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Final Regulations Issued on De Minimis Error Safe Harbors for Failure to File Information Returns and Payee Statements

T.D. 9984

The IRS has issued final regulations regarding the de minimis safe harbors from the penalties under Code Sec. 6721 for failure to file information returns and Code Sec. 6722 for failure to furnish payee statements. The regulations also include the time and manner a payee may elect out of the safe harbor, as well as rules on reporting basis of securities by brokers as it relates to the de minimis safe harbors. The final regulations adopt the 2018 proposed regulations with only minor modifications.

Safe Harbor Exceptions

The safe harbor to the Code Sec. 6721 and Code Sec. 6722 penalties generally apply to an otherwise correctly filed information return or furnished payee statement that includes a de minimis error of the dollar amount required to be reported. A de minimis error is where:

- no single erroneous dollar amount differs from the correct amount by more than $100; and
- no single amount reported for tax withheld differs from the correct amount by more than $25.

The final regulations maintain that the safe harbors apply "per statement" and not on a "per account" basis per the Code requirements. Nothing in the Code prohibits a filer from providing corrected payee statements on an account basis regardless of the de minimis error safe harbor.

The safe harbors do not apply to the failure to file on or before the required due date. They also do not apply to failures that are due to intentional disregard of the requirements to file an information return or furnish a payee statement.

Election Out of Safe Harbor

The person to whom a payee statement must be furnished may elect not to have the safe harbors apply to a payee statement. The election must be made no later than 30 days after the date when the statement must be furnished or October 15 of the calendar year. The election out is prospective and remains in effect for all subsequent calendar years until revoked.

The payee generally must make the election out of the safe harbors in writing to the filer. The filer, however, can provide a reasonable alternative manner for making the election, including electronically (for example, via email or website) or telephonically. The filer must provide timely notification to the payee describing these alternative methods electing out. The filer must retain records of any election, revocation, or notification.

Cost Basis

Code Sec. 6045 provides that a broker that files an information return to report gross proceeds from the sale of a covered security must also include the customer's adjusted basis in the security. The regulations provide that adjusted basis for this purpose must be based the correct dollar amount reported on any corrected information return or payee statement due to the de minimis safe harbors under Code Sec. 6721 or 6722.

Effective Date

The final regulations generally apply with respect to information returns and payee statements required to be file or furnished on or after January 1, 2024. However, Reg. §301.6724-1(h) providing for waiver of the Code Sec. 6721 or 6722 penalties caused by the presence of de minimis errors and an election out of the safe harbors applies with respect to information returns required to be filed and payee statements required to be furnished after January 4, 2017.

Covered Compensation Tables for 2024 Plan Year Released

The IRS has provided tables of covered compensation under Code Sec. 401(l)(5)(E) for the 2024 plan year. Covered compensation with respect to an employee is defined as the average of the contribution and benefit bases in effect under section 230 of the Social Security Act for each year in the 35-year period ending with the year in which the employee attains Social Security retirement age. The tables are developed by rounding the actual amounts of covered compensation for different years of birth. For purposes of determining covered compensation for the 2024 plan year, the taxable wage base is $168,600.

Rev. Rul. 2024-1

IRS To Allow Recipients of Ineligible ERC Funds To Pay Them Back at a Discounted Rate

The Internal Revenue Service announced a new Voluntary Disclosure Program that gives at employers who received erroneous Employee Retention Credit funds the opportunity pay them back at a discounted rate.

The special program runs through March 22, 2024, and allows businesses to pay back erroneous funds at 80 percent of the claim received. If the IRS paid interest on an ERC claim already paid and the business is taking advantage of this voluntary program, that interest does not have to be repaid.

The Voluntary Disclosure Program "is a limited time offer," IRS Commissioner Daniel Werfel said during a December 21, 2023, press teleconference. "From discussions we've had with taxpayers and tax professionals around the country, we understand that there are many employers eager to correct their error but remain concerned about their ability to pay back the portion of the credit that has been lost to promoters that brought them into this mess."

The 80 percent accounts for fees that a so-called ERC mill may have collected to help a business file an ERC claim that they were ultimately not eligible for and is a reflection that the business may not actually have received the full amount of the claim.

Those who cannot make the payment in full at the time of the application approval will have to option to make installment payments, with penalties and interest applying.

In addition, as part of the application process, program participants must name names.

"Those employers participating in the disclosure program must provide the IRS with the names and details of any advisors who advised or assisted them with their claim," Werfel said."This will help with our ongoing efforts to gather information on promoters who created this situation by aggressively pushing people to apply for the credit."

Any employer who has already received ERC funds they were not entitled to can apply to be a part of the Voluntary Disclosure Program if they meet the following criteria:

- The employer is not under criminal investigation and has not been notified they are under criminal investigation;

REFERENCE KEY

USTC references are to ***U.S. Tax Cases***
Dec references are to ***Tax Court Reports***

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- The employer is not under an IRS employment tax examination for the tax period in which they're applying to the Voluntary Disclosure Program;
- The employer has not received an IRS notice and demand for repayment of part or all of the ERC; and
- The IRS has not received information from a third party that the taxpayer is not in compliance or had not acquired information directly related to the noncompliance from an enforcement action.

Those wishing to participate in the program will need to fill out Form 15434, Application for Employee Retention Credit Voluntary Disclosure Program. Application forms must be submitted electronically through the IRS Document Upload Tool.

Employers that outsource their payroll who want to apply to the program must apply through their third-party payroll administrator.

Werfel said it was too early to estimate how much money the IRS expects to collect from this voluntary program.

The program is part of an ongoing campaign by the agency to combat ERC mills that, due to aggressive marketing, may have misled businesses to file for and receive ERC funds, meant to help companies during the COVID-19 pandemic, that they may not have been eligible for.

This program builds upon a current program that allows companies to withdraw potentially ineligible claims that have yet to be processed. Werfel said that there has already been $100 million in ERC claims withdrawn by employers under this program. He added that there is still time to withdraw claims that have not been processed yet if employers review the rules and determine that their claim is ineligible for ERC funds.

The IRS has also halted processing of new claims as it more thoroughly examines claims already received to validate their eligibility after there was a spike in claims filed due to ERC mills encouraging businesses to file claims even though they might not be eligible for them.

As part of the more thorough review of current claims received, the IRS said it has mailed out more 20,000 denial letters to ERC claims earlier this month. Additionally, the agency has thousands of audits under way. The criminal investigations teams also have more than 300 investigations underway involving nearly $3 billion in ERC funds, Werfel said, adding that up to 20,000 addition letters are being readied that have identified erroneous or excessive ERC payments covering tax year 2020, with more planned for the following tax year. A recipient of one of these letters would not be eligible for the Voluntary Disclosure Program.

Excise Tax Return and Wine Operations Report Filing Guidance Updated

Eligible proprietors of bonded wineries and bonded wine cellars may file the Excise Tax Return and the Report of Wine Premises Operations annually, instead of semimonthly or quarterly. In order to file excise tax returns annually, proprietors of bonded wineries and bonded wine cellars must have been liable for wine taxes of $1,000 or less during the previous year, and have an expectation that their wine taxes for the current calendar year will not exceed $1,000.

Wine operations reports may be filed annually if the proprietors of bonded wine premises file the Excise Tax Return annually, and do not expect the total of all bulk and bottled wine on the bonded premises to exceed 20,000 gallons during any month of the calendar year.

This document supersedes TTB Public Guidance TTB G 2018-2.

Public Guidance, TTB G 2023-14, para 40397, Alcohol and Tobacco Tax and Trade Bureau, December 4, 2023

IRS Provides Penalty Relief on 2020 and 2021 Tax Returns; Restarts Collection Notices in 2024 Ending Pandemic-Related Pause

Notice 2024-7; FS-2023-28; IR-2023-244

The IRS has provided certain eligible taxpayers with automatic relief from additions to tax for failure to pay income tax for tax years 2020 and 2021. Relief is only available to taxpayers who filed and eligible return during the relief period, which begins on either the date the IRS issued an initial balance due notice or February 5, 2022, whichever is later, ends on March 31, 2024.

