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Temporary Business-Related Tax Provisions Expiring 2021-2027 and Business "Tax Extenders"

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Temporary and Expiring Business Tax Provisions

SUMMARY

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Fifteen temporary business tax provisions that expired in 2020 were extended or made permanent by the Taxpayer Certainty and Disaster Tax Relief Act of 2020, enacted as Division EE of the Consolidated Appropriations Act, 2021 (P.L. 116-260). Sixteen additional business tax provisions are scheduled to expire between 2021 and 2027. Some of these provisions were enacted as part of the 2017 tax revision, commonly called the "Tax Cuts and Jobs Act" (TCJA; P.L. 115-97). Other expiring business tax provisions were enacted as part of Coronavirus Disease 2019 (COVID-19) tax relief legislation enacted in 2020 and 2021. This report briefly summarizes and discusses the economic impact of the 31 business-related tax provisions that are scheduled to expire by 2027, as well as two provisions that have been made permanent. These provisions include the following:

Provisions Expiring in 2021

Traditional Tax Extenders

- Three-Year Depreciation for Racehorses Two Years or Younger
- Accelerated Depreciation for Business Property on an Indian Reservation
- American Samoa Economic Development Credit
- Indian Employment Tax Credit
- Mine Rescue Team Training Credit
- The Rum Cover Over

Other Temporary Provisions

- Computation of Adjusted Taxable Income Without Regard to Any Deduction Allowable for Depreciation, Amortization, or Depletion
- 12.5% Increase in Annual LIHTC Authority
- Temporary Business Provision Enacted in the Families First Coronavirus Response Act, 2020, and Subsequently Extended
- Payroll Tax Credits for COVID-19 Sick and Family Leave
- Employee Retention and Rehiring Credit
- Prevention of Partial Plan Termination

Provisions Expiring in 2022

Traditional Tax Extender

- 50% Rate for Railroad Track Maintenance

Other Temporary Provision

- Full Deduction for Business Meals

Provisions Expiring in 2025

Traditional Tax Extenders

- Special Expensing Rules for Certain Film, Television, and Live Theatrical Productions
- Seven-Year Recovery Period for Motorsports Entertainment Complexes
- Empowerment Zone Tax Incentives
- New Markets Tax Credit
- Employer Tax Credit for Paid Family and Medical Leave
- Work Opportunity Tax Credit

- Transfers of Excess Pension Assets to Retiree Health and Life Insurance Plans
- Look-Through Treatment of Payments Between Related Controlled Foreign Corporations

Other Temporary Provisions

- Deductibility of Employer De Minimis Meals and Related Eating Facility, and Meals for the Convenience of the Employer
- Higher Exclusion Rates for GILTI and FDII
- Lower Tax Rates and Credits for BEAT
- 20% Deduction for Pass-Through Businesses

Provisions Expiring in 2026 or 2027

Other Temporary Provisions Expiring in 2026

- Limit on Excess Business Losses of Noncorporate Taxpayers
- First Year Depreciation
- Additional Depreciation for Trees Producing Fruits and Nuts
- Election to Invest Capital Gains in an Opportunity Zone

Other Temporary Provision Expiring in 2027

- Citrus Plants Lost by Casualty

Business Tax Extender Provisions Made Permanent

- Credit for Certain Expenditures for Maintaining Railroad Tracks
- Provisions Modifying the Excise Taxes on Wine, Beer, and Distilled Spirits

For other reports related to extenders, see

- CRS Report R46772, *Temporary Individual Tax Provisions ("Tax Extenders")*, coordinated by Molly F. Sherlock and Jane G. Gravelle;
- CRS Report R46627, *Tax Provisions Expiring in 2020 ("Tax Extenders")*, by Molly F. Sherlock; and
- CRS Report R46451, *Energy Tax Provisions Expiring in 2020, 2021, 2022, and 2023 ("Tax Extenders")*, by Molly F. Sherlock, Margot L. Crandall-Hollick, and Donald J. Marples.

Contents

Introduction 1
Tax Provisions Expiring in 2021 3
Business "Tax Extenders" 3
Three-Year Depreciation for Racehorses Two Years or Younger 3
Accelerated Depreciation for Business Property on an Indian Reservation 4
American Samoa Economic Development Credit 5
Indian Employment Tax Credit 5
Mine Rescue Team Training Credit 6
The Rum Cover Over 7
Temporary Business Provision Enacted in the Tax Cuts and Jobs Act (2017) 7
Computation of Adjusted Taxable Income Without Regard to Any Deduction Allowable for Depreciation, Amortization, or Depletion 7
Temporary Business Provision Enacted in the Consolidated Appropriations Act, 2018 8
12.5% Increase in Annual LIHTC Authority 8
Temporary Business Provision Enacted in the Families First Coronavirus Response Act (2020) and Subsequently Extended Through September 30, 2021 9
Payroll Tax Credits for COVID-19 Sick and Family Leave 9
Temporary Business Provision Enacted in the CARES Act (2020) and Subsequently Extended 9
Employee Retention and Rehiring Credit 9
Temporary Business Provision Enacted in the Consolidated Appropriations Act, 2021 11
Prevention of Partial Plan Termination 11
Tax Provisions Expiring in 2022 11
Business "Tax Extenders" 11
50% Rate for Railroad Track Maintenance 11
Temporary Provision Enacted in the Tax Cuts and Jobs Act (2017) and Subsequently Extended 11
Full Deduction for Business Meals 11
Tax Provisions Expiring in 2025 12
Business "Tax Extenders" 12
Special Expensing Rules for Certain Film, Television, and Live Theatrical Productions 12
Seven-Year Recovery Period for Motorsports Entertainment Complexes 13
Empowerment Zone Tax Incentives 14
New Markets Tax Credit 15
Employer Tax Credit for Paid Family and Medical Leave 16
Work Opportunity Tax Credit 17
Transfers of Excess Pension Assets to Retiree Health and Life Insurance Plans 18
Look-Through Treatment of Payments Between Related Controlled Foreign Corporations 18
Temporary Tax Provisions Enacted in the Tax Cuts and Jobs Act (2017) 20
Deductibility of Employer *De Minimis* Meals and Related Eating Facility, and Meals for the Convenience of the Employer 20
Higher Exclusion Rates for GILTI and FDII 20
Lower Tax Rates and Credits for BEAT 21
20% Deduction for Pass-Through Businesses 22

Provisions Expiring in 2026 ... 22
Temporary Provisions Enacted in the Tax Cuts and Jobs Act (2017) ... 22
Limit on Excess Business Losses of Noncorporate Taxpayers ... 22
First-Year Depreciation ... 23
Additional Depreciation for Trees Producing Fruits and Nuts ... 24
Election to Invest Capital Gains in an Opportunity Zone ... 24
Provision Expiring in 2027 ... 25
Temporary Tax Provision Enacted by the Tax Cuts and Jobs Act (2017) ... 25
Citrus Plants Lost by Casualty ... 25
Provisions Made Permanent ... 25
Business "Tax Extenders" ... 25
Credit for Certain Expenditures for Maintaining Railroad Tracks ... 25
Provisions Modifying the Excise Taxes on Wine, Beer, and Distilled Spirits ... 26

Tables

Table 1. Estimated Cost of Extending Expired Business Tax Provisions in P.L. 116-260 and P.L. 117-2 ... 2

Contacts

Author Information ... 28

Introduction

Congress has regularly acted to extend expired or expiring temporary tax provisions.[1] Collectively, these temporary tax provisions are often referred to as "tax extenders." In addition, a number of provisions enacted in the 2017 tax revision, popularly known as the Tax Cuts and Jobs Act (TCJA, P.L. 115-97), were enacted on a temporary basis. Temporary provisions were also enacted, and in some cases extended, in bills addressing the Coronavirus Disease 2019 (COVID-19)-induced recession. This report briefly summarizes and discusses the economic impact of the 30 business-related tax provisions that are scheduled to expire by 2027, as well as two provisions that have been made permanent. It does not include energy-related provisions or individual provisions.[2] It also does not include scheduled tax code changes that are not the result of temporary provisions. For example, research expenditures have been expensed since 1954, but the TCJA provided that, starting in 2022, taxpayers will be required to capitalize and amortize those costs over 5 years for domestic research and 15 years for foreign research.[3]

There are 11 business-related temporary tax provisions scheduled to expire during or at the end of 2021. Six of these business-related provisions were included in past tax extenders legislation. Most recently, Congress enacted or extended nine of these expiring provisions in the Consolidated Appropriations Act, 2021 (P.L. 116-260) and the American Rescue Plan Act of 2021 (P.L. 117-2). These laws extended nine temporary tax provisions that had expired at the end of 2020 either partially into or through 2021. The two provisions partially extended into 2021 are the prevention of partial plan termination (extended through March 31, 2021) and the payroll tax credit for COVID-19-related sick and family leave (extended through September 30, 2021).

Two business provisions are scheduled to expire in 2022: the 50% credit rate for railroad track maintenance (otherwise made permanent with a 40% rate) and the full deduction for businesses meals enacted in the Consolidated Appropriations Act, 2021 (P.L. 116-260).

Twelve business provisions are scheduled to expire in 2025. Eight have been extended as part of past tax extenders legislation. Four were enacted in the TCJA (P.L. 115-97), which scheduled them to expire in 2025.[4]

Four business provisions are scheduled to expire in 2026. These provisions were added by the TCJA (P.L. 115-97). One, the limit on excess business interest, was a revenue raiser. It was scheduled to expire in 2025, but the effective date was extended to 2026 by the American Rescue Plan Act of 2021 (P.L. 117-2).

One business provision enacted in the TCJA (P.L. 115-97), a provision for citrus plants lost by casualty, is scheduled to expire in 2027.

Two temporary business provisions were made permanent: the railroad track maintenance credit and the modifications of the excise taxes on wine, beer, and distilled spirits.

The estimated costs of these and other temporary business tax provisions enacted or extended in the Consolidated Appropriations Act, 2021 (P.L. 116-260) and the American Rescue Plan Act of

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[1] For an overview of tax extenders, see CRS Report R46627, *Tax Provisions Expiring in 2020 ("Tax Extenders")*, by Molly F. Sherlock.

[2] For an overview of temporary individual provisions, see CRS Report R46772, *Temporary Individual Tax Provisions ("Tax Extenders")*, coordinated by Molly F. Sherlock and Jane G. Gravelle.

[3] For more information, see CRS Insight IN11479, *Section 174 and Investment in Research and Development*, by Gary Guenther.

[4] The employer credit for paid family and medical leave was also first enacted in TCJA (P.L. 115-97), with a 2019 expiration date.

