INTERNAL REVENUE
BULLETIN

IRS

HIGHLIGHTS OF THIS ISSUE

Bulletin No. 2018–52
December 24, 2018

These synopses are intended only as aids to the reader in identifying the subject matter covered. They may not be relied upon as authoritative interpretations.

Administrative

NOTICE 2018–96, page 1061.

Section 30D provides a credit of up to $7,500 for new qualified plug-in electric drive motor vehicles sold after December 31, 2009. This notice announces the credit phase-out schedule for new qualified plug-in electric drive motor vehicles sold by Tesla, Inc. Section 30D of the Internal Revenue Code provides for a credit determined under § 30D(b) for certain new qualified plug-in electric drive motor vehicles. The new qualified plug-in electric drive motor vehicle credit begins to phase out for a manufacturer's qualified plug-in electric drive motor vehicles in the second calendar quarter after the calendar quarter in which at least 200,000 of the manufacturer's vehicles that qualify for the credit have been sold for use or lease in the United States (determined on a cumulative basis for sales after December 31, 2009). Tesla, Inc. has submitted quarterly reports that indicate that its cumulative sales of qualified plug-in electric drive motor vehicles reached the 200,000-vehicle limit during the calendar quarter ending September 30, 2018. Accordingly, the credit for all new qualified plug-in electric drive motor vehicles sold by Tesla, Inc. will begin to phase out on January 1, 2019.

NOTICE 2018–100, page 1074.

This notice provides certain tax-exempt organizations a waiver of the addition to tax under section 6655 of the Internal Revenue Code (Code) for underpayment of estimated income tax payments required to be made on or before December 17, 2018, to the extent the underpayment of estimated income tax results from the changes to the tax treatment of qualified transportation fringes under sections 13304(c) and 13703 of "An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018" (the Act). Pub. L. No. 115–97, 131 Stat. 2054.

Employee Plans

NOTICE 2018–95, page 1058.

This notice provides transition relief from the "once-in-always-in" (OIAI) exclusion condition for excluding part-time employees under § 1.403(b)–5(b)(4)(iii)(B) of the Treasury Regulations. Under the OIAI exclusion condition, for a § 403(b) plan that excludes part-time employees from making elective deferrals, once an employee is eligible to make elective deferrals, the employee may not be excluded from making elective deferrals in any later exclusion year on the basis that the employee is a part-time employee. In addition, in applying the OIAI exclusion condition for exclusion years after the transition relief ends, this notice provides a fresh-start opportunity for plans.

Employment Taxes

NOTICE 2018–97, page 1062.

Section 83 generally provides for the federal tax treatment of property transferred in connection with the performance of services. Section 83(i) allows certain employees to elect to defer income that would otherwise be included under § 83(a) upon the exercise of a stock option or settlement of a stock-settled restricted stock unit. Income subject to such an election may be deferred for up to 5 years, subject to certain limitations. The notice provides guidance to taxpayers on (1) application of the requirement in § 83(i)(2)(C)(i)(II) that grants be made to 80% of the employer's employees, (2) application of income tax withholding to the deferred income related to qualified stock, and (3) the manner in which an employer may opt out of permitting employees to elect the deferred tax treatment even if the requirements under § 83(i) are otherwise met.

Finding Lists begin on page ii.

Income Tax

NOTICE 2018–97, page 1062.

Section 83 generally provides for the federal tax treatment of property transferred in connection with the performance of services. Section 83(i) allows certain employees to elect to defer income that would otherwise be included under § 83(a) upon the exercise of a stock option or settlement of a stock-settled restricted stock unit. Income subject to such an election may be deferred for up to 5 years, subject to certain limitations. The notice provides guidance to taxpayers on (1) application of the requirement in § 83(i)(2)(C)(i)(II) that grants be made to 80% of the employer's employees, (2) application of income tax withholding to the deferred income related to qualified stock, and (3) the manner in which an employer may opt out of permitting employees to elect the deferred tax treatment even if the requirements under § 83(i) are otherwise met.

NOTICE 2018–99, page 1067.

This notice provides interim guidance for taxpayers to determine the amount of parking expenses for qualified transportation fringes (QTFs) that is nondeductible under § 274(a)(4) of the Internal Revenue Code (Code) and for tax-exempt organizations to determine the corresponding increase in the amount of unrelated business taxable income (UBTI) under § 512(a)(7) attributable to the nondeductible parking expenses. Sections 274 and 512 were amended by the Tax Cuts and Jobs Act, Pub. L. No. 115–97, §§ 13304 and 13703, 131 Stat. 2054, 2123, 2169 (2017) (the Act), effective for amounts paid or incurred after December 31, 2017. As amended by the Act, § 274(a)(4) generally disallows a deduction for expenses with respect to QTFs provided by taxpayers to their employees, and § 512(a)(7) generally provides that a tax-exempt organization's UBTI is increased by the amount of the QTF expense that is nondeductible under § 274. However, the Act does not address how to determine the amount of the QTF expense that is nondeductible or treated as an increase in UBTI.

NOTICE 2018–100, page 1074.

This notice provides certain tax-exempt organizations a waiver of the addition to tax under section 6655 of the Internal Revenue Code (Code) for underpayment of estimated income tax payments required to be made on or before December 17, 2018, to the extent the underpayment of estimated income tax results from the changes to the tax treatment of qualified transportation fringes under sections 13304(c) and 13703 of "An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018" (the Act). Pub. L. No. 115–97, 131 Stat. 2054.

The IRS Mission

Provide America's taxpayers top-quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all.

Introduction

The Internal Revenue Bulletin is the authoritative instrument of the Commissioner of Internal Revenue for announcing official rulings and procedures of the Internal Revenue Service and for publishing Treasury Decisions, Executive Orders, Tax Conventions, legislation, court decisions, and other items of general interest. It is published weekly.

It is the policy of the Service to publish in the Bulletin all substantive rulings necessary to promote a uniform application of the tax laws, including all rulings that supersede, revoke, modify, or amend any of those previously published in the Bulletin. All published rulings apply retroactively unless otherwise indicated. Procedures relating solely to matters of internal management are not published; however, statements of internal practices and procedures that affect the rights and duties of taxpayers are published.

Revenue rulings represent the conclusions of the Service on the application of the law to the pivotal facts stated in the revenue ruling. In those based on positions taken in rulings to taxpayers or technical advice to Service field offices, identifying details and information of a confidential nature are deleted to prevent unwarranted invasions of privacy and to comply with statutory requirements.

Rulings and procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations, but they may be used as precedents. Unpublished rulings will not be relied on, used, or cited as precedents by Service personnel in the disposition of other cases. In applying published rulings and procedures, the effect of subsequent legislation, regulations, court decisions, rulings, and procedures must be considered, and Service personnel and others concerned are cautioned against reaching the same conclusions in other cases unless the facts and circumstances are substantially the same.

The Bulletin is divided into four parts as follows:

Part I.—1986 Code.
This part includes rulings and decisions based on provisions of the Internal Revenue Code of 1986.

Part II.—Treaties and Tax Legislation.
This part is divided into two subparts as follows: Subpart A, Tax Conventions and Other Related Items, and Subpart B, Legislation and Related Committee Reports.

Part III.—Administrative, Procedural, and Miscellaneous.
To the extent practicable, pertinent cross references to these subjects are contained in the other Parts and Subparts. Also included in this part are Bank Secrecy Act Administrative Rulings. Bank Secrecy Act Administrative Rulings are issued by the Department of the Treasury's Office of the Assistant Secretary (Enforcement).

Part IV.—Items of General Interest.
This part includes notices of proposed rulemakings, disbarment and suspension lists, and announcements.

The last Bulletin for each month includes a cumulative index for the matters published during the preceding months. These monthly indexes are cumulated on a semiannual basis, and are published in the last Bulletin of each semiannual period.

Part III. Administrative, Procedural, and Miscellaneous

Relief from the Once-In-Always-In Condition for Excluding Part-Time Employees from Making Elective Deferrals under a § 403(b) Plan

Notice 2018–95

SECTION 1. PURPOSE

This notice provides transition relief from the "once-in-always-in" (OIAI) condition for excluding part-time employees under § 1.403(b)–5(b)(4)(iii)(B) of the Treasury Regulations. Under the OIAI exclusion condition, for a § 403(b) plan that excludes part-time employees from making elective deferrals, once an employee is eligible to make elective deferrals, the employee may not be excluded from making elective deferrals in any later exclusion year (as defined in section 2.02(2) of this notice) on the basis that the employee is a part-time employee. In addition, in applying the OIAI exclusion condition for exclusion years after the transition relief ends, this notice provides a fresh-start opportunity for plans.

SECTION 2. BACKGROUND

.01 *Universal availability requirement for elective deferrals*

Section 403(b)(12)(A) of the Internal Revenue Code ("Code") provides a "universal availability" nondiscrimination requirement that must be satisfied by a § 403(b) plan that permits employees to make elective deferrals. Under the universal availability requirement, all employees of an employer maintaining a § 403(b) plan generally must be permitted to make elective deferrals if any employee of the employer is permitted to make elective deferrals. However, the flush language of § 403(b)(12)(A) provides that certain categories of employees may be excluded from making elective deferrals despite the universal availability requirement, including part-time employees who normally work less than 20 hours per week ("part-time exclusion").

.02 *Part-time exclusion*

On July 23, 2007, the Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) issued final regulations under § 403(b) (T.D. 9340, 72 FR 41128) (the "§ 403(b) regulations"), which provide rules regarding the part-time exclusion. The § 403(b) regulations also provide, under § 1.403(b)–3(b)(3)(i), that a § 403(b) plan must be a written plan that satisfies the requirements of the § 403(b) regulations in both form and operation, and must include all the material terms and conditions for eligibility. The § 403(b) regulations generally are effective for taxable years beginning after December 31, 2008.

(1) *First-year, preceding-year, and OIAI exclusion conditions*. Section 1.403(b)–5(b)(4)(iii)(B) provides the following rules regarding the part-time exclusion:

> [A]n employee normally works fewer than 20 hours per week *if and only if*—
>
> (*1*) For the 12-month period beginning on the date the employee's employment commenced, the employer reasonably expects the employee to work fewer than 1,000 hours of service (as defined in section 410(a)(3)(C)) in such period; *and*
>
> (*2*) For *each* plan year ending after the close of the 12-month period beginning on the date the employee's employment commenced (or, if the plan so provides, each subsequent 12-month period), the employee worked fewer than 1,000 hours of service in the preceding 12-month period. [Emphasis added.]

Thus, the provision imposes three separate conditions for an employee to be excluded from making elective deferrals under the part-time exclusion: (1) a "first-year" exclusion condition, (2) a "preceding-year" exclusion condition, and (3) the OIAI exclusion condition. Under the first-year exclusion condition, in order to exclude the employee from making elective deferrals, the employer must reasonably expect the employee to work fewer than 1,000 hours during the employee's first year of employment. Under the preceding-year exclusion condition, in order to exclude the employee from making elective deferrals in an exclusion year ending after the first year of employment, the employee must have actually worked fewer than 1,000 hours in the preceding 12-month period. Under the OIAI exclusion condition, the employee may be excluded under the part-time exclusion *if and only if,* in the employee's first year of employment, the employee meets the first-year exclusion condition, *and,* in *each* exclusion year ending after the first year of employment, the employee has met the preceding-year exclusion condition. The effect of the OIAI exclusion condition is that once an employee does not meet the part-time exclusion conditions, whether in the initial year of employment or for any exclusion year, the employee may no longer be excluded from making elective deferrals under the part-time exclusion.

(2) *Definition of exclusion year*. For purposes of this notice, an exclusion year is either (1) any plan year that ends after an employee's first year of employment (so that the exclusion year for each employee would be the plan year), or (2) if a plan so provides, each subsequent 12-month period ("employee anniversary year") after an employee's first year of employment (so that employees may have different exclusion years depending on their start dates).

(3) *Consistency requirement*. Section 1.403(b)–5(b)(4)(i) also imposes a "consistency" requirement, under which the part-time exclusion applies only if the rules applicable under § 410(b)(4) of the Code are satisfied. Under this consistency requirement, if any employee who meets the conditions of the part-time exclusion may make elective deferrals, then no employee who meets those conditions may be excluded under the part-time exclusion.

.03 *Pre-approved plans*

A § 403(b) plan may be either (1) a § 403(b) prototype plan or a § 403(b) volume submitter plan that has been approved in form by the IRS (collectively, a "§ 403(b) pre-approved plan")[1], or (2) a

[1]See Rev. Proc. 2013–22, 2013–18 I.R.B. 985, as modified by Rev. Proc. 2014–28, 2014–16 I.R.B. 944, and clarified by Rev. Proc. 2015–22, 2015–11 I.R.B. 754, and Rev. Proc. 2017–18, 2017–5 I.R.B. 743.

plan that is not a § 403(b) pre-approved plan (an "individually designed plan"). Rev. Proc. 2013–22 establishes a program for issuing opinion and advisory letters approving the form of § 403(b) pre-approved plans. Under section 9.02(1) of Rev. Proc. 2013–22, an employer that adopts a § 403(b) prototype plan may amend the plan only under certain circumstances (including by adopting sample or model amendments published by the IRS), and any other amendments will cause the employer's plan to be considered individually designed and to lose reliance on the opinion letter. Although a § 403(b) volume submitter plan may be amended by an adopting employer, section 15.01 of Rev. Proc. 2013–22 provides that the employer will not be able to rely on the advisory letter received for the § 403(b) volume submitter plan to the extent that the employer modifies the terms of the plan.