Eligible taxpayers will have their additions to tax, imposed under Code Sec. 6651(a)(2) and (3) for the failure to pay during the relief period, waived. To be eligible, a taxpayer must have been:

- assessed income tax for the 2020 or 2021 tax year, as of December 7, 2023, in an amount less than $100,000, excluding any applicable additions to tax, penalties, or interest;
- issued an initial balance due notice (including, but not limited to Notice CP14 or Notice CP161) on or before December 7, 2023, for the 2020 or 2021 tax year; and
- be otherwise liable during the relief period for accruals of additions to tax for the failure to pay under Code Sec. 6651(a)(2) or (3) with respect to an eligible return for the 2020 or 2021 tax year.

Eligible taxpayers who filed eligible returns will have the accrual of additions to tax for the failure to pay taxes owed for the 2020 or 2021 tax year waived for the relief period or, to the extent previously assessed or paid, will have such additions to tax automatically abated, refunded, or credited to other outstanding tax liabilities, as appropriate, for the relief period. The relief applies to additions to tax for failing to pay taxes owed, but does not apply to any interest that accrues as a result of any underpayment.

This automatic relief does not apply to any addition to tax, penalty, or interest that is not specifically listed, nor to any return for which the penalty for fraudulent failure to file under Code Sec. 6651(f) or the penalty for fraud under Code Sec. 6663 applies.

Approximately 4.7 million taxpayers were not sent automated collection reminder notices during the COVID-19 pandemic. Due to the problems caused by the pandemic, the IRS suspended the mailing of automated reminders to pay overdue tax bills starting in February 2022. Normally, these reminders would have been issued as a follow up after the initial notice. Despite the reminder notices being suspended, the failure-to-pay penalties continued to accrue for taxpayers who did not fully pay their bills after receiving the initial balance due notice.

The IRS is preparing to return to normal collection mailings beginning April 1, 2024. But the first round of rebates may be sent out as early as January, 2024.

U.S. Tax Treaties List Updated for Treaties Meeting Reduced Capital Gains Tax Requirements

The list of U.S. income tax treaties has been updated to include a new tax treaty that meets the requirements of Code Sec. 1(h)(11)(C)(i)(II), and to remove two treaties that no longer meet those requirements. The list is updated to include the treaty with Chile, and to remove the treaties with Hungary and Russia. This notice is effective with respect to Chile for dividends paid on or after December 19, 2023. It is effective with respect to Hungary for dividends paid on or after January 8, 2023, and with respect to Russia for dividends paid on or after January 1, 2023.

Individual shareholders who are paid dividends from domestic corporations or qualified foreign corporations are taxed at the reduced tax rates applicable to certain capital gains. Qualified foreign corporations include certain foreign corporations that are eligible for benefits of an income tax treaty with the United States that the IRS determines is satisfactory for purposes of the qualified foreign corporation provision and that includes an exchange of information provision.

Notice 2011-64, I.R.B. 2011-37, 231, is amplified and superseded.

Notice 2024-11

FinCEN Issues Final Rule on Access to Beneficial Ownership Information

FinCEN Final Rule RIN 1506-AB59; FinCEN Issues Final Rule Regarding Access to Beneficial Ownership Information; Fact Sheet: Beneficial Ownership Information Access and Safeguards Final Rule

The U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) has issued a final rule that implements the beneficial ownership information (BOI) access and safeguard provisions of the Corporate Transparency Act (CTA). BOI is reported to FinCEN pursuant to Section 6403 of the CTA. The CTA was enacted as part of the Anti-Money Laundering Act of 2020 (AML Act), which was part of the National Defense Authorization Act for Fiscal Year 2021 (NDAA). The final rule adopts, with some modifications, the proposed rule on access and safeguards, published on December 16, 2022.

The final access and safeguard rule (the ACCESS rule) is the second of three rulemakings required by the CTA. The final rule follows the final rule on the CTA's BOI reporting requirements.

The rule is effective 60 days its publication in the Federal Register.

BOI

Provisions in the CTA (31 U.S.C. 5336(c)) authorize certain recipients to receive disclosure of identifying information associated with reporting companies, their beneficiaries, and company applicants (BOI). The CTA requires companies to report BOI to FinCEN (31 U.S.C. 5336(b)).

Because BOI is sensitive information, the final regulations reflect FinCEN's commitment to creating a database of BOI that is highly useful to BOI recipients, with the requirement to safeguard against unauthorized use.

The final rule aims to ensure that:

- only authorized recipients have access to BOI,
- authorized recipients use that BOI only for permitted purposes, and
- authorized recipients re-disclose BOI only in ways that balance protection of security, and confidentiality of the BOI with furtherance of the CTA's objective to make BOI available to a range of users for permitted purposes.

The final rule also aims to ensure that BOI is subject to strict cybersecurity controls, confidentiality protections and restrictions, and robust audit and oversight measures.

Access and Safeguard Provisions

The final rule clarifies that the disclosure of BOI is governed by new 31 CFR 1010.955. The new rule recognizes that the CTA authorizes FinCEN to disclose BOI only in limited and specified circumstances and requires distinct regulatory treatment, separate from other provisions authorizing disclosure of other Bank Secrecy information.

The final rule adopts the proposed disclosure prohibition rule. The proposed rule adopted the broad prohibition in the CTA on the disclosure of information reported to FinCEN, but extended the rule. Under the CTA prohibition, except as authorized, BOI reported to FinCEN by reporting companies is confidential and cannot be disclosed by an officer or employee of the United States, any State, local, or Tribal agency, or any financial institution or regulatory agency receiving information. The prohibition was extended to apply to officers or employees even if they were no longer in the position they were in when they received BOI and to individuals who receive BOI as contractors or agents.

The final rule largely adopts, with certain modifications and clarifications, the proposed rule's application of the five categories of recipients for which the CTA prescribes specific requirements to access and use of BOI (domestic agencies, foreign requesters, financial institutions with customer due diligence compliance obligations under applicable law, regulatory agencies, and Department of Treasury).

The final rule revises the approach toward financial institutions that will have access to the BOI database and the purpose for which the BOI may be used. The final rule permits a broader range of financial institutions to access the BOI from the FinCEN database for a broader range of purposes.

The final rule makes some changes to the proposed rule regarding the use of information by authorized recipients to establish that recipients of BOI may only re-disclose when authorized.

The final rule makes several modifications to the proposed rule on re-disclosure. For example, the final rule allows re-disclosure of BOI by State, local, and Tribal law enforcement agencies to State, local, and Tribal agencies for the purpose of making a referral for possible prosecution by that agency, or for use in litigation related to the activity for which the requesting agency requested the information. Also, State, local, and Tribal law enforcement agencies are permitted to disclose BOI for the purpose of making a referral to another State, local, or Tribal agency for possible prosecution.

The final rule adopts the proposed rule on the general security and confidentiality requirements that must be satisfied by a requesting agency in order to be eligible to receive BOI from FinCEN.

The final rule also revises the limitation on sending BOI outside of the United States. Financial institutions do not need to keep BOI confined to the United States, but are prohibited from sending BOI to certain foreign jurisdictions and categories of jurisdictions. Financial institutions may also satisfy the requirement to safeguard BOI by applying the security and information handling procedures in Gramm-Leach-Bliley or by implementing procedures that are at least as protective as those procedures.

The final rule continues to provide that FinCEN has the sole discretion to approve or deny requests for access to BOI. Also, failing to meet the requirements and restrictions can result in suspension or debarment from access to BOI.

FinCEN may disclose a reporting company's BOI to a financial institution only if the reporting company consents to the disclosure. Under the final rule, company consent must be documented, but need not be in writing. Under the final rule, FinCEN can determine the form and manner of certification that a financial institution must provide for each BOI request.

The final rule also adopts the rules in the proposed rule that track the CTA's language making it unlawful for any person to knowingly disclose, or knowingly use, BOI obtained by that person, except as authorized by the CTA and these regulations.

