division C of the Families First Coronavirus Response Act, section 3102.

[130] Sec. 3121(a) (defining wages for FICA tax purposes).

[131] Sec. 3221(a) (defining compensation for RRTA tax purposes).

[132] Group health plan for this purpose is defined in section 5000(b)(1).

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

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 RRTA tax imposed on the 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,[134] research expenditures of a qualified small businesses,[135] and for qualified sick leave wages paid (as described above). 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.[136]

If an employer claims the 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, deduction for qualified family leave wages, or deduction for health plan expenses (or any amount capitalizable to basis). In addition, the employer's income tax deduction for any tax imposed by section 3111(a) or 3221(a), the employer's share of OASDI tax or RRTA tax, for such quarter will not be reduced.[137]

Any wages taken into account in determining the credit are not taken into account for purposes of determining the section 45S credit. Thus, the employer may not claim a credit under section 45S with respect to the qualified family leave wages paid, but may be able to take a credit under section 45S with respect to any additional wages paid, provided the requirements of section 45S are met with respect to the additional wages.

An employer may elect, at such time and in such manner as provided by the Secretary (or the Secretary's delegate), not to claim the credit for a calendar quarter. The credit 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 these entities. Employers in the territories may claim the credit by filing their quarterly Federal employment tax returns.

The Secretary (or the Secretary's delegate) shall provide such regulations or other guidance as may be necessary to carry out the purposes of the credit, including regulations or other guidance: (1) to prevent the avoidance of the purposes of the limitations; (2) to minimize compliance and record-keeping burdens with respect to the credit; (3) to provide for waiver of penalties for failure to deposit amounts in anticipation of the allowance of the credit; (4) to

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[134] Sec. 3111(e).

[135] Sec. 3111(f).

[136] 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.

[137] Note that the qualified family leave wages paid are not subject to the tax imposed by section 3111(a) or 3221(a). Employers also receive an increase in the otherwise available credit in the amount of the tax imposed by section 3111(b) on qualified family leave wages.

recapture the benefit of the credit in cases where there is a subsequent adjustment to the credit; and (5) to ensure that the wages taken into account for the credit conform with the paid family leave required to be provided under Division C of the Families First Coronavirus Response Act.

Amounts are appropriated to the OASDI Trust Funds and the Social Security Equivalent Benefit Account established under the RRTA[138] 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.

Explanation of Provision

In general

The provision allows an eligible employer to claim a credit against applicable employment taxes for each calendar quarter in an amount equal to 50 percent of the qualified wages with respect to each employee of such employer for such calendar quarter. Applicable employment taxes are OASDI tax imposed on the employer (*i.e.*, the taxes imposed under section 3111(a)) and so much of the RRTA tax imposed on the employer (*i.e.*, taxes imposed under section 3221(a)) 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 all calendar quarters may not exceed $10,000. Therefore, under the provision, the maximum amount of credit per employee for all calendar quarters is $5,000. The provision applies only to wages paid after March 12, 2020, and before January 1, 2021.

The credit allowed 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,[139] for research expenditures of a qualified small businesses,[140] or for paid sick or family leave under sections 7001 and 7003 of the Families First Coronavirus Response 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.[141]

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

[138] Sec. 15A(a) of the RRTA (45 U.S.C. sec. 231n-1(a)).

[139] This credit is described in section 3111(e).

[140] This credit is described in section 3111(f).

[141] 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.

the Families First Coronavirus Response Act, and (3) a $5,000 employee retention credit. The eligible employer's applicable employment taxes are reduced to $0 and it has a $2,000 refundable overpayment.[142] If, instead, the eligible employer had applicable employment taxes prior to any credits of $2,000, its applicable employment taxes are reduced to $0 and it has an $8,000 refundable overpayment.[143]

Amounts are appropriated to the OASDI Trust Funds and the Social Security Equivalent Benefit Account established under the RRTA[144] 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 calendar year 2020 and which meets either of two additional 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.

For example, a restaurant in a State under a Statewide order that restaurants offer only take-out service meets the governmental order test, as does a concert venue in a State under a Statewide order limiting gatherings to no more than 10 people. Similarly, an accounting firm that is in a county where accounting firms are among businesses subject to a directive from public health authorities to cease all activities other than minimum basic operations and that closes its offices and does not require employees who cannot work from home (*e.g.*, custodial employees, mail room employees) to work meets this test. However, a grocery store in a State that generally imposes limitations on food service, gathering size, and travel outside the home, but exempts grocery stores (and travel to and from grocery stores) from any COVID-19 related restrictions (*e.g.*, because grocery stores are deemed an "essential business" that is excepted from restrictions) would not meet this test.

Under the second test (the "reduced gross receipts test"), such employer is an eligible employer if it experiences a significant decline in gross receipts. The employer is treated as experiencing a significant decline in gross receipts in the period (i) beginning with the first

[142] The tax is reduced by the $4,000 research expenditures credit, the $3,000 section 7001 credit, and $3,000 of the $5,000 employee retention credit. The $2,000 excess employee retention credit is treated as refundable.

[143] The tax is reduced by the $2,000 research expenditures credit, the other $2,000 of which is not refundable. See sec. 3111(e). The $3,000 section 7001 is treated as refundable, section 7001(b)(4) of the Families First Coronavirus Response Act, as is the $5,000 employee retention credit.

[144] Sec. 15A(a) of the RRTA (45 U.S.C. sec. 231n-1(a)).

calendar quarter beginning after December 31, 2019, for which gross receipts (within the meaning of section 448(c)) for the calendar quarter are less than 50 percent of gross receipts for the same calendar quarter in the prior year, and (ii) ending with the quarter following the first calendar quarter beginning after a calendar quarter described in (i) in which gross receipts exceed 80 percent of gross receipts for the same calendar quarter for the prior year.

For example, if an employer had gross receipts of $100 in each calendar quarter of 2019 and then had gross receipts in the first, second, third, and fourth quarters of 2020 of $100, $40, $90, and $100, respectively, the period in which such employer is treated as meeting the significant decline in gross receipts test is the second and third quarters of 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 calendar year 2020 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.

Definition of qualified wages

The definition of qualified wages depends on the average number of full-time and full-time-equivalent employees the eligible employer had during 2019.[145] 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 provision.

For an eligible employer that had more than 100 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 example, if a restaurant that had an average of 150 full-time employees during 2019 meets the governmental order test, and the restaurant continues to pay kitchen employees' wages as if they were working 40 hours per week but only requires them to work 15 hours per week, the wages paid to the kitchen employees for the 25 hours per week with respect to which the kitchen employees are not providing services are qualified wages. However, if the same restaurant reduces kitchen employees' working hours from 40 hours per week to 15 hours per week and only pays wages for 15 hours per week, no wages paid to the kitchen employees are qualified wages.

[145] The provision states that the metric is the "average number of full-time employees (within the meaning of section 4980H of the Internal Revenue Code of 1986)." This language includes full-time equivalents as referred to in section 4980H(c)(2)(E), which reads as follows:

(E) Full-time equivalents treated as full-time employees. Solely for purposes of determining whether an employer is an applicable large employer under this paragraph, an employer shall, in addition to the number of full-time employees for any month otherwise determined, include for such month a number of full-time employees determined by dividing the aggregate number of hours of service of employees who are not full-time employees for the month by 120.

As another example, if an accounting firm that had an average of 500 full-time employees during 2019 meets the governmental order test, and during the period in which the governmental order is in place the accounting firm closes its office and does not require custodial and mail room employees to work but continues to pay them their full salaries, wages paid to those custodial and mail room employees for the time they do not work are qualified wages. Similarly, if the accounting firm continues to pay administrative assistants their full salaries but only requires them to work two days per week on a rotating schedule reflecting reduced demand for assistance resulting from the office closure, the portion of an administrative assistant's salary attributable to days not worked are qualified wages.

Qualified wages paid to an employee by an eligible employer that had more than 100 full-time employees in 2019 cannot exceed the amount such employee would have been paid for working an equivalent duration during the 30 days immediately preceding the period in which the eligible employer met either the governmental order test or the reduced gross receipts test.

For example, if an eligible employer subject to this rule paid an employee $15 per hour for all hours worked prior to meeting the governmental order test, but during the period when the eligible employer meets the governmental order test pays the same employee $10 per hour for hours when the employee is providing services and $20 per hour for hours when the employee is not providing services, only $15 per hour of wages paid when the employee is not providing services are qualified wages. As another example, if an eligible employer subject to this rule paid an employee $15 per hour for all hours worked prior to meeting the governmental order test, but during the period when the eligible employer meets the governmental order test pays the same employee $20 per hour (both for hours when the employee is providing services and for hours when the employee is not providing services), only $15 per hour of wages paid when the employee is not providing services are qualified wages.

For an eligible employer that had an average of 100 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.

For example, if a restaurant that had an average of 45 full-time employees during 2019 meets the governmental order test, and the restaurant continues to pay kitchen employees' wages as if they were working 40 hours per week but only requires them to work 15 hours per week, all of such employees' wages paid during the period to which the governmental order applies are qualified wages. If the same restaurant responds to the governmental order by reducing the hours of kitchen employees who had previously worked 40 hours per week to 15 hours per week and only pays wages for 15 hours per week, such wages paid during the period to which the governmental order applies are qualified wages.

As another example, if a grocery store that had an average of 75 full-time employees during 2019 meets the reduced gross receipts test for the second and third calendar quarters of 2020, all wages paid by the grocery store during those quarters are qualified wages.

Qualified wages do not include any wages taken into account under sections 7001 or 7003 of the Families First Coronavirus Response Act. The term "wages" for purposes of the

provision is defined as wages (as defined in section 3121(a)) and compensation (as defined in section 3231(e)).

Qualified wages also include so much of the employer's qualified health plan expenses as are properly allocable to qualified wages under the provision. Qualified health plan expenses are defined as amounts paid or incurred by the employer to provide and maintain a group health plan,[146] but only to the extent such amounts are excluded from the employees' income as coverage under an accident or health plan.[147] Qualified health plan expenses are allocated to qualified wages in such manner as the Secretary (or the Secretary's delegate) may prescribe. Except as otherwise provided by the Secretary (or the Secretary's delegate), such allocations are treated as properly made if made 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). This broad grant of authority permits the Secretary (or the Secretary's delegate) to treat qualified health plan expenses as qualified wages in a situation where no other qualified wages are paid by the eligible employer or to the particular employee to which such expenses are allocable.

Other rules, definitions, and guidance

No credit is available under the provision to any employer that receives a small business interruption loan (*i.e.*, 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 Act).

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. In addition, the credit is taken into account for purposes of determining any amount allowable as a payroll tax deduction or deduction for qualified wages (or any amount capitalizable to basis). For example, assume an employer pays $2,500 of qualified wages for the quarter and claims an employee retention credit of $1,250 for qualified wages paid during the quarter. The employer's resulting OASDI tax liability (under section 3111(a)) for the quarter is $155. Under the provision, the employer reduces its payroll tax expense by $155 and may deduct only $1,405 of qualified wages[148] (assuming such wages are not subject to capitalization).

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 for a calendar quarter. 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. Employers in the U.S. territories may claim the credit by filing their quarterly Federal employment tax returns.

The provision does not apply to wages paid to any employee for any period with respect to any employer if such employer is allowed a credit under section 51 (*i.e.*, the work opportunity tax credit) with respect to such employee for such period. Furthermore, any wages taken into

[146] Group health plan for this purpose is defined in section 5000(b)(1).

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

[148] $2,500 – ($1,250 - $155) = $1,405.

account in determining the credit allowed under the provision shall not be taken into account for purposes of determining the credit allowed under section 45S (*i.e.*, the employer credit for paid family and medical leave).

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

The provision directs the Secretary (or the Secretary's delegate) 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 under the provision.

The Secretary (or the Secretary's delegate) shall provide such regulations or other guidance as may be necessary to carry out the purposes of the credit, including regulations or other guidance: (1) to allow the advance payment of the credit based on such information as the Secretary (or the Secretary's delegate) may require; (2) to provide for the reconciliation of such advance payment with the amount advanced at the time of filing the return of tax for the applicable calendar quarter or taxable year; (3) to provide for recapture of the credit if it is allowed to a taxpayer which receives a small business interruption loan; (4) with respect to the application of the credit to third party payors (including professional employer organizations, certified professional employer organizations, or agents under section 3504), including regulations or guidance allowing such payors to submit documentation necessary to substantiate the eligible employer status of employers that use such payors; and (5) for application of the reduced gross receipts test to any employer which was not carrying on a trade or business for all or part of the same calendar quarter in the prior year.

Effective Date

The provision is effective on the date of enactment.

2. Delay of Payment of Employer Payroll Taxes (sec. 2302 of the Act and secs. 6302 and 6654 of the Code)

Present Law

Federal employment taxes are imposed on wages paid to employees with respect to employment and include taxes levied under FICA, FUTA, and Federal income tax.[149] In addition, tier 1 of the RRTA imposes a tax on compensation paid to railroad employees and representatives.[150]

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

[150] Sec. 3221.

FICA taxes are comprised of two components: OASDI and Medicare taxes.[151] 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.[152] The tax is assessed on covered wages up to the OASDI wage base ($137,700 in 2020). Generally, the OASDI wage base rises based on increases in the national average wage index.[153]

Generally, the term "wages" for OASDI tax purposes means all remuneration for "employment," including the cash value of all remuneration (including benefits) paid in any medium other than cash, with certain exceptions.[154] The name given to the remuneration for employment is immaterial. OASDI wages includes salaries, vacation allowances, bonuses, deferred compensation, commissions, and fringe benefits. The term "employment" is generally defined for FICA tax purposes as any service, of whatever nature, performed by an employee for the person employing him or her, with certain specific exceptions.

Railroad retirement program

Railroad workers do not participate in the OASDI system. Compensation subject to RRTA tax is exempt from FICA taxes.[155] The RRTA imposes a tax on compensation paid by covered employers to employees in recognition for the performance of services.[156] Employees whose compensation is subject to RRTA are ultimately eligible for railroad retirement benefits that fall under a two-tier structure. Rail employees and employers pay tier 1 taxes at the same rate as FICA taxes.[157] In addition, rail employees and employers both pay tier 2 taxes that are used to finance railroad retirement benefits over and above Social Security benefit levels.[158] Tier

[151] The Hospital Insurance ("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. Sec. 3101(b)(1). An equivalent 1.45 percent is withheld from employee wages. Sec. 3111(b)(1). For purposes of this description, Medicare tax does not include Additional Medicare tax. Additional Medicare taxes are withheld from employee wages in excess of $200,000 at a rate of 0.9 percent. Sec. 3101(b)(2). There is no equivalent employer's share of Additional Medicare taxes.

[152] Sec. 3101.

[153] Sec. 230 of the Social Security Act (42 U.S.C. sec. 430).

[154] Sec. 3121(a).

[155] Sec. 3121(b)(9).

[156] Secs. 3201 through 3233. Instead of FICA taxes, railroad employers and employees are subject, under the RRTA, to taxes equivalent to the Social Security and Medicare taxes under FICA. Under the RRTA, employers and employees are also subject to an additional tax, referred to as the "tier 2" tax, on compensation up to a certain amount.

[157] 7.65 percent, consisting of 6.2 percent for retirement on earnings up to $137,700 in 2020, and 1.45 percent for Medicare hospital insurance on all earnings. An additional 0.9 percent in Medicare taxes are withheld from employees on earnings above $200,000.

[158] In 2020, the tier 2 tax rate on earnings up to $102,300 is 4.9 percent for employees and 13.1 percent for employers.

2 benefits are similar to benefits under a defined benefit plan. Those taxes are funneled to the railroad retirement system and used to fund basic retirement benefits for railroad workers and an investment trust that generates returns for the pension fund.

Self-employment taxes

The SECA imposes tax on the self-employment income of an individual. SECA taxes consist of OASDI tax and Medicare tax.[159] Under the OASDI component, the first rate of tax is 12.4 percent on self-employment income up to the OASDI wage base ($137,700 for 2020).[160] Under the basic Medicare tax component, the second rate of tax is 2.9 percent of all self-employment income (without regard to the OASDI wage base).[161] As is the case with employees, an Additional Medicare tax applies to the Medicare portion of SECA tax on self-employment income in excess of a threshold amount.[162]

Self-employment income subject to SECA tax is determined as the net earnings from self-employment derived by an individual during any taxable year, subject to certain exceptions. Net earnings from self-employment are equal to the gross income derived by an individual from any trade or business less allowed deductions that are attributable to the trade or business and permitted under the SECA rules. Certain passive income and related deductions are not taken into account in determining net earnings from self-employment, including rentals from real estate unless received in the course of a trade or business as a real estate dealer,[163] dividends and interest unless such dividends and interest are received in the course of a trade or business as a dealer in stocks or securities,[164] and sales or exchanges of capital assets and certain other property unless the property is stock in trade that would properly be included in inventory or held primarily for sale to customers in the ordinary course of the trade or business.[165]

For purposes of computing net earnings from self-employment, taxpayers are permitted a deduction equal to the product of the taxpayer's net self-employment income (determined without regard to this deduction) and one-half of the sum of the rates for OASDI and Medicare (*i.e.*, 7.65 percent of net earnings).[166] This deduction is determined without regard to the additional 0.9 percent Additional Medicare tax that may apply to an individual. This deduction reflects the fact that the FICA rates apply to an employee's wages, which do not include FICA

[159] Sec. 1401(a) and (b).

[160] Sec. 1401(a). In calculating the SECA tax for OASDI, the OASDI wage base taken into account is reduced by FICA wages paid to the individual during the taxable year.

[161] Sec. 1401(b)(1).

[162] Sec. 1401(b)(2).

[163] Sec. 1402(a)(1).

[164] Sec. 1402(a)(2).

[165] Sec. 1402(a)(3).

[166] Sec. 1402(a)(12).

taxes paid by the employer, whereas the self-employed individual's net earnings are economically equivalent to an employee's wages plus the employer's share of FICA taxes.[167] This is generally referred to as the "regular method" of determining net earnings from self-employment, and in Internal Revenue Service forms and publications it is expressed as multiplying total net earnings from self-employment by 92.35 percent.

Deposit requirements

The employee portion of OASDI taxes must be withheld and remitted to the Federal government by the employer during the quarter, as required by the applicable deposit rules.[168] The employer is liable for the employee portion of OASDI taxes, in addition to its own share, whether or not the employer withheld the amount from the employee's wages.[169] Employers that make payments of wages and withhold Federal income and FICA taxes are required to make deposits of those taxes in a timely manner.