.04 *Remedial Amendment Period*

Section 21.02 of Rev. Proc. 2013–22 provides for a remedial amendment period during which an employer may retroactively correct defects in the form of its written § 403(b) plan either by timely adopting a § 403(b) pre-approved plan or by otherwise timely amending its written § 403(b) plan. Rev. Proc. 2017–18 sets March 31, 2020, as the last day of this remedial amendment period. Rev. Proc. 2017–18 also provides that the form of a plan will be considered to have satisfied the requirements of § 403(b) if, on or before March 31, 2020, all provisions of the plan that are necessary to satisfy § 403(b) have been adopted and made effective in form and operation from the beginning of the remedial amendment period (which is, generally, the later of January 1, 2010, or the effective date of the plan).

.05 *Listing of Required Modifications*

In 2013, the IRS released sample plan provisions (also referred to as "listings of required modifications" or "LRMs") in connection with the § 403(b) pre-approved plan program (the "2013 LRMs"). LRM 17 of the 2013 LRMs provided sample adoption agreement language for excluding an employee who normally works fewer than 20 hours per week, which tracked the language of § 1.403(b)–5(b)(4)(iii)(B).

In 2015, in response to requests from commenters to clarify certain provisions, the IRS issued revised LRMs in connection with the § 403(b) pre-approved plan program (the "2015 LRMs").[2] Revised LRM 17 of the 2015 LRMs included the following additional sentence that specifically highlights the OIAI exclusion condition in the regulations:

> Once an Employee becomes eligible to have Elective Deferrals made on his or her behalf under the Plan under this [part-time exclusion] standard, the Employee cannot be excluded from eligibility to have Elective Deferrals made on his or her behalf in any later year under this standard.

.06 *Request for relief with respect to the OIAI exclusion condition*

Commenters have requested transition relief with respect to the OIAI exclusion condition, stating that many employers were not aware that the part-time exclusion included the OIAI exclusion condition. In particular, commenters noted that the OIAI exclusion condition was not specifically highlighted in writing until the 2015 LRMs were issued, and that, even then, the LRMs were directed at drafters of pre-approved plans and not adopting employers or sponsors of individually designed plans. As a result, commenters argued, many employers applied the first-year exclusion condition for an employee's first year and applied the preceding-year exclusion condition separately for each succeeding exclusion year, but did not apply the OIAI exclusion condition to prevent an employee who failed to meet either the first-year exclusion condition or the preceding-year exclusion condition from being excluded in all subsequent exclusion years.

SECTION 3. RELIEF FOR § 403(b) PLANS

In response to these comments, the Treasury Department and the IRS are providing transition relief from the OIAI exclusion condition, including relief regarding plan operations for a transition period referred to as the "Relief Period," relief regarding plan language, and a fresh-start opportunity after the Relief Period ends. The Relief Period begins with taxable years beginning after December 31, 2008 (the general effective date for the § 403(b) regulations). For plans with exclusion years based on plan years, the Relief Period ends for all employees on the last day of the last exclusion year that ends before December 31, 2019. For plans with exclusion years based on employee anniversary years, the Relief Period ends, with respect to any employee, on the last day of that employee's last exclusion year that ends before December 31, 2019. For example, under this second type of plan design, if Employee A began employment on April 1, 2015, and Employee B began employment on July 20, 2015, the Relief Period for Employee A would end on March 31, 2019, while the Relief Period for Employee B would end on July 19, 2019.

.01 *Relief regarding plan operations for the Relief Period*

(1) *In general*. During the Relief Period[3], a plan will not be treated as failing to satisfy the conditions of the part-time exclusion merely because the plan was not operated in compliance with the OIAI exclusion condition. However, this notice does not provide relief from the other conditions of the part-time exclusion: (1) the first-year exclusion condition (that is, for the first year of employment, an employee may not be excluded if the employee was expected to work at least 1,000 hours in the first year), and (2) the preceding-year exclusion condition (that is, for exclusion years ending after the first year, an employee may not be excluded if the employee worked at least 1,000 hours in the preceding 12-month period). It also does not provide relief from the consistency requirement.

The following example illustrates the relief provided by this section 3.01(1).

Facts. An employer establishes a § 403(b) plan on January 1, 2009, with a calendar-year plan year. The plan allows elective deferrals, provides for the part-time exclusion, and uses plan years as exclusion years for purposes of applying the preceding-year exclusion

[2]See https://www.irs.gov/pub/irs-tege/403b_lrm0315_redlined.pdf for the 2015 LRMs. This redlined version of the 2015 LRMs highlights changes made to the 2013 LRMs.

[3]A plan with exclusion years based on employee anniversary years that excludes two or more employees with different employee anniversary years (and, therefore, different exclusion years) will have different Relief Periods applicable to these different employees. Nonetheless, for ease of reference, this notice refers to these multiple Relief Periods under such a plan as the Relief Period.

condition under the part-time exclusion. During the period from plan establishment through 2018, the first-year and preceding-year exclusion conditions were applied in operation. However, the OIAI exclusion condition was not applied in operation.

An employee started work January 1, 2012, and the employer reasonably expected the employee to work only 500 hours in the employee's first 12 months of employment. The employee actually worked the following hours for calendar years 2012 through 2017:

Year	Hours Worked
2012	1,000
2013	500
2014	500
2015	500
2016	500
2017	1,000

Because the employee was not expected to work 1,000 hours during the employee's first 12 months of employment, the first-year exclusion condition was met; accordingly, the employee was excluded from making elective deferrals during the employee's first 12 months of employment. Because the employee worked 1,000 hours during 2012 and 2017, the preceding-year exclusion condition was not met for the employee's 2013 and 2018 exclusion years; accordingly, the employee was allowed to make elective deferrals during those years. Because the employee did not work at least 1,000 hours in each of the twelve-month periods that preceded the 2014 through 2017 exclusion years, the preceding-year exclusion condition was met for each of those exclusion years. Further, because, for the 2014 through 2017 exclusion years, the preceding-year exclusion condition was met and the OIAI exclusion condition was not applied in operation, the employee was excluded from making elective deferrals under the part-time exclusion in each of the 2014 through 2017 exclusion years (even though the employee had been eligible to make elective deferrals during 2013).

Conclusion. Disregarding the relief provided in this section 3.01, under the part-time exclusion, the employee was properly excluded from making elective deferrals in 2012 (because the employee was not expected to work 1,000 hours in 2012) and properly allowed to make elective deferrals for the 2013 exclusion year (because the employee actually worked 1,000 hours in 2012), but was improperly excluded from making elective deferrals for the 2014 through 2017 exclusion years (because, under the OIAI exclusion condition, the employee's eligibility to make elective deferrals in the 2013 exclusion year would make the employee not excludible under the part-time exclusion for any period after that exclusion year). However, pursuant to the relief provided in this section 3.01, the plan is not treated as violating the universal availability requirement even though the OIAI exclusion condition, if properly applied, would have precluded excluding the employee from making elective deferrals in the 2014 through 2017 exclusion years.[4]

(2) *Interaction of first-year exclusion condition and preceding-year exclusion condition during the Relief Period*. For plans that use the plan year as the exclusion year, a failure to operate in compliance with the OIAI exclusion condition during the Relief Period may raise issues regarding the application of the first-year and preceding-year exclusion conditions during the period that includes both a portion of a new employee's initial 12 months of employment and a portion of the first plan year ending after the close of the new employee's initial 12 months of employment (the "overlap period"). For example, for such a plan with a calendar-year plan year, if an employee started work on October 1, 2015, then the employee's overlap period would be from January 1, 2016, through September 30, 2016. If the employer reasonably expected the employee to work 1,000 hours from October 1, 2015, through September 30, 2016, the employee only worked 500 hours from October 1, 2015, through December 31, 2015, and the plan did not apply the OIAI exclusion condition during the Relief Period, then issues would arise as to whether the employee would be permitted to make elective deferrals during the overlap period (due to application of the first-year exclusion condition) or would be prevented from making elective deferrals during the overlap period (due to application of the preceding-year exclusion condition). During the Relief Period, despite these issues, a plan will not be treated as failing to satisfy the conditions of the part-time exclusion during an employee's overlap period, if the plan has applied the first-year and preceding-year exclusion conditions with respect to overlap periods in a reasonable and uniform manner for all employees. After the Relief Period ends, and all plans operate in compliance with the OIAI exclusion condition, these issues involving new employees and the overlap period will no longer arise because, under the OIAI exclusion condition, once an employee does not meet the part-time exclusion conditions, whether in the initial year of employment or for any exclusion year, the employee may no longer be excluded from making elective deferrals under the part-time exclusion.

.02 *Relief regarding plan language*

(1) *Pre-approved plans*. Section 403(b) pre-approved plans include language that applies the OIAI exclusion condition retroactive to 2009 (when the § 403(b) regulations became effective). If an employer that did not apply the OIAI exclusion condition adopts a § 403(b) pre-approved plan, the plan will, in the absence of relief, have an operational failure because the plan's past operation with respect to the OIAI exclusion condition will not match the plan's terms. However, under the transition relief provided in this section 3.02(1), a § 403(b) pre-approved plan adopted by an employer will not be treated as failing to satisfy the conditions of the part-time exclusion, and the plan will not be treated as having a failure to follow plan terms, merely because the form of the pre-approved plan for the Relief Period does not match the plan's operation with regard to the OIAI exclusion condition during the Relief Period. Accordingly, if the operational relief granted in section 3.01 applies, a § 403(b) pre-approved plan is not required to be amended to reflect that the plan failed to apply the OIAI exclusion condition during the Relief Period.

(2) *Individually designed plans*. An employer with an individually designed plan has until March 31, 2020 (the end of the remedial amendment period provided in Rev. Proc. 2013–22), to correct form defects in the plan. Under the transition relief provided in this section 3.02(2), if the operational relief granted in section 3.01 applies, an employer may amend plan language, through March 31, 2020, to reflect that the OIAI exclusion condition was not applied for all exclusion years, and that amendment will be treated as a correction of a form defect during the remedial amendment period. Solely for purposes of the relief in this section 3.02(2), plan language that tracks the regulatory language of the part-time exclusion without explicitly highlighting the OIAI exclusion condition (such as, for example, LRM 17 of the 2013 LRMs,

[4]The OIAI exclusion condition, if properly applied, would also have provided an independent reason, in addition to the preceding-year exclusion condition, to prevent the exclusion of the employee from making elective deferrals in the 2018 exclusion year.

which did not explicitly highlight the OIAI exclusion condition) is treated as language that reflects that the OIAI exclusion condition was not applied. An employer's eligibility for the § 403(b) remedial amendment period will not be adversely affected merely because an employer uses the relief provided under this notice (even though, under Rev. Proc. 2017–18, the remedial amendment period generally is available to correct a form defect only if all provisions of the plan that are necessary to satisfy § 403(b) have been adopted and made effective in form and operation from the beginning of the remedial amendment period).

(3) *Requirements after the Relief Period ends*. For periods after the Relief Period ends, both § 403(b) pre-approved plans and individually designed plans that provide for the part-time exclusion must, pursuant to § 1.403(b)–3(b)(3)(i), include the OIAI exclusion condition in plan language.[5] This OIAI exclusion condition language must be included in the plan, for periods after the Relief Period ends, by the end of the remedial amendment period.

.03 *Fresh-start opportunity after the Relief Period ends*

In general, for exclusion years beginning on or after January 1, 2019, a plan that provides for the part-time exclusion must apply the OIAI exclusion condition in both form and operation. However, this section 3.03 provides a fresh-start opportunity under which a plan will not be treated as failing to satisfy the conditions of the part-time exclusion for periods after the Relief Period, if the OIAI exclusion condition is applied as if the OIAI exclusion condition first became effective January 1, 2018. Thus, a plan may apply the OIAI exclusion condition by disregarding the fact that the first-year exclusion condition was not met for an employee if the employee began employment before January 1, 2018, or the fact that the preceding-year exclusion condition was not met for an employee in any exclusion year before the first exclusion year beginning on or after January 1, 2018. Notwithstanding the foregoing, even if a plan applies this fresh-start opportunity with respect to the OIAI exclusion condition, the plan must have been operated during the Relief Period in compliance with the OIAI exclusion or pursuant to the relief provided under section 3.01 of this notice. Additionally, a plan (whether a § 403(b) pre-approved plan or an individually designed plan) is not required to be amended to reflect the use of this fresh-start opportunity in applying the OIAI exclusion condition.