2021 (P.L. 117-2) are provided in **Table 1**. The most costly of these provisions are the employee retention and rehiring credit ($30.8 billion), the work opportunity tax credit ($16.2 billion), the modifications of the excise taxes on wine, beer, and distilled spirits ($9.0 billion), the payroll tax credit for COVID-19-related sick and family leave ($7.9 billion), the full deduction for business meals ($6.3 billion), the new markets tax credit ($5.7 billion), the look-through rules ($4.3 billion), and the employer credit for paid family and medical leave ($3.8 billion). These more costly provisions are associated with COVID-19 relief legislation or were extended for five years. The extension of the limit on excess business interest deductions for one year is estimated to raise $31.0 billion.

Table 1. Estimated Cost of Extending Expired Business Tax Provisions in P.L. 116-260 and P.L. 117-2

(billions of dollars)

Provision	Length of Extension	Cost of Extension in P.L. 116-260	Cost of Extension in P.L. 117-2
Provisions Expiring in 2021			
Three-Year Depreciation for Racehorses Two Years or Younger	1 year	—	
Indian Employment Tax Credit	1 year	$0.1	
American Samoa Economic Development Credit	1 year	-i-	
Accelerated Depreciation for Business Property on an Indian Reservation	1 year	-i-	
American Samoa Economic Development Credit	1 year	-i-	
Mine Rescue Team Training Credit	1 year	-i-	
Payroll Tax Credit for COVID-19-Related Sick and Family Leave	3 months in P.L. 116-260 (through 3/31/2021); 6 months in P.L. 117-2 (through 9/30/2021)	$1.6	$6.3
Employee Retention and Rehiring Credit	6 months in P.L. 116-260 (through 6/30/2021); 6 months in P.L. 117-2 (through 12/31/2021)	$20.6	$10.2
Prevention of Partial Plan Termination	Applies to a plan year that includes the period beginning on 3/13/2020, and ending on 3/13/2021.	negligible	
Provisions Expiring in 2022			
Full Deduction for Business Meals	1 year	$6.3	
Provisions Expiring in 2025			
Special Expensing Rules for Certain Film, Television, and Live Theatrical Productions	5 years	$0.6	
Seven-Year Recovery Period for Motorsports Entertainment Complexes	5 years	$0.2	

Provision	Length of Extension	Cost of Extension in P.L. 116-260	Cost of Extension in P.L. 117-2
Empowerment Zone Tax Incentives	5 years	$1.4	
New Markets Tax Credit	5 years	$5.7	
Employer Credit for Paid Family and Medical Leave	5 years	$3.8	
Work Opportunity Tax Credit	5 years	$16.2	
Look-through Treatment of Payments Between Related Controlled Foreign Corporations	5 years	$4.3	
Provision Expiring in 2026			
Limits on the Deduction of Business Losses by Noncorporate Taxpayers	1 year (2026)		-$31.0
Provisions Made Permanent			
Credit for Certain Expenditures for Maintaining Railroad Tracks	permanent	$1.5	
Provisions Modifying the Excise Tax Rates of Wine, Beer, and Distilled Spirits	permanent	$9.0	

Sources: Joint Committee on Taxation, *Estimated Budget Effects Of The Revenue Provisions Contained In Rules Committee Print 116-68, The "Consolidated Appropriations Act, 2021"*, JCX-24-20, December 21, 2020; and Joint Committee on Taxation, *Estimated Revenue Effects Of H.R. 1319, The "American Rescue Plan Act Of 2021," As Amended By The Senate, Scheduled For Consideration By The House Of Representatives*, JCX-13-21, March 9, 2021.

Notes: The cost estimates are estimated reductions in revenue over a 10-year budget period (FY2021-FY2030). An "-i-" indicates an estimated revenue loss of less than $50 million between FY2020 and FY2029. A negative sign means a revenue gain. An "—" indicates no estimated revenue effect.

There are several options for Congress to consider regarding temporary provisions. Temporary provisions could be extended, and the extension could be short-term, long-term, or permanent. Alternatively, Congress could allow the provisions to expire and remain expired.

Tax Provisions Expiring in 2021

Business "Tax Extenders"

Three-Year Depreciation for Racehorses Two Years or Younger[5]

Racehorses are tangible property, and taxpayers using racehorses in a trade or business must capitalize (deduct over a period of years) the cost of purchasing racehorses. The cost can then be recovered through annual depreciation deductions over time. The cost recovery period for racehorses is seven years, although racehorses that begin training after age two have a three-year recovery period. Under the temporary provision, this three-year recovery period is extended to all racehorses. In particular, all racehorses placed in service after December 31, 2008, have a three-year recovery period as a result of the Food, Conservation, and Energy Act of 2008 (P.L. 110-246), with provisions subsequently extended. The provision was most recently extended through 2021 by the Consolidated Appropriations Act, 2021 (P.L. 116-260).

[5] IRC §168(e)(3)(A).

Advocates of a shorter depreciation period claim that reducing the recovery period to three years more closely aligns the recovery period with the racing life of a horse. The Internal Revenue Service (IRS) cost recovery period suggests a longer view. Some racehorses continue in productive activity after their racing careers through breeding, as well as having a residual value for resale. Taking those uses into account, a U.S. Department of Treasury study estimated an overall economic life of nine years.[6]

This provision does not affect breeders who race their own horses, because they deduct the cost of breeding and thus have no basis (capital investment) in the horses. The provision generally benefits investors who purchase racehorses.

The provision is currently less beneficial because racehorses are eligible for expensing under the general depreciation rules (as discussed below), and the revenue estimate in the recent extension indicates no revenue cost.

Accelerated Depreciation for Business Property on an Indian Reservation[7]

The Omnibus Budget Reconciliation Act of 1993 (P.L. 103-66) contained a provision allowing businesses on Indian reservations to be eligible for accelerated depreciation (through a reduction in the applicable recovery periods) as part of an effort to increase investment in businesses located on Indian reservations. Since its initial temporary enactment, this provision has regularly been extended as part of tax extenders legislation—most recently in the Consolidated Appropriations Act, 2021 (P.L. 116-260), which extended the provision through December 31, 2021.

Extending the provision might encourage additional investment on Indian reservations, which, in turn, could encourage eligible companies to locate, retain, or expand operations on Indian reservations. However, if these provisions' main objective is to improve the economic status of individuals currently living on Indian reservations, it is not clear to what extent this tax subsidy will succeed, because it is not given directly to workers but instead is received by businesses. Capital subsidies may not ultimately benefit workers. While more capital could increase worker productivity, it is possible that capital equipment subsidies may encourage more capital-intensive businesses and make workers relatively worse off. In addition, workers would not benefit from higher wages resulting from an employer subsidy if the wage is determined by regulation (the minimum wage) that is set higher than the prevailing market wage.

This provision is beneficial for structures; equipment is eligible for expensing under the general depreciation rules.

[6] U.S. Department of the Treasury, *Report to Congress on the Depreciation of Horses*, March 1990, at https://www.treasury.gov/resource-center/tax-policy/Documents/Report-Depreciation-Horses-1990.pdf.

[7] IRC §168(j)(8). See also Joint Committee on Taxation, *Overview Of Federal Tax Provisions And Analysis Of Selected Issues Relating To Native American Tribes And Their Members*, JCX-8-20, February 28, 2020, https://www.jct.gov/publications/2020/jcx-8-20/.

American Samoa Economic Development Credit[8]

The American Samoa economy is largely dependent on three sectors: public works and government, tuna canning, and the residual private sector (e.g., tourism and other services).[9]

The American Samoa economic development credit (EDC) is a credit against U.S. corporate income tax. The amount of the credit is equal to the sum of certain percentages of a domestic corporation's employee wages, employee fringe benefit expenses, and tangible property depreciation allowances for the taxable year with respect to the active conduct of a trade or business within American Samoa. The credit is available to U.S. corporations that, among other requirements, (1) claimed the now-expired possession tax credit (predecessor to the EDC) with respect to American Samoa for their last taxable year beginning before January 1, 2006; or (2) have qualified production activities income after December 31, 2011, in American Samoa (akin to production activities income eligible for Section 199 tax treatment in the United States).[10]

The credit's proponents claim it encourages eligible companies to locate, retain, or expand manufacturing operations in the territory. Media reports suggest the EDC's main beneficiary, thus far, has been StarKist, which has retained its cannery operations in American Samoa.[11]

The EDC was first enacted in the Tax Relief and Health Care Act of 2006 (P.L. 109-432). This version of the EDC was only available to corporations that had previously claimed the possession tax credit, and it originally expired at the end of 2007. It has been extended numerous times. The American Tax Relief Act of 2012 (P.L. 112-240) also expanded the EDC's criteria to include corporations that had not previously claimed the possession tax credit. The provision was extended through 2020 by the Further Consolidated Appropriations Act, 2020 (P.L. 116-94), and through 2021 by the Consolidated Appropriations Act, 2021 (P.L. 116-260).

Indian Employment Tax Credit[12]

The Indian employment tax credit is an incremental credit (applied to expenses in excess of a base) claimed by employers for qualified wages and health insurance costs. The credit is designed to encourage hiring of certain individuals—enrolled members of an Indian tribe and their spouses. There are restrictions limiting the benefit to services performed within an Indian reservation for individuals living on or near the reservation.

The Indian employment credit was first enacted in 1993, as part of the Omnibus Reconciliation Act of 1993 (P.L. 103-66), and is equal to 20% of the excess of qualified wages and health

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[8] Section 119 of the Tax Relief and Health Care Act of 2006 (P.L. 109-432) as amended by Section 756 of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (P.L. 111-312), based on the rules of IRC Sections 30A and 936.

[9] U.S. Government Accountability Office (GAO), *Economic Trends, Status of the Tuna Canning Industry, and Stakeholders' Views on Minimum Wage Increases*, GAO-20-467, June 2020, p. 19, at https://www.gao.gov/assets/gao-20-467.pdf.

[10] See Section 936 of H.Rept. 109-455 and Section 329 of P.L. 112-240. See also JCT, *General Explanation of Tax Legislation Enacted in 2015*, JCS-1-16, March 2016, pp. 196-198, at https://www.jct.gov/publications.html?func=startdown&id=4509. For more information on Section 199, see CRS Report R41988, *The Section 199 Production Activities Deduction: Background and Analysis*, by Molly F. Sherlock.

[11] GAO, *Economic Trends, Status of the Tuna Canning Industry, and Stakeholders' Views on Minimum Wage Increases*, GAO-20-467, June 2020, pp. 25, 35, at https://www.gao.gov/assets/gao-20-467.pdf.

[12] IRC §45A(f). See also Joint Committee on Taxation, *Overview Of Federal Tax Provisions And Analysis Of Selected Issues Relating To Native American Tribes And Their Members*, JCX-8-20, February 28, 2020, at https://www.jct.gov/publications/2020/jcx-8-20/.

insurance costs paid by an employer over base-year expenses. The credit is allowed for the first $20,000 in qualified wages and health insurance costs. Hence, the maximum amount of the credit is $4,000 (20% of $20,000). The $20,000 amount has not been changed since the credit was enacted and is not adjusted for inflation. As such, the incentive is incremental to 1993 wages and health insurance costs. The credit is not available for wages paid to an employee if their total wages exceed $30,000, as adjusted for inflation ($50,000 in 2020). The employer must reduce the deduction for wages by the amount of wages claimed for the credit.