The regulations under section 6302 provide that an employer generally must deposit employment taxes under a monthly or semi-weekly schedule, with certain exceptions.[170] The applicable deposit schedule is determined based on the total tax liability reported on an employer's quarterly employment tax return during a lookback period. In general, an employer is a monthly depositor if the total Federal income and FICA tax liability for the four quarters in the lookback period was $50,000 or less. A semiweekly depositor is an employer for which the total tax liability reported during the lookback period was more than $50,000. Employers that accumulate $100,000 or more of employment tax liability on any day are required to make deposits of those taxes by the close of the next banking day.[171]

If the aggregate amount of tax reported on an employment tax return exceeds the total amount of deposits made by the employer for the same quarter, the balance due must be remitted in accordance with the applicable form and instructions.[172]

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[167] The deduction is intended to provide parity between FICA and SECA taxes because the employer may deduct, as a business expense, its share of the FICA taxes paid. As presently written, the deduction for SECA taxes is not the exact economic equivalent to the deduction for FICA taxes. See Joint Committee on Taxation, *Options to Improve Tax Compliance and Reform Tax Expenditures* (JCS-2-05), January 2005, for a detailed description of this issue.

[168] Sec. 3102(a) and Treas. Reg. sec. 31.3121(a)-2. Sec. 6302.

[169] Sec. 3102(b).

[170] Treas. Reg. sec. 31.6302-1. In certain circumstances, employers may make employment tax payments with the filing of a return instead of periodic deposits under a monthly or semiweekly schedule. For example, to the extent an employer's total employment tax liability for the current or prior quarter is less than $2,500, the employer may make a payment with a timely filed IRS Form 944, Employer's ANNUAL Federal Tax Return, or IRS Form 941, Employer's QUARTERLY Federal Tax Return.

[171] Treas. Reg. sec. 31.6302-1(c).

[172] Treas. Reg. secs. 31.6302-1(h)(7) and 31.6302-1(i)(2).

A penalty may be imposed for the failure to deposit employment taxes by the prescribed date.[173] The amount of the penalty varies depending on when the deposit is made in relation to the applicable deadline. The penalty is two percent of the unpaid amount if the payment is made within five days of the deadline, five percent if the payment is made within six and 15 days of the due date, 10 percent if the payment is made more than 15 days after the due date, and 15 percent for taxes still unpaid after the 10th day following a notice and demand from the Internal Revenue Service. The failure to deposit penalty may be waived if the taxpayer demonstrates the failure was due to reasonable cause and not willful neglect.[174]

A penalty may also apply in the event that a taxpayer fails to make a payment of tax due on a tax return with the return absent a showing that the failure to pay was due to reasonable cause and not due to willful neglect.[175] The amount of the penalty is equal to one-half percent of the net amount of tax due for each month that the return is not filed. This penalty is coordinated with the penalty for the failure to timely file a tax return, by reducing the failure to file penalty by the amount of the failure to pay penalty for that month.[176] The maximum amount of the failure to pay penalty is 25 percent of the tax due.

With respect to self-employed individuals, estimated tax payments at least equal to (1) 90 percent of the current year's tax liability or (2) 100 percent of prior year's tax liability, must be made by the applicable deadlines.[177] A penalty is imposed by applying the underpayment interest rate to the amount of the underpayment for the period of underpayment. The penalty does not apply if the tax shown on the return is less than $1,000. There is no general reasonable cause waiver for the failure to pay estimated tax, but a waiver is available to the extent the Secretary determines that a taxpayer suffered a casualty or other unusual circumstance if imposition of a penalty would be against equity and good conscience.[178]

Third-party arrangements

Responsibility for employment tax obligations generally rests with the person who is the employer of an employee under a common-law test that has been incorporated into Treasury regulations.[179] An employer-employee relationship exists if the person for whom the services are performed has the right to direct and control the performance of services by an individual, not only to the result to be accomplished by the work but also the details and means by which that

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[173] Sec. 6656.

[174] Sec. 6656(a).

[175] Secs. 6151(a) and 6651(a)(2).

[176] Sec. 6651(a)(1).

[177] Secs. 6654.

[178] Sec. 6654(e)(3).

[179] Treas. Reg. secs. 31.3401(c)-1, 31.3121(d)-1(c)(1), and 31.3306(i)-1(a). A similar concept for RRTA purposes applies under Treas. Reg. sec. 31.3231(b)-1(a)(1)(i).

result is accomplished. In some cases, however, a person other than the common-law employer may be responsible for effectuating the employer's employment tax obligations.

An employer may designate a third-party agent to be responsible for employment tax withholding, depositing, and reporting requirements on behalf of the employer.[180] The reporting functions undertaken by this third party, a "section 3504 agent," may include filing employment tax returns and furnishing Forms W-2, *Wage and Tax Statement*, to the employer's employees. An employer remains jointly and severally liable with the section 3504 agent for satisfaction of the employer's employment tax obligations.[181]

Another third-party entity is a "professional employer organization," which provides employees to perform services in the business of the professional employer organization's customers, including small and medium-sized businesses.[182] In many cases, before the professional employer organization arrangement is finalized, the employees already work in the customer's business as employees of the customer. A "certified professional employer organization" ("CPEO") is an entity that has applied to the Secretary to be treated as a CPEO and has been certified to meet certain requirements. A CPEO is treated as the employer of any work-site employee performing services for any customer of the CPEO but only with respect to remuneration remitted by the CPEO to a work-site employee.[183] A CPEO is subject to employment tax withholding, depositing, and reporting requirements and associated liability with respect to the work-site employees performing services for a customer of the CPEO, subject to the limitations and requirements of section 3511.

Explanation of Provision

The provision allows eligible employers and self-employed individuals to delay the deposit of certain employment taxes. The deposit and payment of "applicable employment taxes" during the "payroll tax deferral period" will be treated as made timely if made by an applicable date. For this purpose, the term "applicable employment taxes" includes the following: the employer's share of OASDI taxes,[184] the employer's share of the equivalent Social

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[180] Sec. 3504. Treas. Reg. sec. 31-3504-1 provides the criteria for the designation by an employer of an agent by application to the IRS. IRS Form 2678 is used for this purpose. In addition, under Treas. Reg. sec. 31.3504-2, designation of an agent may result from the payment of wages or compensation by a payor to an individual performing services for a client of the payor pursuant to a services agreement meeting certain criteria. The rules for designating an agent is a departure from the general principle that a taxpayer has a nondelegable duty with respect to employment tax obligations. See *U.S. v. Boyle*, 469 U.S. 241 (1985).

[181] Treas. Reg. sec. 31.3405-1(a).

[182] "Professional employer organization" is not a legal term with a specific definition. The term "employee leasing company" is also occasionally used to describe the same or similar relationship between service provider and customer in this context, but both terms can be used to describe a variety of arrangements.

[183] Sec. 3511.

[184] Sec. 3111(a).

Security portion of RRTA taxes and employee representative RRTA taxes,[185] and, for self-employed individuals, the equivalent of the employer's Social Security portion of SECA taxes.[186] The employer's share of OASDI taxes, and equivalent portions for RRTA and SECA taxes, is 6.2 percent of wages, compensation, or net earnings from self-employment, up to the 2020 wage base, $137,700.

The period beginning on March 27, 2020 and ending before January 1, 2021 is the "payroll tax deferral period." Half of the applicable employment taxes required to be deposited during the payroll tax deferral period must be deposited on or before December 31, 2021, and the remaining fifty percent of the applicable employment tax liability accrued during the payroll tax deferral period must be deposited on or before December 31, 2022. To the extent an employer deposits applicable employment taxes otherwise due during the payroll tax deferral period by the foregoing applicable dates, notwithstanding the requirements under section 6302, such deposits will be treated as timely.[187] For SECA tax purposes, 50 percent of the tax liability incurred under section 1401(a) during the payroll tax deferral period shall not be treated as taxes requiring estimated tax payments until the applicable dates.[188]

In order to be eligible to defer the deposit of applicable employment taxes, the employer or self-employed person may not have had indebtedness forgiven under sections 1106 or 1109 of the Act.

In the case of a section 3504 agent designated by an employer to perform the employer's employment tax obligations, the employer will be solely liable for the payment of the applicable employment taxes by the applicable date for any wages paid by the agent on behalf of the employer during the payroll tax deferral period. For sole liability to attach to the employer, the employer must direct the agent to defer payment of applicable employment taxes during the payroll tax deferral period. Likewise, a customer of a CPEO that directs the CPEO to defer payment of applicable employment taxes shall, notwithstanding subsections (a) and (c) of section 3511, be solely liable for the subsequent payment of the applicable employment taxes by the deadlines outlined in the provision. Sole liability is only with respect to wages paid by the CPEO to any work-site employee performing services for such customer during the payroll tax deferral period.

The Secretary (or the Secretary's delegate) shall provide such regulations or other guidance as may be necessary to carry out the purposes of the provision, including the administration and enforcement of the liability of third-party entities, section 3504 agents and CPEOs.

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[185] Secs. 3221(a) and 3211(a).

[186] Sec. 1401(a).

[187] Secs. 6656 and 6651(a)(2).

[188] Sec. 6654.

Effective Date

The provision is effective on the date of enactment.

3. Modifications for Net Operating Losses (sec. 2303 of the Act and sec. 172 of the Code)

Present Law

A net operating loss ("NOL") generally means the amount by which a taxpayer's business deductions exceed its gross income.[189] A taxpayer generally may deduct in a taxable year an NOL carried to such year.[190] For NOLs arising in taxable years beginning after December 31, 2017, the NOL deduction generally is limited to 80 percent of taxable income determined without regard to the NOL deduction (the "80-percent taxable income limitation").[191] Excess losses generally may be carried forward indefinitely, but not back,[192] and carryovers of such NOLs to other taxable years are adjusted to take account of the 80-percent taxable income limitation. NOLs offset taxable income in the order of the taxable years to which the NOL may be carried.[193]

Special rules apply with respect to NOLs arising in certain circumstances. These include a special rule providing a two-year carryback in the case of certain farming losses.[194] A separate special rule provides a two-year carryback and 20-year carryover for NOLs of a property and casualty insurance company (*i.e.*, an insurance company as defined in section 816(a)) other than a life insurance company).[195] Further, the 80-percent taxable income limitation does not apply to the NOLs of such insurance companies.

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[189] Sec. 172(c).

[190] Sec. 172(a). Certain additional limitations apply to NOLs claimed by taxpayers other than a corporation. See sec. 172(d)(4).

[191] Sec. 172(a). For this purpose, a real estate investment trust is subject to a limit based on 80 percent of its real estate investment trust taxable income (as defined in section 857(b)(2) but without regard to the deduction for dividends paid (as defined in section 561)). See sec. 172(d)(6)(C).

[192] Sec. 172(b)(1)(A). An NOL arising in a taxable year beginning before January 1, 2018, generally is carried back two years or forward 20 years.

[193] Sec. 172(b)(2). The amount of the NOL that may be carried to a taxable year is reduced by the taxable income for prior taxable years to which the NOL may be carried.

[194] Sec. 172(b)(1)(B). For this purpose, the term "farming loss" means the lesser of (1) the amount that would be the NOL for the taxable year if only income and deductions attributable to farming businesses (as defined in section 263A(e)(4)) are taken into account, or (2) the amount of the NOL for such taxable year. For any loss year, a farming business may irrevocably elect out of the two-year carryback. The election must be made in the manner as prescribed by the Secretary by the due date (including extensions) of the taxpayer's return for the taxable year of the NOL.

[195] Sec. 172(b)(1)(C).

NOLs arising in taxable years beginning before January 1, 2018, are not subject to the 80-percent taxable income limitation. Further, such NOLs remain subject to the 20-year carryover limitation and the relevant carryback rules in effect for taxable years beginning before January 1, 2018.

A taxpayer with NOL carryovers to a taxable year from both taxable years beginning before 2018 ("pre-2018 NOL carryovers") and taxable years beginning after 2017 ("post-2017 NOL carryovers") computes its tax liability as follows. First, the taxpayer may deduct an NOL in the amount of its pre-2018 NOL carryovers without limitation. Second, the taxpayer may deduct an additional NOL equal to the lesser of (1) its post-2017 NOL carryovers or (2) 80 percent of the excess (if any) of the taxpayer's taxable income (before any NOL deduction attributable to post-2017 NOL carryovers) over the NOL deduction attributable to pre-2018 NOL carryovers.

Explanation of Provision

The provision makes several changes with respect to NOLs arising in taxable years beginning after December 31, 2017.

80-percent taxable income limitation

The provision suspends the application of the 80-percent taxable income limitation for taxable years beginning after December 31, 2017, and before January 1, 2021.[196] The 80-percent taxable income limitation continues to apply in the case of any taxable year beginning after December 31, 2020, and with respect to NOLs arising in taxable years beginning after December 31, 2017, carried to such a taxable year.[197]

The provision clarifies that the 80-percent taxable income limitation is calculated without regard to the deductions allowable under sections 172, 199A, and 250. 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 real estate investment trusts and holders of residual interests in real estate mortgage investment conduits.

[196] Sec. 172(a).

[197] Sec. 172(a)(2). Section 172(a)(2)(A) provides that NOLs arising in taxable years beginning before January 1, 2018, carried to a taxable year beginning after December 31, 2020, are not subject to the 80-percent taxable income limitation.

Carryback of NOLs arising in 2018, 2019, and 2020

In general

The provision modifies the rules relating to NOLs arising in 2018, 2019, and 2020.[198] Specifically, the provision provides that any NOL arising in a taxable year beginning after December 31, 2017, and before January 1, 2021, may be carried to the five taxable years preceding the taxable year of such loss (the "five-year carryback period").[199] Special rules apply for real estate investment trusts[200] and life insurance companies.[201] The provision allows taxpayers to use NOLs to a greater extent to offset taxable income in prior or future years in order to provide taxpayers with liquidity in the form of tax refunds and reduced current and future tax liability.

Treatment of taxable years with section 965(a) inclusion

The provision also provides special rules relating to NOL carrybacks to years to which section 965 applies. If an NOL of a taxpayer is carried to a taxable year in which the taxpayer included an amount in income by reason of section 965(a) (*i.e.*, 2017, 2018, or both), the taxpayer may elect to exclude section 965(a) inclusion years from the five-year carryback period.[202] This election does not extend the five-year carryback period; instead, a taxpayer making this election is permitted to use the NOL in a subsequent year within the five-year carryback period in which the taxpayer has taxable income. This election, as well as an election under section 172(b)(3) to waive the entire carryback period with respect to an NOL arising in a taxable year beginning in 2018 or 2019,[203] is required to be made by the due date (including

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[198] Sec. 172(b)(1)(D).

[199] See sec. 172(b)(1)(D)(i). Pursuant to section 172(b)(2), any NOL carryback must be carried to the earliest taxable years to which such loss may be carried.

NOLs eligible for the five-year carryback period include, for example, those arising with respect to farming losses, which would otherwise be subject to a two-year carryback period. See, *e.g.*, sec. 172(b)(1)(B).

[200] See sec. 172(b)(1)(D)(ii). This rule provides that an NOL for any taxable year for which the provisions of part II of subchapter M (relating to real estate investment trusts) apply to the taxpayer may not be carried to any taxable year preceding the taxable year of such loss. Further, an NOL for a taxable year for which the provisions of part II of subchapter M (relating to real estate investment trusts) do not apply to the taxpayer may not be carried to any preceding taxable year in which such provisions do apply to the taxpayer.

[201] See sec. 172(b)(1)(D)(iii). An NOL of a life insurance company carried to a life insurance company taxable year beginning before January 1, 2018, is treated in the same manner as an operations loss carryback (within the meaning of section 810 as in effect before its repeal) of such company to such taxable year.

[202] Sec. 172(b)(1)(D)(v)(I) (providing that "[i]f the 5-year carryback period under clause (i)(I) with respect to any net operating loss of a taxpayer includes 1 or more taxable years in which an amount is includible in gross income by reason of section 965(a), the taxpayer may, in lieu of the election otherwise available under paragraph (3), elect under such paragraph to exclude all such taxable years from such carryback period.").

[203] For guidance regarding elections to waive the carryback period with respect to NOLs arising in taxable years beginning in 2018 or 2019, see sec. 4.01(1) of Rev. Proc. 2020-24.

extensions) for filing the taxpayer's return for the first taxable year ending after the date of enactment of the Act.[204] If a taxpayer does not elect to exclude its section 965(a) inclusion year(s) from the five-year carryback period and an NOL of the taxpayer arising in a taxable year beginning after December 31, 2017, and before January 1, 2021, is carried to such year(s), then the taxpayer is treated as having made an election under section 965(n) (*i.e.*, an election not to apply any NOL deduction to such taxpayer's section 965(a) inclusion amount net of the section 965(c) deduction) with respect to such taxable year(s).[205]

The following example illustrates the application of the special rules relating to NOL carrybacks to years to which section 965 applies:

Suppose, in 2020, a calendar-year taxpayer has a $120 loss. Because the provision (pursuant to section 172(b)(1)(D)) allows a special five-year carryback period in the case of NOLs arising in a taxable year beginning after December 31, 2017, and before January 1, 2021, the taxpayer may carry the $120 NOL from 2020 to the five taxable years preceding the taxable year of such loss. For an NOL arising in 2020, the relevant taxable years within the relevant five-year carryback period are 2015, 2016, 2017, 2018, and 2019. If the taxpayer had $20 of taxable income in 2015 and $30 of taxable income in 2016 (both without regard to any NOL deduction), then the taxpayer is entitled to a $20 NOL deduction in 2015 and a $30 NOL deduction in 2016. The remaining unused portion of the 2020 NOL (*i.e.*, the remaining $70 of the $120 NOL carryback) may be applied to the taxpayer's 2017 taxable year and, to the extent allowed under section 172(b), to each subsequent year.

If, in 2017, the taxpayer had a section 965(a) inclusion (net of the section 965(c) deduction), which the taxpayer elected under section 965(h) to pay in installments, and other taxable income (before any NOL deduction), the taxpayer has two options: (1) apply the provision's default rule, which deems the taxpayer to have made an election under section 965(n) not to apply the NOL to such taxpayer's section 965(a) inclusion amount net of the section 965(c) deduction;[206] or (2) elect to exclude 2017, the taxpayer's section 965(a) inclusion year, from the five-year carryback period (*i.e.*, carry back the 2020 NOL only to 2015, 2016, 2018, and 2019, before carrying forward).[207]

The special rules relating to NOL carrybacks to years to which section 965 applies allow taxpayers to use NOLs to a greater extent to offset taxable income in prior or future years in order to provide taxpayers with liquidity in the form of tax refunds and reduced current and future tax liability. For example, the election to exclude section 965(a) inclusion years from the five-year carryback period allows taxpayers with an outstanding section 965 tax liability to use

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[204] Sec. 172(b)(1)(D)(v)(II). For guidance regarding this election, see sec. 4.01(2) of Rev. Proc. 2020-24.

[205] Sec. 172(b)(1)(D)(iv). For guidance regarding this deemed election, see sec. 4.02 of Rev. Proc. 2020-24.

[206] Sec. 172(b)(1)(D)(iv).

[207] Sec. 172(b)(1)(D)(v)(I).

NOLs in another year such that any resulting overpayment would result in an authorized refund rather than offset the outstanding section 965 tax liability.