The following examples illustrate the fresh-start opportunity provided in this section 3.03:

Example 1 (disregarding a prior failure to meet first-year exclusion condition). Facts. An employer established a § 403(b) plan on January 1, 2009, with a calendar-year plan year. The plan allows elective deferrals, provides for the part-time exclusion, and uses plan years as exclusion years for purposes of applying the preceding-year exclusion condition under the part-time exclusion. An employee started work on January 1, 2017, and the employer reasonably expected the employee to work 1,000 hours during the employee's first 12 months of employment. The employee actually worked 500 hours during the 2017 calendar year and 500 hours during the 2018 calendar year. The employee was allowed to make elective deferrals during the employee's first year of employment (the 2017 calendar year), and the employee is excluded from making elective deferrals during the 2018 exclusion year under the part-time exclusion. The employee is also excluded from making elective deferrals during the 2019 exclusion year under the part-time exclusion.

Conclusion. Without using the fresh-start opportunity provided in this section 3.03, the employee could not be excluded from making elective deferrals for the 2019 exclusion year because, under the OIAI exclusion condition, the employee could not be excluded for any subsequent exclusion year after the first-year exclusion condition was not met. That is, because the employer reasonably expected the employee to work at least 1,000 hours in the first year of employment, the employee could not be excluded from making elective deferrals in the first year of employment or in any subsequent exclusion year. However, pursuant to the fresh-start opportunity in this section 3.03, because the employee began employment before January 1, 2018, the employer may, in applying the OIAI exclusion condition, disregard the fact that the first-year exclusion condition was not met. Accordingly, excluding the employee from making elective deferrals during the 2019 exclusion year will not be treated as a failure to satisfy the conditions of the part-time exclusion.

Example 2 (disregarding a prior failure to meet preceding-year exclusion condition). Facts. An employer established a § 403(b) plan on January 1, 2009, with a calendar-year plan year. The plan allows elective deferrals, provides for the part-time exclusion, and uses plan years as exclusion years for purposes of applying the preceding-year exclusion condition under the part-time exclusion. An employee started work on January 1, 2016, and the employer reasonably expected the employee to work only 500 hours in the employee's first 12 months of employment. The employee actually worked 1,000 hours in the 2016 calendar year, but worked only 500 hours in the 2017 calendar year and 500 hours in the 2018 calendar year. The employee was excluded from making elective deferrals during the employee's first year of employment (the 2016 calendar year) under the part-time exclusion, but was allowed to make elective deferrals during the 2017 exclusion year. The employee is excluded from making elective deferrals during the 2018 exclusion year and the 2019 exclusion year under the part-time exclusion.

Conclusion. Without using the fresh-start opportunity provided in this section 3.03, the employee could not be excluded from making elective deferrals for the 2019 exclusion year, because, under the OIAI exclusion condition, the employee could not be excluded for any subsequent exclusion year after the preceding-year exclusion condition was not met for the 2017 exclusion year. That is, once the employee works at least 1,000 hours in the applicable 12-month period preceding an exclusion year, the employee could not be excluded from making elective deferrals in that exclusion year or in any subsequent exclusion year. However, pursuant to the fresh-start opportunity in this section 3.03, because the exclusion year for which the preceding-year exclusion condition was not met was an exclusion year before the first exclusion year beginning on or after January 1, 2018, the employer may disregard the fact that the preceding-year exclusion condition was not met for that exclusion year. Accordingly, excluding the employee from making elective deferrals during the 2019 exclusion year will not be treated as a failure to satisfy the conditions of the part-time exclusion.

SECTION 4. DRAFTING INFORMATION

The principal author of this notice is Patrick T. Gutierrez of the Office of Associate Chief Counsel (Tax Exempt and Government Entities). For further information regarding this notice, contact Patrick T. Gutierrez at (202) 317-4148 (not a toll-free number).

Phase-out of Credit for New Qualified Plug-in Electric Drive Motor Vehicles

Notice 2018–96

SECTION 1. PURPOSE

This notice announces the credit phase-out schedule for new qualified plug-in electric drive motor vehicles sold by Tesla, Inc.

SECTION 2. BACKGROUND

Section 30D(a) of the Internal Revenue Code provides for a credit for certain new

[5] For example, LRM 17 of the 2015 LRMs provides sample language highlighting the OIAI exclusion condition. LRM 17 of the 2013 LRMs also includes the OIAI exclusion condition (even though it does not explicitly highlight the condition).

qualified plug-in electric drive motor vehicles. The new qualified plug-in electric drive motor vehicle credit begins to phase out for a manufacturer's vehicles in the second calendar quarter after the calendar quarter in which at least 200,000 of the manufacturer's vehicles that qualify for the credit have been sold for use or lease in the United States (determined on a cumulative basis for sales after December 31, 2009). Taxpayers purchasing the manufacturer's vehicles during the first two calendar quarters of the phase-out period may claim 50 percent of the otherwise allowable credit. Taxpayers purchasing the manufacturer's vehicles during the third and fourth calendar quarters of the phase-out period may claim 25 percent of the otherwise allowable credit. No credit is available for vehicles purchased after the last day of the fourth calendar quarter of the phase-out period.

Notice 2009–89, 2009–48 I.R.B. 714, provides procedures for a vehicle manufacturer (or in the case of a foreign vehicle manufacturer, its domestic distributor) to certify to the Internal Revenue Service (Service) both (1) that a particular make, model and model year of vehicle qualifies as a plug-in electric drive motor vehicle and (2) the amount of the credit allowable with respect to that vehicle.

Section 5.05 of Notice 2009–89 requires a manufacturer (or, in the case of a foreign vehicle manufacturer, its domestic distributor) that has received from the Service an acknowledgement of its certification for a particular make, model, and model year of vehicle to submit to the Service a report of the number of qualified vehicles sold by the manufacturer (or, in the case of a foreign vehicle manufacturer, its domestic distributor) to consumers or retail dealers during the calendar quarter. A qualified vehicle is defined for this purpose as any vehicle that is a new qualified plug-in electric drive motor vehicle.

In accordance with section 5.05 of Notice 2009–89, Tesla, Inc. has submitted reports that indicate that its cumulative sales of qualified vehicles reached the 200,000-vehicle limit during the calendar quarter ending September 30, 2018. Accordingly, the credit for all new qualified plug-in electric drive motor vehicles sold by Tesla, Inc. will begin to phase out January 1, 2019.

SECTION 3. SCOPE OF NOTICE

This notice applies to any make, model, or model year of new qualified plug-in electric drive motor vehicle that is –

(1) sold by Tesla, Inc.; and

(2) purchased for use or lease in the United States on or after January 1, 2019.

SECTION 4. CREDIT AMOUNT

If a new qualified plug-in electric drive motor vehicle sold by Tesla, Inc. is purchased for use or lease on or after January 1, 2019, the allowable credit is as follows:

(1) For vehicles purchased for use or lease on or after January 1, 2019, and on or before June 30, 2019, the credit is 50 percent of the otherwise allowable amount determined under § 30D(b);

(2) For vehicles purchased for use or lease on or after July 1, 2019, and on or before December 31, 2019, the credit is 25 percent of the otherwise allowable amount determined under § 30D(b);

(3) For vehicles purchased for use or lease on or after January 1, 2020, no credit is allowable.

Qualifying Vehicle	Full Credit When Purchased through 12/31/2018; *(first quarter = 100% credit allowed)*	Reduced Credit When Purchased from 1/1/2019 through 6/30/2019 *(2nd & 3rd quarters = 50% credit allowed)*	Reduced Credit When Purchased from 7/1/2019 through 12/31/2019 *(4th & 5th quarters = 25% credit allowed)*	Credit available starting 1/1/2020
All Tesla Vehicles	$7,500	$3,750	$1,875	$0

SECTION 5: DRAFTING INFORMATION

The principal author of this notice is Maggie Stehn of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this notice contact Ms. Stehn at (202) 317-4547 (not a toll-free number).

Guidance on the Application of Section 83(i)

Notice 2018–97

I. PURPOSE

This notice provides initial guidance on the application of section 83(i) of the Internal Revenue Code (Code), as enacted by section 13603 of the Tax Cuts and Jobs Act, Pub. Law 115–97, 131 Stat. 2054, 2155 (2017) (Act). Section 83 generally provides for the federal income tax treatment of property transferred in connection with the performance of services. Section 13603 of the Act amended section 83 by adding section 83(i) to allow certain employees to defer recognition of income attributable to the receipt or vesting of qualified stock.

Stakeholders have indicated that they would benefit from initial guidance on certain aspects of section 83(i), in particular on (1) the application of the requirement in section 83(i)(2)(C)(i)(II) that grants be made to not less than 80% of all employees who provide services to the corporation in the United States, (2) the application of federal income tax withholding to the deferred income related to the qualified stock, and (3) the ability of an employer to opt out of permitting employees to elect the deferred tax treatment even if the requirements under section 83(i) are otherwise met. In response, this notice addresses these three issues. The Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) anticipate that further guidance on section 83(i) will be issued in the form of proposed regulations, which are expected to incorporate the guidance provided in this notice.

II. BACKGROUND

Section 83(i) allows certain employees to elect to defer inclusion in income of the amount that would otherwise be included under section 83(a) upon the transfer of stock pursuant to the exercise of a stock option or the settlement of a restricted stock unit (RSU). Inclusion of that income may be deferred for up to 5 years as the result of a section 83(i) election, subject to certain limitations described in this Background section.

A. Effect of a Section 83(i) Election

Section 83(i)(1)(A) provides that if qualified stock is transferred to a qualified employee who makes an election under section 83(i) with respect to such stock, the amount determined under section 83(a) with respect to such stock will be included in income in the taxable year determined under section 83(i)(1)(B). Accordingly, such income shall be included in the taxable year of the employee which includes the earliest of:

(i) the first date such qualified stock becomes transferable (including, solely for purposes of this clause, transferable to the employer);
(ii) the date the employee first becomes an excluded employee;
(iii) the first date on which any stock of the issuing corporation becomes readily tradable on an established securities market;
(iv) the date that is 5 years after the first date the rights of the employee in such stock are transferable or not subject to a substantial risk of forfeiture, whichever occurs earlier; or
(v) the date on which the employee revokes the election (at such time and in such manner as the Secretary of the Treasury (Secretary) provides).

B. Definition of "Qualified Employee"

Section 83(i)(3)(A) defines a "qualified employee" as any individual who is not an "excluded employee" and who agrees to meet such requirements as are determined by the Secretary to be necessary to ensure that the withholding requirements of the corporation under chapter 24 (Collection of Income Tax at Source on Wages) with respect to the qualified stock are met.

An "excluded employee" is defined under section 83(i)(3)(B) as, with respect to any corporation, any individual:

(i) who is a 1 percent owner at any time during the calendar year or who was a 1 percent owner at any time during the 10 preceding calendar years;
(ii) who is or has been at any prior time (I) the chief executive officer (or an individual acting in such capacity) or (II) the chief financial officer (or an individual acting in such capacity);
(iii) who bears a relationship described in section 318(a)(1) to any individual described in subclause (I) or (II) of clause (ii); or
(iv) who is one of the 4 highest compensated officers of the corporation for the taxable year, or was one of the 4 highest compensated officers of such corporation for any of the 10 preceding taxable years, determined on the basis of the shareholder disclosure rules for compensation under the Securities Exchange Act of 1934 (as if such rules applied to such corporation).

C. Definition of "Qualified Stock"

Section 83(i)(2)(A) defines "qualified stock" as any stock in a corporation that is the employer of a qualified employee, if such stock is received (i) in connection with the exercise of a stock option or in settlement of an RSU, and (ii) such stock option or RSU was granted in connection with the performance of services as an employee and during a calendar year that the employer corporation was an eligible corporation. Section 83(i)(5) provides that, for purposes of this subsection, all persons treated as a single employer under section 414(b) shall be treated as one corporation. Section 83(i)(2)(B) provides that qualified stock does not include any stock if the employee may sell the stock to, or otherwise receive cash in lieu of stock from, the corporation at the time that the employee's rights to the stock first become transferable or not subject to a substantial risk of forfeiture.

D. Definition of "Eligible Corporation"

Section 83(i)(2)(C)(i) defines an "eligible corporation" as any corporation that, with respect to any calendar year, (i) has none of its (or any predecessor's) stock readily tradable on an established securities market during any preceding calendar year, and (ii) has a written plan under which, in such calendar year, not less than 80% of all employees who provide services to the corporation in the United States (or any possession of the United States) are granted stock options, or are granted RSUs, with the same rights and privileges to receive qualified stock. As provided in section 83(i)(2)(C)(iii), for purposes of section 83(i)(2)(C)(i)(II), the term "employee" does not include any excluded employee or any employee described in section 4980E(d)(4) (certain part-time employees).

Section 83(i)(2)(C)(ii)(I) provides that the determination of rights and privileges shall be made in a manner similar to the determination under section 423(b)(5). However, in accordance with section 83(i)(2)(C)(ii)(II), employees shall not fail to be treated as having the same rights and privileges to receive qualified stock solely because the number of shares available to all employees is not equal in amount, so long as the number of shares available to each employee is more than a de minimis amount. In addition, section 83(i)(2)(C)(ii)(III) provides that rights and privileges with respect to the exercise of an option shall not be treated as the same as rights and privileges with respect to the settlement of an RSU. Finally, in the case of any calendar year beginning before January 1, 2018, section 83(i)(2)(C)(iv) provides that neither stock options nor RSUs are required to have been granted with the same rights and privileges for the stock received to be treated as qualified stock.