The Indian employment credit was initially scheduled to expire at the end of 2003, but has been regularly extended, often retroactively. Past extensions of the Indian employment credit have extended the termination date without updating the base year. Some have proposed updating the base year, in an effort to (1) eliminate the need for taxpayers to maintain tax records dating back to 1993; and (2) restore the credit's incremental design.[13] The most recent extension was through 2021 in the Consolidated Appropriations Act, 2021 (P.L. 116-260).

Extending the Indian employment credit might encourage additional hiring of Indian tribe members and their spouses. Although the Indian employment credit may not increase overall employment on or near Indian reservations, it might increase employment among tribe members.

Mine Rescue Team Training Credit[14]

Taxpayers that employ miners in underground mines located in the United States may be able to claim a tax credit for mine rescue team training expenses. The credit amount is limited to the lesser of (1) 20% of training program costs per employee (including wages paid to the employee while in training); or (2) $10,000. For a taxpayer to claim the credit for training provided to an employee, the employee must be a full-time miner who is eligible to serve as a mine rescue team member.

The mine rescue team training credit was enacted in the Tax Relief and Health Care Act of 2006 (P.L. 109-432). It was initially scheduled to be effective for 2006, 2007, and 2008. It has subsequently been extended as part of tax extenders legislation, most recently through 2021 in the Consolidated Appropriations Act, 2021 (P.L. 116-260).

The mine rescue team training credit was enacted at the end of 2006, following the high-profile mining accident at Sago Mine. There was an uptick in coal mining fatalities in 2006—47 fatalities were reported (12 were a result of the Sago Mine disaster).[15] From 2007 through 2020, coal mining fatalities averaged 19 per year. During this period, fatalities were highest in 2010, reflecting the Upper Big Branch Mine accident, where there were 29 fatalities. In the year with the lowest number of fatalities, 2020, there were 5 deaths. Coal mining fatalities have generally been trending downward over time. In recent years, some of this might be explained by a decline in coal production and the decline in the number of coal miners. The fatality rate, however, has also tended to decline over time.

A credit for mine rescue team training can encourage mine operators and employers to invest in additional training. The credit can also reduce the cost of complying with federal regulations

[13] See, for example, Department of the Treasury, *General Explanations of the Administration's Fiscal Year 2017 Revenue Proposals*, February 2016, pp. 39-41, at http://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2017.pdf.

[14] IRC §45N(e).

[15] U.S. Department of Labor, Mine Safety and Health Administration, *Coal Fatalities for 1900 through 2020*, at https://arlweb.msha.gov/stats/centurystats/coalstats.asp.

regarding mine rescue team training.[16] Federal regulations are the government's primary policy instrument governing coal mine safety, with tax incentives playing a small role.[17]

The Rum Cover Over[18]

Under permanent law, the excise tax on rum is $13.50 per proof gallon and is collected on rum produced in or imported into the United States. Under permanent law, $10.50 per proof gallon of imported rum is transferred or "covered over" to the treasuries of Puerto Rico (PR) and the United States Virgin Islands (USVI). Temporary provisions have increased the transfer amount to $13.25. The law does not impose any restrictions on how PR and USVI can use the transferred revenues. Both territories use some portion of the revenue to promote and assist the rum industry.

The cover-over provisions for rum extend as far back as 1917 for PR and 1954 for USVI. Originally, the full amount of the tax was covered over; however, the Deficit Reduction Act of 1984 (P.L. 98-369) limited the cover over to $10.50 when the federal tax rates were increased to $12.50. The cap was intended to address the question of whether the rebates were proper given the lack of rebates to the states. The Omnibus Budget Reconciliation Act of 1993 (OBRA93; P.L. 103-66) temporarily increased the cap to $11.30 for five years, in a law that also reduced another benefit to the possessions (the possessions tax credit). When this increase expired, the cap was increased to $13.25, and it has subsequently been extended, most recently through 2021 by the Bipartisan Budget Act of 2018 (P.L. 115-123).

For additional information on the rum cover over see CRS Report R41028, *The Rum Excise Tax Cover-Over: Legislative History and Current Issues*, by Steven Maguire.

Temporary Business Provision Enacted in the Tax Cuts and Jobs Act (2017)

Computation of Adjusted Taxable Income Without Regard to Any Deduction Allowable for Depreciation, Amortization, or Depletion[19]

Prior to the 2017 tax revision, commonly referred to as the Tax Cuts and Jobs Act (TCJA; P.L. 115-97), the deduction for net interest was limited to 50% of adjusted taxable income for firms with a debt-equity ratio above 1.5. (Adjusted taxable income is income before taxes, interest deductions, and depreciation, amortization, or depletion deductions.) Interest above the limitation could be carried forward indefinitely. The law limited deductible interest to 30% of adjusted taxable income for businesses with gross receipts greater than $25 million. The provision also has an exception for floor plan financing for motor vehicles. Businesses providing services as an employee and certain regulated utilities are excepted from this new limit. Also, certain real property and farming businesses can elect out of this limit but must adopt a slower depreciation method for real property or farming assets. The restrictions on interest, called *thin capitalization rules*, were partially enacted to address concerns about large multinational businesses locating

[16] More on federal requirements for mine rescue team training can be found on the U.S. Department of Labor, Mine Safety and Health Administration website, at https://www.msha.gov/training-education/mine-rescue-training.

[17] 30 C.F.R. §49. For background information, see CRS Report RL34429, *Coal Mine Safety and Health*. (This out-of-print CRS report is available to congressional clients from the authors upon request.)

[18] IRC §7652(e).

[19] IRC §163(j).

borrowing in the United States as a method to shift profits out of the United States and to foreign, lower-tax, jurisdictions.

Under prior law and the temporary provisions of the TCJA, this interest limit applies to earnings (income) before interest, taxes, depreciation, amortization, or depletion (referred to as EBITDA). After 2021, the TCJA changes the measure of income to earnings (income) before interest and taxes (referred to as EBIT). Because EBIT is after the deduction of depreciation, amortization, and depletion, it results in a smaller base and thus a smaller amount of eligible interest deductions. The temporary broader base (EBITDA), which expires in 2021, allows more interest deductions. The current, more generous rules for measuring the adjusted taxable income base are more beneficial to businesses with depreciable assets, although affected businesses might be able to avoid some of the change in the deduction rules by leasing assets from financial institutions, such as banks, that generally have interest income.

For additional discussion of the interest limitation, see CRS Report R45186, *Issues in International Corporate Taxation: The 2017 Revision (P.L. 115-97)*, by Jane G. Gravelle and Donald J. Marples.

Temporary Business Provision Enacted in the Consolidated Appropriations Act, 2018

12.5% Increase in Annual LIHTC Authority[20]

The low-income housing tax credit (LIHTC) program, which was created by the Tax Reform Act of 1986 (P.L. 99-514), is the federal government's primary policy tool for the development of affordable rental housing. LIHTCs are awarded to developers to offset the cost of constructing rental housing in exchange for agreeing to reserve a fraction of rent-restricted units for lower-income households. Although it is a federal tax incentive, the program is primarily administered by state housing finance agencies (HFAs) that award tax credits to developers.

Authority for states to award tax credit is determined according to each state's population. In 2021, the amount of tax credits a state can award is equal to $2.8125 per person, with a minimum small population state authority of $3,245,625 in 2021. These figures reflect a temporary increase in the amount of credits each state received for 2018-2021 as a result of the 2018 Consolidated Appropriations Act (P.L. 115-141). The increase is equal to 12.5% above what states would have received absent P.L. 115-141, and is in effect through 2021.

Advocates argue that the increase in credit authority supports the construction of additional affordable housing. Opponents argue that this view overlooks the potential for LIHTC construction to substitute for (or "crowd out") affordable housing provided by the market.

For more information, see CRS Report RS22389, *An Introduction to the Low-Income Housing Tax Credit*, by Mark P. Keightley.

[20] IRC §42(h)(3)(I).

Temporary Business Provision Enacted in the Families First Coronavirus Response Act (2020) and Subsequently Extended Through September 30, 2021

Payroll Tax Credits for COVID-19 Sick and Family Leave[21]

The Families First Coronavirus Response Act (FFCRA; P.L. 116-127), enacted in March 2020, included an employer payroll tax credit (against Social Security and Railroad Retirement taxes) for the paid sick and family leave required as part of FFCRA. This tax credit was intended to cover the cost to businesses of providing paid leave to address the COVID-19 pandemic. FFCRA generally required private employers with fewer than 500 employees, and all government employers, to provide employees with two workweeks of paid sick leave for certain COVID-19-related leave purposes. It generally provided employees of private employers with fewer than 500 employees, state and local government employees, and some federal employees expanded job-protected Family and Medical Leave Act (FMLA) leave for certain COVID-19-related caregiving responsibilities. Employers were not required to compensate workers for the first two weeks of expanded FMLA, but after this period the leave was to be partially compensated by employers. Self-employed individuals were also covered. The mandates and payroll credit expired at the end of 2020.

The Consolidated Appropriations Act, 2021 (P.L. 116-260) extended the payroll credit through March 31, 2021, and applied it as if the mandate were still in place. The American Rescue Plan Act of 2021 (P.L. 117-2) expanded the credit and extended it through September 30, 2021, with the credit applying against the Medicare (HI) tax.

The purpose of the credits was in part to encourage employees to take leave to reduce the spread of COVID-19. The Social Security trust funds were not affected by the credit. Transfers from the general fund to the Social Security trust funds to cover any shortfall from this provision were allowed under the law. Allowing the credits to be claimed against payroll taxes, as opposed to income taxes, allowed employers to access this tax benefit faster than would have been the case with an income tax credit. Further, employers with limited income tax liability may still be able to benefit from payroll tax credits.

See CRS In Focus IF11739, *Payroll Tax Credit for COVID-19 Sick and Family Leave*, by Molly F. Sherlock for further discussion.

Temporary Business Provision Enacted in the CARES Act (2020) and Subsequently Extended

Employee Retention and Rehiring Credit[22]

The employee retention and rehiring tax credit (ERTC) was first enacted in the Coronavirus Aid, Relief, and Economic Security (CARES) Act (P.L. 116-136) to address the economic fallout from the COVID-19 pandemic. The credit was originally effective through the end of 2020, then was broadened and extended through July 2021 in the Consolidated Appropriations Act, 2021(P.L. 116-260), and most recently restructured and extended through December 31, 2021, by the American Rescue Plan Act of 2021 (P.L. 117-2). Currently, the credit is 70% of qualified wages,

[21] Division G, Families First Coronavirus Response Act (P.L. 116-127).

