

TAX CUTS AND JOBS ACT

\_\_\_\_\_, 2017.—Ordered to be printed

Mr. Brady of Texas, from the committee of conference,  
submitted the following

CONFERENCE REPORT

[To accompany H.R. 1]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 1), to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment, insert the following:

And the Senate agree to the same.

1           (1) DENIAL OF DOUBLE BENEFIT.—Section  
2           280C(a) is amended by inserting “45S(a),” after  
3           “45P(a),”.

4           (2) ELECTION TO HAVE CREDIT NOT APPLY.—  
5           Section 6501(m) is amended by inserting “45S(h),”  
6           after “45H(g),”.

7           (3) CLERICAL AMENDMENT.—The table of sec-  
8           tions for subpart D of part IV of subchapter A of  
9           chapter 1 is amended by adding at the end the fol-  
10          lowing new item:

“Sec. 45S. Employer credit for paid family and medical leave.”.

11          (e) EFFECTIVE DATE.—The amendments made by  
12          this section shall apply to wages paid in taxable years be-  
13          ginning after December 31, 2017.

14          **SEC. 13404. REPEAL OF TAX CREDIT BONDS.**

15          (a) IN GENERAL.—Part IV of subchapter A of chap-  
16          ter 1 is amended by striking subparts H, I, and J (and  
17          by striking the items relating to such subparts in the table  
18          of subparts for such part).

19          (b) PAYMENTS TO ISSUERS.—Subchapter B of chap-  
20          ter 65 is amended by striking section 6431 (and by strik-  
21          ing the item relating to such section in the table of sec-  
22          tions for such subchapter).

23          (c) CONFORMING AMENDMENTS.—

24                 (1) Part IV of subchapter U of chapter 1 is  
25                 amended by striking section 1397E (and by striking

1 the item relating to such section in the table of sec-  
2 tions for such part).

3 (2) Section 54(l)(3)(B) is amended by inserting  
4 “(as in effect before its repeal by the Tax Cuts and  
5 Jobs Act)” after “section 1397E(I)”.

6 (3) Section 6211(b)(4)(A) is amended by strik-  
7 ing “, and 6431” and inserting “and” before  
8 “36B”.

9 (4) Section 6401(b)(1) is amended by striking  
10 “G, H, I, and J” and inserting “and G”.

11 (d) EFFECTIVE DATE.—The amendments made by  
12 this section shall apply to bonds issued after December  
13 31, 2017.

14 **PART VI—PROVISIONS RELATED TO SPECIFIC**  
15 **ENTITIES AND INDUSTRIES**

16 **Subpart A—Partnership Provisions**

17 **SEC. 13501. TREATMENT OF GAIN OR LOSS OF FOREIGN**  
18 **PERSONS FROM SALE OR EXCHANGE OF IN-**  
19 **TERESTS IN PARTNERSHIPS ENGAGED IN**  
20 **TRADE OR BUSINESS WITHIN THE UNITED**  
21 **STATES.**

22 (a) AMOUNT TREATED AS EFFECTIVELY CON-  
23 NECTED.—

24 (1) IN GENERAL.—Section 864(c) is amended  
25 by adding at the end the following:

1 percentage greater than 50 percent (but not  
2 greater than 100 percent) for 50 percent in  
3 subparagraph (B) thereof.

4 “(B) PRE-2018 UNUSED OVERALL DOMES-  
5 TIC LOSS.—For purposes of this paragraph, the  
6 term ‘pre-2018 unused overall domestic loss’  
7 means any overall domestic loss which—

8 “(i) arises in a qualified taxable year  
9 beginning before January 1, 2018, and

10 “(ii) has not been used under para-  
11 graph (1) for any taxable year beginning  
12 before such date.

13 “(C) APPLICABLE TAXABLE YEAR.—For  
14 purposes of this paragraph, the term ‘applicable  
15 taxable year’ means any taxable year of the tax-  
16 payer beginning after December 31, 2017, and  
17 before January 1, 2028.”.

18 (b) EFFECTIVE DATE.—The amendment made by  
19 this section shall apply to taxable years beginning after  
20 December 31, 2017.

## 21 **PART II—INBOUND TRANSACTIONS**

### 22 **SEC. 14401. BASE EROSION AND ANTI-ABUSE TAX.**

23 (a) IMPOSITION OF TAX.—Subchapter A of chapter  
24 1 is amended by adding at the end the following new part:

1 **“PART VII—BASE EROSION AND ANTI-ABUSE TAX**

“Sec. 59A. Tax on base erosion payments of taxpayers with substantial gross receipts.

2 **“SEC. 59A. TAX ON BASE EROSION PAYMENTS OF TAX-**  
3 **PAYERS WITH SUBSTANTIAL GROSS RE-**  
4 **CEIPTS.**

5 “(a) IMPOSITION OF TAX.—There is hereby imposed  
6 on each applicable taxpayer for any taxable year a tax  
7 equal to the base erosion minimum tax amount for the  
8 taxable year. Such tax shall be in addition to any other  
9 tax imposed by this subtitle.

10 “(b) BASE EROSION MINIMUM TAX AMOUNT.—For  
11 purposes of this section—

12 “(1) IN GENERAL.—Except as provided in para-  
13 graphs (2) and (3), the term ‘base erosion minimum  
14 tax amount’ means, with respect to any applicable  
15 taxpayer for any taxable year, the excess (if any)  
16 of—

17 “(A) an amount equal to 10 percent (5  
18 percent in the case of taxable years beginning  
19 in calendar year 2018) of the modified taxable  
20 income of such taxpayer for the taxable year,  
21 over

22 “(B) an amount equal to the regular tax li-  
23 ability (as defined in section 26(b)) of the tax-

1 payer for the taxable year, reduced (but not  
2 below zero) by the excess (if any) of—

3 “(i) the credits allowed under this  
4 chapter against such regular tax liability,  
5 over

6 “(ii) the sum of—

7 “(I) the credit allowed under sec-  
8 tion 38 for the taxable year which is  
9 properly allocable to the research  
10 credit determined under section 41(a),  
11 plus

12 “(II) the portion of the applicable  
13 section 38 credits not in excess of 80  
14 percent of the lesser of the amount of  
15 such credits or the base erosion min-  
16 imum tax amount (determined with-  
17 out regard to this subclause).

18 “(2) MODIFICATIONS FOR TAXABLE YEARS BE-  
19 GINNING AFTER 2025.—In the case of any taxable  
20 year beginning after December 31, 2025, paragraph  
21 (1) shall be applied—

22 “(A) by substituting ‘12.5 percent’ for ‘10  
23 percent’ in subparagraph (A) thereof, and

24 “(B) by reducing (but not below zero) the  
25 regular tax liability (as defined in section

1           26(b)) for purposes of subparagraph (B) there-  
2           of by the aggregate amount of the credits al-  
3           lowed under this chapter against such regular  
4           tax liability rather than the excess described in  
5           such subparagraph.

6           “(3) INCREASED RATE FOR CERTAIN BANKS  
7           AND SECURITIES DEALERS.—

8                   “(A) IN GENERAL.—In the case of a tax-  
9           payer described in subparagraph (B) who is an  
10          applicable taxpayer for any taxable year, the  
11          percentage otherwise in effect under paragraphs  
12          (1)(A) and (2)(A) shall each be increased by  
13          one percentage point.

14                   “(B) TAXPAYER DESCRIBED.—A taxpayer  
15          is described in this subparagraph if such tax-  
16          payer is a member of an affiliated group (as de-  
17          fined in section 1504(a)(1)) which includes—

18                           “(i) a bank (as defined in section  
19                           581), or

20                           “(ii) a registered securities dealer  
21                           under section 15(a) of the Securities Ex-  
22                           change Act of 1934.

23           “(4) APPLICABLE SECTION 38 CREDITS.—For  
24          purposes of paragraph (1)(B)(ii)(II), the term ‘ap-  
25          plicable section 38 credits’ means the credit allowed



1 under section 38 for the taxable year which is prop-  
2 erly allocable to—

3 “(A) the low-income housing credit deter-  
4 mined under section 42(a),

5 “(B) the renewable electricity production  
6 credit determined under section 45(a), and

7 “(C) the investment credit determined  
8 under section 46, but only to the extent prop-  
9 erly allocable to the energy credit determined  
10 under section 48.

11 “(c) MODIFIED TAXABLE INCOME.—For purposes of  
12 this section—

13 “(1) IN GENERAL.—The term ‘modified taxable  
14 income’ means the taxable income of the taxpayer  
15 computed under this chapter for the taxable year,  
16 determined without regard to—

17 “(A) any base erosion tax benefit with re-  
18 spect to any base erosion payment, or

19 “(B) the base erosion percentage of any  
20 net operating loss deduction allowed under sec-  
21 tion 172 for the taxable year.

22 “(2) BASE EROSION TAX BENEFIT.—

23 “(A) IN GENERAL.—The term ‘base ero-  
24 sion tax benefit’ means—

1           “(i) any deduction described in sub-  
2           section (d)(1) which is allowed under this  
3           chapter for the taxable year with respect to  
4           any base erosion payment,

5           “(ii) in the case of a base erosion pay-  
6           ment described in subsection (d)(2), any  
7           deduction allowed under this chapter for  
8           the taxable year for depreciation (or amor-  
9           tization in lieu of depreciation) with re-  
10          spect to the property acquired with such  
11          payment,

12          “(iii) in the case of a base erosion  
13          payment described in subsection (d)(3)—

14               “(I) any reduction under section  
15               803(a)(1)(B) in the gross amount of  
16               premiums and other consideration on  
17               insurance and annuity contracts for  
18               premiums and other consideration  
19               arising out of indemnity insurance,  
20               and

21               “(II) any deduction under section  
22               832(b)(4)(A) from the amount of  
23               gross premiums written on insurance  
24               contracts during the taxable year for  
25               premiums paid for reinsurance, and

1           “(iv) in the case of a base erosion  
2           payment described in subsection (d)(4),  
3           any reduction in gross receipts with re-  
4           spect to such payment in computing gross  
5           income of the taxpayer for the taxable year  
6           for purposes of this chapter.