E. Manner of Making Election

Section 83(i)(4)(A) provides that an election with respect to qualified stock shall be made no later than 30 days after the first date the rights of the employee in such stock are transferable or are not subject to a substantial risk of forfeiture, whichever occurs earlier, and shall be made in a manner similar to the manner in which an election is made under section 83(b). Section 83(i)(4)(C) provides that the term "deferral stock" is used to refer to stock with respect to which a section 83(i) election has been made.

Section 83(i)(4)(B) provides that no election may be made under section 83(i) if the qualified employee has made an election under section 83(b) with respect to such qualified stock, or if any stock of the corporation which issued the qualified stock is readily tradable on an established securities market at any time before the election is made. In addition, no election may be made under section 83(i) with respect to any qualified stock if the corporation that issued the stock purchased any of its outstanding stock in the calendar year preceding the calendar year which includes the first date the rights of the employee are transferable or are not subject to a substantial risk of forfeiture, unless (i) not less than 25% of the total dollar amount of the stock so purchased is deferral stock, and (ii) the determination of which individuals from whom deferral stock is purchased is made on a reasonable basis.

F. Notice Requirement

Section 83(i)(6) provides that any corporation which transfers qualified stock to a qualified employee shall, at the time an amount attributable to such stock would first be includible in the gross income of such employee (or a reasonable time before), certify to the employee that such stock is qualified stock, and notify the employee that the employee may be eligible under section 83(i) to defer income on such stock. Section 83(i)(6) provides that the corporation must also notify the employee that if the employee makes such an election:

(i) the amount of income recognized at the end of the deferral period will be based on the value of the stock at the time at which the rights of the employee first become transferable or not subject to a risk of forfeiture, notwithstanding whether the value of the stock has declined during the deferral period;

(ii) the amount of such income recognized at the end of the deferral period will be subject to withholding under section 3401(i) at the rate determined under section 3402(t); and

(iii) the responsibilities of the employee, as determined by the Secretary under section 83(i)(3)(A)(ii), with respect to such withholding.

Section 6652 was amended by the Act to include a new subsection (p) which imposes a $100 penalty for each failure to provide a notice as required by section 83(i)(6) (up to a maximum of $50,000 per calendar year), unless it is shown that such failure is due to reasonable cause and not to willful neglect. The penalty applies to failures after December 31, 2017.

G. Transition Rule

Section 13603(g) of the Act provides that until the Secretary (or the Secretary's delegate) issues regulations or other guidance for purposes of implementing the 80% requirement of section 83(i)(2)(C)(i)(II) or the notice requirements of section 83(i)(6), a corporation shall be treated as in compliance with those requirements if the corporation complies with a reasonable good faith interpretation of such requirements.

III. GUIDANCE

A. Application of the 80% Requirement

As described above, section 83(i)(2)(C) defines an "eligible corporation," in relevant part, as, with respect to any calendar year, any corporation that has a written plan under which, in such calendar year, not less than 80% of all employees who provide services to the corporation in the United States (or any possession of the United States) are granted stock options, or are granted RSUs, with the same rights and privileges to receive qualified stock. Stakeholders have asked whether the 80% requirement of section 83(i)(2)(C)(i)(II) with respect to a calendar year is applied on a cumulative basis that takes into account stock options or RSUs granted in prior calendar years.

The determination of whether a corporation qualifies as an eligible corporation is made "with respect to any calendar year." Furthermore, to meet the 80% requirement, the corporation must have granted "in such calendar year" stock options to 80% of its employees or RSUs to 80% of its employees. Therefore, the determination that the corporation is an eligible corporation must be made on a calendar year basis, and whether the corporation has satisfied the 80% requirement is based solely on the stock options or the RSUs granted in that calendar year to employees who provide services to the corporation in the United States (or any possession of the United States). In calculating whether the 80% requirement is satisfied, the corporation must take into account the total number of individuals employed at any time during the year in question as well as the total number of employees receiving grants during the year (in each case, without regard to excluded employees or part-time employees described in section 4980E(d)(4)), regardless of whether the employees were employed by the corporation at the beginning of the calendar year or the end of the calendar year.

The Treasury Department and the IRS have determined that interpreting the 80% requirement of section 83(i)(2)(C)(i)(II) with respect to a calendar year on a cumulative basis that takes into account stock options or RSUs granted in prior calendar years is contrary to the language of the statute and is not a reasonable good faith interpretation of the 80% requirement. Accordingly, the transition rule in section 13603(g) of the Act does not apply to such an interpretation.

B. Employment Taxes (including Income Tax Withholding)

1. General

Employment taxes under Subtitle C of the Code include Federal Insurance Contributions Act (FICA) taxes, Federal Unemployment Tax Act (FUTA) tax, and federal income tax withholding. The Act made no amendments to FICA and FUTA taxation with respect to deferral stock. Thus, the FICA and FUTA taxation of deferral stock is unaffected by the Act. See H.R. Rep. No. 115–466, at 501 (2017).[6]

The Act did amend the income tax withholding provisions in the Code with respect to deferral stock. Specifically, section 13603(b) of the Act amended the income tax withholding provisions, as described below, to conform the income tax

[6]See H.R. Rep. No. 115-466, pages 496-497 for a discussion of FICA and FUTA taxation.

withholding provisions in section 3401 and section 3402 to the income taxation of deferral stock. The remainder of the discussion of employment taxes concerns only federal income tax withholding.

Section 3402(a) provides that, except as otherwise provided in section 3402, every employer making payment of wages shall deduct and withhold upon such wages a tax determined in accordance with tables or computational procedures prescribed by the Secretary. The term "wages" is defined in section 3401(a) for income tax withholding purposes as including all remuneration for services performed by an employee for his or her employer including the cash value of all remuneration (including benefits) paid in any medium other than cash, with certain specific exceptions. Section 3401(i), as added by section 13603(b)(1) of the Act, provides that for purposes of section 3401(a), qualified stock (as defined in section 83(i)) with respect to which an election is made under section 83(i) is treated as wages (1) received on the earliest date described in section 83(i)(1)(B), and (2) in an amount equal to the amount included in income under section 83 for the taxable year which includes such date. Thus, under section 3401(i), the amount of the deferral stock included in gross income is treated as wages subject to federal income tax withholding on the earliest date described in section 83(i)(1)(B), which sets forth the end date of the applicable deferral period.

Section 3402(t), which was added by section 13603(b)(2) of the Act, provides that, in the case of any qualified stock with respect to which an election is made under section 83(i), (1) the rate of tax under section 3402(a) must not be less than the maximum rate in effect under section 1 (37% in 2018), and (2) such stock is treated for purposes of section 3501(b) in the same manner as a noncash fringe benefit. Section 3501(b) provides that the taxes imposed by Subtitle C with respect to noncash fringe benefits must be collected (or paid) by the employer at the time and in the manner prescribed by the Secretary by regulations. Questions and Answers 5 and 6 of § 31.3501(a)–1T provide that the employer is liable for the payment of the tax with respect to a noncash fringe benefit regardless of whether the benefit is paid by another entity.

Noncash fringe benefits that fall within section 3501(b) generally are subject to the provisions of Announcement 85–113, 1985–31 I.R.B. 31, which provides guidelines for withholding, paying, and reporting employment tax on taxable noncash fringe benefits. Announcement 85–113 provides generally that taxpayers may rely on the guidelines in the announcement until the issuance of regulations that supersede the temporary and proposed regulations under section 3501(b). No regulations have been issued under section 3501(b) that supersede the announcement. Thus, Announcement 85–113 generally is applicable to current payments of noncash fringe benefits, and until further regulatory guidance is issued, it applies to deferral stock, except as limited by the specific rules of section 3401(i) and the terms of the announcement itself, as discussed further below.

Section 2 of Announcement 85–113 sets out the general income tax and accounting rule, which provides, in relevant part, that employers must withhold the applicable income tax on the date the benefits are paid and must deposit the withheld taxes under the regular rules for tax deposits. The employer may make a reasonable estimate of the value of the fringe benefit on the date the fringe benefit is paid for purposes of meeting the timely deposit requirements. The actual value of the fringe benefit must be determined by January 31 of the following year and reported on Form W–2, Wage and Tax Statement, and Form 941, Employer's Quarterly Federal Tax Return (or Form 944, Employer's Annual Federal Tax Return, if applicable instead of Form 941).

Announcement 85–113 states that if the employer underestimates the value of the fringe benefit and as a result deposits less than the amount required to be deposited (that is, the amount the employer would be required to deposit if the employer had correctly withheld the applicable taxes), the employer may be subject to the failure to deposit penalty under section 6656. Under Announcement 85–113, if the employer overestimates the value and deposits more than the amount required, the employer may claim a refund or elect to have the overpayment applied to the employer's next Form 941 (or other employment tax return).

Generally, under § 31.6205–1(d)(2), if an employer collects less than the correct amount of income tax required to be withheld from wages during a calendar year, the employer must collect the amount of the undercollection *on or before the last day of the year* by deducting the amount from remuneration of the employee. Under § 31.6205–1(d)(2),[7] if such a deduction is not made, the obligation of the employee to the employer with respect to the undercollection is a matter for settlement between the employee and the employer *within the calendar year*. However, in the case of noncash fringe benefits, Announcement 85–113 permits the employer to recover the undercollection of income tax withholding from the employee after the end of the calendar year during which the wage payment is made, as long as the recovery occurs prior to April 1 of the year following the year in which the benefits are paid. This rule in Announcement 85–113 applies to the amount included in wages under section 3401(i). Thus, with regard to any income tax withholding that the employer deposits for deferral stock included in wages under section 3401(i) that has not been collected from the employee, the employer may recover the income tax from the employee prior to April 1 of the year following the year in which the inclusion in wages under section 3401(i) occurs.

Section 3401(i) provides the specific date on which deferral stock must be treated as wages for income tax withholding purposes and the special rules for timing of inclusion in income under Announcement 85–113 available with respect to certain noncash fringe benefits do not apply.[8] The withholding rates described in section 2 of Announcement 85–113 also do not apply to deferral

[7]The reference in Announcement 85-113 is to the section of the regulations (§ 31.6205–1(c)(4)) setting forth the same principle in the section 6205 regulations before amendments to the regulations after 1985. See T.D. 9405, 72 FR 37376 (July 1, 2008).

[8]Announcement 85-113 provides two rules applicable to the date of payment of some noncash fringe benefits that do not apply to deferral stock. The first rule allows payors of certain noncash

stock because, under section 3402(t)(1), the income tax withholding rate under section 3402(a) "shall not be less than the maximum rate of tax in effect under section 1." The Treasury Department and the IRS expect that proposed regulations providing further guidance on section 83(i) will provide that the rate of withholding under section 3402(t)(1) on deferral stock is the maximum rate of tax in effect under section 1 and will provide that withholding is applied (1) without reference to any payment of regular wages, (2) without allowance for the number of allowances or other dollar amounts claimed by the employee on Form W–4, Employee's Withholding Allowance Certificate, (3) without regard to whether the employee has requested additional withholding, and (4) without regard to the withholding method used by the employer. Thus, under the anticipated proposed regulations, only one rate, the maximum rate of tax under section 1, would be used in withholding on deferral stock under section 3402(t), and employers would not be able to increase or decrease the rate at the request of the employee. Under Code section 3402(t) and this notice and unless and until superseding guidance is issued, with respect to wages resulting from deferral stock under section 3402(t), employers must withhold taxes at the maximum rate of income tax under section 1 without regard to whether the employee has requested additional withholding and without regard to any withholding allowances or dollar amounts entered on the employee's Form W–4.

In summary, deferral stock constitutes wages under section 3401(i) and is treated as received on the earliest date described in section 83(i)(1)(B) in an amount equal to the amount included in income under section 83 for the taxable year that includes such date. When the wages are treated as paid under section 3401(i), the employer must make a reasonable estimate of the value of the stock and make deposits of the amount of income tax withholding liability based on that estimate. The wages included under section 3401(i) are subject to withholding at the maximum rate of tax in effect under section 1, and withholding is determined without regard to the employee's Form W–4. By January 31 of the following year, the employer must determine the actual value of the deferral stock on the date it is includible in the employee's income and report that amount and the withholding on Form W–2 and Form 941. With respect to income tax withholding for the deferral stock that the employer pays from its own funds, the employer may recover that income tax withholding from the employee until April 1 of the year following the calendar year in which the wages were paid.

An employer that fails to deduct and withhold federal income tax under section 3402 is liable for the payment of the tax whether or not the employer collects it from the employee, unless section 3402(d) applies.[9] Section 3402(d) provides that if the employer fails to deduct and withhold the correct amount of income tax withholding, and thereafter the income tax against which the tax under section 3402 may be credited is paid, the tax imposed under section 3402(a) shall not be collected from the employer. Section 3402(d) does not relieve the employer from liability for any penalties in respect of the failure to deduct and withhold.

2. Escrow Arrangement

Section 83(i)(3)(A)(ii) provides the Secretary with authority to impose any requirements as the Secretary determines to be necessary to ensure that the withholding requirements of the corporation under chapter 24 with respect to the qualified stock are met. In order to be a qualified employee, an employee making an election under section 83(i) must agree in the election to these requirements.