The final rule does not address the revision of the 2016 Customer Due Diligence (CDD) Rule. How FinCEN should revise the rules will be considered in a notice of proposed rulemaking on the topic in the future. Covered financial institutions will continue to be subject to the existing 2016 CDD Rule until a revision of that rule is effective.

Implementation of BOI Access

FinCEN will take a phased approach to providing access to the BO IT system from which authorized users may obtain BOI. It will start with a pilot program for a handful of key Federal agency users in 2024. Then access will be extended to Treasury offices and certain Federal agencies engaged in law enforcement and national security activities that already have a Memoranda of Understanding for access to BSA information. Subsequent stages will extend access to additional Federal agencies engaged in law enforcement and national security, and intelligence activities, as well as to State, local, and Tribal law enforcement partners, intermediary federal government agencies in connection with foreign government requests, and last to financial institutions and their supervisors.

SECURE 2.0 Act Guidance Issued

Notice 2024-2

The IRS addressed open questions and technical errors with respect to several provision of the SECURE 2.0 Act (P.L. 117-328). The IRS indicated that the guidance, which is in the form of questions and answers, is not intended to be comprehensive but rather to assist in implementation of specified provisions. The guidance also extended the deadline to adopt plan amendments to December 31, 2026, or later, depending on the type of plan.

Guidance for 401(k) and 403(b) qualified plans

With respect to Section 113 of the SECURE 2.0 Act, the IRS provided a limit on the value of a financial incentive to participate in a 401(k) or 403(b) plan. A financial incentive qualifies as a de minimis financial incentive under the SECURE 2.0 Act only if it does not exceed $250.

Section 350 of the SECURE 2.0 Act adds safe harbor for correcting automatic enrollment errors. The IRS addresses unclear language regarding the effective date of the provision. Under the guidance, the effective date with respect to an implementation error may vary depending on, for example, the date the error occurs, the date compensation is paid, whether the employee notifies the plan sponsor of the error, and whether the plan year is a fiscal year or calendar year.

With respect to Section 604, which allows defined contribution plans to make matching contributions on a Roth basis, the IRS provided guidance on circumstances under which employees can elect to have matching and nonelective contributions made on a Roth basis. The IRS indicated that such contributions are not included in wages subject to federal income tax withholding. The designated Roth matching or nonelective contribution should be reported in boxes 1 and 2a of Form 1099-R, and Code G is used in box 7.

Guidance for SEPs and SIMPLEs

With respect to Section 117 of the SECURE 2.0 Act, the IRS addressed a technical error in the definition of eligible employer for purposes of the increased contribution limit for SIMPLE plans. The guidance also specified that an employer must elect to apply the increased limits prior to notifying employees of the opportunity to enter into a salary agreement and must reflect the increased limit in the plan terms.

Section 332 of the SECURE 2.0 Act allows an employer to terminate a SIMPLE IRA and replace it with a safe harbor 401(k) plan after 2023. The guidance requires such an employer to notify employees of the termination of the SIMPLE IRA at least 30 days before the termination date.

The IRS provides guidance on Section 601 of the SECURE 2.0 Act, which permits Roth contributions to SEPs and SIMPLEs after 2022. However, the guidance did not address a technical error in the legislation that eliminated Code Sec. 408A(f). The IRS indicated that the deletion of this provision and its effect on the Roth IRA contribution limit will be addressed in future guidance.

Plan amendment deadline extended

The guidance extends the effective date to amend a plan to reflect the SECURE Act, the SECURE 2.0 Act, the CARES Act, and other legislation, to December 31, 2026 for qualified plans, December 31, 2028 for collectively bargained plans, and December 31, 2029 for governmental plans (or 403(b) plans maintained by a public school). The trust governing an IRA must be updated by December 31, 2026.

Other provisions addressed

In addition to the provisions discussed above, the guidance addressed the following sections of the SECURE 2.0 Act: section 101 (expanding automatic enrollment under Code Sec. 414A), section 102 (small employer pension plan startup costs under Code Sec. 45E), section 112 (military spouse retirement plan credit for small employers under Code Sec. 45AA), section 326 (plan distributions due to terminal illness under Code Sec. 72(t)(2)(L)), and section 348 (cash balance plans under Code Sec. 411(b)(6)).

Guidance Issued on the Incremental Cost for Commercial Clean Vehicle Credit

Notice 2024-5; IR-2023-245

The Treasury Department and the IRS have issued guidance pertaining to the new credit for qualified commercial clean vehicles, established by the Inflation Reduction Act of 2022 (P.L. 117-169). Notice 2024-5 establishes a safe harbor regarding the incremental cost of certain qualified commercial clean vehicles placed in service in calendar year 2024.

Credit for Qualified Commercial Clean Vehicles

The amount of the credit is equal to the lesser of (1) 15-percent of the basis of the vehicle (30-percent if the vehicle is not powered by a gasoline or diesel internal combustion engine) or (2) the incremental cost of the vehicle. The credit is limited to $7,500 for a vehicle with a gross vehicle weight rating (GVWR) of less than 14,000 pounds, and $40,000 for other vehicles.

A qualified commercial clean vehicle's incremental cost is the excess of the vehicle's purchase price over the price of a comparable vehicle. A comparable vehicle is any vehicle that is powered solely by a gasoline or diesel internal combustion engine and is comparable in size and use to the qualified vehicle.

Under Code Sec. 45W(c), a qualified commercial clean vehicle includes a vehicle treated as a motor vehicle for purposes of title II of the Clean Air Act and manufactured primarily for use on public streets, roads, and highways (not including street vehicles); and mobile machinery (as defined by Code Sec. 4053(8)).

Safe Harbor

The Treasury Department reviewed a Department of Energy incremental cost analysis (DOE analysis) of current costs for all street vehicles in calendar year 2024. The DOE analysis determined and/or provided the following:

- the incremental cost of all street vehicles (other than compact car PHEVs) that have a gross vehicle weight rating of less than 14,000 pounds will be greater than $7,500;

- the incremental cost for compact car PHEVs, including mini-compact and sub-compact cars, will be less than $7,500;
- an incremental cost analysis of current costs for several representative classes of street vehicles with a gross vehicle weight rating of 14,000 pounds or more in calendar year 2024; and
- the incremental cost will not limit the available credit amount for vehicles placed in service in calendar year 2024.

Accordingly, the Treasury Department and IRS will accept a taxpayer's use of the incremental cost published in the DOE Analysis to calculate the credit amount for compact car PHEVs placed in service during calendar year 2024; and for the appropriate class of street vehicle to calculate the credit amount for vehicles placed in service during calendar year 2024.

A taxpayer's use of $7,500 as the incremental cost for all street vehicles (other than compact car PHEVs) with a gross vehicle weight rating of less than 14,000 pounds to calculate the credit for vehicles placed in service during calendar year 2024.

Proposed Reliance Regs Address Clean Hydrogen Production Credit and Energy Property Election

Proposed Regulations, NPRM REG-117631-23; IR-2023-248

Taxpayers may rely on proposed regulations governing the clean hydrogen production credit and the election to treat part of a specified clean hydrogen production facility as property eligible for the energy credit.

Comments are requested.

Definitions and General Rules

The proposed regs define several key terms and concepts for the credit, including facility, lifecycle greenhouse gas emissions, most recent GREET model, emissions through the point of production (well-to-gate), and qualified clean hydrogen. The taxpayer that qualifies for the credit is the owner of the facility, regardless of whether that taxpayer is treated as a producer under other Code sections. Additional rules coordinate the credit with the Code Sec. 45Q carbon sequestration credit.

In addition, the regs reiterate that the credit applies to the year the clean hydrogen is produced even if the verification process is completed in another year. The IRS requests comments on this proposed rule.

An anti-abuse rule would make the credit unavailable in extraordinary circumstances in which, based on a consideration of all the relevant facts and circumstances, the primary purpose of the production and sale or use of qualified clean hydrogen is to obtain the benefit of the credit in a manner that is wasteful, such as the production of qualified clean hydrogen that the taxpayer knows or has reason to know will be vented, flared, or used to produce hydrogen.