7           “(B) TAX BENEFITS DISREGARDED IF TAX  
8           WITHHELD ON BASE EROSION PAYMENT.—

9           “(i) IN GENERAL.—Except as pro-  
10          vided in clause (ii), any base erosion tax  
11          benefit attributable to any base erosion  
12          payment—

13                 “(I) on which tax is imposed by  
14                 section 871 or 881, and

15                 “(II) with respect to which tax  
16                 has been deducted and withheld under  
17                 section 1441 or 1442,

18                 shall not be taken into account in com-  
19                 puting modified taxable income under  
20                 paragraph (1)(A) or the base erosion per-  
21                 centage under paragraph (4).

22                 “(ii) EXCEPTION.—The amount not  
23                 taken into account in computing modified  
24                 taxable income by reason of clause (i) shall  
25                 be reduced under rules similar to the rules

1                   under section 163(j)(5)(B) (as in effect be-  
2                   fore the date of the enactment of the Tax  
3                   Cuts and Jobs Act).

4                   “(3) SPECIAL RULES FOR DETERMINING INTER-  
5                   EST FOR WHICH DEDUCTION ALLOWED.—For pur-  
6                   poses of applying paragraph (1), in the case of a  
7                   taxpayer to which section 163(j) applies for the tax-  
8                   able year, the reduction in the amount of interest for  
9                   which a deduction is allowed by reason of such sub-  
10                  section shall be treated as allocable first to interest  
11                  paid or accrued to persons who are not related par-  
12                  ties with respect to the taxpayer and then to such  
13                  related parties.

14                  “(4) BASE EROSION PERCENTAGE.—For pur-  
15                  poses of paragraph (1)(B)—

16                  “(A) IN GENERAL.—The term ‘base ero-  
17                  sion percentage’ means, for any taxable year,  
18                  the percentage determined by dividing—

19                          “(i) the aggregate amount of base  
20                          erosion tax benefits of the taxpayer for the  
21                          taxable year, by

22                          “(ii) the sum of—

23                                  “(I) the aggregate amount of the  
24                                  deductions (including deductions de-  
25                                  scribed in clauses (i) and (ii) of para-

1 graph (2)(A)) allowable to the tax-  
2 payer under this chapter for the tax-  
3 able year, plus

4 “(II) the base erosion tax bene-  
5 fits described in clauses (iii) and (iv)  
6 of paragraph (2)(A) allowable to the  
7 taxpayer for the taxable year.

8 “(B) CERTAIN ITEMS NOT TAKEN INTO AC-  
9 COUNT.—The amount under subparagraph  
10 (A)(ii) shall be determined by not taking into  
11 account—

12 “(i) any deduction allowed under sec-  
13 tion 172, 245A, or 250 for the taxable  
14 year,

15 “(ii) any deduction for amounts paid  
16 or accrued for services to which the excep-  
17 tion under subsection (d)(5) applies, and

18 “(iii) any deduction for qualified de-  
19 rivative payments which are not treated as  
20 a base erosion payment by reason of sub-  
21 section (h).

22 “(d) BASE EROSION PAYMENT.—For purposes of  
23 this section—

24 “(1) IN GENERAL.—The term ‘base erosion  
25 payment’ means any amount paid or accrued by the

1 taxpayer to a foreign person which is a related party  
2 of the taxpayer and with respect to which a deduc-  
3 tion is allowable under this chapter.

4 “(2) PURCHASE OF DEPRECIABLE PROPERTY.—  
5 Such term shall also include any amount paid or ac-  
6 crued by the taxpayer to a foreign person which is  
7 a related party of the taxpayer in connection with  
8 the acquisition by the taxpayer from such person of  
9 property of a character subject to the allowance for  
10 depreciation (or amortization in lieu of depreciation).

11 “(3) REINSURANCE PAYMENTS.—Such term  
12 shall also include any premium or other consider-  
13 ation paid or accrued by the taxpayer to a foreign  
14 person which is a related party of the taxpayer for  
15 any reinsurance payments which are taken into ac-  
16 count under sections 803(a)(1)(B) or 832(b)(4)(A).

17 “(4) CERTAIN PAYMENTS TO EXPATRIATED EN-  
18 TITIES.—

19 “(A) IN GENERAL.—Such term shall also  
20 include any amount paid or accrued by the tax-  
21 payer with respect to a person described in sub-  
22 paragraph (B) which results in a reduction of  
23 the gross receipts of the taxpayer.

1           “(B) PERSON DESCRIBED.—A person is  
2 described in this subparagraph if such person is  
3 a—

4           “(i) surrogate foreign corporation  
5 which is a related party of the taxpayer,  
6 but only if such person first became a sur-  
7rogate foreign corporation after November  
8 9, 2017, or

9           “(ii) foreign person which is a mem-  
10ber of the same expanded affiliated group  
11as the surrogate foreign corporation.

12           “(C) DEFINITIONS.—For purposes of this  
13paragraph—

14           “(i) SURROGATE FOREIGN CORPORA-  
15TION.—The term ‘surrogate foreign cor-  
16poration’ has the meaning given such term  
17by section 7874(a)(2)(B) but does not in-  
18clude a foreign corporation treated as a do-  
19mestic corporation under section 7874(b).

20           “(ii) EXPANDED AFFILIATED  
21GROUP.—The term ‘expanded affiliated  
22group’ has the meaning given such term by  
23section 7874(c)(1).

24           “(5) EXCEPTION FOR CERTAIN AMOUNTS WITH  
25RESPECT TO SERVICES.—Paragraph (1) shall not

1 apply to any amount paid or accrued by a taxpayer  
2 for services if—

3 “(A) such services are services which meet  
4 the requirements for eligibility for use of the  
5 services cost method under section 482 (deter-  
6 mined without regard to the requirement that  
7 the services not contribute significantly to fun-  
8 damental risks of business success or failure),  
9 and

10 “(B) such amount constitutes the total  
11 services cost with no markup component.

12 “(e) APPLICABLE TAXPAYER.—For purposes of this  
13 section—

14 “(1) IN GENERAL.—The term ‘applicable tax-  
15 payer’ means, with respect to any taxable year, a  
16 taxpayer—

17 “(A) which is a corporation other than a  
18 regulated investment company, a real estate in-  
19 vestment trust, or an S corporation,

20 “(B) the average annual gross receipts of  
21 which for the 3-taxable-year period ending with  
22 the preceding taxable year are at least  
23 \$500,000,000, and

24 “(C) the base erosion percentage (as deter-  
25 mined under subsection (c)(4)) of which for the



1 taxable year is 3 percent (2 percent in the case  
2 of a taxpayer described in subsection (b)(3)(B))  
3 or higher.

4 “(2) GROSS RECEIPTS.—

5 “(A) SPECIAL RULE FOR FOREIGN PER-  
6 SONS.—In the case of a foreign person the  
7 gross receipts of which are taken into account  
8 for purposes of paragraph (1)(B), only gross re-  
9 ceipts which are taken into account in deter-  
10 mining income which is effectively connected  
11 with the conduct of a trade or business within  
12 the United States shall be taken into account.  
13 In the case of a taxpayer which is a foreign per-  
14 son, the preceding sentence shall not apply to  
15 the gross receipts of any United States person  
16 which are aggregated with the taxpayer’s gross  
17 receipts by reason of paragraph (3).

18 “(B) OTHER RULES MADE APPLICABLE.—  
19 Rules similar to the rules of subparagraphs (B),  
20 (C), and (D) of section 448(c)(3) shall apply in  
21 determining gross receipts for purposes of this  
22 section.

23 “(3) AGGREGATION RULES.—All persons treat-  
24 ed as a single employer under subsection (a) of sec-  
25 tion 52 shall be treated as 1 person for purposes of

1       this subsection and subsection (c)(4), except that in  
2       applying section 1563 for purposes of section 52, the  
3       exception for foreign corporations under section  
4       1563(b)(2)(C) shall be disregarded.

5       “(f) FOREIGN PERSON.—For purposes of this sec-  
6       tion, the term ‘foreign person’ has the meaning given such  
7       term by section 6038A(c)(3).

8       “(g) RELATED PARTY.—For purposes of this sec-  
9       tion—

10           “(1) IN GENERAL.—The term ‘related party’  
11       means, with respect to any applicable taxpayer—

12                   “(A) any 25-percent owner of the taxpayer,

13                   “(B) any person who is related (within the  
14       meaning of section 267(b) or 707(b)(1)) to the  
15       taxpayer or any 25-percent owner of the tax-  
16       payer, and

17                   “(C) any other person who is related (with-  
18       in the meaning of section 482) to the taxpayer.

19           “(2) 25-PERCENT OWNER.—The term ‘25-per-  
20       cent owner’ means, with respect to any corporation,  
21       any person who owns at least 25 percent of—

22                   “(A) the total voting power of all classes of  
23       stock of a corporation entitled to vote, or

24                   “(B) the total value of all classes of stock  
25       of such corporation.

1           “(3) SECTION 318 TO APPLY.—Section 318  
2           shall apply for purposes of paragraphs (1) and (2),  
3           except that—

4                   “(A) ‘10 percent’ shall be substituted for  
5                   ‘50 percent’ in section 318(a)(2)(C), and

6                   “(B) subparagraphs (A), (B), and (C) of  
7                   section 318(a)(3) shall not be applied so as to  
8                   consider a United States person as owning  
9                   stock which is owned by a person who is not a  
10                  United States person.

11          “(h) EXCEPTION FOR CERTAIN PAYMENTS MADE IN  
12          THE ORDINARY COURSE OF TRADE OR BUSINESS.—For  
13          purposes of this section—

14                  “(1) IN GENERAL.—Except as provided in para-  
15                  graph (3), any qualified derivative payment shall not  
16                  be treated as a base erosion payment.

17                  “(2) QUALIFIED DERIVATIVE PAYMENT.—

18                          “(A) IN GENERAL.—The term ‘qualified  
19                          derivative payment’ means any payment made  
20                          by a taxpayer pursuant to a derivative with re-  
21                          spect to which the taxpayer—

22                                  “(i) recognizes gain or loss as if such  
23                                  derivative were sold for its fair market  
24                                  value on the last business day of the tax-  
25                                  able year (and such additional times as re-

1           required by this title or the taxpayer's meth-  
2           od of accounting),

3           “(ii) treats any gain or loss so recog-  
4           nized as ordinary, and

5           “(iii) treats the character of all items  
6           of income, deduction, gain, or loss with re-  
7           spect to a payment pursuant to the deriva-  
8           tive as ordinary.