[22] Section 2301 of P.L. 116-136, as amended.

and the credit can be computed on up to $10,000 in qualified wages paid to an eligible employee per calendar quarter. The maximum credit amount for 2021 is $28,000. The credit is claimed against the employer's share of the hospital insurance (HI) payroll tax.

Qualified wages depend on the number of employees the employer had in 2019. For employers with more than 500 full-time employees, qualified wages are wages paid when employee services are not provided. For employers with 500 or fewer full-time employees, all wages paid by eligible employers are credit-eligible. Eligible employers are those who (1) are required to fully or partially suspend operations due to a COVID-19-related order (including nonprofit employers); or (2) have gross receipts 20% less than gross receipts in the same quarter as in the prior calendar year. (The credit is no longer available once gross receipts are 80% of prior year calendar quarter gross receipts.)

A credit of up to $50,000 per calendar quarter is also provided to recovery startup businesses, defined as businesses established after February 15, 2020, that have average annual gross receipts less than or equal to $1 million. Severely financially distressed employers—those with gross receipts that are less than 10% of what they were in the same calendar quarter in 2019—are able to treat all wages as qualified wages. Eligible employees are generally those who have been employed by the employer for at least 30 days. Health plan expenses can be treated as qualified wages when computing the credit.

Prior to the Consolidated Appropriations Act, 2021, the ERTC could not be taken if the employer had a Paycheck Protection Program (PPP) loan. This restriction may have limited its use by small businesses, as the PPP program, which provided for forgiven loans under certain circumstances, may have been more attractive. The Consolidated Appropriations Act, 2021 also increased the employment threshold for businesses who could receive the credit even if employees were working from 100 to 500, decreased the decline compared to previous years from 50% to 20%, and increased the credit from 50% to 70%. All of these changes make the credit more attractive.

Structuring the tax credit as a payroll tax credit, as opposed to an income tax credit, addresses policy concerns associated with past employee retention and hiring credits. Payroll tax credits can be delivered relatively quickly, addressing concerns about timing associated with past ERTCs. The benefits of payroll tax credits extend to all employers and are not limited to taxpayers with income tax liability. Further, payroll tax credits can be claimed by nonprofit employers.

One metric for evaluating the effectiveness of ERTCs relates to the economic efficiency, or "bang for the buck," of these incentives. To the extent that this credit is claimed for employees that would have been retained absent this credit, it is less economically efficient than payments directly targeted at those who are laid off.

There are also questions about the credit's potential for economic relief. If employers have laid off employees due to lack of consumer demand, employers may be slow to hire, even with employment subsidies. Economic theory tends to indicate that demand-side stimulus, rather than supply-side (like employer tax relief), is the most effective tool for boosting employment during periods of economic weakness.

For additional discussion of the credit, see CRS In Focus IF11721, *The Employee Retention and Employee Retention and Rehiring Tax Credits*, by Molly F. Sherlock.

Temporary Business Provision Enacted in the Consolidated Appropriations Act, 2021

Prevention of Partial Plan Termination[23]

Employer-sponsored retirement plans, including pension defined benefit plans, 401(k) plans, and tax-deferred annuity programs under 403(b), are partially terminated under normal law if a significant amount of participants are no longer eligible. In a partial termination, the plan must fully vest the benefits or accounts of the affected employees who are no longer covered regardless of the plan's normal vesting schedule. Generally, a plan is considered partially terminated if plan turnover is 20% over the plan year, although this treatment can be rebutted with facts and circumstances. The turnover is considered from the beginning to the end of the year.

The IRS issued guidance that indicated a plan would not be terminated in 2020 as long as employees who were laid off had been rehired at the end of the year.

The Consolidated Appropriations Act, 2021 (P.L. 116-260) provides a temporary rule that a plan will not be considered terminated if at least 80% of the active participants remain the same on March 31, 2021, as on March 13, 2020. The participants do not have to be the same individuals. This rule delays the effect of the partial plan termination due to the COVID-19 recession and makes it more likely that the plan will not be considered partially terminated.

Tax Provisions Expiring in 2022

Business "Tax Extenders"

50% Rate for Railroad Track Maintenance[24]

While the tax credit for railroad track maintenance was made permanent, the 50% rate expires in 2022, and the rate will revert to 40% beginning in 2023. See discussion of the railroad track maintenance provision below.

Temporary Provision Enacted in the Tax Cuts and Jobs Act (2017) and Subsequently Extended

Full Deduction for Business Meals[25]

Prior to the 2017 tax revision (TCJA; P.L. 115-97), no deduction was allowed for activities generally considered to be entertainment, amusement, or recreation, unless the activity or facility was directly related to or associated with the active conduct of the taxpayer's trade or business—such as a meal with a prospective client. If directly related, the allowed deduction for entertainment was generally limited to 50% of the amount of the expense. Similarly, a deduction for any expense for meals generally was limited to 50% of the amount, although meals provided for the convenience of the employer were fully (100%) deductible. (An example of an expense

[23] §209 of Division EE of P.L. 116-260.

[24] IRC §45G.

[25] IRC §274(n).

eligible for the deduction for meals provided for the convenience of the employer is the cost to run an on-site subsidized cafeteria for employees.) In addition, no deduction was allowed for membership dues with respect to any club or organization.

The TCJA restricted businesses' ability to deduct meals and entertainment expenses. The TCJA generally disallowed any deduction for entertainment expenses and reduced the deduction for meals provided for the convenience of the employer to 50%, while largely retaining the broad 50% deduction for other business meals. The deduction for business meals is generally limited to 50% of costs.

The Consolidated Appropriations Act, 2021 (P.L. 116-260) allowed a 100% deduction for restaurant meals for costs paid or incurred after December 31, 2020, and before January 1, 2023.

The restaurant industry has been particularly affected by the COVID-19 recession, and the full expensing would likely increase demand in that industry, although evidence suggests that fears of contracting the virus are the primary reason for decreased demand. Thus, a tax incentive may not be effective compared to controlling the virus.

For additional information, see CRS Insight IN11313, *Business Deductions for Entertainment and Meals*, by Donald J. Marples.

Tax Provisions Expiring in 2025

Business "Tax Extenders"

Special Expensing Rules for Certain Film, Television, and Live Theatrical Productions[26]

Investments in film and television productions are generally recovered using the income forecast method. Under this method, depreciation deductions are based on the pattern of expected earnings.

The American Jobs Creation Act of 2004 (P.L. 108-357) included special rules to allow expensing for certain film and television production costs. The provision's main purpose was to discourage "runaway" productions, or the production of films and television shows in other countries, where tax and other incentives are often offered. Initially, the provision was set to expire at the end of 2008. However, since 2008, the provision has regularly been extended as part of tax extender legislation—most recently in the Consolidated Appropriations Act, 2021 (P.L. 116-260).[27]

Under the special expensing rules for film, television, and live theatrical productions, taxpayers may elect to deduct immediately up to $15 million of production costs ($20 million for productions produced in certain low-income and distressed communities) in the tax year incurred. Eligible productions are limited to those in which at least 75% of the compensation paid is for services performed in the United States. For productions that started before 2008, the expensing deduction is not allowed if the aggregate production cost exceeds $15 million ($20 million for

[26] IRC §181(f).

[27] The bonus depreciation provided in the 2017 tax revision (P.L. 115-97), allowing for 100% bonus depreciation through 2022 and phasing out afterward to 0% after 2026, expands the definition of qualified property for the purposes of claiming bonus depreciation to include the production costs of qualified film, television, and live theatrical productions.

productions in designated low-income and distressed communities). Qualifying live theatrical productions are those generally performed in venues with an audience capacity of not more than 3,000 (or 6,500 for seasonal productions performed no more than 10 weeks annually). The provisions would cover most theatrical productions (the largest of the Broadway theatres, for example, has a seating capacity of less than 2,000).[28]

The ability to expense (deduct immediately) certain film, television, and live theatrical production costs provides a benefit by allowing deductions to be taken earlier, thus deferring tax liability. The magnitude of the first benefit depends on the average lag time from production to earning income. For many films, production costs would be deductible in the year the film is released. If the film is released one year after the production costs are incurred, which may be the case for independent and smaller productions, the provision accelerates cost recovery by one year. The benefit conferred by accelerating cost recovery deductions by one year is limited until the beginning of the expiration of expensing in 2022 adopted in the TCJA (discussed below), when the advantage of expensing even without regard to the production period allows costs to be written off more quickly. Taxpayers with limited or no income tax liability may derive little or no benefit from the expensing allowance.

The primary policy objective of providing special tax incentives for film and television producers is to deter productions from moving overseas, lured by lower production costs as well as tax and other subsidies offered by foreign governments. Because live theatre is tied to audience location, runaway productions are not a concern. However, providing expensing for live theatrical production costs could encourage investment in such productions and provide parity with film and television. In evaluating this incentive, one consideration is the economic value of domestic film, television, and theatre production relative to the cost of the targeted tax benefits.

Seven-Year Recovery Period for Motorsports Entertainment Complexes[29]

An exception from the 39-year depreciation life for nonresidential structures exists for the theme and amusement park industry. Assets in this industry are assigned a recovery period of seven years. Historically, motorsports racing facilities have been included in this industry and also allowed a seven-year recovery period. However, ambiguities in the law led to questions about whether motorsports racing facilities were correctly categorized. When the Treasury reconsidered the appropriateness of this classification in 2004, Congress made the seven-year treatment mandatory through 2007 with the American Jobs Creation Act (P.L. 108-357). Since 2004, the provision has been extended as part of tax extenders legislation—most recently in the Consolidated Appropriations Act, 2021 (P.L. 116-260), which extended the provision through December 31, 2025. Without this provision, motorsports racing facilities would be depreciated over the standard 39-year life. The expensing provisions adopted by the Tax Cuts and Jobs Act in 2017, discussed below, make this provision more valuable because it is eligible for expensing.

The Department of the Treasury presumably estimated motorsports racing facilities to have slower depreciation rates than the seven-year life that applies to amusement park facilities. If so, the seven-year-life provision for motorsports racing facilities constitutes a subsidy to the auto racing industry that does not appear to have an obvious justification. Supporters argued that the provision preserves historical treatment and provides a stimulus to business. They also argued

[28] For information on Broadway theatre seating capacity, see the New York Show Tickets website, at http://www.nytix.com/Links/Broadway/broadwaytheatres.html.

[29] IRC §§168(i)(15) and 168(e)(3)(C)(ii).

that the benefit helps make motorsports facilities more competitive with sports facilities that are often subsidized by state and local governments.

Empowerment Zone Tax Incentives[30]

Empowerment Zones (EZs) are federally designated geographic areas characterized by high levels of poverty and economic distress, where businesses and local governments may be eligible to receive federal grants and tax incentives.[31] Since 1993, Congress has authorized three rounds of EZs (1993, 1997, and 1999) with the objective of revitalizing selected economically distressed communities. EZs are similar to Enterprise Communities (ECs) and Renewal Communities (RCs), which are also federally designated areas for the purposes of tax benefits and grants.