Other rules relating to NOLs

The provision makes technical and conforming amendments. Generally, the provision clarifies the effective date of certain changes made by Public Law 115-97 to section 172. The provision clarifies that the 80-percent taxable income limitation with respect to an NOL applies with respect to taxable years to which NOLs arising in taxable years beginning after December 31, 2017, may be carried. The provision also clarifies that the amendments made by Public Law 115-97 relating to NOL carryovers and carrybacks apply to NOLs arising in taxable years beginning after December 31, 2017. In addition, the provision clarifies the statutory language governing the operation of the rules relating to the taxable years to which NOLs may be carried back and carried forward.

Timeliness of application for refund

The provision provides rules relating to the timeliness of refund applications with respect to NOL carryovers arising in fiscal taxable years beginning before January 1, 2018, and ending after December 31, 2017, and the timeliness with respect to an election to waive or change carrybacks under section 172(b). Specifically, the provision allows taxpayers until 120 days after the date of enactment of the Act to use the tentative carryback adjustment procedures of section 6411(a) for the carryback of an NOL arising in a taxable year beginning before January 1, 2018, and ending after December 31, 2017 (without regard to the 12-month limitation in section 6411).[208] The provision also provides an election to forgo the carryback of such an NOL, or to reduce any period to which such an NOL may be carried back, if made by the date that is 120 days after the date of enactment of the Act (notwithstanding that section 172 requires such elections be made by the due date (including extensions) for filing the taxpayer's return for the taxable year of the loss). For example, under this election, a taxpayer may elect to reduce a five-year period to which such an NOL may be carried back to a two-year period to which such an NOL may be carried back. In addition, the provision provides that any election to forgo any carryback of such an NOL that may have already been made may be revoked within 120 days after the date of enactment of the Act (notwithstanding the irrevocability rule in section 172(b)).

Effective Date

The provision suspending application of the 80-percent taxable income limitation applies to taxable years beginning after December 31, 2017, and to taxable years beginning on or before

[208] For guidance regarding applications under section 6411(a) with respect to an NOL arising in a taxable year that began before January 1, 2018, and ended after December 31, 2017, see sec. 4.04(1) of Rev. Proc. 2020-24. For guidance regarding applications under section 6411(a) with respect to NOLs arising in taxable years beginning after December 31, 2017, sec. 4.04(2) of Rev. Proc. 2020-24 directs taxpayers to consult Notice 2020-26 for procedures on how to file applications under section 6411(a) for taxable years that may otherwise be outside the period for filing such applications. Notice 2020-26 grants a six-month extension of time to file an application for a tentative carryback adjustment under section 6411 with respect to the carryback of an NOL that arose in a taxable year that began during calendar year 2018 and that ended on or before June 30, 2019.

December 31, 2017, to which net operating losses arising in taxable years beginning after December 31, 2017, are carried.

The provision modifying the rules relating to carrybacks applies to NOLs arising in taxable years beginning after December 31, 2017, and taxable years beginning before, on, or after such date to which such NOLs are carried.

The technical amendments made by the provision are effective as if included in section 13302 of Public Law 115-97.

4. Modification of Limitation on Losses for Taxpayers Other Than Corporations (sec. 2304 of the Act and sec. 461(l) and (j) of the Code)

Present Law

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

For taxable years beginning after December 31, 2017, and before January 1, 2026, an excess business loss of a taxpayer other than a corporation is not allowed for the taxable year.[209] The disallowed excess business loss is treated as an NOL for the taxable year for purposes of determining any NOL carryover to subsequent taxable years.[210]

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)[211] over the sum of aggregate gross income or gain attributable to

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[209] Sec. 461(l). Section 461 was modified in 2017 by section 11012 of Public Law 115-97.

[210] See generally sec. 172. 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. Under section 461(l), excess business losses that are not allowed are treated as an NOL arising in the taxable year. Thus, such excess business losses are carried over to a subsequent taxable year under the applicable NOL rules. For example, assume that for 2018, H and W file a joint return on which they report a $1,150,000 loss from their farming business on Schedule F (Form 1040). H and W do not have any other income or loss for 2018. After application of the $500,000 threshold amount for joint filers (sec. 461(l)(3)(A)(ii)(II)), the remaining $650,000 business loss is an excess business loss and is not allowed for H and W's taxable year 2018 by reason of section 461(l)(1)(B). Under the provision, H and W have a $500,000 NOL for 2018 that is eligible for a two-year carryback under section 172(b)(1)(B), and a $650,000 NOL (increased by any portion of the $500,000 NOL for 2018 remaining after application of the two-year carryback) eligible for carryover to 2019. Because the $500,000 NOL for 2018 arises in a taxable year beginning after December 31, 2017, it is subject to the 80-percent limitation under section 172(a)(2). Accordingly, the amount of the taxpayer's $500,000 NOL carried back to 2016 and 2017 is limited to 80 percent of the taxable income (determined without regard to the NOL deduction) for the 2016 and 2017 taxable years, respectively.

[211] 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. For example, continuing the example in the preceding footnote, none of the $650,000 excess business loss in taxable year 2018 is subject to section 461(l) in a subsequent taxable year. Thus, any deduction with respect to any portion of the $650,000 that is carried over to a subsequent taxable year under the rules of section 172 is governed by the rules of section 172 (not section 461(l)). Similarly, any deduction with respect to any portion of the $500,000

trades or businesses of the taxpayer plus a threshold amount. The threshold amount for a taxable year beginning in 2018 is $250,000 (or, in the case of a joint return, twice the otherwise applicable threshold amount, *i.e.*, $500,000). The threshold amount is indexed for inflation for taxable years beginning after 2018.

The aggregate deductions taken into account to determine the excess business loss of the taxpayer for the taxable year that are attributable to trades or businesses of the taxpayer are determined without regard to the deductions under section 172 or 199A. For example, assume that a taxpayer has an NOL carryover from a prior taxable year to the current taxable year. Such NOL carryover is not part of the taxpayer's aggregate deductions attributable to the trade or business for the current taxable year under section 461(l).

An excess business loss (the deduction for which is limited by section 461(l)) does not take into account gross income or gains or deductions attributable to the trade or business of the performance of services as an employee.[212] For this purpose, the trade or business of performance of services by the taxpayer as an employee has the same meaning as it does under section 62(a)(1). However, contrary to Congressional intent, IRS Form 461, Limitation on Business Losses, and the Instructions for Form 461 for 2018 and 2019, include wages and salaries (amounts from the trade or business of being an employee) in the determination of the taxpayer's excess business loss amount.[213]

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,[214] the at-risk limitation,[215] 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

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remaining after carrybacks to 2016 and 2017 that is carried over to a subsequent year is governed by the rules of section 172 (not section 461(l)).

[212] This rule expresses Congressional intent.

[213] See also the IRS explanation of "Excess business losses" available at https://www.irs.gov/newsroom/excess-business-losses (last visited April 22, 2020).

[214] Sec. 469.

[215] Sec. 465.

the S corporation stock and debt.[216] Thus, for example, the amount of any income, deduction, gain, or loss from a passive activity that is taken into account for purposes of the passive activity loss limitation is not taken into account in determining whether a taxpayer has an excess business loss.

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.[217] 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[218] 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.

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. Thus, for purposes of determining the amount of an NOL, the amount deductible on account of losses from sales or exchanges of capital assets cannot exceed the amount includible on account of gains from sales or exchanges of capital assets.

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[216] 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.

[217] Sec. 461(j).

[218] 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. 113-79, February 7, 2014. Thus, only Commodity Credit Corporation loans currently fall within the definition of an applicable subsidy for purposes of section 461(j).

Explanation of Provision

The provision provides that the limitation on excess business loss of a taxpayer other than a corporation (section 461(l)) does not apply for taxable years beginning in 2018, 2019, or 2020. In addition, the limitation on excess farm losses (section 461(j)) does not apply for taxable years beginning after 2017 and before 2026. The provision does not change the applicability of other loss limitation rules that may affect a taxpayer for those taxable years, such as the passive activity loss limitation, the at-risk limitation, 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.

The provision also makes technical amendments. The provision clarifies the operation of the rule providing that, for any taxable year beginning after 2020 and before 2026, any excess business loss of a taxpayer other than a corporation is not allowed for the taxable year and excess business loss not allowed is carried forward and treated as part of the taxpayer's NOL carryover in subsequent taxable years as determined under the NOL rules.[219] The provision clarifies this rule using statutory language consistent with the NOL rules, providing that 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.

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 (relating to NOLs) or 199A (relating to the deduction for qualified business income). This change clarifies the ordering rule for the calculation.

The provision clarifies the statutory language to provide specifically that 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.[220] 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).

The provision clarifies that, 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. The provision also clarifies that the amount of capital gain taken into account

[219] Changes made by section 2303 of the Act to rules governing NOLs (section 172) are described elsewhere in this document.

[220] Thus, the provision reverses the result that was previously provided with respect to this issue on IRS Form 461, Limitation on Business Losses, and the Instructions for Form 461 for 2018 and 2019, and in the IRS explanation of "Excess business losses" available at https://www.irs.gov/newsroom/excess-business-losses (last visited April 22, 2020).

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.

Effective Date

The provision suspending the application of section 461(l) and (j) is effective for taxable years beginning after December 31, 2017. The technical amendments to section 461(l) made by the provision are effective as if included in section 11012 of Public Law 115-97.

5. Modification of Credit for Prior Year Minimum Tax Liability of Corporations (sec. 2305 of the Act and sec. 53 of the Code)

Present Law

Minimum tax credit

Section 12001 of Public Law 115-97 repealed the corporate alternative minimum tax ("AMT") for taxable years beginning after December 31, 2017. If a corporation was subject to AMT in a taxable year beginning before January 1, 2018, the amount of AMT was allowed as a minimum tax credit in any subsequent taxable year to the extent the corporation's regular tax liability exceeded its tentative minimum tax in the subsequent year. For taxable years beginning after December 31, 2017, a minimum tax credit may offset a corporation's entire regular tax liability for a taxable year. In addition, the minimum tax credit is allowable and refundable for a taxable year beginning after 2017 and before 2022 in an amount equal to 50 percent (100 percent in the case of a taxable year beginning in 2021) of the excess (if any) of the minimum tax credit for the taxable year over the amount of the credit allowable for the year against regular tax liability. Thus, in the case of a corporation, the full amount of the minimum tax credit will be allowed in taxable years beginning before 2022.

Tentative carryback and refund adjustments

Section 6411 provides a procedure under which taxpayers may apply for tentative carryback and refund adjustments with respect to net operating losses, net capital losses, and unused business credits (but not unused minimum tax credits).[221] Such application generally must be filed within 12 months after the end of the taxable year in which the net operating loss, net capital loss, or unused business credit arose.[222] The Secretary generally has 90 days to act on a claim for a tentative carryback refund once filed.[223]

[221] Taxpayers other than corporations file an application for a tentative carryback adjustment on IRS Form 1045, Application for Tentative Refund, and corporations file on IRS Form 1139, Corporation Application for Tentative Refund. Treas. Reg. sec. 1.6411-1(b).

[222] See sec. 6411(a) and Treas. Reg. sec. 1.6411-1(c).

[223] See sec. 6411(b) and Treas. Reg. sec. 1.6411-3.

Explanation of Provision

The provision provides that a corporation's minimum tax credit is allowable and refundable for a taxable year beginning after 2017 and before 2020 in an amount equal to 50 percent (100 percent in the case of a taxable year beginning in 2019) of the excess (if any) of the minimum tax credit for the taxable year over the amount of the credit allowable for the year against regular tax liability. Thus, in the case of a corporation, the full amount of the minimum tax credit is allowed in taxable years beginning before 2020.

A corporation may elect instead to treat its minimum tax credit as fully refundable for its first taxable year beginning in 2018. A corporation making this election is eligible to file an application for a tentative refund adjustment for its first taxable year beginning in 2018 in such manner and form as the Secretary (or the Secretary's delegate) may prescribe.[224] The application must be filed prior to December 31, 2020,[225] and set forth (i) the amount of refundable minimum tax credit for such taxable year, (ii) the amount of refundable minimum tax credit claimed for any previously filed return for such taxable year, and (iii) the amount of the refund claimed. As under present law with respect to tentative carryback and refund adjustments, the Secretary (or the Secretary's delegate) generally has 90 days to act on the refund claim.

Effective Date

The provision applies to taxable years beginning after December 31, 2017.

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[224] Starting April 17, 2020, the IRS will temporarily accept tentative carryback claims for refunds of corporate minimum tax credits made on Form 1139 that are submitted via fax to 844-249-6236 (in lieu of mailing). See "Temporary procedures to fax certain Forms 1139 and 1045 due to COVID-19", available at https://www.irs.gov/newsroom/temporary-procedures-to-fax-certain-forms-1139-and-1045-due-to-covid-19 (last visited April 22, 2020).

[225] Note that if a corporation would like to file one application for a tentative refund to claim both a net operating loss ("NOL") carryback and its minimum tax credit at the same time, it must do so by the earlier of the due date for the NOL carryback claim or the due date for the minimum tax credit claim. For example, if a calendar year corporation would like to file one Form 1139 to request a tentative refund based on the carryback of its 2018 NOL and its minimum tax credit for such year, it must do so by June 30, 2020. See IRS Notice 2020-26, which extended the deadline for filing a tentative carryback claim under section 6411 with respect to the carryback of an NOL that arose in any taxable year that began in 2018 and ended before July 1, 2019. For a discussion of the changes made by the Act to the NOL rules, see the description in this document of section 2303 of the Act, "Modifications for Net Operating Losses."

6. Modifications of Limitation on Business Interest (sec. 2306 of the Act and sec. 163(j) of the Code)

Present Law

Limitation on deduction of business interest expense

Interest paid or accrued by a business generally is deductible in the computation of taxable income, subject to a number of limitations.[226] In particular, the deduction for business interest expense[227] is generally limited to the sum of (1) business interest income of the taxpayer for the taxable year,[228] (2) 30 percent of the adjusted taxable income[229] of the taxpayer for the taxable year (not less than zero), and (3) the floor plan financing interest of the taxpayer for the taxable year.[230] Thus, other than floor plan financing interest, business interest expense in excess of business interest income is generally deductible only to the extent of 30 percent of adjusted

[226] Sec. 163(a). In addition to the limitations discussed herein, other limitations include: denial of the deduction for the disqualified portion of the original issue discount on an applicable high yield discount obligation (sec. 163(e)(5)), denial of deduction for interest on certain obligations not in registered form (sec. 163(f)), reduction of the deduction for interest on indebtedness with respect to which a mortgage credit certificate has been issued under section 25 (sec. 163(g)), disallowance of deduction for interest on debt with respect to certain life insurance contracts (sec. 264(a)), and disallowance of deduction for interest relating to tax-exempt income (sec. 265(a)(2)). Interest may also be subject to capitalization. See, *e.g.*, secs 263A(f) and 461(g).

[227] Business interest means any interest paid or accrued on indebtedness properly allocable to a trade or business and does not include investment interest (within the meaning of section 163(d)). Sec. 163(j)(5). Under proposed Treasury regulations, section 163(j) applies only to business interest that would otherwise be deductible in the current taxable year, absent the application of section 163(j). Prop. Treas. Reg. sec. 1.163(j)-3(b)(1). Thus, section 163(j) applies after the application of provisions that subject interest to deferral, capitalization, or other limitation (*e.g.*, secs. 163(e)(3), 163(e)(5)(A)(ii), 246A, 263A, 263(g), 267, 1277, and 1282), but before application of sections 461(l), 465, and 469. Prop. Treas. Reg. secs. 1.163(j)-3(b)(2) - (6).

[228] Business interest income means the amount of interest includible in the gross income of the taxpayer for the taxable year that is properly allocable to a trade or business and does not include investment income (within the meaning of section 163(d)). Sec. 163(j)(6).

[229] Adjusted taxable income means the taxable income of the taxpayer computed without regard to: (1) any item of income, gain, deduction, or loss that is not properly allocable to a trade or business; (2) any business interest or business interest income; (3) the amount of any net operating loss deduction; and (4) the amount of any deduction allowed under section 199A. Additionally, for taxable years beginning after December 31, 2017 and before January 1, 2022, adjusted taxable income is computed without regard to any deduction allowable for depreciation, amortization, or depletion. For taxable years beginning after December 31, 2021, adjusted taxable income is computed with regard to deductions allowable for depreciation, amortization, or depletion. Sec. 163(j)(8)(A). Section 163(j)(8)(B) authorizes the Treasury to provide for additional adjustments to adjusted taxable income and proposed Treasury regulations provide other adjustments to the definition of adjusted taxable income. Prop. Treas. Reg. sec. 1.163(j)-1(b)(1).

[230] Floor plan financing interest means interest paid or accrued on floor plan financing indebtedness. Floor plan financing indebtedness means indebtedness used to finance the acquisition of motor vehicles held for sale or lease to retail customers and secured by the inventory so acquired. A motor vehicle means a motor vehicle that is: (1) any self-propelled vehicle designed for transporting person or property on a public street, highway, or road; (2) a boat; or (3) farm machinery or equipment. Sec. 163(j)(9).

taxable income. The amount of any business interest expense not allowed as a deduction for any taxable year may be carried forward indefinitely.

The limitation generally applies at the taxpayer level (although special carryforward rules apply in the case of partnerships, described below). In the case of a group of affiliated corporations that file a consolidated return, the limitation applies at the consolidated tax return filing level.[231]

Carryforward of disallowed business interest

The amount of any business interest expense not allowed as a deduction for any taxable year is generally treated as business interest expense paid or accrued by the taxpayer in the succeeding taxable year. Such business interest expense may be carried forward indefinitely.[232]

Application to passthrough entities

In general

In the case of a partnership, the section 163(j) interest limitation is generally applied at the partnership level.[233] A partner must generally perform its own section 163(j) calculation for business interest expense it incurs at the partner level. To prevent double counting, the business interest income and adjusted taxable income of each partner are determined without regard to such partner's distributive share of any items of income, gain, deduction, or loss of the partnership.[234] However, in cases where the partnership has an excess amount of business interest income, an excess amount of adjusted taxable income, or both, section 163(j) may allow for partnership items to support additional business interest expense deductions by the partnership's partners. Specifically, a partner's business interest deduction limitation is increased by the sum of the partner's distributive share of the partnership's excess business interest income and 30 percent of the partner's distributive share of the partnership's excess taxable income.[235]

Similar rules apply with respect to any S corporation and its shareholders.[236]

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[231] See Prop. Treas. Reg. sec. 1.163(j)-4(d) (providing that a consolidated group has a single section 163(j) limitation and generally treats all members of the consolidated group as a single taxpayer for section 163(j) purposes).

[232] Sec. 163(j)(2). With respect to corporations, any carryforward of disallowed business interest of a corporation is an item taken into account in the case of certain corporate acquisitions described in section 381 and is subject to limitation under section 382. Secs. 381(c)(20) and 382(d)(3).

[233] Sec. 163(j)(4)(A)(i).

[234] Sec. 163(j)(4)(A)(ii)(I); Prop. Treas. Reg. sec. 1.163(j)-6(e)(1).

