



January 29, 2018

The Honorable David J. Kautter
Assistant Secretary for Tax Policy
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Mr. William M. Paul
Principal Deputy Chief Counsel and
Deputy Chief Counsel (Technical)
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

RE: Request for Immediate Guidance Regarding [Pub. L. No. 115-97](#)

Dear Messrs. Kautter and Paul:

The American Institute of CPAs (AICPA) respectfully requests immediate guidance on various provisions regarding Pub. L. No. 115-97, which revised many sections of the Internal Revenue Code (IRC or “Code”). The guidance requested is listed in order of the IRC section affected.

We have highlighted some of the specific areas that need immediate guidance in order for taxpayers and practitioners to comply with their 2017 tax obligations and to make informed decisions regarding cash-flow, entity structure, retirement, wealth transfer and a vast number of other tax planning issues.

In particular, there are three areas of main concern. First, under section 199A, guidance is needed on the definition of specified service trade or business, the interaction of this section with other Code sections and the calculation of the section 199A deduction for complex business structures. Second, for section 481 accounting method changes, general procedural guidance is needed for making accounting method changes in order to comply with the new rules. Finally, penalty relief for underpayment of taxes is needed. Taxpayers and preparers need sufficient time to determine the appropriate withholding and estimated tax payments for businesses, individuals, trusts, estates, and other entities that may have a dramatically different tax liability in 2018 or that are affected by provisions effective for 2017.

The AICPA is the world's largest member association representing the accounting profession, with more than 418,000 members in 143 countries and a history of serving the public interest since 1887. Our members advise clients on federal, state and international tax matters and prepare income and other tax returns for millions of Americans. Our members provide services to individuals, not-for-profit organizations, small and medium-sized businesses, as well as America's largest businesses.

We appreciate your consideration of these comments and welcome the opportunity to discuss these issues further. If you have any questions, please contact me at me at (408) 924-3508 or Annette.Nellen@sjsu.edu; or Melanie Lauridsen, AICPA Senior Manager – Tax Policy & Advocacy, at (202) 434-9235, or Melanie.Lauridsen@aicpa-cima.com.

Sincerely,

A handwritten signature in black ink, appearing to read "Annette Nellen". The signature is fluid and cursive, with the first name being more prominent.

Annette Nellen, CPA, CGMA, Esq.
Chair, AICPA Tax Executive Committee

Encl.

cc: The Honorable David J. Kautter, Acting Commissioner, Internal Revenue Service

AICPA Tax Division
Request for Immediate Guidance Regarding
Pub. L. No. 115-97¹ (commonly referred to as the *Tax Cuts and Jobs Act* (TCJA))
January 29, 2018

1. Penalty Relief for Underpayment of Taxes

- Transitional rules and penalty relief are needed regarding potential underpayment of tax due to revisions to the income tax withholding tables and under-calculated estimated payments due prior to June 30, 2018. Taxpayers and preparers need sufficient time to determine the appropriate withholding and estimated tax payments for businesses, individuals, trusts, estates, and other entities that may have a dramatically different tax liability in 2018.
- Penalty relief for estimated payments due on January 15, 2018 for the 2017 tax year. Taxpayers may have a dramatically different tax liability in the 2017 tax year as a result of the new transition tax under section 965.² Section 965 does not provide sufficient guidance from the Department of the Treasury and the Internal Revenue Service (IRS) to properly calculate the estimated tax payments due on January 15, 2018 (if basing those calculations on 90% of the estimated 2017 tax).

2. IRC Section 45S – Employer Credit for Paid Family and Medical Leave (TCJA Sec. 13403)

- The new section 45S “Employer Credit for Paid Family and Medical Leave.”

3. IRC Section 59A – Base Erosion and Anti-Abuse Tax (TCJA Sec. 14401)

- Definition of a “net operating loss (NOL) deduction” as used in section 59A(c)(1)(B).
- The application of the exception for amounts qualifying for the “Services Cost Method” under section 482. For example, is it possible to bifurcate amounts where some amounts are qualifying and others are not but are charged as one amount?
- The proper treatment of pre-2018 NOLs with respect to section 59A.