Pursuant to the authority provided to the Secretary under section 83(i)(3)(A)(ii), in order to be a qualified employee an employee making a section 83(i) election with respect to qualified stock must agree in the election that all deferral stock will be held in an escrow arrangement, the terms of which are consistent with the following requirements:

(i) The deferral stock must be deposited into escrow before the end of the calendar year during which the section 83(i) election is made and must remain in escrow until removed in accordance with clause (ii) or the corporation has otherwise recovered from the employee an amount equal to the corresponding income tax withholding obligation under section 3401(i) for the taxable year determined in accordance with section 83(i)(1)(B).

(ii) At any time between the date of income inclusion under section 83(i)(1)(B) and March 31 of the following calendar year, the corporation may remove from escrow and retain the number of shares of deferral stock with a fair market value equal to the income tax withholding obligation that has not been recovered from the employee by other means. The fair market value of the shares must be determined pursuant to the rules in § 1.409A–1(b)(5)(iv). The fair market value used for purposes of this calculation is the fair market value of the shares at the time the corporation retains shares held in escrow to satisfy the income tax withholding obligation.

(iii) Any remaining shares held in escrow after the corporation's income tax withholding obligation has been met, whether by retention of shares in accordance with clause (ii) or otherwise, must be delivered to the employee as soon as reasonably practicable thereafter.

The Treasury Department and the IRS have concluded that the escrow arrangement described above adequately ensures the statutory income tax withholding requirements of the corporation will be met and that this approach is less burdensome

fringe benefits to treat the benefits as paid on any day(s) during the year so long as they treat benefits provided in a calendar year as paid not later than December 31 of the calendar year. The second rule allows employers to treat certain benefits paid during the last two months of the year (or any shorter period) as paid during the subsequent calendar year. However, Announcement 85-113 provides that neither of these two rules applies when the fringe benefit is the transfer of personal property (either tangible or intangible) of a kind normally held for investment or the transfer of real property. Because deferral stock is personal property of a kind normally held for investment, neither of these rules may be used with respect to deferral stock.

[9]Section 3403, Section 31.3403–1.

than alternatives that would require a cash outlay by the corporation or the employee before the due date for the relevant withholding, and thus allow less flexibility with respect to resource allocation. If the corporation and the employee do not agree to deposit the deferral stock into an escrow arrangement consistent with the terms outlined above, the employee is not a "qualified employee" within the meaning of section 83(i)(3). The Treasury Department and the IRS are aware that this has the effect of allowing a corporation to preclude its employees from making section 83(i) elections by declining to establish an escrow arrangement consistent with the terms outlined above.

Future guidance on section 83(i)(3)(A)(ii) may establish alternative or substitute mechanisms to ensure a corporation's income tax withholding requirements are satisfied. Such mechanisms may be more restrictive than the above described escrow arrangement.

C. Designation of Stock as Not Eligible for Section 83(i) Election

As described above, section 83(i) imposes a number of requirements and limitations that must be met for a section 83(i) election to be allowed. Although the election, if allowed, may be made by an employee, the corporation is responsible for creating the conditions that would allow an employee to make the election. Stakeholders have indicated that a corporation may wish to compensate its employees with equity-based compensation for which no section 83(i) election may be made. As noted above, a corporation can preclude its employees from making section 83(i) elections by declining to establish an escrow arrangement as described in Section III.B.2 of this notice. As a result, a corporation need not be concerned that it would inadvertently create the requisite conditions for its employees to make section 83(i) elections or be required to comply with the notice requirement of section 83(i)(6). If a corporation does not intend to deposit qualified stock into an escrow arrangement (as described in Section III.B.2 of this notice) or otherwise create the conditions that would allow an employee to make the section 83(i) election, the terms of a stock option or RSU may provide that no election under section 83(i) will be available with respect to stock received upon the exercise of the stock option or settlement of the RSU. This designation would inform employees that no section 83(i) election may be made with respect to stock received upon exercise of the option or settlement of the RSU even if the stock is qualified stock.

IV. EFFECTIVE DATE

Section 83(i) applies to stock attributable to stock options exercised, or RSUs settled, after December 31, 2017. The Treasury Department and the IRS anticipate that the guidance in this notice will be incorporated into future regulations that, with respect to issues addressed in this notice, will apply to any taxable year ending on or after December 7, 2018. Any future guidance, including regulations, addressing the issues covered by this notice, such as the establishment of more restrictive mechanisms to ensure a corporation's income tax withholding requirements are satisfied, will apply prospectively only.

V. REQUEST FOR COMMENTS

The Treasury Department and the IRS anticipate issuing further guidance on section 83(i). Accordingly, comments are requested on additional issues under section 83(i) that future guidance should address, as well as any clarifications or further guidance that may be helpful on the issues addressed in this notice. Comments specifically are requested on additional or alternative mechanisms that could be established to ensure the collection of the required income tax withholding in accordance with section 83(i)(3)(A)(ii).

Written comments may be submitted through February 5, 2019. Comments should include a reference to Notice 2018–97. Comments may be submitted electronically via the Federal eRulemaking Portal at ***www.regulations.gov*** (type IRS-2018–0039 in the search field on the ***regulations.gov*** homepage to find this notice and submit comments). Alternatively, submissions may be sent to CC:PA:LPD:PR (Notice 2018–97), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions also may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (Notice 2018–97), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC 20044. All recommendations for guidance submitted by the public in response to this notice will be available for public inspection and copying in their entirety.

VI. DRAFTING INFORMATION

The principal author of this notice is Michael Hughes of the Office of Associate Chief Counsel (Tax Exempt and Government Entities), although other Treasury and IRS officials participated in its development. For further information on the provisions of this notice, contact Michael Hughes at (202) 317-5600 (not a toll-free number). For further information regarding issues with respect to income tax withholding, contact A.G. Kelley at (202) 317-4774 (not a toll-free number).

Section 83.—Property transferred in connection with performance of services

The notice contains guidance on the application of § 83(i) of the Internal Revenue Code, including the application of the 80% requirement described in §83(i)(2)(C)(i)(II). Additionally, the notice describes how stock may be designated as not eligible for a §83(i) election. See Notice 2018–97.

Section 3402.—Income tax collected at source

The notice contains guidance on income tax withholding with respect to qualified stock, as defined in § 83(i). See Notice 2018–97.

Parking Expenses for Qualified Transportation Fringes Under § 274(a)(4) and § 512(a)(7) of the Internal Revenue Code

Notice 2018–99

PURPOSE

This notice provides interim guidance for taxpayers to determine the amount of parking expenses for qualified transportation fringes (QTFs) that is nondeductible under § 274(a)(4) of the Internal Revenue Code (Code) and for tax-exempt organizations to determine the corresponding increase in the amount of unrelated business taxable income (UBTI) under § 512(a)(7) attributable to the nondeductible parking expenses. Sections 274 and 512 were amended by the Tax Cuts and Jobs Act, Pub. L. No. 115–97, §§ 13304 and 13703, 131 Stat. 2054, 2123, 2169 (2017) (the Act), effective for amounts paid or incurred after December 31, 2017. As amended by the Act, § 274(a)(4) generally disallows a deduction for expenses with respect to QTFs provided by taxpayers to their employees, and § 512(a)(7) generally provides that a tax-exempt organization's UBTI is increased by the amount of the QTF expense that is nondeductible under § 274. However, the Act does not address how to determine the amount of the QTF expense that is nondeductible or treated as an increase in UBTI.

This notice also announces that the Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) intend to publish proposed regulations under §§ 274 and 512 (and under § 6012 with regard to the exempt organization's related filing requirement). The proposed regulations will include guidance on the determination of nondeductible parking expenses and other expenses for QTFs and the calculation of increased UBTI attributable to QTFs. Until such guidance is issued, taxpayers and tax-exempt organizations that own or lease parking facilities where their employees park may use any reasonable method, as provided in section B of the Interim Guidance on QTF Parking section of this notice, to determine the amount of nondeductible expenses under § 274(a)(4) or the amount of the increase in UBTI under § 512(a)(7). Furthermore, until further guidance is issued, taxpayers may rely on the guidance in this notice to determine the amount of nondeductible parking expenses for QTFs under § 274(a)(4), and tax-exempt organizations may rely on the guidance in this notice to determine the amount of the increase in UBTI under § 512(a)(7).

BACKGROUND AND ANALYSIS

Section 274(a)(4), as added by the Act, provides that no deduction is allowed under Chapter 1 of the Code for the expense of any QTF (as defined in section 132(f)) provided by taxpayers to their employees. Section 132 generally excludes from employees' gross income the value of certain fringe benefits, including QTFs under § 132(f). Although the value of a QTF is relevant in determining the exclusion under § 132(f) and whether the § 274(e)(2) exception (discussed below) applies, the deduction disallowed under § 274(a)(4) relates to the expense of providing a QTF, not its value.

QTFs are defined in § 132(f)(1) to include: (1) transportation in a commuter highway vehicle between the employee's residence and place of employment, (2) any transit pass, and (3) qualified parking.[10] Qualified parking is defined in § 132(f)(5)(C) as parking provided to an employee on or near the business premises of the employer or on or near a location from which the employee commutes to work. The term does not include any parking on or near property used by the employee for residential purposes. The term "employee" for these purposes is defined in §§ 1.132–1(b)(2)(i) and 1.132–9(b) of the Income Tax Regulations, Q/A–5, as any individual who is currently employed by the employer; the term includes common law employees and other statutory employees, such as officers of corporations. Section 1.132–9(b), Q/A–24, explains that partners, 2-percent shareholders of S Corporations, sole proprietors, and independent contractors are not employees for purposes of § 132(f).

Section 132(a)(5) generally provides that gross income does not include any fringe benefit that qualifies as a QTF. Section 132(f)(2) provides that the amount of QTFs provided by an employer to any employee that can be excluded from gross income under § 132(a)(5) cannot exceed a maximum monthly dollar amount, adjusted for inflation. The adjusted maximum monthly excludable amount for 2018 is $260.

An employer may provide QTFs as a supplement to an employee's compensation, either in kind or through a bona fide cash reimbursement arrangement. In addition, § 132(f)(4) provides that QTFs may be provided via compensation reduction agreements. *See also* § 1.132–9(b), Q/A–11 through 15. Section 274(a)(4) disallows a deduction for expenses incurred for QTFs regardless of whether the benefit is provided by the employer in-kind, through a bona fide cash reimbursement arrangement, or through a compensation reduction agreement. Additional guidance regarding qualified parking and other QTFs is provided in § 1.132–9.

Section 274(e) enumerates nine specific exceptions to § 274(a), two of which are discussed in more detail below as applied to parking expenses. Deductions for expenses that are within one of the exceptions in § 274(e) are not disallowed under § 274(a).

Section 274(e)(2) provides an exception for expenses for goods, services, and facilities, to the extent that the expenses are treated by the taxpayer, with respect to the recipient of the entertainment, amusement, or recreation, as compensation to its employees under Chapter 1 and as wages to its employees under chapter 24. Although the language in § 274(e)(2) refers to a recipient of entertainment, amusement, or recreation, it applies as a specific exception to the application of § 274(a), which, as amended by the Act includes the QTF expense disallowance in § 274(a)(4). Thus, the Treasury Department and the IRS have determined that QTF expenses are included in this exception to the extent that the fair market value of the QTF exceeds the § 132(f)(2) limitation on exclusion and such excess amount is included in an employee's compensation under Chapter 1 and wages under chapter 24. *See* § 1.132–9(b), Q/A–8. This interpretation is consistent with Congressional intent. *See* H.R. Rep. No.115–409, at 266 (2017) ("As part of its broader tax reform effort, the Committee believes that certain nontaxable fringe benefits should not be

[10] Although § 132(f)(1)(D) lists qualified bicycle commuting reimbursements as a QTF, § 132(f)(8) suspends the reference in § 132(f)(1)(D) for taxable years beginning after December 31, 2017, and before January 1, 2026. Thus, for 2018–2025, QTFs do not include bicycle commuting reimbursements.

deductible by employers if not includible in income of employees.”).

Section 274(e)(7) provides an exception for expenses for goods, services, and facilities made available by the taxpayer to the general public. When enacting § 274(n) in 1986 (limiting the deduction for meal and entertainment expenses), Congress acknowledged that a taxpayer’s customers and potential customers are members of the general public for purposes of § 274(e)(7):

> The reduction rule [in § 274(n)] does not apply in the case of items, such as samples and promotional activities, that are made available to the general public. For example, if the owner of a hardware store advertises that tickets to a baseball game will be provided to the first 50 people who visit the store on a particular date, or who purchase an item from the store during a sale, then the full amount of the face value of the tickets is deductible by the owner.