[235] Sec. 163(j)(4)(A)(ii)(II); Prop. Treas. Reg. sec. 1.163(j)-6(e)(1).

[236] Sec. 163(j)(4)(D).

Carryforward rules for partnerships

Special rules for the carryforward of disallowed business interest expense apply only to partnerships and their partners.[237] In the case of a partnership, the general taxpayer-level carryforward rule does not apply. Instead, any business interest expense that is not allowed as a deduction to the partnership for the taxable year (referred to as "excess business interest expense") is allocated to the partners.[238] A partner may not deduct excess business interest expense in the year in which it is allocated to a partner. A partner may deduct its share of the partnership's excess business interest expense in any future year, but only in an amount that is based on the partner's distributive share of excess business interest income and excess taxable income of the partnership the activities of which gave rise to the disallowed business interest expense carryforward.[239] Any amount that is not allowed as a deduction generally continues to be carried forward.

When excess business interest expense is allocated to a partner, the partner's basis in its partnership interest is reduced (but not below zero) by the amount of such allocation, even though the excess business interest expense does not give rise to a deduction in the year of the basis reduction.[240] However, the partner's deduction in a subsequent year for excess business interest expense does not reduce the partner's basis in its partnership interest. In the event the partner disposes of a partnership interest the basis of which has been reduced by an allocation of excess business interest expense, the partner's basis in such interest is increased, immediately before such disposition, by the amount by which such basis reductions exceed any amount of excess business interest expense that has been treated as business interest expense paid or accrued by the partner as a result of an allocation of excess business interest income or excess taxable income by the same partnership.[241] Under the proposed Treasury regulations, the increase in the partner's adjusted basis in the partnership occurs if a partner disposes of all or substantially all of a partnership interest (whether by sale, exchange, or redemption).[242] Under proposed Treasury regulations, however, if a partner disposes of less than substantially all of its

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[237] Sec. 163(j)(4)(B).

[238] Sec. 163(j)(4)(B)(i)(II).

[239] Sec. 163(j)(4)((B)(ii)(I); Prop. Treas. Reg. sec. 1.163(j)-6(g)(2). See also Joint Committee on Taxation, *General Explanation of Public Law 115–97* (JCS–1–18), December 2018, pp. 175-178 (describing section 163(j)(4) as it was intended to work).

[240] Sec. 163(j)(4)(B)(iii)(I).

[241] Sec. 163(j)(4)(B)(iii)(II); Prop. Treas. Reg. 1.163(j)-6(h)(3). The special rule for dispositions also applies to transfers of a partnership interest (including by reason of death) in transactions in which gain is not recognized in whole or in part. Id. No deduction is allowed to the transferor or transferee for any disallowed business interest resulting in a basis increase under this rule. Id.

[242] Prop. Treas. Reg. sec. 1.163(j)-6(h)(3)(i).

interest in a partnership (whether by sale, exchange, or redemption), a partner does not increase its basis in its partnership interest.[243]

These special carryforward rules do not apply to S corporations and their shareholders.[244]

Exceptions

The section 163(j) limitation does not apply to any taxpayer (other than a tax shelter prohibited from using the cash method under section 448(a)(3)) that meets the $25 million gross receipts test of section 448(c).[245] Aggregation rules apply to determine the amount of a taxpayer's gross receipts under the gross receipts test of section 448(c).

The trade or business of performing services as an employee is not treated as a trade or business for purposes of the limitation.[246] As a result, for example, the wages of an employee are not counted in the adjusted taxable income of the taxpayer for purposes of determining the limitation.

At the taxpayer's election, any real property development, redevelopment, construction, reconstruction, acquisition, conversion, rental, operation, management, leasing, or brokerage trade or business (*i.e.*, any electing real property trade or business) is not treated as a trade or business for purposes of the limitation, and therefore the limitation does not apply to such trades or businesses.[247] Similarly, at the taxpayer's election, any farming business or any business engaged in the trade or business of a specified agricultural or horticultural cooperative (collectively, any electing farming business) is not treated as a trade or business for purposes of the limitation, and therefore the limitation does not apply to any such trade or business.[248] A taxpayer's election to be an electing real property trade or business or an electing farming business, once made, shall be irrevocable.[249]

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[243] Prop. Treas. Reg. sec. 1.163(j)-6(h)(3)(ii).

[244] Sec. 163(j)(4)(D).

[245] Sec. 163(j)(3). The $25 million amount is indexed for inflation for taxable years beginning after 2018. For taxable years beginning in 2020, the limitation is $26 million. See Rev. Proc. 2019-44, 2019-47 I.R.B. 1093.

[246] Sec. 163(j)(7)(A)(i).

[247] Sec. 163(j)(7)(A)(ii) and (B).

[248] Sec. 163(j)(7)(A)(iii) and (C).

[249] Secs. 163(j)(7)(B) and (C). In Rev. Proc. 2020-22, 2020-18 I.R.B. 1, the IRS provided guidance for making an election to be an electing real property trade or business or an electing farming business. The revenue procedure allows certain taxpayers to make a late election, or to withdraw an election, to be an electing real property trade or business or electing farming on an amended Federal income tax return, an amended Form 1065, or an administrative adjustment request under section 6227. In Rev. Proc. 2020-23, 2020-18 I.R.B. 1, the IRS provided guidance allowing certain partnerships to file an amended Form 1065, and to issue amended Schedules K-1, for taxable years beginning in 2018 and 2019. As a result, the IRS, for example, will allow certain partnerships to

The limitation does not apply to certain regulated public utilities. Specifically, the trade or business of the furnishing or sale of (1) electrical energy, water, or sewage disposal services, (2) gas or steam through a local distribution system, or (3) transportation of gas or steam by pipeline, if the rates for such furnishing or sale, as the case may be, have been established or approved by a State or political subdivision thereof, by any agency or instrumentality of the United States, by a public service or public utility commission or other similar body of any State or political subdivision thereof, or by the governing or ratemaking body of an electric cooperative is not treated as a trade or business for purposes of the limitation, and thus any interest paid or accrued on indebtedness properly allocable to such trades or businesses is not business interest.[250]

Explanation of Provision

The provision permits taxpayers to increase the limit on the deduction of business interest expense paid or accrued in taxable years beginning in 2019 or 2020 in two ways.

Increase to 50 percent of adjusted taxable income

For taxable years beginning in 2019 or 2020, the provision generally increases the percentage of the taxpayer's adjusted taxable income that factors into the calculation of the limitation on deduction of business interest from 30 percent to 50 percent. For example, a corporation with $100 of adjusted taxable income and $50 of business interest expense in its 2019 taxable year may deduct all $50[251] of its 2019 business interest expense on its 2019 return, including on an amended return. If the corporation has $100 of adjusted taxable income and $70 of business interest expense in its 2020 taxable year, it may deduct $50[252] of its 2020 business interest expense on its 2020 return, and $20[253] of its 2020 business interest expense will carry forward.

For partnership taxable years beginning in 2019, this rule does not apply, and instead partners that were allocated excess business interest expense of a partnership for any taxable year of the partnership beginning in 2019 are permitted to deduct 50 percent of such excess business interest expense in the partner's first taxable year beginning in 2020 (the other 50 percent of such excess business interest expense is subject to the limitations of section 163(j)(4)(B)(ii) described above).

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withdraw an election to be an electing real property trade or business made on a statement attached to a 2018 Form 1065 by filing an amended 2018 Form 1065.

[250] Sec. 163(j)(7)(A)(iv).

[251] $100 * 50 percent = $50.

[252] $100 * 50 percent = $50.

[253] $70 - $50 = $20.

For example, assume a partnership has $100 of adjusted taxable income and $70 of business interest expense in a taxable year beginning in 2019. The partnership has $30[254] of deductible business interest expense for its 2019 taxable year and allocates $40[255] in excess business interest expense to its partners. A partner in the partnership that was allocated $20 of excess business interest expense may deduct $10[256] of such excess business interest expense in the partner's first taxable year beginning in 2020. The other $10 of such excess business interest expense remains subject to the limitations of section 163(j)(4)(B)(ii).[257]

Taxpayers are permitted to elect out of application of the increase in the adjusted taxable income percentage for any taxable year to which the increase potentially applies,[258] and partners are permitted to elect out of the special rule for 2019 excess business interest.[259]

Election to substitute last taxable year beginning in 2019

The provision permits a taxpayer to elect to substitute the adjusted taxable income for its last taxable year beginning in 2019 for its adjusted taxable income for any taxable year beginning in 2020. In the case of a partnership, the election is made at the partnership level.[260]

If the election to substitute adjusted taxable income from a taxpayer's last taxable year beginning in 2019 is made with respect to a taxable year beginning in 2020 that is a short taxable year, the 2019 adjusted taxable income amount that is substituted is scaled down by multiplying the taxpayer's 2019 adjusted taxable income by the ratio of (1) the number of months in the short taxable year beginning in 2020, to (2) 12.

For example, assume a taxpayer has $200 of adjusted taxable income in its last taxable year beginning in 2019, $10 of adjusted taxable income in a short taxable year starting on January 1, 2020, and ending on March 31, 2020, and $50 of business interest expense in its short 2020 taxable year. If the taxpayer makes the election to substitute its last taxable year beginning

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[254] $100 * 30 percent = $30.

[255] $70 - $30 = $40.

[256] $20 * 50 percent = $10.

[257] This assumes that the partner does not sell all or substantially all of its partnership interest in 2019 or 2020. If the partner sells all or substantially all of its partnership interest in 2019 or 2020, the rules of section 163(j)(4)(B)(iii)(II), described above, apply.

[258] For partnership taxable years beginning in 2020, the election out of the increase in the adjusted taxable income percentage is made at the partnership level.

[259] In Rev. Proc. 2020-22, the IRS describes the time and manner in which certain taxpayers may elect out of the 50 percent adjusted taxable income limitation for taxable years beginning in 2019 and 2020 and partners may elect out of deducting 50 percent of excess business interest expense for taxable years beginning in 2020.

[260] In Rev. Proc. 2020-22, the IRS describes the time and manner in which taxpayers may elect to use the taxpayer's adjusted taxable income for its last taxable year beginning in 2019 for its adjusted taxable income for any taxable year beginning in 2020.

in 2019 in determining adjusted taxable income under the provision, the taxpayer may deduct $25[261] of such business interest expense.

Effective Date

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

7. Technical Amendments Regarding Qualified Improvement Property (sec. 2307 of the Act and sec. 168(e) 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.[262] The period for depreciation or amortization generally begins when the asset is placed in service by the taxpayer.[263] Tangible property generally is depreciated under the modified accelerated cost recovery system ("MACRS"), which determines depreciation for different types of property based on an assigned applicable depreciation method, recovery period, and convention.[264]

Recovery periods and depreciation methods

The applicable recovery period for an asset is determined in part by statute and in part by historic Treasury guidance.[265] The "type of property" of an asset is used to determine the "class life" of the asset, which in turn dictates the applicable recovery period for the asset.

The MACRS recovery periods applicable to most tangible personal property range from three to 20 years. The depreciation methods generally applicable to tangible personal property

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[261] ($200 * 3/12) * 50 percent = $25.

[262] 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.

[263] 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).

[264] Sec. 168.

[265] Exercising authority granted by Congress, the Secretary issued Rev. Proc. 87-56, 1987-2 C.B. 674, laying out the framework of recovery periods for enumerated classes of assets. The Secretary clarified and modified the list of asset classes in Rev. Proc. 88-22, 1988-1 C.B. 785. In November 1988, Congress revoked the Secretary's authority to modify the class lives of depreciable property. Rev. Proc. 87-56, as modified by Rev. Proc. 88-22, 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 assets.

are the 200-percent and 150-percent declining balance methods,[266] 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 and 27.5 years for residential rental property. The straight line depreciation method is required for the aforementioned real property.

Placed-in-service conventions

Depreciation of an asset begins when the asset is deemed to be placed in service under the applicable convention.[267] Under MACRS, nonresidential real property, residential rental property, and any railroad grading or tunnel bore generally are subject to the mid-month convention, which treats all property placed in service during any month (or disposed of during any month) as placed in service (or disposed of) on the mid-point of such month.[268] All other property generally is subject to the half-year convention, which treats all property placed in service during any taxable year (or disposed of during any taxable year) as placed in service (or disposed of) on the mid-point of such taxable year to reflect the assumption that assets are placed in service ratably throughout the year.[269] However, if substantial property is placed in service during the last three months of a taxable year, a special rule requires use of the mid-quarter convention,[270] designed to prevent the recognition of disproportionately large amounts of first-year depreciation as a result of the half-year convention.

Depreciation of additions or improvements to property

The recovery period for any addition or improvement to real or personal property begins on the later of (1) the date on which the addition or improvement is placed in service, or (2) the date on which the property with respect to which such addition or improvement is made is placed

[266] Under the declining balance method, the depreciation rate is determined by dividing the appropriate percentage (here, 150 or 200 percent) 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.

[267] Treas. Reg. sec. 1.167(a)-10(b).

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

[269] Sec. 168(d)(1) and (4)(A).

[270] The mid-quarter convention treats all property placed in service (or disposed of) during any quarter as placed in service (or disposed of) on the mid-point of such quarter. Sec. 168(d)(3) and (d)(4)(C).

in service.[271] Any MACRS deduction for an addition or improvement to any property is to be computed in the same manner as the deduction for the underlying property would be if such property were placed in service at the same time as such addition or improvement. Thus, for example, the cost of an improvement to a building that constitutes nonresidential real property is recovered over 39 years using the straight line method and mid-month convention. However, an exception to the 39-year recovery period applies to qualified improvement property, as described below.

Qualified improvement property

Qualified improvement property is any improvement made by the taxpayer[272] to an interior portion of a building that is nonresidential real property if such improvement is placed in service by the taxpayer after the date such building was first placed in service by any taxpayer.[273] Qualified improvement property does not include any improvement for which the expenditure is attributable to the enlargement of the building, any elevator or escalator, or the internal structural framework of the building.[274]

Qualified improvement property placed in service after December 31, 2017, is generally depreciable over 15 years[275] using the straight line method[276] and half-year convention. However, when the definition of qualified improvement property was added to section 168(e) by section 13204 of Public Law 115-97, language providing a 15-year recovery period for such property was inadvertently omitted from the statute. As a result, the IRS and Treasury have taken the position that such property is recoverable over 39 years, rather than the intended 15 years.[277]

Alternative depreciation system

The alternative depreciation system ("ADS") is required to be used for tangible property used predominantly outside the United States, certain tax-exempt use property, tax-exempt bond

[271] Sec. 168(i)(6).

[272] This rule expresses Congressional intent.

[273] Sec. 168(e)(6)(A).

[274] Sec. 168(e)(6)(B).

[275] This rule expresses Congressional intent. Note that as 15-year property, qualified improvement property is generally eligible for the additional first-year depreciation deduction under section 168(k). Qualified improvement property is also eligible for section 179 expensing. See sec. 179(e)(1). Note that the amount of the additional first-year depreciation deduction is determined after basis adjustments for any section 179 expensing. See Treas. Reg. sec. 1.168(k)-1(a)(2)(iii).

[276] Sec. 168(b)(3)(G).

[277] See T.D. 9874, 84 Fed. Reg. 50109-50110, September 24, 2019. Note that if treated as 39-year property, the property would not be eligible for the additional first-year depreciation deduction under section 168(k) as such property would not have a MACRS recovery period of 20 years or less. See sec. 168(k)(2)(A)(i)(I).

financed property, and certain imported property covered by an Executive order.[278] In addition, ADS is required to be used for certain property held by an electing real property trade or business[279] and an electing farming business.[280] An election to use ADS is available to taxpayers for any class of property for any taxable year.[281] Under ADS, all property is depreciated using the straight line method over recovery periods that generally are equal to the class life of the property, with certain exceptions.[282] For example, nonresidential real property has a 40-year ADS recovery period, and residential rental property placed in service after December 31, 2017, has a 30-year ADS recovery period,[283] while qualified improvement property placed in service after December 31, 2017, is intended to have a 20-year ADS recovery period.[284]

Explanation of Provision

The provision clarifies that qualified improvement property is 15-year property under MACRS and 20-year property under ADS.[285]

The provision also clarifies that the 15-year MACRS (or 20-year ADS) recovery period only applies if the qualified improvement property is made by the taxpayer. Thus, for example, if a taxpayer purchases a building in a taxable transaction, any qualified improvement property

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[278] Sec. 168(g)(1)(A)-(D).

[279] As defined in section 163(j)(7)(B). See sec. 168(g)(1)(F) and (8). For a discussion of changes made to section 163(j) by the Act, see the description of section 2306 of the Act (Modifications of Limitation on Business Interest) in this document.

[280] As defined in section 163(j)(7)(C). See also sec. 168(g)(1)(G). For a discussion of changes made to section 163(j) by the Act, see the description of section 2306 of the Act (Modifications of Limitation on Business Interest) in this document.

[281] Sec. 168(g)(1)(E) and (7).

[282] Sec. 168(g)(2) and (3).

[283] See sec. 168(g)(3).

[284] This rule expresses Congressional intent.

[285] Thus, the provision reverses the result in T.D. 9874, *supra*, with the result that qualified improvement property may be eligible for the additional first-year depreciation deduction under section 168(k). Note that if qualified improvement property placed in service after 2017 was improperly depreciated as 39-year property (or 40-year property under ADS), the taxpayer may be eligible to file an amended return, administrative adjustment request under section 6227, or IRS Form 3115, Application for Change in Accounting Method, to change to properly treat such property as 15-year property (or 20-year property under ADS). Similarly, a taxpayer wishing to make, revoke, or withdraw an election for such property under section 168(g)(7) (regarding an election to use ADS), section 168(k)(7) (regarding an election out of the additional first-year depreciation deduction under section 168(k)), or section 168(k)(10) (regarding an election to use a 50-percent allowance under section 168(k) for certain property placed in service during certain periods) may be eligible to do so by filing an amended return, administrative adjustment request, or IRS Form 3115. See sec. 446(e), Rev. Proc. 2020-25, and sec. 6 of Rev. Proc. 2019-43, 2019-48 I.R.B. 1107, as modified by Rev. Proc. 2020-25.

previously placed in service by the seller with respect to such building does not qualify as qualified leasehold improvement property with respect to the buyer.

Effective Date

The provision is effective as if included in section 13204 of Public Law 115-97 (*i.e.*, for property placed in service after December 31, 2017).