9           “(B) REPORTING REQUIREMENT.—No  
10          payments shall be treated as qualified derivative  
11          payments under subparagraph (A) for any tax-  
12          able year unless the taxpayer includes in the in-  
13          formation required to be reported under section  
14          6038B(b)(2) with respect to such taxable year  
15          such information as is necessary to identify the  
16          payments to be so treated and such other infor-  
17          mation as the Secretary determines necessary  
18          to carry out the provisions of this subsection.

19          “(3) EXCEPTIONS FOR PAYMENTS OTHERWISE  
20          TREATED AS BASE EROSION PAYMENTS.—This sub-  
21          section shall not apply to any qualified derivative  
22          payment if—

23                 “(A) the payment would be treated as a  
24                 base erosion payment if it were not made pur-

1           suant to a derivative, including any interest,  
2           royalty, or service payment, or

3           “(B) in the case of a contract which has  
4           derivative and nonderivative components, the  
5           payment is properly allocable to the nonderiva-  
6           tive component.

7           “(4) DERIVATIVE DEFINED.—For purposes of  
8           this subsection—

9           “(A) IN GENERAL.—The term ‘derivative’  
10          means any contract (including any option, for-  
11          ward contract, futures contract, short position,  
12          swap, or similar contract) the value of which, or  
13          any payment or other transfer with respect to  
14          which, is (directly or indirectly) determined by  
15          reference to one or more of the following:

16                 “(i) Any share of stock in a corpora-  
17                 tion.

18                 “(ii) Any evidence of indebtedness.

19                 “(iii) Any commodity which is actively  
20                 traded.

21                 “(iv) Any currency.

22                 “(v) Any rate, price, amount, index,  
23                 formula, or algorithm.

24                 Such term shall not include any item described  
25                 in clauses (i) through (v).

1           “(B) TREATMENT OF AMERICAN DEPOSI-  
2           TORY RECEIPTS AND SIMILAR INSTRUMENTS.—  
3           Except as otherwise provided by the Secretary,  
4           for purposes of this part, American depository  
5           receipts (and similar instruments) with respect  
6           to shares of stock in foreign corporations shall  
7           be treated as shares of stock in such foreign  
8           corporations.

9           “(C) EXCEPTION FOR CERTAIN CON-  
10          TRACTS.—Such term shall not include any in-  
11          surance, annuity, or endowment contract issued  
12          by an insurance company to which subchapter  
13          L applies (or issued by any foreign corporation  
14          to which such subchapter would apply if such  
15          foreign corporation were a domestic corpora-  
16          tion).

17          “(i) REGULATIONS.—The Secretary shall prescribe  
18          such regulations or other guidance as may be necessary  
19          or appropriate to carry out the provisions of this section,  
20          including regulations—

21                 “(1) providing for such adjustments to the ap-  
22                 plication of this section as are necessary to prevent  
23                 the avoidance of the purposes of this section, includ-  
24                 ing through—

1           “(A) the use of unrelated persons, conduit  
2 transactions, or other intermediaries, or

3           “(B) transactions or arrangements de-  
4 signed, in whole or in part—

5           “(i) to characterize payments other-  
6 wise subject to this section as payments  
7 not subject to this section, or

8           “(ii) to substitute payments not sub-  
9 ject to this section for payments otherwise  
10 subject to this section and

11           “(2) for the application of subsection (g), in-  
12 cluding rules to prevent the avoidance of the excep-  
13 tions under subsection (g)(3).”.

14 (b) REPORTING REQUIREMENTS AND PENALTIES.—

15           (1) IN GENERAL.—Subsection (b) of section  
16 6038A is amended to read as follows:

17           “(b) REQUIRED INFORMATION.—

18           “(1) IN GENERAL.—For purposes of subsection  
19 (a), the information described in this subsection is  
20 such information as the Secretary prescribes by reg-  
21 ulations relating to—

22           “(A) the name, principal place of business,  
23 nature of business, and country or countries in  
24 which organized or resident, of each person  
25 which—

1                   “(i) is a related party to the reporting  
2                   corporation, and

3                   “(ii) had any transaction with the re-  
4                   porting corporation during its taxable year,

5                   “(B) the manner in which the reporting  
6                   corporation is related to each person referred to  
7                   in subparagraph (A), and

8                   “(C) transactions between the reporting  
9                   corporation and each foreign person which is a  
10                  related party to the reporting corporation.

11                 “(2) ADDITIONAL INFORMATION REGARDING  
12                 BASE EROSION PAYMENTS.—For purposes of sub-  
13                 section (a) and section 6038C, if the reporting cor-  
14                 poration or the foreign corporation to whom section  
15                 6038C applies is an applicable taxpayer, the infor-  
16                 mation described in this subsection shall include—

17                   “(A) such information as the Secretary de-  
18                   termines necessary to determine the base ero-  
19                   sion minimum tax amount, base erosion pay-  
20                   ments, and base erosion tax benefits of the tax-  
21                   payer for purposes of section 59A for the tax-  
22                   able year, and

23                   “(B) such other information as the Sec-  
24                   retary determines necessary to carry out such  
25                   section.



1 For purposes of this paragraph, any term used in  
2 this paragraph which is also used in section 59A  
3 shall have the same meaning as when used in such  
4 section.”.

5 (2) INCREASE IN PENALTY.—Paragraphs (1)  
6 and (2) of section 6038A(d) are each amended by  
7 striking “\$10,000” and inserting “\$25,000”.

8 (c) DISALLOWANCE OF CREDITS AGAINST BASE  
9 EROSION TAX.—Paragraph (2) of section 26(b) is amend-  
10 ed by inserting after subparagraph (A) the following new  
11 subparagraph:

12 “(B) section 59A (relating to base erosion  
13 and anti-abuse tax),”.

14 (d) CONFORMING AMENDMENTS.—

15 (1) The table of parts for subchapter A of chap-  
16 ter 1 is amended by adding after the item relating  
17 to part VI the following new item:

“PART VII. BASE EROSION AND ANTI-ABUSE TAX”.

18 (2) Paragraph (1) of section 882(a), as amend-  
19 ed by this Act, is amended by inserting “ or 59A,”  
20 after “section 11,”.

21 (3) Subparagraph (A) of section 6425(c)(1), as  
22 amended by section 13001, is amended to read as  
23 follows:

24 “(A) the sum of—

1 “(i) the tax imposed by section 11, or  
2 subchapter L of chapter 1, whichever is  
3 applicable, plus

4 “(ii) the tax imposed by section 59A,  
5 over”.

6 (4)(A) Subparagraph (A) of section 6655(g)(1),  
7 as amended by sections 12001 and 13001, is amend-  
8 ed by striking “plus” at the end of clause (i), by re-  
9 designating clause (ii) as clause (iii), and by insert-  
10 ing after clause (i) the following new clause:

11 “(ii) the tax imposed by section 59A,  
12 plus”.

13 (B) Subparagraphs (A)(i) and (B)(i) of section  
14 6655(e)(2), as amended by sections 12001 and  
15 13001, are each amended by inserting “and modi-  
16 fied taxable income” after “taxable income”.

17 (C) Subparagraph (B) of section 6655(e)(2) is  
18 amended by adding at the end the following new  
19 clause:

20 “(iii) MODIFIED TAXABLE INCOME.—  
21 The term ‘modified taxable income’ has the  
22 meaning given such term by section  
23 59A(c)(1).”.

24 (e) EFFECTIVE DATE.—The amendments made by  
25 this section shall apply to base erosion payments (as de-

1 fined in section 59A(d) of the Internal Revenue Code of  
2 1986, as added by this section) paid or accrued in taxable  
3 years beginning after December 31, 2017.

4 **PART III—OTHER PROVISIONS**

5 **SEC. 14501. RESTRICTION ON INSURANCE BUSINESS EXCEP-**  
6 **TION TO PASSIVE FOREIGN INVESTMENT**  
7 **COMPANY RULES.**

8 (a) IN GENERAL.—Section 1297(b)(2)(B) is amend-  
9 ed to read as follows:

10 “(B) derived in the active conduct of an in-  
11 surance business by a qualifying insurance cor-  
12 poration (as defined in subsection (f)),”.

13 (b) QUALIFYING INSURANCE CORPORATION DE-  
14 FINED.—Section 1297 is amended by adding at the end  
15 the following new subsection:

16 “(f) QUALIFYING INSURANCE CORPORATION.—For  
17 purposes of subsection (b)(2)(B)—

18 “(1) IN GENERAL.—The term ‘qualifying insur-  
19 ance corporation’ means, with respect to any taxable  
20 year, a foreign corporation—

21 “(A) which would be subject to tax under  
22 subchapter L if such corporation were a domes-  
23 tic corporation, and

24 “(B) the applicable insurance liabilities of  
25 which constitute more than 25 percent of its

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## **G. Bond Reforms**

### **1. Termination of private activity bonds (sec. 3601 of the House bill and sec. 103 of the Code)**

#### **Present Law**

##### **In general**

Under present law, gross income generally does not include interest paid on State or local bonds.<sup>941</sup> State and local bonds are classified generally as either governmental bonds or private activity bonds. Governmental bonds are bonds which are primarily used to finance governmental functions or that are repaid with governmental funds. Private activity bonds are bonds with respect to which the State or local government serves as a conduit providing financing to nongovernmental persons (*e.g.*, private businesses or individuals). The exclusion from income for State and local bonds only applies to private activity bonds if the bonds are issued for certain permitted purposes (“qualified private activity bonds”).

##### **Private activity bonds**

Present law provides three main tests for determining whether a State or local bond is in substance a private activity bond, the two-part private business test, the five-percent unrelated or disproportionate use test, and the private loan test.

##### **Private business test**

Private business use and private payments result in State and local bonds being private activity bonds if both parts of the two-part private business test are satisfied—

1. More than 10 percent of the bond proceeds is to be used (directly or indirectly) by a private business (the “private business use test”); and
2. More than 10 percent of the debt service on the bonds is secured by an interest in property to be used in a private business use or to be derived from payments in respect of such property (the “private payment test”).

Private business use generally includes any use by a business entity (including the Federal government), which occurs pursuant to terms not generally available to the general public. For example, if bond-financed property is leased to a private business (other than pursuant to certain short-term leases for which safe harbors are provided under Treasury regulations), bond proceeds used to finance the property are treated as used in a private business use, and rental payments are treated as securing the payment of the bonds. Private business use also can arise when a governmental entity contracts for the operation of a governmental facility by a private business under a management contract that does not satisfy Treasury regulatory safe

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<sup>941</sup> Sec. 103.



harbors regarding the types of payments made to the private operator and the length of the contract.