¹ An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018.

² All references to “section” or “§” are to the Internal Revenue Code of 1986, as amended, and all references to “Treas. Reg. §” and “regulations” are to U.S. Treasury regulations promulgated thereunder. All references to “Sec.” are to Pub. L. No. 115-97.

4. IRC Section 132(g) – Suspension of Exclusion for Qualified Moving Expense Reimbursement (TCJA Sec. 11048)

- The treatment of the reimbursement of moving expenses incurred by an employee during the taxable year 2017 with the corresponding reimbursement made by the employer, to the employee, during the taxable year 2018.

5. IRC Section 149(d) – Repeal of Advance Refunding Bonds (TCJA Sec. 13532)

- Transition rules for advance refunding bonds.

6. IRC Section 162(m) – Modification of Limitation on Excessive Employee Remuneration (TCJA Sec. 13601)

- Section 13601 of the legislation amends section 162(m). However, the rules provide an exception for remuneration provided in a written binding contract which was in effect on November 2, 2017, and was not modified in any material respect on or after that date. General guidance is needed on the application of the transition relief in addition to the following specific items:
 - a. The definition of a material modification to the contract.
 - b. Whether the discretion to increase or decrease the amount payable pursuant to a written binding contract which was in effect on November 2, 2017, affects the eligibility for the transition relief.
 - c. Whether the transition relief applies to benefits that have accrued under a written binding contract which was in effect on November 2, 2017 and is subject to termination at any time, prospectively, by the employer. Specifically, clarify whether the benefits accrued (e.g., benefits accrued under a nonqualified deferred compensation plan) as of November 2, 2017 are eligible for the transition relief or whether those benefits are treated as provided under a new agreement entered into after November 2, 2017.
- Definition of a “predecessor,” including if the term “predecessor” applies in cases where a target is acquired in a taxable or tax-free transaction. New section 162(m)(3)(C) expands the definition of a covered employee to “a covered employee of the taxpayer (or any predecessor) for any preceding taxable year beginning after December 31, 2016.”

7. IRC Section 163(h) – Limitation on Deduction for Qualified Residence Interest (TCJA Sec. 11043)

- The definition of “binding contract” as used in section 163(h)(3)(F)(i)(IV).

8. IRC Section 163(j) – Limitation on Deduction for Interest (TCJA Sec. 13301)

- Guidance is needed on the treatment of section 163(j) as it relates to consolidated returns as follows:
 - a. Whether section 163(j) applies to consolidated groups overall and if yes, how it applies.
 - b. The allocation of the section 163(j) limitation/expense for consolidated members leaving or joining the consolidated group.
 - c. The allocation of the section 163(j) limitation/expense in a spin-off transaction.
 - d. The treatment of section 163(j) carryforwards.
- The process for certain taxpayers to elect for the interest expense limitation not to apply, such as real estate and farming businesses.
- The application of existing/new groupings of trades or businesses to the \$25 million income cap for exclusion, as well as the ability to make a one-time regrouping election for existing groups.
- The treatment of the carryover limitation by partners. For example, what happens to the carryover when a partner transfers interest?
- The application of section 163(j) on self-charged interest between a partner and a partnership or a shareholder and an S Corporation.
- The interplay between the floorplan financing exceptions, the utility exceptions and bonus depreciation under section 163(j).

9. IRC Section 163(k) – Applicable Recovery Period for Real Property (TCJA Sec. 13204)

- The election for 50% expensing under section 163(j) for real property trade or business under the transition provision of section 168(k)(10).

10. IRC Section 164 – Limitation on Deduction for State and Local, etc. Taxes (TCJA Sec. 11042)

- The ability for a cash basis taxpayer to preserve the deduction in 2018 (subject to the \$10,000 limitation) for 2018 state and local taxes paid in 2017 and found non-deductible in 2017.