8. Temporary Exception from Excise Tax for Alcohol Used to Produce Hand Sanitizer (sec. 2308 of the Act and sec. 5214 of the Code)

Present Law

Distilled spirits produced in or imported into the United States generally are subject to Federal excise tax.[286] Under certain circumstances, however, distilled spirits may be withdrawn from the bonded premises of any distilled spirits plant free of Federal excise tax, such as when such spirits are denatured or are used in hospitals, blood banks, sanitariums, or nonprofit clinics for non-beverage purposes and not for resale or use in the manufacture of any product for sale.[287] Although the Secretary in the event of a disaster has broad authority to temporarily exempt proprietors of distilled spirits plants from any provision of the Code related to distilled spirits, such authority does not extend to those Code provisions requiring payment of the Federal excise tax on distilled spirits.[288]

Explanation of Provision

Under the provision,[289] distilled spirits that are removed after December 31, 2019, and before January 1, 2021, are free of Federal excise tax if they are used or contained in hand sanitizer produced and distributed in a manner consistent with any guidance issued by the Food and Drug Administration (the "FDA") that is related to the outbreak of COVID-19.[290]

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[286] Sec. 5001.

[287] Sec. 5214(a).

[288] Sec. 5562.

[289] The provision also exempts alcohol removed under the provision from certain labeling and bulk sales requirements under section 105 or 106 of the Federal Alcohol Administration Act (27 U.S.C. sec. 205; 207 U.S.C. sec. 206) and section 204 of the Alcoholic Beverage Labeling Act of 1988 (27 U.S.C. sec. 215).

[290] The FDA has issued temporary guidance for the preparation of alcohol-based hand sanitizers with denatured ethanol by certain firms and pharmacies during the outbreak of COVID-19. See FDA, "Guidance for Industry: Temporary Policy for Preparation of Certain Alcohol-Based Hand Sanitizer Products During the Public Health Emergency (COVID-19)" (March 2020), available at https://www.fda.gov/regulatory-information/search-fda-guidance-documents/guidance-industry-temporary-policy-preparation-certain-alcohol-based-hand-sanitizer-products-during (last visited April 22, 2020); FDA, "Policy for Temporary Compounding of Certain Alcohol-Based Hand Sanitizer Products During the Public Health Emergency" (March 2020), available at https://www.fda.gov/regulatory-information/search-fda-guidance-documents/policy-temporary-compounding-certain-alcohol-based-hand-sanitizer-products-during-public-health (last visited April 22, 2020); FDA, "Temporary

Effective Date

The provision applies to distilled spirits removed after December 31, 2019.

Policy for Manufacture of Alcohol for Incorporation Into Alcohol-Based Hand Sanitizer Products During the Public Health Emergency (COVID-19) Guidance for Industry" (March 2020), available at https://www.fda.gov/regulatory-information/search-fda-guidance-documents/temporary-policy-manufacture-alcohol-incorporation-alcohol-based-hand-sanitizer-products-during (last visited April 22, 2020).

TITLE III – SUPPORTING AMERICA'S HEALTH CARE SYSTEM IN THE FIGHT AGAINST THE CORONAVIRUS

A. Education Provisions (Subtitle B)

1. Technical and Other Amendments Relating to the FUTURE Act (sec. 3516 of the Act and sec. 6103 of the Code)

Present Law

General rule of confidentiality and exception for certain disclosures to administer certain student financial aid and loan programs

As a general rule, returns and return information are confidential and cannot be disclosed unless authorized by Title 26 (the Code).[291] Among others, this general rule applies to officers and employees of the United States and any person who has or had access to returns or return information under section 6103(l)(13). The Fostering Undergraduate Talent by Unlocking Resources for Education ("FUTURE") Act[292] amended and rewrote section 6103(l)(13) to authorize the disclosure of certain return information for purposes of administering student financial aid and loan programs.

The provision requires the IRS to disclose certain return information to the Department of Education and others for the purpose of administering financial aid and loan programs. Upon receiving a written request from the Secretary of Education,[293] the IRS must disclose specified return information to authorized persons for the purposes of (1) determining eligibility for, and repayment obligations under, income-contingent or income-based repayment plans; (2) monitoring and reinstating loans that were discharged based on a total and permanent disability; and (3) determining the eligibility for, and the amount of, awards of Federal student financial aid.

Authorized persons may only use the disclosed information for the purposes above and for three additional purposes related to the programs. These additional purposes are (1) reducing the net cost of improper payments under such plans, relating to such awards, or relating to such discharges; (2) oversight activities by the Office of Inspector General of the Department of Education as authorized by the Inspector General Act of 1978; and (3) conducting analyses and forecasts for estimating costs related to such plans, discharges, or awards. The additional purposes do not include conducting criminal investigations or prosecutions.

An "authorized person" is any person who is an officer, employee, or contractor of the Department of Education, and is specifically authorized and designated by the Secretary of Education for purposes of the specific disclosure authority programs (income-contingent or income-based repayment plans, loans discharged based on a total and permanent disability,

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[291] Sec. 6103(a).

[292] Pub. L. No. 116-91, December 19, 2019.

[293] The Secretary of Education can make a request for disclosure under section 6103(l)(13) with respect to an individual only if the Secretary of Education has obtained approval from the individual for such disclosure.

awards of Federal student financial aid (the designation is applied separately with respect to each program)).

With the consent of the taxpayer, authorized persons may redisclose the return information received from the IRS to certain institutions of higher education, State higher education agencies, and scholarship organizations solely for use in financial aid programs.

Civil damage remedy for unauthorized disclosure or unauthorized inspection of returns and return information

A taxpayer whose return or return information is disclosed in violation of section 6103(a) may bring a lawsuit in a district court of the United States for actual or statutory damages, and in certain cases, punitive damages. If a Federal employee makes knowingly or by reason of negligence, a disclosure or inspection in violation of any provision of section 6103, a taxpayer may sue the United States. If a person other than a Federal employee knowingly or by reason of negligence inspects or discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103, suit may be brought directly against such person.

No liability results from a disclosure based on a good faith, but erroneous, interpretation of section 6103. A disclosure or inspection requested by the taxpayer will also relieve liability.

Upon a finding of liability, a taxpayer can recover the greater of $1,000 per act of unauthorized disclosure (or inspection) or, the sum of actual damages plus, in the case of an inspection or disclosure that was willful or the result of gross negligence, punitive damages. The taxpayer may also recover the costs of the action and, if found to be a prevailing party, reasonable attorney fees.

The taxpayer has two years from the date of the discovery of the unauthorized inspection or disclosure to bring suit. The IRS is required to notify a taxpayer of an unauthorized inspection or disclosure as soon as practicable after any person is criminally charged by indictment or information for unlawful inspection or disclosure. In addition, the taxpayer is to be notified if the IRS or a Federal or State agency (upon notice to the Secretary by such Federal or State agency) proposes an administrative determination as to disciplinary or adverse action against an employee arising from the employee's unauthorized inspection or disclosure of the taxpayer's return or return information.

Safeguards and accountings

Accountings

Unless specifically listed in the statute as excluded from the accounting requirement, section 6103(p)(3) requires the IRS to maintain a permanent system of standardized records or accountings of all requests for inspection or disclosure of returns and return information (including the reasons for and dates of such requests) and of returns and return information inspected or disclosed under section 6103 (and section 6104(c)). The IRS is required to account for all disclosures made under section 6103(l)(13), including those made to the Department of Education and its contractors, as well as redisclosures made by authorized persons to institutions of higher education, State higher education agencies, and scholarship organizations. The

Secretary of Education is required to annually submit a written report to the Secretary of the Treasury regarding: (1) redisclosures of return information to institutions of higher education, State higher education agencies, and scholarship organizations, including the number of such redisclosures; and (2) any unauthorized use, access, or disclosure of the return information under section 6103(l)(13).

Section 6103(p)(4) requires, as a condition of receiving returns and return information, that Federal and State agencies and specified other recipients provide safeguards to the satisfaction of the Secretary of the Treasury as necessary or appropriate to protect the confidentiality of returns or return information.[294] It also requires that a report be furnished to the Secretary at such time and containing such information as prescribed by the Secretary, regarding the procedures established and utilized for ensuring the confidentiality of returns and return information. The Secretary, after an administrative review, may take such actions as are necessary to ensure these requirements are met, including the refusal to disclose returns and return information.

All agencies and other persons described in section 6103(l)(13) as authorized to receive confidential return information (*i.e.*, the Department of Education, its contractors, certain institutions of higher education, State higher education agencies, and scholarship organizations) are required to safeguard such information to the satisfaction of the Secretary.

Explanation of Provision

General rule of confidentiality and civil actions for damages

Under the provision, a person who has or had access to return information under section 6103(l)(13)(D)(iii) (*i.e.*, certain institutions of higher education, State higher education agencies, scholarship organizations, and the authorized persons designated to the make redisclosures to such entities) is no longer required to maintain the confidentiality of that return information as provided by section 6103(a). As a result, the general rule of confidentiality and nondisclosure under section 6103(a) does not apply to these entities with respect to the information redisclosed to them, and a civil action for damages due to inspections and disclosures by such entities in violation of section 6103(a) is no longer available.

Accountings

Under the provision, the IRS is no longer required to maintain a permanent system of standardized records to account for disclosures the IRS makes to the Department of Education and its contractors. The IRS is still required to account for redisclosures made by authorized persons to institutions of higher education, State higher education agencies, and scholarship organizations.

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[294] The IRS has published guidelines for safeguarding the confidentiality of Federal tax information in IRS Publication 1075, *Tax Information Security Guidelines for Federal, State and Local Agencies* (2016).

Safeguards

For institutions of higher education, State higher education agencies, scholarship organizations, and the authorized persons designated to make redisclosures to such entities, the provision eliminates the requirement that as a condition of receiving return information such entities establish safeguard requirements to the satisfaction of the Secretary of the Treasury.

Technical amendment

The provision corrects an erroneous cross-reference defining taxable income from a farming business.

Effective Date

The amendments made by the provision are effective as if included in the FUTURE Act (Pub. L. No. 116–91).

B. Labor Provisions (Subtitle C)

1. Advance Refunding of Credits (sec. 3606 of the Act)

Present Law

Federal employment taxes are imposed on wages paid to employees with respect to employment and include taxes levied under FICA, FUTA, and Federal income tax.[295] In addition, tier 1 of the RRTA imposes a tax on compensation paid to railroad employees and representatives.[296]

FICA taxes are comprised of two components: OASDI and Medicare taxes.[297] 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.[298] The tax is assessed on covered wages up to the OASDI wage base ($137,700 in 2020). Generally, the OASDI wage base rises based on increases in the national average wage index.[299]

Generally, the term "wages" for OASDI tax purposes means all remuneration for "employment," including the cash value of all remuneration (including benefits) paid in any medium other than cash, with certain exceptions.[300] The name given to the remuneration for employment is immaterial. OASDI wages includes salaries, vacation allowances, bonuses, deferred compensation, commissions, and fringe benefits. The term "employment" is generally defined for FICA tax purposes as any service, of whatever nature, performed by an employee for the person employing him or her, with certain specific exceptions.

Railroad retirement program

Railroad workers do not participate in the OASDI system. Compensation subject to RRTA tax is exempt from FICA taxes.[301] The RRTA imposes a tax on compensation paid by

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

[296] Sec. 3221.

[297] The Hospital Insurance ("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. Sec. 3101(b)(1). An equivalent 1.45 percent is withheld from employee wages. Sec. 3111(b)(1). For purposes of this description, Medicare tax does not include Additional Medicare tax. Additional Medicare taxes are withheld from employee wages in excess of $200,000 at a rate of 0.9 percent. Sec. 3101(b)(2). There is no equivalent employer's share of Additional Medicare taxes.

[298] Sec. 3101.

[299] Sec. 230 of the Social Security Act (42 U.S.C. sec. 430).

[300] Sec. 3121(a).

[301] Sec. 3121(b)(9).

covered employers to employees in recognition for the performance of services.[302] Employees whose compensation is subject to RRTA are ultimately eligible for railroad retirement benefits that fall under a two-tier structure. Rail employees and employers pay tier 1 taxes at the same rate as FICA taxes.[303] In addition, rail employees and employers both pay tier 2 taxes that are used to finance railroad retirement benefits over and above Social Security benefit levels.[304] Tier 2 benefits are similar to a private defined benefit pension. Those taxes are funneled to the railroad retirement system and used to fund basic retirement benefits for railroad workers and an investment trust that generates returns for the pension fund.

Self-employment taxes

The SECA imposes tax on the self-employment income of an individual. SECA taxes consist of OASDI tax and Medicare tax.[305] Under the OASDI component, the first rate of tax is 12.4 percent on self-employment income up to the OASDI wage base ($137,700 for 2020).[306] Under the basic Medicare tax component, the second rate of tax is 2.9 percent of all self-employment income (without regard to the OASDI wage base).[307] As is the case with employees, an Additional Medicare tax applies to the Medicare portion of SECA tax on self-employment income in excess of a threshold amount.[308]

Self-employment income subject to SECA tax is determined as the net earnings from self-employment derived by an individual during any taxable year, subject to certain exceptions. Net earnings from self-employment is the gross income derived by an individual from any trade or business less allowed deductions that are attributable to the trade or business and permitted under the SECA rules. Certain passive income and related deductions are not taken into account in determining net earnings from self-employment, including rentals from real estate unless received in the course of a trade or business as a real estate dealer,[309] dividends and interest unless such dividends and interest are received in the course of a trade or business as a dealer in

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[302] Secs. 3201 through 3233. Instead of FICA taxes, railroad employers and employees are subject, under the RRTA, to taxes equivalent to the Social Security and Medicare taxes under FICA. Under the RRTA, employers and employees are also subject to an additional tax, referred to as the "tier 2" tax, on compensation up to a certain amount.

[303] 7.65 percent, consisting of 6.2 percent for retirement on earnings up to $137,700 in 2020, and 1.45 percent for Medicare tax on all earnings.

[304] In 2020, the tier 2 tax rate on earnings up to $102,300 is 4.9 percent for employees and 13.1 percent for employers.

[305] Sec. 1401(a) and (b).

[306] Sec. 1401(a). In calculating the SECA tax for OASDI, the OASDI wage base taken into account is reduced by FICA wages paid to the individual during the taxable year.

[307] Sec. 1401(b)(1).

[308] Sec. 1401(b)(2).

[309] Sec. 1402(a)(1).

stocks or securities,[310] and sales or exchanges of capital assets and certain other property unless the property is stock in trade that would properly be included in inventory or held primarily for sale to customers in the ordinary course of the trade or business.[311]

For purposes of computing net earnings from self-employment, taxpayers are permitted a deduction equal to the product of the taxpayer's net self-employment income (determined without regard to this deduction) and one-half of the sum of the rates for OASDI and Medicare taxes (*i.e.*, 7.65 percent of net earnings).[312] This deduction is determined without regard to the additional 0.9 percent Additional Medicare tax that may apply to an individual. This deduction reflects the fact that the FICA rates apply to an employee's wages, which do not include FICA taxes paid by the employer, whereas the self-employed individual's net earnings are economically equivalent to an employee's wages plus the employer share of FICA taxes.[313] This is generally referred to as the "regular method" of determining net earnings from self-employment, and in IRS forms and publications is expressed as multiplying total net earnings from self-employment by 92.35 percent.

Division G of the Families First Coronavirus Response Act

Division G of the Families First Coronavirus Response Act[314] (the "Families First Act") provided a tax credit for qualified sick leave wages and qualified family leave wages mandated under the Families First Act, as well as allocable qualified health plan expenses.[315] Section 7001 of the Families First Act requires certain employers to provide an employee with paid sick time to the extent that the employee is unable to work or telework due to enumerated conditions. Under the Families First Act, an employer is allowed a corresponding credit against the OASDI tax or RRTA tax imposed on the employer. The amount of the credit is equal to 100 percent of the qualified sick leave wages paid by the employer with respect to that calendar quarter, subject to some limitations. The provision limits the amount of qualified sick leave wages taken into account for purposes of the credit.

Section 7003 of the Act required certain employers to provide qualified family leave wages to employees. Qualified family leave wages include public health emergency leave

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[310] Sec. 1402(a)(2).

[311] Sec. 1402(a)(3).

[312] Sec. 1402(a)(12).

[313] The deduction is intended to provide parity between FICA and SECA taxes because the employer may deduct, as a business expense, its share of the FICA taxes paid. As presently written, the deduction for SECA taxes is not the exact economic equivalent to the deduction for FICA taxes. See Joint Committee on Taxation, *Options to Improve Tax Compliance and Reform Tax Expenditures* (JCS-2-05), January 27, 2005, for a detailed description of this issue.

[314] Families First Coronavirus Response Act, Pub. L. No. 116-127, secs. 7001-7005, March 18, 2020.

[315] Joint Committee on Taxation, *Technical Explanation of Division G, "Tax Credits for Paid Sick and Paid Family and Medical Leave," of H.R. 6201, the "Families First Coronavirus Response Act"* (JCX-10-20), March 2020.

provided to employees under FMLA. Under the Families First Act, employers are allowed a credit against OASDI or RRTA taxes in an amount equal to 100 percent of qualified family leave wages paid by the employer during the quarter, subject to the limitations prescribed in the Families First Act.

For both sections 7001 and 7003, the credit allowed is increased by so much of the employer's qualified health plan expenses as are properly allocable to the qualified sick leave wages or qualified family leave wages for which the credit is allowed. In addition, the amount of the credit is increased by the amount of tax imposed by section 3111(b)[316] on qualified sick leave wages or qualified family leave wages, for which a credit is allowed under such section 7001 or 7003, respectively.

With respect to sections 7001 and 7003 of the Families First Act, the credit allowed may not exceed the OASDI tax or RRTA tax imposed on the employer, reduced by any credits allowed for the employment of qualified veterans[317] and research expenditures of qualified small businesses[318] 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, subject to the foregoing reductions, such excess is treated as a refundable overpayment.[319]

Explanation of Provision

The refundable portion of the credits allowed under the Families First Act may be advanced during the calendar quarter in which the qualified sick leave wages or qualified family leave wages are paid. The provision allows employers to choose to receive an offset, through a tax credit, of expenditures made for paid sick leave and paid family and medical leave mandated under the Families First Act at an earlier juncture during a calendar quarter rather than at the end of a quarter upon the filing of a quarterly employment tax return. The amount of the credit that may be advanced, according to forms and instructions provided by the Secretary (or the Secretary's delegate), is limited to the amount of employer OASDI or RRTA taxes, reduced by any credits allowed for qualified veterans or research expenditures on qualified small businesses. The amount of the credit advancement is calculated through the end of the most recent payroll period in the quarter.

Penalties for the failure to timely deposit the employer portion of OASDI tax or equivalent employer's share of RRTA tax shall be waived if the Secretary (or the Secretary's

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[316] Section 3111(b) imposes on the employer a Medicare hospital insurance excise tax of 1.45 percent on all earnings.

[317] This credit is described in section 3111(e).

[318] This credit is described in section 3111(f).

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

delegate) determines that the failure to make such deposits was due to the anticipation of the credit allowed.[320] The Secretary (or the Secretary's delegate) shall provide regulations or other guidance as may be necessary to carry out the purposes of the provision.[321]

Effective Date

The provision is effective on the date of enactment.