#### Five-percent unrelated or disproportionate business use test

A second standard to determine whether a bond is to be treated as a private activity bond is the five percent unrelated or disproportionate business use test. Under this test the private business use and private payment test (described above) are separately applied substituting five percent for 10 percent and generally only taking into account private business use and private payments that are not related or not proportionate to the government use of the bond proceeds. For example, while a bond issue that finances a new State or local government office building may include a cafeteria, the issue may become a private activity bond if the size of the cafeteria is excessive (as determined under this rule).

#### Private loan test

The third standard for determining whether a State or local bond is a private activity bond is whether an amount exceeding the lesser of (1) five percent of the bond proceeds or (2) \$5 million is used (directly or indirectly) to finance loans to private persons. Private loans include both business and other (e.g., personal) uses and payments by private persons; however, in the case of business uses and payments, all private loans also constitute private business uses and payments subject to the private business test. Present law provides that the substance of a transaction governs in determining whether the transaction gives rise to a private loan. In general, any transaction which transfers tax ownership of property to a private person is treated as a private loan.

#### Special limit on certain output facilities

A special rule for output facilities treats bonds as private activity bonds if more than \$15 million of the proceeds of the bond issue are used to finance an output facility (an output facility includes electric and gas generation, transmission and related facilities but not a facility for the furnishing of water).<sup>942</sup>

#### Special volume cap requirement for larger transactions

A special volume cap requirement for larger transactions treats bonds as private activity bonds if the nonqualified amount of private business use or private payments exceeds \$15 million (even if that amount is within the general 10-percent private business limitation for governmental bonds) unless the issuer obtains a private activity bond volume allocation.<sup>943</sup>

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<sup>942</sup> Sec. 141(b)(4).

<sup>943</sup> Sec. 141(b)(5).

## **Qualified private activity bonds**

As stated, interest on private activity bonds is taxable unless the bonds meet the requirements for qualified private activity bonds. Qualified private activity bonds permit States or local governments to act as conduits providing tax-exempt financing for certain private activities. The definition of qualified private activity bonds includes an exempt facility bond, or qualified mortgage, veterans' mortgage, small issue, redevelopment, 501(c)(3), or student loan bond.<sup>944</sup> The definition of exempt facility bond includes bonds issued to finance certain transportation facilities (airports, ports, mass commuting, and high-speed intercity rail facilities); qualified residential rental projects; privately owned and/or operated utility facilities (sewage, water, solid waste disposal, and local district heating and cooling facilities, certain private electric and gas facilities, and hydroelectric dam enhancements); public/private educational facilities; qualified green building and sustainable design projects; and qualified highway or surface freight transfer facilities.<sup>945</sup>

In most cases, the aggregate volume of these tax-exempt private activity bonds is restricted by annual aggregate volume limits imposed on bonds issued by issuers within each State. For 2017, the State volume limit is the greater of \$100 multiplied by the State population, or \$305.32 million.<sup>946</sup>

### **House Bill**

The provision repeals the exception from the exclusion from gross income for interest paid on qualified private activity bonds issued after December 31, 2017. Thus, such interest on private activity bond issued after such date is includible in the gross income of the taxpayer.<sup>947</sup>

Effective date.—The provision applies to bonds issued after December 31, 2017.

### **Senate Amendment**

No provision.

### **Conference Agreement**

The conference agreement does not follow the House bill provision.

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<sup>944</sup> Sec. 141(e).

<sup>945</sup> Sec. 142(a).

<sup>946</sup> Sec. 3.20 of Rev. Proc. 2016-55, 2016-2 C.B. 707.

<sup>947</sup> The provisions do not apply to any previously issued bond, nor would the provisions prevent State and local governments from issuing private activity bonds in the future; the provisions merely remove the Federal tax subsidy for newly issued bonds. The bill also terminates section 25 of the Code as it relates to credits associated with mortgage credit certificates issued after December 31, 2017. See section 1102 of the bill (Repeal of nonrefundable credits).

## 2. Repeal of advance refunding bonds (sec. 3602 of the House bill, sec. 13532 of the Senate amendment, and sec. 149(d) of the Code)

### Present Law

Section 103 generally provides that gross income does not include interest received on State or local bonds. State and local bonds are classified generally as either governmental bonds or private activity bonds. Governmental bonds are bonds the proceeds of which are primarily used to finance governmental facilities or the debt is repaid with governmental funds. Private activity bonds are bonds in which the State or local government serves as a conduit providing financing to nongovernmental persons (*e.g.*, private businesses or individuals).<sup>948</sup> Bonds issued to finance the activities of charitable organizations described in section 501(c)(3) (“qualified 501(c)(3) bonds”) are one type of private activity bond. The exclusion from income for interest on State and local bonds only applies if certain Code requirements are met.

The exclusion for income for interest on State and local bonds applies to refunding bonds but there are limits on advance refunding bonds. A refunding bond is defined as any bond used to pay principal, interest, or redemption price on a prior bond issue (the refunded bond). Different rules apply to current as opposed to advance refunding bonds. A current refunding occurs when the refunded bond is redeemed within 90 days of issuance of the refunding bonds. Conversely, a bond is classified as an advance refunding if it is issued more than 90 days before the redemption of the refunded bond.<sup>949</sup> Proceeds of advance refunding bonds are generally invested in an escrow account and held until a future date when the refunded bond may be redeemed.

Although there is no statutory limitation on the number of times that tax-exempt bonds may be currently refunded, the Code limits advance refundings. Generally, governmental bonds and qualified 501(c)(3) bonds may be advance refunded one time.<sup>950</sup> Private activity bonds, other than qualified 501(c)(3) bonds, may not be advance refunded at all.<sup>951</sup> Furthermore, in the case of an advance refunding bond that results in interest savings (*e.g.*, a high interest rate to low interest rate refunding), the refunded bond must be redeemed on the first call date 90 days after the issuance of the refunding bond that results in debt service savings.<sup>952</sup>

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<sup>948</sup> Sec. 141.

<sup>949</sup> Sec. 149(d)(5).

<sup>950</sup> Sec. 149(d)(3). Bonds issued before 1986 and pursuant to certain transition rules contained in the Tax Reform Act of 1986 may be advance refunded more than one time in certain cases.

<sup>951</sup> Sec. 149(d)(2).

<sup>952</sup> Sec. 149(d)(3)(A)(iii) and (B); Treas. Reg. sec. 1.149(d)-1(f)(3). A “call” provision provides the issuer of a bond with the right to redeem the bond prior to the stated maturity.

### **House Bill**

The provision repeals the exclusion from gross income for interest on a bond issued to advance refund another bond.

Effective date.—The provision applies to advance refunding bonds issued after December 31, 2017.

### **Senate Amendment**

The Senate amendment follows the House bill.

### **Conference Agreement**

The conference agreement follows the Senate amendment.

### **3. Repeal of tax credit bonds (sec. 3603 of the House bill and secs. 54A, 54B, 54C, 54D, 54E, 54F and 6431 of the Code)**

### **Present Law**

#### **In general**

Tax-credit bonds provide tax credits to investors to replace a prescribed portion of the interest cost. The borrowing subsidy generally is measured by reference to the credit rate set by the Treasury Department. Current tax-credit bonds include qualified tax credit bonds, which have certain common general requirements, and include new clean renewable energy bonds, qualified energy conservation bonds, qualified zone academy bonds, and qualified school construction bonds.<sup>953</sup>

#### **Qualified tax-credit bonds**

##### General rules applicable to qualified tax-credit bonds<sup>954</sup>

Unlike tax-exempt bonds, qualified tax-credit bonds generally are not interest-bearing obligations. Rather, the taxpayer holding a qualified tax-credit bond on a credit allowance date is entitled to a tax credit. The amount of the credit is determined by multiplying the bond's credit rate by the face amount on the holder's bond. The credit rate for an issue of qualified tax credit bonds is determined by the Secretary and is estimated to be a rate that permits issuance of

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<sup>953</sup> The authority to issue two other types of tax-credit bonds, recovery zone economic development bonds and Build America Bonds, expired on January 1, 2011.

<sup>954</sup> Certain other rules apply to qualified tax credit bonds, such as maturity limitations, reporting requirements, spending rules, and rules relating to arbitrage. Separate rules apply in the case of tax-credit bonds which are not qualified tax-credit bonds (*i.e.*, “recovery zone economic development bonds,” and “Build America Bonds”).

the qualified tax-credit bonds without discount and interest cost to the qualified issuer.<sup>955</sup> The credit accrues quarterly and is includible in gross income (as if it were an interest payment on the bond), and can be claimed against regular income tax liability and alternative minimum tax liability. Unused credits may be carried forward to succeeding taxable years. In addition, credits may be separated from the ownership of the underlying bond similar to how interest coupons can be stripped for interest-bearing bonds.

#### New clean renewable energy bonds

New clean renewable energy bonds (“New CREBs”) may be issued by qualified issuers to finance qualified renewable energy facilities.<sup>956</sup> Qualified renewable energy facilities are facilities that: (1) qualify for the tax credit under section 45 (other than Indian coal and refined coal production facilities), without regard to the placed-in-service date requirements of that section; and (2) are owned by a public power provider, governmental body, or cooperative electric company.

The term “qualified issuers” includes: (1) public power providers; (2) a governmental body; (3) cooperative electric companies; (4) a not-for-profit electric utility that has received a loan or guarantee under the Rural Electrification Act; and (5) clean renewable energy bond lenders. There was originally a national limitation for New CREBs of \$800 million. The national limitation was then increased by an additional \$1.6 billion in 2009. As with other tax credit bonds, a taxpayer holding New CREBs on a credit allowance date is entitled to a tax credit. However, the credit rate on New CREBs is set by the Secretary at a rate that is 70 percent of the rate that would permit issuance of such bonds without discount and interest cost to the issuer.<sup>957</sup>

#### Qualified energy conservation bonds

Qualified energy conservation bonds may be used to finance qualified conservation purposes.

The term “qualified conservation purpose” means:

1. Capital expenditures incurred for purposes of: (a) reducing energy consumption in publicly owned buildings by at least 20 percent; (b) implementing green community programs;<sup>958</sup> (c) rural development involving the production of electricity from

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<sup>955</sup> However, for new clean renewable energy bonds and qualified energy conservation bonds, the applicable credit rate is 70 percent of the otherwise applicable rate.

<sup>956</sup> Sec. 54C.