11. IRC Section 168 – Temporary 100% Expensing for Certain Business Assets (TCJA Sec. 13201)

- The application of the binding contract rules to the 100% expensing of property acquired and placed in service after September 27, 2017.
- The acquisition date for self-constructed property for bonus depreciation purposes.³

12. IRC Section 168 – Applicable Recovery Period for Real Property (TCJA Sec. 13204)

- Clarify class life on qualified improvement property (QIP). It is unclear whether QIP is nonresidential real property (39 years modified accelerated cost recovery system (MACRS)), not subject to bonus depreciation or some other class of property (e.g., a property with 15 years MACRS) subject to bonus depreciation as provided in the Committee Report. There is a drafting error, in that section 168(e)(3)(E) does not include QIP. Further, the table in section 168(g)(3)(B) refers to a non-existent clause (D)(v) of section 168(e)(3).
- The election of real property trade or business and as to whether a method change is required to change to an alternative depreciation system under section 168.

13. IRC Section 179 – Modification of Rules for Expensing Depreciable Business Assets (TCJA Sec. 13101)

- The specific types of assets that qualify as “qualified real property” under section 179.

14. IRC Section 199A – Deduction for Qualified Business Income (QBI) (TCJA Sec. 11011)

- Guidance is needed on the meaning of specified service trade or business as defined in section 199A(d)(2) namely, *any trade or business involving the performance of services in the fields of health, law, accounting, actuarial science, performing arts, consulting, athletics, financial services, brokerage services, or any trade or business where the principal asset of such trade or business is the reputation or skill of 1 or more of its employees or owners, or any trade or business which involves the performance of services that consist of investing and investment management, trading, or dealing in securities (as defined in section 475(c)(2)), partnership interests, or commodities (as defined in section 475(e)(2)).*
- The calculation of QBI when flowing through multiple tiered entities.
- The netting computation of losses from one business against gains from another business.

³ Prior legislation issued in 2003 provided specific rules for determining the acquisition date for self-constructed property. However, Pub. L. No. 115-97 is silent on this matter regarding 100% expensing.

- The effect of existing grouping (such as under section 469) of trades or businesses for purposes of the limitations based on W-2 wages, adjusted basis of assets, and specified service business. For example, if grouping is allowed, will taxpayers have an opportunity to regroup their trades or businesses to take advantage of the deduction?
- Whether wages are determined similar to the concepts provided in Treas. Reg. section 1.199-2(a)(2) (consider wages of the common law employees, regardless of who is responsible for the payment of the wage). Whether a trade or business is defined as an activity within an entity. For example, what if an entity has two clearly separate trades or businesses?
- Whether all similar qualified businesses are aggregated for purposes of the calculation or if each business is evaluated separately. Clarity is needed, for taxpayers with non-qualified business activities, as to whether or not there is a *de minimis* percentage at which the activity is not excluded, or whether the taxpayer makes separate computations for the personal service activity versus the non-personal service activity.
- Whether the taxpayer may consider a management company an integral part of the operating trade or business (and thus, not a specified business activity) if substantially all of the management company's income is from that other trade or business.
- The qualification of real property rental income as qualified business income (or loss).
- If grouping is allowed, whether taxpayers may treat the rental of real estate to their related C Corporation (e.g., a self-rental) as trade or business income.
- The determination of items effectively connected with a business, e.g., section 1245 gains and losses, retirement plan contributions of partners and sole proprietors, the section 162(l) deduction and one-half of self-employment tax.
- The unadjusted basis of assets expensed under section 179 or subject to bonus depreciation.
- The unadjusted basis of assets held as of January 1, 2018.
- The unadjusted basis of property subject to 743(b) basis adjustments.
- The effect, if any, of the 20% deduction on net investment income tax calculations.

15. IRC Section 250 – Deduction for Foreign-derived Intangible Income and Global Intangible Low-taxed Income (GILTI) (TCJA Sec. 14202)

- Confirm whether S Corporations qualify for the deduction provided by section 250. Specifically, if section 250(a)(1) includes S Corporations within the definition of “domestic corporation.”

16. IRC Section 263A – Small Business Accounting Method Reform and Simplification (TCJA Sec. 13102)

- Transition rules regarding section 263A uniform capitalization rules (UNICAP) for taxpayers who meet the \$25 million small business definition.