2. Expansion of DOL Authority to Postpone Certain Deadlines (sec. 3607 of the Act, sec. 518 of ERISA, and sec. 319 of the Public Health Service Act)

Present Law

Employee benefit plans

Under the Employee Retirement Income Security Act of 1974, as amended ("ERISA")[322], the Secretary of Labor has the authority to postpone certain deadlines with respect to actions within its jurisdiction by reason of a Presidentially declared disaster[323] or a terroristic or military action.[324] The Secretary of Labor may, in the case of a pension or other employee benefit plan, or any sponsor, administrator, participant, beneficiary, or other person with respect to such plan, affected by such a Presidentially declared disaster or a terroristic or military action notwithstanding any other provision of law, prescribe, by notice or otherwise, a period of up to one year that may be disregarded in determining the date by which any action is required or permitted to be completed by such a plan or person under ERISA. A plan will not be treated as failing to be operated in accordance with its terms solely as the result of disregarding any such period.

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[320] Secs. 3111(a), 3221(a), and 6656.

[321] See IRS Notice 2020-22, March 31, 2020.

[322] 29 U.S.C. 1001 et seq. In the past, questions had arisen concerning the scope of section 7508A with respect to employee benefit plans because a number of acts related to employee benefit plans may be required or provided for under ERISA, or the terms of the plan, rather than under the Code. For example, a plan sponsor or plan administrator may be required to provide a notice to plan or participant or to make a plan contribution.

[323] As defined in section 1033(h)(3), which provides that the term "Federally declared disaster" has the same meaning as under section 165(i)(5).

[324] Sec. 518 of ERISA. A terroristic or military action is defined in section 692(c)(2).

Under the Code, the Secretary has the authority to postpone certain tax deadlines affected by a Federally declared disaster,[325] or a terroristic or military action.[326] In the case of a pension or other employee benefit plan, or any sponsor, administrator, participant, beneficiary, or other person, the Secretary may prescribe a period of up to one year that may be disregarded in determining the date by which any action by a pension or other employee benefit plan, or by a plan sponsor, administrator, participant, beneficiary or other person would be required or permitted to be completed.[327]

Section 319 of the Public Health Service Act

Under section 319 of the Public Health Service ("PHS") Act,[328] the Secretary of the Department of Health and Human Services ("HHS") can determine, after consulting with such public health officials as may be necessary, that (1) a disease or disorder presents a Public Health Emergency ("PHE") or (2) a PHE, including significant outbreaks of infectious diseases or bioterrorist attacks, otherwise exists. A PHE declaration allows the Secretary of HHS to take certain actions in response to the PHE. In addition, the determination of a public health emergency authorizes the Secretary of HHS to take a variety of discretionary actions to respond to the PHE under the statutes the Secretary of HHS administers.[329]

Explanation of Provision

Under the provision, the Secretary of Labor's authority to postpone certain deadlines under ERISA is extended to include a public health emergency declared by the Secretary of HHS pursuant to section 319 of the PHS Act.

Effective Date

The provision is effective on the date of enactment.

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[325] A Federally declared disaster is defined in section 165(i)(5)(A) as "any disaster subsequently determined by the President of the United States to warrant assistance by the Federal Government under the Robert T. Stafford Disaster Relief and Emergency Assistance Act" (the "Stafford Act"). On March 13, 2020, President Trump declared the COVID-19 pandemic an "emergency" under section 501(b) of the Stafford Act. As part of that declaration, he instructed the Secretary to provide relief from tax deadlines pursuant to section 7508(A)(a).

[326] Sec. 7508A.

[327] Sec. 7508A(b).

[328] 42 U.S.C. 274(d).

[329] On January 31, 2020, the Secretary of HHS declared COVID-19 a public health emergency for the entire United States under section 319 of the PHS Act.

3. Single-Employer Plan Funding Rules (sec. 3608 of the Act and secs. 430(j) and 436 of the Code)

Present Law

Minimum required contributions

Single-employer defined benefit pension plans are subject to minimum funding requirements under the Employee Retirement Income Security Act of 1974, as amended ("ERISA")[330] and the Code.

For plan years beginning after December 31, 2007,[331] the amount of the minimum required contribution[332] to a single-employer defined benefit pension plan for a plan year generally depends on a comparison of the value of the plan's assets with the plan's funding target and target normal cost.

A plan's funding target is the present value of all benefits accrued or earned as of the beginning of the plan year.[333] A plan's target normal cost for a plan year is the present value of benefits expected to accrue or be earned during the plan year.[334] A shortfall amortization charge is generally the sum of the amounts required to amortize any shortfall amortization bases for the plan year and the six preceding plan years.[335] A shortfall amortization base is generally required to be established for a plan year if the plan has a funding shortfall for a plan year.[336] A shortfall amortization base may be positive or negative (*i.e.*, an offsetting amortization base is established for gains). In general, a plan has a funding shortfall if the plan's funding target for the year exceeds the value of the plan's assets (reduced by any prefunding balance and funding standard

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[330] 29 U.S.C. 1001 et seq.

[331] Sec. 430(a). The Pension Protection Act of 2006 ("PPA"), Pub. L. No. 109-280, August 17, 2006, repealed the funding rules that were applicable for plan years beginning before December 31, 2007 (including the requirement that a funding standard account be maintained) and provided a new set of rules for determining minimum required contributions. A delayed effective date applies to certain plans such as certain CSEC plans. Governmental plans and church plans are exempt from the funding rules to the extent provided under law.

[332] As determined under section 430(a) and section 303(a) of ERISA.

[333] Special rules apply for determining the funding target for plans in "at-risk" status. See sec. 430(d) and (i)(1).

[334] Sec. 430(b).

[335] Sec. 430(c).

[336] Sec. 430(c)(3). A shortfall amortization base does not have to be established if the value of a plan's assets (reduced by any prefunding balance, but only if the employer elects to use any portion of the prefunding balance to reduce required contributions for the year) is at least equal to the plan's funding target for the plan year.

carryover balance).[337] A waiver amortization charge is the amount required to amortize a waived funding deficiency.[338]

The interest rates and mortality table that must be used in determining a plan's target normal cost and funding target, as well as certain other actuarial assumptions, are specified, including special assumptions ("at-risk" assumptions) for a plan in at-risk status. A plan is generally in at-risk status for a year if the value of the plan's assets (reduced by any prefunding and funding standard carryover balances) for the preceding year was less than (1) 80 percent of the plan's funding target determined without regard to the at-risk assumptions and (2) 70 percent of the plan's funding target determined using the at-risk assumptions.[339]

Timing rules for contributions

The due date for the payment of a minimum required contribution for a plan year is generally 8½ months after the end of the plan year.[340] Any payment made on a date other than the valuation date for the plan year must be adjusted for interest accruing at the plan's effective interest rate for the plan year for the period between the valuation date and the payment date. Quarterly contributions must be made during a plan year if the plan had a funding shortfall for the preceding plan year (*i.e.*, if the value of the plan's assets, reduced by the funding standard carryover balance and prefunding balance, was less than the plan's funding target for the preceding plan year).[341] If a quarterly installment is not made, interest applies for the period of underpayment at the rate of interest otherwise applicable (*i.e.*, the plan's effective interest rate) plus five percentage points.

Excise tax on failure to make minimum required contributions

An employer is generally subject to an excise tax if it fails to make minimum required contributions and fails to obtain a waiver from the IRS.[342] The excise tax is 10 percent of the aggregate unpaid minimum required contributions for all plan years remaining unpaid as of the end of any plan year. In addition, a tax of 100 percent of such unpaid required minimum

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[337] Sec. 430(c)(4). Contributions in excess of the minimum contributions required under the provision for plan years beginning after 2007 generally are credited to a prefunding balance that may be used in certain circumstances to reduce otherwise required minimum contributions. Credit balances determined under pre-PPA law are carried over into a funding standard carryover balance and generally may also be used (in certain circumstances) to reduce otherwise required minimum contributions. For example, a credit balance would have resulted where contributions in excess of minimum required contributions were made or from large net experience gains.

[338] Sec. 430(e).

[339] Sec. 430(i).

[340] Sec. 430(j).

[341] The amount of any quarterly installment must be sufficient to cover any liquidity shortfall.

[342] Sec. 4971. A lien in favor of the plan with respect to property of the employer (and members of the employer's controlled group) arises in certain circumstances in which the employer fails to make required contributions.

contributions may be imposed if any unpaid minimum required contributions remain unpaid after a certain period.

Benefit restrictions

With respect to plan years beginning after December 31, 2007, the Code imposes the following funding-based limits on benefits and benefit accruals under single-employer plans.[343]

Plant shutdown and other unpredictable contingent event benefits

If a participant is entitled to an unpredictable contingent event benefit payable with respect to any event occurring during any plan year, the plan must provide that such benefits may not be provided if the plan's adjusted funding target attainment percentage for that plan year: (1) is less than 60 percent or (2) would be less than 60 percent taking into account the occurrence of the event. For this purpose, the term unpredictable contingent event benefit means any benefit payable solely by reason of: (1) a plant shutdown (or similar event, as determined by the Secretary) or (2) any event other than attainment of any age, performance of any service, receipt or derivation of any compensation, or the occurrence of death or disability.[344]

The determination of whether the limitation applies is made in the year the unpredictable contingent event occurs. For example, suppose a plan provides for benefits upon the occurrence of a plant shutdown, and a plant shutdown occurs in 2019. Taking into account the plant shutdown, the plan's adjusted funding target attainment percentage is less than 60 percent. Thus, the limitation applies, and benefits payable solely by reason of the plant shutdown may not be paid (unless the employer makes contributions to the plan as described below), regardless of whether the benefits will be paid in the 2019 plan year or a later plan year.[345]

The limitation ceases to apply with respect to any plan year, effective as of the first day of the plan year, if the plan sponsor makes a contribution (in addition to any minimum required contribution for the plan year) equal to: (1) if the plan's adjusted funding target attainment percentage is less than 60 percent, the amount of the increase in the plan's funding target for the plan year attributable to the occurrence of the event; or (2) if the plan's adjusted funding target attainment percentage would be less than 60 percent taking into account the occurrence of the event, the amount sufficient to result in an adjusted funding target attainment percentage of 60 percent.

The limitation does not apply for the first five years a plan (or a predecessor plan) is in effect.

[343] Sec. 436.

[344] Sec. 436(b).

[345] Benefits already being paid as a result of a plant shutdown or other event that occurred in a preceding year are not affected by the limitation.

Plan amendments increasing benefit liabilities

Certain plan amendments may not take effect during a plan year if the plan's adjusted funding target attainment percentage for the plan year (1) is less than 80 percent or (2) would be less than 80 percent taking into account the amendment.[346] In such a case, no amendment may take effect if it has the effect of increasing the liabilities of the plan by reason of any increase in benefits, the establishment of new benefits, any change in the rate of benefit accrual, or any change in the rate at which benefits vest under the plan. The limitation does not apply to an amendment that provides for an increase in benefits under a formula that is not based on compensation, but only if the rate of increase does not exceed the contemporaneous rate of increase in average wages of the participants covered by the amendment.

The limitation ceases to apply with respect to any plan year, effective as of the first day of the plan year (or, if later, the effective date of the amendment), if the plan sponsor makes a contribution (in addition to any minimum required contribution for the plan year) equal to: (1) if the plan's adjusted funding target attainment percentage is less than 80 percent, the amount of the increase in the plan's funding target for the plan year attributable to the amendment; or (2) if the plan's adjusted funding target attainment percentage would be less than 80 percent taking into account the amendment, the amount sufficient to result in an adjusted funding target attainment percentage of 80 percent.

The limitation does not apply for the first five years a plan (or a predecessor plan) is in effect.

Prohibited payments

A plan must provide that, if the plan's adjusted funding target attainment percentage for a plan year is less than 60 percent, the plan will not make any prohibited payments after the valuation date for the plan year.[347]

A plan must also provide that, if the plan's adjusted funding target attainment percentage for a plan year is 60 percent or greater, but less than 80 percent, the plan may not pay any prohibited payments exceeding the lesser of: (1) 50 percent of the amount otherwise payable under the plan and (2) the present value of the maximum Pension Benefit Guaranty Corporation ("PBGC") guarantee with respect to the participant (determined under guidance prescribed by the PBGC, using the interest rates and mortality table applicable in determining minimum lump-sum benefits). The plan must provide that only one payment under this exception may be made with respect to any participant during any period of consecutive plan years to which the limitation applies. For this purpose, a participant and any beneficiary of the participant (including an alternate payee) is treated as one participant. If the participant's accrued benefit is allocated to an alternate payee and one or more other persons, the amount that may be distributed

[346] Sec. 436(c). The pre-PPA rules limiting benefit increases while an employer is in bankruptcy continue to apply.

[347] Sec. 436(d).

is allocated in the same manner unless the applicable qualified domestic relations order provides otherwise.

In addition, a plan must provide that, during any period in which the plan sponsor is in bankruptcy proceedings, the plan may not pay any prohibited payment. However, this limitation does not apply on or after the date the plan's enrolled actuary certifies that the adjusted funding target attainment percentage of the plan is not less than 100 percent.

For purposes of these limitations, "prohibited payment" is defined as (1) any payment in excess of the monthly amount paid under a single life annuity (plus any Social Security supplement provided under the plan) to a participant or beneficiary whose annuity starting date occurs during the period, (2) any payment for the purchase of an irrevocable commitment from an insurer to pay benefits (*e.g.*, an annuity contract), or (3) any other payment specified by the Secretary by regulations.[348]

The prohibited payment limitation does not apply to a plan for any plan year if the terms of the plan (as in effect for the period beginning on September 1, 2005 and ending with the plan year) provide for no benefit accruals with respect to any participant during the period.

Cessation of benefit accruals

A plan must provide that, if the plan's adjusted funding target attainment percentage is less than 60 percent for a plan year, all future benefit accruals under the plan must cease as of the valuation date for the plan year.[349] The limitation applies only for purposes of the accrual of benefits; service during the freeze period is counted for other purposes. For example, if accruals are frozen under the plan, service earned during the freeze period still counts for vesting purposes. As another example, suppose a plan provides that payment of benefits begins when a participant terminates employment after age 55 and with 25 years of service. Under this example, if a participant who is age 55 and has 23 years of service when the freeze on accruals becomes applicable terminates employment two years later, the participant has 25 years of service for this purpose and thus can begin receiving benefits. However (assuming the freeze on accruals is still in effect), the amount of the benefit is based on the benefit accrued before the freeze (*i.e.*, counting only 23 years of service).

The limitation ceases to apply with respect to any plan year, effective as of the first day of the plan year, if the plan sponsor makes a contribution (in addition to any minimum required contribution for the plan year) equal to the amount sufficient to result in an adjusted funding target attainment percentage of 60 percent.

The limitation does not apply for the first five years a plan (or a predecessor plan) is in effect.

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[348] Sec. 436(d)(5).

[349] Sec. 436(e).

Adjusted funding target attainment percentage

In general

The term "funding target attainment percentage" is defined as under the minimum funding rules, that is, the ratio, expressed as a percentage, that the value of the plan's assets (reduced by any funding standard carryover balance and prefunding balance) bears to the plan's funding target for the year (determined without regard to at-risk status). A plan's adjusted funding target attainment percentage is determined in the same way, except that the value of the plan's assets and the plan's funding target are both increased by the aggregate amount of purchases of annuities for employees, other than highly compensated employees, made by the plan during the two preceding plan years.[350]

Special rule for fully funded plans

Under a special rule, if a plan's funding target attainment percentage is at least 100 percent, determined by not reducing the value of the plan's assets by any funding standard carryover balance or prefunding balance, the value of the plan's assets is not so reduced in determining the plan's funding target attainment percentage for purposes of whether the benefit limitations apply.

Presumptions as to funded status

Certain presumptions apply in determining whether limitations apply with respect to a plan, subject to certification of the plan's adjusted funding target attainment percentage by the plan's enrolled actuary.

If a plan was subject to a limitation for the preceding year, the plan's adjusted funding target attainment percentage for the current year is presumed to be the same as for the preceding year until the plan actuary certifies the plan's actual adjusted funding target attainment percentage for the current year.

If (1) a plan was not subject to a limitation for the preceding year, but its adjusted funding target attainment percentage for the preceding year was not more than 10 percentage points greater than the threshold for a limitation, and (2) as of the first day of the fourth month of the current plan year, the plan actuary has not certified the plan's actual adjusted funding target attainment percentage for the current year, the plan's funding target attainment percentage is presumed to be reduced by 10 percentage points as of that day and that day is deemed to be the plan's valuation date for purposes of applying the benefit limitation. As a result, the limitation applies as of that date until the actuary certifies the plan's actual adjusted funding target attainment percentage.

In any other case, if the plan actuary has not certified the plan's actual adjusted funding target attainment percentage by the first day of the tenth month of the current plan year, for purposes of the limitations, the plan's adjusted funding target attainment percentage is

[350] Sec. 436(j)(2).

conclusively presumed to be less than 60 percent as of that day and that day is deemed to be the valuation date for purposes of applying the benefit limitations.

Reduction of funding standard carryover and prefunding balances

The value of plan assets is generally reduced by any funding standard carryover or prefunding in determining a plan's funding target attainment percentage. As provided for under the funding rules applicable to single-employer plans, a plan sponsor may elect to reduce a funding standard carryover balance or prefunding balance, so that the value of plan assets is not required to be reduced by that amount in determining the plan's funding target attainment percentage.

Contributions made to avoid a benefit limitation

An employer may make contributions (in addition to any minimum required contribution) in an amount sufficient to increase the plan's adjusted funding target attainment percentage to a level to avoid a limitation on unpredictable contingent event benefits, a plan amendment increasing benefits, or additional accruals. An employer may not use a prefunding balance or funding standard carryover balance in lieu of such a contribution, and such a contribution does not result in an increase in any prefunding balance.

Instead of making additional contributions to avoid a benefit limitation, an employer may provide security in the form of a surety bond, cash, certain U.S. government obligations, or such other form as is satisfactory to the Secretary and the parties involved. In such a case, the plan's adjusted funding target attainment percentage is determined by treating the security as a plan asset. Any such security may be perfected and enforced at any time after the earlier of (1) the date on which the plan terminates; (2) if the plan sponsor fails to make a required contribution for any subsequent plan year, the due date for the contribution; or (3) if the plan's adjusted funding target attainment percentage is less than 60 percent for a consecutive period of seven years, the valuation date for the last year in the period. The security will be released (and any related amounts will be refunded with any accrued interest) at such time as the Secretary may prescribe in regulations (including partial releases by reason of increases in the plan's funding target attainment percentage).

Treatment of plan as of close of prohibited or cessation period

If a limitation on prohibited payments or future benefit accruals ceases to apply to a plan, all such payments and benefit accruals resume, effective as of the day following the close of the period for which the limitation applies.[351] Nothing in this rule is to be construed as affecting a plan's treatment of benefits, which would have been paid or accrued but for the limitation.

[351] This rule does not apply to limitations on unpredictable contingent event benefits and plan amendments increasing liabilities.