A number of studies have evaluated the effectiveness of the EZ, EC, and RC programs. Government Accountability Office and Department of Housing and Urban Development studies have not found links between EZ and EC designation and improvement in community outcomes.[32] Other research has found modest, if any, effects and called into question these programs' cost-effectiveness. This inability to link these programs to improvements in community-level outcomes should not be interpreted as meaning that the EZ, EC, and RC programs did not aid economic development. The main conclusion from these studies is that the EZ, EC, and RC programs have not been shown to have caused a general improvement in the examined localities' economic conditions. One possible cause for this inability to empirically show the program effects on a large geographic area is that the EZ tax incentives are relatively small. Another possibility is that the EZ tax incentives are targeted at business owners and do not provide direct benefits to workers in EZs.

Five tax incentives[33] are typically related to designated EZs:[34] (1) increased exclusion of capital gains from taxation;[35] (2) issuance of qualified, tax-exempt zone academy bonds (QZABs) in EZs;[36] (3) EZ employment credits under the Work Opportunity Tax Credit (WOTC);[37] (4) increased expensing under Internal Revenue Code (IRC) Section 179 for businesses located in EZs;[38] and (5) nonrecognition of capital gains on rollover of EZ investments.[39]

EZs were created by legislation enacted in 1993, and the program expired at the end of 2009. The provisions were extended in the Protecting Americans from Tax Hikes (PATH) Act of 2015 (P.L.

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[30] For related provisions, see IRC §§1391, 1394, 1396, 1397A, and 1397B.

[31] For a list of EZs, see U.S. Department of Housing and Urban Development (HUD), "List of Current Empowerment Zones and Updated Contact Information," at http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/economicdevelopment/programs/rc/ezcontacts.

[32] For more discussion, see CRS Report R41639, *Empowerment Zones, Enterprise Communities, and Renewal Communities: Comparative Overview and Analysis*, by Donald J. Marples.

[33] For a quick reference chart with a description of each of these provisions, see U.S. Department of Housing and Urban Development (HUD), "Empowerment Zone Tax Incentives Summary Chart," August 2013, at http://portal.hud.gov/hudportal/documents/huddoc?id=ez_tis_chart.pdf.

[34] IRC §§1391(d)(1)(A)(i) and (h)(2).

[35] IRC §§1202(a)(2) and 1391(d)(1)(A)(i).

[36] IRC §§1394 and 1391(d)(1)(A)(i).

[37] IRC §§1396 and 1391(d)(1)(A)(i). For more information of the WOTC, see CRS Report R43729, *The Work Opportunity Tax Credit*, by Benjamin Collins and Sarah A. Donovan.

[38] IRC §§1397A and 1391(d)(1)(A)(i). For more information on Section 179 expensing, see CRS Report RL31852, *The Section 179 and Section 168(k) Expensing Allowances: Current Law and Economic Effects*, by Gary Guenther.

[39] IRC §§1397B and 1391(d)(1)(A)(i).

114-113), which also amended the requirements for tax-exempt enterprise zone facility bonds to treat an employee as a resident of a particular EZ if the employee is a resident of a different EZ, EC, or qualified low-income community. Provisions were extended after 2015, and were last extended through 2025 by the Consolidated Appropriations Act, 2021 (P.L. 116-260).

For more analysis of EZs, see CRS Report R41639, *Empowerment Zones, Enterprise Communities, and Renewal Communities: Comparative Overview and Analysis*, by Donald J. Marples.

New Markets Tax Credit[40]

The New Markets Tax Credit (NMTC) was enacted in the Community Renewal Tax Relief Act of 2000 (P.L. 106-554) to encourage investors to invest in low-income communities (LICs) that traditionally lack access to capital. The NMTC is a competitively awarded tax credit overseen by the Community Development Financial Institutions (CDFI) Fund, organized within the Department of the Treasury. For each NMTC round authorized by Congress, the CDFI Fund ranks all requests for NMTC allocation authority and grants awards to those Community Development Entities (CDEs) that score highest. A CDE is a domestic corporation or partnership that is an intermediary vehicle for the provision of loans, investments, or financial counseling in LICs.[41] All taxable investors, such as banks, venture capital firms, and other private investors, are eligible to receive the NMTC.

The NMTC's structure creates incentives for CDEs and private investors to participate in the program. CDEs benefit from the NMTC because they charge fees to their investors for organizing the NMTC application and for structuring the financing for a portfolio of community development projects. The private investors benefit because they receive, each year over seven years, an annual tax credit equal to 5% to 6% of the total amount paid for the stock or capital interest in the CDE that they purchase.[42] Overall, the tax credit amounts to 39% of the cost of the qualified equity investment (less the CDE's fees) as long as the interest in the investment is retained for the entire seven-year period. Thus, even if the community development project funded by the CDE incurs some losses, the value of the tax credit could generate a positive return for the private investors.

Opposition to the NMTC is partly based on the belief that corporations and higher-income investors primarily benefit from the provision or that the NMTC leads to an economically inefficient allocation of resources. For instance, although banks and other investors might benefit directly from the credit, a 2009 study found that the NMTC's benefits to selected low-income communities were modest.[43] The study concluded that poverty and unemployment rates fell by statistically insignificant amounts in tracts that received NMTC-subsidized investment relative to similar tracts that did not. From a national economic perspective, the NMTC's impact would be greatest in the case where the investment represents a net investment in the U.S. economy rather than a shift in investment from one location to another. Another 2009 study found that corporate NMTC investment represented a shift in investment location, but a portion of individual NMTC

40 IRC §45D(f).

41 Because CDEs serve purposes outside the NMTC, they do not have to be for-profit organizations. However, to receive a NMTC allocation, a CDE must be a for-profit organization.

42 For more details, see CRS Report RL34402, *New Markets Tax Credit: An Introduction*, by Donald J. Marples and Sean Lowry.

43 Matthew Freedman, "Teaching New Markets Old Tricks: The Effects of Subsidized Investment on Low-Income Neighborhoods," *Journal of Public Economics*, vol. 96, no. 11-12 (December 2012), pp. 1000-1014.

investment (roughly $641 million in the first four years of the program from 2001 to 2004) represented new investment.[44]

The NMTC has been extended as a temporary tax provision since 2008, after its initial authorization expired at the end of 2007.[45] In more recent years, the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (P.L. 111-312) extended NMTC authorization through 2011 and permitted a maximum annual amount of qualified equity investments of $3.5 billion. Following several other extensions, the Further Consolidated Appropriations Act, 2020 (P.L. 116-94) extended the provision through 2020 with a maximum allocation authority of $5 billion. It was further extended, with an allocation of $5 billion per year through 2025 by the Consolidated Appropriations Act, 2021 (P.L. 116-260).

For more information on the NMTC, see CRS Report RL34402, *New Markets Tax Credit: An Introduction*, by Donald J. Marples and Sean Lowry; and CRS Report R42770, *Community Development Financial Institutions (CDFI) Fund: Programs and Policy Issues*, by Sean Lowry.

Employer Tax Credit for Paid Family and Medical Leave[46]

The employer credit for paid family and medical leave (PFML) can be claimed by employers providing paid leave (wages) to employees under the Family and Medical Leave Act of 1993 (FMLA; P.L. 103-3).

The credit amount is equal to up to 25% of PFML wages paid to qualifying employees.[47] The credit can only be claimed for PFML provided to certain employees with incomes below a fixed threshold.[48] For credits claimed in 2021, employee compensation in 2020 cannot have exceeded $78,000. The amount of PFML wages for which the credit is claimed cannot exceed 12 weeks per employee per year. Further, all qualifying employees must be provided at least two weeks of PFML for an employer to be able to claim the credit. Tax credits cannot be claimed for leave paid by state or local governments, or for leave that is required by state or local law. To claim the credit, an employer must have a written family and medical leave policy in effect. The policy cannot exclude certain classifications of employees, such as unionized employees.

The employer credit for paid family and medical leave was added to the IRC in the 2017 tax revision (TCJA; P.L. 115-97). Initially, the credit was effective for wages paid in 2018 and 2019. The credit was extended for one year, through 2020, by the Further Consolidated Appropriations Act, 2020 (P.L. 116-94) and extended through 2025 by the Consolidated Appropriations Act, 2021 (P.L. 116-260).

Providing a tax credit for employers that provide PFML should, on the face of it, tend to increase access to this benefit. How effective the credit will be at achieving this goal remains an open question. Employers may provide PFML to qualified employees for a number of reasons; attracting high-quality talent might be one. If most of the credit's beneficiaries are employers that

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[44] Tami Gurley-Calvez et al., "Do Tax Incentives Affect investment? An Analysis of the New Markets Tax Credit," *Public Finance Review*, vol. 34, no. 4 (2009), pp. 371-398.

[45] Given that some of these tax extenders have been passed retroactively, the CDFI Fund has often issued a Notice of Funds Availability (NOFA) for the NMTC in the *Federal Register* despite not having formal authorization of funds.

[46] IRC §45S.

[47] The credit rate increases from 12.5% to 25% ratably as leave wages increase from 50% to 100% of wages normally paid.

[48] A qualifying employee is one who, in the preceding year, did not have compensation in excess of 60% of the amount applicable for a highly compensated employee under the nondiscrimination requirements rules for qualified retirement plans (IRC §414(q)(1)(B)).

would have provided PFML without the credit, then the credit is not a particularly efficient mechanism for increasing PFML. There is also the possibility that employers choose to substitute credit-eligible PFML for other forms of leave. An employer could reduce the amount of paid sick, personal, or vacation time off, knowing that employees use this time for paid family and medical leave purposes. If other benefits are scaled back in favor of tax-preferred FMLA leave, employees may not be better off.

For more information, see CRS In Focus IF11141, *Employer Tax Credit for Paid Family and Medical Leave*, by Molly F. Sherlock.

Work Opportunity Tax Credit[49]

The work opportunity tax credit (WOTC) is a nonrefundable wage credit intended to increase job opportunities for certain categories of disadvantaged individuals. The WOTC reduces the cost of hiring specified groups of disadvantaged individuals. WOTC-eligible hires include members of families receiving Temporary Assistance to Needy Families (TANF) benefits, certain members of families receiving food stamp benefits, ex-felons, and certain veterans.

For most eligible hires that remain on a firm's payroll at least 400 hours, an employer can claim an income tax credit equal to 40% of wages paid during the worker's first year of employment, up to a statutory maximum. For most WOTC-eligible hires, the wage maximum is $6,000, for a maximum credit of $2,400. For eligible veterans, the maximum eligible wage varies between $6,000 and $24,000, depending on the veteran's characteristics and work history. Eligible summer youth hires' maximum wage to which the credit can be applied is $3,000. A credit equal to 25% of a qualified worker's wages is available for eligible hires that remain employed for at least 120 hours, but fewer than 400 hours.