17. IRC Section 266 – Limitation on Deduction for State and Local, etc. Taxes (TCJA Sec. 11042)

- The annual election under section 266 to capitalize taxes and carrying charges in lieu of deducting the interest, for taxpayers owning real estate.

18. IRC Section 267A – Certain Related Party Amounts Paid or Accrued in Hybrid Transactions or with Hybrid Entities (TCJA Sec. 14222)

- Which types of transactions, pursuant to section 267A(e), will fall within the eight categories specified in the regulatory grant. Specifically, as to whether the grant of a notional interest deduction to the recipient of an interest payment from a United States (U.S.) person will fall within the definition of a hybrid payment for purposes of section 267A.

19. IRC Section 280F – Temporary 100% Expensing for Certain Business Assets (TCJA Sec. 13201).

- The effect on section 280F by the 100% bonus depreciation and special rules with respect to self-constructed assets and the effective date requirements.

20. IRC Section 382 – Modification of NOL Deduction (TCJA Sec. 13302)

- The treatment of pre-2018 recognized built-in losses (RBIL) triggered in taxable years after December 31, 2017 resulting in excess RBIL under section 382(h)(4). Specifically, clarify whether the NOL is limited to the 20-year carryforward.

21. IRC Section 448 – Small Business Accounting Method Reform and Simplification (TCJA Sec. 13102)

- Transition rules for taxpayers who meet the \$25 million small business definition and want to move from the accrual basis to the cash basis of accounting.
- Clarify if aggregation of gross receipts of affiliated taxpayers is required in calculating any limitations or exceptions to the general rule, for purposes of the small taxpayer accounting methods under \$25 million.

22. IRC Section 451 – Certain Special Rules for Taxable Year of Inclusion (TCJA Sec. 13221)

- The procedures to initiate a change required to income inclusion under the new section 451(b). Public L. No. 115-97 notes that a change required by the amendment is a qualified change in method of accounting initiated by the taxpayer and made with consent of the Secretary, but it does not clarify what is expected procedurally.
- The changes under section 451 and the Accounting Standards Codification ASC 606 guidance, which have not been issued.
- The revision to section 451.
 - a. Clarify whether the application of section 451 applies to taxpayers in industries where the recognition of revenue through unbilled accounts receivable is common practice (e.g., government contractors).⁴ If it is determined that section 451, as modified by Pub. L. No. 115-97, applies to all taxpayers with no exception, we recommend that the IRS provide transitional relief or a cut-off application of the revised section 451 for affected taxpayers.
 - b. Identify what constitutes special methods of accounting.
 - c. Clarify when, and provide relief for situations where, financial reporting changes result in tax method changes.

23. IRC Section 460 – Small Business Accounting Method Reform and Simplification (TCJA Sec. 13102)

- Transition from percentage of completion method to completed contract method (due to increased income limit), for taxpayers who meet the \$25 million small business definition.

24. IRC Section 471 – Small Business Accounting Method Reform and Simplification (TCJA Sec. 13102)

- Transition from section 471 inventory accounting methods to either section 162 method or book method, for taxpayers who meet the \$25 million small business definition.

25. IRC Section 481 – Cost Recovery and Accounting Methods (TCJA Part III)

- General procedural guidance for ensuring accounting method changes under section 481 comply with the new rules under Pub. L. No. 115-97 (e.g., exemption from UNICAP/accrual method of accounting for taxpayers with \$25M of gross receipts or less).

⁴ Prior to tax reform, these taxpayers recognized revenue for tax purposes at a date later than when recognized in their applicable financial statements, to the extent such revenue was included in the balance of unbilled accounts receivable.

- a. We recommend that these changes are automatic, waive the five-year change eligibility rules for a transition period, simplify the accounting method change procedures by allowing multiple changes in one filing, and exempt small taxpayers from filing a Form 3115, *Application for Change in Accounting Method*, during the transition period.
- b. Whether taxpayers should make accounting method changes with a section 481(a) adjustment or on a cut-off basis.
- c. Whether taxpayers who are currently using the deferral method under Rev. Proc. 2004-34 must file any forms to continue with the codified version of Rev. Proc. 2004-34.