The proposed regs describe how to determine when a qualified facility is placed in service. The 80/20 rule would apply to a modification or retrofit of an existing facility.

Lifecycle GHG Emissions

The proposed regs provide detailed procedures for determining the lifecycle greenhouse gas (GHG) emissions rates for qualified clean hydrogen. The regs address GREET models, and explain how to determine and use a provisional emissions rate (PER).

The regs would also allow certain energy attribute certificates (EACs) to be considered in documenting purchased electricity inputs and assessing emissions impacts of electricity used in the production of hydrogen. According to the Environmental Protection Agency (EPA), EACs are an established mechanism for substantiating the purchase of electricity from zero GHG-emitting sources. They also serve as a reasonable methodological proxy for quantifying certain indirect emissions associated with electricity.

Verification

The proposed regs describe how taxpayers must verify the production and the sale or use of the clean hydrogen. Verifiable use would not include the use of hydrogen to generate electricity that is then directly or indirectly used in the production of more hydrogen, or venting or flaring hydrogen. This rule is intended to discourage inefficient production of clean hydrogen for unproductive use. The IRS requests comments on this proposed rule.

Election to Treat Facility as Energy Property for Energy Credit

The proposed regs provide detailed rules and procedures for electing to treat a qualified clean hydrogen production facility as energy property that may qualify for the energy investment credit. Special procedures would apply to partnerships and S corporations. Electing taxpayers would have to provide annual verification reports. Like other investment credits, the elective credit would be subject to recapture.

RNG and Fugitive Sources of Methane

Finally, the IRS intends to provide rules addressing hydrogen production pathways that use renewable natural gas (RNG) or other fugitive sources of methane (for example, from coal mine operations and equipment leaks) for purposes of the credit. RNG is biogas that has been upgraded to be equivalent in nature to fossil natural gas.

The preamble to the proposed regs describes the rules the IRS is considering. They generally would require that RNG used during the hydrogen production process must originate from the first productive use of the relevant methane. The IRS requests detailed comments on these rules.

Comments Requested

The IRS requests comments on the proposed regs, including on the particular issues noted above.

Comments must be received by the IRS by February 26, 2024. A public hearing is scheduled for March 25, 2024. Comments may be mailed to the IRS or submitted electronically via the Federal eRulemaking Portal at https://www.regulations.gov (indicate IRS and REG-117631-23).

IRS Clarifies Rules for Amortizable Research and Experimentation Expenses

Notice 2024-12

A new notice clarifies and modifies Notice 2023-63, 2023-39 I.R.B. 919, which described forthcoming proposed regulations addressing the capitalization and amortization of specified research or experimental (SRE) expenditures, as well as related accounting issues. Taxpayers may rely on the new guidance for expenses paid or incurred in tax years beginning after December 21, 2021. The new notice does not apply to SRE paid or incurred for tax years beginning before 2022.

SRE for Contract Research

The notice clarifies rules for a research provider that does not bear financial risk under the terms of the contract with the research recipient obtains an excluded SRE product, but does not obtain any other SRE product right. In this case, the costs paid or incurred by the research provider to perform SRE activities on behalf of the research recipient are not SRE expenditures.

Without this clarification, a research provider might be able to treat contract expenses as SRE even if the provider does not bear financial risk, as long as the research provider obtains an SRE product right that is separately bargained for or was acquired for the limited purpose of performing SRE activities under the contract.

Reliance on Notice 2023-64

Taxpayers could rely on Notice 2023-64 as long as they relied on all of its rules, other than those for SRE expenditures paid or incurred with respect to property that is contributed to, distributed from, or transferred from a partnership. However, doing so may require a taxpayer to amend a tax return that was filed before or shortly after the notice was issued, because the taxpayer may not be able to use a change in method of accounting to change certain return positions that are inconsistent with the notice.

To alleviate this problem, the new guidance provides that taxpayers may rely on Notice 2023-64 as longs as they rely on its rules in a consistent manner, but they are not required to rely on all of the rules. Taxpayers continue to be barred from relying on the special rules for SRE expenditures with respect to property that is contributed to or distributed or transferred from a partnership

In addition, the IRS issued Rev. Proc. 2024-9 to provide procedures for obtaining automatic IRS consent to change methods of accounting in reliance on Notice 2023-63.

Pre-2022 Guidance

Finally, the new notice reiterates that Sec. 5 of Rev. Proc. 2000-50, 2000-2 CB 601, is obsoleted only with respect to SRE paid or incurred in tax years beginning after 2021. It continues to apply to research expenses paid or incurred in tax years beginning before 2022.

Research and Experimental Expenditure Automatic Accounting Change Rules Updated

Rev. Proc. 2024-9

The IRS has updated the automatic consent procedure to change methods of accounting for specified research or experimental expenditures addressed in Sections 7 and 19 of Rev. Proc. 2023-24, 2023-28 I.R.B. 1207, to comply with guidance provided in Notice 2023-63, 2023-39 I.R.B. 919, as modified by Notice 2024-12. In addition, the IRS amends Section 9 of Rev. Proc. 2023-24 to clarify that Section 5 of Rev. Proc. 2000-50 is obsoleted only for software development costs paid or incurred in tax years beginning after 2021. Section 5 remains applicable to such expenses paid or incurred in tax years beginning prior to 2022. The changes made by this procedure are effective for Forms 3115 filed on or after December 22, 2023.

Tax Cuts and Jobs Act

Prior to January 1, 2022, research and experimental expenditures were deductible under Code Sec. 174. The Tax Cuts and Jobs Act (P.L. 115-97) amended Code Sec. 174 and replaced the deduction with a five-year amortization period (15 years for foreign research) for specified research or experimental (SRE) expenditures and software expenditures. The change in treatment of research and experimental expenditures required by the amended Code Sec. 174 is considered an accounting method change. The change is to be applied on a cut-off basis for any research or experimental expenditures paid or incurred in tax years beginning after December 31, 2021.

Impact of Amendments to Code Sec. 174 on Long-term Contracts

In order to account for taxable income from a long-term contract, Code Sec. 460(a) generally requires taxpayers to use the percentage-of-completion method (PCM). Under the regulations governing the PCM, an increase in the percentage of the contract price reported by the taxpayer is generally matched by deduction of the incurred costs that cause the increase. Consequently, a taxpayer typically deducts allocable contract costs as they incur. However, Code Sec. 174(a) requires the amortization SRE expenditures. Thus, under the current Code Sec. 460 regulations, incurred SRE expenditures increase the percentage of the contract price that the taxpayer must report, but Code Sec. 174(a) prevents the taxpayer from claiming a corresponding deduction.

Guidance under Notice 2023-63

The IRS issued Notice 2023-63 to describe proposed regulations that will address the amortization of qualified research and experimentation expenses. Sections 3 through 7 of Notice 2023-63 provide interim guidance to taxpayers regarding definition of SRE expenditures and software expenditures; the capitalization and amortization of SREs; the treatment of SRE expenditures performed under contract with a third party, including the application of Code Sec. 482 to cost sharing arrangements involving SRE expenditures; and the disposition or abandonment of SRE expenditures. Section 8 provides guidance on long term contracts under Code Sec. 460.

Under Section 8 of Notice 2023-63, if allocable long term contract costs include SRE expenditures, a taxpayer may limit the increase of the percentage of the contract price that the taxpayer must report to the amortization of incurred SRE expenditures, instead of the full amount.

Changing Method of Accounting

Under the modifications made to Rev. Proc. 2023-24 by this procedure, an automatic change in method of accounting to rely on the interim guidance in Sections 3 through 7 of Notice 2023-63, may be made by filing a statement with the taxpayer's original Federal income tax return for the first tax year beginning after December 31, 2021. If a change in method of accounting to rely on the interim guidance in Sections 3 through 7 of Notice 2023-63 is made for a tax year subsequent to the first tax year beginning after December 31, 2021, the change is made by filing a Form 3115, with a modified Code Sec. 481(a) adjustment that takes into account only expenditures paid or incurred in tax years beginning after December 31, 2021.