The WOTC was created as part of the Small Business Job Protection Act of 1996 (P.L. 104-188). The WOTC evolved from an earlier tax credit designed to increase employment among targeted groups, the Targeted Jobs Tax Credit (TJTC), which was available from 1978 through 1994. When first enacted, the WOTC was scheduled to expire on October 1, 1997. Since 1997, the WOTC has been expanded, modified, and regularly extended. In several instances, the WOTC was allowed to lapse before being retroactively reinstated. It was extended through 2020 in the Further Consolidated Appropriations Act, 2020 (P.L. 116-94). It was extended through 2025 by the Consolidated Appropriations Act, 2021 (P.L. 116-260).

The WOTC is designed to encourage employers to hire more disadvantaged individuals by compensating for potential higher training costs and possible lower productivity. Because the credit is focused on hiring from targeted groups, and not net job creation, it is not necessarily intended to create new jobs or promote recovery in labor markets.[50] Studies evaluating the credit have examined whether it increases job opportunities for targeted disadvantaged individuals, and whether the WOTC is a cost-effective policy measure for achieving this objective.

Early evidence on the WOTC suggested that although the credit did offset part of the cost of recruiting, hiring, and training WOTC-eligible employees, it had a limited effect on companies' hiring decisions.[51] More recent studies have found that the WOTC provided benefits to certain

[49] IRC §51(c)(4).

[50] Kenneth A. Couch, Douglas J. Besharov, and David Neumark, "Spurring Job Creation in Response to Severe Recessions: Reconsidering Hiring Credits," *Journal of Policy Analysis and Management*, vol. 32, no. 1 (Winter 2013), pp. 142-171.

[51] For an overview of the empirical literature on the WOTC, see U.S. Congress, Senate Committee on the Budget, *Tax*

groups: increasing the wage income of disabled veterans and increasing employment among long-term welfare recipients, for example. Researchers have also explored whether the credit causes employers to "churn" their workforce to take advantage of the credit, replacing currently credit-ineligible workers with credit-certified workers. Evidence of this behavior has not been found.

For more information on the WOTC, see CRS Report R43729, *The Work Opportunity Tax Credit*, by Benjamin Collins and Sarah A. Donovan.

Transfers of Excess Pension Assets to Retiree Health and Life Insurance Plans[52]

This provision, first enacted in the Omnibus Budget Reconciliation Act of 1990 (P.L. 101-508), allows firms with excess assets in their pension plans to transfer them to retiree health and life insurance plans without causing adverse consequences, such as losing tax-exempt status, being considered a prohibited transaction, or being included in income or subject to an excise tax on reversions. The original legislation allowed transfers to health plans.

This provision has been extended on several occasions, by P.L. 103-465 in 1994, P.L. 106-170 in 1999, P.L. 108-218 in 2004, P.L. 112-141 in 2012, and by P.L. 114-41 in 2015. The 2012 law added life insurance to the programs eligible for the transfers. The 2015 extension established the December 31, 2025, expiration date.

Look-Through Treatment of Payments Between Related Controlled Foreign Corporations[53]

Look-through rules effectively allow U.S. corporations to reduce tax paid by allowing them to shift the income of certain foreign subsidiaries in high-tax countries into a lower-taxed foreign subsidiary. The temporary look-through rules were originally enacted in the Tax Increase Prevention and Reconciliation Act of 2005 (P.L. 109-222), for 2006 through 2008, and subsequently extended, most recently through 2025 in the Consolidated Appropriations Act, 2021 (P.L. 116-260).

Depending on its source, income earned abroad by foreign-incorporated subsidiaries of U.S. parent corporations is taxed at full rates, not taxed at full rates, or not taxed at all. Tax rules require passive income (such as interest income) and certain types of payments that can be easily manipulated to reduce foreign taxes to be taxed at the full rate (21% for a corporate shareholder) if earned by controlled foreign corporations (CFCs).[54] This income is referred to as Subpart F income, reflecting the part of the tax code where treatment is specified. Credits against the U.S. tax imposed are allowed for any foreign taxes paid on this income, and are applied on an overall basis (so that unused foreign taxes in one country can offset taxes paid on income in another country). Other income earned abroad by CFCs is subject to the global intangible low-taxed income (GILTI) provision, which taxes this foreign-source income at half the corporate tax rate

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Expenditures: Compendium of Background Material on Individual Provisions, committee print, prepared by Congressional Research Service, 116th Cong., December 2020, S. Prt. 116-53, pp. 757-766, at https://www.crs.gov/Reports/Pdf/CP10004.

[52] IRC §420(b)(4).

[53] IRC §954(c)(6).

[54] A CFC is 50% or more controlled by U.S. parents who each have at least 10% ownership. Many CFCs are wholly owned by one U.S. parent corporation. CFCs can be owned by individuals as well as corporations, but individual shareholders are not eligible for benefits such as the GILTI deduction. Individuals can elect corporate treatment, however.

(10.5%), after allowing a deduction for a deemed return of 10% on tangible assets. Credits are allowed for 80% of foreign taxes paid. This GILTI rate is scheduled to rise to 13.125% after 2025.

Thus, some income (Subpart F) is taxed at the full rate, some income (GILTI) is taxed at partial rates, and some income (the deemed return from tangible assets) is not taxed. (For a more extensive discussion of international tax rules, see CRS Report R45186, *Issues in International Corporate Taxation: The 2017 Revision (P.L. 115-97)*, by Jane G. Gravelle and Donald J. Marples.)

Unless an exception applies, Subpart F income includes dividends, interest, rent, and royalty payments between related firms. These items of income are subject to Subpart F. If they were not subject to subpart F, affiliated firms could shift income and avoid taxation. For example, without Subpart F, a U.S. parent's subsidiary (first-tier subsidiary) in a country without taxes (e.g., the Cayman Islands) could lend money to its own subsidiary (second-tier subsidiary) in a high-tax country. The interest payments would be deductible in the high-tax country, but no tax would be due in the no-tax country. Thus, an essentially paper transaction would shift income out of the high-tax country. A similar effect might occur if an intangible asset (e.g., a patent) were transferred to the no-tax subsidiary, and then licensed in exchange for a royalty payment by the high-tax subsidiary. As a result of Subpart F, this income is taxed at full rates.

Avoidance of Subpart F taxation was made easier in 1997, when U.S. entity classification rules (to be a corporate or noncorporate entity) were simplified to allow checking a box on a form. These "check-the-box" regulations provided a way to avoid treatment of payments as Subpart F income under certain circumstances by allowing firms to elect treatment as an unincorporated entity. They were originally intended to simplify classification issues for domestic firms and the IRS, but their usefulness in international tax planning quickly became evident. The Treasury issued regulations in 1998 to disallow their use to avoid Subpart F, but withdrew them after protests from firms and some Members of Congress.[55]

In the example above, if the high-tax subsidiary is not a direct subsidiary of the U.S. parent but is a subsidiary of the Cayman Islands subsidiary (i.e., a second-tier subsidiary), the Cayman Islands (first-tier) subsidiary can elect to treat the high-tax subsidiary as if it were a pass-through entity. This treatment would effectively combine the two subsidiaries into a single firm. This outcome can be achieved simply by checking a box, making the high-tax subsidiary a disregarded entity under U.S. law. Because there are no separate firms, no income is recognized by the Cayman Islands firm, although the high-tax subsidiary (second tier) is still a corporation from the point of view of the foreign jurisdiction in which it operates and can deduct interest in the high-tax jurisdiction.

The look-through rules expand the scope of check-the-box, as the check-the-box rules do not work in every circumstance. For example, if the related firms do not have the same first-tier parent, check-the-box does not apply. In some cases, because of foreign countries' rules about corporate and noncorporate forms, the check-the-box regulations' classification of some entities as per se corporations make this planning unavailable. In addition, other undesirable tax consequences (from the firm's point of view) could occur as a side effect of check-the-box. The look-through rule effectively puts this check-the-box type of planning into the tax code, rather than implementing it as a regulation (which could be altered without legislation), but disconnects it from the check-the-box regulations' creation of a disregarded entity. Related firms do not have to have the parent-child relationship; they can be otherwise related as long as they are under common control.

[55] See Internal Revenue Service Notice 98-11 at https://www.irs.gov/pub/irs-drop/n-98-11.pdf.

The main argument against the look-through rules (and check-the-box) is that they undermine Subpart F's purpose, which is to prevent firms from using passive and easily shifted income to avoid taxation. The main argument for the provision is to allow firms the flexibility to redeploy earnings from one location to another without having U.S. tax consequences (foreign tax rules are unchanged). Firms could, for example, accomplish much of the treatment of look-through rules (even in the absence of check-the-box), but that may involve complex planning and inconvenience. An argument can also be made that in some cases (for example, with the payment of interest), the profit shifting is not harming the U.S. Treasury, but rather reducing taxes collected by foreign governments, as income is shifted out of high-tax countries into low-tax ones. Some might view this last argument as a "beggar-thy-neighbor" argument because it facilitates U.S. firms in using tax planning to reduce taxes paid to other countries.

Temporary Tax Provisions Enacted in the Tax Cuts and Jobs Act (2017)

Deductibility of Employer *De Minimis* Meals and Related Eating Facility, and Meals for the Convenience of the Employer[56]

Prior to the 2017 tax revision (TCJA, P.L. 115-97), *de minimis* meals provided by an employer through an eating facility and meals for the convenience of the employer were deductible even if they were not included in income. The TCJA reduced that deduction to 50%, for the years 2018 through 2025, with no deduction after 2025.

The rationale for disallowing these deductions is to reduce the favorable treatment of firms and their employees where meals are commonly provided, such as for restaurant employees or firms remote from other eating facilities or with short lunch periods. Some interest in revising the treatment of these meals was due to news reports about the provision of gourmet meals by Silicon Valley employers.[57]

Higher Exclusion Rates for GILTI and FDII[58]

Prior to the 2017 tax revision (TCJA; P.L. 115-97), earnings of foreign-related corporations were taxed only when income was paid to the U.S. shareholder as a dividend, so that taxes were deferred, perhaps indefinitely, with one exception. That exception was for income of controlled foreign corporations (CFCs) that was easily shifted to avoid tax (called Subpart F). CFCs are foreign-incorporated firms that are 50% or more controlled by U.S. parents who each have at least 10% ownership. Hence, under this exception, the corporate income tax applied to CFCs' 10% shareholders and it was retained in the 2017 revision.