26. IRC Section 481 – Production Period for Beer, Wine, and Distilled Spirits (TCJA Sec. 13801)

- Whether an accounting method change is required for the two-year exemption under section 263A(f) from the requirement to capitalize interest during the post-production period for beer, wine, and distilled spirits.
- Whether an accounting method change is required in two years when the interest costs are capitalized again (absent an extension).
- Whether these accounting method changes are automatic.

27. IRC Section 512 – Unrelated Business Taxable Income (UBTI) Separately Computed for Each Trade or Business Activity (TCJA Sec. 13702)

- The activity-by-activity UBTI reporting for exempt organizations. For example, how to delineate separate trades and businesses, how to define an “activity” and how to group similar activities is needed.

28. IRC Section 512 – UBTI Increased by Amount of Certain Fringe Benefit Expenses for Which Deduction is Disallowed (TCJA Sec. 13703)

- Whether UBTI is increased by any employee salary reduction elections made through a section 125 cafeteria plan. Newly added section 512(a)(7) increases UBTI by the amount not otherwise deductible under section 274 which was paid or incurred by the organization for any qualified transportation fringe.
- Whether an organization may include in an employee’s gross income an otherwise excludible qualified transportation fringe to avoid an increase to UBTI.

29. IRC Section 951A – Current Year Inclusion of GILTI by U.S. Shareholders (TCJA Sec. 14201)

- Whether the GILTI pursuant to new section 951A is applied on a U.S. shareholder or consolidated group basis.

30. IRC Section 958 – Modification of Stock Attribution Rules for Determining Status as a Controlled Foreign Corporation (CFC) (TCJA Sec. 14213)

- The application of the modification to section 958(b)(4). Specifically, confirm the intent of the provision is not to trigger CFC treatment of a foreign corporation with respect to a U.S. Shareholder as a result of attribution of ownership under section 318(a)(3) to a U.S. person who is not related (within the meaning of section 954(d)(3)) to such shareholder.
- Whether relief is granted under section 6038 with respect to filing Form 5471, *Information Return of U.S. Persons with Respect to Certain Foreign Corporations*, for CFCs which are CFCs only by attribution.

31. IRC Section 960 – Repeal of Section 902 Indirect Foreign Tax Credits; Determination of Section 960 Credit on Current Year Basis (TCJA Sec. 14301)

- When are taxes “properly attributable” to such items of income. Section 960(a), as amended, provides that “if there is included in the gross income of a domestic corporation any item of income under section 951(a)(1) with respect to any controlled foreign corporation with respect to which such domestic corporation is a United States shareholder, such domestic corporation shall be deemed to have paid so much of such foreign corporation’s foreign income taxes as are properly attributable to such item of income.”

32. IRC Section 965 – Treatment of Deferred Foreign Income Upon Transition to Participation Exemption System of Taxation (TCJA Sec. 14103)

- Definition of “NOL deduction” as used in section 965(n)(1)(A). Section 965(n) provides an election not to apply NOL deductions to the amount include in taxable income under section 965.
- Section 965(b) provides that certain deficits at earnings and profits (E&P) deficit corporations may reduce the amount of includible income under section 951(a)(1). Confirm in which years deficits are allowed (e.g., the same taxable year as the deferred foreign income corporation which is the last taxable year beginning before January 2, 2018).
- Application of section 965 to partners in partnerships and beneficiaries of trusts. Specifically, whether the inclusion and other related items are determined at the partner level or at the partnership level.

- Whether section 965 provisions are considered an income inclusion under section 951 for purposes of section 898, thereby eliminating the exception to section 898 and requiring a year end change. In general, section 898 requires a CFC to adopt the year end of its majority U.S. shareholder. Section 898 has certain exceptions for CFCs that have never had Subpart F income or other section 951 inclusions.
- The application of the subtraction in section 965(c) to non-corporate taxpayers.
- The interaction of section 962 and section 965. Specific guidance is needed on the application of section 965 when a taxpayer owns an interest in a specified foreign corporation both directly and indirectly.
- Which allocation method to use in calculating “accumulated post-1985 deferred foreign income” when one or both of the calculation dates (November 2, 2017 and December 31, 2017) are not the end of a corporation’s fiscal year.
- Definition of an accounts receivable and accounts payable (as determined under section 461).