H.R. Rep. No. 99–426 (1986), reprinted in 1986–3 (Vol. 2) C.B. 1, 124, and S. Rep. No. 99–313(1986), reprinted in 1986–3 (Vol. 3) C.B. 1, 72. Thus, the Treasury Department and the IRS have determined that expenses for parking made available to the general public are within this exception. The regulations under § 274(e)(7) further explain the general public exception:

> Expenditures for entertainment of the general public by means of television, radio, newspapers and the like, will come within this exception, as will expenditures for distributing samples to the general public. Similarly, expenditures for maintaining private parks, golf courses and similar facilities, to the extent that they are available for public use, will come within this exception. For example, if a corporation maintains a swimming pool which it makes available for a period of time each week to children participating in a local public recreational program, the portion of the expense relating to such public use of the pool will come within this exception.

Section 1.274–2(f)(2)(viii). However, goods, services, and facilities are not made available to the general public if they are made available only to an exclusive list of guests. *See Churchill Downs, Inc. v. Commissioner*, 307 F.3d 423 (6th Cir. 2002).

Generally, § 274 is not applicable to tax-exempt organizations except with regard to determining their deductions connected with unrelated trades or businesses. However, under § 512(a)(7), as added by the Act, the UBTI of organizations described in § 511(a)(2) (“tax-exempt organizations”) is increased by any amount for which a deduction is not allowable by reason of § 274 and which is paid or incurred by such organization for (1) any QTF as defined in § 132(f), (2) any parking facility used in connection with qualified parking as defined in § 132(f)(5)(C), or (3) any on-premises athletic facility as defined in § 132(j)(4)(B).

INTERIM GUIDANCE ON QTF PARKING ISSUES

The Treasury Department and the IRS have received questions about how to determine the amount of parking expenses that is nondeductible or treated as an increase in UBTI. This notice provides guidance to determine the nondeductible amount of parking expenses, as well as the amount treated as increasing UBTI. The method of determining the nondeductible amount depends on whether the taxpayer pays a third party to provide parking for its employees or the taxpayer owns or leases a parking facility where its employees park.

A. *Taxpayer Pays a Third Party for Employee Parking Spots*

If a taxpayer pays a third party an amount so that its employees may park at the third party’s parking lot or garage, the § 274(a)(4) disallowance generally is calculated as the taxpayer’s total annual cost of employee parking paid to the third party. However, if the amount the taxpayer pays to a third party for an employee’s parking exceeds the § 132(f)(2) monthly limitation on exclusion, which for 2018 is $260 per employee, that excess amount must be treated by the taxpayer as compensation and wages to the employee. As a result, the total of the monthly amount in excess of $260 that is treated as compensation and wages is excepted from the taxpayer’s § 274(a) disallowance amount by § 274(e)(2).

B. *Taxpayer Owns or Leases All or a Portion of a Parking Facility*

Until further guidance is issued, if a taxpayer owns or leases all or a portion of one or more parking facilities where its employees park, the § 274(a)(4) disallowance may be calculated using any reasonable method. The methodology described in Steps 1–4 of this section B is deemed to be a reasonable method. Using the value of employee parking to determine expenses allocable to employee parking in a parking facility owned or leased by the taxpayer is not a reasonable method because § 274(a)(4) disallows a deduction for the expense of providing a QTF, regardless of its value. Furthermore, for taxable years beginning on or after January 1, 2019, a method that fails to allocate expenses to reserved employee spots (within the meaning of step 1 in this section B) cannot be a reasonable method; however, see the rule later in this notice providing that changes in employee reserved spot designations made by March 31, 2019, may be treated as applying retroactively for purposes of this notice.

For purposes of this notice, a “parking facility” includes indoor and outdoor garages and other structures, as well as parking lots and other areas, where employees may park on or near the business premises of the employer or on or near a location from which the employee commutes to work. The term does not include any parking on or near property used by the employee for residential purposes. If a taxpayer owns or leases more than one parking facility in a single geographic location, the taxpayer may aggregate the number of spots in those parking facilities when using the methodology in this section B. However, if a taxpayer owns or leases parking facilities in more than one geographic location, the taxpayer may not aggregate the spots in parking facilities that are in different geographic locations. See example 8 below.

For purposes of this notice, “total parking expenses” include, but are not limited to, repairs, maintenance, utility costs, insurance, property taxes, interest, snow and ice removal, leaf removal, trash removal, cleaning, landscape costs, parking lot attendant expenses, security, and rent or lease payments or a portion of a rent or lease payment (if not broken out separately). A deduction for an allowance for depreciation on a parking structure owned by a taxpayer and used for parking by the taxpayer's employees is an allowance for the exhaustion, wear and tear, and obsolescence of property, and not a parking expense for purposes of this notice. *Compare* § 274(a)(1) (disallowing deductions for any "item" with respect to entertainment activities or facilities) to § 274(a)(4) (disallowing deductions for the "expense" of any QTF). *See also W.L. Schautz v. United* States, 567 F.2d 373, 376 (Ct. Cl. 1977) (noting that § 274(a)(1) applies to deductions broadly, not to expenses), and *Gordon v. Commissioner*, 37 T.C. 986, 987 (1962) ("Any allowance for depreciation is not an 'expense paid' or 'amount paid.'"). Expenses paid for items not located on or in the parking facility, including items related to property next to the parking facility, such as landscaping or lighting, also are not included.

Step 1. Calculate the disallowance for reserved employee spots

A taxpayer that owns or leases all or a portion of one or more parking facilities must identify the number of spots in the parking facility, or the taxpayer's portion thereof, exclusively reserved for the taxpayer's employees ("reserved employee spots"). Employee spots in the parking facility, or portion thereof, may be exclusively reserved for employees by a variety of methods, including, but not limited to, specific signage (for example, "Employee Parking Only") or a separate facility or portion of a facility segregated by a barrier to entry or limited by terms of access.

The taxpayer must then determine the percentage of reserved employee spots in relation to total parking spots and multiply that percentage by the taxpayer's total parking expenses for the parking facility. The product is the amount of the deduction for total parking expenses that is disallowed under § 274(a)(4) for reserved employee spots. Until March 31, 2019, taxpayers that have reserved employee spots as defined in this notice may change their parking arrangements (changing signage, access, etc.) to decrease or eliminate their reserved employee spots and treat those parking spots as not reserved employee spots for purposes of this notice retroactively to January 1, 2018.

Step 2. Determine the primary use of remaining spots (the "primary use test")

The taxpayer may identify the remaining parking spots in the parking facility and determine whether their primary use is to provide parking to the general public. If the primary use of the remaining parking spots in the parking facility is to provide parking to the general public, then the remaining total parking expenses for the parking facility are excepted from the § 274(a) disallowance by the general public exception under § 274(e)(7). For purposes of § 274(a)(4) and this notice, "primary use" means greater than 50 percent of actual or estimated usage of the parking spots in the parking facility. Primary use of the parking spots is tested during normal business hours on a typical business day, or in the case of an exempt organization during the normal hours of the exempt organization's activities on a typical day. Non-reserved parking spots that are available to the general public but empty during normal business hours on a typical business day, or in the case of an exempt organization, during the normal hours of the exempt organization's activities on a typical day, are treated as provided to the general public. In addition, if the actual or estimated usage of the parking spots varies significantly between days of the week or times of the year, the taxpayer may use any reasonable method to determine the average actual or estimated usage.

For purposes of § 274(a)(4) and this notice, the "general public" includes, but is not limited to, customers, clients, visitors, individuals delivering goods or services to the taxpayer, patients of a health care facility, students of an educational institution, and congregants of a religious organization. The general public does not include employees, partners or independent contractors of the taxpayer.

Step 3. Calculate the allowance for reserved nonemployee spots

If the primary use of a taxpayer's remaining parking spots is not to provide parking to the general public, the taxpayer may identify the number of spots in the parking facility, or the taxpayer's portion thereof, exclusively reserved for nonemployees ("reserved nonemployee spots"). For example, reserved nonemployee spots include spots reserved for visitors and customers, as well as spots reserved for partners, sole proprietors, and 2-percent shareholders of S Corporations.

The number of reserved nonemployee spots in the parking facility, or portion thereof, may be exclusively reserved for nonemployees by a variety of methods, including, but not limited to, specific signage (for example, "Customer Parking Only") or a separate facility or portion of a facility segregated by a barrier to entry or limited by terms of access. A taxpayer that has no reserved nonemployee spots may go to Step 4.

If the taxpayer has reserved nonemployee spots, it may determine the percentage of reserved nonemployee spots in relation to the remaining total parking spots and multiply that percentage by the taxpayer's remaining total parking expenses. The product is the amount of the deduction for remaining total parking expenses that is not disallowed under § 274(a)(4).

Step 4. Determine remaining use and allocable expenses

If the taxpayer completes Steps 1–3 in the methodology above and has any remaining parking expenses not specifically categorized as deductible or nondeductible, the taxpayer must reasonably determine the employee use of the remaining parking spots during normal business hours on a typical business day (or, in the case of an exempt organization, during the normal hours of the exempt organization's activities on a typical day) and the related expenses allocable to employee parking spots. Methods to determine employee use of the remaining parking spots may include specifically identifying the number of employee spots based on actual or estimated usage. Actual or estimated usage may be based on the number of spots, the number of employees, the hours of use, or other measures. *See* examples 7 and 8 below.

EXAMPLES

For each example, assume that the parking expenses are otherwise deductible expenses; that all or some portion of the expenses relate to a QTF under § 132(f); and that the § 132(f)(2) limitation on an employee's exclusion is $260 per month. For examples 3–10, also assume that the taxpayer or tax-exempt organization uses the methodology described in Steps 1–4 in Section B of this notice, as applicable.

Example 1. Taxpayer A pays B, a third party who owns a parking garage across the street from A, $100 per month for each of A's 10 employees to park in B's garage, or $12,000 per year (($100 × 10) × 12 = $12,000). The $100 per month paid for each employee for parking is excludible under § 132(a)(5), and none of the § 274(e) exceptions apply. Thus, the entire $12,000 is subject to the § 274(a)(4) disallowance.

Example 2. Assume the same facts as *Example 1*, except A pays B $300 per month for each employee, or $36,000 per year (($300 × 10) × 12 = $36,000). Of the $300 per month paid for parking for each employee, $260 is excludible under § 132(a)(5) and none of the § 274(e) exceptions apply to this amount. Thus, $31,200 (($260 × 10) × 12 = $31,200) is subject to the § 274(a)(4) disallowance.

The excess amount of $40 per employee per month is not excludible under § 132(a)(5) and is treated as compensation and wages. As a result, the § 274(e)(2) exception applies to this amount. Thus, $4,800 ($36,000 – $31,200 = $4,800) is not subject to the § 274(a)(4) disallowance and remains deductible.

Example 3. Taxpayer C, a big box retailer, owns a surface parking lot adjacent to its store. C incurs $10,000 of total parking expenses. C's parking lot has 500 spots that are used by its customers and employees. C usually has approximately 50 employees parking in the lot in non-reserved spots during normal business hours on a typical business day. C usually has approximately 300 non-reserved parking spots that are empty during normal business hours on a typical business day.

Step 1. Because none of C's parking spots are exclusively reserved for employees, there is no amount to be specifically allocated to reserved employee spots.

Step 2. The primary use of C's parking lot is to provide parking to the general public because 90% (450/500 = 90%) of the lot is used by the public. The 300 empty non-reserved parking spots are treated as provided to the general public. Thus, expenses allocable to these spots are excepted from the § 274(a) disallowance by § 274(e)(7). Because the primary use of the parking lot is to provide parking to the general public, none of the $10,000 is subject to the § 274(a)(4) disallowance.

Example 4. Taxpayer D, a manufacturer, owns a surface parking lot adjacent to its plant. D incurs $10,000 of total parking expenses. D's parking lot has 500 spots that are used by its visitors and employees. D usually has approximately 400 employees parking in the lot in non-reserved spots during normal business hours on a typical business day. Additionally, D has 25 spots reserved for nonemployee visitors.

Step 1. Because none of D's parking spots are exclusively reserved for employees, there is no amount to be specifically allocated to reserved employee spots.

Step 2. The primary use of D's parking lot is not to provide parking to the general public because 80% (400/500 = 80%) of the lot is used by its employees. Thus, expenses allocable to those spots are not excepted from the § 274(a) disallowance by § 274(e)(7) under the primary use test.

Step 3. Because 5% (25/500 = 5%) of D's parking lot spots are reserved nonemployee spots, up to $9,500 ($10,000 × 95% = $9,500) of D's total parking expenses are subject to the § 274(a)(4) disallowance under this step.

Step 4. D must reasonably determine the employee use of the remaining parking spots during normal business hours on a typical business day and the expenses allocable to employee parking spots.

Example 5. Taxpayer E, a manufacturer, owns a surface parking lot adjacent to its plant. E incurs $10,000 of total parking expenses. E's parking lot has 500 spots that are used by its visitors and employees. E has 50 spots reserved for management and has approximately 400 employees parking in the lot in non-reserved spots during normal business hours on a typical business day. Additionally, E has 10 reserved nonemployee spots for visitors.

Step 1. Because E has 50 reserved spots for management, $1,000 ((50/500) × $10,000 = $1,000) is the amount of total parking expenses that is nondeductible for reserved employee spots under § 274(a)(4).

Step 2. The primary use of the remainder of E's parking lot is not to provide parking to the general public because 89% (400/450 = 89%) of the remaining parking spots in the lot are used by its employees. Thus, expenses allocable to these spots are not excepted from the § 274(a) disallowance by § 274(e)(7) under the primary use test.