Explanation of Provision

Under the provision, in the case of any minimum required contribution which, but for this provision, would have been due[352] during calendar year 2020, such contribution is due on January 1, 2021, and the amount of each such contribution must be increased by interest accruing between the original due date for the contribution (determined without regard to this provision) and the payment date (as determined under this provision), at the effective rate of interest for the plan for the plan year that includes such payment date.

Additionally, under the provision, for purposes of determining whether benefit restrictions[353] apply to a plan for a plan year that includes calendar year 2020, a plan sponsor may elect to treat the plan's adjusted funding target attainment percentage for the last plan year ending before January 1, 2020, as the adjusted funding target attainment percentage for plan years that include calendar year 2020.

Effective Date

The provision is effective on the date of enactment.

4. Application of Cooperative and Small Employer Charity Pension Plan Rules to Certain Charitable Employers Whose Primary Exempt Purpose Is Providing Services with Respect to Mothers and Children (sec. 3609 of the Act, sec. 210(f) of ERISA, and sec. 414(y) of the Code)

Present Law

Defined benefit plans maintained by private employers are generally subject to minimum funding requirements under the Code and ERISA.[354] Different minimum funding rules apply to (1) single-employer plans and most multiple-employer plans, (2) multiple-employer plans that are cooperative and small employer charity ("CSEC") plans, and (3) multiemployer plans. For this purpose, businesses and organizations that are members of a controlled group, a group under common control, or an affiliated service group are treated as one employer (referred to as "aggregation").[355]

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[352] Under section 430(j) (including quarterly contributions under section 430(j)(3)) and section 303(j) of ERISA.

[353] Determined under section 436.

[354] Secs. 412 and 430-433 and secs. 301-306 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). If the funding requirements are not met, an employer may be subject to a two-tier excise tax under section 4971 unless a funding waiver is obtained. The minimum funding requirements do not apply to most governmental or church plans.

[355] Sec. 414(b), (c), (m), and (o).

A single-employer plan is a plan maintained by one employer. A single-employer plan may cover employees who are also covered by a collective bargaining agreement ("collectively bargained employees"), pursuant to which the plan is maintained (a "collectively bargained plan").[356] An employer may maintain separate single-employer plans for collectively and non-collectively bargained employees, or they may be covered by the same plan.

A multiple-employer plan is a single plan maintained by two or more unrelated employers (*i.e.*, employers that are not treated as a single employer under the aggregation rules) and that is not a multiemployer plan (as defined below).[357] Multiple-employer plans are commonly maintained by employers in the same industry. A multiple-employer plan may cover collectively bargained employees or non-collectively bargained employees.

Multiemployer plans (also known as "Taft-Hartley" plans and distinct from multiple-employer plans) are plans 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 the collective bargaining agreement(s).[358] Multiemployer plans commonly cover collectively bargained employees in a particular industry.

Minimum funding requirements

Before the Pension Protection Act of 2006 ("PPA"),[359] the basic funding rules applicable to single-employer plans, multiple-employer plans, and multiemployer plans were similar, with an additional contribution requirement, referred to as the "deficit reduction contribution" ("DRC") requirement, for single-employer and multiple-employer plans.[360] PPA replaced the funding rules for single-employer plans and multiple-employer plans with new rules, effective for plan years beginning after December 31, 2007. However, PPA provided a delayed effective date (the "PPA delayed effective date") for certain multiple-employer plans, under which the PPA funding rules apply as of the earlier of (1) the first plan year for which the plan ceases to be

[356] Treas. Reg. sec. 1.410(b)-6(d).

[357] Sec. 413(c) and ERISA sec. 210(a).

[358] Sec. 414(f) and ERISA sec. 2(37).

[359] Pub. L. No. 109-280, August 17, 2006.

[360] Single-employer plans and multiple-employer plans have generally been subject to the same funding rules. Under section 413(c)(4), in the case of a multiple-employer plan established by December 31, 1988, the minimum funding requirement is generally determined as if all plan participants are employed by a single employer, and, in the case of a multiple-employer plan established after December 31, 1988, each employer is treated as maintaining a separate plan for purposes of the funding requirements unless the plan uses a method for determining required contributions that provides for any employer to contribute not less than the amount that would be required if the employer maintained a separate plan. ERISA section 210(a)(3) provides that the minimum funding requirement for a multiple-employer plan is determined as if all plan participants are employed by a single employer.

an eligible cooperative plan (described below) or (2) January 1, 2017.[361] In the interim, as discussed below, these plans continue to be subject to the minimum funding rules in effect before PPA, with certain modifications.

The PPA delayed effective date applies to a plan that was in existence on July 26, 2005, and was an eligible cooperative plan for the plan year including that date. A plan is treated as an eligible cooperative plan for a plan year if it is maintained by more than one employer and at least 85 percent of the employers are (1) certain rural cooperatives or (2) certain cooperative organizations that are more than 50-percent owned by agricultural producers or by cooperatives owned by agricultural producers, or organizations that are more than 50-percent owned, or controlled by, one or more of these cooperative organizations.[362] A plan is also treated as an eligible cooperative plan for any plan year for which it is maintained by more than one employer and is maintained by a rural telephone cooperative association.

Funding rules for CSEC plans

Funding rules for CSEC plans were enacted by the Cooperative and Small Employer Charity Pension Flexibility Act.[363] For this purpose, a CSEC plan is a defined benefit plan (other than a multiemployer plan) that (1) is an eligible cooperative plan to which the PPA delayed effective date for funding rules applies (without regard to the January 1, 2017 end of the delayed effective date),[364] or (2) was maintained by more than one employer (taking into account the aggregation rules for controlled groups and groups under common control) and all the employers were tax-exempt charitable organizations as of June 25, 2010.[365]

If a plan is treated as a CSEC plan, the PPA delayed effective date ceases to apply to the plan as of the first date the plan is treated as a CSEC plan.[366] However, a plan described in (1) or

[361] Sec. 104 of PPA.

[362] The definition of a CSEC plan was further amended by the Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, December 16, 2014, to include a plan that, as of June 25, 2010, was maintained by an employer (1) that is a tax-exempt charitable organization and a Federally chartered patriotic organization, (2) that has employees in at least 40 States, and (3) the primary exempt purpose of which is to provide services with respect to children. For purposes of determining the employer maintaining the plan, the aggregation rules for controlled groups and groups under common control employers apply.

[363] Pub. L. No. 113-97, April 7, 2014.

[364] Sec. 104 of PPA.

[365] June 25, 2010 is the date of enactment of the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010 ("PRA 2010"), Pub. L. No. 111-192, which expanded the applicability of the delayed effective date. A tax-exempt charitable organization is an organization exempt from tax under section 501(c)(3).

[366] A plan maintained by employers treated as a single employer under the aggregation rules is not a CSEC plan. Thus, not all eligible charity plans as defined for purposes of the PPA delayed effective date come within the definition of a CSEC plan. Those that do not may continue to be covered by the PPA delayed effective date.

(2) in the preceding paragraph is not a CSEC plan if the plan sponsor elects, not later than the close of the first plan year beginning after December 31, 2013, not to be treated as a CSEC plan.[367] An election takes effect for the first plan year beginning after December 31, 2013, and, once made, may be revoked only with the consent of the Secretary.

In general

CSEC plans are permanently exempted from the PPA funding rules generally applicable to single-employer plans and multiple-employer plans. New minimum funding rules for CSEC plans are established that are similar to the rules applicable to eligible cooperative and eligible charity plans under the PPA delayed effective date, with the following modifications:[368]

- the deficit reduction contribution rules are repealed with respect to CSEC plans,
- new rules apply to a CSEC plan in "funding restoration status," as discussed below,
- supplemental cost attributable to past service liability and a reduction in unfunded past service liability as a result of a plan amendment decreasing plan benefits are amortized over 15 years (rather than 30 years) (any funding method available to a CSEC plan under the funding rules in effect before PPA continues to be available under the CSEC rules),[369]
- all costs, liabilities, interest rates, and other factors are required to be determined on the basis of actuarial assumptions and methods (each of which is reasonable taking into account the experience of the plan and reasonable expectations),[370] and
- the IRS may grant an amortization period extension to a CSEC plan if it determines that (1) the extension would carry out the purposes of ERISA and would provide adequate protection for participants and beneficiaries under the plan and (2) the failure to permit the extension would result in a substantial risk to the voluntary continuation of the plan or a substantial curtailment of pension benefit levels or employee compensation.

Rules relating to funding restoration status

If a CSEC plan is in funding restoration status for a plan year, as discussed below, a special minimum contribution requirement applies, the plan sponsor must adopt a funding

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[367] If an election not to be treated as a CSEC plan is made with respect to a plan eligible for the PPA delayed effective date, the plan may continue to be covered by the PPA delayed effective date unless making the required election.

[368] A CSEC plan's amortization bases for plan years beginning before January 1, 2014, and related charges and credits continue to apply. In addition, the minimum funding requirement for a CSEC plan is determined as if all plan participants are employed by a single employer.

[369] IRS approval is required for a change in funding method.

[370] The assumptions are also required to offer the actuary's best estimate of anticipated experience under the plan.

restoration plan, and the plan generally may not be amended to increase benefits. Not later than the 90th day of a CSEC plan's plan year, the plan actuary of a CSEC plan must certify to the plan sponsor whether or not the plan is in funding restoration status for the plan year, based on the plan's funded percentage as of the beginning of the plan year.

A CSEC plan is in funding restoration status for a plan year if the plan's funded percentage as of the beginning of the plan year is less than 80 percent. For this purpose, funded percentage means the ratio (expressed as a percentage) that the value of the plan's assets bears to the plan's funding liability. A plan's funding liability for a plan year is the present value of all benefits accrued or earned under the plan as of the beginning of the plan year, determined using the assumptions, including interest and mortality, used in other funding computations with respect to plan. In making the certification described above, the plan actuary may conclusively rely on an estimate of (1) the plan's funding liability, based on the funding liability of the plan for the preceding plan year and on reasonable actuarial estimates, assumptions, and methods and (2) the amount of any contributions reasonably anticipated to be made for the preceding plan year.[371] Reasonably anticipated contributions for the preceding year are taken into account in determining the plan's funded percentage as of the beginning of the plan year.

If a plan is in funding restoration status for a plan year, the minimum required contribution is the greater of (1) the amount otherwise required without regard to restoration status and (2) the normal cost of the plan for the plan year.[372] Thus, an accumulated funding deficiency will result if contributions are less than normal cost.

If a CSEC plan is certified as being in funding restoration status, within 180 days after receipt of the certification, the plan sponsor must establish a written funding restoration plan. If a CSEC plan remains in funding restoration status for more than a year, the plan sponsor must update the funding restoration plan each year within 180 days after receipt of the certification of funding restoration status. If a plan sponsor fails to adopt or update a funding restoration plan as required, the plan sponsor may be subject to an excise tax under the Code or an ERISA penalty of up to $100 per day.

A funding restoration plan must consist of actions that are calculated, based on reasonably anticipated experience and reasonable actuarial assumptions, to increase the plan's funded percentage to 100 percent over seven years, or, if sooner, the shortest amount of time practicable. The funding restoration plan is to take into account contributions required under the minimum funding requirements (determined without regard to the funding restoration plan).

If a CSEC plan is in funding restoration status for a plan year, no plan amendment may take effect during the plan year if it has the effect of increasing plan liabilities by means of increases in benefits, establishment of new benefits, changing the rate of benefit accrual, or

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[371] Because contributions for a plan year may be made up to 8½ months after the end of the plan year, some contributions for the preceding year might not have been made by the time of the certification.

[372] In certain cases, a specific funding method (*i.e.*, the entry age normal funding method) must be used in determining normal cost for this purpose.

changing the rate at which benefits vest under the plan. However, this prohibition does not apply to any plan amendment required to comply with any applicable law. The prohibition ceases to apply with respect to any plan year, effective as of the first day of the plan year (or if later, the effective date of the amendment), if a plan contribution is made, in addition to any contribution otherwise required under the funding rules, in an amount equal to the increase in the plan's funding liability as a result of the plan amendment.

Funding-related benefit restrictions

CSEC plans are permanently exempted from the PPA funding-related benefit restrictions. CSEC plans are also exempted from (1) the restrictions on benefit increases when an employer maintaining a plan is involved in bankruptcy proceedings and (2) the ERISA restriction on prohibited payments if a plan has a liquidity shortfall, and a quarterly installment is less than the amount required to cover the liquidity shortfall.

Explanation of Provision

The provision amends the definition of CSEC plan to include a plan that, as of January 1, 2000, was maintained by an employer (1) that is a tax-exempt charitable organization, (2) has been in existence since at least 1938, (3) that conducts medical research directly or indirectly through grant making, and (4) whose primary exempt purpose is to provide services with respect to mothers and children.

Effective Date

The provision is applicable to plan years beginning after December 31, 2018.

C. Finance Committee (Subtitle D)

1. Exemption for Telehealth Services (sec. 3701 of the Act and sec. 223 of the Code)

Present Law

Health savings accounts

An individual may establish 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,[373] 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) 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) for self-only coverage (twice this amount for family coverage).[374] These dollar thresholds are subject to inflation adjustment, based on chained CPI.[375]

An individual who is covered under a high deductible health plan is eligible to establish 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

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[373] For 2020, the basic limit on annual contributions that can be made to an HSA is $3,550 in the case of self-only coverage and $7,100 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).

[374] Sec. 223(c)(2).

[375] Sec. 223(g).

and (2) provides coverage for any benefit (subject to certain exceptions) covered under the high deductible health plan.[376]

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 accounts.[377] 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.[378]

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.[379] IRS guidance provides a safe harbor of the types of coverage that constitute preventive care for this purpose.[380]

Explanation of Provision

The provision provides that 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, 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 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.

Effective Date

The provision is effective on the date of enactment

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[376] Sec. 223(c)(1).

[377] Sec. 223(c)(1)(B).

[378] Sec. 223(c)(3).

[379] Sec. 223(c)(2)(C).

[380] Notice 2004-23, 2004-15 I.R.B. 725 (April 12, 2004). See also Notice 2004-50, 2004-33 I.R.B. 1 (Aug. 9, 2004); Notice 2008-59, 2008-29 I.R.B. 123 (July 21, 2008); Notice 2013-37, 2013-40 I.R.B. 293 (Sept. 30, 2013); and Notice 2019-45, 2019-32 I.R.B. 593 (August 5, 2019).

2. Inclusion of Certain Over-the-Counter Medical Products as Qualified Medical Expenses (sec. 3702 of the Act and secs. 106, 220, and 223 of the Code)

Present Law

Individual deduction for medical expenses

Under the rules relating to itemized deductions, an individual may deduct expenses for medical care, not reimbursed by insurance or otherwise, to the extent the expenses exceed 7.5 percent of AGI (10 percent for taxable years beginning on or after January 1, 2021).[381] Medical care is defined broadly as amounts paid for the diagnoses, cure, mitigation, treatment or prevention of disease, or for the purpose of affecting any structure of the body.[382]

Any amount paid during a taxable year for medicine or drugs is deductible as a medical expense only if the medicine or drug is a prescribed drug or insulin.[383] The term prescribed drug means a drug or biological that requires a prescription of a physician for its use by an individual.[384] Thus, any amount paid for a medicine or drug available without a prescription ("over-the-counter medicine") is not deductible as a medical expense, including any medicine or drug prescribed or recommended by a physician.[385]

Exclusion for employer-provided health care

Employees generally may exclude from gross income the value of employer-provided health coverage under an accident or health plan.[386] In addition, any reimbursements paid by an employer under an accident or health plan for medical care expenses for employees, their spouses, and their dependents generally are excluded from gross income.[387] An employer may reimburse expenses for medical care of its employees (and their spouses and dependents) not covered by a health insurance plan through a flexible spending account (an "FSA"). An FSA allows such reimbursement not in excess of a specified dollar amount.[388] Such dollar amount is either elected by an employee under a cafeteria plan[389] (a "health FSA") or otherwise specified

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[381] Secs. 213(a) and (f).

[382] Sec. 213(d). There are certain limitations on the general definition including a rule that cosmetic surgery or similar procedures are generally not medical care.

[383] Sec. 213(b).

[384] Sec. 213(d)(3).

[385] Rev. Rul. 2003-58, 2003-1 CB 959.

[386] Sec. 106.

[387] Sec. 105(b).

[388] Sec. 125(i). For 2020, this limit is $2,750.

[389] Sec. 125.

by the employer under a health reimbursement account (an "HRA"). Reimbursements under these arrangements are also excludible from gross income as reimbursements for medical care under employer-provided health coverage.

Health savings accounts

An individual may establish 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.[390] 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. Accordingly, 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.

Within limits,[391] contributions to an HSA made by or on behalf of an eligible individual are deductible by the individual. Contributions to an HSA made by the employer are excludable from income and exempt from employment taxes. Earnings in HSAs are not taxable.

Distributions from an HSA for qualified medical expenses are excludable from 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 or disability, or the individual attains the age of Medicare eligibility (age 65). Similar rules apply for another type of medical savings arrangement called an Archer MSA.[392]

Medical care for excludable reimbursements and distributions

For purposes of the exclusion for reimbursements under employer-provided accident and health plans (including under health FSAs and HRAs), and for distributions from HSAs and Archer MSAs used for qualified medical expenses, the definition of medical care is generally the same as the definition that applies for the itemized deduction for the cost of medical care. However, prior to the enactment of the Patient Protection and Affordable Care Act (the "PPACA"),[393] the limitation (applicable to the itemized deduction) that only prescription medicines or drugs and insulin are taken into account did not apply. Thus, for example, reimbursements from a health FSA or HRA or funds distributed from an HSA for expenses of

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[390] A high deductible health plan is a health plan that has an annual deductible which is not less than $1,400 (for 2020) for self-only coverage and 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) for self-only coverage and twice this amount for family coverage. Sec. 223(c)(2).

[391] For 2020, the basic limit on annual contributions that can be made to an HSA is $3,550 in the case of self-only coverage and $7,100 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).

[392] Sec. 220.

[393] Pub. L. No 111-148, March 23, 2010.

nonprescription drugs, such as nonprescription aspirin, allergy medicine, antacids, or pain relievers, were excludable from income even though, if the taxpayer paid for such amounts directly, the expenses could not be taken into account in determining the itemized deduction for medical expenses.[394]

For years beginning after December 31, 2010, the PPACA changed the definition of medical care for purposes of the exclusion for reimbursements for medical care under employer-provided accident and health plans and for distributions from HSAs and Archer MSAs used for qualified medical expenses. The revised definition required that over-the-counter medicine (other than insulin) be prescribed by a physician in order for the medicine to be medical care for these purposes.[395] Thus, a health FSA or an HRA is only permitted to treat a reimbursement for the cost of over-the-counter medicine as a qualified medical expense if the medicine or drug is prescribed by a physician, and a distribution from an HSA or an Archer MSA used to purchase over-the-counter medicine is not a qualified medical expense unless the medicine or drug is prescribed by a physician.