Under the new regime, dividends paid by foreign firms are exempt (through a dividend-received deduction) if a U.S. corporate shareholder owns at least 10% of the foreign firm. The new law imposed a minimum tax on some of the CFCs' remaining profits under the tax on global intangible low-taxed income (GILTI), which is imposed after exclusion of a deemed return on tangible assets and a deduction from the remainder. The deduction from the remaining income is currently 50%, but that rate is scheduled to fall to 37.5% after 2025.

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[56] IRC §274(o).

[57] See Mark Maremount, "Silicon Valley's Mouthwatering Tax Break," *Wall Street Journal*, April 7, 2013, at https://www.wsj.com/articles/SB10001424127887324050304578408461566171752.

[58] IRC §250(a).

As in prior law, U.S. owners are allowed a credit for foreign taxes paid, although the credit for GILTI income is limited to 80% of foreign taxes.

The 2017 law also enacted a provision to provide similar benefits to GILTI for domestic holdings of intangible assets: the deduction for foreign-derived intangible income (FDII). FDII is determined based on the share of exports and with an exclusion for a deemed return on tangible assets. The remainder is eligible for a 37.5% deduction, which is scheduled to fall to 21.875% under GILTI. The tax deductions for GILTI and FDII cannot exceed taxable income.

Among the purposes of the new regime was to end the system of U.S. taxation of CFCs where taxes were triggered by repatriating income (paying dividends). The exemption of dividends led to concerns that artificial profit shifting to low-tax jurisdictions would increase. The purpose of GILTI and FDII was to reduce this profit shifting, which is associated with earnings from intangible assets. Reducing the deductions will increase the taxation of intangible foreign-source income but maintain relative neutrality between holding intangible assets abroad or in the United States. While a deduction for tangible assets has been aimed at targeting intangible income, this deduction has been criticized for encouraging investment in tangible assets since that investment reduces the GILTI tax and increases the tax in the United States by reducing the FDII deduction.

For additional discussion of GILTI and FDII, see CRS Report R45186, *Issues in International Corporate Taxation: The 2017 Revision (P.L. 115-97)*, by Jane G. Gravelle and Donald J. Marples.

Lower Tax Rates and Credits for BEAT[59]

The 2017 tax revision (TCJA; P.L. 115-94) introduced the base erosion and anti-abuse tax (BEAT) as an alternative minimum tax, and imposed it at a 10% rate on a broadened base. Most credits are disallowed for BEAT, although a credit was allowed for the research credit and 80% of the sum of three credits (the low-income housing credit, the renewable electricity production credit in Section 45 of the code, and the Section 48 energy investment credit). The rate will rise to 12.5% and the credits will no longer be available after 2025.

BEAT aims to reduce profit shifting by adding back certain payments to related foreign subsidiaries. Its focus is primarily on U.S. subsidiaries of foreign parents, although it applies in general to related parties. It can also affect U.S. multinationals with foreign-source income from higher-tax locations because it does not allow foreign tax credit. It applies to corporations with average annual gross receipts of at least $500 million over the past three tax years and with deductions attributable to outbound payments exceeding 3% of overall deductions (2% for certain financial institutions).

Base erosion payments are payments to related foreign parties, including those that would result in a deduction (such as interest, rents, royalties, and services), the purchase of depreciable or amortizable property, certain reinsurance payments, and payments to certain inverted firms (who have moved their headquarters abroad). Other than payments to inverted firms,[60] costs of goods sold would not be included, and costs of services would not be included if determined under the services cost method.

BEAT was originally proposed without credits, but concerns about credits, particularly the research credit, resulted in allowing these credits on a temporary basis. BEAT has also been

[59] IRC §59A.

[60] Inverted firms are firms that have moved their headquarters abroad. This provision applies to firms that invert after passage of the 2017 act.

criticized for not allowing foreign tax credits while including foreign-source income, such as Subpart F and GILTI, in the tax base.

For additional discussion of BEAT, see CRS Report R45186, *Issues in International Corporate Taxation: The 2017 Revision (P.L. 115-97)*, by Jane G. Gravelle and Donald J. Marples.

20% Deduction for Pass-Through Businesses[61]

Pass-through business income generally is taxed according to ordinary individual income tax rates. Under the 2017 revision, taxpayers may deduct 20% of qualified pass-through income. The deduction is limited to the greater of 50% of W-2 wages, or 25% of W-2 wages plus 2.5% multiplied by depreciable property (equipment and structures). Specified service businesses (health, law, accounting, actuarial science, performing arts, consulting, athletics, financial services, brokerage services, and services consisting of investment and investment management, and trading of securities, partnership interests, or commodities) generally may not claim the deduction. The specified service business definition does not include architecture or engineering firms. The deduction limitation and the specified service business limitation do not apply, for 2021, if taxable income is less than $164,900 (single) or $329,800 (married). These limits are phased in over a $50,000 (single) and $100,000 (married) range, and thus apply fully at $214,900 (single) and $429,800 (married).

The pass-through deduction was enacted in part to allow benefits to businesses not taxed as corporations and thus not benefitting from the corporate rate cut (from 35% to 21%). Individual tax rates were reduced by smaller amounts. The reduction also reduced the incentive for firms to switch to a corporation form. This provision, however, unlike the corporate tax rate cut, was scheduled to expire after 2025, as was the case for other individual tax changes that were not related to business.

The provision has been criticized as adding to complexity, especially given the phaseout and exceptions, leading firms to engage in reorganizations to maximize use of the deduction (such as splitting business sectors or combining them). The provision benefits high-income taxpayers, with 80% of the benefit going to taxpayers with more than $200,000 of income.[62]

See CRS In Focus IF11122, *Section 199A Deduction for Pass-through Business Income: An Overview*, by Gary Guenther and CRS Report R46650, *Section 199A Deduction: Economic Effects and Policy Options*, by Gary Guenther for further discussion.

Provisions Expiring in 2026

Temporary Provisions Enacted in the Tax Cuts and Jobs Act (2017)

Limit on Excess Business Losses of Noncorporate Taxpayers[63]

Businesses are generally permitted to carry over a net operating loss (NOL) to certain past and future years. Under the passive loss rules, individuals and certain other taxpayers are limited in their ability to claim deductions and credits from passive trade and business activities, although

[61] IRC §199A.

[62] See Joint Committee on Taxation, *Tables Related to the Federal Tax System as in Effect 2017-2026*, JCX-32R-18, April 24, 2018, at file:///C:/Users/jgravelle/Downloads/x-32R-18-5093.pdf.

[63] IRC §461(l).

unused deductions and credits may generally be carried forward to the next year. Similarly, certain farm losses may not be deducted in the current year, but can be carried forward to the next year.

For taxpayers other than C corporations, the TCJA disallowed a deduction in the current year for excess business losses and treats such losses as a NOL carryover to the following year. An excess business loss is the amount that a taxpayer's aggregate deductions attributable to trades and businesses exceed the sum of (1) aggregate gross income or gain attributable to such activities and (2) $250,000 ($500,000 if married filing jointly), adjusted for inflation. For partnerships and S corporations, this provision was applied at the partner or shareholder level. The TCJA provision was set to expire after 2025.

This TCJA provision was temporarily suspended for 2018 through the end of 2020 by the CARES Act (P.L. 116-136). The limit on deductions was extended through 2026 by the American Rescue Plan Act (P.L. 117-2).

See CRS Insight IN11296, *Tax Treatment of Net Operating Losses (NOLs) in the Coronavirus Aid, Relief, and Economic Security (CARES) Act*, by Jane G. Gravelle and CRS Report R46377, *The Tax Treatment and Economics of Net Operating Losses*, by Mark P. Keightley, for further discussion.

First-Year Depreciation

The cost of assets that provide services over a period of time, such as machines or buildings, is deducted over a period of years as depreciation. The schedule of depreciation deductions depends on the asset's life and the distribution of deductions over that life. Straight-line depreciation is used for structures, where equal amounts are deducted in each year. For equipment, deductions are accelerated, with larger amounts deducted in earlier years. Equipment is most commonly depreciated over 5 years or 7 years, but some short-lived assets are depreciated over 3 years and some longer-lived assets are depreciated over 10, 15, or 20 years. Residential structures are depreciated over 27.5 years and nonresidential structures are depreciated over 39 years. Aside from the desire for economic stimulus, traditional economic theories suggest that tax depreciation should match economic (physical) depreciation of assets as closely as possible.

The expensing provision allows immediate deductions for depreciation, which are valuable because of the time value of money. A fixed reduction in tax liability today is worth more than that same fixed reduction in tax liability in the future. Expensing provisions allow a firm to deduct the cost of an asset the year it is placed in service. Expensing or partial expensing is also commonly referred to as bonus depreciation. The expensing provision does not apply to structures.

Through 2022, bonus depreciation of 100% allows for full expensing of investments in qualifying equipment and property. The share of investments that can be deducted in the year they are incurred is scheduled to decrease to 80% in 2023, 60% in 2024, 40% in 2025, 20% in 2026, and 0% for property acquired and placed in service in 2027 and thereafter.

Full expensing leads to an effective zero tax rate on new tangible business investment, and to negative tax rates when financed in part by borrowing. Incentives for equipment investment favor those investments relative to investment in buildings, although they lead to uniform treatment with respect to investment in most intangibles (such as research and development), which are currently expensed. (Research and development expensing is currently scheduled to be replaced by five-year amortization in 2022.)

For more information, see CRS Report RL31852, *The Section 179 and Section 168(k) Expensing Allowances: Current Law and Economic Effects*, by Gary Guenther.

Additional Depreciation for Trees Producing Fruits and Nuts[64]

Uniform capitalization rules require the costs of orchards to be capitalized and depreciated only when the trees reach an income-producing level. This provision allows depreciation when trees are planted.

The provision was originally introduced by the Protecting Taxpayers from Tax Hikes Act, Division Q of the Consolidated Appropriations Act, 2016 (P.L. 114-113).

Most farmers are familiar with the uniform capitalization rules. Typically, when orchards are acquired before the trees have reached an income-producing level, the preproductive costs must be capitalized. But a farmer may choose to elect out of the rules at the cost of a slower depreciation method known as the alternative depreciation system (ADS). The language adopted at that time referenced ADS deductions relative to the existing depreciation provisions at that time. The provision was amended by the 2017 tax revision (TCJA; P.L. 115-97) to provide a deduction for the ADS system consistent with the expensing provisions adopted in that law.

Election to Invest Capital Gains in an Opportunity Zone[65]

The 2017 tax revision (TCJA; P.L. 115-97) temporarily authorized Opportunity Zone (OZ) tax incentives, which are intended to encourage private investment in economically distressed communities. OZ tax incentives are allowed for investments held by Qualified Opportunity Funds (QOFs) in qualified OZs. In 2018, the Community Development Financial Institutions (CDFI) Fund in the Treasury Department designated qualified census tracts that are eligible for OZ tax incentives after receiving recommendations from state executives (e.g., governors). Qualified OZ designations for census tracts are in effect through the end of 2026.