Step 3. Because 2% (10/450 = 2.22%) of E's remaining parking lot spots are reserved nonemployee spots, the $180 allocable to those spots (($10,000-$1,000) × 2%)) is not subject to the § 274(a)(4) disallowance and continues to be deductible.

Step 4. E must reasonably determine the employee use of the remaining parking spots during normal business hours on a typical business day and the expenses allocable to employee parking spots.

Example 6. Taxpayer F, a financial services institution, owns a multi-level parking garage adjacent to its office building. F incurs $10,000 of total parking expenses. F's parking garage has 1,000 spots that are used by its visitors and employees. However, one floor of the parking garage is segregated by an electronic barrier and can be entered only with an access card provided by F to its employees. The segregated floor of the parking garage contains 100 spots. The other floors of the parking garage are not used by employees for parking during normal business hours on a typical business day.

Step 1. Because F has 100 reserved spots for employees, $1,000 ((100/1,000) × $10,000 = $1,000) is the amount of total parking expenses that is nondeductible for reserved employee spots under § 274(a)(4).

Step 2. The primary use of the remainder of F's parking lot is to provide parking to the general public because 100% (900/900 = 100%) of the remaining parking spots are used by the public. Thus, expenses allocable to those spots are excepted from the § 274(a) disallowance by § 274(e)(7) under the primary use test, and only $1,000 is subject to the § 274(a)(4) disallowance.

Example 7. Taxpayer G, an accounting firm, leases a parking lot adjacent to its office building. G incurs $10,000 of total parking expenses related to the lease payments. G's leased parking lot has 100 spots that are used by its clients and employees. G usually has approximately 60 employees parking in the leased parking lot in non-reserved spots during normal business hours on a typical business day.

Step 1. Because none of G's leased parking spots are exclusively reserved for employees, there is no amount to be specifically allocated to reserved employee spots.

Step 2. The primary use of G's leased parking lot is not to provide parking to the general public because 60% (60/100 = 60%) of the lot is used by its employees. Thus, G may not utilize the general public exception from the § 274(a) disallowance provided by § 274(e)(7).

Step 3. Because none of G's parking spots are exclusively reserved for nonemployees, there is no amount to be specifically allocated to reserved nonemployee spots.

Step 4. G must reasonably determine the use of the parking spots and the related expenses allocable to employee parking. Because 60% (60/100 = 60%) of G's parking spots are used by G's employees during normal business hours on a typical business day, G reasonably determines that \$6,000 (\$10,000 × 60% = \$6,000) of G's total parking expenses is subject to the § 274(a)(4) disallowance.

Example 8. Taxpayer H, a large manufacturer, owns multiple parking lots and garages adjacent to its manufacturing plant, warehouse, and office building at its complex in the city of X. H owns parking lots and garages in other cities as well. For purposes of applying the methodology in this notice, H chooses to aggregate the parking spots in the lots and garages at its complex in city X. However, H may not aggregate the spots in parking lots and garages in other cities with its parking spots in city X. H incurs \$50,000 of total parking expenses related to the parking lots and garages at its complex in city X. H's parking lots and garages at its complex in city X have 10,000 spots in total that are used by its visitors and employees. H has 500 spots reserved for management and has approximately 8,000 employees parking in the garages and lots in non-reserved spots during normal business hours on a typical business day at H's complex in city X.

Step 1. Because H has 500 reserved spots for management, \$2,500 ((500/10,000) × \$50,000 = \$2,500) is the amount of total parking expenses that is nondeductible for reserved employee spots under § 274(a)(4).

Step 2. The primary use of the remainder of H's parking facility is not to provide parking to general public because 84% (8,000/9,500 = 84%) of the remaining parking spots in the facility are used by its employees. Thus, expenses allocable to these spots are not excepted from the § 274(a) disallowance by § 274(e)(7) under the primary use test.

Step 3. Because none of H's parking spots are exclusively reserved for nonemployees, there is no amount to be specifically allocated to reserved nonemployee spots.

Step 4. H must reasonably determine the employee use of the remaining parking spots during normal business hours on a typical business day and the expenses allocable to employee parking spots at its complex in city X. Because 84% (8,000/9,500 = 84%) of the remaining parking spots in the lot are used by its employees during normal business hours on a typical business day, H reasonably determines that \$39,900 ((\$50,000–\$2,500) × 84% = \$39,900) of H's total parking expenses is subject to the § 274(a)(4) disallowance.

INTERIM GUIDANCE ON SECTION 512(a)(7) ISSUES

As noted above, under the Act, tax-exempt organizations that have employees are required by § 512(a)(7) to increase their UBTI by any amount for which a deduction is not allowable by reason of § 274 for any QTF (as defined by § 132(f)), any parking facility used in connection with qualified parking (as defined in § 132(f)(5)(C)), or any on-premises athletic facility (as defined in § 132(j)(4)(B)). Because § 512(a)(7) increases UBTI for any QTF amount for which a deduction is disallowed by reason of § 274, the rules governing tax-exempt organizations necessarily mirror the rules for taxpayers under § 274. *See* H.R. Rep. No. 115–409, at 266 (2017) ("The Committee believes that aligning the tax treatment between for-profit and tax-exempt employers with respect to nontaxable transportation and gym benefits provided to employees will make the tax system simpler and fairer for all businesses."). However, § 512(a)(7) does not apply to the extent the amount paid or incurred is directly connected with an unrelated trade or business that is regularly carried on by the organization. In such case, the amount of the QTF expenses directly connected with the unrelated trade or business is subject to the disallowance under § 274(a)(4) and, thus, is disallowed as a deduction in calculating the UBTI attributable to such unrelated trade or business under the general rule of § 512(a)(1).

Section 512(a)(7) specifically requires UBTI to be increased by any amount for which a deduction is not allowable under § 274 for any parking facility used in connection with qualified parking (as defined in § 132(f)(5)(C)). Although parking facilities are not separately listed in § 274(a)(4), § 274(a)(4) disallows a deduction for QTFs (as defined in § 132(f)), and § 132(f)(1)(C) provides that QTFs include qualified parking. Under § 132(f)(5)(C) and § 1.132–9(b), Q/A–4, qualified parking means parking provided to an employee by an employer on or near the employer's business premises or at a location from which the employee commutes to work (other than property used by the employee for residential purposes) and may be provided on property that the employer owns or leases. Thus, the expenses for a parking facility referenced in § 512(a)(7) are those expenses related to the property an employer owns or leases, at or near the employer's business or at a location from which the employee commutes to work. Expenses for these parking facilities used in connection with qualified parking and as part of the provision of qualified parking are nondeductible under § 274(a)(4) as expenses for QTFs and result in an increase in UBTI under § 512(a)(7). Section 512(a)(7) mentions on-premises athletic facilities. However, the Act did not include a corresponding change to § 274 disallowing deductions generally for on-premises athletic facilities. Accordingly, a deduction for expenses paid or incurred for on-premises athletic facilities is not disallowed under § 274 if the athletic facility is primarily for the benefit of the tax-exempt organization's employees and does not discriminate in favor of highly compensated employees. *See* § 274(e)(4); § 1.274–2(f)(2)(v).

The provision of QTFs that results in an increase in UBTI under § 512(a)(7) is not an unrelated trade or business. See Notice 2018–67, 2018–36 I.R.B. 409, which discusses and solicits comments regarding the calculation of UBTI under § 512(a)(6) for exempt organizations with more than one unrelated trade or business. Therefore, any increase in UBTI under § 512(a)(7) is not subject to § 512(a)(6), meaning that an exempt organization with only one unrelated trade or business and an increase in UBTI under § 512(a)(7) does not become an exempt organization with more than one unrelated trade or business subject to § 512(a)(6). Accordingly, for taxable years beginning after December 31, 2017, until further guidance is issued, a tax-exempt organization with only one unrelated trade or business can reduce the increase to UBTI under § 512(a)(7) to the extent that the deductions directly connected with the carrying on of that unrelated trade or business exceed the gross income derived from such unrelated trade or business.

Section 512(b)(12) generally provides a specific deduction of \$1,000 as a modification to the UBTI otherwise determined under § 512(a), which, after the Act, includes the increase in UBTI determined under § 512(a)(7). Furthermore, tax-exempt organizations are required to file a return on Form 990–T, *Exempt Organiza-*

tion Business Income Tax Return, if they have gross income, included in computing UBTI, of $1,000 or more. *See* § 1.6012–2(e). This threshold amount for filing Form 990–T also applies to UBTI calculated with respect to § 512(a)(7). Therefore, organizations for which the sum of (1) gross income from unrelated trades or businesses and (2) the increase of UBTI under § 512(a)(7) is less than $1,000 need not file a Form 990–T. Organizations for which this amount is $1,000 or more must file a Form 990–T. The Treasury Department and the IRS intend to revise the regulations under § 6012 to clarify that amounts which increase UBTI under § 512(a)(7) are included in applying the § 1,000 threshold for filing the Form 990–T.

EXAMPLES FOR TAX-EXEMPT ORGANIZATIONS

The principles illustrated in examples 1 through 8 above apply to tax-exempt organizations. Accordingly, the amount of the deduction disallowed under § 274(a)(4) for each entity would, in the case of a tax-exempt organization with the same relevant facts, be the increase in UBTI under § 512(a)(7). These principles are further illustrated by the following examples:

Example 9. Tax-Exempt Organization J, a religious organization that operates a church and a school, owns a surface parking lot adjacent to its buildings. J incurs $10,000 of total parking expenses. J's parking lot has 500 spots that are used by its congregants, students, visitors, and employees, and 10 spots that are reserved for certain employees. During the normal hours of J's activities on weekdays, J usually has approximately 50 employees parking in the lot in non-reserved spots and approximately 440 non-reserved parking spots that are empty. During the normal hours of J's activities on weekends, J usually has approximately 400 congregants parking in the lot in non-reserved spots and 20 employees parking in the lot in non-reserved spots.

Step 1. Because J has 10 reserved spots for certain employees, $200 ((10/500) × $10,000 = $200) is the amount of total parking expenses that is nondeductible for reserved employee spots under § 274(a)(4). Thus, under § 512(a)(7), J must increase its UBTI by $200, the amount of the deduction disallowed under § 274(a)(4).

Step 2. Because usage of the parking spots varies significantly between days of the week, J uses a reasonable method to determine that the primary use of the remainder of J's parking lot is to provide parking to the general public because 90% (440/490 = 90%) of the spots are used by the public during the weekdays and 95% (470/490) of the spots are used by the public on the weekends. The empty, non-reserved parking spots are treated as provided to the general public. Thus, expenses allocable to these spots are excepted from the § 274(a) disallowance by § 274(e)(7) under the primary use test, and only $200 of the $10,000 is subject to the § 274(a)(4) disallowance. Therefore, only $200 of the expenses for the provision of the QTF will result in an increase to UBTI under § 512(a)(7).

If J does not have gross income from any unrelated trades or businesses of $800 or more included in computing its UBTI (to reach the $1,000 filing threshold), J is not required to file a Form 990–T for that year.

Example 10. Tax-Exempt Organization K is a hospital and owns a surface parking lot adjacent to its building. K incurs $10,000 of total parking expenses. K's parking lot has 500 spots that are used by its patients, visitors, and employees. K has 50 spots reserved for management and has approximately 100 employees parking in the lot in non-reserved spots during the normal operating hours of the hospital.

Step 1. Because K has 50 reserved spots for employees, $1,000 ((50/500) × $10,000 = $1,000) is the amount of total parking expenses that is nondeductible for reserved employee spots under § 274(a)(4). Thus, under § 512(a)(7), K must increase its UBTI by $1,000, the amount of the deduction disallowed under § 274(a)(4).

Step 2. The primary use of the remainder of K's parking lot is to provide parking to the general public because 78% (350/450 = 78%) of the remaining spots in the lot are open to the public. Thus, expenses allocable to these spots are excepted from the § 274(a) disallowance by § 274(e)(7) under the primary use test, and only $1,000 is subject to the § 274(a)(4) disallowance. Therefore, only $1,000 of the expenses for the provision of the QTF will result in an increase in UBTI under § 512(a)(7).

K will need to add the $1,000 increase of UBTI under § 512(a)(7) to its gross income from unrelated trades or businesses. K is required to file a Form 990–T because the $1,000 increase to UBTI under § 512(a)(7) meets the filing threshold.

RELIANCE

Until further guidance is issued, taxpayers may rely on the guidance provided in this notice to determine the amount of expenses for QTFs that is nondeductible under § 274(a)(4) or treated as an increase in UBTI under § 512(a)(7).

REQUEST FOR COMMENTS

The Treasury Department and the IRS request comments for future guidance to further clarify the treatment of QTFs under §§ 274 and 512. In particular, the Treasury Department and the IRS request comments about the definitions of "primary use" and "general public" and whether primary use should be used to determine the extent to which parking is made available to the general public under § 274(e)(7). The Treasury Department and the IRS request comments on other methods for determining the use of the parking spots and the related expenses allocable to employee parking. The Treasury Department and the IRS also request comments on the applicability of § 274(e)(8) to expenses for any goods or services that constitute a QTF sold by the taxpayer to an employee in a bona fide transaction for an adequate and full consideration in money or money's worth and the circumstances under which such a transaction should be excluded from the term QTF for purposes of § 274(a)(4).