<sup>957</sup> Given the differences in credit quality and other characteristics of individual issuers, the Secretary cannot set credit rates in a manner that will allow each issuer to issue tax credit bonds at par.

<sup>958</sup> Capital expenditures to implement green community programs include grants, loans, and other repayment mechanisms to implement such programs. For example, States may issue these tax credit bonds to finance retrofits of existing private buildings through loans and/or grants to individual homeowners or businesses, or through other repayment mechanisms. Other repayment mechanisms can include periodic fees assessed on a

renewable energy resources; or (d) any facility eligible for the production tax credit under section 45 (other than Indian coal and refined coal production facilities);

2. Expenditures with respect to facilities or grants that support research in:
  - (a) development of cellulosic ethanol or other nonfossil fuels; (b) technologies for the capture and sequestration of carbon dioxide produced through the use of fossil fuels;
  - (c) increasing the efficiency of existing technologies for producing nonfossil fuels;
  - (d) automobile battery technologies and other technologies to reduce fossil fuel consumption in transportation; and (e) technologies to reduce energy use in buildings;
3. Mass commuting facilities and related facilities that reduce the consumption of energy, including expenditures to reduce pollution from vehicles used for mass commuting;
4. Demonstration projects designed to promote the commercialization of: (a) green building technology; (b) conversion of agricultural waste for use in the production of fuel or otherwise; (c) advanced battery manufacturing technologies; (d) technologies to reduce peak-use of electricity; and (e) technologies for the capture and sequestration of carbon dioxide emitted from combusting fossil fuels in order to produce electricity; and
5. Public education campaigns to promote energy efficiency (other than movies, concerts, and other events held primarily for entertainment purposes).

There was originally a national limitation on qualified energy conservation bonds of \$800 million. The national limitation was then increased by an additional \$2.4 billion in 2009. As with other qualified tax credit bonds, the taxpayer holding qualified energy conservation bonds on a credit allowance date is entitled to a tax credit. The credit rate on the bonds is set by the Secretary at a rate that is 70 percent of the rate that would permit issuance of such bonds without discount and interest cost to the issuer.<sup>959</sup>

#### Qualified zone academy bonds

Qualifies zone academy bonds (“QZABs”) are defined as any bond issued by a State or local government, provided that (1) at least 95 percent of the proceeds are used for the purpose of renovating, providing equipment to, developing course materials for use at, or training teachers and other school personnel in a “qualified zone academy,” and (2) private entities have promised to contribute to the qualified zone academy certain equipment, technical assistance or training, employee services, or other property or services with a value equal to at least 10 percent of the bond proceeds.

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government bill or utility bill that approximates the energy savings of energy efficiency or conservation retrofits. Retrofits can include heating, cooling, lighting, water-saving, storm water-reducing, or other efficiency measures.

<sup>959</sup> Given the differences in credit quality and other characteristics of individual issuers, the Secretary cannot set credit rates in a manner that will allow each issuer to issue tax credit bonds at par.

A total of \$400 million of QZABs has been authorized to be issued annually in calendar years 1998 through 2008. The authorization was increased to \$1.4 billion for calendar year 2009, and also for calendar year 2010. For each of the calendar years 2011 through 2016, the authorization was set at \$400 million.

#### Qualified school construction bonds

Qualified school construction bonds must meet three requirements: (1) 100 percent of the available project proceeds of the bond issue is used for the construction, rehabilitation, or repair of a public school facility or for the acquisition of land on which such a bond-financed facility is to be constructed; (2) the bonds are issued by a State or local government within which such school is located; and (3) the issuer designates such bonds as a qualified school construction bond.

There is a national limitation on qualified school construction bonds of \$11 billion for calendar years 2009 and 2010, and zero after 2010. If an amount allocated is unused for a calendar year, it may be carried forward to the following and subsequent calendar years. Under a separate special rule, the Secretary of the Interior may allocate \$200 million of school construction bond authority for Indian schools.

#### Direct-pay bonds and expired tax-credit bond provisions

The Code provides that an issuer may elect to issue certain tax credit bonds as “direct-pay bonds.” Instead of a credit to the holder, with a “direct-pay bond” the Federal government pays the issuer a percentage of the interest on the bonds. The following tax credit bonds may be issued as direct-pay bonds: new clean renewable energy bonds, qualified energy conservation bonds, and qualified school construction bonds. Qualified zone academy bonds may not be issued as direct-pay using any national zone academy bond allocation for calendar years after 2011 or any carryforward of such allocations. The ability to issue Build America Bonds and Recovery Zone bonds, which have direct-pay features, has expired.

#### House Bill

The provision prospectively repeals authority to issue tax-credit bonds and direct-pay bonds.

Effective date.—The provision applies to bonds issued after December 31, 2017.

#### Senate Amendment

No provision.

#### Conference Agreement

The conference agreement follows the House bill.

the provision clarifies that there is no gain deferral available with respect to any sale or exchange made after December 31, 2026, and there is no exclusion available for investments in qualified opportunity zones made after December 31, 2026. The agreement also makes some technical changes to the Senate amendment to make it clear which taxpayer may claim the tax benefits.

## **18. Provisions relating to the low-income housing credit (secs. 13411 and 13412 of the Senate amendment and sec. 42 of the Code)**

### **Present Law**

#### **In general**

The low-income housing credit may be claimed over a 10-year period for the cost of building rental housing a sufficient portion of which is rent restricted and occupied by tenants having incomes below specified levels.<sup>1193</sup> Qualified basis is the low-income portion of the building times the eligible basis. The amount of the credit for any taxable year in the credit period is the applicable percentage of the qualified basis of each qualified low-income building. The applicable percentage for new buildings that are not Federally subsidized, is computed to yield a present value of 70 percent of the qualified basis over a 10-year period. For other buildings the applicable percentage is calculated to yield 30 percent. Rehabilitation expenses are treated as a separate new building.

#### **Increase in credit for certain high cost areas**

In the case of a building located in a qualified census tract or difficult development area, the eligible basis of a building is 130 percent of eligible basis. This “basis boost also applies to rehabilitation expenditures that are treated as a separate new building.

A “difficult development area” is an area designated by the Secretary of Housing and Urban Development (“HUD”) as having high construction, land, and utility costs relative to the area’s median income. The portions of metropolitan statistical areas that may be designated for this purpose cannot exceed an aggregate area having 20 percent of the population of such metropolitan statistical areas. A comparable rule applies to nonmetropolitan areas.

A “qualified census tract” means any census tract which is designated by HUD in which either: (1) 50 percent or more of the households have an income which is less than 60 percent of the area median income for the year; or (2) the poverty rate in that tract is 25 percent. The portion of a metropolitan statistical area that may be designated for this purpose cannot exceed an area having 20 percent of the population of such metropolitan statistical area. Each metropolitan statistical area is treated as a separate area and all nonmetropolitan areas in a State are treated as one area.

In addition, a building which is designated by a State housing credit agency as requiring an increase in credit to be financially feasible is treated as located in a HUD-designated difficult

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<sup>1193</sup> Sec. 42.



development area. This rule does not apply to a building if any portion of the eligible basis is financed with tax-exempt bonds.

### **General public use**

In order to be eligible for the low-income housing credit, the residential units in a qualified low-income housing project must be available for use by the general public. A project is available for general public use if the project complies with housing non-discrimination policies including those set forth in the Fair Housing Act (42 U.S.C. sec. 3601) and (2) the project does not restrict occupancy based on membership in a social organization or employment by specific employers. In addition, any residential unit that is part of a hospital, nursing home, sanitarium, lifecare facility, trailer park, or intermediate care facility for the mentally or physically handicapped is not available for use by the general public.

However, a project that otherwise meets the general public use requirements above shall not fail to meet the general public use requirement solely because of occupancy restrictions or preferences that favor tenants with (1) special needs; (2) who are members of a specified group under a Federal program or State program or policy that supports housing for such specified group; or (3) who are involved in artistic or literary activities.

### **House Bill**

No provision.

### **Senate Amendment**

#### **Treatment of veterans' preference as not violating general public use requirements**

The provision replaces the exception to the general public use requirement for tenants engaged in artistic and literary activities with an exception for veterans.

#### **Increase in credit for certain rural housing**

For buildings eligible for the 70 percent present-value credit, the provision makes two changes. First, the provision treats such buildings located in rural areas (as defined in section 520 of the Fair Housing Act of 1949) as located in a HUD-designated difficult development area. Second, the provision reduces the eligible basis for difficult to develop areas and qualified census tracts from 130 percent to 125 percent.<sup>1194</sup>

Effective date.—The provisions generally apply to buildings placed in service after the date of enactment. The changes related to the treatment of a veterans preference as not violating general public use requirements applies to buildings placed in service before, on, or after the date of enactment.

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<sup>1194</sup> A correction to the language is needed to conform to the intent that the change be limited to buildings eligible for the 70 percent credit only.

## **Conference Agreement**

The conference agreement does not follow the Senate amendment provisions.

## **E. Prevention of Base Erosion**

### **1. Base erosion using deductible cross-border payments between affiliated companies (sec. 4303 of the House bill and new secs. 4491 and 6038E of the Code; sec. 14401 of the Senate amendment and secs. 6038A and 6038C and new secs. 59A and 59B of the Code)**

#### **House Bill**

##### **In general**

This provision imposes an excise tax on certain amounts paid by U.S. payors to certain related foreign recipients to the extent the amounts are deductible by the U.S. payor. However, the excise tax does not apply if the foreign recipient elects to be subject to U.S. income tax on the amounts received. In calculating the U.S. income tax liability imposed under such an election, deemed expenses are allowed as a deduction. A foreign tax credit of 80% of applicable foreign credits are allowed against the U.S. tax liability imposed by this provision if an election is made.

##### **Excise tax**

The provision provides for an excise tax on specified amounts paid or incurred by a domestic corporation to a foreign corporation if both the foreign and domestic corporations are members of the same international financial reporting group. The amount of the tax is equal to 20 percent of the specified amounts paid or incurred. The excise tax is not imposed with respect to amounts that are or are deemed to be effectively connected with a U.S. trade or business of the foreign corporation. The excise tax imposed is neither deductible nor creditable.