OZ tax incentives include (1) a temporary tax deferral for capital gains reinvested in a QOF, (2) a step-up in basis for any investment in a QOF held for at least five years (10% basis increase) or seven years (15% basis increase), and (3) a permanent exclusion of capital gains from the sale or exchange of an investment in a QOF held for at least 10 years.

Taxpayers can defer capital gains tax due upon sale or disposition of a (presumably non-OZ) asset if the capital gain portion of that asset is reinvested within 180 days in a QOF.[66] Under current law, the deferral of gain is available on qualified investments up until the earlier of (a) the date on which the investment in the QOF is sold or exchanged, or (b) December 31, 2026. In other words, this deferral is only in effect until December 31, 2026. Any reinvested capital gains in a QOF made before this date must be realized on December 31, 2026. Thus, investors would realize the deferred gain in their 2026 income filings, even if they do not sell or dispose of their investment in a QOF. Any reinvested capital gains in a QOF after this date are not eligible for deferral.

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64 IRC §168(k)(5)(A).

65 IRC §1400Z-(2)(a)(2)(B).

66 IRS issued regulations extending the 180-day window for certain investments in qualified opportunity funds. If the last day of the 180-day investment period within which a taxpayer must make an investment in a QOF in order to satisfy the 180-day investment requirement falls on or after April 1, 2020, and before March 31, 2021, the last day of that 180-day investment period is postponed to March 31, 2021. See IRS Notice 2021-10, January 19, 2021, p. 8, at https://www.irs.gov/pub/irs-drop/n-21-10.pdf.

See CRS Report R45152, *Tax Incentives for Opportunity Zones*, by Sean Lowry and Donald J. Marples for additional discussion.

Provision Expiring in 2027

Temporary Tax Provision Enacted by the Tax Cuts and Jobs Act (2017)

Citrus Plants Lost by Casualty[67]

The uniform capitalization (UNICAP) rules address the method for determining costs that taxpayers are required to capitalize or treat as inventory. They generally apply to property produced in a trade or business or acquired for resale. One exception is for edible plants lost or damaged by reason of a casualty or similar event. The exception may apply to (1) the taxpayer's cost of replanting such plants and (2) costs paid or incurred by other persons if the taxpayer has more than a 50% equity interest in the plants at all times during the year and the other person owns any of the remaining interest and materially participates in the planting or similar activities.

The TCJA (P.L. 115-97) expanded this treatment to persons other than the taxpayer if (1) the taxpayer has an equity interest of at least 50% in the replanted plants at all times during the year and the other person owns any of the remaining interest, or (2) the other person acquired the taxpayer's entire equity interest in the land on which the plants were located and the replanting is on such land. This expansion expires in 2027.

Provisions Made Permanent

Business "Tax Extenders"

Credit for Certain Expenditures for Maintaining Railroad Tracks[68]

Qualified railroad track maintenance expenditures paid or incurred in a taxable year by eligible taxpayers qualify for a 50% business tax credit. The credit is limited to $3,500 multiplied by the number of miles of railroad track owned or leased by an eligible taxpayer. Qualified railroad track maintenance expenditures are amounts, which may be either repairs or capitalized costs, spent to maintain railroad track (including roadbed, bridges, and related track structures) owned or leased as of January 1, 2005, by a Class II or Class III (regional or local) railroad. Eligible taxpayers are smaller (Class II or Class III) railroads and any person who transports property using these rail facilities or furnishes property or services to such a person.

The taxpayer's basis in railroad track is reduced by the amount of the credit allowed (so that any deduction of cost or depreciation is only on the cost net of the credit). The credit cannot be carried back to years before 2005. The credit is allowed against the alternative minimum tax. The amount eligible is the gross expenditures, not accounting for reductions such as discounts or loan forgiveness.

[67] IRC §263A.

[68] IRC §45G.

The provision was enacted in the American Jobs Creation Act of 2004 (P.L. 108-357) and extended numerous times. The provision relating to discounts was added by the Tax Relief and Health Care Act of 2006 (P.L. 109-432). The credit was allowed against the alternative minimum tax by the Emergency Economic Stabilization Act of 2008 (P.L. 110-343). It was most recently extended through 2022 by the Further Consolidated Appropriations Act, 2020 (P.L. 116-94). It was made permanent in the Consolidated Appropriations Act, 2021 (P.L. 116-260), although the 50% rate is reduced to 40% after 2022.

This provision substantially lowers the cost of track maintenance for the qualifying short-line (regional and local) railroads, with tax credits covering half the costs for those firms and individuals with sufficient tax liability. Class II and III railroads account for 32% of the nation's freight rail miles.[69] These regional railroads are particularly important in providing transportation of agricultural products.

Although no rationale was provided when the credit was introduced, sponsors of earlier freestanding legislation and industry advocates indicated that the purpose was to encourage the rehabilitation, rather than the abandonment, of short-line railroads. These railroads were spun off in the deregulation of railroads in the early 1980s. Advocates also indicated that this service is threatened by heavier 286,000-pound cars that must be used to connect with longer rail lines. They also suggested that preserving these local lines would reduce local truck traffic. There was also some indication that a tax credit was thought to be more likely to be achieved than grants.

The arguments stated by industry advocates and sponsors of the legislation are also echoed in assessments by the Federal Railroad Administration (FRA), which indicated the need for rehabilitation and improvement, especially to deal with heavier cars. The FRA also suggested that these firms have limited access to banking.[70]

Provisions Modifying the Excise Taxes on Wine, Beer, and Distilled Spirits[71]

The temporary provisions modifying excise taxes on alcoholic beverages were originally enacted through 2019 in the 2017 tax revision (TCJA; P.L. 115-97). The first provision applies to beer, wine, and distilled spirits broadly. The provisions that apply only to beer, wine, or distilled spirits are discussed separately below.

These temporary provisions are made permanent by the Consolidated Appropriations Act, 2021 (P.L. 116-260).

In general, the uniform capitalization (UNICAP) rules require some costs that would otherwise be immediately deductible (such as interest and overhead) to be added to inventory or to the cost of property and deducted in the future when goods are sold or assets depreciated. In the case of interest costs, the rules apply only if the asset is long-lived or has a production period over two years or a production period over one year and a cost of more than $1 million. The production period includes any customary aging period. A temporary modification to the UNICAP rules exempts the aging periods for beer, wine, and distilled spirits from the production period for the UNICAP interest capitalization rules, thus leading to shorter production periods.

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69 Association of American Railroads, "Railroad 101," June 2019, at https://www.aar.org/wp-content/uploads/2018/08/Overview-of-Americas-Freight-RRs.pdf.

70 See discussion in United States Senate, Committee on the Budget, *Tax Expenditures: Compendium of Background Material on Individual Provisions*, Prepared by the Congressional Research Service, 108th Congress, 2nd Session, S. Prt. 108-54, December 2004, p. 341, at https://www.govinfo.gov/content/pkg/CPRT-108SPRT97214/pdf/CPRT-108SPRT97214.pdf.

71 IRC §§263A, 5041, 5051, 5414.

Beer

Absent the temporary excise tax modification provisions, the excise tax rate on beer producers is $18 per barrel (31 gallons), and small brewers that domestically produce no more than 2 million barrels annually are subject to a rate of $7 per barrel on the first 60,000 barrels. The temporary provision reduces the rate for small brewers (producing no more than 2 million barrels) to $3.50 per barrel on the first 60,000 barrels and $16 per barrel on the remaining production. Beer importers and large producers meeting certain requirements may also be eligible for the reduced rate of taxation. For all other producers or importers, the excise tax rates are $16 per barrel on the first 6 million barrels.

The tax on beer is due when the beer is removed from the brewery for sale. Beer can be transferred between breweries that are commonly owned (and released from customs) without paying the tax (although tax would be paid on the eventual sale). The temporary provision also allows transfer without payment of tax to an unrelated brewer if the transferee accepts responsibility for paying the tax.

Wine

Excise taxes are imposed at different rates on wine, depending on the wine's alcohol content and carbonation levels. Still wines are taxed at $1.07 per wine gallon (w.g.) if they are 14% alcohol or less, $1.57/w.g. if they are 14% to 21% alcohol, and $3.15 per w.g. if they are 21% to 24% alcohol. Naturally sparkling wines are taxed at $3.40 per w.g. and artificially carbonated wines are taxed at $3.30 per w.g.

Absent the temporary provisions, up to a $0.90 credit against excise tax liability ($0.056 per w.g. for hard cider) may be available for the first 100,000 w.g. removed by a small domestic winery producing not more than 150,000 w.g. per year. The per wine gallon tax credit rate is phased out on production in excess of 150,000 w.g. for wineries producing not more than 250,000 w.g. per year. This small winery credit does not apply to sparkling wine.

The temporary provisions modify the credit for small domestic wineries to allow it to be claimed by domestic and foreign producers, regardless of the gallons of wine produced. The credit is also made available to sparkling wine producers. Also, a $1.00 credit against excise tax liability may be available for the first 30,000 w.g. removed annually by any eligible wine producer or importer. The credit is reduced to $0.90 on the next 100,000 w.g., and $0.535 on the next 620,000 w.g. In contrast to permanent law, this credit is not phased out based on production. For hard cider, the credit rates, above, are adjusted to $0.062 per gallon, $0.056 per gallon, and $0.033 per gallon, respectively.

Mead is taxed according to wine excise tax rates depending on its alcohol and carbonation content. Naturally sparkling wines are taxed at $3.40 per w.g. and artificially carbonated wines taxed at $3.30 per w.g. Under the temporary provision, mead and certain sparkling wines are to be taxed at the lowest rate applicable to still wine of $1.07 per wine gallon. Mead contains not more than 0.64 grams of carbon dioxide per hundred milliliters of wine, is derived solely from honey and water, contains no fruit product or fruit flavoring, and contains less than 8.5% alcohol. The sparkling wines eligible to be taxed at the lowest rate contain no more than 0.64 grams of carbon dioxide per hundred milliliters of wine, are derived primarily from grapes or grape juice concentrate and water, contain no fruit flavoring other than grape, and contain less than 8.5% alcohol.

Distilled Sprits

Producers and importers of distilled spirits are taxed at a rate of $13.50 per proof gallon (ppg) of production. Under the temporary provision, the tax rate is lowered to $2.70 ppg on the first 100,000 proof gallons, $13.34 ppg for proof gallons in excess of that amount but below 22,130,000 proof gallons, and $13.50 ppg for amounts thereafter. The provision contains rules to prevent members of the same controlled group from receiving the lower rate on more than 100,000 proof gallons of distilled spirits.

Distilled spirits are taxed when removed from the distillery, or, in the case of an imported product, from customs custody or bonded premises. Bulk distilled spirits may be transferred in bond between bonded premises without being taxed, but may not be transferred in containers smaller than one gallon. The temporary provision allows transfer of spirits in approved containers other than bulk containers without payment of tax.

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