Under Reg. §1.460-5(g), a change in a taxpayer's method of allocating costs to its long-term contracts only applies to contracts entered into on or after the year of change. According to this procedure, the IRS intends to amend Reg. §1.460-5(g) to permit accounting method changes made to rely on Section 8 of Notice 2023-63 to be made in the same manner as changes made to rely on Sections 3 through 7. Thus, under the guidance a change for the taxpayer's first tax year beginning after December 31, 2021, applies to all long-term contracts for which an SRE expenditure is an allocable contract cost, including long-term contracts entered into before the beginning of the year of change. A change made subsequent to the first tax year beginning after December 31, 2021, is made with a modified Code Sec. 481(a) adjustment that takes into account the Code Sec. 460 treatment of SRE expenditures paid or incurred in taxable years beginning after December 31, 2021. Such change applies to all long-term contracts for which an SRE expenditure is an allocable contract cost, including long-term contracts entered into before the beginning of the year of change.

Rev. Proc. 2024-9 has modified and clarified Rev. Proc. 2023-24.

Proposed Regulations Revise Guidance on Bad Debts Held by Regulated Financial Companies

Proposed Regulations, NPRM REG-121010-17

The IRS has proposed regulations revising guidance on whether a debt instrument held by a regulated financial company or member of a regulated financial group is worthless for federal income tax purposes.

A regulated financial company or a member of a regulated financial group may rely on Proposed Reg. §1.166-2(d) for charge-offs made on its applicable financial statement that occur in tax years ending on or after the date of publication in the Federal Register, and before the date of publication of final regulations in the Federal Register.

Background

In determining whether a debt is worthless, the IRS considers all pertinent evidence, including the value of any collateral securing the debt and the financial condition of the debtor. The existing regulations provide two alternative conclusive presumptions of worthlessness for bad debt for banks and other regulated corporations subject to supervision by federal authorities, or by state authorities maintaining substantially equivalent standards:

(1) Reg. §1.166-2(d)(1) generally provides that if a bank or other corporation charges off a debt in whole or in part, either (a) in obedience to the specific orders of such authorities, or (b) in accordance with the established policies of such authorities, and such authorities at the first audit after the charge-off confirm in writing that the charge-off would have been subject to specific orders, the debt is conclusively presumed to have become worthless to the extent charged off during the tax year.

(2) Reg. §1.166-2(d)(3) generally provides that a bank (but not other corporations) may elect to use a method of accounting that establishes a conclusive presumption of worthlessness for debts, provided the bank's supervisory authority has made an express determination that the bank maintains and applies loan loss classification standards that are consistent with the regulatory standards of that supervisory authority.

For financial reporting purposes, financial institutions in the United States follow U.S. Generally Accepted Accounting Principles (GAAP) issued by the Financial Accounting Standards Board (FASB). Publicly traded insurance companies report their financial transactions and losses to the Securities and Exchange Commission in accordance with GAAP. Privately held insurance companies may also report their financial transactions and losses in accordance with GAAP. However, in the United States, all insurance companies, whether publicly traded or privately held, are regulated by state governments and are required by state law to prepare financial statements in accordance with statutory accounting principles (Statements of Statutory Accounting Principles, known as SSAPs or SAPs).

In 2016, FASB introduced a new standard (Update) that became effective for many entities for fiscal years beginning after December 15, 2019, and became generally effective for all entities for fiscal years beginning after December 15, 2022.

The Update is based on a current expected credit loss model (CECL Model), which generally requires the recognition of expected credit loss (ECL) in the allowance for credit losses upon initial recognition of a financial asset, with the addition to the allowance recorded as an offset to current earnings. Subsequently, the ECL must be assessed each reporting period, and both negative and positive changes to the ECL must be recognized through an adjustment to the allowance and to earnings. A charge-off of a financial asset, which may be full or partial, is taken out of the allowance in the period in which a financial asset is deemed uncollectible. At that time the carrying value of the financial asset is also written down. The ECL recognized under the CECL Model cannot be used to determine bad debt deductions under Code Sec. 166 because the ECL recognized under the CECL Model would be a current deduction for estimated future losses.

Proposed Regulations

The proposed regulations would revise Reg. §1.166-2(d) to permit regulated financial companies and members of regulated financial groups to use a method of accounting under which amounts charged off from the allowance for credit losses, or pursuant to SSAP standards, would be conclusively presumed to be worthless for federal income tax purposes (Allowance Charge-off Method). Proposed Reg. §1.166-2(d)(1) would allow these taxpayers to conclusively presume that charge-offs from the allowance for credit losses of debt instruments subject to Code Sec. 166 or, for insurance companies that do not produce GAAP financial statements for substantive non- tax purposes, charge-offs pursuant to SSAP standards, satisfy the requirements for a bad debt deduction under Code Sec. 166. The proposed regulations do not address when a debt instrument qualifies as a security within the meaning of Code Sec. 165(g)(2)(C) and therefore would not change the scope of debt instruments to which Code Sec. 166 applies.

When the proposed regulations are finalized, regulated financial companies or members of regulated financial groups that do not presently use or change to the Allowance Charge-off Method would not be entitled to a conclusive presumption of worthlessness and would in most cases be required to use the specific charge-off method for deducting bad debts under Code Sec. 166(a) and Reg. §1.166-1(a)(1).

Under the proposed regulations, the Allowance Charge-off Method would be a method of accounting because it would determine the timing of the bad debt deduction. Accordingly, a change to the Allowance Charge-off Method is a change in method of accounting requiring consent of the Commissioner.

Phaseout Exception Procedures Provided for Certain Credit Elective Payments

Notice 2024-9; IR-2023-252

The Internal Revenue Service has issued procedures for applicable entities to claim the statutory exception to the application of phaseouts for failing to satisfy the domestic content requirement for elective payment projects that begin construction during calendar year 2024.

The phaseouts for elective payment and the statutory exception apply to the following credits:

- Renewable Electricity Production Credit (Code Sec. 45);
- Clean Electricity Production Credit (Code Sec. 45Y);
- Energy Credit (Code Sec. 48); and
- Clean Electricity Investment Credit (Code Sec. 48E).

Applicable entities are generally tax-exempt organizations, state and local governments, Indian tribal governments, Alaska Native Corporations, the Tennessee Valley Authority, and rural electric cooperatives.

Background

The Inflation Reduction Act of 2022 (P.L. 117-169) amended Code Secs. 45 and 48, in part, to provide rules for taxpayers to receive bonus credit amounts for satisfying domestic content requirements for qualified facilities and energy projects placed in service after December 31, 2022. The Act also adds Code Secs. 45Y and 48E, which provide similar rules for domestic content bonus credit amounts for qualified facilities, and qualified investments in qualified facilities or energy storage technologies, placed in service after December 31, 2024. Domestic content is generally defined as steel, iron, or manufactured products that are manufactured or produced in the United States. For tax years beginning after 2022, an applicable entity may elect, under Code Sec. 6417, to treat the amount of an applicable credit as a payment against federal income tax (elective payment). Generally, unless a statutory exception applies, phaseouts for elective payments apply to projects that produce one or more megawatts of electricity and that fail to satisfy the domestic content requirement.

An exception to the phaseout generally applies if (1) the inclusion of steel, iron, or manufactured products that are produced in the United States increases the overall costs of construction of qualified facilities by more than 25 percent (Increased Cost Exception), or (2) relevant steel, iron, or manufactured products are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality (Non Availability Exception).