A specified amount is any amount which is allowable by the payor as a deduction or includible in costs of goods sold, or inventory, or in the basis of an amortizable or depreciable asset. A specified amount does not include: (i) interest, (ii) an amount paid or incurred for the acquisition of a security defined in section 475(c)(2) (without regard to the last sentence thereof) or a commodity defined in sections 475(e)(2), that is, a commodity actively traded within the meaning of section 1092(d)(1) or an identified hedge of such commodity, or, (iii) for a payor which has elected to use a services cost method under section 482, an amount paid or incurred for services if such amount is the total services cost with no markup.

An international financial reporting group is any group of entities that prepares consolidated financial statements<sup>1542</sup> if the average annual aggregate payment amount for the

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<sup>1542</sup> This term is defined in new section 163(n)(4) as a financial statement certified as being prepared in accordance with generally accepted accounting principles, international financial reporting standards, or any other comparable method of accounting identified by the Secretary of the Treasury and which is: (i) a 10-K (or successor form), or annual statement to shareholders required to be filed with the United States Securities and Exchange Commission, or, if this is not available, (ii) an audited financial statement used for (1) credit purposes, (2) reporting to shareholders, partners or other proprietors, or to beneficiaries, or (3) any other substantial nontax purpose, or, if (i) and (ii) are not available, (iii) filed with any other Federal or State agency for nontax purposes, or, if (i), (ii), or (iii) are not available, a financial statement used for a purpose described in (ii)(1), (2) and (3), or filed with any regulatory or governmental body, within or outside the United States, specified by the Secretary of the Treasury.

group for the three-year period ending in the reporting year exceeds \$100,000,000. The annual aggregate payment amount means the aggregate of the specified amounts made by U.S. members of the group to foreign members of the group during the reporting year.

### **Partnerships and branches**

For purposes of this provision, a partnership is treated as an aggregate of its partners. Accordingly, a payment made to a partnership is treated as a payment to the partners, and a payment from a partnership is treated as a payment from the partners, in an amount equal to the partner's distributive share of the relevant item of income, gain, deduction, or loss.

For purposes of this provision, U.S. branches are treated as separate entities for purposes of determining the treatment of payments between a branch and entities other than its owner and for purposes of deemed payments between a branch and its owner.

### **Election to treat payments as effectively connected income**

If a specified amount is paid or incurred by a domestic corporation with respect to a foreign corporation and both the foreign and domestic corporations are members of the same international financial reporting group, the foreign corporation may elect to take into account all such specified amounts as if the foreign corporation were engaged in a U.S. trade or business and had a permanent establishment and as if the payment were effectively connected with that U.S. trade or business and were attributable to the permanent establishment, irrespective of any otherwise applicable treaty. If the foreign corporation makes such election, the excise tax is not imposed and tax is imposed on a net basis on such specified amounts less deemed expenses. The election applies for the taxable year for which the election is made and all subsequent taxable years unless revoked with consent of the Secretary of the Treasury.

In general, the amount treated as effectively connected income under this provision is treated as such for all purposes of the Code. For example, it is subject to the branch profit tax (unless otherwise reduced, such as by an applicable treaty) and is not subject to the excise tax under section 4371. However, for purposes of section 245 and new section 245A, these amounts are not treated as effectively connected income. Therefore, a distribution of earnings attributable to the amounts described in this provision is eligible for the participation DRD under new section 245A.

The deemed expenses with respect to any specified amount received by a foreign corporation during any reporting year is the amount of expenses such that the net income ratio of the foreign corporation with respect to the specified amount (taking into account only such specified amounts and such deemed expenses) is equal to the net income ratio of the international financial reporting group determined for the reporting year with respect to the product line to which the specified amount relates. The net income ratio is the ratio of net income determined without regard to income taxes, interest income, and interest expense, divided by revenue. The net income ratio is calculated in accordance with the books and records used in preparing the group's consolidated financial statements. The net income ratio is determined by taking into account only revenues and expenses of the foreign members of the international financial reporting group (other than the members of the group that are or are treated as domestic

corporations for purposes of the provision) derived from, or incurred with respect to, persons that are not members of the group or members of the group that are or are treated as domestic corporations for purposes of the provision.

The following example illustrates the determination of a foreign affiliate's deemed expenses under the provision:

According to the books and records (after taking into account intercompany transactions otherwise eliminated in consolidation) of an international financial reporting group consisting of US, FS1, and FS2, a domestic corporation, US has third-party revenues of \$1000, incurs third-party expenses of \$500, and makes a \$300 payment for intercompany services to its foreign affiliate, FS1. FS1 has revenues of \$500 (\$200 of which are third-party) and incurs third-party expenses of \$250. US's other foreign affiliate, FS2, has \$300 of revenues, incurs \$150 of third-party expenses, and makes a \$100 intercompany payment to US. US's entire payment to FS1 is deductible for Federal income tax purposes, and FS1 elects to treat the \$300 amount as subject to section 882(g)(1). On a consolidated basis, the US-FS1-FS2 group has revenues of \$1500 and incurs third-party expenses of \$900.

To determine the foreign affiliate's deemed expenses, its foreign profit margin will be determined by reference to ratio of the foreign earnings before interest and taxes ("EBIT") against the foreign revenues, with adjustments for related party inbound and outbound payments. In other words, the foreign affiliate's profit margin can be determined as follows:

$$(GEBIT - USEBIT + RPOP - RPIP) \div (GREV - USREV + RPOP)$$

GEBIT is global EBIT (determined on a consolidated basis), USEBIT is the domestic corporation's EBIT (without regard to related party transactions), RPOP is the group's related party outbound payments made from domestic corporations to foreign affiliates, and RPIP is the group's related party inbound payments made from foreign affiliates to domestic corporations.

In the denominator, GREV is global revenues (determined on a consolidated basis) and USREV is the domestic corporation's revenues (without regard to related party transactions).

Under the aforementioned facts, the foreign affiliate's profit margin would be 37.5%, or

$$(600 - 500 + 300 - 100) \div (1500 - 1000 + 300)$$

Accordingly, of the \$300 payment from US to FS1, \$112.50 would be deemed to be income effectively connected to a US trade or business, and subject to corporate tax. The remaining \$187.50 of the payment would be deemed expenses for which FSI would be allowed a deduction.

### **Coordination with FDAP**

Amounts treated as effectively connected income under this provision are not excluded from the definition of fixed or determinable annual or periodical ("FDAP") income. Payments subject to tax under section 881 do not constitute specified payments under this provision except

to the extent that the rate of tax imposed under section 881 is reduced by a bilateral income tax treaty.

### **Joint and several liability**

If there is an underpayment with respect to any taxable year of an electing foreign corporation which is a member of an international financial accounting group, each domestic corporation in the group is jointly and severally liable for as much of the underpayment as does not exceed the excess of such underpayment over the amount of such underpayment determined without regard to this rule and any penalty, addition to tax, or additional amount attributable to the above amount.

### **Foreign tax credit**

The foreign tax credit allowed under section 906(a) with respect to amounts taken into account as effectively connected income is limited to 80 percent of the amount of taxes paid or accrued (and determined without regard to section 906(b)(1)). These foreign tax credits are effectively separately basketed and may not be carried backwards or forwards.

### **Reporting**

An electing foreign corporation that receives a specified amount is required to report, with respect to each member of the international financial reporting group from which any such amount is received: (i) the name and taxpayer identification number of each member, (ii) the aggregate amounts received from each member, (iii) the product lines to which such amounts relate, the aggregate amounts relating to each product line, and the net income ratio for each product line, and (iv) a summary of changes in financial accounting methods that affect the computation of any net income ratio described above.

A domestic corporation that pays or accrues a specified amount with respect to which a foreign corporation has made the election is required to make a return according to the forms and regulations prescribed by the Secretary of the Treasury containing certain information and to maintain sufficient records to determine the tax liability imposed by this provision. The information required to be provided is as follows: (1) the name and taxpayer identification number of the common parent of the international financial reporting group of which the domestic corporation is a member, and (2) with respect to a specified amount: (A) the name and taxpayer identification number of the recipient of the amount, (B) the aggregate amounts received by the recipient, (C) the product lines to which the amounts relate and the aggregate amounts for each product line, and the net income ratio for each product line, and (D) a summary of any changes in financial accounting methods that affect the computation of any net income ratio described in (C).

Treasury may prescribe regulations or other guidance that address reporting requirements of foreign affiliates under this provision, such as allowing reporting or elections on a group basis.

Effective date.—The provisions of this section apply to amounts paid or incurred after December 31, 2018.

## Senate Amendment

### In general

Under the provision, an applicable taxpayer is required to pay a tax equal to the base erosion minimum tax amount for the taxable year. The base erosion minimum tax amount is the excess of 10 percent of the modified taxable income of the taxpayer for the taxable year over an amount equal to the regular tax liability (defined in section 26(b)) of the taxpayer for the taxable year reduced (but not below zero) by the excess of an amount equal to the credits allowed under Chapter 1 less the credit allowed under section 38 (general business credits) for the taxable year allocable to the research credit under section 41(a). For taxable years beginning after December 31, 2025, two changes are made, (A) the 10-percent provided for above is changed to 12.5-percent, and (B) the regular tax liability is reduced by the aggregate amount of the credits allowed under Chapter 1 (and no other adjustment is made).<sup>1543</sup>

To determine its modified taxable income, the applicable taxpayer computes its taxable income for the year without regard to any base erosion tax benefit of a base erosion payment or base erosion percentage of any allowable net operating loss deduction.

### Base erosion payments

A base erosion payment generally includes any amount paid or accrued by a taxpayer to a foreign person that is a related party of the taxpayer and with respect to which a deduction is allowable under Chapter 1. Such payments also include any amount paid or accrued by the taxpayer to the related party in connection with the acquisition by the taxpayer from the related party of property of a character subject to the allowance of depreciation (or amortization in lieu of depreciation).

Base erosion payments do not include payments for cost of goods sold (which is not a deduction but rather a reduction to income). A base erosion payment includes any amount that constitutes reductions in gross receipts of the taxpayer that is paid or accrued by the taxpayer with respect to: (1) a surrogate foreign corporation which is a related party of the taxpayer, but only if such person first became a surrogate foreign corporation after November 9, 2017, or (2) a foreign person that is a member of the same expanded affiliated group as the surrogate foreign corporation. A surrogate foreign corporation has the meaning given in section 7874(a)(2), but does not include a foreign corporation treated as a domestic corporation under section 7874(b).