33. IRC Section 965(f) – Guidance on Shareholder Basis and AAA (TCJA Sec. 14103)

- Confirm that the statutory language of section 965(f)(2) is intended to create an *additional* amount of tax exempt income, to the extent of the section 965(c) deduction, which would then have the effect of a basis increase (for partnerships and S Corporations) and accumulated adjustments account (AAA) increase (for S corporations) for the entirety of the deemed repatriation income included under section 965(a).⁵

34. IRC Section 1371(f) – Modification of Treatment of S Corporation Conversion to C Corporations (TCJA Sec. 13543)

- The effect current E&P would have following the post-termination transition period (PTTP) distributions made subject to section 1371(f). Specifically, whether PTTP distributions should first source from current E&P and then source proportionately between AAA and accumulated E&P, or if an alternate ordering rule should apply. Section 1371(f) affects distributions which follow the PTTP of certain terminated S corporations. If the entity’s AAA is not fully distributed before the end of the entity’s PTTP, then section 1371(f) may have the effect of sourcing post-PTTP distributions proportionately between AAA and *accumulated* E&P (as applicable). Normally, distributions from a C corporation – including those following the PTTP – are sourced first from *current* E&P and then from *accumulated* E&P.

⁵ The Joint Explanatory Statement of the Committee of Conference provides for a full basis increase (for partnerships and S corporations) and for a full AAA increase (for S corporations) for the deemed repatriation income included under code section 965(a) (i.e., without regard to the deduction under section 965(c)). However, the actual statutory language under section 965(f)(2) provides some ambiguity, in focusing on the potential recharacterization of an amount under code section 965(a) as tax exempt income.

35. IRC Section 1502 – 21% Corporate Tax Rate (TCJA Sec. 13001)

- The tax rate to apply with respect to a deferred intercompany transaction originating in a taxable year before 2018 and triggered in a taxable year after 2017 (35% or 21%).

36. IRC Sections 2001(g) and 2010(c)(3) – Increase in Estate and Gift Tax Exemption (TCJA Sec. 11061)

- Clarify that when the new gift, estate, and generation skipping transfer (GST) tax exemptions sunset after 2025, and the exemption reverts to 2017 law in 2026, any 2018-2025 transaction is not taxable at sunset.⁶

37. IRC Section 3402 – Modification of Rates (TCJA Sec. 11001)

- The appropriate applicable rate under the flat rate income tax withholding option for supplemental wages less than \$1,000,000.

38. IRC Section 4960 – Excise Tax on Excess Tax-Exempt Organization Executive Compensation (TCJA Sec. 13602)

- New section 4960 imposes a 21% excise tax on “remuneration paid by an applicable tax-exempt organization for the taxable year with respect to employment of any covered employee in excess of \$1,000,000.....”
 - a. Accounting for remuneration when determining who is considered a covered employee and for determining the amount of compensation subject to the 21% excise tax when it is for services provided to an employer which is not tax-exempt but is owned by a tax-exempt organization.
 - b. Accounting for remuneration when a covered employee provides services to both a tax-exempt owner and a taxable subsidiary of the tax-exempt owner.
 - c. Define what is considered contingent on the employee’s separation of employment.
 - d. The exception to the definition of remuneration for the portion paid to a licensed medical professional for the performance of medical or veterinary services. It is unclear in cases where an employee performs both direct medical care services and administrative duties for a single form of remuneration, if 100% of their compensation is exempt from section 4960 or if an allocation is necessary to carve out the remuneration for the performance of direct medical care.

⁶ It is necessary to clarify that the government will not require a clawback to the pre-2018 (2017) law of only a \$5.49 million exemption level (i.e., will not subject to gift or estate tax in the future the amount excluded by the \$11.2 million per person exemption) for the 2018-2025 transactions.

39. IRC Section 4968 – Excise Tax Based on Investment Income of Private Colleges and Universities (TCJA Sec. 13701)

- The excise tax on endowments of colleges and universities and related calculation and documentation requirements.