Attestation Requirement

If an applicable entity provides an attestation for an applicable credit property for which construction begins before January 1, 2025, the Treasury Department and the IRS will treat the attestation as establishing that the applicable credit property meets domestic content exception. The applicable entity must attest, under penalties of perjury, that it has reviewed the requirements for the Increased Cost Exception and the Non-Availability Exception provided under Code Secs. 45(b)(10)(D), 48(a)(13), 45Y(g)(12)(D), or 48E(d)(5), as applicable, and has made a good faith determination that the qualified facility, energy project, or qualified investment with respect to a qualified facility or energy storage technology, as applicable, qualifies for either the Increased Cost Exception or the Non-Availability Exception, or both. The attestation must be signed by a person with the legal authority to bind the applicable entity in federal tax matters and must be attached to a Form 8835, Renewable Electricity Product Credit; Form 3468, Investment Credit; or other applicable form required to be filed by the Applicable Entity to make an elective payment election under Code Sec. 6417.

Comments Requested

The notice also requests comments to help develop future proposed regulations. In addition to general comments, the Treasury Department and the IRS request comments that address the number of qualified facilities that are expected to be affected by the phaseouts for elective payment, factors in defining overall costs of construction, and documentation and substantiation requirements.

Treasury Announces Entry into Force of Income Tax Treaty with Chile

Treasury Announces Entry into Force of Income Tax Treaty with Chile

The U.S. Treasury Department officially confirmed the commencement of the comprehensive income tax treaty between the United States and Chile. This treaty represents a significant milestone as the first bilateral tax agreement signed by the United States in over a decade. Facilitating cross-border investments by reducing tax-related barriers, it is only the second U.S. comprehensive bilateral tax treaty in effect with a South American nation. The U.S. Senate approved the Chile tax treaty on June 22, 2023, and President Biden formally ratified it in December. The Chile tax treaty applies to taxes withheld at source from February 1, 2024. For all other taxes, it takes effect for tax years beginning on or after January 1, 2024.

Documents related to the treaty can be accessed at https://home.treasury.gov/policy-issues/tax-policy/treaties#chile. The treaty incorporates the following provisions:

- reduced source-country withholding tax on certain payments of dividends as well as payments of interest and royalties;
- a prohibition against source-country taxation of business profits of an enterprise in the absence of a so-called “permanent establishment”;
- beneficial rules for individuals, including provisions that govern the taxation of income from employment, payments to students and trainees, and pensions and social security payments;
- a comprehensive limitation on benefits provision; and
- a comprehensive provision allowing for full exchange of information between the U.S. and Chilean tax authorities.

Future Proposed Regulations Will Address Treatment of Section 961(c) Basis in Certain Inbound Nonrecognition Transactions

Notice 2024-16

The IRS has issued guidance describing future proposed regulations that will address the treatment of Code Sec. 961(c) basis in inbound Code Sec. 332 liquidations and Code Sec. 368(a)(1) asset reorganizations where a domestic corporation acquires stock of a controlled foreign corporation (CFC). Taxpayers generally may rely on this guidance for transactions completed on or before the date the proposed regulations are published.

Section 961 Basis Adjustment Rules

In general, a U.S. shareholder's basis in stock of a CFC or other property by reason of which the shareholder is considered as owning stock of the CFC is increased by the amounts actually included in the U.S. shareholder's gross income under Code Sec. 951(a) (Code Sec. 961(a)). The basis of the CFC stock or other property is reduced by any amount received by the U.S. shareholder with respect to the stock or other property that is excluded from the shareholder's gross income under Code Sec. 959(a). To the extent that the amount excluded from gross income exceeds the basis of the stock or other property, the amount is treated as gain from the sale or exchange of property (Code Sec. 961(b)).

Under Code Sec. 961(c), if a U.S. shareholder is treated under Code Sec. 958(a)(2) as owning stock in a CFC that is owned by another CFC, then adjustments similar to the Code Secs. 961(a) and (b) adjustments are made to the basis of the stock and the basis of stock in any other CFC by reason of which the U.S. shareholder is considered as owning the stock of the first mentioned CFC, but only for the purpose of determining the amount included in gross income under Code Sec. 951. The Code Sec. 961(c) adjustments do not apply with respect to any stock to which a Code Secs. 961(a) or (b) basis adjustment applies.

The current Code Sec. 961 regulations were issued long before the enactment of Code Sec. 961(c) and implement only the rules of Code Secs. 961(a) and (b).

Inbound Nonrecognition Transactions and Potential Double Taxation of CFC Earnings

Under the current rules, in a transaction in which a domestic corporation (a domestic acquiring corporation) acquires all of the stock of a CFC (an acquired CFC) from another CFC (a transferor CFC) in a Code Sec. 332 liquidation or Code Sec. 368(a)(1) asset reorganization (an inbound nonrecognition transaction), the domestic acquiring corporation generally obtains a basis of the acquired CFC stock that is determined by reference to the basis of the stock in the hands of the transferor CFC under Code Sec. 334(b) or 362(b). Before the inbound nonrecognition transaction, the transferor CFC may have increased the basis of the acquired CFC stock under Code Sec. 961(c) (a Section 961(c) basis), but the Section 961(c) basis in the stock of the acquired CFC would apply only for the purpose of determining an amount included in the U.S. shareholder's gross income under Code Sec. 951.

As a result, the domestic acquiring corporation may recognize gain on a subsequent distribution of previously taxed earnings and profits (PTEP) from the acquired CFC or recognize gain attributable to PTEP on a disposition of stock in the acquired CFC if the domestic acquiring corporation's adjusted basis in the acquired CFC stock does not reflect the Section 961(c) basis that the transferor CFC had in the acquired CFC stock before the inbound nonrecognition transaction. This result would be inconsistent with one of the purposes of Code Sec. 961, which is to prevent double taxation of the same CFC earnings.

Treatment of Section 961(c) Basis in Covered Inbound Transactions Under the Forthcoming Proposed Regulations

The forthcoming proposed regulations would provide that, in the case of a covered inbound transaction, a domestic acquiring corporation's adjusted basis of the stock of an acquired CFC determined under Code Sec. 334(b) or 362(b) is determined as if the transferor CFC's Section 961(c) basis were adjusted basis. The transferor CFC's Section 961(c) basis is taken into account for this purpose, however, only to the extent the Section 961(c) basis is with respect to a domestic corporation described in this guidance (that is, the Section 961(c) basis resulted from inclusions in gross income of the domestic corporation under Code Sec. 951(a) or 951A(a), or the Section 961(c) basis was inherited by the domestic corporation under Code Sec. 961(c)'s successor rules in an acquisition by the domestic corporation of stock of the transferor CFC from another person).

Covered inbound transaction. A covered inbound transaction, with respect to an acquired CFC, is one of the following transactions in which a domestic acquiring corporation acquires all of the stock of the acquired CFC from a transferor CFC that, immediately before the transaction and any related transactions, owns (directly or indirectly) all of the stock of the acquired CFC:

- Section 332 liquidation or upstream asset reorganization (a nontriangular A reorganization or a nontriangular C reorganization), in which all of the stock of the transferor CFC is owned directly by the domestic acquiring corporation immediately before the transaction.

- Other asset reorganization (a nontriangular A reorganization, a nontriangular C reorganization, a D reorganization, or an F reorganization), in which all of the stock of the transferor CFC is owned directly by a single domestic corporation (or by members of the same consolidated group) immediately before the transaction, and that same domestic corporation (or members of the same consolidated group) directly owns all of the stock of the domestic acquiring corporation immediately after the transaction and any related transactions.

De minimis stock ownership rule. The proposed regulations would include a de minimis stock ownership rule under which a transaction would not fail to be a covered inbound transaction solely because, immediately before the transaction, one or more persons other than the domestic corporation (or members of a consolidated group, as applicable) own (in the aggregate) one percent or less of the total fair market value of the stock of the transferor CFC.

Limitations on covered inbound transaction scope. A transaction would not be considered a covered inbound transaction in the following situations:

- If money or other property (boot) is received in the reorganization, subject to a de minimis boot exception where the boot amount is no more than one percent of the total fair market value of the stock of the transferor CFC.
- If, immediately before the transaction, the total amount of the transferor CFC's basis in the stock of the acquired CFC exceeds the total fair market value of the acquired CFC stock (i.e., there is a loss in the acquired CFC stock).
- If the acquired CFC stock is subsequently transferred pursuant to Code Sec. 368(a)(2)(C) or Reg. §1.368-2(k)(1) (except for transfers within a consolidated group), or if such stock is subsequently transferred to partnerships or foreign corporations pursuant to a plan and in connection with the covered inbound reorganization.
- If the domestic acquiring corporation is a regulated investment company (RIC), a real estate investment trust (REIT), or an S corporation.