A base erosion payment does not apply to any amount paid or accrued by a taxpayer for services if such services meet the requirements for eligibility for use of the services cost method under section 482,<sup>1544</sup> determined without regard to the requirement that the services not

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<sup>1543</sup> In the case of an applicable taxpayer that is a member of an affiliated group (defined in section 1504(a)(1)) that includes a bank as defined in section 581 or a registered securities dealer defined in section 15(a) of the Securities Exchange Act of 1934, the rates are 11 percent instead of the abovementioned 10 percent and 13.5 percent instead of the abovementioned 12.5 percent.

<sup>1544</sup> Described in Treas. Reg. sec. 1.482-9(b).

contribute significantly to fundamental risks of business success or failure and such amount constitutes the total services cost with no markup.

Any qualified derivative payment is not treated as a base erosion payment. A qualified derivative payment means any payment made by a taxpayer pursuant to a derivative with respect to which the taxpayer: (i) recognizes gain or loss as if such derivative were sold for its fair market value on the last business day of the taxable year (and such additional times as are required by this title or the taxpayer's method of accounting), (ii) treats any gain or loss so recognized as ordinary, and (iii) treats the character of all items of income, deduction, gain or loss with respect to a payment pursuant to the derivative as ordinary.

No payment is treated as a qualified derivative payment unless the taxpayer includes in the information required to be reported under section 6038B(b)(2) with respect to such taxable year such information as is necessary to identify the payments to be so treated and such other information as the Secretary of the Treasury determines necessary to carry out the provision.

The rule for qualified derivative payments does not apply if such payment would be treated as a base erosion payment if it were not made pursuant to a derivative, including any interest, royalty, or service payment, or in the case of a contract which has derivative and nonderivative components, the payment is properly allocable to the nonderivative component.

For these purposes, the term derivative means any contract (including any option, forward contract, futures contract, short position, swap, or similar contract) the value of which, or any payment or other transfer with respect to which, is (directly or indirectly) determined by reference to one or more of the following: (i) any share of stock of a corporation, (ii) any evidence of indebtedness, (iii) any commodity which is actively traded, (iv) any currency, (v) any rate, price, amount, index, formula, or algorithm. Except as otherwise provided by the Secretary of the Treasury, American depository receipts and similar instruments with respect to shares of stock in foreign corporations are treated as shares of stock in such foreign corporations.

A base erosion tax benefit means: (i) any deduction allowed under Chapter 1 for the taxable year with respect to a base erosion payment, (ii) in the case of a base erosion payment with respect to the purchase of property of a character subject to the allowance for depreciation (or amortization in lieu of depreciation), any deduction allowed in Chapter 1 for depreciation or amortization in lieu of depreciation with respect to the property acquired with such payment, or (iii) any reduction in gross receipts with respect to a payment described above with respect to a surrogate foreign corporation (as defined there) in computing gross income of the taxpayer for the taxable year.

Any base erosion tax benefit attributable to any base erosion payment on which tax is imposed by sections 871 or 881 and with respect to which tax has been deducted and withheld under sections 1441 or 1442, is not taken into account in computing modified taxable income as defined above. The amount not taken into account in computing modified taxable income is reduced under rules similar to the rules under section 163(j)(5)(B).<sup>1545</sup>

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<sup>1545</sup> As in effect before the date of enactment of Tax Cuts and Jobs Act.



The base erosion percentage means for any taxable year, the percentage determined by dividing the aggregate amount of base erosion tax benefits of the taxpayer for the taxable year by the aggregate amount of the deductions allowable to the taxpayer under Chapter 1 for the taxable year, taking into account base erosion tax benefits described above and by not taking into account any deduction allowed under sections 172, 245A or 250 for the taxable year.

### **Applicable taxpayers and related parties**

Applicable taxpayer means with respect to any taxable year, a taxpayer: (A) which is a corporation other than a regulated investment company, a real estate investment trust, or an S corporation; (B) the average annual gross receipts of the corporation for the three-taxable-year period ending with the preceding taxable year are at least \$500 million, and (C) the base erosion percentage (as defined above) of the corporation for the taxable year is four percent or higher.

In the case of a foreign person the gross receipts of which are taken into account for purposes of this provision, only gross receipts which are taken into account in determining income effectively connected with the conduct of a trade or business within the United States is taken into account. If a foreign person's gross receipts are aggregated with a U.S. person's gross receipts for reasons described in the aggregation rules below, the preceding sentence does not apply to the gross receipts of any U.S. person which are aggregated with the taxpayer's gross receipts.

All persons treated as a single employer under section 52(a) are treated as one person for purposes of this provision, except that in applying section 1563 for purposes of section 52, the exception for foreign corporations under section 1563(b)(2)(C) is disregarded (called the "aggregation rules").

For purposes of this provision, foreign person has the meaning given in section 6038A(c)(3).

Related party means: (i) any 25-percent owner of the taxpayer, (ii) any person who is related to the taxpayer or any 25-percent owner of the taxpayer, within the meaning of sections 267(b) or 707(b)(1), and (iii) any other person related to the taxpayer within the meaning of section 482. For these purposes, section 318 regarding constructive ownership of stock applies to these related party rules except that 10-percent is substituted for 50-percent in section 318(a)(2)(C), and for these purposes section 318(a)(3)(A), (B) and (C) do not cause a United States person to own stock owned by a person who is not a United States person.

The provision provides that the Secretary of the Treasury is to prescribe such regulations or other guidance necessary or appropriate, including regulations providing for such adjustments to the application of this section necessary to prevent avoidance of the provision, including through: (1) the use of unrelated persons, conduit transactions, or other intermediaries, or (2) transactions or arrangements designed in whole or in part: (A) to characterize payments otherwise subject to this provision as payments not subject to this provision, or (B) to substitute payments not subject to this provision for payments otherwise subject to this provision.

## **Information reporting requirements**<sup>1546</sup>

The provision authorizes the Secretary of the Treasury to prescribe additional reporting requirements under section 6038A relating to: (A) the name, principal place of business, and country or countries in which organized or resident of each person which: (i) is a related party to the reporting corporation, and (ii) had any transaction with the reporting corporation during its taxable year, (B) the manner of relation between the reporting corporation and the person referred to in (A), and (C) transactions between the reporting corporation and each related foreign person.

In addition, for purposes of information reporting under sections 6038A and 6038C, if the reporting corporation or the foreign corporation to which section 6038C applies is an applicable taxpayer under this provision, the information that may be required includes: (A) base erosion payments paid or accrued during the taxable year by the taxpayer to a foreign person which is a related party of the taxpayer, (B) such information as the Secretary of the Treasury finds necessary to determine the base erosion minimum amount of the taxpayer for the taxable year, and (C) such other information as the Secretary of the Treasury determines is necessary.

The penalties provided for under sections 6038A(D)(1) and (2) are both increased to \$25,000.

Effective date.—The provision applies to base erosion payments paid or accrued in taxable years beginning after December 31, 2017.

## **Conference Agreement**

The provision in the conference agreement follows the Senate amendment with some changes, as follows.

### **In general**

Under the provision, an applicable taxpayer is required to pay a tax equal to the base erosion minimum tax amount for the taxable year. The base erosion minimum tax amount is the excess of 10 percent<sup>1547</sup> of the modified taxable income of the taxpayer for the taxable year over an amount equal to the regular tax liability (defined in section 26(b)) of the taxpayer for the taxable year reduced (but not below zero) by the excess (if any) of the credits allowed under

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<sup>1546</sup> Section 15006 of the bill (and new section 6050Z) establishes certain reporting requirements. These reporting requirements are effective for taxable years beginning after December 31, 2024, and continue to be required regardless of whether the revenue requirement is met. Any taxpayer who makes a payment to a foreign person who is a related party (as such term is defined in section 14401 of the bill and new section 59A) of the taxpayer during the taxable year is required to make a return, according to forms and regulations prescribed by the Secretary, setting forth (1) the amount of such payments by type and separately stated and (2) any amount paid that results in a reduction of gross receipts to the taxpayer (*e.g.*, cost of goods sold).

<sup>1547</sup> 5 percent rate applies for one year for base erosion payments paid or accrued in taxable years beginning after December 31, 2017.

Chapter 1 against such regular tax liability over the sum of: (1) the credit allowed under section 38 for the taxable year which is properly allocable to the research credit determined under section 41(a), plus (2) the portion of the applicable section 38 credits not in excess of 80 percent of the lesser of the amount of such credits or the base erosion minimum tax amount (determined without regard to this clause (2)). For taxable years beginning after December 31, 2025, two changes are made, (A) the 10-percent provided for above is changed to 12.5-percent, and (B) the regular tax liability is reduced by the aggregate amount of the credits allowed under Chapter 1 (and no other adjustment is made).<sup>1548</sup>

Applicable section 38 credits means the credit allowed under section 38 for the taxable year which is properly allocable to: (A) the low-income housing credit determined under section 42(a), (B) the renewable electricity production credit determined under section 45(a), and (C) the investment credit determined under section 46, but only to the extent properly allocable to the energy credit determined under section 48.

To determine its modified taxable income, the applicable taxpayer computes its taxable income for the year without regard to any base erosion tax benefit with respect to any base erosion payment or the base erosion percentage of any allowable net operating loss deduction allowed under section 172 for the taxable year.

### **Base erosion payments**

A base erosion payment means any amount paid or accrued by a taxpayer to a foreign person that is a related party of the taxpayer and with respect to which a deduction is allowable under Chapter 1. Such payments include any amount paid or accrued by the taxpayer to the related party in connection with the acquisition by the taxpayer from the related party of property of a character subject to the allowance of depreciation (or amortization in lieu of depreciation). A base erosion payment includes any premium or other consideration paid or accrued by the taxpayer to a foreign person which is a related party of the taxpayer for any reinsurance payments taken into account under sections 803(a)(1)(B) or 832(b)(4)(A).

Base erosion payments do not include any amount that constitutes reductions in gross receipts including payments for costs of goods sold. However, base erosion payment includes any amount that constitutes reductions in gross receipts of the taxpayer that is paid or accrued by the taxpayer with respect to: (1) a surrogate foreign corporation which is a related party of the taxpayer, but only if such person first became a surrogate foreign corporation after November 9, 2017, or (2) a foreign person that is a member of the same expanded affiliated group as the surrogate foreign corporation. A surrogate foreign corporation has the meaning given in section 7874(a)(2), but does not include a foreign corporation treated as a domestic corporation under section 7874(b).