Explanation of Provision

Under the provision, distributions from an HSA that are qualified medical expenses are no longer limited only to those medicines and drugs that are prescribed, allowing over-the-counter medicines and drugs, and also including amounts paid for menstrual care products (defined as tampons, pads, liners, cups, sponges, or similar products used by individuals with respect to menstruation or other genital-tract secretions).

The provision amends the definition of qualified medical expense for Archer MSAs to permit distributions for over-the-counter medicine and menstrual care products.

The provision also amends the definition of qualified medical expense for health FSAs and HRAs to permit reimbursements for expenses incurred for over-the-counter medicine and menstrual care products.

Effective Date

The provision applies to distributions from HSAs and MSAs for amounts paid after December 31, 2019.

The provision applies to reimbursements from health FSAs and HRAs for expenses incurred after December 31, 2019.

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[394] Rev. Rul. 2003-102, 2993-2 C.B. 559, now obsoleted by Rev. Rul. 2010-23, 2010-39 I.R.B. 388, September 3, 2010.

[395] Sec. 9003 of the PPACA. Notice 2010-59, 2010-39 I.R.B. 388, provides guidance on this change to the definition of medical care for these purposes.

TITLE IV – ECONOMIC STABILIZATION AND ASSISTANCE TO SEVERELY DISTRESSED SECTORS OF THE UNITED STATES ECONOMY

A. Coronavirus Economic Stabilization Act of 2020 (Subtitle A)

1. Suspension of Certain Aviation Excise Taxes (sec. 4007 of the Act)

Present Law

In general

Excise taxes are imposed on amounts paid for commercial air passenger and freight transportation and on fuels used in commercial and noncommercial aviation to fund the Airport and Airway Trust Fund.[396] The aviation excise taxes are as follows:

Tax (and Code section)	Tax Rates
a. Domestic air passengers (sec. 4261)	7.5 percent of fare, plus $4.30 (2020) per domestic flight segment generally[397]
b. International air passengers (sec. 4261)	$18.90 (2020) per arrival or departure[398]
c. Amounts paid for right to award free or reduced rate passenger air transportation (sec. 4261)	7.5 percent of amount paid
d. Air cargo (freight) transportation (sec. 4271)	6.25 percent of amount charged for domestic transportation; no tax on international cargo transportation
e. Aviation fuels (sec. 4081):[399]	
i. Commercial aviation	4.3 cents per gallon
ii. Non-commercial (general) aviation:	
Aviation gasoline	19.3 cents per gallon
Jet fuel	21.8 cents per gallon
f. Surtax on fuel used in fractional ownership program aircraft (sec. 4043)	14.1 cents per gallon

[396] The Airport and Airway Trust Fund excise taxes (except for 4.3 cents per gallon of the taxes on aviation fuels) are scheduled to expire after September 30, 2023. The 4.3-cents-per-gallon fuels tax rate is permanent.

[397] A segment consists of a single takeoff and a single landing. which is taxable transportation. The domestic flight segment portion of the tax is adjusted annually (effective each January 1) for inflation. Rev. Proc. 2019-44, sec. 3.45 (2019).

[398] The international arrival and departure tax rate is adjusted annually for inflation. For a domestic segment that begins or ends in Alaska or Hawaii, a reduced tax per person applies only to departures. For calendar year 2020, that reduced rate is $9.50 per departure (to/from mainland United States). *Ibid*.

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

Commercial aviation

"Commercial aviation" is defined as any use of an aircraft in the business of transporting persons or property by air for compensation or hire. It does not include aircraft used for skydiving, small aircraft on nonestablished lines, transportation for affiliated group members, transportation by seaplanes, or transportation when the fuel is subject to the surtax on fuel used in fractional ownership program aircraft.[400] Whether the transportation by air is "commercial aviation" for Code purposes is determined on a flight-by-flight basis and is not determined by Federal Aviation Administration classifications.

The Code imposes tax on certain removals, entries, and sales of taxable fuel, including kerosene. In general, kerosene is taxed at 24.3 cents per gallon. However, a reduced rate of 4.3 cents per gallon is imposed on kerosene removed from any refinery or terminal directly into the fuel tank of an aircraft for use in commercial aviation. As noted above, an additional 0.1-cent-per-gallon excise tax is imposed to fund the Leaking Underground Storage Tank Trust Fund. In the case of kerosene removed directly into the fuel tank of an aircraft for use in commercial aviation, the operator of the aircraft is liable on the removal at the reduced tax rate of 4.3 cents per gallon.[401]

If kerosene is taxed at the 24.3-cents-per-gallon rate and later used in commercial aviation, the reduced rate is effectuated through claims filed for the difference.[402] The 0.1-cent-per-gallon excise tax for the Leaking Underground Storage Tank Trust Fund is not refundable. A claim may be made by the ultimate purchaser (the operator) for taxed kerosene used in commercial aviation (other than foreign trade). The registered ultimate vendor of kerosene for use in commercial aviation (other than foreign trade) may make this claim if the ultimate purchaser waives its right to the credit or payment by providing the registered ultimate vendor with a waiver.

Explanation of Provision

The provision suspends the imposition of certain aviation excise taxes from March 28, 2020, through December 31, 2020 (the "excise tax holiday period").[403]

For commercial aviation only, the provision suspends certain excise taxes during the excise tax holiday period. For fuel used in commercial aviation, the 4.3 cents-per-gallon rate for commercial aviation is reduced to zero during the excise tax holiday period only when fuel is removed from a terminal directly into the fuel tank of an aircraft. If kerosene removed from the terminal rack at a higher rate is later used in commercial aviation, a claim for the difference can

[400] Sec. 4083(b).

[401] Sec. 4081(a)(4).

[402] Sec. 6427(l)(4).

[403] The CARES Act was signed by the President on March 27, 2020. The "excise tax holiday period" is the period beginning after the date of enactment and before January 1, 2021.

be made under section 6427(l). The provision does not affect the imposition of the 0.1-cent-per-gallon excise tax to fund the Leaking Underground Storage Tank Trust Fund.

The provision also suspends the excise taxes imposed under sections 4261 and 4271 on amounts paid during the excise tax holiday period for the transportation by air of persons or property. The suspension only applies to amounts actually paid during the excise tax holiday period. The excise tax holiday does not apply to amounts paid before March 28, 2020, even if the travel occurs during the excise tax holiday period.

Effective Date

The provision is effective on the date of enactment.

OTHER PROVISIONS

1. Loan Forgiveness (sec. 1106 of the Act)

Explanation of Provision

In general

Under the provision, a recipient of a covered loan is eligible for forgiveness of indebtedness on the loan in an amount generally equal to the sum of certain costs incurred and payments made during the eight-week period beginning on the date of the origination of the covered loan, including payroll costs, certain mortgage interest payments, certain rent payments, and certain utility payments. For this purpose, a covered loan is a loan guaranteed under paragraph (36) of section 7(a) of the Small Business Act,[404] as added by section 1102 of the Act, the "Paycheck Protection Program."[405]

The amount forgiven may be reduced (by an amount not to exceed the principal amount of the covered loan) if the recipient reduces the number of the recipient's employees, or the amount of salaries and wages paid, by a specified amount during the covered period.

A covered loan recipient must apply for loan forgiveness. Once an application is submitted to the lender with the required documentation, the lender must issue a decision on the loan forgiveness within 60 days.

Amounts that have been forgiven under the provision are considered canceled indebtedness by a lender authorized under section 7(a) of the Small Business Act (15 U.S.C. 636(a)). The provision requires the Administrator of the Small Business Administration to remit to the lender, no later than 90 days after the date on which the amount of forgiveness under the provision is determined, an amount equal to the amount of forgiveness, plus any interest accrued through the date of payment.

Federal tax consequences

For Federal tax purposes, any amount which (but for the provision) would be includible in gross income of the recipient of a covered loan by reason of forgiveness pursuant to the provision is excluded from gross income.

Effective Date

The provision is effective on the date of enactment.

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[404] 15 U.S.C. 636(a).

[405] Treasury and the Small Business Administration have issued FAQs on the Paycheck Protection Program, including answers to common questions regarding the determination of the amount of loan forgiveness. See "Paycheck Protection Program Loans Frequently Asked Questions (FAQs)", available at https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf (last visited April 22, 2020).

2. Emergency Relief and Taxpayer Protections (sec. 4003 of the Act)

Explanation of Provision

In general

The provision authorizes the Secretary, notwithstanding any other provision of law, to provide liquidity to eligible businesses, States, and municipalities related to losses incurred as a result of coronavirus. The Secretary is authorized (1) to make loans, loan guarantees, and other investments in support of eligible businesses, States, and municipalities that do not, in the aggregate, exceed $500 billion and (2) to provide the subsidy amounts necessary for the loans, loan guarantees, and other investments in accordance with the provisions of the Federal Credit Reform Act of 1990 (2 U.S.C. 661 et seq.).

Under the provision, the Secretary must make a loan, loan guarantee, or other investment in such form and on such terms and conditions and with such covenants, representations, warranties, and requirements (including requirements for audits) as the Secretary determines appropriate. The provision requires that any loans made by the Secretary under the provision be at a rate that the Secretary determines based on the risk and the current average yield on outstanding marketable obligations of the United States of comparable maturity.

Federal tax consequences

Any loan made by or guaranteed by the Treasury under the provision is treated as indebtedness for Federal tax purposes and as issued for its stated principal amount. Any stated interest on any such loan is treated as qualified stated interest.

The provision directs the Secretary (or the Secretary's delegate) to prescribe such regulations or guidance as may be necessary or appropriate to carry out the purposes of the provision, including guidance providing that the acquisition of warrants, stock options, common or preferred stock or other equity under the provision does not result in an ownership change for purposes of section 382.

Effective Date

The provision is effective on the date of enactment.

APPENDIX

The following table[406] shows the estimated revenue effects of the tax provisions of the CARES Act.

[406] Joint Committee on Taxation, *Estimated Revenue Effects of the Revenue Provisions Contained in an Amendment in the Nature of a Substitute to H.R. 748, the "Coronavirus Aid, Relief, And Economic Security ('CARES') Act," as Passed by the Senate on March 25, 2020, and Scheduled for Consideration by the House of Representatives on March 27, 2020* (JCX-11-20), March 2020.

JOINT COMMITTEE ON TAXATION
March 26, 2020
JCX-11-20

ESTIMATED REVENUE EFFECTS OF THE REVENUE PROVISIONS CONTAINED IN AN AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 748, THE "CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ('CARES') ACT," AS PASSED BY THE SENATE ON MARCH 25, 2020, AND SCHEDULED FOR CONSIDERATION BY THE HOUSE OF REPRESENTATIVES ON MARCH 27, 2020

Fiscal Years 2020 - 2030

[Millions of Dollars]

Provision	Effective	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2020-25	2020-30
Division A - Keeping Workers Paid and Employed, Health Care System Enhancements, and Economic Stabilization														
Title II - Assistance for American Workers, Families, and Businesses														
B. Rebates and Other Individual Provisions														
1. 2020 recovery rebate for individuals: $1,200 for singles/$2,400 for married filing jointly, and $500 per qualifying child; phaseout rate of 5% for AGI over $75,000 for single/$112,500 for head of household/$150,000 for married filing jointly (sunset 12/31/20)...............................	DOE	-268,984	-23,390	---	---	---	---	---	---	---	---	---	-292,374	-292,374
2. Special rules for use of retirement funds.............................	DOE	144	-2,096	-333	-27	-17	-21	-30	-36	-42	-48	-54	-2,352	-2,560
3. Temporary waiver of required minimum distribution rules for certain retirement plans and accounts for calendar year 2020..	cyba 12/31/19	-10,620	-1,104	923	999	852	774	824	795	731	670	619	-8,177	-4,538
4. Allowance of partial above the line deduction for charitable contributions (sunset 12/31/20)..	tyba 12/31/19	-310	-1,241	---	---	---	---	---	---	---	---	---	-1,551	-1,551
5. Modification of limitations on charitable contributions during 2020...	tyea 12/31/19	-1,080	-3,748	2,403	741	367	45	179	---	---	---	---	-1,272	-1,093
6. Exclusion for certain employer payments of student loans (sunset 12/31/20)...	pma DOE	-215	-245	---	---	---	---	---	---	---	---	---	-460	-460
C. Business Provisions														
1. Employee retention credit for employers subject to closure due to COVID-19 (sunset 12/31/20)....................................	wpa 3/12/20	-49,115	-5,457	---	---	---	---	---	---	---	---	---	-54,572	-54,572
2. Delay of payments of employer OASDI payroll taxes, plus employer OASDI equivalent of employee representative RRTA tax and SECA, with half due by 12/31/21, and the remainder due by 12/31/22 (sunset 12/31/20).....................	DOE	-211,071	-140,714	170,967	168,505	---	---	---	---	---	---	---	-12,312	-12,312
3. Modifications for net operating losses ("NOLs") - increase taxable income limitation for net operating loss from 80 percent to 100 percent of taxable income, and allow 5 year NOL carryback (sunset tyba 12/31/20)................................	generally tyba 12/31/17 & [1]	-80,032	-8,671	3,133	4,053	9,009	12,990	12,673	8,701	6,214	2,945	3,477	-59,519	-25,509
4. Modification of credit for prior year minimum tax liability for corporations..	tyba 12/31/17	-3,201	3,201	---	---	---	---	---	---	---	---	---	---	---

Provision	Effective	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2020-25	2020-30
5. Modification of limitation on losses for taxpayers other than corporations (sunset tyba 12/31/20)	tyba 12/31/17 & [1]	-74,339	-66,271	-3,664	-3,591	-3,494	-3,428	-3,243	-2,994	-2,946	-2,859	-2,780	-154,787	-169,609
6. Modification of limitation on business interest - increase adjusted taxable income limitation under section 163(j) from 30 percent to 50 percent (sunset tyba 12/31/20)	tyba 12/31/18	-7,173	-4,915	-461	-444	-298	-74	-19	-5	-1	[2]	[2]	-13,366	-13,390
7. Technical amendments regarding qualified improvement property	[1]	*No Revenue Effect*												
8. Temporary exception from excise tax for alcohol used to produce hand sanitizer (sunset 12/31/20)	dsra 12/31/19	[2]	[2]	---	---	---	---	---	---	---	---	---	[2]	[2]
Total of Title II		**-705,996**	**-254,651**	**172,968**	**170,236**	**6,419**	**10,286**	**10,384**	**6,461**	**3,956**	**708**	**1,262**	**-600,742**	**-577,968**
Title III - Supporting America's Health Care System in the Fight Against the Coronavirus														
A. Health Provisions														
Part IV - Health Care Workforce														
C. Labor Provisions														
1. Advance refunding of mandated leave credits	DOE	*No Revenue Effect*												
2. Expansion of DOL authority to postpone certain deadlines	DOE	*No Revenue Effect*												
3. Single-employer plan delay in contribution [3][4]	pywicy 2020	2,918	2,396	-415	-464	-499	-553	-615	-664	-686	-708	-730	3,383	-19
4. Application of cooperative and small employer charity pension plan rules to certain charitable employers whose primary exempt purpose is providing services to mothers and children [5][6]	pyba 12/31/18	-1	-1	-1	-1	-1	-1	-1	-1	-1	-1	-1	-6	-11
D. Finance Committee														
1. Exemption for telehealth services from certain high deductible health plan rules [7]	DOE	[2]	-65	-27	---	---	---	---	---	---	---	---	-92	-92
2. Include certain over-the-counter medical products as qualified medical expense [8]	apa 12/31/19 & eia 12/31/19	-56	-500	-709	-759	-807	-839	-923	-977	-1,006	-1,037	-1,067	-3,671	-8,680
Total of Title III		**2,861**	**1,830**	**-1,152**	**-1,224**	**-1,307**	**-1,393**	**-1,539**	**-1,642**	**-1,693**	**-1,746**	**-1,798**	**-386**	**-8,802**
Title IV - Economic Stabilization and Assistance to Severely Distressed Sectors of the United States Economy														
A. Coronavirus Economic Stabilization Act of 2020														
1. Suspension of Certain Aviation Excise Taxes (sunset 12/31/20) [9]	DOE	-3,067	-1,262	---	---	---	---	---	---	---	---	---	-4,328	-4,328
Total of Title IV		**-3,067**	**-1,262**	**---**	**---**	**---**	**---**	**---**	**---**	**---**	**---**	**---**	**-4,328**	**-4,328**
NET TOTAL		**-706,202**	**-254,083**	**171,816**	**169,012**	**5,112**	**8,893**	**8,845**	**4,819**	**2,263**	**-1,038**	**-536**	**-605,456**	**-591,098**

Joint Committee on Taxation

NOTE: Details may not add to totals due to rounding. The date of enactment is assumed to be April 1, 2020.

[Legend and Footnotes for JCX-11-20 appear on the following page]

Legend and Footnotes for JCX-11-20:

Legend for "Effective" column:

apa = amounts paid after
cyba = calendar years beginning after
DOE = date of enactment
dsra = distilled spirits removed after
eia = expenses incurred after
pma = payments made after
pyba = plan years beginning after
pywicy = plan years which include calendar year
tyba = taxable years beginning after
tyea = taxable years ending after
wpa = wages paid after

[1] Effective as if included in the provision of Public Law 115-97 to which the technical amendment relates.

[2] Loss of less than $500,000.

[3] Estimate provided by the Joint Committee on Taxation and the Congressional Budget Office.

[4] Estimate includes the following budget effects [3]:

	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2020-25	2020-30
Total Revenue Effect	2,918	2,396	-415	-464	-499	-553	-615	-664	-686	-708	-730	3,383	-19
On-budget effects	2,778	2,368	-365	-392	-412	-447	-495	-532	-543	-553	-564	3,529	842
Off-budget effects	140	29	-50	-72	-87	-106	-120	-132	-143	-154	-165	-147	-861

[5] Estimate provided by the Congressional Budget Office.

[6] Estimate contains the following outlay effects:

	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2020-25	2020-30
Application of cooperative and small employer charitable employers whose primary exempt purpose is providing services with respect to mothers and children [5]	1	1	1	1	1	1	1	1	1	1	1	6	11

[7] Estimate includes the following budget effects:

	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2020-25	2020-30
Total Revenue Effect	[2]	-65	-27	---	---	---	---	---	---	---	---	-92	-92
On-budget effects	[2]	-48	-20	---	---	---	---	---	---	---	---	-69	-69
Off-budget effects	[2]	-17	-6	---	---	---	---	---	---	---	---	-23	-23

[8] Estimate includes the following budget effects:

	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2020-25	2020-30
Total Revenue Effect	-56	-500	-709	-759	-807	-839	-923	-977	-1,006	-1,037	-1,067	-3,671	-8,680
On-budget effects	-43	-371	-527	-564	-599	-621	-695	-741	-762	-784	-806	-2,726	-6,514
Off-budget effects	-13	-129	-182	-195	-208	-218	-228	-236	-244	-253	-261	-945	-2,166

[9] The suspension period is the period beginning after the date of enactment and before January 1, 2021. For amounts paid on or before the date of enactment, the suspension does not apply.