If stock of multiple acquired CFCs is transferred by a single transferor CFC, the above limitations apply separately with respect to each acquired CFC.

Reliance on Guidance

A taxpayer may rely on the rules described in this guidance for transactions completed on or before the date the proposed regulations governing the basis consequences of covered inbound transactions are published in the Federal Register, provided the taxpayer and its related parties follow the rules in their entirety and in a consistent manner.

No inference is intended with regard to the treatment of Section 961(c) basis as a result of transactions other than covered inbound transactions. The IRS will consider in future guidance the extent to which basis in CFC stock under Code Sec. 961(c) may be taken into account as adjusted basis by a domestic corporation that acquires stock of the CFC in a transaction other than a covered inbound transaction.

A taxpayer relying on this guidance that has maintained Section 961(c) basis in a currency other than U.S. dollar must, before applying the rules described in this guidance, translate the Section 961(c) basis into U.S. dollars, under a reasonable method consistently applied to all acquired CFCs in any covered inbound transaction undertaken by one or more domestic acquiring corporations. For this purpose, a reasonable method must use an exchange rate that reflects the original U.S. dollar inclusion amounts of the U.S. shareholder that gave rise to the Section 961(c) basis, reduced as appropriate, including to take into account distributions of PTEP on the stock. Distributions of PTEP are treated as reducing the Section 961(c) basis as so translated by the U.S. dollar basis of the PTEP.

Request for Comments

The IRS requests comments on all aspects of this guidance, including whether the rules described in this guidance should apply to transactions other than covered inbound transactions and whether additional limitations should apply in those cases. Comments should be submitted by February 26, 2024, as described in the guidance.

IRS Issues Guidance on Calculating Qualifying Payment Amount

Notice 2024-1

The IRS has provided the combined percentage increase for calculating the qualifying payment amount for items and services furnished during 2024 under Code Secs. 9816 and 9817. For items and services provided in 2024, the percentage increase to adjust the median contracted rate from 2023 to 2024 is 1.0543149339. Group health plans and group and individual health insurance issuers would round any resulting qualifying payment amount to the nearest dollar.

Background

The No Surprises Act was enacted as Title I of Division BB of the Consolidated Appropriations Act, 2021. These provisions provide protections against surprise medical bills in certain circumstances. The No Surprises Act generally limits a patient's cost-sharing amount to a "qualifying payment amount," which is determined by increasing the median contracted rate by the percentage increase in the consumer price index.

Guidance for Calculation

To adjust qualifying payment amounts that were based on January 31, 2019 rates, the qualifying payment amounts for items and services furnished in 2024 are calculated by multiplying the 2023 adjusted qualifying payment amounts by the percentage increase from 2023 to 2024, that is, 1.0543149339.

For an item or service furnished in 2023 for which a plan or issuer did not have sufficient information to calculate the median of the contracted rates in 2019, the plan or issuer calculated the qualifying payment amount by multiplying the median of the in-network allowed amounts for the same or similar item or service provided in the geographic region in 2022, drawn from any eligible database, by the percentage increase from 2022 to 2023, which was 1.0768582128. To calculate the qualifying payment amount for items and services furnished in 2024, the 2023 adjusted qualifying payment amounts are multiplied by 1.0543149339.

Similarly, in the case of a newly covered item or service furnished in 2024, when 2024 is the first coverage year for the item or service with respect to the plan or coverage, the plan or issuer must calculate the qualifying payment amount by multiplying the median of the in-network allowed amounts for the same or similar item or service provided in the geographic region in 2023, drawn from any eligible database, by the percentage increase of 1.0543149339.

Rules on IDR Fees Under No Surprises Act Finalized

T.D. 9985

The IRS, Department of Labor (DOL), and the Department of Health and Human Services (HHS) jointly issued final regulations related to the federal independent dispute resolution (IDR) process established under the No Surprises Act (P.L. 116-260). The regulations are effective January 20, 2024.

For disputes initiated after the effective date of the regulations, the final rule sets the administrative fee for IDR at $115 per party per dispute. The certified IDR entity fee range is $200 to $840 for single determinations and $268 to $1,173 for batched determinations. The tiered fee range for batched determination is $75 to $250.

The regulations finalize the proposal to establish the administrative fee and certified IDR entity fee ranges in notice and comment rulemaking for disputes initiated on or after the rule's effective date. The regulations also set forth the methodology for setting the administrative fee amount.

2023 Cumulative List of Changes for Fourth Remedial Amendment Cycle Issued

Notice 2024-3

The IRS has issued its 2023 Cumulative List of changes in plan qualification requirements for pre-approved Code Sec. 403(b) plans. Cumulative Lists identify changes in the qualification requirements of the tax code that must be taken into account in a pre-approved plan document submitted to the IRS under the IRS's pre-approved plan program.

Submission Period for Fourth Remedial Amendment Cycle

The 2023 List is to be used by pre-approved plan providers to submit opinion letter applications for pre-approved Code Sec. 403(b) plans during the fourth remedial amendment cycle (Cycle 4), which begins on February 1, 2024, and ends January 31, 2025. The 2023 List does not extend the deadline by which a plan must be amended to comply with any statutory, regulatory, or guidance changes.

Cut-offs for Cumulative List

Generally, the IRS will consider only the items on the 2023 Cumulative List in determining whether to issue a Cycle 4 opinion letter with respect to a pre-approved plan. However, if a plan has not been previously reviewed and is submitted for Cycle 4 or has been amended with respect to previously approved language, the IRS will also review the plan for items on earlier Cumulative Lists as well as for any other applicable qualification requirements that were considered by the IRS in issuing opinion letters prior to the implementation of Cumulative Lists.

Tennessee Victims of Severe Storms and Tornadoes Granted Tax Relief

Tennessee Disaster Relief Notice (TN-2023-06)

The president has declared a federal disaster area in Tennessee. The disaster is due to severe storms and tornadoes that began on December 9, 2023. The disaster area includes Davidson; Dickson; Montgomery; and Sumner counties. Taxpayers who live or have a business in the disaster area may qualify for tax relief.

Tennessee Filing Deadlines Extended

The IRS extended certain deadlines falling on or after December 9, 2023, and on or before June 17, 2024, have been postponed to June 17, 2024. This extension includes filing for most returns, including:

- individual, corporate, estate and trust income tax returns;
- partnership and S corporation income tax returns;
- estate, gift and generation-skipping transfer tax returns;
- the Form 5500 series returns;
- annual information returns of tax-exempt organizations, and
- employment and certain excise tax returns.

However, the extension does not include information returns in the Form W-2, 1094, 1095, 1097, 1098, or 1099 series or Forms 1042-S, 3921, 3922, or 8027.

Tennessee Payment Deadlines Extended

The relief includes extra time to make tax payments. This includes estimated tax payments due on or after December 9, 2023, and before June 17, 2024. Taxpayers have until June 17, 2024, to perform other time-sensitive actions due on or after December 9, 2023, and before June 17, 2024.

Late penalties for employment and excise tax deposits due on or after December 9, 2023, and before December 26, 2023, will be abated as long as the deposits are made by December 26, 2023.

Casualty Losses

Affected taxpayers can claim disaster-related casualty losses on their federal income tax return. Taxpayers may get relief by claiming their losses on their 2022 or 2023 return. Individuals may deduct personal property losses not covered by insurance or other reimbursements.

Taxpayers claiming a disaster loss on their 2022 or 2023 return should write the FEMA disaster declaration number "4751-DR" at the top of the return. This will allow the IRS to speed refund processing.