WHERE TO SEND COMMENTS

Public comments should be submitted by February 22, 2019 and should include a reference to Notice 2018–99. Comments may be submitted electronically via the Federal eRulemaking Portal at ***www.regulations.gov*** (type IRS–2018–0038 in the search field on the ***regulations.gov*** homepage to find this notice and submit comments). Alternatively, submissions may be sent by one of the following methods:

- By Mail:

  Internal Revenue Service
  Attn: CC:PA:LPD:PR (Notice 2018–99)
  Room 5203
  P.O. Box 7604
  Ben Franklin Station
  Washington, DC 20044

- By Hand or Courier Delivery: Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to:

Courier's Desk
Internal Revenue Service
Attn: CC:PA:LPD:PR
(Notice 2018–99)
1111 Constitution Avenue, NW
Washington, DC 20224

All recommendations for guidance submitted by the public in response to this notice will be available for public inspection and copying in their entirety.

DRAFTING INFORMATION

The principal author of this notice is Patrick M. Clinton of the Office of Associate Chief Counsel (Income Tax & Accounting). However, other personnel from the Treasury Department and the IRS participated in its development. For further information about income tax issues addressed in this notice, please contact Patrick M. Clinton at (202) 317-7005; for further information about qualification as a QTF, please contact Mikhail Zhidkov at (202) 317-4774; and for further information about exempt organization issues addressed in this notice, please contact La Vonne Fischer at (202) 317-5800. These are not toll-free numbers.

Relief from Additions to Tax for Underpayment of Estimated Income Tax for Tax-Exempt Organizations That Provide Certain Qualified Transportation Fringes

Notice 2018–100

This notice provides certain tax-exempt organizations a waiver of the addition to tax under section 6655 of the Internal Revenue Code (Code) for underpayment of estimated income tax payments required to be made on or before December 17, 2018, to the extent the underpayment of estimated income tax results from the changes to the tax treatment of qualified transportation fringes under sections 13304(c) and 13703 of "An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018" (the Act). Pub. L. No. 115–97, 131 Stat. 2054. This relief applies to a tax-exempt organization that (1) provides qualified transportation fringes (as defined in section 132(f)) to an employee for which estimated income tax payments, affected by changes to sections 274 and 512 under the Act, would otherwise be required to be made on or before December 17, 2018, and (2) was not required to file a Form 990–T, Exempt Organization Business Income Tax Return, for the taxable year preceding the organization's first taxable year ending after December 31, 2017. This relief is limited to tax-exempt organizations that timely file Form 990-T and timely pay the amount reported for the taxable year for which relief is granted.

BACKGROUND

Generally, the Code requires taxpayers to pay federal income taxes as they earn income. To the extent these taxes are not withheld, a taxpayer must pay estimated income tax on a quarterly basis.

Subsections 6655(c) and (d)(1)(A) of the Code generally provide that, in the case of a corporation, private foundation, private foundation organized as a trust, or tax-exempt organization, estimated income tax is required to be paid in four installments and the amount of any required installment is 25 percent of the required annual payment. Generally, under section 6655(d)(1)(B), the required annual payment is the lesser of (i) 100 percent of the tax shown on the return for the taxable year or (ii) 100 percent of the tax shown on the taxpayer's return for the preceding taxable year, so long as the preceding taxable year was a full twelve months long. However, section 6655(d)(1)(B)(ii) shall not apply if the preceding taxable year was not a taxable year of 12 months, or the corporation did not file a return for such preceding taxable year showing a liability for tax. Under section 6655(e), the amount of the required installment is the annualized income installment or adjusted seasonal installment for those taxpayers who establish that such amount is lower than 25 percent of the required annual payment determined under section 6655(d). Section 6655(a) imposes an addition to tax for failure to make a sufficient and timely payment of estimated income tax.

On December 22, 2017, the Act amended the Code. Among other things, the Act affected employers who provide qualified transportation fringes to employees. Under section 274(a)(4), added by section 13304(c) of the Act, employers may no longer deduct expenses for qualified transportation fringes provided to employees. Section 13304(c) of the Act also added section 274(l), which disallows deductions for transportation and commuting benefits except as necessary for ensuring the safety of the employee. Section 274(l)(2) provides that deductions for qualified bicycle commuting reimbursements (as described in section 132(f)(5)(F)) are not disallowed by section 274(l)(1) for any amounts paid or incurred after December 31, 2017, and before January 1, 2026. Section 274(a)(4) does not disallow deductions for qualified bicycle commuting reimbursements during the same period because section 132(f)(8) suspends their exclusion from gross income for any taxable year beginning after December 31, 2017 and before January 1, 2026. Thus, for the suspension period, qualified bicycle reimbursements are not qualified transportation fringes.

Under section 512(a)(7), added by section 13703 of the Act, tax-exempt organizations must increase unrelated business taxable income (UBTI) by any amount for which a deduction is not allowable by reason of section 274 and which is paid or incurred for any qualified transportation fringes (as defined in section 132(f)) and any parking facility used in connection with qualified parking (as defined in section 132(f)(5)(C)). (While new section 512(a)(7) also mentions on-premises athletic facilities, the Act did not include a corresponding change to section 274; accordingly, a deduction for expenses paid or incurred for on-premises athletic facilities is disallowed due to application of section 274 only if it discriminates in favor of highly compensated employees. See IRC § 274(e)(4). This Notice does not address the possibility of estimated tax payments of UBTI related to discriminatory on-premises athletic facilities.) These provisions are effective for amounts paid or incurred after December 31, 2017.

TRANSITIONAL RELIEF FOR UNDERPAYMENT OF ESTIMATED INCOME TAX

Enactment of section 512(a)(7) may result in tax-exempt organizations owing unrelated business income tax and having to pay estimated income tax for the first time. These taxpayers would not be eligible to use the safe harbor in section 6655(d)(1)(B)(ii) to calculate the required annual payment of estimated income tax on the basis of the tax shown on the return for the taxpayer's preceding taxable year and may need additional time to develop the knowledge and processes to comply with estimated income tax payment requirements. Accordingly, in the interest of sound tax administration, the addition to tax under section 6655 for failure to make estimated income tax payments otherwise required to be made on or before December 17, 2018, is waived for certain tax-exempt organizations that provide qualified transportation fringes (as defined in section 132(f)) and any parking facility used in connection with qualified parking (as defined in section 132(f)(5)(C)) to an employee to the extent that the underpayment of estimated income tax results from enactment of section 13304(c) and section 13703 of the Act. This relief is available only to any tax-exempt organization that was not required to file a Form 990–T for the taxable year immediately preceding the organization's first taxable year ending after December 31, 2017. This relief is limited to tax-exempt organizations that timely file Form 990–T and timely pay the amount reported for the taxable year for which relief is granted. Taxpayers who do not qualify for relief under this notice may avoid an addition to tax for underpayment of estimated income tax if they meet one of the statutory safe harbor or exception provisions under section 6654 or section 6655 of the Code.

To claim the waiver under this notice, the tax-exempt organization must write "Notice 2018–100" on the top of its Form 990–T.

Simultaneous to the publication of this Notice, Notice 2018–99 is being published which provides interim guidance for taxpayers to determine the amount of parking expenses for qualified transportation fringes that is nondeductible under section 274(a)(4) of the Code and for tax-exempt organizations to determine the corresponding increase in the amount of UBTI under section 512(a)(7) attributable to the nondeductible parking expenses.

CONTACT INFORMATION

The principal author of this notice is Michael A. Franklin of the Office of the Associate Chief Counsel (Procedure and Administration). For further information, please contact Mr. Franklin at (202) 317-6844 (not a toll-free number).

Definition of Terms

Revenue rulings and revenue procedures (hereinafter referred to as "rulings") that have an effect on previous rulings use the following defined terms to describe the effect:

Amplified describes a situation where no change is being made in a prior published position, but the prior position is being extended to apply to a variation of the fact situation set forth therein. Thus, if an earlier ruling held that a principle applied to A, and the new ruling holds that the same principle also applies to B, the earlier ruling is amplified. (Compare with *modified*, below).

Clarified is used in those instances where the language in a prior ruling is being made clear because the language has caused, or may cause, some confusion. It is not used where a position in a prior ruling is being changed.

Distinguished describes a situation where a ruling mentions a previously published ruling and points out an essential difference between them.

Modified is used where the substance of a previously published position is being changed. Thus, if a prior ruling held that a principle applied to A but not to B, and the new ruling holds that it applies to both A and B, the prior ruling is modified because it corrects a published position. (Compare with *amplified* and *clarified*, above).

Obsoleted describes a previously published ruling that is not considered determinative with respect to future transactions. This term is most commonly used in a ruling that lists previously published rulings that are obsoleted because of changes in laws or regulations. A ruling may also be obsoleted because the substance has been included in regulations subsequently adopted.

Revoked describes situations where the position in the previously published ruling is not correct and the correct position is being stated in a new ruling.

Superseded describes a situation where the new ruling does nothing more than restate the substance and situation of a previously published ruling (or rulings). Thus, the term is used to republish under the 1986 Code and regulations the same position published under the 1939 Code and regulations. The term is also used when it is desired to republish in a single ruling a series of situations, names, etc., that were previously published over a period of time in separate rulings. If the new ruling does more than restate the substance of a prior ruling, a combination of terms is used. For example, *modified* and *superseded* describes a situation where the substance of a previously published ruling is being changed in part and is continued without change in part and it is desired to restate the valid portion of the previously published ruling in a new ruling that is self contained. In this case, the previously published ruling is first modified and then, as modified, is superseded.

Supplemented is used in situations in which a list, such as a list of the names of countries, is published in a ruling and that list is expanded by adding further names in subsequent rulings. After the original ruling has been supplemented several times, a new ruling may be published that includes the list in the original ruling and the additions, and supersedes all prior rulings in the series.

Suspended is used in rare situations to show that the previous published rulings will not be applied pending some future action such as the issuance of new or amended regulations, the outcome of cases in litigation, or the outcome of a Service study.

Abbreviations

The following abbreviations in current use and formerly used will appear in material published in the Bulletin.

A—Individual.
Acq.—Acquiescence.
B—Individual.
BE—Beneficiary.
BK—Bank.
B.T.A.—Board of Tax Appeals.
C—Individual.
C.B.—Cumulative Bulletin.
CFR—Code of Federal Regulations.
CI—City.
COOP—Cooperative.
Ct.D.—Court Decision.
CY—County.
D—Decedent.
DC—Dummy Corporation.
DE—Donee.
Del. Order—Delegation Order.
DISC—Domestic International Sales Corporation.
DR—Donor.
E—Estate.
EE—Employee.
E.O.—Executive Order.
ER—Employer.
ERISA—Employee Retirement Income Security Act.
EX—Executor.
F—Fiduciary.
FC—Foreign Country.
FICA—Federal Insurance Contributions Act.
FISC—Foreign International Sales Company.
FPH—Foreign Personal Holding Company.
F.R.—Federal Register.
FUTA—Federal Unemployment Tax Act.
FX—Foreign corporation.
G.C.M.—Chief Counsel's Memorandum.
GE—Grantee.
GP—General Partner.
GR—Grantor.
IC—Insurance Company.
I.R.B.—Internal Revenue Bulletin.
LE—Lessee.
LP—Limited Partner.
LR—Lessor.
M—Minor.
Nonacq.—Nonacquiescence.
O—Organization.
P—Parent Corporation.
PHC—Personal Holding Company.
PO—Possession of the U.S.
PR—Partner.
PRS—Partnership.
PTE—Prohibited Transaction Exemption.
Pub. L.—Public Law.
REIT—Real Estate Investment Trust.
Rev. Proc.—Revenue Procedure.
Rev. Rul.—Revenue Ruling.
S—Subsidiary.
S.P.R.—Statement of Procedural Rules.
Stat.—Statutes at Large.
T—Target Corporation.
T.C.—Tax Court.
T.D.—Treasury Decision.
TFE—Transferee.
TFR—Transferor.
T.I.R.—Technical Information Release.
TP—Taxpayer.
TR—Trust.
TT—Trustee.
U.S.C.—United States Code.
X—Corporation.
Y—Corporation.
Z—Corporation.

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[1]A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2018–01 through 2018–26 is in Internal Revenue Bulletin 2018–26, dated June 27, 2018.

Internal Revenue Service
Washington, DC 20224

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INTERNAL REVENUE BULLETIN

The Introduction at the beginning of this issue describes the purpose and content of this publication. The weekly Internal Revenue Bulletins are available at *www.irs.gov/irb/*.

We Welcome Comments About the Internal Revenue Bulletin

If you have comments concerning the format or production of the Internal Revenue Bulletin or suggestions for improving it, we would be pleased to hear from you. You can email us your suggestions or comments through the IRS Internet Home Page (*www.irs.gov*) or write to the Internal Revenue Service, Publishing Division, IRB Publishing Program Desk, 1111 Constitution Ave. NW, IR-6230 Washington, DC 20224.