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<sup>1548</sup> In the case of a taxpayer that is a member of an affiliated group (defined in section 1504(a)(1)) that includes a bank as defined in section 581 or a registered securities dealer defined in section 15(a) of the Securities Exchange Act of 1934, the rates are 6 percent instead of 5 percent, 11 percent instead of 10 percent and 13.5 percent instead of 12.5 percent.

A base erosion payment does not include any amount paid or accrued by a taxpayer for services if such services meet the requirements for eligibility for use of the services cost method described in Treas. Reg. sec. 1.482-9, as in effect as of the date of enactment of TCJA, without regard to the requirement that the services not contribute significantly to fundamental risks of business success or failure and only if the payments are made for services that have no markup component.

Any qualified derivative payment is not treated as a base erosion payment. A qualified derivative payment means any payment made by a taxpayer pursuant to a derivative with respect to which the taxpayer: (i) recognizes gain or loss as if such derivative were sold for its fair market value on the last business day of the taxable year (and such additional times as are required by this title or the taxpayer's method of accounting), (ii) treats any gain or loss so recognized as ordinary, and (iii) treats the character of all items of income, deduction, gain or loss with respect to a payment pursuant to the derivative as ordinary.

No payment is treated as a qualified derivative payment unless the taxpayer includes in the information required to be reported under section 6038B(b)(2) with respect to such taxable year such information as is necessary to identify the payments to be so treated and such other information as the Secretary of the Treasury determines necessary to carry out the provision.

The rule for qualified derivative payments does not apply if a payment with respect to a derivative is in substance, or is disguising, the kind of payment that would be treated as a base erosion payment if it were not made pursuant to a derivative, including any interest, royalty, or service payment, (or any other payment subject to this provision) or in the case of a contract which has derivative and nonderivative components, the payment is properly allocable to the nonderivative component.

For these purposes, the term derivative means any contract (including any option, forward contract, futures contract, short position, swap, or similar contract) the value of which, or any payment or other transfer with respect to which, is (directly or indirectly) determined by reference to one or more of the following: (i) any share of stock of a corporation, (ii) any evidence of indebtedness, (iii) any commodity which is actively traded, (iv) any currency, (v) any rate, price, amount, index, formula, or algorithm. Except as otherwise provided by the Secretary of the Treasury, American depository receipts and similar instruments with respect to shares of stock in foreign corporations are treated as shares of stock in such foreign corporations. The term derivative does not include any item described in paragraphs (i) through (v) above nor shall the term 'derivative' include any insurance, annuity, or endowment contract issued by an insurance company to which subchapter L applies (or issued by any foreign corporation to which such subchapter would apply if such foreign corporation were a domestic corporation).

A base erosion tax benefit means: (i) any deduction allowed under Chapter 1 for the taxable year with respect to a base erosion payment, (ii) in the case of a base erosion payment with respect to the purchase of property of a character subject to the allowance for depreciation (or amortization in lieu of depreciation), any deduction allowed in Chapter 1 for depreciation or amortization in lieu of depreciation with respect to the property acquired with such payment, or (iii) any reduction in gross receipts with respect to a payment described above with respect to a

surrogate foreign corporation (as defined there) in computing gross income of the taxpayer for the taxable year.

Any base erosion tax benefit attributable to any base erosion payment on which tax is imposed by sections 871 or 881 and with respect to which tax has been deducted and withheld under sections 1441 or 1442, is not taken into account in computing modified taxable income as defined above. The amount not taken into account in computing modified taxable income is reduced under rules similar to the rules under section 163(j)(5)(B).<sup>1549</sup>

The base erosion percentage means for any taxable year, the percentage determined by dividing the aggregate amount of base erosion tax benefits of the taxpayer for the taxable year by the aggregate amount of the deductions allowable to the taxpayer under Chapter 1 for the taxable year, taking into account base erosion tax benefits described above and by not taking into account any deduction allowed under sections 172, 245A or 250 for the taxable year, any deduction for amounts paid or accrued for services to which the exception for the services cost method (as described above) applies, and any deduction for qualified derivative payments which are not treated as a base erosion payment as described above.

### **Applicable taxpayers and related parties**

Applicable taxpayer means with respect to any taxable year, a taxpayer: (A) which is a corporation other than a regulated investment company, a real estate investment trust, or an S corporation; (B) the average annual gross receipts of the corporation for the three-taxable-year period ending with the preceding taxable year are at least \$500 million, and (C) the base erosion percentage (as defined above) of the corporation for the taxable year is three percent or higher.<sup>1550</sup>

In the case of a foreign person the gross receipts of which are taken into account for purposes of this provision, only gross receipts which are taken into account in determining income effectively connected with the conduct of a trade or business within the United States is taken into account. If a foreign person's gross receipts are aggregated with a U.S. person's gross receipts for reasons described in the aggregation rules below, the preceding sentence does not apply to the gross receipts of any U.S. person which are aggregated with the taxpayer's gross receipts.

All persons treated as a single employer under section 52(a) are treated as one person for purposes of this provision, except that in applying section 1563 for purposes of section 52, the exception for foreign corporations under section 1563(b)(2)(C) is disregarded (called the "aggregation rules").

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<sup>1549</sup> As in effect before the date of enactment of TCJA.

<sup>1550</sup> In the case of an applicable taxpayer that is a member of an affiliated group (defined in section 1504(a)(1)) that includes a bank as defined in section 581 or a registered securities dealer defined in section 15(a) of the Securities Exchange Act of 1934, the base erosion percentage of which is two percent or higher.

For purposes of this provision, foreign person has the meaning given in section 6038A(c)(3).

Related party means: (i) any 25-percent owner of the taxpayer, (ii) any person who is related to the taxpayer or any 25-percent owner of the taxpayer, within the meaning of sections 267(b) or 707(b)(1), and (iii) any other person related to the taxpayer within the meaning of section 482. For these purposes, section 318 regarding constructive ownership of stock applies to these related party rules except that 10-percent is substituted for 50-percent in section 318(a)(2)(C), and for these purposes section 318(a)(3)(A), (B) and (C) do not cause a United States person to own stock owned by a person who is not a United States person.

The provision provides that the Secretary of the Treasury is to prescribe such regulations or other guidance necessary or appropriate, including regulations providing for such adjustments to the application of this section necessary to prevent avoidance of the provision, including through: (1) the use of unrelated persons, conduit transactions, or other intermediaries, or (2) transactions or arrangements designed in whole or in part: (A) to characterize payments otherwise subject to this provision as payments not subject to this provision, or (B) to substitute payments not subject to this provision for payments otherwise subject to this provision.

### **Information reporting requirements**<sup>1551</sup>

The provision authorizes the Secretary of the Treasury to prescribe additional reporting requirements under section 6038A relating to: (A) the name, principal place of business, and country or countries in which organized or resident of each person which: (i) is a related party to the reporting corporation, and (ii) had any transaction with the reporting corporation during its taxable year, (B) the manner of relation between the reporting corporation and the person referred to in (A), and (C) transactions between the reporting corporation and each related foreign person.

In addition, for purposes of information reporting under sections 6038A and 6038C, if the reporting corporation or the foreign corporation to which section 6038C applies is an applicable taxpayer under this provision, the information that may be required includes: (A) base erosion payments paid or accrued during the taxable year by the taxpayer to a foreign person which is a related party of the taxpayer, (B) such information as the Secretary of the Treasury finds necessary to determine the base erosion minimum amount of the taxpayer for the taxable year, and (C) such other information as the Secretary of the Treasury determines is necessary.

The penalties provided for under sections 6038A(D)(1) and (2) are both increased to \$25,000.

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<sup>1551</sup> Section 15006 of the bill (and new section 6050Z) establishes certain reporting requirements. These reporting requirements are effective for taxable years beginning after December 31, 2024, and continue to be required regardless of whether the revenue requirement is met. Any taxpayer who makes a payment to a foreign person who is a related party (as such term is defined in section 14401 of the bill and new section 59A) of the taxpayer during the taxable year is required to make a return, according to forms and regulations prescribed by the Secretary, setting forth (1) the amount of such payments by type and separately stated and (2) any amount paid that results in a reduction of gross receipts to the taxpayer (*e.g.*, cost of goods sold).

Effective date.—The provision applies to base erosion payments paid or accrued in taxable years beginning after December 31, 2017.

## **2. Limitations on income shifting through intangible property transfers (sec. 14222 of the bill and secs. 367, 482, and 936 of the Code)**

### **House Bill**

No provision.

### **Senate Amendment**

The provision addresses recurring definitional and methodological issues that have arisen in controversies<sup>1552</sup> in transfers of intangible property for purposes of sections 367(d) and 482, both of which use the statutory definition of intangible property in section 936(h)(3)(B). The provision revises that definition and confirms the authority to require certain valuation methods. It does not modify the basic approach of the existing transfer pricing rules with regard to income from intangible property.

Under the provision, workforce in place, goodwill (both foreign and domestic), and going concern value are intangible property within the meaning of section 936(h)(3)(B), as is the residual category of “any similar item” the value of which is not attributable to tangible property or the services of an individual. The flush language at the end of that subparagraph is removed, to make clear that the source or amount of value is not relevant to whether property that is one of the specified types of intangible property is within the scope of the definition.

The provision clarifies the authority of the Secretary to specify the method to be used to determine the value of intangible property, both with respect to outbound restructurings of U.S. operations and to intercompany pricing allocations,<sup>1553</sup> by amending 482 as well as the grant of regulatory authority under section 367 regarding the use of aggregate basis valuation and the application of the realistic alternative principle.

With respect to aggregate basis valuation, the provision requires use of that method of valuation in the case of transfers of multiple intangible properties in one or more related transactions if the Secretary determines that an aggregate basis achieves a more reliable result than an asset-by-asset approach. The provision is consistent with the position that the additional value that results from the interrelation of intangible assets can be properly attributed to the underlying intangible assets in the aggregate, where doing so yields a more reliable result. This

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<sup>1552</sup> *Veritas v. Commissioner*, 133 T.C. No. 14 (December 10, 2009), *non-acq.*, IRB 2010-49 (December 6, 2010). (stating that including goodwill and going concern value within the definition would “expand[]” that definition, and that “taxpayers are merely required to be compliant, not prescient”); *Amazon v. Commissioner*, 148 T.C. No. 8 (2017) (holding that “workforce in place, going concern value, goodwill, and what trial witnesses described as ‘growth options’ and corporate ‘resources’ or ‘opportunities’” all fell outside the definition under present law).

<sup>1553</sup> Secs. 367(d) and 482.