AFRs Issued for January 2024

Rev. Rul. 2024-02

The IRS has released the short-term, mid-term, and long-term applicable interest rates for January 2024.

Applicable Federal Rates (AFR) for January 2024

Short-Term	Annual	Semiannual	Quarterly	Monthly
AFR	5.00%	4.94%	4.91%	4.89%
110% AFR	5.50%	5.43%	5.39%	5.37%
120% AFR	6.02%	5.93%	5.89%	5.86%
130% AFR	6.52%	6.42%	6.37%	6.34%
Mid-Term				
AFR	4.37%	4.32%	4.30%	4.28%
110% AFR	4.81%	4.75%	4.72%	4.70%
120% AFR	5.25%	5.18%	5.15%	5.12%
130% AFR	5.70%	5.62%	5.58%	5.56%
150% AFR	6.58%	6.48%	6.43%	6.39%
175% AFR	7.70%	7.56%	7.49%	7.44%
Long-Term				
AFR	4.54%	4.49%	4.47%	4.45%
110% AFR	5.00%	4.94%	4.91%	4.89%
120% AFR	5.46%	5.39%	5.35%	5.33%
130% AFR	5.93%	5.84%	5.80%	5.77%

Adjusted AFRs for January 2024

	Annual	Semiannual	Quarterly	Monthly
Short-term adjusted AFR	3.79%	3.75%	3.73%	3.72%
Mid-term adjusted AFR	3.31%	3.28%	3.27%	3.26%
Long-term adjusted AFR	3.44%	3.41%	3.40%	3.39%

The Code Sec. 382 adjusted federal long-term rate is 3.44%; the long-term tax-exempt rate for ownership changes during the current month (the highest of the adjusted federal long-term rates for the current month and the prior two months) is 3.81%; the Code Sec. 42(b)(1) appropriate percentages for the 70% and 30% present value low-income housing credit are 8.04% and 3.44%, respectively, however, under Code Sec. 42(b)(2), the appropriate percentage for non-federally subsidized new buildings placed in service after July 30, 2008, shall not be less than 9%; and the Code Sec. 7520 AFR for determining the present value of an annuity, an interest for life or a term of years, or a remainder or reversionary interest is 5.20%.

The IRS will provide affected taxpayers with copies of prior year returns without charge. To get this expedited service, taxpayers should add the disaster designation at the top of Form 4506, Request for a Copy of Tax Return, or Form 4506-T, Request for Transcript of Tax Return; and submit it to the IRS.

Washington Round-up

AICPA makes recommendations on application for EINs. The American Institute of CPAs, in a December 14, 2023, letter requested a change in Internal Revenue Service employee identification number issuance procedures to "allow entities that are organized in the U.S. with a responsible person that lacks a taxpayer identification number (TIN) to be able to call the IRS and obtain an EIN over the phone, as entities organized outside the U.S. currently may do." It noted that the new Beneficial Ownership Information reporting requirements "will also create urgency for entities to obtain an EIN to meet their filing requirements. Since the filing cannot be made without an EIN, entities organized in the U.S. that lack a reasonable person with [a Social Security Number] or an [Individual Taxpayer Identification Number] will not be able to file the required BOI reports until the IRS issues an EIN." A copy of this and other 2023 AICPA tax and policy advocacy letters can be found at https://us.aicpa.org/advocacy/tax/2023taxadvocacycommentletters.html.

ABA files comments on reporting requirements of brokers to include digital asset transactions. The American Bar Association, in a December 20, 203, provided a series of recommendation on proposed regulations that expand reporting requirements for brokers under Sec. 6045 to including transactions involving digital assets. ABA makes 15 recommendations in total, covering a range of topics. Those comments and recommendations can be found at https://www.americanbar.org/content/dam/aba/administrative/taxation/policy/2023/122023comments.pdf.

AICPA seeks changes to Form 8308. The American Institute of CPAs in a December 14, 2023, letter is "writing to urge Treasury and the IRS to simplify the burdensome new filing requirements mandated by the revised version of Form 8308, Report of a Sale or Exchange of Certain Partnership Interests, for the 2023 tax filing season. The 2023 version of Form 8308 impedes the ability of taxpayers and tax practitioners to timely calculate computations and prepare complete and accurate returns for partnerships by the required January 31st deadline." The organization made two alternative recommendations: revert to the previous filing requirements of the 2018 revised Form 8308 or extend the deadline for Form 8308 reporting to align with the due date of Schedules K-1 (Form 1065), Partner's Share of Income, Deductions, Credits, Etc. A copy of this and other 2023 AICPA tax and policy advocacy letters can be found https://us.aicpa.org/advocacy/tax/2023taxadvocacycommentletters.html.

TAX BRIEFS

Clean Vehicle Credits

The IRS has updated frequently asked questions (FAQs) to provide guidance related to the critical mineral and battery component requirements for the New, Previously Owned and Qualified Commercial Clean Vehicle Credits. These updated FAQs supersede earlier FAQs that were posted in FS-2023-22.

FS-2023-29; IR-2023-251

Supreme Court Docket

A petition for review was filed in the following case:

D. Thrush, CA-6—A district court properly held that a judge's exposure to Coronavirus 2019 (COVID-19) was reason for a mistrial. The mistrial was not (1) an abuse of discretion; and (2) a violation of Double Jeopardy under the Fifth Amendment. The taxpayer's objection that an adjournment was not feasible precluded the taxpayer from arguing that the district court should not have accepted multiple jurors' excuses, and should have resumed the trial after an adjournment. By first arguing against an adjournment without addressing the court's COVID-19 exposure and then answering on juror availability, the taxpayer's counsel conceded that an adjournment was not a viable option. The taxpayer forfeited any argument that adjournment was the appropriate course rather than declaring a mistrial. Since taxpayer's counsel made this concession, the district court was not obliged to further explore the jurors' answers.

A petition for review was filed in the following case:

Rocky Branch Timberlands, LLC, CA-11—The district court correctly dismissed a limited liability company's (LLC's) lawsuit on jurisdictional grounds because the relief that the taxpayer sought was barred by the Anti-Injunction Act. The taxpayer argued that its suit was not barred by the Anti-Injunction Act because it did not seek to restrain the assessment or collection of a tax. However, the taxpayer would not have been subject to any "costs separate and apart" from the tax penalty that may result from the Final Partnership Administrative Adjustment

(FPAA). At its heart, this suit was a dispute over taxes and the taxpayer's single claim alleged that the IRS violated Code Sec. 7803(e)(4) by failing to provide the taxpayer with administrative review of its tax case. Accordingly, the taxpayer sought to compel the IRS to provide it with administrative review and, until it did, to prevent the IRS from issuing an FPAA, which the IRS had already issued. Consequently, the relief sought by the taxpayer would have restrained the IRS from assessing and collecting those taxes, it was barred by the Anti-Injunction Act. Further, the taxpayer argued that the lawsuit fell within a narrow exception to the Anti-Injunction Act. That exception permitted injunctive relief for taxpayers who showed that they will suffer irreparable injury if collection of the tax were effected and that it was clear that under no circumstances could the IRS ultimately prevail. The taxpayer could not make either showing.

A petition for review was granted in the following case:

T. Connelly, Exr., CA-8,—The U.S. Court of Appeals for the Eighth Circuit that life insurance proceeds intended to fund a stock redemption were includible in the estate tax valuation of a closely-held corporation. In its petition for certiorari, the executor of a decedent's estate asked the court to decide whether the life insurance proceeds should be considered a corporate asset in determining the value of the decedent's shares for estate tax purposes.

A petition for review was applied for in the following case:

R.N. Stevens, CA-9—The Tax Court erred in holding that taxpayers owned neither penalties nor interest for certain tax years because the partnership losses exceeded the IRS's adjusted non-partnership deficiencies. The partnership losses claimed on unfiled, unsigned tax returns could not be used to offset non-partnership income in an individual deficiency proceeding. Net operating losses composed of partnership losses could not offset the taxpayer's non-partnership income. Instead, the NOLs were partnership items to be used in calculating net loss from partnership items.